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BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSIAC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ARLENE KRAFT ET AL.,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning Board sought determination of whether Smith Lane extension walkway constituted a public walkway within the meaning of N.J.S.A. 18A:39-1 and N.J.A.C. 6:21-1.3 for purpose of determining remoteness in connection with pupil transportation.

In light of testimony of witnesses and consideration of Commissioner decision in Mangieri, ALJ concluded Smith Lane is a public roadway and Smith Lane extension walkway is a public walkway within the meaning of N.J.A.C. 6:21-1.3(b). ALJ found the extension walkway is freely used by the public except it is closed to vehicular traffic; it traverses a residential area; and the Township does maintain it by proper lighting and removal of debris. Therefore, the Board may use Smith Lane and the extension walkway to measure remoteness. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own relying on testimony of Board witnesses and Mangieri. Moreover, citing Nelson, Commissioner found Board was not prohibited from using elementary school driveway to get to and from the extension walkway and as part of measurement in determining eligibility for school busing.

JANUARY 2, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9987-90
AGENCY DKT. NO. 386-11/90

THE BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE,
Petitioner,
v.
ARLENE KRAFT, ANGELA O'KEEFE, JUNE BROOKS, ROSEANN MORIARTY, STEPHANIE GLAZER, ABBY EDEN, CHRISTINE DEGARCIA, RONALD TULINO, LINDA FISHMAN, CARLA FATTAL, MARY POTTER, CHRISTOPHER MARRA, SANDY BURTON, WAYNE R. REPPA, ALAN TELL, DAVID GOLUB, FONG-JIAO CHEN, AND PATRICIA A. LAVULLO,
Respondents.

Stephen R. Fogarty, Esq., for petitioner (Fogarty & Hara, attorneys)

Charles J. Mysak, Esq., for respondents

Record Closed: October 22, 1991 Decided: November 18, 1991

BEFORE **EDITH KLINGER**, ALJ:

On November 29, 1990, petitioner, the Board of Education of the Township of Wayne (Board), filed a petition for declaratory judgment with the Commissioner of Education seeking a determination of whether the Smith Lane extension walkway constitutes a public walkway within the meaning of *N.J.S.A.* 18A:39-1 and *N.J.A.C.* 6:21-1.3 for the purpose of determining remoteness in connection with pupil transportation. Respondents filed their answer on November 15, 1990, and on December 5, 1990, the matter was 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*

The Board's request for a declaratory judgment is based upon the provisions of *N.J.S.A.* 18A:39-1, which states:

> Whenever in any district there are pupils residing remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such pupils to and from school, including the transportation of school pupils to and from school other than a public school, except such school as is operated for profit in whole or in part.

The concept of remoteness is further clarified in *N.J.A.C.* 6:21-1.3 as follows:

> (a) The words "remote from the schoolhouse" shall mean beyond $2\frac{1}{2}$ miles for high school pupils (grades 9 through 12) and beyond two miles for elementary pupils (grades kindergarten through eight), except for educationally handicapped pupils.
>
> (b) For the purpose of determining remoteness in connection with pupil transportation, measurement shall be made by the shortest route along public roadways or public walkways from the entrance of the pupil's walkway to the nearest public entrance of the assigned school.

The sole issue upon which the Board seeks determination is whether the Smith Lane extension walkway may be considered a "public walkway" within the meaning of *N.J.A.C.* 6:21-1.3(b) for the purpose of determining remoteness from the schoolhouse. If the Smith Lane extension walkway constitutes a public walkway, then the Board may include it for purposes of measuring the "shortest route" between pupils' homes and the Schuyler-Colfax Middle School which they attend. The respondents named by the Board in its petition will all be affected by the determination.

If the walkway cannot be used for the purpose of determining remoteness, the Board would be required to provide transportation for approximately 89 pupils who attend the Schuyler-Colfax Middle School, including the children of respondents, and eight pupils who attend Wayne Hills High School. Reimbursement of the school district by the State for this transportation pursuant to *N.J.S.A.* 18A:58-7 will be adversely affected if the Board excludes the walkway and it is determined by State audit that it should have been included.

The hearing in the matter was held on September 20, 1991, and the record closed on October 22, 1991, following receipt of the briefs submitted by the parties.

REVIEW OF EVIDENCE AND FINDINGS OF FACT

The Smith Lane extension walkway is approximately five to six feet wide and 500 feet long. It extends from the Theunis Dey Elementary School to Smith Lane. Smith Lane intersects with Jackson Avenue, a heavily-travelled thoroughfare of Wayne Township. The walkway is, for the most part, bordered on one side by the rear yards of private homes and by the ballfield of the Theunis Dey School on the other.

The walkway has been officially designated by Wayne Township as one of the 34 school paths which are used by pupils throughout Wayne Township to walk to and from school. It is identified as school path number 22 on the Township's list of school paths. All of the school paths, which are maintained by the Township, are approximately the same widths as the walkway and used daily by the children of the school district. The extension walkway is paved and maintained by the Township.

The Smith Lane extension walkway appears on the official map of Wayne Township. It is marked by dotted lines which, according to the map legend, designates it a private road. The actual ownership of the land on which the walkway is situated cannot be determined from the evidence. The Board denies that it is the property of the school district. The Township does not claim ownership; the walkway is not a dedicated right-of-way. The deeds to the privately-owned property abutting the walkway either specifically convey the land subject to the rights of the public over the 12-foot easement upon which the walkway lies or exclude the walkway site from the land conveyed. Whatever the actual ownership of the strip of land, I **FIND** that it is subject to permanent unrestricted use by the public.

Respondents claim that Smith Lane itself is a private road since there is a sign posted at its intersection with Jackson Avenue so stating. According to Gary Peatick, the transportation supervisor for the school district, the sign does not prevent public entry to the road; the sign was placed there to discourage its use by motorists to avoid the traffic on Jackson Avenue. Smith Lane is designated as a public road on the official map of Wayne Township. It is paved by the Township and has traffic lines painted by the Township Public Works crew. At the junction between Smith Lane and the Smith Lane extension, there is a metal barrier designed to prevent three-wheeled vehicles from traversing the extension walkway.

The walkway was described by Peatick as a paved asphalt pathway similar to a sidewalk. It has a slight grade and at one point traverses a wooded area. The Township keeps the walkway in repair and removes snow and ice from its surface. At night, the Board of Education provides security by means of security lamps on the Theunis Dey Elementary School which illuminate the walkway from dusk to dawn. Respondents allege that these lamps do not provide sufficient light for safety after dark. However, the major use of the walkway by students is during the daylight; they play there after school hours.

Peatick testified that he has lived in Wayne Township for more than 20 years approximately a mile to a mile and a half from where the Smith Lane extension walkway is located. He used the walkway himself as a young child both on foot and on his bicycle. He testified from his personal experience and his observations as the transportation supervisor that the walkway is as safe and well-maintained as any other public sidewalk in Wayne Township.

Eric Ernst is the assistant transportation supervisor of the district. Prior to holding his present position, he was a maintenance employee assigned to the Theunis Dey Elementary School. In both positions, he has had the opportunity to observe the walkway and its use by children going back and forth to school and for recreational purposes. Ernst testified that children using the walkway can be seen for the majority of the time they are on the walkway. It is his opinion that the cries of a child in distress on the walkway could be heard by the nearest school crossing guard on Jackson Avenue.

Respondents oppose the use of this walkway on the grounds that it is not a public walkway and, therefore, cannot be used to determine the shortest route. In addition, respondents' only witness, Marilyn Mysak, the wife of respondents' counsel, testified that the walkway is not safe for the use of middle-school-aged children.

In order to substantiate the lack of safety, Mrs. Mysak testified to the existence of debris or garbage on the walk. However, she also testified that during the times that she inspected the walkway, the debris differed so that it appears that someone had cleaned and maintained the walkway in the interim between her visits.

As further evidence that this route is unsafe, she testified to the steep grade of the path and the existence of gullies or crevices on the sides of the path. Neither Ernst nor Peatick are aware of such hazards and the photographs taken of the path which were

placed into evidence do not indicate the presence of any dangerous conditions. (A videotape of the walkway, filmed and narrated by respondents' counsel, was excluded from evidence because its existence was not disclosed to the undersigned until late in the afternoon of the day of hearing and it would have been impossible to arrange for its viewing at that time.) The existence of a slope does not make the path unsuitable for use; a sloping sidewalk on a main thoroughfare may be used as an appropriate route over which to measure remoteness.

In addition, Mrs. Mysak expressed her concern that parts of the pathway were hidden from public view. The danger allegedly involved in this brief concealment of children using the walkway is largely eliminated by the fact that it is in regular use by the children during and after school hours. Her concern that a child in distress on the walkway could not be heard is inconsistent with her testimony that she regularly hears the shouts of children at play on the walkway from the backyard of her home, which is situated at approximately the same distance from the walkway as is the school crossing guard on Jackson Avenue.

She was also troubled because older children use the secluded areas of the walkway at night to "hang out" and drink beer, but this behavior occurs well after school hours and presents no particular threat to students using the walkway during the day.

Finally, respondents object to the fact that the walkway is not regularly patrolled by school guards. However, no stretch of public road is regularly patrolled except to protect children from the hazards of motor vehicles, and there are no motor vehicles on the walkway. Even though bicycles use the walkway, there is no evidence to show that the possibility of being struck by a bicycle is more of a threat on the walkway than at any other place in the Township.

The forum attaches little weight to the certification of Thomas Huff, assistant superintendent of the district in winter-spring 1989, at the time it was redistricted. He stated in this certification that the walkway was not historically used to determine remoteness and, in his opinion, it should not be used at this time. Huff condemns the proposed use of the walkway to measure remoteness as a change of policy on the part of the Board. There is no reason that a board may not change its policy to accommodate the needs of the school district it administers. The policy change here, if any, is not unreasonable since it appears to be based upon a considered reassessment of the available routes.

I **FIND** that the Smith Lane extension walkway is a public walkway. It is used freely by the public except that it is closed to vehicular traffic. There is evidence of its status as a public easement in the deeds of the private landowners whose property abuts the walkway and it is maintained by the Township of Wayne as if it were a public walkway; respondents' concerns as to the existence of debris on the walkway, the lighting of the walkway, or the maintenance of the walkway should be addressed to the Township of Wayne, which has assumed the responsibility for its condition.

Based upon all of the evidence, I **FIND** that the use of the Smith Lane extension walkway presents no greater risk to children walking back and forth to school than does any other sidewalk in the Township. There is nothing on the record, such as police or accident reports, to show that a hazard exists. I **FIND** that Smith Lane is a public street no matter what the sign at its entrance may say, and it is so designated on the official map of Wayne Township.

DISCUSSION OF LAW AND CONCLUSIONS

The Board cites *Mangieri v. Bd. of Ed. of the Boro. of Cresskill, Bergen Co.*, OAL DKT. EDU 8927-89 (Nov. 30, 1990), aff'd Comm'r. of Ed. (Jan. 11, 1991), in support of its position. I **CONCLUDE** that the Smith Lane extension walkway is, if anything, even more open to public use than the easement over the Conrail railroad tracks which was determined to constitute a public walkway in *Mangieri*. "In sum, there is nothing about the disputed crossing that would preclude its acceptance as a lawful means of providing convenience of access to the school building." *Mangieri*, Comm'r.'s decision at 15.

The Commissioner noted in *Mangieri* that even if the actual ownership of a portion of the property over which the walkway passed were private, it would not, in itself, "render the thoroughfare any less public under the circumstances of this case." *Mangieri*, Comm'r.'s decision at 15. The walkway which is the subject of the present matter is either a public easement granted by deed over private land or on land belonging to the school district or the Township of Wayne. It is even less a matter of private property than was the public walkway in *Mangieri*.

I **CONCLUDE** that the rationale of the *Bd. of Ed. of Boro. of Fair Lawn v. Bailey*, 1984 *S.L.D.* ___ , Comm'r. of Ed. (June 21, 1984), aff'd State Bd. (Dec. 5, 1984), relied upon by

respondents does not apply here. There is no additional risk to which the children are exposed by using the Smith Lane extension walkway than they would meet on any public roadway or walkway in the Township.

For all of the above reasons, I **CONCLUDE** that Smith Lane is a public roadway and the Smith Lane extension walkway is a public walkway within the meaning of *N.J.A.C.* 6:21-1.3(b). Consequently, I **CONCLUDE** that they may be used by the Wayne School Board to measure remoteness.

ORDER

It is hereby **ORDERED** that Smith Lane and the Smith Lane extension walkway may both be used by the Wayne School Board to measure remoteness from the schoolhouse in accord with the provisions of *N.J.A.C.* 6:21-1.3.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 18, 1991
DATE

Edith Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

NOV 20, 1991
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 22 1991
DATE

OFFICE OF ADMINISTRATIVE LAW

md/e

APPENDIX

WITNESSES

For Petitioner:	For Respondent:
Gary Peatick	Marilyn Mysak
Eric Ernst	

EXHIBITS

P-1	Official Map of Wayne
P-2a - 2i	Photographs of the walkway
P-3a, 3b	Photographs of the merger of the walkway with the Theunis Dey School driveway
P-4	Letter, Township of Wayne to President of Wayne PTO listing all asphalt school paths, April 5, 1990
P-5	Deed
P-6	Deed
R-1	Letter, September 13, 1991
R-2	Letter, Wayne Assistant Township Engineer to Peatick, October 11, 1990
R-3	Letter, Wayne Township Business Administrator to Parent
R-4	Copy of Official Map with route mapped by Peatick
R-5	Certification of Huff
R-6	Diagram (Peatick)
R-7	Letter, Superintendent of Schools to County Superintendent of Schools, November 29, 1988

BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSIAC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ARLENE KRAFT ET AL.,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Respondents filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Board filed timely reply exceptions.

Respondents except to the ALJ's review of the evidence, findings of fact and conclusions of law in this matter, averring the decision to allow a denominated private road on the Wayne Township Official Map to be used for purposes of measuring remoteness in connection with pupil transportation is in violation of N.J.A.C. 6:21-1.3(b). Respondents rely on R-7, a letter from the Superintendent of Schools Robert Winter dated November 29, 1988 for support of their contention that in said letter the district acknowledges that middle school children on their way to school have no business in a local elementary school driveway not their own. They claim that what the superintendent perceived as a "short cut in order to avoid providing these students with the needed transportation" (Exceptions, at p. 2, quoting R-7 in evidence), the "[ALJ] has

found to be a pathway 'subject to permanent unrestricted use by the public'." Respondents aver that R-7 negates the basis of the Board's contention in this case that reimbursement of the school district by the State for this transportation pursuant to N.J.S.A. 18A:58-7 will be adversely affected if the Board excludes the walkway from its measurement of remoteness. They claim a decision to exclude the walkway would have no adverse consequences because, as long ago as 1988, the district had confirmed that transportation would be subsidized based upon discussions with the County Superintendent.

Respondents also except to the ALJ's determination that Smith Lane is a public street so designated on the Official Map of Wayne Township. Respondents contend it is not a public road at the point where it intersects with the pathway in question, and they rely on the Map of Wayne Township, P-1 in evidence, in support of this contention as well as the Board's Stipulation of Fact that Smith Lane at this location was a private road.

Moreover, respondents except to the ALJ's conclusion that nothing in the record supports that a hazard exists with respect to the safety of the path. Respondents acknowledge that police reports were not introduced into the record, but they claim they did present the sworn certification of Assistant Superintendent of Schools Thomas Huff who stated that the path is unsafe, and that its proposed use would put children "in harm's way." (Exceptions, at p. 3, (R-5) Respondents find "it difficult to understand how a police report could be more compelling or satisfactory as a proof than the account of a school district administrator of sterling reputation." (Exceptions, at p. 4)

Respondents would have the Commissioner consider the testimony of Mrs. Mysak who testified that the path is unsafe, and they further rely on the case captioned Board of Education of the Borough of Fair Lawn v. Bailey and Orlando, 1984 S.L.D. 1156, aff'd State Board 1165 as being squarely on point on the issue of remoteness and safety. Respondents submit Fair Lawn stands for the proposition that children should not be made to walk in secluded areas which expose them to an increased risk to their safety and persons, and for the Commissioner to interpret the remoteness regulation otherwise would contradict the purpose of N.J.S.A. 18A:39-1, which is to promote the safety and welfare of children.

Finally, respondents would distinguish the ALJ's reliance on Mangieri v. Board of Education of the Borough of Cresskill, Bergen County, decided by the Commissioner January 11, 1991, because in Mangieri, the particular walkway in question, over railroad tracks, was the subject of a specific easement from the Railroad Company to the school district. Further, they claim, the walkway in Mangieri was patrolled by a crossing guard who supervised the children in negotiating the crossing, which they claim is not the case in this matter.

In sum, respondents claim the Board should not be free to interpret laws, rules and regulations to suit its financial ends. They claim private roads are not public walkways, and it is a corruption of language to decree that they are.

The Board's reply exceptions contend the Superintendent's letter dated November 29, 1988 does not constitute an admission on the part of the Board, which respondents seem to suggest it does, stressing that the letter was not even written by a Board member.

The Board also notes the letter is three years old, with the composition of the Board markedly different now from what it was then, and thus the statements made in the letter are not attributable to the present Board. In particular, the Board contends it cannot be said that it is trying to avoid its responsibility when the very purpose of the instant declaratory judgment action is to determine exactly what its responsibilities are.

In response to respondents' contention that children have no business being on an elementary school driveway not their own, the Board submits respondents are attempting to reargue their case because such issue was not raised below. Nevertheless, the Board asserts it is proper to include a school driveway as part of a measured route to determine eligibility for busing, and relies upon Nelson v. Board of Education of the Borough of Glen Ridge, decided by the Commissioner April 4, 1990, aff'd State Board August 1, 1990, aff'd 246 N.J. Super. 467 (App. Div. 1991) in support of this contention. The Board suggests that case held that the use of the word "public" in N.J.A.C. 6:21-1.3 was not intended to exclude school driveways, and that, therefore, driveways can be included in a measurement to determine eligibility for busing.

Thereafter, the Board reiterates the arguments presented at hearing and in its post-hearing submission supporting the ALJ's conclusions in response to respondents' contentions that Smith Lane is a public roadway. It cites Mangieri as supporting its position and that of the ALJ in this regard.

As to respondents' exceptions regarding the safety of the walkway, the Board concurs with the ALJ's attaching little weight to

the Huff certification, first because the certification stands in contrast to the testimony of the two Board witnesses, who were cross-examined, and whom the ALJ was able to evaluate in terms of credibility. As to respondents' witness regarding safety, Mrs. Mysak, the Board notes that on cross-examination, she testified that debris was regularly removed, evidence that the pathway is regularly maintained by the Township. The Board concurs with the ALJ that Mrs. Mysak's concern with older children hanging out near the walkway is offset by the conclusion that it is more than likely that such behavior, if it exists, occurs well after school hours.

In response to respondents' reliance on Fair Lawn, supra, the Board contends that case is distinguishable from this matter because in Fair Lawn, there was a problem with snow and ice removal. Further, in Fair Lawn the walkways were not considered by the Park Commission to be public walkways, and third, the park was close in proximity to an urban area, creating a danger of molestation and other dangers. The Board contends this matter is more nearly like that in Mangieri, supra, wherein the walkway connected a residential cul-de-sac to school grounds. In that case the maintenance and safe operation of the pathway were the responsibility of the borough and school district, where there was no urban area nearby. Further, in Mangieri, the pathway was closed to vehicular traffic, the Board contends. In the instant matter, the Board avers the Smith Lane extension walkway traverses through a residential area, is maintained by Wayne Township and has been designated by the Township as an official school path. Its maintenance, the Board adds, includes removal of snow and ice. It is not near an urban area, and is closed to vehicular traffic.

The Board concludes that the ALJ's decision that the Smith Lane extension walkway is a public walkway and that Smith Lane is a public roadway is supported by the facts and case law. Thus, the Board contends the walkway and roadway can be used pursuant to N.J.A.C. 6:21-1.3(b) to measure eligibility for busing under N.J.S.A. 18A:39-1 and those students within those distances on a measured route which include the Smith Lane extension walkway as well as Smith Lane are not entitled to be bused to school.

Upon a careful and independent review of this matter, the Commissioner concurs with the findings and conclusions of the Office of Administrative Law as expressed in the initial decision filed on November 18, 1991. In so finding, the Commissioner notes that those contentions raised in the exceptions filed by respondents merely reiterate those arguments argued at hearing and in their post-hearing submissions.

The Commissioner's perusal of the map of the Township of Wayne comports with the ALJ's that Smith Lane extension walkway is designated by the Township as a private road, while Smith Lane is designated as a public road. Moreover, the Commissioner agrees with the ALJ that notwithstanding the fact that a sign at the intersection of Smith Lane and Jackson Avenue states that Smith Lane is a private road, it is a public thoroughfare, paved by the Township with traffic lines painted on it by the Township Public Work crews. Further, the Commissioner finds, as did the ALJ that where such public road becomes Smith Lane extension, vehicular traffic is blocked by a metal barrier, thus creating a public walkway, freely used by the public except that it is closed to vehicular traffic other than bicycles. The Commissioner so finds,

adopting the credibility determinations of the witnesses in this case, in the absence of transcripts having been provided to the record. See In re Morrison, 216 N.J. Super. 143 (App. Div. 1987).

The Commissioner agrees with the ALJ also, that the certification of Thomas Huff is entitled to little weight. First, such memorandum does not represent an action by the Board, either when the memo was scribed in 1989, or now. Moreover, even if such memo did constitute a Board policy in the past, by its filing the instant Petition for Declaratory Judgment seeking direction from the Commissioner as to its obligation regarding transportation, the Board demonstrates responsible action in exercising its authority to consider changing its past practice or policy. Hence, the Commissioner determines that such certification adds little to respondents' position in this matter.

Rather, the Commissioner is swayed by that testimony elicited at hearing from Board witnesses Peatick and Ernst as to the safety and maintenance of the walkway. The Commissioner adopts their assessment that the walkway in question is as safe and well-maintained as any other public sidewalk in Wayne Township, that is is maintained by the Township, which also removes snow and ice from it, and that the Board of Education provides security lamps on the elementary school which illuminate the walkway from dusk to dawn, albeit that student use is primarily during the day.

In this regard, the Commissioner agrees with the Board that this matter is distinguishable from the facts in Fair Lawn, supra, where snow and ice were not removed, no public thoroughfare linked the pathways in the park to the rest of the community and, thus, said pathways were not deemed by the Park Commissioner to be public

walkways, and where the park was near an urban area, creating a potential danger of attack. The record reveals no urban area near the Smith Lane Extension.

As pointed out by the ALJ and respondents, this matter is more closely akin to Mangieri, supra. There was no urban area to contend with in Mangieri or in this case; rather, in Mangieri the walkway linked a residential cul-de-sac to school grounds, over a macadam easement traversing railroad tracks. In this case the path is surrounded by suburban residences, is maintained by the Township and school district, and has been designated as an official school path. The Township takes care of snow removal and debris collection and the area is illuminated to discourage hidden danger points. Thus, the Commissioner adopts those findings and conclusions of the ALJ below regarding safety, as augmented herein.

As to respondents' argument that children have no business being on an elementary school driveway not their own, the Commissioner finds this contention to be without merit. Nothing in statute, regulation or Board policy, for that matter, prohibits the district's children from using the Theunis Dey Elementary School driveway to get to and from the Smith Lane extension walkway. Moreover, as noted by respondents, the Commissioner has held in Nelson, supra, that it is proper to include a school driveway as part of the measurement to determine eligibility for school busing. Hence, the Commissioner finds no merit in respondents' concern regarding the driveway at the Theunis Dey Elementary School.

Accordingly, for the reasons expressed by the ALJ, as augmented herein, the initial decision is affirmed, and the Petition of Appeal dismissed. Accordingly, the Board may use the Smith Lane extension walkway and Smith Lane, a public roadway, in measuring remoteness pursuant to N.J.A.C. 6:2-1.3(b) and N.J.S.A. 18A:39-1.

COMMISSIONER OF EDUCATION

JANUARY 2, 1992

DATE OF MAILING - JANUARY 2, 1992

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EDU #9987-90
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SB # 6-92

BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,

PETITIONER-RESPONDENT,

V.

ARLENE KRAFT, ET AL.,

RESPONDENTS-APPELLANTS.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, January 2, 1992

For the Petitioner-Respondent, Fogarty & Hara
(Stephen R. Fogarty, Esq., of Counsel)

For the Respondent-Appellant, Charles J. Mysak, Esq.

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

June 3, 1992

Date of mailing 5 JUN 1992

(SB) 1-92

DHP # 231
SB #1-92

KENNETH WOLFFBRANDT,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, December 5, 1991

For the Petitioner-Appellant, Alfred T. Sanderson, Esq.

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney General (Robert J. Del Tufo, Attorney General)

Kenneth Wolffbrandt (hereinafter "Petitioner"), who was employed in September 1991 as an electrical maintenance employee at Glassboro High School, was disqualified by the Department of Education from continued employment in the State's schools when a fingerprint search conducted pursuant to N.J.S.A. 18A:6-7.1 et seq. revealed several criminal convictions. The criminal history record check revealed that Petitioner had been arrested for distribution of a controlled dangerous substance in 1974, possession of marijuana in 1977, and armed robbery in 1981. Petitioner sought to overturn his disqualification on the basis of rehabilitation.

In a letter decision dated December 5, 1991, the Commissioner of Education upheld the disqualification, finding that Petitioner had "failed to meet the standard for demonstrating

July 1, 1992

rehabilitation pursuant to N.J.S.A. 18A:6-7.1." Noting that Petitioner's parole had not yet expired,[1] the Commissioner concluded that "the seriousness of his offenses coupled with the remaining time to be served on probation militate against a demonstration of rehabilitation." The Commissioner added that "a determination of failure to demonstrate rehabilitation now will not foreclose [Petitioner] from reasserting his claim in the future when his probationary period has expired and he can advance similarly positive letters of recommendation from those who have known of his offenses and rehabilitation since being released from prison in 1986. Until such time, however, Mr. Wolffbrandt is disqualified from service in the schools of New Jersey."

After a thorough review of the record, we reverse the decision of the Commissioner.

N.J.S.A. 18A:6-7.1 provides, in pertinent part:

> c. Notwithstanding the provisions of this subsection, no individual shall be disqualified from employment or service under this act on the basis of any conviction disclosed by a criminal record check performed pursuant to this act if the individual has affirmatively demonstrated to the Commissioner of Education clear and convincing evidence of his or her rehabilitation. In determining whether an individual has affirmatively demonstrated rehabilitation, the following factors shall be considered:
>
> 1. The nature and responsibility of the position which the convicted individual would hold;
> 2. The nature and seriousness of the offense;
> 3. The circumstances under which the offense occurred;
> 4. The date of the offense;
> 5. The age of the individual when the offense was committed;

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[1] The record indicates that Petitioner's parole is scheduled to expire on August 15, 1993.

> 6. Whether the offense was an isolated or repeated incident;
> 7. Any social conditions which may have contributed to the offense;
> 8. Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have had the individual under their supervision.
>
> (Emphasis added.)

The Commissioner, as noted, concluded that Petitioner had failed to satisfy the standard set forth in N.J.S.A. 18A:6-7.1 for demonstrating rehabilitation. Such determination was predicated solely on the fact that Petitioner's parole arising from the robbery convictions had not yet expired. In so doing, the Commissioner misapplied the statutory standard. The language of N.J.S.A. 18A:6-7.1(c) does not preclude a finding of rehabilitation solely on the basis of unexpired parole. All pertinent circumstances, including any evidence of rehabilitation, must be adequately addressed. Consequently, the Commissioner erred in failing to consider the factors set forth in the statute and in rejecting Petitioner's claim of rehabilitation simply by virtue of his parole status.

The record in this matter is such that, given our authority as the ultimate administrative decision-maker and fact-finder in school matters, In the Matter of the Tenure Hearing of Lynn Jenisch Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), certif. den., 121 N.J. 615 (1990); Dore v. Bedminister Tp. Bd. of Ed., 185 N.J. Super. 447, 452 (App. Div. 1982), we need not remand to the Commissioner for determination of the substantive issue raised. Based upon our careful review of the record, we conclude that Petitioner has

demonstrated clear and convincing evidence of his rehabilitation.

The evidence before us indicates that the armed robberies committed by Petitioner took place during a relatively short period in late 1980. The sentencing judge pointed out in his Statement of Reasons for Sentence that Petitioner was the "set-up" man in each case and never had possession of a weapon. He participated in the robberies to support his drug addiction. The court related:

> I would indicate that Kenneth Wolffbrandt may have been a victim of the system. He was in excellent health; however, he did experience a neck injury and experienced a great deal of pain and discomfort as a result of that. This is a recurrent problem. He had earned four varsity letters while playing sports in Glassboro High School. The neck injury was a football related injury obtained in 1973 and he turned from an athlete into a drug addict. In 1970, he had started using marijuana in high school and in 1973 he experimented with other drugs. In 1977 he began using heroin in addition to other drugs. In 1979 he finally developed a heroin habit at approximately $100.00 to $200.00 a day and of course in 1980 he started committing these armed robberies to obtain money....There is no question in the Court's mind that the football injury and the emotional trauma associated with that injury, is what started him on his spree of crime.

Petitioner was sentenced to serve 18 years to run concurrently on these charges. He received his release on parole on December 30, 1986. The conditions of his parole included random urine monitoring, drug counseling and intensive parole supervision.

Petitioner's parole officer, who has been supervising him since his release from prison, indicated in a letter dated October 25, 1991 to the Office of Criminal History Review that:

> [Petitioner] has complied with all rules and regulations of his parole contract. He has been and remains arrest and drug free. He was to participate in an outpatient drug program, which he successfully completed.

> Due to Subject's cooperation, stable lifestyle, and positive adjustment his parole status was advanced. On 5/87 status was advanced from intense to regular, then on 2/88 from regular to quarterly. Then on 5/89 to semi-annual and on 9/90 to annual status, where he presently remains. His termination or max date is 8/15/93.
>
> I hope you will take into consideration that Mr. Wolffbrandt has worked very hard to attain where he is today. He views this position as a very positive aspect and accomplishment in his life.

Petitioner was 18 at the time of his arrest for distribution of a controlled dangerous substance, for which he received two years probation, 21 when he was arrested for possession of less than 25 grams of marijuana, for which he received a $200 fine, and 24 at the time he committed the armed robberies in 1980. It is evident that his drug dependency led to these robberies, and the record indicates that Petitioner has successfully overcome his addiction and remained drug-free. He completed drug treatment and counseling programs both in prison and following his release as mandated by the terms of his parole.

Petitioner has also actively pursued academic and vocational training. He participated in electrical training programs during his imprisonment, and since his release, Petitioner has successfully completed eight courses in electrical theory, electrical blueprint reading, industrial safety, motor control, residential electrical installations, and mathematics for the apprentice tradeworker as an evening student at Gloucester County Vocational-Technical School. As further evidence of Petitioner's dedication to his rehabilitation, it is noteworthy to us that he has completed one or two night courses nearly every semester over a four-year period since his release. There have been no further arrests.

The Assistant Superintendent of the Glassboro Public Schools, writing on behalf of the Glassboro Board of Education, indicated that the board would like Petitioner to remain in its employ. He praised Petitioner as "a fine man of good character who apparently has worked very hard, and successfully, to rehabilitate himself." The unit manager for Marriott Management Services in the Monroe Township School District, Petitioner's employer prior to his employment in the Glassboro district, characterized Petitioner as an "exceptional individual" who was "very skilled, honest and hardworking." He recommended Petitioner "for any position in the maintenance field," adding that "[i]f a position were available here at Monroe, I would re-hire him without question."

While the gravity of Petitioner's offenses is evident, under the circumstances, we find that further penalization of this individual, who has made great strides in rehabilitating himself, is neither a just result nor warranted under the terms of the statute. Given the uncontradicted evidence in the record, including Petitioner's successful efforts to acquire vocational training and experience and to eradicate the drug dependency which led to his crimes over a decade ago, we conclude that Petitioner has convincingly demonstrated his rehabilitation under N.J.S.A. 18A:6-7.1(c). We find no justification in the statute for negating such a conclusion until such time as Petitioner's parole, which has been progressively advanced to an annual reporting status, expires next year. We stress also that Petitioner was disqualified from employment as a school maintenance worker, a position which does not include responsibility for the care, supervision or instruction of students.

Accordingly, in view of our finding that Petitioner has demonstrated clear and convincing evidence of his rehabilitation pursuant to N.J.S.A. 18A:6-7.1(c), we reverse the decision of the Commissioner to disqualify Petitioner from service in the schools of New Jersey.

Maud Dahme opposed.

July 1, 1992

Date of mailing JUL 06 1992

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2-92

PAULA JACOBS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning teaching staff member alleged Board improperly transferred her from Work Experience Career Exploration Program (WECEP) vocational teacher-coordinator position to social studies teaching position for 1990-91 school year.

Initial decision concluded petitioner lacked appropriate certification to serve as a WECEP teacher-coordinator, and thus Board properly transferred her. ALJ noted "primary responsibility" for obtaining appropriate certification belongs to teacher. ALJ found petitioner had ample opportunity to satisfy new certification requirements that took effect when she became a WECEP teacher-coordinator. Since petitioner did not meet the requirements after the 5-year grace period, she could no longer legally continue employment as a WECEP teacher-coordinator until she obtained new certificate. Petition was dismissed.

Commissioner adopted findings and determination in initial decision. Commissioner emphasized petitioner did not possess appropriate certificate during period she served as teacher-coordinator and thus she failed to meet statutory requirements for tenure acquisition. (N.J.S.A. 18A:28-5) (See Spiewak.) Moreover, factual circumstances of matter did not warrant credit for period of service on equitable grounds since petitioner knew or should have known she lacked proper certification. Settlement agreement in prior matter could not confer such tenure.

JANUARY 6, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8529-90
AGENCY DKT. NO. 207-7/90

PAULA JACOBS,
Petitioner,
v.
PATERSON BOARD OF EDUCATION,
Respondent.

Gregory T. Syrek, Esq., for petitioner
(Bucceri & Pincus, attorneys)

Joseph J. Ryglicki, Esq., for respondent

Record Closed: August 30, 1991 Decided: November 22, 1991

BEFORE **KEN R. SPRINGER,** ALJ:

Statement of the Case

This is an appeal by a teaching staff member who alleges that the board of education violated her tenure and seniority rights by transferring her from a

vocational teacher-coordinator position to a social studies teaching position for the 1990-91 school year. Petitioner Paula Jacobs ("Jacobs") contends that she is entitled to preference over other staff members who have less seniority. Basically, the outcome depends on whether Jacobs holds an appropriate certification as a teacher-coordinator under *N.J.A.C.* 6:11-20.

Procedural History

On July 31, 1990, Jacobs filed her verified petition with the Commissioner of Education ("Commissioner"). Respondent Paterson Board of Education ("Board") filed its answer on October 9, 1990.[1] Subsequently, on October 17, 1990, the Commission forwarded the matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

By certified mail, dated February 7, 1991, petitioner's attorney served written notice of the pendency of this matter on the County Superintendent of Schools and on three individuals whose interests might be adversely affected by this litigation. Neither the County Superintendent nor the individuals moved to participate in these proceedings. Thereafter, the OAL held a hearing on August 2, 1991. Witnesses who testified and documents considered in deciding the case are listed in the appendix. Upon receipt of additional exhibits, the record closed on August 30, 1991. Time for preparation of the initial decision has been extended to November 29, 1991.

Findings of Fact

All the material facts are stipulated or uncontested. I **FIND:**

In 1976 Paula Jacobs started working for the Paterson school district as a teacher-coordinator of the vocational education program known as the Work Experience Career Exploration Program ("WECEP"), first as a substitute in June and

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[1]Recently the State took over operation of the Paterson school district and replaced the local school board. *Mulhern v. Paterson Bd. of Ed.*, 1991 *S.L.D.* ____ (Comm'r July 23, 1991), aff'd (St. Bd. Aug. 7, 1991).

then as a full-time employee in September.[2] Previously, she had served as a substitute teacher in the classroom. At the time of her hiring in 1976, Jacobs possessed an instructional certificate endorsed as a social studies teacher. Her combined duties included teaching the instructional portion of the program in the classroom as well as coordinating the work component in the field. Originally her base of operation was Elementary School No. 6, but later she moved to Eastside High School. Often she visited the various job sites where her students were assigned. An important part of her function was to act as coordinator between the school and the employer.

During the 1976-77 school year, the State Department of Education ("State") revised its licensing standards to require a new certificate for the position of "teacher-coordinator of cooperative vocational-technical education programs." In a memo distributed to the county offices in October 1977, the State advised that "[a]ll persons employed as teacher-coordinators must complete the requirements by June 30, 1980." Admittedly, Jacobs was aware of the change, having received a letter from the State informing her of the new certification. She submitted her application for the teacher-coordinator certificate in May 1977. Requirements for issuance of the teacher-coordinator certificate include successful completion of four vocational courses at the college level.[3] Between fall 1977 and spring 1979, Jacobs took all four courses at Montclair State College in Upper Montclair, New Jersey. However, there is

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[2]WECEP is a type of work-study program for children who receive instruction for part of the day and spend the remainder of the day receiving on-the-job training. Students earn credit for experience on the job. It differs from the Cooperative Industrial Education (CIE) program primarily in terms of student age and skill level. Typically, children enrolled in WECEP are between 14 and 16 years old and have unskilled jobs at department stores, the school lunchroom or local manufacturers. Children in the CIE program are generally above age 16 and are learning skilled trades such as automotive mechanics.

[3]These courses are: (1) Principles and philosophy of vocational-technical education; (2) Problems in organizing and teaching cooperative education programs; (3) Curriculum construction in vocational-technical education and (4) Vocational guidance. See *N.J.A.C.* 6:11-11.20(c) [formerly *N.J.A.C.* 6:11-12.24(c).]

no record that her college transcript was ever filed with the State or County offices. Certainly the transcript could not have accompanied the application filed in 1977, since Jacobs did not complete the last course until two years later in 1979. Meanwhile, in October 1977, the State issued an endorsement to Jacobs as a "teacher of production, personal or service occupations."[4] While this *instructional* certificate permitted Jacobs to continue in her position until June 30, 1980, it was not the equivalent of the newly created *educational services* certificate.

State monitors notified the district in April 1990 that Jacobs "does not hold the Teacher Coordinator Certificate for WECEP which authorizes the holder to coordinate WECEP Programs." Consequently, the Board took appropriate action to transfer her to a position as a high school social studies teacher effective September 1, 1990. At the time of the hearing in August 1991, Jacobs had still not obtained the appropriate certificate needed to be a WECEP coordinator. Correspondence from the County Office indicates that the information previously submitted was "inconclusive" on the question of Jacobs' eligibility for the coordinator certificate and that the licensing authority was still awaiting receipt of an official transcript from Montclair State College.

This is not the first time that Jacobs had reason to be aware of her lack of the necessary certificate. Previously, in September 1983, the Board had transferred her from the position as WECEP teacher-coordinator to a position as social studies teacher. Jacobs filed an appeal to the Commissioner of Education. Paragraph No. 5 of her own petition alleges that the position of WECEP teacher-coordinator "requires the holder of said position to possess an Educational Services certificate with an endorsement of Coordinator: Cooperative Industrial Education Programs."

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[4] *N.J.A.C.* 6:11-6.2(a)(26) provides that such endorsement "authorizes the holder to teach vocational courses in the areas of his or her State-approved occupational experience in all public schools."

Obviously Jacobs knew or should have known that she did not have such certificate. Nevertheless, she made no effort to correct the situation.[5]

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that Jacobs lacks the appropriate certificate to serve as a WECEP teacher-coordinator; and, therefore, that the Board properly transferred her to another position for which she is properly certified.

Teaching staff members must hold an appropriate certificate for the position to which they are assigned. No teaching staff member shall require tenure in any position without "an appropriate certificate for such position . . . in full force and effect." *N.J.S.A.* 18A:28-4. Employment of teaching staff members who lack an "appropriate"certificate is expressly prohibited. *N.J.S.A.* 18A:27-2. Teaching staff members are not entitled to salary unless they hold an "appropriate" certificate. *N.J.S.A.* 18A:29-1.

Ultimately, the "primary responsibility" for obtaining appropriate certification belongs to the teacher. *McAneny v. Bd. of Ed. of the Chathams,* 1991 *S.L.D.* _____ (Comm'r May 28, 1991). See also, *Jennings v. Highland Park Bd. of Ed.,* 1989 *S.L.D.* _____ (St. Bd. Feb. 28, 1989). While local school officials share some responsibility for checking that teaching staff members in their district are properly certified, it is the individual's obligation to obtain any necessary certificates. *Sydnor v. Englewood Bd. of Ed.*, 1976 *S.L.D.* 113, 117 (Comm'r 1976). *Jennings* overrules a prior line of authority typified by *Saad v. Dumont Bd. of Ed.*, 1982 *S.L.D.* 440 (Comm'r 1982),

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[5]The 1983 litigation was ended by a settlement agreement in which Jacobs was restored to her position as a WECEP coordinator. As part of the settlement, the Board acknowledged Jacobs' tenure in the position of WECEP coordinator. Significantly, the agreement makes no mention of the crucial fact that Jacobs did not possess the necessary certificate In any event, the parties cannot privately agree among themselves to authorize a person to hold a position for which she is not properly certified.

which had recognized retroactive seniority credit based on mere eligibility for a certificate, regardless of whether the actual certificate was ever issued.

Earlier cases had dealt with situations where the delay in acquiring the necessary certificate was "not of [one's] own doing," *Givens v. Newark Bd. of Ed.*, 1974 *S.L.D.* 906, 908 (Comm'r 1974) or "not attributable to any wrongdoing on anyone's part." *Saad,* 1982 *S.L.D.* at 450. Here, however, the failure to obtain the necessary certificate is not attributable to administrative delay or bureaucratic backlog, but rather to Jacobs' own failure to supply the licensing authority with missing information. Hence, the situation is analogous to *Nealy v. Roselle Bd. of Ed.*, 1985 *S.L.D.* ___ (Comm'r 1985), where a science teacher had completed the necessary course work in May 1984 but "did absolutely nothing about obtaining her official transcripts from Jersey City State until she was again reminded at the end of January 1985." (Slip op. at 22). See also *Fischbach v. North Brunswick Bd. of Ed.*, 1983 *S.L.D.* 1418, 1429 (Comm'r 1983), aff'd 1984 S.L.D. ___ (St. Bd. 1984), where the delay in issuance of an appropriate certificate was "not caused by the slowness of others, but rather by Fischbach's own willingness to cut corners and ignore regulations."

At the same time that Jacobs became a WECEP teacher-coordinator, new certification standards also took effect. *N.J.A.C.* 6:11-12.24 [now codified as *N.J.A.C.* 6:11-11.20]. Proposed 8 *N.J.R.* 319 (July 8, 1976); adopted 8 *N.J.R.* 459 (Oct. 7, 1976). Besides creating the new certificate for teacher-coordinator, the regulation also granted a five-year grace period for compliance with the added requirements. Thus, Jacobs had ample opportunity to satisfy the new certification requirements. After the cutoff date, she could no longer legally continue employment as a WECEP teacher-coordinator until she obtained the new certificate.

Order

It is **ORDERED** that the relief requested by Jacobs is denied.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Nov. 22, 1991
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

11/25/91
Date

Maureen Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 27 1991
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

1. Paula Jacobs

List of Exhibits

No.	Description
J-1	Copy of a letter to Dr. Frank Napier, Jr. from Melindo A. Persi, dated April 27, 1990
J-2	Copy of a memorandum to Mr. Charles Lighty from Dr. Kayte M. Monroe, dated May 4, 1990
J-3	Copy of a letter to Paula Jacobs from Dr. Frank Napier, Jr., dated July 18, 1990
J-4	Copy of a letter to Paula Jacobs from Melindo A. Persi, dated September 17, 1990
J-5	Copy of a letter to Melindo A. Persi from Paula Jacobs, dated September 17,1 990
J-6	Copy of a letter to Melindo A. Persi from Gregory T. Syrek, dated December 14, 1990
J-7	Copy of a letter to Gregory Syrek, Esq., from Melindo A. Persi, dated December 14, 1990
J-8	Copy of a transcript from Montclair State College, dated March 12, 1991
J-9	Copy of a memorandum to Joseph J. Ryglicki, Esq. from Dr. Kayte M. Monroe, dated February 1, 1991

J-10 Copy of a verified petition in the matter entitled Jacobs v. Paterson Board of Education, dated November 28, 1983

J-11 Copy of an answer in the matter entitled Jacobs v. Paterson Board of Education, dated December 13, 1983

J-12 Copy of a prehearing order in the matter entitled Jacobs v. Paterson Board of Education, decided July 31, 1984

J-13 Copy of an initial decision in the matter entitled Jacobs v. Paterson Board of Education, decided July 31, 1984

J-14 Copy of decision of the Commissioner of Education in the matter entitled Jacobs v. Paterson Board of Education, dated September 22, 1984

J-15 Copy of *N.J.A.C.* 6:11-12.24

J-16 Copy of an excerpt from a booklet entitled Regulations and Standards for Certification published by the Department of Education (26 Ed. 1976)

J-17 Copy of an excerpt from a booklet entitled Regulations and Standards for Certification published by the Department of Education (26 Ed. 1976)

J-18 Copy of a memorandum to the County Offices of Education from Fred A. Price, dated October 21, 1977

J-19 Copy of an application for certification made by Paula Harris, dated May 10, 1977

J-20 Copy of a memorandum to the Passaic County Superintendent of Schools from George Russ, dated July 27, 1977

J-21 Copy of a letter to the Department of Education from Henry M. Porway, dated September 9, 1977

J-22 Copy of an instructional certificate endorsed as teacher of production, personal or service occupations, issued October 1977

J-23 Copy of an application for change of name on teaching certificate, dated June 20, 1978

J-24 Copy of a notation by the Passaic County Superintendent's office, dated September 5, 1978

J-26 Copy of a letter to Melindo Persi from Dr. Kayte M. Monroe, dated December 5, 1989

J-27 Copy of a letter to Dr. Celeste Rorro from Melindo A. Persi, dated January 10, 1990

J-28 Copy of a letter to Melindo A. Persi from Celeste M. Rorro, dated January 18, 1990

J-29 Copy of a letter to Dr. Kayte Monroe from Melindo A. Persi, dated January 29, 1990

J-30 Copy of a letter to Melindo A. Persi from Dr. Kayte M. Monroe, dated March 15, 1990

J-31 Copy of a memorandum to Dr. Celeste Rorro from the Passaic County Superintendent's office, dated August 13, 1990

J-32 Copy of a letter to Melindo A. Persi from Celeste M. Rorro, dated August 28, 1990

J-33 Copy of a letter to Melindo A. Persi from Dr. Celeste M. Rorro, dated November 28, 1990

P-1 Copy of a letter to Melindo A. Persi from Gregory T. Syrek, Esq., dated February 7, 1991

P-2 Copy of a letter to Jacqueline Smith from Gregory T. Syrek, Esq., dated February 7, 1991

P-3 Copy of a letter to Dominic Belmont from Gregory T. Syrek, Esq., dated February 7, 1991

P-4 Copy of a letter to Louis Gill from Gregory T. Syrek, Esq., dated February 7, 1991

P-5 Certification of mailing, dated August 2, 1991

R-1 Copy of an instructional certificate endorsed as teacher of social studies, issued June 1974

PAULA JACOBS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PATERSON, PASSAIC 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 the requirements of N.J.A.C. 1:1-18.4.

Petitioner's exceptions are summarized below:

> 1) The clear fact that at no time prior to the events leading to the present litigation did anyone indicate to the petitioner that she lacked proper certification.
>
> 2) Petitioner has satisfied the education requirements for the Teacher Coordinator certificate. As she indicated, she arranged to have a copy of her transcript forwarded to the County Superintendent of Schools. She was told that this was needed to establish proof of satisfying the requirements. Petitioner did as she was told and, again prior to this matter, was never told that she must do anything more to satisfy her obligations.
>
> 3) The petitioner's application for certification, dated May 10, 1977, requests a certificate for "W.E.C.E.P. Coordinator." (J-19) The certificate actually issued was for "Teacher of Production Personal or Service Occupations." (J-2) There is no information suggesting that the petitioner was ever told of the difference between the certificate requested and the one actually received or what further

action would be necessary other than simply completing some courses. She did as she was told and should not be deemed to have expertise in certification requirements when the people with such expertise at the State, County and local levels never conveyed any information to her.

4) In her prior litigation with the Board, a settlement was reached and approved by the Commissioner of Education. (J-10, 11, 12, 13, 14) This approved settlement includes a stipulation of the Board's acknowledgement that the petitioner is tenured as a W.E.C.E.P./C.I.E. Teacher Coordinator. This is a clear indication that the parties and the Commissioner were unaware of any certification problems or additional requirements. Consequently, the determination in the initial decision that placed the burden of any lack of knowledge on the petitioner is inappropriate.

5) The effect of the conclusions found in the initial decision is to eliminate a significant number of valuable years of service and experience from the petitioner. It is as if the service from 1980 to 1990 no longer exists. This is a harsh, inadequate result under the circumstances of this case. The proper authorities failed to convey information to her. Now, the only person required to suffer is the petitioner. This is an unwarranted result, given the complete lack of attention and communication evidenced by these authorities. The petitioner should be deemed to have acquired the Teacher Coordinator certificate when she completed the educational requirements. That is all she was told to do. (Petitioner's Exceptions, at pp. 1-2)

Upon review of the record including petitioner's exceptions, the Commissioner agrees with and adopts the findings and conclusions of the Administrative Law Judge. Notwithstanding petitioner's arguments otherwise, the circumstances in this matter do not indicate that petitioner has been a victim of administrative error relative to her 1977 application for certification as a WECEP coordinator (exhibit J-19). The record is clear that petitioner was not eligible for an educational services certificate as a teacher-coordinator in October 1977. She was, however, issued an

instructional certificate for which her training entitled her. (Exhibit J-22) The title of that certificate is plain faced in its wording that it is a teacher certificate and not one for teacher-coordinator. Petitioner never sought to challenge the issuance of only the teacher certificate in 1977, notwithstanding the fact she had applied for a coordinator certificate. Moreover, it is clear that it was not until she completed the required course work at Montclair State College several years later that she became eligible for the educational services certificate for teacher-coordinator of cooperative vocational-technical education programs. (Exhibit J-8)

The settlement agreement reached by the parties and approved by the Commissioner in 1984, which had as a term acknowledging petitioner's tenure and seniority as a coordinator, cannot serve to compel a determination in the instant matter that she actually had such status. Petitioner did not possess the appropriate certificate during her period of service as a teacher-coordinator and thus has failed to meet the statutory requirements for tenure acquisition. N.J.S.A. 18A:28-5 See also Spiewak v. Board of Education of Rutherford, 90 N.J. 63 (1982). No settlement agreement could confer such a right; only by meeting the precise requirements of law can one achieve that status. Further, the record fails to present circumstances which would lead to a determination that the statutory conditions of N.J.S.A. 18A:28-5 have been satisfied on equitable grounds.

It was petitioner who bore primary responsibility to ascertain why she was not granted a teacher-coordinator certification in 1977 and to obtain proper certification for the position she held in the Paterson School District.

Accordingly, for the reasons stated in the initial decision, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

JANUARY 6, 1992

DATE OF MAILING - JANUARY 6, 1992

3-92

CHARLES A. SCHULTZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, former pool substitute, sought 60 days' pay in lieu of 60 days' notice of termination from his position. Petitioner had assumed he would be rehired for 1990-91 school year.

ALJ found pool substitute was not a contract teacher and was therefore not entitled to 60 days' salary. Since pool substitutes cannot obtain tenure, petitioner had no reasonable expectation of reemployment until he actually received written notice of rehire. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

JANUARY 3, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10634-90
AGENCY DKT. NO. 380-11/90

CHARLES A. SCHULTZ,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Alan S. Porwich, Esq., for petitioner
(Feintuch & Porwich, attorneys)

Derlys Gutierrez-Congett, Esq., for respondents
(Murray, Murray & Corrigan, attorneys)

Record Closed: November 18, 1991 Decided: November 26, 1991

BEFORE **STEPHEN G. WEISS,** ALJ:

PROCEDURAL HISTORY

This matter was transmitted by the Department of Education to the Office of Administrative Law (OAL) on December 20, 1990, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq., following the filing of a verified petition by Charles A. Schultz, formerly employed as a "pool substitute" by the respondent State-Operated School District of the City of Jersey City. Schultz maintained in his petition that he is entitled to be paid a sum equal to 60 days' pay, based upon his

1989-90 salary, by virtue of the respondent Board's failure to inform him prior to August 29, 1990, that he would not be reemployed for the 1990-91 school year.

Following the filing by respondent of an answer denying that petitioner is entitled to relief, the case was transmitted to the OAL and a telephone prehearing conference was conducted by the undersigned administrative law judge with counsel on May 22, 1991. It was agreed at that time that the following issue was to be resolved: "Was petitioner entitled to be paid 60 days' pay in lieu of 60 days' notice of termination?" See, Prehearing Order, May 29, 1991, para. 1(b).

A plenary hearing was conducted by me on October 4, 1991, and posthearing memoranda of law, and reply memoranda, were filed in accordance with an agreed schedule. The following constitutes my initial decision dismissing the verified petition.

FINDINGS OF FACT

At the outset of the hearing, counsel proffered a joint stipulation of facts, with attached exhibits (Exhibits J-1 through J-6 and Exhibits P-1, P-2), as follows:

1. Charles Schultz was employed by the Jersey City School District on January 12, 1989 for the remainder of the 1988-89 school year as a pool substitute.

2. Mr. Schultz was offered employment as a pool substitute by correspondence dated January 11, 1989 from Louis Lanzillo, first assistant superintendent/personnel of the Jersey City Board of Education.

3. Pool substitutes are assigned to one school for the school year, but may be assigned to a different school at any time when the need arises.

4. Mr. Schultz was assigned to Dickinson High School from January 12, 1989 to May 17, 1989, and at Ferris High School from May 18, 1989 to June 1989 and again from September 1989 through June 1990.

5. As a pool substitute, Mr. Schultz substituted for different teachers who were absent at his assigned school or at any other school in the District.

6. Pool substitutes are required to possess a standard New Jersey teaching certificate.

7. Mr. Schultz has a standard teaching certificate with a social studies endorsement.

8. While at Ferris High School, Mr. Schultz substituted for a variety of absent teachers in different subject matters. He also substituted for absent teachers at other high schools and at several elementary schools.

9. Pool substitutes are not covered by the collective bargaining agreement between the State-Operated School District of Jersey City and the Jersey City Education Association.

10. Pool substitute is not a recognized title in [the] New Jersey Administrative Code.

11. The Jersey City School District sometimes uses per diem substitutes in addition to pool substitutes. Per diem substitutes are paid a daily rate and report to work when called by the District.

12. Pool substitutes receive the following salary and benefits: $1,850/month salary, paid hospitalization, life insurance, dental and prescription plans, and one sick day per month for a total of 10 sick days per year which are not accruable.

13. The principal at Ferris High School recommended to the human resources department on or about March 9, 1990 that Mr. Schultz not be rehired as a pool substitute for the 1990-1991 school year.

14. By correspondence dated August 28, 1990, Mr. Robert Schaefer, executive director of human resources, notified Mr. Schultz that he would not be rehired as a pool substitute for the 1990-1991 school year.

15. Mr. Schultz was never given a written contract of employment such as the sample attached as Exhibit J-3.

16. From April 17, 1989 to May 17, 1989, for 21 school days, Mr. Schultz substituted for Mr. Appleman, a social studies teacher at Dickinson High School.

TESTIMONY

In addition to the stipulated facts set forth above, oral testimony was offered at the hearing by the petitioner on his own behalf, and by two witnesses for the respondent, Robert Y. Schaefer, its executive director of human resources since January 1990, and William F. Millevoi, vice principal at Ferris High School.

For Petitioner

According to petitioner, he was told early in 1989 that he would be rehired for the following school year (1989-90) based upon his performance. He was duly rehired and worked as a pool substitute during that school year. When a prescription drug plan card was issued to him in June 1990, which was to be effective until January 1, 1991, Schultz assumed he was going to be rehired for the 1990-91 school year. Thus, his receipt of notice from Schaefer on August 29, 1990 (Exhibit J-5) that he had not been recommended to be rehired came as a surprise to him.

With respect to an incident of alleged insubordination which took place in February 1990, and which led to the issuance to him of the memorandum of March 2, 1990 from Millevoi, and his response of March 21, 1990 (Exhibit J-6), Schultz maintained that he was not made aware that a recommendation had been made by his principal on March 9, 1990, that he not be rehired, and he reiterated that it was not until August 29, 1990, that he first learned that he would not be retained.

On cross-examination, Schultz maintained that he believed he was a "contract employee" since he had signed a pool substitute acceptance form in January 1989 (Exhibit J-1).* Also, although the Board adopted a formal resolution in August 1989 engaging petitioner as a pool substitute for the 1989-90 school year (Exhibit R-1), petitioner could not state positively whether he had ever seen that resolution. Of course, no similar resolution with respect to hiring Schultz for the following school year was ever passed.

Finally, Schultz noted that while working as a pool substitute, he attended teacher workshops and Parents' Night conferences to cover for absent homeroom teachers.

For Respondent

Respondent's two witnesses testified essentially as follows. Schaefer, the executive director of human resources since January 1990, related that prescription drug plan cards are issued automatically to each eligible employee, and they are reissued automatically every six months as long as that employee is listed on the Board's payroll. According to Schaefer, coverage stops only when the personnel office is informed that the employment has ceased.

Schaefer also explained that employment decisions with respect to rehiring pool substitutes normally are made during August of each year, and the individuals involved usually were notified of the decision shortly thereafter. As far as Schaefer was concerned, since pool substitutes can never obtain tenure, Schultz had no reasonable expectation of reemployment until he actually received a written notice of rehire.

On cross-examination, Schaefer observed that employment decisions with respect to pool substitutes were made by him, in consultation with others, and that

*It was stipulated that Schultz was never offered, and therefore never executed, the standard professional employment contract form used in Jersey City (Exhibit J-3).

10 pool substitutes employed during 1989-90, including Schultz, were not rehired for 1990-91.

The second Board witness, William F. Millevoi, vice principal of Ferris High School for the last six years, described the duties of pool substitutes to include filling in where needed to cover all disciplines (regardless of their certification) if a teacher was going to be absent. However, if, upon reporting to work, no classroom assignment was required, the pool substitute would be utilized, as he put it, "in the best way possible" -- such as security or clerical work. Millevoi was the administrator who memorialized the alleged insubordination by petitioner in the memorandum of March 2, 1990, to Schultz (Exhibit J-6).

DISCUSSION

In its posthearing brief, the respondent District raises for the first time a claim that the petition should be dismissed as untimely under the 90-day rule contained in N.J.A.C. 6:24-1.2(c). Neither the original pleadings nor the prehearing order contain any reference to that defense and, therefore, it will not be addressed herein.

The 90-day rule issue aside, a dispute still exists with respect to what precise issue or issues are to be adjudicated by me. Specifically, as noted, the prehearing order identifies only one "issue to be resolved," as follows: "Was petitioner entitled to be paid 60 days' pay in lieu of 60 days' notice of termination?" Prior to the prehearing conference, I had requested counsel to submit, in writing, what they believed the issues to be.

In response, the Board articulated the issue which eventually was set forth in the prehearing order. However, petitioner's counsel submitted a statement which made reference to the fact that his client had ". . . received no notice from the Board pursuant to N.J.S.A. 18A:27-10." In light of that statement, I raised the issue again at the hearing. Although counsel for petitioner was somewhat ambivalent regarding the reference to and reliance upon that statutory provision, I left open to him the opportunity to argue the pertinence of the statute in his posthearing brief, which has been done. Thus, although technically the prehearing order was never amended to provide for that additional issue, it will be addressed herein.

N.J.S.A. 18A:27-10 et seq. provides a mechanism whereby nontenured teaching staff members continuously employed by a board since the preceding September 30 must be made aware, in writing, of their employment prospects for the upcoming school year. In particular, the statute mandates that on or before April 30, the board shall give to each such person either a written offer of a contract for employment for the next succeeding school year or a written notice that such employment will not be offered.

N.J.S.A. 18A:27-11 then provides that should a board fail to make an offer of contract for employment or provide notice that such employment will not be offered, then the board shall be deemed to have offered to that teaching staff member employment for the next succeeding school year. N.J.S.A. 18A:27-12 then requires the teaching staff member desiring to accept such employment to notify the Board of such acceptance, in writing, on or before June 1. In the event written acceptance is provided as set forth, then and in that event the employment shall be deemed to continue. In the absence of such notice of acceptance, the provisions of the article shall no longer be applicable.

Obviously, in order to determine whether this statutory scheme applies to petitioner, it is necessary to first identify his precise status, i.e., whether as a "pool substitute" he falls into the class of persons referred to in the statute as "nontenured teaching staff members." According to petitioner, he was a member of that class since he was fully certified and employed as a full-time teacher in the District. In particular, he was required to report to work every day of the school year, taught within the area of his certification, attended workshops and substituted for homeroom teachers on Parents' Nights, received the same medical benefits paid to contract teachers, and received sick leave. Moreover, petitioner was paid an annual salary and not a "per diem rate."

With respect to whether "pool substitutes" nevertheless are in a separate category and not considered to be regular teachers, both counsel have made reference to the decision of the Commissioner in Lowicki v. Board of Education of the City of Jersey City, OAL DKT. EDU 2505-81, Commissioner's Partial Decision, September 16, 1986. The undersigned administrative law judge authored the partial initial decision in the Lowicki case which was reviewed by the Commissioner in the decision cited above.

In my partial initial decision, decided August 4, 1986, I reviewed the evidence which had been set forth in the record before me in order to determine whether the pool substitutes were to be treated at "regular teachers." Following my review of the evidence and applicable case law, I recommended to the Commissioner that pool substitutes were not to be considered as regular teachers. In his partial decision of September 16, 1986, the Commissioner agreed with my recommendation and found that pool substitutes serve on a temporary basis, are not "regular" teachers, and therefore have no expectation of reemployment or tenure, criteria which were set forth by the New Jersey Supreme Court in its decision in Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982).

Petitioner in this case attempts to distinguish his situation from the Lowicki case by pointing out that in that earlier matter, the issue had to do with enrollment in the Teachers' Pension and Annuity Fund -- a matter which is of no concern in the present case. In addition, petitioner points out that the Board's method of engagement of pool substitutes which was reviewed in the 1986 decision differs in material respects from the procedure used more recently and under which Schultz was hired and served. Thus, rather than be paid a monthly stipend, Schultz was paid an annual salary. In addition, petitioner notes that there was no reference in Lowicki to whether the pool substitutes in that case received the medical and health benefits provided to Schultz.

Respondent, for its part, relies heavily on the Lowicki decision and argues that the Commissioner's express finding in that case bars a contrary conclusion herein.

Based upon my review and consideration of the evidence in this case, and in light of my initial decision and the affirmance by the Commissioner in Lowicki, I agree with respondent that pool substitutes are not regular teachers and therefore are not entitled to the benefits of N.J.S.A. 18A:27-10 et seq. As respondent pertinently observes, pool substitutes are utilized in a teaching context to fill in for teachers who are absent. They do not have employment contracts and are not necessarily certified to teach in the various areas that they actually do teach.

Plainly, as I observed in 1986, as the Commissioner confirmed in that same year, and as respondent points out in its posthearing brief, pool substitutes simply have no

expectation of reemployment. Thus, I agree with the Board that Schultz, as a pool substitute, does not fall within the class of persons entitled to invoke the provisions of N.J.S.A. 18A:27-10, and the Board's "failure" to provide him with notice of nonreemployment by April 30, 1990, is irrelevant.*

Finally, as to this issue, petitioner asks why, if N.J.S.A. 18A:27-10 et seq. does not apply, respondent gave Schultz and other pool substitutes any notice at all that they would not be rehired. The short answer to that inquiry, of course, is that the provision of notice was a matter of accommodation and the carrying out by the Board of, at the very least, a courtesy to persons who had worked for it during the previous school year.

The remaining issue to be determined, then, is whether, even absent an entitlement to relief under N.J.S.A. 18A:27-10 et seq., petitioner was nevertheless entitled to 60 days' pay in lieu of 60 days' notice of nonrenewal. Petitioner's position in this respect seems to be that simply because he was employed as a pool substitute, the Board owed him that, at least. In support of that proposition, petitioner argued that he was a "contract employee" since the Board led him to believe that he would be rehired by reissuing a prescription card to him in June 1990. Since a similar card had been issued in June 1989, and petitioner was hired for the following school year, he was, according to his argument, entitled to rely upon the most recent prescription drug card issuance for the same benefit.

Respondent, of course, vehemently resists that argument and points out that Schultz clearly had no "contract" and, as the Commissioner noted in the Lowicki decision, no expectation of reemployment. Indeed, since petitioner received a notice of reemployment in August 1989, he knew, or should have known, that his employment for 1990-91 required the same action. Under the circumstances, then, the Board argues that petitioner, having no contract or reasonable expectation of reemployment, has no basis in law or in equity to expect to be paid 60 days' pay in lieu of any 60 days' notice.

---

*Indeed, petitioner never explained why, if the statutory scheme did apply to him, his failure to provide a written offer of acceptance as required by N.J.S.A. 18A:27-12 would not be fatal to his case.

I agree with the position taken by the Board. Schultz's engagement was by Board resolution and at no time was he ever a "contract" teacher. Issuance of the prescription drug card was a ministerial act essentially triggered by his mere presence on the Board payroll during June 1990. There is no basis that I can find either in statute or in Board practice or policy that would provide Schultz with any legitimate claim to be paid 60 days' pay prorated upon his $18,500 annual salary.

CONCLUSION AND ORDER

Accordingly, in light of the undisputed facts, and for the reasons set forth herein, I **CONCLUDE** that petitioner, Charles A. Schultz, as a "pool substitute" was not entitled to be paid 60 days' salary in lieu of 60 days' notice of termination. Accordingly, I **ORDER** that his petition of appeal be **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 26, 1991
Date

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

NOVEMBER 27, 1991
Date

MAUREEN KELLEY
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 03 1991
Date

OFFICE OF ADMINISTRATIVE LAW

amr/e

WITNESS LIST

For Petitioner:

Charles A. Schultz

For Respondent:

Robert Y. Schaefer

William F. Millevoi

EXHIBIT LIST

J-1 Letter of January 11, 1989, from Lanzillo to Schultz

J-2 Teacher Certificate

J-3 Professional Employment Contract Form

J-4 Schultz attendance log

J-5 Letter of August 28, 1990, from Schaefer to Schultz

J-6 Nonrenewal recommendation, March 9, 1990, memo of March 2, 1990, letter of March 21, 1990

P-1 Letter of May 30, 1990, from Schultz to Schaefer

P-2 Memo of June 7, 1990, from Schaefer to Schultz, et al.

R-1 Letter of August 24, 1989, from Lanzillo to Schultz

OAL DKT. NO. EDU 10634-90

CHARLES A. SCHULTZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon careful and independent review, the Commissioner concurs with the ALJ that petitioner in this matter was not a contract teacher and therefore had no entitlement, statutory or otherwise, to 60 days' salary in lieu of 60 days' notice of termination.

Accordingly, the initial decision of the Office of Administrative Law dismissing the instant Petition of Appeal is affirmed for the reasons stated therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 6, 1992

DATE OF MAILING - JANUARY 6, 1992

4-92

IN THE MATTER OF THE TENURE	:	
HEARING OF INEZ SENHOUSE, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF NEWARK,	:	DECISION
ESSEX COUNTY.	:	

JANUARY 9, 1992

IN THE MATTER OF THE TENURE :
HEARING OF INEZ SENHOUSE, SCHOOL : COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF NEWARK, : DECISION
ESSEX COUNTY. :

For the Board, Charles I. Auffant, Esq.

This matter having been opened before the Commissioner of Education on October 29, 1991 through certification of tenure charges of unbecoming conduct against respondent, a tenured guidance counselor in the School District of the City of Newark, on grounds of unexplained and unauthorized absence from her position beginning on October 10, 1989 and continuing to the time of filing; and

The Commissioner having directed respondent by two notices to file an Answer to the charges against her; and

As of this date, respondent having filed no answer and the second of the Commissioner's notices having been returned marked "MOVED, LEFT NO ADDRESS;" now therefore

IT IS ORDERED this 9th day of January 1992 that the Board's charges against respondent are deemed to be admitted, so that summary judgment shall be granted to the Board. Respondent is accordingly dismissed from tenured employment as of the date of this decision and the instant matter is referred to the State Board of Examiners pursuant to N.J.A.C. 6:11-3.6(a).

JANUARY 9, 1992

DATE OF MAILING - JANUARY 10, 1992

COMMISSIONER OF EDUCATION

5-92

LEWIS B. FREIMARK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	
	:	

JANUARY 10, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION-DISMISSAL
OAL DKT. NO. EDU 638-91
AGENCY DKT. NO. 398-12/90

LEWIS B. FREIMARK,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,
Respondent.

Lewis B. Freimark, Esq., pro se

Arlene G. Lutz, Deputy Attorney General, for respondent
(Robert J. Del Tufo, Attorney General of New Jersey, attorney)

Record Closed: December 5, 1991 Decided: December 6, 1991

BEFORE **STEPHEN G. WEISS,** ALJ:

There is pending before me in this matter a motion by the respondent to dismiss the petition of appeal for failure to comply with my order of August 19, 1991, requiring petitioner to provide answers to complete interrogatories by September 13, 1991, and to pay $605.20 in costs and expenses incurred by counsel in having to prepare and file two motions seeking to compel discovery.

This case originally was transmitted to the Office of Administrative Law by the State Board of Examiners on January 16, 1991, as the result of an appeal by Lewis B. Freimark from the determination of the State Board to deny his application for certification as a principal. A telephone prehearing conference was conducted by the undersigned administrative law judge on March 20, 1991, and a prehearing

order was issued on March 22, 1991. That order provided in paragraph eight that petitioner would have until April 4, 1991, within which to serve answers to outstanding interrogatories previously served upon him by respondent.

In mid-May 1991, respondent moved to dismiss the petition for petitioner's failure to provide answers by the date set forth in the prehearing order. In support of that application, counsel observed that the deadline for service had long past.

No response was made by petitioner to the moving papers. Accordingly, on June 6, 1991, I sent a letter to petitioner and the deputy attorney general setting forth that rather than dismiss the petition under N.J.A.C. 1:1-14.4, I had determined to provide petitioner with additional time to make the requested discovery. At my request, an order embodying that determination was submitted by Ms. Lutz, which I signed on June 21, 1991.

Thereafter, in late June 1991, the deputy attorney general renewed her motion to dismiss the petition, setting forth that the complete answers to interrogatories had still not been served. An affidavit in support of that motion was also submitted.

In a letter determination dated July 18, 1991, I advised Mr. Freimark and the deputy attorney general that under all of the circumstances, although dismissal of the petition arguably was justified, I was reluctant to order dismissal in light of the fact that Mr. Freimark related that his lack of diligence stemmed in part from a personal family illness situation. Accordingly, pursuant to N.J.A.C. 1:1-14.14, I directed that petitioner pay to the State of New Jersey the reasonable costs and expenses incurred by the deputy attorney general in connection with having to make the two motions. I also directed that the outstanding discovery had to be provided. Subsequently, on August 19, 1991, I entered a formal order embodying my determination. Although I denied the motion to dismiss, I directed that complete answers to interrogatories and missing attachments had to be provided to counsel for respondent no later than September 13, 1991. I also ordered petitioner to pay to the State of New Jersey the sum of $605.20, the amount of fees and expenses set forth in Ms. Lutz's affidavit of July 29, 1991. I further provided that petitioner could apply to the director of the Office of Administrative Law for interlocutory relief from the sanctions if he so desired. See, N.J.A.C. 1:1-14.10(k). No such motion was made.

In light of the continuing failure by petitioner to comply with the terms of my order, the instant motion to dismiss was made.

In light of the foregoing recitation of the history of this case, and in view of petitioner's continuing failure and refusal to provide discovery despite having been given more than ample opportunity to do so, I am compelled to conclude that dismissal of his petition is distinctly appropriate. Accordingly, for the reasons set forth herein, and in light of petitioner's continuing failure and refusal to provide necessary discovery, it is **ORDERED** pursuant to N.J.A.C. 1:1-14.4(c) that respondent's motion to dismiss the petition, with prejudice, should be **GRANTED** for failure by petitioner to: (a) provide complete and timely answers to interrogatories; and (b) pay respondent's costs and expenses.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 6, 1991
Date

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

12/10/91
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 12 1991
Date

OFFICE OF ADMINISTRATIVE LAW

amr

OAL DKT. NO. EDU 638-91

LEWIS B. FREIMARK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon review, the Commissioner concurs with the ALJ that in light of petitioner's continuing failure to abide by the ALJ's directives and his persistent refusal to provide discovery, dismissal of this matter is fully warranted.

Accordingly, the initial decision of the Office of Administrative Law dismissing the instant Petition of Appeal is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 10, 1992

DATE OF MAILING - JANUARY 10, 1992

6-92

DR. EUGENIA CRINCOLI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JANUARY 10, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6152-90
AGENCY DKT. NO. 233-7/90

DR. EUGENIA CRINCOLI,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT, CITY OF JERSEY CITY,
Respondent.

Alexander W. Booth, Jr., Esq., for petitioner (Brownstein and Booth, attorneys)

Charlotte Kitler, General Counsel, for respondent

Record Closed: November 27, 1991 Decided: December 9, 1991

BEFORE **EDITH KLINGER,** ALJ:

Petitioner, Dr. Eugenia Crincoli, who was the medical director of the Jersey City School District prior to the creation of the state-operated school district pursuant to *N.J.S.A.* 18A:78-34 *et seq.*, seeks reemployment in the position and reevaluation in addition to back pay and other monetary relief.

The petition was filed with the Commissioner of Education on July 9, 1990. Respondent's answer was filed on July 26, 1990. On August 2, 1990, the matter was 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.*

The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement disposes of all issues in controversy, is in the interest of the parties and public, and comports with *Cardonick v. Bd. of Ed. Boro. of Brooklawn*, State Board Decision (April 8, 1983).

I therefore **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and **ORDER** that the parties comply with the terms of settlement and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 9, 1991
DATE

Edith M. Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

12/10/91
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 12 1991
DATE

OFFICE OF ADMINISTRATIVE LAW

md/e

CHARLOTTE KITLER, ESQ.
Attorney for Respondent
Jersey City Public Schools
346 Claremont Avenue
Jersey City, New Jersey 07305
(201) 915-6231

Nov 27 1 03 PM '91

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DKT. NO. EDU-06152-90

EUGENIA CRINCOLI,	:	
Petitioner,	:	
v.	:	STIPULATION OF SETTLEMENT
JERSEY CITY PUBLIC SCHOOLS,	:	
RESPONDENT.	:	

. . . . . .

The parties in this matter have voluntarily resolved all disputed matters and enter into the following settlement which fully disposes of all issues in controversy between the parties:

1. The Petitioner withdraws her Petition and request for hearing, and Respondent agrees to the terms stipulated and attached hereto.

2. The Petitioner waives all claims against the State-Operated School District of Jersey City, including claims of back pay or other monetary relief, arising out of the abolishment of the position of Medical Director and the reorganization of the school district on April 4, 1990. This waiver includes claims asserted in this matter before the Commissioner of Education as well as claims presented to the New Jersey Department of Personnel.

3. Nothing in this Stipulation and agreement shall be deemed to be an admission of liability on behalf of either party. This Stipulation and agreement shall be subject to the approval of the Commissioner of Education. Any disapproval by the Commissioner shall not interfere with the rights of either party to pursue the matter further.

DATE: 4-29-91 _____
Eugenia Crincoli, Petitioner

DATE: 4-29-91 _____
Attorney for Petitioner

DATE: _____ _____
Attorney for Respondent

NOV 27 1 03 PM '91

CRINCOLI V. STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY

OAL DOCKET NO. EDU-06152-90, Agency Ref. No. 233-7190

STIPULATED TERMS OF SETTLEMENT

1. On April 4, 1990, the position of Medical Director at the State-operated school district of Jersey City was abolished. That decision was based solely on administrative considerations having to due with de-centralization of the school district. Dr. Crincoli is a competent and dedicated physician who is still employed in the district as a school physician.

2. In March of 1990 an evaluation of Dr. Crincoli, as well as all other administrative and supervisory employees of the central office, was undertaken as required by the statutes governing the State takeover of a local school district. Dr. Crincoli was given the right to respond to that evaluation and she took exceptions to several statements made therein. Because a policy decision had been made abolishing the Medical Director's position, the evaluation was not reconsidered by the district in light of Dr. Crincoli's exceptions.

3. The parties have agreed that the evaluation of Dr. Crincoli and her response will be sealed and transferred to the Legal Department of the district for custody and will not be opened without the approval of the Commissioner of Education.

4. The State District Superintendent will write the following letter and place it in Dr. Crincoli's file with a copy to counsel:

"To Whom It May Concern:

On April 4, 1990 the position of Medical Director was abolished in the Jersey City Public Schools. The decision to take this action was in no way based on the performance of the current director Dr. Eugenia Crincoli. It was solely an administrative decision which in no way reflected on the doctor's abilities.

Dr. Crincoli remained in the district's employ where she still serves as a school physician. She is and has always shown herself to be a competent and dedicated physician."

5. Should the position of Medical Director or any other administrative or professional position directly involving medical services be established by the State-operated school district of Jersey City, Dr. Crincoli will be given direct notice thereof, will be considered eligible to apply and if she chooses to apply, will be given due consideration. In the event that Mr. Robert Y. Schaefer is not actively serving as Director of Human Resources for the State-operated school district, Dr. Crincoli is obligated to notify Mr. Schaefer's successor as to the terms of this stipulation so that the school district may be able to provide the notice called for in this section.

6. Dr. Crincoli shall be paid for five (5) unused professional/vacation days which were accrued prior to the abolishment of the position of Medical Director.

CERTIFICATION

I, Eugenia Crincoli, being the Petitioner in this matter, hereby certify that I have reviewed this Stipulation of Settlement, fully understand its meaning and terms, and I enter into this agreement voluntarily.

DATE: 4-29-91

Eugenia Crincoli

DR. EUGENIA CRINCOLI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

Upon review, the Commissioner is able to accept all of the proposed terms of the instant settlement with the exception of Stipulated Term of Settlement No. 3, which reads in pertinent part that "the evaluation of Dr. Crincoli and her response will be sealed and transferred to the Legal Department of the district for custody and will not be opened without the approval of the Commissioner of Education."

Notwithstanding that petitioner disagrees with certain portions of her evaluation document, as set forth in her response thereto, nothing in the within matter warrants the extraordinary measure of asking the Commissioner to take control of access to that document as a condition of settlement; nor will he agree to do so. Moreover, the evaluation in question was specifically required to be

undertaken as a matter of law; it therefore cannot be "sealed" and must remain a part of petitioner's file, together with her objections and any further clarifications as to the evaluation's content and history that the parties may accept as part of the instant settlement.

Accordingly, this matter is remanded to the Office of Administrative Law for revision of the settlement terms consistent with the parameters set forth above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 10, 1992

DATE OF MAILING - JANUARY 10, 1992

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DR. EUGENIA CRINCOLI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

MAY 4, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 420-92
(EDU 6152-90 ON REMAND)
AGENCY DKT. NO. 233-7/90

DR. EUGENIA CRINCOLI,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT, CITY OF JERSEY CITY,
Respondent.

Alexander W. Booth, Jr., Esq., for petitioner (Brownstein and Booth, attorneys)

Charlotte Kitler, General Counsel, for respondent

Record Closed: March 11, 1992 Decided: March 23, 1992

BEFORE **EDITH KLINGER**, ALJ:

Petitioner, Dr. Eugenia Crincoli, who was the medical director of the Jersey City School District prior to the creation of the state-operated school district pursuant to *N.J.S.A.* 18A:78-34 *et seq.*, seeks reemployment in the position and reevaluation in addition to back pay and other monetary relief.

The petition was filed with the Commissioner of Education on July 9, 1990 Respondent's answer was filed on July 26, 1990. On August 2, 1990, the matter was 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.*

A Stipulation of Settlement by the parties was rejected in part by the Commissioner on January 10, 1992. The matter was remanded to the Office of Administrative Law on January 15, 1992 for revision of the disapproved term of settlement.

The parties revised their stipulation of Settlement in accord with the Direction of the Commissioner and the revised stipulation was provided to the undersigned on March 11, 1992. The revised Stipulation of Settlement is attached to this Initial Decision.

The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement indicating the terms of settlement.

I have reviewed the decision of the Commissioner of January 10, 1992 and the revised settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement disposes of all issues in controversy, is in the interest of the parties and public, and comports with *Cardonick v. Bd. of Ed. Boro. of Brooklawn*, State Board Decision (April 8, 1983).

I therefore **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1.1-19.1 and that the settlement should be approved. I approve the settlement and **ORDER** that the parties comply with the terms of settlement and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 23, 1992
DATE

Edith Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

March 25, 1992
DATE

Maureen R. Kelly
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 27 1992
DATE

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

md/e

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STATE OF N.J.
OFFICE OF ADMINISTRATIVE LAW
MAR 11 10 40 AM '92

CHARLOTTE KITLER, ESQ.
Attorney for Respondent
Jersey City Public Schools
346 Claremont Avenue
Jersey City, New Jersey 07305
(201) 915-6231

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DKT. NO. EDU-06152-90 AND
EDU-00420-92N

EUGENIA CRINCOLI,	:	
Petitioner,	:	
v.	:	STIPULATION OF SETTLEMENT
JERSEY CITY PUBLIC SCHOOLS,	:	
Respondent.	:	
. . . . .	:	

The parties in this matter having voluntarily resolved all disputed matters enter into the following settlement which fully disposes of all issues in the controversy between them and which is consistent with the Decision of the Commissioner of Education of January 10, 1992:

1. The Petitioner withdraws her Petition and request for hearing, and Respondent agrees to the terms stipulated and attached hereto.

2. The Petitioner waives all claims against the State-Operated School District of Jersey City, including claims of back pay or other monetary relief, arising out of the abolishment of the position of Medical Director and the reorganization of the school district on April 4, 1990. This waiver includes claims asserted in this matter before the Commissioner of Education as well as claims presented to the New Jersey Department of Personnel.

3. Nothing in this Stipulation and agreement shall be deemed to be an admission of liability on behalf of either party. This Stipulation and agreement shall be subject to the approval of the Commissioner of Education. Any disapproval by the Commissioner shall not interfere with the rights of either party to pursue the matter further.

DATE: 2/13/92

Eugenia Crincoli, Petitioner

DATE: 2/13

Attorney for Petitioner

DATE: 2/5/92

Attorney for Respondent

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OFFICE OF
MAR 11 10 40 AM

CRINCOLI V. STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY

OAL DOCKET NO. EDU-06152-90 and EDU-00420-92N,
Agency Ref. No. 233-7190

STIPULATED TERMS OF SETTLEMENT

1. On April 4, 1990, the position of Medical Director at the State-operated school district of Jersey City was abolished. That decision was based solely on administrative considerations having to do with decentralization of the school district. Dr. Crincoli is a competent and dedicated physician who is still employed in the district as a school physician.

2. In March of 1990 an evaluation of Dr. Crincoli, as well as all other administrative and supervisory employees of the central office, was undertaken as required by the statutes governing the State takeover of a local school district. Dr. Crincoli was given the right to respond to that evaluation and she took exceptions to several statements made therein. Because a policy decision had been made abolishing the Medical Director's position, the evaluation was not reconsidered by the district in light of Dr. Crincoli's exceptions.

3. The State District Superintendent will write the following letter and place it in Dr. Crincoli's file with a copy to counsel:

"To Whom It May Concern:

On April 4, 1990 the position of Medical Director was abolished in the Jersey City Public Schools. The decision to take this action was in no way based on the performance of the current director Dr. Eugenia Crincoli. It was solely an administrative decision which in no way reflected on the doctor's abilities.

Dr. Crincoli remained in the district's employ where she still serves as a school physician. She is and has always shown herself to be a competent and dedicated physician."

4. Should the position of Medical Director or any other administrative or professional position directly involving medical services be established by the State-operated school district of Jersey City, Dr. Crincoli will be given direct notice thereof, will be considered eligible to apply and if she chooses to apply, will be given due consideration. In the event that Mr. Robert Y. Schaefer is not actively serving as Director of Human Resources for the State-operated school district, Dr. Crincoli is obligated to notify Mr. Schaefer's successor as to the terms of this stipulation so that the school district may be able to provide the notice called for in this section.

5. Dr. Crincoli shall be paid for five (5) unused professional/vacation days which were accrued prior to the abolishment of the position of Medical Director.

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STATE OF NJ
DEPT OF LAW
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CERTIFICATION

I, Eugenia Crincoli, being the Petitioner in this matter, hereby certify that I have reviewed this Stipulation of Settlement, fully understand its meaning and terms, and I enter into this agreement voluntarily.

DATE: 2/13/92

Eugenia Crincoli

Eugenia Crincoli

OAL DKT. NO. EDU 420-92 (EDU 6152-90 ON REMAND)

DR. EUGENIA CRINCOLI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record and initial decision on remand in the form of a revised stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the amended settlement terms and adopts the revised settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

MAY 5, 1992

DATE OF MAILING - MAY 5, 1992

7-92

IN THE MATTER OF THE TENURE HEARING OF ROGER WATSON, SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

AND

ROGER WATSON,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

JANUARY 10, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,
Petitioner,
v.
ROGER WATSON,
Respondent.

OAL DKT. NO. EDU 9409-90
AGENCY DKT. NO. 337-9/90

ROGER WATSON,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

OAL DKT. NO. EDU 3721-91
AGENCY DKT. NO. 58-3/91

Anthony P. Sciarillo, Esq., for Roger Watson

Robin T. McMahon, Esq., Associate Counsel, for Newark Board of Education (Marvin L. Comick, General Counsel)

Record Closed: December 3, 1991 Decided: December 4, 1991

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

The Board of Education of the City of Newark, Essex County, filed on September 4, 1990 and certified on September 25, 1990 tenure charges and specifications of unbecoming conduct, incapacity and other just cause with the Commissioner of the Department of Education against Roger Watson, a tenured teaching staff member. The charges were certified on September 25, 1990,

respondent was suspended at that time without pay. On October 24, 1990, respondent filed an answer in general denial with affirmative defenses. The Commissioner transmitted the matter to the Office of Administrative Law on November 14, 1990 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq. No procedural irregularities under N.J.A.C. 6:24-5.1 et seq. were claimed by respondent.

On February 15, 1991, a prehearing conference was scheduled in the Office of Administrative Law and an order entered under OAL Dkt. No. EDU 9409-90.

Roger Watson filed a petition in the Bureau of Controversies and Disputes of the Department of Education on April 11, 1991 challenging action of the Board in failing to rescind a prior retirement notice on December 14, 1990 in accordance with his request of December 21, 1990. The Commissioner transmitted that matter to the Office of Administrative Law on April 11, 1991, where it was assigned OAL Dkt. No. EDU 3721-91.

Before hearing dates assigned, the parties advised the administrative law judge both matters should be consolidated for disposition and both matters together should be dismissed in accordance with a settlement agreement reached between them. On December 3, 1991, the parties filed a consent order for consolidation of the matters and a stipulation of settlement and withdrawal of both cases in accordance with settlement. The Board approved the agreement by its resolution on roll call vote on November 26, 1991.

CONCLUSION

Based on the above, I **CONCLUDE** as follows:

1. The within matters should be and are hereby consolidated for disposition;

2. The parties have voluntarily agreed to consolidation and settlement as evidenced by their signatures or their representatives' signatures on the agreement;

3. The settlement fully disposes of all issues in controversy, is in the interest of parties and public and comports with Cardonick v. Bd. of Ed. Bor. of Brooklawn, 1983 S.L.D. -- (slip op. at 2); and

4. Watson's petition under OAL Dkt. No. EDU 3721-91 and the Board's filing and certification of tenure charges under OAL Dkt. No. EDU 9409-90 are hereby **DISMISSED**, being in accordance with settlement pursuant to N.J.A.C. 1:1-19.1, subject to effectuation of terms of agreement.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 4, 1991
Date

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

12/6/91
Date

MAUREEN KIELEK
DEPARTMENT OF EDUCATION

DEC 10 1991
Date

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

amr

BOARD OF EDUCATION
OFFICE OF THE
GENERAL COUNSEL
2 CEDAR STREET
NEWARK, NEW JERSEY 07102-3091
(201) 733-7139
(201) 733-8771 FAX No.

Dec 3 1 39 PM '91

MARVIN L. COMICK
GENERAL COUNSEL

CAROLYN RYAN REED
CHARLES I. AUFFANT
ROBIN T. MCMAHON
SAMUEL M. MANIGAULT
ASSOCIATE COUNSEL

November 27, 1991

Honorable James A. Ospenson
Administrative Law Judge
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

RE: Newark Board of Education v.
Roger Watson OAL Dkt. No. EDU 9409-90
and EDU 3721-91

Dear Judge Ospenson:

Enclosed please find a fully executed stipulation of settlement and addendum with respect to the above-captioned matters together with a duplicate original of both documents. Also enclosed is a Board Resolution authorizing the General Counsel to enter into the settlement agreement. The terms of the settlement have also been approved by the Executive Superintendent of the Newark School District.

Kindly contact Mr. Sciarrillo or me if there is anything further that you need from us in order to submit an initial decision to the Commissioner of Education. Thank you for your assistance and patience.

Very truly yours,

Robin T. McMahon
Associate Counsel

RTM:lkh

Enclosures

cc: Anthony P. Sciarrillo, Esq.

ANTHONY P. SCIARRILLO, ESQ.
381 Franklin Avenue
Belleville, New Jersey 07109
(201) 450-9777

Attorney for Petitioner
Roger Watson,

IN THE MATTER OF THE TENURE HEARING OF ROGER WATSON, STAFF MEMBER OF THE SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

-AND-

ROGER WATSON,

Petitioner,

vs.

THE BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

BEFORE THE COMMISSIONER
OF EDUCATION

OAL DOCKET NO. EDU 9409-90
AGENCY NO. 337-9/90

OAL DOCKET NO. EDU 03721-91
AGENCY NO. 58-3/91

CONSENT ORDER FOR CONSOLIDATION; STIPULATION OF SETTLEMENT AND WITHDRAWAL OF A CONTESTED CASE

THIS MATTER opened before the Honorable James A. Ospenson of the Office of Administrative Law by Robin T. McMahon, Esq. appearing for the Board of Education of the City of Newark, Essex County, and Anthony P. Sciarrillo, Esq., appearing for Roger Watson, and it appearing that the parties voluntarily entered

into a consolidation and settlement of all issues of the within contested matters. The following terms and conditions of settlement were agreed by and between the parties.

IT IS on this _____ day of _____, 1991,

ORDERED, that the following Stipulation of Settlement by and between the parties shall be accepted as a full settlement of all issues and claims before the Commissioner of Education arising and emanating from these two matters; and it is further

ORDERED, as follows:

1. The Board of Education of the City of Newark (hereinafter " the Board") certified tenure charges against Respondent, Roger Watson (hereinafter "WATSON") on September 25, 1990.

2. WATSON filed an Answer to those charges on October 24, 1990.

3. WATSON notified the Executive Superintendent on December 14, 1990 that he was retiring immediately for medical reasons on the advice of his physicians and without the advice of counsel.

4. On February 15, 1991, a prehearing conference in the matter bearing OAL Docket No. EDU 9409-90, Agency No. 331-9/90 was conducted by the Honorable James A. Ospenson.

5. On February 26, 1991, WATSON filed an Amended Answer to the tenure charges.

6. On March 12, 1991, WATSON filed a Verified Petition with the Commissioner of Education contesting certain action allegedly taken by the Board. That matter bears OAL Docket No. EDU 03721-91 and Agency Reference No. 58-33/91.

7. On April 5, 1991, the Board filed an Answer to the Petition filed by WATSON.

8. The parties acknowledge, agree and Consent for the purposes of this Agreement and the resolution of all issues before the Commissioner of Education emanating from the two matters identified herein to a consolidation of these two matters.

9. Upon retirement, a member of WATSON's professional association, the City Association of Supervisors and Administrators (hereafter "CASA") is entitled to convert unused, accumulated sick days into salary pursuant to a formula set forth by the Collective Bargaining Agreement between CASA and the Board.

10. The Collective Bargaining Agreement described above also authorizes the Executive Superintendent to grant terminal sabbatical leave for one-half year to members who immediately retire at the end of that leave.

11. The Board hereby rescinds the suspension without pay effective September 25, 1990.

12. The Board hereby grants WATSON a medical leave of absence without pay for the period September 25, 1990 through May 7, 1991.

13. The Board hereby grants WATSON a terminal sabbatical leave for one-half year pursuant to the agreement between the Board and CASA beginning May 8, 1991 and ending November 30, 1991 (equivalent to 5 months and 5 days).

14. WATSON voluntarily resigns from his position as principal at the end of that leave and no later than November 30, 1991.

15. WATSON shall be entitled to convert his unused accumulated sick days into additional salary upon his resignation.

16. WATSON shall be exempt from the application procedure for sabbatical leave pursuant to the Collective Bargaining Agreement between the Board and CASA, and this Stipulation and Consent Order shall function as a waiver permitting WATSON to initiate the process with the appropriate representative of the Board immediately.

17. The parties acknowledge and agree that this agreement shall act as a letter of resignation from WATSON's teaching position as principal effective November 30, 1991.

18. Notwithstanding the foregoing items, the total salary payment to WATSON under this agreement for both the terminal sabbatical leave and the unused accumulated sick days shall be and not exceed $40,000.00, apportioned as follows:

(A) $35,988.50 as salary for the period of the terminal sabbatical, May 8, 1991 through November 30, 1991; and

(B) $4,011.50 as salary representing the conversion of WATSON's accumulated sick days.

19. The Board shall permit WATSON to purchase full health coverage as per the Collective Bargaining Agreement and the applicable Federal and State laws (COBRA) for the period beginning June 30, 1991, the date when this coverage was terminated by the Board and continuing up to this health coverage is provided to WATSON through his retirement benefits.

20. WATSON releases the Board, its agents and its employees from any and all claims present or future emanating from these actions before the Commissioner of Education.

21. The Board releases WATSON, his heirs and assigns from any and all claims present or future emanating from these actions before the Commissioner of Education.

22. The parties acknowledge and agree that this Consent Order and Agreement shall have no bearing nor effect, nor shall same or any part hereof be admissible in any manner in the workers compensation claim currently filed by WATSON with the Division of Workers Compensation, Department of Labor, entitled WATSON v. Newark Board of Education, CP#90-050608.

23. WATSON voluntarily and knowingly waives his right to a hearing in this matter.

24. The Board voluntarily and knowingly waives its right to a hearing in this matter.

25. The tenure charges filed by the Board are hereby withdrawn (OAL Docket No. EDU 9409-90).

26. The Petition of Appeal filed by WATSON is hereby withdrawn (OAL Docket No. EDU 03721-91).

27. The Board will cooperate with WATSON in submitting his retirement application and application for continuing health coverage. However, this Agreement is not contingent upon or subject to any particular action by the New Jersey Teacher's Pension and Annuity Fund with respect to WATSON's retirement or pension benefits or by any health care provider with respect to WATSON's health coverage.

28. The parties acknowledge and agree that the terms and conditions of this agreement shall not be precedent setting, nor shall it extend to any matters past, present or future between the parties and/or any matter which exist or may arise between the Board and CASA.

29. The parties acknowledge and agree to the terms and conditions of this agreement, and have entered into same freely and voluntarily.

30. The parties acknowledge and agree to be bound by the terms and conditions of this agreement finding it to be fair and equitable under all circumstances surrounding these matters.

31. The parties acknowledge and agree that the terms and conditions of this agreement are subject to the ratification and approval by the Board.

32. The parties acknowledge and agree that the terms an conditions of this settlement are subject to the review and approval of the Commissioner of Education.

33. The parties acknowledge and that in view of the circumstances surrounding this matter, the terms and conditions of this settlement are consistent with public interest and will result in a financial savings to all parties.

34. The parties acknowledge and agree that they have entered into this agreement with a full understanding of their rights and with the advice of counsel.

35. The parties acknowledge and agree that this agreement fully disposes of all issues in controversy emanating from these two matters before the Commissioner of Education and is consistent with law and public interest.

36. The parties acknowledge and agree that this Consent Order and Agreement shall have no bearing nor effect nor shall same or any part hereof be admissible or utilized for the purpose of establishing precedent or policy or past practice in any other matter past, present or future.

37. The parties acknowledge and agree that this Stipulation of Settlement and Consent Order contains the entire understanding of the parties and may not be altered, amended or modified except by a writing, signed and duly authorized by all parties.

_____
JAMES A. OSPENSON, A.L.J.

We hereby consent to the form and entry of the foregoing Order.

By _____
ROBIN McMAHON, ESQ.
Attorney for the
NEWARK BOARD OF EDUCATION

By _____
ROGER WATSON

By _____
ANTHONY P. SCIARRILLO, ESQ.
Attorney for Roger Watson

ADDENDUM TO CONSENT ORDER AND STIPULATION OF SETTLEMENT

The parties, by and through their respective counsel, hereby agree to the following terms, which modify the foregoing consent order and stipulation of settlement, and that this addendum shall be and hereby is incorporated into and made a part of said consent order.

Paragraph 3 of the consent order shall provide as follows:

> Watson notified the Executive Superintendent on December 14, 1991 that he was retiring immediately because of his continuing health problems and on the advice of his personal physicians.

Paragraph 6, as revised, shall provide as follows:

> On March 12, 1991, Watson filed a Verified Petition with the Commissioner of Education contesting certain action taken by the Board. It is Watson's position that his retirement must be set aside based upon the claim, among others, that he submitted his December 14, 1990 letter upon the advice of his physicians and without the advice of counsel.

The following language shall apply in place of paragraphs 11 and 12 of the consent order:

> The Board agrees to rescind Watson's suspension without pay, which was effective September 25, 1990, and to grant Watson an unpaid medical leave of absence for the period between September 25, 1990 and May 7, 1991 although it is the position of the Board that Watson's health problems are not work related nor compensable.

Paragraph 13 is modified to provide as follows:

> The Board agrees to grant Watson a terminal sabbatical leave beginning May 8, 1991 and ending November 30, 1991 pursuant to the agreement between the Board and CASA, and Board exempts Watson from submitting an application to request the leave.

Paragraph 14, as revised, shall provide as follows:

> Watson voluntarily resigns from his position as principal at the end of that leave and no later than November 30, 1991 for the purpose of retirement, effective December 1, 1991.

Paragraph 16 is hereby deleted.

Paragraph 19, as revised, shall provide as follows:

> The Board has permitted Mr. Watson to apply for the continuation of health coverage retroactive to July 1, 1991 as per the collective bargaining agreement and applicable federal and state laws (COBRA). However, this agreement is not contingent upon or subject to any particular action by any health care provider with respect to Mr. Watson's health coverage.

Paragraph 20, as revised, shall provide as follows:

> Watson, his heirs and assigns, release the Board, its agents, and its employees from any and all claims, present or future including without limitation, any claim relating to Watson's employment by the Board or to the tenure charges filed against him except as provided for in paragraph 22 of this agreement.

Paragraph 21, as revised, shall provide as follows:

> The **Board** releases Watson, his heirs and assigns from any **and all** claims, present or future including without **limitation**, any claim relating to Watson's employment by the **board** or to the tenure charges filed against him.

Paragraph 27, as revised, shall provide as follows:

> The Board will cooperate with Watson in submitting his retirement application. However, this agreement is not contingent upon or subject to any particular action by the New Jersey Teacher's Pension & Annuity Fund with respect to Watson's retirement.

ROGER WATSON

ANTHONY P. SCIARRILLO, ESQ.
Attorney for Watson

ROBIN T. McMAHON, ESQ.
Associate Counsel for the
Newark Board of Education

DATED: November 19, 1991

BOARD OF EDUCATION
Newark, New Jersey

CERTIFICATION

I, VIRGINIA HASKINS DE VANE, Executive Director, for the Board of Education of the City of Newark, in the County of Essex, and the State of New Jersey, hereby certify that the following is a true, correct, and complete copy of Resolution: Proposed Settlement: Tenure Hearing of Roger Watson and Roger Watson vs. Newark Board of Education II approved at the November 26, 1991 Board Action Meeting.

which is on file and of record.

IN WITNESS WHEREOF, I hereby set my hand and the Seal of said Board this 27th day of November 1991.

Virginia Haskins DeVane
Executive Director/
Office of Board Affairs

SEAL

OBA/R ____

BOARD OF EDUCATION RESOLUTION

INTRODUCED BY: Eugene C. Campbell, Executive Superintendent

RESOLUTION: Proposed Settlement: Tenure Hearing of Roger Watson and Roger Watson vs. Newark Board of Education II

WHEREAS, the Board of Education of the City of Newark certified tenure charges, including incapacity, against Roger Watson on September 25, 1990; and

WHEREAS, on December 14, 1990 Mr. Watson notified the Executive Superintendent that he was retiring immediately due to ill health; and

WHEREAS, Mr. Watson thereafter petitioned the Commissioner of Education to have his retirement set-aside and to be reinstated with backpay; and

WHEREAS, Mr. Watson offered to settle both cases and resign if the Board granted him a terminal sabbatical leave for a half year at full pay and paid him for his unused sick days pursuant to the collective bargaining agreement with the City Association of Supervisors and Administrators; and

WHEREAS, settling the cases on these terms would require the Board to pay Mr. Watson at least $62,000; and

WHEREAS, the Board approved a settlement on these terms but limited additional salary payments so as not to exceed $41,000; and

WHEREAS, Mr. Watson has requested the Board to change the settlement terms as follows:

a) Rescind his suspension, which was effective September 25, 1990,
b) Grant him an unpaid leave of absence for illness from that date to May 7, 1991,
c) Grant him a terminal sabbatical leave from May 8, 1991 to November 30, 1991, when he shall be resigned from his employment; and

WHEREAS, this settlement remains cost-effective and is in the district's best interest;

NOW THEREFORE BE IT RESOLVED as follows:

1. General Counsel is hereby authorized to enter into an appropriate agreement with Mr. Watson whereby Mr. Watson agrees to withdraw his petition challenging his retirement;

2. The Board hereby rescinds Mr. Watson's suspension and grants him an unpaid medical leave of absence effective September 25, 1990 to May 7, 1991 (although the Board denies that Mr. Watson's illness is work-related or a compensable injury);

3. The Board hereby grants Mr. Watson a terminal sabbatical leave beginning May 8, 1991 and ending November 30, 1991 with salary provided, however, that the total salary payments not exceed $40,000;

4. The Board hereby accepts Mr. Watson's resignation effective November 30, 1991; and

5. General Counsel is hereby authorized to do all things necessary to implement the settlement agreement and to obtain the Commissioner of Education's approval thereof.

YEAS		NAYS
—	Charles A. Bell	
✓	Guillermina Cruz	
✓	Mary Darden	
✓	Eleanor George	
✓	William A. Good	
✓	Dennis LaScala	
✓	John Maville	
✓	Evelyn Williams	
✓	Rev. Perry Simmons, Jr.	

Yeas 8
Nays —
Abstained —
Absent 1
Total 9

Adopted at a meeting of the Board of Education of the City of Newark, New Jersey on November 27, 1991.

General Counsel
(approved as to form)

Rev. Perry Simmons, Jr.
President

Executive Director of Board Affairs
(attestment of execution)

This resolution when adopted must remain in the custody of the Executive

IN THE MATTER OF THE TENURE HEARING OF ROGER WATSON, SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
AND	:	
ROGER WATSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this consolidated matter and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standard for review of settlements in tenure matters and adopts the settlement as the final decision in this consolidated matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983) The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

JANUARY 10, 1992

DATE OF MAILING - JANUARY 10, 1992

8-92

BOARD OF EDUCATION OF THE PINELANDS REGIONAL SCHOOL DISTRICT,

PETITIONER,

V.

TOWNSHIPS OF LITTLE EGG HARBOR, EAGLESWOOD, OCEAN COUNTY, AND BASS RIVER, BURLINGTON COUNTY, AND THE BOROUGH OF TUCKERTON, OCEAN COUNTY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

JANUARY 14, 1992

BOARD OF EDUCATION OF THE PINELANDS REGIONAL SCHOOL DISTRICT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TOWNSHIPS OF LITTLE EGG HARBOR, EAGLESWOOD, OCEAN COUNTY, AND BASS RIVER, BURLINGTON COUNTY, AND THE BOROUGH OF TUCKERTON, OCEAN COUNTY,	:	DECISION
RESPONDENTS.	:	

Gelzer, Kelaher, Shea, Novy & Carr for Petitioner (Paul J. Carr, Esq.)

Shackleton, Hazeltine & Bishop for Respondent Township of Bass River (Eric J. Miller, Esq.)

Gilmore & Monahan for Respondent Township of Eagleswood and the Borough of Tuckerton (Terry F. Brady, Esq.)

Hiering, Hoffman & Gannon, for Respondent Township of Little Egg Harbor (William T. Hiering, Esq.)

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed by the Board of Education of the Pinelands Regional Board of Education (Board), which is comprised of four constituents, Bass River, Eagleswood, Little Egg Harbor and Tuckerton. Said petition appealed a $292,000 reduction in its tax levy for current expense for school year 1991-92, restoration of which it contends is necessary for the district to provide a thorough and efficient system of education for its students.

The aforestated reductions were imposed by the governing bodies of the constituent districts (respondents) after consultation with the Board pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2 following the voters' rejection of the Board's proposed budget for current expense on April 30, 1991. The proposed 1991-92 budget and reductions are set forth below:

Proposed Tax Levy Adopted By Board of Education	Amount of Tax Levy Certified By Governing Bodies
Current Expense $6,310,522	$6,018,522
Amount of Reduction in the Budget By Governing Bodies	**Amount in Dispute Before Commissioner**
Current Expense $ 292,000	$292,000

On June 28, 1991 Little Egg Harbor filed an Answer to the Petition of Appeal, to which the Townships of Bass River and Eagleswood sought and were granted permission to join. Said Answer admitted the amounts as stated above but denied the Board's allegation that such $292,000 reduction in the current expense budget would prevent the Board from fulfilling its constitutional obligations to provide a thorough and efficient education program. Respondents also denied that said reductions of the proposed tax levy and budget were arbitrary and capricious or were based on erroneous findings of fact.

Respondents' reduction is to be accomplished by adjustments to four line items of the budget as proposed by the Board. Line Item 53, Appropriation Balances, was reduced from $533,901.21 to $293,901.21, which amounts to a $240,000 reduction. Account No. 2401, Salaries of School Administrators, was reduced from $1,131,921 to $931,921, which resulted in a $200,000 reduction. Account No. 2503, Transportation, was altered by an addition of

$225,000, said amount having been appropriated from Line Item 53. Finally, Account No. 2702, Group Insurance, was reduced from $1,345,302 to $1,248,302, which resulted in a reduction of $97,000.

Both the Board and Respondent Little Egg Harbor filed position statements. The other three respondent districts were granted permission to join in the arguments presented by Little Egg Harbor.

Upon receipt of such documents, the Acting Director of the Bureau of Controversies and Disputes noted two major discrepancies in the resolution and chart accompanying the resolution, Schedule C. The Acting Director of the Bureau of Controversies and Disputes informed the parties by telephonic conference call on November 13, 1991 that respondents would be provided until November 18, 1991 to clarify what appeared to be a arithmetic error in the above-stated documents. Schedule C page 5 of said petition indicates that the total amount of monies in dispute before the Commissioner is $292,000. The "analysis of reduction of tax levy", attached to Resolution $91-091 of the petition, Exhibit C, indicates that $297,000 in reductions are at issue. Respondents were provided an opportunity to clarify the reductions amounts, by line item or account, but would not be permitted to alter the resolution striking the tax levy. The Board was provided two working days from its receipt of respondents' clarification to respond to the Bureau. Such understanding was reduced to writing by the Acting Director of the Bureau of Controversies and Disputes.

On December 13, 1991 respondents filed their response to such directive. Little Egg Harbor, on behalf of the respondents, indicated that first, there is a discrepancy between the adjusted

current expense budget figures and the line item reductions enacted by each of the respondent's sending districts. It noted that the resolution adopted by Little Egg Harbor is incorrect in that the current expense budget figure of $6,018,522 is in excess of what it should be when each of the line item reductions are calculated.

Suggesting that the total reduction in expenditures should be $312,000 (not $292,000 as stated on Schedule C), respondents aver that the figure which should be quoted in the resolution is $5,998,522 not $6,018,522. It claims the error is simply one "*** in calculation and/or transcription." (Letter dated December 12, 1991 from respondent Little Egg Harbor at p. 1) Respondent Little Egg Harbor therefore requests that the Commissioner recognize the revised Pinelands budget current expense allocation as $5,998,522.

Second, respondents acknowledge an apparent "misunderstanding" (Id at p. 2) regarding the line item reductions contained within each of the sending district's explanation with respect to the reductions in expenditures. Little Egg Harbor clarifies by stating:

> There has been a reduction in the line item for appropriations of $240,000.00 (Line Item No. 53). As stated, there is a reduction by the sending districts of $240,000.00. The sending districts also have increased the line item for transportation by $225,000.00 (Line Item No. 2503). It is not the intent of the Township of Little Egg Harbor that the increase in expenditure match the reduction in expenditure from Line Item 53. Moreover, there is no where evident in evidence that it is the intention of the sending districts to have Line Item 53's reduction match Line Item 2503's increase. The $15,000.00 difference which has been noted by the Commissioner is simply intended to be an additional decrease in the overall tax levy. (Id.)

The Board's response first seeks a finding by the Commissioner that because respondents filed their submission nearly

a month after imposed by the Commissioner, respondents' letter be declared untimely. The Board formally objects to consideration of said letter due to its belated filing.

Second, the Board finds respondents to be nonresponsive to the Commissioner's directive to clarify inconsistencies in their resolution. The Board finds it insufficient to assert that the difference in line items is simply intended to be an additional decrease in the overall tax levy, because respondents fail to provide the Commissioner with a statement of reasons for all such cuts. The Board thus formally objects to the unsubstantiated cuts it avers the respondents make in their submission of December 12, 1991.

The Commissioner's review of the parties' submissions requires comment at the outset of his review of this case. First, although the Commissioner notes with accord the Board's objection to the late submission of respondents' clarification letter of December 12, 1991, the Commissioner is obliged to review and consider the information contained therein, albeit belated, in order to resolve the budget issues before him. The Commissioner admonishes respondents, however, that their delay penalizes the taxpayers, and ultimately the children of the district to whom they are answerable for their lack of diligence in responding to the Commissioner's directive.

Second, the Commissioner dismisses as inappropriate respondents' attempt to alter the amount certified to the Ocean and Burlington County Boards of Taxation from the Commissioner's directive to clarify discrepancies in the statement of reasons for their reductions. Respondents may not and indeed were not permitted

an opportunity to reconsider and recast their certification. The sole purpose of the directive to respondents was to enable the Commissioner to understand the inconsistencies in the figures provided in their resolution and attachments. Accordingly, the Commissioner will not consider respondents' efforts to alter the current expense tax levy certified in the amount of $6,018,555.

The Commissioner takes cognizance, however, of respondents' statement concerning the transfer of $240,000 from the Board's free appropriated balance to be applied to Account No. 2503, Transportation, in the amount of $225,000. Respondents explain in their December 13, 1991 submission that while not clear in the resolution or statement of reasons, they intended the $15,000 difference between the $240,000 reduction in Appropriated Balances and the amount transferred to Transportation, $225,000, to be considered an additional reduction.

Similarly, the Commissioner takes cognizance of the Board's objection to such clarification, suggesting that respondents fail, in so doing, to provide the Commissioner with a statement of reasons for all such cuts. However, taking respondents' statement of reasons already provided as part of the record in their position statement, combined with the clarification of December 13, 1991, the Commissioner rejects the Board's concern that no statement of reasons accompanied the $15,000 reduction.

Having considered individually each of the reductions and the arguments of the parties, the Commissioner notes that the standard of review that prevails in a budget appeal is whether the amount of monies available to the Board as a result of the governing body's action is sufficient for the provision of a thorough and

efficient education to the pupils of that school district. Board of Education, East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966)

Reduction in Line Item 53

The Board's position statement argues that the proposed reduction of $240,000 from Line Item 53 cannot be accommodated because such amount would completely evacuate the free, unappropriated balance in the surplus account. It claims that, as it is, the district is operating well below the 3% allowable free balance restriction. To reduce the account any more would be a poor educational decision that might have future impact on the thorough and efficient educational process in the district, the Board avers.

Respondents' position statement indicates that the reduction of $240,000 in surplus available is being appropriated toward the increased expenditure to maintain transportation services as noted in Account No. 2503. It claims the budget shows on line 6 a balance appropriation as revenue of $310,000, which leaves an appropriation balance estimate as of June 30, 1992 of $549,398.80, which represents 3.6% of the total budget of $15,315,715. Respondents aver the Board has failed to demonstrate that prior years' emergencies exceeded $306,399, so the governing bodies decided to reduce the amount of surplus by $240,000 to leave an appropriated balance in Line Item 53 of $293,901.21. Respondents reject the Board's assertion that any additional amounts are needed in surplus, and further argue that the Board failed to demonstrate any manner in which a thorough and efficient education could be jeopardized as a result of the proposed reduction. Moreover, respondents' reduction to Line Item 53 was used almost solely for

the purpose of maintaining transportation services deemed necessary by the respective governing bodies to ensure the safety of those students going to Pinelands Regional, they claim.

The Commissioner determines that the $225,000 reduction to Line Item 53 for purposes of transportation must be restored. The Commissioner notes from the Board's position statement in reference to Account No. 2503, Transportation, that the amount transferred to Transportation from surplus "represents the total, non-funded gratis to and from student transportation fees originally included by the Board but 'cut' in order to place the 1991-92 budget within the 8% cap." (Position Statement, Exhibit B) The Board's position statement goes on to say that it is "***not legally obligated to provide such a service and has established other priority, educational goals for the first year of its new middle school operation." (Id.) The Commissioner agrees with the Board that non-remote busing is not a legal obligation in meeting the state requirement for a thorough and efficient education.

Moreover, the Commissioner notes for the record that there is no provision in law for a governing body to increase a line item or account of a school district's budget. To do so would allow the governing body to substitute its judgment for that of the Board. See Board of Education of the Township of Belleville v. Mayor and Council of the Township of Belleville, Essex County, decided by the Commissioner December 9, 1991. Accordingly, the Commissioner determines that the $225,000 reduction from Line Item 53 shall be restored. In so deciding, the matter of an appropriation of $225,000 to Account No. 2503, Transportation, from Line Item 53 is rejected, and such appropriation is denied.

As to the $15,000 additional reduction amount clarified by respondents as having been intended as an additional reduction from surplus, the Commissioner is convinced that such cut shall be sustained. In so finding, the Commissioner acknowledges respondents' argument that of a total budget as of June 30, 1992 of $15,315,715, the appropriated balance in surplus $549,398.80 was estimated to be 3.6% with the $240,000 reduction included in such appropriated balance. The Commissioner recognizes said amount as within the parameters set forth in N.J.A.C. 6:24-2.13. Respondents' attempt to reduce the surplus by $240,000 served to bring the unappropriated balance to barely 2%, which is not sufficient to protect against contingencies. However, with $225,000 restored to surplus, the amount remaining in surplus now, $534,398.80, represents 3.5% of the total budget, a comfortable margin to ensure against unforeseen contingencies. Accordingly, the Commissioner sustains the $15,000 cut contemplated by respondents.

Account No. 2401 - Salaries of School Administrators

The Board charges that the $200,000 proposed reduction to Account No. 2401 - line 1, Salaries, cannot be accommodated. The Board notes that salaries for 1991-92 are guaranteed by way of negotiated agreements between employees and employee groups with the Board. Moreover, the Board claims that it has only six administrators by title and 13 part-time supervisors of instruction. It observes that approximately 30% of Pinelands' professional staff is nontenured and that any reductions in supervisory staff would have a bumping effect within the teaching staff since most, if not all, supervisors are tenured in instructional positions. The Board suggests that approximately six or seven positions would have to be eliminated to provide $200,000

in reductions, amounting to a 50% reduction in supervisory staff. The Board claims such a reduction would directly impact upon the thorough and efficient educational program of the district.

Respondents note that they certified a reduction in this line item from $1,131,921 to $931,921, a $200,000 reduction with a statement of reasons to the effect that the amount appropriated for administrative salaries may be reduced while still providing adequate funds for the purposes of this account. They cite the annual school district budget statement supporting documentation which, respondents aver, states that there are currently five administrators and a total of 19 supervisors and principals in the district. Respondents claim this totals 24 supervisors, which, when correlated with 105 teachers, equals 1 supervisor for each 4½ teachers. Respondents claim the Board was not able to offer any satisfactory explanation as to why 24 supervisors are necessary. They elected not to question the number of teachers employed by the district, but determined instead that given the lack of response by the Board as to the need for 24 supervisors, a reduction of $200,000 in this account could be accommodated.

The Commissioner determines that the reduction in this account shall be sustained. The line item budget reflects the amount noted by respondents as having been allocated in the budget for salaries of school administrators, an amount of $1,131,921. Moreover, the document labeled as "Annual School District Budget Statement Supporting Documentation" comports with respondents' figures, indicating that the district currently employs five administrators and a total of 19 supervisors and principals. Nowhere in the record has the Board advanced proof to support its figures which noted, in its position statement, that the district

employs six administrators, not five as respondents contend, and 13 part-time supervisors of instruction compared with the 19 principals and supervisors, combined, that respondents have documented exist. For failure of the Board to meet its burden of persuasion as to why the $200,000 cut in this line item would hamper the provision of a thorough and efficient education, the Commissioner sustains respondents' $200,000 reduction to Account No. 2401.

Account No. 2702 - Employee Benefits (Group Insurance)

Here as well, the Board argues that the $97,000 reduction cannot be accommodated because these monies, like those for the administrators, are guaranteed to staff through negotiated agreements with the Board for payment of group insurance programs. It adds that the New Jersey State Health Benefits Program, of which the Board is a member, advanced a more than 25% increase in premiums for the 1991-92 school year.

Respondents' statement of reasons suggests that Account No. 2702 - line 2, Group Insurance, was reduced from $1,345,302 to $1,248,302 resulting in a reduction of $97,000 because the amount appropriated for health benefits may be reduced while still providing adequate funds for the purpose of this account. Noting the Board's budget projection represents a 63% rise in group insurance costs from last year, respondents aver that submissions by the Board appear to suggest that the increase in group insurance is actually expected to be 35%. Respondents contend there is no satisfactory explanation provided by the Board as to the need for an additional $228,566, which is 28% above the projected cost increase.

The Commissioner determines that although costs already entered into via a duly negotiated agreement ordinarily require

restoration in budget appeal matters, the $97,000 reduction in the instant matter must be sustained. The Commissioner finds that the Board has failed to demonstrate that a 63% increase over last year's health benefit costs actually exists. The resulting amount allocated in the account, even with a $97,000 reduction, $1,248,302, represents a 51% increase over last year's allocation of $827,212. Accordingly, the Commissioner sustains the $97,000 cut to this account.

Consequently, the Commissioner restores $225,000 to Line Item 53, Appropriation Balances. The Commissioner sustains the $15,000 reduction in that line item, the $200,000 reduction to Account No. 2401, Salaries of School Administrators, and the $97,000 cut to Account No. 2702, Employee Benefits (Group Insurance).

Accordingly, the Ocean and Burlington County Boards of Taxation are hereby directed to strike a tax rate which shall add an additional $225,000 to the 1991-92 current expense tax levy for the Townships of Little Egg Harbor, Eagleswood and Bass River and the Borough of Tuckerton for budgetary allocations to Pinelands Regional High School District 1991-92 school budget. The aforestated increase shall raise the 1991-92 tax levy for current expense as set forth below:

	Tax Levy Certified By Governing Body	Amount Restored	Tax Levy After Restoration
Current Expense	$6,018,522	$225,000	$6,243,522

IT IS SO ORDERED.

JANUARY 14, 1992

COMMISSIONER OF EDUCATION

DATE OF MAILING - JANUARY 14, 1992

9-92

ELISSA A. KISH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning riffed instructional supervisor claimed Board violated her tenure and seniority rights by employing another teaching staff member in the new position of administrative assistant to the superintendent of curriculum and instruction (AASCI). Petitioner also claimed tenure and seniority as a principal based on a period of service in an acting capacity.

ALJ found petitioner did not possess any tenure or seniority entitlement to the positions of AASCI or elementary school principal, as petitioner had attained tenure solely as a supervisor and the AASCI position was determined by the county superintendent to be an assistant superintendency. Petitioner's appeal was dismissed.

Commissioner affirmed the initial decision of the Office of Administrative Law, noting that petitioner's entire service as principal constituted service as a substitute under the facts of this matter and hence could not lead to acquisition of tenure or seniority in that position. (Spiewak, Sayreville)

JANUARY 16, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
ORAL INITIAL DECISION
OAL DKT. NO. EDU 8159-90
AGENCY DKT. NO. 322-9/90

ELISSA A. KISH,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY,

Respondent.

Robert M. Schwartz, Esq., for petitioner
(Lake and Schwartz, attorneys)

Glenn T. Leonard, Esq., for respondent

Record Closed: December 2, 1991 Decided: December 2, 1991

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

PROCEDURAL HISTORY

On or about September 10, 1990, petitioner, Elissa A Kish, filed a petition of appeal with the Commissioner of Education alleging that respondent had violated her tenure rights by employing a nontenured teaching staff member in the unrecognized position of administrative assistant to the superintendent of curriculum and instruction. Petitioner requested that the Commissioner reinstate her to the position of administrative assistant to the superintendent of curriculum and instruction. Further, petitioner alleged that she had accrued tenure and seniority as an elementary principal and that respondent's failure to reassign her to a principalship was violative of her tenure rights.

On October 1, 1990, respondent filed an answer to the petition, denying the allegations and alleging that petitioner had failed to state a cause of action upon which relief could be granted. On October 5, 1990, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter 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.*

A telephone prehearing conference was held on February 7, 1991. At that time, the issues were isolated and the hearing was scheduled for June 17 and 18, 1991, at the Office of Administrative Law. On June 18, 1991, a conference with counsel was held. It was determined that the parties could stipulate to most of the essential facts and any necessary testimony taken on July 1, 1991. The hearing was held on July 1, 1991. A briefing schedule was established, and the record closed on December 2, 1991, upon receipt of petitioner's response to respondent's memorandum and respondent's reply thereto.

ISSUE

At issue in the instant matter is whether respondent violated petitioner's tenure and/or seniority rights. More particularly at issue is whether petitioner is entitled to be appointed to the position of administrative assistant to the superintendent of curriculum and instruction (AASCI) or to the position of elementary school principal on the basis of seniority.[1] The issue as stated in the prehearing order as to whether petitioner is barred from relief for failure to comply with the 90-day rule was the subject of a motion to dismiss by respondent. It was denied on June 18, 1991, and the reasons were stated on the record on July 1, 1991.

1. It is to be noted that petitioner's argument that the current holder of the position of AASCI is not qualified to hold said position in that she lacks the appropriate endorsements, while petitioner is so qualified, was first raised after the hearing and the submission of briefs in this matter. It was raised at a point in time after the factual allegations had been heard. Not only was said argument not properly addressed, but in actuality is not the issue here. The issue is petitioner's claim to the position of AASCI based on her tenure and seniority rights. The matter of the lack of appropriate certification by Carol Mulhare, while of import, does not define petitioner's right to the position. Even if Mulhare does not have the proper qualifications for the position, this would not mean that petitioner would be appointed to the position. Further, it is to be noted that the County Superintendent has already determined the requisite certification for the position. For petitioner to attack Mulhare's qualifications, she would have to demonstrate her right to the position.

UNDISPUTED FACTS

The facts necessary to the resolution of this matter are essentially undisputed. The stipulation of facts (J-1 in evidence) is incorporated by reference and constitutes this tribunal's findings of fact.

Petitioner is a tenured teaching staff member who was employed by the respondent Board of Education (Board). She holds certificates as a reading specialist, teacher of speech, arts, and dramatics, elementary teacher K-8, supervisor, principal, and school administrator. Petitioner served under the title of instructional supervisor from the beginning of the 1980-81 academic year through the end of the 1989-90 academic year. (The job description for the position (Exhibit A) indicates her responsibilities.) Petitioner accrued tenure under the title of "supervisor."

Effective July 1, 1990, the Board created a new position: administrative assistant to the superintendent of curriculum and instruction (AASCI). The job description for the position is in evidence as Exhibit B. Said position was approved by the County Superintendent, who determined, pursuant to *N.J.A.C.* 6:11-3.3, that the legal title for said position would be "assistant superintendent in charge of curriculum and instruction."

The position of instructional supervisor (*i.e.*, the petitioner's position) was abolished effective June 30, 1990.

The teaching staff member appointed by the Board to fill the newly-created position is one whose prior service was as a vice principal (from December 1, 1984 to July 1, 1990, the effective date of her current appointment). The Board's appointee has accrued tenure as a vice principal.

With respect to the other position at issue, that of elementary school principal, the holder thereof is a teaching staff member whose only accrued tenure is as an athletic director and supervisor. Petitioner grounds her claim to this position on her past work experience. Petitioner was directed by the former Superintendent of Schools to perform the duties of elementary principal from March 2, 1988 through June 30, 1988, on account of the regular principal's absence due to illness. There was

no Board approval of this directive. It was stipulated that the directive was given pursuant to the petitioner's job description as an instructional supervisor. (See, *Job Description, Instructional Supervisor*, para. 20 of the "Performance Responsibilities" and *Job Description, Instructional Supervisor Multi-Discipline*, para 15. of the "Performance Responsibilities"). The petitioner's job description as an instructional supervisor required her to "assume other responsibilities which may from time to time be assigned by the assistant superintendent of schools or the superintendent. . . ." *Id.*

It was stipulated that, as an instructional supervisor, petitioner had a responsibility to supervise certain specific subject areas: mathematics, science, business, computer education, industrial arts, music, art, foreign language, and home economics. It was only over the foregoing subject areas that the petitioner had any district-wide responsibilities. In contrast, it was stipulated that "Performance Responsibilities 1 through 12 of an AASCI encompass all subject areas in the curriculum district-wide." In addition, it was stipulated that "Performance Responsibilities" 13 through 24 of said position were not part of the responsibilities of an instructional supervisor. Rather, in the past, those special education duties were performed by an administrative assistant (a position which was also abolished by the Board). It was further stipulated that the curriculum development responsibilities previously charged to instructional supervisors are now being given to teachers by appointed committees.

Lastly, petitioner does not challenge the Board's right to abolish the position of instructional supervisor, nor does she challenge its right to create the new position of AASCI.

In addition, testimony was given by Elissa Ann Kish, petitioner, and Dr. Carole Lee Mulhare, presently serving as AASCI. The facts necessary for determination here may be summarized as follows: Elissa Kish testified that as supervisor of instruction, she observed special education personnel. She went into the special education classrooms, observed the teaching, and wrote narratives, comments, and suggestions. She gave her observation to the Superintendent's office. The evaluation was written by Mr. Fedor, administrative assistant to the superintendent. Noting that she had a role in implementing instruction for special education, she stated that on occasion, she was asked to review the IEP to determine if the

curriculum was suitable to the child. She observed that the special education program in the district was limited.

On cross-examination, she indicated that the teachers she observed in special education classrooms were only teaching special education children in that classroom. She contended that she began to observe special education classes in 1982, but admitted that she mainly observed non-special education teachers. She indicated that she is responsible for special education curriculum when a special education student takes a curriculum of core courses for which she is responsible. She explained that the core curriculum for which she had responsibility was utilized if the Child Study Team felt it was appropriate and it became a part of the IEP for certain classified students. On further questioning, she indicated that she believed ESL and the gifted and talented are part of special education. She admitted that she did not develop IEPs and was not part of the Child Study Team.

Next to testify was Dr. Carole Lee Mulhare, who discussed her special education functions. She pointed to the job description for AASCI and noted that her special education functions consisted of numbers 13 to 24 (exhibit B). She indicated that she devotes two-thirds of her time to these duties.

On cross-examination, she stated that she earned a doctorate in educational administration and supervision in 1985 and holds a principal and supervisor's certificate. She is presently awaiting an administrator's certificate, and she contended that she was eligible for the certificate three years ago. She does not have a certificate for pupil personnel services or guidance counselor. Referring to her special education responsibilities, she noted that she sits as the chairperson of the Child Study Team, directing and supervising the work of the team, responsible for seeing that the guidelines are followed. She evaluates special education personnel, 15 to 20 teachers, who only teach special education, six Child Study Team members, and three secretaries. She evaluated the 15 to 20 teachers based on her observations. She explained that she meets with the Child Study Team on a daily basis, discusses students, reads reports, and signs off on the IEPs. She has parent conferences and talks to DYFS. She also makes budget recommendations for special services.

Referring to the job description, she indicated that she develops and implements procedures for referral, securing medical reports, psychological examinations, and placement of special education students. She explained that the Child Study Team members wrote the procedures and submitted them to her, and that she would correct them. She had working sessions with the Child Study Team members during which they wrote the procedures. She did not write the procedures on her own. Although there is a transportation coordinator, she is involved in transportation as necessary as part of an out-of-district placement. She further explained that curriculum work in the district is done by teachers and principals.

DISCUSSION

I. Entitlement to the position of AASCI

In the case at bar, petitioner is asserting a tenure and seniority claim to the position of AASCI. In essence, petitioner argues that, as an instructional supervisor, she performed substantially the same duties which are now contained in the job description of the AASCI. Petitioner argues that the Board should not be able to compromise a teaching staff member's statutory rights by merely juggling titles and assignments. Petitioner contends that while the positions of instructional supervisor and AASCI may be separate categories for tenure and seniority purposes, the circumstances of the present case show that they are substantially the same. As such, petitioner argues that by virtue of her past service as an instructional supervisor, she has tenure and seniority entitlement to the newly-created position.

A. Tenure entitlement to the position of AASCI

The statute governing the acquisition of tenure by teaching staff members, such as petitioner, is *N.J.S.A.* 18A:28-5. In relevant part, that statute provides as follows:

> The services of all teaching staff members including all teachers, principals . . . vice principals, superintendents, assistant superintendents . . . and such other employees 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 . . . shall be under tenure . . . 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 . . .; 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;

Applying the above statute to the petitioner's employment history shows that petitioner accrued tenure only as a supervisor (teaching staff member), *i.e.*, she did not serve the requisite period of time in any of the other enumerated positions, including principal and assistant superintendent (which, as indicated earlier, is the legal title assigned to the position of AASCI by the County Superintendent pursuant to *N.J.A.C.* 6:11-3.3).

In the instant matter, petitioner's employment as an instructional supervisor was terminated when the Board abolished that position effective June 30, 1990. As noted above, petitioner does not contest the Board's right to abolish said position. *N.J.S.A.* 18A:28-9, which governs reductions in force (RIFs), provides that:

> 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. [Emphasis added.]

N.J.S.A. 18A:28-12 provides for the reemployment of persons, such as the petitioner, who have been the subject of a RIF. In pertinent part, that statute provides as follows:

> If any teaching staff member shall be dismissed as a result of [a RIF], 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. . . . [Emphasis added.]

As will be shown, substantial differences exist between the position of instructional supervisor and that of AASCI. In addition, petitioner did not accrue seniority with respect to the sought-after position. In light of the foregoing, it appears that petitioner's reemployment rights under *N.J.S.A.* 18A:28-12 were not infringed upon when the Board failed to appoint her to the position of AASCI. Pursuant to *N.J.S.A.* 18A:28-12, petitioner would be entitled to placement upon a preferred eligibility list for reemployment as an instructional supervisor were that position ever to be reinstated.

More particularly, contrary to the petitioner's allegations, the instant matter does not involve a "mere juggling of position titles by the Board." As previously indicated, there are substantive differences between petitioner's former position and that which she now seeks. To begin with, there are some, albeit minor, differences between the qualifications for being an instructional supervisor and those for being an AASCI. For example, while at least three years of classroom teaching experience are required for the former position, five years of such experience are required for the latter. In addition, while the former requires advanced graduate work in the areas of "curriculum development, supervision and/or instructional practices," the latter position also lists the area of "administration."

The substantive diversity of the two positions is more clearly manifest in their respective "Performance Responsibilities," or duties. It was stipulated that the only district-wide responsibility held by the petitioner, as an instructional supervisor, was that of supervising certain specific subject areas, *i.e.*, only those subject areas which were assigned to her for a given period of time. In sharp contrast, "Performance Responsibilities" 1 through 12 of an AASCI cover all subject areas in the curriculum on a district-wide basis. Further, "Performance Responsibilities" 13 through 24 of an AASCI, which pertain to special education, are not responsibilities which had been previously assigned to instructional supervisors. Rather, in the past, those duties were performed by an administrative assistant, which is also a position which has since been abolished. In addition, some of the duties previously performed by instructional supervisors are now performed by persons other than the AASCI. For example, the curriculum development responsibilities previously charged to instructional supervisors have now been charged to teachers by appointed committees.

Moreover, Dr. Mulhare testified that she spends at least two-thirds of her time discharging the special education Performance Responsibilities (13-24 of the job description) of the position of AASCI. Petitioner's testimony attempting to establish special education responsibilities akin to those of AASCI failed to accomplish this. Petitioner made certain observations of special education teachers, and Child Study Team members may have consulted with her about certain areas of the core curriculum assigned to petitioner as an instructional supervisor in considering the appropriateness of incorporating such subjects into a classified student's IEP. Her involvement with special education certainly did not rise to the level of those of the AASCI, who sits as chairman of the Child Study Team.

In light of the foregoing, the situation at hand cannot be viewed as analogous to that in *Viemeister v. Bd. of Ed. of Prospect Park*, 5 *N.J. Super.* 215 (App. Div. 1949). In that case, the Appellate Division ordered reinstatement of a tenured principal whose position had allegedly been abolished by the board. The board had argued that the position of principal had been abolished, and that a new position of "teaching principal" had been created. In determining that the position of principal had never really been abolished, the Appellate Division stated that it looked to substance rather than to form. *Viemeister*, 5 *N.J. Super.* at 218.

Upon reviewing the stipulated facts in the case, the court concluded that the principalship had not been abolished; rather, its functions had merely been transferred to another teaching staff member acting under a new job title. As shown above, the instant matter does not involve such a wholesale transfer of duties to another teaching staff member with a mere title change in position. Consequently, petitioner's tenure in the position of instructional supervisor cannot be used to support a tenure claim to the position of AASCI. See also, *Dennery v. Passaic Valley Regional High School Bd. of Ed., District No. 1* (A-1298-90 T2), wherein the court held that petitioner had tenure rights to the newly created position of class supervisor since that position encompassed a substantial amount of the work performed by petitioner while she served as a tenured guidance counsellor.

Similarly, *Walldov v. East Brunswick Bd. of Ed.*, OAL DKT. EDU 6540-84 (March 25, 1985), modified by the Comm'r. (May 10, 1985), aff'd by the State Bd. (Nov. 6, 1985) is inapposite to the instant case. In *Walldov*, the Commissioner held that if a

board changes the qualifications for positions which are essentially the same as those which existed previously, in such a way as to displace tenured persons, its action would be deemed arbitrary and capricious. The instant matter does not involve a mere change in the qualifications for a position which remained basically the same in all other respects. As indicated above, the newly-created position of AASCI, in addition to having qualification requirements slightly different from those previously set for instructional supervisors, also has duties which differ substantially from those previously performed by such supervisors. Moreover, in *Walldov*, the board did not transfer any duties of the "old" positions to other positions. In the instant case, it was stipulated that the curriculum development duties previously performed by instructional supervisors are currently being performed by teachers selected by appointed committees.

Petitioner's reliance upon *DeCarlo v. Bd. of Ed. of South Plainfield*, OAL DKT. EDU 6111-87 (June 20, 1988), aff'd by the Comm'r. (Aug. 4, 1988), is also misplaced. In that case, the issue was whether the petitioner could lay claim to the position of assistant principal, whose duties were claimed to be indistinguishable from those of a general supervisor, which was the position held by the petitioner in the past. One of the factors considered by the Commissioner, in rendering a decision against the petitioner, was the county superintendent's earlier determination approving use of the unrecognized title of general supervisor and assigning said position to the category of "supervisor" for seniority purposes. Based upon that determination, the Commissioner found that the petitioner had accrued tenure solely as a supervisor, which he found to be a position separately tenurable from that of an assistant principal under *N.J.S.A.* 18A:28-5.

In the instant matter, the County Superintendent also approved of the Board's newly-created position of AASCI and assigned to it the legal title of "assistant superintendent in charge of curriculum and instruction." Applying the Commissioner's reasoning in *DeCarlo* to the instant matter leads one to conclude that the petitioner acquired tenure solely as a supervisor, which likewise is a position separately tenurable from that of assistant superintendent under *N.J.S.A.* 18A:28-5. The reasoning in *DeCarlo* might have supported the petitioner's claim had the County Superintendent assigned the legal title of "supervisor" to the newly-created position of AASCI.

In addition, petitioner grounds her tenure claim upon two 1987 Appellate Division decisions. *Capodilupo v. Bd. of Ed. of West Orange*, 218 *N.J. Super.* 510 (App. Div. 1987) involved a claim by a tenured secondary school physical education teacher to a similar position at the elementary level, which was being occupied by a nontenured employee. The petitioner therein, who had never taught at the elementary level, had been the subject of a RIF. In deciding the petitioner's claim, the court held that a tenured teacher seeking reinstatement within the endorsements on his/her certificate (as was the petitioner there) is entitled to preference in a RIF as against a nontenured applicant with the same certification. *Capodilupo*, 218 *N.J. Super* at 515.

In *Bednar v. Westwood Bd. of Ed.*, 221 *N.J. Super.* 239 (App. Div. 1987), certif. denied 110 *N.J.* 512 (1988), it was held that a tenured elementary school art teacher, who had been the subject of a RIF, held a tenure entitlement to a full-time position at the secondary level notwithstanding the fact that that position's nontenured occupant had more experience (seniority) at that level than did the petitioner.

As was true of the other cases relied upon by the petitioner, both *Capodilupo* and *Bednar* are inapposite to the instant matter. To begin with, the positions sought by the petitioners in those cases were held by nontenured persons. In the case at bar, the Board's appointee to the position of AASCI is a tenured teaching staff member, albeit she is tenured as a vice principal. Moreover, petitioners in those cases were tenured in the positions' sought, whereas, in the instant matter, petitioner is not tenured in the position sought.

B. Seniority entitlement to the position of AASCI

The state regulation governing the determination of seniority is contained in *N.J.A.C.* 6:3-1.10. In pertinent part, that regulation states that:

> (b) Seniority . . . shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided.

Under *N.J.A.C.* 6:3-1.10, seniority is calculated in terms of actual service rendered in specific categories of employment. In other words, seniority is measured by years of

employment in specific job categories, which are usually narrower than the subject fields which are endorsed on teachers' certificates. *Bednar, supra*, 211 *N.J. Super.* at 242. The specific job categories relevant to the case at bar are listed under *N.J.A.C.* 6:3-1.10(l):

> 4. Assistant superintendent (each assistance superintendency shall be a separate category);
>
> . . .
>
> 11. Elementary principal;
>
> 12. Supervisors (each approved supervisory title shall be a separate category. . . .)

In the instant matter, petitioner has never rendered any service as an "assistant superintendent," which, as previously noted, is the legal title assigned to the position of AASCI by the County Superintendent. Save for the brief period in which petitioner served as an acting principal, her service has been rendered as an instructional supervisor. As such, any seniority accrued by the petitioner has been in the category of "supervisor," which is a category entirely separate from that of "assistant superintendent" for seniority calculation purposes. *N.J.A.C.* 6:3-1.10(i), which is also relevant to the instant matter, provides that

> Whenever any person's particular employment shall be abolished in a category, he or she shall be given that employment in the same category to which he or she is entitled by seniority. . . . [Emphasis added.]

Given the absence of any service as an assistant superintendent *per se,* and the fact that the newly-created position of AASCI is not merely a continuation of the petitioner's former position as instructional supervisor, it may be readily concluded that petitioner did not possess any seniority entitlement to the position of AASCI. Rather, under *N.J.A.C.* 6:3-1.10(i), petitioner would be entitled to reemployment as an instructional supervisor if that position were ever to be reinstated by the Board.

In sum, because petitioner did not possess any tenure or seniority entitlement to the newly-created position of AASCI, no such rights of the petitioner were violated upon the Board's failure to appoint the petitioner to said position.

II. Tenure or seniority entitlement to the position of elementary school principal

Petitioner argues, in the alternative, that if she does not possess a tenure and/or seniority entitlement to the position of AASCI, she should be found to have seniority entitlement to the position of elementary school principal. The petitioner grounds her claim principally upon her past work experience. From March 2, 1988 through June 30, 1988, at the direction of the former Superintendent, the petitioner performed the duties of an elementary school principal who was absent due to illness. (The petitioner's four months as an acting principal were followed by two more years of service in the district as an instructional supervisor.)

Petitioner argues that under *N.J.S.A.* 18A:28-6, *N.J.A.C.* 6:3-1.10, and the principles enunciated in *Meyer v. Bd. of Ed. of Wayne*, 1983 *S.L.D.* 1099, aff'd by the State Board (March 5, 1986), aff'd by the Appellate Division (A-3175-85T6, Sept. 24, 1987) (unreported), she acquired both tenure and seniority as an elementary school principal.

A. Tenure in the position of elementary principal

Petitioner relies upon *N.J.S.A.* 18A:28-6 to support her claim of tenure acquisition in the position of principal. In pertinent part, that statute provides that:

> 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 . . . 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, 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. . . . [Emphasis added.]

Petitioner's reliance upon *N.J.S.A.* 18A:28-6 is misplaced for several reasons. First, while that statute does govern tenure acquisition in a "new" position, the scope of the statute is clearly limited. It only applies in cases where a teaching staff member is "transferred or promoted with his consent." In the instant matter, the "new" position must be deemed to be the elementary principalship which the petitioner assumed for four months in 1988. In light of the method by which the petitioner was placed in that position, it is doubtful whether *N.J.S.A.* 18A:28-6 is even applicable in the instant matter. The method by which "transfers" are to be made is explicitly prescribed by statute. *N.J.S.A.* 18A:25-1 provides that

> No teaching staff member shall be transferred, except by a recorded roll call majority vote of the full membership of the board of education by which he is employed.

The method by which "appointments" to positions are to be made is likewise explicitly prescribed by statute. *N.J.S.A.* 18A:27-1 provides as follows:

> No teaching staff member shall be appointed, except by a recorded roll call majority vote of the full membership of the board of education appointing him.

In the matter at hand, neither of the above procedures were utilized when petitioner was placed in the position of elementary school principal in the latter half of the 1987-88 academic year. Rather, it was stipulated that the Superintendent's directive to the petitioner was given pursuant to the latter's job description as an instructional supervisor. Moreover, it was stipulated that there was no Board approval of this directive. (The job description of an instructional supervisor requires the supervisor to assume "other responsibilities which may, from time to time, be assigned by the assistant superintendent . . . or the superintendent. . . .") As such, it cannot be concluded that the petitioner was "transferred or promoted with [her] consent" to the position of elementary school principal, within the meaning of *N.J.S.A.* 18A:28-6.

Even assuming the applicability of *N.J.S.A.* 18A:28-6, the petitioner served as an elementary school principal for only four months (March 2, 1988 through June 30, 1988). As such, she failed to serve in the "new" position for the requisite period of time prescribed by *N.J.S.A.* 18A:28-6 for the acquisition of tenure in new positions. Consequently, she did not acquire tenure in the position of principal as a result of her past service in that position.

The only benefit inuring to petitioner under *N.J.S.A.* 18A:28-6 is that her period of service as an elementary school principal may be included in seniority and tenure determinations with respect to her position as an instructional supervisor. The statute provides, in relevant part, that the period of employment in the new position (elementary school principal, in the instant matter) "shall be included in determining the tenure and seniority rights in the former position (instructional supervisor)." *N.J.S.A.* 18A:28-6. However, the period of employment afterward in the former position is not included in determining tenure and/or seniority rights in the newer position from which termination occurred.

Petitioner may not argue that her service as an instructional supervisor, subsequent to her service as an acting principal, was service rendered in a "new" position for purposes of applying *N.J.S.A.* 18A:28-6 to credit her with tenure and seniority rights in what would then be her "former" position, *i.e.,* elementary principal. Such an argument misconstrues *N.J.S.A.* 18A:28-6. That statute is primarily concerned with the acquisition of tenure in new positions. In the instant matter, by the time of the petitioner's service as an acting principal, she had already acquired tenure as an instructional supervisor. Thus, even if one were to assume that the two years of service as a supervisor, rendered subsequent to the service as a principal, was service rendered in a "new" position, *N.J.S.A.* 18A:28-6 would be of no help to petitioner.

Given the fact that the petitioner did not gain tenure in the position of elementary school principal, any reliance by her on the *Capodilupo* or *Bednar* decisions, *supra*, would be misplaced. Those decisions involved claims by petitioners who were tenured in the positions sought. As discussed above, petitioner did not accrue tenure in the position sought, *i.e.,* elementary school principal.

B. Seniority entitlement to the position of elementary school principal

Support for petitioner's claim of a seniority entitlement to the position of elementary school principal may be gleaned from *N.J.A.C.* 6:3-1.10(h). That section provides:

> Whenever a person shall move from or revert to a category [*i.e.*, one of the employment categories enumerated under *N.J.A.C.* 6:3-1.10(l)], all periods of employment shall be credited toward his or her seniority in any or all categories in which he or she previously held employment.

It may be argued that when petitioner returned to her position as an instructional supervisor, following her service as an acting principal, she "revert[ed] to a category" within the meaning of *N.J.A.C.* 6:3-1.10(h). As such, it may be contended from the language of the regulation that the two-year period of employment, following the petitioner's service as an acting principal, could be credited toward her seniority in both the categories of supervisor and elementary principal. The accrual of seniority in both those positions would be supported under the regulation, for both would be "categories in which [the petitioner] previously held employment" at the time of her "reversion" to the category of supervisor. Under such a construction, it may be argued that the petitioner may have possessed a seniority entitlement to the position of elementary school principal.

However, in light of the facts in the instant case, it appears that such an application of *N.J.A.C.* 6:3-1.10(h) would be inappropriate. As previously noted, petitioner served as an elementary school principal at the directive of the former Superintendent of Schools, who ordered her to take the place of the regular principal, who was absent due to illness. It was stipulated that this directive was given by the Superintendent pursuant to the job description for the petitioner as an instructional supervisor. As indicated earlier, one of the duties or "performance responsibilities" of an instructional supervisor had been that of "assum[ing] other responsibilities which may, from time to time, be assigned by the assistant superintendent of schools or the superintendent. . . ."

In light of the foregoing, it appears that although the petitioner may have been performing all of the duties of a regular elementary school principal from March 2, 1988 through June 30, 1988, she was in fact continuing to function as an instructional supervisor. In other words, given the method by which petitioner was made to assume the principalship in 1988 and the basis for the Superintendent's directive, it appears that when the petitioner undertook that task, she was merely carrying out her duties as an instructional supervisor. As such, it cannot be said, within the meaning of *N.J.A.C.* 6:3-1.10(h), that petitioner was "move[d] from" the category of supervisor when she was given the principal assignment. Consequently, it also could not be said that she "revert[ed] to a category" when her service as an acting principal came to an end. As such, *N.J.A.C.* 6:3-1.10(h) would not serve to credit petitioner with seniority in the category of elementary principal.

Moreover, the case law cited by petitioner in support of her seniority claim to the position of elementary school principal is of no avail. *Schienholz v. Bd. of Ed. of Ewing*, OAL DKTS. EDU 5959-88 and 5961-88 (May 4, 1989), modified by the Comm'r. (June 19, 1989), modified by the State Bd. (Feb. 7, 1990), aff'd by the Appellate Division (A-2905-89T3, Nov. 19, 1990) (unreported), essentially reiterated the holdings in *Capodilupo* and *Bednar, supra,* by holding that the petitioners therein, who were tenured principals, could lay claim to the position of high school principal, which was being occupied by a nontenured employee selected by the board to fill a vacancy. The holding was not affected by the fact that the petitioners had acquired tenure solely at the elementary level, *i.e.,* they had no experience as secondary principals. However, for the same reason that *Capodilupo* and *Bednar, supra*, are inapposite, so too is *Schienholz.* All three cases involved claims by petitioners who were tenured in the positions which they sought. As shown above, petitioner in the instant matter did not acquire tenure in the position currently being sought, *i.e.,* principal.

In addition, Meyer, *supra,* is of no help to petitioner. *Meyer* involved the construction of *N.J.S.A.* 18A:16-1.1, which contains an exception to tenure acquisition for periods of employment wherein a teaching staff member is filling in for a temporarily absent regular teacher (as opposed to filling a permanent vacancy). In *Meyer,* it was established that because the statute is silent with respect to seniority credit for such temporary employment periods, the teaching staff member is entitled to such credit for such employment periods. *Meyer* held that the petitioner therein,

a tenured elementary school principal, who had served as an acting principal for one year following a RIF, was entitled to have that year of temporary service credited to her overall seniority in the category of elementary principal.

Clearly, the primary focus of *Meyer* was the construction of *N.J.S.A.* 18A:16-1.1. It did not address *N.J.S.A.* 18A:28-6 nor *N.J.A.C.* 6:3-1.10, which form the basis of petitioner's seniority claim to the position of elementary principal. The issue addressed by *Meyer,* as indicated above, was whether the tenure acquisition exception statute, *N.J.S.A.* 18A:16-1.1, precludes the accrual of seniority for service which, under the statute, would be excluded for tenure acquisition purposes. *Meyer* does not stand for the principle which petitioner appears to be ascribing to it -- that employment periods following a period of temporary service which was rendered in a seniority category different from that in which one is tenured can be added to such temporary service so as to give a person tenure and seniority rights in the category of temporary service.

CONCLUSION

Petitioner did not possess any tenure or seniority entitlement to the positions of administrative assistant to the superintendent of curriculum and instruction (AASCI) or elementary school principal. Consequently, no such rights of the petitioner were violated by the respondent Board's failure to appoint the petitioner to either of these positions.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that petitioner's appeal is **DISMISSED**.

END OF TRANSCRIPT

I, Jane R. Pearson, hereby certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Elinor R. Reiner's oral decison rendered in the above matter.

12/2/91
Date

Jane R. Pearson
JANE R. PEARSON

This oral decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Receipt Acknowledged:

12/6/91
Date

MAUREEN KEIER
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 10 1991
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

jrp/e

OAL DKT. NO. EDU 8159-90

ELISSA A. KISH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions by petitioner and replies by respondent Board were timely filed pursuant to N.J.A.C. 1:1-18.4 and are briefly set forth below.

In her exceptions, petitioner reiterates her prior arguments, contending that the ALJ accorded too much emphasis to the differences between her abolished position and the new position of Administrative Assistant to the Superintendent for Curriculum and Instruction (AASCI), and not enough emphasis to her tenure rights. Petitioner's tenure may be limited to the position of supervisor, she avers, but only because of the way the Board elected to categorize her prior position. The Board cannot be permitted to simply recast her old position under a different title and thereby defeat her statutorily conferred tenure rights. Moreover, petitioner is better qualified than the current incumbent in the AASCI position (Dr. Carole Mulhare), as she holds a more suitable

certificate (reading specialist, an educational services endorsement) for the position's pupil personnel duties.

Petitioner further reiterates her claim and arguments regarding her right to a principalship in the event she is found not to be entitled to the AASCI position, alleging that the ALJ's analysis of this claim wrongly relies on N.J.S.A. 18A:16-1.1 rather than on N.J.S.A. 18A:28-6 which properly controls in this situation. Moreover, the Board's current appointee to the principalship is nontenured, so that the court's consistent directives to construe tenure laws liberally in favor of tenured staff over nontenured are being ignored.

In reply, the Board contends that stipulated facts and undisputed testimony speak for themselves with respect to the lack of similarity between petitioner's prior position and the AASCI position, so that the case law relied upon by petitioner is wholly inapposite as found by the ALJ. The Board further endorses the ALJ's handling (Initial Decision, at p. 2) of petitioner's charges regarding Mulhare's certification, noting the county superintendent's determination of the requisite certificate and adding that even if petitioner had standing to challenge it, her claim would have been filed out of time. With respect to petitioner's claim to the principalship, the Board essentially reiterates its prior arguments and those of the ALJ reaching the conclusion that N.J.S.A. 18A:28-6 (tenure upon transfer) is inapplicable and that petitioner has no tenure, and hence no seniority as principal.

Upon careful review of this matter, the Commissioner concurs with the ALJ that petitioner has entitlement to neither the AASCI nor the principal position to which she lays claim.

It is clear from the record that petitioner has attained tenure, and therefore seniority, which flows exclusively from tenure right, solely as a supervisor, as all of her tenurable service was under this certificate and title. Given that the county superintendent has determined the AASCI position to be an assistant superintendency, a separately tenurable position under 18A:28-5, neither petitioner nor Mulhare has entitlement to the position under Capodilupo, supra, and Bednar, supra, both of which deal with the rights of staff tenured in their positions to other positions within the same tenure category. Nor does Dennery, supra, alter this determination with respect to petitioner, as the positions at issue in that case (guidance counselor and class supervisor) were substantially similar notwithstanding their different titles, while the positions at issue herein are significantly different, as correctly found by the ALJ. As for petitioner's allegations regarding Mulhare's qualifications, so long as Mulhare holds the requisite certificate as determined by the county superintendent, her appointment is not subject to challenge by petitioner absent any legal entitlement to Mulhare's position.

Finally, as all of petitioner's service as a principal was in an acting capacity and constituted service as a substitute under the facts of this matter, in contrast to the facts of case law relied upon by petitioner to support her claim, petitioner has no basis for any kind of entitlement to tenure or seniority rights in a principal position. Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982); Sayreville Education Association v. Board of Education of Sayreville, 193 N.J. Super. 424 (App. Div. 1984)

Accordingly, petitioner's exceptions are deemed to be without merit and the initial decision of the Office of Administrative Law dismissing the instant Petition of Appeal is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 16, 1992

DATE OF MAILING - JANUARY 16, 1992

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EDU #8159-90
C # 9-92
SB # 5-92

ELISSA A. KISH,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, January 16, 1992

For the Petitioner-Appellant, Lake & Schwartz (Robert M. Schwartz, Esq., of Counsel)

For the Respondent-Respondent, Matthew P. DeMaria (Glenn T. Leonard, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. We add, with regard to our rejection of Petitioner's claim to an assistant superintendent position, that tenure is achieved within a "position," Howley v. Bd. of Ed. of Ewing Township, decided by the Commissioner of Education, 1982 S.L.D. 1328, aff'd by the State Board of Education, 1983 S.L.D. 1554, and tenure protection as against nontenured individuals following a reduction in force extends only to assignments within that tenured position for which the individual is qualified by virtue of his or her certification. Kaprow v. Board of Education of the Township of Berkeley, decided by the State Board of Education, January 9, 1991, slip op., at 9, aff'd, ____ N.J. Super. ____ (App.

MAY 6, 1992

Div. 1992). See Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987), certif. den., 110 N.J. 512 (1988); Capodilupo v. West Orange Bd. of Ed., 218 N.J. Super. 510 (App. Div. 1987), certif. den., 109 N.J. 514 (1987); Herbert v. Board of Education of the Township of Middletown, decided by the State Board of Education, August 1, 1990, aff'd, Docket #A-318-90T1 (App. Div. 1991). Such protection does not extend to assignments within the purview of other separately tenurable positions in which the staff member has not achieved tenure pursuant to N.J.S.A. 18A:28-5 or 18A:28-6. Kaprow, supra. As found by the Commissioner, Dennery v. Passaic Valley High Sch., 251 N.J. Super. 144 (App. Div. 1991), certif. granted, ____ N.J. ____ (1992) is distinguished in that the duties and responsibilities of Petitioner's abolished position and the new administrative assistant to the superintendent of curriculum and instruction position are significantly different.

May 6, 1992

Date of mailing MAY 08 1992

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GILLIAN IMPEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SHREWSBURY, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, tenured Speech Correctionist, alleged Board, in violation of her tenure and seniority rights, abolished her position and contracted with the Monmouth County Educational Services Commission (ESC) for identical services she had provided.

Initial decision found RIF was proper and that there was no statutory bar to contracting with an ESC for speech correctionist services because of economic reasons. (Hunterdon Central State Board decision) Petition was dismissed.

Commissioner affirmed findings and determination in initial decision. The Board acted in good faith on basis of economic reasons to abolish petitioner's position under N.J.S.A. 18A:28-9. No restrictions in education law were found to exist (Hunterdon Central) since an ESC, while not a board of education, is a creation of boards of education, and speech correctionists are not members of a basic child study team except in limited circumstances. Moreover, no allegation was made that the ESC speech correctionist did not have an identifiable apportioned commitment to the Shrewsbury Board or that he/she is not available during hours that pupils are in attendance. (N.J.A.C. 6:28-3.1(b))

JANUARY 22, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DECISION ON MOTION FOR
FOR SUMMARY JUDGMENT
OAL DKT. NO. EDU 9220-90
AGENCY DKT. NO. 345-10/90

GILLIAN IMPEY,
Petitioner,
v.
BOARD OF EDUCATION OF THE
BOROUGH OF SHREWSBURY,
Respondent.

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

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

Record Closed: October 4, 1991 Decided: November 4, 1991

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

Gillian Impey (petitioner) claims the Shrewsbury Board of Education (Board) improperly abolished her speech correctionist position and contracted out services, identical to those she performed, to the Monmouth County Educational Services Commission, in violation of her tenure and seniority rights.

This matter was opened before the Commissioner of Education. The matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held, by telephone, on June 6, 1991. Among other things it was agreed that the matter would be heard on November 1, 1991 and that any motion for summary judgment would be filed by September 16, 1991. The parties timely moved and cross-moved for summary judgment. All submissions were made by October 4, 1991.

FACTUAL BACKGROUND

The parties submitted the following joint stipulation of facts and documents:

1. Petitioner Gillian Impey, holds certification as a Speech Correctionist from the Department of Education, State Board of Examiners, initially issued in July, 1970 and reissued March 1976.

2. Petitioner Gillian Impey was hired by the Shrewsbury Board of Education (hereafter "Board") as part-time Speech Correctionist effective March 1, 1970 through June 30, 1990.

3. By correspondence dated July 5, 1990 from David A. Winter, Board Secretary to Gillian Impey, the Board notified petitioner that the Board would discuss at a special meeting scheduled for Tuesday, July 10, 1990 the possibility of abolishing the position of Speech Correctionist. Exhibit A.

4. At the Board's special meeting of July 10, 1990, the Board voted to abolish the position of Speech Correctionist for the 1990-91 school year. Exhibit B.

5. At the Board's special meeting of July 10, 1990, the Board also adopted a resolution terminating the employment of the petitioner as a result of the abolishment of position and reduction in force. The Board further placed petitioner on a preferred eligibility list for re-employment in her area of seniority. Exhibit B.

6. By correspondence dated July 11, 1990 from Dr. Wayne A. Cochrane, Superintendent to Gillian Impey, the Board advised the petitioner that at the special meeting of the Board held on July 10, 1990, the Board adopted a resolution terminating her employment effective with the Board action as a result of abolishment of position and reduction in force. Additionally, petitioner was advised that based upon her tenure and seniority rights, she had been placed on a preferred eligibility list for recall to the position of Speech Correctionist. Exhibit C.

7. At the board's special meeting of July 10, 1990, the Board approved a contract with the Monmouth County Educational Services Commission to provide speech services for the school district for the 1990-91 school year for two days per week at a stipend of $20.00 per hour for five hours x two days per week for a total cost of $8,000.00 per year. Exhibit B.

8. The Monmouth County Educational Services Commission is a duly established agency organized in accordance with N.J.S.A. 18A:6-51 with the purpose of carrying on programs of educational research and development and providing to public school districts such educational and administrative services as may be authorized pursuant to the Rules of the State Board of Education. At the meeting of the State Board of Education held on June 2, 1982, the Monmouth County Educational Services Commission was approved to provide special education services to public school districts pursuant to N.J.S.A. 18A:6-51 and, 63 and 69. Exhibit D.

9. The Board's decision to abolish the position of Speech Correctionist and to contract with Monmouth County Educational Services Commission for speech services has had no adverse impact on the program needs of the school district for such speech services.

10. Petitioner's compensation for the 1989-90 school year was based upon Guide 5, Step 14 pro-rated as set forth in the Master Agreement between the Shrewsbury Education Association and the Shrewsbury Board of Education, resulting in a salary in the amount of $19,965.00 together with pro-rated longevity in the amount of $360.00 for a total salary of $20,325.00. Petitioner's salary for the 1990-91 school year is yet undetermined due to unsettled negotiations.

11. The use of the Educational Services Commission has resulted in a savings to the School District of Shrewsbury in the amount of at least $12,325.00 for the 1990-91 school year and for each year thereafter in which it participates in this contract arrangement.

12. The Shrewsbury School District is a K through 8 School District consisting of a total school enrollment in the amount of 375 students. The total school enrollment for the 1989-90 school year was 331 and for the 1990-91 school year the total was 358. The total number of students involved in the speech program for the 1989-90 school year was 37. The total number of students involved in the speech program for the 1990-91 school year was 37. The number of students involved in the speech program for the 1991-92 school year is 40.

13. During the 1989-90 school year, in addition to a Speech Correctionist, the Board employed a Learning Disability Teacher Consultant, School Psychologist and School Social Worker, and for the 1990-91 school year the Board employed a School Psychologist and School Social Worker.

14. In Monmouth County, the following school districts utilize the Monmouth County Educational Services Commission for special education services by having one or more members of the Child Study Team exclusively supplied in a contractual arrangement by the Commission: Avon, Spring Lake Heights, Neptune City, Shrewsbury and Deal.

I adopt the foregoing as FINDINGS OF FACT herein.

ARGUMENTS

Petitioner's Arguments

The petitioner asserts that the Board violated her tenure rights by failing to employ her as a speech correctionist in the district for the 1990-91 and subsequent school years. She enjoyed tenure as a teaching staff member and was a member of the district's Child Study Team (CST). The Commissioner of Education consistently has upheld the rights of teachers under tenure in the context of a reduction in force (RIF). Dedrick v. Hammonton Bd. of Ed., 1977 S.L.D. 1043; McKay v. Redbank Bd. of Ed., 1972 S.L.D. 606. These cases and many others stand for the proposition that tenured employees must be retained if positions for which they are qualified exist in the district and are held by persons with lesser or no seniority. The petitioner argues that it is irrelevant that her replacement was employed through a subcontracting relationship with the Monmouth County Educational Service Commission (ESC). The Board may not do by indirection that which it cannot do by direction.

Political subdivisions of the State, such as boards of education, are limited to powers granted by the Legislature either expressly or by necessary implication. See, e.g., Fair Lawn Ed. Ass'n v. Fair Lawn Bd. of Education, 79 N.J. 574 (1979); Wagner v. Newark, 24 N.J. 467 (1957). The Supreme Court has refused consistently to read powers into statutes giving political subdivisions of the State, including school boards, authority beyond that set forth on the face of a statute. In re Jamesburg High School Closing, 83 N.J. 540 (1980). In Jamesburg, the Commissioner ordered tenured teachers employed at a closed high school transferred to the Monroe and Spotswood High Schools where the Jamesburg pupils were sent. He relied on N.J.S.A. 18A:28-6 and his action was affirmed by the State Board of Education. The Court, however, held the statute provided only that when a school is closed and the pupils are sent by agreement with another board of education to such other district, then the teaching staff members from the closed school who had tenure shall be

employed by the board of the other district in the same or nearest equivalent position.

In construing statutory enactments, the controlling factor is the intendment of the Legislature. Matawan Borough v. Monmouth Cty. Tax Bd., 51 N.J. 291 (1968). The intent must be garnered from the plain language of the statute being reviewed. Witt v. Witt, 98 N.J. Super. 590, 595 (Ch. Div. 1967), and the words and phrases are to be read in context and given their generally accepted meaning according to the proved usage of the language. N.J.S.A. 1:11-1. When more than one statute is implicated, the statutes must be viewed in pari materia and the intent of the language used in each must be considered together. State Bd. of Med. Examiners v. Warren Hospital, 102 N.J. Super. 407 (Cty. Ct. 1968), aff'd 104 N.J. Super. 409 (App. Div. 1969). Statutes relating to the same subject matter must be construed so as to give each as much effect as possible. Bergen Cty. Bd. of Taxation v. Bor. of Bogota, 104 N.J. Super 499 (Law Div. 1969).

With all this in mind, the petitioner suggests that, as a general rule, a board is not permitted to provide professional services to its pupils by means of nonemployees. N.J.S.A. 18A:16-1 provides:

> Each board of education, subject to the provisions of this title and of any other law, shall employ and may dismiss a secretary or a school business administrator to act as secretary and may employ and dismiss a superintendent of schools, a treasurer of school moneys, when and as provided by section 18A:13-14 or 18A:17-31, and such principals, teachers, janitors and other officers and employees, as it shall determine, and fix and alter their compensation and the length of their terms of employment.

Other sections of the Title authorize employment of other professional educational personnel; e.g., N.J.S.A. 18A:17-16 authorizing appointment and removal of assistant superintendents. Nowhere does the statute authorize nonemployees to perform educational services for pupils.

Administrative code provisions recognize a board's limited right to use nonemployees to perform professional duties for its pupils by providing:

N.J.A.C. 6:28-3.1(b):

> A child study team shall consist of a school psychologist, a learning disabilities teacher-consultant and a school social worker. For pupils ages 3 to 5, the study team shall include a speech correctionist or speech-language specialist. All members of the child study team shall be employees of a district board of education, have an identifiable, apportioned commitment to the local school district and shall be available during the hours pupils are in attendance. [Emphasis added by petitioner.]

N.J.A.C. 6:28-1.1(f):

> Each district board of education, independently or through joint agreements, shall employ child study teams, speech correctionists or speech-language specialists and other school personnel in numbers sufficient to ensure provision of required programs and services pursuant to this chapter.

The petitioner also asserts that N.J.A.C. 6:28-1.3(f) [sic] provides:

> Prior approval by the Office of the County Superintendent of Schools and the Bureau of Special Education and Pupil Personnel Services shall be obtained for the purchase by any local school district of services of eligible, approved diagnostic clinics; agencys; or professionals in private practice representing basic child study team discipline to supplement members of the basic child study team. When such approval is granted to a local school district for the purchase of external diagnostic or professional services, the local school district's basic child study team shall develop and coordinate the appropriate individualized education program. [Emphasis added by petitioner.]

The petitioner urges that this limited exception permits an outside agency to supplement, but not supplant a board's own basic child study team. Although "supplement" is not defined in the Administrative Code, the courts have defined the word. In Jersey City v. Borst, 90 N.J.L. 454 (Sup. Ct. 1917), the court stated:

> [N]ow the ordinary meaning of the word "supplement" doubtless is a supplying by addition of what is wanting. Rahway Savings Institution v. Mayor, etc., of Rahway, 53 [N.J.L.] 48 [Sup. Ct. 1890].

The petitioner asserts that the Board cannot claim, after eliminating her two-day-a-week position as a teacher speech correctionist through a RIF, that an outside agency is needed "to supply by addition what is wanting." If there is a wanting or a need for supplementation, the cited statutes and regulations mandate that any needed additional work be performed by the basic child study team.

Cochran, et al . v. Watchung Bd. of Ed., 4 N.J.A.R. 163 (1983), aff'd St. Bd. of Ed. (Dec. 4, 1985), aff'd App. Div. (Dec. 22, 1986, A-2327-85T7) (unreported), held that a child study team had been improperly RIFed to part-time while transferring their abolished duties to an outside contractor.

The State Board decision made clear that a RIF may be reviewed to determine whether the position ostensibly abolished has not in fact been abolished, but merely transferred to another in violation of the incumbent's tenure and seniority rights. In its conclusion, the State Board said:

> The CST was intended by regulation to represent a multi-disciplinary approach to identifying, evaluating, and planning suitable educational programs for children with learning difficulties. N.J.A.C. 6:28-1.3(d)[1982].* The basic CST consisted of school psychologist, a learning disabilities teacher-consultant and a social worker, all of whom were expected to be employees of the local board of education. N.J.A.C. 6:28-1.3(a). Outside contractors were authorized in limited circumstances by N.J.A.C. 6:28-1.3(f), only with prior approval of the County Superintendent, and only for the purpose of supplementing existing team members. General CST work was still intended to be performed by employees of the local board. Nevertheless, in the instant case, the board set out to abolish full-time CST positions and replace them with half-time positions fully recognizing that more general CST contracting would be necessary because of anticipated case load. See, Affidavit of Joseph Sabo, at para. 3.
>
> Hence, the Board's intention was not an actual abolishment of positions, but a mere reorganization and transfer of duties to a less expensive provider. Under these circumstances the Board action taken here falls squarely within the prohibition of Viemeister v. Prospect Park Bd. of Ed., supra. The Commissioner and the ALJ correctly concluded that the integrity of the reduction in force decision was vitiated by the virtually contemporaneous decision to contract for additional CST services that the team, as originally constituted, would otherwise have performed. That being the case, the reduction in force decisions were properly voided, the full-time positions reinstated, and Petitioners ordered restored to those positions. [Slip opinion at 5-6.]

*Citation will be to the New Jersey Administrative Code as it existed in 1982. A major revision and recodification in 1984, effective July 16, 1984, made changes not relevant here.

The petitioner argues she functioned as a speech correctionist in the Shrewsbury Borough district for 20 years prior to the Board's decision to terminate her employment in July 1990. She was advised that based upon her tenure and seniority rights, she had been placed on a preferred eligibility list for recall to the position of speech correctionist.

On July 10, 1990, the Board approved a contract with the ESC to provide speech correctionist services for two days per week in the 1990-91 school year to pupils in the district. The individual speech correctionist assigned by the ESC pursuant to contract provided the same speech correctionist services that the petitioner provided during her prior years of employment. The Board's decision to enter into the ESC contract was motivated solely by a desire for a more cost-effective relationship, saving the district thousands of dollars a year.

For the reasons set forth in Cochran, above, the petitioner asserts her tenure rights were ignored by the Board when it failed to employ her for the 1990-91 school year and succeeding years to perform the same duties she had performed for over two decades.

If the Board's conduct is permitted to stand, the concept of tenure will be forever eviscerated in this State. Boards of education will be permitted to eliminate all tenured certified teaching personnel by entering into similar ESC relationships or by entering into other contractual arrangements with private teaching services.

Board's Arguments

The Board argues that it possesses the managerial prerogative to abolish the petitioner's position and to contract with the ESC for the district's speech correctionist services. Tenured employees' positions may be abolished. In re Maywood Bd. of Education, 168 N.J. Super. 45 (App. Div. 1979), certif. den. 81 N.J. 292 (1979); Jamison v. Morris Sch. Dist. Bd. of Educ., 198 N.J. Super. 411 (App. Div. 1985).

N.J.S.A. 18A:28-9 authorizes a board to reduce the number of tenured teaching staff members for reasons of economy, because of reduction in the number of pupils, because of a change in the administrative or supervisory organization of the district, or for other good cause. Other statutes allow reduction of tenured janitorial and secretarial employees.

Despite the petitioner's objection to the Board's reasons behind implementation of the RIF, the law specifically sets forth that economy in operation is a valid and legal good faith, good cause justification for Board action. It is also well established that a public employer's decision to contract or subcontract for required services is a non-negotiable managerial prerogative. In re I.F.P.T.E. Local 195 v. State, 88 N.J. 393 (1982). A board of education has the legal authority to contract with many outside entities to provide needed services. N.J.S.A. 18A:46-19.7, together with other statutory and regulatory provisions, permits a board of education to contract with an ESC for speech services. It was the Board's clear and absolute managerial prerogative both to abolish a position pursuant to law and to subcontract for the district's speech correctionist services.

In Hunterdon Central High School Ed. Ass'n v. Hunterdon Central High School Bd. of Ed., (N.J. App. Div., June 28, 1989, A-5036-87T2) (unreported), the Appellate Division determined that 21 tenured custodians, terminated because the Board decided to subcontract its custodial work to an independent contractor, were properly released notwithstanding that each enjoyed tenure pursuant to N.J.S.A. 18A:17-3. In the present matter, it is undisputed that the Board's decision to abolish the speech correctionist position and contract for speech services with the ESC resulted in a more economical delivery of services. The provision of speech services through the ESC has had no adverse effect on the district's program. Therefore, as a matter of fact and law, the Board's action was a permissible exercise of its statutory authority notwithstanding the petitioner's tenure status at the time.

The Board also argues that it had express authority to contract for the speech services in question. N.J.S.A. 18A:46-19.7 states that a board may contract with an educational improvement center, an educational services commission or another public or private agency, provided approved by the Commissioner and not church-affiliated, for provision of examination, classification and speech correctionist services. This statute has been addressed by the courts.

In Remedial Educ. & Diag. v. Essex Cty. Educ. Serv., 191 N.J. Super. 524 (App. Div. 1983), the ESC contracted with public school districts to provide auxiliary and remedial services for classified pupils. The ESC then subcontracted with a private organization to furnish the services and programs. The court analyzed the enabling legislation, N.J.S.A. 18A:6-51 et seq., and determined that the ESC was brought into existence for the purpose of providing educational services to the public school districts. In this case, the court found no authority for the ESC to subcontract.

However, the court went on to analyze N.J.S.A. 18A:46-19.7 and found it expressly provided that, as to securing services for handicapped children, a board "may contract with an educational improvement center, an educational services commission . . . for the provision of examination, classification and speech correction services required by this act." The court knew of no reason why the Legislature differentiated between the powers granted to a local board and to an ESC. Nevertheless, the Legislature must have had a reason:

> [N]evertheless, . . . a reasoned basis for the distinction exists. In the case of a local board, the number of pupils in need of a particular auxiliary or remedial service could well be so small that the interests of teaching efficiency and economy would be better served by contracting on a per pupil basis with a private agency rather than by enlarging its facility to provide the needed services directly. An educational services commission, on the other hand, under contract with a large number of school districts and therefore serving a large pupil population, would probably experience a lower per pupil cost by providing services directly rather than through subcontracts with private agencys. 191 N.J. Super. at 528.

The petitioner's reliance on N.J.S.A. 18A:16-1 and other provisions of the administrative code for the proposition that a district's speech correctionist must be an employee of the board is contradicted by the specific statute, N.J.S.A. 18A:46-19.7, together with the court's interpretation of that statute in Remedial Education above.

Even if the various administrative code provisions cited do not support the position that speech correctionist services in a public school district must be provided by a speech correctionist employed by the district, N.J.A.C. 6:28-1.3 identifies three positions constituting the basic child study team, none of which is a speech correctionist. The enabling statutes, N.J.S.A. 18A:46-1 et seq., do not require districts to employ even these members of the basic child study team as employees of the district. N.J.S.A. 18A:46-5.1 clearly permits boards to provide child study team services separately or jointly with one or more boards of education or approved state agencies. N.J.S.A. 18A:46-14 is consistent in that it enumerates various facilities and programs which are required to be provided by the local district for special education pupils. The facilities and programs include, in addition to special classes in the district, classes in hospitals, convalescent homes or other institutions, classes in public schools of another district, joint facilities to be provided by agreement between one or more school districts, a jointure commission and several other options. To the extent that administrative code is in conflict with the enabling statute, the statute must control. Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239

(App. Div. 1987), certif. den. 110 N.J. Super. 512 (1988). In Bednar, above, the Appellate Division held that an administrative regulation promulgated by the State Board of Education was in direct conflict with the enabling statute and, therefore, was unenforceable. The threshold issue involved balancing the concepts of tenure and seniority. The court noted that the State Board 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. However, the court noted that the State Board's approach was in error because the statute does not authorize regulatory dilution of tenure rights by affording a nontenured teacher seniority. The tension the State Board perceived between tenure and seniority is one the Board created. The rights conferred by tenure statute may not be dissolved by implementing regulations. The State Board's approach may or may not represent sound educational policy. Nevertheless, it erodes tenure rights that "appear plain on the face of the statute, which we are bound to recognize and which can be removed only by the Legislature." Id. at 242-243.

In light of this clear analysis, to the extent that N.J.A.C. 6:28 conflicts with N.J.S.A. 18A:46, the statutes must prevail. The legal authority given to a school district under N.J.S.A. 18A:46-19.7 to contract for special education services may not be diluted or eroded by conflicting regulations requiring a board to provide speech services only through its own employee(s).

The Board further argues that even under the administrative code regulations addressing a speech correction, speech is specifically categorized as a related service, similar to transportation, physical therapy, occupational therapy, etc. Related services can be contracted for by a school district. A school district is not required to employ any one or more of the properly licensed personnel needed for each specific related educational service.

In N.J.A.C. 6:28-1.3, speech-language services are among the defined related services. Not only is there express permission to contract for speech -related services, N.J.S.A. 18A:46-19.7, but the applicable provisions of the statute and administrative code do not require that a provider of speech-language services be a district employee.

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq., formerly known as the Education of the Handicapped Act (EHA), provides federal moneys to assist state and local education agencies to provide educational services to handicapped children. Handicapped children, as defined by the IDEA, are those having specific impairments and who, because of those impairments, require special education and related services. 20 U.S.C. §1401(1). As a condition of receiving federal funds, each state must comply with an extensive set of goals and procedures to ensure that all handicapped children have access to a free, appropriate public education (FAPE). State plans must include a description of facilities, personnel services and the timetable for making such education available, assurances that each local education agency will develop an individualized educational program (IEP) for each handicapped child, and the establishment of procedural safeguards to protect the rights of children, parents and guardians.

Just as the State is responsible for assuring compliance with the provisions of the IDEA, local school districts seeking funds under the IDEA must submit an application to the state education agency. The pertinent federal regulation, 34 C.F.R. §300.1, states in pertinent part:

> The purpose of this part is
>
> (a) To insure that all handicapped children have available to them a free appropriate public education which includes special education and related services to meet their unique needs.

34 C.F.R. §300.13(a) states:

> As used in this part the term related services means transportation and such developmental, corrective and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training. [Emphasis in original.]

34 C.F.R. 300.13(a)(12) states:

> Speech pathology includes:
>
> (i) Identification of children with speech or language disorders;

(ii) Diagnosis and appraisal of specific speech or language disorders;

(iii) Referral for medical or other professional attention necessary for the habilitation of speech or language disorders;

(iv) Provisions of speech and language services for the habilitation or prevention of communicative disorders; and

(v) Counseling and guidance of parents, children, and teachers regarding speech and language disorders.

The State of New Jersey has complied with the Federal Act. It has adopted policies and procedures to meet the standards of the IDEA by statutes and by regulations promulgated by the State Board as well as through the state plan submitted to and approved by the federal government. Acceptance of federal funds under the IDEA makes provisions of the Act binding upon the State.

Considering all fact and law presented in this argument, there can be no question that the threshold determination of whether the action by the Board to subcontract speech correction services with an ESC violated the election laws must be answered in favor of the Board. The Board had discretion to implement a reduction in force and to abolish the speech position for economic reasons. The Board has specific authority to contract with an ESC for specific related services that include speech correction. There is nothing in federal or state law that mandates employment of a speech correctionist by a school district. Rather, the district is required to ensure that speech services are made available to those pupils in need of them. The Shrewsbury Board of Education had the legal right to contract with the ESC for speech services, much the same way it contracts with other outside agencies for the provision of transportation, occupational therapy, physical therapy, counseling, psychiatric assessment and medical services for diagnostic or evaluative purposes. Notwithstanding the protections of the tenure statute, the exercise of authority invested in the Board in this matter should be sustained.

DETERMINATION

Code Provisions

Under general provisions, N.J.A.C. 6:28-1.1(f) requires that

> Each district board of education, independently or through joint agreements, shall employ child study teams, speech correctionist or speech -language specialists and other school personnel in numbers sufficient to ensure provisions of required programs and services pursuant to this chapter

This rule distinguishes child study teams from speech correctionists or speech-language specialists. It also recognizes that these services may be provided independently by the board or through joint agreements.

Concerning parental notice, consent, participation and meetings, N.J.A.C. 6:28-2.3(h) provides:

> Meetings shall be conducted to determine eligibility and to develop, review and revise the basic plan of a pupil's individualized education program.
>
> 1. Each meeting shall include the following participants:
>
> i. The parent(s);
> ii. Teacher(s) having knowledge of the pupil's educational performance;
> iii. The pupil, where appropriate;
> iv. At least one member of the child study team;
> v. Referring certified school personnel, the school principal or designee and other appropriate individuals if they choose to participate; and
> vi. A curriculum consultant from the Department of Human Services, for those pupils classified as eligible for day training.

A speech correctionist or speech-language specialist, although such person could be involved, is not required by this rule to be involved in formulation, review and revision of IEPs.

N.J.A.C. 6:28-3.1(b) states:

> A child study team shall consist of a school psychologist, a learning disabilities teacher-consultant and a school social worker. For pupils ages three to five, the study team shall include a speech correctionist or speech-language specialist. All members of the child study team shall be employees of a district board of education, have an identifiable, apportioned commitment to the local school district and shall be available during the hours pupils are in attendance.

According to this rule, all members of the child study team shall be employees of a district board of education, have a recognized percentage of their time committed to the local school district and shall be available during normal school hours. The rule does say that for pupils ages three to five, the CST shall include a speech correctionist or speech-language specialist. About this, more below.

Concerning evaluation, N.J.A.C. 6:28-3.4(d) provides:

> An initial evaluation shall consist of the following:
>
> . . .
>
> 5. For children ages three to five, a speech and language assessment shall be the responsibility of a speech correctionist or speech-language specialist employed by the district board of education. The assessment shall include observation of the pupil, communication with the parent(s) and an evaluation and analysis of speech and language development.

N.J.A.C. 6:28-3.4(f) provides:

> Evaluation by additional specialists may be required as listed in N.J.A.C. 6:28-3.5(c).

That reference, N.J.A.C. 6:28-3.5(c) dealing with determination of eligibility, states in pertinent part:

> Classification of pupils determined to be eligible for special education and/or related services shall be determined collaboratively by the child study team, parent(s) and, if they choose to participate, the school principal and referring staff members. Classification according to the following definitions shall be based on all evaluations conducted:
>
> 1. "Auditorily handicapped" . . . . Evaluations by a specialist qualified in the field of audiology and a speech and language evaluation by a certified speech correctionist or speech-language specialist are required.

. . .

2. "Autistic" . . . . An evaluation by a certified speech correctionist or speech-language specialist and an evaluation by a physician trained in neurodevelopmental assessment is required.

. . .

3. "Chronically ill" . . . . Evaluation by the school physician or his or her review and written acceptance of the medical report of another physician is required. The school nurse shall assist in the accumulation of the data necessary to determine eligibility.

4. "Communication handicapped" . . . . A evaluation by a certified speech correctionist or speech-language specialist is required.

. . .

5. "Emotionally disturbed". . . . An evaluation by a psychiatrist experienced in working with children is required.

. . .

7. "Multiply handicapped" . . . . Evaluations by all specialists required in this subsection for the separate handicapping conditions being considered for the determination of "multiply handicapped" are required.

8. "Neurologically or perceptually impaired" . . . .

   i. "Neurologically impaired". . . . An evaluation by a physician trained in neuro-developmental assessment is required.

   . . .

10. "Orthopedically handicapped" . . . . An evaluation by a physician qualified to conduct an orthopedic evaluation is required.

11. "Socially maladjusted" . . . . If determined necessary by the child study team, an evaluation by a psychiatrist experienced in working with children is to be obtained.

12. "Visually handicapped" . . . . An evaluation by a specialist qualified to determine visual disability is required.

All of the above show the clear intent to match expertise with a suspected handicap. Obviously, virtually no school district is going to employ all of the specialists these rules refer to.

Concerning individualized education program, N.J.A.C. 6:28-3.6 states:

> (c) The basic plan of the individualized education program shall be developed with the participation of the parent(s) and members of the district board of education child study team who have participated in the evaluation and any additional persons required to attend a meeting according to N.J.A.C. 6:28-2.3(h) [above].
>
> (d) When a pupil has been classified as eligible for speech-language services or the school physician has determined an educationally handicapped pupil needs home instruction, the individualized program meeting shall be as follows:
>
> 1. For pupils classified as eligible for speech-language services, the meeting shall be attended by the parent(s) and, when appropriate, the pupil. The speech correctionist or speech-language specialist shall attend.

N.J.A.C. 6:28-3.8 speaks to related services. See, 34 C.F.R. §300.13, above. The New Jersey code requires, among other things, that counseling services for educationally handicapped pupils be provided within the public schools during the school day by certified school psychologists, social workers or guidance counselors; that occupational and/or physical therapy be provided by educationally certified therapists; that recreation be provided by certified school personnel and that a district board of education may contract with approved clinics and agencies for the provision of occupational and/or physical therapy. At N.J.A.C. 6:28-4.3, the code goes on to provide:

> (a) Supplementary instruction and speech-language services provided to educationally handicapped pupils shall be in addition to the regular instructional program and shall meet the following criteria:
>
> . . .
>
> 5. Speech-language services shall be provided by a certified speech correctionist or speech-language specialist.

Nothing in the rules suggests that related speech-language services must be provided by an employee of the district board of education.

Discussion

The rule the petitioner cites concerning county superintendent approval of professionals in private practice to supplement the basic CST, N.J.A.C. 6:28-1.3(f), was deleted from the administrative code effective August 3, 1983. 15 N.J.R. 1470 (Sep. 6, 1983). See, now, N.J.A.C. 6:28-5.1(d).

The statute the Board cites, N.J.S.A. 18A:46-19.7, does give legal authority to contract with many outside entities to provide needed services. However, N.J.S.A. 18A:46-19.7 is part of Article 14A of Chapter 46 and is restricted to remedial services for handicapped children in nonpublic schools. See, L. 1977, c. 193.

The petitioner properly points out that political subdivisions of the State are limited to powers granted by the Legislature, either expressly or by necessary implication. The petitioner concededly enjoyed a tenured status. The question to be answered, then, is whether the Board has the authority to purchase the services the petitioner rendered from an ESC and RIF the petitioner, notwithstanding her tenured status. For the reasons that follow, the answer is yes.

There is no broad prohibition on subcontracting in the education laws. Hunterdon Central, above, State Board decision at 11. And, as in Hunterdon Central, no statute directly bars contracting for speech correction services. Cochran, above, was subject to restriction and, therefore, is distinguishable from the present case. N.J.S.A. 18A:46-5.1 provides:

> Each board of education and State operated program shall separately or jointly with one or more boards of education or State agencies provide for basic child study services. The basic child study team shall consist of a school psychologist, a learning disability teacher consultant and a school social worker, ...

N.J.S.A. 18A:28-9 provides:

> Nothing in this title or any other law relating to tenure 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 of 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.

The article referred to was Article 3 of Chapter 8, "Effect of reduction of force upon persons under tenure." The article includes N.J.S.A. 18A:28-9 through 18A:28-14. The plain meaning of N.J.S.A. 18A:28-9 is that a RIF, if done for reasons of economy, is within the authority of the board. Jamison v. Morris School Dist. Bd. of Educ., 198 N.J. Super. 411 (App. Div. 1985).

The Board has the authority to reduce force for economic reasons and there is no statutory bar to contracting for speech correction services. There is nothing in the record that even suggests a Board motive other than economy. Therefore, the petitioner's termination by the Board did not contravene her rights under the education laws notwithstanding that she enjoys tenure. N.J.S.A. 18A:28-5. That statute and N.J.S.A. 18A:28-9 require only that the Board's decision to abolish the position and to contract for the services be made in good faith. In consideration of the record, I **FIND** that the termination complained of herein was a legitimate reduction in force for economic reasons. I also **FIND** no statutory bar to contracting with an ESC for speech correction services. I further **FIND** no evidence of an ulterior motive; the impetus was economic.

Chapter 28 of N.J.A.C. Title 6 echoes the federal requirements. A fair reading of the appropriate C.F.R. indicates the emphasis is that services be provided by qualified personnel rather than on how they are provided. As is readily seen from the rule excerpts, each board of education must employ child study teams, speech correctionist or speech-language specialists and other school personnel in numbers sufficient to ensure that required programs and services are delivered. N.J.A.C. 6:28-1.1(f) says that boards must provide required programs and services independently or through joint agreements. Even reading this most favorably to the petitioner, it remains that there is no statutory bar to providing these services on a contracted basis. The petitioner's strongest support appears to be at N.J.A.C. 6:28-3.1(b), which says, among other things, that for pupils ages three to five, the CST shall include a speech correctionist or speech-language specialist. This language is echoed in

N.J.A.C. 6:28-3.4(d)5, which requires for children ages three to five that a speech and language assessment shall be the responsibility of a speech correctionist or speech-language specialist employed by the district board of education. But N.J.A.C. 6:28-5.1, dealing with approved clinics and agencies, says at subsection (c):

> Services which may be contracted shall be restricted to the following:
>
> 1. For public school pupils:
>
> i. Independent child study team evaluation and /or child study team diagnostic services to supplement existing local district services; and
>
> ii. The related services of occupational therapy and physical therapy.

Boards of education may purchase the listed services, obviously including speech correction services, provided they secure prior written approval through the county office of the Department of Education. If the Board here has not already secured that approval, it is **DIRECTED** to request it forthwith. N.J.A.C. 6:28-5.1(d).

Again, in the words of the State Board in Hunterdon Central, above, the education laws do not prohibit subcontracting. Rather, those laws recognize the authority of a district board to contract for materials, supplies and services. See, N.J.S.A. 18A:18A-1 et seq., the Public Schools Contracts Law. The exercise of authority to contract may be limited by other provisions of the education laws. However, the petitioner has identified no law that would prohibit contracting for speech correction services.

N.J.S.A. 18A:46-5.1 provides:

> Each board of education and State operated program shall separately or jointly with one or more boards of education or State agencies provide for basic child study team services. The basic child study team shall consist of a school psychologist, a learning disability teacher-consultant and a school social worker, and for the purposes of evaluation and classification shall include pertinent information from certified school personnel making the referral. This information shall be considered in the evaluation and classification process as defined in N.J.A.C. 6:28-1.1 et seq.
>
> The referring certified school personnel and the school principal, or his designee, may attend the classification conference as defined in N.J.A.C. 6:28-1.1 et seq. and participate in the classification decision.

This statute does not limit the power of a district board of education to contract for speech correction services. Other statutes give the Commissioner several opportunities to prescribe rules. N.J.S.A. 18A:46-6 authorizes uniform rules prescribed by the Commissioner for the identification of children who because of handicaps cannot properly be accommodated through regular school facilities. Similarly, the Commissioner promulgates rules concerning identification of children between the ages of three and five who require and would be benefited by special education. The Commissioner has other rule making powers, express and implied. However, no administrative rule may contravene a statute.

N.J.S.A. 18A:18A-2(c) defines contracts for the purposes of the public school contracts law as meaning contracts or agreements for the performance of work or the furnishing or hiring of services, materials or supplies as distinguished from contracts of employment. The same statute defines professional services as those services rendered or performed by a person authorized by law to practice a recognized profession and whose practice is regulated by law and the performance of which services requires knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study as distinguished from general academic instruction or apprenticeship and training.

N.J.S.A. 18A:6-51 et seq. creates Educational Services Commissions and defines their powers. An ESC operates much in the same manner as a district board of education. Among its powers is the sale of services, pursuant to contract, to school districts whether member districts of the Commission or not. N.J.S.A. 18A:6-51(f).

The sales of these services being expressly authorized by the Legislature, they cannot be thwarted by an administrative adoption.

In consideration of the foregoing, I **FIND**:

1. The Shrewsbury Borough Board of Education abolished the part-time position of speech correctionist for the 1990-91 school year at its special meeting of July 10, 1990. Stipulation 4.

2. The Board also terminated the petitioner's employment as part-time speech correctionist for the 1990-91 school year at that meeting and placed her on a preferred eligibility list. Stipulation 5.

3. The Board contracted with the Monmouth County Educational Services Commission to provide speech correctionist services to

the district at the rate of $20 per hour for five hours a day, two days per week, a total of $8,000 per year. Stipulation 7.

4. The sole motive of the Board's actions was economic.

5. There is no legal impediment to the purchase of speech correction services, as opposed to employment of one or more speech correctionists, by a board of education.

6. The decision to contract out work or to subcontract is an area where managerial interests dominate. Unless in violation of law or patently uneconomical, the locus of the decision should remain with the public employer. In re IFPTE, above.

I **CONCLUDE** the Board's decision to purchase speech correction services, which resulted in the petitioner's termination, was for good cause and not inconsistent with the law.

The Board's action having been a lawful exercise of its legislatively invested powers, I **ORDER** the present petition of appeal **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

4 NOVEMBER 91
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

11/7/91
Date

Maureen Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 18 1991
Date

Jayne LaBuckis
OFFICE OF ADMINISTRATIVE LAW

km

EXHIBITS

A	Letter, Winter To Impey, July 5, 1990
B	Agenda, Special Board Meeting, July 10, 1990, 2 pp.
C	Letter, Cochrane to Impey, July 11, 1990
D	Letter, Ruh to Flynn, June 4, 1982

GILLIAN IMPEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SHREWSBURY, MONMOUTH 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 thereto were timely filed pursuant to the requirements of N.J.A.C. 1:1-18.4.

Petitioner's exceptions aver that the ALJ ignored her tenure rights, seniority rights and re-employment entitlements in rendering his recommended decision. As to this, petitioner contends, inter alia, that there was no legitimate reduction in force effectuated by the Board pursuant to N.J.S.A. 18A:28-9, but merely a reorganization and transfer of the duties of a tenured teaching staff member to a less expensive provider through the mechanism of contracting out speech correction services to the Monmouth County Educational Services Commission (ESC). Viemeister v. Prospect Park Bd. of Ed., 5 N.J. Super. 215 (App. Div. 1949)

Petitioner also avers that the ALJ erred in failing to conclude that the relevant statutes and regulations relating to child study team operations in New Jersey require the employment of

an in-district speech correctionist exclusively unless there is a need to supplement services performed by tenured personnel. In support of this, she reiterates those regulatory citations which she believes fully substantiate her tenure and seniority contentions in this matter; namely, N.J.A.C. 6:28-1.1, 1.1(f), 3.1, 3.4, 5.1 in general and 5.1(c)2ii and 5.1(d) in particular. See Petitioner's Exceptions at pages 11-14.

Petitioner further maintains that the ALJ totally ignored the relevance of the State Board of Education and Appellate Division decisions in Cochran, supra, avowing, inter alia, that, if anything, her case is far stronger than the case on behalf of the petitioners in that matter because her job was totally eliminated and she was replaced by a nontenured contracted speech correctionist. She also maintains that the Appellate Division and Supreme Court decisions relied upon in part by the ALJ are totally inapplicable to the instant matter, namely, Remedial Educational, supra, and In re IFPTE Local 195, supra. More specifically, petitioner argues that in the former matter, the court merely states educational services commissions did not have the authority to subcontract or delegate to a private agency its obligations to provide remedial services even in a supplemental context and in the latter case, the Supreme Court stated in part that its decision did not leave public employees vulnerable to arbitrary or capricious substitutions of private workers for public employees.

In summary, petitioner avers that:

> In the instant matter, for all the reasons set forth in this Brief and in the Summary Decision Brief annexed to these Exceptions, it is averred that there are critically important statutes and regulations governing the tenure, seniority and

> re-employment rights of school district personnel, such as speech correctionists, that clearly would be abrogated if a local Board of Education was permitted to terminate the employment of tenured personnel only to replace said personnel with Educational Services Commission employees. In addition, based upon the regulations previously summarized in Point II, it is clear that there are preemptive regulations specifically referring to supplemental services that could be contracted for to assist existing child study teams that strongly substantiates the legal contentions of the Petitioner in this case. More specifically, those regulations mandate the employment of speech correctionists, as Board of Education employees, except under certain delineated circumstances that are clearly inapplicable to the instant matter; i.e. Boards of Education could in non-public school pupil situations employ speech correctionists in a supplemental capacity. (emphasis in text)
>
> (Petitioner's Exceptions, at p. 19)

The Board's reply exceptions point out that on page 20 of the initial decision the ALJ references the requirement for prior written approval through the county superintendent for purchase of outside speech services. It provides a copy of the written approval issued by the Monmouth County Superintendent, Milton Hughes, on November 18, 1991, which was apparently obtained as a result of the directive of the ALJ to secure such permission if it had not already been done. The Board further urges that the ALJ's decision be affirmed because it confirms several essential tenets of education law, namely that

1. A board of education has the explicit statutory authority to implement a good faith, good cause reduction in force for economic reasons.

2. A board has the explicit statutory authority to contract with outside approved agencies for certain related services.

3. These statutory powers may be exercised at a board's discretion when exercised in good faith and in the absence of specific countervailing statutory and regulatory prohibition.

The Board also avers that petitioner distorts the ALJ's opinion as well as its actions in asserting that her tenure, seniority and employment rights were ignored. It maintains that careful review of the initial decision reveals that the ALJ is fully cognizant of the rights and entitlements of petitioner and liberally cited its requirements to abide by same. The Board also contends that petitioner's reliance on Viemeister, supra, is misplaced because in the instant matter it has been stipulated by the parties that the abolishment of position was done in good faith. Moreover, the ALJ correctly concluded that a district may provide for speech services by contracting out with an ESC in that N.J.S.A. 18A:46-5.1 clearly sets forth that a board may provide for such services separately or jointly with one or more boards of education or approved state agencies. The Board also relies upon N.J.A.C. 6:28-1.1 and 5.1 to support that there is no prohibition for contracting speech correction services and it further avers that statute does not require speech correctionist services as part of the basic child study team. As to this latter point, the Board maintains that to the extent that the administrative code exceeds the statute, it is invalid and unenforceable. Bednar, supra

As to petitioner's contention that the ALJ ignored Cochran, supra, the Board asserts that the ALJ did properly consider that decision and correctly determine that the prohibition set forth in Cochran on the subcontracting rights for services of a basic child study team (school psychologist, LDTC and school social worker) did

not apply to speech correctionists. In similar vein, the Board also urges that the ALJ properly relied on In re IFPTE, supra; Hunterdon Central, supra; and Remedial Education, supra.

In summary, the Board argues that:

> In conclusion, Judge Campbell's initial decision confirms and reaffirms basic education principles as they are plainly set forth in statutes, administrative code provisions and developed precedent case law. The decision by the Shrewsbury Board of Education in this matter was clearly authorized by the relevant and applicable Federal and State statutes. The Board's management prerogative to contract for speech services is based upon established precedent and authority. The parties' stipulated record sets forth that the reduction in force and abolishment of petitioner's position were implemented in good faith. There is a clear absence of specific legal prohibition on the Board's contracting rights for the particular services in question. Judge Campbell's decision that the Board's decision to purchase speech correction services, which resulted in the petitioner's termination, was for good cause and not inconsistent with the law[,] was legally proper and should be sustained. (Board's Reply Exceptions, at p. 4)

Upon review of the record in this matter, including the exceptions filed by the parties, and the statutes and regulations pertinent to this matter, the Commissioner agrees with and adopts the ALJ's recommendation to dismiss the Petition of Appeal for the reasons set forth below.

The ALJ is correct in recognizing that the issue to be decided herein is whether the Board has the authority to purchase the speech correctionist services petitioner had rendered to the Shrewsbury school district from an ESC and RIF her, notwithstanding her tenured status in the district. (Initial decision, at p. 18) The ALJ is further correct in citing the State Board of Education decision in Hunterdon Central, supra, wherein it is determined that there is no broad prohibition in education laws against a board of

education subcontracting for the delivery of services, even those provided by tenured staff. In that decision the State Board also ruled, however, that while there is no blanket prohibition on subcontracting, such authority may be limited by other provisions of education law. In the Hunterdon matter no such limitation on subcontracting custodial services of tenured staff was found to exist. In contrast, the State Board found in Cochran, supra, that the board's action therein "involved contracting that was subject to regulatory restriction." (Hunterdon State Board, Slip Opinion, at p. 12)

In the instant matter, the ALJ correctly recognized that no restrictions in education law limited the Shrewsbury Board of Education's authority to subcontract speech correction services.

N.J.A.C. 6:28-1.1(f) requires that

> (f) Each district board of education, independently or through joint agreements shall employ child study teams, speech correctionists or speech-language specialists and other school personnel in numbers sufficient to ensure provision of required programs and services pursuant to this chapter.

N.J.S.A. 18A:46-5.1 provides that

> Each board of education and State operated program shall separately or jointly with one or more boards of education or State agencies provide for basic child study team services. The basic child study team shall consist of a school psychologist, a learning disability teacher consultant and a school social worker, and for the purposes of evaluation and classification shall include pertinent information from certified school personnel making the referral. This information shall be considered in the evaluation and classification process as defined in N.J.A.C. 6:28-1.1 et seq.
>
> The referring certified school personnel and the school principal, or his designee, may attend the classification conference as defined in N.J.A.C. 6:28-1.1 et seq. and participate in the classification decision.

While an education services commission is not a board of education, it is a creation of two or more local boards of education and the ESC's board of directors is comprised of representatives of each member board of education. N.J.S.A. 18A:6-52 through 55 Further, a speech correctionist is not a member of a basic child study team except in matters involving children ages 3-5, N.J.A.C. 6:28-3.1(b); thus, the instant matter is distinguishable from Cochran, supra, which involved the subcontracting of basic child study team services. More importantly, however, N.J.A.C. 6:28-5.1 which petitioner relies so heavily upon sets forth the types of programs and services which may be subcontracted by a board of education for public and nonpublic school students through clinics and agencies, not educational services commissions which are regulated by subchapter 7 of N.J.A.C. 6:28. Finally, there is no allegation that the ESC speech correctionist does not have an identifiable apportioned commitment to the Shrewsbury Board or that he/she is not available during the hours pupils are in attendance. N.J.A.C. 6:28-3.1(b)

Accordingly, for the reasons set forth in the initial decision and herein, and having found petitioner's remaining exceptions to be without merit, the Commissioner dismisses the Petition of Appeal.

IT IS SO ORDERED.

JANUARY 22, 1992

DATE OF MAILING - JANUARY 22, 1992

COMMISSIONER OF EDUCATION

10-92

EDU #9220-90
C # 10-92
SB # 10-92

GILLIAN IMPEY,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF SHREWSBURY, MONMOUTH COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, January 22, 1992

For the Petitioner-Appellant, Klausner, Hunter & Cige (Stephen B. Hunter, Esq., of Counsel)

For the Respondent-Respondent, Schwartz, Pisano, Simon & Edelstein (Nathanya G. Simon, Esq., of Counsel)

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

July 1, 1992

Date of mailing JUL 06 1992

11-92

11-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF CHESILHURST, CAMDEN COUNTY.	:	
	:	

SYNOPSIS

Unsuccessful candidate for seat on school board alleged violations of statutorily prescribed procedures which affected the outcome of the election.

ALJ concluded that irregularities and deviations from the election laws occurred and were sufficient to have caused the will of the people not to have been fairly expressed, particularly in view of the closeness of the election results. ALJ ordered conduct of a special election pursuant to N.J.S.A. 18A:12-15(d).

Commissioner affirmed the initial decision of the ALJ and further directed that a copy of the final decision be forwarded to the Camden County Prosecutor's Office.

JANUARY 28, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4952-91
AGENCY DKT. NO. 102-5/91

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN CHESILHURST SCHOOL DISTRICT, CAMDEN COUNTY,

---

William C. O'Brien, Jr., Esq., for the petitioner, Debra Barney

Harvey C. Johnson, Esq., for the respondent, Board of Education, Chesilhurst School District

Record Closed: September 12, 1991 Decided: December 10, 1991

BEFORE **STEVEN L. CARNES**, ALJ:

STATEMENT OF THE CASE

This is a petition by Debra Barney (petitioner), an unsuccessful candidate in the annual school board election held for seats on the Board of Education, Chesilhurst School District (Board or respondent). The petitioner pursues an inquiry under N.J.S.A. 18A:14-63.12. She alleges violations of statutorily prescribed procedures which affected the outcome of the election.

PROCEDURAL HISTORY

An election was held on April 30, 1991, to fill two seats on the Board of Education of the Chesilhurst School District. The petitioner was an unsuccessful candidate. On May 1, 1991, the petitioner requested an inquiry be conducted pursuant to N.J.S.A. 18A:14-63.12 by the Commissioner of Education (Commissioner). On May 6, 1991, the Commissioner granted the petitioner's request for an inquiry and transmitted the matter to the Office of Administrative Law, which

received it on May 14, 1991, 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 hearing commenced on June 14, 1991, at the Municipal Courtroom, Waterford Township Municipal Building, Atco, New Jersey. The hearing continued on June 17, 1991, at the same location. A telephone conference was held between the parties on July 8, 1991. The hearing was scheduled to continue on July 11, 1991; however, on July 9, 1991, the respondent requested the hearing be adjourned as the Board president and Board secretary were not available on that date. This request for an adjournment was granted, and the hearing was rescheduled. The hearing continued on July 29, 1991, at the Municipal Courtroom, Berlin Township Municipal Building, West Berlin, New Jersey. The hearing continued on July 31, 1991, August 2, 1991, and August 14, 1991, again in Atco, New Jersey. The record remained open at the conclusion of the hearing at the respondent's request in order to afford the parties the opportunity to submit written summations and briefs. I received the petitioner's brief on August 26, 1991. I received the respondent's brief on September 4, 1991, and I received the petitioner's reply brief on September 12, 1991, and the record closed at that time. On November 18, 1991, the Commissioner granted an extension of time for the filing of this initial decision pursuant to P.L. 1978, c. 687, §8 (c), and N.J.S.A. 52:14B-10(c).

FACTUAL DISCUSSION

The petitioner, Debra Barney, and LeRoy Berry were incumbent members of the Chesilhurst School Board who sought reelection. Mrs. Barney had been a member of the Chesilhurst Democratic Club and her husband had been a municipal councilman and is the local fire chief.

The president of the Chesilhurst School Board, Lawrence B. James, is a Camden County Democratic committeeman and is chairman of the Chesilhurst Democratic Party. Mr. James decided to attempt to unseat Mrs. Barney and Mr. Berry, and he solicited Ethel Dixon, the wife of Democratic Club vice president Nathan Dixon, and Norman Robinson to run for the School Board. Mr. James assisted the organization of the Dixon/Robinson campaign and organized support for his ticket. He was assisted by Elaris Robinson, president of the Chesilhurst Democratic Club and Borough Council. A campaign flier supporting the election of Dixon and Robinson was mailed using the Democratic Club's postal permit (P-5).

Approximately a week before the election, Mr. James telephoned Harry L. Cooper, manager of the R&M Guest Home.[1] The R&M Guest Home is a state-licensed residential health care facility. It houses residents with mental deficiencies. The residents come to R&M Guest Home from state institutions such as Ancora State Psychiatric Hospital and Lakeland Developmental Center and private hospitals such as Our Lady of Lourdes. R&M Guest Home is considered to be one level above institutionalization in the state residential health care system. The residents are on medication which includes Thorazine, Novane, Coget, Prolixin, Stellazine and Diazazen. Some of the residents get injections. The purpose of the drugs is to control their behavior.

Mr. James requested that Mr. Cooper allow him to bring Mrs. Dixon and Mr. Robinson to the Guest Home and allow them to speak to the residents. Mr. Cooper granted this request.

On the Saturday before the election, Mr. James brought Mr. & Mrs. Dixon and Mr. Robinson to the Guest Home. The candidates brought soda and cookies to the Guest Home for the residents. Mr. Cooper announced over the public address system that all residents were to come to the dayroom. Upon gathering all of the residents, Mr. Cooper announced that two candidates had come to speak to them.

At that point a few residents departed but most remained. Between 40 and 50 residents were in attendance. Mr. James introduced himself as the Board president, said a few words, and then introduced the candidates. The candidates then addressed the residents. At the conclusion of the talk, a campaign flier was distributed to the residents (R-3). The campaign flier was written by Mr. James, and he was the author of the Dixon/Robinson campaign slogan: "the two in the middle" (referring to their ballot positions).

Numerous residents of the R&M Guest Home testified that Mr. Cooper had them register to vote. Mr. Cooper routinely tells residents whom to vote for and transports them to the polls on election day.

---

[1] Mr. Cooper is a member of the Chesilhurst Democratic Club, but he is not an active member.

On election day Mr. Cooper, Elaris Robinson and Ed Bryant drove residents from the R&M Guest Home to the polls to vote. At the polls, Mr. Cooper took numerous residents into the voting booth and assisted them in voting. The election board workers did not administer an oath to any of the residents and did not inquire as to whether the residents were unable to read or write, were blind or had other physical disabilities which would make them unable to mark their ballots without assistance. The judge of the election, Pauline Peters, automatically granted any request by Mr. Cooper or a resident to allow Mr. Cooper to enter the voting booth with a resident. Mr. Cooper signed his name on a piece of paper indicating whom he assisted; however, this piece of paper cannot be located. Delia Henson, an election board worker who has served as the election judge in prior elections, was responsible for checking registrations and signatures in the registration books. She also verified that she did not know if any of the residents needed assistance in voting, that the residents were not asked why they needed assistance, that no oath was administered, and that no inquiry was made by the election board. She did however, indicate that she was concerned about one person, Mr. Cooper, helping so many people vote; however, she made no official inquiry into the practice. The election board merely let Mr. Cooper enter the voting booth whenever he desired.

At one point a resident yelled out from the voting booth "Now what do I do? Who do I vote for?" Mr. Clarence Covington, an incumbent School Board member who was not up for reelection this year and whose wife is on the Borough Council and is a member of the Democratic Club, heard Mr. Cooper yell back, "You vote for the two in the middle." Mrs. Barney also testified to this occurrence. Mrs. Henson also heard the response, "vote for the two in the middle," however, she could not identify who said it.

Mrs. Barney remained at the polls for most of the day as an observer. She testified that several R&M Guest Home residents shouted out from inside the voting booth, "we vote for the two in the middle, right Mr. Cooper?" and Mr.Cooper responded "yes." One woman yelled from the voting booth, "Mr. Cooper, I don't know who to vote for and who did you say to vote for?" and Mr. Cooper then entered the voting booth. Mrs. Henson also testified to this occurrence. While residents were standing in line waiting to vote, some residents would say "do we vote for the two in the middle, Mr. Cooper?" and Mr. Cooper responded, "the two in the middle, right." Mrs. Peters also heard residents asking Mr. Cooper whom they should vote for and heard him respond, "you know who to vote for." At one point, Mrs. Henson asked Mr. Covington if, as a School Board member, he could stop the

people from shouting out whom to vote for or what to do; however, Mr. Covington believed he had no authority over the election and told her he could do nothing.

Numerous residents of the R&M Guest Home testified in this proceeding. Deborah Earp indicated that on election day Mr. Cooper placed her in the car to go to the polls. She did not even know it was election day. She indicated that she is not from the area and did not know whom to vote for. Mr. Cooper entered the voting booth with her and told her for whom to vote. Mr. Cooper tells her whom to vote for, and she generally follows his suggestions. She does not solicit Mr. Cooper's advice; he just gives it to her. She thought she was voting to elect teachers to teach in the school not School Board members.

Florence Clifford testified that Mr.Cooper took her to the polls on election day. Prior to leaving for the polls, Mr. Cooper told her whom to vote for. Mr. Cooper gave Ms. Clifford a piece of paper indicating whom to vote for. He also entered the voting booth with her. Inside the voting booth, Mr. Cooper again told Ms. Clifford for whom to vote. Ms. Clifford indicated that Mr. Cooper tells her whom to vote for in other elections also, and she does what he says. Ms.Clifford volunteered, as did Ms. Earp, that she voted for herself (exercised her own judgment). These statements were blurted out and were not in response to any question. Upon further examination, Ms. Clifford admitted that prior to testifying, Mr. Cooper had instructed her to say that she had voted for herself. Mr. Cooper instructed her to testify that she had signed her own name and that she had voted for whom she wanted. Ms. Clifford testified that she believed she was voting to elect the principal of the school, not School Board members. Ms.Clifford's responses on cross-examination that she made up her own mind whom to vote for, had not been threatened, and always voted her own free will appeared to be rehearsed, and based upon her direct examination, I do not believe she exercised her own independent judgment when she voted.

Elizabeth Wells testified that Mr. Cooper told her that she had to go vote and gave her a piece of paper indicating whom to vote for. He then took her to the polls. Mr. Cooper told her to vote for the people on the paper. Ms. Wells volunteered, as did Ms. Clifford and Ms. Earp, that she voted on her own and made her own selection. She did hear someone say vote for the "two in the middle" while she was

standing in line at the polling place. She believed she was voting to elect school teachers and she voted for the only school teacher who was running.[2]

Beverly Jones remembered the campaign party and the free sodas. She did not know Mrs. Dixon or Mr. Robinson but Mr. Cooper said to trust them. They were his friends. Mr. Cooper took her to the polls and Mr. Cooper told her for whom to vote. She stated that Mr. Cooper would not have taken her to the polls if she did not vote for the two candidates who had come to the Guest Home. Ms. Jones testified that Mr. Cooper told her to say that he had not told her whom to vote for. He instructed her to testify that she voted for whom she wanted. She testified that Mr. Cooper rewards them if they are good. She indicated she believed she was voting to elect a principal and a vice principal of the school, not School Board members.

Celestine Collins remembered the campaign party and initially testified that she selected whom to vote for herself based upon the party. Mr. Cooper took her to the polls and entered the voting booth with her. She did not request any assistance from anyone. In the car she had the piece of paper Mr. Cooper had given her indicating for whom to vote;however, she denied taking the paper into the voting booth. This piece of paper only had two names on it. Initially, she testified that Mr. Cooper only showed her how to use the voting machine; however, at one point, she admitted that Mr. Cooper told her the names to vote for inside the voting booth, and she voted for those candidates. She also stated that prior to testifying, Mr. Cooper had instructed her not to testify that he had told her to vote or told her for whom to vote.

Andrew Chamberlain was transported to the polls by Mr. Cooper. Mr. Chamberlain does not recall receiving or reading any literature or other papers concerning the School Board election. Mr. Cooper did talk to him about the election in the car on the way to the polls. As he had forgotten his glasses, Mr. Chamberlain requested assistance form the election board workers. Mr. Chamberlain did not request Mr. Cooper to assist him; however, Mr. Cooper entered the voting booth with him. Prior to entering the voting booth, Mr. Chamberlain had no idea for whom to vote. Upon entering the voting booth, Mr. Cooper showed him for whom to vote and which levers to pull. Mr. Chamberlain has no idea for whom he voted.

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2 Mrs. Dixon was a school teacher.

Daniel McLaurin was also transported to the polls by Mr. Cooper. Both Mssrs. Cooper and James had given him papers indicating for whom to vote. Mr. Cooper entered the voting booth with Mr. McLaurin, showed him how to operate the voting machine, and then departed the voting booth.

Lucille Flacco was also transported to the polls by Mr. Cooper. She testified that Mr. Cooper tells residents whom to vote for at elections. On the way to the polls, Mr. Cooper mentioned the names of the people to vote for and stated "you know who I told you to vote for." She stated that residents usually do what Mr. Cooper says; however, she voted for whom she wanted. She stated Mr. Cooper was persistent regarding for whom to vote. She felt offended because she did not know if she had the right to vote for her own choices. She indicated that residents are afraid of Mr. Cooper, and that he threatens to place them in Ancora if they do not comply with his wishes. She had never voted prior to moving to the R&M Guest Home. Mr. Cooper told her she was going to register to vote and assisted her in registering. Ms. Flacco, however, does not remember a ballot configuration similar to the sample ballot in this case (P-1).

Lucille Harflinger at first could not remember much. She appeared to be extremely fidgety and nervous. She first indicated that she knew whom she was going to vote for and that she voted Democratic.[3] She then indicated that Mr. Cooper told her whom to vote for in the car when being driven to the polls.

Russell Alston was also transported to the polls by Mr. Cooper. Mr. Alston did not ask for any assistance, yet Mr. Cooper entered the voting booth with him. Inside the voting booth, Mr. Cooper showed Mr. Alston which levers to pull. Mr. Cooper pointed at the names, and Mr. Alston pulled those levers. Mr. Alston stated that prior to entering the voting booth he did not know for whom to vote. Once inside the voting booth, Mr. Cooper told him for whom to vote and showed him the names. Mr. Alston does not know for whom he voted. He believes he voted "straight Democrat."

Several other residents of R&M Guest Home testified that Mr. Cooper had transported them to the polls, but did not testify to anything which could be considered an election irregularity.

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3 School Board elections are nonpartisan elections.

Voters were asked to elect two of the four candidates. The official results of the election are as follows:

1. Ethel Dixon - 117 votes
2. Norman Robinson - 114 votes
3. LeRoy Berry - 113 votes
4. Debra Barney - 112 votes

During the hearing, a meeting was held at Mr. James' home concerning testimony in the case. Present were Mr. Jones, Abdi Gass (board secretary and vice president of the Democratic Club), Mr. Cooper, Mr. Poindexter (the mayor of Chesilhurst), and Mr. Johnson and his associate. Curiously, when subpoenas were served upon the residents of the Guest Home, Mr. Cooper telephoned Mr. James (who is not an attorney) to determine if the subpoenas were in proper order. Mr. James then went to the Guest Home to inspect the subpoenas before they were distributed.

I **FIND** the above Factual Discussion as **FACT**.

DISCUSSION

This case involves an attempt by rival factions in both the Chesilhurst Democratic Club and the Chesilhurst Volunteer Fire Department to gain control of the Chesilhurst Board of Education. A loosing candidate, an incumbent, seeks to have the election set aside. To set aside school board elections, it must be shown that "the will of the electorate . . . has been thwarted." In re Annual School Election Held in the Greater Egg Harbor Regional School District, 1978 S.L.D. 11, 20. This rule was developed by adapting the standard from Title 19.

"Election laws are to be liberally construed so as to effectuate their purpose. [citation omitted] They should not be construed so as to deprive voters of their franchise or so as to render an election void for technical reasons." Kilmurray v. Gilfert, 10 N.J. 435, 440 (1952). Accord, Stone v. Wyckoff, 102 N.J. Super. 26, 33 (App. Div. 1968), certif. den., 52 N.J. 254 (1968). The theme of liberal construction of election laws to prevent disenfranchisement of voters is found repeatedly in the case law.

Procedural laws are generally considered to be "directory, unless a non-compliance with their terms is expressly declared to be fatal. [citations omitted] Elections should never be held void unless they are clearly illegal." In re Wene, 26 N.J. Super. 363, 376 (Law Div. 1953), aff'd sub nom. Wene v. Meyner, 13 N.J. 185 (1953). Additionally, irregularities which may be "sufficient to challenge the right to vote at the polls, are not sufficient to set aside an election. . . . " In re Petition of Hartnett, 163 N.J. Super. 257, 265-266 n. 3 (App. Div. 1978).

There must exist a connection between the alleged election irregularities and the election results.

> The rule in our State is firmly established that if any irregularity or any other deviation from the election law by the election officials is to be adjudged to have the effect of invalidating a vote or an election, where the statute does not so expressly provide, there must be a connection between such irregularity and the result of the election; that is, the irregularity must be the producing cause of illegal votes which would not have been cast or of defeating legal votes which would have been counted, had the irregularity not taken place, and to an extent to challenge or change the result of the election; or it must be shown that the irregularity in some other way influenced the election so as to have repressed a full and free expression of the popular will. [Wene, 26 N.J. Super. at 383]

This language was adopted by the Commissioner in In re Garfield, 1977 S.L.D. 771, 775-776. Accord, Magura v. Smith, 131 N.J. Super. 395, 401 (Law Div. 1974); In re Application of Abbott Low Moffat, 142 N.J. Super. 217, 224 (App. Div. 1976), certif. den. sub nom. Princeton Tp. v. Bleiman, 71 N.J. 527 (1976). The burden of proof is on the contestant. Abbott Low Moffat, supra at 224.

Before election results can be overturned, there is a requirement that malconduct or fraud exists on the part of election officers which results in the thwarting of the free expression of popular will. Wene v. Meyner, supra at 196.

When adopted by the Commissioner of Education for N.J.S.A. Title 18A school election cases, the thwarting of the will standard was accepted. "However, it is well established that an election will be given effect, and will not be set aside unless it is shown that the will of the people was thwarted, was not fairly expressed, or could not properly be determined." (citations omitted) In re Annual School Election Held in the Madison Tp. School District, 1974 S.L.D. 744, 751.

Similar to the Title 19 decisions, the Commissioner has stated that absent fraud or deviations which actually led to a result different from that which would have occurred absent the fraud, the election results will not be overturned:

> It has been held by the courts of this State that gross irregularities, when not amounting to fraud, do not vitiate an election. [citations omitted] It is clear that irregularities and deviations from election laws by election officials provide insufficient grounds for voiding an election if the will of the people has been fairly expressed and determined and has not been thwarted. [citations omitted] It is only when the deviations from statutory procedure are so gross as to produce illegal votes which would not have been cast or to defeat legal votes which would have been counted, so as to make impossible a determination of the will of the people, that an election will be set aside. [In re Election Inquiry in the Borough of S. River School District, 1974 S.L.D. 1040, 1048]

Accord, Greater Egg Harbor, 1978 S.L.D. at 20.

It is the clear intent of the law that elections are to be given effect whenever possible. It has been held by the courts of this State that gross irregularities, when not amounting to fraud, do not vitiate an election. Love v. Board of Chosen Freeholders, 35 N.J.L. 269 (Sup. Ct. 1871); Stone v. Wyckoff, 102 N.J. Super. 26 (App. Div. 1968). It is clear that irregularities and deviations from election laws by election officials provide insufficient grounds for voiding an election if the will of the people has been fairly expressed and determined and has not been thwarted. Petition of Clee, 119 N.J.L. 310 (Sup. Ct. 1938); In re Livingston, 83 N.J. Super. 98 (1964). It is only when the deviations from statutory procedure are so gross as to produce illegal votes which would not have been cast or to defeat legal votes which would have been counted, so as to make impossible a determination of the will of the people, that an election will be set aside. In re Garfield, 1977 S.L.D. 771, 775-776.

Acts and omissions to act on the part of local election officers may render them liable to indictment. Yet, absent malconduct, fraud or corruption, the election result is unimpeachable. Wene v. Meyner, supra at 196. Irregularities pleaded must be sufficient, if established by proof, to warrant the relief sought. Proofs must operate per se to disqualify a nominee or alter the result of the election. Id. at 197-198.

However, when an election result is very close, and "irregularities (or the absence of regularity) infected the contest," it has been held that the full and free expression of the popular will had been subjected to interference. In re Klayman, 97 N.J. Super. 295, 305 (Law Div. 1967). In Klayman, the irregularities involved write-in

voting procedures. The County Board of Elections failed to follow a statutory directive to inspect each machine following each vote. The write-in names were obliterated by stickers, confusing the results of the balloting. The court found no fraud or collusion in the obliteration of the names on the ballot, and found that the election dispute was the result of failure to inspect the machines after each vote. However, it also determined that the election result was prejudiced, because voters for the write-in candidates were deprived of an opportunity to express their will. Id. at 305. Because the election result was only one vote apart, the court found the full and free expression of the popular will had been subjected to interference. Ibid.

There must be concrete evidence that the will of the people has been suppressed, rather than speculation that improved conditions would have afforded a different result. In the Matter of the Annual School Election Held in the Borough of Ringwood, Passaic County, 1974 S.L.D. 591. What must be established is the real intent of a voter. The expression of intent is to be read in light of the surrounding circumstances proven by reliable evidence. In re Fifteen Registered Voters, City of Sussex, 129 N.J. Super. 296, 300-301 (App. Div.1974). Absent a prima facie case that the will of the electorate has been thwarted and the outcome of the election changed, the election will not be overturned. See, In re Clee, 119 N.J.L. 310 (Sup. Ct. 1938). (Broad and vague allegations of fraud and illegal conduct, including unauthorized assistance in ballot preparation and electioneering at polling places, is not sufficient to vitiate the election results, absent any allegation that invalidating the illegal votes would change the result of the election. Irregularities on the part of the election boards having no effect upon the voting, etc., will never vitiate an election. Id. at 329. It is the duty of the court to uphold an election unless it clearly appears that it was illegal. Public policy so ordains. Id. at 330.)

The Appellate Division held in Application of James T. Murphy:

> [T]hat in such circumstances an election may not be voided, as it was here, merely on a showing that the successful candidate's majority was smaller than the number of illegal votes cast, without any attempt by the contestant to show for whom the illegal votes were cast.
>
> When, as here, an election is contested on the sole ground that "illegal votes have been received * * * at the polls sufficient to change the result," N.J.S.A. 19:29-1(e), the contestant has not only the burden of showing that illegal votes were cast in number sufficient to change the result if they had in fact been cast for the contestee, but also the burden of showing, to the extent possible under the circumstances, for whom the illegal votes were cast.

> Such is the rule not only of the New Jersey cases but also of the weight of authority elsewhere. [Citations Omitted] [Application of James T. Murphy, et al., 101 N.J. Super. 163, 167 (App. Div. 1968)]

The holdings of Lehlbach v. Haynes, 54 N.J.L. 77 (Sup. Ct. 1891), and its progeny have application in this case. It is clear that not all situations are amenable to direct proof on how the person cast his vote. In that instance circumstantial evidence on the issue is admissible. Murphy, at 170. Such evidence can be the party affiliation of the voter, the relation between the voter and the candidate, "or between him and others actively interested in advancing the cause of certain candidates." (citation omitted; emphasis added) Murphy, at 170.

In this case, the activities of Harry Cooper and Lawrence James show a unity of purpose from the beginning of the election procedure where the candidates were hand-picked by Mr. James to election day when Mr. Cooper and Mr. Robinson were busing the residents and entering the voting booth with Mr. Cooper instructing residents for whom to vote. These gentlemen were certainly a connection between the R & M Guest Home voters and the candidates, and were certainly active in the campaign of the two successful candidates.

Circumstantially, it can be shown that the persons for whom some of the R & M Guest Home voters cast votes were other than Mrs. Barney and Mr. Berry and that such occurred to the extent that it affected the outcome of the election.

Similar to Title 19 decisions, the burden of proof is on the petitioner to "demonstrate that there is a connection between the irregularity charged and the results of the election . . . . A presumption of correctness reposes in the incumbents." (citation omitted) In re Annual School Bd. Election, Lakewood Tp., OAL DKT. EDU 2729-84 & 2730-84 (July 16, 1984) at 2, adopted, Comm'r of Educ. (Aug. 30, 1984). Exceptions as to who has the burden of proof exist when the violations are so gross as to make the task "impossible." In re Annual School Election Held in Tinton Falls Borough School District, 1979 S.L.D. 872, 873, rev'g, 1978 S.L.D. 344.

The standard of review used in N.J.S.A. Title 18A school election cases is a difficult standard to meet. It was adopted to protect the will of the people, through both preventing the arbitrary setting aside of election results and ensuring that fair results expressing the electorate's actual will are achieved.

N.J.S.A. 18A:14-101 prohibits impeding or interfering with the voter:

> No person shall by abduction, duress or any forcible or fraudulent device or contrivance whatever, impede, prevent or otherwise interfere with the free exercise of the elective franchise by any voter at any election; or compel, induce or prevail upon any voter either to vote or refrain from voting at any election, or to vote or refrain from voting for any particular person or persons at any election.

Electioneering is prohibited under two statutes. The first, N.J.S.A. 18A:14-72, states:

> If a person shall on any day fixed for any election tamper, deface or interfere with any polling booth or obstruct the entrance to any polling place, or obstruct or interfere with any voter, or loiter, or do any electioneering within any polling place or within 100 feet thereof, he shall be a disorderly person and shall be punished by a fine not exceeding $500.00 or by imprisonment not exceeding one year, or both.

The second, N.J.S.A. 18A:14-81, states:

> If a person shall distribute or display any circular or printed matter or offer any suggestion or solicit any support for any candidate, party or public question, to be voted upon at any election, within the polling place or room or within a distance of 100 feet of the outside entrance to such polling place or room, he shall be a disorderly person.

In In the Matter of the Annual School Election Held in the School District of Point Pleasant Borough, OAL Docket No. EDU 2007-80, irregularities near the polls included, inter alia, the distribution in the parking lot of the polling place, of a card endorsing two candidates. The administrative law judge cited the rules of law established in Wene and Garfield, and found that the incident was not sufficient in scope to conclude that the will of the electorate was thwarted (at 4).

A case involving electioneering similar to the case at hand is In the Matter of the Annual School Election held in the School District of the City of Passaic, Passaic County, OAL Docket No. EDU 2598-88 (May 17, 1988). The facts of Passaic show that an individual was found to be electioneering as he stood behind the voting booth calling out names and numbers from the back of the machine. Further, this individual was found to be advising people how they should vote while standing near the machines. The court found these actions constituted improper electioneering. Id. at 23.

Further, there was factual evidence that on several occasions in Passaic, voters accompanied other voters into the polling booths. There was no demonstration or request of assistance, as required by Title 19. (Title 19 specifies that assistance may be rendered to a voter who demonstrates an inability to read or write, blindness or other physical disability which prevents him from casting his vote without assistance.)

The court determined in Passaic that the irregularities did indeed occur, but there was no showing that because they occurred, a determination of who received the majority of the legal votes could not be ascertained with the "reasonable certainty" the law requires. Id. at 26. The court quoted Sharrock v. Keansburg, 15 N.J. Super. 11, 18 (App. Div. 1951), stating:

> The right of suffrage in a government of and by a free people must always be regarded with jealous solicitude. To overthrow the expressed will of a large number of voters for no fault of their own and solely because of some harmless irregularity would in many cases defeat the paramount object of the election laws. . . .

The administrative law judge ordered that a copy of the initial decision be made available to the Passaic County Prosecutor in view of the testimony regarding electioneering activities. Passaic at 31.

The electioneering in the case at hand was more potent than written endorsements or instructions handed to voters walking into the polling place. The disputed voters were orally instructed whom to vote for as they entered the polling booth, and, in some instances, orally reminded once they were inside the booth. The sanctity of the voting booth was thus violated.

There were numerous election irregularities in this case; some of them technical, and some amounting to voter fraud. The election board workers admitted that they did not know if any of the residents needed assistance, and contrary to statutory requirements, the workers did not administer any oaths nor make any inquiries. Residents of R & M Guest Home shouted out from the voting booth requesting guidance or instruction on whom to vote for and Mr. Cooper responded "vote for the two in the middle." Also, while standing in line residents questioned Mr. Cooper about whom to vote for. Mrs. Henson was concerned about Mr. Cooper entering the voting booth with so many people, but she took no action to curb these activities. She was also concerned about voters shouting out for whom to vote. She

took no action to stop these activities other than request Mr. Covington's assistance; however, Mr. Covington had no legal authority to intervene. It is clear that the activities of Mr. Cooper in the polling place amounted to electioneering.

The activities of Mr. Cooper inside the voting booth are most troubling. His presence and influence in the voting booth with several voters is questionable. In addition, it appears that Mr. Cooper attempted to influence the testimony of several residents in this proceeding. But due to the extreme closeness of this election, one need look no further than to the testimony of Mssrs. Chamberlain and Alston . Mr. Cooper assisted both of these voters. Neither knew for whom to vote prior to entering the voting booth. In both cases, Mr. Cooper showed them for whom to vote and which levers to pull. Neither man knows for whom he voted. Relying upon Lehlbach and Murphy, it can be determined that based upon the activities of Mr. Cooper, Mssrs. Chamberlain and Alston, as well as other residents of the Guest Home, voted for Mrs. Dixon and Mr. Robinson.

CONCLUSIONS OF LAW

As a result of these activities, I **CONCLUDE** that the will of the people was thwarted, was not fairly expressed, and cannot be properly determined. I further **CONCLUDE** that the irregularities and deviations from the election laws in this case are sufficient grounds to void the election, as the will of the people has not been fairly expressed and determined and has been thwarted. The deviations in this case are so gross, and the election results are so close, as to make impossible a determination of the will of the people.

This case is distinguishable from Passaic, as only one vote separates the winning second place nominee from the losing third place nominee and only two votes separate the winning second place nominee from the losing fourth place nominee. Therefore, I **CONCLUDE** in this case, a determination cannot be made with reasonable certainty of who received the majority of the legal votes.

ORDER

It is hereby **ORDERED** that the election held on April 30, 1991, to fill two seats on the Board of Education of the Chesilhurst School District be set aside. It is further **ORDERED** that, pursuant to N.J.S.A. 18A:12-15d, a special election shall be held within 60 days of the final order of the Commissioner of Education to fill these two

seats on the Board of Education of the Chesilhurst School District. Said special election shall be conducted in accordance with the procedures for annual and special school elections set forth in chapter 14 of Title 18A of the New Jersey Statutes.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 10, 1991
Date

STEVEN L. CARNES, ALJ

Receipt Acknowledged:

Dec. 12, 1991
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 17 1991
Date

OFFICE OF ADMINISTRATIVE LAW

cad

DOCUMENTS IN EVIDENCE

For the Petitioner:

P-1 Official sample ballot for Chesilhurst School District
P-2 Voter list for Chesilhurst, dated October 10, 1990
P-3 Certification of vote totals upon recount, dated May 30, 1991
P-4 Voter disability form
P-5 Mailed election flier for Dixon and Robinson with bulk rate permit
P-6 All registered voters list, dated June 17, 1991
P-7 Removed registered voters list from April 3, 1991, to June 17, 1991
P-8 Chesilhurst Annual School Election poll list 1 to 100
P-9 Chesilhurst Annual School Election poll list to 101 to 200
P-10 Chesilhurst Annual School Election poll list to 201 to 240
P-11 Chesilhurst Annual School Election voting authorities 1 to 239

For the Respondent:

R-1 Letter of Debra Barney to Joanne DeGailor, Camden County Board of Elections, dated May 1, 1991
R-2 Statement of Clarence Covington
R-3 Campaign flier for Dixon & Robinson
R-4 Official Sample Ballot for Lower Camden County Regional School District
R-5 Campaign flier from the 1987 School Board election
R-6 FID Not in evidence

WITNESSES

For the Petitioner:

Debra Barney, the petitioner
Pauline Peters, judge of the election
Delia Henson, election board worker
Clarence Covington, incumbent School Board member
Joanne DeGailor, assistance administrator, Camden County Superintendent of Elections Office
John W. Knorr, Camden County school business administrator

Deborah A. Earp, resident of R&M Guest Home
Florence Clifford, resident of R&M Guest Home
Elizabeth Wells, resident of R&M Guest Home
Beverly Ann Jones, resident of R&M Guest Home
Celestine Collins, resident of R&M Guest Home
Andrew Chamberlain, resident of R&M Guest Home
Daniel McLaurin, resident of R&M Guest Home
Lucille Flacco, resident of R&M Guest Home
Lucille Harflinger, resident of R&M Guest Home
Joan Cole, resident of R&M Guest Home
Ervin Kane, resident of R&M Guest Home
Melvin Mathis, resident of R&M Guest Home
Russell Alston, resident of R&M Guest Home

For the Respondent:

Marie Walker, nurses aide, R&M Guest Home
Abdi Gass, Board secretary/business manager
Lawrence B. James, Board president
Harry L. Cooper, manager, R&M Guest Home

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF CHESILHURST, CAMDEN COUNTY.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The Board of Education's request for an extension of time in which to file exceptions was made beyond the period for such requests permitted by N.J.A.C. 1:1-18.8(b) and was denied on that basis.

Upon a careful and independent review of the record, including transcripts of hearings, the Commissioner affirms the decision of the ALJ as well founded in fact and correct in law. The factual recitation of the ALJ is fully supported by the transcripts of testimony, and the Commissioner finds no basis therein to question the ALJ's assessment of credibility or weighing of evidence. Further, the ALJ's discussion reflects a fair and complete consideration of the parties' positions and relevant law with respect to his ultimate conclusion that a new election was warranted. Indeed, the Commissioner fully concurs with the ALJ that "[t]he deviations in this case are so gross, and the election results are so close, as to make impossible a determination of the will of the people." (Initial Decision, at p. 15)

Accordingly, the initial decision of the Office of Administrative Law ordering a new election pursuant to N.J.S.A. 18A:12-15(d) is affirmed for the reasons expressed therein. Such election shall take place forthwith, but no later than 60 days from the date of this decision.

Further, the Commissioner directs that a copy of this decision shall be made available to the Camden County Prosecutor in view of the testimony within regarding violation of N.J.S.A. 18A:14-72, 18A:14-81 and 18A:14-101 as discussed at pages 12-15, ante.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 28, 1992

DATE OF MAILING - JANUARY 28, 1992

11-92

EDU #4952-91
C # 11-92
SB # 12-92

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH : DECISION
OF CHESILHURST, CAMDEN COUNTY. :
:

Decided by the Commissioner of Education, January 28, 1992

For the Petitioner-Respondent, William C. O'Brien, Jr., Esq.

For the Respondent-Appellant, Harvey C. Johnson, Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. The Appellant's motion for a stay of the Commissioner's decision is rendered moot by our decision herein, and it is, accordingly, denied.

July 1, 1992

Date of mailing JUL 06 1992

12-92

12-92

BOARD OF EDUCATION OF THE TOWNSHIP OF BOONTON, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BOONTON AND BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY, RESPONDENTS.	:	DECISION

SYNOPSIS

Petitioning Board of Boonton Township sought to end its more than 100-year-old sending-receiving relationship with Boonton Town in order to enter into new relationship with Mountain Lakes. Township contended termination would not produce substantial negative financial, educational, or racial impact.

In light of feasibility study, revised feasibility study and testimony of financial experts and in consideration of relevant cases such as Englewood Cliffs and Jenkins, ALJ found Township must be granted severance because Town failed to demonstrate any substantial negative financial, educational or racial impact (N.J.S.A. 18A:38-13).

Commissioner adopted findings of fact and conclusions of law of ALJ as his own. As to financial impact, Commissioner adopted ALJ's findings and conclusions stressing Town's own financial expert conceded there would be no substantial negative financial impact to any district involved, which testimony Town's exceptions were unable to overcome. As to educational impact, Commissioner determined new contract between Township and Lakes provided thorough and efficient education for Township's pupils. Finally, no substantial negative impact on racial balance was demonstrated. Thus, Commissioner granted severance of the relationship.

JANUARY 30, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1092-90

AGENCY DKT. NO. 377-12/89

BOARD OF EDUCATION
OF THE TOWNSHIP OF
BOONTON,

Petitioner,

v.

BOARD OF EDUCATION
OF THE TOWN OF BOONTON
AND BOARD OF EDUCATION
OF THE BOROUGH OF
MOUNTAIN LAKES,

Respondents.

Fredric J. Sirota, Esq. and **Anne M. Siotka**, Esq., for petitioner
(Wiley, Malehorn & Sirota, attorneys)

David W. Carroll, Esq., for respondent
(Carroll & Weiss, attorneys)

Peter P. Kalac, Esq., for co-respondent
(Kalac, Newman & Lavender, attorneys)

Record Closed: March 19, 1991 Decided: October 31,1991

BEFORE **KEN R. SPRINGER**, ALJ:

I. Statement of the Case

This case involves an application by a sending district, Boonton Township Board of Education ("Township"), which seeks to terminate its existing relationship with its receiving district, Boonton Town Board of Education ("Town"), and to enter into a new relationship with a rival district, Mountain Lakes Board of Education ("Mountain Lakes"). Overall, the process implicates a mixture of fact-finding, legal interpretation and, ultimately, of policy-making at the level of the Commissioner of Education ("Commissioner") and State Board.

Local school districts too small to support high school facilities of their own may enter into financial arrangements with another district to educate their children at the other's high school Once such a sending-receiving relationship has been established, it cannot be dissolved "except upon application made to and approved by the [C]ommissioner." *N.J.S.A.* 18A:38-13. A recent amendment has revised the statutory standards guiding the Commissioner's deliberations. *L.* 1986, c. 156 (effective Nov. 24, 1986).

Relieved of the express requirement under the prior law to prove "good and sufficient reasons" for withdrawal, the sending district contends that it is entitled to relief because termination of the current relationship would not produce "substantial negative impact" in any of the three areas of quality of education, financial condition or racial composition. Even if a substantial negative impact would occur, the sending district maintains that the Commissioner must still "balance the equities" and determine whether the anticipated benefits from termination outweigh any likely detriments.

For its part, the receiving district has assumed the burden of showing that termination would result in substantial negative impacts, not only for the remaining students at the present high school but for the sending district's students as well. Consideration of all of the circumstances also entails an examination into the underlying reasons for the proposed move, reasons which the receiving district

charges are "spurious" and "rooted in misconceptions" about what makes a good high school, about what programs will actually be available at the new school and about how much it will cost.

II. Procedural History

On December 28, 1989, petitioner Township filed its petition with the Commissioner, naming both the present and proposed receiving districts as parties. Respondent Town filed its answer and counterclaim on January 30, 1990. Cross-respondent Mountain Lakes filed its answer on February 8, 1990. Subsequently, on February 9, 1990, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

The OAL conducted a prehearing conference on May 4, 1990. Prior to any hearings, the parties engaged in extensive discovery, including on-site studies of each other's facilities and depositions of expert witnesses. Originally the Lincoln Park Board of Education ("Lincoln Park"), another small district which also sends students to the Town's high school, had been permitted to intervene in the proceedings, but eventually it was dropped as a separate party because its interests and objectives were represented to be "identical with those of the Town."

Thereafter, the OAL held 15 days of hearing commencing on November 26, 1990 and ending on January 14, 1991. The parties submitted their initial briefs by March 5, 1991 and reply briefs by March 19, 1991. Upon receipt of the last paper to be filed, the record closed on March 19, 1991. An appendix to this decisions contains a witness list and an exhibit list updated by the parties during the course of the hearings. Time for preparation of the initial decision has been extended to October 31, 1991.

III. Findings of Fact

A. Background Characteristics of the Three Communities

Located in Morris County some 30 miles west of New York City, the municipalities of Boonton Town, Township and Mountain Lakes are primarily suburban and residential in character. In terms of physical size, the Township, occupying an area over 8 square miles, is bigger than either the Town or Mountain Lakes, each less than 3 square miles. But in terms of population, the Town, with 8,500 inhabitants reported in the 1980 Census, is considerably larger than the Township, with 3,400, or Mountain Lakes, with 3,900.

By the usual measurements, the Township is more affluent and has a better educated populace than the Town. Average household income for a family of four in the Township during 1988 was twice that of the Town ($90,500 compared to $45,000). College graduates comprised 31% of the Township's population in 1980, twice as many as the Town, which had only 14%. Mountain Lakes is even wealthier and more highly educated, with three times the Town's average household income ($148,300) and a college-educated population of 60%.[1] Generally, the Town may be regarded as a predominantly "blue collar" community and the Township as "middle class." Mountain Lakes has been described as attracting "business executives, college professors, doctors, and other professional people as well as many managerial level business leaders."

Current enrollment in the Township's public school system as of October 15, 1990 totaled 310 students, including 79 Township residents who attend Boonton High School. Due to its comparatively low enrollment, the Township operates a K-to-8 only district and has a single elementary school. In comparison, the Town has a total resident enrollment of 1,011, of which 316 attend high school. It has been able to maintain two elementary schools as well as the high school. With a secondary-level enrollment of 322 residents, Mountain Lakes also has two elementary schools

[1]Differences in the 1983 per capita income are much less dramatic, with the Town at $11, 700, the Township at $11,700 and Mountain Lakes at $20,700.

and one high school. Over the last several years, both Boonton High School and Mountain Lakes High School have experienced a continuing decline in enrollment.[2]

Interestingly, the greatest number of students now at Boonton High School come not from either Town or Township, but from the other sending district, Lincoln Park. Broken down by district, the distribution of students at Boonton High School is roughly 46% from Lincoln Park, 43% from the Town and the remaining 11% from the Township. Lincoln Park, which closely resembles the Town in income and education levels, presently sends 335 students to Boonton High School.

B. Historical Overview

Town and Township have been joined in a sending-receiving relationship for almost 100 years. Although the last formal contract memorializing this arrangement expired more than 20 years ago, the relationship continues by operation of law. Over the past several years, many Township residents have become increasingly unhappy about what they perceive to be the Town's lack of responsiveness to the needs of their children and to the concerns of local taxpayers. This dissatisfaction "seems to come to a boiling point" every four or five years, and has been a recurrent theme in Township school elections. Not everyone in the Township shared this view, as indicated by outgoing board president Carl Allieri, father of five, who was pleased with his children's education and had "very good communications with the high school." In the election in April 1990, however, a slate of candidates pledged to ending the existing relationship won seats by a wide margin.

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[2]Enrollments at Boonton High School have declined about 19% from a base of 933 in 1985 to 755 in 1989. During the same five-year period, enrollments at Mountain Lakes High School declined by about 7.2% from 374 to 347.

Meanwhile, in late 1988, the Township had retained the services of Dr. Robert Savitt and his educational consulting firm of Guidelines, Inc. to prepare a feasibility study on the possibility of withdrawal.[3] Dr. Savitt submitted his report to the Township in mid-February 1989. Township board members visited the two high schools and a third high school also under consideration. On June 29,1989, the Township adopted a resolution declaring its intent to terminate its relationship with the Town and authorizing its representatives to negotiate a new agreement with Mountain Lakes. Ensuing negotiations culminated in the signing on December 7, 1989 of an executory contract with Mountain Lakes, subject to removal of "all barriers to implementation." On the same date, the Township passed a resolution instructing its attorney to initiate this litigation.

C. Reasons for Termination of the Existing Relationship

There is a dispute not only as to the adequacy of the Township's reasons for seeking termination but also as to the legal relevance of this question. While the Town contends that petitioner's actions are "arbitrary, capricious and unreasonable," the Township counters that the amended statute no longer permits inquiry into whether severance is justified by "good and sufficient reasons." Factual disagreements among the parties will be addressed at this juncture (Section III) and the legal arguments will be deferred until later (Section IV).

Township witnesses advanced numerous reasons why the present impasse had been reached. Basically, the reasons all centered on poor communication and lack of cooperation. Town, Township and Lincoln Park had established a tri-district "liaison committee" or "task force" comprised of the superintendents and at least two board members from each district. James Bolan, the Township's superintendent of schools for the last 23 years, recalled that past tri-district meetings had served no useful purpose and that the group was on the verge of disbanding. Two years ago, in June

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[3]Before filing an application with the Commissioner, "the district seeking to sever the relationship shall prepare and submit a feasibility study, consisidering the educational and financial implications for the sending and receiving districts, the impact on the quality of education received by pupils in each of the districts, and the effect on the racial composition of the pupil population of each of the districts." *N.J.S.A.* 18A:38-13.

1989, the group decided to meet more frequently and succeeded in drawing up a list of common priorities. Continuity was hampered by shifting membership resulting from changes in the Town's composition and the resignation of the Town's superintendent. Newer members forgot or ignored the priorities on which earlier members had agreed. Eventually, tri-district meetings degenerated into arguments among its members. Even when the group was able to come to a consensus, Bolan's experience was that "nothing ever happened anyway."

Similarly, Bolan vented his frustration at his inability to obtain necessary information about Boonton High School. Although he had maintained close personal and telephone contact with the Town's former superintendent,James Swalm, Bolan's rapport with Dr. Swalm's successor and other Town administrators was much less satisfactory.[4] In particular, Bolan complained that the high school principal, Robert Kane, did not always return his telephone calls. Kane himself admitted that he talks with the Lincoln Park superintendent "at least a hundred times a year" but with the Township superintendent "maybe two or three times a year." In his dealings with Kane, Dr. Savitt, the Township's educational consultant, sensed what he described as an "irritation" about efforts by parents and school administrators to gain more information.

Bolan also charged that school business administrator Joy Northrop failed to respond to his "numerous calls and letters" asking for important budgetary information. Letters which Bolan sent to Swalm seeking assistance in furnishing documents lend support to Bolan's version. Swalm verified that Bolan did not feel he was getting the information he required. Sometimes Swalm would have to intercede personally to "see if the information couldn't be provided."

One bone of contention is the inaccessibility of data broken down by individual district. Understandably, the sending district wanted to know its own children's scores on standardized tests and their post-graduation plans. Town records lumped such information together for the entire student body, obscuring exactly how well

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[4]The Town has had three superintendents in 12 years. Ruth Krawitz served from 1979 to 1984. Dr. James Swalm served from 1985 to 1989. Dr. Richard Sheely's term will be from 1989 to 1991.

the Township students as a group were faring. The Town did not regularly begin to keep separate records until after the Township had voted to terminate the relationship. Town witnesses did not deny this fact. Indeed, the Town argues that it was educationally beneficial to collect information only for the whole school rather than "for three separate entities." Such argument, however, confuses two different issues. Certainly it is a good thing that teachers at Boonton High School don't know or care which district a student happens to come from. As Dr. Savitt noted approvingly in his study, Township students attending Boonton High School appear to be totally integrated into the student body and "there was no evident labeling of these students as being from outside the district." But this does not relieve the Town of the responsibility to collate data for statistical purposes, so that Township residents can evaluate the appropriateness of the education received by their sons and daughters.

Another source of dissatisfaction is poor "articulation" or the insufficient coordination of curriculum between the upper and lower grades. Articulation of what is taught at the elementary and high school levels is important to provide continuity in instruction and to minimize unnecessary duplication. As far back as October 1986, Middle States Association of Colleges and Schools ("Middle States"), a non-governmental accreditation agency for secondary schools, had identified the need for greater articulation in the high school science department. Township consultant Dr. Robert Savitt faulted the Town for cooperating "only the most limited way in carrying out joint curriculum development and other articulation projects with the sending districts' elementary schools." Mountain Lakes' expert, Dr. Ronald Hyman, a professor at Rutger's Graduate School of Education, cited a recent example in which English teachers at a Boonton High School faculty meeting expressed "dismay" that some of the feeder elementary schools had already covered Shakespeare's *Romeo and Juliet* in their classes. Dr. Hyman was "shocked" that these teachers were only now beginning to realize the need for articulation, when it seemed to him "to be kind of late to start talking about articulation."

Genuine efforts to improve articulation have been few and far between. Ten years ago, in 1981, the three districts sent representatives to a summer session to develop curriculum goals and guidelines. In 1983, the districts conducted a joint summer workshop on writing skills. In 1986, the districts held a successful summer workshop to revise the mathematics curriculum. Since then, however, the districts

have stopped holding summer workshops, largely because they could not agree on a suitable topic. Very little has changed with respect to the science curriculum since Middle States rendered its report in 1986. Dorothy Allen, head of the science department at Boonton High School, had never seen her school's 1990 progress report to Middle States, which contains the modest claim that "sharing of pertinent information is being developed." Although the high school administration has invited Township teachers to attend in-service training lectures and to participate in regular departmental meetings, it failed to make any concerted attempt to involve them in revising the curriculum.

Township parents are justly concerned about the performance of Boonton High School students on college entrance exams and achievement tests. Many institutions of higher learning use student scores on the Scholastic Aptitude Test or SAT as a predictor of how well a particular individual is likely to do in college. Boonton High School students achieved a verbal mean score of 429 and a math mean score of 471 in 1989, compared to Mountain Lakes High School students' verbal mean of 507 and math mean of 566. Out of 22 high schools in Morris County, Boonton ranked near to the bottom at 18th on the verbal scale and 20th on the math scale. SAT scores for Boonton High School in 1988 were 461 verbal and 515 math, compared to Mountain Lake's 469 verbal and 544 math.

Much spirited debate revolved around the validity of using SAT scores to make generalizations about the quality of instruction offered at a particular school. Dr. Craig Richards, an associate professor at Columbia Teacher's College who served as the Town's educational consultant, testified that outside factors, such as family income and family education, "appear to have a significant influence on the test scores of students." To the extent that families in Mountain Lakes have higher incomes and are more highly educated, one might expect their children, in the aggregate, to do better on normed tests. School districts which encourage widespread participation by all students will generally fare less well than those districts in which only college-bound students take the test.

New Jersey's Education Department adopts a cautious approach to the problem, endorsing the position of the Educational Testing Service that SAT average scores "should not be used as a *single* indicator to compare or to rank districts, schools or teachers" while, at the same time, supporting public release of SAT data

"when they are among *a number of indicators* of school performance." (Emphasis added). *New Jersey School Report Card* (Nov. 1989). Insofar as the SAT has value in predicting a student's potential for college achievement, the Department points out that the "richness and depth of a school's curriculum as well as the quality of instruction help to develop students' readiness for higher education." *Ibid.* Even Dr. Richards, the Town's expert, recognized SAT scores as a valid measure of academic excellence in a separate study he prepared for another district.

Moreover, the Town cannot explain away its lower SAT scores simply by reference to socioeconomic differences. Other less affluent school districts, such as Pequanock High School, managed to achieve substantially higher scores. While clearly not dispositive on the quality issue, comparative SAT scores are one objective measure of the results that a particular school system is achieving.

Graduation requirements for high school students include passing of a state-mandated test, the High School Proficiency Test or HSPT, designed to measure mastery of minimum basic skills.[5] Unlike the SAT which is geared to college admissions, the HSPT has the more modest goal of testing what every high school student should know. On the whole, Boonton's success rate on the HSPT is unimpressive. Boonton's total test passing rate for ninth graders was less than 89% in 1989 and less than 93% in 1988, compared to Mountain Lakes' 100% passage rate in both years. County-wide, in 1989 Boonton ranked last of all 22 high schools.

Another area of disagreement involved the Township's perception that the Town failed to seek its input in major decision-making, especially with respect to school finances. On the other hand, the Town tended to portray the issue in terms of the Township's "adamant" opposition to paying its fair share of the reasonable costs of running the schools. During the mid-1980's, the two districts had engaged in protracted litigation about whether certain expense items were "current expenses" included in tuition rates charged to the Township, or "capital outlay" excluded from

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[5] *N.J.A.C.* 6:8-7.1(b) obligates local school districts to adopt graduation procedures which include "performing at or above the State minimum levels of pupil proficiency on the State-mandated High School Proficiency Test in reading, writing, and mathematics skills."

tuition rates. Although the law suit was never adjudicated on its merits, ultimately the parties entered into a settlement whereby the Town agreed to "refund" overcharges totaling more than $106,000.

More generally, the Township had a long-standing complaint that the estimated tuition rates would consistently understate the actual rates after final audit by the State, so that the Township unexpectedly "would wind up owing a great deal of money." School superintendent Bolan also resented the fact that the Town had sought tuition payment for a foreign exchange student temporarily residing in the Township, contrary to the common practice of not charging for foreign exchange students.

Against this backdrop of financial bickering, the Town embarked on an ambitious project of renovations to the high school physical plant, as outlined in a 1984 facilities study, which included: refurbishing several science laboratories; replacing the old roof on the building; providing handicapped access by the installation of chair lifts and elevators; completing work on sidewalks and curbing; upgrading an obsolete heating and ventilating system; and revamping damaged student lockers. All interested parties seem to agree on the necessity for these improvements. Lincoln Park, in fact, wanted the Town to add more science classrooms than originally planned. Nevertheless, the Township again complained that its residents had been denied any meaningful participation in the planning process. Township officials first learned of the renovation proposal by reading about it in local newspapers or in minutes of Town board meetings. At one point, Township board members walked out of a joint meeting, at which the architects described the details of proposed project, because the information was given "after the fact" and "they felt they should have been consulted during the input phase."

Initially, the project was to be funded by sale of bonds. In October 1987 Town voters approved a bond referendum, which included $1.9 million for renovations to the high school. At that time, receiving districts could include a proportional part of interest costs in tuition rates, but not any part of the principal payments. Afterwards, state regulations were amended so that a few receiving districts which derive a majority of their enrollment from other districts might pass along a portion of the

principal as well.[6] In an effort to take advantage of this change in the law, the Town held a second referendum to "decertify" the bond approval and launched a series of meetings with the other districts about the proposed switch to a lease purchase method of financing.

Predictably, the sending districts were outraged at what they regarded as the Town's "unilateral" decision to renege on the bond referendum which the voters had already approved. Even supporters of a continuing relationship, such as Lincoln Park's superintendent Robert Vitacco, acknowledged that it would "probably be an understatement" to say he was angry about lease purchase . Opposition to lease purchase was so strong that ultimately the Town decided to abandon the idea altogether and pay for most of the renovations without contribution from the sending districts. The Town's argument that the Township's net cost for both principal and interest would have averaged less than $30,000 per year for ten years cuts both ways. Given the past antagonisms and mutual distrust, it tells much about the Town's approach to dealing with its partners that it would risk increased resentment to save such a comparatively small sum.

I FIND that the Township has cogent reasons for wanting to terminate the existing sending-receiving relationship with the Town. Most of these reasons relate to the breakdown of good will and lingering mistrust between the parties. Specifically, they include: (1) poor communications among the two districts's respective board members, school administrators and teaching staff; (2) a persistent lack of cooperation and communication, extending to articulation of curriculum, textbook selection and exchange of information; (3) an absence of adequate consultation or involvement of the Township in the making of major decisions which affect Township children; (4) continuing financial disagreements, which implicate

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[6]Amendments to *N.J.A.C.* 6:20-3.1, effective April 4, 1988, created a "special building use charge" which includes "the actual amount expended for principal and interest on major repairs" or "the entire rental on a site or school building acquired by a lease purchase agreement." Proposed, 19 *N.J.R.* 1958(a) (Sept. 8, 1987); Adopted 20 *N.J.R.* 787(a) (March 10, 1988). Each sending district with more than ten percent of the enrollment in the program must adopt a resolution in support of the receiving district's entry into the lease purchase agreement or, alternatively, the receiving district must obtain the Commissioner's approval.

issues of fairness and equal distribution of tax burdens; and, (5) disappointing results on outcome measures of educational quality.

D. Benefits of a New Relationship with Mountain Lakes

Numerous benefits make Mountain Lakes High School an attractive alternative for Township students. Undeniably, Mountain Lakes offers its students a rigorous academic preparation for higher educational opportunities. As noted, its students perform exceedingly well on standardized measures of academic ability and accomplishment. Nearly 98% of the graduating class in 1989-90 went on to four or two-year colleges. That same year, not a single student at Mountain Lakes dropped out of high school. Mountain Lakes' administration appreciates that a great deal of what happens in school "cannot be easily measured" by test scores alone. Besides success in the classroom, the school achieves a high rate of student participation in a variety of extracurricular activities, including interscholastic athletics, student publications, language clubs, theater productions and musical events. Mountain Lakes also has a fine reputation for its availability of services for hearing impaired youngsters.

Equally important is the ethos or "tone" of Mountain Lakes High School, characterized by Dr. Hyman as a "commitment to excellence" amid surroundings that are "warm, cheerful and inviting." Dr. Hyman conducted a qualitative survey of tuition-paying Township students currently attending Mountain Lakes High School, who, after all, are the consumers of educational services. Incoming students "felt good about being welcomed" at Mountain Lakes and had a sense of being "totally accepted by resident students." One pupil praised the intimate family-like atmosphere, where "teachers know who you are even if you are not in their classes." Another liked that "[y]ou can go up to a teacher and just talk about things that are on your mind." Teachers take a personal interest in each individual's progress, and students believe that "[w]e do well here because the teachers don't let us fail." Others remarked that "[i]t's o.k. to be smart and do well in your subjects" and "you're not considered a nerd if you get all A's here."

Any successful sending-receiving relationship depends on trust and good will more than on paper promises or formal guarantees. Local districts joined together in such cooperative venture want a smooth working relationship and not the right

to sue each other for breach of contract. Nonetheless, in an effort to avoid future misunderstandings and promote open lines of communication, the Township and Mountain Lakes have entered into a written ten-year agreement carefully spelling out each parties' rights and responsibilities in the event that the Commissioner should approve a new sending-receiving relationship.

Many of the concerns which the Township has regarding its current relationship with the Town are addressed in this comprehensive document. Illustratively, the agreement provides for adequate prior notice of all "decisions and actions potentially affecting the high school or the Boonton Township students;" establishes annual "joint planning sessions" to coordinate program articulation between the two districts; and ensures that curriculum development and review will be "conducted by members of the administration, teaching and guidance staffs from both sending and receiving schools[.]" Mountain Lakes agrees to implement reasonable program changes to meet Township pupils' instructional needs and seeks to anticipate potential areas of need, such as an expansion of guidance services and business course offerings.

The agreement goes so far as to give the Township a non-voting seat on the Mountain Lakes Board of Education, membership on the high school textbook selection committee, and a voice in filling any vacancies which might occur in Mountain Lakes superintendency or high school principalship. As an added incentive, Mountain Lakes also offers a discount on tuition rates for the initial six years.[7] Instead of charging the actual per pupil costs as determined by state formula, tuition would be 20% less than actual costs for the first year, 15% less for the second year, 10% less for the third year, 5% less for the fourth year and $200 less per pupil for the fifth and sixth years. Thereafter, the no discount applies and the rates are set at actual per pupil costs.

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[7]Interestingly, the economics of this arrangement would be mutually advantageous to both districts. State statute places a ceiling but no floor on the amount of tuition which may charged for pupils attending public schools in another district. *N.J.S.A.* 18A:38-19 allows the receiving district to charge a maximum amount not in excess of "the actual cost per pupil." Since Mountain Lakes already incurs high fixed costs to educate its own children, the marginal cost of educating one more child is less than the average per pupil cost. Many school districts are scrambling to fill up their empty seats.

I FIND that the Township would derive many genuine benefits from the proposed linkage with Mountain Lakes. Among such benefits are a top notch academic program, a supportive and nurturant school culture, a wide array of extracurricular activities, greater responsiveness to the interests of the sending district, a willingness to listen on the part of Mountain Lakes officials, and, at least temporarily, a savings from the actual costs of educating Township students.

E. Projections of Future Enrollment

Accurate enrollment projections are important in assessing the impact of the proposed withdrawal on educational quality and financial condition. Expert witnesses differed in their estimates of the expected loss of students at Boonton High School if severance were granted. Not surprisingly, the Township's demographic expert projected a smaller loss and, hence, a lesser impact, whereas the Town's expect projected a somewhat larger loss and a greater impact. While both sides used a similar methodology, they made different underlying assumptions about what historical data to use.[8] Five years into the future in September 1995, the expected loss would be a total of 40 Township students under the Township's assumptions or 82 under the Town's assumptions, leaving a remaining student enrollment of 672 or 608, respectively, at Boonton High School.

Dr. Emmanual Averbach, who performed the Township's enrollment projections, has much more experience than Dr. Richards, who made the Town's calculations. Dr. Averbach has done about 75 demographic studies for school districts, while Dr. Richards has worked on only two such studies, one of which was predicated on enrollment projections supplied by others. Differences in their projections result from differences in their assumptions. Although Dr. Averbach actually made three sets of calculations using from two to five years of historical data, his "best estimate" is based on three years of data or two ratios to obtain a

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[8]Both sides employ the "cohort survival ratio" method, which predicts future enrollment by tracking the historical progression of the same class of students from grade to grade.

"trend."[9] Dr. Richards used five years of historical data or four ratios. In making his projections, Dr. Averbach used the most recent figures showing actual enrollment as of October 1990, while Dr. Richards relied on older data from 1989. Lastly, both experts assume that any severance would be phased-in over a four year period, but Dr. Averbach starts with the entering ninth grade class in September 1991 while Dr. Richards starts with September 1990.

Forecasting of future enrollment patterns is an art as much as an exact science. No recognized standard exists on how many years of historical data must be utilized, although both experts agree that enrollment projections are traditionally based on at least five years of past data.[10] Dr. Richards acknowledged, however, that issue of how much data to use is "complicated," and that where to draw the line is "a judgment call." Each expert presented plausible arguments for why his choice best approximates current population trends. In particular, Dr. Averbach defended his selection of three years of data by reference to the declining birth rate and a slump in residential housing market, which translates into an expectation of less population growth than during the "ebullient psychology" of the mid-1980s.

Significantly, Dr. Richards did not contradict Dr. Averbach's assertion that the "go-go" economic conditions of last decade "are not likely to be seen again for a substantial period of time." Yet, Dr. Richards believes that it is "fairly risky" to project more years into the future than the number of past years of data, especially when dealing with very small numerical samples. When enrollment in a particular

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[9]Additionally, the Township's educational consultant, Dr. Savitt, made a rough enrollment estimate, using a different technique described as the "push up" method. While the details of his methodology are somewhat vague, he "did not go through the whole process of cohort survival," but looked only at how many children attending the Township public schools would be phased out in the next four years. Even though he predicted a greater loss than did either of the two other experts, a total of 100 students by September 1993, he still opined that the negative impact of the Township's withdrawal would not be substantial.

[10]*N.J.A.C.* 6:3-3.1(a), dealing with the analogous situation of withdrawal from a limited purpose regional school district, requires submission of projected enrollments "based" on growth factors using averages percentages for the last three school years. However, the Department's cohort survival worksheets have room for seven years of data or six ratios.

grade is unusually low, a loss of only a few students in any one year has a "disproportionate influence" on future projections. As examples of what he termed "unusual events" or "anomolies," Dr. Richards pointed to the loss of nine out of 27 Township students in the entering ninth grade class of 1990, which produces a survival ratio of .67, or the loss of three out of 15 students in the entering ninth grade class of 1989, which produces a ratio of .80. Because of such "statistical aberrations," Dr. Richards believes that the use of three years of data distorts the true picture in the long-run.

Dr. Richards is on shaky ground when he speculates that the recent "sharp drop" in Township students attending Boonton High School might be due to "[adverse] publicity surrounding the conflict between the two school systems" and that some "very sharp" parents may be pulling their children out of Boonton in anticipation of the Township winning this litigation.[11] To the contrary, the impression conveyed by the record as a whole is that the declining enrollment within the last two years is a symptom rather than a cause of parental dissatisfaction. Notably, Bolan testified that many Township parents "feel [their children] will get a better education going elsewhere" and are exploring other alternatives, such as private or parochial schools, as well as Mountain Lakes.

Additionally, Dr. Richards contends that "errors" in the use of the 1990 actual enrollment data contaminate Dr. Averbach's results. It turns out that the single "error" was a reversal or transposition of the number of "shared students," so that the total number from Lincoln Park is understated by 28 students and the number from the Town is overstated by a corresponding amount. [12] At one point, Dr.

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[11]In actuality, there is no incentive for doing so. If severance is granted, it would be phased-in prospectively over four years, starting with future ninth graders. Any student currently assigned to Boonton High School would remain through graduation, unless his family is willing to pay to send their child somewhere else. Parents who jump the gun by sending their children to Mountain Lakes would not derive any financial advantage. In other words, parents who remove their children prematurely do not achieve any priority over parents who do not.

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[12]"Shared students" spend part-time in academic courses at the high school and part-time in vocational instruction or training at an off-site location.

Richards was unable to say whether this error would serve to minimize or magnify any potential negative impact. At another point, he conceded that the numbers "counterbalance" each other. In any event, he agreed that Dr. Averbach utilized the correct 1990 actual figures for the Township enrollment and for total enrollment from all three districts. While the transposed numbers may affect predictions of the allocation of tuition costs between the Town and Lincoln Park, they have no bearing on projected losses resulting from the Township's withdrawal.

I FIND that Dr. Averbach's approach of using the latest three years of data most accurately mirrors current housing patterns, vital statistics and parental choices. Dr. Richards failed to consider the best available data and assumed a continuation of earlier–conditions less likely to be repeated in the foreseeable future. His trivialization of the decline in enrollment for the last two years as an "abberation" betrays an unrealistic expectation of the direction in which future enrollment is heading.

F. Substantial Negative Impacts of Termination

(1) Impact on Quality of Education

Two aspects of the educational impact of the withdrawal must be examined: first, the impact on Town and Lincoln Park students who would remain at Boonton High School; and, second, the impact on Township students who would move to Mountain Lakes.

Presently, Boonton High School offers a menu of course selections in all types of subjects and at all achievement levels. In 1989-90, for example, Boonton offered 289 separate classes or sections, comparable to districts with twice its enrollment. Programmatic reductions at Boonton High School which might be necessitated by withdrawal of the Township would be felt most heavily in low enrollment courses, where there is less student demand. Dr. Richards endeavored to quantify the possible impact by looking at classes of 15 or less students and arrived at the dire prospect that some 39 courses, including advanced placement, high honors, foreign language, and fine arts selections, will be "entirely eliminated" if 82 Township students are allowed to leave by 1995. In the worst case scenario, Dr. Richards predicted that "as many as 71 sections would be lost." Even in Dr. Richards'

pessimistic outlook, only one-third of the anticipated reduction in course offerings would actually be due to the withdrawal of Township students and two-thirds will occur due to normal attrition, regardless of whether the Township stays or leaves.

In addition to inflated enrollment projections, Dr. Richards' report contains other flaws which greatly exaggerate the negative effect of the Township's withdrawal. In the first place, Dr. Richards uses 15 students as the cutoff point for keeping a class, whereas the Town's own documents disclose that its practice has been to discontinue classes only when enrollment drops below eight. Important enough classes have been offered for less than eight students. Professor Hyman of Rutgers University regards a cutoff point of 15 as "highly questionable" and criticizes Dr. Richards for giving "no rationale for using this number." Looking at actual enrollments, Dr. Hyman determined that "if all the Boonton Township 9th grade students were to withdraw as of the 1990-91 school year, the only course to fall below 8 would be General Math, which is already averaging below 8 and did so last year, 1989-90, as well." Dr. Hyman concluded that "[i]n all other courses selected by 9th grade Boonton Township students, the withdrawal would not leave fewer than 15 students remaining, let alone 8 students."

Moreover, Dr. Richard's predictions rely on the false premise that Boonton Township students are now the constituent core of the enrollment of these courses. However, enrollment losses are unlikely to be concentrated in any one particular course because, as reported by guidance counselor Lois Branch, Township students are evenly distributed throughout all ability levels. Dr. Hyman posits that complete withdrawal of all Township students "represents a fairly insignificant portion of these [low enrollment] classes," except for high honors algebra and Spanish IV. This assessment is consistent with interviews of Town teachers, who confided to Dr. Hyman that "since Township students have a range of abilities and achievements, no special classes would be affected [by a withdrawal.]" Independently, two groups of teachers told Dr. Hyman that the only probable impact is "We would lose about 90 students. That's all." They foresaw no significant loss in curricular offerings.

Curiously, the major thrust of the Town's proofs on this issue dealt not with its own interests, but with the supposed adverse impact on other people's children. Dr. Richards argues that Township students would suffer from "significantly fewer academic and vocational opportunities" at Mountain Lakes High School.[13] Couched simplistically in terms of course listings, the differences between the two high schools actually stem from differing educational philosophies. Booton follows a "leveling" or ability grouping approach, offering regular, honors and high honors sections for students with varying academic capabilities and motivation. Mountain Lakes places greater emphasis on strong college preparation and has a fewer number of choices for vocational or business-oriented students.

Both Dr. Savitt and Dr.Richards engaged in "course counting." Purely in terms of numbers, Boonton High School comes out ahead. By Dr. Savitt's count, Boonton High School offered a total of 148 full year courses in 1988-89, while Mountain Lakes offered only 59. Likewise, Dr. Richards counted courses taught in 1989-90 and found that Boonton had two-and-a-half times as many English and social studies courses, twice as many mathematics and music courses, one-and-a half as many science courses, seven times as many art courses and five times as many industrial arts courses. In highly specialized areas, Boonton offers electives for which Mountain Lakes has no equivalent, such as Italian, jazz ensemble or psychology. Clearly the number of course offerings is no guaranty of successful learning. Notwithstanding Dr. Richards' calculation that Boonton offers a greater number of advanced placement classes, Mountain Lakes students are more successful in earning advanced placement college credits.

Meaningful comparison of programs based on titles or brief course descriptions is exceedingly difficult. Within the confines of their limited studies, neither expert

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[13]Concern about the breadth of Mountain Lakes's curriculum is not new. As early as 1980, Middle States recommended that Mountain Lakes "explore ways of relating its curriculum to less able students." Initially, Dr. Savitt harbored his own reservations about the comprehensiveness of Mountain Lakes' program and the need for "additional specialized courses" to accomodate the non-college bound student. In his updated report, however, Dr. Savitt was satisfied with Mountain Lakes' eagerness to expand its course selections for the benefit not only of Township students but its own residents as well.

attempted to evaluate the scope or adequacy of course content. Skills or subjects covered under one title in one district may be covered under a different title in the other, such as "banking and finance" which Boonton treats as a separate entity and Mountain Lakes includes as part of its "business mathematics" course. Douglas Lyons, Mountain Lakes' superintendent, expressed confidence that his district incorporates the same range of intellectual functioning in a fewer course selections. Comprehensiveness, in the modern sense that Dr. Lyons uses that term, means teaching communication and computation skills which have "transfer value," regardless of whether the students "choose college or trade school or employment."

Philosophically, Dr. Lyons is critical of what he regards as excessive "tracking" of students by Boonton. For instance, Boonton identifies five separate "levels of rigor" for American Literature, as opposed to Mountain Lakes which offers only one regular and one honors section. Dr. Lyons believes that Boonton's "fine-tuned" distinctions result in labeling children as "deficient" and in restricting upward mobility. Children stuck in lower tracks are consigned to "far less stimulating" learning environments. Overly rigid tracking also deprives more able students of the opportunity for valuable social interaction with classmates of differing talents. Even if Mountain Lakes had a larger enrollment base, Dr. Lyons would still resist unnecessary stratification.

Point by point, Dr. Lyons refuted the charge that Mountain Lakes' existing curriculum is unsuited for the Township's more diverse student body. Since the Town's attack focused on opportunities for non-college bound students, Dr. Lyons paid particular attention to industrial arts, business education and home economics offerings.- Only 8 Township students now at Boonton are taking industrial arts courses, most of whom have elected basic courses like mechanical drawing or woodworking which are also available at Mountain Lakes.[14] Sixteen Township juniors or seniors are enrolled in business courses, the majority in first-year accounting which is taught at Mountain Lakes as well. Mountain Lakes wants to

[14]Students interested in pursuing a vocational career can attend Morris County Vocational-Technical School, which boasts more skilled trade and technical occupational opportunities than any single district could offer on its own.

broaden its business offerings for resident students, and Dr. Lyons divulged that "one of the reasons why the introduction of another population is attractive to us, is because . . . with increased numbers there well be increased elective opportunities for all kids, including our own." Similarly, sixteen Township students take home economics subjects at Boonton, primarily a "foods course" also given at Mountain Lakes.

Dr. Lyons also rebutted the charge that large numbers of single course offerings at Mountain Lakes would cause scheduling conflicts for Township students. School guidance counselors, assisted by an outside computer company, generate a matrix which maximizes students' first choices. Qualified students never miss out on advanced placement courses, although some individuals may have to choose a different elective.

I **FIND** that Township students are widely distributed among different classes at Boonton and their departure, phased over a four-year period, would not have a substantial negative impact on the Township's continuing ability to offer its students a wide variety of courses. Dr. Hyman's assessment that few, if any, courses are genuinely threatened is more reliable than Dr. Richards' alarmist view.

Mountain Lakes and Boonton are both good schools, capable of delivering a thorough and efficient education to their students. Each has its particular virtues and strengths. Mountain Lakes has an especially strong academic program, while Boonton has more vocational and career opportunities. However, Mountain Lakes presently meets the needs of all its students, including those less academically motivated, and is sincerely willing to add additional courses to accomodate Township students. Nothing on the record indicates that Mountain Lakes would be unable to provide educational benefit to all types of students. In the final analysis, the Township community, through its elected representatives, must decide which philosophical approach is best suited for the majority of its residents.

(2) Impact on Financial Conditions

Both sides presented testimony by equally knowledgeable experts in the field of school finance. The Town called Vincent B. Calabrese, retired assistant commissioner of education who was the state official directly responsible for

supervision of school financial matters. The Town called Ronald E. Burgess, a licensed attorney who works for a certified public accounting firm specializing in municipal and school audits. Although the experts applied a similar methodology to project future high school costs and municipal tax bases, they came to ~~strikingly~~ different conclusions about the tax impact on the average homeowner. Neither expert, incidentally, felt comfortable about expressing any opinion on the probable effect of Quality Education Act of 1990, popularly known as "QEA." Thus, the financial impact analysis has an air of unreality about it, since no one was prepared to say definitively whether the affected districts will be losing state financial aid and, if so, whether local taxpayers will be expected to make up the difference.[15]

Taxpayers are interested in the bottom line, as measured by the total annual increase in taxes. Under Calabrese's calculations, the yearly tax bill for the average homeowner in the first full year of implementation (1994-95) would increase by $112 for a Town resident and $80 for a Lincoln Park resident. Burgess' calculation for the same year is about half as much, or $69 for a Town resident and $41 for a Lincoln Park resident. Their differences are attributable to variations in their underlying data, primarily the use of different enrollment projections. Calabrese relied on the less accurate four-ratio projections of Dr. Richards, while Burgess adopted the more trustworthy two-ratio projections of Dr. Averbach. Also, Calabrese used "assessed valuation" in his computations, while Burgess used "net valuation taxable" which resulted in slightly higher ratables because it included the value of a telephone company installation in Boonton Town.

Assuming the correctness of his own figures, Calabrese was forced to concede, nevertheless, that the financial impact of the anticipated loss of tuition would be minimal. During his deposition, Calabrese admitted that his predicted loss of $246,000 in comparison to a budget totaling $12.6 million would produce no impact

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[15]Shortly after the last hearing date, the Legislature amended the school funding law by enactment of legislation dubbed "QEA II." *L.* 1991, c. 3230 (effective March 14, 1991). The revised law reduced appropriations to the 30 special needs districts, earmarked certain revenue for property tax relief and put new limitations or caps on local school spending. Further refinements to the school funding mechanism are likely to follow. *See* Bird, *Abbott Lawyer Set to Challenge QEA Overhaul*, 127 *N.J.L.J.* 811 (March 28, 1991).

"statistically." In fact, he went on to indicate that any impact would be largely "emotional," because taxes might have to be raised. Subsequently, he tried to rehabilitate his position by explaining that the largest portion of any school budget consists of fixed costs which are difficult to cut. Candidly, however, he acknowledged that, "I can't sit here and tell you it's [referring to the tuition loss] of major significance in cost." At the hearing itself, Calabrese reiterated that a loss of some $300,000 out of ten or twelve million "would not be significant" in terms of the total budget.

Importantly, Calabrese failed to consider potential cost-savings to the Town which could be realized from no longer having to educate Township children. Contrary to the Town's other expert, Dr. Richards, who had predicted a drastic cutback of course offerings, Calabrese saw no immediate reduction in teaching staff and "little, if any, impact on the educational program." Based on 40 years of practical experience, Calabrese testified that "it is highly unlikely with the small number of students leaving a high school that there would be major reductions[.]" For his part, Dr. Richards also did not make any allowance for cost- savings, although in another case study he had envisioned savings of $64,000 in teachers' salaries from a loss of about 60 students.

Proponents of severance argue that the Town could "absorb" any negative financial impact by expending the accumulated surplus in its current expense budget. Testimony differed radically as to the magnitude of the Town's budget surplus at any particular moment, with Burgess talking about a surplus of $577,714 at the end of June 1990 and Calabrese about $287,883 at the start of July 1990. As a rule of thumb, both financial experts agreed that it is reasonable for a local school district to maintain at least 3% of its expense budget in a contingency fund for emergencies or unexpected expenses. If Calabrese's recent information is correct, then the Town's surplus is well within 3% of its 1990-91 current expense budget. In any case, Burgess' proposition that surplus could be exhausted to cushion any negative impact is highly dubious, since it would be a one-shot answer and not a permanent solution.

At the conclusion of petitioner's proofs, the Town made a big point of the Township's alleged failure to quantify future tuition costs for sending students to Mountain Lakes.[16] Contending that the temporary discount "masks" the real costs of Mountain Lakes tuition rates, the Town accuses the Township of having failed to make an informed judgment on the financial implications of the move. On behalf of the Town, Calabrese calculated that by 1994-95 tuition rates will be $13,854 at Mountain Lakes versus $11,083 at Boonton, which translates into an additional $183 on the average Township homeowner's tax bill. Once more, Calabrese relied on Dr. Richard's inflated enrollment projections in performing his calculations.

Admittedly, Burgess was never asked by his client to explore Mountain Lakes future tuition rates or analyze the impact on Township taxes. However, Dr. Savitt's feasibility study contains a chart purportedly showing that Mountain Lakes' actual tuition rates were lower than the Town's rates in two out of three past years. Dr. Savitt used the best figures available at the time, which were the tentative or unaudited rates for the two later years. Calabrese used more recent cost reports and state-certified rates for all but the last year, and recalculated that Mountain Lakes' rates were higher in all three prior years, by $720 in 1989-90; by $307 in 1988-89; and by $379 in 1987-88.

I FIND that the negligible tax increases due to severance would not have a substantial negative impact on the financial condition of any affected district. Because Calabrese's long-range extrapolations are tainted by his acceptance of Dr. Richards' enrollment figures, Burgess' estimate of the probable tax impact on Town and Lincoln Park is closer to the truth. But even if Calabrese is right, the small increase for an average homeowner by 1994-95, amounting to less than 31 cents per day for the Town and 22 cents per day for Lincoln Park, is minuscule in relation to a

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[16] *N.J.S.A.* 18A:38-13 obligates the district seeking severance to prepare a comprehensive feasibility study, embracing an analysis of the "financial implications for the *sending* and receiving districts." (Emphasis added). Departmental guidelines provide that a feasibility study should include the impact on the tax rate of the communities involved and the "change in tuition costs for sending districts." *N.J. Dept. of Educ. Internal Memorandum to County Superintendents*, dated March 9, 1988.

multi-million dollar budget. Viewed sympathetically, Calabrese's testimony does not support any other finding.

Per-pupil tuition rates may be somewhat cheaper at Town than at Mountain Lakes, but the difference must be considered in terms of value received for each educational dollar spent. Township leaders are justified in concluding that they would get more for their money at Mountain Lakes. Unequivocally, the Township would obtain the benefit of below-cost tuition rates for the next six years.

(3) Impact on Racial Composition

Enrollment reports for October 15, 1990 record that Boonton High School has 22 African American students, 26 Hispanic students and 49 Asian students out of a total enrollment of 729. Together, African American and Hispanic students constitute about 6.5% of the total student population. If the 49 Asian students at Boonton are also counted, the percentage of minority students is 13%. On the same date, Mountain Lakes High School reported 2 African American students and 19 Asian students in a total school population of 412. Accordingly, African Americans constitute less than half of one percent of the student body and the entire minority population is about 5%. Bluntly, as Mountain Lakes acknowledged in its brief, "both districts are racially segregated."

Withdrawal of the Township's virtually all white block of students would, under Dr. Richards' overblown projections, increase Boonton High School's minority population to just over 14% by 1994. Without withdrawal, Dr. Richards projects that Boonton High School's minority population would remain at around 12% by 1994. No one, not even Dr. Richards, contends that this difference has any real significance. During direct examination, Dr. Richards testified that, in his estimation, the slight change would not have a substantial negative impact on racial balance at Boonton High School.

Again, the Town places greater emphasis on departing Township children than on remaining Town and Lincoln Park children. Unable to find any substantial racial impact at the home school, Dr. Richards ventured the opinion that Township students would encounter increased "racial isolation" at Mountain Lakes. Apart from the obvious fact that smaller numbers of minority students attend Mountain

Lakes, Dr. Richards does not provide any supporting research for his conclusion, such as a comparison of racial attitudes at the two schools or proof that minority students are more readily accepted and better integrated at predominantly white Boonton High School.

Between the two districts, the evidence suggests that Mountain Lakes is more keenly conscious of its limitations and has taken greater measures to teach its students respect for other ethnic groups and the value of racial understanding. Aware of the need for cooperative learning experiences, Mountain Lakes has inaugurated a voluntary activity, known as "The Paterson Connection." Mountain Lakes students and their teachers participate in an exchange program with an urban sister school system in the City of Paterson, involving visits to each other's schools, jointly planned field trips and attendance at social functions. Recently, Mountain Lakes students were guests at a school for the performing arts in Paterson. Inner city students from Paterson also recently spent a day at Mountain Lakes High School. Interest in the program is growing in both communities, and new friendships are beginning to be forged.

I FIND that race is simply not a major factor in whether or not to allow severance. Both high schools have large white majorities and will continue to do so, whatever the outcome of this case. The Town presented no expert evidence of any substantial negative impact on the racial composition of Boonton High School. While the evidence is hardly conclusive, what little does exist indicates that Township students at Mountain Lakes would benefit from the enlightened leadership which takes a more active role in promoting social interchange, by minimizing artificial divisions within the school itself and by encouraging broader contacts with the outside world.

IV. Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the requested change in designation of the receiving district will not result in any substantial negative impact and, therefore, should be granted.

Existing sending-receiving relationships at the high school level cannot be "changed or withdrawn . . . except upon application made to and approved by the [C]ommissioner." *N.J.S.A.* 18A:38-13. *See Merchantville Bd. of Educ. v. Pennsauken Bd. of Educ.* 204 *N.J. Super.* 508 (App. Div. 1985). Effective November 24, 1986, the governing statute was amended to modify the standard to be applied by the Commissioner when considering requests to alter or terminate sending-receiving relationships.

As noted in *Englewood Cliffs Bd. of Educ. v. Englewood Bd. of Educ.*, 12 *N.J.A.R.* 566, 622, adopted (Comm'r July 11, 1988), modified (St. Bd. April 4, 1990), appeal docketed No. A4912-89T5 (N.J. App. Div. May 17, 1990), the amendment to *N.J.S.A.* 18A:38-13 deleted language of the predecessor statute, which had conditioned the Commissioner's approval upon a showing of "good and sufficient reason. " In its place, the new statute substituted a provision that the Commissioner "shall grant the requested change . . . if no substantial negative impact will result therefrom." The amendment also added a new statutory standard:

> The [C]ommissioner shall make equitable determination based upon consideration of all the circumstances, including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils and the effect on the racial composition of the pupil population of the districts.

Case law has begun to interpret the meaning of this new language as applied to specific factual situations. In *Englewood*, the State Board observed that " the Legislature, however, further altered the statute so as to *require* the Commissioner to grant termination if he finds, after consideration of all circumstances, including the effect of severance on the racial composition of the pupil populations of the districts, that 'no substantial negative impact will result therefrom.' " (Emphasis in the original). 12 *N.J.A.R.* at 664, n. 1.

At first, it appeared that a finding of substantial negative impact in any one of the three areas enumerated in the statute would be enough to preclude severance. Thus, in *Belmar Bd. of Educ. v. Asbury Park Bd. of Educ.*, OAL Dkt. No. EDU 3773-87 (April 14, 1989), adopted No. 171-89 (Comm'r June 29, 1989), appeal docketed No. 42-89 (St. Bd. June 28, 1989), the Commissioner rejected the argument that the new statute requires a balancing of the three separate factors. Instead, the Commissioner ruled that "the presence of any one such factor, if found to be significantly negative, constitutes cause for denial of the application." (slip op. at 96-97). However, the ruling was never put to practical use, since the Commissioner actually found substantial negative impacts in two of the three areas.

The latest and most authoritative interpretation of the new legal standard arose in the context of an interlocutory appeal to the State Board from an evidentiary ruling on burdens of proof. Recently, in *Merchantville Bd. of Educ. v. Pennsauken Bd. of Educ.*, No. 78-89 (St. Bd. Sept. 7, 1990), the State Board backed away from the Commissioner's single-impact test and moved in the direction of a balancing test. "While requiring that termination be granted where there will be no substantial negative impact, the terms of the statute do not mandate that the Commissioner deny termination where the proceedings establish that a negative impact, even a substantial negative impact, will result. Thus, termination may be granted where negative impact will result in some area but such impact is outweighed by the benefits that will result from the change sought." *Merchantville,* at 4.

Since the advent of the new statute, the sending district no longer must show a good and sufficient reason for termination. *Merchantville*, at 3. Nevertheless, it deserves mention that the Township did not act arbitrarily and unreasonably in seeking a change of its designated receiving district. Unfortunately, the primary impetus for the switch came when the Town started to take the Township for granted and ignored its requests for a more equal partnership.

Legislative declarations embodied in *N.J.S.A.* 18A:7A-2 provide for "citizen involvement in educational matters" and for a public school system "which guarantees and encourages local participation." Receiving districts must be attuned to the legitimate interests of the sending districts which they serve. After all, the

receiving district does not possess "a statutory right to continue as the receiving district for a particular sending district indefinitely or to perpetuity." *Cranbury Bd. of Educ. v. Lawrence Bd. of Educ.*, No. 95-85 (St. Bd. April 1, 1987) (at 9), appeal dismissed, No. A-4253-86T1 (N.J. App. Div. 22, 1988). Accord, *Washington Twp. Bd. of Educ. v. Upper Freehold Bd. of Ed.*, No. 178-89 (Comm'r June 27, 1989). This is important because sending districts lack direct representation on the corporate body in control of the high school. Citizens of the sending district do not vote for members of the school board which operates the high school, as they would in a typical Type II elected school district, *N.J.S.A.* 18A:12-11; or for the mayor who appoints the board members, as they would in a Type I appointive school district, *N.J.S.A.* 18A:12-7; or for members of an apportioned board of education, as they would in a regional school district, *N.J.S.A.* 18A:13-10. They must depend entirely on the good will and responsiveness of school board members whom they do not elect.

Under the revised statute, the outcome turns on an analysis of the negative impacts. What makes this case unique is the Town's heavy emphasis on the supposed harm to the withdrawing students. There is a hollow ring to the Town's assertion that it knows better about the educational needs of other people's children and about saving other people's tax dollars. Absent unusual circumstances or overriding social policy, it is preferable in a democratic society to let local people decide for themselves how their children should be educated and how their tax money should be spent. Ordinarily, one would expect the receiving district to come forward with proofs that the harm to those left behind would outweigh the anticipated benefit to those who leave. Here the Town took the opposite tack and unsuccessfully tried to show that Township children would suffer if forced to attend Mountain Lakes' excellent public high school.

Even in more conventional terms, the Town does not make a convincing case for denial of severance. Educational impact on the Town would not be appreciably worse than in *Cranbury,* where the loss of some 90 students scattered throughout different classes was deemed to have no impact on the number of future course offerings, or *Washington Twp.*, where the courses had sufficient enrollment "to continue even if Washington Township withdrew all at once." (slip op. at 21). Boonton is not in any risk of being abandoned by white students and relegated to permanent minority status, as distinguished from *Englewood* and *Asbury Park* where termination was disallowed in order to preserve racial balance. Some increased costs as a result of withdrawal may be unavoidable, but the Town's own

expert acknowledged that the additional tax burden would not be substantial. Furthermore, the statutory scheme was never intended to create a revenue source for receiving districts or protect them from tax increases. *Washington Twp.*, at 47. Balancing of the equities is superfluous, there being nothing to tip the scales in favor of the existing relationship. In short, the Town has failed to establish any substantial negative impact, so the case falls into the category where the Commissioner must grant the requested change.

Order

It is **ORDERED** that the Township is hereby authorized to terminate its existing sending-receiving relationship with the Town, subject to the following two conditions:

(1) The Township must enter into a contract for a new sending-receiving relationship with Mountain Lakes for a minimum duration of five years; and,

(2) Withdrawal shall be phased-out over a four year period, starting with the incoming ninth grade class in September 1992, the 10th grade class in September 1993, the 11th grade class in September 1994 and the 12th grade class in September 1995.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Oct. 31, 1991
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

11/1/91
Date

Maureen Killion
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 4 1991
Date

Jayne L. Wechsler
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

List of Witnesses

Petitioner's Witnesses

1. James Bolan, superintendent of schools, Boonton Township school district

2. Maureen Nyman, board member, Boonton Township Board of Education

3. Dr. Emanuel Averbach, consultant in demography and enrollment projections, Averbach & Associates

4. Dr. Robert F. Savitt, consultant in school administration and management, Guidelines Incorporated

5. Ronald E. Burgess, consultant in school finances, Seaman & Company

Respondent's Witnesses

6. Dr. Craig E. Richards, consultant in school administration and management, Richards & Associates Consulting Services

7. Dorothy Allen, science department chair, Boonton Town school district

8. Alfred Tagliabue, director of special services, Boonton Town school district

9. Dr. James Swalm, former superintendent of schools, Boonton Town school district

10. Thomas R. Curtin, Esq.

11. Robert R. Vitacco, superintendent of schools, Lincoln Park school district

12. Vincent B. Calabrese, consultant in school finances

13. Josephine Washburn, parent and resident of Boonton Township

14. Carl Allieri, parent and past president, Boonton Township Board of Education

15. Joy Northrop, business administrator and board secretary, Boonton Town school district

16. Lois Branch, director of guidance, Boonton Town school district

17. Robert Kane, high school principal, Boonton Town school district

Cross-Respondent's Witnesses

7. Dr. Ronald Hyman, consultant in school administration and curriculum, Rutgers Graduate School of Education

8. Dr. Douglas Lyons, superintendent of schools, Mountain Lakes school district

OAL DKT. NO. EDU 1092-90

BOARD OF EDUCATION OF THE TOWNSHIP OF BOONTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BOONTON AND BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have reviewed. The Town of Boonton (hereinafter Town) filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Township of Boonton (hereinafter Township) and the Borough of Mountain Lakes (hereinafter Lakes) filed timely reply exceptions.

Town cites five exceptions to the initial decision, the first of which claims that Township failed to address, in both its feasibility study and in its proofs, the financial impact of withdrawal from its sending-receiving relationship with Town, Lakes and Lincoln Park, (hereinafter Park), thus requiring that termination should be denied. In the alternative, petitioner seeks a remand of the matter to the ALJ to determine financial impact on all the districts in a quantitative manner.

Because Town's first exceptions raise a fundamental procedural issue relating to the burdens of persuasion and proof in this sending-receiving termination matter, the Commissioner will consider it before proceeding to the other exceptions. The State Board of Education in the case captioned Board of Education of the Borough of Merchantville v. Board of Education of the Township of Pennsauken, Camden County v. Board of Education of the Borough of Haddonfield, Camden County, Decision on Motion by the Commissioner of Education, November 13, 1989, decision of State Board of Education, September 5, 1990 has clearly delineated the shifting burdens of production in such cases as the one at bar. Therein the State Board made plain that N.J.S.A. 18A:38-13 requires as a prerequisite to applying for termination that the petitioning district, in this case Township, prepare and submit a feasibility study which considers, inter alia: "***2) the financial implications of termination *** of each district involved." (Slip Opinion, at p. 4) (emphasis supplied)

The State Board further explained that "*** it is crucial that the record produced by the proceedings provide a sufficient basis upon which the Commissioner can arrive at his substantive determination and upon which we can review that determination if the Commissioner's decision is appealed to us." (Id., at p. 5) Thereafter the State Board continues,

> ***Obviously, the feasibility study must address, at a minimum, all of the areas specifically set forth in the statute, and petitioner must establish in the proceedings the factual basis underlying the study so as to withstand challenge by the party contesting termination. Once the petitioning board has met its initial burden of production, the burden shifts to the party contesting termination to go forward with

> evidence that termination will result in a negative impact.***
>
> The allocation of the burden of production delineated above does not shift the ultimate burden of persuading the Commissioner that termination is mandated or warranted. That burden remains on the petitioning party. However, where a petitioner has met its initial burden of production in proceedings under N.J.S.A. 18A:28-13, *** the claim by the respondent that termination will have a substantial negative impact is in the nature of an affirmative defense. Thus, it is appropriate that the party asserting that claim bear the burden of showing that a negative impact outweighing any positive benefits of termination will result. (Id., at pp. 5-6)

The Commissioner notes that the ALJ properly assessed the burdens assigned in a sending-receiving termination case wherein he states at page 2 of the initial decision:

> For its part, the receiving district [Town] has assumed the burden of showing that termination would result in substantial negative impacts, not only for the remaining students at the present high school but for the sending district[s'] students as well.***

However, Town's exception, which first raised the issue of the sufficiency of the feasibility study as a Motion to Dismiss at the conclusion of petitioner's case in chief, again suggests that Township failed to meet its burden of proof on the issue of financial impact on all the districts involved because neither the feasibility study nor petitioner's case in chief presented the factual basis necessary to withstand challenged on the matter of tax impact on Boonton Township.

The parties acknowledge that no Township tax analysis per se was made a part of the feasibility study prepared by Dr. Savitt, Township's consultant in school administration and management and author of its feasibility study and updated feasibility study.

Rather, petitioner contends that tax impact can be "inferred" (Tr. VII-8 (12/11/91)) by the analysis conducted by Dr. Savitt regarding tuition payment differentials. The ALJ denied the Motion to Dismiss, suggesting:

> THE COURT: All right I'm going to deny the motion to dismiss at this stage of the case. Mr. Carroll properly set forth the general standards which apply here; namely, that all reasonable inferences must be drawn in favor of the party opposing dismissal. And Mr. Carroll was also correct that at this point my concern is with the sufficiency of the proofs and not with the weight. So anything my ruling expresses no views whatsoever on the weight of the testimony to this point.
>
> I'm satisfied from the proofs this far that a prima facie case has been made out. Mr. Kalac was correct that Dr. Savitt did testify that since there is no financial impact on the Town it's implicit that there is no financial impact on the Township as well. That alone is sufficient to defeat the motion.
>
> ***
>
> And it seems to me that the rationale behind 18A:38-13 is an attempt to protect the interests of the receiving district as well. And certainly in looking at the financial condition, that's of greatest concern.
>
> That is not to say that the financial impact on the sending district is not a part of the case, but I think it's a less important part of the case. Since the petitioner's Board of education is evidently willing to pay the price. And feels that the bargain it wants to enter into is a good one.
>
> For these reasons I am going to deny the motion at this point. Again I want to emphasize that I'm expressing no views at all on what weight [is] to be given to these various factors, but merely as to whether or not a prima facie case has been proven and in my view clearly, there has been a prima facie case presented.
>
> (Tr. VII-11, 14 (12/11/90))

Although the statute in question, N.J.S.A. 18A:38-13, is silent as to what must actually be included in the feasibility study to assess negative financial impact, the Commissioner believes that such study should include in the financial impacts section, but not be limited to, an analysis of not only tuition costs for the current receiving district, but also changes in tuition costs for the sending districts and tax rates for all communities involved. (See, N.J. Department of Education Internal Memorandum to County Superintendents, March 9, 1988 at p. 4, Exhibit R-26.) However, petitioner may not have had access to the criteria suggested in such exhibit at the time it developed its feasibility study, insofar as the memorandum is addressed to county superintendents, merely suggesting that they discuss such elements with local superintendents at a round table discussion. However, even if they had access to the memorandum, it does not carry the weight of law to the extent of requiring dismissal.

Consequently, in reviewing the instant matter, the sufficiency of proofs related to financial impact is reduced to an investigation of whether, despite the absence of a tax analysis of financial impact on Township in the feasibility study, the Commissioner can conclude from the record before him, that there is "sufficient basis" developed in the "case in chief" (see Merchantville, supra) for him to fulfill his statutory responsibility to assess whether there is substantial negative financial impact to any or all districts involved. In this case, the Commissioner is persuaded by the evidence in the record that a conclusion can be reached that no substantial negative financial impact befalls any of the districts involved.

The Commissioner so finds notwithstanding Town's correct observation made in exceptions that the comment made by the ALJ in denying the motion earlier in the hearing was erroneous; the testimony regarding financial impact made by Dr. Savitt related to Lincoln Park, not Boonton Township. However, the Commissioner's review of the record finds that there was adequate testimony adduced from Mr. Calabrese, the Town's expert, on financial impact on Boonton Township to withstand both a dismissal for failure to meet the statutory standard of review and also to avoid a remand for further findings on tax impact on Boonton Township. See Tr. XIII-64-164 (1/9/91) and R-57.

From Mr. Calabrese's testimony and study of the financial impacts of the proposed withdrawal (Exhibit R-57) the Commissioner has reached the same conclusions as did the ALJ below, that the 1994-95 tuition rates will be $13,854 at Mountain Lakes as compared to $11,083 at Boonton Town, which translates into an additional $183 on the average Township homeowner's tax bill. The Town's exceptions can hardly fault Mr. Calabrese's calculation of financial impact of the change on the Township; Calabrese is Town's own financial expert. Instead, Town challenges the ALJ's statement that because Mr. Calabrese relied on inflated enrollment projections of Dr. Richards, Town's consultant on school administration and management, his cost projections are, if anything, higher than Mr. Burgess'. Town suggests that Mr. Calabrese relied primarily upon Mountain Lakes' own enrollment figures not Richards' in calculating the impact on Mountain Lakes, citing R-57, Table 8, Column Notation: Tr. XIII-56 (1/9/91) Town submits that Calabrese only used Richards' figures for determining the number of students coming from Boonton Township.

The ALJ refers to Richards' inflated enrollment figures as a component of Calabrese's calculations only begrudgingly in comparing what the ALJ believed were Mr. Calabrese's higher figures regarding tax impact to make the point that the increase for an average homeowner in Town or Lincoln Park is small in relation to a multimillion dollar budget. The Commissioner's review of the testimony comports with the ALJ's conclusion and that of Town's own expert, that the tax rate increases, to any or all of the districts, are not significant in light of the total budgets at play herein, ranging from 10 to 12 million dollars. See Tr. XIII-130-132 (1/9/91). See also Initial Decision, at pp. 23-27.

The conclusion is reached notwithstanding Town's exception to the ALJ's conclusion at page 26 of the initial decision concerning Township's tax rate impact wherein the ALJ concludes that "***the negligible tax increases due to severance would not have a substantial negative impact on the financial condition of any affected district." Petitioner challenges such conclusion in exceptions by suggesting that if Dr. Averbach's (Township's consultant in demography and enrollment projections) lower projections for Township high school age students are used, the Mountain Lakes Average Daily Enrollment (ADE) would be lower, resulting in the per pupil tuition being higher, not lower, as the ALJ suggests. Thereafter, petitioner elaborates by offering a series of calculations with and without Township students attending Mountain Lakes High School. Town arrives at the conclusion that a substantial financial difference in cost exists, a difference of which the Township Board was "ignorant" (Exceptions, at p. 10) in deciding to sever its relationship with Boonton. The Commissioner

observes a shortcoming in Town's calculations in that it maintains as a constant the "historical rate of cost increases," whether the number of students attending Mountain Lakes High School rises or falls. Although Town's financial expert, Mr. Calabrese, promotes cost as a constant (See Tr. XIII-128-9), to do so artificially inflates the total tuition costs, because by virtue of serving fewer students, at some point cost factors must decline. Thus, while it is true that if Averbach's lower enrollment projections for Township high school age students are used, the Lakes ADE would be lower, the rate of cost increase would also be reduced, minimizing or perhaps even negating tuition cost increases.

Accordingly, the Commissioner dismisses Town's argument that Township was "ignorant" of a "substantial financial difference in cost" (Exceptions, at p. 10) and observing, as did the ALJ, that based on the Savitt figures, Mountain Lakes' actual tuition rates have been lower than the Town's rates in two out of the three past years. Coupled with the discount rates the Township would reap for the next six years by sending its students to Mountain Lakes, the Commissioner concurs with the ALJ that, even if per pupil rates may be somewhat cheaper at Town than at Mountain Lakes, the difference can be offset by consideration of value received for educational dollars spent. Consideration of value received, where there is no substantial financial, educational or racial negative impact, is a judgment to be made by the withdrawing district. With the conclusion made that no substantial financial impact inures to any of the districts involved in this litigation, based on the reasoning of the ALJ, as augmented herein, the Commissioner will now consider the other exceptions raised by the Town related to educational and racial impact.

Exception II posits that Mountain Lakes High School is not a comprehensive high school, and the narrowness of its curricular offerings will have a substantial negative impact on Township students. The Town avers the ALJ erred in limiting his consideration of educational impact on the testimony of Dr. Lyons, Lakes' superintendent, while nearly dismissing out of hand the course comparisons of Savitt and Richards who concluded Lakes' current program is inadequate to serve the Township's student population. The Town excepts to the ALJ's conclusion based on Dr. Lyon's testimony that Lakes "currently" offers a comprehensive high school program. (Town's Exceptions, at p. 13, emphasis in original) Town cites Township's own expert, Dr. Savitt, in his preliminary feasibility study, wherein he concluded that the current Lakes' program was not sufficiently diverse to meet the needs of Boonton Township students and that there would be a substantial negative impact on Township students if Lakes did not make changes in its program, citing Tr. VIII-52-53 (12/5/90) in support of its position regarding course inadequacies at Lakes.

Town bolsters its position by citing the 1989 Middle States Visiting Committee Report, (R-42), as well as the 1985 and 1989 Lakes' progress reports for the point that Lakes' priorities lie in educating the "elite college bound students" to the detriment of less able students. (Exceptions, at p. 18) It claims that as recently as 1990 it may be stated that by any standard, Town's curricular offerings dwarf those available at Lakes in all achievement areas, and in all types of subject, and that Town is better able to provide for the deficiencies in programming that Dr. Savitt recognized in preparing his original feasibility study (P-19).

Town thus rejects the ALJ's criticisms of Town's experts' "course counting" (Exceptions, at p. 21 and Initial Decision, at p. 21) and rejects the ALJ's accepting Dr. Lyons' definition of "comprehensiveness." Town finds the Lyons' definition unsupported in the record by any expert testimony or written report, citing Dr. Lyons' testimony at Tr. IX, (1/2/91) in support of this position.

Averring that the factual and opinion evidence from experts before the ALJ was overwhelming that Lakes does not currently offer an appropriate educational program for Township students, Town submits the Commissioner must address the issue of how much Lakes is going to expand offerings and programs, noting that the ALJ did not make any specific findings on this issue because he was convinced that Lakes' existing curriculum was appropriate for Township's more diverse student body. Town avers that the promises as to what courses Lakes is going to add are generalized, leaving much discretion to the Lakes Board. Citing the transcript at Tr. VIII-46-47 and 51-54, (1/2/91), Town submits Dr. Lyons could not identify at the time of hearing a single course the Board was going to add to make Lakes a comprehensive high school, nor was he able to identify a threshold number of students that would be needed to warrant adding a course, citing Id., at pp. 59-60 for this point.

Town finds Lakes' reliance on the availability of shared time vocational program at the County Vocational Technical School for meeting the needs of the non-college bound students "very restrictive and limiting." (Exceptions, at p. 28) It claims such approach fails to recognize the different needs served by in-house courses in these allied areas, the latter of which serve all students at Town, it claims.

Town submits that cost, inertia and the small size of Lakes militate against the expansion of any course offerings at Lakes. Town proffers that this is the first sending-receiving case in which there have been serious questions raised about the adequacy of breadth of the program at the new sending district. In this case, Town argues, the Commissioner is being asked to approve a withdrawal on the basis of unknown curricular changes which might be made at Lakes. Town submits that such a finding is too speculative to support withdrawal, where the experts agree that the current program is inadequate for the Township's student population.

Township's reply exceptions find it "incredible" (Petitioner's Reply Exceptions, at p. 8) that Town argues about alleged substantial negative impact on Township students while not mentioning whether there is a substantial negative impact on its own school, as the "district left behind." (Id.) Township claims that because it makes no mention of impact on itself, Town must agree with the ALJ's determination that there is no substantial negative impact on the educational program at Town upon termination. In response to Town's allegation that Township is incapable of knowing what is in its students' best interests, Township summarizes the testimony of Dr. Savitt, Mr. Bolan, Township's superintendent, and Dr. Lyons, Superintendent at Lakes, suggesting that Township's negotiations with Lakes resulted in contract provisions that would assure it obtained the best educational opportunity for all its students. Township cites P-20 and Tr. 1/21 pp. 152-53 in support of this position.

Citing Dr. Lyons' reports (Cr-2&3), Township rebuts Town's argument that Township students do not fit Lakes programs, stating that with a few exceptions like Italian, Township students would have the same core opportunities at Lakes as they enjoy at Town, and cites Tr. 1/21:18. Of the specialized courses, in which few Township students participate, petitioner adds, Lakes substantively offers most of these courses. For students desiring more extensive vocational or business opportunities, which Township avers involved only one Township student in 1990-91, citing CR-5, Lakes, like Town, participates in the shared time program with Morris County Vocational Technical. Township cites CR-14 in support of this proposition. Township claims that Town's championing individual Township students' ability needs and interests is "too little, too late" (Petitioner's Reply Exceptions, at p. 12) and self-serving.

Lakes' reply exceptions mirror Township's position that the similarity of the student bodies of Township and Lakes makes an excellent educational fit, noting that approximately 80% of Township's graduates go on to college while Lakes sends in excess of 90% of its graduates to college each year.

The Commissioner's review of the record concerning educational impact and his consideration of the ALJ's discussion -- amplified by petitioner in reply exceptions -- that Town emphasized the supposed harm to withdrawing Township students, convinces him that some further discussion of the burdens of proof in a sending receiving withdrawal case is warranted.

The ALJ notes at p. 31 of his initial decision that:

> ***There is a hollow ring to the Town's assertion that it knows better about the educational needs of other people's children and about saving other

> people's tax dollars. ***Ordinarily, one would expect the receiving district to come forward with proofs that the harm to those left behind would outweigh the anticipated benefit to those who leave. Here the Town took the opposite tack and unsuccessfully tried to show that Township children would suffer if forced to attend Mountain Lakes' excellent public high school.

As noted earlier, the State Board in Merchantville, supra, has painstakingly clarified the shifting burdens of production in a sending-receiving severance matter. Once the petitioning board has met its initial burden of production, the burden shifts to the party contesting termination to go forward with evidence that termination will result in a negative impact. (Slip Opinion, at pp. 5-6)

Plainly, Town's burden might include arguments related to alleged hardship upon other than its own population upon severance because the receiving district's burden is to convince the Commissioner that termination will result in negative impact to any and all districts involved. Hence, the Commissioner is not as critical as the ALJ and petitioner and Lakes appear to be, of Town's "tack" (Initial Decision, at p. 31) in attempting to demonstrate that Township children would suffer if they were to attend Lakes. However, in so stating, the Commissioner agrees with the ALJ that Town is unsuccessful in meeting its burden of establishing that substantial negative educational impact will befall Township by withdrawing from its sending-receiving relationship with Town, for the reasons expressed by the ALJ.

First, the Commissioner notes that Dr. Savitt's preliminary feasibility study, upon which Town relies for the proposition that additional Lakes' course offerings would have to be added if Boonton Township pupils were to attend, was revised after consultation

between Lakes and Township. Such negotiations led Savitt to conclude that all concerns addressed in the preliminary Feasibility Study (P-18) regarding comprehensive curriculum offerings for students of all ability levels had been addressed and satisfied. See, P-21 in evidence, at pp. 3-4. See also, testimony of Savitt Tr. IV-29 (12-4-90) wherein Dr. Savitt testified:

> Q:*** With respect to the educational impact, did you have an opinion as to whether there would be a substantial negative impact, educationally, by the withdrawal?
>
> A:*** [O]ur conclusions were that the withdrawal of those young people from Boonton Township to some other high school would not have a substantial negative educational effect on Boonton Township and in fact, we saw a possibility that that withdrawal might, instead, have some positive implications for the school.

Further, Mr. Bolan and Dr. Lyons, the Superintendents of Township and Lakes, respectively, credibly testified before the ALJ that Township students' schedules (see CR-5) and post-graduate profiles (P-36) closely match those of Lakes, and further that students who seek extensive vocational or business opportunities will have at their disposal the shared time program with Morris County Vocational-Technical School. (See CR-14, the academic requirements and course descriptions of Lakes High School for 1990-91.) The Commissioner's review of the record leads him to conclude that Lakes has been forthcoming, willing and able to accommodate whatever curricular modifications are indicated in accepting Township students, as evidenced by the contract negotiations that lead to the accord reached between the two towns in anticipation of Township's being permitted to withdraw from Town. (See P-21, at pp. 2-4, 7-15.) Moreover, it bears noting that

no law or regulation requires a district to develop a vocational program equivalent to or surpassing the county vocational program, as Town suggests.

Certainly, the Commissioner must discount as being without merit Town's suggestion that the ALJ's reliance on testimony from the superintendents was inappropriate because neither was deemed an educational expert. In no manner may it be concluded that the ALJ was limited in assessing the proof in this case to that testimony adduced from the parties' expert witnesses. Moreover, as suggested by counsel for Township, the superintendents of these two communities' schools are learned educators with many years experience in the field of public education. See Tr. I-35-36 (11/26/90). See also Tr. IX-89-90 (1/2/91). Their testimony and opinions are worthy of great weight in the Commissioner's opinion.

Like the ALJ, the Commissioner finds that while Mountain Lakes High School and Boonton High School are both good schools, capable of providing a thorough and efficient education to their students, nothing in the record provided convinces him that Lakes would be unable to provide a thorough and efficient education to all types of students. Thus, it is the Commissioner's conclusion that Boonton Town has failed to demonstrate substantial negative impact on any of the districts involved. The Commissioner so finds for the reasons expressed in the initial decision.

In so deciding, the Commissioner notes Town's third exception concerning the enrollment projections adopted as findings of fact by the ALJ, which Town avers are seriously flawed and should not be accepted by the Commissioner in assessing educational and financial impact. Town avers Averbach's sharply lower enrollment

figures, suggesting that only 45 Township high school students would enroll at Lakes in 1994 and 40 by 1995 (P-24, Table B-15; Tr. III-103-4 (12/3/90), must be rejected because they are so radically different from those of the other two experts, Dr. Savitt and Dr. Richards. Town also finds Averbach's enrollment projections flawed because they project a high school population that is half of that of 1990, despite K-8 enrollments in the feeding district which have remained constant. Town claims Averbach's results do not make sense because the K-8 populations are constant in the sending towns, thus suggesting that the high school population over the next few years would also be stable as these elementary age students move into the high school, absent new housing patterns, which, Town avers, Averbach conceded are only a factor in Lincoln Park, citing Tr. III (12/3/90) in support of Averbach's conceding this point.

Town avers that Averbach's analysis violates the guiding principle in the cohort survival method, namely, the assumption that "the ratio of students moving from one grade to another as a result of promotion [is] fairly constant over extended periods of time." (Exceptions, at p. 35, citing Tr. III-97 (12/3/90)) Town's concern is that Township's proofs and the ALJ's analysis ignore the ability of Lakes to expand its curriculum with new students because Lakes is relying on the expectation of 100 to 130 new Township students to make the necessary curriculum expansions. Town posits that if there are only 40-45 new Township students, a question arises as to whether it will realistically be able to make curriculum adjustments. Town avers Township cannot have it both ways, using low Township enrollment projections to minimize the supposed impact on Town and the remaining districts, while using high enrollment

projections to "prop up a case that [Lakes] will be able to significantly expand its curriculum with the advent of larger numbers of Township students." (Exceptions, at p. 37)

Finally, Town suggests Averbach's projections must be rejected because of significant errors in his 1990 base year data, which errors, Town submits, were not denied by the other side. Town cites a comparison of R-33 and Tr. III-83-112 (12/11/90) to R-31 and R-32 with P-24 in support of this claim. Town suggests the ALJ noted such errors too and attempted "to explain them away." (Exceptions, at p. 37) Town claims it was incumbent on Township to present revised or rebuttal expert testimony to either correct the errors and projections or to explain why the projections remain valid, despite the errors in the data. The ALJ is in error, Town claims, when he states that these numbers only impact on the percentage of tuition paid by Township and Lincoln Park. Town submits they also significantly influence the cohort survival ratios, and the cohorts in turn impact on enrollment projections.

Town's position is that the Commissioner should reject Averbach's enrollment projections for all districts in favor of Dr. Richards'. Adoption of Richards' projections in turn require the rejection of Burgess' financial projections in favor of Calabrese's, since the only significant difference in their analyses was the use of different enrollment projections, Town adds. At the very least, Town claims, the Commissioner should remand this matter because it is clear that the data on which the termination impacts were based are seriously in error.

In regard to the enrollment projections, the Commissioner agrees with the ALJ in the first instance that Dr. Averbach's expertise as a demographer exceeds Dr. Richards, who has limited experience preparing enrollment projections and in serving as an expert in severance of sending-receiving relationships. Compare Tr. III-95 to Tr. VII-27 and Tr. VII-29. See also, initial decision at pp. 16-17. Moreover, it may not be ignored that Dr. Averbach's projections were based on the most recent figures available showing actual enrollment as of October 1990, while Dr. Richards relied on data from 1989. While Town would charge Township with responsibility for correcting alleged errors in Averbach's 1990 base year data, Town would ignore its own responsibility to come forward with updated projections to rebut Township's obviously more weighty projections made so by their recency. Dr. Richards admitted in testimony that he failed to update his projections to include the 1990-91 data in his four-year trend because he did not have time. (See Tr. VII-157)

Rather, Town attempts to bolster its older data by attacking Township's expert's use of a two-year trend/three-year base in arriving at his enrollment projections instead of the more usual five or six years of enrollment history, which Dr. Richards suggests is standard procedure in preparing cohort survival ratios. Apparently, Dr. Averbach would agree that the latter procedure is usual in such situations to provide a stable platform of conditions for projecting future enrollment. (See P-24, at p. 10.) (See also Tr. III-124.) However, in the instant matter, such lengthy history, in his professional judgment, did not provide such stable base, thus requiring a determination, again, based on his professional

judgment, where the line for base years should more correctly be drawn. P-24 and Tr. III-101 indicate that a narrow spread would result from use of the standard methodology; accordingly, Dr. Averbach reasoned that it was unreasonable to assume that the last five years' growth patterns would continue in the next five years, due primarily to current economic factors.

The Commissioner concludes that nothing obliges an expert to employ the five to six year historical data advocated by Dr. Richards and that moreover, Dr. Averbach's projections must be assigned more credibility in determining student population projections in all districts at issue herein based on his professional judgment that the two-year trend/three-year base was more reliable. See Englewood Cliffs v. Englewood, decided by the Commissioner, July 11, 1988, affirmed in part with modification and reversed in part by State Board decision of April 4, 1990, at pp. 102-103, of Commissioner's decision wherein the Commissioner and ALJ agreed that the enrollment projections in that case, which were similarly based on a two-year trend/three-year base were a "realistic and accurate assessment of enrollment," citing N.J.A.C. 6:3-3.1, which requires three years of enrollment history in assessing enrollment projections in regionalization studies.

Finally, concerning any errors in the 1990 base year data, the Commissioner rejects as being without merit Town's attempt to fault the ALJ for chastising Dr. Richards for not doing a study to correct and determine the impact of any such error in Township's 1990 actual enrollment data. The Commissioner agrees that even in exceptions, Township was unable, as noted by the ALJ, to suggest what, if any effect any such errors would have on potential negative

impact. While Town argues that the ALJ erred when he stated that the alleged errors in the data only impact on the percentage of tuition paid by Township and Lincoln Park, Town presents no counter information to justify its contention that the ALJ's explanation was erroneous. Accordingly, such arguments regarding the lack of validity of Dr. Averbach's enrollment projections are dismissed as being without merit, and the Commissioner accepts for the reasons expressed in the initial decision the findings and conclusions of ALJ Springer regarding the absence of any significant negative financial and educational impact based upon his acceptance of Dr. Averbach's more reliable enrollment projections.

Town's Fourth Exception avers the withdrawal of Township students would negatively impact on racial balance, albeit that Town concedes in exceptions, as it submits it did at hearing "the impact of the withdrawal on racial balance at BHS is not significant." (Exceptions, at p. 39) With such concession, Town reiterates the argument presented at hearing that withdrawal will result in "increasing racial isolation of Township students." (Id.) Acknowledging the absence of evidence comparing racial attitudes at the two schools, which Town avers is not presented because to do so would have run directly counter to the State Board's rejection of such an approach in Englewood Cliffs v. Englewood, State Board decision dated April 4, 1990, at p. 37, Town posits instead that New Jersey's strong policy of racial balance as expressed in Jenkins v. Morris, 58 N.J. 483, 498, 499 (1971) does not require proofs. It claims "***racial isolation itself is condemned, without the necessity for proving psychological or other damage or poor racial attitudes in each individual case." (Exceptions, at pp. 40-41)

Moreover, Town finds the ALJ's reliance on Lakes' "Paterson Connection" (Initial Decision, at p. 28) is insufficient to overcome the day-to-day racial isolation that termination would bring about for Township students, suggesting the contact is too limited to be of value. Town submits that the Commissioner "should be loath to allow an all white suburban community to pull its kids out of school which is truly multi-racial and multi-ethnic to attend a school so racially isolated as Mountain Lakes." (Exceptions, at p. 41)

Town's own enrollment figures as set forth in R-34 reveal its population to be 86.6% Caucasian, 6.7% Asian, 3.5% Hispanic and 3% African American. The Commissioner takes official notice that the total minority population at Boonton High School which housed 755 students in 1989 is 13.3%. The total minority population at Lakes which housed 347 students in 1989 is 5.1%. Plainly, then, this case does not represent a case of "white flight" as was the concern addressed in Jenkins, supra. Notwithstanding the Commissioner's accord with Town's mentioning New Jersey's strong policy of racial balance, the Commissioner concurs with the ALJ's point that in the presence of two essentially racially segregated districts, but where racial minorities exist in similar percentages, Lakes has demonstrated more effort than Town in adopting measures to teach the value of racial understanding through its "Paterson Connection." Like the ALJ, the Commissioner finds no conclusive evidence presented suggesting substantial negative impact on the racial composition and thus concludes as did the ALJ that Town has failed to meet its burden in this regard for the reasons expressed in the initial decision.

Town's last exception is a listing of miscellaneous exceptions addressing its position regarding Township's alleged reasons for seeking severance including:

1. Poor communication;
2. Lack of cooperation, specifically including articulation between districts;
3. Lack of adequate consultation or participation in decision-making, particularly related to tuition setting and lease purchase; and
4. Unsatisfactory output factors, most especially related to SAT scores.

Town argues in exceptions against the ALJ's finding of fact regarding each of these areas.

The Commissioner notes that each of the arguments raised by Town under these headings in exceptions reiterates the contentions argued and briefed before the ALJ. The Commissioner's consideration of the record agrees with the conclusions of the ALJ regarding each of the claims averred by Town in these miscellaneous exceptions, but some further comment is in order regarding each.

First, as to poor communication, the Commissioner found the testimony offered by Mr. Bolan, Township's superintendent, not only credible but persuasive on the trials of trying to communicate with Town through the Tri-District Task Force, in acquiring budgetary information and in day-to-day operations. See, Tr. II-26, 28, 88 and 89. The Commissioner finds that despite repeated attempts, communication and cooperation between Town and Township were poor, and constituted a reasonable basis for seeking withdrawal.

Further, the Commissioner is persuaded that although the issue of choosing between lease purchase or severance of the sending-receiving relationship has been a "bone of contention" among the districts herein for some time, Mrs. Nyman's (Boonton Township Board Member) testimony was convincing that Township was not concerned solely for the cheapest district, but rather held the educational benefits for its children foremost in choosing which route to pursue. See, Tr. III-38 (12/3/90). See also Tr. II-177-188 (11/28/90).

As to output indicators, the Commissioner agrees that SAT scores, are at best, one indicator of a district's success in providing a thorough and efficient education. Town stresses the importance of SES (Socio Economic Status) data in understanding not only the communities and who is seeking to group with whom, but also for purposes of comparing standardized test scores. Town avers the ALJ and Township have used SAT scores to compare Town with Lakes, and it claims the ALJ's conclusions made in reliance on such scores are a gross misuse of data that is disapproved by every expert in the field and by the Department of Education.

More particularly, Town avers the ALJ erred in ranking the districts at bar by SAT scores on a comparative and a county basis. It claims the Commissioner should disapprove such simplistic and erroneous rankings claiming only like SES districts should be comparatively ranked.

In this regard, it bears noting that the ALJ considered SAT scores among other "output predictors," such as the four districts' HSPT scores, in assessing whether Township's concern to secure the best education for its children was reasonable. A review of the

record supports such concern. The Commissioner concurs with the ALJ that Town cannot "explain away" (Initial Decision, at p. 11) its lower SAT scores by merely referring to socioeconomic differences or manners of interpreting such socioeconomic ratings. Regardless of number manipulation, it is clear that Township's lack of satisfaction with its standardized test scores was reasonable especially when other surrounding districts such as Pequannock, which is rated an H, have higher scores on the SATs (see R-22 and Tr. XI-30 (1/7/91) and Town's pass rate, county-wide, on the HSPT was last of all 22 high schools. (See Initial Decision, at p. 11.) Accordingly, Town's exceptions related to comparative test scores are dismissed as being without merit.

Finally, Town challenges the ALJ's factual conclusions regarding board level communications, superintendent level communications, requests for information on Township students, school to parent/parent to school communications, the alleged lack of communication and coordination, the atmosphere at Lakes, and lastly, the input on decision particularly related to financial disagreement.

In reviewing the individual exceptions under these broad headings, the Commissioner notes that the standard of review in a sending-receiving severance case does not require petitioner to demonstrate good and sufficient reasons for the withdrawal. See N.J.S.A. 18A:38-13. Town notes correctly in exceptions, however, that a district's reasons for seeking withdrawal are subject to challenge as being arbitrary, capricious or unreasonable. See Washington Township Board of Education v. Upper Freehold Regional Board of Education et al. decided by the Commissioner June 27, 1989.

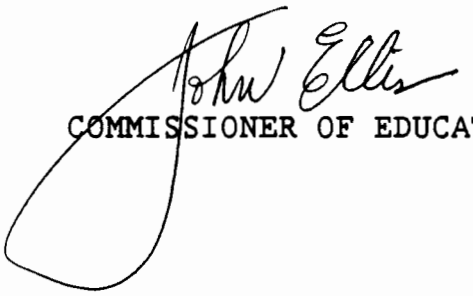
In this matter, however, the Commissioner disagrees with Town that the ALJ's treatment of the evidence in the areas listed above are too one-sided. Upon consideration of the arguments cited in exceptions, none of which represents new evidence or novel arguments to those raised below, the Commissioner determines that such contentions must be dismissed as being without merit. The ALJ's consideration of the rationales which compelled Township to seek withdrawal were entirely reasonable and justified. The Commissioner so finds after an exhaustive review of the record below. He finds the ALJ's analysis of those rationales to have been tempered by fairness and objectivity. Accordingly, he adopts those findings and conclusions of the ALJ below concerning communications and rationales underlying Township's decision to seek termination of its sending-receiving relationship with Town.

In so finding, the Commissioner in mindful that there is not universal unanimity on the part of all community members wanting the change. The Commissioner notes that testimony was taken from Township residents who sincerely believe that the best educational interests of its students lie in remaining a part of the current relationship with Town. See Tr. IV-6-17, 18-34 and 71 (1/10/91). However, the duly elected Board of Education of Boonton Township, which, by law, bears responsibility to make decisions for the District, also sought to sever the relationship and absent the statutory finding of substantial negative impact, the Commissioner has no choice but to grant the severance request.

Accordingly, for the reasons expressed in the initial decision, as augmented herein, the Commissioner grants the requested severance sought by Boonton Township from its sending-receiving

relationship with Boonton Town, subject to the Township's entering into a new sending-receiving relationship with Mountain Lakes for a minimum duration of five years; and that withdrawal shall be phased-out over a four-year period, starting with the incoming ninth grade class in September 1992.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

JANUARY 30, 1992

DATE OF MAILING - JANUARY 31, 1992

13-92

13-92

ANTHONY POLO,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS OF THE COUNTY OF BERGEN,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENT,	:	
AND	:	
RALPH ROSSI,	:	
INTERVENOR.	:	

SYNOPSIS

Petitioner, tenured teacher at vocational school, alleged Board violated his tenure and seniority rights when it reduced his position and that of tenured teacher Boles to 3/7th positions while retaining Intervenor Rossi in the remaining full-time position. All three teachers had approximately 19 years of service. Petitioner sought reinstatement to full-time position with back pay due to his having worked in the summer of 1971.

Initial decision found petitioner's summer work was entirely voluntary even though he was compensated for additional services. Thus, he did not gain seniority credit for such optional summer employment. Moreover, ALJ found Board did not have to structure programs or positions solely to accommodate employee rights and Board did demonstrate valid educationally based reason for staffing pattern. Finally, ALJ found petitioner possessed no legally enforceable right to teach a class in adult evening school since teachers in adult evening school need not be certified and are thus not tenure eligible. ALJ concluded Board properly applied tenure and seniority laws in reducing staff. (N.J.S.A. 18A:28-9) Petition was dismissed.

In light of record including transcripts, Commissioner adopted findings and determination in initial decision as his own.

JANUARY 30, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6469-90

AGENCY DKT. NO. 213-6/90

ANTHONY POLO,

Petitioner,

v.

BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS OF THE COUNTY OF BERGEN ,

Respondent

and

RALPH ROSSI,

Intervenor.

Robert A. Fagella, Esq., for petitioner
(Zazzali, Zazzali, Fagella & Nowak, attorneys)

Philip Scalo, Esq., for respondent
(Smith, Don, Alampi, Scalo, Diktas, D'Argenio & Habeeb, attorneys)

Randi Doner, Esq., for intervenor
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: June 7, 1991 Decided: December 13, 1991

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal by a tenured teacher who alleges a violation of his seniority rights when his employment was reduced from full to part-time for the 1990-91 school year. In addition, Polo asserts a tenure claim to an evening school job. Basically, the dispute involves competing seniority claims of three long-time teachers, all of whom have been district employees for nearly two decades. Due to programmatic changes, the Board of Education of the Vocational Schools of Bergen County ("Bergen Vo-Tech") decided to reduce its tenured teaching staff in carpentry. Its most recent seniority list credits petitioner Anthony Polo ("Polo") with 19 years of service, intervenor Ralph Rossi with 19 years, and a third individual, Thomas Boles, with 18.9 years. Accordingly, Bergen Vo-Tech reduced Polo and Boles to a 3/7th position each and kept Rossi in the one remaining full-time position.

Polo's challenge raises three separate issues: (1) Whether Polo's starting date for employment was August rather than September 1971, giving him additional seniority credit for work performed during the summer and putting him ahead of Rossi; (2) Whether Bergen Vo-Tech must rearrange its class schedule so that Polo receives a 6/7th position and Boles, who admittedly has less seniority, gets nothing; and (3) Whether Polo is entitled to a preference over nontenured teachers for teaching assignments at the district's adult evening school.[1]

Procedural History

On June 27, 1990, Polo filed his verified petition, seeking reinstatement to a full-time position and back pay, with the Commissioner of Education ("Commissioner"). Respondent Bergen Vo-Tech filed its answer on August 6, 1990.

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[1]At the hearing, Polo also claimed an entitlement to teach a "warehousing course" presently taught by an untenured teacher with an emergency certificate as a teacher of production skills. Counsel later notified the OAL, however, that Polo had decided to "withdraw any claim to the production skills position."

Subsequently, on August 15, 1990, the Commissioner forwarded the matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

By certified mail, dated November 7, 1990, petitioner's attorney served written notice of the pendency of this matter on six other teachers whose interests potentially might be adversely affected by the outcome, including Ralph Rossi and Thomas Boles. Rossi promptly moved to intervene in the proceedings and presented testimony at the hearing. Boles and the others, however, did not apply to be heard and failed to attend the hearing. On January 18, 1991, petitioner sent notice by certified mail to three additional individuals who teach evening courses.[2] None of them sought to intervene.

Thereafter, the OAL held hearings on April 29 and 30, 1991. Witnesses who testified and documents considered in deciding this case are listed in the appendix. Polo, Rossi and Bergen Vo-Tech submitted legal briefs by June 7, 1991, on which date the record closed. Time for preparation of the initial decision has been extended to December 13, 1991.

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[2]A prehearing order, entered on December 26, 1990, required that proof of service of notice on all those over whom Polo claimed employment preference must be filed with the OAL no later than January 21, 1991. Belatedly, on or about February 28, 1991, petitioner attempted to add nine more teachers by sending them written notice. Insofar as Polo wanted to pursue a generalized claim to teach trades in which he does not hold any endorsement, such as plumbing or building mechanics, the OAL sustained Bergen Vo-Tech's objections that such evidence is untimely and beyond the scope of the pleadings. Polo's petition is limited to the areas of carpentry, brick and stone masonry, and vocational skills/science.

Findings of Fact

Most of the material facts are undisputed, although their legal significance is hotly contested. **I FIND:**

(1) General Background Facts

Bergen Vo-Tech is in charge of a county vocational school system which, in 1971, operated a number of facilities at three locations, including a vocational high school and separate adult job training center in Hackensack; a satellite school or technical education center in Norwood; and another satellite school, as well as a special education facility for children with learning disabilities, in Paramus. Since 1971, the Norwood satellite school has closed and a new satellite school, with adjacent special education facility, has opened in Teterboro. Enrollment at the two remaining satellite schools consists of "shared students," who take academic courses at their local high schools and receive part-time vocational instruction at one of the county sites. Both the vocational high school and the special education facilities offer full-time programs for students.

Depending on whether or not summer work is counted, Polo started working for the county vocational system either on August 9, 1971 or at the start of the school year in September. He later graduated from Montclair State College in 1978 and has prior job experience in construction work. At the time of initial hire in 1971, he held only an emergency teaching certificate. After one year, in August 1972, he obtained an instructional certificate as a teacher of skilled trades.[3] Ten years later, in January 1982, he obtained specific skilled trade endorsements as teacher of carpentry, of brick and stone masonry and of vocational related subjects. Meanwhile, in August 1978 he acquired another endorsement as teacher of industrial arts. Also, in June 1979, he obtained an educational services certificate as coordinator of cooperative industrial education.

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[3]This endorsement authorizes the holder to teach skilled trade courses in the area of his or her state-approved occupational experience in all public schools. *N.J.A.C.* 6:11-6.2(a)(27).

During the 1971-72 and 1972-73 school years, Polo was assigned to the Norwood satellite school, where he designed and taught a course in building mechanics, covering "virtually anything that would be done in home construction." Next year, in 1973-74, he taught "carpentry," a broad course which also included some plumbing and home decorating. Then he transferred to the satellite school in Paramus, teaching construction trades or building mechanics for one year in 1974-75. Since 1975-76, he has taught a narrower "carpentry" course, which covers carpentry only.

Ralph Rossi started working for the district in September 1973, two years later than Polo. However, he has two years of military credit added to his 17 years of actual teaching experience.[4] Consequently, Bergen County Vo-Tech treats both Polo and Rossi as having equal years of service, each with 19 years as of June 1990. Throughout his entire career in the district, Rossi taught carpentry. For all but one year, Rossi was assigned to the vocational high school in Hackensack. Rossi holds an instructional certificate as teacher of skilled trades, without endorsement in any specific trade, and a second certificate as a teacher of industrial arts.

Thomas Boles, third contender for the single full-time carpentry position, began employment with the district in September 1973, the same year as Rossi. All parties have stipulated that Boles is entitled to 1.9 years of military service credit, resulting in a total of 18.9 years of service, or less than the 19 years of Polo and Rossi

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[4]Pursuant to *N.J.S.A.* 18A:28-11.1, teachers who fulfill certain requirements of military service in the armed forces of the United States "shall be entitled to receive equivalent years of employment or seniority credit for that service" up to a maximum credit of four years. See also, *N.J.A.C.* 6:3-1.10(c). It is undisputed that Rossi is entitled to two years of military service credit for seniority purposes.

respectively. Thus, the amount of Boles' military credit is not factually in dispute.

In or about April 1990, Bergen Vo-Tech decided to abolish one carpentry position by reducing two of its three positions from full to part-time. None of the parties has challenged the good faith of that determination. Because the Board erroneously regarded all three carpentry teachers as having equal seniority rights, it felt justified in choosing among the three. Initially, it awarded the full-time position to Boles and offered 3/7th positions to Polo and Rossi. Together with a lunch period, the two 3/7th positions added up to a full-time position.

After Polo had filed the present appeal, Bergen Vo-Tech acknowledged that that Polo and Rossi have greater seniority than Boles. It reduced Boles from full-time to 3/7th time for the 1990-91 school year. Instead of giving the full-time position to Polo, however, it gave the full-time position to Rossi, split between mornings at Teterboro and afternoons at Hackensack. Boles's part-time assignment was in the afternoon at Teterboro and Polo's in the afternoon at Paramus.

Bergen Vo-Tech presented valid educationally-based reasons for scheduling two part-time teachers at different locations in the afternoon rather than retaining a second full-time position. Due to declining enrollment and concern about the appropriateness of the curriculum, the Board opted to reduce its carpentry offerings. Existing arrangements with sending districts involved introductory carpentry courses for ninth and tenth graders in the morning and advanced carpentry courses for eleventh and twelfth graders in the afternoon. Since the Board intended to phase out the program, it did not want to introduce a new batch of morning students to a course sequence about to be discontinued. Thus, legitimate educational needs of the district dictated one full-time position, given to Rossi, and two part-time afternoon positions, shared by Polo and Boles. The fact that the Board also may have readjusted Rossi's schedule for personal considerations is irrelevant, since he had equal seniority to Polo and greater seniority than Boles.

(2) Summer Work

Prior to commencement of the 1971-72 school year, Polo was hired by Bergen Vo-Tech to help plan and establish the new program at the satellite school about to open in Norwood. In spring and early summer, Polo met with Stephen Fong, head of

the Norwood facility, who asked him if he could start work a month early. At a meeting on July 20, 1971, Bergen Vo-Tech passed a resolution authorizing the employment of newly appointed Norwood teachers "to work during the month of August 1971. . . for curriculum development and shop set-up, with pay prorated from their ten-month contractual salary." On August 11, 1971, Dr. Neil Perkins, the district superintendent, sent Polo a letter confirming his appointment to a teaching position at the new Norwood satellite school. In addition, the letter advised that "[a]ny time that you can devote to working with Mr. Fong in preparing for your new teaching assignment will be eligible for payment based on your contract salary."

Board minutes for September reflect that Polo was appointed to a teaching position at a ten-month salary of $10,700 on the "effective date" of August 9, 1971. Nevertheless, Polo's written contract refers to a ten-month position "from September 1, 1971 to June 30, 1972" and contemplates the Polo would "begin duties on September 1, 1971." Similarly, district personnel records indicate that Polo is a ten-month employee and shows September 1, 1971 as the "date employment began." The teachers' collective agreement for 1971-72 is silent on the terms and conditions of summer employment.

Polo actually did preparatory work during the last three weeks of August 1971. His hours were 8:00 a.m. to 3:00 p.m. In anticipation of the arrival of students, he wrote a course outline, prepared lesson plans, ordered tools and equipment, built a storage crib and arranged furniture and equipment in the shop. Such work was voluntary, in the sense that the district's teaching staff is not required to work over the summer. Compensation for this extra effort was a proportional amount of Polo's annual salary, rather than a stipend or per diem rate.

Apparently Rossi also worked during the summer months, although the details are vague and unsubstantiated by any official documents. According to Rossi's recollection, he taught a carpentry apprentice class at night in the summer of 1973, a summer adult course on some other unspecified occasion, and another summer course for juvenile delinquents in 1989. As best as he can remember, he was paid at an hourly rate.

(3) Adult Evening School

Apart from its day program for high school students, Bergen Vo-Tech operates an adult evening school. Teachers at the evening school are not required to hold state teaching certificates. They are represented by a separate bargaining unit from the day teachers and are covered under a different collective agreement. Students at the evening school do not earn credit toward a high school diploma. Bergen Vo-Tech has not maintained seniority lists for the evening school for the last twenty years. Evening school positions are posted annually and interested individuals have an equal opportunity to apply. Previously, Polo had taught a carpentry class at the evening school for some indefinite period starting in or about 1974-75. No evidence suggests that Polo applied for an evening school position for 1990-91.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that Bergen Vo-Tech properly applied the tenure and seniority laws in determining Polo's legal rights.

N.J.S.A. 18A:28-9 authorizes a board of education to reduce its teaching force for reasons of economy, declining enrollment, administrative reorganization or other good cause. Seniority provides a mechanism for ranking all tenured teaching staff members so that reductions can be effected in an equitable fashion and in accord with sound educational policies. *Capodilupo v. West Orange Bd. of Ed* , 218 *N.J. Super.* 510, 514 (App. Div. 1987), certif. den. 109 *N.J.* 514 (1987). *Accord, Bednar v. Westwood Bd. of Ed.*, 221 *N.J. Super.* 239, 242 (App. Div. 1987), certif. den. 110 N.J. 512 (1988). A cutback in hours of employment is regarded as a "reduction in force." *Popovich v. Wharton Bd. of Ed.*, 1975 *S.L.D.* 737,745 (Comm'r Oct. 7, 1975). Tenured teachers are accorded preference for the remaining job openings on the basis of seniority standards developed by the Commissioner of Education. *N.J.S.A.* 18A:28-10,-11 Standards established by the Commissioner "shall classify insofar as practicable the fields or categories of administrative, supervisory, teaching or other educational services[.]" *N.J.S.A.* 18A:28-13. Additionally, the Commissioner "may, in his discretion, determine seniority upon the basis of years of service and experience within such fields or categories of service as well as the school system as a whole, or both." *Id.*

Pursuant to this statutory grant of rule-making authority, the Commissioner has promulgated *N.J.A.C.* 6:3-1.10, which establishes standards for determining seniority. Subsection (b) of the rule provides that seniority shall be determined "according to the number of *academic or calendar years* of employment, or fraction thereof . . . in specific categories[.]" (Emphasis added).[5] Subsection (c) says that, "[i]n computing length of service for seniority purposes full recognition shall be given to previous years of service within the district[.]" Finally, subsection (f) adds that "[f]or purposes of calculating seniority entitlement, there shall be no distinction between academic years and calendar years." It is unclear from this language whether a 10-month employee like Polo can earn seniority credit only for the academic year or fraction thereof, or whether such employee can also earn seniority credit for work performed beyond the ten months of the academic year.

Neither the statutes nor the regulations directly address the issue of seniority credit for summer work. However, it is the well-settled policy of the Commissioner that a teacher may not gain seniority credit for optional summer employment. This policy is expressed in a long line of reported administrative decisions dealing with the subject. Illustratively, in *Reeves v. Westwood Bd. of Ed.*, 1981 *S.L.D.* 1051 (Comm'r Sept. 25, 1981), the Commissioner declined to count the services of a speech correctionist performed during the summer preceding her initial hiring for the regular school year. Even though the speech correctionist had virtually identical duties, used the same teaching materials, had essentially the same class size, and worked the same number of hours as in her regular teaching assignment, the Commissioner held that her summer employment was "temporary" and, therefore, "not creditable" toward seniority. 1981 *S.L.D.* at 1068.

Similarly, in *Blitz v. Bridgeton Bd. of Ed.*, 1980 *S.L.D.* 825 (Comm'r July 21, 1980), aff'd (St. Bd. Feb. 4, 1981), the Commissioner ruled that service for a single summer school session, being only "temporary" and "part-time," cannot be equated with regular teaching for calculation of seniority rights. In arriving at the result, the

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[5]Title 18A defines "academic year" as "the period between the time school opens in any school district or under any board of education after the general summer vacation until the next succeeding summer vacation." *N.J.S.A.* 18A:1-1

Commissioner observed that summer teachers normally receive lower pay, are prohibited from contributing to any pension or enhanced life insurance plans, and do not accrue additional sick days or receive other customary benefits given regular teachers. See also, *Mihatov v. Woodcliff Lakes Bd. of Ed.*, 1977 *S.L.D.* 1, 9 (Comm'r Jan. 5, 1977), where the Commissioner refused to recognize "voluntary summer work performed by a teacher in preparation for the important duty of teaching in the ensuing academic year."

Teaching a class at summer school is arguably distinguishable from Polo's summer activities, which he contends were "intimately related" to his assignment during the rest of the year. If similarity to one's usual duties is an important consideration, however, Rossi's summer carpentry class is much closer to his regular teaching assignment than Polo's preparations for "setting up shop." Here the proofs demonstrate that Polo's summer work was entirely voluntary, in that his academic-year employment was not conditioned on acceptance of summer work and he received extra compensation for his additional services. Thus, the situation is substantially different from that in *Flood v. Jersey City Bd. of Ed.*, 1984 *S.L.D.* __ (Comm'r Jan 17, 1984), where a school administrator "was required to work during August 1982 as part of his regular duties and did not receive any additional remuneration outside of his usual salary." Indeed, the petitioner in *Flood* did not seek any tenure credit for other summer work when such "summer employment was clearly above and beyond his regular duties." (slip op. at 76).

Further support for Bergen Vo-Tech's position derives from *Schmidt v. New Providence Bd. of Ed.*, 1984 *S.L.D.* 2015 (N.J. App. Div., July 30, 1984), where the Appellate Division noted that "there is nothing in the statutes or regulations to suggest that for seniority purposes an employee who works for longer than an academic year in any one calendar year should be given more than one year of credit." 1984 *S.L.D.* at 2017. *Schmidt* involved a seniority contest between two tenured elementary school principals, one of whom had been employed under a 10-month contract and the other under a 12-month contract. As a result of the court's ruling, a full academic year of employment is treated as the equal of a calendar year. At that time, a specific regulation provided that "not more than one year of employment may be counted toward seniority in any one academic or calendar year." *N.J.A.C.* 6:3-1.10(e). Although that particular language has since been omitted, the current rule continues to draw "no distinction between academic and

calendar years." *N.J.A.C.* 6:3-1.109(f). Absent a clear expression of intent to alter preexisting law, an agency's consistent interpretation of its own regulations is entitled to great deference. *In re Glen Rock*, 25 *N.J.* 241(1957); *In re Plainfield-Union Water Co.*, 57 *N.J. Super.* 158 (App. Div. 1959).

Cases on which Polo relies are inapposite. *Lichtman v. Ridgewood Bd. of Ed.*, 93 *N.J.* 362 (1983) involves tenure eligibility for part-time employment during the academic year as opposed to a temporary summer job. *Old Bridge Ed. Ass'n v. Old Bridge Bd. of Ed.*, 1985 *S.L.D.* __ (Comm'r June 11, 1985) deals with a teacher whose continuity of service was interrupted by maternity leave.

Next, Polo argues that Bergen Vo-Tech must readjust its student schedules to maximize his hours of employment. Boards of education need not structure programs or positions solely to accommodate employee rights. *Eftychiou v. Bergenfield Bd. of Ed.*, 1990 *S.L.D.* __ (Comm'r July 19, 1990) (Slip op at 20). Illustratively, in *Klinger v. Cranbury Twp. Bd. of Ed.*, 190 *N.J.Super.* 354 (App. Div. 1982), a school board abolished the full-time positions of two physical education teachers, both of whom "taught the same classes at the same time," 190 *N.J. Super.* at 356, and offered them part-time positions. Even though one teacher had been employed for 21 years and the other, in her third year, had no tenure, the Appellate Division held the school board was not under any legal obligation to offer a full-time job to the senior teacher, since the nontenured teacher had "received no better treatment." (at 358). "So long as petitioner was not treated inferiorly upon reduction in force, he has no legitimate complaint." *Id.* See also, *Wendelken v. Demarest Bd. of Ed.*, 1984 *S.L.D.* __ (Comm'r May 3, 1984), upholding the reduction of a tenured school librarian from full to half-time, while allowing an nontenured librarian to retain a half-time position. *A fortiori*, Polo has no right to relief against another tenured teacher, with nearly as much seniority, who did not receive any preferential treatment.

Bergen Vo-Tech has demonstrated valid educationally-based reasons for its staffing pattern, namely the desirability of scheduling afternoon classes for shared students at two locations. Ordinarily, the Commissioner will not try to second-guess such an administrative judgment call, unless the supposed educational advantages are found to be sham or nonexistent. Thus, the present case differs significantly from *Lingelbach v. Hopatcong Bd. of Ed.*, 1984 *S.L.D.* __ (St. Bd. May 2, 1984), aff'd

No. A-4783-83T7 (N.J. App. Div. May 17, 1985), where the need for services actually increased and the purported staff reduction was a subterfuge designed to replace tenured employees with cheaper hourly wage-earners. It is also unlike *Bartz v. Greenbrook Bd. of Ed.,* 1987 *S.L.D.* __ (St. Bd. Aug. 5, 1987), where no program reduction was anticipated and the senior teacher could just as easily have been assigned a full-time teaching load, or *Miles v. Watchung Bd. of Ed.*, 1984 *S.L.D.* __ (Comm'r June 14, 1984), aff'd (St. Bd. Dec. 7, 1984), where a tenured teacher could have been assigned to full-time duties without any disruption of the academic program.

Last, Polo argues that he should have been given the opportunity to teach a carpentry class in the adult evening school. Interestingly, he does not claim that persons assigned to evening instruction in this district are, in fact, tenured, but merely that the failure to offer him an evening position is "grossly unfair." Prior to *Spiewak v. Rutherford Bd. of Ed.*, 90 *N.J.* 63 (1982), courts had construed Title 18A as not evincing any legislative intent to confer tenure at adult evening schools, relying in part on the statutory distinction between "required" and "optional" educational programs. *Capella v. Camden Cty. Voc. Tech. Sch. Bd. of Ed.*,145 *N.J. Super.* 209 (App. Div. 1976). *Spiewak* undercuts the continued viability of *Capella* by cautioning against the creation of judge-made exceptions to the tenure statute and by expressly overruling other cases on which *Capella* relied for support. Nonetheless, *Spiewak* also acknowledges that "the *Capella* court did act correctly in examining the various tenure provisions in the current statute to determine whether the Legislature intended to grant tenure to teachers in adult evening school programs," 90 *N.J.* at 79, thus leaving it somewhat ambiguous as to how much of *Capella* still survives.

School law decisions subsequent to *Spiewak* recognize the possibility of achieving tenure in a full-time adult day school, as distinct from a part-time adult evening school, *Rabolli v. Bergen Cty. Vo-Tech. Schs. Bd. of Ed.*, 1983 *S.L.D.*__ (Comm'r March 18, 1983), and of transferring seniority rights accrued in an adult evening school setting to an equivalent position in the regular day school. *Williams v. Englewood Bd. of Ed.*, 1987 *S.L.D.* __ (Comm'r June 29, 1987), aff'd 1989 S.L.D. __ (St. Bd. July 6, 1989). Both *Rabolli* and *Williams* presuppose that the teacher satisfies the statutory criteria for tenure entitlement, which *Spiewak* succinctly summarizes as follows: "[A]n employee of a board of education is entitled to tenure if (1) she works in a position for which a teaching certificate is required; (2) she holds the

appropriate certificate; and (3) she has served the requisite period of time." 90 *N.J.* at 74.

Proofs in this case establish that Bergen Vo-Tech does not require teaching certificates for its adult evening school. As recently as February 1988, the County Superintendent of Schools confirmed that teachers in the adult evening school "need not be certified." Therefore, the first test for tenure is not met, and the position of adult evening school teacher is not tenure-eligible. Without tenure protection in that position and the seniority which accompanies it, Polo possesses no legally enforceable right to teach a class in the adult evening school. While the Board must certainly give honest consideration to any application Polo might make for the job, it is not obliged to offer him an evening school position in connection with its reduction in force.

Order

It is **Ordered** that the relief requested by Polo is denied.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

12/13/91
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

12/16/91
Date

Maureen Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 18 1991
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX
List of Witnesses

1. Anthony A. Polo, carpentry teacher, Bergen County Vocational Technical school district

2. Anthony Miller, assistant superintendent, Bergen County Vocational technical school district

3. Ralph Rossi, carpentry teacher, Bergen County Vocational Technical school district

List of Exhibits

No.	Description
P-1	Anthony Polo - Certificate - Skilled Trades 8/72
P-2	Anthony Polo- Certificate - 1/82
	(a) Teacher of Carpentry
	(b) Vocational Tech. Related Subjects
	(c) Brick and Stone Masonry
P-3	Anthony Polo - Certificate - 8/78
	(a) Teacher of Industrial Arts
P-4	Anthony Polo - Certificate - 6/79
	(a) Coordinator, Cooperative Industrial Ed.
P-5	Anthony Polo - Bach. of Science 8/78

P-6	Minutes - Bd. of Education July 20, 1971
P-7	Minutes - Bd. of Education, September 7, 1971
P-8	Letter - Perkins to Polo - 8/11/71
P-9	Employment Contract - A Polo - 8/11/71
P-10	Letter - Giacomarro to Polo - April 27, 1990
P-11	Respondent Seniority List - June 30, 1990
P-12	Respondent Seniority List - June 30, 1989
P-13	Respondent Seniority List - June 30, 1988
P-14	Respondent Seniority List - June 30, 1987
P-15	Respondent Seniority List - June 30, 1986
P-16	Respondent Seniority List - June 30, 1985
P-17	Respondent Seniority List - June 30, 1984
P-18	Respondent Seniority List - June 30, 1983
P-19	Respondent Seniority List - June 30, 1982
P-20	Respondent Seniority List - June 30, 1981
P-21	Course Outline - Building Mechanics
P-22	Course Outline - Construction Trades
P-23	Course Outline - Production Skills

P-24 Northeast Bergen Technical Education center (undated Document)

P-25 Document - "Paramus Campus" - undated

P-26 Course Descriptions

(a) Building Maintenance

(b) Construction Trades

(c) Production

P-27 Fall 1990/Spring 1991 Course Catalog Bergen County Adult & Continuing Education Center

P-28 Handwritten notes of Anthony Polo - April 29, 1991

P-29 Respondent's answers to Interrogatories - Undated

R-1 Certification of Michael F. Mazzola

R-2a January 14, 1988 letter from John Grieco to Dr. M. Ray Kelly

R-2b February 25, 1988 letter from Dr. M. Ray Kelly to John Grieco

R-3 June 26, 1990 letter from Robert F. Strauss to Anthony Miller

R-4 September 1, 1971 Employment Contract for Anthony Polo for the period of September 1, 1971 to June 30, 1972

R-5 Employment History Salary Record

R-6 August 8, 1980 letter from Fred A. Price to Stephen Fong

R-7 1988-92 Negotiated Agreement

R-8	Emergency Certification of Julius Danna, issued July 1990
R-8b	April 27, 1990 letter from Connie J. Giacomarro to Julius Danna
R-8c	May 15, 1990 Announcement of position opening
R-8d	Course description for warehousing
R-8e	June 25, 1990 Board Resolution
R-9	1971-72 Negotiated Agreement

ANTHONY POLO,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS OF THE COUNTY OF BERGEN,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENT,	:	
AND	:	
RALPH ROSSI,	:	
INTERVENOR.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed in accordance with the requirements of N.J.A.C. 1:1-18.4.

Petitioner's exceptions set forth the following issues to support his position that the ALJ's decision should be reversed:

1. The Administrative Law Judge erred in failing to recognize that Polo's tenure extended to the full-time position of industrial arts and that he was entitled to that position over an untenured incumbent.

2. Pursuant to N.J.A.C. 6:3-1.10(b) and N.J.A.C. 6:3-1.10(c), petitioner is entitled to full recognition of his entire length of service at the Bergen County Vocational/Technical School. As such, Polo's seniority should be calculated to have begun on August 9, 1971 when he actually commenced employment.

3. Alternatively, petitioner is entitled to a preference over Mr. Rossi for the full-time position because of Polo's earlier starting date.

4. The Board's actions in creating two 3/7th positions and affording one to the less senior Boles was improper. Polo's greater seniority entitles him to the combined 3/7th positions.

5. The ALJ erred in failing to permit any evidence that Polo's "Skilled Trades" endorsement (without restriction) entitled him to any skilled trades position in which he had experience.

Upon review of the initial decision and record in this matter, including the transcripts which are part thereof, the Commissioner concurs with and adopts the recommendation of the Administrative Law Judge to dismiss the Petition of Appeal essentially for the reasons stated in the initial decision.

Upon review of the transcript of April 29, 1991, the Commissioner finds correct the ALJ's determination not to consider evidence regarding petitioner's alleged right to other skilled trades positions to which he believed he was entitled and his refusal to consider evidence relative to petitioner's entitlement to a nontenured industrial arts position. While these issues were not specifically addressed in the initial decision, pages 17-37 of the April 29, 1991 transcript demonstrate that the ALJ did consider the legal arguments raised by parties relative to these issues and he did determine not to allow testimony with respect to same because petitioner failed to set forth claims to such positions in his petition and further he failed to raise such claims by way of the prehearing order or amendment to the petition. See Tr. (4/29/91) 33-37 in particular.

As to petitioner's argument relative to greater seniority due to his commencing employment in the District on August 9, 1971, the record fails to support any claim that service rendered prior to September 1, 1971 must be included in the calculation of petitioner's seniority. Petitioner's contract with the District indicates a starting date of September 1, 1971 (Exhibit P-9) and the superintendent's letter to petitioner dated August 11, 1971 (Exhibit P-8) fails to demonstrate that petitioner was required as part of his teaching duties to work during August 1971, albeit that he was paid on pro rata teacher salary basis for service he did choose to engage in to prepare for his new assignment.

Further, the Commissioner finds meritless petitioner's arguments that the ALJ erred in determining that the Board did not violate his tenure and seniority rights when not combining Boles' part-time position with petitioner's so as to maintain petitioner's full-time employment. The ALJ's analysis is well-reasoned and his conclusion that the Board had a bona fide educational reason to maintain two part-time positions is appropriate under the factual circumstances of this matter.

Accordingly, the Petition of Appeal is hereby dismissed for the reasons set forth in the initial decision and herein.

COMMISSIONER OF EDUCATION

JANUARY 30, 1992

DATE OF MAILING - JANUARY 31, 1992

13-92

EDU #6469-90
C # 13-92
SB # 7-92

ANTHONY POLO,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS OF THE COUNTY OF BERGEN, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT,	:	
AND	:	
RALPH ROSSI,	:	
INTERVENOR.	:	

Decided by the Commissioner of Education, January 30, 1992

For the Petitioner-Appellant, Zazzali, Zazzali, Fagella & Nowak (Robert A. Fagella, Esq., of Counsel)

For the Respondent-Respondent, Philip Scalo, Esq.

For the Intervenor, Balk, Oxfeld, Mandell & Cohen (Randi Doner, Esq., of Counsel)

Anthony Polo (hereinafter "Petitioner"), a tenured teaching staff member, alleged violation of his tenure and seniority rights when his employment as a teacher of carpentry was reduced to part-time in 1990-91 as the result of a reduction in force ("RIF"). The Board abolished one carpentry position by reducing two of its three carpentry positions from full-time to part-time. The Board's seniority list credited both Petitioner and Ralph Rossi (hereinafter "Intervenor") with 19 years in the applicable category, and Thomas

Aug. 5, 1992

Boles, another tenured teacher, with 18.9 years. Petitioner and Boles were reduced by the Board to 3/7 positions, and Intervenor was retained in the one remaining full-time position.

The issues, as stated by the Administrative Law Judge ("ALJ"), were:

> 1) Whether Polo's starting date for employment was August rather than September 1971, giving him additional seniority credit for work performed during the summer and putting him ahead of Rossi; (2) Whether Bergen Vo-Tech must rearrange its class schedule so that Polo receives a 6/7th position and Boles, who admittedly has less seniority, gets nothing; and (3) Whether Polo is entitled to a preference over nontenured teachers for teaching assignments at the district's adult evening school.

Initial Decision, at 2.

On December 13, 1991, the ALJ rejected Petitioner's arguments and recommended dismissal of the petition.

The ALJ concluded that Petitioner was not entitled to seniority credit for the services he performed in August 1971. As found by the ALJ, Petitioner was employed for three weeks prior to commencement of the 1971-72 school year to help plan and establish the new program at a satellite school opening in Norwood. The Board had earlier passed a resolution authorizing the employment of newly appointed Norwood teachers "to work during the month of August 1971...for curriculum development and shop set-up, with pay prorated from their ten-month contractual salary." Id. at 7. Petitioner's contract referred to a ten-month position "from September 1, 1971 to June 30, 1972" and contemplated that he would "begin duties on September 1, 1971." Id. Stressing "the well-settled policy of the Commissioner that a teacher may not gain seniority credit for optional summer employment," id. at 9, the ALJ concluded that the

summer work performed by Petitioner was entirely voluntary in that his academic year employment was not conditioned on acceptance of summer work and he received extra compensation for his additional services.

The ALJ also rejected Petitioner's assertion that he should have been given a full-time position, concluding that the Board had demonstrated legitimate educational needs for retaining one full-time position, which was assigned to the Intervenor, a tenured staff member with the same seniority as Petitioner, and creating two part-time afternoon positions, which were assigned to Petitioner and Boles. Finally, the ALJ concluded that since teachers in the adult evening school were not required to possess certification, they were not eligible for tenure. N.J.S.A. 18A:28-5. Consequently, Petitioner could have no tenure or seniority rights to such an assignment.

On January 30, 1992, the Commissioner of Education adopted the recommended decision of the ALJ. The Commissioner, recognizing that Petitioner's contract with the district indicated a starting date of September 1, 1971, found that he had failed to demonstrate that he was required as part of his teaching duties to work during August 1971.

The Commissioner rejected the Petitioner's assertion that the ALJ had improperly failed to consider evidence relative to Petitioner's alleged entitlement to other skilled trades positions and to an industrial arts position. The Commissioner observed that while these issues were not specifically addressed in the initial decision, the ALJ had considered the legal arguments raised by the parties at hearing and had determined not to allow testimony with

regard thereto in that Petitioner had failed to allege entitlement to such positions in his petition or to raise such claims by way of prehearing order or amendment to the petition.

Petitioner has appealed to the State Board of Education from the Commissioner's decision.

After a thorough review of the record, we reject the Commissioner's analysis with regard to Petitioner's claim to seniority credit for services rendered to the district in August 1971, but affirm his ultimate determination to dismiss the petition.

Seniority is determined "according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district..." N.J.A.C. 6:3-1.10(b). N.J.S.A. 18A:1-1 defines "academic year" as the "period between the time school opens in any school district or under any board of education after the general summer vacation until the next succeeding summer vacation." "For purposes of calculating seniority entitlement, there shall be no distinction between academic years and calendar years." N.J.A.C. 6:3-1.10(f). See Schmidt v. Board of Education of the Borough of New Providence, 1984 S.L.D. 2015 (App. Div. 1984).

Petitioner was first employed under contract for the academic year commencing September 1971. There is no indication that his status as an academic year employee was altered by the services he provided for three weeks in August 1971 in preparation for his teaching position. The seniority regulations, as noted, stress that there is no distinction between academic and calendar years for purposes of calculating seniority. Thus, it is evident that an academic year employee may not receive seniority credit in

excess of one academic year on the basis of services provided in augmentation of his or her ten-month employment.[1] It is therefore of no moment under the facts of this case whether or not the services Petitioner rendered to the district in August 1971 are deemed to have been "required" by the Board as part of his teaching position.

On all other points of appeal before us, we affirm the Commissioner's decision for the reasons expressed therein. We concur with the Commissioner's determination not to consider Petitioner's belated claims to positions not set forth in his petition. The petition specifically alleges entitlement only to the positions of teacher of skilled trades/carpentry, teacher of skilled trades/bricks and stone masonry and teacher of vocational skills/science. Our review of the petition indicates that no other positions are claimed, even by implication. As indicated in the transcripts, the ALJ notified the parties during the prehearing conference that the pleadings would have to be amended if claims were sought to other positions. Tr. 4/29/91, at 34. Despite such instructions, no amendments were made by the Petitioner. Consequently, under the circumstances, we find that the ALJ and Commissioner acted properly in limiting this matter to the claims specifically raised in the petition.

We therefore affirm the Commissioner's ultimate

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[1] We note that if, as Petitioner argues, he is entitled to seniority credit for August 1971, he would be able to assert superior seniority for that 11-month period (11/10 or 1.1 years) over a calendar year employee who provided services for 12 full months during a single calendar year (12/12 or one year). Such a result is contrary to the clear language of the regulations.

determination to dismiss the petition, as modified and clarified herein.

Attorney exceptions are noted.

August 5, 1992

Date of mailing AUG 07 1992

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14-92

ALBERT J. SYVERTSEN,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF SCOTCH PLAINS-FANWOOD, UNION COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT,	:	DECISION
AND	:	
ROBERT J. HOWLETT,	:	
INTERVENOR.	:	

SYNOPSIS

Petitioner, citizen and board member, challenged the actions of respondent regarding employment contract between Board and Intervenor, dated January 26, 1989, claiming Open Public Meetings Act violation (OPMA). Said challenge relied on a letter dated March 16, 1989, which petitioner avers he became aware of on February 5, 1990, suggesting that such letter constituted voidable board action relative to the contract extension. Board argued that the March 16, 1989 letter did not represent formal board action and denied that the letter is a part of Intervenor's contract. By Motion to Dismiss, Board sought dismissal of Petition of Appeal as untimely pursuant to N.J.A.C. 6:24-1.2(b) claiming that because the March 16, 1989 letter did not represent a final board action, the petition, filed on April 16, 1990 was out of time from the date when the board formally acted to ratify Intervenor's contract extension, January 26, 1989.

ALJ granted Motion to Dismiss finding petition untimely. ALJ found that the letter of March 16, 1989 was ultra vires and did not have legal effect of amending, modifying or changing any of the terms and conditions of the 1988-89 employment contract; thus, the filing of the appeal far exceeded the 90-day limitation pursuant to N.J.A.C. 6:24-1.2(b). Petition of Appeal was dismissed.

Commissioner adopted as his own the findings and conclusions of the ALJ for the reasons expressed in the initial decision.

JANUARY 31, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING INTERVENOR'S MOTION
FOR INVOLUNTARY DISMISSAL
OAL DKT. NO. EDU 8347-90
AGENCY DKT. NO. 82-4/90

ALBERT J. SYVERTSEN,
Petitioner,
v.
SCOTCH PLAINS-FANWOOD BOARD OF EDUCATION,
Respondent,
and **ROBERT J. HOWLETT,**
Intervenor.

Albert J. Syvertsen, pro se

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

Philip Stern, Esq., for intervenor

Record Closed: December 5, 1991 Decided: December 13, 1991

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter involves a challenge by petitioner to the actions of respondent with respect to an employment contract between respondent and intervenor which petitioner claims to be illegal, invalid, and executed in violation of the Open Public Meetings Act. The petition was filed on April 16, 1990 (C-3). Following certain proceedings before the Commissioner of Education, the answers of both respondent and intervenor were filed on September 21, 1990. On October 2, 1990, petitioner made a motion to annul the answers of respondent and intervenor on the basis that doubt existed as to the authorship of both

answers because of the similarity and the identity of portions thereof, and on the further basis that respondent's answer was legally invalid because it was not authorized by respondent.

The matter was then transmitted to the Office of Administrative Law (OAL) on October 11, 1990, for hearing 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 December 26, 1990, the undersigned Administrative Law Judge (ALJ) entered an Order Denying Petitioner's Motion to annul the answers of respondent and intervenor. Thereafter, a telephone prehearing conference was scheduled for February 27, 1991. On that date, attorney for intervenor filed a Motion to Dismiss the petition (Exhibit C-1) as having exceeded the time limits set forth in N.J.S.A. 10:4-15(a) and N.J.A.C. 6:24-1.2(b). As a result, further proceedings were held in abeyance until a decision was rendered on that motion. After submissions were received from petitioner (Exhibit C-27) and attorney for respondent (Exhibit C-26), the ALJ scheduled the matter for oral argument on April 9, 1991. An Order Denying Intervenor's Motion to Dismiss was entered on May 24, 1991.

An in-person prehearing conference was held on June 20, 1991, and a Prehearing Order was entered on June 24, 1991, settling the procedures to be followed in this matter.

The matter was scheduled for hearing to commence on December 5, 1991. On that date, the hearing commenced, and at the close of petitioner's case, attorney for intervenor moved to dismiss, which motion was hereby granted.

DISCUSSION OF STANDARD APPLICABLE TO MOTION

Intervenor's motion to dismiss at the close of petitioner's case is the same as a motion for judgment of involuntary dismissal in a court of law. The test is identical to that applied in the judiciary, and is whether all of the evidence together with the legitimate inferences therefrom could sustain a judgment in favor of the party opposing the motion. All evidence supporting the party defending against the motion must be accepted, and that party is to be accorded the benefit of all inferences which can be reasonably and legitimately deduced therefrom. If reasonable minds could differ, the

motion must be denied. See, R. 4:37-2; Dolson v. Anastasia, 55 N.J. 2 (1969).

FACTUAL DISCUSSION

After reviewing the pleadings and other submissions of the parties in connection with intervenor's earlier motion to dismiss, certain facts were found to be undisputed as follows:

Petitioner is a property owner and taxpayer of the Township of Scotch Plains and is a member of the respondent Board of Education, having been elected in April 1989. Prior to his membership on the Board, petitioner filed an earlier petition with the Commissioner of Education in June 1988 (Exhibit C-4) contesting the legality of a Memorandum of Understanding between respondent and intervenor, which was approved by respondent on April 4, 1988 (Exhibit C-5). The subject matter of this earlier petition became moot as a result of an order of the Superior Court entered on December 19, 1988 (Exhibit C-6), voiding the action of respondent in relation to the 1988/1989 contract extension and the Memorandum of Understanding because of violations of the Open Public Meetings Act. As a result, this first petition was dismissed on January 26, 1989, by Initial Decision, OAL DKT. EDU 5146-88, AGENCY REF. NO. 182-6/88.

On January 19, 1989, respondent authorized the execution of a Contract Extension with intervenor covering the period from July 1988 to June 1989. Pursuant to this authorization, a Contract Extension dated January 26, 1989 (Exhibit C-19), for the year 1988/1989, was executed by respondent and intervenor. Paragraph 1 of this Contract Extension reads:

> 1. The annual salary shall be $99,000.00. As additional compensation, the Board of Education shall provide as a salary continuation plan, a whole life insurance contract on the life of Dr. Robert J. Howlett, with an annual premium of $10,000.00.

Petitioner alleges that he made an inquiry by letter dated February 21, 1989 (Exhibit C-8), concerning the details of the salary continuation plan, but he received no response. Petitioner did not challenge the legality or validity of the Contract Extension of January 26, 1989 (C-7).

Since petitioner had become a member of respondent Board, in preparation for the negotiation of the extension of the Superintendent's contract for the 1990/1991 school year, he received on February 5, 1990, a copy of the Superintendent's contract together with its extensions (Exhibits C-19, C-20, and C-21) and a letter appended thereto, dated March 16, 1989 (Exhibit C-22). Petitioner asserted that this was the first knowledge he had of the existence of the March 16, 1989 letter, and neither respondent nor intervenor challenged this assertion by petitioner.

The second paragraph of the letter of March 16, 1989, states:

> It is my understanding that the benefit provided to you concerning the payment of a whole life insurance premium in the amount of $10,000.00 per annum as a salary continuation plan is a benefit that will not be granted in excess of an additional four years even if you continue to be employed by the Scotch Plains-Fanwood Board of Education after that date. It is my further understanding that you have agreed that commencing the 1993-1994 contract that this benefit will not be requested by you and will not be part of said contract.
>
> It is hereby requested that you sign a copy of this letter indicating your consent to the removal of this benefit in the 1993-1994 contract and that a copy of this letter be placed in your personal file.

The first paragraph of the letter also states that it "is written to confirm the intentions" of the Board and the Superintendent, "as a result of the negotiations that took place with regard to" the 1988/1989 contract of employment.

Paragraph 5 of the 1988/1989 Memorandum of Understanding (Exhibit C-5), which was ruled invalid by the Superior Court, states:

> It is further agreed by the parties hereto that the sole obligation of the Scotch Plains-Fanwood Board of Education shall be to deposit to the aforesaid plan the amount of $10,000.00 per annum on or before June 1 of each contract year for a maximum of five (5) years commencing on June 1, 1989.

Paragraph 7 of the invalidated Memorandum of Understanding states:

> This Agreement has been entered into and executed as an inducement to Robert J. Howlett to remain employed in the Scotch Plains-Fanwood Regional School District as Superintendent of Schools. . . .

Petitioner acknowledges that on January 19, 1989, respondent met and approved the contract extension for services to be rendered by intervenor during school year 1988/1989, and petitioner received a copy of same. Petitioner points out that this contract extension differs from the original that was voided by the Superior Court action since it contained only a salary-continuation plan involving a whole life insurance contract with an annual premium of $10,000.00. Petitioner asserts that he did not challenge the contract extension of January 26, 1989, because it had been modified and it did not contain either a five-year limit on the benefit or the requirement that the intervenor remain in the employ of respondent, as did the original.

Petitioner acknowledges that respondent, by formal motion, granted a contract extension for the 1989/1990 school year (C-20) in February 1989, and that it continued the same $10,000.00 per year benefit. Petitioner also acknowledges that respondent, by formal motion, granted a contract extension for the 1990/1991 school year (C-37) on April 19, 1990, and that it, too, continued the same $10,000.00 per year benefit.

Petitioner states that he received a copy of the March 16, 1989 letter on February 5, 1990. Petitioner acknowledges that his filing of the petition on April 10, 1990, was made 64 days after the letter of March 16, 1989, became known to him on February 5, 1990.

At the commencement of the hearing on December 5, 1991, and prior to the commencement of petitioner's case, attorney for intervenor made a motion to dismiss the petition on the basis that the letter of March 16, 1989 has no legal force and effect as an amendment to the Contract Extension of January 26, 1989. He argues that, as a result, the petition was filed approximately one year after the expiration of the 90-day time limit specified by N.J.A.C. 6:24-1.2(b). Attorney for respondent took no position on the motion, but pointed out that certain affidavits submitted by petitioner (Exhibits C-29, C-

30, and C-31) establish that the letter of March 16, 1989, was not authorized by any formal action of respondent. In response to these arguments, petitioner indicated that he intended to produce evidence at the hearing to show that the letter of March 16, 1989, is, in fact, an amendment to the contract extension of January 26, 1989. Based upon this representation by petitioner, intervenor's motion at the commencement of these proceedings was denied.

After the denial of intervenor's motion, petitioner presented the testimony of Richard J. Marshall, secretary to respondent, and submitted two documents in evidence. The first document consisted of the minutes of the regular public meeting of respondent on March 16, 1989, to which was attached a bills and claims list, a voucher, a billing statement, and an invoice (Exhibit P-1). This exhibit was submitted by petitioner for the purpose of establishing that on March 16, 1989, the sum of $10,000 was paid to Evlico for a salary continuation program for intervenor.

The second document submitted by petitioner was the affidavit of Richard J. Marshall (Exhibit P-2), the purpose of which was clarified by the testimony of Mr. Marshall. Mr. Marshall confirmed the statements contained in the affidavit that negotiations for the the contract extension for the 1988-89 school year approved on January 19, 1989 did not appear as an item in the notice of any meetings or in the minutes of any meeting of respondent. In addition, he confirmed that the letter of March 16, 1989, regarding intervenor's contract of employment, has never appeared as an item on any notice of any meetings or in the minutes of any open meetings.

On cross-examination, Mr. Marshall testified that he was aware that the prior contract between respondent and intervenor had been declared void by a Superior Court judge, and he indicated that his affidavit (Exhibit P-2) referred to the letter of March 16, 1989 (Exhibit C-22).

Mr. Marshall also indicated that under the provisions of the Sunshine Law, the forwarding of an annual notice makes it unnecessary to itemize individual agenda items.

On redirect, Mr. Marshall testified that the contract extension dated January 26, 1989 (Exhibit C-19), is the contract extension he was referring to in paragraph 1 of his affidavit (Exhibit P-2).

At the conclusion of Mr. Marshall's testimony and the presentation of the two additional documents in evidence (P-1 and P-2), petitioner indicated that he had no further witnesses to produce and no further evidence to present, except on rebuttal. After explaining to petitioner that this meant that he was resting his case, petitioner indicated that he wished to make no further presentation of any testimony or documentary evidence, except on rebuttal, and that he simply wished to present his arguments in this matter. It was again explained to the petitioner that this would mean that he had concluded his case. At that point, attorney for intervenor made a motion for involuntary dismissal in this matter.

In support of his motion, attorney for intervenor asserted that the letter of March 16, 1989, has no legal effect, that it was not authorized by formal action of respondent, and that it does not amend the terms of the contract of employment between respondent and intervenor. While again not taking a position on the motion in accordance with the instructions of his client, attorney for respondent repeated that the affidavits of the members of respondent board submitted by petitioner (Exhibit C-29, C-30, and C-31) and the affidavit of Richard J. Marshall (Exhibit P-2) make it clear that respondent never took any formal action authorizing the letter of March 16, 1989, and that under these circumstances it cannot have any legally valid or binding effect as an amendment to the employment agreement between respondent and intervenor. Attorney for respondent takes the position that the letter of March 16, 1989, is not the product of action by respondent.

In his response to intervenor's motion, petitioner argued that the letter of March 16, 1989, amends the originally negotiated terms of the contract extension of January 26, 1989, by imposing a five-year limitation on the payment of this benefit. Petitioner also argued that the March 16, 1989 letter amends the contract extension by changing the $10,000 payment from being "additional compensation" (C-7) to being a "benefit" (Exhibit C-22). Petitioner also points to correspondence authored by the attorney for respondent

on March 9, 1990 (Exhibit C-32) and on April 23, 1990 (Exhibit C-33), to support his contention that there were negotiations or discussions which occurred, and which led to the letter of March 16, 1989. Because there is no official record of any negotiations having occurred, petitioner argues that these negotiations were part of a secret agreement between respondent and intervenor, and that the letter of March 16, 1989, corroborates the existence of this secret agreement. Petitioner also argues that because the contract extension, when taken together with the letter of March 16, 1989, is virtually identical to the original agreement which was voided by the Superior Court action, this was a complex plan devised to thwart additional litigation in this matter.

DISCUSSION AND ANALYSIS

I have previously discussed the standard applicable to a motion for involuntary dismissal. Accordingly, there is no need to reiterate this discussion at this point.

This matter presents a set of circumstances which are clearly out of the ordinary. The board of education and its Superintendent have entered into an employment agreement whereby the board has agreed to provide, as a salary continuation plan, a whole life insurance contract on the life of the Superintendent with an annual premium payment of $10,000 (C-19). Petitioner did not challenge this agreement. Following the execution of this agreement, a letter signed by the president of the board of education, directed to the Superintendent (C-22), confirmed the understanding of the board president that the payment of the $10,000 annual premium will not be granted in excess of an additional four years even if the Superintendent continues to be employed by the board after that date. The letter further indicates that the Superintendent has agreed not to request a continuation of this benefit commencing with his 1993-1994 contract and that this benefit will not be part of that contract. The letter requests that the Superintendent sign a copy of the letter indicating his consent to the removal of this benefit in the 1993-1994 contract, and he did so.

The intervenor now argues in support of his motion to dismiss that this letter does not have any effect upon the 1988-1989 contract of employment between the board and the Superintendent. Attorney for respondent board, while taking no position on the

motion, refers to documentary evidence which supports this argument, and indicates that petitioner's own evidence establishes that no formal board action authorized the execution of this letter. Petitioner also takes the position that the letter is invalid since it attempts to resurrect the original agreement between the intervenor and respondent which was declared to be invalid.

What is curious about this whole situation is that the petitioner and intervenor appear to agree that the letter of March 16, 1989, is invalid, and respondent does not challenge their assertions. If the letter of March 16, 1989, is invalid, intervenor will not be bound by the five-year limitation on the payment of the $10,000 per year premium for his salary continuation plan. Thus, the position of the intervenor that the March 16, 1989 letter has no legal effect is understandable.

What is less understandable, however, is that the board of education does not contest the assertion by the intervenor that the letter has no legal effect. In fact, the attorney for respondent points out that the records of respondent reflect that no formal action was ever taken by respondent authorizing the execution of the letter of March 16, 1989. While attorney for respondent did not come out and make the argument, it appears clear from his statements that the letter is ultra vires since it was action taken by the board president without authorization by the board membership.

The positions of respondent and intervenor are consistent with their pleadings. In its answer to the petition, respondent, while admitting the existence of the letter of March 16, 1989, denied that the letter is a part of the Superintendent's contract or that it contains any terms and conditions of the contract. In his answer, intervenor also denied that the letter is a part of intervenor's contract.

In addition, there is a legal basis for concluding that the letter is invalid if it is considered to be an amendment to intervenor's employment contract. It is clear, based upon the specific provisions of the employment agreements and annual extensions entered into between the board and the Superintendent, that these agreements are renewed

between the parties on an annual basis. Thus, the determination as to the appropriate salary to be paid to the Superintendent, and the decision as to whether to include in the employment agreement the payment of an annual $10,000 premium toward a salary continuation plan, is a matter which is to be negotiated and decided at the time of each annual renewal. The letter of March 16, 1989, by its terms, deals with the 1993-1994 contract. However, since a board of education is a noncontinuous body, Skladzien v. Bd. of Ed. of Bayonne, 12 N.J. Misc. 602 (Sup. Ct. 1934), any alleged agreement that is proposed to be entered into by a current board of education to bind a board of education in some future year is invalid as a matter of law.

Based upon the foregoing, I **FIND** that the letter of March 16, 1989 is ultra vires, invalid, and does not have the legal effect of amending, modifying, or otherwise changing any of the terms and conditions of the 1988-1989 employment contract between respondent board of education and intervenor-Superintendent. Accordingly, I **FIND** that the letter of March 16, 1989, does not amount to a final order, ruling, or other action by respondent. As a result, I **CONCLUDE** that the filing of the petition by petitioner on April 16, 1990, challenging the contract extension of January 26, 1989, far exceeded the 90-day limitation set forth in N.J.A.C. 6:24-1.2(b) and should be **DISMISSED.**

In addition, since the letter of March 16, 1989, is ultra vires, invalid, and does not have the legal effect of amending, modifying, or otherwise changing any of the terms and conditions of the employment contract between respondent and intervenor, I **FIND** that petitioner's challenge to the 1988-1989 employment contract also fails since it far exceeds the 45-day limitation set forth in the Open Public Meetings Act, N.J.S.A. 10:4-15(a) and should be dismissed.

DECISION AND ORDER

Based upon the foregoing, it is hereby **ORDERED** that intervenor's motion for involuntary dismissal at the close of petitioner's case on the basis that the petition was filed out of time under the provisions of N.J.A.C. 6:24-1.2(b) and N.J.S.A. 10:4-15(a) is hereby **GRANTED** and petitioner's appeal is hereby **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 13, 1991
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

12/17/91
DATE

Maureen Kelley
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 19 1991
DATE

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

dgi/e

APPENDIX

List of Witnesses

For petitioner:

Richard J. Marshall

For respondent:

None

For intervenor:

None

List of Exhibits

C-1 Intervenor's Notice of Motion to Dismiss, filed February 27, 1991
C-2 Intervenor's Letter Memorandum, dated February 26, 1991, with the following attachments:
C-3 Petition, dated April 10, 1990
C-4 Petition, dated June 15, 1988
C-5 Memorandum of Understanding, dated April 12, 1988
C-6 Order of the Superior Court, Law Division, Union County, Docket No. L-99191-88, dated December 19, 1988
C-7 Contract Extension, dated January 26, 1989
C-8 Petitioner's letter, dated February 21, 1989
C-9 Employment Contract, dated June 29, 1978
C-10 Amendment to Employment Contract, dated May 24, 1979
C-11 Amendment to Employment Contract, dated July 15, 1980
C-12 Memorandum of Agreement, dated July 2, 1981
C-13 Memorandum of Agreement, dated April 20, 1982
C-14 Memorandum of Agreement, dated April 14, 1983
C-15 Memorandum of Agreement, dated May 18, 1984
C-16 Memorandum of Agreement, dated April 25, 1985
C-17 Memorandum of Agreement, dated April 30, 1986
C-18 Memorandum of Agreement, dated April 14, 1987
C-19 Contract Extension, dated January 26, 1989
C-20 Contract Extension, dated March 31, 1989
C-21 Contract Extension Addendum, dated March 31, 1989
C-22 Letter, dated March 16, 1989
C-23 Newspaper Article
C-24 Certification of Casper P. Boehm, Jr. of January 4, 1989
C-25 Letter of Casper P. Boehm, Jr., Esq., dated March 9, 1990
C-26 Letter, dated March 18, 1990, submitted by attorney for respondent regarding Motion to Dismiss

C-27 Brief for petitioner with appendix containing the following items:
C-28 Letter of March 16, 1989
C-29 Affidavit of Lilliam M. Dettmar, dated March 14, 1991
C-30 Affidavit of Leonia Reilly, dated March 14, 1991
C-31 Affidavit of August Ruggiero, dated March 14, 1991
C-32 Letter of Casper P. Boehm, Jr., Esq., dated March 9, 1990
C-33 Letter of Casper P. Boehm, Jr., Esq., dated April 23, 1990
C-34 Contract Extension Addendum, dated March 31, 1989
C-35 Contract Extension, dated January 26, 1989
C-36 Contract Extension, dated March 31, 1989
C-37 Contract Extension, dated July 12, 1990

P-1 Minutes of Regular Public Meeting of March 16, 1989 of respondent with various attachments
P-2 Affidavit of Richard J. Marshall dated December 3, 1991

OAL DKT. NO. EDU 8347-90

ALBERT J. SYVERTSEN,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF SCOTCH PLAINS-FANWOOD, UNION COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT,	:	DECISION
AND	:	
ROBERT J. HOWLETT,	:	
INTERVENOR.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Board and Intervenor filed timely reply exceptions thereto. Petitioner's reponses to the Board's reply exceptions are not considered in that there is no provision in law providing for replies to reply exceptions. Similarly, a letter submitted by the current Board president on behalf of the members of the Board dated January 17, 1992 has not been considered in the disposition of this matter insofar as the Board membership is represented by its counsel. Thus, independently filed remarks are not appropriate and are not provided for in law.

Petitioner requests that the initial decision be rejected as the crucial issue was decided solely by the testimonial position advanced by the Board's attorney, which position he finds was not that of the Board. Said attorney's position should also be rejected as the evidence clearly shows the Board attorney acted in concert with the "Board majority" (Exceptions, at p. 8) and intervenor to deceive the public, concerning the negotiated terms for intervenor's contract extension for the 1988-89 school year, when the Board majority approved it on January 19, 1989. Petitioner further charges that as a result of the Board attorney's "complicity in this deception" (Id.), the position he gave may be self-serving, although it shows he contributed to the creation of an ultra vires instrument for an unknown reason.

Petitioner states in footnote that he disagrees with the ALJ's statement that both "[he] and intervenor appear to agree that the letter of March 16, 1989, is invalid***." (Initial Decision, at p. 9) Rather, petitioner states he does not contest the March 16, 1989 letter's legality and does not claim it is invalid. Rather, he charges that the letter was never made public, that it was done secretly by the Board of Education to avoid challenge on the merits of the premium payments, and indeed he has made every effort to show the letter to be an action of the Board, albeit a voidable one. Thus, he disagrees with the ALJ and intervenor that the letter is invalid.

Petitioner's further submits that the dismissal, as untimely, was not made on statutory grounds. Citing N.J.S.A. 10:4-15 of the Open Public Meeting Act (OPMA), petitioner claims that the date that a challenge to the letter of March 16, 1989 would

be out of time "45 days after the action has been made public." (Exceptions, at p. 5, quoting N.J.S.A. 10:4-15) Citing Exhibit P-2, petitioner claims the letter of March 16, 1989 was never made public up through the time of the filing of his petition on April 10, 1990. Similarly, petitioner claims N.J.A.C. 6:24-1.2 requires that "something must be done 'by the district board of education' to start the clock running on the 90 day time limit." (Exceptions, at p. 5, quoting N.J.A.C. 6:24-1.2) Petitioner avers the Board did none of the things specified in the code or under the OPMA to bring knowledge of the March 16, 1990 letter to one's attention. Since both laws require an act by respondent to initiate the measurement of the time limits for filing a petition, and because the Board did not do so, petitioner claims the time limits specified do not come into play.

Petitioner further requests that the initial decision be rejected because his request that estoppel be invoked was not addressed in any manner by the Office of Administrative Law. His claim is that the two parties in this case, the Board majority and the Board attorney, claim they did not have the authority to implement their act, to prevent adjudication of the act itself.

Finally, petitioner requests that the initial decision be rejected in this matter as the OPMA issues were not resolved because of the finding that his petition was untimely.

The Board's reply exceptions aver petitioner apparently misunderstands the position taken by the Board in this matter. It claims its position on intervenor's Motion to Dismiss has been consistent throughout. The Board indicated to its counsel that it would take no position on the Motion to Dismiss petitioner's case on

a procedural basis, because the majority of the members of the Board would like a decision on the merits. Thus, the Board claims, it did not join in the motion with intervenor to dismiss the case. The Board clarifies in reply exceptions its understanding of what the merits of this case entail, namely the legality of the payment of $10,000 to intervenor by the Board. The Board has never suggested or required that its attorney misrepresent, conceal or deliberately change any facts in this matter, it claims, and its attorney adds that had the Board made such a request, he would not take such an action.

The Board notes any arguments relating to the OPMA are procedural, and that any facts that need to be proved or made known to the Court in order to decide that procedural issue should be accurate and correct. Regarding petitioner's exception referring to whether the Board or a majority of it could have met in violation of the OPMA "by not inviting all members over for coffee, for example." (Reply Exceptions, at p. 4) The Board's attorney, speaking for the Board, states emphatically that if such situation occurred or something similar, he is not aware of any such meeting.

Further, he states that petitioner's proofs failed to prove that such a meeting took place, but rather, indicate that there was no Board meeting authorizing the letter of March 16, 1989. The Board refers to C-29, C-30, C-31 and P-2 in evidence in support of this contention. Conceding that if such meeting took place, it would have been in violation of the OPMA, and it would have required Board's attorney to so advise the Board, the Board notes that petitioner chose not to call either the Superintendent of Schools or

a former Board member from 1989, Louis C. Jung, who were both present at the hearing of this matter, to testify in support of petitioner's case.

Additionally, the Board contends that the affidavit of Richard J. Marshall, the Board Secretary, paragraph 2, indicates that the letter of March 16, 1989 does not appear in any notice of meeting or in any minutes of any open meeting to date or in the minutes of any closed meeting prior to February 5, 1990. As attorney for the Board, Mr. Boehm states in reply exceptions that he cannot represent that the Board or a majority of the Board met with regard to the issuance of the letter of March 16, 1989 when he knows of no such meeting.

Finally, the Board restates its stance that it takes no position on the motion filed by intervenor to dismiss petitioner's petition on procedural grounds, and it participates in the discussion on the motion to insure that facts considered by the ALJ and the Commissioner of Education are truthful and accurate.

Intervenor's reply exceptions aver petitioner's exceptions are without merit. He claims petitioner obfuscates the simply fact that his appeal far exceeded the 90-day and 45-day time limitations of N.J.A.C. 6:24-1.2(b) and N.J.S.A. 10:4-15(a), respectively.

It is Intervenor's contention that petitioner filed his petition on April 16, 1990. Intervenor further argues that in an effort to circumvent the time limitations set forth in statute and code, petitioner relied on a letter dated March 16, 1989, that he purportedly discovered in February 1990, suggesting that the letter constituted Board action. It is intervenor's position that petitioner's proofs only substantiated intervenor's position that the March 16, 1989 letter did not constitute Board action.

Intervenor agrees with the ALJ that the March 16, 1989 letter did not amount to a final order, ruling or other action by the Board. Thus, it is intervenor's position that petitioner's challenge to the January 26, 1989 contract was untimely filed, thus rendering the ALJ's decision to dismiss the petition correct. Such determination was proper also because petitioner failed to introduce any testimony or to advance any argument to rebut Intervenor's Motion to Involuntarily Dismiss the matter as untimely, argues intervenor. Intervenor contends the exceptions are an attempt to move the actual time of Board action from January to March 1989, which intervenor claims has no basis in law or fact.

At trial, Intervenor Dr. Howlett avers, petitioner introduced Exhibits C-29, C-30, C-31 and P-2 into evidence, all of which are affidavits from Board members and/or employees which prove that the letter of March 16, 1989 did not constitute Board action. Dr. Howlett notes the testimony and affidavit of Mr. Marshall suggesting that the letter in question never appeared as an item on any notice of any meeting, open or closed, or in the minutes of any open meeting to date, or in any closed meeting prior to February 5, 1990. Intervenor cites Exhibit P-2 in support of this contention. He reiterates the ALJ's observation that Exhibits C-29, C-30 and C-31, affidavits of Board members, all state that the March 16, 1989 letter was never noted to them for information, discussed at any meeting, nor did it appear on the agenda for any public meeting or executive session of the Board. Intervenor thus claims that the letter did not constitute Board action, but rather, the Board action on the contract which is the subject of the within petition was taken at a public meeting on January 26, 1989. Thus, intervenor

contends, the Petition of Appeal, filed on April 16, 1990 is untimely. Moreover, intervenor concurs with the ALJ that insofar as petitioner offered no other evidence to rebut the motion to dismiss, it was correct for the ALJ to find that the letter did not constitute a final order, ruling or other action by the Board. Dr. Howlett cites Township of Bernards v. State, Dept. of Community Affairs, 233 N.J. Super. 1 (App. Div. 1989) and the State Board Decision in Kaprow v. Board of Education of the Township of Berkeley, Ocean County, decided by the Commissioner November 29, 1989, aff'd with modification State Board January 9, 1991. Intervenor cites Kaprow as being similar to this matter because in that case the State Board rejected the petitioner's argument that a letter constituted board action, and dismissed the appeal as being beyond the 90-day time limit of N.J.A.C. 6:24-1.2.

Upon a careful and independent review of the record of this matter, and the exceptions and reply exceptions of the parties, the Commissioner affirms the findings and determinations of the Office of Administrative Law for the reasons expressed therein.

The Commissioner concurs with the ALJ that petitioner's proofs fail to demonstrate that the Board formally acted to ratify the contents of the March 16, 1989 letter at any time. See Exhibits P-2 and C-29, C-30 and C-31, the affidavits from Board members and the Board Secretary. Consequently, such letter is without legal or binding effect on the Board's employment agreement with intervenor which was properly ratified earlier on January 26, 1989. (Exhibit C-19) Thus the Commissioner concludes, as did the ALJ that the letter of March 16, 1989 does not constitute a final order, ruling

or other action by the Board. Accordingly, petitioner's April 16, 1990 Petition of Appeal challenging the final action of the Board in ratifying the contract extension of January 26, 1989, is untimely pursuant to N.J.A.C. 6:24-1.2 Additionally, the Commissioner finds and determines that no basis appears in the record to relax the strict dictates of the 90-day rule made in reliance on petitioner's having only belatedly "discovered" such letter of March 16, 1989 during February, 1990, insofar the letter bears no legal significance.

The Commissioner reaches these conclusions noting petitioner's exception that it was his purpose to convince this forum that the March 16, 1989 letter was in fact, valid, and thus a voidable action under the OPMA. However, such understanding of petitioner's position in this regard is of no moment in resolving this case. As noted by the ALJ,

> The letter of March 16, 1989, by its terms, deals with the 1993-1994 contract. However, since a board of education is a noncontinuous body, Skladzien v. Bd. of Ed. of Bayonne, 12 N.J. Misc. 602 (Sup. Ct. 1934), any alleged agreement that is proposed to be entered into by a current board of education to bind a board of education in some future year is invalid as a matter of law.
> (Initial Decision, at p. 10)

Accordingly, for the reasons expressed by the ALJ as amplified herein, the initial decision below is adopted as the Commissioner's own and the Petition of Appeal is dismissed, with prejudice, as untimely filed pursuant to N.J.A.C. 6:24-1.2(b).

COMMISSIONER OF EDUCATION

JANUARY 31, 1992

DATE OF MAILING - JANUARY 31, 1992

14-92

EDU #8347-90
C # 14-92
SB # 13-92

ALBERT J. SYVERTSEN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF SCOTCH PLAINS-FANWOOD, UNION COUNTY,	:	DECISION
RESPONDENT-RESPONDENT,	:	
AND	:	
ROBERT J. HOWLETT,	:	
INTERVENOR.	:	

Decided by the Commissioner of Education, January 31, 1992

For the Petitioner-Appellant, Albert J. Syvertsen, pro se

For the Respondents-Respondents, Casper P. Boehm, Jr., Esq.

For the Intervenor, Philip E. Stern, Esq.

The decision of the Commissioner of Education to grant the Intervenor's motion to dismiss the instant petition is affirmed for the reasons expressed therein. Appellant's motion to supplement the record with a letter to the Commissioner from the Board president, urging determination of Appellant's substantive claim on the merits, is denied as irrelevant to the merits of the Intervenor's motion to dismiss.

June 3, 1992

Date of mailing 5 JUN 1992

(SB) 14-92

SB #14-92

IN THE MATTER OF THE CAP WAIVER APPEAL FOR THE BOARD OF EDUCATION OF HILLSBOROUGH TOWNSHIP, SOMERSET COUNTY.	:	STATE BOARD OF EDUCATION DECISION

Decided by the Commissioner of Education, February 28, 1992

Under the particular circumstances presented to us by this appeal, the State Board of Education reverses the Commissioner's determination which reduced by $83,392 the District's cap waiver for 1992-93. The Commissioner reallocated that amount apparently on the basis of an anticipated reduction in the contribution to the Public Employees Retirement System (PERS) due from the District for fiscal year 1991-92. The record in this matter shows, based on the certified bill of December 16, 1991 from the State of New Jersey's Division of Pensions, that the District's obligation for its contribution is as of this date $160,918, which includes the $83,392 that the Commissioner reallocated as anticipated savings. Consequently, the District having met the conditions set forth in N.J.S.A. 18A:7A-28, we grant its request for a cap waiver in the amount of $765,896.

In that we have not found oral argument necessary in arriving at our conclusion, we deny the District's request for oral argument in this matter.

March 18, 1992

Date of mailing MAR 23 1992

15-92

15-92

JUNO DELANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

JANUARY 31, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5626-90
AGENCY DKT. NO. 215-6/90

JUNO DELANO,
Petitioner,
v.
TRENTON BOARD OF EDUCATION,
Respondent.

Richard A. Friedman, Esq., for the petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Thomas J. Sumners, Jr., Esq., for the respondent

Record Closed: December 17, 1991 Decided: December 18, 1991

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

This matter concerns the petition filed by Juno Delano, the petitioner, alleging the improper docking of her salary. The petitioner requested a hearing and the matter was transmitted to the Office of Administrative Law on July 18, 1990, for a hearing pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

After several adjournments, a telephone prehearing conference took place on March 28, 1991, at which time the parties agreed that the issues in this matter are:

1. Whether the respondent, Trenton Board of Education, improperly docked the petitioner's salary for the time used by her to go for medical treatments, and if so, what is the appropriate remedy?

2. Whether the petition was filed in a timely matter.

The hearing was adjourned several times while the parties were attempting to settle the matter. The parties have now agreed to a settlement and the terms of this settlement are contained in the attached signed stipulation, which is incorporated herein.

I have reviewed the record and the terms of the settlement and I **FIND**:

1. The parties have voluntarily signed the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply wit the settlement terms and that these proceedings be concluded. I further note that the parties have agreed to waive the right to file exceptions and cross-exceptions.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 18, 1991
Date

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

12/23/91
Date

Maureen Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 30 1991
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

cad

RECEIVED
STATE OF N.J.
OFFICE OF ADM. LAW
DEC 17 1 41 PM '91

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioner

JUNO DELANO, Petitioner,	:	BEFORE THE OFFICE OF ADMINISTRATIVE LAW
v.	:	OAL DKT NO. EDU 5626-90
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY Respondent.	:	STIPULATION OF SETTLEMENT

The parties to this matter, through their respective counsel, hereby agree that this matter, which is currently pending before the Office of Administrative Law and the Commissioner of Education, shall be settled and resolved subject to the following conditions:

1. This settlement was submitted to the Trenton Board of Education and approved, and will be submitted to Administrative Law Judge Beatrice Tylutki and to the Commissioner of Education for their approval.

2. Respondent shall pay to petitioner, within thirty (30) days of the date of the Commissioner's approval of the agreement, the sum of Three Thousand, Seven Hundred Seventeen Dollars, and Sixty-eight Cents ($3,717.68).

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
GATEWAY I
NEWARK, N.J. 07102

3. In consideration for the payment set forth in paragraph two, petitioner waives all claims for interest on the payment.

4. The parties agree that in view of a prior agreement between them, as reflected in correspondence dated April 29, 1987 between their former counsel (attached as Exhibit "A"), petitioner shall be allowed to receive work related medical treatment as required by respondent's physicians or healthcare providers or by those designated by respondent's insurance carrier/administrator during work hours without any loss or reduction in pay, provided that reasonable notice is afforded to petitioner's supervisors. The term reasonable notice shall mean notice forty-eight hours in advance of the scheduled treatment, or as soon as petitioner schedules treatment, whichever is sooner, except in the event of an emergency.

5. The parties agree that this settlement shall apply only to petitioner and that both parties reserve all of their rights under the Workers' Compensation Act, including but not limited to respondent's right to request that the physicians and healthcare providers referred to in paragraph #4 schedule her medical treatment outside of the normal work day. However, any such efforts by respondent regarding the dates and times of such treatment shall relate to the time such treatment can be scheduled in general, and respondent shall not attempt to schedule specific appointments for petitioner, or to change the date or times of specific appointments.

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
GATEWAY I
NEWARK, N.J. 07102

6. The parties agree that all correspondence, documents and other papers and materials related to the subject matter of this case, in particular to petitioner obtaining work related medical treatment during work hours, and respondent's response to same, shall be removed from petitioner's personnel folder and from respondent's files, and shall not be used for any purpose, except that either party may use and refer to such materials in connection with other litigation currently pending between the parties.

7. The parties agree that their approval of this settlement is contingent upon approval of all of the terms of the agreement by Administrative Law Judge Tylutki and the Commissioner of Education. In the event that this settlement agreement or any term thereof is rejected by Administrative Law Judge Tylutki or by the Commissioner, neither this settlement or any part thereof shall be binding on either party. Rejection of this agreement by the Commissioner or Administrative Law Judge Tylutki shall not preclude either party from engaging in further settlement efforts or pursuing other avenues of conflict resolution.

8. This agreement constitutes the full and complete understanding of the parties in the matter pending before the Office of Administrative Law and Commissioner of Education and shall not be altered except by written consent of both parties.

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
Attorneys for Petitioner

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
GATEWAY 1
NEWARK, N.J. 07102

DATED: 12/13/91

BY: _____
Richard A. Friedman, Esq.

SUMNERS, COUNCIL & INNISS, P.C.
Attorneys for Respondent

DATED: [illegible]

BY: _____
Thomas Sumners, Jr., Esq.

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
GATEWAY I
NEWARK, N.J. 07102

LEMUEL H. BLACKBURN, JR.
A PROFESSIONAL CORPORATION

LEMUEL H. BLACKBURN, JR.
AUDREY P. BLACKBURN
HOPE R. BLACKBURN*
GERALD J. COUNCIL
THOMAS W. SUMNERS, JR.*
*MEMBER N.J. & PA. BAR

224 WEST STATE STREET
P.O. BOX 1563
TRENTON, N.J. 08608
(609) 393-2325

April 29, 1987

David J. Kenny, Esquire
Hartsough, Kenny & Innes
714 Alexander Road
Princeton, New Jersey 08540

RE: Juno Delano

Dear Mr. Kenny:

This letter is to follow up our discussion from the meeting with Dr. Gadson and Dr. Delano on March 25, 1987. I have discussed the issue of whether Dr. Delano may attend doctor's appointments for her claimed work related injury during working hours with Mrs. Jean Pearson who is acting director of the Personnel Department for the Trenton Board of Education. She has advised me that so long as Dr. Delano is seeing a physician recommended by Lawrenceville Professional Center it is permissable for her to attend these appointments during working hours. As we discussed in the meeting, in order to avoid any further problems kindly ask Dr. Delano to advise Dr. Gadson of the scheduled appointments in advance.

If you have any further questions kindly contact me.

Very truly yours,
LEMUEL H. BLACKBURN, JR., P.C.

BY: H/cr H. Blackburn
HOPE R. BLACKBURN
For the Firm

HRB:car
cc Dr. Gadson
Dr. Lennox

Ce 1/9/91

Exhibit #11

OAL DKT. NO. EDU 5626-90

JUNO DELANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

JANUARY 31, 1992

DATE OF MAILING - JANUARY 31, 1992

(SB) 15-92

SB #15-92

BOARD OF EDUCATION OF THE RIVER DELL REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BRENDA CANAL ET AL.,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, February 18, 1992

For the Petitioner-Appellant, Joseph & Feldman
(Edward Paul Alper, Esq., of Counsel)

For the Respondent-Respondent, Bucceri & Pincus
(Louis P. Bucceri, Esq., of Counsel)

This is an appeal by the Board of Education of the River Dell Regional School District from a Commissioner's decision dismissing its petition on the grounds that he lacked jurisdiction over the subject matter of the dispute. In reaching this conclusion, the Commissioner found that the threshold inquiry was whether unaccredited courses could be used as a basis for advancement on the District's salary guide. He determined that due to enactment of the Teacher Quality Employment Act, issues of guide placement which do not implicate that Act are now within the purview of the collective bargaining process and outside of his jurisdiction.

We have reviewed the petition filed by the district board in this case. The substance of that petition asserts that the salary of certain teachers employed by the District had been

previously increased in error and that any future salary increases otherwise due them should be withheld to the extent of the increases previously granted. In its brief in support of this appeal, the Board is more specific, characterizing the relief it seeks as a declaration that its action in withholding increments was for "good cause" under N.J.S.A. 18A:29-14.

The respondent teachers argue that because N.J.S.A. 18A:29-14 gives teachers the right to contest an increment withholding and does not give the district board the authority to bring such a suit, that statute does not give the Commissioner jurisdiction over the Board's claim and, further, that the issue presented is one of contractual interpretation outside the Commissioner's jurisdiction.

Despite the apparent confusion of all involved here, the Board has in fact raised a question under the education laws, i.e., whether a determination on its part that contractual conditions have not been met constitutes "good cause" for it to withhold salary increments under N.J.S.A. 18A:29-14. The Teacher Quality Employment Act, N.J.S.A. 18A:29-5.1 et seq., in no way deprives the Commissioner of the jurisdiction to answer that question. Nor does the fact that interpretation of a contract might be required in order to resolve a question arising under the education laws divest the Commissioner of his jurisdiction to decide such controversies. E.g., Paladino v. Board of Education of the Township of Lacey, decided by the State Board, February 1, 1989.

We therefore remand this matter to the Commissioner for his determination. We emphasize that our ruling is limited to the question of whether the Commissioner has the jurisdiction to

entertain this matter, and we do not resolve any other questions that may affect the justiciability of the case. We, however, can not avoid making the observation that although initiated as a contested case pursuant to N.J.A.C. 6:24-1.2, the matter appears to be more properly the subject of a declaratory judgment as provided for under N.J.A.C. 6:24-2.1.[1]

July 1, 1992

Date of mailing JUL 06 1992

[1] We note that under N.J.A.C. 6:24-2.1, the determination to entertain such petitions is within the sole discretion of the Commissioner. Board of Education of the Township of Neptune v. Neptune Township Education Association and the Neptune Principals Association, decided by the State Board, March 4, 1992.

16-92

F.B., on behalf of his minor child, L.A.B.,

PETITIONER,

V.

BOARD OF EDUCATION OF MORRIS HILLS REGIONAL HIGH SCHOOL DISTRICT, MORRIS COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

JANUARY 31, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5714-91
AGENCY DKT. NO. 29-2/91

F.B. ON BEHALF OF HIS MINOR CHILD, L.A.B.,
Petitioner,
v.
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL HIGH SCHOOL DISTRICT,
Respondent.

F. B., *pro se*

Joanne L. Butler, Esq., for respondent (Greenwood, Young, Tarshis, Dimiero & Sayovitz, attorneys)

Record Closed: December 19, 1991 Decided: December 19, 1991

BEFORE **EDITH KLINGER,** ALJ:

This matter was transmitted to the Office of Administrative Law on June 7, 1990, 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 hearing was scheduled for December 19, 1991 at the Office of Administrative, Newark, New Jersey.

On the date of the hearing, the parties agreed to a settle this matter and prepared and executed a Stipulation of Settlement indicating the terms of settlement which is attached and fully incorporated herein.

I have reviewed the settlement terms, and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 19, 1991
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

12/23/91
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 26 1991
DATE

OFFICE OF ADMINISTRATIVE LAW

md/e

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

STIPULATION OF SETTLEMENT
OAL DKT. NO. EDU 5714-91
AGENCY DKT. NO. 29-2/91

F.B. ON BEHALF OF HIS MINOR CHILD, L.A.B.,
Petitioner,
v.
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL HIGH SCHOOL DISTRICT,
Respondent.

This matter having come before the Court upon petition of F.B., *pro se*, seeking a change in the Physical Education grade awarded to L.A.B., a minor, for the first quarter of the 1990-1991 school year, and the parties having agreed upon the following settlement terms:

Administrative change of grade from 65 to 70, a passing grade, for the first quarter of the 1990-91 school year.

The parties stipulate that the aforementioned terms of settlement constitutes resolution of all outstanding issues relative to the within matter, and that the parties release any and all claims arising from this action.

12/11/91
DATE

Frederick Breem
Frederick Breem, *pro se*

12/19/91
DATE

Joanne L. Butler
Joanne L. Butler, Esq.
Attorney for Respondent

md

OAL DKT. NO. EDU 5714-91

F.B., on behalf of his minor child, L.A.B., PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF MORRIS HILLS REGIONAL HIGH SCHOOL DISTRICT, MORRIS COUNTY, RESPONDENT.	:	DECISION

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

JANUARY 31, 1992

DATE OF MAILING - JANUARY 31, 1992

(SB)16-92

SB #16-92

PHILIP O. SHERIDAN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, February 18, 1992

Decision on motion by the Commissioner of Education, March 27, 1992

For the Petitioner-Appellant, Lake & Schwartz (Robert M. Schwartz, Esq., of Counsel)

For the Respondent-Respondent, Ashley & Charles (Thomas R. Ashley, Esq., of Counsel)

On November 13, 1990, the Board of Education of the City of Orange Township (hereinafter "Board") certified tenure charges against Philip O. Sheridan (hereinafter "petitioner"), a tenured teaching staff member, for unbecoming conduct and suspended him without pay.[1] At the time, petitioner was serving as chairperson of the Science Department, a position he had held in the district since 1972.

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[1] N.J.S.A. 18A:6-14 permits suspension without pay for the first 120 days following certification of tenure charges to the Commissioner of Education.

SEPT. 7, 1994

While those tenure charges were still pending before the Commissioner of Education, the Board undertook a reorganization in which it abolished and restructured its existing departments. In so doing, it reduced the number of departments from 11 to 7. On July 24, 1991, as a result of such reorganization, petitioner's position as chairperson of the Science Department was eliminated, and he was reassigned to a teaching position.[2] The Board subsequently employed a non-tenured individual as chairperson of the newly-created Department of Math and Natural Science.

On November 20, 1991, petitioner filed the instant petition of appeal with the Commissioner, contending that the Board had violated his tenure rights in failing to appoint him as chairperson of the Math and Natural Science Department. Petitioner sought reinstatement to such position, along with back pay and emoluments.

On February 6, 1992, the Commissioner, finding that the tenure charges against petitioner had been demonstrated by a preponderance of the credible evidence, dismissed him from his tenured employment as of that date, a decision subsequently affirmed by the State Board of Education. In the Matter of the Tenure Hearing of Philip Sheridan, decided by the Commissioner, February 6, 1992, aff'd by the State Board, June 3, 1992.

Thereafter, in a letter decision dated February 18, 1992, the Commissioner dismissed the instant petition, concluding that this matter had been rendered moot by his decision of February 6. The Commissioner explained that, "[a]s that decision ordered

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[2] We note that petitioner remained on suspension as a result of the pending tenure charges.

Sheridan's removal from tenured employment in the district, no claim can now be made by him on the basis of tenure entitlement. There are, therefore, no grounds on which the present matter may proceed."

Petitioner thereupon filed a motion with the Commissioner requesting reconsideration of the February 18 decision, arguing that his petition had been improperly dismissed on mootness grounds. The petitioner maintained that, irrespective of the February 6 decision dismissing him from his tenured employment, he would still be entitled to back pay and emoluments for violation of his tenure rights during the period between July 24, 1991, when his position was abolished, and February 6, 1992, when he was dismissed from his employment for unbecoming conduct.

On March 27, 1992, the Commissioner denied the motion for reconsideration, finding "no clear showing of error or other compelling basis, consistent with established law, to reconsider my prior dismissal of petitioner's claim."

Petitioner has filed the instant appeal to the State Board, contending that the Commissioner erred in dismissing his petition as moot.

We agree. Notwithstanding the tenure charges which were then pending against petitioner or his subsequent dismissal from his employment as the result of those charges, petitioner remained under tenure at the time his position was abolished in July 1991 and was entitled to all the rights and protection attending such status. N.J.S.A. 18A:6-10 provides that "[n]o person shall be dismissed or reduced in compensation...if he is or shall be under tenure...except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held...by the commissioner..."

Moreover, it is now well established that a tenured teaching staff member subject to a reduction in force pursuant to N.J.S.A. 18A:28-9 has entitlement by virtue of tenure to an assignment within the scope of his or her certificate as against non-tenured individuals. Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987), certif. den., 110 N.J. 512 (1988); Capodilupo v. West Orange Bd. of Ed., decided by the State Board of Education, September 3, 1986, aff'd, 218 N.J. Super. 510 (App. Div. 1987), certif. den., 109 N.J. 514 (1987). Consequently, regardless of the ultimate disposition of the tenure charges, the Board could not act in contravention of petitioner's statutory rights during such time as he remained under tenure.

The fact that petitioner was subsequently dismissed did not render such a claim moot. A tenured staff member is entitled to his or her full salary until a determination is made of pending tenure charges, except for the first 120 days following certification of those charges. N.J.S.A. 18A:6-14. In this case, petitioner was suspended without pay upon certification of the tenure charges in November 1990. His position as chairperson of the Science Department was not abolished until July 1991, more than eight months later. He was subsequently dismissed from his employment in February 1992. As a consequence, while petitioner would have no right to reinstatement in this instance, he may be entitled to back pay and emoluments if he can demonstrate that the Board, in effectuating the reorganization, violated his statutory rights prior to his dismissal.

We therefore reverse the Commissioner's decision to dismiss the instant petition as moot. Since the record before us does not

permit a determination of the merits of petitioner's claim,[3] we remand this matter to the Commissioner for further proceedings in order to provide the petitioner with the opportunity to demonstrate that the Board violated his tenure rights as a result of the reorganization in 1991. In so doing, we stress that we make no findings herein as to whether any such violation occurred.

Margaret M. Bennett abstained.

Attorney exceptions are noted.

September 7, 1994

Date of mailing SEP 09 1994

[3] We note that there were no hearings conducted in this matter in that the Commissioner dismissed the petition on the basis of the pleadings.

17-92

MARCO VAN VELSEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

FEBRUARY 3, 1992

MARCO VAN VELSEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION ON MOTION
RESPONDENT.	:	

This matter has come before the Commissioner of Education by way of Petition of Appeal and Motion for Emergent Relief, accompanied by a brief in support of the application for interim relief pursuant to N.J.A.C. 6:24-1.5, seeking a stay of the decision dated December 20, 1991 of the Eligibility Appeals Committee (hereinafter EAC) of the New Jersey State Interscholastic Athletic Association (NJSIAA) denying petitioner participation in interscholastic basketball for Cherry Hill High School East (hereinafter Cherry Hill East) for the 1991-92 basketball season, due to a violation of Article V, Section 4K(6) of the NJSIAA Bylaws which states:

> Any evidence of a transfer for athletic advantage shall subject the athlete to a prompt determination of eligibility by the Eligibility Appeals Committee and may subject the school and the athlete to appropriate disciplinary proceedings as set forth in Article X herein. A transfer for athletic advantage is defined as, but not limited to:
> (a) seeking a superior athletic team;
> (b) seeking relief due to a conflict with the philosophy or action of an administrator, teacher or coach relating to sports;

(c) seeking a team consistent with the student's athletic abilities; or
(d) seeking a means to nullify punitive action by the previous school. (NJSIAA Handbook, at 46)

Petitioner acknowledges that the matter heard before the EAC also included a request for waiver of Article V, Section 4E of the NJSIAA Bylaws, a rule which requires the successful completion of 27.5 credits in the previous academic year, which he admittedly lacked in transferring for his senior year to Cherry Hill East from his native country, the Netherlands. Petitioner's Motion for Emergent Relief and Petition of Appeal do not challenge that finding of the EAC denying such waiver. Accordingly, the Commissioner notes for the record that petitioner is ineligible to play interscholastic basketball until at least February 1, 1992 due to his having failed to satisfy Article V, Section 4E. Petitioner seeks participation after that date, the beginning of the second semester at Cherry Hill East.

Petitioner avers in his Motion for Emergent Relief that he was denied due process because the EAC did not afford reasonable notice to him that its hearing would include resolution of the athletic advantage issue, and thus that the decision of the EAC was arbitrary, capricious and unreasonable. Petitioner seeks to have the Commissioner stay the decision of the EAC and to order that petitioner is eligible to participate in interscholastic basketball for Cherry Hill East beginning on February 1, 1992 through the remainder of the basketball season pursuant to Article V, Section 4E(2) of the NJSIAA Bylaws.

Petitioner's brief in support of his Motion for Emergent Relief cites Crowe v. DeGioia, 90 N.J. 126 (1982) as representing the standards for consideration for pendente lite restraints, and

avers he has met each of the requirements, the first of which is a reasonable probability of success on the merits of his claim. Petitioner avers that the findings of the EAC, among them that petitioner is obviously an outstanding college basketball prospect, with club basketball experience in Holland, who signed a letter of intent for a basketball scholarship at Temple University, are arbitrary because there was no testimony in the record with regard to any advanced basketball skill level on his part. Petitioner cites the testimony of Mr. Rose, counsel in this matter and also the Temple University alumnus and Cherry Hill resident with whom petitioner resides, who stated that petitioner is not a "blue chipper" or on any list of college basketball prospects in the United States or Europe. (Brief in Support of Motion for Emergent Relief, at p. 13, quoting Tr.57) Petitioner avers the EAC did not inquire into his skill level but rather made unfounded inferences based upon his height and the fact that he signed a letter of intent to accept a scholarship at Temple University. He argues instead that the scholarship was offered him as a result of the recommendation of Yan Post, a fellow Hollander who played basketball at Temple, and the evaluation by Coach Chaney, the head basketball coach at Temple, based upon a home visit, interview and "shoot around" pursuant to NCAA Rules and Regulations. (Brief, at p. 13, quoting Tr.48)

In response to the EAC's conclusion that principles of fairness of competition would be undermined and that a member of the Cherry Hill East student body would be displaced by petitioner were he allowed to participate, petitioner claims no member of the EAC questioned the Cherry Hill East coach with regard to his skill level

or inquired as to whether he would displace a present member of the Cherry Hill East student body or have any impact on the number of individuals who would participate in the Cherry Hill East basketball program. Petitioner claims a transfer student-athlete, such as he, will displace a member of the student body in any situation and therefore, it is irrational to use this as a basis for finding athletic advantage. He further avers that he will not take a scholarship away from any individual presently on the Cherry Hill East Team because he has already accepted a scholarship offer.

Petitioner distinguishes Dam Jin Koh and Hong Jun Kim v. NJSIAA, a transfer for athletic advantage case decided by the Commissioner February 3, 1987, from this matter. Unlike that fact pattern, in this situation, there is no evidence in the record that petitioner left his country to improve his basketball skills or that the basis for the transfer was on the availability of a high school basketball program, petitioner submits.

Petitioner suggests the only other case on point, Felicia Blake v. NJSIAA, decided by the Commissioner June 2, 1982, was one of first impression, and a unique case for which the Commissioner entered a modified penalty of 45 days of ineligibility. In the event that the Commissioner does not stay and reverse the EAC's decision, petitioner herein seeks a penalty of 45 days of ineligibility from the EAC determination of ineligibility, which would expire on or about February 2, 1992.

On the standard of demonstrating irreparable harm, petitioner claims that if the Commissioner does not grant the stay, he will not be afforded an opportunity to be heard on the merits of the case until after the basketball season has terminated. He

claims that such event would result in his suffering irreparable harm because participation in high school athletics is an important aspect of the educational experience.

On the standard of balancing the equities, petitioner claims the harm to him in the absence of the requested relief is greater than the potential harm to NJSIAA, which he claims will not suffer any harm whatsoever. Petitioner claims the Cherry Hill East basketball team currently has two wins and eight losses, and therefore, will most likely not be eligible for the NJSIAA Post Season Tournament. Thus, he claims, any harm to NJSIAA or other member schools or any other party, is minimal. Therefore, he avers, the equities clearly weigh in his favor.

Finally, petitioner submits that the role of the EAC is to interpret NJSIAA's Constitution, Bylaws, Rules and Regulations, not to create its own rules and regulations. Petitioner claims his situation does not fall squarely within any of the proscriptions envisioned under the athletic advantage rule. He further contends that it is widely known that other states have enacted legislation to impose a waiting period and/or to deny athletic eligibility to foreign transfer students. If such legislation is NJSIAA's objective, petitioner submits it should become a uniform rule through the proper legislative process and not through the ad hoc decisions of the EAC that are not based on the language of its own rules.

Accordingly, petitioner seeks emergent relief to afford him the opportunity to play basketball through the remainder of the 1991-92 season.

On January 27, 1992 NJSIAA filed its Answer and Brief in Opposition to petitioner's motion. Said Answer denies, inter alia,

that the conclusion that petitioner transferred for athletic advantage is not supported by the evidence in the record and is arbitrary and capricious. Instead, NJSIAA argues in affirmative defenses that the EAC determination was based upon substantial credible evidence in the record, which revealed that petitioner, a 6'9" tall basketball player who had played for clubs at his home in the Netherlands, transferred to Cherry Hill High School East for one year, in anticipation of accepting a scholarship to play basketball at Temple University. NJSIAA further claims petitioner's transfer and living arrangements were all initiated by Temple University's basketball staff, acting in cooperation with the Cherry Hill East High School basketball coach and a Temple alumnus. It states additionally in affirmative defenses that petitioner signed a national letter of intent to play basketball at Temple beginning in the fall of 1992 and accepted a basketball scholarship to that school.

NJSIAA further avers that petitioner was afforded complete due process through the procedures employed by the EAC, after a complete hearing at which petitioner was represented by counsel, presented witnesses and documentary evidence and was allowed to argue his case and cross-examine witnesses. Further, NJSIAA contends petitioner was given three opportunities to postpone the EAC hearing with respect to his transfer for athletic advantage, but he elected to proceed with the hearing, thereby waiving his right to claim that he was prejudiced by having to proceed with the hearing on short notice.

NJSIAA's Brief in Opposition to the Motion for Emergent Relief cites the Findings of Fact of the EAC, which are incorporated

herein by reference, as part of its statement of facts. Its legal argument addresses the Crowe v. DeGioia, supra, standards, contending first that there is an absence of irreparable injury. NJSIAA cites Burnside et al. v. NJSIAA et al., unpublished decision of the Appellate Division, November 15, 1984, Docket No. A-625-84T7, cert. den. 101 N.J. 236 (1985) for the proposition that no student has a constitutional right to participate in interscholastic sports. NJSIAA claims there is nothing preventing petitioner from continuing his academic work at Cherry Hill East and practicing with the basketball team, however.

Second, NJSIAA argues that there is no substantial likelihood of success on the merits of petitioner's claims. It submits that petitioner's request that "the Commissioner substitute [his] own judgment for that of the EAC and reverse their decision" (emphasis in text) (Brief in Opposition, at p. 9, quoting Petitioner's Brief, at p. 4) is "precisely what the Commissioner may not do in reviewing a case like this." (Brief in Opposition, at p. 9). It cites Dam Jin Koh and Hong Jun Kim, supra, for the standard of review in NJSIAA cases; specifically, if due process has been granted, and there is an adequate basis for the decision reached by the NJSIAA committees, the Commissioner will not substitute his judgment, even when he would decide otherwise in a de novo review. NJSIAA cites two additional cases in support of this proposition, B.C. v. NJSIAA, decided by the Commissioner October 4, 1991 and R.D. v. NJSIAA, decided by the Commissioner October 17, 1991.

In response to petitioner's allegation that he did not have adequate notice that the EAC was investigating charges that he

transferred for athletic advantage, NJSIAA responds that the transcript shows at pp. 14, 16 and 17 petitioner was afforded no fewer than three opportunities to postpone the hearing to allow him more time to prepare, and that it was petitioner and his counsel who elected to proceed with the hearing. (Tr.19) It further argues that the charge regarding athletic advantage was prepared and sent to petitioner as soon as the Association became aware that it was an issue, the day after it was published in U.S.A. Today. NJSIAA avers that by agreeing to go forward with the hearing and waiving the opportunity to adjourn the hearing, petitioner can not be heard to say that the proceeding prejudiced his due process rights.

Also, in rebuttal to petitioner's arguments on the likelihood of success on the merits, NJSIAA states it was neither arbitrary nor capricious for the EAC to conclude that a student who has been evaluated and recruited by the Temple basketball coach, and who has signed a national letter of intent to play on a basketball scholarship at that university, is not an outstanding basketball prospect. NJSIAA finds petitioner's contention that EAC has "legislated" (Brief in Opposition, at p. 12) beyond its authority by declaring petitioner ineligible, and that through "ad hoc" (Id.) decision-making, EAC seeks to deny athletic eligibility to foreign students to be without merit. It claims foreign transfers are welcome to play interscholastic sports when they have transferred to the school for non-athletic reasons, but claims that is not petitioner's situation. NJSIAA avers the record demonstrates that he transferred for athletic advantage. NJSIAA submits the EAC is charged with the responsibility to investigate "the circumstances surrounding a student athlete's eligibility when 'any evidence of a

transfer for athletic advantage' is discovered.***" (emphasis in text) (Brief in Opposition, at p. 13, citing NJSIAA Handbook, at 46) Thus, NJSIAA argues that petitioner is not likely to succeed on the merits of his petition before the Commissioner.

Finally, on the standard of demonstrating relative hardship to the parties in granting or denying relief, NJSIAA submits because petitioner will continue to have every opportunity to pursue his academic studies at Cherry Hill East to better prepare himself for the rigors of his college career, he will suffer no hardship as a result of the Association's actions. On the other hand, NJSIAA contends Cherry Hill East, its students, and member schools of NJSIAA could suffer greatly if petitioner prevails in playing in this year's basketball season first because the eligibility rules and guidelines of NJSIAA provide that if any member school's interscholastic team uses an ineligible player, it must forfeit a contest. It cites NJSIAA Handbook at 67 and Northern Burlington Regional High School Bd. of Ed. v. NJSIAA et al., decided by the Commissioner November 16, 1984 in support of this position.

Further, NJSIAA claims adverse impact upon opposition schools if petitioner is allowed to participate because to allow a promising athlete to become a part of the Cherry Hill East basketball team through the placement efforts of a college basketball program would disserve the basic objectives of amateur competition. To do so would undermine the principles of fairness of competition with other member schools and would, it claims, displace a present member of the Cherry Hill East student body who would otherwise have had the opportunity to participate in basketball

during the 1991-92 basketball season. NJSIAA claims, therefore, that the extraordinary relief sought herein would undermine public policy.

Accordingly, NJSIAA requests that the Commissioner deny emergent relief and dismiss the petition on its merits.

Upon a careful and independent review of the record of this matter, which includes, inter alia, the transcript of the hearing below before the NJSIAA EAC, as well as the final decision of that body, the Commissioner finds and determines that the Motion for Emergent Relief in this matter is denied for failure to meet the standards for the extraordinary relief of pendente lite restraints set forth in Crowe v. DeGioia, supra.

First, petitioner has failed to demonstrate irreparable harm if the Motion for Emergent Relief is not granted. The courts have plainly stated that participation in interscholastic sports is a privilege, not a right. See, Burnside, supra, wherein the Appellate Division has stated, "Participation is subject to eligibility requirements or other preconditions***" and that "[such] requirements are within the control of the NJSIAA subject to review and approval of the Commissioner of Education." (Slip Opinion, at p. 6) As such, petitioner's argument that he will be irreparably harmed if the stay is not granted through a hearing on the merits of this matter must fail insofar as participation in high school athletics is not an entitlement in the provision of a thorough and efficient education.

Similarly, petitioner has not made a showing that he is likely to succeed on the merits of his claim. On the matter of the provision of due process, the Commissioner agrees that NJSIAA is

charged with the responsibility of investigating any allegation of athletic advantage alleged in a student's participation in interscholastic athletics. See NJSIAA Handbook, at 46. Albeit that petitioner himself had sought a hearing before the EAC on the question of a waiver of the 27.5 credit rule, as a prospective candidate for participation in interscholastic sports for a member of NJSIAA, he was subject to a review of his eligibility under any grounds set forth in the Association's Constitution, Bylaws, Rules and Regulations. Although notice to him may have been less than he would have preferred, the notice to the Association of petitioner's potential ineligibility on the basis of seeking athletic advantage came before the Association, apparently, shortly before the start of the basketball season through his own action of signing an intent to accept a basketball scholarship for Temple University. Petitioner does not deny that he so signed such intent on November 13, 1991. (See Brief in Support of Petitioner's Motion for Emergent Relief, at p. 8.) NJSIAA's Brief states the charge that petitioner had transferred for athletic advantage was prepared and sent to petitioner the day after U.S.A. Today published announcement of petitioner's signing the letter of intent which was on December 5, 1991. (See NJSIAA's Brief in Opposition, at p. 11.) That such letter took four days to reach petitioner, as he claims, is not an unreasonable length of time and cannot, in the Commissioner judgment be a basis for suggesting that he was in any manner denied notice of due process particularly in light of the fact that he was provided the option of postponing his defense of the matter at hearing, which he chose not to do. See Tr.14, 16, 18-19.

Moreover, the likelihood of petitioner's demonstrating that he did not transfer for athletic advantage, but rather that the "primary purpose of his transfer to Cherry Hill East was to prepare himself academically, integrate himself into the social culture of the United States prior to attending college in the United States" (see Petition of Appeal, at p. 3) is belied by his readily admitting that before he even sought to leave his school in the Netherlands, he was in contact with a member of the Temple basketball team, Mr. Post, that the Temple University coaches contacted Cherry Hill East about housing and schooling him, that he in fact currently resides with a Temple University alumnus, and that he continued contact with the Temple basketball coaches through the time when in November 1991 he signed a letter of intent to accept a basketball scholarship at Temple University. (See Petitioner's Brief in Support of the Motion for Emergent Relief, at pp. 6-8.) The Commissioner thus concludes, that on the Motion for Emergent Relief, petitioner has failed to demonstrate a likelihood of success on the merits of his claim.

Finally, the Commissioner finds that petitioner has failed to demonstrate that the relative hardship that would be visited upon him were the stay denied is greater than the hardship which the Board would suffer were the stay granted. The Commissioner finds that because petitioner will continue to have every opportunity to pursue his academic career, he suffers little or no privation of his rights as compared to the hardship which would befall those students of Cherry Hill East and throughout the State who are members of NJSIAA were the stay denied. The laudable purposes of promoting evenhandedness and uniform application of the rules and regulations

of the Association would be compromised if the extraordinary relief sought by petitioner herein were granted in the absence of a preliminary showing of privation of his rights to due process or a thorough and efficient education. See, Burnside, supra.

Accordingly, petitioner's request for emergent relief is denied. The matter is to proceed on the merits expeditiously with any additional briefs to be filed by petitioner by February 5, 1992. NJSIAA will have until February 12 for a reply brief on the merits.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 3, 1992

DATE OF MAILING - FEBRUARY 3, 1992

17-92

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(17-92)

MARCO VAN VELSEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning high school student sought a stay of the decision of the Eligibility Appeals Committee (EAC) of the New Jersey State Interscholastic Athletic Association (NJSIAA) which denied petitioner participation in interscholastic basketball for the 1991-92 season. Petitioner contended that the EAC erred in determining that he transferred for athletic eligibility, that he was an outstanding college basketball prospect with club basketball experience in Holland, and that it was arbitrary, capricious and unreasonable for the Association to have drawn any conclusions about his basketball skill level because there was no testimony in the record with regard to any such advanced skills. Petitioner also argued that the fact that he signed a letter of intent to accept a basketball scholarship with Temple University did not support the finding of EAC that he transferred for athletic advantage.

The Commissioner adopted as his own the conclusions and recommendations of the EAC. The Commissioner found the record supported the EAC's findings that the purpose of petitioner's transfer to Cherry Hill East was to attend high school in the United States in anticipation of enrollment at Temple to play basketball and thus, was for athletic advantage which was in violation of NJSIAA rules. Petition of Appeal was dismissed.

MARCH 23, 1992

MARCO VAN VELSEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	
	:	

This matter came before the Commissioner of Education by way of Petition of Appeal and Motion for Emergent Relief, accompanied by a brief in support of the application for interim relief pursuant to N.J.A.C. 6:24-1.5, seeking a stay of the Eligibility Appeals Committee (hereinafter EAC) decision dated December 20, 1991 of the New Jersey State Interscholastic Athletic Association (NJSIAA) denying petitioner participation in interscholastic basketball for Cherry Hill High School East (hereinafter Cherry Hill East) for the 1991-92 basketball season, due to a violation of Article V, Section 4K(6) of the NJSIAA Bylaws, prohibiting transfer for athletic advantage. Said petition was accompanied by a brief in support of the Motion for Emergent Relief elaborating on the standard for pendente lite restraints as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982). Petitioner's Motion sought a stay of the NJSIAA claiming that the Association did not provide him due process because the EAC did not afford reasonable notice to him that its hearing would include resolution of the

athletic advantage issue, insofar as he had sought a hearing on a waiver of the 27.5 credit rule as a result of his having transferred to Cherry Hill East from his native country, the Netherlands, without having satisfactorily completed his junior year credits in the Netherlands. Said argument was dropped on appeal to the Commissioner.

Petitioner also contended on Motion that the EAC erred in determining that he transferred for athletic eligibility, that he was an outstanding college basketball prospect with club basketball experience in Holland, and that it was arbitrary, capricious and unreasonable for the Association to draw any conclusions about his basketball skill level because there was no testimony in the record with regard to any such advanced skills. Petitioner also argued he was irreparably harmed by the EAC determination because participation in high school athletics is an important aspect of the educational experience. Finally, petitioner contended on Motion that the fact that he had signed a letter of intent to accept a basketball scholarship with Temple University in November 1991 did not support the finding of the EAC that he transferred to Cherry Hill for athletic advantage.

On February 3, 1992, having reviewed the papers submitted by petitioner and the responsive papers submitted by NJSIAA, the Commissioner denied the Motion for Emergent Relief finding petitioner had failed to demonstrate a showing of irreparable harm in that there is no entitlement to play in scholastic sports, citing Burnside et al. v. NJSIAA et al., unpublished decision of the Appellate Division, November 15, 1984, Docket No. A-625-84T7, cert. den. 101 N.J. 236 (1985). The Commissioner also found petitioner

failed to demonstrate a likelihood of success on the merits stating first that on the matter of the provision of due process, NJSIAA was timely in providing notice to petitioner of the athletic advantage question, that is, as soon as the Association learned of his having signed a letter of intent. Further, on the matter of whether petitioner transferred for athletic advantage, the Commissioner found that because petitioner was in contact with a former member of the Temple Basketball team from the time before he sought schooling in America, that the Temple University coaches contacted Cherry Hill East about housing and schooling him, that he currently resides with a Temple University alumnus, and that he continued contact with the Temple coaches through the time when he signed his letter of intent, petitioner failed to demonstrate a likelihood of success on the merits.

Finally, the Commissioner determined that petitioner failed to demonstrate that the relative hardship that would be visited upon him were the stay denied was not greater than the hardship which the Board would suffer were the stay granted because petitioner would continue to have every opportunity to pursue his academic career, would suffer no privation of his rights and because the laudable purposes of evenhandedness and uniform application of the rules and regulations of the Association would be compromised if the extraordinary relief petitioner sought were granted. Thus, the Commissioner denied the Motion and directed that the matter proceed on the merits upon the filing by February 5, 1992 of any additional brief by petitioner and until Feburary 12, 1992 by NJSIAA.

Thereafter, by faxed transmission on February 5, 1992, petitioner submitted a brief in support of his petition of appeal

incorporating all of the statement of facts and arguments contained in his Memorandum of Law in Support of Application for Emergent Relief, which are incorporated herein by reference. Said arguments are summarized in pertinent part as follows:

> It is respectfully submitted that when the facts are viewed from a positive and optimistic perspective regarding this matter, it is uncontroverted in the record and clear that the Petitioner became aware of the opportunities and experiences available in the United States through his relationship with Jon Post ("Post) his hometown friend. As a result, Post was the natural person for the Petitioner to turn to for guidance and assistance in coming to the United States. In turn, it was natural for Post to ask the coaches to assist him in an effort to find an appropriate high school for the Petitioner. Post was only at Temple for two years and therefore, as a result of his participation on the basketball team, it was natural for him to turn to the coaching staff for assistance.
>
> The EAC further characterized the facts to be that the coaching staff at Temple sought out Cherry Hill East and Leon H. Rose as a result of their "placement" efforts. The EAC makes innuendos with regard to the fact that Mr. Rose is a Temple alumnus, when in fact his only relationship to Temple University is that he graduated from their law school. Mr. Rose has never had any involvement or relationship with the coaching staff or basketball program at Temple University. Moreover, the record is clear that Cherry Hill East was one of four different high schools that were contacted as a result of the fact that they met the criteria of having an excellent academic reputation as well as many foreign students attending their school.
>
> ***
>
> Moreover, the Association recognizes in the interpretive guidelines for same that the desire to participate in interscholastic sports may be one of a number of considerations involved in a transfer, in addition to facts such as finances, academic, religious training, social and transportation. The primary reason for the transfer must be for athletic advantage in order for there to be a violation of this Section. (Interpretative Guidelines at page 65). The

> uncontroverted evidence in the record reflects that the primary purpose of the transfer of the Petitioner was not for athletic advantage.
>
> For all of the foregoing reasons, it is respectivefully submitted that the Commissioner reverse the decision of the EAC, and order that the Petitioner immediately be permitted to participate in interscholastic basketball at Cherry Hill East.
>
> (Petitioner Brief Filed 2/9/92, at pp. 2-4)

On February 7, 1992, NJSIAA registered its continuing opposition to the petition, maintaining that petitioner's transfer was for athletic advantage, in violation of NJSIAA rules. In so stating NJSIAA relies on it's previously submitted answer and affirmative defenses, brief in opposition to the motion for emergent relief and the written decision of the EAC. Respondent NJSIAA requests that the petition be dismissed and the ruling of the EAC, based as it was on substantial credible evidence, be upheld.

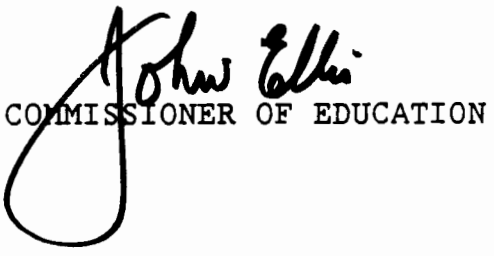
Upon a careful and independent review of the record of this matter, the Commissioner adopts as his own those conclusions and recommendations of the EAC, in this case. Said determination found, inter alia, and the Commissioner's review of the record concurs, that Mr. Van Velsen transferred to Cherry Hill High School East (Cherry Hill East) from his native country of the Netherlands, for athletic advantage, in violation of Article V, Section 4K(6) of the NJSIAA Bylaws. Such conclusion was predicated upon a finding that petitioner consulted with a former basketball player at Temple, who placed him in touch with Temple University basketball personnel, and a Temple University alumnus who would house him during his senior year of high school in the United States, following contact by Temple University basketball coaching personnel with the Cherry Hill East basketball coach. It was further found by the EAC that

petitioner was evaluated by the Temple basketball coach and offered a basketball scholarship, which petitioner accepted, along with his signing a national letter of intent to play basketball at Temple.

The Commissioner's review of the evidence proffered in this matter, comports with that of the EAC that based on the credible evidence brought to bear, petitioner's purpose in transferring to Cherry Hill East was to attend high school in the United States in anticipation of enrolling at Temple the following year to play basketball. Thus, the Commissioner finds that EAC's determination that petitioner's transfer was for athletic advantage in violation of the NJSIAA rules was not arbitrary or unreasonable. See for example Dam Jin Koh and Hong Jun Kim v. NJSIAA, decided by the Commissioner February 3, 1987 (Standard of review in NJSIAA cases holds that if due process has been granted, and there is an adequate basis for the decision reached by the NJSIAA Committees, the Commission will not substitute his judgment, even if he would decide otherwise in a de novo review.)

Accordingly, for the reasons expressed by the EAC, as well as those embodied in the Commissioner's Decision on Motion in this matter dated February 3, 1992, the instant Petition of Appeal is dismissed, with prejudice.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

MARCH 23, 1992

DATE OF MAILING - MARCH 23, 1992

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MAYOR AND COUNCIL OF THE CITY OF JERSEY CITY, PETITIONER, V. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

FEBRUARY 6, 1992

MAYOR AND COUNCIL OF THE CITY OF JERSEY CITY, PETITIONER, V. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

Carol Zylbert, Esq., for Petitioner

Charlotte Kitler, Esq., for Respondent

This matter was opened before the Commissioner by way of a notice of intent to appeal filed by the City of Jersey City on May 13, 1991. Upon receipt of the aforesaid notice, the Director of the Bureau of Controversies and Disputes conducted a telephone conference call with the parties at which time a schedule was established for the filing of the papers to be considered in this matter.

Subsequent to the establishment of the schedule for filing, the Petitioner, the City of Jersey City, requested a delay for filing pending the outcome of matters before the Division of Local Government Services of the Department of Community Affairs relating to the capacity of the City of Jersey City to assume the tax burden required by its legal obligations (N.J.S.A. 18A:7A-52B).

Upon agreement of the State-operated School District of Jersey City (District), the requested delay was granted.

In light of the delay granted for filing in this matter, a formal Petition in this matter was not filed by the City until August 23, 1991. On September 27, 1991 the District filed its Answer to the Petition. Subsequently, the parties filed position statements on October 30, 1991 and reply briefs on November 12 and 13, 1991. Summary papers were filed by the City on November 20, 1991 and by the District on November 21, 1991. The record was formally closed on November 25, 1991 when Dr. Maureen Keller, Acting Director of the Bureau of Controversies and Disputes, rejected the City's request for further extension of time within which to examine the District's Audit Report and directed that the papers filed by the City on November 20, 1991 be considered its final summary of position.

Pursuant to N.J.S.A. 18A:7A-52(a) the State Superintendent of a State-operated School District is required "...[to] fix and determine the amount of money necessary to be appropriated for the ensuing school year and ... certify the amounts to be raised by special district tax for school purposes ... to the county board of taxation and the ... amounts so certified shall be included in the taxes assessed, levied and collected in the municipality or municipalities comprising the school district." Unlike other budget appeal processes in the State of New Jersey, it is the municipality which must appeal the determination of the amount necessary to be raised for school purposes setting forth those specific line items which it believes can be reduced without obstructing the district's ability to provide a thorough and efficient system of education.

Based upon the statutory language summarized above, the City proposed the following tax levy reduction:

Appeal by City of Jersey City of the Budget of the State-operated School District of Jersey City

Tax Levy Adopted by the District Board of Education		Amount of Tax Levy Proposed By Governing Body	
Current Expense	$79,262,043	Current Expense	$67,466,791
		Appropriation from Surplus	(4,500,000)
		Total Operating Tax Levy	62,966,791
Capital Outlay	59,917	Capital Outlay	NA

Amount of Recommended Reduction in the Budget by Governing Body

Current Expense	$11,795,252
Appropriation from Surplus	4,500,000
Capital Outlay	-0-
Total Reduction in Tax Levy	16,295,252

Amount of Reduction in Dispute Before the Commissioner

Current Expense	$11,795,252
Reduction in Surplus	4,500,000
Capital Outlay	-0-
Total Reduction in Tax Levy	16,295,252

By way of specific line item reductions, the City has set forth the following list of such tax levy reductions:

Account Number	Title	1991-92 Budget	Recommended Reduction In Tax Levy
130	Other Administrative Expenses	$ 882,349	$ 105,000
211	Principals' Salaries	6,375,319	560,000
212	Supervisors' Salaries	3,187,176	700,000

Account Number	Title	1991-92 Budget	Recommended Reduction In Tax Levy
214	Other Instructional Salaries	$10,031,536	$ 1,600,000
215	Secretarial Salaries	3,596,066	270,000
216	Other Salaries	5,278,557	500,000
220	Textbooks	1,648,379	475,000
230	Library and A/V	521,686	300,000
240	Teaching Supplies	3,842,444	560,000
250	Other Instructional Expenses	1,061,217	550,000
260	Purchased Prof./Technical Ser.	50,000	50,000
310	Salaries-Attendance	592,418	90,000
410	Salaries-Health	2,336,539	475,000
420	Other Expenses/Health	418,142	175,000
430	Consultants	104,500	55,000
520	Contracted Services	6,606,550	1,100,000
530	Replacement of Vehicles	36,252	36,252
550	Other Transportation Expenses	14,980	9,000
640	Utilities	3,189,819	200,000
650	Operational Supplies	454,402	35,000
710	Maintenance Salaries	3,823,520	200,000
730	Purchase Instructional Equipment	1,430,371	200,000
810	Employee Retirement Contributions	4,996,397	600,000
820	Insurance	18,794,182	950,000
830	Rent	2,700,000	500,000
870	Tuition	9,654,693	1,500,000
	Free Balance Appropriation		4,500,000
	Total Reduction in Tax Levy		$16,295,252

I. CITY'S REASONS AND POSITION

By way of general argument the City contends that it has identified approximately $11.6 million dollars in over expenditures in the District budget. It further contends that the District will have a free balance of $8.6 million dollars at the conclusion of the 1990-91 school year and would therefore be required to appropriate $4.5 of such unappropriated free balance to reduce the local tax levy by that amount.

The City contends that a comparison of historical expenditures to the 1991-92 budgeted amounts demonstrates that the District has overestimated its spending. Further, the City contends that the District may be encumbering 1990-91 accounts to pay summer salaries and 1991-92 supplies. The City contends that accounts

should be encumbered in the 1991-92 budget and the 1990-91 unexpended funds should be permitted to lapse into surplus. In the alternative, the City argues that the 1991-92 budget be reduced by the amounts of 1991-92 supplies and salaries paid for out of 1990-91 funds.

The City provides the following specific reduction recommendations in support of its position:

Account 130 - Other Administrative Expenses

Budgeted	Proposed Reduction	Revised Amount
$882,349	$105,000	$777,349

The City contends that the increase recommended for 1991-92 represents 20% over the 1990-91 level and 24% over the 1989-90 level without reasonable explanation as to why such increases are necessary. It likewise contends that the District has a history of overbudgeting in this account.

Further, the City contends that the District spent an additional $76,738 in June over the figures given in May 1991. This amount it believes represents purchases for the 1991-92 school year using funds left unspent and budgeted for in 1990-91. Thus, it believes its request for a $105,000 reduction in this account is appropriate.

Accounts 211-216 - Instructional Salaries

		Budgeted	Proposed Reduction	Revised Amount
211	Principals' Salaries	$ 6,375,319	$ 560,000	$ 5,815,319
212	Supervisors' Salaries	3,187,176	700,000	2,487,176
214	Other Inst. Salaries	10,031,536	1,600,000	8,431,536
215	Secretarial Salaries	3,596,066	270,000	3,326,066
216	Other Salaries	5,278,557	500,000	4,778,557
		$28,468,654	$3,630,000	$24,838,654

In these accounts the City contends that the District by its own admission intends no new principal or supervisory hiring nor any additional hiring in the area of Other Instructional Salaries. Nevertheless, its budget request for 1991-92 calls for 28% and 45% increases respectively for principals and supervisors. Despite reductions in the number of persons in the 214 account from 178 to 173 the amount budgeted for 1991-92 is increased by 3.16%. The tendency to overbudget, contends the City, is illustrated by the 214 Account in that almost $2,000,000 was transferred from the 214 Account in 1990-91.

Insofar as secretarial salaries are concerned, the City points out that despite the fact that the District contemplates no additional principals, 8 fewer supervisors, 81 fewer teachers and 5 fewer Compensatory Education Guidance Counselors, it has budgeted for five additional principals' secretaries.

Finally, the City contends that spending after 11 months in the 216 Account was only $3,632,036 out of $5,027,194 budgeted, yet the 1991-92 budget calls for an increase of $251,363.

Account 220 - Textbooks

Budgeted	Proposed Reduction	Revised Amount
$1,648,379	$475,000	$1,173,379

In 1990-91 the City points out that only $690,384 was spent in this account out of an original $2,275,668 while nearly $1,400,000 was transferred out. The City argues that expenditures over the last four years have been approximately $1,000,000 per year.

Account 230 - Library Books and A/V

Budgeted	Proposed Reduction	Revised Amount
$521,686	$300,000	$221,686

The City contends that the amount budgeted is not consistent with the amount spent over the past four years. The City points out that $331,896 was transferred out of this account in 1991 and no reason is given to support the large increase in the amount budgeted for 1991-92 over the amount actually expended in 1990-91.

Account 240 - Teaching Supplies

Budgeted	Proposed Reduction	Revised Amount
$3,842,444	$560,000	$3,282,444

The City points out that the District expended only slightly over $1,400,000 in 11 months of 1990-91 out of an original budget of $3,279,759 and transferred $1,790,429. Encumbrances of $479,319 as of May 31, 1991 even if spent are likely for supplies to be used in 1991-92 thus justifying a reduction in the 1991-92 amount budgeted. The City points out that the district has averaged expenditures of less than $2,000,000 per year in teaching supplies over the past four years, yet budgets $3.8 million for 1991-92.

Account 250 - Other Instructional Expenses

Budgeted	Proposed Reduction	Revised Amount
$1,061,217	$550,000	$511,217

Spending patterns over the last four years, the City contends, bear no resemblance to the $1,040,534 budgeted in 1990-91 and the $1,061,217 budgeted in 1991-92. It is the City's position that the District itself acknowledges the overbudgeting in this

account by virtue of its transfer of $471,845 from this account during the 1990-91 school year.

Account 260 - Professional/Technical Services

Budgeted	Proposed Reduction	Revised Amount
$50,000	$50,000	$0

None of the monies in this account ($11,000) were expended in 1990-91 and no explanation is provided for why the line item should be increased.

Account 310 - Salaries-Attendance

Budgeted	Proposed Reduction	Revised Amount
$592,418	$90,000	$502,418

The City contends that this account was overbudgeted by $101,710 in 1990-91, yet was increased in 1991-92 despite no apparent increase in staffing levels. It also points to current spending for 11 months of only $437,259.

Account 410 - Salaries-Health

Budgeted	Proposed Reduction	Revised Amount
$2,336,539	$475,000	$1,861,539

Despite transfers of $344,720 from the original amount budgeted the balance of $1,841,095 exceeds the actual expenditures of $1,427,836 for 11 months. The City acknowledges that the District contemplates three new positions in this area including a physician but finds the increase projected for 1991-92 to be excessive and sufficient to pay each employee $11,787 more than the average estimated salary of $27,815.

Account 420 - Other Expenses/Health

Budgeted	Proposed Reduction	Revised Amount
$418,142	$175,000	$243,142

The City argues for the above reduction based upon the historic spending pattern of the District contending that the 1991-92 budget exceeds by many times the amounts spent in the past. The City points to the availability of funds in the 1990-91 budget which were unused.

Account 430 - Consultants

Budgeted	Proposed Reduction	Revised Amount
$104,500	$55,000	$49,500

With the increase of three health positions, the City contends the request for additional consultant services is excessive. The District, it avers, plans to spend more than twice its 1990-91 revised budget in this area. The City deems the increase available despite the fact that the intended reduction is sufficient to provide the necessary services.

Account 520 - Contracted Services

Budgeted	Proposed Reduction	Revised Amount
$6,606,550	$1,100,000	$5,506,550

The City points out that the District by virtue of transfers during 1990-91 has left just under $6,000,000 in this account and spent less than $4,700,000 over 11 months. Since the City contends the entire account is for the transportation of students, there should be no anticipation of large increases. Despite a history of underspending the amount budgeted, the District

continues to increase its budgeted amount yearly as illustrated by a summary contained on page 12 of the City's Petition and incorporated herein by reference.

Account 530 - Replacement of Vehicles

Budgeted	Proposed Reduction	Revised Amount
$36,252	$36,252	$0

The City points out that the District has in previous years budgeted monies in this account only to transfer all or most of the funds out of the account without expending any monies for the purposes budgeted. It therefore believes that past experience justifies the total reduction in this account.

Account 550 - Other Transportation Expenses

Budgeted	Proposed Reduction	Revised Amount
$14,980	$9,000	$5,980

The City contends that no explanation has been provided to explain why a budget of $14,980 is necessary when only $4,025 was spent in 1990-91. Therefore, it contends the reduction is justified.

Account 640 - Utilities

Budgeted	Proposed Reduction	Revised Amount
$3,189,819	$200,000	$2,989,819

The City points to a history of alleged overbudgeting in 1989-90 and 1990-91 based upon transfers of $442,000 and $493,997 respectively. Based upon the past history, the City contends its recommended reduction is reasonable.

Account 650 - Operational Supplies

Budgeted	Proposed Reduction	Revised Amount
$454,402	$35,000	$419,402

The City contends that the District has averaged expenditures of only $322,000 for three years and spent only $363,392 for 11 months in 1990-91 out of $437,303 budgeted. It therefore contends that the District has failed to justify why it needs an increase to $454,402 in 1991-92. The City contends that it has permitted a 6% increase for inflation within its reduced amount.

Account 710 - Maintenance Salaries

Budgeted	Proposed Reduction	Revised Amount
$3,823,520	$200,000	$3,623,520

The District budget document indicates a reduction of three positions in this account yet calls for a 13% increase over current spending after transfers from this account. The amount remaining after the reductions recommended is sufficient, according to the City, to ensure raises of $5,795 per employee.

Account 730 - Purchase Instructional Equipment

Budgeted	Proposed Reduction	Revised Amount
$1,430,371	$200,000	$1,230,371

The City points out the District's expenditure level over the years from 1987-88 to 1990-91 has been reduced from $1,555,588 to $747,923. The District transferred more than $1.9 million dollars out of this account in 1990-91 yet it requests a budget almost twice its actual expenditures in 1990-91. The amount remaining after the recommended reductions in this account will leave the District with a sufficient increase to improve its position relative to equipment.

Account 810 - Employee Retirement Contributions

Budgeted	Proposed Reduction	Revised Amount
$4,996,397	$600,000	$4,396,397

The City has made the above-recommended reduction based upon its independent analysis of the District's pension and Social Security requirements. The City points to a history of transfers from this account indicating what it believes to be overbudgeting.

The City contends that Social Security rates, as well as maximum taxable salaries, have increased only slightly over the past few years and were largely offset by the reduction of the number of positions subject to FICA. The City points out that the total 1990-91 spending in this account, even assuming the entire amount budgeted is expended, is still $33,000 greater than the spending of three years ago, less than a 1% increase in cost.

Based upon the foregoing reasons and the fact that the number of positions in the District has been decreased by 142 positions, the City contends its reductions are reasonable.

Account 820 - District Insurance

Budgeted	Proposed Reduction	Revised Amount
$18,794,182	$950,000	$17,844,182

While recognizing the difficulty in budgeting for insurance, the City once again justifies its reduction based upon past spending levels. The District has expended $19,209,984 for 11 months as of May 31, 1991 yet its 1991-92 budget is up over 20% for the City's projected annualized insurance spending. The City contends that based upon its own experience the District's projected increase of 27.8% for hospitalization is excessive.

The City also challenges the District's contention that an increase is necessary to meet judgments yet $405,599 budgeted in 1990-91 for such purpose was never expended. The City contends that the 1991-92 budget projects an increase over the 1990-91 budget yet 1990-91 spending fails to approach the amount originally budgeted.

Account 830 - Rent

Budgeted	Proposed Reduction	Revised Amount
$2,700,000	$500,000	$2,200,000

The City points out that spending for rental space has ranged from between $1,874,162 and $2,016,420 over the past four years yet $2,700,000 is requested for 1991-92 despite falling enrollment. The City argues that better use of existing space should be undertaken rather than renting outside facilities.

The City further contends that the District has failed to provide sufficient information to justify a $700,000 increase in this account over actual expenditures.

Account 870 - Tuition

Budgeted	Proposed Reduction	Revised Amount
$9,654,693	$1,500,000	$8,154,693

The City describes the following pattern of spending in this account:

1987-88	$5,851,511	
1988-89	6,400,331	
1989-90	7,222,817	
1990-91	4,856,509	(11 months)

While the City recognizes that a large portion of the tuition payments for 1990-91 will have occurred in June, it points out that the District's own projections for 1990-91 are only

$6,630,807; thus, the 1991-92 budgeted figure of $9,654,693 represents a 45% increase over the actual anticipated expenditures for 1990-91.

The City further points out that the number of placements have decreased over the years and no projection has been provided for 1991-92. Notwithstanding the City's recognition that reductions in this account must be conservative since placements can occur at any time during the school year, the City contends its recommended reduction is reasonable and will not hamper the District.

Revenues - Free Balance

The City contends that its recommendation that $4,500,000 be appropriated from free balance will not harm the District based upon its estimate of a projected free balance as of June 30, 1991 of $8.6 million. The District funded the 1989-90 school year with a $17,630,855 free balance and encumbrances in the May 31, 1991 Statement of Expenditures are not likely to be expended by June 30, 1991. Further, the City contends that the District will likely accrue greater revenues than originally anticipated as well as additional funds from cancellation of orders. As proof of this likelihood, the City offered the following listing:

	Excess Revenues	Unexpended Budget	Cancelled Orders
1987-88	$1,567,201	$2,342,365	$ 935,677
1988-89	2,404,541	2,106,433	1,843,754
1989-90	2,484,114	1,812,496	2,193,866

The City argues that despite two charges to the free balance of $7 million in 1991 offsetting excess revenues, unexpended balances and cancelled orders will result in an approximately $8.6 million free balance as of June 1991.

The City contends that the appropriation of $4.5 million in free balance will leave the district with a free balance of approximately $4.1 million equivalent to 2% of its current expense budget of $209.7 million after the reductions recommended here. (1.9% if no reductions are upheld) This ratio of free balance to the total budget is sufficiently close to the 3-5% accepted guidelines and does not harm the District's ability to provide a thorough and efficient system of education.

II. DISTRICT'S POSITION

The District's general position is that the City has grossly exaggerated its estimate of the District's fund balance and has made its recommended reductions solely on the analysis of financial data without consideration of educational matters.

The District contends that the burden of proof in this case rests upon the City to demonstrate that its proposed reductions will not impair the presentation of a thorough and efficient system of education. This reversal of the burden of proof for that which normally applies in budget appeals is based not only upon matters of procedure since the provisions of N.J.S.A. 18A:7A-52(a) require the City to be the petitioning party, but also upon the fact that the Jersey City School District is one which has failed its educational mission and has been put into the hands of a State Superintendent. Therefore, the District contends that the proper inquiry for the Commissioner is not whether the reductions herein will prevent the continuance of a thorough and efficient system of education, but whether the reductions will prevent the District from making progress toward the provision of such a system of education.

Further, the District argues that Jersey City is a special needs district which must begin to increase its expenditures in 1991-92 to meet the constitutional requirements of substantial equivalence of expenditures with affluent districts within five years as mandated by the New Jersey Supreme Court in Abbott v. Burke, 119 N.J. 287 (1990). To meet this requirement, contends the District, the Legislature passed the Quality Educational Act, P.L. 1990, c. 52, as amended by P.L. 1991, c. 62 for the purpose of ensuring the mandate of the Court. This act, argues the District, requires special needs districts to increase their expenditures each year over five years beginning with 1991-92 to reach a level of per pupil expenditures equal to the average of the wealthier districts. The Act, contends the District, also provides for a minimum tax levy which must be maintained as the local share to support the budget.

The District therefore argues that as a poor urban district, it is required to increase its budgetary expenditures in order to address the special needs of an urban population and thus makes obsolete the pattern of spending which the City relies on in recommending reductions. Finally, the District argues that its total budgetary increase over 1990-91 is only 2.02% as indicated on page 23 of its Budget Document and the J-1 Current Expense portion of its budget has increased only by 4.55% as indicated on page 22 of the Budget.

The following represents the line item by line item response on the part of the District:

Account 130 - Other Administrative Expenses

The District argues that the City's position is predicated on only 11 months of expenditures. The final unaudited 1990-91

figure for 1990-91, $809,090, is just $52,823 less than the $861,913 amount budgeted in this account. The amount budgeted for 1991-92, $882,349, is only 9.05% over the 1990-91 actual and within the District's budget spending cap of 9%.

The District argues that the major increase in this account is for the cost of data processing services for district operations and new software for the Human Resources Department to assist in computerizing personnel records currently maintained by hand.

The data processing services are necessary to modernize operations of the second largest school district in the state.

Accounts 211-216 - Salaries

(a) Account 211 - Principals' Salaries

The District rebuts the contention of overbudgeting of the Principals' Salary Account (211) from 1987-88 to 1990-91 by contending that collective bargaining negotiations were ongoing with principals throughout those years so that sufficient funds had to be available to meet a settlement agreement. Settlement was reached in the 1990-91 school year.

Further the District argues that the figure used by the City for 1990-91 actual expenditures represents expenditures for 9 months and not 11 as contended since the City's figures did not include encumbrances for the 2 summer months in which principals are employed. It contends that its actual expenditures for the full 12 months of 1990-91 in the 211 Account are $6,081,651 and thus the amount budgeted in 1991-92 ($6,375,319) represents an increase of only 4.8% over 1990-91.

The District points out that its settlement with the principals extends only through August 31, 1991 and thus it is in the process of negotiating a successor agreement. The amount budgeted over the actual 1990-91 provides for a modest 5% increase for 1991-92 and is entirely needed to pay a minimal increase over current salaries.

(b) Account 212 - Supervisors' Salaries

The District points out that the City's recommendation for reduction which was based upon expenditures in this account for past years once again fails to consider that the supervisors are members of the same bargaining unit as the principals and thus were without a contract until the 1990-91 school year. As indicated in Account 211, the District contends that adequate funds had to be budgeted in prior years in order to meet any contract settlement that might have been reached.

The District acknowledges that the total expenditure in this account for 1990-91 was $2,717,308 substantially lower than the $3,711,405 budgeted; however, the District claims that this is attributable to vacancies in positions during 1990-91 and the District's decision to eliminate overtime pay for supervisors attending night meetings and working on curriculum.

While the amount budgeted in 1991-92 represents an increase of $469,868 over actual expenditures for 1990-91, the District contends this amount represents the actual salaries for 47 positions (down from 55) plus a 5% anticipated negotiated raise. Further, the District points out that it intends to employ a limited number of supervisors who are 10-month employees over the summer at a cost of approximately $90,000 as eight special education

supervisors who will work on student placement and transportation for the 1991-92 school year. An additional $250,000 has been earmarked for Compensatory Education Department Chairpersons for new duties to be assumed in supervisory staff at the District's high schools.

It is the District's contention that these funds are necessary to improve the effectiveness of the instructional supervision.

(c) Account 214 - Other Instructional Salaries

The District claims that the City's financial analysis is flawed as it relates to this account and that its actual expenditures for the 12 months of 1990-91 were $8,215,611. Even this figure, argues the District, is not a true reflection of the District's needs for the 178 positions in this account since there were 16 vacancies during the course of the year which, had they been filled, would have resulted in a much higher level of expenditure.

The District points out that this account covers librarians, guidance counselors and child study team members whose necessity is not questioned by the City. It is the District's contention that the amount budgeted for 1991-92 represents the salaries for the 173 positions plus a 5% increase which it deems to be modest considering the contract covering these employees for 1991-92 has not been settled.

(d) Account 215 - Secretarial Salaries

The District contends that the amount budgeted in this account represents the actual salaries of 133 secretaries plus five additional positions increased by 5%. In response to the City's questioning of the need for the additional positions, the District

indicates that these positions are being added to support the 23 district high school vice principals in handling the paperwork associated with "house plans" established in the schools. Vice principals under such plans head teams of guidance counselors, attendance officers, substance abuse coordinators and other support staff in providing continuity of services to students and parents. The secretaries will be assigned to relieve vice principals of ministerial tasks.

(e) Account 216 - Other Salaries

These salaries are for teacher aides (300) in regular classrooms, special education classes, compensatory education classes and bilingual and library classes. They do not, according to the District, represent new positions. Actual expenditures in this account for 12 months were $4,851,588. This total indicates the District does not reflect the salaries for all 300 aides since there were eight unfilled positions at the start of the 1990-91 school year.

The District points out that the City does not question the need for these positions. It is the District's position that the amount budgeted for 1991-92 represents the actual salaries for the full 300 positions plus a modest 5% raise.

Account 220 - Textbooks

The District contends that the City's analysis in this area is based upon an inaccurate statement of 1990-91 actual expenditures. The actual expenditures in 1990-91 in this account were $994,106. This entire amount was utilized to replace textbooks lost, stolen or damaged and to purchase texts necessary to bring textbooks into conformity with the existing curriculum.

The District contends that actual expenditures in 1990-91 were lower then the budgeted amount because of the District's program of curriculum revision in health, music, mathematics, language arts and social studies which caused a delay of purchases until the revision was completed and an inventory of textbooks in the district could be completed. This program of revision of curriculum and updating of textbooks was a outgrowth of the findings which led to the stated takeover of the Jersey City School District.

The District argues that the process of curriculum revision resulted in the adoption of new textbooks in music and health during 1990-91. These new adoptions were charged to the 1989-90 balance in the 220 Account and thus no expenditures were made in the 220 Account for new adoptions in 1990-91.

The District contends that $1.2 million dollars out of the $1,648,379 in the 1991-92 budget have been allocated for the replacement of lost and damaged textbooks. Since additional revisions in curriculum have occurred in language arts, foreign language and social studies and textbooks have been purchased as a result of these revisions, the District contends that $350,000 of the amount allocated for textbooks in 1991-92 has been committed leaving only $100,000 for the purchase of mathematics textbooks upon completion of the curriculum revision in that subject.

The District argues that the delay which the District experienced in completing its curriculum revision during 1990-91 does not provide a justification for reducing the 1991-92 textbook budget.

Account 230 - Library and A/V Materials

The District again argues that the City has understated actual expenditures for 11 months in this account. The District contends that actual expenditures for the full 12 months of 1990-91 were $396,049.

While the 1991-92 budget of $521,686 exceeds the actual expenditures of 1990-91 by $125,637, the District contends that $98,698 of this increase has been set aside to update library media resources which has not been undertaken for several years. The District contends that the total amount budgeted also includes $90,000 to enhance materials in career education, business studies, computer technology, home economics and industrial arts for the purpose of preparing students for modern workplace entry.

Account 240 - Teaching Supplies

Actual expenditures in this account for 1990-91, which provides basic materials and supplies such as paper, chalk, pencils, crayons, tests and other printed materials and workbooks, were $2,318,484 out of $3,279,759 budgeted.

The District contends that the $3,842,444 budgeted for 1991-92 includes the following new items:

a.	$116,000	for inflation
b.	$200,000	Early Warning Tests
c.	$200,000	Math Supplies to prepare for HSPT
d.	$100,000	Computer Software
e.	$750,000	Materials and supplies to accompany new textbooks and for music, visual and performing arts, science, health, gifted and talented and alternative education
f.	$165,000	purchase of new standardized test
g.	$ 50,000	purchase of supplies for pre-K (5 classes).

The District contends that reducing this account would deprive children of basic materials necessary to give them a full opportunity to learn.

Account 250 - Other Instructional Expenses

The District argues that the amount actually expended in 1990-91 for 12 months, $777,776, is greater than the expenditure level indicated by the City in its Petition. The District contends that the amount budgeted in this account for 1991-92 is $283,441 greater than the actual expenditures in 1990-91 of which $180,000 is intended for staff development activities in all subject areas and $138,000 allocated for Child Study Team expenses necessary to carry out their responsibilities to review placements and educational improvement plans.

Thus, the District contends the increase is warranted.

Account 260 - Purchased Professional/Technical Education Services

These funds are for the purpose of hiring consultants to train staff and parents to implement the Site-based Management pilot program in eight schools. The $50,000 budgeted in this account is to cover the cost of $6,000 at each of the eight schools involved in the pilot with an additional $2,000 earmarked for training materials.

The specialized nature of this project cannot be conducted by the District's own staff.

Account 310 Salaries - Attendance

The District charges the City with understating the actual expenditures in this account for 1990-91 possibly due to a failure to consider expenditures for attendance counselors for bilingual and compensatory education programs. The District contends that actual expenditures in the 310 Account for 1990-91 were $572,328 which was above the $564,208 budgeted during that year.

The District argues that the amount budgeted for 1991-92 represents only a 3.5% increase over 1990-91 without any decrease in

the number of positions, thus being barely enough to maintain these positions which the District believes are essential.

Account 410 - Health Salaries

The District points out the City's underestimation of actual expenditures in this account was due to failure to recognize that amount encumbered for summer payments through August 1991. The District contends that the actual total of expenditures for the entire year was $1,892,638 which it acknowledges as being short of the $2,185,815 budgeted in this account.

The District attributes the difference between the amount budgeted and the amount expended to vacancies in eight budgeted positions during the 1990-91 school year. The District contends that its appropriated amount $2,336,539 for 1991-92 was calculated based upon the actual salaries of the full complement of nurses plus a 5% raise and the cost of three new positions: one school physician, one occupational therapist and one physical therapist.

The physician is projected as being needed to provide medical examinations and referring students for treatment in an environment in which student needs are growing in volume and complexity. The other two positions are justified by the District as being necessary to reduce the costs of hiring independent contractors to perform the services required by handicapped pupils.

Account 420 - Other Expenses for Health

The District disputes the allegations of the City in its Petition that funds in this account went unexpended in 1990-91. Actual expenditures, it contends, were $281,534 more than the $143,000 budgeted.

The District points out that of the $418,142 budgeted in 1991-92, $200,000 is for health clinics at Snyder and Dickinson High Schools which are operated in conjunction with the Jersey City Medical Center which charges for its services. Part of the $200,000 will be used to defray the costs of services billed to students who have no health insurance. The remainder is to pay the salary of a full-time Substance Abuse Counselor for the two clinics. Excluding the $200,000 for the purposes outlined above, the District argues that its remaining amount would be less than actually spent in 1990-91.

Account 430 - Consultants

The District argues that the $104,500 budgeted in this account is for purposes of hiring the services of neurologists, psychiatrists and ophthalmologists on a consulting basis. These specialists are required to provide services to educationally handicapped students.

The District contends that the specialized services required in this area are required by law and are outside the expertise and competency of the three new positions being added.

Account 520 - Contracted Services, Transportation

The District disputes the contention of the City that it has had a history of overbudgeting in this account. The District contends that its actual expenditures for 1990-91 were $5,954,792 which is very close to the $6,035,243 budgeted for that year.

The District argues that since the services involved in this account are subject to the public bidding process it has no control over prices. For the 1991-92 school year the District contends that it budgeted a 10.9% increase over 1990-91 actual

expenditures to anticipate increased costs arising from the public bidding process. The District cites the fact that the number of students requiring transportation in 1991-92 is expected to increase to 3,150 as opposed to the 2,700 transported in 1990-91, a 17% increase. It further argues that the 10.9% increase budgeted may prove to be inadequate.

Account 530 - Replacement of Vehicles

The District admits that it expended only $475 in 1990-91 out of a total amount budgeted of $35,000. The District contends that its decision not to expend the amount budgeted on a diesel fueled bus was based upon its finding that the amount saved in diesel fuel was not sufficient to warrant the expenditure for a new bus.

The $36,252 budgeted for 1991-92, argues the District, is consistent with its approval of expending funds only where genuinely needed. In this instance, the District contends that there is a current need for two mini-vans to transport students to field trips and academic competitions. The purchase of the vans would reduce costs by precluding the necessity of hiring the services of contractors.

Account 550 - Other Transportation Expenses

The District admits that it only expended $4,025 out of the $13,775 budgeted in 1990-91. It does, however, argue that past years' experience cannot be used as a guide for future expenditures since repairs to vehicles are essential for safety purposes and it must guard against extraordinary expenses particularly since the District's fleet includes vehicles dating to 1984.

It argues that the $14,980 budgeted in this account represents only a 8.75% increase over 1990-91 and well within the 9% budget cap permitted by the state.

Account 640 - Utilities

The District points out that actual expenditures in this account for 1990-91 were $3,104,128 which is slightly above the amount of $3,081,200 budgeted. Since the amount budgeted for 1991-92 represents an increase of only 2.76% over 1990-91 actual expenditures and only a 3.53% increase over the amount budgeted for 1990-91, the District argues that such a reasonable increase cannot be reduced and remain prudent.

Account 650 - Operational Supplies

The District contends that the City's objections in this account are based upon a review of expenditures over 11 months and do not take into account amounts encumbered for expenses not paid as of May 31, 1991.

The District contends that actual expenditures in 1990-91 were $488,334, an amount actually in excess of the $437,303 budgeted. It further points out that the 1991-92 amount budgeted is 6.95% lower than actual 1990-91 expenditures.

The District points out that despite the inaccuracy of the City's figures on actual expenditures in 1990-91, the City does acknowledge the reasonableness of a 6% increase over 1990-91 actual expenditures and since its 1991-92 budgeted amount is actually less than 1990-91 expenditures, no reduction is justified without impairing the District's ability to keep its schools clean.

Account 710 - Maintenance Salaries

The District argues that its failure to expend the entire amount budgeted in 1990-91 in this account is attributable to six vacancies which it experienced in 1990-91. It contends that despite reducing its number of positions in this area from 99 to 96, a reduction in expenditures in this account cannot be made without adversely affecting its ability to pay its carpenters, electricians, mechanics, painters, plumbers and laborers. The District claims that the amount budgeted for 1991-92 is based upon the actual salaries of the 96 employees plus a 6% increase provided for in its negotiated agreement with AFSCME for 1991-92.

Account 730 - Purchase of Instructional Equipment

While it acknowledges that the amount expended in this account for 1990-91 ($1,226,721) was substantially less than budgeted for that year ($2,146,316), the District argues that its budgeted amount for 1991-92 is lower than the 1990-91 budgeted amount and only $203,650 more than 1990-91 actual expenditures.

The District contends that the vast amount of the funds budgeted for 1991-92 is for computers both for improving district operations and enhancing student opportunities. The District contends the computers will be used to teach computer literacy, business operations and to enrich accelerated courses. Computers will also be purchased for modernization of the District's payroll system ($150,000), a new security system ($249,680) and for a new system of student accounting and scheduling ($150,000).

The District contends that the above-cited expenditures are above and beyond the normal cost of equipment replacement. The District argues that the expenditures indicated are necessary to

modernize the District's operations and to enable Jersey City students to obtain familiarity with computers and their operation in the field.

Account 810 - Employee Retirement Contributions

This account covers the employer's share of the employee retirement systems and Social Security. The 1991-92 budgeted amount in this account is $4,996,397, a 13.8% increase over total actual expenditures of $4,390,152 in 1990-91. The District contends that spending in this account fluctuates every year depending upon a variety of factors. The District points out that it has frequently received retroactive bills due to adjustments made by the Division of Pensions during or after the close of the year. As an example of such retroactive adjustments, the District cites a $301,221 adjustment applied retroactively for the 1988 school year, a copy of which it submits as Exhibit 1 of its Answer. The District argues that while it has received no notice of retroactive bills for 1989 and 1990, it believes it probable that such bills might be received and therefore the budgeted amount for 1991-92 includes $300,000 for each of those two years as a contingency against such an adjustment.

Account 820 - Insurance

The District argues that the City's position relative to this cut is inexplicable since it is based upon expenditures for only 11 months. It is the District's position that its expenditures for insurance in 1990-91 amounted to $16,484,520 which is more than $2.5 million above what had been budgeted.

The amount budgeted in 1991-92 is 14% over 1990-91 actual expenditures. It is the District's contention that health insurance will increase in 1991-92 by 27.8% and despite the City's

protestation the increase is based upon receipt of notification of such increase from the State Health Benefits Program. (See Exhibit 2 of the District's Answer.)

While agreeing with the City as to the unfortunate nature of such increases, the District maintains that such costs are beyond its ability to control.

The District also responds to the City's contention that its estimate as to judgments is excessive by pointing out that a summary of its potential liability is $4.6 million exclusive of workers' compensation claims.

Account 830 - Rent

The District contends that its budgeted amount for 1991-92 of $2,700,000 is necessary to cover rental increases. In response to the City's questioning of the need for rental space in an era of declining enrollment, the District points out that the predominant source for its rental needs are three school sites (P.S. #42, P.S. #17 Annex and Academic High School) which have been in operation for years. The District argues that a further source for rental expenditures is the rent for the District's administrative offices.

Account 870 - Tuition

The amount of expenditures in 1990-91 for tuition for out-of-district placement of special education students was $6,716,869 out of a budgeted amount of $7,077,669. The District argues that the $9,654,693 budgeted in this account for 1991-92 is predicated upon tuition increases in effect for 271 special education placements out-of-district amounting to $6,483,891. (See pages 104 to 106 of the District Budget.) Additionally, the District contends it has received a bill for payment of $3,170,802 in 1991-92 for

placement of Jersey City children in State facilities. (See Exhibit 4 of District's Answer.) These costs, it is argued, leave no room for reduction.

Revenues - Fund Balance

The District acknowledges that it had a fund balance of $17,630,855 at the conclusion of the 1989-90 school as audited. It argues, however, that it appropriated $7 million of that amount into the 1990-91 budget and an additional $7 million to offset a cut of that size in the tax levy imposed by the Department of Community Affairs. The District argues that $1,684,443 is restricted for use in the Regional Day School and special schools for adult education. A further appropriation of $1 million, it is contended, is to be made to offset cost of operating expenditures in 1990-91.

The District contends that its free fund balance for 1990-91 will be $946,412 and not the $8.6 million contended by the City. The City's estimate, it is argued, is based upon a belief that there will be excess revenues, unexpended budget items and cancelled orders. The District denies such likelihood and instead points out that it will have to appropriate $1 million to meet 1990-91 expenses as indicated above.

The District further points out that it anticipates little surplus from cancelled orders and even if such amount as estimated by the City were achieved, it would still leave the District with a fund balance of only $1,946,412. This amounts to less than 1% of the District's current expense budget, an amount considerably lower than the estimated 3% necessary.

The District further points out that the City upon application to the Department of Community Affairs was successful in

having the City's local school tax levy reduced by $11 million dollars. Despite recognition of this tax levy reduction, the City requests a reduction in the District's fund balance knowing that any such balance will be wiped out by the $11 million cut in local tax revenues. The District argues that the City's request for an appropriation of $4.5 million is "...frivolous [and] lacking in good faith."

The District's final general agreement raised by way of an Affirmative Defense is that the Quality Education Act, P.L. 1991, c. 62, section 21 requires a "Special Needs District" to meet its Local Fair Share. This minimum tax levy for Jersey City has been calculated by the Department of Education to be $76,780,872 for 1991-92. Thus, it is the District's argument that any reductions imposed by the Commissioner cannot reduce the tax levy below that level.

III. COMMISSIONER'S DECISION

In rendering his determination in this matter the Commissioner takes note of the respective legal arguments of the parties as set forth in their position statements. He notes the argument put forth by the City that the State-operated School District of Jersey City has overestimated its expenditures in the 1991-92 budget by approximately $11.5 million and has failed to appropriate $4.5 million dollars from its free balance which it estimates at $8.6 million.

In making such request of the Commissioner, the City relies upon a comparison of historical spending with the spending allocations for the 1991-92 school year. While acknowledging that increases in spending in and of themselves should not be a basis for

reduction, the City argues that expenditure increases should be documented and justified. Further, the City believes its budgetary analysis raised the question of whether the District has encumbered 1990-91 accounts to pay summer salaries and purchase supplies actually payable in fiscal 1991-92. The City takes the position that these accounts should be encumbered in the 1991-92 budget and the unexpended portions of the 1990-91 budget be allowed to lapse into surplus or, in the alternative, the amount of such encumbrances should be deducted from the 1991-92 budget. On the contrary, the City alleges that the District uses such end-of-the-year expenditures to justify higher expenditures for the 1991-92 school year.

The Distirct uses its position statement to present its legal argument that the City as the petitioning party in this matter, not the District, bears the burden of demonstrating that the amounts budgeted are not required to provide a thorough and efficient system of education. This burden, argues the District, must be borne by the City, not only as a procedural matter but because of the District's status as a district requiring state operation for failure to meet its educational obligations to the pupils and citizens of Jersey City.

In addition to pointing out that the Jersey City School District has been determined by the State to have failed in its mission to provide a thorough and efficient system of education, the District likewise points out that it is classified as a Special Needs District pursuant to the New Jersey Supreme Court's Decision in Abbott v. Burke, supra, which requires that such districts increase their budgeted expenditures within the next five school

years to reach a level of per pupil expenditures which is equal to the average per pupil expenditures of the most affluent districts. The District points out that pursuant to such decision the Legislature passed the Quality Education Act of 1990, (QEA), supra, which requires the increased expenditures determined by the Court to be necessary to meet the state constitutional mandate of providing a thorough and efficient system of education.

The District argues that in evaluating the City's proposed budgeting reductions in this case the Commissioner should consider that the District is required to increase its expenditures to address the educational disadvantages arising from years of educational neglect. Such requirement, in the District's view, negates the City's reliance upon previous patterns of expenditures.

Notwithstanding its obligations under law to increase its expenditure level, the District argues that its total budget for 1991-92 has increased by only 2.02% and its J-1 Current Expense budget has increased by only 4.55% over the comparable J-1 budget of 1990-91. The District further argues that the amendments to the QEA have significantly reduced the state aid which it had anticipated and required it to severely reduce personnel from its 1990-91 level.

The Commissioner notes that the City, in rebuttal to the District's position, contests the District's assertion that it bears the burden of proof in this matter. Instead, it urges the Commissioner to conduct an independent review of the necessity for the line item expenditures which the City has challenged. In so doing, the City calls to the Commissioner's attention the New Jersey Supreme Court's admonishments in Board of Education of East Brunswick v. Township Council of East Brunswick, 48 N.J. 94 (1966)

and Board of Education of the Township of Deptford v. Mayor and Council of Township of Deptford, 116 N.J. 305 (1989) that deference be given to the municipality if the municipality's determinations do not override or jeopardize the right to a thorough and efficient system of education.

The City argues that no deference is due the decisions of the State-operated School District but that such status requires even closer scrutiny by the Commissioner since there exists no citizen control over the expenditures of such a district in that there is neither a true electoral or appointed board nor an opportunity for the voters to pass on the budget either by direct vote or through their elected representatives. It further argues that the mere finding of deficiency on the part of the Jersey City School District does not justify unsubstantiated budget increases.

The City also challenges the District's interpretation of Abbott v. Burke, supra, in that the City argues that Abbott's purpose was to redirect financial resources for wealthy districts to special needs districts where municipal overburden prevented those districts from raising sufficient funds to provide for a thorough and efficient system of education. In defense of this position, the City points out that the plaintiffs in Abbott have returned to court alleging that the QEA as amended has not sufficiently reallocated funding from wealthy districts to special needs districts to release the overburden on the municipal tax levies.

The City argues that not only does Abbott mandate increases in special needs district appropriation for education, it also mandates the State of New Jersey provide the financing that Jersey City and its sister special needs districts cannot afford.

Finally, the Commissioner takes note of the final summations presented by the parties. The District's final summation alleges the ineffectiveness of citing previous years' expenditures as a basis of judging the relevancy of 1991-92 budgetary requests since the very reason for the State takeover of the Jersey City School District was predicated upon the deficiencies of the District's operation under its previous board of education and administration.

The District argues that the City's analysis is founded upon incomplete financial data which is presently available in the form of 1990-91 audit report and its failure to recognize the need for additional expenditures to improve the Jersey City school system.

The District asserts that any reference to 1990-91 expenditure figures must bear in mind that revenues to support the J-1 Current Expense budget fell short as indicated by Exhibit A-3 of the audit report and that $3.8 million dollars in budgeted expenditures were withheld to avert a deficit.

The District argues that under the amended QEA both the amount of budgeted expenditures, as well as state funding, were to increase for special needs districts while local revenues were, pursuant to P.L. 1991, c. 62, section 21, to be maintained at a minimum at the levels of 1990-91 funding. The District argues, however, that despite a $28.5 million increase in state funding, half of such increase was negated by a need to appropriate $14 million from free balance to offset revenue losses imposed by reduction of the 1990-91 tax levy originally established by the State Superintendent at $87,993,944 but actually totaling only

$76,287,907 as a result of a decision of the Department of Community Affairs and property re-evaluation appeal. (See 1991-92 Budget, at p. 114.)

Prior to rendering his decision on a line-item-by-line-item basis, the Commissioner finds it necessary to dispose of the legal arguments raised by the parties in this matter. Initially, the Commissioner notes that the Legislature has vested in the State Superintendent of a State-operated School District the authority to certify a tax levy deemed necessary to the provision of a thorough and efficient system of education. The Legislature has also vested the right to appeal such determination of the State Superintendent with the municipal authorities. Thus, the Commissioner finds and determines that the City in this matter bears the burden of proof that the certification of the State Superintendent is in excess of that required to provide for a thorough and efficient system of education. N.J.S.A. 18A:7A-52(a)

N.J.S.A. 18A:7A-52(a) further requires that the Commissioner shall determine the amount necessary for the district to provide a thorough and efficient educational program to its students; thus, the focus of the Commissioner's review in this budget appeal is on determining what amount of funds must be provided for the District to meet the educational needs of its students. This determination is made independent of any action which may have been taken by the Director of the Division of Local Government Services who by law has been granted the authority to review, determine and certify the amount of revenues which can be raised locally to support the budget of the State-operated school district. N.J.S.A. 18A:7A-52(b) and (c) Given the provisions of

this statute, it is the Director who examines and determines municipal tax burden for state-operated school districts, while the Commissioner focuses on the amount of local revenues necessary for a thorough and efficient education.

Very importantly in regard to this bifurcation of responsibility with respect to local revenues in state-operated school districts, the Legislature itself has provided a mechanism in law which dictates what must occur if there is a difference between what the Commissioner determines to be the amount of local revenues necessary for a thorough and efficient education and the amount of revenues the Director has certified the municipality can raise locally to support the District's budget. N.J.S.A. 18A:7A-52(c) reads in pertinent part:

> ***Any difference between the amount which the director certifies and the total amount of local revenues required by the budget approved by the Commissioner shall be paid by the State in the fiscal year in which the expenditures are made, subject to the availability of appropriations.

Further, while the Commissioner agrees with the urging of the City that no special deference should be accorded the actions of state-operated school districts and that its individual line item expenditures should be subject to independent analysis, he cannot escape considering the fact that the State-operated School District of Jersey City, in addition to its failing status, is also a Special Needs District under the provisions of QEA which both the Supreme Court and our Legislature have mandated be provided with additional resources to enable it to provide its pupils with similar educational opportunities as those afforded to pupils in the state's most affluent districts.

Lastly, the Commissioner determines that he must be guided by the District's overall final financial status as of June 30, 1991 as determined by the official statutorily required audit. In so concluding, the Commissioner notes that possible underexpenditure from the amount budgeted in any single account becomes less meaningful when one recognizes that the final audit as indicated in Exhibit A-3 of such audit reveals that anticipated revenues for 1990-91 fell short by approximately $3.9 million and the total district general fund free balance was only $1,854,454. Therefore, in light of the foregoing free balance situation, the City's recommendation that the tax levy be reduced by way of a $4.5 million appropriation from free balance is rejected. Further, the Commissioner must conclude that such a precarious free balance situation for a school district the size of Jersey City with a total budget of $241,326,789 likewise must of necessity preclude too stringent a standard when reviewing individual line items. In so concluding, the Commissioner notes that no budget or proposed line item appropriation within a budget can be regarded as being an iron-clad guarantee as to expenditure. Were it to be so regarded, the Legislature in its wisdom would not permit transfer of funds from one account to another. The final analysis in determining whether a district has deliberately overbudgeted must be the bottom line and the relationship between overall appropriations and overall expenditures.

The following represents the Commissioner's line-item-by-line-item determinations:

Account 130 - Other Administrative Expenses

1991-92 Budgeted	Proposed Reduction	Revised Amount
$882,349	$105,000	$777,349

The Commissioner notes that the final level of expenditure in 1990-91 in this account was $809,089 out of $861,913 budgeted. The District's contention that its 1991-92 budgeted amount includes $200,000 for upgrading its personnel records system by computerizing them, as well as an anticipated increase for inflation, appears reasonable particularly in light of the fact that such computerization will not only increase efficiency over handling entirely by hand but will result in a reduction of employees in the personnel office. Further, a reduction of $105,000 as proposed by the City would reduce this account below that of the actual expenditure level of 1990-91. A disparity of $52,824 between actual expenditures and the amount budgeted in this account hardly justifies a $105,000 reduction. The recommendation of the City is denied.

Account 211 - Principals' Salaries

1991-92 Budgeted	Proposed Reduction	Revised Amount
$6,375,319	$560,000	$5,815,319

In reviewing the arguments of the parties presented relative to this account, the Commissioner finds correct the City's contention that summer salaries for principals should not be encumbered in the 1990-91 salary accounts but should rightfully be attributed to the 1991-92 fiscal year when such salaries are earned. Therefore, the Commissioner determines that the 1991-92 principals' salaries account may be reduced by $560,000.

Account 212 - Supervisors' Salaries

1991-92 Budgeted	Proposed Reduction	Revised Amount
$3,187,176	$700,000	$2,487,176

The Commissioner notes that the reduction recommended by the City would reduce the monies available for supervisors' salaries to less than the $2,904,040 which the audit indicates was actually expended. If one were to multiply the aforesaid amount by a minimal 5% raise as indicated by the District and add the additional costs of $90,000 for summer work, as well as the $250,00 contemplated for the creation of Department Chairpersons' positions, the amount required exceeds the $3,187,176 budgeted. Therefore, the Commissioner determines the amount budgeted to be reasonable and rejects the City's recommended reduction.

Account 214 - Other Instructional Salaries

1991-92 Budgeted	Proposed Reduction	Revised Amount
$10,031,536	$1,600,000	$8,431,536

The Commissioner finds unpersuasive the District's argument explaining the difference between the 1990-91 budget allocation and expenditures as being partially attributable to 16 vacancies in librarian and counselors' positions. He agrees with the City that if such positions were necessary they should have been filled. The Commissioner does, however, accept as valid the need to assume the cost of compensation for Child Study Team members working during summer months when such costs had previously been met through a grant and the need to provide replacements for persons on paid sabbatical leaves.

In arriving at such a conclusion, the Commissioner finds it difficult to believe that a $1.5 million discrepancy between appropriations and expenditures can be accounted for by 16 unfilled positions. At the same time, the Commissioner is sensitive to the needs of a district such as Jersey City to have full complement of librarians and guidance counselors to meet the special needs of urban children and he therefore will defer to the District's judgment relative to the requirement for the 16 positions unfilled during 1990-91. In so concluding, however, the Commissioner deems a $600,000 reduction as being capable of being sustained without injury to the District's plans in this area.

Account 215 - Secretarial Salaries

1991-92 Budgeted	Proposed Reduction	Revised Amount
$3,596,066	$270,000	$3,326,066

Having carefully considered the actual expenditures in 1990-91 for secretarial salaries ($3,194,312) and a 5% increase anticipated upon conclusion of the negotiations for a new contract taken against the actual expenditures for 1990-91, the Commissioner finds the amount budgeted for 1991-92 a reasonable estimate if one includes five new positions as contemplated by the District. In reviewing the District's rationale for such positions, the Commissioner finds the need justified by the importance of freeing the vice principals from the burden of paperwork so that they are able to spend more time in supervising student behavior. The City's recommended reduction is rejected.

Account 216 - Other Salaries

1991-92 Budgeted	Proposed Reduction	Revised Amount
$5,278,557	$500,000	$4,778,557

The District's argument that the disparity between the budgeted amount in 1990-91 and actual expenditures was due to eight vacancies is likewise unpersuasive since these vacancies were, if filled, not sufficient to account for a disparity of $135,360 between the budgeted amount and the amount expended. On the other hand, the City's recommended reduction of $500,000 would result in a smaller amount than actually expended in 1990-91. Therefore presuming a 5% increase upon the amount actually expended in 1990-91 ($5,136,426) and an average salary of $15,000 for eight additional aides positions unfilled last year ($120,000) equals potential expenditure of $5,256,426. Such figure being close enough to the amount budgeted to preclude reduction of the amount budgeted in this account for 1991-92, the City's recommended reduction is rejected.

Account 220 - Textbooks

1991-92 Budgeted	Proposed Reduction	Revised Amount
$1,648,379	$475,000	$1,173,379

The Commissioner notes that the actual expenditure for textbooks in 1990-91 was only $994,105 out of $2,275,668 budgeted. He also notes the District's explanation for failure to expend the full amount budgeted is based upon a delay in completing the project of curriculum updating. Had the overbudgeting in 1990-91 resulted in a significant surplus, the requested reduction by the City would be entirely reasonable. Under the present circumstances with the District's free balance at such a precariously low status as indicated in its annual audit, the amount budgeted for textbooks in 1991-92 appears to be reasonable given the unquestioned need of the system to upgrade its curriculum and ensure uniformity of textbooks for all schools and all grade levels. The City's recommended reduction is denied.

Account 230 - Library Books and A/V Materials

1991-92 Budgeted	Proposed Reduction	Revised Amount
$521,686	$300,000	$221,686

Expenditures for 1990-91 were almost $300,000 less than the amount budgeted which is precisely the amount by which the City seeks to reduce this account. Since the District seeks to expend much less in 1991-92 than the amount budgeted in 1990-91, a reduction of the size requested by the City would allow the District only $221,686 to upgrade its audio visual and library resources, an amount $174,363 less than actually expended in 1990-91. Clearly such a reduction would prevent the District from carrying out its ambitious plan for expanding its library and media resources. Under the circumstances, the $125,637 increase over 1990-91 expenditures does not appear unreasonable. The Commissioner therefore rejects the City's recommended reduction.

Account 240 - Teaching Supplies

1991-92 Budgeted	Proposed Reduction	Revised Amount
$3,842,444	$560,000	$3,282,444

The Commissioner notes the significant disparity in the amount expended in 1990-91, $2,318,623, and the amount budgeted $3,279,759. Presuming the amount of $2,318,623 as expended in 1990-91 to be a reasonable base for normal replacement of consumable teaching supplies, the plans for carrying out the improvements detailed in the District's position statement and summary account for $1,381,000 for a combined total expenditure of approximately $3.7 million. The Commissioner therefore determines that a reduction of $100,000 in this account can be effectuated without any

damage to the District's ability to provide the supplies required to meet its responsibilities.

Account 250 - Other Instructional Expenses

1991-92 Budgeted	Proposed Reduction	Revised Amount
$1,061,217	$550,000	$511,217

The Commissioner notes that a reduction of $550,000 as prepared by the City would reduce the amount available to the District by more than $250,000 less than actually expended in 1990-91. Such a reduction in a district desperately in need of improvement and opportunity for its students would be unconscionable. The Commissioner therefore rejects the proposed reduction of $550,000 but does approve a reduction of $50,000.

Account 260 - Purchased Professional/Technical Services

1991-92 Budgeted	Proposed Reduction	Revised Amount
$50,000	$50,000	$0

Notwithstanding the failure of the District to expend any of the $11,000 budgeted in this account in 1990-91, the $50,000 budgeted for training principals, teachers and parents in how to implement a process of site-based management is an essential expenditure in a District where dramatic initiatives are required to involve the community in the improvement of the educational process. The reduction recommended by the City is rejected.

Account 310 - Salaries - Attendance

1991-92 Budgeted	Proposed Reduction	Revised Amount
$592,418	$90,000	$502,418

Given the fact that there has been no decrease in the number of positions in this account and the expenditures for 1990-91

exceeded the amount budgeted, the City has failed to advance any reasonable argument as to why any reduction should be required. The City's recommendation is rejected.

Account 410 - Health Salaries

1991-92 Budgeted	Proposed Reduction	Revised Amount
$2,336,539	$475,000	$1,861,539

The Commissioner notes that the actual expenditures for 1990-91 were $290,712 less than the amount budgeted. The District seeks to account for this discrepancy by indicating the existence of eight vacancies which they were unable to fill. It further indicates its intention to create and fill three new positions; one physician, one occupational therapist and one physical therapist.

Given the circumstances described by the District and the significant need in an urban special needs district for sufficient support staff in the area of providing health care for students, the budget allocations for the 1991-92 school year do not appear to be excessive. Since the City has advanced no convincing argument to justify its recommended reduction, the Commissioner rejects such reduction.

Account 420 - Other Expenses for Health

1991-92 Budgeted	Proposed Reduction	Revised Amount
$418,142	$175,000	$243,142

The Commissioner notes that expenditures in this account for 1990-91 even excluding the $80,000 for consultants now budgeted in Account 430 were significantly higher than the amount budgeted. Given the increase of $200,000 required to fund two new school-based clinics in Dickinson and Snyder High Schools, the budgeting increase

provided by the District is reasonable. The Commissioner finds no merit in the City's attempt to reduce this account through its analysis of spending in previous years. There exists no valid argument that the previous board's efforts in this area were sufficient nor can the need for on-site health care clinics be denied in the atmosphere in which urban school districts are required to function. The City's recommended reduction is rejected.

Account 430 - Consultants

1991-92 Budgeted	Proposed Reduction	Revised Amount
$104,500	$55,000	$49,500

Given the reason for the amount budgeted in this account, namely the employment of consultants in the fields of neurology, psychiatry and ophthalmology to provide special education services, and the fact that such services were obtained in 1990-91 for $80,000 as indicated in Account 420, a $20,000 reduction in this account appears justified.

Account 520 - Contracted Services

1991-92 Budgeted	Proposed Reduction	Revised Amount
$6,606,550	$1,100,000	$5,506,550

The 1990-91 audited expenditures in this account show expenditures exceeding the budgeted amount by over $100,000. (See District's Final Summary, at p. 19.) Given the unchallenged increase of the number of students requiring transportation from 2,700 to 3,150 and the fact that the increase projected over last year's expenditures is approximately 7%, the Commissioner holds that the City has failed to meet its burden that the amount budgeted in this account can be reduced without impairing the District's ability to meet its obligations. The recommended reduction is rejected.

Account 530 - Replacement of Vehicles

1991-92 Budgeted	Proposed Reduction	Revised Amount
$36,252	$36,252	$0

The City has provided convincing argument that the District has over the years failed to utilize the amounts budgeted in this account for the purposes stated. The Commissioner approves a reduction of $36,252 in this account.

Account 550 - Other Transportation Expenses

1991-92 Budgeted	Proposed Reduction	Revised Amount
$14,980	$9,000	$5,980

Based upon the record of previous expenditures in this account, the Commissioner finds that the City has provided a reasonable basis for the reduction requested. The Commissioner grants the reduction of $9,000 recommended by the City.

Account 640 - Utilities

The City has withdrawn its recommended reduction in this account.

Account 650 - Operational Supplies

1991-92 Budgeted	Proposed Reduction	Revised Amount
$454,402	$35,000	$419,402

Based upon actual expenditures which exceeded the amount budgeted as indicated by the District's year-end official audit, the Commissioner finds that the City has failed to meet its burden of demonstrating overbudgeting. The Commissioner rejects the recommended reduction.

Account 710 - Maintenance Salaries

1991-92 Budgeted	Proposed Reduction	Revised Amount
$3,823,520	$200,000	$3,623,520

Upon examination of the actual expenditures in this account for 1991-92 and considering the newly completed 6% salary contractual agreement with the union representing the maintenance workers, the Commissioner concludes that the $200,000 reduction recommended by the City can be sustained without impairing the District's ability to provide a cushion for overtime work. Multiplying the actual expenditures for 1990-91 times the negotiated 6% increase, which includes the three positions eliminated by the District, the resultant amount available is $3,480,498 which is still less than the amount available to the District after subtracting the $200,000 reduction. The Commissioner therefore approves the reduction of $200,00 imposed by the City in this account.

Account 730 - Purchase of Instructional Equipment

1991-92 Budgeted	Proposed Reduction	Revised Amount
$1,430,371	$200,000	$1,230,371

While noting the disparity between the amount budgeted in 1990-91 ($2,146,316) and the amount actually spent as indicated by the District's audit ($1,226,728), the Commissioner does find the District's explanation plausible for a reduction of orders in this account because of a potential deficit indicated by the final audit. Under the circumstances and considering that the budgeted amount for 1991-92 is considerably less than that for 1990-91 and close to actual expenditures in that year, the Commissioner finds no basis for depriving the District of the opportunity to purchase computers for purposes of upgrading its instruction in that vital area. The City's recommended reduction is rejected.

Account 810 - Employee Retirement Contributions

1991-92 Budgeted	Proposed Reduction	Revised Amount
$4,996,397	$600,000	$4,396,397

The Commissioner finds the reasoning of the District to be persuasive regarding the necessity for maintaining a reserve in this account to guard against unanticipated adjustments as have occurred in the past. A reduction of the size recommended by the City would leave the District in a very precarious position given the absence of any significant free balance. The recommended reduction is rejected.

Account 820 - Insurance

1991-92 Budgeted	Proposed Reduction	Revised Amount
$18,794,182	$950,000	$17,844,182

A review of 1990-91 expenditures in this account reveals that the amount spent as indicated by the District's annual audit was more than $2.5 million greater than the amount budgeted. This coupled with a $3.3 million (27.8%) increase in medical insurance costs as documented by Exhibit 2 in the District's Answer more than justifies the amount budgeted for 1991-92. To impose a $950,000 reduction as recommended by the City would place the District in a precarious financial position. The recommended reduction in this account is rejected.

Account 830 - Rent

1991-92 Budgeted	Proposed Reduction	Revised Amount
$2,700,000	$500,000	$2,200,000

While the Commissioner finds no merit in the City's argument that required rental space can be replaced by District-

owned facilities given the fact that the rentals involved are for three separate school facilities and the District central office. Notwithstanding the fact that a rental increase is anticipated for central office facilities, the approximate $767,000 increase over the 1990-91 expended amount ($1,932,813) seems excessive in light of past years' expenditures. The Commissioner therefore directs a reduction in this account of $200,000 which should enable the District to absorb the rental increases anticipated without overbudgeting.

Account 870 - Tuition

1991-92 Budgeted	Proposed Reduction	Revised Amount
$9,654,693	$1,500,000	$8,154,693

Based upon the number of pupils to be placed out of the district in special education classes as indicated on pages 104 and 106 of the Budget and the bill presented for payment for children placed in State facilities (Exhibit 4 of the District's Answer), the need for the total amount budgeted in this account has been well documented. The City offers no justification for its recommended reduction other than what it perceives to be a historic decline in the number of pupils requiring placement. Consequently, the City's recommended reduction in this account is rejected.

Revenues - Fund Balance

The Commissioner has already dealt with this recommended reduction of $4.5 million in the tax levy by the City which had anticipated an $8.6 million unappropriated free balance. Since the audit has demonstrated no such surplus exists, the Commissioner has earlier rejected the City's recommendation.

Summary of Reductions Approved by the Commissioner

Account			Reduction
211	-	Principals' Salaries	$ 560,000
214	-	Other Instructional Salaries	600,000
240	-	Teaching Supplies	100,000
250	-	Other Instructional Expenses	50,000
430	-	Consultants	20,000
530	-	Replacement of Vehicles	36,252
550	-	Other Transportation Expenses	9,000
710	-	Maintenance Salaries	200,000
830	-	Rent	200,000
		TOTAL	$1,775,252

In light of the foregoing, the Commissioner finds and determines that for the 1991-92 school year the Jersey City Public School District is in need of $77,486,791 in local revenues for Current Expense purposes in order to provide a thorough and efficient system of education. In reaching such determination, the Commissioner reiterates that N.J.S.A. 18A:7A-52(c) provides that "[a]ny difference between the amount which the director certifies and the total amount of local revenues required by the budget approved by the commissioner shall be paid by the State in the fiscal year in which the expenditures are made, subject to availability of appropriations."

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 6, 1992

DATE OF MAILING - FEBRUARY 6, 1992

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MAYOR AND COUNCIL OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

MARCH 10, 1992

MAYOR AND COUNCIL OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

Carol Zylbert, Esq., for Petitioner

Charlotte Kitler, Esq., for Respondent

This matter was opened before the Commissioner by way of a filing of Notice of Motion for Stay by respondent State-operated School District of the City of Jersey City seeking a stay of the budget reductions set forth in the Commissioner's decision rendered on February 6, 1992 which is currently pending on appeal before the State Board of Education, claiming error and inconsistencies in said decision since the Commissioner recognized that the District experienced a $3.8 million shortfall in revenues and could not expend all of its 1990-91 monies. Petitioner, City of Jersey City, submitted its affidavit opposing the stay on February 24, 1992.

The basis for the request for stay by respondent is set forth in an affidavit by the Superintendent of the State-operated School District, Dr. Elena Scambio. The superintendent avers, inter alia, that because the $1,775,252 in reductions effectuated by the

Commissioner would come mid-year, they would have to be compressed over the short time span remaining in the fiscal year and the effect of initiating budget reductions at this time would have an adverse impact upon direct services to students.

The superintendent further avers that the Commissioner's decision was released after the State Legislature had passed a supplementary appropriation in January 1992 to provide revenues to the District cut by the Department of Community Affairs and, thus, appears contradictory and misleading. Moreover, the superintendent avers that the District's financial condition, including its free balance, is extremely weak as recognized in the Commissioner's decision.

The basis for the City's opposition to the stay is set forth in an affidavit by its Assistant Director of Finance, Paul Soyka, which reads in pertinent part:

> 3. While it is true that this reduction occurred in the middle of the school year, the District was aware of the pendency of the City's petition. The City petitioned for a reduction in the District's 1990-91 budget in May of 1990, and the Commissioner's decision was not received until December 1990. The District should reasonably have anticipated that portions of its 1991-92 budget might have been reduced at mid-year. Moreover, the City's analysis of past spending patterns and of proposed staffing levels demonstrated that the District could not justify large spending increases in certain accounts. The information provided by the District did not show that the District had actual plans to spend those sums.
>
> 4. The District's receipt of $11 million in state aid appropriated in January 1992 should greatly improve its financial condition.
>
> 5. Because the school year is half over, if the District does not implement the budget cuts recommended by the City and approved by the

> Commissioner of Education, the City will be irreparably damaged. I have reason to believe that any unspent funds remaining at the end of the 1991-92 school year will be encumbered during the last month of the year for expenditures properly chargeable to 1992-93. Large amounts of funds were encumbered during the month of June 1991. For this reason, to grant the District a stay at this time will be to deny any relief to the City.
>
> 6. The City of Jersey City has filed a cross-appeal in this matter. The City asks that the entire amount of its proposed budget reductions be implemented, less $200,000. The City's proposed reductions were the product of many hours of analysis of data provided by the District. Based on current staffing levels and historical spending patterns, I believe that the City's proposed reductions are fully justified, and that no harm to the students will result.
>
> (Affidavit, at pp. 2-3)

The total proposed current expense and capital outlay budget for 1991-92 in the State-operated School District of Jersey City was $241,326,789. Of that, $221,667,796 was for current expense purposes. The amount by which the budget was reduced in the Commissioner's decision, $1,775,252, represents .7% of the total budget and .8% of the current expense budget.

The governing body sought reduction to the current expense budget in the amount of $16,295,252. The Commissioner's decision denied $14,520,000 of the reductions sought by the governing body which represents denial of 89% of the reductions requested.

The District has contended that the $1.7 million reduction is inconsistent with the fact that the Legislature restored $11 million by which the Department of Community Affairs reduced the tax burden of the City. It should be noted that the $11 million allocation by the Legislature has no bearing whatsoever on what the

appropriate school budget should be since the Department of Community Affairs does not review the budget for adequacy, but rather examines the requested tax levy to determine the ability of the City of Jersey City to bear the tax burden set by the superintendent of the state-operated school district. The matter of the adequacy of the budget for a thorough and efficient education lies solely within the jurisdiction of the Commissioner. N.J.S.A. 18A:7A-52 It must also be borne in mind that notwithstanding that Jersey City is a state-operated school district, it is by law subject to the same standard of review as all other school districts appealing a budget to the Commissioner. Namely, the Commissioner is obligated to review the reductions of the governing body in light of the evidence and supportive documentation submitted by the parties to determine if the governing body has met its burden of proof that the reductions will not jeopardize a thorough and efficient education in the district. Board of Education of East Brunswick v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of the Township of Deptford v. Mayor and Council of Township of Deptford, 116 N.J. 305 (1989)

Because of the District's claims of error and inconsistencies, the Commissioner shall now review the nine accounts reduced in his decision of February 6, 1992 to ascertain if the District has demonstrated a likelihood of prevailing on the merits of an appeal. Crowe v. DeGioia, 90 N.J. 126 (1982)

Account 211 - Principals' Salaries

1991-92 Amount Budgeted	Reduction Sought	Amount of Reduction Denied	Amount of Reduction Sustained
$6,375,319	$560,000	$-0-	$560,000

The District allocated $6,375,319 for principals' salaries for the 1991-92 school year which represents the amount needed for the same number of principals as the prior year plus 5%.

The $560,000 in dispute is the amount for the salaries of summer school principals for the summer of 1991. That amount had been encumbered in the 1990-91 budget even though payment thereof occurred during the 1991-92 budget year. Since the District had already encumbered the $560,000 in its 1990-91 budget, the requested reduction to the 1991-92 budget allocation must be sustained.

The appropriation in the account after reduction, $5,815,319, is deemed sufficient as it represents the salaries for the same number of principals as last year, plus 6%, one percent more than the District's allocation was based on. Thus, it is determined that the District has not shown a likelihood of prevailing on an appeal as to this account.

Account 214 - Other Instructional Salaries

1991-92 Amount Budgeted	Reduction Sought	Amount of Reduction Denied	Amount of Reduction Sustained
$10,031,536	$1,600,000	$1,000,000	$600,000

The City claimed that this account was overbudgeted given that in the 1990-91 school year the District had appropriated $9,723,805 yet expended only $8,215,611, a difference of $1,508,194. Thus, an allocation of $10,031,536 was, according to the City, an excessive increase over actual expenditures from the prior year. The District countered this argument by stating that 16 necessary positions went unfilled during the 1990-91 school year. It further pointed out that it had actually reduced the number of budgeted positions for the 1991-92 school year from 178 to 173. The

monies allocated for the 173 positions included the 16 unfilled positions from the 1990-91 school year. The District further argued that the $10,031,536 allocated for 1991-92 represents the money needed for 173 positions, plus 5%.

If you multiply the actual expenditures for 162 positions filled in 1990-91 ($8,215,611) by the 5% increase sought by the District, a total of $8,626,391 is yielded. This amount leaves in the account $1,405,145 for the 11 additional positions budgeted by the District for 1991-92 or $127,740 per position. A $600,000 reduction would still allow $73,195 per position for the newly filled positions.

Based on the above, it is again concluded that a $600,000 reduction from $10,031,536 can certainly be sustained by the District because the amount which remains in the account totals $9,431,536. That level of expenditure can fund:

- The 157 positions (162 minus 5 abolished positions) remaining from last year;
- A 5% increase for those positions; AND
- More than enough monies for the 16 unfilled positions from 1990-91.

It should be noted that the Commissioner's decision clearly acknowledged the importance of the state-operated school district to have the full complement of librarian, guidance and child study team positions it believed necessary.

The decision, thus, deferred to the District's judgment as to the necessity for filling the 16 positions left vacant in 1990-91, notwithstanding the sustaining of a $600,000 reduction out of the $10,031,536 budgeted. It is, therefore, determined the

District has failed to demonstrate a likelihood of prevailing on an appeal for this account.

Account 240 - Teaching Supplies

1991-92 Amount Budgeted	Reduction Sought	Amount of Reduction Denied	Amount of Reduction Sustained
$3,842,444	$560,000	$460,000	$100,000

The City in this account argued overbudgeting, pointing to the discrepancy between the $2,318,484 actually expended in 1990-91 versus the $3,279,759 budgeted for that year. The District never set forth an explanation for the difference between the amount budgeted and expended last year. It did argue that the $3,842,444 budgeted for 1991-92 included $1.6 million in new materials necessary for a thorough and efficient education, plus inflation. (See page 22 of Commissioner's February 6, 1992 decision.)

A review of the arguments of the parties continues to support a reduction of $100,000 in the teaching supply account because such a reduction provides for all new materials sought by the District, including the amount of $116,000 estimated by the District for inflation over and above last year. Even with reducing the $3,842,444 budget allocation by $100,000, the $3,742,444 which remains represents a 61.4% increase over actual expenditures last year. Thus, it is concluded that the District has failed to demonstrate any likelihood of prevailing on an appeal of this account.

Account 250 - Other Instructional Expenses

1991-92 Amount Budgeted	Reduction Sought	Amount of Reduction Denied	Amount of Reduction Sustained
$1,061,217	$550,000	$500,000	$50,000

The City claimed overbudgeting in this account as exemplified by the District's transfer of $262,166 from that account last year. The District failed to set forth why such transfer was necessary. However, it did argue that it needed $1,061,217 in order to provide for new expenditures for staff development ($180,000) and child study team travel ($138,000).

A review of the record demonstrated that only $778,368 of the $1,040,534 budgeted last year was expended. A $50,000 reduction in this account is still deemed reasonable given that the amount remaining for 1991-92, $1,011,217, represents a 29.9% increase over last year's expenditures. Therefore, it is determined that the District has failed to show a likelihood of prevailing on the merits of an appeal for this account.

Account 430 - Consultants

1991-92 Amount Budgeted	Reduction Sought	Amount of Reduction Denied	Amount of Reduction Sustained
$104,500	$55,000	$35,000	$20,000

The City claimed that the District planned to spend in 1991-92 more than twice its 1990-91 expenditures for special health consultants. The District contended it needed the amount budgeted for 1991-92 because of the increased costs for the services of neurologists, psychiatrists and ophthalmologists for the evaluation of special education students.

The record did not bear out the City's claim because $80,000 was expended last year out of another account for the services of such specialists. However, the 30% increase requested by the District, i.e., the difference between $104,500 and $80,000, is deemed excessive absent specific data being provided to justify such an increase.

The $4,500 increase contained in the Commissioner's decision represents a 5.6% increase over last year's expenditures which is deemed consistent with the District's own 4.55% increase in current expense from 1990-91 to 1991-92.

The District's own reply brief acknowledges the fact that the $104,500 budgeted for 1991-92 is not for additional services but is for compensating the same number of consultants as in 1990-91 whose services they obtained for $80,000. Also, the 5.6% increase after the reduction is entirely consistent with the 5% increase in compensation afforded to other members of the professional staff in the proposed budget. Thus, it is determined the District has failed to demonstrate a likelihood of prevailing on the merits of an appeal for this account.

Account 530 - Replacement of Vehicles

1991-92 Amount Budgeted	Reduction Sought	Amount of Reduction Denied	Amount of Reduction Sustained
$36,252	$36,252	$-0-	$36,252

The City claimed that in previous years the District has failed to expend any monies in this account. The record demonstrated that the District expended only $475 out of a $35,000 allocation budgeted last year and that in 1989-90 it also expended only $475 out of a $40,000 allocation despite an $8.6 million surplus that year.

The District sought $36,252 this year to purchase two mini-vans to transport students on field trips and academic competitions.

Given the fact that the District for at least two consecutive years budgeted a like amount as 1991-92 without making

the intended purchases and it has failed to provide to the Commissioner any explanation whatsoever as to why it did not expend said monies, it is once again concluded that the City has met its burden of demonstrating the $36,252 is not necessary for a thorough and efficient education.

Merely saying there is a need to purchase two mini-vans does not constitute sufficient basis for overturning the City's requested reduction. Had the District told the Commissioner how many vehicles it owns, their age and condition and its past experience in transporting students for the intended usage, he would be in a far better position to sustain the $36,252 allocated by the District even though it failed to spend the budgeted amounts the past two years. Given that (1) the District made the same assertions of need in the past two years and it failed to expend such monies and (2) no explanation was provided to the Commissioner as to why it did not or could not spend the monies allocated, it is determined that the District has failed to demonstrate a likelihood of prevailing on the merits of its appeal for this account.

Account 550 - Other Transportation Expenses

1991-92 Amount Budgeted	Reduction Sought	Amount of Reduction Denied	Amount of Reduction Sustained
$14,980	$9,000	$-0-	$9,000

In reviewing the history of expenditures by the District in this account, namely $6,422 in 1989-90, $4,106 in 1990-91, the approximately $6,000 ($5,980) remaining in the account after a $9,000 reduction was deemed to be consistent with previous years expenditures, absent further justification by the District to explain why and how it arrived at its budgeted figure of $14,980.

The City relied upon the past expenditures to demonstrate that the $14,980 is in excess of the District's need. The District argued that the difference between the $14,980 and the $4,106 it expended in the previous year is intended for unforeseen problems as opposed to regular maintenance. Absent a demonstration of unforeseen problems arising in prior years and given the fact that the amount allocated represents an increase of more than 300% over last year's expenditure, rejecting the City's requested reduction was not supportable. The $5,980 which remains in the account represents an increase of 45.6% over last year.

Further, it needs to be pointed out that the $45,252 in reductions made in the two transportation accounts (530 and 550) come from a total transportation budget of more than $6.9 million. Thus, the two reductions are minimal (.6%) and inevitably are absorbable under either expenditures in the transportation area or in the budget as a whole. Therefore, it is determined that the District has failed to demonstrate a likelihood of prevailing on the merits of its appeal to the State Board for this account.

Account 710 - Maintenance Salaries

1991-92 Amount Budgeted	Reduction Sought	Amount of Reduction Denied	Amount of Reduction Sustained
$3,823,520	$200,000	$-0-	$200,000

The City argued that the District's budget documents indicated a reduction of three positions for 1991-92 (from 99 to 96). Yet, the District allocated 13% over last year's expenditures and transfers had been made from this account.

The District argued that its failure to expend the amount allocated last year was due to six vacancies it did not fill. It

agreed it reduced the overall number of positions this year over last year by three. It further claimed the amount budgeted for 1991-92 is based upon the actual salaries of the 96 employees plus 6% provided in the contract negotiated with the union.

Last year the District allocated $3,655,290 and expended $3,283,489 which represents $371,801 less than the amount allocated. To accept the District's argument that this differential represented six unfilled maintenance salaries would have to assume that each of those individuals earned in excess of $60,000 ($61,966) - a conclusion that stretches credulity. Thus, it is once again concluded that a $200,000 reduction can reasonably be justified and still provide a thorough and efficient education given that the $3,623,520 which remains in the account represents at least a 10% increase over actual expenditures last year. That amount is deemed sufficient to bear the cost of the 96 positions it intends to fund this year. It is, therefore, concluded that the District has failed to demonstrate a likelihood of prevailing on the merits of its appeal for this account.

Account 830 - Rent

1991-92 Amount Budgeted	Reduction Sought	Amount of Reduction Denied	Amount of Reduction Sustained
$2,700,000	$500,000	$300,000	$200,000

The City argued that the $2,700,000 allocated for 1991-92 was excessive in that spending for rental space has ranged from $1,874,162 to $2,016,420 over the past four years, particularly since the District has a declining enrollment.

The District rebutted the City's argument by pointing out that the $2,700,000 is necessary to cover estimated rental

increases. It further pointed to the fact that the primary source of rental focuses on three school rental sites which have been in operation for years.

Last year the District budgeted $2,284,755 and expended $1,932,813 for rentals, a difference of $351,942. For 1991-92 the amount budgeted for rentals, $2,700,000 represents a 39.6% increase over actual expenditures for 1990-91. The District did not budget for the rental of any new space for 1991-92.

It provides documentation regarding one school site, the administrative office and the Teen-age Expectant Mothers Program which, when cast in the most favorable light, accounts for $1,976,639. However, there is absolutely no documentation as to what the rental costs have been, or were projected to be, for the remaining two school sites.

$723,361 is presumably needed for the other two rental sites but no data whatsoever was submitted by the District relative to the rental of the other two sites; thus, it is impossible to weigh the reasonableness of, or need for, that amount. Given this fact, a reduction of $200,000 requested by the City remains reasonable in that the $2,500,000 which is left in the account is sufficient to provide an average increase of 29% over last year's expenditures. Therefore, it is determined that the District has failed to demonstrate a likelihood of prevailing on the merits of its appeal of this account item.

The Commissioner has reviewed the arguments of the parties with respect to the Motion for Stay in light of the standards for the grant of injunctive relief set forth by the New Jersey Supreme Court in Crowe v. DeGioia, supra, and determined that although the

State-operated School District has failed to demonstrate a likelihood of prevailing on the merits of its appeal to the State Board, the potential does, nonetheless, exist for irreparable harm to be experienced by the students of the District should the State Board determine that the monies reduced were necessary for a thorough and efficient education. Thus, it is determined that a stay shall be granted to avoid any possibility of harm to the District through maintenance of the status quo relative to the budget set by the superintendent. This conclusion is reached upon a heavy weighing of the fact that the District is a State-operated District which has been determined by the state to have extraordinary special needs.

Further, it is determined that in weighing the equities of the matter, greater harm would be experienced by the District and its students if a stay is denied and the Commissioner's decision is reversed on appeal than to the City, given that the Department of Community Affairs has already acted to protect the interest of the City's taxpayers by setting the local tax rate at the level the municipality is able to bear.

Now, therefore, it is ORDERED that the Motion for Stay is GRANTED this 10th day of March 1992.

COMMISSIONER OF EDUCATION

MARCH 10, 1992

DATE OF MAILING - MARCH 10, 1992

19-92

C # 19-92
SB # 8-92

MAYOR AND COUNCIL OF THE CITY OF JERSEY CITY,

PETITIONER-CROSS/APPELLANT,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 6, 1992

For the Petitioner-Cross/Appellant, Carol Zylbert, Esq.

For the Respondent-Appellant, Charlotte Kitler, Esq.

This matter was initiated by the City of Jersey City (hereinafter "City") by appeal to the Commissioner pursuant to N.J.S.A. 18A:7A-52(a). By its action, the City sought reductions in the 1991-92 budget of the State-operated School District of the City of Jersey City (hereinafter "District") plus a $4.5 million appropriation from the District's free balance. The Commissioner declined to appropriate any of the District's free balance and rejected $11,595,252 of the line item reductions sought by the City. However, he directed $1,775,252 in reductions to the District's budget, which, as certified by the State District Superintendent, totaled $241,326,789. The District appealed and the City cross-appealed.

The statutory framework under which the budget of a State-operated school district is established differs from that

Aug. 5, 1992

applicable to other school districts. In contrast to other districts, the budget of a State-operated school district is set under N.J.S.A. 18A:7A-50, -51, and -52, which provide for current year funding and require that, after comment and recommendation by the district board and public hearing, the State district superintendent shall fix the amount necessary to be appropriated and raised. Moreover, challenges to the education budget established by the district differ from budget appeals under other provisions of Title 18A in that N.J.S.A. 18A:7A-52(a) provides that the municipal governing body rather than the district board must initiate any appeal to the Commissioner, and the governing body must prevail in that appeal before any budget reductions may be effectuated.

In further contrast to the law applicable to other school districts, N.J.S.A. 18A:7A-52(b) grants the municipal governing body the right to apply to the Director of the Division of Local Government Affairs within the Department of Community Affairs (hereinafter "Director") for relief from the amount of the tax levy required to support the school district's budget, and N.J.S.A. 18A:7A-52(c) provides that any difference between the tax levy required to support the budget approved by the Commissioner and the tax levy established by the Director of the Division of Local Government Affairs is to be paid by the State, subject to the availability of appropriations.

In this case, the District's budget was fixed under N.J.S.A. 18A:7A-52(a) at $241,326,789, an amount which would have required $79,321,960 in local revenues to support it. The City appealed the amount of the education budget to the Commissioner of Education pursuant to N.J.S.A. 18A:7A-52(a) and also applied to the

Director of the Division of Local Government Affairs pursuant to N.J.S.A. 18A:7A-52(b) for a determination that the tax levy required to support the budget adopted for the State-operated school district would result in an unreasonable tax burden. By decision of August 19, 1991, the Director determined that the local share of revenues necessary to support the education budget certified by the State District Superintendent would create an unreasonable tax burden.

Again, as stated above, any difference between the amount to be raised by the City and the funds required to support the education budget as established by these proceedings is to be made up by the State. Consequently, as the Commissioner emphasized in his decision, our concern is with the amount necessary for the school district to provide a thorough and efficient education rather than with the funding of that amount.

Given the statutory framework applicable here, we concur with the Commissioner that the proper standard for reviewing the reductions sought by the City of Jersey City is whether the City has demonstrated that the certification of the State Superintendent is in excess of that required to provide for a thorough and efficient education. After applying that standard of review to the record before us and having considered the arguments of counsel, we find that the City has failed to show that any of the amounts included in the District's budget as certified by the State District Superintendent are in excess of those required by the District to provide a thorough and efficient education. Therefore, for the reasons expressed by the Commissioner, and given that the record shows that anticipated revenues fell short for 1990-91 so that the District's free balance as of June 30, 1991 was only $1,857,454, we

affirm the Commissioner's determination to reject appropriating $4.5 million from the District's free balance. We also affirm the Commissioner's determinations to reject reductions in the line item accounts as delineated in his decision. However, as follows, we reverse the Commissioner's determinations to make line item reductions in nine other accounts.

Initially, we find, as did the Commissioner in his decision, that this matter must be assessed on the basis of the District's financial status as of June 30, 1991. Moreover, given this district's history of educational inadequacy and fiscal mismanagement which resulted in our decision to order the creation of a State-operated school district, McCarroll v. Board of Education of the City of Jersey City, decided by the State Board, October 4, 1989, we find that the historical spending patterns of this particular district can not be used to conclude that amounts in its 1991-92 budget have been over-budgeted. Rather, in reviewing this district's budget, we must be particularly attentive to whether the District's financial resources will be sufficient to enable it to meet the educational needs of its students. Accordingly, we must review the reductions sustained by the Commissioner with great care.

Having done so, we reject the Commissioner's determination that Principals' Salaries (Account 211) be reduced by $560,000. This determination was based on the Commissioner's conclusion that monies paid during the summer of 1991 to principals employed on a ten-month basis but paid on a 12-month basis should be attributed to the 1991-92 fiscal year and, therefore, the 1990-91 salary accounts should not be encumbered by these expenses. This conclusion is in error, contradicting N.J.S.A. 18A:29-3, which provides that:

> Whenever persons employed for an academic year by a board of education shall indicate in writing their desire to participate in a summer payment plan, and such board of education approves such participation, then, and thereupon, the proper disbursing officer of the board of education, under such rules as may be promulgated by the commissioner with the approval of the state board, is hereby empowered and directed to deduct and withhold an amount equal to 10% of each semimonthly or monthly salary installment, from the payments of the salaries made to such employees as shall participate in such plan and the accumulated deductions for any academic year shall be paid to the employee or his estate under such rules as may be established by the board of education in one of the following ways: (1) at the end of the academic year; (2) in one or more installments after the end of the academic year but prior to September 1; (3) upon death or termination of employment if earlier. Such deductions may be deposited by the board of education in an interest bearing account in any financial institution having its principal office in the State of New Jersey.
>
> Any board of education which had in effect, prior to January 1, 1980, any payment plan which permitted funds to be raised in the next fiscal year is hereby authorized to continue to raise funds in this manner.

Thus, the statute requires, except in cases where the district had a plan in effect prior to 1980 to raise summer funds the next fiscal year, that summer payments are to be deducted from salaries paid during the preceeding academic year and are to be attributed to the budget for that year. Even for districts falling within the exception, the statute is permissive rather than mandatory. Therefore, it was in error for the Commissioner to order a reduction in the 1991-92 budget for the purpose of offsetting the summer salaries already paid by the District in 1990-91.

We also reject the Commissioner's determination to reduce Other Instructional Salaries (Account 214) by $600,000. This determination was based on the Commissioner's agreement with the City that if 16 vacant positions not filled "were necessary, they should have been filled." Commissioner's decision, at 41. We reject this view. The fact that a position has not yet been filled

in no way shows that the services attending that position do not need to be provided so as to establish that the position is not needed. Moreover, we find this reduction arbitrary in that there is no basis in the Commissioner's decision to ascertain how he arrived at this particular amount for reduction. For the same reason, we reject the Commissioner's reduction of $50,000 in Other Instructional Expenses (Account 250).

We also reject the $20,000 reduction to Consultants (Account 430). Quite simply, the fact that a reduction "appears" justified does not provide a sufficient basis to reduce the education budget. Moreover, the fact that $80,000 was expended for services in this category in 1990-91 does not demonstrate that the District does not need the amount it budgeted for 1991-92. For the same reason, reductions of $36,252 to Replacement of Vehicles (Account 530) and $9,000 to Other Transportation Expenses (Account 550) must also be rejected.

We also reverse the Commissioner's determination to reduce by $200,000 Maintenance Salaries (Account 710). The District has demonstrated that the Commissioner's calculation does not accurately reflect costs for 1991-92 in that he based his calculation on 1990-91 expenditures and did not take into account that the reduction in the number of employees effectuated by the District for 1991-92 necessitated budgeting a higher amount for overtime. Similarly, the Commissioner's reduction of $200,000 in Rent (Account 830) does not take into consideration the impact of the District's rent increase for its central offices which will occur in 1991-92, and especially in view of the "precariously low" free balance remaining to the District, see Commissioner's decision, at 39, this

reduction must be rejected.

In sum, for the reasons stated, we reverse the line item reductions made by the Commissioner in the amount of $1,775,252 and direct that these amounts be reinstated into the District's education budget.

August 5, 1992

Date of mailing AUG 07 1992

20-92

EDU #10364-90
C # 20-92
SB # 9-92

IN THE MATTER OF THE TENURE :
HEARING OF PHILIP SHERIDAN, : STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION
OF ORANGE TOWNSHIP, ESSEX COUNTY. :
:

Decided by the Commissioner of Education, February 6, 1992

For the Petitioner-Respondent, Ashley & Charles
(Ronald C. Hunt, Esq., of Counsel)

For the Respondent-Appellant, Wayne J. Oppito, Esq.

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

June 3, 1992

Date of mailing 15 JUN 1992

20-92

20-92

IN THE MATTER OF THE TENURE :
HEARING OF PHILIP SHERIDAN, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY : DECISION
OF ORANGE TOWNSHIP, ESSEX COUNTY. :
:

SYNOPSIS

Tenured teacher was charged with unbecoming conduct for using profanity, and sexist and racist innuendo while in the presence of students in his classroom. He asserted the affirmative defense that the charges did not constitute conduct unbecoming a teacher, but rather inefficiency, and that the Board had not met the statutory prescriptions set forth in N.J.S.A. 18A:6-11 before bringing such charges. He further argued that the conduct in question did not warrant dismissal, particularly in view of mitigating factors.

ALJ dismissed respondent from his teaching position for unbecoming conduct, as he engaged in profanity, made sexual, sexist and racist innuendoes and comments and regularly slept in class, all of which was found to be antithetical to his function as teacher and role model for students. ALJ also concluded that nothing in the charges brought by the Board spoke of inefficiency and that mitigation was unwarranted.

Commissioner affirmed the ALJ's decision that respondent teacher be dismissed from his tenured teaching position in the school district of Orange Township. He further directed that the matter be forwarded to the State Board of Examiners pursuant to N.J.A.C. 6:11-3.6(a)1.

FEBRUARY 6, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10364-90
AGENCY DKT. NO. 368-11/90

IN THE MATTER OF THE TENURE HEARING OF PHILIP SHERIDAN, SCHOOL DISTRICT OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY

Ronald C. Hunt, Esq., for petitioner (Ashley & Charles, attorneys)

Wayne J. Oppito, Esq., for respondent Philip Sheridan

Record Closed: November 15, 1991 Decided: December 23, 1991

BEFORE **EDITH KLINGER**, ALJ:

On November 14, 1990, petitioner, the City of Orange Township Board of Education (Board), certified tenure charges against respondent, Philip Sheridan (Sheridan), to the Commissioner of Education. Respondent filed his answer to the tenure charges on December 7, 1990, and on December 13, 1990, the matter was 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 to the parties, a prehearing conference was held on February 21, 1991, at which it was determined that the following were the issues to be resolved:

1. Is respondent guilty of conduct unbecoming a teaching staff member?

   a) Do certain of the charges brought by the Board constitute inefficiency rather than unbecoming conduct and do these charges fail to meet the statutory prescriptions of *N.J.S.A.* 18A:6-11?

2. What sanctions, if any, should be imposed against respondent?

The specifications of the disciplinary charges brought against respondent as certified to the Commissioner are as follows:

> Philip Sheridan in his capacity as a teaching staff member has engaged in conduct unbecoming a teacher in that:
>
> 1. Mr. Sheridan was a tenured employee in the Orange School District during the academic year 1989 to 1990.
>
> 2. On or about June 5, 1990, Mr. Sheridan used gross profanity while in the presence of students in his classroom.
>
> 3. On or about June 5, 1990, Mr. Sheridan verbally harassed students in his classroom by making insulting and derogatory remarks about women.
>
> 4. On or about June 5, 1990, Mr. Sheridan verbally harassed a female student in his classroom by insinuating that she was involved with other teaching personnel and/or himself in a sexual manner.
>
> 5. During the course of the 1989-1990 academic year, Mr. Sheridan used profanity toward and in the presence of the students in his classroom on numerous occasions.
>
> 6. During the 1989-1990 academic year, Mr. Sheridan performed the duties of a teacher in an unsatisfactory manner by not educating the students on a daily basis.
>
> 7. During the academic year 1989-1990, Mr. Sheridan neglected his duties as a teacher by regularly falling asleep during class sessions.
>
> 8. During the 1989-1990 school year, Mr. Sheridan engaged in conduct unbecoming a teacher by using derogatory and profane language toward members of the faculty while in the presence of the students.
>
> 9. During the 1989-90 school years, Mr. Sheridan engaged in conducted unbecoming a teaching staff member by making sexually explicit remarks about [T.S.] while in the presence of her fellow classmates.
>
> 10. During the 1989-90 school years, Mr. Sheridan engaged in conducted unbecoming a teacher by referring to a faculty member as incompetent in addition to derogatory language in the students' presence.
>
> 11. Sometime during the academic year 1989-1990, Mr. Sheridan spewed racial slurs at a student in his classroom.

In his answer to the charges, respondent asserted the affirmative defense that the charges do not constitute conduct unbecoming a teacher but, rather, inefficiency and that

the Board did not meet the statutory prescriptions set forth in *N.J.S.A.* 18A:6-11 before bringing such a charge.

The hearing was held on October 15, 17, and 18, 1991. The record closed on November 15 following receipt of the final submission from the parties.

Sheridan resigned from his employment with the Orange Township School District and is planning to retire as of January 16, 1992. He argues in his brief that this retirement renders the tenure charges moot and, consequently, no initial decision is required. This position is incorrect for several reasons. The first is that a teacher may not escape the consequences of tenure charges merely by submitting his resignation from the school district. The second is that, pursuant to *N.J.A.C.* 6:11-3.6(a)1, where a contested case results in loss of tenure or dismissal of a teacher on charges, the Commissioner must forward the matter to the State Board of Examiners for determination of the possible revocation or suspension of his certification. I therefore **CONCLUDE** that there is no merit in respondent's position and an initial decision is required.

REVIEW OF EVIDENCE

Philip Sheridan has been employed by the Board as a teacher and chairman of the science department between 1972 and the present. Prior to his employment in the district, he had 10 years of teaching experience. Since 1972, Sheridan has been involved in a number of professional activities in the school district including:

1972 pres.	-	Science Department Chairperson Teacher of advance biology District Steering Committee for curriculum
1973	-	National Science Foundation Study of science curriculum
1974	-	Summer School Principal
1975	-	Summer School Principal
1976	-	"Big O" booster club - a community group which recognizes students who excel in the arts or athletics
1980	-	Middle States Evaluation Steering Committee
1980 pres.	-	District Promotion Committee

1984-86	-	Family Life Curriculum Committee
1985	-	District Report Card Committee - Chairperson
1986	-	District Discipline Committee
1987-88	-	District Career Education Infusion Program
1988	-	Effective Schools Grant - Chairperson-Coordinator
1988	-	Essex County representative to the Department of Education for "alternate route" program
1988-90	-	District representative to the Essex County Alliance for Gender Equity Education

During the 1989-90 school year, Mr. Sheridan was involved in the following professional programs:

Middle States Steering Committee
Attendance Committee
Oasis Program - for students with excessive absences
Administrative Council
Big O Booster Club
Bausch and Lomb Science Award
Alternate Route Mentor

The facts leading to the tenure charges against Sheridan came to the attention of the district beginning June 5, 1990.

T.S., a student in Sheridan's junior Biology A class, was a fifth-year senior in a special program because she had given birth in the first half of the 1989-90 school year. Her pregnancy was a difficult one. She suffered from toxemia and pneumonia, and her baby had to be delivered by caesarean section. Because of her illness, she was out of school for about four to five months. The reasons for her absence were known to the school administration, and she was given a tutor to help her keep up in her work until she could return to school. T.S. was scheduled to graduate in June 1990.

In the first half of the 1989-90 school year, she had a biology teacher who died during the fall semester, so that when she was ready to return to classes at the beginning of 1990, she was placed in Sheridan's Biology A class.

T.S. was absent from Sheridan's class more than the number of times permitted by Board policy with the knowledge of her guidance counselor and letters from her mother and her physician. On June 5, 1990, T.S. came to class late and was told by another student that Sheridan had just announced to the whole class before she arrived that she was going to fail the course because of her absences and there was nothing she could do to remedy the situation.

T.S. was distraught and went to the office of guidance counselor Gaye Johnson. She told Johnson what Sheridan had said. Johnson was aware of T.S.'s problems and her program, designated a "contract," that had been worked out by the district, T.S., and her parents to enable her to complete her high school education. Johnson believed that Sheridan was aware of this contract also. She accompanied T.S. back to Sheridan's classroom to remind him that T.S. was scheduled to graduate in June and asked him to refrain from taking any action until the next day when T.S.'s grandmother could come to school. Johnson left T.S. in the classroom and returned to her office.

James Sherman, acting principal, recalled that T.S. was crying on that day when she walked past his office on her way to Johnson's office. She walked by again with Johnson; Johnson returned alone and seemed upset. Within 10 minutes, T.S. walked past his office, crying again.

When T.S. returned to Johnson's office, she told her that Sheridan had cursed Johnson out in front of the class when she left the room. According to the testimony of T.S., Sheridan announced to the class that he "didn't give a f - - - what Johnson said. She wasn't going to do a goddamn thing to him."

Upon hearing what T.S. had to say, Johnson went to Sherman's office. Sherman had her bring T.S. to him.

Sherman asked T.S. to write out her description of the incident on a piece of paper. In response to his request, T.S. wrote the following:

> After Mrs. Johnson brought me back to my class I sat down and he sat there for a minute than he started saying that he didn't give a fuck and that they're not going to do a god damn thing to him. He also use to tell us that women has no rights. He nodds off in class. He has a very negative against women.

Sherman testified that he had received complaints about Sheridan previously but all of them were hearsay and he "took them with a grain of salt -- everyone complains." It is not his practice to take complaints seriously which are not put into writing. When he read what T.S. wrote, he was concerned with the seriousness of the accusation.

He asked Johnson to check with Sheridan's other students since it was his experience that students who are failing their courses make the kinds of accusations made by T.S. When Johnson inquired, other students confirmed that Sheridan had made the statement. At approximately 4:10 p.m., Sherman went to Sheridan's classroom and suspended him from his position immediately. He confirmed the suspension by letter the next day.

Sheridan taught two junior biology classes: Biology A and Biology B, the honors class. When the students in these two classes heard about Sheridan's suspension, almost all of them came to Johnson, individually and in groups, to complain about him. They asked Johnson why she was so upset by what he had said about her since he said those kinds of things to them all of the time. After hearing the students complain, she asked them if they were willing to give written statements They were afraid but agreed to do so if they were assured that there would be no repercussions.

On June 11, 1991, Sheridan's students were placed in a conference room and asked to write a paragraph about Sheridan. None of the school administrators remained in the conference room and the door was left open so that a secretary could observe that there was no discussion among them. Johnson gave them each a piece of paper, and Sherman came in and assured them again that there would be no repercussions and that they were free to leave and did not have to give statements if they did not wish to. They were then left to complete their paragraphs. Eight of the students' paragraphs, including that of T.S. mentioned above, have been placed into evidence.

Sherman noted that the students' paragraphs confirmed the incident of June 5, 1991 as described by T.S. They also reported that Sheridan almost always fell asleep in class, that he spoke in a derogatory way about women and said they had no rights, that he overtly and improperly observed the bodies of the female students in his classes and commented on them to the class, and that he openly suggested that T.S. was having a sexual relationship with him.

At the end of June or the beginning of July 1990, Sheridan was called to a meeting attended by Dr. Maxine J. Pijeaux, Superintendent of Schools of the district, Sherman, and Johnson. Sheridan was accompanied by an association representative who advised him not to say anything. At that meeting, Sheridan was given copies of all of the students' paragraphs, including those that were introduced into evidence at this proceeding. Johnson herself never confronted Sheridan concerning the incident of June 5, 1991. However, it was fully described by students in their paragraphs.

Upon reflection, Sherman was concerned that it might be believed that undue influence had been exerted on the students at the time they prepared these paragraphs, so he developed a questionnaire based upon the students' statements, which was mailed to each of them at home after the school year was over. At the beginning of the questionnaire, the students were given the following direction:

> We are trying to ascertain whether there is an extensive problem with Mr. Sheridan's teaching and behavior or if this recent classroom situation was an isolated incident.
>
> Please respond, briefly, to the following questions: Be aware that we are dealing with a person's livelihood and that this information may be used in a court of law.

At the end of the questionnaire, the students certified the information given and the parents signed them to indicate that they had given permission to their child to respond to the questions. In addition, the students were informed that they could respond to the questionnaire and mail it back to the school strictly on a voluntary basis. Some were completed and mailed back; four of these were introduced into evidence by the Board.

Based upon the investigation conducted by Sherman, Dr. Pijeaux certified tenure charges of conduct unbecoming a teacher against Sheridan to the Commissioner of Education on November 14, 1990.

The specifications of the charges that Sheridan engaged in conduct unbecoming a teacher are listed above and will be dealt with separately.

Use of Profanity

Although Johnson testified at hearing that T.S. told her on June 5, 1990 that Sheridan did not give a "damn" about what she said, it appears that she "cleaned up" his statement for purposes of the hearing. According to Sherman, she told him on that date that Sheridan used the word "f - - -," and this is supported by the testimony of students who were present, their written paragraphs, and answers on the questionnaires.

Sheridan does not recall using this word in front of the class. He recalled that on June 5, 1990, he was angry with Johnson because, as a colleague, she was not supporting him in enforcing the school's policy on absences or disciplining T.S. for leaving his classroom without permission.

D.E., a male student who was a junior in Sheridan's Biology A class during the 1989-90 school year, recalled an incident where Sheridan used profanity to him. D.E. was absent and brought an explanatory note with him when he returned to class. Sheridan, without reading the note, asked him why he was out. When D.E. suggested that he read his note, Sheridan said, "I don't give a f - - - about the note. Why were you out?" D.E. did not report this conversation to anyone but his mother at the time because Sheridan was a teacher and D.E. was afraid that he would not be believed. D.E. was offended by Sheridan's use of profanity.

M.M. was a female student in Sheridan's Biology B honors class during the 1989-90 school year, when she was a junior. She testified that Sheridan used the word "bitch" almost every day when addressing female students in the class. For example, if a female student entered the classroom late, he would ask her for a pass and say, "Why are you late, bitch?" J.L. and M.A. were two female students in the same biology class with M.M. They were in their sophomore year of high school at the time. Both related an incident in which Sheridan sent M.M. to the office, audibly calling her a "bitch" as she left. M.M. did not hear the comment but was told about it by the other two girls. J.L. thinks that M.M. might have called Sheridan a "bastard" before she left the room but expressed her opinion that even if M.M. had done so, he had no right to call M.M. a "bitch."

Sheridan denied using the word "bitch" except to refer to a female dog. He did not deny that he used it when referring to M.M. but believed that he had said it under his breath or to the wall; he did not mean to direct the expression to M.M. or to the class.

D.E. testified that he frequently heard Sheridan call female students "bitches." This was also reported by C.B. and J.M. in their written paragraphs.

D.V., another student, reported in his questionnaire that he once heard Sheridan tell a girl to "get the hell out" of the classroom because she had argued with him about her absences.

Based upon the above, I **FIND** that Sheridan was guilty of using profanity in the presence of his students in his classroom during the 1989-90 school year.

Derogatory Remarks About Women

Sheridan's Biology A class had approximately five male and 12 female students. His Biology B class was made up of about three male and 18 female students.

All of the witnesses testified that Sheridan used the term "bimbo" or "bimbette" to refer to female students. According to Sheridan, he used the term as an equivalent to "airhead" and said that he got it from watching Archie Bunker on the television show *All in the Family*. He claims that he did not realize that it could be an offensive term until he heard the testimony of the students at the hearing. He explained that he was trying to be flip and humorous, but his slang is out-of-date and the word was not taken by the students in the way that he meant it. He further denied that he ever called his female students "bimbos" but that he said they were acting that way -- that is, in an empty-headed fashion -- when he was attempting to modify their behavior.

Sheridan also claims that used the term "bimbo" as opposed to the term "fox" during a biology lesson in genetics on sex-linked characteristics. A normal female was a "fox" and an afflicted female was a "bimbo." Dr. Sharon Brendzel, who was his supervisor and evaluated him during the 1989-90 school, observed this biology lesson and wrote a memorandum to Pijeaux on April 2, 1990, expressing her disapproval because the term "bimbo" was offensive to some of the students. A conference was held with Sheridan, Pijeaux, and Brendzel, at which Pijeaux directed him not to use the term "bimbo" in his lessons anymore and not to direct it at his students. He claims that he did not use it again after this conference, but that he "may have slipped once."

None of the students who testified or gave statements understood that Sheridan used the word either as a genetic term or to mean an empty-headed woman. To D.E., a "bimbo" meant a slut. To J.T., it was a prostitute, a woman of low values. M.A. never thought about its meaning since Sheridan used it so frequently that it became just another word. N.S. responded in her questionnaire that Sheridan's use of the term "bimbo" led her to believe that he thought a woman was only needed "to have sex with." D.H. believed that the person he called a bimbo was "cheap," meaning that she was some sort of a "hoe" (whore). D.E. and D.V., two male students, took it to be an insulting reference to women. Only T.S. thought it meant that "we couldn't make our own decisions; we were dizzy." All of the students uniformly were offended by the term whether or not it was addressed to them.

J.L. testified that she heard Sheridan say more than one time that women have no rights. This was also the testimony of M.A., L.S., M.M., and T.S. It appears in the paragraphs written by T.S., D.V., C.B., D.H., K.L., J.M., and S.G. It is also found in the responses on the questionnaires prepared by some of these students.

Sheridan would also make statements to female students like "woman, sit down." M.S. wrote on her questionnaire that when she asked him a question about biology, instead of explaining the work to her, he told her how nice she looked and asked her if she had anything to tell him that he wanted to hear.

He also referred to women, including the students in his class, as "bitches," as set forth above, which was interpreted by his students to be degrading to women in general.

I **FIND** that Sheridan made insulting and derogatory remarks about women in general and specifically about and to the female students in his classes. It is no excuse that he believed his slang to be out-of-date; the term "bimbo" is derogatory no matter what its meaning and should not have been used even with the meaning he intended. It should certainly not have been used by him without ascertaining what it meant within the contexts of the students in his classes. His repeated reference to women as "bitches" is indefensible. The meaning of his statements that women have no rights was unambiguous since he apparently followed them up with consistent statements and actions.

Sexual References

D.E. testified that he heard Sheridan make references about T.S.'s body in front of the class. One day before class, only he and Sheridan were in the room when T.S. came in and her pencil fell to the floor. As she bent over to pick it up, Sheridan made a "comment about her behind." He said, "Could you drop the pencil again, please?" D.E. estimates that Sheridan referred to parts of T.S.'s anatomy in front of the whole class on at least 20 occasions.

J.L. testified to similar conduct by Sheridan in regard to the female students in the honors biology class. She said that he looked at the girls' "body parts" and made "references." In particular, there was one girl in the class with large breasts. If she went to ask Sheridan a question, he would stare at her chest until the girl felt uncomfortable. J.L. felt uncomfortable just watching his behavior.

T.S. testified that Sheridan tried to act like one of the boys in his class and she repeated this exchange between Sheridan and one of the male students: Boy: "She has a big butt." Sheridan: "Oh, do she!"

According to T.S., she was subjected to comments from Sheridan about her anatomy. Specifically, her "butt" and her breasts. He made this type of remark about her on more than one occasion to the class from his desk in front of the classroom. It embarrassed her badly.

Because of her health problems, T.S. was absent from class more than eight times between January and June 1990. The rest of the class was curious about why she was passing the course since they did not know anything about her medical history. Sheridan explained to the class that T.S. was passing the course because she did "special assignments" for him after school. The tone of voice in which this was said and the accompanying facial expressions and gestures made it clear that he was implying that she was having a sexual relationship with him. The students who testified and/or completed the student questionnaire who are in the same class with T.S. agreed that the term "special assignment" referred to Sheridan having sex with T.S.

T.S. did not take this as a joke. Sheridan made her feel self-conscious and that she was somehow "leading him on." She felt "nasty" and was angry about the impression that his statements created upon her fellow students.

Sheridan denied any sexual content in his reference to "special assignment." He testified that he was actually referring to participation by T.S. in the Oasis Program, an after-school program in which students who were absent could make up work which they missed. He said that he had several students on special assignment. Although he previously claimed that he did not know that T.S. was in a contractual program with the guidance office with respect to the number of her absences at the time that he announced his intention to fail her for the year, he now testified that he had this contractual arrangement in mind when he announced to the class that T.S. was participating in "special assignments."

Based upon the above, I **FIND** that Sheridan was guilty of making improper sexual references to the body parts of female students in his classes and inferring that he was carrying on a sexual relationship with one of these students to his classes.

Sleeping in Class

Every single student who testified or prepared a statement for the Board referred to Sheridan's sleeping in class. It appeared that it was his habit to place the assignments for the class on the blackboard and then fall asleep at his desk, leaving the students to their own devices.

According to L.S., who was in his honors biology class, the students used the opportunity to talk to their friends or do the homework assignment on the board. J.L., a classmate of L.S.'s, said that when Sheridan fell asleep, which was quite often, the students would talk or stare at him and call his name. M.A. used Sheridan's honors biology class in order to do her algebra homework. M.M. said he slept in class almost every day.

D.E., a student in his Biology A class, testified that Sheridan fell asleep almost every day in that class also. When T.S., who was in the same class as D.E., asked Sheridan why he fell asleep in class, he told her that he worked at a bar at night and was involved with a lot of women and therefore did not get enough sleep.

Apparently, Sheridan explained the notes which he placed on the board at the time he wrote them but refused to answer any student's questions in reference to the material. In fact, he apparently refused to discuss the subject matter with the students at all until the final weeks of the course, when he had to prepare them to take their final examinations.

M.A. testified that she was able to recall the incidents that went on in Sheridan's class because "there was no teaching going on, so if something went on, everyone paid attention." When Sheridan wrote on the blackboard before the final examination that he was not allowed to speak to them, the class laughed because "he never spoke to us anyway."

Sheridan testified that he may have nodded off in class because he was under extreme physical and mental stress during the 1989-90 school year. He was suffering from back, elbow, and shoulder problems, working at two jobs, in the process of getting a divorce, and dieting. At hearing, he produced a one-paragraph report from Gerald H. Rozan, M.D., a psychiatrist who stated that Sheridan was suffering from intense stress and "his type A behavior was involved with low self-esteem which gave him significant problems with anger and made him vulnerable to depression." Dr. Rozan was attempting to modify Sheridan's behavior and reduce his stress.

Sheridan was also being treated by Joseph J. O'Connor, M.D., an orthopedist, for low back pain and pain over the right shoulder and right elbow. His condition was being significantly aggravated by his "occupational activities as a bartender." Sheridan testified that his arm and shoulder pain meant that he could not write comfortably on the blackboard in class. He also admitted that he had difficulty staying awake whenever he was reading or writing. He never sought a leave of absence for either his psychiatric or orthopedic problems. He said that he could not afford to because of his financial condition.

I **FIND** that Sheridan fell asleep regularly in class. The fact that he suffered from various conditions of which he was aware must work to his detriment, not to his advantage. If he was unable to provide the teaching services which his students needed and he was being paid to deliver, he should have taken steps to remove himself from the situation. Instead, he remained in the classroom, thereby demonstrating a low opinion of his students and their ability to learn. His attitude conveyed the message that it did not matter if they did not have a teacher since they were not worth teaching. I therefore **FIND** that Sheridan's falling asleep in class demonstrated an attitude of contempt for his students.

Racial and Ethnic Slurs

Orange High School has a student body which is between 95 and 97 percent minority. In addition to African-American and Hispanic students, there are also Vietnamese, Haitians, and Greeks. Sheridan is white.

J.L. is of Haitian descent. She was born in the United States, but her mother was born in Haiti. Sheridan occasionally made reference to her national origin.

According to M.M., J.L. generally objected to the way Sheridan was teaching the honors biology class, so she asked a lot of questions. On one occasion, she was told by Sheridan, "If you wanted to learn that, why didn't you stay in Haiti?" or, "Why don't you go back to Haiti?" J.L. testified that Sheridan told her to get on a "banana boat" and go back to her country. M.A., who is also Haitian, was a witness to these ethnic slurs and was insulted.

J.L. recalled that Sheridan also told two Vietnamese sisters, Y.T. and C.T., to go back to Vietnam if they did not like what was going on.

All of these remarks were made in front of the entire class.

T.S., who was in the other biology class, testified that Sheridan "doesn't like black people." He did not say it outright but, according to T.S., made racist jokes. She did not give any specific incidents.

T.S.'s allegations as to Sheridan's attitude are supported by the testimony of Gaye Johnson. She testified that in 1989, there were problems at the school between the African-American and Haitian students. A council meeting was called to find ways to neutralize the relationship between the two groups. While waiting for this meeting to begin, Sheridan suggested to her that they should "just give them all machetes and let them take care of it themselves." Another time she was asked by a student in reference to Sheridan what could be done when a teacher referred to the students as "little monkeys."

Sheridan denied being prejudiced. He did not recall saying anything to Johnson about giving the students machetes, but he added that if he did, he was only being sarcastic. He does not deny what he is alleged to have said to J.L. or to the Vietnamese

students but does not recall it and thinks that they may have taken his statements out of context.

I **FIND** that Sheridan is guilty of making ethnic slurs and racist remarks to the students in his biology classes during the 1989-90 school year.

SHERIDAN'S DEFENSES

Sheridan defended his conduct in several ways. He referred to the condition of his health and the chaos in his private life and submitted the reports of Drs. Rozan and O'Connor to support his contentions. A review of these reports indicates nothing in either of them that could serve to justify his conduct. If he were affected as badly as he claims, he was obligated to remove himself from the classroom.

In his defense, Sheridan points to his prior excellent record as a teacher. There is nothing in evidence indicating his performance in the 1989-90 school year except the report of a classroom observation by his supervisor, Brendzel, between 9:25 and 10:04 a.m. on December 8, 1989 of a tenth-grade biology class in which Sheridan was very highly rated by Brendzel in all respects. No formal evaluation of Sheridan was conducted during this school year and, therefore, only this observation report and Sheridan's professional improvement plan developed with Joseph Moore, the prior principal, is available. The only thing demonstrated by the observation report is that Sheridan was capable of doing a good job of teaching. It is a shame that he did not feel that his students were worth his best efforts and he did not teach them as well as he was capable of doing.

Sheridan also claims that no one complained about his performance until Johnson brought the incident of June 5, 1990 to the attention of acting-principal Sherman. Therefore, he argues that the Board must be resting its allegations entirely upon this one incident in his entire otherwise excellent teaching history.

The failure of the administration of the high school to take note of Sheridan's conduct is explained by the history of the school administration.

Before Sherman became principal of Orange High School between May 15 and 27, 1990, he was the principal of the Park Avenue Elementary School. He was called upon by the Board to replace James Moore, who was summarily removed by the Board at the end of

his third year of service in the district approached so that the district would not have to grant him tenure in the position. Sherman was brought in against his wishes by the Board to close out the high-school year in an orderly fashion.

According to Johnson, who has been acting assistant principal of the high school since September 1991, complaints about Sheridan's behavior were made to Moore, who took no action with respect to them. She herself reported Sheridan's remarks about giving the students machetes without Moore taking any action.

J.L. testified that she did not complain to Moore because "he was having trouble also at the time." When she mentioned to another science teacher that she was not learning anything in her biology class, he said, "Oh, you have Mr. Sheridan?" She decided from the attitude of other faculty members and members of the school administration that everyone knew what Sheridan was doing and condoned his behavior. L.S. testified that she never complained because she felt that there was not much that would be done. D.E. never told anyone but his mother what he had observed because he did not feel that he would be believed. T.S. told her social worker about the abusive remarks Sheridan was making to her but nothing changed.

J.L. and M.M. went directly to Moore after Sheridan called M.M. a "bitch" in front of the class. As a result of their complaint, Moore came to Sheridan's class and called each of the students individually to a table in the back of the room and asked them about the incident and also about Sheridan's racial remarks to M.M. J.L. testified that they did not tell Moore about Sheridan's ogling the bodies of his female students. No action was taken against Sheridan as a result of Moore's investigation.

In addition to the perceived attitude of indifference on the part of the administration and other staff members at the high school, the students were also intimidated by Sheridan's position as chairman of the science department and his attitude that he could do anything he wanted without consequence. Many of the students became inured to his behavior and accepted it as something which they were forced to put up with.

The status quo might have been maintained until Sheridan had safely retired from teaching except for a fortunate confluence of circumstances: Moore's contract to continue as principal was not renewed by the district and Sherman was appointed to the position; Sheridan's abusive behavior so upset T.S. that she went to directly to Gaye Johnson; and

Johnson, who had previously heard unsubstantiated complaints about Sheridan, now herself became the butt of Sheridan's abuse. Her report to Sherman received a very different response than the one she had gotten from Moore.

In an exercise of firm and responsible leadership, Sherman immediately conducted a thorough and fair investigation of the allegations and acted immediately to remedy the situation. The students, used to the prior administration, came forward timidly and reluctantly at first, fearing administrative inaction which would leave Sheridan free to retaliate against them. They eventually responded to Sherman's assurances that they would not be subject to reprisal and they cooperated with the investigation.

The facts set forth above were the results of Sherman's investigation. No one listening to the testimony of the students and observing their demeanor could believe that they were telling anything but the whole truth as they experienced it. The outrage of M.M., J.T., and M.A., the disappointment and resignation of D.E. and L.S., and the sheer anguish of T.S., who had been singled out by Sheridan for special abuse, were apparent in every word and gesture.

I **FIND,** contrary to Sheridan's assertions that the charges against him were based upon one incident that occurred on June 6, 1991, that he engaged in an ongoing course of abusive and demeaning conduct towards his students during the 1989-90 school year. His conduct makes his claims that his students just objected to his strict enforcement of disciplinary rules and his attempts to implement the policy of the district on student absences a travesty of his duty as a teacher in the district and the chairman of the science department in the high school. One who is intent on strictly enforcing guidelines for student behavior does not consistently sleep through their behavior. One who is intent on improving the conduct of his charges does not freely indulge in egregious conduct in front of them.

PROCEDURAL DEFENSES

Sheridan raised several procedural defenses to the tenure charges brought against him by the Board.

The first is that the charges should be dismissed because the Board failed to comply with discovery requests. I **FIND** that although the Board might have failed to provide timely responses to Sheridan's interrogatories, he was not injured in the conduct of his case. He was provided with copies of the paragraphs written by the students at a meeting held approximately one month after he was suspended from his teaching duties at which he was accompanied by his association representative. Respondent received answers to his interrogatories from the district somewhat out of time. However, he sought no prompt relief from the forum with regard to the delayed discovery. In addition, on the day of hearing he was given the opportunity to again review petitioner's documents before proceeding with his defense.

Sheridan also alleges that the tenure charges should be dismissed because the district failed to comply with the provisions of *N.J.S.A.* 18A:6-11 that the charges be served upon him "within three working days of the date they were filed with the secretary of the district." The Board has represented that the apparent discrepancy in dates was the result of a typographical error on the letter transmitting the charges rather than a genuine failure to observe the required time limit. I **FIND** that there was no procedural reason based upon this allegation for dismissing the charges against Sheridan and, given the outrageous nature of his conduct, a technical infraction of the rules by the Board, if any, should not be considered on balance.

CONCLUSIONS

Sheridan has been charged by the district with conduct unbecoming a teacher. I **CONCLUDE** that it has proved by a preponderance of the credible evidence that during the 1989-90 school year, he engaged in conduct directly antithetical to his role as a teacher and as a role model for the students in his classes. He insulted them, demeaned them, exposed them to racial and ethnic prejudice, and refused to provide them with the benefits of his acknowledged teaching skills. I **CONCLUDE** that this unequivocally constitutes conduct unbecoming a teacher.

Respondent has attempted to argue that the tenure charges brought by the district in fact constitute allegations of inefficiency which failed to meet the statutory prescriptions of *N.J.S.A.* 18A:6-11. I **CONCLUDE** that nothing in the charges brought by the Board bespeaks inefficiency on the part of Sheridan. Inefficiency implies an inability to perform

the job; the only relationship between inefficiency and Sheridan's actions is that not much learning could be expected to result from either.

PENALTY

Sheridan's attempts to excuse or explain his conduct on the basis of his personal problems or the state of his health cannot be given much weight; his conduct is indefensible under any circumstances whatsoever. I **CONCLUDE** that there are no mitigating circumstances in this case which would warrant consideration in regard to any penalty imposed.

Under *N.J.S.A.* 18A:6-10, a tenured teacher may be dismissed or reduced in compensation for unbecoming conduct. Sheridan has been found guilty of unbecoming conduct and the acts constituting this conduct are of such a nature that his continued employment by the district is unsupportable. I therefore **CONCLUDE** that the only appropriate penalty is this matter is that Sheridan be removed from his position. *N.J.A.C.* 6:11-3.4.

ORDER

Accordingly, it is hereby **ORDERED** that Philip Sheridan be removed from his teaching position in the school district of the City of Orange Township, Essex County.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey**

08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 23, 1991
DATE

Edith K. Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

12/27/91
DATE

Thomas Hilton
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 30 1991
DATE

Joyce L. Vecchio
OFFICE OF ADMINISTRATIVE LAW

md/e

APPENDIX

WITNESSES

For Petitioner:	For Respondent:
Gaye Johnson	Philip Sheridan
M. M.	
L. S.	
D. E.	
T. S.	
J. L.	
M. A.	
James Sherman	

EXHIBITS

P-1	Paragraph by D.V., June 11, 1990
P-2	Paragraph by C.B.
P-3	Paragraph by T.S.
P-4	Paragraph by D.H.
P-5	Paragraph by K.L.
P-6	Paragraph by J.M.
P-7	Paragraph by S.G.
P-8	Paragraph by N.S.
P-9	Student questionnaire of N.S.
P-10	Student questionnaire of D.V.
P-11	Student questionnaire of T.S.
P-12	Student questionnaire of D.H.
R-1	Memorandum from Brendzel to Dr. Pijeaux, April 2, 1990
R-2	Letter from Gerald H. Rozan, M.D., October 15, 1991
R-3	Letter from Joseph J. O'Connor, M.D., May 15, 1990
R-4	Classroom Observation Report, December 8, 1989
R-5	Professional Improvement Plan, October 12, 1989

IN THE MATTER OF THE TENURE :
HEARING OF PHILIP SHERIDAN, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY : DECISION
OF ORANGE TOWNSHIP, ESSEX COUNTY. :
:

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by respondent pursuant to N.J.A.C. 1:1-18.4 and are briefly set forth below.* The Board's reply was filed out of time and is not considered herein.

In his exceptions, respondent (hereinafter "Sheridan") initially submits that the ALJ erred in not dismissing the charges against him because of the Board's failure to serve them within three days of their being sworn to by the superintendent and because of the Board's failure to timely comply with discovery requests. (Exceptions, at pp. 1-2)

Sheridan further asserts that the ALJ erred in assuming that Gaye Johnson "cleaned up" her testimony regarding Sheridan's language; rather, the testimony should have been taken exactly as stated, namely that Sheridan said "damn" rather than "f---," which

* Respondent's exceptions also incorporate his post-hearing submissions, including Sheridan's own personal statement regarding his present situation and the conduct of the tenure case against him. The contents of these submissions, however, are adequately addressed in the initial decision and therefore not reiterated at length below.

is also how the incident is reported on student statements P-2 and P-4. (Exceptions, at pp. 2-3)

Also in error, according to Sheridan, was the ALJ's decision to permit into the record, and then rely on, statements from students who did not testify and were hence not subjected to cross-examination. The error is compounded by the fact that the narrative statements (P-1 through P-8) were "collaboratively authored by unsupervised students" and the questionnaire responses (P-9 through P-12) were "totally unsubstantiated" and unclear in their origin, with Ms. Johnson attributing them to Principal Sherman and vice versa. (Exceptions, at p. 3)

Sheridan next contends that the ALJ erred in placing her own judgment of his teaching methods above that of the certified administrators and supervisors whose reports and other documentation constitute the only legitimate evaluation of Sheridan's teaching performance on the present record. All of these documents indicate that Sheridan was a good teacher, and no evaluator or administrator testified to the contrary. (Id.)

The ALJ further erred, Sheridan avers, in finding that the Board had proven the charges against him by a preponderance of the evidence. No administrators other than Mr. Sherman testified. Witnesses gave conflicting or inconsistent testimony (e.g. "damn" vs. "f---" as discussed above); much credance was given to a student (T.S.) who was absent for over half the school year in question; and Sheridan's use of "bitch" and "bimbo" was clearly explained by him. Altogether, the testimony on which the ALJ based her decision was insufficient to prove the charges she ultimately sustained. (Id., at pp. 3-4)

Finally, Sheridan argues that the ALJ erred in failing to accord due weight to his twenty-year service record and the effect of his health and personal problems during the period in question. Had she done so, she would have properly concluded that any unbecoming conduct in the 1989-90 school year was an aberration deserving a penalty less severe than dismissal. (Id., at p. 4)

Upon careful and independent review of the record, including complete transcripts of hearings, the Commissioner finds Sheridan's exceptions to be without merit and affirms the initial decision of the ALJ.

Initially, the Commissioner rejects Sheridan's contention that the charges against him should be dismissed on procedural grounds. With regard to failing to serve the charges "forthwith," the Commissioner concurs with the ALJ that even if Sheridan's factual contentions are true, a period of five working days does not constitute so great an extension of "forthwith" as to warrant dismissal of such egregious charges on procedural grounds alone. Neither was there any demonstration that Sheridan's case was prejudiced by the Board's admitted lateness in responding to interrogatories; indeed, Sheridan was acquainted with the students' written accounts of his behavior, which are clearly indicative of the bases on which the Board would be proceeding against him, long before the date of hearing. Nor does the Commissioner accept that the ALJ erred in placing these written accounts into evidence and referencing them in her findings, as she relied on them primarily as corroboration of behaviors consistently noted by witnesses whom she found to be fully credible.

The Commissioner further finds no basis in the record to dispute the determination of the ALJ with respect to the credibility of the witnesses who testified in this matter, including Sheridan himself, or the validity of student statements which were clearly taken in a manner designed not to permit collaboration or coercion. This being so, the overwhelming thrust of credible evidence amply supports the Board's contention that Sheridan routinely used profane and abusive language (whether a particular utterance included "damn" or "f---" is of no import whatsoever when the comment's general tone was consistently reported and effectively admitted by Sheridan), denigrated women and foreign students, made sexual innuendoes by word and gesture, and routinely slept in class.

Finally, the Commissioner finds no merit whatsoever in Sheridan's contention that the ALJ substituted her opinion of Sheridan's teaching performance for that of certified supervisors and administrators. Sheridan's professional capability is not at issue herein, his behavior is. Sleeping in class and using foul or abusive language are not matters of efficiency or teaching style, but of conduct befitting a teaching staff member. The conduct attributed to Sheridan in the course of these proceedings is reprehensible notwithstanding any indication that he could, and apparently did, teach satisfactorily when he so chose.

The Board's charges having been sustained in all instances, there remains only the question of the penalty to be imposed. The Commissioner is unpersuaded by Sheridan's argument that the 1989-90 school year, on which the present charges focus, constituted an "aberration" in an otherwise stellar teaching career brought on by personal and health problems which must militate against dismissal.

To the contrary, the Commissioner concurs with the ALJ that indications instead show habits of speech and attitude that were apparently allowed to exist, and therefore in the minds of students were sanctioned by authorities, well before the incidents of the school year in question. Moreover, as the record pertaining to 1989-90 shows, Sheridan was capable of acceptable, even good, performance during the very period when his behavior was most egregious, so that the Commissioner is less inclined to view past good performance as indicative of overall fitness to teach.

Accordingly, for the reasons well stated by the ALJ in her initial decision, the Commissioner affirms that Philip Sheridan shall be dismissed from his tenured teaching position in the school district of Orange Township as of the date of this decision. He further directs that this matter be forwarded to the State Board of examiners pursuant to N.J.A.C. 6:11-3.6(a)1 for action against Sheridan's certificate as the Board deems appropriate.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* The Commissioner notes that Sheridan submitted his resignation to the district on October 25, 1991 (one week after the close of hearings in this matter), to take effect in January 1992. The record is unclear, however, as to whether the resignation was accepted (it had not been at the time of post-hearing briefs), and in any event, as the ALJ properly notes at p. 3, resignation cannot be used to escape the consequences of tenure charges which have been duly certified and against which respondent has defended him or herself.

FEBRUARY 6, 1992

DATE OF MAILING - FEBRUARY 6, 1992

21-92

21-92

ROSEMARY GERDES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SPOTSWOOD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, tenured teaching staff member, claimed to have acquired tenure status as a cooperative education coordinator. Petitioner sought reinstatement to that position which was filled by nontenured coordinator for 1990-91. All parties agreed that no reduction in force occurred.

Citing Ellicott Appellate Division decision, ALJ concluded petitioner acquired tenure status in position of cooperative office education under her educational services certificate pursuant to N.J.S.A. 18A:28-5 and could not be removed from that position except as provided by law. Petitioner was ordered reassigned to position of part-time cooperative office education while retaining her part-time position under her instructional certificate.

Commissioner adopted findings and determination in initial decision as his own with slight modification. Commissioner found petitioner had acquired tenure in position of educational services under educational services certificate (Ellicott State Board decision) and could not be removed absent rif or dismissal under Tenure Employees Hearing Act. Petitioner was ordered reinstated to her tenured educational services position.

FEBRUARY 6, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 386-91

AGENCY DKT. NO. 375-11/90

ROSE MARY GERDES,

Petitioner,

v.

SPOTSWOOD BORO BOARD OF EDUCATION,

Respondent.

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

Philip H. Shore, Esq., for respondent (Shore & Zahn, attorneys)

Record Closed: December 4, 1991 Decided: December 23, 1991

BEFORE **DANIEL B. McKEOWN**, ALJ:

Petitioner, who otherwise has acquired a tenure status as a teacher in the employ of the Spotswood Board of Education (Board), claims to have also acquired a tenure status as a cooperative education coordinator. She alleges that despite her tenure as the cooperative education coordinator, the Board improperly and in violation of her tenure employed a nontenured cooperative education coordinator (or Coordinator) for 1990-91. Petitioner demands reinstatement to the position of Coordinator . After the Commissioner transferred the matter January 10, 1991 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 6, 1991 at the South Brunswick Municipal Building. Thereafter, the parties filed letter memorandum in support of their respective positions. The record remained opened until a conference call was attempted December 4, 1991 for clarification of a filed stipulation of fact.

STIPULATED FACTS

At the hearing the parties agreed that because they could stipulate all relevant and material facts, testimony was not necessary. Consequently, the parties reached the following stipulation of fact at that time which was later memoralized in writing. The facts as stipulated and as memorialized in writing on September 10, 1991 are as follows:

1. Petitioner has an instructional certificate with five endorsements, four of which she obtained in 1978 and one of which she obtained in 1981. The endorsements obtained in 1978 for the teaching of bookkeeping and accounting, general business studies, typing and data processing. The endorsement petitioner acquired in 1981 is for teaching of secretarial studies.

2. In addition to an instructional certificate, petitioner has also acquired an educational services certificate in 1983 as a teacher-coordinator of cooperative vocational-technical education-business education pursuant to N.J.A.C. 6:11-11.20(a).

3. Petitioner was first employed by the Spotswood Board in 1978 under her instructional certificate.

4. Between 1983 through June 1990 petitioner taught three courses under her instructional certificate in addition to teaching one period per day, five days per week, in cooperative office education and having two daily periods, five days per week, of field pupil supervisory periods.

5. Cooperative office education in part allowed petitioner to teach the cooperative office education course and to act as liason between the school and cooperating employers training stations (places of employment).

6. Near the end of 1989-90 the school administration considered the elimination of cooperative office education courses.

7. During June 1990 the very same school administration determined not to eliminate cooperative office education courses but did assign petitioner's cooperative office education courses to another tenured teacher who, while properly certified, never taught cooperative office education.

8. Petitioner presently is in a position of employment with the Board for which she is properly certified.

9. Salary is not in issue in this dispute.

10. Cooperative office education duties are non supervisory of other teachers.

Three other points are noted regarding the stipulation of fact. One, it was agreed between counsel to the parties that the supervisor of vocational education supervises cooperative education. Two, it was also agreed that the Board also has cooperative education in marketing and cooperative education in industrial education. Three, petitioner's employment now and in prior years has been on a full-time basis.

ARGUMENTS

I

PETITIONER

Petitioner claims, quite simply, she acquired "* * * tenure pursuant to an educational services endorsement [and] may not be involuntarily transferred back to an instructional position." (Petitioner's letter memorandum) In support of that basic position, petitioner relies upon Childs v. Union Township Board of Ed, 1980 S.L.D. 1134, aff'd St. Bd. 1988 S.L.D. 1401. Petitioner also cites Horun v. Watchung Hills Regional High School,

1981 S.L.D. 360, aff'd St. Bd. 1982 S.L.D. 1982 S.L.D. 1518. Petitioner seeks an Order compelling the Board to immediately reassign her to the part-time position of teacher/coordinator of cooperative vocational technical education-business education.

The Board notes that petitioner's tenure status is not in issue because neither she nor her replacement as cooperative office education teacher has tenure in that position and neither suffered a salary reduction nor termination of employment. In this regard, the Board relies upon an unreported decision of the Appellate Division in Stegemann v. Board of Education of the Township of **Union**, N.J. App. Div., Oct. 7, 1981, A-4737-79 - T2 (unreported), cert. den., 89 N.J. 437 (1982). It is noted that the Board also acknowledges that a subsequent decision of the Appellate Division, again unreported, in Childs v. Union Township Board of Ed., (N.J. App. Div., July 19, 1982, - -) (unreported), cert. den., 91 N.J. 550 (1982) is contrary to Stegemann. Nevertheless, the Board points out that the State Board of Education in a recent decision, Ellicott v. Frankford Township Board of Ed., 1990 S.L.D. - (Nov. 19, 1990), appears to conflict with the opinion in Childs.

Next, the Board contends that petitioner is not entitled to the position of cooperative office education coordinator by virtue of seniority for the simple reason that no reduction in force has occurred under N.J.S.A. 18A:28-9. The Board notes that seniority has been declared to provide a mechanism for ranking all tenured teaching staff members when a reduction in force occurs for re-employment rights and cites Lictman v. Ridgewood Board of Education, 93 N.J. 362, 368n. 4 (1983), that seniority declares only the rights inter sese of tenured teachers in a reduction in force citing Bednar v. Westwood Board of Education, 221 N.J. Super 239, 243 (App. Div. 1987). In short, the Board maintains that seniority has relevance only where a reduction in the employment force is necessary and for no other purpose.

In this case, the Board contends that it has the right and the duty to assign teachers to particular grades and subjects and to deploy personnel in the manner which it considers most likely to promote the overall goal of providing all students with a thorough and efficient education and cites Ridgefield Park Education Association v. Ridgefield Park Board of Education, 78 N.J. 144, 156 (1978). Thus, the Board concludes that in the absence of any legally and enforceable right petitioner has to the position of cooperative office education its determination to reassign her from that employment may not be disturbed.

ANALYSIS

Petitioner's claim to have acquired a tenure status in the position of cooperative office education must be upheld and her separate acquisition of tenure as a teacher must be honored for the following reasons. N.J.S.A. 18A:28-5 provides "The services of all teaching staff members including all teachers * * * and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners * * * shall be under tenure * * *" upon the assumption the individual serves the statutory requisite period of time. In this instance, petitioner has served the statutory period of time of more than three consecutive academic years to have acquired tenure as a teacher in the traditional sense. That is, petitioner is employed and assigned by the Board under an instructional certificate to perform teaching duties.

But between 1983 through June 1990 petitioner was also in a position, cooperative office education, which required her to hold an appropriate certificate issued by the board of examiners which is the educational services certificate, with an endorsement of teacher-coordinator of cooperative-vocational-technical education, N.J.A.C. 6:11-11.20. Petitioner, having acquired tenure as a teacher pursuant to an instructional certificate and tenure as a cooperative office education teacher under a separate educational services certificate, with an appropriate endorsement, may not under law be "* * * dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecomming such a teaching staff member or other just cause * * *."

It is recognized N.J.S.A. 18A:28-9 authorizes board of education to initiate reduction-in-force, or the elimination of certain teaching positions, and that if teachers with tenure are to be dismissed as a result, seniority determines which of the tenure teachers shall have their employment terminated. However, in this case it is agreed that no reduction-in-force occurred. What did occur is that petitioner, having served the requisite period of time and being properly certificated to have acquired tenure in the position of cooperative office education, was simply removed from that position by school administrators, without her consent, and reassigned full-time to another position. That petitioner suffered no salary reduction nor reduction in any other employment emoluments does not justify the removal of a tenured employee from the position in which tenure was acquired for mere transfer to another position. If such an administrative

transfer could occur in this case, it could occur in the case where a school prinicpal has simultaneously acquired tenure as a teacher and as a principal, and having last acquired tenure as a principal, be reassigned from the principalship back to a full-time classroom position with no loss of salary or employment emoluments. Such is not the intent of the tenure statute. While it is acknowledged a school principal may be assigned to teach certain classes, there is no authority for a transfer from a tenure principal position to a full-time teaching position.

In the decision referenced by the Board regarding the State Board of Education, that decision has since been affirmed by the Appellate Division. See Ellicott v. Board of Education of the Township of Frankford, -N.J. Super - (App. Div., Oct 24, 1991) Judge Havey, writing for the court in a opinion approved for publication, discussed tenure and its acquisition in the following manner:

> Tenure is conferred by statute, N.J.S.A. 18A:28-1 to -18, which "should be liberally construed to achieve its beneficent ends." Spiewak v. Board of Educ. of Rutherford, 90 N.J. 63, 74 (1982). N.J.S.A. 18A:28:5 defines with specificity the conditions under which teaching staff members are entitled to the security of tenure. It provides that the services of "all teaching staff members including ... teachers ... and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners," shall be under tenure upon satisfying one of the requisite statutory probationary terms set forth in the staute. (Emphasis added). Thus, tenure is achieved by a teaching staff member who serves the probationary period either in a specifically designated "position," such as a teacher, or in "positions which require them to hold appropriate certificates...." While "position" is not defined by the act, "teaching staff member" is defined as a staff member who holds "office, position or employment" which requires that he or she "hold a valid ... certificate...." N.J.S.A. 18A:1-1. (Emphasis added). Also, N.J.S.A. 18A:28-4 provides that "[n] o teaching staff member shall acquire tenure in any position ... who is not the holder of an appropriate certificate for such position...." (Emphasis added).
>
> As the State Board properly observed, what is clear from the statutory scheme is that tenure is achieved in a specific "position," and the scope of the tenured position is initially limited by the "certificate" the teaching staff member must hold to satisfy the prerequisite of qualifications for his or her employment. The statute does not require service of the probationary term under a specific "endorsement." Because the legislative will is expressed by the plain language of the statute, we will "not engage in conjecture or surmise which will circumvent the plain meaning of the act." In re Closing of Jamesburg High School, 83 N.J. 540, 548 (1980).

The State Department of Education regulations provide for three types of regular certifications: instructional; administrative, and educational services. N.J.A.C. 6:11-2.3. The Board of Examiners may issue for each teaching, administrative or educational services position a "special endorsement" under the appropriate certificate. Id. Under each certification there are numerous "special endorsements" required for teaching staff member assignments in specific fields. For example, N.J.A.C. 6:11-11.3 to 11.20 enumerate various endorsements under the educational services certificate, including LDTC and speech correctionist. A teaching staff member holding an educational services certificate is qualified to serve in any assignment under that certificate for which he or she holds the requisite endorsement. Also, teachers holding an instructional certificate are authorized and qualified for service under the certificate for which the member possess the appropriate endoresement. N.J.A.C. 6:11-6.1 to -8.7. Thus, unlike the statutory language under N.J.S.A. 18A:28-5, which predicates tenure to a particular "position" upon the acqusition of a "certificate," the regulations enumerate endorsements under the certificates which, if acquired, qualify the teaching staff member to be assigned to the endorsement position.

We have already upheld a State Board determination, in a different setting, that a teaching staff member has tenure in all positions for which his instructional certificate qualified him. In Capodilupo, the State Board distinguished seniority rights under N.J.S.A. 18A:28-9 (which provides a mechanism for ranking tenured teaching staff members so that reductions can be effected in an equitable fashion) from tenure rights under N.J.S.A. 18A:28-5. N.J. Super. at 514-15. See also Lichtman, 93 N.J. at 368, n.4. We endorsed the State Board's determination that a tenured teacher is entitled to retention as against a nontenured teacher regardless of seniority, in the event of a RIF. Capodilupo, 218 N.J. Super. at 514-15. We held that "a tenured teacher seeking reinstatement within the endorsements on his or her certificate is entitled to preference in a RIF as against a non-tenured applicant with the same certification." Id. at 515 (emphasis added). This was so despite the fact that the tenured teacher had no "demonstrable experience" under the endorsement. Id. at 513. See also Bednar v. Westwood Bd. of Educ., 221 N.J. Super. 239 (App. Div. 1987), certif. denied, 110 N.J. 512 (1988) (the Tenure Act "surely does not contemplate use of the concept of seniority to justify retaining a non-tenured teacher in a position within the certificate of a dismissed tenured teacher"). 221 N.J. Super. at 242 (emphasis added). The State Board's determination here is entirely consistent with the Capodilupo and Bednar holdings.

The Local Board urges that even if Capodilupo and Bednar properly define the scope of a teacher's tenure protection under an instructional certificate, the reasoning of the decisions should not apply to teaching staff members employed under an educational

services certificate. It argues that Capodilupo and Bednar "[do] not logically apply to endorsements held under the [e]ducational [s]ervices certificate, because those endorsements constitute separate categories of jobs rather than distinct subject areas, as is the case with instructional certificate endorsements."

The short answer to this argument is that the statute and attendant regulations make no such distinction. What is apparent from the statutory language is that the Legislature left it to the State Board to promulgate specifications concerning the categories of "certification," and we cannot intervene unless the State Board's decision is palpably arbitrary. Shelton College v. State Bd of Educ., 48 N.J. 501, 517-18 (1967). The regulations defining the parameters of each certificate are accorded a presumption of reasonableness. In re Amendment of N.J.A.C. 8:31B-3.31 and N.J.A.C. 8:31B-3.51, 119 N.J. 531, 544 (1990). We must presume that the State Board, applying its expertise, cataloged the numerous endorsements, including speech correctionist and LDTC, under the single umbrella of the educational services certificate for sound administrative and educational reasons. See id. at 543; see also In re Amendments to N.J.A.C. 6:11-8.4, 249 N.J. Super. 52, 57 (App. Div. 1991). Indeed, comparing the pertinent endorsements here, it becomes clear that there exists integrated and overlapping functions and duties under the speech correctionist and LDTC endorsements. As petitioner points out, both participate in child study teams and in presenting specialized remediative services to school district children. See N.J.A.C. 6:11-11.9 and N.J.A.C. 6:11-11.13. Moreover, any differences among the endorsements, in the context of tenure rights, become less significant since the teaching staff member asserting a tenure right under the certification must still qualify for the particular position by securing the pertinent endorsement.

Lastly, the Local Board argues even if petitioner had tenure entitlement to the LDTC position, it had "sound educationally-based reasons" for its decision to employ a nontenured person rather than petitioner. In Capodilupo, we observed in dictum that:

> We recoginze that, in upholding the [Local] Board's decision to retain [a nontenured teacher], the State Board also made a finding that the Board's obligation to consider tenure in a RIF could be balanced by "sound educationally based reasons for its decision to retain a non-tenured teacher."

218 N.J. Super. at 515-16. However, we found it "both unnecessary and inappropriate" to address the merits of this portion of the State Board's opinion because the Local Board had advanced "no educationally based reasons" to retain the nontenured teacher, beyond his experience, as an elementary teacher. Id. at 516.

> We now question whether, at least in the context before us, there can be any "sound educationally based reasons" for retaining a nontenured over a tenured teaching staff member in the event of a RIF, once the statutory right ot tenure is fixed. Indeed, in Bednar, the State Board had concluded that tenure did not permit a teacher to claim an assignment in a job catergory against a nontenured teacher who had seniority in that category. 221 N.J. Super. at 242. We held that while the State Board's approach may or may not represent "sound educational policy," 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 Legislture." Id. at 243...

Even if the tenure law allows for "sound educational policy," there is no evidence in the case before me that petitioner was removed from the cooperative office education position in which she had tenure for such reasons. Rather, the evidence discloses that school administrators simply declared they were to discontinue the program only to reverse that proposed action at a subsequent time while simultaneously removing petitioner from that position. In short, the Board does not claim that there was a reorganization or other just cause for the complained of action.

Based on the facts in this case, together with the applicable law, I **CONCLUDE** that petitioner has under law acquired a tenure status in the position of cooperative office education pursuant to N.J.S.A. 18A:28-5 and that, as a result, she may not be removed from that position except as provided by law. Therefore, petitioner is to reassigned to the position of part-time cooperative office education, while retaining her part-time position under her instructional certificate, as soon as is practicable following the final decision in this matter.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 23, 1991
DATE

Daniel B. McKeown
DANIEL B. McKEOWN, ALJ

Receipt Acknowledged:

12/26/91
DATE

Maureen Kelly
DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 2 1992
DATE

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

tmp

ROSEMARY GERDES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SPOTSWOOD, 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 thereto were timely filed under the provisions of N.J.A.C. 1:1-18.4.

The Board's exceptions aver that petitioner's tenure rights are not implicated in the instant matter as she has been neither dismissed nor reduced in compensation and that a mere transfer is neither a demotion nor a dismissal.

The Board also excepts to the ALJ's determination that petitioner can acquire tenure within endorsements on educational certificates. It avers that Ellicott, supra, upon which the ALJ relied, stands for the exact opposite to his determination that petitioner acquired tenure in the position of cooperative office education under her educational services certificate and that the instant matter is distinguishable from Ellicott because it involved the rights of a tenured teacher against a nontenured teacher where there had been a reduction in force.

Further, the Board excepts to the ALJ's determination that it may not reassign petitioner within the scope of her certificates and endorsements in that the initial decision's effect wrongfully denies it the right to do that.

Upon review of the record and the parties' exceptions, the Commissioner fully concurs with the ALJ's legal conclusions, finding his analysis of the issues and pertinent law both well-reasoned and accurate with one modification as set forth below. The ALJ states on page 9 of the initial decision that petitioner acquired tenure in the position of cooperative office education. However, the State Board's decision in Ellicott, supra, indicates that staff members who serve under educational services certificates achieve tenure in the position of "educational services."

Thus, contrary to the Board's arguments otherwise, petitioner by virtue of her service under an educational services certificate acquired tenure in the position of "educational services." See State Board's November 19, 1990 decision in Ellicott, supra, at pp. 7-8.

Consequently, petitioner could not be removed from her tenured educational services position absent a reduction in force or dismissal under the Tenure Employees Hearing Act. Childs, supra; Ayoub v. Bd. of Ed. of South Plainfield, decided by the Commissioner May 24, 1988 The fact that she was not dismissed or reduced in salary does not alter this determination.

Moreover, the Board's claim that this determination robs it of its right to transfer within the scope of petitioner's certificates and endorsements is without merit. Petitioner by virtue of her service in the Spotswood School District under her

instructional certificate has acquired tenure in the position of teacher. As determined herein, she has also acquired tenure under her educational services certificate. The Board is in no way prohibited by this decision from transferring petitioner within the scope of her instructional certificate and endorsements for that portion of her full-time employment which is a teaching position. Nor is the Board prohibited from transferring or reassigning petitioner within the scope of her educational services certificate for that portion of her full-time employment which is an educational services position.

Accordingly, the initial decision is affirmed. Petitioner is, therefore, ordered reinstated to her tenured educational services position.

COMMISSIONER OF EDUCATION

FEBRUARY 6, 1992

DATE OF MAILING - FEBRUARY 6, 1992

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ROSEMARY GERDES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SPOTSWOOD, MIDDLESEX COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

APRIL 1, 1992

OAL DKT. NO. EDU 386-91

ROSEMARY GERDES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SPOTSWOOD, MIDDLESEX COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

This matter was opened by way of Notice of Motion for Stay by the Spotswood Board of Education (Board) dated February 27, 1992 and filed with the Commissioner on March 2, 1992 seeking a stay of his decision in this matter issued on February 6, 1992. Said decision is currently pending before the State Board of Education.

The Board seeks a stay of the Commissioner's decision on the basis of the fact petitioner is employed full time by it and is currently assigned under her instructional certificate. The Board avers that should it be required to reassign her as ordered on February 6, 1992 by the Commissioner, it would have to remove another tenured teacher from an educational services position in the middle of the year which would, in the Board's judgment, be disruptive to the educational program and to students, as well as contrary to a thorough and efficient education.

On March 16, 1992 petitioner filed an affidavit in opposition to the Motion for Stay. The affidavit was, however, untimely filed pursuant to the requirements of N.J.A.C. 6:2-2.2.

Upon review of the Board's request for a stay and the arguments contained therein, the Commissioner denies said stay due to the failure of the Board to meet the standards for the granting of injunctive relief set forth by the New Jersey Supreme Court in Crowe v. DeGioia, 90 N.J. 126 (1982). This determination is reached based on the fact that the Board has not demonstrated that irreparable harm would result absent the granting of injunctive relief. Nor has the Board demonstrated a likelihood of prevailing on the merits of its appeal nor that the public interest compels granting a stay.

Accordingly, it is ordered this 1 day of April 1992 that the stay be DENIED.

COMMISSIONER OF EDUCATION

APRIL 1, 1992

DATE OF MAILING - APRIL 2, 1992

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EDU #386-91
C # 21-92
SB # 11-92

ROSEMARY GERDES,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF SPOTSWOOD, MIDDLESEX COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 6, 1992

For the Petitioner-Respondent, Klausner, Hunter & Cige (Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Appellant, Shore & Zahn (Philip H. Shore, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. The Appellant's motion for a stay of the Commissioner's decision is rendered moot by our decision herein, and it is, accordingly, denied.

July 1, 1992

Date of mailing JUL 06 1992

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BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
GUSTAVO ACEVEDO, JR., RESPONDENT.	:	DECISION

SYNOPSIS

Petitioning Board of Education sought declaratory judgment with respect to N.J.S.A. 18A:12-2 as to whether a conflict of interest existed, requiring respondent to withdraw his civil lawsuit against the Board for accident to son on monkey bars, or forfeit his seat on the Board.

ALJ found that a board member who filed a lawsuit against the board, pursuant to N.J.S.A. 18A:12-2, must forfeit his or her seat as he was in receipt of monetary judgments. ALJ ordered Board member be removed as he was in conflict of interest.

Commissioner affirmed in part and rejected in part the initial decision. Commissioner concurred with the ALJ that respondent's claim against the Board, which had been lodged at time he ran for Board seat, constituted a substantial and material conflict of interest that would have required respondent's disqualification. However, Commissioner found contrary to ALJ, that because the lawsuit was settled on October 24, 1991 and because there were no allegations that respondent exercised influence over Board regarding the litigation that was the subject of the instant petition, or that he would exercise influence in the future, or be enriched in the future, respondent had no longer a conflict of interest, and thus there remained no current impediment to his serving on the Board. Remedy was declared moot.

FEBRUARY 6, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 5995-91
AGENCY DKT. NO.160-5/91

BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY
Petitioner,

v.

GUSTAV ACEVEDO, II,
Respondent.

Gail L. Shanker, Esquire, for petitioner (Carroll and Weiss, attorneys)
Eward F. Liston, Esquire, for the respondent (Liston and Pinizzotto, attorneys)

RECORD CLOSED: November 9, 1991 DECIDED: December 19, 1991

BEFORE: LILLARD E. LAW, ALJ

STATEMENT OF THE CASE

Petitioner, Board of Education of the Township of Jackson (Board) seeks a declaratory judgment with respect to the provisions of N.J.S.A. 18A:12-2 as to whether a conflict of interest exists which requires Gustav Acevedo, II, (respondent) to either withdraw his civil lawsuit against the Board or forfeit his seat on the Board. Respondent contends, among other things, that the legal action against the Board is being prosecuted by his wife on behalf of their son and, therefore, his claim in the matter is merely a tangential per quod claim and not such as would create a conflict of interest which could not be cured by his abstaining from any actions having to do

with his claim. Respondent further contends the matter has been settled for a monetary sum and that it is his understanding the matter was to be dismissed.

MOTION

The Board now moves for Summary Decision in its favor asserting, among other things, that there is no genuine issue as to any material fact, pursuant to N.J.S.A. 1:1-12.5.

Having carefully considered the criteria for summary judgment established by our Supreme Court in Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67(1954) and, having carefully considered the entire record before me; I **CONCLUDE** that the instant matter is ripe for summary decision.

ISSUE

The sole issue to be determined by this tribunal is whether a conflict of interest exits, as prohibited by N.J.S.A. 18A:12-2, which requires respondent to either withdraw his civil lawsuit against the Board or forfeit his seat on the Board?

THE STATUTE

The statute which is in controversy in this matter, N.J.S.A. 18A:12-2, states in pertinent part, as follows:

> No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board .....

UNCONTESTED FACTS

Respondent, as the result of the April 30, 1991 annual school election, was elected to the Jackson Township Board of Education and was seated as a member at the Board's organization meeting on May 7, 1991. Respondent is one of three plaintiffs in a civil lawsuit, Docket No. OCN-L-5116-89, against the Board and three employees for injuries to his son, Gustavo Acevedo III, who fell from the monkey bars at a Jackson Township school in which his son was enrolled as a pupil. Respondent acknowledges in paragraph 2 of the Fourth Count of the Complaint that he and his wife are "responsible for the debts, care and maintenance of, and are entitled to the services and society" of their son. The civil action lawsuit sought damages on behalf

of respondent's son for his pain and suffering and on behalf of respondent, individually, and on behalf of his wife, individually, for deprivation of their son's society and services, compensatory damages for the cost of his son's medical treatment, and pecuniary loss of an unspecified amount for being prevented from continuing their regular duties and occupations while seeking medical care for their son.

On October 24, 1991, judgment was entered in behalf of respondent's son against the Board in the amount of $30,000.

DISCUSSION OF THE LAW

The determination of whether a board of education member who has filed a lawsuit against his board has a conflict of interest that requires him or her to either drop the claim or else forfeit his or her seat on the board focuses on the nature of the board member's interest at stake in the claim. If the goal of the lawsuit is to vindicate the public's interest, as, for example, in an action challenging a contract issued by the board to the school district superintendent, then the board member may retain his or her seat but must abstain from participating in any discussion or vote regarding the litigation. Scotch Plains-Fanwood Bd. of Ed. v. Syvertsen, Comm'r decision (June 13, 1990). In contrast, if the lawsuit seeks compensatory or punitive damages that will accrue to the benefit of the board member personally, then there likely exists a substantial and material conflict of interest requiring either withdrawal of the claim or forfeiture of board membership. Tp. of Holmdel Bd. of Ed., Monmouth County v. O'Connell, Comm'r decision (May 10, 1990).

The statue prohibiting board members from having an "inconsistent interest or office," N.J.S.A. 18A:12-2, reads in pertinent part: "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board . . . ." (emphasis added). The decisions interpreting N.J.S.A. 18A:12-2 fall into two categories of cases: 1) those in which the alleged conflict of interest arises when a board member (or the member's spouse or close relative) enters into a contract (commercial or employment) with the board, and 2) those in which a board member lodges a legal claim against the board.

In an often-quoted, though not education-related, case dealing with a contract-based conflict of interest, Aldom v. Borough of Roseland, 42 N.J. Super. 495 (App. Div. 1956), the court emphasized the fiduciary duty a council member as public officer owes the citizens of his community. Declaring that "[t]he law tolerates no mingling of self interest "but rather"demands exclusive loyalty," id. at 500, and that citizens "have the right to expect that in everything that appertains to their business

or welfare, [the public officer] will exercise his best judgment, unaffected and undiluted by anything which might inure to his own interest as an individual," id. at 501, the court invalidated a zoning ordinance on a taxpayer challenge because a councilman who was a twenty-three-year employee of the corporation seeking the zoning change had participating in the vote.

The Aldom court addressed the assertion that the councilman, as a middle-management employee, would not directly benefit economically from the zoning change. It pointed out that the "interest which disqualifies is not necessarily a direct pecuniary one, nor is the amount of such an interest of paramount importance. It may be indirect; it is such an interest as is covered by the moral rule: no man can serve two masters whose interests conflict." Id. at 502. Consequently, the decision to disqualify a public officer on the grounds of conflict of interest must depend on the facts and circumstances of each particular case. Id. at 503. The Aldom court thus set out the overarching policy considerations to be weighed in conflict of interest cases involving public officers. (It is interesting to note that the Aldom court cited with approval the "Public Officers Law of New York," proscribing "'any interest, financial or otherwise, direct or indirect, . . . which is in substantial conflict with the proper discharge of [their] duties in the public interest," Id. at 502. The identical phrasing was incorporated into the 1971 New Jersey Conflicts of Interest Law at N.J.S.A. 52:13D-23(e)(1).)

"Contract with" cases under N.J.S.A. 18A.:12-2

Narrowing the discussion to conflict of interest cases decided pursuant to N.J.S.A. 18A:12-2, the "contract with" branch of decisions focus on whether the conflict of interest is substantially and materially sufficient to disqualify the board member from his or her seat. This standard was imported by the State Board of Education from the general New Jersey Conflicts of Interest Law, which requires that the "standards of conduct [adopted by state agencies pursuant to the general principles in the statute] should separate those conflicts of interest which are unavoidable in a free society from those conflicts of interest which are substantial and material, or which bring government into disrepute." In re Bayless, 1974 S.L.D. 595, rev'd St. Bd. of Ed., 1974 S.L.D. 603, 605 (quoting N.J.S.A. 52:13D-23(e)(8)). Thus, in Bayless, the State Board, in reversing the Commissioner, held that the board member was not barred from her seat simply by virtue of her being married to a long-term board employee. Since it saw the board member's statutorily created right to hold public office, N.J.S.A. 10:1-1, being abridged on the basis of marital status, the State Board used an equal protection-strict scrutiny analysis and found that the board member did not have such a direct and continuing interest in her

husband's employment contract that her disqualification from the board could be a compelling state interest. The State Board held the remedy of abstention adequate, but, echoing the Aldom court, cautioned that its holding was limited to the facts and merits of the case before it. Id. at 605-06.

The Bayless approach was subsequently applied in Elms v. Mt. Olive Tp. Bd. of Ed., Morris County, 1977 S.L.D. 713, where the Commissioner found no conflict of interest in the employment by the board of a board member's spouse or close relative , id. at 721, or in a board member's being a teacher in an adjoining school district. Id. at 722. The Commissioner did, however, condemn as a conflict of interest in contravention of N.J.S.A. 18A:12-2 the board's entering into a business transaction with a close relative of a board member. Id. at 722.

Although the respondent in the case at bar cites Salerno v. Old Bridge Tp. Bd. of Ed., Middlesex County, 6 N.J.A.R. 405 (1984) in support of his contention that any conflict of interest arising from his tort claim against the board can be cured by abstention, Salerno (holding that board members who negotiated contracts with employee bargaining units in which some of the board members' relatives were participants were not in a conflict of interest and, in fact, were not required to abstain from voting on such contracts although they had taken the precaution of doing so) comes from the "contract with" branch of N.J.S.A. 18A:12-2 decisions. The remedy of abstention as applied in "claim against" cases is discussed below.

"Claim against" cases under N.J.S.A. 18A:12-2

In the "claim against" category of N.J.S.A. 18A:12-2 conflict of interest decisions, the pivotal issue is whether the board member's claim is intended to vindicate the public's interest or instead will accrue to the board member's personal benefit. When the claim is made on behalf of the public's interest, the board member is not subject to disqualification, but he or she may be required to abstain from any discussions or votes regarding the litigation. Scotch Plains-Fanwood Bd. of Ed. v. Syvertsen, Comm'r decision (June 13, 1990); Bd. of Ed. of Newark v. Brown, 1984 S.L.D. 671, aff'd St. Bd., 1984 S.L.D. 683; Bd. of Ed. of Borough of Barrington, Camden County v. Heins, OAL Dkt. No. EDU 1272-86 (March 21, 1986), remanded by Comm'r for analysis of cases and issues (Apr. 24, 1986).

In Scotch Plains-Fanwood, the board member had lodged a petition of appeal with the Commissioner of Education in which he challenged the propriety of a contract his board had made with the school district's superintendent. The board argued that N.J.S.A. 18A:12-2 gave it an implied right to exclude the claimant-board member from executive sessions wherein the litigation was to be discussed. The Commissioner found in favor of the board, but he did not find it necessary to stretch

N.J.S.A. 18A:12-2 to cover exclusion as well as disqualification. Instead, he grounded his decision on the New Jersey Open Public Meetings Act, which does allow the public, and, it follows, the board member, to be excluded in order to protect the attorney-client privilege between the board and its counsel. N.J.S.A. 10:4-12(b)(7).

In Newark, the claim the board asserted must disqualify the newly elected board members was their appeal to the Appellate Division from the dismissal of the suit filed under the Open Public Meetings Act, as well as their claim under N.J.S.A. 18A:12-20 for reimbursement of the legal costs of defending against the disqualification action. The Commissioner dismissed the board's argument that N.J.S.A. 18A:12-2 required automatic disqualification for "any" claim against a board of education as inconsistent with the statute and with case law, citing Hogan v. Kearny Bd. of Ed., 1982 S.L.D. 329, adopted Comm'r of Ed., 1982 S.L.D. 354, aff'd St. Bd., 1982 S.L.D. 356 (while suit for reimbursement of legal fees was a claim against board within purview of N.J.S.A. 18A:12-2, such claim does not automatically disqualify board member, and abstention doctrine as applied in Bayless would be appropriate if board were to vote on fees voucher). He applied the test set forth in Bayless; i.e., that the claim against the board allegedly giving rise to the conflict of interest, under the circumstances of the particular case, must promise "substantial and material" benefit to the claimant before it can result in disqualification, and found that the board members were indeed pursuing a claim in the public interest rather than "personal aggrandizement and enrichment." Newark, 1984 S.L.D. at 680. Alluding to the finding of the Aldom court, which recognized that the personal interest that could create a conflict of interest did not necessarily have to be pecuniary, the Commissioner nevertheless concluded that whatever political advantage the board member may have been seeking by bringing suit was unproved and likely unprovable in the context of a vigorous election campaign. Id. at 681.

The Barrington case is troublesome as a precedent because the case was withdrawn after the Commissioner remanded it for an explanation of the rationale for the initial decision but before such further action was taken by the administrative law judge. Thus, while it is not clear whether the claim against the board in Barrington, which sought retraction of the board's resolution of censure and a public apology, amounted to a conflict of interest requiring disqualification under N.J.S.A. 18A:12-2 (the administrative law judge had held that it did not), the Commissioner did call attention to the Newark test for determining a conflict of interest, i.e., whether in light of the particular facts and circumstances, the claim was likely to substantially and materially benefit the claimant. Barrington, Comm'r decision (April 24, 1986) at 9.

When, as in the case at bar, the board member is a party to a suit against the board seeking monetary damages, whether compensatory or punitive, the finding of a conflict of interest sufficient to disqualify the board member seems inevitable because the material and substantial benefit to the claimant-board member is clear. That the board member's claim is per quod does not erase the personal financial benefit he will reap if the underlying suit is successful.

In a recent case, Tp. of Holmdel Bd. of Ed., Monmouth County v. O'Connell, Comm'r decision (May 10, 1990), the Commissioner again applied the Newark analysis and determined that a board member who was a named plaintiff in a suit seeking compensatory and punitive damages for alleged negligence and intentional torts committed by agents and employees of the board against the member's son, and asking as well for compensation for tuition and transportation expenses incurred when the son enrolled in another school, was "by operation of [N.J.S.A. 18A:12-2]," id. at 10, precluded from further service as a board member. The Commissioner observed that "it cannot seriously be argued that such claim is insubstantial" or that, if the board member won on his claim, that there would not result "a material gain to him personally." Id. Neither the language of the statute nor the legislative history nor case law interpreting the statute supported the board member's narrow construction of N.J.S.A. 18A:12-2 as targeting only conflicts of interest arising from claims based on the simultaneous holding of conflicting public offices. Id. at 10-14. Second, the statute did not limit causes for removal to those delineated in N.J.S.A. 18A:12-1 (sitting board member ineligible for appointment to paid position required to be filled by board) and section 12-3 (sitting board member removable if ceases to be resident of district, becomes mayor or member of governing body of a municipality, breaches the attendance requirement, is disqualified as a voter, or is convicted of false swearing); rather, N.J.S.A. 18A:12-2 is an additional source of cause for removal, i.e., disqualification for conflicts of interest. Id. at 14.

The Commissioner in Holmdel also quoted extensively from a State Board of Education decision applying N.J.S.A. 18A:12-2 in a case wherein a board member who had been sued by the board to recover monies allegedly paid him improperly counterclaimed against the board for compensation and punitive damages. Woodstown-Pilesgrove Regional Bd. of Ed., Salem County v. Ketas, 1979 S.L.D. 353, rev'd St. Bd., 1989 S.L.D. 1563. The State Board's conclusion in Woodstown-Pilesgrove that the Commissioner particularly emphasized in Holmdel, and which is apropos to the case at bar, was the following: "[The Respondent is] actively suing the Board for compensatory and punitive damages. Obviously Respondent's conflict with the Board is strong and persistent. In this situation the law requires a person to

choose between sitting on the Board and litigating his claims against it. So long as the litigation over the counterclaim continues, the Respondents lacks eligibility to be a member of the petitioning Board." Holmdel at 13, quoting Woodstown-Pilesgrove at 1564.

CONCLUSIONS

I **CONCLUDE** that a member of a board of education who files a lawsuit against the board on which she or he sits will be required, under N.J.S.A. 18A:12-2, to forfeit his or her seat if it is found that the claim would, if successful, bring the board member substantial and material personal benefit.

I **CONCLUDE** that respondent Gustav Acevedo, II, was in receipt of a monetary judgment, per quod, against the Jackson Township Board of Education and, therefore, is in conflict of interest pursuant to N.J.S.A. 18A:12-2.

I **CONCLUDE**, under the facts and circumstances of this matter, that respondent Gustav Acevedo, II has forfeited his seat on The Board of Education of the Township of Jackson.

ORDER

It is **ORDERED** that summary decision be and is hereby entered on behalf of the Jackson Township Board of Education and Declared that respondent Gustav Acevedo, II is in conflict of interest with the Board.

Accordingly, it is **ORDERED** that respondent Gustav Acevedo, II immediately be removed as member of the Jackson Township Board of Education by operation of law.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

19 December 1991
Date

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

12/26/91
Date

Maureen Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 2 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

/plm

BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
GUSTAVO ACEVEDO, JR., RESPONDENT.	:	DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Respondent filed timely exceptions pursuant to the dictates of N.J.A.C. 1:1-18.4. The Board filed timely reply exceptions. However, the Board's reply to petitioner's reply exceptions was not considered in that there is no provision in law providing for such submission.

Respondent's exceptions are tersely stated and are therefore recited verbatim:

> Exception is taken to:
>
> 1. The conclusion that a member of a board of education who files a lawsuit against the board on which she or he sits will be required, under N.J.S.A. 18A:12-2, to forfeit his or her seat if it is found that the claim would, if successful, bring the board member substantial and material personal benefit.
>
> 2. The conclusion that respondent, [Gustavo Acevedo, Jr.], was in receipt of a monetary judgment, per quod, against the Jackson Township Board of Education and, therefore, is in conflict of interest pursuant to N.J.S.A. 18A:12-2.
>
> 3. The conclusion that under the facts and circumstances of this matter, that respondent,

[Gustavo Acevedo, Jr.], has forfeited his seat on The Board of Education of the Township of Jackson.

4. The Order that respondent, [Gustavo Acevedo, Jr.], immediately be removed as a member of the Jackson Township Board of Education by operation of law.

5. Gustavo Acevedo, [Jr.] did not personally benefit by the lawsuit against the Board and, nevertheless, the issue in this case was rendered moot as a result of the settlement of the personal injury lawsuit filed in favor of Gustavo Acevedo III pursuant to an Order for Judgment and Order for Deposit which was entered on October 24, 1991 by the Honorable Bernard A. Kannen, J.S.C. A conflict of interest does not exist under N.J.S.A. 18A:12-2 which would require Gustavo Acevedo, [Jr.] to be removed as a member of the Jackson Township Board of Education. Further, any potential or alleged conflict of interest can be cured by Gustavo Acevedo, [Jr.] abstaining from any activities or votes involving the claim of his son, Gustavo Acevedo III against the Board. (Exceptions, at p. 2)

The Board's reply exceptions support the ALJ's conclusions for the reasons expressed therein, citing the Township of Holmdel Board of Education, Monmouth County v. Stephen O'Connell, decided by the Commissioner May 10, 1990 as being dispositive of this matter, because the facts in the Holmdel case are virtually identical to those in the instant matter. The Board's other reply exceptions are as terse as those presented by respondent, and are thus also set forth herein, verbatim:

2. The conclusion that respondent was in receipt of a monetary judgment, per quod, against the Jackson Township Board of Education is factually correct. It is admitted by respondent in Exception number 5 that the lawsuit causing disqualification was settled for a monetary sum. It is immaterial to the existence of a conflict as to whether the settlement payment was characterized as payable directly to respondent or only to his minor son, since the statute prohibits even an indirect interest. This settlement caused petitioner to benefit materially and substantially. In accordance with

> the Commissioner's decision in Holmdel, respondent was disqualified from membership on the Board.
>
> The ALJ's decision was made in accordance and in compliance with NJSA 18A:12-2, which provides for the disqualification of board members and removal for conflicts of interest.
>
> 3. The ALJ properly concluded as a matter of law under the facts and circumstances of this matter, that respondent has forfeited his seat on the Board of Education of the Township of Jackson. The ALJ fully supported his decision by citing the applicable statutes and case law, which establishes that forfeiture is proper under the circumstances.
>
> 4. The order that respondent be immediately removed as a member of the Jackson Township Board of Education by operation of law is fully supported by the applicable statutes and case law.
>
> 5. Respondent did personally benefit by the lawsuit in question, which he filed against the Board. He reaped the monetary benefits of the settlement award as guardian for his infant son. Under the rule of prior case law and most pointedly the decision in Holmdel, the issue is rendered moot only if the lawsuit causing the conflict of interest and disqualification is withdrawn and not if the lawsuit is settled, resulting in a material gain [to] the board member or his family. (Reply Exceptions, at p. 2)

The Board claims no remedy other than forfeiture is appropriate because respondent has remained on the Board pending administrative review and has reaped the benefit of his conflict of interest with the Board through monetary gain, which it claims is prohibited by N.J.S.A. 18A:12-2. To decide otherwise would frustrate the statutory intent, and thus the Board seeks affirmance of the initial decision.

Upon a careful and independent review of the instant matter, the Commissioner adopts as his own that part of the initial decision which determined that a member of a board of education who files a lawsuit against the board on which he or she sits is in

conflict with N.J.S.A. 18A:12-2 if the claim brings the board member substantial and material personal benefit. Holmdel, supra The Commissioner also concurs with the findings and conclusion of the ALJ below, for the reasons expressed in the initial decision, that respondent herein was in fact in conflict of interest with the Board of Education herein at the time he was seated as a Board member on May 7, 1990 due to his having been a plaintiff in a civil lawsuit, Docket No. OCN-L-5116-89, against the Board and three employees for injuries alleged against his son, which sought damages, compensatory damages and pecuniary loss of an unspecified amount of money. See, Woodstown-Pilesgrove Regional Bd. of Ed. v. Ketas, 1979 S.L.D. 353, rev'd St. Bd. 1980 S.L.D. 1563 wherein it was stated

> [The Respondent is] actively suing the Board for compensatory and punitive damages. Obviously Respondent's conflict with the Board is strong and persistent. In this situation the law requires a person to choose between sitting on the Board and litigating his claims against it. So long as the litigation over the counterclaim continues, the Respondent lacks eligibility to be a member of the petitioning Board.
> (emphasis provided) (at 1564)

See also Holmdel, supra, wherein, upon finding a conflict of interest between respondent and the Board existed "since no doubt exists that such a claim indeed has been lodged by respondent against the Board," (Slip Opinion, at p. 15), the Commissioner directed that respondent either withdraw his claim against the Board or forfeit his seat on the Board.

Such case, however, requires that the Commissioner reject the conclusion of the ALJ below that respondent must now forfeit his seat on the Board. Made a part of the record of this matter is a letter from respondent's attorney indicating that Acevedo's case against the Board was settled on October 24, 1991. Such Order for

Judgment and Order for Deposit renders the matter resolved between the parties, without recourse to further levels of appeal.

Consequently, the State Board language of Woodstown-Pilesgrove emphasized above makes plain that the respondent is no longer in conflict with the Board by virtue of the settlement of his case, with no avenue of appeal open to him. Accordingly, the Commissioner must reject the finding of the ALJ below that the respondent must forfeit his seat on the Board. Instead, he finds the issue of remedy is now moot. As there are no allegations that respondent exercised influence over the Board regarding the litigation that was the subject of the instant petition, or that he would exercise influence in the future, or be enriched in the future, the Commissioner finds and determines that no further remedy is available that he has authority to grant.

Accordingly, the initial decision is affirmed in part and rejected in part. The Commissioner finds and determines that while respondent was in fact in substantial and material conflict of interest with the Board of Education pursuant to N.J.S.A. 18A:12-2 at the time he was seated, the impediment to his service on the Board has been eliminated by virtue of the settlement of his claim against the Board on October 24, 1991. Woodstown-Pilesgrove, supra The remedy sought by the Board herein, disqualification, is thus rendered moot. Summary Judgment on the merits is granted for the Board, but the remedy sought is found and determined to have been rendered moot.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 6, 1992

DATE OF MAILING - FEBRUARY 6, 1992

23-92

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning Board sought reversal of decision for NJSIAA Executive Committee which affirmed Controversies Committee's determination holding Camden Board responsible for melee instigated by Camden fans at the Group IV semi-final basketball championship game between Camden High School basketball team and Trenton Central High School's basketball team on March 7, 1991 held at Monmouth College. Petitioner sought reversal of decision and resulting penalties which included a $1,000 fine, $1,500 in restitution for damage to the college facility and that the Camden basketball program be placed on probation for two years, during which it would be ineligible to participate in the state championship tournament for at least one year, and would be required to submit various game reports to NJSIAA. Executive Committee affirmed findings and determinations of Controversies Committee finding exclusion from championship games is a penalty permitted under the Association rules and regulations for unsportsmanlike conduct which extends to fan behavior as well as team behavior. Further, individual boards of education, as members, are responsible for crowd control due to need for security at, and integrity of, interscholastic sport competitions.

Having reviewed record including testimony of eyewitnesses and documentary evidence, Commissioner found conduct at game to have been instigated by Camden fans, to have been an extremely serious breach of good sportsmanship as established by Article IX of the NJSIAA Handbook, and the result of poor fan control by Camden security, in violation of the NJSIAA rules and regulations. Thus, findings of Committees were deemed to be proper and penalties reasonable. Request for Emergent Relief which accompanied Board's Petition of Appeal was denied for failure to demonstrate irreparable harm and success on the merits of the case, which Commissioner considered fully. Petition was dismissed.

FEBRUARY 7, 1992

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	
	:	

For Petitioner, Clifford L. Van Syoc, Esq.

For Respondent, Picco, Mack, Herbert, Kennedy, Jaffe & Yoskin (Michael J. Herbert, Esq., of Counsel)

This matter has come before the Commissioner of Education by way of Petition of Appeal and Motion for Emergent Relief filed by the Petitioning Board (Camden) on December 12, 1991 seeking a stay of the determination by the New Jersey State Interscholastic Athletic Association (NJSIAA) Executive Committee dated September 17, 1991, which affirmed the decision of the Controversies Committee dated June 26, 1991, involving an incident which occurred on March 7, 1991, following the conclusion of a basketball game between the Camden High School basketball team and the Trenton Central High School basketball team in the Group IV, semi-final basketball championship, held at Monmouth College gymnasium. The parties acknowledge that the game itself proceeded without incident into double overtime, and was ultimately won by Camden by a score of 87 to 85. There are no allegations of unsportsmanlike conduct

committed by any of the athletes during the game. Rather, the crux of this dispute challenges the NJSIAA determination which found Camden responsible for a melee at the site which NJSIAA finds was instigated by Camden fans resulting in several injuries and the destruction of Monmouth College property. The Association assessed Camden Board of Education a $1,000 fine, $1,500 in restitution for damage to the College facility and placed Camden basketball program on probation for two years, during which time it would be ineligible to participate in the state championship tournament for at least one year, and would be required to submit game reports to NJSIAA on all security measures taken, all efforts made to educate its fans as to proper standards of conduct, and all accounts of unsportsmanlike conduct.

On December 13, 1991 the Acting Director of the Bureau of Controversies and Disputes notified counsel for Camden that because the action complained of occurred by decision of the Executive Committee three months before the Board filed its petition with the Commissioner, any suggestion of urgency was defeated. The Acting Director stated that, upon further receipt of an Answer and response to the Motion, the Commissioner would decide if the Motion for Emergent Relief and the merits should be decided simultaneously, in which event an accelerated schedule for briefing would be established. Thereafter, on December 30, 1991, NJSIAA filed its Answer and Document Index and Table of Items regarding the record below. By letter dated January 3, 1992 the Acting Director of the Bureau of Controversies and Disputes directed the parties to submit briefs on the merits of their claims followed by a five-day period in which to submit reply briefs. It was further determined by the

Acting Director that upon receipt of all submissions, the Commissioner of Education would decide the emergent relief motion and the merits of the case simultaneously, on an accelerated schedule, in that the basketball championship is to be held on Friday, February 14, 1992. The record was expected to close on January 21, 1992.

However, by letter faxed January 15, 1992 to the Bureau of Controversies and Disputes, Camden sought an extension to file its submission, due to a change of counsel. Said request was granted with submissions from petitioner due January 27, and February 3, 1992 and respondent's reply brief due also on February 3, 1992.

All submissions were received timely by February 3, 1992. Camden notes that its brief in support of the petition also serves in reply to respondent's brief in opposition filed on February 3, 1992.

Petitioner's Motion for Emergent Relief for stay of enforcement of the penalties imposed by NJSIAA pending final adjudication of the merits cites Crowe v. DeGioia, 90 N.J. 126 (1982) as articulating the standards for the granting of pendente lite restraints. Before presenting its legal argument petitioner submitted the following version of the facts following the game:

> ***The game was attended by approximately 1,000 to 1,500 fans, who were seated in spectator areas on both sides of the court. Spectators and fans attending the game were free to sit anywhere in the spectator areas, although one side was designated for each respective school. Other than the general designation of each side of the seating area there was no way for anyone to determine where any particular spectator would be seated.
>
> During the contest, there was obviously fan involvement, consisting of normal and expected cheering and displays of support and

> encouragement. On at least two occasions, fans on the site of the court designated for Camden were asked to return to their seats, which they did. There were no claims of any unsportsmanlike activities committed during the game by fans, spectators, students or the teams, except that certain Trenton High School students were admittedly taunting Camden students during halftime.
>
> After the game had concluded a disturbance occurred amongst the spectators and fans who had attended the game. During this disturbance chairs were thrown into the stands which had been designated as the Trenton side, and chairs were also thrown back from the stands onto people remaining on the floor area. At the time this disturbance occurred the entire Camden High School Basketball Team, their coaches and support personnel, had already left the court and entered the locker room area.
>
> While it was clear that a disturbance did occur, there was never any identification of the persons involved. The disturbance also admittedly involved only a small number of persons. There were no persons associated with, or specifically identified as coming from Camden High School, be they teachers, students, administrators, athletes or employees who were involved in the disturbance that occurred after the game.
> (Petitioner's Brief in Support of Motion for Stay received December 12, 1991, at pp. 2-3)

Petitioner's Reply Brief dated January 27, 1992, added 18 pages to its version of the facts with transcript citations which are incorporated herein by reference. Because the Motion for Emergent Relief was belatedly submitted, at the same time that the Commissioner will consider the Motion for Stay under the standards articulated in Crowe, supra, for pendente lite restraints, he will also decide the merits of the matter under the standard of review articulated by the Courts in reviewing an appeal from NJSIAA. That standard holds that the Commissioner will not substitute his judgment for that of the Association, even if he were to decide differently in a de novo hearing, where due process has been

provided and where there is an adequate basis for the decision reached by the NJSIAA Committees. See, e.g., Dam Jin Koh and Hong Jun Kim v. NJSIAA, decided by the Commissioner February 3, 1987.

Camden appeals the basis for the Controversies Committee's determination, alleging the findings of fact and conclusions were both unreasonable and not supported by substantial, competent credible evidence; that the penalty imposed was arbitrary and capricious; that the determination was the subject of geographic bias and that an injustice and violation of the constitutional rights of Camden High School and its basketball players would result were the penalty not reversed.

Petitioner observes that the Association states at page 19 of its Handbook a provision of N.J.A.C. 6:29-6.4(b), that where athletic facilities are used which are not owned by the Board, the owner of the facility is required to provide adequate safeguard to players and spectators. Petitioner also notes that one of the objectives of the Association as set forth in Article II, Section 4 of its Constitution is "to promote uniformity in the arrangement and control of contests" (Petitioner's Brief, at p. 3, quoting page 22 of Handbook). Petitioner submits that despite this being an objective of the Association, NJSIAA has never promulgated or even suggested guidelines for the provision of security at contests, nor published recommendations as to the number of security personnel required for a specific crowd size or methods of crowd control and suggested practices. It claims the Association has no rule prohibiting spectators from coming onto the gym floor after the game in celebration so as to preclude potential altercations as occurred in this matter.

Camden also argues violations of due process, contending that it was prevented from presenting all of its evidence, including evidence regarding the impact of an adverse ruling on its players. It claims that the hearing examiner at the proceeding before the Controversies Committee limited to one day the testimony to be heard, and that any witnesses who did not appear on that day or who had not provided the Committee with written statements prior to the hearing would be barred from testifying. Camden claims the Association arbitrarily limited its ability to put on any more witnesses purportedly "in fairness to Trenton which produced all of its witnesses' statements." (Petitioner's Brief, at p. 5, citing Tr.272)

Camden also objects to the hearing's purpose being cast as intending "to consider whether or not the Camden High School Basketball Team acted in an unsportsmanlike manner at the March 5, 1991 Group IV Semi-Final Basketball Championship held at Monmouth College on that date." (emphasis in Brief) (Id., at p. 4, citing Tr.12) Camden charges that by allowing Trenton to proceed first at the hearing, it had the advantage of twelve witnesses; by the Association's unilateral imposition of procedural obstacles, unfounded in its Constitution, Bylaws, Rules, and Regulations, Camden was limited to the testimony of only nine witnesses.

Also in regard to due process, Camden avers the basketball team members themselves never received notice that their individual interests were potentially to be affected, nor notice that there was a specific charge of misconduct by any specific individual which could result in "group punishment." (Petitioner's Brief, at p. 21) Thus, Camden claims, the players were unaware that the potential

punishment barring participation in the 1991-92 championship play-offs was contemplated, or that any such punishment would be based on an allegation that there was any specific prescribed standard of conduct which had been allegedly violated involving fans taking the floor after the game.

Camden avers that such violations of due process warrant the imposition of a stay against the Association's ruling. It suggests that even if the Commissioner were to find no irreparable harm would result to Camden if the stay were denied, under the Crowe standard, this does not mean that the Camden basketball players who, it claims, conducted themselves in the 1991 basketball play-offs in an exemplary fashion, and have conducted themselves properly since the time of the events at question herein, would not suffer irreparable injury. Camden claims the New Jersey courts have not addressed in any published decision the issue of whether a child's interest in participating in interscholastic athletics is of constitutional dimension. Citing Florida High School Activities Association, Inc., v. Thomas, 409 So. 2d 245 (Fla. App. 1982), Camden claims even if the Commissioner rejects the argument that the individual athletes do not have a constitutional right to participate such that the right to participate is deemed a privilege, "all concerned must concede that this 'privilege' is an essential part of the American educational mosaic, such that it cannot be dispensed with arbitrarily or irrationally." (Petitioner's Brief, at p. 20) Camden cites cases from Tennessee and Minnesota among others for the proposition that in similar circumstances courts have held that the deprivation of the privilege or right to participate in interscholastic athletics requires that

the proceeding conform to the minimal standards of due process, including notice and the right to be heard. Camden claims the Minnesota case, Behagan v. Inter-Collegiate Conference of Faculty Representatives, 346 F. 2d 602, 604 (D. Minn. 1972) stands for the proposition that "athletics in high school are a 'total part of the educational process,' and that high school students' interest in participation in athletics is so substantial it cannot be impaired without proceedings which comply with the minimum standards of due process." (Petitioner's Brief, at pp. 21-22)

Camden claims that even though the children on the team were not provided notice of the hearing below nor were their interests directly represented during the course of the hearing, the impact of the Association's decision upon them should be considered by the Commissioner in his capacity as the key state officer controlling the circumstances under which educational benefits are to be denied to innocent students. Petitioner further summarizes its due process argument by suggesting that the right to participate in high school championship athletic contests is one which has been recognized around the United States as being of sufficient significance, particularly in the context of the ability of an economically underprivileged child to obtain a college scholarship, that monetary damages could not possibly redress deprivation of the interest at stake. It claims that irreparable harm will in fact result were the stay to be denied.

Camden adds that the standard announced by the Association's committee chairman at the beginning of the hearing was that of "fairness and equity." (Petitioner's Brief, at p. 24, citing Tr. (4/25/91) 9 Such standard it claims clearly does not militate

in favor of punishment to be imposed upon the Camden team by reason of any unsportsmanlike conduct by others. Camden cites a U.S. Supreme Court case involving criminal activities for the point suggesting that "guilt is personal" Scales v. United States, 367 U.S. 203, 224-25. Petitioner avers that when the "group punishment" sought to be justified by respondent is considered in the context of the concession by Trenton's Mayor that only a few of the spectators from the Camden site of the gymnasium engaged in misconduct, the proposed denial of the players' substantive due process rights by having to suffer punishment when they were not even a part of the "group" that engaged in misconduct cries out for relief, Camden avers. It claims it would be hard put to complain if this matter were an appeal from a decision barring Camden and Trenton spectators from attending the 1992 championship games, which it avers would be punishment specifically directed against those allegedly demonstrating unsportsmanlike conduct, because this sanction would recognize and protect the rights of the innocent athletes. The decision below, Camden contends, though, is beyond that necessary to accomplish the goals of the Association. Camden submits it has established that the legal rights sought to be protected and upon which this appeal and request for stay are based are well settled and favor Camden's position.

Further, Camden argues that a stay is appropriate because the punishment to be imposed is overly broad. It claims it is not controverted that the team members and coaching staff were well behaved and observed all applicable standards of sportsmanlike conduct during the season, during the subject game, and at every single contest thereafter, up to and including the present. It

claims, therefore that it has a probability of success on the merits insofar as the extent and reasonableness of the punishment is concerned.

On the factor under Crowe, supra, concerning relative hardship to the parties in the event the stay is granted, Camden submits the punishment in this matter, to insure that Camden and all other schools similarly situated demonstrate sportsmanlike conduct, both by teams and by spectators, has been and could be accomplished through the imposition of a probationary sentence. It submits that even if the Commissioner should determine that the team's suspension from the play-offs is necessary, the punitive impact of such a finding will be the same were the team barred from participating in next year's play-offs. On the other hand, Camden avers, staying the decision until such time as Camden's right to appeal to the the Courts has been protected will in no way adversely impact upon the ability of the Association to conduct its business. It reiterates that the hardship to the individual athletes of Camden from a denial of the stay is obvious. It claims students will be denied exposure to college scouts, denied the opportunity to benefit from college scholarship offers, and in all probability, based on the socio-economic environment in which Camden students exist, prevented from attending higher levels of education. Camden thus claims that on balance, justice favors the individual athletes of Camden, and the stay should be denied.

Camden's second legal argument is that the Commissioner should reverse or modify the penalty imposed by the Association, claiming its decision is not supported by substantial competent credible evidence. Instead of that standard of review, however,

Camden submits that the proper standard is that the review must focus on the reasonableness of the action taken in relation to the interests of the public, the Association, and the individual students involved, citing Garrow v. Elizabeth General Hospital, etc. 79 N.J. 549, 401 A. 2d 533, 541 (1979) as the case embodying this more "flexible standard." (Petitioner's Brief, at p. 27)

Camden avers the penalty imposed was based upon a selective evaluation of the evidence, and was apparently predicated upon a finding of "geographical credibility." (Id., at p. 27) Petitioner submits that the Association accepted the factual contentions of Trenton "wholesale." (Id.) None of the alleged findings of credibility were based on demeanor, Camden argues, but rather rested entirely upon alleged inconsistencies and contradictions in the testimony of the Camden witnesses, despite the fact that the independent and Trenton witnesses' testimony suffers from the same lack of consistency and thoroughness.

Camden charges even NJSIAA's emphasis on Camden's failure to discipline any of the participants in the melee does not support its penalty considering that it is conceded by all that no individual student was identified as a participant on either side, so that no individual sanction could be imposed. Moreover, petitioner claims, Camden's failure to discipline children involved in the melee pales in comparison with Trenton's failure to do anything about the individual arrested by the police at the gym, which person was armed with a gun, as described by Patrolman Austin. Camden avers that the lack of an evenhanded approach to the evidence in terms of credibility and emphasis compels the conclusion that the Association decision was unreasonable and not supported by substantial credible competent evidence.

Further, Camden contends that in analyzing whether the decision below was reasonable under the Garrow, supra, standard, the Commissioner is required under New Jersey's Constitution to provide a thorough and efficient education, with a modicum of variety and a chance to excel. It cites Abbott v. Burke, 119 N.J. 287 (1990) in support of this proposition. It argues that the decision below would deprive the students of Camden the opportunity to excel and to escape from their "environment of violence, poverty and despair." (Petitioner's Brief, at p. 29, quoting Abbott) Instead, Camden sees the decision as an after-the-fact attempt to justify a punitive decision already reached. In particular, Camden objects to the Committee's Finding of Fact No. 19, which states the violence that occurred was:

> both foreseeable and could have been prevented had Camden officials taken the stronger precautionary measures. As Trenton had done, all of Camden security personnel should have been placed between the Camden spectator area and the gym floor, and specific instructions should have been given that no fans were allowed onto the gym floor after the game. (emphasis in original)
> (Petitioner's Brief, at p. 30)

Camden avers that this finding of fact ignores the fact that never before had any similar act of violence occurred, and further ignores the fact that it is traditional that the winning team's fans will take the floor to celebrate. Camden claims this is confirmed by the testimony of multiple witnesses and is consistent with the Trenton Mayor's testimony, whom Camden states, conceded that had his team won, they would have taken the floor.

Camden further avers that the filing below ignores the fact that the violence is claimed to have started when fans interacted with Trenton team players. Camden submits that had Trenton followed

the same prudent practice as Camden security personnel in "hustling" the players to the locker room instead of permitting them to remain on the floor "sulking," the subsequent melee would never have occurred. (Id.)

Camden also avers Trenton had the advantage of a physical barricade which enhanced their ability to keep the majority of the Trenton fans separated from the Camden fans. Thus, Camden submits, it was criticized primarily for failing to anticipate an unprecedented act of violence, failing to have prevented a rational response to a championship victory by taking the floor, and failing to have enforced a rule which the Association itself has never enacted, adopted, announced or even suggested, and in failing to have the benefit of physical barricades. Thus, Camden claims Finding of Fact No. 19 cannot be supported.

Similarly, Camden finds Finding of Fact No. 20 deficient. In that finding, Camden claims it was criticized for the failure of its investigative report to include the fact that among those injured by the flying chairs was the Camden Dean of Students. Camden notes that the Dean testified, without contradiction, that the chair with which he was struck came from the Trenton spectator area, not the Camden side.

Camden avers the same finding of fact also condemns Camden for not disciplining any of its students, despite the fact that not one single participating student was ever specifically identified by anyone, that not one Trenton student was disciplined in any manner as a result of this incident, that Trenton fans threw chairs in "self-defense" (id., at p. 31), and that one Trenton person not only drew a firearm in the gym, but was taken into custody. Camden

complains it is not clear how the "1988 Camden High School drop-out," who was not "specifically identified" by name or otherwise, was to have been identified and apprehended by Camden. It claims it had no monopoly on the ability to do so, and should not be punished because of its inability to apprehend him.

Noting that this was a public event, Camden states there was no method of identifying the residence of the spectators. Thus, it claims, attributing responsibility to Camden for the conduct of fans is not based on any real ability to control those individuals, but instead is based merely on the fact that they chose to sit in the area designated for Camden fans. Moreover, it claims there is not one iota of evidence to suggest that anyone involved in Camden security had any warning that the incident was about to occur. Camden submits there is undisputed testimony that the incident occurred spontaneously and was over within one or two minutes. Camden suggests the findings of the Association appear to be based on 20/20 hindsight, with no clear indication made as to how the act of violence was to have been anticipated and prevented.

Further, Camden objects to conclusion No. 3, which found that the unsportsmanlike conduct was that "of a large portion of the Camden crowd," (Petitioner's Brief, at p. 33), in direct contradiction to all the testimony, including that of the Mayor of Trenton, who established that it was only a few members of the Camden-side spectators who participated in the acts complained of. Similarly, Camden avers that although the Association claims that similar incidents would be repeated in the future unless a severe sanction was imposed upon Camden, that conclusion has no support in the record. Camden states emphatically that the record is clear

that such conduct has never occurred in the past at any Camden games and has not occurred since. Thus, Camden finds the Association's conclusion at No. 3 is an unreasonable finding. Relying on the definition of unsportsmanlike conduct articulated in its Handbook and discussed on the second page of the Association's supplemental memorandum of January 15, 1992, Camden avers there appears to be no basis for the finding that Camden alone should be singled out as the "sole scape-goat" in this incident. (Id.) It claims Trenton fans taunted, used obscene gestures, profane and provocative language, and threatened action toward Camden spectators. Thus, Camden submits the determination of the Association as to penalty is overly broad, arbitrary and unreasonable. Further, it claims the Handbook of the Association at Article IX, Section 3, pp. 50-51 places responsibility upon the administration of a member's school, and not the team, to prevent unsportsmanlike conduct. Thus, it claims that while Camden believes that the restitution and penalty should have been imposed on both school administrations if imposed upon either, it is more reasonable that the administration should be the one punished, whether through fines, restitution or otherwise, instead of the children.

In conclusion Camden submits that the determination of the Association barring Camden from 1991-92 basketball championship play-offs is unreasonable, is not supported by the facts, and fails to take into account contributory fault or conduct of the Trenton fans.

Camden further summarizes by claiming the decision below ignores the disadvantages the Camden security personnel had in terms of the lack of a crowd barrier, and ignores the undisputed tradition

that the winning team's crowd takes the floor in celebration of victory. Camden also avers that NJSIAA ignored the fact that there was no advance warning of any potential act of violence, and also ignored the fact that order was quickly restored within one to two minutes of the outbreak of violence.

Under all circumstances, and considering the interests of all parties involved, the penalty should be reversed or modified so as to permit Camden to participate in the play-offs even if the Camden fans are to be barred from the gym in which the play-offs occur.

NJSIAA's reply brief objects to petitioner's application for interim relief and to its petition on the merits. Respondent submits petitioner's statement of facts does not accurately depict the background of this matter, but instead takes quotes out of context, mischaracterizes the testimony below and completely ignores the significant documentary evidence which was made part of the record. NJSIAA contends the voluminous record refutes petitioner's contentions, and it replies to some of what it contends are inaccuracies articulated by petitioner:

> * Petitioner claims that the hearing officer prevented Camden from presenting witnesses. (PB 5). In fact, a fair reading of the transcript shows that all of the witnesses which Camden presented were allowed to testify, and the hearing was even extended to an extra day to allow Camden to complete its case. On the other hand, Trenton was not permitted to bring in a witness who had failed to appear and who would have supported Trenton's version of the events. (T275). Significantly, Mr. Vogelson, the Camden attorney, did not object to this procedure. (T 271-275).
>
> * Petitioner claims that Joan Martin, the Monmouth College Site Manager, could provide "no observed facts" to support her opinion that Camden caused the melee. (PB 6-7). In fact

> Miss Martin's report stated that Camden fans had taunted Trenton supporters; 20 chairs from the Camden side were found on the Trenton side after the gym was cleared; and that lack of direction, support and proper guidelines from the Camden authorities had contributed to the problem. (Exhibit T-11).
>
> * Petitioner claims that Trenton players "sulked" and exhibited unsportsmanlike behavior (PB 12, 30) because some players fell to the floor following their defeat. In fact, the players had just played their hearts out and lost an exhausting, tension-packed, double-overtime contest. The players laid on the floor in "exhaust and agony." (Exhibit T-12D).
>
> * Petitioner claims that because of its failure to hustle its players off the floor, Trenton, not Camden, caused the ensuing violence. (PB 30). In fact, the hostility of the Camden fans and Camden's ineffective crowd control caused the violence.
>
> * Petitioner claims that Robert Coward, a neutral site official, expressed "no opinion" as to who caused the disturbance. (PB 8). In fact, Mr. Coward reported that Camden's spectators "stormed the court" and that Camden's "celebration of cheering and hanging from baskets turned ugly when these spectators gathered to the front of the Trenton spectators and began to taunt and demean them." (Emphasis in original, Exhibit T-10).
>
> * Petitioner claims that one Trenton witness, Trenton Principal Charlie Ramsey was a liar (PB 18) and another, Mercer County Prosecutor's Office investigator Ernest McNeil, exhibited "bias and hostility" towards Camden. (PB 10). In fact, Petitioner demeans its case by attacking the personal integrity of these witnesses.
>
> (NJSIAA's Reply Brief, at p. 6)

NJSIAA rebuts each of Camden's legal arguments as well. On the issue of the Controversies Committee hearing, NJSIAA states the transcript comprises 375 pages, encompassing 25 witnesses who testified under and were subject to cross-examination. Respondent notes again that the hearing was extended a second day specifically to allow Camden to present witnesses who had not been heard, and

both Camden and Trenton were prohibited from presenting additional witnesses. It cites the Transcript at page 275 in support of this contention. NJSIAA observes that 31 exhibits were presented and admitted at the hearing, but that while NJSIAA and Trenton presented virtually all of its exhibits to Camden well in advance of the hearing, Camden did not do so. Nevertheless, it avers, over the objection of Trenton, the hearing officer admitted documents proffered by Camden even though they had not been submitted beforehand. It cites the Transcript at pages 17-21, and 120 in support of this point. NJSIAA submits the hearing officer applied the rules evenly to both sides, and no objection or exception was taken to his ruling by the attorney for Camden.

As to participating in interscholastic sports, NJSIAA submits that contrary to petitioner's position, there is no constitutional right to participate in interscholastic athletics. It cites, among a number of cases on this point, Burnside et al. v. NJSIAA et al., A-625-84T7, decided November 15, 1984, N.J. Superior Court Appellate Division, cert. den. 101 N.J. 236 (1985); B.C. v. Bd. of Ed. of the Cumberland Regional School District et al. and NJSIAA, decided by the Commissioner May 19, 1986, aff'd Appellate Division September 23, 1987. It claims additionally that the New Jersey District Court and the Third Circuit have specifically held that the "right" (Respondent's Reply Brief, at p. 4) to participate in high school athletics did not rise to the level of a specific constitutional guarantee, citing Moreland v. Western Pa. Interscholastic, Etc., 572 F.2d 121 (3rd Cir. 1978); and Palmer v. Merluzzi, 689 F. Supp. 400, 408-409 (D. N.J. 1988), aff'd 868 F.2d 90 (3rd Cir. 1989) in support of this position. It further claims

that the requirement that New Jersey schools offer a thorough and efficient education does not impart any great significance to interscholastic sports that the Courts have mentioned above, citing Burnside wherein at page 5 it is stated:

> ***It is not disputed that extracurricular activities, including interscholastic athletics, play an integral part in satisfying the breadth of programs requirements of "T&E." While they are important factors toward a sound and comprehensive academic education, each pupil does not have a right to participate in interscholastic athletics.***

On the question of the penalty imposed by NJSIAA, the Association avers that upon a determination that Camden violated the Association's rules, it had the power, had it chosen to expel Camden from the Association. Instead, it fashioned a remedy which allowed Camden players to participate in the 1991-92 basketball season but disqualified the team from participating in the season-ending tournament. It adds that it even permitted Camden to travel out of the country to play two games during the season in St. Croix, Virgin Islands. Moreover, it submits that Article X, Section 2A allows the Controversies Committee to "determine than an offending school may not participate in championship contests in the sport in which the violation occurred." It claims that N.J.S.A. 18A:11-3 requires that this regulation be "deemed to be the policy of the Board of Education." Thus, NJSIAA argues, the Camden Board of Education has adopted this rule as its own and cannot now claim that imposition of a penalty which it has adopted was improper or overly broad.

Concerning Camden's claim of impact on its students, respondent avers Camden's argument that due process was denied because individual players did not receive notice from the Association that their individual interests were potentially to be

affected, or that there would be "group punishment," misconceives the nature of NJSIAA. It cites B.C., supra, as stating that NJSIAA is a "voluntary association of public and non-public schools formed for the purpose of promoting and regulating interscholastic sports activities." (Respondent's Reply Brief, at p. 5, quoting B.C., at p. 217) (emphasis in brief) NJSIAA claims no individual student has been rendered ineligible. Rather, the Camden basketball team has been disqualified from participating in basketball championships. It notes that application for such championships are made each year by member schools and school boards, not by individual students.

Moreover, NJSIAA claims it has no duty to notify every Camden basketball player of the hearing, citing a case relied upon by petitioner to make this point, Kelly v. Metropolitan County Bd. of Ed. of Nashville, 293 F. Supp. 45, 496 (MD Ten., 1968) wherein it is stated:

> In cases of possible group misconduct on the part of students, due process is satisfied if notice and opportunity to defend are afforded to a responsible person whose position requires him to represent and speak for the entire group. A school principal occupies such a position. (Emphasis added.)
>
> (Respondent's Brief, at p. 6, quoting Kelly)

The Association claims its regulations agree that a principal shall be the final authority responsible for athletic activity of that school at whatever level of competition in which the school is engaged, and cites Article IX, Section 1 of the Handbook at p. 49 in support of this proposition. It also cites Article VI, Section 1 of the Handbook for the proposition that "The principal of the school is responsible to the State Association for all matters pertaining to the athletic relations of his/her school...."

The Association claims that its notification on March 8, 1991 to the Camden High School principal stating that the events of the previous evening would be investigated by the Controversies Committee on April 15, 1991 (Exhibit T-1) constituted complete and adequate notice under the Association's rules of due process. It claims that such notice did not violate the students' rights, citing Burnside, supra, at p. 8 wherein the Court stated that "Appellants' suggestion that there must exist proof of actual notice of the new rule to each individual appellant student-athlete and his parent or parents in order for it to be effective as to them is without merit. Such requirement is not mandated by law."

As to Petitioner's contention that punishing the team for the actions of others is unconstitutional, NJSIAA notes again that its Bylaws specifically allow the Association to preclude a team from participating in a championship tournament, that the students have been granted the opportunity to participate in the rest of the season, and further that students have no constitutional right to participate in athletics.

NJSIAA claims of even greater significance is that the Courts, which have addressed the issue of penalizing teams for violation of an association's rules by other individuals, have determined assessing such penalties is proper, and it cites among other cases Justice v. NCAA, 577 F. Supp. 356,370 (D. Az 1983) in support of this proposition wherein it is stated:

> The fact that the plaintiffs are innocent of the wrongdoing that led to the imposition of sanctions is truly unfortunate, but it does not in itself elevate the interest at stake to the level of a substantive constitutional right protected by the due process clause of the Fourteenth Amendment.

Last, in regard to petitioner's argument concerning student exposure to scouts, scholarship offers, and attending higher levels of education, NJSIAA avers such contentions are pure speculation on petitioner's part. It claims approximately 100,000 students participate in 31 sports sanctioned by NJSIAA each year. By the very selective nature of post season team championships, the majority of even the superior athletes do not participate in championship contests. Thus, NJSIAA claims petitioner's argument lacks merit because the students will miss only a limited number of games. Moreover, NJSIAA finds petitioner's argument surprising, because it serves to perpetuate the myth that the sole way an urban youngster can succeed is through sports, when the Board of Education is charged with educating these students.

NJSIAA also rebuts petitioner's second argument pertaining to the penalty imposed by the Association. First, NJSIAA denied the allegation that there was a geographic bias in the Controversies Committee's determination, suggesting instead it was fully supported in the record. It claims there is no reason why the Committee should be biased insofar as both Trenton and Camden are members of the Association. It further states that petitioner suggests no rationale for any such bias. It posits that both sides presented evidence, cross-examined witnesses, and argued their cases. Neutral witnesses testified, but in the end the Committee found Trenton's case to be more compelling and its witnesses more credible. It submits the neutral witnesses supported Trenton's version of the facts. It submits that in light of the seriousness and potential danger of the events under review, the Committee's ultimate decisions were not only fair, but restrained.

Petitioner's reliance on Garrow, supra, is inapposite, NJSIAA argues, stating that legions of cases have held that the Commissioner sits in review of NJSIAA determinations, but will not substitute his judgment, absent arbitrary, capricious or unreasonable action on the part of NJSIAA. It cites B.C., supra, and Dam Jin Koh, supra, as examples of the cases bespeaking this standard of review. The Association contends Garrow deals with an appeal from a nonpublic adjudication in which full due process was not required. Further, NJSIAA contends Garrow provides a "looser" (Respondent's Brief, at p. 9) standard of review, one which, if accepted, would permit the Association's rulings to stand so long as they were merely based on "'sufficient reliable evidence,' rather than 'competent credible evidence.'" (Id., citing Garrow, at 565)

Additionally, NJSIAA argues that petitioner, throughout its brief, makes the recurrent and baseless argument that it should not be held responsible because there was no identification of the specific individuals responsible for the violations. The facts, NJSIAA submits, show otherwise; and it cites the following examples:

> * Signs directed fans to either the Trenton or Camden side of the gym. (T 35).
>
> * The game had to be stopped several times because the Camden crowd was spilling out onto the floor. (Exhibit T-8).
>
> * Officials were forced repeatedly to take the microphone and implore the Camden fans to be calm. (Exhibit T-11b).
>
> * The overtime periods were delayed because Camden fans would not take their seats. (Exhibit T-11b).
>
> * Despite being told repeatedly to take their seats, Camden fans insisted on standing between press row and the stands. (Exhibit T-11b).

* When the game ended, Camden fans ran onto the floor, climbing over tables and chairs as they went. (Exhibit T-11b).

* Approximately 20 chairs were thrown by the Camden crowd into the Trenton crowd. All of the displaced chairs were later found on the Trenton side. (Exhibit T-11b).

* Camden fans climbed onto the rims of the baskets, damaging the equipment. (Exhibit T-11b).

* A Trenton basketball player was struck by a Camden fan and his tooth was knocked out. (Exhibit T-11b, T-12n).

* Trenton officials risked their own safety by forming a human barricade to keep the melee from becoming a full-scale riot. (Exhibit T-126; Tr. 157-158).

* Two neutral witnesses laid the blame for the incident at Camden's fans. (Exhibit T-10, T-11b).

* Camden Athletic Director McPherson acknowledged in his report that a Camden fan had attacked a Trenton player. "A 1988 Camden dropout punched #20 in the mouth and both sides started throwing chairs." (Exhibit C-2, p. 2).

(Respondent's Reply Brief, at pp. 10-11)

NJSIAA charges that Camden's argument is "unfortunate" (id., at p. 11) because rather than assuming responsibility for a series of events which overwhelming evidence shows that Camden fans instigated, the Board has attempted to blame NJSIAA and Trenton High School for its problems. NJSIAA rules require, and common sense dictates, that a school be responsible for the conduct of its fans, the Association argues, citing Article IX, Section 3 of the Handbook, at pp. 50-51.

Upon a careful and independent review of this matter, the Commissioner affirms those findings and determinations rendered by the Committees of NJSIAA, including the penalty assessed against the Camden Board of Education. In so finding, the Commissioner would first place the matter under review in perspective, both in terms of

the legal standard of review under which the Commissioner considers such cases, and also, in terms of factual circumstances under which the events in question took place.

At the outset, the Commissioner observes that his review of an NJSIAA determination is an appellate one. N.J.S.A. 18A:11-3 Thus, in considering appeals after the exhaustion of the internal appeals mechanisms of the Association, the Commissioner will not substitute his judgment for that of the NJSIAA, if due process has been granted, and there is an adequate basis for the decision reached by the Association. See, Dam Jin Koh, supra. Similarly, in reviewing any penalty assessed by the Association, the Commissioner is constrained by the same standard of review. He rejects as being inapposite petitioner's suggestion that Garrow, supra, provides a preferable standard of review for this matter. The Commissioner may not impose an ad hoc condition in considering one case as opposed to all others. Moreover, in evaluating evidence in matters arising before the Commissioner in this quasi-judicial forum the standard has been determined to be based on substantial credible evidence in the record. See Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 453 (App. Div. 1982). To adopt petitioner's stance, based on Garrow, that sufficient reliable evidence is adequate and more "flexible" in deciding this case would, as respondent notes, permit the Association's rulings to stand so long as they met such lesser standards. Such approach cannot be condoned, and petitioner's argument concerning the standard of review extant in these proceedings is rejected as being without merit.

It also bears clarifying that the Courts in this state, have adjudged, contrary to petitioner's contention, that

participation in the interscholastic sports is not a constitutional right. See Burnside, supra, wherein the Appellate Division has stated:

> ***It is not disputed that extracurricular activities, including interscholastic athletics, play an integral part in satisfying the breadth of programs requirements of "T&E." While they are important factors toward a sound and comprehensive academic education, each pupil does not have a right to participate in interscholastic athletics.***
>
> Participation is subject to eligibility requirements and other preconditions.***
>
> (Id., at pp. 5-6)

See also, Palmer, supra. The Third Circuit Court of Appeals case held in Palmer that participation in extracurricular activities was not a fundamental right, and upheld the District Court's determination that under New Jersey law, student's interest in participating in extracurricular activities did not rise to the level of a property interest protected by procedural due process. Accordingly, the Commissioner dismisses as being without merit those arguments suggesting that irreparable harm will befall the Camden basketball team if a stay is not granted in this matter.

Moreover, the Commissioner rejects petitioner's argument that the individual members of the team were denied due process because they did not each receive notice from the Association that their individual interests might be affected by the assessment of a group penalty. As noted by respondent, no individual student has been rendered ineligible as a result of the NJSIAA determination herein; rather, the team has. Under the Constitution, Bylaws, Rules and Regulations of the Association, to which petitioner is bound by its membership in the Association, the principal and Board of Education are answerable and responsible to it for matters

pertaining to the athletic relations of his/her school and for athletic activity of such school at whatever level of competition in which the school is engaged. See, Article IX, Section 1, NJSIAA Handbook, at p. 49 and Article VI, Section 1, NJSIAA Handbook at p. 47. See also, Burnside, supra, wherein the Appellate Division held, in regard to individual notice of eligibility standards that "[a]ppellants' suggestion that there must exist proof of actual notice of the new rule to each individual appellant student-athlete and his parent or parents in order for it to be effective as to them is without merit. Such a requirement is not mandated by law." (Burnside, at p. 8) Accordingly, the Commissioner rejects petitioner's due process argument as being without merit.

Similarly, the Commissioner must reject petitioner's argument that by denying Camden's team participation in the basketball play-offs for 1991-92, that the student-athletes will be denied exposure to college scouts, scholarship offers and potentially, be prevented from attending higher levels of education. As noted earlier, the Courts have determined that no property right exists to participation in interscholastic sports. While the Commissioner is fully mindful of the importance interscholastic sports plays in the lives of our students in New Jersey, he cannot sanction an argument that suggests that the only means by which an urban pupil might progress onward to post-secondary education is through sports. As noted by the Association in its Handbook at page 13 under its "A Philosophy of Athletic Education for Secondary Schools:"

> ATHLETICS CONTRIBUTE TO EDUCATION when their existence can be justified by the contributions they make to the educational objectives through proper guidance and controls. If athletics are

> to serve educational ends, they must be wisely guided, developed, and administered as a vital and effective aspect of education. The policies under which they are conducted will determine whether the athletic program is directed for the development of students or for spectator entertainment. While responsibility for development of ideas is shared with the home, the church, and the community, the development of constructive educational policies rests primarily with the local school district, which responsibility cannot be shirked or taken lightly.
>
> Participation in sound and wholesome athletic programs contributes to health, physical skill, instructional maturity, social competencies, and moral values. Cooperation and competition are both important components of American life; therefore, the experience of playing athletic games should be a part of the education of all youth who attend our secondary schools. (emphasis supplied)

The Commissioner finds that petitioner's contentions regarding denial of the opportunity to benefit from college athletic scholarships or education are merely speculative, at best, and misguided as to the purpose of interscholastic sports in the educational process at worst, and are thus dismissed, as being without merit.

Last in the way of predicates to a review of the facts underlying this matter, the Commissioner must reject petitioner's claim that the Controversies Committee Hearing was deficient in that the Committee was subject to a "geographic bias," that the hearing officer prevented testimony from being taken from all witnesses and that he failed to apply the rules evenly to both sides. The Commissioner finds that petitioner offers no support in the record for his allegation that the Controversies Committee was geographically biased. Rather, the Commissioner's review reveals an evenhandedness in the proceeding, as evidenced by the fact that the hearing was extended a second day to allow Camden to present

witnesses, and that Camden's attorney at the time, voiced no objections at the hearing to the rulings on who was to testify from either side. The transcript reveals that both Camden and Trenton were precluded from presenting additional witnesses. In fact, at the end of the first day of hearing, Camden's attorney agreed to submit the report of Mr. Curtis, one of his witnesses, in lieu of his live testimony. See Tr.274. Further, it was a Trenton witness who was declined to be heard, with no further objection from either attorney voiced. (Id., at 275). Further, as noted in its reply exception, the hearing officer admitted documents proffered by Camden even though they had not been submitted beforehand. See Tr.17-21 and 120. Finally, even after the determination precluding further testimony was made at the end of the first day, after some 15 or 20 witnesses had been heard, four more Camden witnesses were presented on May 22, 1991. Thus, the Commissioner rejects petitioner's contentions regarding the due process afforded Camden at hearing as being without merit.

In considering the underlying facts of this matter, the Commissioner again notes the need for perspective. Interscholastic high school competition at the play-off level bespeaks the very best our able student-athletes can achieve.

Concomitantly, approximately, 1,000 fans packed the gym at Monmouth College in support of their respective teams, in the event in question, such a volatile situation is frought with the potential for extremely high zeal, and thus is equally fraught with potential for danger. One need only look to the recent tragic event in New York where lives were forfeit to an out-of-control crowd to understand fully the absolute requirement of the schools to assume

that championship games spawn crowd control hazards and safety dangers. To prepare thoroughly for all conceivable hazards is, thus, an absolute requirement of each participating school district.

It is the Commissioner's judgment, upon careful consideration of the record that the substantial credible evidence indicates the violent melee that ensued at the end of the play-off semi-final basketball game between Camden High School and Trenton Central High School on March 7, 1991 was both foreseeable and preventable had Camden officials taken better and stronger security measures, both precautionary and as the events unfolded. He finds that the weight of the credible evidence demonstrates that approximately 20 chairs were thrown from the Camden side fans into the Trenton side crowd, and that the fact that all of the displaced chairs were later found on the Trenton side (Exhibit T-11b) supports the testimony of the two neutral witnesses that blame for the violence must lie with the Camden fans. See Exhibits T-10 and T-11b. See also Tr.44, 52-60.

Further, the Commissioner finds that Camden must be found liable for damage resulting from the chair-throwing as well as the damage to the facility, including but not limited to the rims of the baskets, as observed by neutral witnesses. See Exhibit T-11b and Tr.58-59.

Additionally, the Commissioner finds and determines that Camden's security force, comprised of two uniformed security officers, three plainclothed security officers and several volunteer detectives who accompanied the spectators into the stands as spectators (See Tr.282, 287, 288-9 and 293) with a total of five paid Camden security personnel was inadequate in number in light of

the high potential for danger extant that evening. Moreover, the Commissioner finds such Camden security personnel were inadequately supervised, and trained for the potentialities. Detective Stevens, one of the two uniformed security officers indicated that while he was in charge, he was not the other Detective's supervisor for that evening, suggesting there was a lack of clear lines of authority. See Tr.295. Moreover, while Detective Stevens indicated it was his duty to move the students to the locker room, his first duty was to "get myself out of that, first of all, before I got hit with a chair and, you know, try to get the kids calm down on our side and everybody to the buses and get out of there." (Tr. 286) On examination by Mr. Stubbs, a member of the Controversies Committee, Detective Stevens further elaborated:

> MR. STUBBS: I'm not clear about one thing. When you saw these chairs flying, you thought your job was to get everybody out and avoid getting hit with a chair?
>
> MR. STEVENS: Right.
>
> MR. STUBBS: Yet, you were paid security. Was it your job or someone else's job to try to get to these people who are throwing chairs and stop that action from occurring?
>
> MR. STEVENS: Before you can get to anybody that's throwing chairs, you have to step back and see who's throwing chairs and avoid being hit by the chairs.

Further testimony adduced at hearing makes plain that not only did Detective Stevens accompany the team to the locker room, but all the designated security personnel plus the principal, head coach and perhaps the dean of students left the gym as well. See Tr.185, 190, 311. See also Committee Finding of Fact No. 17 at p. 20. While the administration's concern with the students' safety is appropriate and their actions in removing them from harm's way

correct, Camden's security lacked organization, depth of manpower and good judgment in abandoning the gym floor.

By stark contrast, the eight designated Trenton security officers, and other volunteer security personnel from Trenton, risked their own safety during the chair-throwing melee by forming a human barricade in what was termed "no man's land" (Tr. 55-56) to prevent the two spectator crowds from making substantial contact, thereby preventing more injuries and further violence. See for example Tr.126, 157-158.

Finally, in regard to the episode that evening, the Commissioner is troubled indeed by the testimony of Camden Patrolman Austin, one of Camden's volunteer security officers, wherein he testified that a man in a "green sweatsuit" drew a gun in the gym, and that said man returned to the gym to challenge him, to a fight "one-on-one." The Patrolman testified that he drew his firearm. See Tr.249-254. He commends the Association for its resolve in directing its attorney to report the episode of drawing weapons to the Division of Criminal Justice. Such reports as this and the similarly very serious reports of injury to both Patrolman Austin "I got smashed with a chair *** [o]n the right side of my head" (Tr.249) and to the Camden Dean of Students Jenkins who was also struck by an airborne chair, lead the Commissioner to the inescapable conclusion that Camden's response to the extraordinarily serious incident at question was totally inadequate, warranting severe sanction.

As stated earlier, when a board of education in New Jersey chooses to join NJSIAA it adopts the Association's Bylaws, Rules and Regulations as its own. One such Bylaw states at Article X, Sec. 2A

of the Handbook at p. 52 that a school may be required to forfeit championship rights as determined by the Controversies Committee as a penalty for violation of the Association's Rules and Regulations. The record before the Commissioner makes plain for the reasons expressed above, that Camden must bear responsibility for the aggressive and violent behavior of its fans. NJSIAA Regulations hold the school responsible for the conduct of its fans. See Article IX, Section 3, NJSIAA Handbook at pp. 50-51. Therein it states:

> SPORTSMANSHIP RULE/POLICY
> HIGH STANDARDS OF COURTESY, FAIR PLAY AND SPORTSMANSHIP MUST FEATURE ALL ASSOCIATION COMPETITIONS.
>
> (While this rule is a general statement and one which may be difficult to reduce to objective standards in terms of enforcement, it is the heart of the entire Association program. Good sportsmanship, respect for rules, respect for others, and fair play, are basically the motives through which an interscholastic athletic program is justified and defended.)
>
> It shall be the responsibility of each member school to insure that all individuals employed by or directly associated with the athletic program, including its student-athletes, comport themselves in a sportsmanlike manner when representing their school, especially at interscholastic events.
>
> Unsportsmanlike conduct shall subject the individual to disciplinary action. The member schools with which the individual is associated may also be subject to disciplinary action if it is found that the member school's policies, actions, or failure to act, substantially contributed to the individual's conduct.
>
> Unsportsmanlike conduct shall include but not be limited to the following:
>
> a. Any person (athletic department, staff member, student-athlete or a fan or spectator associated with a member school) who strikes or physically abuses an official, opposing coach, player, or spectator.

b. Any person (athletic department, staff member, student-athlete or a fan or spectator associated with a member school) who intentionally incites participants or spectators to violent or abusive action.

c. Any person (athletic department, staff member, student-athlete or a fan or spectator associated with a member school) who uses obscene gestures or profane or unduly provocative language or action towards officials, opponents, or spectators.

d. Any school or athletic staff member who is publicly critical of any game official, opponents and/or opposing coaches/players.

e. The administration of a member school will be responsible for the unsportsmanlike conduct of that school's fans or spectators. (emphasis supplied)

Further, by virtue of Camden's having voluntarily agreed to participate in the 1991-92 tournament, NJSIAA Regulations further require that the participating school accept all relevant tournament rules and abide by the sportsmanship standard set by the Association. The tournament regulations, 1991 NJSIAA Boys and Girls Basketball Tournament Regulations, at p. 6, provide

CONDUCT OF PARTICIPANTS

The Executive Committee reserves the right at any time to withdraw the right to compete in the preliminaries, or finals, if an individual or team is guilty of misconduct or unsportsmanlike conduct while the guest of the NJSIAA.

Schools will not be permitted to enter the tournament, even though the teams qualify if the SECURITY/CROWD CONTROL RESPONSIBILITY OF COMPETING SCHOOLS FORM IS NOT SIGNED AND FILED IN THE CENTRAL OFFICE BY THE DATE INDICATED ON THE FORM.

All schools entered in the annual basketball tournament will be completely responsible for the conduct of their coaching staffs, players, cheerleaders, students, and spectators. Member schools cannot expect the NJSIAA to assume responsibility for such conduct at tournament games.... (emphasis in original, underlining added in Respondent's Brief, at p. 28).

The Commissioner concurs with the conclusion of the Association that when a high school's fans behave in a life-threatening manner, it must act to protect the integrity of its tournament play and penalize the school responsible for such destructive and dangerous behavior for failing to adequately address the situation. Petitioner's argument that the team must be saved harmless from the conduct of Camden's fans must fail in the face of the compelling public interest to ensure safety, and the Camden Board's adopting the Rules governing the membership of the Association of which it is a part, as well as the regulations governing tournament play that it voluntarily accepted. Furthermore, in the face of a record demonstrating Camden's inadequate security force, the Commissioner cannot find it unreasonable or arbitrary for NJSIAA to levy a penalty befitting the offense, that is, that the school not be permitted to participate in the tournament the following year. The Commissioner so finds.

While the Commissioner is sympathetic to the anguish the student-athletes of Camden must feel in light of their exemplary behavior on the evening in question, he would be remiss, indeed, to suggest that anything less than swift certain action must be taken by the Association to deter any notion that aggression at sporting events will be tolerated. He thus finds and determines that the penalties meted by the Association were assessed in the best interests of students, parents, administrators and the public alike and were reasonable considering the potential harm that could have been visited upon the event. In so finding, the Commissioner must reject petitioner's alternative recommendation that fans from Trenton and Camden be barred from attending this year's basketball

championships. While appealing at first blush, such recommendation is unenforceable, insofar as each member of the public would have in some way to identify him or herself as a spectator for either team. Moreover, because it is not known which schools from within the state will face one another during any given game, to ban all spectators from watching the competition would penalize all schools whom either Camden or Trenton might face in competition. Such an alternative would wrongfully punish those school communities and would debase interscholastic competition.

Accordingly, for the reasons expressed in the Controversies Committee's report, the Executive Committee's Decision, and herein, the Commissioner finds and determines that Camden has failed to demonstrate irreparable harm. Moreover, for the same reasons, the Commissioner finds that petitioner has failed to demonstrate by the substantial credible evidence in the record that the determination of, and penalities assessed by, NJSIAA was arbitrary, capricious or unreasonable. Thus, the Commissioner adopts as his own those findings and conclusions of the Executive Committee and Controversies Committee in this matter and dismisses the Petition of Appeal, with prejudice.

COMMISSIONER OF EDUCATION

FEBRUARY 7, 1992

DATE OF MAILING - FEBRUARY 10, 1992

24-92

24-92

R.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
DAVID BRYAN, VICE PRINCIPAL AND BOARD OF EDUCATION OF THE MAINLAND REGIONAL HIGH SCHOOL, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent of high school student, R.F., challenged suspension of daughter three times for alleged use of foul language and fighting with fellow students and staff members.

Initial decision concluded R.F. clearly defied authority within meaning of N.J.S.A. 18A:37-2b on October 15, 1990. Thus, suspension was appropriate. Further, the Board's actions to suspend R.F. in December 1990 and in April 1991 were also appropriate as discipline for fighting incidents. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

FEBRUARY 18, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1555-91
AGENCY DKT. NO. 14-1/91

R.F.,
Petitioner,
v.
DAVID BRYAN, VICE PRINCIPAL AND BOARD OF EDUCATION OF MAINLAND REGIONAL HIGH SCHOOL, ATLANTIC COUNTY,
Respondent.

R.F., petitioner, pro se
Louis J. Greco, Esq., for respondent

Record Closed: November 19, 1991 Decided: January 2, 1992

BEFORE **LILLARD E. LAW, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenges the authority of the Board of Education of the Mainland Regional High School District (Board) to suspend his daughter from school on three occasions asserting, among other things, that the Board's action was without just cause, arbitrary and contrary to school law regarding the discipline of pupils.

The matter was transmitted to the Office of Administrative Law (OAL) on February 14, 1991, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.SA. 52:14F-1 et seq. A prehearing conference order was issued on June 17, 1991, followed by a hearing held on October 2, 1991. The parties requested and were granted leave to submit post-hearing memoranda. The last submission was received on November 19, 1991, which constituted the hearing record closing date.

ISSUES

The issues to be resolved by this administrative tribunal and as agreed upon by the parties, are these:

1. Whether there was good cause to suspend pupil R.F. from school by its Vice Principal under the control of the Board of Education of the Mainland Regional High School District?

   a. Whether the suspensions were arbitrary, capricious and/or unreasonable?

BURDEN OF PROOF

Petitioner carries the burden of proof to affirmatively demonstrate that the Board's actions to suspend R.F. were arbitrary, capricious and/or unreasonable, by the standard of a preponderance of the credible evidence.

FINDINGS OF FACT

Based upon the testimony and other evidence proffered at the hearing, and having given fair weight thereto, the following constitutes my **FINDINGS OF FACT** in this matter:

OCTOBER 15, 1990

During the 1990-91 school year, petitioner's daughter was enrolled in the Board's school in the tenth grade. The first incident which resulted in R.F.'s suspension from school for three days occurred on October 15, 1990, during the school lunch period. R.F. testified that she and a friend waited in line to use the girls lavatory which was supervised by Ms. Judy Goins, Language Arts Teacher. R.F. testified that she went to the front of the line, passing up other girls waiting to use the facility. Ms. Goins instructed R.F. to return to her place in the line. R.F. testified that she "had to go," therefore, she went into the lavatory ahead of the rest of the girls waiting in line.

Ms. Goins' written statement, dated October 29, 1990 (R-1), asserts, in part, that:

> [R.F.] walked past me toward the bathroom and I said, "Excuse me, where are you going?" Never turning around [R.F.] replied, "I have an emergency." I then said, "Excuse me, what

> is your name?" Still, never turning around [R.F.] replied, "Don't argue with me." I then followed [R.F.] into the bathroom and firmly said, "I want your name." She told me. I then walked out of the bathroom and asked Ms. Connolly, who was standing outside the bathroom, to cover my duty while I went to get Mr. Bryan (assistant principal). Ms. Connolly told me moments after I left, [R.F.] walked out of the bathroom alone and looked at Ms. Connolly and said, "that Bitch." (R-1).

R.F. admits that she called Ms. Goins a "bitch" when R.F. left the girls lavatory. Subsequently, R.F. was summoned to appear at the assistant principal's office at which time R.F. was advised she would be suspended from school for three days for unacceptable language directed at a staff member and defiance of authority. Thereafter, R.F.'s father arrived at the assistant principal's office and contested his daughter's suspension. R.F. testified on this hearing record she thought she would be disciplined with Saturday detention. However, she was just a bit happy she could miss three days of school; sleep late; make-up any tests she missed and do her homework at her leisure.

Mr. F. followed his oral complaint with the assistant principal with a written complaint to the Superintendent of Schools, dated October 16, 1990 (R-1). In his written complaint, Mr. F. summarized his impressions of the incident of October 15, 1990, and opined, among other things, that the action to suspend R.F. was highly improper, an abuse of authority and lacking a basic courtesy to withhold bathroom privileges from a pupil. Mr. F. also alleged that due process was absent, i.e., facing your accuser and substantiating facts from witnesses (R-1).

In a follow-up letter to the Superintendent, dated November 16, 1990, Mr. F. opined that he did not believe that Ms. Goins or any other staff member had the authority to deny anyone what he believed to be a fundamental civil right. He also asserted that he intended to appeal (the decision to suspend R.F.) to the Board. Mr. F. further opined that R.F.'s conduct was appropriate for the situation (R-1). Mr. F. lost his appeal to the Board.

DECEMBER 21, 1990

R.F. testified that she and another female pupil exchanged heated and foul words in the school's lunch room. The two girls were extremely angry with the other. As a consequence, a teacher escorted the girls to the assistant principal's office. Assistant principal David Bryan's written report states that two teaching staff members had the impression that there was going to be a fight between R.F. and K.R. (R-3).

Assistant principal Bryan reports he had a long discussion with R.F., making her aware of the consequences of fighting, even though the fighting does not occur on school grounds (R-3). R.F. reported to Bryan that she would not fight in school but that a fight would probably occur. R.F. asserted to Bryan that K.R. had accused R.F. of scheming with K.R.'s boyfriend. R.F. also asserted that K.R. constantly called R.F. names whenever K.R. sees R.F. R.F. stated to Bryan that she did not want to fight nor did she know how to fight. Nevertheless, R.F. was stubborn and unwilling to change her attitude toward K.R. R.F. mentioned to the assistant principal that she would get her friends to fight her battles (R-3).

Assistant principal Bryan reports that K.R. was called into his office for a conference where K.R. claimed that R.F. had been threatening K.R. for some time. K.R. asserted that R.F.'s friends would do the fighting for R.F., although K.R. did not want to fight. K.R. indicated that a large number of R.F.'s friends would be at the fight, if there was a fight.

Assistant principal Bryan and Mr. Richard Edel, Behavior Modification Counselor, conducted four separate conferences with the two female pupils on December 20, 1990, during school hours.

School dismissed at 2:44 p.m. on December 20, 1990. Approximately one-half hour later, a group of approximately 20 pupils gathered at the Student Parking Lot area. Assistant principal Bryan circulated in the area and the pupils dispersed, only to regroup at the Linwood Park. R.F. testified that a girl by the nickname of "Peaches" struck R.F. on the back of R.F.'s head and R.F. fell to the ground. This testimony was corroborated by the testimony of pupil J.L.G., a friend of R.F.'s who witnessed the fracas. J.L.G. testified she did not see R.F. strike anyone. J.L.G. asserted that everyone knew there was going to be a fight after school. She observed K.R. and K.R.'s friends run away after R.F. had been struck by "Peaches."

Assistant principal Bryan's written report states, among other things, that he held a conference with pupil D.E. a/k/a Peaches, and D.E.'s mother subsequent to the altercation. D.E. admitted she struck R.F. but denied she kicked or punched R.F. when R.F. had fallen to the ground. Assistant principal Bryan suspended D.E., K.R. and R.F. three days each for fighting (R-3).

APRIL 2, 1991

An altercation between R.F. and another female pupil, D.D. occurred on April 2, 1991, which resulted in R.F.'s suspension from school for one day.

Assistant principal Bryan was unaware of the incident until April 3, 1991, when D.D. and a male pupil, D.W., appeared in Bryan's office at approximately 7:45 a.m. to

report that D.D. and R.F. had engaged in a fight the previous afternoon. D.D. reported to Bryan that at approximately 3:15 p.m. on April 2, 1991, she and R.F. had a confrontation at the Linwood Park, off of school property. D.D., who is the mother of an infant child, reported that R.F. had called her baby a "scum bag" and referred to D.D. as a "slut." D.D. asserted that R.F. made peace signs in front of D.D.'s face, hitting D.D. in the nose while making the signs. R.F. pushed her friends in between herself and D.D. (R-2).

D.D. admitted she was upset with R.F. and finally punched R.F. D.D. then turned to leave; however, the Linwood Police were present and placed both girls in patrol vehicles and transported them to the Linwood Police Department Headquarters.

R.F. testified that the Linwood Police took photographs of the injuries to her face caused by D.D. Thereafter, the police took R.F. to the hospital for treatment of her injuries. R.F. further testified that the matter was subsequently prosecuted at the municipal court level where D.D. was required to pay R.F.'s medical bills.

On April 3, 1991, R.F. appeared at assistant principal Bryan's office at approximately 8:05 a.m., immediately after D.D. and D.W. had left. R.F. immediately asked Bryan, "Am I suspended?" After which, Bryan took R.F. into his office where R.F. showed Bryan her swollen lip. Bryan also observed a hospital bracelet on R.F.'s wrist which indicated to him that R.F. had recently spent some time in a hospital (R-2).

R.F. indicated to Bryan that after school on April 2, 1991, R.F. left school and went across the street to her usual gathering spot in the parking lot. R.F. asserted that D.D. and her friends generally gathered at the opposite end of the parking lot. R.F. asserted to Bryan that D.D. and her friends yelled at R.F. asking why R.F. called D.D.'s baby a "scum bag." R.F. stated she replied, "Let's call peace, I don't want to fight." When Bryan asked R.F. about R.F.'s peace moves, R.F. demonstrated how she used her hands in front of D.D.'s face. R.F. admitted to Bryan that she called D.D. a "slut." R.F. asserted that she may have called D.D.'s baby a "scum bag," however, she asserted she could not recall (R-2).

Bryan's written report states that when he assigned R.F. a one day suspension, R.F. commented, "You're only giving me one day? That's not enough - this Easter vacation was only a tease" (R-2).

DISCUSSION AND CONCLUSIONS

Petitioner contends, among other things, that under the applicable statute, N.J.S.A. 18A:37-2, the suspension of his daughter on three occasions was

inappropriate and denied her access to an education. The cited statute provides as follows:

> Any pupil who is guilty of continued and willful disobedience, or of open defiance of the authority of any teacher or person having authority over him, or of the habitual use of profanity or of obscene language, or who shall cut, deface or otherwise injure any school property, shall be liable to punishment and to suspension or expulsion from school.
>
> Conduct which shall constitute good cause for suspension or expulsion of a pupil guilty of such conduct shall include, but not be limited to, any of the following:
>
> a. Continued and willful disobedience;
> b. Open defiance of the authority of any teacher or person, having authority over him;
> c. Conduct of such character as to constitute a continuing danger to the physical well-being of other pupils;
> d. Physical assault upon another pupil;
> e. Taking, or attempting to take, personal property or money from another pupil or from his presence, by means of force or fear;
> f. Willfully causing, or attempting to cause, substantial damage to school property;
> g. Participation in an unauthorized occupancy by any group of pupils or others of any part of any school or other building owned by any school district, and failure to leave such school or other facility promptly after having been directed to do so by the principal or other person then in charge of such building or facility;
> h. Incitement which is intended to and does result in unauthorized occupation by any group of pupils or others of any part of a school or other facility owned by any school district;
> i. Incitement which is intended to and does result in truancy by other pupils;

Petitioner argues that none of the above causes for R.F.'s suspension from school existed. Rather, he argues, assistant principal Bryan exceeded his authority and arbitrarily imposed the penalty of suspension to R.F. Any attempt to define Bryan's ability to suspend a pupil as a matter of internal school policy is spurious. Mr. Bryan cannot impose his judgment in place of that of the New Jersey Legislature and the rulings of the court. The State statutes take precedence over school policy and school policy must conform to the law.

Petitioner observes that on October 15, 1990, R.F. was suspended for three days ". . . for unacceptable language directed at a staff member and defiance of authority." Petitioner asserts that the points of agreement were that R.F. needed to use the girls lavatory and that she had "an emergency." Petitioner now attempts to introduce new evidence through his brief which was not demonstrated by any of the

witnesses nor revealed through documents, either prior to or during the hearing. Petitioner now contends that the "emergency" was the need for R.F. to change a sanitary napkin that was about to leak and cause her great embarrassment. This "emergency" was not revealed to Ms. Goins, the teaching staff member in charge at the time. Nor did R.F. or any of her witnesses at the hearing express this reason for R.F.'s "emergency." Rather, R.F. testified before this tribunal that she "had to go."

Further, R.F. admits that without an explanation to Ms. Goins, R.F. proceeded to the head of the line and, in defiance of Ms. Goins, entered the girls lavatory without permission. Petitioner argues, that under the circumstances, R.F.'s behavior and conduct was appropriate. I disagree.

There is no question nor doubt that R.F. demonstrated "open defiance of the authority of [a] teacher" on October 15, 1990. N.J.S.A. 18A:37-2b. This open defiance was in the presence of other pupils and staff members. R.F. offered no explanation for her "emergency" or reason she "had to go" to Ms. Goins. Rather, she defiantly placed herself in the front of the line of other female pupils waiting to use the lavatory and then proceeded to enter the lavatory without permission.

I **CONCLUDE** that R.F.'s conduct on October 15, 1990, was clearly defiant of authority within the meaning of N.J.S.A. 18A:37-2b.

With regard to the "fighting" incidents which occurred on December 21, 1990 and April 2, 1991, petitioner contends, among other things, that both events took place after school hours and off school grounds. Petitioner misinterprets the holding in the matter of R.R. v. Bd. of Ed., Shore Reg. H.S., 109 N.J. Super. 337, where he cites the headnote, which reads as follows:

> 1. Schools and school districts (key) 177
>
> Public school officials cannot exercise power to expel or suspend a student where activity which is subject of proposed suspension or expulsion does not materially and substantially interfere with requirements of appropriate discipline in operation of the school. (Id. at 337).

Petitioner is cautioned to consider the subsequent language of the Court where it said:

> In New Jersey public school officials have the authority to suspend or expel students for events happening out of school hours. Palmyra Board of Education v. Hansen, 56 N.J. Super. 567, 571 (Law Div. 1959); N.J.S.A. 18A:37-2. This court is unable to find a New Jersey decision holding that school officials have the right to expel or suspend a pupil for conduct

> away from school grounds, but the better view is that school authorities have such a right where such is reasonably necessary for the student's physical or emotional safety and well-being, or for reasons relating to the safety and well-being of other students, teachers or public school property. . . Id. at 344.

The R.R. court continued to hold at 347, that:

> Where public school officials have reasonable cause to believe that a student, by virtue of activities after school hours and off school property, presents a danger to himself, to others or to school property, they may temporarily suspend the student for a short period of time . . .

Petitioner is also reminded of the statute at N.J.S.A. 18A:25-2, which provides, in pertinent part, as follows:

> A teacher or other person in authority over such pupil shall hold every pupil accountable for disorderly conduct in school and during recess on the playgrounds of the school and on the way to and from school.

Thus, R.F.'s conduct which resulted in fights between herself and other female pupils after school hours and off school property were subject to disciplinary action by the school authorities. R.F. admits that her conduct which resulted in the fighting carried over from her in-school activities concerning the other two girls.

As the Commissioner said in the matter of Gustave M. Wermuth, et al v. Bd. of Ed. of Twp. of Livingston, 1965 S.L.D. 121 at 129:

> . . . unacceptable behavior must be restrained and discouraged and when necessary appropriate deterrents and punishments must be employed for purposes of correction and to insure conformity with desirable standards of conduct.

I **CONCLUDE**, therefore, that R.F.'s suspension from school for three days in December 1990 and one day in April 1991, were in accordance with the applicable statutes and case law. N.J.S.A. 18A:37-2; N.J.S.A. 18A:25-2; R.R., supra.

I **CONCLUDE** that petitioner has failed to carry his burden of proof to affirmatively demonstrate that the Board's action to suspend R.F. was arbitrary, capricious and/or unreasonable.

ORDER

Accordingly, it is **ORDERED** that the herein Petition of Appeal be and is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 2, 1992
Date

John E. Juten, A.L.J. Fa
LILLARD E. LAW, ALJ

Receipt Acknowledged:

1/3/92
Date

Maureen Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 9 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

psa

WITNESSES

FOR PETITIONER:

R.F.
J.L.G.
M.C.G.

FOR RESPONDENT:

DAVID BRYAN

DOCUMENTS IN EVIDENCE

FOR PETITIONER:

P-1 TWO INTERIM REPORTS, TWO STUDENT REPORT CARDS

FOR RESPONDENT:

R-1 LETTER OCTOBER 15, 1990 (6 PAGES)
R-2 LETTER APRIL 3, 1991 (7 PAGES)
R-3 LETTER DECEMBER 21, 1990 (5 PAGES)
R-4 DISCIPLINE REPORT

OAL DKT. NO. EDU 1555-91

R.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
DAVID BRYAN, VICE PRINCIPAL AND BOARD OF EDUCATION OF THE MAINLAND REGIONAL HIGH SCHOOL, ATLANTIC 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 according to the provisions of N.J.A.C. 1:1-18.4.

Upon review of the record and initial decision, the Commissioner agrees with and adopts the findings and conclusion of the Administrative Law Judge. Accordingly, the Petition of Appeal is dismissed for the reasons set forth by the ALJ.

COMMISSIONER OF EDUCATION

FEBRUARY 18, 1992

DATE OF MAILING - FEBRUARY 18, 1992

25-92

25-92

RICHARD ENGLISH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, former 12-month teacher-coordinator of industrial arts, alleged Board violated his rights under N.J.S.A. 18A:28-5, 28-6, and 6-10 et seq. by removing him from his teacher-coordinator position and reassigning him to 10-month industrial arts teaching position. Petitioner contended he was terminated prior to the abolition of the position. Board admitted that it did not formally abolish the 12-month position pending enrollment figures for 1991-92 school year. However, it argued it acted in good faith and that while imperfect, the resolution passed on April 25, 1991 was tantamount to formal notice of abolition of position.

Citing Wexler and Hyun, Commissioner determined, although defective, the Board demonstrated its clear intent to effectuate a RIF despite its technical failure to formally do so at its meeting of April 25, 1991. Board did notify petitioner of his changed assignment in April 1991. Commissioner found Board provided notice to petitioner that his 12-month position was abolished and his new employment with Board would be a 10-month teaching position in industrial arts commencing on September 1, 1991. Petition was dismissed.

FEBRUARY 20, 1992

RICHARD ENGLISH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

For Petitioner, Zazzali, Zazzali, Fagella and Nowak
(Richard A. Friedman, Esq., of Counsel)

For Respondent, Kenney, Gross & McDonough
(Mark S. Tabenkin, Esq., of Counsel)

This matter has come before the Commissioner of Education by way of Petition of Appeal filed on July 17, 1991, alleging that the Board violated petitioner's rights under N.J.S.A. 18A:28-5, N.J.S.A. 18A:28-6 and N.J.S.A. 18A:6-10 et seq. by removing him from his tenured position as a teacher-coordinator of industrial arts. Petitioner seeks compensation commensurate with his twelve-month position as a teacher-coordinator from June 30, 1991, the date he avers he was terminated from such position, through August 12, 1991, the date he avers the Board acted by resolution to abolish the position. Petitioner's prayer that he be reinstated to such position was apparently dropped in the filing of his Motion for Summary Decision on December 18, 1991.

On August 8, 1991, the Board filed its Answer to the Petition of Appeal accompanied by its own Motion for Summary Judgment. By way of affirmative defenses, the Board acknowledged, inter alia, that petitioner had served in a twelve-month position as an industrial arts teacher-coordinator and noted that at a meeting held on April 25, 1991 the Board approved a resolution to reassign petitioner to a full-time industrial arts teaching position, a ten-month position, for the school year commencing September 1, 1991 due to the low enrollment in the Cooperative Industrial Education (CIE) program. The Board also averred by way of affirmative defenses that only one instructor with greater seniority than petitioner was reappointed to the position of CIE teacher-coordinator.

The Board's affirmative defenses acknowledge that by letter dated April 26, 1991 the Board informed petitioner of his assignment as a ten-month industrial arts teacher for the 1991-92 school year. It also stated that the Board did not abolish the twelve-month position pending enrollment figures for the 1991-92 school year. Said Answer also admitted that the Board intended to adopt a resolution formally abolishing petitioner's position of CIE teacher-coordinator at its August 12, 1991 meeting. The Board contended in its Answer that its planned action to abolish the position was in good faith in the exercise of its right as provided in N.J.S.A. 18A:28-9 to reduce the number of teaching staff members because of reductions in the number of pupils. The Board also cited Mildred Wexler v. Bd. of Ed. of the Borough of Hawthorne, Passaic County, 1976 S.L.D. 309, aff'd State Board 314, and Sherman v. Bd. of Ed. of North Plainfield, decided by the Commissioner October 13,

1981 and [Outslay] 1977 S.L.D. at 1038-39 for the proposition that while not the preferred procedure, the Board's action on April 25, 1991 is identical to that which has been held legal in other instances. Citing Hyun v. Bd. of Ed. of the Borough of Wharton, Morris County, 1976 S.L.D. 763, the Board also claims that any defect in its action of April 25, 1991 is insufficient to render its action null and void.

The Board's Answer requested that the Commissioner dismiss the petition with prejudice.

Thereafter, on November 7, 1991 the parties submitted a joint stipulation of fact establishing the following:

> 1. Richard English is a tenured teaching staff member presently employed by the Franklin Township Board of Education.
>
> 2. Prior to the 1990-91 school year, the Franklin Township Board of Education (the "Board") operated a Cooperative Industrial Education ("CIE") program, a work-study program overseen by one or more teacher-coordinators who arrange for the employment of the students in the program and supervise them at their various work-sites.
>
> 3. Petitioner served as an industrial arts teacher-coordinator in the CIE program, a twelve-month position, commencing on or about September 1, 1972, through the 1990-91 school year.
>
> 4. Over the last several years, student enrollment in the CIE program has declined markedly.
>
> 5. During the 1990-91 school year, due to the under-enrollment in the CIE program, the Board temporarily assigned petitioner to a supervisory position elsewhere in the district, in addition to his regular teaching duties, thereby retaining his status as a twelve-month employee.
>
> 6. During the 1990-91 school year, enrollment in the total CIE program has continued to decrease. For the 1991-92 school year, enrollment declined to a total of approximately

34 students. These 34 students are divided into two separate instructional groups of approximately 19 and 15 students each.

7. At a meeting held on April 25, 1991, the Board approved a resolution to re-assign petitioner to a full-time industrial arts teaching position, a ten-month position, for the school year commencing on September 1, 1991. This appointment was due to the continuing extremely low enrollment in the CIE program. Petitioner was not re-appointed to the twelve-month position as a teacher-coordinator of the CIE program. Only one instructor, with greater seniority than petitioner, was re-appointed to the position of CIE teacher-coordinator.

8. By letter dated April 26, 1991, the Board informed petitioner of his assignment as a ten-month industrial arts teacher for the 1991-92 school year. However, the Board did not abolish the twelve-month position pending enrollment figures for the 1991-92 school year.

9. Enrollment figures for the CIE program failed to improve during the period of April 25, 1991, to August 12, 1991.

10. At a regularly scheduled meeting held on August 12, 1991, the Board adopted a resolution formally abolishing petitioner's position of CIE teacher-coordinator based on the continuing under-enrollment in the CIE program.

On December 19, 1991, petitioner filed a brief in support of his Motion for Summary Judgment seeking compensation for the period from July 1, 1991 until August 12, 1991, as if he were assigned to the teacher-coordinator position, until it was abolished by the Board on the latter date.

Petitioner cites Kathi L. Savarese v. Board of Education of the Borough of Bernardsville, (Savarese II), decided by the Commissioner November 15, 1990 for the proposition that unless his/her tenured position is actually abolished or he/she is dismissed after tenure charges, a tenured teaching staff member shall not suffer removal from such position. Petitioner believes

the facts in Savarese are similar to those in this case, claiming that while he held a tenured twelve-month position as an industrial arts teacher-coordinator from which he was reassigned on June 30, 1991 to a teaching position, shortening his work year from twelve months to ten, his twelve-month position was not abolished.

Citing Sherman, supra, petitioner concedes that a Board has statutory authority under N.J.S.A. 18A:28-9 to effect a reduction in force by abolishing a full-time teaching position and establishing in its place a part-time position. However, petitioner contends that because his twelve-month position was still in existence at the time he was reassigned, he could not validly have been removed from that position, and therefore his compensation was reduced.

Petitioner would distinguish the Board's reliance upon Wexler, supra, and Hyun, supra, first because they predate Savarese, which he claims is now the controlling law. Second, petitioner would distinguish the facts of those cases from this one. Here, he claims the Board removed him from his twelve-month position before it decided to abolish that position. In Wexler and Hyun the decisions to abolish were made, but the resolutions were not in perfect form. In this case, the Board acted to reassign him to the ten-month position before the Board decided to effect the reduction in force. Also, petitioner adds, in Wexler and Hyun a tenured position was reduced in part, but not eliminated, but in this matter the entire position was abolished.

The Board's brief, submitted on December 20, 1991, contends that although the Board's action in reducing petitioner's work year without formally abolishing his twelve-month position was not the preferred procedure, the statute which governs RIF's effected under

school law, specifically N.J.S.A. 18A:28-9, does not impose any requirement of a formal board resolution as a condition precedent to finding the existence of a RIF, nor has the Commissioner imposed such a requirement as a matter of case law. The Board cites Board of Education of the Township of Madison v. Madison Township Education Association, 1974 S.L.D. 488 for the proposition that despite the absence of a formal resolution, in a case involving the abolition of two teaching staff positions by a local board, the Commissioner held that the board in substance had abolished the positions. The Board also cites Riemann v. Board of Education of the Township of Edison, 1980 S.L.D. 636, 641-42 as being in accord with Madison.

The Board also reiterates its contention that Wexler, supra, and Hyun, supra, as well as another, Margot Outslay v. Board of Education of the Borough of Midland Park, 1977 S.L.D. 1033 are dispositive of the Motion for Summary Judgment. The board in Outslay initially neglected to formally abolish a tenured teacher's full-time position, but instead adopted resolutions which effectively abolished those positions or at least evidenced the Board's intent to do so, primarily by reducing a full-time position to a part-time one. In each of those cases, the Board submits, the Commissioner held that the defect of failing to formally abolish was insufficient to invalidate the Board's action.

Thus, the Board contends that its action was not so defective as to render its action null and void and that consequently, summary judgment must be granted in favor of the Board, dismissing the Petition of Appeal with prejudice.

Petitioner's reply brief, submitted on January 9, 1992, contends the facts in Madison, supra, Wexler, supra, and Hyun, supra, are distingishable from this matter. Petitioner claims that unlike the facts in Madison, at the time the Board removed him from his twelve-month position, the Franklin Board had not demonstrated an intent to abolish the position, whereas in Madison the funds for the two nontenured positions had been eliminated from the budget before the petitioners were advised that they would not be returning to those positions. Petitioner claims the twelve-month position and the monies allocated as compensation for the position at question remained in existence at the time he was transferred to the ten-month position.

Similarly, in Wexler and Hyun the resolutions, while defective, demonstrated a clear intent to effect a RIF, petitioner avers, because the boards decided to reduce teaching staff in accordance with reductions in student enrollment before they notified the petitioners that their positions were being reduced in part to accommodate a RIF. In Outslay, petitioner contends, the board decided to reduce the hours of several librarians and school nurses, including petitioner's. However, the board failed to formally abolish the full-time positions and create new part-time positions. However, petitioner contends, in this case, the Franklin Board did not decide to effect a RIF until after it removed him from his tenured position.

Petitioner reiterates his contention that Savarese, supra, is dispositive of this case wherein the issue is whether a RIF actually took place before the Board's resolution of August 12, 1991. Petitioner claims the Board's argument is erroneous that the

Savarese case dealt with whether there had actually been a RIF in the number of teaching positions available through an action by the Board. He faults the Board's position that Savarese is different from this one because unlike in Savarese, in this case there was a reduction in the actual number of coordinator positions. However, petitioner submits that the Board in this matter took no steps to reduce the number of coordinator positions until August 12, 1991, almost two months after he was removed from his tenured position. Accordingly, petitioner requests that the Commissioner grant him the compensation which he was denied as a result of the Board's improper termination of him as a teacher-coordinator.

The Board's reply brief argues it gave petitioner timely notice in April 1991 that his employment was being reduced from a twelve-month position to a ten-month position with a corresponding reduction in compensation. Accordingly, the Board submits, petitioner's argument that he is entitled to be compensated at the rate for his twelve-month salary until the formal abolition of the twelve-month position must be rejected.

Further, the Board claims petitioner's reliance on Sherman, supra, and Sarah Armstrong v. Board of Education of the Township of East Brunswick, 1975 S.L.D. 112, aff'd in part/rev'd in part State Board 177, aff'd New Jersey Appellate Division 1976 S.L.D. 1104 are inapposite. The Board contends, Sherman applied to the compensation of a tenured teacher in rescission of contract cases, under circumstances where a contract for full-time employment, offered to a tenured teacher who accepted it, is subsequently rescinded by the Board. In such cases, the teacher is entitled to additional compensation but the present case is not a rescission of contract matter, and hence petitioner's reliance on Sherman is misplaced, the

Board argues. Moreover, petitioner herein has never argued that the notice of ten-month employment provided to him by letter dated April 26, 1991 was untimely or inadequate in any way.

Further, the Board argues that Sherman, supra, relied on Armstrong, supra. It contends Armstrong awarded 60 days additional compensation to a nontenured teacher, pursuant to a contractual 60-day cancellation clause, because she received untimely notices of nonrenewal pursuant to N.J.S.A. 18A:27-10. Thus, the Board finds Armstrong, like Sherman, inapplicable to the facts of this case in that N.J.S.A. 18A:27-10 applies to notices provided to nontenured teachers. Also, the Board avers petitioner has not argued that the notice of ten-month employment provided to him by letter dated April 26, 1991 was untimely or inadequate in any way.

The Board thus submits that the cases on which petitioner relies in support of his compensation argument fail to support a claim for any additional compensation on the facts of this case, and his claim must be rejected.

Upon a careful and independent review of the record of this matter, the Commissioner determines that this case falls among those cases such as Wexler, supra, and Hyun, supra, wherein, although defective, the Board demonstrated its clear intent to effectuate a RIF, despite its technical failure to formally do so on April 25, 1991. The record makes plain that the Board's failure to so act to formally abolish Mr. English's position was acknowledged readily by the Board, but was an omission in good faith; it forestalled such action in the hope that enrollment in the CIE course might swell sufficiently, despite pessimistic projections, to permit the Board to maintain a second CIE Industrial Arts teacher/coordinator. See Stipulation of Fact No. 8.

While the Commissioner concurs with petitioner that pursuant to such cases as Savarese, supra, unless the Board acts to formally abolish a position, a tenured teaching staff member shall not suffer removal from such position, in the instant matter it would be to place form over substance to suggest that the Board's actions of April 25, 1991 failed to provide petitioner adequate notice that his twelve-month position was being eliminated. Its action of that date resolved that petitioner be reassigned to a ten-month industrial arts position beginning on September 1, 1991 due to low enrollment in the CIE program. By letter dated April 26, 1991 the Board so informed petitioner of his changed assignment. See Stipulation of Facts Nos. 7 and 8.

In Wexler, supra, Outslay, supra, and Hyun, supra, the boards' intention, albeit flawed in execution, was unquestionably to announce the abolition of full-time positions. On the other hand, in Savarese, the Commissioner held the action of the board was not intended to effectuate an abolition in the position in question, but instead represented a mere transfer because the same number of positions existed after the Board's action as existed before. In Wexler, Outslay and Hyun, the number of positions available were in fact, reduced, which petitioner concedes. Hence, Savarese is distinguishable from the instant matter because there was no actual RIF. In Wexler, Outslay and Hyun, although defective, the boards' actions were determined to have been taken in good faith, in an attempt to abolish the full-time positions in question, and were found to be merely less than fatally defective in the attempt. Accord, Madison, supra, and Rieman, supra.

Similarly, in this case, the Board's act was not one "of subterfuge or designed to compel a resignation***." (Wexler, at 313) Rather, the Board provided what notice it could to petitioner that his twelve-month position was abolished and that his new employment with the Board would be a ten-month teaching position in industrial arts commencing on September 1, 1991.

Whether the contract in question ran from July 1 to June 30 or from September 1 to August 31, is, in the Commissioner's view, a "red herring." Instead, the crux of this decision involves the adequacy of the Board's actions in April, which the Commissioner deems to have been tantamount to the declaration of a RIF, because it carefully explained in resolution respondent's status and provided reasons for so acting to reduce petitioner to a ten-month position. Notwithstanding this conclusion, however, the Commissioner would note that to have acted correctly, the Board should have formally abolished the position in April, and if enrollment were sufficient to support the second position as the new school year approached, to recreate or reestablish the second slot.

Because there is no allegation that the remaining teacher-coordinator of industrial arts has less seniority than petitioner, the Commissioner finds and directs that no relief is due or owing petitioner under the facts of this case, and accordingly he dismisses the Petition of Appeal, with prejudice.

IT IS SO ORDERED.

FEBRUARY 20, 1992

COMMISSIONER OF EDUCATION

DATE OF MAILING - FEBRUARY 20, 1992

(SB) 25-92

SB #25-92

TALAYA YVETTE STODDARD,	:	
PETITIONER-APPELLANT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the State Board of Examiners, December 5, 1991

Decided by the Commissioner of Education, May 15, 1992

For the Petitioner-Appellant, Talaya Yvette Stoddard, pro se

For the Respondent-Respondent, Marlene Zuberman, Deputy Attorney General (Robert J. Del Tufo, Attorney General)

By letter of December 6, 1991, the State Board of Examiners notified Appellant that it had voted to deny her issuance of elementary certification because of her "conviction for theft by deception from the Mercer County Board of Social Services."

Appellant challenged this determination by petition to the Commissioner. By letter decision of May 15, 1992, the Commissioner dismissed the matter for lack of jurisdiction, finding that the State Board of Education's regulations direct that final decisions of the Board of Examiners must be appealed directly to the State Board of Education.

Appellant then filed an appeal to the State Board of Education, arguing that she had not been convicted of any crime. In support of her appeal, she filed letters from the Trenton Chief of

SEPT. 2, 1992

Police and the Manager of the Department of Education's Office of Criminal History Review indicating that their respective checks did not show any convictions.

Before the merits of Appellant's appeal can be decided, the question of who has jurisdiction over the matter must be settled. We have reviewed the relevant regulations and find that they fail to support the Commissioner's conclusion that he does not have jurisdiction.

N.J.A.C. 6:11-3.7 directs appeal to the State Board of Education from decisions of the State Board of Examiners revoking certification and does not alter the Department of Education's appeal structure so as to give us jurisdiction to hear appeals directly from Board of Examiner's determinations to deny issuance of certification. In re Masiello, 25 N.J. 590, 607 (1958). Nor is there any indication that it was our intent to do so when we adopted the section. See 22 N.J.R. 1873(a) (June 18, 1990).

Accordingly, we reverse the Commissioner's decision that he does not have jurisdiction, and, because the appeal is not properly before us, we remand the merits of this matter to the Commissioner.

September 2, 1992
Date of mailing SEP 4 1992

26-92

26-92

IN THE MATTER OF THE TENURE	:	
HEARING OF RONNIE GOULD, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF NEWARK,	:	DECISION
ESSEX COUNTY.	:	
	:	

FEBRUARY 24, 1992

IN THE MATTER OF THE TENURE	:	
HEARING OF RONNIE GOULD, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF NEWARK,	:	DECISION
ESSEX COUNTY.	:	
	:	

For the Board, Carolyn Ryan Reed, Esq.

This matter having been opened before the Commissioner of Education on December 4, 1991 through certification of tenure charges of conduct unbecoming a teaching staff member and other just cause (excessive absenteeism) against respondent, a tenured teaching staff member last assigned to South Seventeenth Street School in the Board's employ; and

The Commissioner having directed respondent by numerous notices and by letter sent via both regular and certified mail on January 24, 1992 to file an Answer to the charges against him; and

As of this date, neither respondent nor any attorney on his behalf having filed an Answer to the tenure charges against him and each count of the charges against respondent having been deemed to be admitted; now therefore

IT IS ORDERED this 24 day of February 1992 that summary judgment shall be granted to the Board and that respondent shall be dismissed from his tenured position as a teacher in the district's employ as of the date of of this decision.

IT IS FURTHER ORDERED that, pursuant to N.J.A.C. 6:11-3.6, this matter shall be forthwith referred to the State Board of Examiners for review and action as it deems appropriate.

COMMISSIONER OF EDUCATION

FEBRUARY 24, 1992

DATE OF MAILING - FEBRUARY 25, 1992

26-92

26-92

IN THE MATTER OF THE TENURE	:	
HEARING OF RONNIE GOULD, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF NEWARK,	:	DECISION
ESSEX COUNTY.	:	
	:	

MARCH 31, 1992

26-92 (AMENDED)

IN THE MATTER OF THE TENURE	:	
HEARING OF RONNIE GOULD, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF NEWARK,	:	DECISION
ESSEX COUNTY.	:	
	:	

On February 24, 1992 the Commissioner of Education granted Summary Judgment in favor of the Board of Education of the City of Newark, finding Respondent Ronnie Gould guilty of conduct unbecoming a tenured teaching staff member and other just cause (excessive absenteeism). Mr. Gould had failed to respond to the tenure charges levied against him by the Board, for whom he had been employed as a teacher at South Seventeenth Street School. Said decision dismissed Mr. Gould from his tenured position in the district's employ as of the 25th of February, 1992.

Thereafter, by letter filed with the Bureau of Controversies and Disputes on March 23, 1992 the Board of Education's General Counsel requested that this matter be reopened and the Commissioner's decision rescinded as a result of the following:

> 1. Mr. Gould was reported as being absent without leave by the administrators at South Seventeenth Street school at the beginning of the 1991-1992 school year.
>
> 2. A letter was sent to Mr. Gould on September 24, 1991 advising him of his A.W.O.L. status and threatening tenure charges. A second letter was sent on September 30, 1991 advising Mr. Gould of his continued A.W.O.L. status. Both

letters were sent regular and certified mail. Only the certified mail was returned.

3. Sometime during mid-September 1991, Mr. Gould changed his address with the Board, but this change was not immediately processed. Therefore said letters and subsequently the tenure charges were forwarded to an invalid address.

4. Tenure charges were filed against Mr. Gould in November 1991, and the matter was opened before the Commissioner on December 4, 1991.

5. The Commissioner also sent numerous notices to Mr. Gould via certified and regular to the invalid address that was supplied by the Board.

6. On February 24, 1992, summary judgment was granted to the Board wherein Mr. Gould was to be dismissed from his tenured position as a teacher.

7. An employee status form was sent to Mr. Gould (at the new address). Mr. Gould came in and informed us that he reported to work two days late.

The administrators of the school failed to notify the appropriate staff that Mr. Gould had reported to work. In the same instant, Mr. Gould's new address was not immediately processed and recorded. Such unfortunate and inexcusable errors, resulted in the above referenced tenure charges. (Letter, at pp. 1-2)

Based on the error in the record as relayed by the Board's counsel, the Commissioner rescinds his directive that Ronnie Gould be dismissed from his tenured employ with the Newark Board of Education. In so doing the Commissioner strongly admonishes the Newark Board of its obligation to ensure that procedures are implemented to avoid what it admits is an unfortunate and inexcusable series of errors on its part that resulted in these tenure charges having been filed before the Commissioner of Education.

By copy of this Amended Decision, the Commissioner notifies the New Jersey State Board of Examiners of his determination to rescind his earlier decision in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 31, 1992

DATE OF MAILING - MARCH 31, 1992

(SB) 26-92

SB #26-92

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, PETITIONER-APPELLANT,	
V.	STATE BOARD OF EDUCATION
BOROUGH COUNCIL OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY, RESPONDENT-CROSS/APPELLANT.	DECISION

Decided by the Commissioner of Education, June 18, 1992

For the Petitioner-Appellant, Peggy M. O'Dowd, Esq.

For the Respondent-Cross/Appellant, Scangarella & Feeney (John F. Feeney, Esq., of Counsel)

In January 1992, the Board of Education of the Borough of Lincoln Park (hereinafter "Board") submitted, aside from its proposed current expense budget submitted for approval as required by N.J.S.A. 18A:7D-27,[1] a request to the County Superintendent for a budget cap waiver (hereinafter "cap waiver") in the amount of $994,601.00 under the criteria of N.J.S.A. 18A:7D-28(e).[2] Specifically, utilizing the form prescribed by the Commissioner, the

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1 N.J.S.A. 18A:7D-27 provides that:

> Annually, on or before February 1, local boards of education shall submit to the commissioner a copy of their proposed budgets for the next school year. The commissioner shall review each item of appropriation within the current expense and capital outlay budgets and shall determine the adequacy of the budgets with regard to the annual reports submitted pursuant to section 11 of P.L. 1975, c 212 (C. 18A:7A-11) and such other criteria as may be established by the state board.

2 N.J.S.A. 18A:7D-28(e) provides that:

> A board of education of a school district which: (1) for the two years prior to the prebudget year, has had an annual average increase in the district's resident enrollment which is greater than two percent; or (2) between the prebudget year and

DEC. 2, 1992

District requested $742,788 due to annual average increases in resident enrollment and $251,813 for increased costs for special education pupils. 1992-93 CAP REVIEW FACT SHEET, Appellant's Brief, Exhibit A.

By letter of Feburary 28, 1992, the Commissioner approved a cap waiver in the amount of $240,496 for increased special education costs under the criteria of N.J.S.A. 18A:7D-28(e). Commissioner's Letter of 2/28/92, Appellant's Brief, Exhibit C. He rejected $754,105 of the $994,601 requested "due to budget reallocations, reductions, and/or errors in the calculations in the amount ...which were identified during the review process." Id. Finally, the Commissioner advised the District that its maximum permitted net budget would be $11,170,532 for tax levy purposes and that this amount excluded "requests to exceed the expenditure limitation which will be submitted to the voters or board of school estimate." Id.

By letter of March 4, 1992, the County Superintendent notified the District that its current expense budget for 1992-93, which included the amount waived by the Commissioner for increased special education costs, was "approved for advertisement." County Superintendent's Letter of 3/4/92, Appellant's Brief, Exhibit D.

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the year prior to the prebudget year, has had an increase in the district's local cost for special education pupils which is greater than five percent; or (3) during the 1990-91 school year but prior to April 1, 1991, has entered into a lease purchase agreement, may apply to the Commissioner of Education for a waiver of the expenditure limitation established pursuant to this section. A board of education of a school district that sends pupils and pays tuition to a special needs district may apply to the Commissioner of Education for a waiver of the expenditure limitation established pursuant to this section. Any waiver granted by the commissioner pursuant to this subsection shall not be included in the question on excess expenditures which is to be submitted to the voters of the district pursuant to subsection f. of this section.

By that same letter, she also notified the District that it was authorized to advertise a budget cap waiver proposal for $299,035 for specific line items which she determined were "approved T & E amounts." Id. She, however, advised the District that while the remainder, another $330,124, could be included in the cap waiver proposal, this amount was not included in the "conditional approval" and therefore was not eligible for appeal with the Commissioner if the cap waiver proposal was rejected by the voters. Id.

In accord with the above, the District's budget, including the amount over cap approved by the Commissioner under N.J.S.A. 18A:7D-28(e), was submitted to the voters. At the same time, but as a separate question, a proposal for a cap waiver in the amount of $629,159 was also submitted to the voters pursuant to N.J.S.A. 18A:7D-28(f).[3]

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[3] In contrast to N.J.S.A. 18A:7D-28(e), N.J.S.A. 18A:7D-28(f) provides:

> Any school district may submit a proposal to raise the amount of tax levy necessary to exceed the maximum permissible net budget permitted by this section to the legal voters of the district for type II school districts without a Board of School Estimate and to the Board of School Estimate for those school districts with a Board of School Estimate as required during the school budget approval process pursuant to chapters 22 and 54 of Title 18A of the New Jersey Statutes and section 13 of P.L.1971, c.271 (C. 18A:46-41). The proposal to raise additional tax levy to exceed the maximum permissible net budget shall be in addition to the amounts required to be approved for each school district in accordance with chapters 22 and 54 of Title 18A of the New Jersey Statutes and section 13 of P.L. 1971, c.271 (C. 18A:46-41). In the event that a school district's proposal to raise the tax levy to exceed the maximum permissible net budget is not approved in accordance with the budget approval process set forth in chapter 22 of Title 18A of the New Jersey Statutes to type II districts and for type I districts, chapter 54 of Title 18A of the New Jesey Statutes for county vocational school districts and section 13 of P.L. 1971, c.271 (C. 18A:46-41) for county special services school districts, that disapproval shall be deemed final and shall not be subject to further review of appeal.

The voters approved the current expense budget proposed by the Board, but defeated the cap waiver proposal submitted to them under N.J.S.A. 18A:7D-28(f).

The District Board appealed to the Commissioner of Education naming the governing body as respondent pursuant to direction from the Department of Education's Bureau of Controversies and Disputes.[4] In its petition, the Board challenged the action of the County Superintendent in not granting "conditional approval" of the full amount of $629,159 requested for waiver and alleged that a thorough and efficient system of schools could not be conducted without inclusion of the full amount of the waiver request.

The municipality answered the petition although objecting that it could not properly be named as respondent. It also moved for dismissal of the Board's petition arguing that the Commissioner was barred by the express language of the statute from considering any portion of the waiver proposed to and defeated by the voters under N.J.S.A. 18A:7D-28(e).

The Commissioner acted on the Borough's motion to dismiss, determining that he had the authority to consider that portion of the cap waiver request which the County Superintendent had previously determined to be necessary for T & E, but dismissing that portion of the cap waiver which had not been "conditionally approved."

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[4] By letter of May 26, 1992, which is included in the record, the Director of the Bureau of Controversies and Disputes apparently provided respondent with a copy of a memorandum to all County Superintendents regarding procedures relating to cap waiver appeals. While that memorandum is not included in the record, a letter from the Director dated June 8, 1992, indicates that all districts were required to name their governing bodies as respondents and to proceed in accord with N.J.A.C. 6:24-7.5 et seq.

The Board appealed to the State Board asserting that the Commissioner had the obligation to consider the full amount of its waiver request. The Borough cross appealed arguing that the Commissioner has no authority to consider any portion of a cap waiver request submitted to the voters and that hearing the matter under procedures not codified in regulation denies them due process.

The starting point for resolving this matter is arriving at a proper appreciation of the Commissioner's obligation to assure that each school district has sufficient fiscal resources to provide a thorough and efficient education to its students. Robinson v. Cahill 69 N.J. 449, 463 (1976) (Robinson V); Abbott v. Burke, 119 N.J. 287 (1990). This obligation is an integral part of the Commissioner's responsibility for assuring that the State's constitutional mandate is fulfilled and it is of such importance as to vest in the Commissioner the authority to direct an increase in a district's budget beyond those amounts approved by the district's voters. In re Upper Freehold Reg'l School District, 86 N.J. 265 (1981). Given the nature of the responsibility entrusted to the Commissioner, we have no doubt that the authority to fulfill it must embrace the power to direct an increase in a district's education budget in any case where such increase is necessary to satisfy the constitutional mandate, including a case where voters have defeated a proposal to exceed its statutory budget limitation. See Administrative Agency Advice (AAA) 91-0036 (July 8, 1991).

However, the power to direct such increase may properly be exercised only where an increase is necessary to enable the district to provide a thorough and efficient education. Upper Freehold, supra. Further, any increase must be limited to those amounts the

district needs in order to provide a thorough and efficient education. Id. Consequently, it is necessary to assess the adequacy of the budget as advertised and to determine whether it is possible to reallocate amounts within that budget before directing any increase. See AAA 91-0036, supra, at 6.

The record before us in this matter does not provide a sufficient basis upon which we can make these determinations. In point of fact, there is nothing in the record to indicate that the possibility of reallocation within the budget passed by the voters was considered at any point following defeat of the District's cap waiver proposal and appeal to the Commissioner.

Again the record is sparce. While the record made before the Commissioner includes a Financial Status Summary Report as of June 30, 1992, this is the only document in the record reflecting or relating to the entirety of the budget approved for advertisement and proposed to the voters. As previously indicated, the limited documentation relating to the budget approval process was not part of the record below, but was provided as attachments to the Board's brief on appeal. That documentation shows only that, by her letter of March 4, 1992, the County Superintendent "approved" the District's budget for advertisement. She also authorized the District to advertise a cap waiver proposal which included certain line item amounts designated as "approved T & E amounts" and others as "not approved T & E amounts." The District was advised that it was required to appeal the "approved T & E amounts" in the event that the proposal was rejected by the voters, but that it could not appeal those designated as "not approved T & E amounts."

Given the limited record here and the lack of regulatory

criteria relating to the budget approval process by which the County Superintendent "approved" the District's budget for advertisement,[5] we are unable to determine whether and, if so, what additional amounts are necessary in order for the District to provide a thorough and efficient education to its students. Therefore, we have no recourse but to remand this matter to the Commissioner.

In remanding this matter, we can find no basis to treat those amounts designated by the County Superintendent in her March 4 letter as "approved T & E amounts" differently from those designated in the same letter as "not approved T & E amounts" so as

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5 See N.J.S.A. 18A:7D-27. The only regulatory provision relating to the budget approval process is codified at N.J.A.C. 6:8-4.2(10), which specifies that for monitoring purposes:

> The financial element of the district shall be rated acceptable upon documentation of performance in six indicators as follows:
> i. The chief school administrator shall present to the district board of education accurate and timely fiscal and statistical reports of the district pursuant to law and rule.
> ii. The fiscal and statistical reports of the district shall be accurate and timely in transmittal to county, State and Federal offices pursuant to law and rule.
> iii. The annual budget for the district shall be developed, approved and presented to the public pursuant to law and rule.
> 1. The district board of education shall submit a proposed budget to the county superintendent of schools on or before January 15 in an authorized budget format.
> 2. The proposed budget shall be reviewed and approved by the county superintendent of schools prior to its advertisement.
> iv. The district shall have an annual audit of accounts and financial transactions pursuant to law and rule and State audits as determined by the Commissioner of Education.
> 1. Within 30 days of receipt, the district board of education shall accept and discuss the annual or State audit at a regularly scheduled board meeting.
> 2. The district board of education shall implement the recommendations cited in the annual or State audit and shall report such implementation to the Commissioner of Education.

to exclude those amounts designated as "not approved T & E amounts" from review by the Commissioner. In this respect, we emphasize that in seeking agency advice from the Attorney General, this agency asked the specific question of whether section 19(f) of the Quality Education Act (now codified at N.J.S.A. 18A:7D-28(f)) precluded the Commissioner from ordering an increase in a local budget if such an increase is necessary for the district to have a constitutionally sufficient budget. AAA 91-0036, supra, at 1. Careful review of the written agency advice responding to that question on behalf of the Attorney General shows nothing which would insulate any amounts included in a cap waiver proposal presented to the voters pursuant to N.J.S.A. 18A:7D-28(f) from the Commissioner's review where the district has asserted that such amounts are in fact necessary for it to provide a thorough and efficient education. See AAA 91-0036, supra.

Nor can we identify any other provision of law which would insulate the County Superintendent's determination from review.[6] Perhaps, as suggested by the Commissioner, it would be better for boards of education to raise their challenges to a county superintendent's determination such as that challenged here prior to the election at which the waiver is to be presented to the voters. Commissioner's decision, at 5. However, no such procedures were in place at the time that this matter arose. To the contrary, the procedures followed here, while not codified in regulation, were those specified by the Department of Education. We find nothing in

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6 Although not raised as an issue in this case, we note that the Board of Education filed its appeal on May 4, 1992, well within 90 days of the County Superintendent's determination of March 4. N.J.A.C. 6:24-1.2.

the circumstances here which would justify depriving the Board of the opportunity to demonstrate that the funds at issue are necessary, in whole or in part, for it to provide a thorough and efficient education to its students.

However, we emphasize that it is the District which has the responsibility to convince the Commissioner that reallocation within the budget approved by the voters is impossible. AAA 91-0036, supra, at 6. In this respect, although the proceedings in this matter subsequent to defeat of the District's budget cap waiver proposal have been styled after those applicable to controverted cases, in resolving this matter, the Commissioner essentially is required to apply his expertise to a set of facts and figures and determine whether the amounts at issue are necessary, in whole or in part, to enable the district to provide a thorough and efficient education to its students. East Windsor Reg'l Bd. of Ed. v. State Bd. of Ed., 172 N.J. Super. 547, 551-52 (1980).

Moreover, in contrast to those cases in which a municipal governing body has acted pursuant to N.J.S.A. 18A:22-37 to establish the amount necessary for a thorough and efficient education following voter defeat of the budget proposed by the district board of education, the municipal governing body has no statutorily prescribed role where, as here, the budget proposed to the voters was approved and the governing body was not called upon to "determine the amount necessary to be appropriated, for each item appearing in such budget, to provide a thorough and efficient system of schools in the district." N.J.S.A. 18A:22-37. Further, we find no indication that this agency would be precluded from affording complete relief to the District if the Borough Council were not

joined as a respondent in the proceedings, and we do not find under the circumstances here that the Borough Council is an indispensable party to these proceedings. Eg., Allen B. Dumont Laboratories, Inc. v. Marcalus Mfg. Co., 30 N.J. 290 (1959); Garnick v. Serewitch, 39 N.J. Super. 486 (Ch. Div. 1956). However, while the governing body is not an indispensable party and might not even be entitled to standing as a party as a matter of law, see, e.g., N.J.A.C. 1:1-16.1; Capra v. Board of Education of the Borough of Eatontown, decided by the State Board, November 4, 1987, we fail to see on the basis of the papers submitted by the parties how affording the governing body the opportunity to participate on a voluntary basis would deprive it of due process.

In sum, based on the foregoing, the State Board of Education reverses the Commissioner's decision and remands this matter to him with the direction that he determine whether each of the items for which the District proposes to allocate the additional $629,159 is necessary in order for the District to provide a thorough and efficient education to its students, and whether or to what degree the budget adopted can be reallocated so as to include those amounts.[9]

December 2, 1992

Date of mailing DEC 04 1992

[9] In arriving at our conclusion, we have not considered exceptions submitted by Respondent on November 16 in that exceptions were due on November 6. N.J.A.C. 6:2-1.17.

27-92

27-92

IN THE MATTER OF THE TENURE	:	
HEARING OF PATRICIA WILSON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
EAST ORANGE, ESSEX COUNTY.	:	
	:	

FEBRUARY 25, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1049-91
AGENCY DKT. NO. 402-12/90

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE,

Petitioner,

v.

PATRICIA WILSON,

Respondent.

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

Nancy I. Oxfeld, Esq., for respondent
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: December 23, 1991 Decided: January 7, 1992

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

On or about December 21, 1990, the Board of Education of the city of East Orange certified charges of incompetency and incapacity against respondent, Patricia Wilson, a teacher of English as a second language at East Orange High School. On January 28, 1991, respondent filed an answer denying the charges and requesting that the tenure charges be dismissed. On January 30, 1991, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law for hearing 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 telephone prehearing conference was held on May 9, 1991, at which time the issues were isolated. The hearing was scheduled for October 2, 3, and 4, 1991, at the Office of Administrative Law. As a result of a settlement conference held on September 6, 1991, a tentative settlement was reached and the hearing was adjourned to February 10 and 11, 1992. The settlement was based on respondent's application for a disability pension to be effective January 1, 1992.

A Stipulation of Settlement was filed on November 19, 1991, outlining the terms of the settlement. On December 16, 1991, the undersigned was advised that respondent had been approved for an ordinary disability pension effective January 1, 1992; that being so, the settlement could be effectuated. A notice of determination from the Board of Trustees of the Teachers' Pension and Annuity Fund was filed with the undersigned on December 23, 1991.

The parties have prepared the attached Stipulation of Settlement and letters of December 13, 1991 and December 23, 1991, from counsel for respondent, outlining the terms of the settlement. Those documents are attached and fully incorporated herein.

I have reviewed the record and the settlement terms, and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be and are hereby concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 7, 1992
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

1/13/92
DATE

Maureen Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 15 1992
DATE

OFFICE OF ADMINISTRATIVE LAW

jrp/e

LAW OFFICES

BALK, OXFELD, MANDELL & COHEN

A PROFESSIONAL CORPORATION

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JACK MANDELL
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DORA P. ROTHSCHILD
OF COUNSEL

NEW YORK OFFICE
225 BROADWAY, SUITE 1505
NEW YORK, NEW YORK 10007
(212) 619-4100

RESPOND TO: NEWARK

December 23, 1991

Honorable Elinor Reiner
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: In the Matter of the Tenure Hearing of
Patricia Wilson, School District of the
City of East Orange, Essex County
OAL DKT. NO. EDU-1049-91
Agency Dkt. No. 402-12/90

Dear Judge Reiner:

As a follow-up to my previous letter to you concerning the above, I enclose herewith a copy of the notification that the Respondent received from the Division of Pensions indicating that her oridinary disability pension would begin effective January 1, 1992.

Respectfully yours,

BALK, OXFELD, MANDELL & COHEN
By:

NANCY I. OXFELD

NIO:mp
Enclosure
cc: Melvin Randall, Esq.;
Michael Mulkeen;
Patricia Wilson.

LAW OFFICES

BALK, OXFELD, MANDELL & COHEN

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RESPOND TO: NEWARK

December 13, 1991

Honorable Elinor Reiner
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: In the Matter of the Tenure Hearing of
Patricia Wilson, School District of the
City of East Orange, Essex County
OAL DKT. NO. EDU-1049-91
Agency Dkt. No. 402-12/90

Dear Judge Reiner:

I am pleased to inform you that the Respondent in the above, Patricia Wilson, notified on December 11, 1991 that she had been approved for an ordinary disability pension effective January 1, 1992. There is thus no problem with proceeding with the settlement in the above.

Respectfully yours,

BALK, OXFELD, MANDELL & COHEN
By:

NANCY I. OXFELD

NIO:mp
cc: Melvin C. Randall, Esq.;
Patricia Wilson;
Michael Mulkeen.

DEC 16 12 24 PM '91

JIM FLORIO
GOVERNOR
DOUGLAS C. BERMAN
STATE TREASURER

STATE OF NEW JERSEY
DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS
CN 295
TRENTON, NEW JERSEY 08625-0295

MARGARET M. McMAHON
DIRECTOR

December 6, 1991

Patricia Q. Wilson
38 Carlton Street
East Orange, NJ 07017

In reply, refer to:
TPAF #353355
Notice of Determination

Dear Ms. Wilson:

The Board of Trustees, Teachers' Pension & Annuity Fund at its meeting of December 5, 1991 approved your application for Ordinary disability under Maximum effective January 1, 1992.

Your retirement allowance as a disability retirant under age 60 is subject to adjustment if your earnings from employment after retirement exceed the difference between the pension portion of your retirement allowance and the salary attributable to your former position

It is noted that you elected to receive benefits under Maximum. You have the right to change this election to another type of retirement payment provided you file an amended application within 30 days from the date of Board approval; otherwise, retirement will stand as approved and may not be changed for any reason whatsoever thereafter.

The statute permits the Board of Trustees to require a disability retirant who is under 60 years of age to undergo annual medical examinations to determine if he continues to be totally and permanently disabled and therefore eligible for continued receipt of his disability retirement allowance.

Your first retirement check cannot be disbursed until a minimum of 30 days has elapsed from the date of Board approval or your effective date of retirement, whichever is the later date.

Sincerely,

Michael Weik
Secretary
Teachers' Pension and Annuity Fund

MW:pe
c: Marie Schweickert w/file
Employer - East Orange Board of Education

New Jersey Is An Equal Opportunity Employer

LAW OFFICES

BALK, OXFELD, MANDELL & COHEN

A PROFESSIONAL CORPORATION

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RESPOND TO: NEWARK

November 18, 1991

Honorable Elinor Reiner
Office of Administrative Law
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: In The Matter of the Tenure Hearing
of Patricia Wilson
OAL DKT. NO. EDU 01049-91

Dear Judge Reiner:

Enclosed please find a stipulation of settlement in the above matter which has been signed by both counsel.

Respectfully yours,

BALK, OXFELD, MANDELL & COHEN
By:

NANCY I. OXFELD

NIO:mp
ENclosure
cc: Melvin C. Randall, Esq.;
Patricia Wilson;
Michael Mulkeen.

NOV 3 1991

FILED
Nov 13 3 19 PM '91

BALK, OXFELD, MANDELL & COHEN
50 Commerce Street
Newark, New Jersey 07102
(201) 642-0161
Attorneys for Respondent

BEFORE THE COMMISSIONER
OF EDUCATION OF THE STATE
OF NEW JERSEY
OAL DKT. NO. EDU-1049-91
Agency Dkt. No. 402-12/90

IN THE MATTER OF THE TENURE HEARING OF PATRICIA WILSON, SCHOOL DISTRICT OF THE CITY OF EAST ORANGE, ESSEX COUNTY.	:	STIPULATION OF SETTLEMENT

The parties to the above matter have agreed to an amicable resolution of this litigation. The resolution is based upon agreement as to the following facts:

1. The Respondent, Patricia Wilson, is a tenured teacher of English as a Second Language employed by the Petitioner School District of the City of East Orange.

2. Commencing with the 1988-89 school year, the Respondent exhibited performance problems, which were documented in observations conducted by a number of supervisors and administrators employed by the Petitioner.

3. As a result of these problems, the Petitioner decided in November, 1990 to certify tenure charges against the Respondent. The charges filed against the Respondent were charges of inefficiency and incapacity based upon an alleged psychiatric disability.

4. At the request of the Petitioner, the Respondent was evaluated by a psychiatrist, William Furst, M.D. Dr. Furst diagnosed the Respondent as suffering from schizophrenia, paranoid type, chronic.

5. The performance problems which the Respondent exhibited in the classroom are attributable to the fact that the Respondent suffers from a psychiatric illness.

6. The Respondent has filed an application to the Teachers' Pension and Annuity Fund requesting ordinary disability retirement benefits to become effective January 1, 1992.

Based upon the above factual agreements, the parties hereby agree to resolve this matter on the following basis:

1. Patricia Wilson will resign her position of employment as teacher with the East Orange Board of Education effective December 31, 1991;

2. Patricia Wilson will continue to pursue her application for ordinary disability retirement from the Teachers' Pension and Annuity Fund effective January 1, 1992;

3. Based upon the documentation of disability, the Respondent will be placed upon paid sick leave through December 31, 1991;

4. The Board of Education will withdraw the tenure charges in this matter;

5. Should the Board of Trustees of the Teachers' Pension and Annuity Fund refuse to approve the granting of an ordinary disability pension to the Respondent, the tenure charges will proceed to hearing;

6. This agreement represents a complete resolution of all issues outstanding between the parties. Neither party shall be entitled to any relief in this matter other than the relief set forth in this agreement.

BALK, OXFELD, MANDELL & COHEN
Attorneys for Respondent
By:

NANCY I. OXFELD

Dated: 11/14/91

LOVE & RANDALL, ESQS.
Attorneys for East Orange Board of Education
By:

MELVIN RANDALL

Dated: 11/5/91

OAL DKT. NO. EDU 1049-91

IN THE MATTER OF THE TENURE	:	
HEARING OF PATRICIA WILSON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
EAST ORANGE, ESSEX COUNTY.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standard for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983) The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

FEBRUARY 25, 1992

DATE OF MAILING - FEBRUARY 25, 1992

28-92

28-92

RITA BROSS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LITTLE SILVER, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

FEBRUARY 25, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
WITHDRAWAL
OAL DKT. NO. EDU 6111-90
AGENCY DKT. NO. 211-6/90

RITA BROSS,
Petitioner,
v.
LITTLE SILVER
BOARD OF EDUCATION,
Respondent.

Arnold M. Mellk, Esq., for petitioner (Wills, O'Neill & Mellk, attorneys)

Robert E. Murray, Esq., for respondent (Murray, Murray & Corrigan, attorneys)

Record Closed: January 13, 1992 Decided: January 14, 1992

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

Rita Bross appealed the Little Silver Board of Education's decision to withhold her employment and adjustment increments for the 1990-91 school year.

Bross' petition of appeal was filed with the Commissioner of Education on June 27, 1990 and timely answered by the Board. It was 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. This judge held a prehearing conference on September 28, 1990, at which procedures were settled and the matter was set down for hearing on

March 3 and 4, 1991. The matter was rescheduled once because of an attorney scheduling conflict and then placed on the inactive list for six months by Order dated June 25, 1991 because the parties agreed to submit the matter to binding arbitration.

Prior to expiration of the inactive period, the judge wrote to counsel and requested a status report. Counsel supplied the Opinion and Award of Robert L. Mitrani, arbitrator, dated July 1, 1991. Letters of January 8, 1992 from Mr. Mellk and Ms. Maxwell.

There no longer being a controversy, the matter is moot. The parties seek nothing of the Commissioner and, therefore, of this tribunal. I **DETERMINE** the matter to be **WITHDRAWN** and direct the Clerk of the Office of Administrative Law to return the case file to the Department of Education.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

14 JANUARY 1992
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

1/17/92
Date

Maureen Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 23 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

km

RITA BROSS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LITTLE SILVER, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record and order of withdrawal granted by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner agrees with the withdrawal order. Consequently, the matter is no longer deemed to be a dispute before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 25, 1992

DATE OF MAILING - FEBRUARY 25, 1992

29-92

29-92

RICKY ROMANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

FEBRUARY 25, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7075-91
AGENCY DKT. NO. 176-6/91

RICKY ROMANO,
Petitioner,
v.
HOBOKEN BOARD OF EDUCATION,
Respondent.

Alan S. Porwich, Esq., for petitioner
(Feintuch, Porwich & Feintuch, attorneys)

David F. Corrigan, Esq., for respondent
(Murray, Murray & Corrigan, attorneys)

Record Closed: January 13, 1992 Decided: January 15, 1992

BEFORE **RICHARD McGILL,** ALJ:

Ricky Romano filed a petition requesting the difference between his full wages and temporary disability benefits during a period when he was out of work due to injury and restoration of sick days pursuant to *N.J.S.A.* 18A:30-2.1. The matter was transmitted to the Office of Administrative Law on July 23, 1991 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.*

Prior to hearing, the parties agreed to an amicable resolution of the matter and submitted the attached Stipulation of Settlement. Having reveiwed the record and the settlement terms, I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Jan. 15, 1992
Date

Richard McGill
RICHARD McGILL, ALJ

Receipt Acknowledged:

1/17/92
Date

Maureen Kelley
DEPARTMENT OF EDUCATION

JAN 24 1992
Date

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

am

FEINTUCH, PORWICH & FEINTUCH
ATTORNEYS AT LAW

PHILIP FEINTUCH
ALAN S. PORWICH
HOWARD S. FEINTUCH

26 JOURNAL SQUARE
SUITE 1003
JERSEY CITY, NEW JERSEY 07306
PHONE: (201) 656-8600
FAX: (201) 656-7125

JAN 13 12 52 PM '92

January 9, 1992

Honorable Richard McGill, A.L.J.
Office of Administrative Law
185 Washington Street
Newark, NJ 07102

Re: Ricky Romano v. Board of the City of Hoboken
OAL Docket No. EDU 07075-91N

Dear Judge McGill:

Enclosed herewith please find original and one copy of Stipulation of Settlement in connection with the above referenced matter. Kindly file same, returning a filed copy to me in the envelope provided for your convenience.

Thank you.

Respectfully yours,

ALAN S. PORWICH

ASP:rjd
Encls.

cc: David Corrigan, Esq. (w/encl.)
Mr. Ricky Romano (w/encl.)

FILED
JUN 12 52 PM '92

FEINTUCH, PORWICH & FEINTUCH
26 Journal Square
Suite 1003
Jersey City, New Jersey 07306
(201) 656-8600
Attorneys for Petitioner

RICKY ROMANO, Petitioner,	:	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
vs.	:	OAL DKT. NO. EDU 07075-91
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, COUNTY OF HUDSON, Respondent.	:	STIPULATION OF SETTLEMENT

THIS MATTER having been brought before the Office of Administrative Law, with Feintuch, Porwich & Feintuch appearing on behalf of petitioner and Murray, Murray & Corrigan appearing on behalf of respondent, and the parties having resolved the issues in dispute,

IT IS HEREBY STIPULATED AND AGREED AS FOLLOWS:

1. Respondent shall pay to petitioner the sum of $2,019.79 in settlement of all claims for back wages for the period from April 21, 1988 through June 30, 1988.

2. Respondent shall restore any sick days deducted from petitioner's sick leave bank for the period from April 21, 1988 to June 30, 1988.

3. Petitioner agrees to dismiss his petition on completion of negotiations [illegible] 2.

dfc ASP

WE HEREBY AGREE TO THE FORM AND ENTRY OF THE ABOVE STIPULATION.

FEINTUCH, PORWICH & FEINTUCH
Attorenys for Petitioner

By: _____
ALAN S. PORWICH

DATED: 1/6/92

MURRAY, MURRAY & CORRIGAN
Attorneys for Respondent

By: _____
DAVID F. CORRIGAN

DATED: 1-2-92

OAL DKT. NO. EDU 7075-91

RICKY ROMANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

FEBRUARY 25, 1992

DATE OF MAILING - FEBRUARY 25, 1992

(SB) 29-92

SB #29-92

R.F., individually and by her parents R. and M.F., R.F., AND M.F.; L.H., individually and by her parents T. and C.H., T.H. AND C.H.,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PARK RIDGE, BERGEN COUNTY, NEIL GIOVANNIELLO, LOUISE RUHLE, GEORGE APFEL, KATHLEEN COLEMAN, GEORGE CRESTAS, GERALD HOFFMAN, JAMES VIOLANTE, EMIL BINOTTO, AND CATHERINE MOZAK,	:	DECISION ON MOTION
RESPONDENTS-RESPONDENTS.	:	
	:	

Decided by the Commissioner of Education, June 18, 1992

For the Petitioners-Appellants, Meri Freedman and Thomas Hennessy, pro se

For the Respondents-Respondents, Fogarty & O'Hara (Stephen R. Fogarty, Esq., of Counsel)

Upon review of the papers submitted in this appeal, we find that the matter is moot, and we therefore dismiss the appeal. In so doing, we emphasize that the appeal before us is from a Commissioner's decision denying emergent relief and that our decision does not dispose on the merits of the underlying petition.[1]

November 4, 1992

Date of mailing NOV 05 1992

1 We note that the parties have represented that the underlying petition is the subject of seperate proceedings and that the hearing in the matter was conducted before an Administrative Law Judge (ALJ) on October 2, 1992.

30-92

30-92

DIANE G. CAIROLI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS, DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, candidate for Educational Media Specialist Certificate, alleged improper denial of said certificate by New Jersey State Board of Examiners.

ALJ found petitioner did not meet requirements of N.J.A.C 6:11-11.17 as she needed 21 semester hours of professional education courses and a semester of supervised student teaching. ALJ concluded petitioner did not submit sufficient evidence to permit substitute education or experience for the requirements she lacked. ALJ affirmed denial of petitioner's application.

Commissioner adopted findings and determination in initial decision as his own.

FEBRUARY 26, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1190-91
AGENCY DKT. NO. 9-1/91

DIANE G. CAIROLI,
Petitioner,
v.
NEW JERSEY STATE BOARD OF EXAMINERS, DEPARTMENT OF EDUCATION,
Respondent.

Diane G. Cairoli, petitioner, *pro se*
Arlene Goldfus Lutz, Deputy Attorney General, on behalf of the respondent (Robert J. Del Tufo, Attorney General of New Jersey, attorney)

Record Closed: November 28, 1991 Decided: January 10, 1992

BEFORE **ROBERT W. SCOTT,** ALJ:

CASE STATEMENT AND HISTORY

Sometime prior to September 13, 1990, the petitioner submitted an application to the Department of Education for an Educational Media Specialist Certificate. On September 13, 1990, the respondent heard the petitioner's application and on October 18, 1990, denied the petitioner's request. On October 30, 1990, the petitioner was notified of the respondent's denial and on January 14, 1991, she submitted a petition requesting that the matter be considered a controversy under the provisions of *N.J.S.A.* 18A:6-9. On January 30, 1991, the respondent filed an answer to the petitioner's petition. On February 5, 1991, the matter was transmitted to the Office of Administrative Law for determination as a contested case. A hearing was held on September 30, 1991 and the record was closed after the Deputy Attorney General submitted a post-hearing argument in writing.

LEGAL DISCUSSION

The governing regulation in this matter is *N.J.A.C.* 6:11-11.17. That code provision sets forth the requirements for the certification of Educational Medical Specialist. Those requirements are as follows: 1) a Master's degree from an accredited institution; 2) a standard New Jersey Teacher's certificate or Associate Educational Media Specialist Endorsement; 3) one year of teaching or one year experience as an Associate Educational Media Specialist; and 4) completion of a graduate curriculum or a minimum of 30 hours semester credit of post graduate studies.

Pursuant to *N.J.A.C.* 6:11-3.24, the respondent exercises supervisory authority over the issuance of teaching certificates and may substitute alternate education and/or experience for the above requirements.

It is not disputed by the petitioner that she fails to meet one of the requirements set forth above, that being a standard New Jersey Teacher's certificate or an Associate Educational Medial Specialist Endorsement. Under the provisions of *N.J.A.C.* 6:11-7.3 to be eligible for a teacher's certificate an applicant is required to have 30 semester credit hours of professional education courses and, pursuant to *N.J.A.C.* 6:11-7.3(e), complete a semester of supervised student teaching.

UNDISPUTED FACTS AND ISSUE

The respondent does not dispute that the petitioner has completed nine credit hours in professional education courses. The respondent also does not dispute that through education and experience the petitioner has completed what is referred to as the subject matter component (Educational Media) for qualification of a teaching certificate. Further the petitioner has also completed the National Teacher's Examination. The issue in this matter is whether or not the petitioner's education and experience demonstrates the equivalant of 21 semester hours in professional education courses and a semester of supervised student teaching.

In Exhibit P-1, the petitioner has set forth a complete statement concerning her education and employment experience. The petitioner has also shown that she holds a Public School Teacher's Certificate in the State of New York for a School Media Specialist (Library). In that state, she also holds a Public Librarian's

Professional Certificate. In Pennsylvania, she holds a certificate of Public Librarianship and in this state she holds a Professional Librarian's Certificate.

What follows is a summary of Exhibit P-1 and the petitioner's testimony. In 1980, the petitioner received a Bachelor of Arts Degree in Art History from the University of Notre Dame. In 1983, she received Masters of Science Degree in Library Service from Columbia University. The next school year the petitioner was employed as a School Library Media Specialist. From September 1984 through the present the petitioner has been a School Librarian at the junior and senior high school level. The petitioner testified that while she was taking a media course at Columbia University she student taught at the "Dalton School (First Program)." She observed various classes and prepared and taught her own lesson plans. She met regularly with the supervisor of the school and her Columbia University instructor about teaching methods in classroom instruction. The petitioner argues that this experience meets the requirements of a semester of student teaching.

As to her lack of professional education courses, the petitioner argues that the following experience makes up for the lack of 21 semester hours of these types of courses. Over the past seven years as a School Librarian the petitioner has conducted orientation classes and taught library skills to what I would refer to as junior and senior high school students. She has prepared lesson plans, work sheets, handouts, etc. and has prepared testing material. She has also worked with classroom teachers in planning student research papers. She has helped teach and lecture students on journalistic and public speaking skills. She has done those things which teachers do in public schools such as attend faculty meetings and conduct inservice programs, workshops, and conferences.

When an application is submitted to any professional board and that professional board has taken action considerable weight must be given to that decision because of the Board's expertise. In this particular case, the respondent has considerable expertise in educational matters and especially in issuing certificates to individuals who teach and are employed in our public schools. As in any administrative determination, the respondent's action should only be overturned if it appears that the Board acted capricious, arbitrary or unreasonable. The undersigned claims to have no particular expertise in professional education. The undersigned has a Bachelor of Science Degree as well as a *Juris Doctorate* degree. I have also completed 15 hours in a Masters Degree Program. I have also been a college instructor for three semesters. Again, I do not feel that this particular

education and experience provides me with any expertise in professional education. However, upon examining Exhibit P-1 and listening to the testimony of the petitioner I find myself agreeing with the decision of the respondent. In other words, there is not substantial evidence to show that the respondent acted arbitrary, capricious or unreasonable in not accepting the petitioner's experience for professional education and student teaching. What the petitioner is basically asking for is the acceptance of her experience for approximately seven courses in professional education. The undersigned is of the opinion that her experience has not reached that level. Further what she has described as her student teaching experience is not compatible with what the undersigned believes to be the normal student teaching experience for a semester.

FINDINGS OF FACT

Based upon the evidence before me I **FIND** that the petitioner has received a Bachelor of Arts Degree in Art History and a Master of Science Degree in Library Service. For the past year seven years the petitioner has been a School Librarian at the junior and senior high school level. For a year prior to this she was a School Library Media Specialist. She holds a School Media Specialist (Library) and a Public Librarian's Professional Certificate in New York. She has a Certificate of Public Librarianship from Pennsylvania and in this state she holds a Professional Librarian Certificate. The petitioner has completed nine hours of Professional Educational courses. The petitioner has not completed a Supervised Student Teaching Program for one semester. The petitioner however, has passed the National Teacher's Examination. The petitioner has taught high school students journalistic, library and public speaking skills. The petitioner has participated in curriculum committees, faculty meetings, inservice programs, workships and conferences. Her experience however is not equivalent to 21 semester hours of Professional Education courses.

CONCLUSION

I **CONCLUDE** that the petitioner has not met the requirements of *N.J.A.C.* 6:11-11.17 for the certificate she seeks nor has she submitted sufficient evidence for the respondent to permit substitute education or experience for her failure to meet the requirements of this regulation. I therefore **AFFIRM** the action of the respondent in denying the petitioner's application.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 10, 1992
Date

Robert W Scott
ROBERT W. SCOTT, ALJ

Receipt Acknowledged:

1/14/92
Date

Maureen Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 17 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

slf

EXHIBITS

On behalf of the Petitioner:

P-1 Booklet prepared by the petitioner on August 4, 1990
P-2 Results of petitioner's National Teacher's Examination

On behalf of the Court:

C-1 Decision of the State Board of Examiners dated October 18, 1990
C-2 Petitioner's petition

WITNESSES

On behalf of the Petitioner:

Diane G. Cairoli, petitioner

On behalf of the Respondent:

John T. Exkstein, Jr., Principal Examiner, New Jersey Department of Education

OAL DKT. NO. EDU 1190-91

DIANE G. CAIROLI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS, DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon careful consideration, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge, so that the action of the State Board of Examiners in denying petitioner's application is judged to have been fully appropriate.

Accordingly, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 26, 1992

DATE OF MAILING - FEBRUARY 26, 1992

31-92

31-92

MARLENE UNTERBERGER,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MIDDLESEX COUNTY,

RESPONDENT,

AND

ELAINE B. GOLDSTEIN AND PAULA GREENE,

INTERVENORS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, tenured teaching staff member, alleged Board violated her tenure and seniority rights by reducing her full-time employment to part-time for 1989-90 school year and by riffing her in 1990-91 school year. Intervenors Greene and Goldstein contended petitioner's assignments were proper.

Initial decision found petitioner was entitled to full-time position of Teacher of Tools for Life as she was more senior than Intervenor Goldstein by virtue of comprehensive business endorsement. (N.J.A.C. 6:3-1.10) Moreover, petitioner was entitled to mitigated compensation. Petitioner's claim of superior entitlement to teach business mathematics and consumer math taught by Intervenor Greene was rejected as Greene properly possessed general business endorsement.

Commissioner affirmed in part and rejected in part the initial decision. Commissioner concurred with ALJ's evaluation of Intervenor Greene's entitlement to position of business mathematics and consumer math. Commissioner reversed ALJ's finding that Edgar School was in elementary category for seniority purposes because it was "historically" an elementary school. Commissioner found instead that instruction provided fell into secondary category pursuant to N.J.A.C. 6:3-1.10(1)19 because all grades at Edgar School including 6th grade were departmentalized. Commissioner remanded this matter for further findings of fact and conclusions of law as to whether Board knew the Edgar School was departmentalized and thus in secondary category for seniority purposes as it is not possible to determine whether the Board made the proper reduction in force decisions based on the seniority determinations in the matter. Commissioner further directed that on remand should it be determined that the Board knew the instruction at Edgar School was departmentalized and thus in the secondary category, the ALJ is to address Board's allegations relative to Tools for Life not being a full-time assignment and to assess petitioner's right to full-time employment.

FEBRUARY 28, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
CONSOLIDATED
OAL DKT. NO. EDU 7252-89
AGENCY DKT. NO. 283-9/89
OAL DKT. NO. EDU 4216-90
AGENCY DKT. NO. 126-5/90

MARLENE UNTERBERGER,
Petitioner,
v.
METUCHEN BOROUGH BOARD OF EDUCATION,
Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)
James E. Stahl, Esq., for respondent (Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, attorneys)
Sanford R. Oxfeld, Esq., for intervenors Elaine B. Goldstein and Paula Greene (Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: September 13, 1991 Decided: January 10, 1992

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

Marlene Unterberger (petitioner) claims the Metuchen Borough Board of Education (Board) violated her tenure and seniority rights with respect to its reduction of her full-time employment as a teacher to part-time employment for the 1989-90 year and, by separate Petition of Appeal consolidated herein, she claims it also violated her tenure and seniority rights with respect to the elimination of her employment by way of a reduction-in-force for 1990-91. Alternatively, petitioner seeks monetary relief for 1989-90 upon the assertion the Board failed to give her timely notice of the reduction of her full-time employment. The Board denies the allegations raised by petitioner and is joined

by Elaine B. Goldstein and Paula Greene (intervenors), teachers in the Board's employ who have a substantial interest in the outcome of the matter, in its assertion that its assignments of petitioner for 1989-90 and for 1990-91 are lawful and proper in all respects.

After the matters were transferred on separate dates to the Office of Administrative Law as contested cases under the provisions of N.J.S.A. 52:14F-1 et seq., a telephone prehearing conference was conducted during which all parties agreed the matters should be consolidated for purposes of adjudication. Thereafter, the parties agreed that all relevant and material facts could be stipulated and that the matter should be decided by way of cross-motions for summary decision. However, a hearing eventually was held to resolve the issue whether, as petitioner asserts, the Board's Edgar School, grades 6 and 7, is a "middle school" with grade 7 being secondary as a consequence of departmentalization or, as the Board asserts, the school is elementary as a consequence of a reorganization. The parties did file briefs in support of their respective positions. An extension of time was requested and granted for the preparation of this initial decision.

FACTS AND STIPULATION OF FACTS

The parties did file a stipulation of fact, together with an amended stipulation of fact, which includes reference to certain exhibits. The facts stipulated by the parties shall be presented, as submitted, while the exhibits referenced therein and the facts established by those exhibits shall be discussed when appropriate and as noted in brackets, thusly [].

1. The Respondent in this matter is the Metuchen Board of Education.

2. Petitioner, Marlene Unterberger, claims tenure and/or seniority rights to teach the following courses in the Respondent's school district as a result of certifications:

   A. Business Mathematics;

   B. Consumer Mathematics;

C. Tools For Life.

The syllabus of each course is attached to this Stipulation as Exhibit "A" (Business Mathematics), Exhibit "B" (Consumer Mathematics) and Exhibit "C" (Tools for Life).

> [According to the syllabi, BUSINESS MATH is designed to provide students with 'experience' in percentages, fractions, interests, discounts, salary and wage computation and related office and marketing mathematical functions met in 'typical jobs settings' where students "work" for small businesses. Subject areas covered in this course are integers, common fractions, percentages, mixed numbers and decimals ostensibly emphasizing the four basic mathematical processes of addition, subtraction, multiplication, and division; buying problems in regard to sales tickets, credit card sales, sale taxes, cash handling, and reconciling cash drawers; special buying problems regarding fractions of a unit; trade discounts and cash discounts; establishing retail prices with regard to mark-ups and mark-downs; and, payroll. The text used is Business Mathematics, published by McGraw Hill. CONSUMER MATHEMATICS, a half-year course, relies on the same text as business math and emphasizes the subject areas of commissions, manufacturing cost control including depreciation, business organization of single proprietorship, partnership, and corporate forms of ownership including stocks and dividends, measuring business progress, and banks and banking services. Consumer mathematics then emphasizes the purchase of food, clothing, transportation, home expenses, life and health insurance, money management, and personal money records. TOOLS FOR LIFE is identified as an "interdisciplinary course" for sixth and seventh graders who, the course intends, will acquire study skills, skills in personal financing including banking, household

economics, comparison shopping, and will learn about income taxes, insurance, the need for community participation, and career planning. This course does not rely upon the text, Business Math; rather, two texts are assigned, Strengthening of Skills and It's Your Future.]

3. Business Mathematics and Consumer Mathematics are taught at Metuchen High School, a secondary school, and contained in the Practical Arts Department.

4. Tools For Life is a program under the immediate supervision of the principal and assistant superintendent and is taught at the Edgar School to 6th and 7th graders. Grades 6 and 7 at the Edgar School are departmentalized. Petitioner asserts that the Edgar School is a middle school and grade 7 is secondary as a result of the departmentalization of the school.

Respondent asserts that Edgar School is an elementary school as a result of the reorganization of the district in June of 1988. Respondent further asserts that as a consequence of the Resolution of June, 1988 (Exhibit "I") and the Assistant Superintendent's memorandum (Exhibit "J") that Edgar School is classified as an elementary school.

[Exhibit I is not a "Resolution" adopted by the Board; rather, it is an excerpt of an agenda for a board meeting held June 28, 1989. The relevant portion shows that a motion was to be made to house grades kindergarden through seven in three elementary schools with the grade configuration of K-2, 3-5, and 6-7. Exhibit J is apparently an excerpt from an unidentified document in which the assistant superintendent states that as of September, 1989, the district's three elementary schools are to be reorganized in the following manner: primary grades will be served at

> Moss elementary, intermediate grades at Campbell elementary, and middle grades at Edgar elementary. The excerpt also states that the assistant superintendent reported "two new practical cycle courses in the 6-7 program, Tools for Life, which grades were assigned to the Edgar School which is also identified as an 'elementary school.']

Petitioner denies that the Resolution or memorandum results in classification of Edgar School as an elementary school and asserts that the Tools For Life course is a practical arts offering as set forth in the assistant superintendent's memorandum (Exhibit "J").

> [The testimony of Assistant Superintendent Marcia Holtzman establishes that the Edgar School contained for many years kindergarden through fifth grade, then for several other years kindergarden though sixth grade, then kindergarden through seventh grade, and since 1989-90 grades six and seven. Grade eight is part of the high school. When the Board's three elementary schools were reorganized as of 1989-90, there was no Board resolution to determine which grade levels were to be assigned to which of the three elementary schools. Rather, the grade levels were decided administratively. Nevertheless, the Edgar School is, I am persuaded, considered by its history to be an elementary school while both grades, grades six and seven, are departmentalized and have been since September 1989.]

5. The Respondent, Board of Education, has not established any requirement with respect to endorsements for the teaching of Tools for Life. The Board has not submitted the course to the county superintendent of schools for determination of the appropriate endorsement to teach that course.

6. Petititioner holds, and held at all times during her employment, an instructional certificate with a comprehensive business endorsement. The personnel record of petitioner is annexed hereto as Exhibit "H". Her employment history in the district is as follows:

1984-85	full-time	Typing 1 - 3 sections Typing II - 1 section Shorthand I - 1 section
1985-86	4/5	Typing I - 3 sections Shorthand I - 1 section
1986-87	3/5	Typing I - 2 sections Typing II - 1 section
1987-88	full-time	Accounting I - 2 sections Accounting II - 1 section Keyboarding - 1 section Business Math - 1 section
1988-89	full-time	Keyboarding - 1 section Accounting 1 - 2 sections Accounting II - 1 section Business Math - 1 section
1989-90	3/5	Accounting 1 - 2 sections Accounting II - 1 section

[A comprehensive business endorsement on an instructional certificate authorizes the holder to teach business education subjects in all public schools. According to the rule, N.J.A.C. 6:11-6.2, included in the comprehensive business education endorsements are the subject areas of bookkeeping and accounting, secretarial studies, general business education, business math, business English.]

[Based on petitioner's stipulated employment service with the Board, she acquired a tenure status under N.J.S.A. 18A: 28-5 and, as of June 30, 1989 she also acquired 4.4 years seniority which, under N.J.A.C. 6:3-1.10 (L) (19) is generally in the secondary category. It is noted that petitioner's seniority in accounting, keyboarding and business math is not as great as 4.4 years but the amount of seniority in specific subject areas is not critical in this case. It will suffice to note she has 4.4 years seniority generally in the secondary category.]

7. Paula Greene holds an instructional certificate with endorsements as teacher of general business studies, and teacher of secretaries studies. Her employment history in the district has been as follows:

1983-84	3/5	Typing I - 2 sections Business Math - 1 section
1984-85	3/5	Typing I - 3 sections
1985-86	3/5	Typing I - 2 sections Typing II - 1 section

1986-87	full-time	Typing I - 3 sections Typing II - 1 section Shorthand - 1 section
1987-88	full-time	Typing I - 3 sections Typing II - 1 section Shorthand - 1 section
1988-89	full-time	Typing I - 3 sections Typing II - 1 section Shorthand I - 1 section
1989-90	full-time	Typing I - 3 sections 8th Grade Typing - 1 section Business Math - 1 section

8. Consumer Math, commencing January 26, 1990, has been taught by Paula Greene.

[Under N.J.A.C. 6:11-6.2, the general business endorsement on an instructional certificate authorizes the holder to teach general business studies in all public schools. The rule provides that general business studies normally include business law, economic geography, economics, social business studies, consumer education sales, retailing, and advertising. The rule also authorizes the holder of an endorsement for secretarial studies to teach shorthand, typewriting, office procedures, business machines, business English.]

[Intervenor Greene, by virtue of her employment with the Board, acquired a tenure status and, as of June 30, 1989, she acquired 4.8 years seniority under N.J.A.C. 6:3-1.10(l) in, generally, the secondary category. As with petitioner, intervenor Greene's seniority in the specific subjects of shorthand, eighth grade typing, and business math was not as great as 4.8 years on June 30, 1989 but it is not crucial to this decision other than to note her 4.8 years generally in the secondary category.]

9. Elaine Goldstein holds an instructional certificate, with an endorsement as an elementary teacher, grades K-8. Her employment history has been 1985-86 school year through 1988-89 school year - 6th grade teacher, full-time at Campbell School. For the school year 1989-90, she has been the teacher of Tools For Life, grade 6 and 7, at the Edgar School. The personnel record and employment history of Elaine Goldstein is set forth on Exhibit "K" annexed hereto.

[Intervenor Goldstein acquired a tenure status in the employ of the Board by virtue of her employment service. As of June 30, 1989 she acquired 4.0 years senioity under N.J.A.C. 6:3-1.10(l)(20) in the elementary category.]

10. Petitioner, because of her tenure and seniority status, asserts that she should have been assigned to the following courses:

A. Business Mathematics: Petitioner assets that Paula Green is not certified to teach Business Mathematics and, therefore, acquired no tenure or seniority rights as a teacher of Business Mathematics.

B. Consumer Mathematics: Petitioner asserts that Paula Greene is not certified to teach Consumer Mathematics.

In support of her position that Business Mathematics and Consumer Mathematics should have been assigned to her, petitioner relies on the scope of endorsements as established under the Administrative Code.

C. Tools For Life: Petitioner asserts that she is more senior than Elaine Goldstein and is certified to teach Tools For Life.

Respondent asserts that Paula Greene is certified to teach both Business Mathematics and Consumer Mathematics for the following reasons:

A. The matrix furnished to the respondent by the county and prepared by the New Jersey State Department of Education is annexed hereto as Exhibit "G" and permits teachers of General Business Studies to teach Business Mathematics. Petitioner objects to the introduction of this document and also asserts that the issue is controlled by the applicable regulations rather than the matrix. Respondent asserts Consumer Mathematics is a basic mathematics course which is also within the certification of a teacher of General Business Studies.

B. Tools for Life is an interdisciplinary elementary course which does not require any specific endorsement, nor would it be a course which would normally be within the discipline taught by Petitioner.

11. Petitioner claïms that she was not given 60 days notice prior to her reduction to 3/5ths employment (by Respondent), that she was entitled to such as a tenured teacher under the school laws, and, therefore, that she is entitled to 60 days full time, under the

case of Sherman v. North Plainfield Bd. of Ed. Commissioner of Education (decided October 13, 1981). Respondent submits the following documents D1 through D6 which it alleges are relevant to this issue:

D1- Minutes of Board Meeting June 27, 1989;
D2- Evaluation of Petitioner dated April 1989;
D3- Letter from Superintendent of Schools to Petitioner dated May 16, 1989;
D4- Letter from Superintendent of Schools to Petitioner dated May 30, 1989;
D5- Letter from Assistant Superintendent of Schools to Petitioner dated June 9, 1989;
D6- Letter from Superintendent of Schools to Petitioner dated June 15, 1989.

Petitioner asserts that Respondent acted by formal Resolution on June 27, 1989 to formally abolish Petitioner's position and reduce her to 3/5ths employment. Respondent asserts that a full time business position was abolished on June 27, 1989 and a new position of a 3/5ths teacher of business was created.

[D1, minutes of a board meeting held June 27, 1989, shows in part that the Board acted to abolish one full-time position of teacher of business education because of a decline in course enrollment in the business department and that the Board determined petitioner had the least seniority. D1 also reveals that the Board simultaneously created a part-time teacher of business education and determined to offer that position of employment to petitioner effective September 1, 1989. D2 is an evaluation of petitioner's performance as a teacher for 1988-89, which evaluation is highly positive, while simultaneously advising petitioner that because of declining pupil enrollments she would not be offered a 'contract' for 1989-1990. D3 is a memorandum of May 16, 1989 from the superintendent to petitioner confirming that

more likely than not her employment would be on part-time basis for 1989-90 but that that status could change to full-time or less than the part-time employment then being anticipated. D4 is a letter from the superintendent to petitioner on May 30, 1989 advising that the Board had not yet acted on her 1989-90 employment status; that whatever her status would be for 1989-90 would be probably less than was earlier anticipated; and, the Board would probably act on her employment at one of two conference sessions scheduled in June and one of two public meetings scheduled for June 'as the case may be.' D5 is a letter dated June 9, 1989 from the assistant superintendent to petitioner confirming that the Board intended to discuss her employment for 1989-90 at a conference session scheduled for June 13. The assistant superintendent also advised that part-time status would now go back to the originally scheduled level of employment communicated by the superintendent in his May 16 memorandum (D3). D6 is a letter June 15, 1989 from the superintendent to petitioner advising her he recommended a 2/5 reduction of one position in the business department and that he may recommend her employment in a 1/5 or 2/5 assignment for 1989-90. The superintendent also attached a proposed resolution he was to recommend for adoption to the Board for the creation of a 3/5 position in place of the full-time position slated for elimination].

12. Petitioner asserts that the information with regard to the abolition of the position and the creation of a 3/5ths position were communicated to her by two documents, Exhibits "E" and "F" attached. Exhibit "E" is dated July 26, 1989 and Exhibit "F" is dated August 4, 1989 advising Petitioner of her schedule for 1989-90 school year and that it is reduced to 3/5ths. Petitioner further asserts that the first notice of her reduction to 3/5ths employment was as contained on Exhibit "F".

Petitioner acknowledges receipt of an evaluation on May 9, 1989 which advises:

> "Unfortunately due to the uncertain status of position vacancies at this time, a contract for the 1989-90 school year cannot be offered to Mrs. Unterberger. However, it should be noted that depending upon student enrollments, every effort will be made to retain her services, at least in a part-time capacity."

This evaluation is annexed hereto as Exhibit "D-2"

Petitioner asserts that this evaluation and the language contained therein did not constitute an abolition of her position.

13. Although the parties disagree as to the resolution of these issues, the issues in this matter involve:

A. Whether Petitioner is entitled, by virtue of tenure or seniority rights, to additional classes in Business Mathematics, Consumer Mathematics, and/or Tools For Life.

B. Whether Petitioner, assuming that she is not entitled to a full-time position, is entitled to an additional sixty (60) days pay for full-time position (minus the pay received for a 3/5 position) based upon the Sherman decision.

By way of an amended Stipulation of Fact which addresses petitioner's challenge to the absence of employment by the Board for 1990-91, the parties stipulate the following facts:

1. Respondent in this matter is the Metuchen Board of Education.

2. Petitioner Marlene Unterberger claims tenure and seniority rights to teach the following courses in the respondent's school district as a result of certifications:

A. Business Mathematics;

B. Consumer Mathematics;

C. Tools for Life.

3. Respondent Board of Education on April 24, 1990, abolished the position of three-fifths business teacher and provided petitioner with notice that a contract [employment] would not be offered to her for the school year 1990-1991 on April 25, 1990.

4. Respondent is not offering during the 1990-1991 school year Business Mathematics nor Consumer Mathematics.

5. Petitioner contemplates that Tools For Life will be offered in the Edgar School, grades 6 and 7 during the 1990-91 school year and will be taught by Elaine Goldstein.

6. Petitioner claims for reasons as set forth in the Stipulation of Facts, that she is entitled to teach Tools for Life.

7. Although the parties disagree as to the resolution of the issues, the issues in this companion matter involve whether petitioner is entitled, by virture of tenure or seniority rights, to teach the Tools for Life class in the Edgar School.

ANALYSIS

Keeping in mind that there are two reductions-in-force in this dispute, it is well to note that petitioner, as well as each intervenor, had acquired a tenure status by the time of the first reduction-in-force which occurred June 27, 1989. The second reduction-in-force occurred April 24, 1990 when the Board determined to abolish petitioner's part-time position as teacher of business. But, because each of the three principals had acquired tenure prior to the time of the first reduction-in-force whatever relief petitioner is entitled to must be based on seniority, not tenure.

In regard to petitioner's claim to the position Tools for Life which had been given to intervenor Goldstein, petitioner's comprehensive business endorsement, N.J.A.C. 6:11-6.2(a)(4)(i), to the instructional certificate she possesses entitles her to have been

assigned to tech Tools for Life. This is so for the Board admittedly created the course without assigning a specific endorsement to an instructional certificate for the selected teacher to possess. Consequently, petitioner was qualified to teach the subject. The petitioner, at the time of the first reduction-in-force June 27, 1989, to be effective for 1989-90, had acquired 4.4 years of seniority in the Board's employ while intervenor Goldstein had only acquired 4.0 years seniority. Therefore, the conclusion must be reached that petitioner Greene had an entitlement to be appointed to the full-time position of teacher of Tools for Life as against intervenor Greene for 1989-90. It was not necessary for petitioner to have had taught Tools for Life in order to have had a seniority claim thereto in 1989-90 because the Board, when it allowed any certificate or endorsement to be the basis for appointment, eliminated the need for specific subject matter experience.

Petitioner's claim of superior entitlement to the subject Business Mathematics and Consumer Math as taught by intervenor Greene on the basis that Greene is not properly certified to teach that course is rejected. Intervenor Greene possesses a general business endorsement under N.J.A.C. 6:11-6.2(4)(ie), to her insturctional certificate which authorizes her

> * * * to teach general business studies in all public schools. General business studies normally include: business law, economic geography, economics, social business studies, consumer education sales, retailing, advertising[.]

According to the syllabus for business Math and the syllabus for consumer math both courses rely upon the four basic mathematical processees of addition, subtraction, multiplication, and division for which the holder of general business clearly is entitled to teach. It is recognized that Consumer Mathematics also treats depreciation, business organization of single proprietship, partnership, and corporate forms of ownership, including stocks and dividends. One who possesses a general business endorsement is qualified to teach business law, economics, consumer education sales, retailing, and advertising. It can hardly be said that one who possesses a general busniess endoresement is not authorized to teach consumer mathematics as that course has been designed by this Board.

Therefore, for 1989-90 I **FIND** and **CONCLUDE** that petitioner had a valid claim to be assigned a full-time position of Tools for Life as held by intervernor Green by virtue of having greater seniority in the Board's employ and because she was authorized by virtue of her comprehensive business endorsement to teach the course Tools for Life in view of the fact the Board elected not to assign a specific endoresement as a pre-requisite for appointment as the teacher of that course.

In regard to the second reduction-in-force which occurred April 24, 1990 to be effective for 1990-91, it logically follows that if petitioner has a superior seniority claim to the full-time position of teacher for Tools for Life in 1989-90 as against intervenor Goldstein, then that superior claim would follow into 1990-91. Therefore, I **FIND** and **CONCLUDE** that petitioner did in fact and under the seniority rules, N.J.A.C. 6:3-1.10, have a superior seniority claim to the position of teacher of Tools for Life for 1990-91 as against intervernor Goldstein. It is noted that the parties stipulated neither business mathematics nor consumer mathematics was offered by the Board during 1990-91.

CONCLUSION

I **CONCLUDE** that the seniority rights of preference acquired by petitioner Marlene Unterberger were violated by the Board for 1989-90 and 1990-91 when it failed to appoint her to the full-time position teacher for Tools for Life rather than the part-time position to which it did appoint her for 1989-90 and the termination of her employment for 1990-91. Therefore, Marlene Unterberger is entitled to receive the difference between what she earned as a part-time teacher during 1989-90 compared to what she should have received as a full-time teacher, together with all benefits and emoluments of such employment, and she is entitled to the compensation she would have received as a full-time teacher for 1990-91 had her employment not be terminated in violation of her seniority rights. Such compensation, together with all other benefits and emoluments of employment, shall be mitigated by whatever earnings Marlene Unterberger did receive during 1990-91. In light of the foregoing conclusions, there is no need to address petitioner's alternate claim of 60 days pay for an asserted failure of the Board to have afforded her timely notice of the 1989-90 reduction-in-force.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 10, 1992
DATE

Daniel B. McKeown
DANIEL B. McKEOWN, ALJ

Receipt Acknowledged:

1/14/92
DATE

Maureen Kelley
DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 17 1992
DATE

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

tmp

DOCUMENTS IN EVIDENCE

Exhibits as referenced in the Initial Decision

P-1 Directory

MARLENE UNTERBERGER,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MIDDLESEX COUNTY,	:	COMMISSIONER OF EDUCATION
		DECISION
RESPONDENT,	:	
AND	:	
ELAINE B. GOLDSTEIN AND PAULA GREENE,	:	
INTERVENORS.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner and the Board filed timely exceptions. Petitioner also filed timely reply exceptions.

Petitioner agrees with the ALJ's conclusion that the Board violated her seniority rights by not appointing her to a full-time position as teacher of Tools for Life for the 1989-90 and the 1990-91 school years. However, petitioner excepts to the ALJ's failure to order her reinstated to the position retroactive to the date of the termination of her employment.

Petitioner also excepts to the ALJ's conclusion that the Board did not violate her seniority rights by assigning the business mathematics and consumer math courses to Intervenor Greene. Petitioner contends that because she holds a comprehensive business

endorsement whereas Intervenor Greene holds only a general business endorsement, Intervenor Greene was not qualified to teach those courses, and also that she, petitioner, has greater seniority in those courses. In support of these contentions, petitioner relies on her post-hearing submission at pages 9-16. Petitioner goes on to say that if the Commissioner affirms the ALJ's decision on the issue of Tools for Life, she recognizes that her entitlement to back pay and benefits as if employed on a full-time basis in the Tools for Life position would subsume any compensation entitlement for the business courses.

Thus, petitioner urges the Commissioner to modify the ALJ's decision and order her reinstated to that position together with back pay and benefits and emoluments for the 1989-90, 1990-91 and current school years. She also urges modification of the initial decision to grant her the consumer math and business mathematics classes over Paula Greene.

The Board's exceptions first posit that it is inappropriate for the initial decision to conclude that a business teacher in the high school, namely, petitioner, would be entitled to pick up two additional courses in the Edgar School, held to be an elementary school by the initial decision, over Intervenor Goldstein, who was teaching four periods of Tools for Life and two special duty periods.

Further, the Board avers in its amended stipulation of facts that the Board indicated it was contemplating that Tools for Life would be offered during the 1990-91 school year and would be taught by Intervenor Goldstein. Thus, the Board argues, it was improper for the initial decision to conclude that Intervenor

Goldstein would only teach Tools for Life and that, therefore, petitioner was entitled to the entire position held by Intervenor Goldstein. The Board claims there is no basis in law or fact for such conclusion.

Further, noting that petitioner's 3/5ths position as a business teacher in 1990-91 was abolished while Intervenor Goldstein was still at the Edgar Elementary School teaching four periods of Tools for Life, one period of social studies and one special duty period, the Board finds it to be "inconsistent with sound educational practice to now conclude that Petitioner should have the right to teach the four periods of Tools for Life." (Board's Exceptions, at pp. 2-3)

The Board claims petitioner had never taught nor gained experience in the Tools for Life course. It cites Kathi Savarese v. Board of Education of Bernardsville, Somerset County, decided by the Commissioner July 24, 1989, aff'd State Board January 3, 1990 for the proposition that no seniority accrued in family life education as it is not a specific category under N.J.A.C. 6:3-1.10, and thus, Intervenor Goldstein in this case had a legal entitlement to teach the Tools for Life course, without seniority rights, "by virtue of the 'factual circumstances'" (Board's Exceptions, at p. 3), that is that she was qualified and had taught the course in question.

Moreover, the Board suggests that Tools for Life is an interdisciplinary program requiring no specific endorsement, and thus, the Board contends, petitioner has accrued no seniority rights in Tools for Life by virtue of her comprehensive business endorsement. It claims that seniority allows a teacher to demand to teach courses in which a teacher has gained experience, citing

Dullea v. Board of Education of the Borough of Northvale, Bergen County, 1978 S.L.D. 638, 641, 1979 S.L.D. 823 (App. Div.). It thus avers that petitioner had no experience in Tools for Life or the elementary curriculum.

The Board further argues that the conclusion that Intervenor Goldstein was the full-time teacher for Tools for Life for 1989-90 and 1990-91 is misplaced. The Board contends the record did not establish the allocation in each of the two years in question (1989-1990 and 1990-91) of the teaching responsibilities of Intervenor Goldstein. "The thrust of the claims of Petitioner as perceived by Respondent was with respect to the claims under the Business Mathematics and Consumer Mathematics certification, and the positions held by Intervenor Greene." (Board's Exceptions, at p. 4)

Noting that Intervenor Goldstein holds an instructional certificate with an endorsement as an elementary teacher grades K through 8, the Board contends petitioner has failed to prove that she would have been entitled to teach all the positions then taught by Intervenor Goldstein during the two years in question, and it therefore avers the initial decision is erroneously based on facts not now in the record. The Board contends that if petitioner's argument were followed, it would then find a high school business teacher holding an instructional certificate with a comprehensive business endorsement teaching in an elementary school with departmentalized grades 6 and 7. The Board submits there is no basis in law or in fact for such a conclusion.

For such reasons, the Board submits that the ALJ's conclusion is unfounded and unsupported by the stipulated facts. It avers, in creating a course without assigning a specific endorsement

for an instructional certificate for the selected teacher to possess, the Board created the opportunity for petitioner to teach the subject.

The Board claims that if the initial decision is followed, the result is that a tenured teaching staff member with four years of seniority in the elementary school, and two years in a Tools for Life position, would be replaced by a tenured teaching staff member with seniority in a business educational area and with no elementary or Tools for Life experience.

Apart from these exceptions, the Board concurs with the conclusion of the ALJ with respect to a rejection of petitioner's claim with regard to seniority rights for the business mathematics and consumer math courses taught by Intervenor Greene.

Finally, the Board submits that if the initial decision is affirmed, petitioner is obligated not only to demonstrate earnings received, but earnings that she should or could have obtained for the period in question.

For the foregoing reasons, the Board submits that that portion of the initial decision finding in favor of petitioner with regard to seniority rights be rejected.

By way of reply exception, petitioner contends that there is no evidence in the record, or demonstration in the exceptions, that the Tools for Life classes were not in the secondary category, 7th grade departmentalized, or that she was not appropriately certified for the two special duty periods. Similarly, petitioner submits there is nothing in the record or exceptions which suggest that the four periods of Tools for Life and one special duty period taught by Intervenor Goldstein during the 1990-91 school year were

not correctly found to be within the scope of Petitioner Unterberger's seniority status. Thus, petitioner claims, the ALJ correctly concluded that she was entitled to the four periods of Tools for Life and to the two special duty periods for the 1989-90 school year, and to the four periods of Tools for Life and the one special duty period for the 1990-91 school year.

Alternatively, petitioner suggests in reply exceptions that even if she were entitled only to some, not all, of the Tools for Life and business classes, it is well established that in a RIF, a more senior staff teaching member is entitled to classes assigned to less senior teaching staff members, unless the Board can demonstrate that such assignment would unduly interfere with its educational program. She cites Panarotto v. Emerson Bd. of Ed., Bergen County, decided by the Commissioner July 8, 1986, rev'd State Board April 6, 1988, aff'd Superior Court Appellate Division May 22, 1989, cert. den. 118 N.J. 182 (1989) among other cases, in support of this contention. Consequently, she claims, even if she were not entitled to a full-time position, she was entitled to those classes assigned to less senior teachers, such as Intervenor Goldstein, in the absence of any evidence that such assignment would significantly interfere with the respondent's educational program.

In response to the Board's contention that Tools for Life was an interdisciplinary program requiring no specific endorsement, and that therefore petitioner had no seniority rights to that class, petitioner cites Lewis et al. v. Bd. of Ed. of the City of Trenton, Mercer County, decided by the Commissioner December 10, 1990, among others, for the proposition that when a course exists for which a

board of education has required no specific endorsement, all teachers holding instructional endorsements may assert seniority rights to that course. Thus, petitioner contends, the Board's claim that she did not have enforceable seniority rights to the Tools for Life class is wrong. She claims the law is precisely the opposite.

In response to the Board's contention that the Edgar School was an elementary school is irrelevant and wrong, petitioner submits. She contends that respondent never passed a resolution classifying the newly reorganized school, and thus, its past classification or characterizations are irrelevant. More significantly, she asserts that N.J.A.C. 6:3-1.10(1)(19) makes clear that for seniority purposes, grade 7 departmentalized is in the secondary category, so she has an enforceable seniority claim to the position.

On the issue of mitigation of damages, petitioner claims the Board has confused the current status of the matter, and the applicable burden of proof. She claims mitigation and damages are not presently in the record or before the Commissioner. Moreover, petitioner claims it is not her burden to demonstrate what she could have earned, but instead mitigation is an affirmative defense, the burden of proof lying with the wrongdoer, Respondent Board. She cites Goodman v. London Metals Exchange, Inc., 86 N.J. 19, 40-41 (1981), among other cases in support of this contention.

In sum, petitioner again asserts that the Commissioner should affirm the ALJ's decision with the modifications requested in her original exceptions.

Upon a careful and independent review of this matter, the Commissioner must remand it for further fact-finding and conclusions to be derived therefrom.

In reviewing the arguments of the parties, the Commissioner first considers the seniority entitlements among the petitioner and intervenors relative to the course entitled Tools for Life, which, it is not contested, is taught at the Edgar School to 6th and 7th graders. The gravamen of arriving at such determination involves deciding first into what seniority category the instruction at Edgar School falls, either elementary or secondary. N.J.A.C. 6:3-1.10(1)19 states that the "secondary" category for assessing seniority among tenured employees

> shall include grades nine through 12 in all high schools, grades seven and eight in junior high schools and grades seven and eight in elementary schools having departmental instruction.

N.J.A.C. 6:3-1.10(1)20 specifies:

> Elementary. The word "elementary" shall include Kindergarten, grades one through six and grades seven and eight without departmental instruction. (emphasis supplied)

It is undisputed that the 6th grade at Edgar School is departmentalized. See Exhibit I. See also Stipulation of Facts, at page 4. Hence, an anomaly exists: a departmentalized 6th grade is not provided for in the seniority regulations. Because the elementary category precludes departmentalization and given that the secondary category includes two elementary grades that are departmentalized, i.e., grades 7 and 8, and based upon the fact that the Board admits that the 6th grade classes at Edgar School are departmentalized, the Commissioner finds and determines that the instruction provided therein falls under the secondary category for seniority purposes.

In so concluding, the Commissioner rejects the ALJ's conclusion, as found on page 5 of the initial decision, that because

of its "history" as an elementary school, the seniority category should, therefore, be elementary. Similarly, the Commissioner observes but rejects the argument raised by petitioner that because the Board failed to pass a resolution classifying Edgar School as an elementary school, for some reason it cannot be in the elementary category for seniority purposes. Such argument misses the mark. How the school itself is designated is not relevant to this matter which deals with assessing seniority rights pursuant to a RIF. The seniority regulations operate independently of any designation of a school since it is the type of instruction that dictates the seniority categories. N.J.S.A. 18A:28-9, N.J.A.C. 6:3-1.10 Thus, even if the Board had acted to designate or classify the Edgar School as elementary, the seniority category for instruction provided therein as prescribed by N.J.A.C. 6:3-1.10(1)(19) is secondary. The Commissioner so finds.

Having so determined, the next inquiry must be whether the Board knew that departmentalized instruction was to be provided the pupils at Edgar School at the time of the RIF it effectuated in June 27, 1989, which event triggered its evaluating the seniority rights of those to be affected by such RIF. Because the record before the Commissioner provides no proof as to whether the Board was cognizant of the departmentalization of the 6th and 7th grades, it is not possible to determine whether it made the proper reduction in force decisions based on the seniority entitlements of the parties in this matter. Thus, the Commissioner must remand this matter for further findings of fact and conclusions of law as to whether the Board knew the Edgar School was departmentalized, and therefore the instruction to be provided therein was to fall in the secondary category for seniority purposes.

In so directing, the Commissioner notes that if the Board was aware of the departmentalized nature of the 6th and 7th grades at Edgar School, it follows that petitioner's seniority in the secondary category would have entitled her to the position as instructor of Tools for Life, which position was assigned to Ms. Goldstein for both the 1989-90 and the 1990-91 school years. In this regard, the Commissioner is puzzled by the ALJ's conclusion drawn at page 5 of the initial decision that Edgar School is an elementary school, thus implying that he concluded that it was likewise in the elementary category for seniority purposes, when compared to his conclusion at pages 15 and 16 of the inital decision stating that petitioner's 4.4 years of seniority accrued in the secondary category and proceeded to order her reinstatement to a position deemed to be in the elementary category. Perhaps part of the confusion can be addressed by what appears to be some typographical confusion in the names of the parties. On page 15, petitioner was referred to as "Petitioner Greene" and in the same sentence, Intervenor Greene's name is used when referring to the teacher of Tools for Life, who was Ms. Goldstein, not Ms. Greene. Similarly, on page 16, Intervenor Greene is named rather than Intervenor Goldstein, as the teacher of Tools for Life, the position petitioner was entitled to hold. Again, the record makes plain that Intervenor Greene never taught Tools for Life, and the Commissioner is convinced that on remand, the ALJ can clarify such apparent typographical errors.

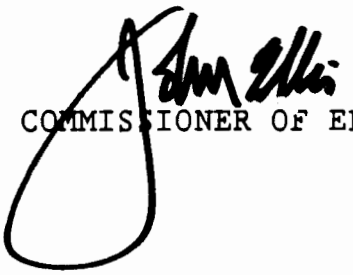
Finally, in remanding the matter for further fact-finding, the Commissioner observes that following the first RIF in 1989-90, petitioner was reduced to a 3/5ths position teaching business at

Metuchen High School, while Intervenor Goldstein remained in the Board's full-time employ teaching four periods of Tools for Life and two special duty periods. Should it be determined on remand that the Board was aware of the departmentalization of instruction at Edgar School and thus that it erroneously denied petitioner a position in the secondary category, then the ALJ is to address the Board's allegations relative to Tools for Life not being a full-time assisgnment and to assess petitioner's right to full-time employment.

Last, for the reasons expressed in the initial decision, the Commissioner concurs with the ALJ's evaluation of Intervenor Greene's entitlement to the positions of business mathematics and consumer math for the reasons expressed at page 15.

Accordingly, for the reasons expressed herein, the initial decision is affirmed in part and rejected in part. The matter is remanded for further action consistent with this decision.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

FEBRUARY 28, 1992

DATE OF MAILING - FEBRUARY 28, 1992

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(31-92)

MARLENE UNTERBERGER, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MONMOUTH COUNTY, : DECISION ON REMAND

RESPONDENT. :

SYNOPSIS

Petitioner, tenured business teacher whose position was reduced to part-time and then totally eliminated, claimed Board violated her tenure and seniority rights. Commissioner remanded matter for further findings of fact and conclusions of law as to whether Board knew Edgar School was departmentalized for 6th and 7th grades, which would result in use of secondary category for seniority purposes.

On remand, testimony showed Board knew Edgar School was departmentalized. ALJ thus found secondary seniority applied due to fact that the school was departmentalized in the 6th and 7th grades. Therefore, Board retained wrong person as petitioner had been entitled to positions in 1989-90, 1990-91 and 1991-92. Board was ordered to reinstate petitioner to 2/3rds position in Tools for Life program for 1992-93 with mitigated back pay. If petitioner did not work during those years, back pay should not be mitigated.

Commissioner adopted findings and determination in initial decision on remand. Commissioner added that requirement of mitigation includes not only what a petitioner earned from outside employment, but what could have been earned with reasonable and diligent efforts. (**West** Orange Supplemental Instructors Association)

NOVEMBER 13, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
CONSOLIDATED
OAL DKT NO. EDU 1771-92
AGENCY DKT. NOS. 283-9/89 & 126-5/90
ON REMAND FROM
OAL DKT. NO. EDU 7252-89
AGENCY DKT. NO. 283-9/89
OAL DKT. NO. EDU 4216-90
AGENCY DKT. NO. 126-5/90

MARLENE UNTERBERGER,
Petitioner,
v.
METUCHEN BOROUGH BOARD OF EDUCATION,
Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)
James E. Stahl, Esq., for respondent (Borrus, Goldin, Foley, Vignuoli, Hyman & Stahl, attorneys)
Sanford R. Oxfeld, Esq., for intervenors Elaine B. Goldstein and Paula Green (Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: July 23, 1992 Decided: August 21, 1992

BEFORE **DANIEL B. MCKEOWN,** ALJ:

This matter is on remand from the Commissioner of Education on an initial decision which issued January 10, 1992. Petitioner Marlene Unterberger had claimed that the Metuchen Borough Board of Education (Board) violated her tenure and seniority rights regarding its reduction of her full-time employment as a teacher to part-time employment for 1989-90 and the elimination of the part-time employment at the conclusion of that school year. Competing claims were filed against petitioner's allegation by teachers Elaine B. Goldstein and Paula Green, both

of whom were granted intervention status, N.J.A.C. 1:1-16.1 et seq. After the matter was transferred March 10, 1992 a hearing was scheduled and conducted June 3, 1992 at the Metuchen Borough Hall. The record closed July 21, 1992 upon receipt of a copy of transcript of earlier proceedings conducted September 12, 1991.

BACKGROUND FACTS

The facts earlier stipulated by the parties and as set forth in the original initial decision are incorporated herein as if set forth in full. For purposes of this proceeding, however, it is noted that petitioner, as well as each intervenor, acquired a tenure status in the employ of the Board. As of June 30, 1989 when the first of two reductions-in-force were ordered by the Board which directly affected petitioner's employment, their respective seniority time and category of each teacher was as follows:

Petitioner Unterberger	4.4 years	Secondary category
Intervenor Greene	4.8 years	Secondary category
Intervenor Goldstein	4.0 years	Elementary category

Petitioner Unterberger is in possession of an instructional certificate with a comprehensive business endorsement. Throughout her employment, petitioner has taught business and business related courses. Intervenor Greene possesses an instructional certificate with endorsements as a teacher of general business studies and as a teacher of secretarial studies. While during the course of her employment, intervenor Greene was assigned to teach predominantly typing, she also has been assigned to teach business mathematics, and shorthand. After the first reduction-in-force by the Board effective for 1989-90, intervenor Greene was also assigned to teach consumer math. Intervenor Goldstein possesses an instructional certificate with an endorsement as an elementary teacher, grades K-8. Goldstein had been assigned to teach sixth grade at the Campbell School. During the 1989-90 year, Goldstein was assigned to teach a program known as 'Tools for Life", at the departmentalized grade six and seven level at the Boards Edgar School. Tools for Life, the parties agree, as created by the Board does not require specific endorsement. The course is designed to provide sixth and seventh graders with study skills, skills in personal financing including banking, household economics, comparison shopping, income taxes, insurance, and the need for community participation and career planning.

When the Board ordered the 1989-90 reduction-in-force, petitioner's full-time employment as a teacher assigned to the Board's high school was reduced to 3/5ths of full-time employment. Intervenor Greene, during 1989-90, retained full-time employment teaching four sections of typing and one section of business mathematics,[1] while intervenor Goldstein was employed full-time and assigned to teach Tools for Life, grades six and seven, at the Edgar School.

Petitioner claims that the 1989-90 reduction-in-force and her subsequent reduction of full-time to part-time employment violated her seniority rights because she should have been assigned to teach business mathematics upon the assertion that intervenor Greene was not properly certified to teach the course and hence acquired no tenure nor seniority thereto. Petitioner also complained that intervenor Greene was not certified to teach consumer mathematics to which she had also been assigned as of January 26, 1990 during the course of 1989-90 year. Finally, petitioner complained regarding the 1989-90 reduction-in-force that she is properly certified to teach Tools for Life and, because she is more senior than intervenor Goldstein, she should have been afforded the opportunity to retain full-time employment, rather than intervenor Goldstein, by being assigned the full-time position of teaching Tools for Life.

On or about April 24, 1990 the Board instituted a second reduction-in-force and advised petitioner her part-time 3/5ths teaching position was being completely eliminated and that she would not be reemployed for 1990-91. As part of the second reduction-in-force for 1990-91, the Board did not offer business mathematics nor consumer mathematics. It did offer Tools for Life in 1990-91 at the departmentalized sixth and seventh grade levels at the Edgar School and intervenor Goldstein continued full-time to teach that course.

Petitioner repeats her claim that because she is properly certified to teach Tools for Life, and that because she has greater seniority than intervenor Goldstein, she has a superior claim to that assignment over any claim which intervenor Goldstein may have.

---

1 Testimony adduced at the hearing on remand and as reported post, establishes that full-time employment since at least 1989-90 consisted of at least six assigned periods which may be a combination of academic and/or duty periods.

In the original initial decision, the conclusion was reached in regard to the first reduction-in-force for 1989-90 that because the Board did not identify a specific endorsement a teacher assigned Tools for Life was expected to possess, petitioner held an appropriate endorsement to be assigned that possession. Therefore, because petitioner had more seniority as of June 30, 1989 than intervenor Goldstein, petitioner had a superior claim for appointment in 1989-90 to this full-time position over intervenor Goldstein.

Petitioner's claims regarding intervenor Greene not being properly certificated to teach business mathematics or consumer mathematics were rejected upon the finding that Greene was properly certified to be assigned either teaching position.

In regard to the second reduction-in-force instituted by the Board for 1990-91, the conclusion was reached that because petitioner had a superior seniority claim for the full-time position as teacher of Tools for Life in 1989-90 as against intervenor Goldstein, that superior claim followed into 1990-91.

The Commissioner reviewed the recommended initial decision and reached independent findings and conclusions.

The Commissioner found and determined that for purposes of seniority the instruction provided by the teacher assigned Tools for Life at the departmentalized sixth and seventh grades at the Board's Edgar School is in the secondary category and cites N.J.A.C. 6:3-1.10(1)(19).

The Commissioner then found the factual record insufficient to determine "whether the Board knew that departmentalized instruction was to be provided the pupils at Edgar School at the time of the RIF it effectuated in June 27, 1989, which event triggered its evaluating the seniority of those to be affected by such RIF." (Slip opinion, at p.27) The Commissioner concluded:

> [I]f the Board was aware of the departmentalized nature of the 6th and 7th grades at Edgar School, it follows that petitioner's seniority in the secondary category would have entitled her to the position as instructor of Tools for Life, which position was assigned to Ms. Goldstein for both the 1989-90 and the 1990-91 school years.
>
> Id., at p.28

The Commissioner then remanded the matter for "further findings of fact and conclusions of law as to whether the Board knew the Edgar School was departmentalized; and therefore the instruction to be provided therein was to fall in the secondary category for seniority purposes." The Commissioner also directed that if the Board was aware of the departmentalization of instruction at the Edgar School then the Board's allegations regarding Tools for Life not being a full-time assignment must be addressed and, in the circumstance, petitioner's right to full-time employment. It is noted that the Board had not earlier argued before this judge that the Tools for Life was not a full-time assignment.

Finally, it is noted that the Commissioner affirmed the findings and conclusion reached in the initial decision in regard to petitioners allegations that intervenor Greene was not properly certified to teach business mathematics or consumer mathematics.

HEARING ON REMAND

Marcia Holtzman, the assistant superintendent for the past three years and who had been the curriculum coordinator for 16 years, testified at the remand hearing. Her testimony, uncontroverted, establishes the following facts.

Ms. Holtzman regularly attends all Board meetings and has done so for many years. Since at least 1985-86, the Board had knowledge that the 6th and 7th grades at the Edgar School were and are departmentalized. No one, however, had ever given the Board advice that departmentalization has an impact on seniority. The Board was not aware that teachers who provided instruction at departmentalized 6th or 7th grade levels would accumulate seniority in the secondary category under N.J.A.C. 6:3-1.10(1)(19).

The testimony of Ms. Holtzman establishes as fact that during 1989-90 intervenor Goldstein taught four classes of Tools for Life and was also assigned a lunch duty period and a preparation period. The testimony of Ms. Holtzman establishes as fact that since at least 1989-90 full-time teachers at Edgar School were assigned six periods which consisted of a combination of academic and duty periods. Consequently, intervenor Goldstein who was assigned to teach four classes of Tools

for Life, a lunch duty period, and a preparation period was a full-time teacher in a full-time assignment during 1989-90.

During 1990-91, the testimony of Ms. Holtzman establishes as fact that intervenor Goldstein was assigned to teach four classes of Tools for Life, one social studies period, and one lunch duty period. Consequently, intervenor Goldstein was employed full-time during 1990-91 by the Board at the Edgar School. During 1991-92, intervenor Goldstein taught four classes of Tools for Life and two classes of social studies. Consequently, intervenor Goldstein was employed full-time during 1991-92. Tentatively, intervenor Goldstein's schedule for 1992-93 is the same as it was for 1991-92.

Ms. Holtzman acknowledges that it was she who prepared a seniority list regarding teachers of business for the 1989-90 reduction-in-force and she assumed that Tools for Life was not a business course.

FINDINGS OF FACT ON REMAND

In response to the Commissioner's directives, the following facts are found based on a preponderance of credible evidence as follows:

1. The Board had knowledge that departmentalized instruction was to be provided pupils at Edgar School at the time of the first reduction-in-force on or about June 27, 1989.

2. There is no proof in this record that the Board was aware at the time of the first reduction-in-force or at the time of the second reduction-in-force that instruction provided at a departmentalized 6th or 7th grade level would be classified under the secondary category for seniority purposes.

3. Consistent with the Commissioner's directive in his slip opinion on page 28, because the Board was aware of the departmentalized nature of the 6th and 7th grades at Edgar School petitioner's seniority in the secondary category entitled her to the position as instructor of Tools for Life, which position was assigned to intervenor Goldstein for both the 1989-90, 1990-91, and 1991-92 school years.

4. Intervenor Goldstein was employed full-time during 1989-90, 1990-91, 1991-92, and is expected to be employed full-time for 1992-93. Her initial assignment in 1989-90 was to teach four classes of Tools for Life, one duty period, and one preparation period. Her assignment for 1990-91was to teach four classes of Tools for Life, one social studies class, and one lunch duty. In 1991-92 as well as 1992-93, intervenor Goldstein's assignment was and shall be to teach four classes of Tools for Life, and two classes of social studies.

5. Intervenor Goldstein has been employed full-time each year since 1989-90, though all full-time assignments have not been limited to Tools for Life.

Having reached the fact that the Board had knowledge of departmentalization of instruction in its own schoolhouse, and having applied that finding to the Commissioner's conclusion that petitioner's seniority in the secondary category would have entitled her to the position as instructor of Tools for Life which position was assigned to intervenor Goldstein for 1989-90, 1990-91 and 1991-92, the issue which remains on remand is the Board's assertion that Tools for Life is not a full-time assignment and, in that context, what is petitioner's enforceable claim to resume full-time employment.

Intervenor Goldstein's seniority at the commencement of 1989-90 when the first reduction-in-force occurred was limited to the elementary category. *N.J.A.C.* 6:3-1.10(L)(20T0). Petitioner's seniority at that time was 4.4 years, all in the secondary category. According to the Commissioner's conclusion in the decision on remand, instruction provided in the departmentalized sixth and seventh grade at Edgar School generates seniority in the secondary category. Petitioner had greater seniority in the secondary category than did Goldstein. Therefore, petitioner was entitled to continued full-time employment as against intervenor Goldstein and should have been assigned the full-time position of employment held by Goldstein which required instruction in the secondary category.

Recalling that petitioner's employment was reduced to 3/5ths for 1989-90, she was eligible and had a superior claim to the full-time employment enjoyed by intervenor Goldstein. Petitioner was properly certificated to maintain the

assignment of four classes for Tools for Life, a lunch duty, and a preparation period during 1989-90. Petitioner is certified to teach Tools for Life by virtue of her possession of an instructional certificate, not because Tools for Life is or is not a business course. In similar manner, petitioner was certified to be assigned lunch duty and a preparation period. Consequently, petitioner is entitled for 1989-90 to the difference between the salary she should have received as a full-time teacher compared to the salary she did receive as a part-time teacher, together with other benefits and emoluments to which she was entitled as a full-time teacher.

During 1990-91, petitioner's employment with the Board was eliminated. However, petitioner was qualified for and had a superior claim to 5/6ths of the full-time assignment granted intervenor Goldstein. Goldstein was assigned to teach four periods of Tools for Life, one lunch duty, and one social studies class. Petitioner is properly certified to teach Tools for Life and to be assigned lunch duty. Consequently, petitioner is entitled to the difference in salary she would have received as a 5/6ths teacher during 1990-91, together with all other benefits and emoluments as a 5/6ths teacher she would have received. Petitioner does not have an enforceable claim to teach social studies in a departmentalized setting because she does not possess the appropriate endorsement for such an assignment. See N.J.A.C. 6:11-6.2(a)(21).

For 1991-92 petitioner had a superior seniority claim to teach four periods of Tools for Life as against intervenor Goldstein and, consequently, she must receive the salary she would have earned as a 2/3rds of a full-time teacher's salary. Petitioner has no enforceable claim to the remaining two social studies classes, or back pay therefrom, because she is not in possession of the appropriate endorsement to teach social studies.

To the extent that the Board, through Ms. Holtzman, anticipates intervenor Goldstein's schedule and assignment for 1992-93 would have been identical to her assignment for 1991-92, then petitioner is to be reinstated to her employment on a 2/3rds basis teaching four classes of Tools for Life because she has a superior seniority claim for that assignment as compared with intervenor Goldstein. Petitioner may not claim the two additional social studies periods at the departmentalized level because she is not properly certificated for such an assignment.

This record is absent any evidence that assigning petitioner to teach Tools for Life in 1989-90 through 1992-93 would unduly interfere with the Board's

educational program. In fact, the only evidence in this record is that the Board erroneously did not consider petitioner's seniority at the time of its first reduction-in-force for assignment to teach Tools for Life because it did not consider a teacher with seniority in the secondary category could have an enforceable claim to a teaching position in its Edgar School.

A final matter remains. On page 28 of the Commissioner's slip opinion he expresses puzzlement over a finding contained within the initial decision compared to a conclusion which was also set forth in that decision. The finding with which the Commissioner apparently disagrees that Edgar School is an elementary school was stated solely because the parties argued the point. At best, it was and is, an innocuous finding in light of the emphasis that grades six and seven at Edgar School are departmentalized. Next, the Commissioner points out certain typographical errors on pages 15 and 16 of the initial decision. So that the record is clarified, petitioner's surname is Unterberger; intervenor Goldstein taught Tools for Life; and, intervenor Green has not at anytime taught Tools for Life.

In summary, petitioner Unterberger is entitled relief in the form of back pay, benefits and emoluments as stated above for 1989-90, 1990-91, and 1991-92. Back pay shall be mitigated by the amounts petitioner earned through outside employment in which she may have engaged during the same years and during the hours of the day she otherwise could not have been engaged in such employment had her claim to greater employment not been violated by the Board. If petitioner did not engage in outside employment during the same years for which she now receives relief, then back pay shall not be mitigated.

Finally, petitioner Unterberger is to be reinstated to her employment on at least at 2/3rds basis for 1992-93 as the teacher of four classes of Tools for Life at the Board's Edgar School, departmentalized grades six and seven, absent lawful Board action which would prohibit such assignment.

It is so **ORDERED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 21, 1992
Date

Daniel B. McKeown
DANIEL B. McKEOWN, ALJ

Receipt Acknowledged:

8/25/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 27 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

tmp

OAL DKT. NO. EDU 1771-92 (ON REMAND FROM OAL DKT NOS. EDU 7252-89 AND EDU 4216-90 (CONSOLIDATED))

MARLENE UNTERBERGER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MONMOUTH COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record and initial decision on remand have been reviewed. Both petitioner and the Board filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. petitioner also filed timely reply exceptions. Intervenor's exceptions were untimely filed, and the Board's reply to petitioner's reply exceptions are not considered in the review of this matter insofar as no provision exists for the submission of replies to replies.

Petitioner's exceptions concur with the ALJ's decision on remand except to note that if petitioner is not reinstated before the beginning of the 1992-93 school year, the initial decision should be modified to provide that she is entitled to back pay and benefits for that period of the 1992-93 school year between the start of the school year and her actual reinstatement by the Board.

The Board's exceptions are essentially a reiteration of those arguments raised before the Office of Administrative Law and thus need not be recounted herein.

The Board does concur, however, with the findings set forth in the initial decision regarding the rejection of petitioner's claim concerning seniority rights for the business and consumer math courses taught by Intervenor Greene.

The Board also raises the issue of mitigation claiming that should the initial decision be affirmed, the Board asserts that the requirement for mitigation is not only what petitioner earned from outside employment but also what she could have earned with reasonable and diligent efforts on her part.

The Board asks that that portion of the Initial Decision on Remand finding in favor of petitioner with regard to seniority rights be rejected.

Upon careful and independent review of the record of this matter, and the exceptions and replies filed by the parties, the Commissioner adopts as his own the findings and conclusions of the Office of Administrative Law as found in the ALJ's thorough and cogent Initial Decision on Remand. The Commissioner finds that the ALJ has fully discussed and disposed of those arguments the Board raised at the hearing on remand and posed again in its exceptions.

As to the ALJ's discussion of mitigation as found on page 9 of the Initial Decision on Remand, the Commissioner would add that the requirement of mitigation includes not only what a petitioner earned from outside employment, but what could have been earned with reasonable and diligent efforts. See West Orange Supplemental Instructors Association et al. v. Board of Education of the Township of West Orange, 1991 S.L.D. 1, State Board aff'd in part/rev'd in part/remanded April 1, 1992.

Accordingly, the Initial Decision on Remand is adopted for the reasons expressed by the Office of Administrative Law in said decision dated August 21, 1992.

COMMISSIONER OF EDUCATION

NOVEMBER 13, 1992

DATE OF MAILING - NOVEMBER 13, 1992

31-92

EDU #7252-89 and #4216-90 (consolidated)
C # 31-92
EDU #1771-92
C #284+-92
SB # 63-92

MARLENE UNTERBERGER,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MIDDLESEX COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Remanded by the Commissioner of Education, February 28, 1992

Decision on remand by the Commissioner of Education, November 13, 1992

For the Petitioner-Respondent, Zazzali, Zazzali, Fagella & Nowak (Richard A. Friedman, Esq., of Counsel)

For the Respondent-Appellant, Borrus, Goldin, Foley, Vignolo, Hyman & Stahl (James E. Stahl, Esq., of Counsel)

For the Intervenors, Balk, Oxfeld, Mandell & Cohen (Sanford R. Oxfeld, Esq., of Counsel)

This matter involves an appeal and cross-appeal of a decision made by the Commissioner of Education on November 13, 1992. The Commissioner found that petitioner had to be retained in a 2/3 assignment as Instructor of Tools for Life because she had seniority in that assignment and directed her reinstatement therein with back pay for 1989-90, 1990-91, and 1991-92. The district Board appealed that determination.

The Commissioner also found that petitioner was not entitled to assignment to certain Business Math courses. Petitioner appealed that aspect of the decision.

August 3, 1994

On January 13, 1993, at the request of the parties, the matter was placed in abeyance so that they could attempt to arrive at an amicable resolution.

On October 18, 1993, the parties made their first submission to the State Board, seeking dismissal of their respective appeals on the basis of that submission. Our Legal Committee's review of that document identified a potential infirmity therein and it so informed the parties. In additional submissions to us, both parties advised that they were aware of this, but that they were both satisfied with the agreement they had achieved.

We have reviewed the parties' most recent submission. From that review, it is apparent that any potential deficiency in their agreement is theoretical. Therefore, and because the public interest is not implicated, the State Board is willing to consent to the request of both parties that we dismiss this matter.

August 3, 1994

Date of mailing AUG 04 1994

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32-92

J. G., on behalf of her minor child, S.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY, AND DAVID WEINTRAUB, TEACHER, AND ALL ADMINISTRATORS,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning parent, on behalf of her daughter S.G., a middle school student, appealed three-day suspension due to S.G.'s alleged use of profanity in class against music teacher who denied her permission to leave the room to use lavatory. Petitioner contended suspension interrupted S.G.'s constitutional right to a free public school education and was racially motivated.

Initial decision determined that suspension of S.G. was proper in light of Parent/Student Handbook that clearly stated use of profanity to staff shall result in out-of-school suspension. Further, S.G. was afforded due process prior to suspension which was in accord with N.J.S.A. 18A:37-1 and 2. Moreover, petitioner did not produce competent evidence that suspension was racially motivated. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

MARCH 13, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO EDU 10904-91
AGENCY DKT. NO. 420-12/91

J.G., on Behalf of Her Minor Child S.G.,
Petitioners,
v.
LAKEWOOD BOARD OF EDUCATION,
ALL ADMINISTRATORS AND DAVID WEINTRAUB,
TEACHER,
Respondents.

J.G., petitioner, *pro se*
Richard K. Sacks, Esq., for respondent

RECORD CLOSED: January 27, 1992 Decided: February 4, 1992

BEFORE **DANIEL B. McKEOWN,** ALJ:

In a petition of appeal filed to the Commissioner of Education, *pro se* petitioner J.G., on behalf of her daughter S.G., appeals a proposed three day suspension from school to be imposed upon S.G. for her use of profanity in class to teacher Weintraub. Petitioner alleges that the teacher provoked her daughter's use of profanity and that the Board, its agents, officers, or employees, denied her daughter due process of law. After the Commissioner transferred the matter on December 4, 1991 to the Office of Administrative Law as a contested case under *N.J.S.A.* 52:14F-1 et seq., a hearing was scheduled and conducted January 24, 1992 at the Lakewood Municipal Court, Lakewood.

Findings are reached in this initial decision that S.G. did use profanity which was specifically directed at teacher Weintraub during class. The conclusion is reached that a three day suspension is proper and appropriate to be imposed by school authorities upon S.G.

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FACTS

The facts of the matter are not in dispute betwen the parties and they are as follows. S.G. is 14 years of age. She is enrolled in the eighth grade of the Lakewood Middle School. She also attended the Middle School for the seventh grade during 1990-91. During each year, S.G. received a Parent/Student handbook (R-1) which contains information intended to help the students and parents become familiar with the policies by which the Middle School is operated. The evidence in this case shows that these handbooks are sent to each pupil's home prior to the commencement of the particular school year. S.G. admits she has never read the contents of the handbook nor did her mother, petitioner, read the contents of the handbook.

Sometime during October 1991 S.G. had just arrived at the music room for her third scheduled academic period of the day. The Lakewood Middle School is departmentalized so that pupils move from classroom to classroom for various subjects. S.G. had just completed math class which is located on the other side of the school. Students have three minutes to change class at the end of each period. Pupils are encouraged to use the lavatory facilities during the class change. The music class which was about to begin was taught by David Weintraub. At the commencement of music instruction, S.G. had requested of teacher Weintraub permission to go the the girls' lavatory. Weintraub had just started all pupils in vocal music instruction. Weintraub assessed the situation as not being an emergency for S.G. to leave the room at that time to go to the bathroom so he asked her to sing for two more minutes with the rest of the class and then go the the bathroom. As the class was singing, but before the song was over, S.G. slammed her music folder on the floor and indicated she refused to sing anymore. Teacher Weintraub then said to S.G. she did not have permission to leave the classroom to go to the bathroom. S.G. turned to a friend sitting next to her and, in a voice loud enough for teacher Weintraub to hear and for students to hear, exclaimed "Fuck him". It is noted that when S.G. testified at hearing she claimed she could not really recall whether she said "Fuck him" or merely said "F him". In either case, however, S.G. was candid when she explained that the referenced 'him' was intended for teacher Weintraub. Teacher Weintraub immediately filled out a disciplinary referral form, handed it to S.G., and directed her to go the vice-principal's office immediately. S.G. accepted the form, left the classroom, went to the lavatory, then to the vice-principal's office. At the vice-principal's office, S.G. acknowledged she did utter the expletive, "Fuck

him", reported on the disciplinary form by teacher Weintraub. S.G. acknowledged at hearing that she was not at all embarrassed by the circumstance because, in her view, Weintraub should have allowed her to go to girls' lavatory when she wanted to go.

S.G. acknowledges the use of such language is improper although she did intend Weintraub to hear and she acknowledges that students heard her exclamation. Nevertheless, S.G. acknowledges that teacher Weintraub never before refused her permission to go to the bathroom and she now complains that no one ever explained the rule regarding bathroom use to her. However, S.G. fully explained the bathroom rules at hearing which provide that pupils are encouraged to use the bathroom facilities during the change of class and, is that is not possible, then they are to get the individual teacher's permission prior to leaving the classroom. S.G. also acknowledges that at the time she requested permission to use the bathroom facility, another pupil had already been out of the classroom at the facility and that she was obligated to wait for that pupil to return.

Later on that day, after S.G. had returned home, S.G.'s mother, petitioner, was notified by the Middle School principal through a telephone call that S.G. was to be suspended for three days because of the use of profanity to the teacher in the classroom. Petitioner demanded, and was granted, a hearing before the superintendent of schools who affirmed the decision of the Middle School principal to suspend S.G. for three days. Petitioner then demanded a hearing before the full board of education, which was granted, and it affirmed the determination to suspend S.G. for three days. When petitioner filed the petition to the Commissioner, the Board agreed to stay the suspension pending this disposition.

Petitioner's testimony, though she is not a fact witness, is that her daughter should not be suspended for merely saying "Fuck him" because she did not say to teacher "Fuck you". The difference petitioner sees in either profanity escapes this judge particularly in light of the fact S.G. readily acknowledges that the 'him' was intended for teacher Weintraub and the communication was understood in that manner by Weintraub. Petitioner also complains that her daughter's constitutional right to a free public school education may not be interrupted by a three day out-of-school suspension and that suspension was racially motivated. Petitioner demands relief.

ANALYSIS

There is no doubt that S.G. has a right to a free public school education. However, this right is not absolute. The exercise of the right is subject to S.G.'s adherence with the rules and regulations of the school. *N.J.S.A.* 18A:37-1. The referenced statute provides in full as follows:

> Pupils in the public schools shall comply with the rules established in pursuance of law for the government of such schools, pursue the prescribed course of study and submit to the authority of the teachers and others in authority over them.

Furthermore, *N.J.S.A.* 37-2 provides, in part, as follows:

> Any pupil who is guilty of continued and willful disobedience, or of open defiance of the authority of any teacher or person having authority over him, or of the habitual use of profanity or of obscene language *** shall be liable to punishment and to suspension or expulsion from school.
>
> Conduct which shall constitute good cause for suspension or expulsion of a pupil guilty of such conduct shall include, but not be limited to, any of the following:
>
> a. Continued and willful disobedience;
> b. Open defiance of the authority of any teacher or person having authority over him ***

The Parent/Student Handbook (R-1) for the Lakewood Middle School clearly states that the use of profanity to staff shall result in out of school suspension. Therefore, had S.G. or petitioner taking the time to read the handbook they would have known that the use of "Fuck him" directed at a teacher and intended to be for that teacher's ears as well as the ears of fellow and sister students constitutes profanity and open defiance of the lawful authority of a teacher having control over the pupils in the class.

Pupils who are to be suspended for misconduct from a public school are entitled to due process of law. Due process of law takes on various meanings depending on the circumstance. A three day suspension is considered a short-term suspension for due process considerations. S.G. is entitled to give her side of the story and the school authority is entitled to exercise his/her discretion whether in all the circumstances a short-term suspension is warranted. If the determination is reached that a short-term suspension is warranted, that is a suspension of less than 10 days, then the suspension may be imposed.

In this case, S.G. received more due process than that to which she is constitutionally entitled because not only was S.G. given the opportunity by the vice-principal to state her side but the superintendent of schools granted petitioner and S.G. a hearing as did the Board of Education. In each instance , S.G.'s justification for uttering the expletive was rejected. So too, here. S.G.'s justification to exclaim "Fuck him" in a classroom under the direct supervision of a teacher, in a voice loud enough to heard by pupils and the teacher, is wholly rejected. Her request to leave class for the girls' lavatory was not made out of any emergency nor is it unreasonable for the teacher to have told her to finish the singing for two minutes and then leave. The defiance of the teacher's authority manifested by "Fuck him" is conduct not to be tolerated in an educational setting such as a public school.

Finally, petitioner presented no competent evidence, nor was any offer made to produce competent evidence, that the three (3) day suspension in these circumstances was racially motivated.

In light of the facts of this case, neither petitioner nor S.G. are entitled to any relief. It was noted earlier that the suspension was stayed pending determination here. Because this matter has been kept alive since October 1991, a three day suspension to be presently imposed would continue to bring about the beneficial result of assisting S.G. learn such conduct shall not be tolerated.

Therefore , the petition of appeal is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 4, 1992
Date

Daniel B McKeown
DANIEL B. McKEOWN, ALJ

Receipt Acknowledged:

Feb 6, 1992
Date

Maureen Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 13 1992
Date

OFFICE OF ADMINISTRATIVE LAW

tmp

DOCUMENTS IN EVIDENCE

R-1 Parent/Student Handbook

OAL DKT. NO. EDU 10904-91

J. G., on behalf of her minor child, S.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY, AND DAVID WEINTRAUB, TEACHER, AND ALL ADMINISTRATORS,	:	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 a careful and independent review of the matter, the Commissioner concurs with the findings and conclusions of the Office of Administrative Law that the Board's action in assessing a three-day suspension against S.G. for use of profanity addressed at Teacher Weintraub during music class was a reasonable extension of its authority, and reasonable under the circumstances. Consequently, the Commissioner determines petitioner and S.G. are not entitled to any relief and accordingly, the instant Petition of Appeal is dismissed.

IT IS SO ORDERED.

MARCH 13, 1992

COMMISSIONER OF EDUCATION

DATE OF MAILING - MARCH 13, 1992

33-92

IN THE MATTER OF THE SUSPENSION OF THE :
TEACHING CERTIFICATE OF LAURA RUSSO, :
LAKELAND REGIONAL HIGH SCHOOL DISTRICT, :
PASSAIC COUNTY. :
:

COMMISSIONER OF EDUCATION

ORDER

MARCH 13, 1992

SILLS CUMMIS ZUCKERMAN RADIN
TISCHMAN EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(201) 643-7000
Attorneys for Petitioner
Lakeland Regional Board of Education

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF LAURA RUSSO, LAKELAND REGIONAL HIGH SCHOOL DISTRICT.	STATE OF NEW JERSEY COMMISSIONER OF EDUCATION DOCKET NO.

ORDER

THIS MATTER having been brought before the Commissioner of Education by Sills Cummis Zuckerman Radin Tischman Epstein & Gross, P.A., attorneys for Petitioner Lakeland Regional Board of Education, James L. Plosia Jr., appearing, and it appearing that Respondent Laura Russo has failed to respond to the Order to Show Cause dated January 14, 1992 served upon her by the Commissioner of Education;

IT IS HEREBY ORDERED this 13th day of March, 1992, that the teaching certificate of Laura Russo be and hereby is suspended; and it is further

ORDERED that within five days of the date this Order, signed copies of this Order shall be served upon Petitioner Lakeland Regional Board of Education, Respondent Laura Russo, and the appropriate agencies of the Department of Education.

John Ellis

Dr. John Ellis,
Commissioner of Education

MARCH 13, 1992

SILLS CUMMIS ZUCKERMAN RADIN
TISCHMAN EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(201) 643-7000
Attorneys for Petitioner
Lakeland Regional Board of Education

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF LAURA RUSSO, LAKELAND REGIONAL HIGH SCHOOL DISTRICT.	STATE OF NEW JERSEY COMMISSIONER OF EDUCATION DOCKET NO. NOTICE OF MOTION

TO: LAURA RUSSO
35A Hamburg Turnpike
Riverdale, New Jersey 07457

PLEASE BE ADVISED that on February 27, 1992, Sills Cummis Zuckerman Radin Tischman Epstein & Gross, P.A. attorneys for Petitioner Lakeland Regional Board of Education, James L. Plosia Jr., appearing, shall move for entry of Default in the above-captioned matter, Respondent Russo having failed to respond to the Commissioner's Order to Show Cause. Petitioner shall rely on the attached Certification of James L. Plosia Jr.

By: _____
JAMES L. PLOSIA JR.

DATED: February 27, 1992

MARCH 13, 1992

DATE OF MAILING - MARCH 16, 1992

SILLS CUMMIS ZUCKERMAN RADIN
TISCHMAN EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(201) 643-7000
Attorneys for Petitioner
Lakeland Regional Board of Education

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF LAURA RUSSO, LAKELAND REGIONAL HIGH SCHOOL DISTRICT.	STATE OF NEW JERSEY COMMISSIONER OF EDUCATION DOCKET NO. CERTIFICATION OF JAMES L. PLOSIA JR.

1. I am associated with the law firm of Sills Cummis Zuckerman Radin Tischman Epstein & Gross, P.A. Sills Cummis represents Petitioner Lakeland Regional Board of Education in the above-captioned matter. I am familiar with the facts in this case.

2. On January 8, 1992, Petitioner filed an Order to Show Cause requesting that Respondent's teaching certificate be suspended as per N.J.S.A. 18A:26-10 for failure to give the Board sixty days' notice of intent to leave her teaching position.

3. By the terms of said pleadings Respondent Russo was to respond to the Order within twenty days of receipt. It is our understanding that Respondent has failed to so respond.

4. As a result Petitioner Lakeland Regional Board of Education herewith submits a Notice of Motion and a form of Order for Default requesting that Respondent Russo's teaching certificate be suspended.

I hereby certify that the foregoing statements made by me are true to the best of my knowledge. I understand that if the foregoing statements are wilfully false, I am subject to punishment.

By: _____
JAMES L. PLOSIA JR.

DATED: February 26, 1992

34-92

34-92

BOARD OF EDUCATION OF THE SALEM COUNTY VOCATIONAL-TECHNICAL SCHOOLS OF SALEM COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
WILLETTA MULHORN, Ed.D. SALEM COUNTY, SUPERINTENDENT OF SCHOOLS,	:	DECISION
RESPONDENT.	:	

MARCH 19, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT BY DISMISSAL
OAL DKT. NO. EDU 5994-91
AGENCY DKT. NO. 114-5/91

BOARD OF EDUCATION OF THE SALEM COUNTY VO-TECH. SCHOOLS/SALEM COUNTY
Petitioner,

v.

WILLETTA MULHORN, ED. D., SALEM COUNTY, SUPERINTENDENT OF SCHOOLS,
Respondent.

George G. Rosenberger, Jr., Esquire, for petitioner, (Butler, Butler, Rosenberger & Farrell)

David E. Powers, Deputy Attorney General, (Robert J. DelTufo, Attorney General of New Jersey, attorney), for respondent

Record Closed: January 7, 1992 Decided: February 6, 1991

BEFORE EDGAR R. HOLMES , ALJ :

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law on June 18, 1991, for a hearing pursuant to N.J.S.A. 52:14B-1 et seq and N.J.S.A. 52:14F-1 et seq

The matter has now been resolved between the parties. The parties have submitted an executed Stipulation of Dismissal.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Feb 6, 1991
Date

Edgar R Holmes
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

2/11/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 18 1992
Date

OFFICE OF ADMINISTRATIVE LAW

lmh

OFFICE OF ADMINISTRATIVE LAW FILED

JAN 24 3 41 PM '92

Attorney(s): GEORGE G. ROSENBERGER, JR., ESQUIRE
Butler, Butler, Rosenberger & Farrell

Office Address & Tel. No.: 279 East Broadway, Box 72
Salem, NJ 08079-1188
(609) 935-7550

Attorney(s) for

CONTROVERSIES AND DISPUTES

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY

SALEM COUNTY BOARD FOR VOCATIONAL TECHNICAL SCHOOLS,

Plaintiff(s)

vs.

WILLETTA MULHORN, Ed.D., SALEM COUNTY SCHOOL SUPERINTENDENT,

Defendant(s)

DOCKET NO. 114-5-91

CIVIL ACTION

Stipulation of Dismissal

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed without costs against either party.

Dated: 7 January 1992 .

By ~~Louis A. Chew~~ DAVID EARLE POWERS
DEPUTY ATTORNEY GENERAL
Attorney(s) for Defendant(s)

By George G. Rosenberger, Jr.
Attorney(s) for Plaintiff(s)

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OAL DKT. NO. EDU 5994-91

BOARD OF EDUCATION OF THE SALEM COUNTY VOCATIONAL-TECHNICAL SCHOOLS OF SALEM COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
WILLETTA MULHORN, Ed.D. SALEM COUNTY, SUPERINTENDENT OF SCHOOLS,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered in the form of a joint stipulation of dismissal have been reviewed. However, no terms were spread on the record bespeaking the settlement terms to which the parties agreed and thereby sought to dismiss this matter. Without such information, the Commissioner is without a basis for considering the proposed dismissal.

Accordingly, the recommended initial decision must be rejected and remanded to the Office of Administrative Law for incorporation in the record the terms of the settlement reached by the parties in this case.

MARCH 19, 1992

COMMISSIONER OF EDUCATION

DATE OF MAILING - MARCH 19, 1992

35-92

35-92

IN THE MATTER OF THE TENURE HEARING OF PUELLA HAINES, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

MARCH 23, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9947-90
AGENCY DKT. NO. 355-10/89

IN THE MATTER OF THE TENURE HEARING OF PUELLA HAINES, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY.

Philip Feintuch, Esq., for petitioner
(Feintuch, Porwich & Feintuch, attorneys)

Cherie L. Maxwell, Esq., for respondent
(Murray, Murray & Corrigan, attorneys)

Record Closed: February 14, 1992 Decided: February 20, 1992

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

Puella Haines requested a hearing on charges by the State-Operated School District of the City of Jersey City, Hudson County. The matter was transmitted to the Office of Administrative Law on December 4, 1990 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.*

At the hearing, the parties agreed to settle the matter and submitted the attached Settlement Agreement. Having reveiwed the record and the settlement terms, I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is further **ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

2/20/92
Date

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

2/21/92
Date

Maureen Kelley
DEPARTMENT OF EDUCATION

FEB 25 1992
Date

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

am

MURRAY, MURRAY & CORRIGAN
COUNSELLORS AT LAW
25 SYCAMORE AVENUE
LITTLE SILVER, N.J. 07739
(908) 747-2300

FAX NO. (908) 758-8095

ROBERT EMMET MURRAY
MEMBER N.Y. & N.J. BARS
KAREN A. MURRAY
MEMBER D.C., N.Y. & N.J. BARS
DAVID F. CORRIGAN
MEMBER N.J. BAR

CHERIE L. MAXWELL
MEMBER D.C., TX & N.J. BARS
REGINA WAYNES JOSEPH
MEMBER N.Y. & N.J. BARS
DERLYS GUTIERREZ-CONGETT
MEMBER N.J. BAR

CAMDEN COUNTY OFFICE
WILSON BUILDING, OFFICE 1107
130 NORTH BROADWAY
CAMDEN, N.J. 08102

OCEAN COUNTY OFFICE
44 WASHINGTON STREET
TOMS RIVER, N.J. 08753
(908) 286-0550

February 12, 1992

Hon. Mary Louise Lucchi-McCloud, ALJ
Office of Administrative Law
185 Washington Street
Newark, NJ 07102

Re: State-Operated School District
Puella Haines - Tenure Charges
OAL Docket No. EDU 09947-90N
Agency Ref. No. 355-10/89
Our File No. 99,132

Dear Judge Lucchi-McCloud:

Pursuant to the parties' agreement in the above-captioned matter, enclosed please find an originally executed settlement agreement which conforms to the terms placed on the record before Your Honor.

In accordance with said Agreement, the State-Operated School District hereby requests that the above-referenced tenure charges be withdrawn from further consideration by this Court.

Should you have any questions concerning this matter, please do not hesitate to contact me.

Very truly yours,

MURRAY, MURRAY & CORRIGAN

Cherie L. Maxwell

CHERIE L. MAXWELL

CLM/kmm
Enclosure
cc: Elena J. Scambio, Superintendent (w/o enc.)
Robert Y. Schaefer, Exec. Dir. of Human Resources (w/o enc.)
Charlotte Kitler, General Counsel (w/o enc.)
Philip Feintuch, Esq. (w/ enc.)

MURRAY, MURRAY & CORRIGAN
25 Sycamore Avenue
Little Silver, N.J. 07739
(908) 747-2300
Attorneys for Petitioner

In the Matter of the Tenure Hearing of Puella Haines and State-Operated School District of Jersey City, Hudson County.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL DOCKET NO. EDU 09947-90N AGENCY REF. NO. 355-10/89

SETTLEMENT AGREEMENT

The parties hereby agree as follows relative to the tenure charges filed against Puella Haines by the State-Operated School District of the City of Jersey City:

1. Ms. Haines will immediately tender her written resignation from employment with the Jersey City School District, to be effective April 1, 1992.

2. Upon receipt of Ms. Haines' written resignation, the State-Operated School District will withdraw the tenure charges filed on October 18, 1990 with the Commissioner of Education, Agency Ref. No. 355-10/89, and transmitted to the Office of Administrative Law under Docket No. EDU 09947-90N.

3. Retroactive to December 1, 1991, Ms. Haines will be returned to the payroll, on leave with pay until March 31, 1992.

4. Pension deductions and pension payments by the District for Ms. Haines will be made for the period from December 1, 1991 through March 31, 1992. Health benefits coverage will also be

provided by the District for husband and wife coverage for Ms. Haines upon the full execution of this Agreement until March 31, 1992.

5. To the extent Ms. Haines has individually paid for health coverage in the period from December 1, 1991 through March 31, 1992, and submits proof of said payments, the District shall reimburse Ms. Haines for said costs.

6. Ms. Haines submits her resignation and enters into this Settlement Agreement voluntarily and without coercion.

7. This Agreement will constitute a full and final settlement of all claims between the parties relative to Ms. Haines' employment with the Jersey City School District.

FOR THE RESPONDENT

PUELLA HAINES
DATED: 1/28/92

PHILIP FEINTUCH, ESQUIRE
DATED: 1/31/92

FOR THE STATE-OPERATED SCHOOL DISTRICT

DR. ELENA J. SCAMBIO
STATE DISTRICT SUPERINTENDENT
DATED:

CHERIE L. MAXWELL, ESQUIRE
DATED: 1/31/92

P.O. Box 4022
Bergen Station
Jersey City, NJ 07304
January 27, 1992

Dr. Elena J. Scambio
346 Claremont Avenue
Jersey City, NJ

Dear Dr. Scambio:

Please accept this letter of resignation to be effective April 1, 1992.

Very truly yours,

Puella Haines

PUELLA HAINES

OAL DKT. NO. EDU 9947-90

IN THE MATTER OF THE TENURE HEARING OF PUELLA HAINES, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement. In so deciding, the Commissioner notes that the terms of the settlement comport with the standards enunciated in In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983.

COMMISSIONER OF EDUCATION

MARCH 23, 1992

DATE OF MAILING - MARCH 23, 1992

36-92

36-92

EDISON PRINCIPALS ASSOCIATION, ET AL.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MARCH 23, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7542-90S
AGENCY DKT. NO. 267-7/90

EDISON PRINCIPALS ASSOCIATION, ET AL.,
Petitioner,
v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON,
Respondent.

Robert M. Schwartz, Esq., for petitioners (Lake and Schwartz, attorneys)

James E. Stahl, Esq., for respondent (Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, attorneys)

Record Closed: February 18, 1992 Decided: February 20, 1992

BEFORE **JEFF S. MASIN**, ALJ:

This matter came before the Office of Administrative Law (OAL) as a contested case following transmittal from the Department of Education. The petitioner appealed from action taken by the Board of Education following an alleged illegal "sick out" on June 8, 1990. As a result of the absence of various members of petitioner's organizations on that date the school board withheld one day's compensation from principals, vice-principals, supervisors and department heads who purportedly engaged in the "sick out." However, petitioners contended that

their absences on that date were legitimate and allowable under applicable statutory and contractual provisions and that the Board's action was illegal.

Following transmittal of this contested case to the OAL, a prehearing conference was held before Administrative Law Judge Jeff S. Masin. Subsequently, hearing dates were established, with the case scheduled to begin on December 5, 1991. At that time, the parties, cognizant of the substantial hearing time necessary for complete presentation of the proofs in the matter and desirous of avoiding substantial counsel fees and expenses of litigation, entered into a Stipulation of Settlement, which document is attached hereto and made a part hereof. Pursuant to the terms and conditions of the Stipulation, the parties have agreed that each member of the association who did not receive compensation on June 8, 1990 will have added to his or her personnel records a personal or sick day in accordance with Exhibit "B" annexed to the Stipulation and hereto. Additional terms and conditions of the settlement agreement, including an agreement by the parties that this stipulation is not to be construed as any admission of wrongdoing and/or fault on the part of either party, are set forth in the Stipulation.

Based upon the facts and circumstances of this case, and the representations of counsel, I **FIND** that the parties have voluntarily entered into this agreement which fully disposes of the matters in issue between them. I **FIND** that the settlement is within the confines of law and should be accepted. The parties are therefore **ORDERED** to comply with the terms and conditions of the settlement. The contested case is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

2/20/92
Date

Jeff S. Masin
JEFF S. MASIN, ALJ

Receipt Acknowledged:

2/24/92
Date

Maureen Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 27 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

RECEIVED JAN 0 3 1992

FEB 13 11 23 AM '92

BORRUS, GOLDIN, FOLEY, VIGNUOLO, HYMAN & STAHL, P.C.
2875 U.S. Highway 1
P.O. Box 1963
North Brunswick, NJ 08902
(908)422-1000
Attorneys for Respondent

EDISON PRINCIPALS ASSOCIATION, et al.,	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
Petitioner,	OAL DOCKET NO: 07542-90 S AGENCY REF. NO: 267-7/90
v.	CIVIL ACTION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON,	
Respondent.	STIPULATION OF SETTLEMENT

THIS MATTER having been amicably resolved between the parties, it is agreed as follows.

1. The Petition filed on behalf of Petitioners is dismissed with prejudice.

2. The within settlement is not intended to nor shall it be construed as any admission of wrongdoing and/or fault on the part of either party to this action. The matter is being resolved in order to eliminate ongoing counsel fees and expenses of litigation. The parties represent and agree to each other that as a condition of this settlement, this settlement and the terms of same are not to be utilized by either party during any

ongoing or future negotiations. The parties further agree that the settlement shall not be intentionally released to any newspaper or public media source, but shall be available in the normal course of events as a public document.

3. The Respondent shall, as to each member of the Petitioners' Association who did not receive compensation on June 8, 1990, add to each such member's personnel records a personal or sick day as set forth Exhibit "B" annexed hereto. Example: In the event a member on June 8, 1990 requested a sick day and thereafter did not receive compensation for that day, that member shall receive an additional sick day on their personnel records.

4. The Petitioners and each of their members waive any and all claims that they have, had, or may have with respect to the reinstatement of any compensation not paid to its members on June 8, 1990, the sole remedy being afforded being the addition of sick or personal days as the case may be, which may be utilized in accordance with Title 18A and the contract between the parties.

EDISON PRINCIPALS AND
SUPERVISORS ASSOCIATION

By: Mary M. Reece

EDISON DEPARTMENT HEADS ASSOCIATION

By: Michael E. Kaplan

EDISON SUPERVISORS ASSOCIATION

By: _____

_____
Gerald F. Young

_____
John A. DiMuzio

_____
Michael E. Kaplan

LAKE AND SCHWARTZ
Attorneys for Petitioners

By: _____
Robert M. Schwartz

EDISON TOWNSHIP BOARD OF EDUCATION

By: _____
Joseph A. Kreskey, Supt. of Schools

BORRUS, GOLDIN, FOLEY, VIGNUOLO, HYMAN & STAHL, P.C.
Attorneys for Respondent

By: _____
James E. Stahl

Exhibit B

PUBLIC SCHOOLS OF EDISON TOWNSHIP
Office of the Superintendent
100 Municipal Boulevard
Edison, NJ 08817

- Edison HS Department Heads Association -

ABSENTEES: June 8, 1990

Department Head:	Reason:
COE, John	P
DE HANES, Robert	P
DREW, Joseph	P
JOBBINS, Donald	P
KAPLAN, Michael	A
METTLER, Donald	A
O'DONNELL, C.	A
RICHARDS, Diann	A
RIEMANN, A.	P
SCHUSTER, Ronald	A
SKARECKI, Peter	A
SOFKA, Robert	P
STOUT, J. Kenneth	A
THOMPSON, Janet	A
WALSH, Ruth	P

LEGEND:
A - Sick Day
P - Personal Day
V - Vacation Day

CAB:ib
1A28

PUBLIC SCHOOLS OF EDISON TOWNSHIP
Office of the Superintendent
100 Municipal Boulevard
Edison, NJ 08817

EXHIBIT B

- Edison Principals/Supervisors Association -

ABSENTEES: June 8, 1990

Supervisors:	Reason:
BERTUCCI, M. Jennene	A
DI MUZIO, John	A
FLOR, Donald	A
FRANCIS, Jovita - EXEMPT	V
HUGHES, Winson	A
KLEINCHESTER, Joseph - EXEMPT	LOA
KORNFELD, Martin	A
KRIEGER, Larry	A
RANTA, Robert	P
RASPOLICH, Louis	P
SHAFRANSKI, John	A
SHANKS, Robert	A
SPEILLER, Judith	A
TRESS, Gretchen - EXEMPT	A (Long-Term)
VIGGIANO, Thomas	A

Head Counselor:	
RICCIO, Fred - EXEMPT	V

Athletic Directors:	
ADAMS, Edward	P
COWARD, Robert	A

LEGEND:
A - Sick Day
P - Personal Day
V - Vacation Day
LOA - Leave of Absence

CAB:ib
1A27

UBLIC SCHOOLS OF EDISON TOWNSH
Office of the Superintendent
100 Municipal Boulevard
Edison, NJ 08817

- Edison Principals/Supervisors Association -

ABSENTEES: June 8, 1990

Principal:	Reason:
AHERN, John	P
CAPACCIO, Rosario	A
KEERS, Susaan	P
KRAJKOVICH, Joseph	A
LUGER, Judith	A
MANNELLO, Louis	P
MC HOLME, Bonnie	P
PUORRO, Allen	A
REECE, Mary — EXEMPT	V/P
WEINFELD, Arthur	P
YOUNG, Gerald	A
BOHN, William	A
GABRIELSON, William	A
OLSEN, Harry	A
ROBINSON, Donald	P
CAPRARO, Vincent	A
RICHARDSON, Cedric	P
Vice Principal:	
KOTCHO, John	A
LA PLACE, Michael	A
LUTTER, Robert	A
WILLIAMS, Edward	A
ESPOSITO, S.	A
ILLES, Arlene	P
SAMOLEWICZ, Edward	A
YETMAN, Beatrice	P

LEGEND:
A - Sick Day
P - Personal Day
V - Vacation Day

CAB:ib
1A26

OAL DKT. NO. EDU 7542-90S

EDISON PRINCIPALS ASSOCIATION, ET AL.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

MARCH 23, 1992

DATE OF MAILING - MARCH 23, 1992

37-92

37-92

BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY	:	
PETITIONER	:	
V.	:	COMMISIONER OF EDUCATION
JOSEPH ZACH, OCEAN COUNTY SUPERINTENDENT OF SCHOOLS,	:	DECISION ON MOTION
RESPONDENT.	:	

MARCH 23, 1992

BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY	:	
PETITIONER	:	
V.	:	COMMISIONER OF EDUCATION
JOSEPH ZACH, OCEAN COUNTY SUPERINTENDENT OF SCHOOLS,	:	DECISION ON MOTION
RESPONDENT.	:	

For Petitioner, Martin J. Anton, Esq.

For Respondent, Arlene G. Lutz, DAG (Robert J. Del Tufo, Attorney General of New Jersey)

WHEREAS, this matter was opened before the Commissioner of Education by way of a Petition of Appeal with Motion for Emergent Relief filed by the Board of Education on March 16, 1992; and

WHEREAS, said petition appealed as ultra vires two directives of respondent County Superintendent regarding petitioner's proposed budget, the first of March 6, 1992 advising the Board that if the municipal governing body should reduce its school budget following defeat by the voters, or if voters should reject the cap waiver question upon which conditional budget approval has been granted by respondent, the district must appeal those reductions to the Commissioner; and the second of March 12, 1992 advising the Board that its proposed budget was now final in as much as a detailed review for cap waiver purposes had led to the conclusion that no item could be deleted or reallocated without compromising the budget's thoroughness and efficiency (T&E); and

WHEREAS, the Board moved for emergent relief on the basis that irreparable harm would result if restraints were not granted, as there would be no opportunity for the Board to receive and act upon public input in time to meet the statutory deadline for pre-election budget adoption, thus depriving the Board and the public of their right to an open, informed budget hearing; that it had a likelihood of success on the merits due to clear decisional law stating that "it does not automatically follow***that because the Commissioner has determined that a reallocation of resources within the permissible level of spending would be insufficient to accomplish [T&E], the entire budget is cast in stone," Board of Education of the Borough of South River v. Mayor and Council of the Borough of South River, Middlesex County, Commissioner's decision of November 20, 1986, and due to regulatory provisions which provide for county superintendent review of reductions to defeated budgets agreed upon by a board and municipality, N.J.A.C. 6:24-7.3(e), contrary to respondent's contention that any reduction to petitioner's budget must automatically be appealed; and that sustaining the County Superintendent's position would render N.J.S.A. 18A:22-13 meaningless and tempt districts to seek cap waivers in the hope of eliminating public objection to their proposed budgets; and

WHEREAS, on March 20, 1992 respondent filed an Answer admitting his actions as embodied by the directives in question but denying that those actions were improper, taken in bad faith or otherwise violative of applicable law; and

WHEREAS, together with said Answer was filed a reply to the Motion for Emergent Relief, said reply arguing that petitioner had

failed to meet the criteria for granting of emergency restraints in that its challenge to any directive to appeal a defeated budget and/or cap waiver was not ripe for adjudication in view of the fact that no such defeat had yet occurred; in that it cannot suffer irreparable harm by merely being reminded of action that the constitution requires it to take, irrespective of any directive from respondent; in that it is unlikely to prevail on the merits insofar as settled law requires a district which certifies, as petitioner herein already has, that its budget is inadequate for T&E purposes to seek a cap waiver and appeal any defeat of it or the budget from whence it arose, the Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, Gloucester County, 116 N.J. 305, 316 (1989), accord, the Board of Education of the Township of East Brunswick v. the Township Council of the Township of East Brunswick, Middlesex County, 48 N.J. 94, 108 (1966), and insofar as petitioner's budget was carefully scrutinized for possible reallocations prior to respondent's determination, in accordance with the Quality Education Act (QEA, P.L. 1991, c.62) and the Commissioner's obligation thereunder as set forth in an Opinion of the Attorney General dated July 8, 1991, that $1.8 million of an $8,537,558 cap waiver request was essential for T&E purposes, so that any reallocations subsequently effectuated by petitioner would be inherently impermissible as a violation of constitutional requirements; and

WHEREAS, the Commissioner of Education has designated his authority to hear and decide this matter to Deputy Commissioner John C. Woodbury pursuant to N.J.S.A. 18A:4-33; and

WHEREAS, the Deputy Commissioner has carefully considered the arguments of the parties as well as the standards for

appropriate grant of pendente lite restraints as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982) and its progeny; and

WHEREAS, the Deputy Commissioner finds the actions complained of herein to have been fully in accord with the Commissioner's constitutional obligation, delegated in the instance of budget review to county superintendents of schools, to ensure that all districts provide sufficient resources for T&E, even in the wake of public disapproval; and that the directives from which petitioner seeks relief are nothing more than statements of the district's constitutional obligation given that its budget has been, through the QEA conditional approval process, specifically found to be inadequate absent provision of all allocations itemized therein together with designated cap waiver items totaling $1.8 million, a circumstance which critically distinguishes this matter from the general rules upon which the Board bases its claims; and

WHEREAS, having so found, the Deputy Commissioner sees no basis for grant of petitioner's one remaining prayer for relief, a request for additional time in which to adopt a budget in view of its having thus far not done so; now therefore

IT IS ORDERED this 23rd day of March 1992 that petitioner's Motion for Emergent Relief is DENIED and that the Board is directed to adopt a budget on or before March 26, 1992 in accordance with N.J.S.A. 18A:22-32. It is further ORDERED that, all prayers for relief having been disposed of by the within decision, the Petition of Appeal is hereby DISMISSED without further proceedings.

John C Woodbury

MARCH 23, 1992 DEPUTY COMMISSIONER OF EDUCATION

DATE OF MAILING - MARCH 24, 1992

38-92

BOARD OF EDUCATION OF THE PINELANDS REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
THE TOWNSHIPS OF LITTLE EGG HARBOR, EAGLESWOOD, OCEAN COUNTY, AND BASS RIVER, BURLINGTON COUNTY, AND THE BOROUGH OF TUCKERTON, OCEAN COUNTY,	:	DECISION
RESPONDENTS.	:	

APRIL 3, 1992

BOARD OF EDUCATION OF THE PINELANDS REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
THE TOWNSHIPS OF LITTLE EGG HARBOR, EAGLESWOOD, OCEAN COUNTY, AND BASS RIVER, BURLINGTON COUNTY, AND THE BOROUGH OF TUCKERTON, OCEAN COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

Gelzer, Kelaher, Shea, Novy & Carr for Petitioner (Paul J. Carr, Esq.)

Shackleton, Hazeltine & Bishop for Respondent Township of Bass River (Eric J. Miller, Esq.)

Gilmore & Monahan for Respondent Township of Eagleswood and the Borough of Tuckerton (Terry F. Brady, Esq.)

Hiering, Hoffman & Gannon, for Respondent Township of Little Egg Harbor (Brian E. Rumpf, Esq.)

This matter has come before the Commissioner by way of petition to appeal the voter rejected cap waiver of the school budget in petitioner's district for the 1991-92 school year filed by faxed transmission on October 15, 1991. Petitioner claims its budget at the cap level is not sufficient to provide a thorough and efficient education and that it is necessary for the Commissioner to order an increase in the budget in the amount of $637,332, more particularly detailed as follows:

Student Transportation	$225,000
Summer School	$ 50,000
Athletics and Equipment	$ 53,000
Professional/Support Staff	$213,000
Co-curricular Programs	$ 30,000
Staff Benefits	$ 66,332
TOTAL	$637,332

The Board alleges that said budget was conditionally approved by the Ocean County Superintendent of Schools contingent upon a cap waiver, and that an informal opinion rendered by the Attorney General of the State of New Jersey dated July 8, 1991 (91-0036) does not preclude the Commissioner's review of this cap waiver appeal.

On November 18, 1991 counsel for the Borough of Tuckerton acknowledged receipt of notice from the Bureau of Controversies and Disputes that respondents had not answered the petition as required by N.J.A.C. 6:24-1 et seq., and requested permission to adopt the answer and position of co-respondent Little Egg Harbor Township, thus rendering its further participation unnecessary. By letter dated December 19, 1991 Bass River Township made the same request. By letter dated November 20, 1991 the Township of Eagleswood made the same request, which asked to adopt Little Egg Harbor's position. All three such requests were acknowledged and granted by letter from the Acting Director of the Bureau of Controversies and Disputes on December 24, 1991. Another letter from the Bureau dated December 6, 1991 apprised the respondents that if the answer were not received within ten days, the Commissioner would deem each count of the petition to be admitted, whereupon he would decide the matter on a summary judgment basis.

Thereafter, by faxed transmission dated December 16, 1991, the Mayor and Township Committee of the Township of Little Egg Harbor filed its answer stating, inter alia, that the rejection of petitioner's cap waiver proposal by the voters of the Pinelands Regional school system sending districts does not deny the students in the Pinelands Regional school system a thorough and efficient education. The Answer also raised the affirmative defense that pursuant to L. 1991, c. 62, Sec. 19(f), petitioner is not permitted to appeal the rejection of a voter decided cap waiver proposal, and that as a result, said appeal is precluded pursuant to state statute.

Thereafter by letter dated December 23, 1991, the Bureau of Controversies and Disputes apprised the parties that the matter would be decided in a manner consistent with the procedures for budget appeals as set forth at N.J.A.C. 6:24-7.8. On January 13, 1992 respondent Little Egg Harbor sought an extension to submit its position, which request was granted by letter dated January 15, 1992. The Bureau's letter of that date apprised petitioner that its position statement would be due on the same date, Tuesday, January 21, 1992.

Respondent Little Egg Harbor (respondent) filed said position statement on January 21, 1992, as did petitioner. On January 30, 1992, respondent filed a response to petitioner's position statement. Petitioner filed no response to respondent's position statement. Further, neither party filed a final summation of its position within five days of the parties' receipt of the other's response to the written position statement. Consequently, the record closed on February 6, 1992.

Petitioner's position statement first presented an overview of the Pinelands Regional school district, averring that such overview reflects related costs and issues involved with the start-up year of its two facilities, the first of which opened in 1979, the second in September 1991. Thereafter petitioner addressed each of the rejected cap waiver items, stating its position on each by submitting to the record the cap waiver question appeal as follows:

> On September 4, 1991 the Pinelands Regional School District opened a new 800 student capacity middle school. Approved via a lease/purchase transaction, the facility's tax impact was dramatically reduced when the Board of Education capitalized interest payments during the two budget years of building construction. However, this school year reflected the first "principal" payment of almost $700,000. Additionally, staffing requirements for the new school as well as operational allocations amounted to another $500,000. New middle school costs (beyond annual district budgetary increases) exceeded $1.2 million dollars.
>
> Faced with the dilemma of an 8% CAP ceiling, enormous cuts in expenditures and programs were required***. From these cuts the Board and administration fashioned a CAP waiver question seeking approval for a reinstatement of approximately 60% of expenditure cuts. Unfortunately, the question was defeated and this places the school district in an untenable position as it attempts to provide a thorough and efficient education for its student body. Specifically:
>
> <u>Professional/Support Staff & Benefits</u> - $279,332.00
>
> Amounting to almost half of the money requested, the unavailability of these funds has created a situation in the district where overcrowded classrooms, inefficient student supervision, less student time on task, and less than acceptable student performance are quickly becoming a reality. The school district was previously categorized as Level II (monitoring) and worked diligently to overcome its deficiencies. Lack of sufficient staff will lead to a return to a less than thorough and efficient educational program.

Summer School/Athletics/Co-Curricular Programs - $133,000.00

Categorized as extensions of our regular instructional program, a lack of funding in these budgetary areas had directly impacted upon the continuity of our educational program. A regional school district with little, if any, community recreational facilities, the district has been expected to provide students with activities outside the classroom. Major cutbacks in these areas are reflected in fewer students enjoying supplementary and complementary activities that are designed to broaden their knowledge, expand their horizons and provide meaningful interaction with peers and adults alike. Once again, the geographic location of the district, its regional design, as well as an enormous lack of other recreational facilities makes inclusion of these budgetary items a "must" for a thorough and efficient educational process.

Student Transportation - $225,000.00

The location of this school district places more emphasis on this budgetary area than might be expected. A regional school district in very rural New Jersey, the students no longer bussed face a very perilous and dangerous walk to school each day. The area is without sidewalks, is surrounded by major county or state roadways and is confronted by local township attitudes that reflect a "blame the Board of Education" philosophy. Such attitudes are reflected in the lack of sidewalks, a "deaf ear" to possible township funding of these transportation routes and a lack of genuine interest in the welfare of the young citizens of the community. Less than 100% student transportation will result in unacceptable higher rates of student absenteeism and unsafe conditions for those students walking to and from school each day.

Petitioner also submitted to this record a report of budget cuts it claims are necessary to get to the maximum permitted current expense budget as well as explanations for each such budget cut. Said "cap waiver question appeal statements" and the amounts they recite as budget amounts necessary to secure the maximum permitted current expense budget are recited herein verbatim:

BUDGET CUTS TO GET TO MAXIMUM PERMITTED CURRENT EXPENSE BUDGET

Student Transportation	$ 225,000
Student Field Trips	33,000
High School Roofing	142,000
Professional Staff Services	34,000
General Supplies	14,100
Summer School	50,000
Summer Curriculum Writing	12,000
Athletics and Equipment	53,000
Substitutes	37,250
Co-Curricular Program	30,000
Overtime and Extra Work	40,500
General Program Equipment	27,300
District Building Equipment/Vehicles	64,750
Professional/Support Staff	213,000
Staff Benefits	66,332
Other	35,000
TOTAL	$1,077,232

BUDGET CUT EXPLANATIONS

Student Transportation - Includes some to/from transportation costs (non-aided) and late bus routes. Approx. 250 students would walk to/from school each day.

Student Field Trips - Includes All field trips normally paid for through Board funds. Does not include field trips paid for by grants or other aid monies.

High School Roofing - Includes monies allocated for additional roof repairs next year. This does not impact the roof repairs planned for this spring.

Professional Staff Services	-	Includes all trips, conferences, seminars for professional staff which are not guaranteed within a contract, as well as monies for our District In-service and I.T.I.P. programs.
General Supplies	-	Includes some of the monies allocated for general teaching supplies, athletic supplies, office supplies, etc. A "conservation" program, within the district will be mandated!
Summer School	-	Includes all monies for the summer school and driver education programs.
Summer Curriculum Writing	-	Monies for curriculum updating and course of study re-writing. These will need to be accomplished during the regular 1991-92 school year.
Athletics and Equipment	-	Includes monies from various items in the athletic program ($53,000)
Substitutes	-	Includes monies for substitutes for professional, support, maintenance and custodial staff (approx. $30,000 for professional and $7,250 for all others).
Co-curricular Program	-	Includes monies for Close-Up ($5,000) and other allocations ($25,000) for other honoraria positions. Only approx. one-half of all clubs will be able to function unless staff volunteer to be advisors without compensation.
Overtime and Extra Work	-	Includes reduction of monies for guidance and Child Study Team summer employment ($16,000) as well as other monies ($24,500) from maintenance and custodial overtime accounts. This may impact changes to be negotiated in their contracts and might affect Sunday use of the facilities by outside groups.
General Program Equipment	-	Includes equipment monies allocated in departments such as Industrial Arts, Music, Home Economics, Business Ed, Science, Nurse and Media. Those items are generally new/replacement equipment for high school programs.
District Building Equipment/Vehicles	-	Includes items such as a new truck, warehouse shelving, and exterior doors for the high school as well as replacement carpeting for the high school.

Professional/Support Staff	-	Includes monies for the following new or existing staff positions: M.S. Media Specialist, M.S. Maintenance (1), Custodian (1), Food Service (1), M.S.. Attendance Clerk, a Special Education aide, a Science teacher, and a student coop worker in District Offices. It also includes leaving vacant a H.S. Asst. Principal's position as well as termination of the Clerk of the Works position as of June 30th.
Staff Benefits	-	Includes monies for staff health, prescription and dental program benefits for staff listed above.
Other	-	Includes monies from the Superintendent, Board of Education, Public Information and Legal Services accounts. Items such as equipment, out-of-state trips (conferences, legal fees, supplies, student recognition, and privilege pass monies are included).

Said documents constitute the entire record submitted by petitioner in this cap waiver appeal.

Respondent's position statement first objects to Attorney General Opinion No. 91-0036, as applied to the facts in this matter, claiming that its use "overtly obliterates the clear statutory dictate as set forth at N.J.S.A. 18A:7D-28(f)." (Respondent's Position Statement, at p. 2) It cites that portion of the Attorney General Opinion that suggests that the authority to appeal cap waivers "...only extends to those limited situations where such action is essential to meet the constitutional requirement only after the exhaustion of other administrative remedies and may not be exercised to ease budget requirements where the constitutional standard is being met." (Id.) Respondent contends an examination of the individual line items for which the cap waiver is sought emphasizes the fact that the funds from the cap waiver will not alter the constitutional standard of the provision of a thorough and

efficient education if said funds are not applied to the current expense budget for the 1991-92 school year.

Respondent thereafter evaluates each item presented in petitioner's Notice of Appeal, which arguments are summarized, in pertinent part, below.

Student Transportation - $225,000

Respondent avers that the advertised budget statement reveals that for 1991-92 there remains $773,250 in the student transportation line item without the $225,000. It also notes that petitioner has engaged a private bus company to reduce the cost associated with student transportation for the first time. Thus, it concludes not only is there an additional cost savings not reflected in the publicized budget, but there may be additional proceeds from the sale of the existing fleet of buses which petitioner has begun selling to outside parties. Respondent further notes that the Board's own position in its budget appeal decided by the Commissioner January 14, 1992 acknowledged that it is "...not legally obligated to provide such a service (student transportation was cut to meet the State mandated cap) and has established other priority, educational goals for the first year of its new middle school operations." (Respondent's Position Statement, at p. 4, quoting Board's Position Statement in budget appeal) Relying on the Commissioner's decision, which agreed that non-remote busing is not a legal obligation in meeting the state requirement for a thorough and efficient education, respondent contends there is no dispute that failing to grant a cap waiver for an additional $225,000 for student transportation does not operate to negate a constitutionally sufficient budget for Pinelands.

Summer School - $50,000

Quoting petitioner's Budget Cut Explanation Sheet that summer school "includes all monies for the summer school and driver education programs," respondent avers petitioner has failed to demonstrate the manner in which summer school is necessary for the district to provide a thorough and efficient education. (Id.) It claims further that petitioner has also failed to delineate the manner in which all other administrative remedies have been exhausted to redirect the appropriation of money to the summer school program in the event petitioner believes summer school to be a vital ingredient in meeting the Board's constitutional mandate.

Further, respondent contends that in the two previous years of budget appropriations and expenditures, Line Item 1411 for summer school contained a subtotal of $35,282.01 and $36,100.00 respectively for each of the two preceding years. Inasmuch as petitioner has a newly restored budget surplus balance estimate at Line 53 of $549,398.80, respondent contends the Board clearly has surplus funds available without erasing the comfortable margin of surplus to ensure against unforeseen contingencies. Respondent claims that if the Board were to expend $50,000 from said surplus for summer school, its budget surplus would still represent 3.26% of the total budget, which it claims is a comfortable margin. Thus, respondent contends the Board has failed to demonstrate how the rejection in the proposed cap waiver of $50,000 for summer school impairs the provision of a thorough and efficient education.

Athletics and Equipment - $53,000

Respondent cites the Board's Budget Cut Explanation Sheet, wherein petitioner describes the $53,000 as "monies from various

items in the athletic program." (Respondent's Position Statement, at p. 5). Respondent avers the Board does not include in its appeal the amount budgeted for athletics and equipment without the addition of $53,000 sought in the proposed cap waiver. Claiming that the Board does not contend that the athletic programs have been abandoned, and further does not demonstrate the inability of the Board to appropriate other funds for athletics or equipment or to make concessions while not disrupting the provision of a thorough and efficient education, respondent suggests petitioner has failed to meet its burden in asking for $53,000 for athletics and equipment.

Professional/Support Staff - $213,000

Respondent claims petitioner has failed to demonstrate that failure to have a middle school specialist and an additional middle school maintenance person would be a deprivation sufficient to cause an impairment in the provision of a thorough and efficient education, claiming there are other staff who may be able to fulfill the responsibilities of the proposed added media service specialists and media service maintenance person.

Respondent notes further that the Board also seeks the addition of one custodian in this aspect of its cap waiver appeal. It cites the current expense appropriation budgets submitted by the Board stating there is currently $620,106 provided for salaries at Line Item 2502 (operation/maintenance). Respondent claims petitioner has made no showing that the existing custodial staff is insufficient to handle the need of the physical plants and further has failed to show how the loss of a new custodial position will impair the provision of a thorough and efficient education. Respondent claims the same is true regarding the reduction of a food

service person. It claims there is currently $146,841 budgeted for salaries in the food service Line Item 2504. Respondent claims the Board has not shown how the absence of one food service person will effect the quality of education received by the children within the district in any fashion.

In response to the Board's seeking a cap waiver for the addition of an attendance clerk at the middle school, respondent contends at Line Item 2109 for attendance services, $78,526 is budgeted in appropriations for this school year, as contrasted with $70,590 for the year before. Of that amount, respondent claims, $73,436 is for salaries. Respondent avers the Board has not provided any reason which would suggest an inability to use the existing salaried personnel to accommodate the needs of the new middle school. It further claims that the existing budget also provides for an increase in salary expenditure of $7,741.

As to the Board's request for a special education aide in its cap waiver, respondent counters that there are numerous line items in petitioner's advertised budget which may constitute special education and must provide for salaries beyond that contained within the overall instructional salaries set forth for each school. It offers as examples, that there is $95,391 budgeted for salaries for the emotionally disturbed at Line Item 1206, and that there is budgeted: $37,438 for salaries in Line Item 1209 for the multiply handicapped, $80,261 at Line Item 1210 for the neurologically impaired and $235,617 at Line Item 1212 for the perceptually impaired. Respondent further suggests that there is an additional $331,158 budgeted at Line Item 1405 for salaries for preventative/remedial programs. Respondent claims the Board has

failed to demonstrate that the lack of appropriation of one additional special education aide will impair the provision of a thorough and efficient education.

Moreover, respondent further argues against petitioner's allegation that the reduction in professional support staff expenditures due to the denial of the cap waiver request will preclude the provision of money for a science teacher. Respondent claims the Board did not reduce Line Items 1104 and 1105, and thus cannot seek the reinstatement of any monies for those line items for instruction in this cap waiver request. It claims that there appears to be no basis to support the Board's request that a science teacher be added to the grant of the cap waiver. It claims the same is true with respect to the student co-op worker in district offices. Respondent avers there is no basis for the request to allow a cap waiver in order to pay a student to work in the district offices, claiming experience may be more properly gained through a voluntary position in a like capacity.

In response to petitioner's contention that to meet the cap a high school assistant principal's position cannot be filled, respondent replies that inasmuch as the Board functioned during the 1990-91 school year with five administrators and a total of 19 supervisors and principals totaling 24 supervisors, the need for an additional assistant principal at the high school clearly has not been justified. Respondent notes that the Board has made no showing that there is no other qualified person to continue assuming the duties of the assistant principal while that post is left vacant, and likewise has failed to show how the termination of the Clerk of the Works position will jeopardize the provision of a

thorough and efficient education of the Pinelands Regional pupils, and refers to Line Item 2502 which respondent claims has a $620,106 appropriation for the 1991-92 budget for salaries for operation and maintenance. It claims also that the Board has failed to show that existing personnel were not adequately able to fulfill the functions of the position of Clerk of the Works.

Co-Curricular Programs - $30,000

Respondent contends that while the Board has admitted in its Budget Cut Explanation Sheet that half of all clubs will be able to function with paid staff despite the rejection of the cap waiver proposal, it does not state whether it has been unable to gain volunteer advisors to assist with co-curricular programs or whether paid staff members are unavailable. Respondent also claims the Board has failed to show whether it has explored more cost effective ways of coordinating co-curricular programs to reduce the size of paid personnel in assisting with such programs. Respondent submits that the fact that at least half of the co-curricular programs continue to exist shows that the children in the district are not being deprived of a thorough and efficient education by the reduction in this paid staff expenditure.

Staff Benefits - $66,332

Respondent contends that by not employing such professional support staff as sought in this cap waiver appeal, the Board automatically assumes the benefit of saving the $66,332 in staff benefits which must exist as a corollary to the professional support staff mentioned.

Respondent concludes its position statement by averring that the Attorney General Opinion states that cap waiver appeals to

the Commissioner are only permissible where there would clearly be a deprivation of the constitutionally required provision of a thorough and efficient education should the cap waiver not be permitted. Respondent submits that such is not the case in this appeal, and that petitioner's appeal of the voter rejected cap waiver should be denied.

Respondent's response to petitioner's position statement on the voter rejected cap waiver portion of the budget for 1991-92 adds that petitioner fails to address the six cap waiver items in which additional funding was sought through a cap waiver proposal presented to the public in 1991, and failed to adequately address the manner in which the voter rejected cap waiver results in a deprivation of funds needed to provide a constitutional thorough and efficient education to the students in the district. It claims the $637,332 is simply not necessary for the provision of a thorough and efficient education.

It notes more specifically that the $225,000 which petitioner seeks for student transportation has already been provided by the respondents herein, due to the fact that respondents inappropriately added this amount to the 1991-92 budget of the district. The remaining line items which petitioner seeks to bolster through the addition of funds rejected by the voters in the cap waiver request were simply not necessary as there are sufficient services already in place to compensate for rejection of these funds which exceed the 8% cap waiver, respondent claims.

Respondent thus submits that the Board has failed to demonstrate in any manner why the statutory dictate precluding a petition of appeal of a voter rejected cap waiver should not apply. Respondent asks that the appeal be dismissed.

No other submissions were brought to the record by the parties.

Upon a careful and independent review of the record of this budget appeal, the Commissioner must first address the procedural argument posted by respondent regarding review of this cap waiver appeal. At the outset, it bears noting that just as in a budget appeal pursuant to N.J.A.C. 6:24-7.1 et seq., the standard of review in this cap waiver appeal is whether the amount of monies available to the Board in the absence of a cap waiver is sufficient for the provision of a thorough and efficient education to the pupils of that school district, as is required under our state constitution. See Quality Education Act ("QEA") L. 1991, c. 62, Sec. 19(f). See also, Attorney General Informal Opinion (91-0036) dated July 8, 1991. It is the case in this cap waiver appeal that the county superintendent conditionally approved the budget at the time of its presentation to the voters on April 30, 1991. Under such circumstances and upon requests from the individual boards, filed pursuant to the dictates of N.J.A.C. 6:24-7.1 et seq., the Commissioner must examine those items for which a cap waiver is sought, along with the arguments of the parties regarding whether granting such waiver is essential to meet the constitutional requirement to determine whether to exceed the cap and grant such amounts sought by the district.

In this regard, the Commissioner rejects respondent's argument that this cap waiver appeal is not among those envisioned as appropriate for the Commissioner's review because such amounts as sought by petitioner herein are not necessary for the provision of a thorough and efficient education. Such a determination cannot, in

the Commissioner's judgment, be made as a preface to a thorough and independent review of each line item amount and justification sought by the Board, weighed against those arguments advanced by the Mayor and Council or Board of School Estimate in opposition to such waiver. Accordingly, respondent's argument advanced at the outset of its statement of position that the instant matter is not appropriately before the Commissioner is dismissed as being without merit.

As to the merits of this case, the Board first seeks a cap waiver in the amount of $225,000 for student transportation. The Commissioner observes that the same amount was sought in its budget appeal for the same service, and that therein the Board admitted that such amount

> "represents the total, non-funded gratis to and from student transportation fees originally included by the Board but 'cut' in order to place the 1991-92 budget within the 8% cap." (Position Statement, Exhibit B)
> (Commissioner's decision, dated January 14, 1992, at p. 8)

The Commissioner's decision stressed that "non-remote busing is not a legal obligation in meeting the state requirement for a thorough and efficient education." (Id.) While the district benefitted in its budget appeal by a restoration of $225,000 said amount was the result of a procedural error on the Mayor and Council's part. See respondent's comment in its reply statement to petitioner's position statement to the instant cap waiver, wherein the Mayor and Council admitted that the Commissioner directed respondent to "certify an additional tax levy of $225,000.00 due to the fact that respondents inappropriately added this amount to the 1991/1992 budget of Pinelands Regional." (Respondent's Reply Statement, at p. 4)

Accordingly, the Commissioner must reject petitioner's cap waiver request for a $225,000 increase for student transportation on the face of the district's failure to advance proof that such busing is necessary for the provision of a thorough and efficient education.

As to petitioner's request for a $133,000 cap waiver for the provision of summer school programming, athletics and co-curricular programs, the Commissioner must reject such application for want of a demonstration of actual need. The sole justification brought to the record before the Commissioner regarding the need for such amounts is embodied in one paragraph of the cap waiver question appeal and one sentence addressed to each line item in the budget cut explanations. The Commissioner remains uninformed as to whether the summer school program in question involves remediation required by T&E, whether the athletic equipment is to replace old, or unsafe equipment or whether any such funds are necessary for mandated curricular instruction as compared to extracurricular or club activities. Moreover, the record is devoid of references from the Board as to what amounts exist in the budget currently for such expenses or what has been spent in the past. Petitioner's statement in its cap waiver question appeal, in fact, militates against a finding of necessity of such funds for the provision of a thorough and efficient education in its statement that it seeks such monies for "activities outside the classroom" and by explaining that "***cuts in these areas are reflected in fewer students enjoying supplementary and complementary activities***." (Petition of Appeal, Exhibit C) Moreover, driver education is not mandated by statute or regulation as necessary for the provision of a thorough and efficient education, and the district makes absolutely no showing of same. Accordingly, the Commissioner

rejects the cap waiver request for $133,000 sought for summer school/athletics, co-curricular programs and driver education.

The last broad grouping of monies sought in this cap waiver address professional and support staff and benefits in the amount of $279,332. Broken down into more discreet categories, the Board seeks $213,000 for professional/support staff and $66,332 in staff benefits.

Although the Board said that the amount it seeks in this appeal before the Commissioner for these categories represents almost half of the monies requested in its cap waiver appeal which was defeated by the public, the Board proffers in its budget cut explanations that such monies include the following new or existing staff positions: 1) a middle school media specialist; 2) a middle school maintenance position; 3) one custodian; 4) one food service position; 5) a middle school attendance clerk; 6) a special education aide; 7) a science teacher; and 8) a student co-op worker in the school district offices, as well as leaving vacant a high school assistant principal's position and the termination of the Clerk of the Works position as of June 30. (Petition of Appeal, Budget Cut Explanations)

However, here again, the Commissioner is at a loss to assess the need of such positions without more extensive budgetary data. Respondent has provided some helpful information such as what amounts are appropriated for the current school year in the line item budget for each position for which the district seeks a cap waiver. Moreover, the Commissioner's decision of January 14, 1992 dealt with a request for restoration of $200,000 to Account No. 2401, Salaries of School Administrators, which might help analyze the need addressed in this cap waiver to fill a vacancy in a

high school assistant principal's position, but in said Commissioner's decision such $200,000 was sustained as a cut in the budget for the Board's failure to meet its burden of persuasion as to why the $200,000 reduction would hamper the provision of a thorough and efficient education. A terse statement that failure to provide monies for these various positions might result in "a return to a less than thorough and efficient educational program" (Exhibit C) is hardly sufficient demonstration of how each such position's elimination would impact on the provision of the constitutional requirement of a thorough and efficient education. On the other hand, neither has respondent provided persuasive argument as to its position that other line items or individuals may well be able to fulfill the responsibilities of those positions sought in this category of employees.

However, the Commissioner likewise believes that the extent of the reduction sought by respondent does raise the specter of leaving the Board with an insufficient amount of money to meet its obligation for providing a thorough and efficient education in the instructional areas regarding the science teacher, educational media specialist and special education aide. Thus, it is the Commissioner's assessment in reviewing the arguments presented herein concerning these three professional/support staff positions that it is appropriate to grant the Board a total amount of $90,000 for salary for the positions of science teacher, educational media specialist and special education aide.

Further, the Commissioner finds and determines that given the Board's failure to demonstrate that the staff positions sought are necessary to meet the constitutional mandate of a thorough and efficient education, except for the three positions discussed above,

the Board has failed to justify the necessity of staff benefits in the amount of $66,332. However, $25,000 is deemed necessary for employee benefits associated with the three positions set forth above. The Commissioner so finds.

The Commissioner emphasizes that in presenting its request for a cap waiver in this matter, the Board has provided a litany of projected cuts it envisioned were necessary to stay within its budgetary cap. However, because the Board has failed to demonstrate that such projections were actually carried out, or that its assertion of needs are founded by producing hard evidence such as prior spending patterns, demonstration that reallocation of funds is impossible or actual staffing reductions, the Commissioner has no choice but to agree with the governing bodies that the amounts sought are unnecessary for a thorough and efficient education, except for the professional/support staff positions of science teacher, educational media specialist and special education aide.

Accordingly, for the reasons expressed herein, the Commissioner directs the Ocean and Burlington County Boards of Taxation to strike a tax levy which shall add $115,000 to the 1991-92 current expense tax levy for the Townships of Little Egg Harbor, Eagleswood and Bass River and the Borough of Tuckerton for budgetary allocations for Pinelands Regional High School District's 1991-92 school budget.

COMMISSIONER OF EDUCATION

APRIL 3, 1992

DATE OF MAILING - APRIL 3, 1992

39-92

39-92

BOARD OF EDUCATION OF THE TOWNSHIP OF HOWELL, MONMOUTH COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BEN SUCHCICKI, RESPONDENT.	:	DECISION

SYNOPSIS

Petitioning Board sought ruling declaring respondent unqualified for election and respondent's nominating petition invalid, null and void because he was employed by said Board as a custodian/grounds keeper. Board sought order removing respondent's name from April 7 ballot.

ALJ concluded that respondent's employment by the Board was inconsistent with the clear prescriptions of N.J.S.A. 18A:12-2 and 14-10. Therefore, respondent was not legally qualified for election to Board; his nominating petition was invalid, null and void; and his name was to be removed from the ballot.

Commissioner adopted findings and determination in initial decision, reminding Board of its obligation to promptly pursue problems relating to qualification of candidates so they can be resolved prior to preparation of ballots.

MARCH 30, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2097-92
AGENCY DKT. NO. 73-3/92

BOARD OF EDUCATION OF THE TOWNSHIP OF HOWELL,
Petitioner,
v.
BEN SUCHCICKI,
Respondent.

Edward B. Kasselman, Esq., for petitioner (Bathgate, Wegener, Dugan, Wouters, Neumann & Wolf, attorneys)

Ben Suchcicki, respondent, pro se

Record Closed: March 26, 1992 Decided: March 26, 1992

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

Respondent, Ben Suchcicki, an employee of the petitioner Board of Education of the Township of Howell ("Board") and an official of the union which represents Board employees, has filed a nominating petition for the purpose of election to the Board.

The Board seeks (1) a ruling declaring the respondent unqualified for election, (2) a ruling that the respondent's nominating petition is invalid, null and void, and (3) an order removing the respondent's name from the ballot for the upcoming election.

PROCEDURAL HISTORY

On March 20, 1992, the Board's petition and affidavit of verification were filed with the Commissioner of Education. See N.J.S.A. 18A:6-9. The Commissioner transmitted the matter to the Office of Administrative Law ("OAL") where, on March 23, 1992, it was filed as a contested case and assigned a date for hearing. N.J.S.A. 52:14B-1 et seq.; N.J.S.A. 52:14F-1 et seq.; N.J.A.C. 1:1-3.1; and N.J.A.C. 1:1-12.6. On March 26, 1992, the case was heard in the OAL's Trenton (Hamilton Township) office.

FACTUAL DISCUSSION

During the hearing of this matter, the parties stipulated and agreed that the following **FACTS** are not in dispute:

The respondent is employed by the Board as a "custodian/grounds keeper" and he is an official of the union which represents Board employees.

On or about February 7, 1992, the respondent filed a nominating petition for the purpose of qualifying as a candidate for election to the Board in its April 7, 1992, election.

LEGAL DISCUSSION AND CONCLUSIONS

Public policy demands that one who holds public office discharge his duties with undivided loyalty and from this policy the concept of "incompatibility" has evolved. Consistent with this concept, one may not hold two public offices, each of which has an interest which competes with the other, and one cannot hold two public offices where his performance in one office would be subordinate to the other, or subject to its control, or requires him to choose the obligation of one office over another. In such circumstances, it is not enough for the office holder to abstain from participation when an area of conflict arises; holding both the public offices is prohibited. See Jones v. MacDonald, 33 N.J. 132 (1960); Dunn v. Froehlich, 155 N.J. Super. 249 (App. Div. 1978); Kaufman v. Pannuccio, 121 N.J. Super. 27 (App. Div. 1972); and Visotcky v. City Council of City of Garfield, 113 N.J. Super. 263 (App. Div. 1971).

Consistent with the concept of "incompatibility," N.J.S.A. 18A:12-2 provides that "[n]o member of any board of education shall be interested directly or

indirectly in any contract with or claim against the board." Also, a nominating petition, such as that filed by the respondent, must state that the proposed candidate "is legally qualified to be elected" to the board and must be accompanied by a certificate signed by the proposed candidate that "[h]e is qualified to be elected." N.J.S.A. 18A:14-10. (Emphasis added.)

Surely the respondent's employment contract, if not his union responsibilities, give him the kind of "interest" which N.J.S.A. 18A:12-2 speaks of. Compare Visotcky v. City Council of Garfield, supra, wherein it was decided that holding the position of teacher is "incompatible" with membership on the board of education in the same school district and where membership on the board would be invalid in such circumstances.

During the hearing, the respondent represented that it was and is his intention, conditioned upon his election, to resign as an employee and union representative. However, as quoted above, in N.J.S.A. 18A:14-10, the Legislature speaks in the present tense of legal qualification for election to the Board, i.e. there must be qualification at the time of execution of the petition and its accompanying certificate. (This is a reasonable and practical condition intended to assure that a candidate will not later reconsider and decide not to give up his disqualifying employment, etc.) Therefore, I **FIND** and **CONCLUDE** that, despite the respondent's petition's statement and accompanying certification wherein he is described as "qualified," he was and is not qualified.

During the hearing, the respondent also stated that he was unaware of his lack of qualification. This statement is somewhat inconsistent with the respondent's representation that he intended to resign his position as a Board employee if elected, but, in any event, it is the proposed candidate's responsibility to learn applicable laws before certifying his qualification for election. See Graham v. N.J. Real Estate Comm'n, 217 N.J. Super. 130, 138 (App. Div. 1987), and In re Krah, 130 N.J. Super. 366 (App. Div. 1974), for the proposition that everyone is conclusively presumed to know the law, statutory and otherwise, and, in the absence of statutory or constitutional requirements, an agency is not required to give actual notice of the law.

Given the above facts and circumstances, I **FIND, CONCLUDE** and **DECLARE** as follows: (1) The respondent is not legally qualified for election to the Board; (2) The

respondent's nominating petition is invalid, null and void; and (3) The respondent's name as a candidate for election to the Board must be removed from the ballot relative to the April 7, 1992, election.

ORDERS

Consistent with the above, I **ORDER** the respondent's name removed from the ballot.

It is further **ORDERED**, given the April 7, 1992 election date, that any exceptions to this decison be filed with the Commissioner of the Department of Education by March 31, 1992. See N.J.A.C. 1:1-1.3(a) and R. 1:1-2.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

On or before March 31, 1992, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

3/26/92
Date

John R. Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

3/27/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

Date

OFFICE OF ADMINISTRATIVE LAW

jz

EXHIBITS

For the Board:

BOE-1 Petition and Affidavit (of Verification) of Massa, dated March 19, 1992

BOE-2 Nominating Petition (including "Verification" and "candidate's acceptance" signed by the respondent)

For the respondent:

None

OAL DKT. NO. EDU 2097-92

BOARD OF EDUCATION OF THE TOWNSHIP OF HOWELL, MONMOUTH COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BEN SUCHCICKI, RESPONDENT.	:	DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exception to this decision was taken by respondent.

Upon review, the Commissioner endorses the decision of the Administrative Law Judge for the reasons expressed therein. The law is clear, unequivocal and well-established in its prohibition of district employees serving as members of the board of education by which they are employed.

The Commissioner notes, however, that he is somewhat perplexed by the Board's delay in seeking to have respondent's name removed from the ballot, as Board agents must have known when respondent filed his nominating petition on February 7, 1992 that he was an employee of the district and consequently barred from candidacy. The Commissioner therefore reminds board secretaries of their obligation to promptly pursue problems of this type so that they can be resolved prior to, and without needless complication of, the preparation of ballots.

Accordingly, the initial decision of the Office of Administrative Law is affirmed and respondent's name is to be removed from the ballot for the April 7, 1992 school election by reason of his lack of legal qualification for board membership.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 30, 1992

DATE OF MAILING - MARCH 30, 1992

40-92

40-92

IN THE MATTER OF THE TENURE	:	
HEARING OF CHRISTINE PELLAGATTI,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF	:	DECISION
THE CITY OF JERSEY CITY, HUDSON	:	
COUNTY.	:	
_____	:	

SYNOPSIS

Petitioning State District Superintendent sought removal of tenured teacher on charges of incapacity due to illness and chronic and excessive absenteeism.

ALJ found that teacher had an extensive history of absenteeism due to illness, resulting in a negative impact on continuity of instruction and concerns being expressed about respondent's attendance and tardiness in performance evaluations and other documents dating back to the early 1980s. He further found that teacher was on several occasions incapacitated during school hours by abuse of prescription drugs and that her refusal to submit to drug testing was an act of insubordination and unbecoming conduct notwithstanding that she later agreed to such testing. ALJ found continued employment unsupportable and recommended dismissal.

Commissioner concurred with the findings and determination of the ALJ and dismissed respondent from her tenured employment. He further referred the matter to the State Board of Examiners for action against respondent's certificate as deemed appropriate pursuant to N.J.A.C. 6:11-3.6(a)1.

MARCH 30, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3722-91
AGENCY DKT. NO. 50-3/91

OAL DKT. NO. EDU 5300-91
AGENCY DKT. NO. 82-4/91

IN THE MATTER OF THE TENURE HEARING OF CHRISTINE PELLAGATTI, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY

David F. Corrigan, Esq., for petitioner, State-operated School District of the City of Jersey City
(Murray, Murray & Corrigan, attorneys)

Philip Feintuch, Esq., for respondent
(Feintuch, Porwich & Feintuch, attorneys)

Record Closed: December 19, 1991 Decided: February 10, 1992

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

The state district superintendent of the state-operated school district of Jersey City, Hudson County, filed and certified to the Commissioner of the Department of Education tenure charges against Christine Pellagatti, a tenured teaching staff member, sounding in incapacity due to illness and chronic and excessive absenteeism, pursuant to N.J.S.A. 18A:7A-34, et seq., which if found true warranted respondent's removal or reduction in compensation, in accordance with N.J.S.A. 18A:6-10 et seq. A certificate of determination together with supporting statement of evidence was filed with the Commissioner on March 5, 1991. Respondent's

answer in general denial was filed there on April 2, 1991. The matter was transmitted to the Office of Administrative Law on April 11, 1991, for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq. and was assigned OAL Dkt. No. EDU 3722-91.

Subsequently, on April 16, 1991, further tenure charges against respondent sounding in unbecoming conduct, incapacity and insubordination as a teacher, contrary to N.J.S.A. 18A:6-10 et seq., were filed and certified by the state district superintendent, which, if proven, warranted respondent's removal or reduction in compensation. Respondent's answer in general denial was filed on May 23, 1991. The matter was transmitted to the Office of Administrative Law on May 28, 1991, for hearing and determination in accordance with N.J.S.A. 52:14F-1 et seq., and was assigned OAL Dkt. No. EDU 5300-91.

The two matters were consolidated by consent order of the administrative law judge on July 16, 1991, at prehearing conference, pursuant to N.J.A.C. 1:1-17.1 et seq. As provided in the prehearing order, at issue in the consolidated matters were (1) whether the state-operated district shall have proven by a preponderance of the credible evidence tenure charges and specifications against respondent sounding in chronic and excessive absenteeism, incapacity, insubordination and/or unbecoming conduct; and (2) if so, whether respondent should be removed from her employment or suffer reduction in compensation or other sanction. No procedural irregularity in filing of tenure charges was alleged under N.J.A.C. 6:24-5.1.

Hearing was conducted in the Office of Administrative Law on November 13 and 14, 1991, and was concluded. Thereafter, time for posthearing submissions having elapsed and such submissions having been filed, the record closed.

PRELIMINARY FINDINGS OF FACT
(OAL DKT. NO. EDU 3722-91)

Tenure charges against respondent under this docket number specified, in charge no. 1, that respondent had been incapacitated due to illness to the extent she was chronically and excessively absent from her duties as a teacher, which resulted in significant adverse impact on the school children through incapacity. In a second charge, her chronic and excessive absences over a ten-year period from 1980-81

through 1990-91, despite repeated counseling and cautions, were alleged to have had a significant deleterious impact upon welfare of her students.

From documented attendance records for the ten-year period, Exhibits A 1 through A-11, I **FIND** respondent was absent for the following periods:

1980-81	25 absences
1981-82	41 absences
1982-83	28 1/2 absences
1983-84	48 and 1/4 absences
1984-85	17 absences
1985-86	45 absences
1986-87	51 absences
1987-88	46 1/2 absences
1988-89	31 1/4 absences
1989-90	71 absences (including 20 that involved a suspension with pay)

The records also indicated that from October 26, 1989 until her suspension on charges respondent was late in reporting for her teaching duties 39 times. Exhibits A-22, 25.

Respondent's absences in the early 1980's were recognizably occasioned by her suffering from a chronic illness known as lupus erythematosus, said to be a skin disease of unknown cause characterized by red, scaly patches that tend to produce scars, sometimes affecting connective tissue and involving the kidneys, spleen, etc. Her husband also died during that period. The District counseled her and approved leaves of absence but cautioned her to improve her attendance and avoid further latenesses. Well-documented District concern for her deteriorating attendance records was reflected in her annual written performance reports and PIPs from 1981 through 1985. Exhibits A-76 through A-80. In February 1980 her principal advised the personnel director of the District that he was requesting a review of respondent's records because of her excessive latenesses, absences and inability to function to her fullest capacity. Exhibit A-28. On March 9, 1990, the personnel director advised respondent by letter that "in 11 plus years you have been a teacher

in the Jersey City Public Schools you have been absent for personal illness more than two full school years," that is to say, some 406 and 1/2 days. A-26.

On May 11, 1990, respondent was observed in an incapacitated condition while seated at a table with her head down. She was sent home. Exhibit A-23. On May 18, 1990, the state district superintendent suspended respondent with pay for the rest of the school year, urging her to file for disability retirement. Exhibit A-20, 21. On September 26, 1990, respondent was assigned to grade three in school no. 38, effective November 28, 1990. Exhibit A-16. When she returned to work on November 30, 1990, she continued to have problems with attendance and lateness, being absent six days and late five times in less than two months. She was cautioned about the excessiveness. Exhibits A-13, 14. The adverse effect on students was noted by the principal on January 29, 1991. Exhibit A-12.

(OAL DKT. NO. EDU 5300-91)

Charges of unbecoming conduct, incapacity and insubordination were the subject of OAL Dkt. No. EDU 5300-91. On February 7, 1991, respondent's principal received a phone message from a concerned parent of a child in respondent's class, who feared respondent might fall asleep in class. Exhibit B-1 On February 19, 1991, two school luncheon aides asked the school nurse to observe respondent, who seemed to be "falling asleep standing up." Exhibit B-2. Later that day, respondent, who was not in her classroom and whose class was being monitored by a teacher from the next classroom, was found in the teachers' room rocking up and down, nodding in and out of what appeared to be a stupor and acting strangely. Exhibit B-4. The principal saw respondent having difficulty walking that same day. Exhibit B-5. Respondent was suspended with pay on February 21, 1991. Exhibit B-6.

Specification of respondent's alleged insubordination resulted from her failure and refusal to submit to a directive from the state district superintendent to submit, during working hours, to medical testing by Health Net. Exhibits B-6 to 8. In a letter to respondent on February 20, 1991, the state district superintendent noted a report submitted to her by respondent's principal and reports of the school nurse indicating suspected drug use. The state district superintendent suspended respondent with pay pending a physical examination and directed her to go with the school nurse to Health Net. It was expressly stated that "failure to submit to this drug testing at this

time shall be considered insubordinate action and subject to further disciplinary action." Exhibit B-6. The principal reported to the state district superintendent by memorandum later that day that respondent "chose not to go to Health Net" as indicated in [the] letter of suspension." Exhibit B-8.

EVIDENCE AT HEARING

I

Testimony at hearing corroborated documentation in the record. Kathleen Hudak, a luncheon aide employed by the District, testified that on February 19, 1991 she went to the second floor, where other teachers had said respondent did not look well and her class seemed unruly. Hudak said respondent in her classroom was standing swaying with her hands on the ledge of a window. Children in her class were eating lunch and were indeed unruly. Hudak reported to the principal what she saw. She next saw respondent in the company of a vice principal and the school nurse: respondent's eyes appeared "tired." Hudak graduated from nursing school as an LPN in 1989.

Mary Ertle has been employed as school nurse by the District at school no. 38 for 13 years. She is an RN and holds educational certification as a New Jersey school nurse. Her experience includes work as emergency nurse at Jersey City Medical Center, handling trauma, orthopedic and psychiatric injuries and overdoses. Sixty-five percent of her work there was drug-related. Her reports on the incidents of February 19 and 20, 1991 are Exhibits B-2 and B-4. On February 19, 1991, she saw respondent experiencing difficulty standing still, difficulty with her gait and experiencing difficulty in keeping her eyes open. Respondent appeared drowsy, saying merely she had taken Contac for a cold. On February 20, 1991, Ertle was called to the second-floor teachers' room by the principal. Respondent's actions appeared the same. Her pupils were restricted; her respiration was slow and steady. She appeared to be in a stupor. In Ertle's opinion, respondent, who wanted to leave school at the time, was unable to drive or walk by herself. Ertle stayed with respondent about an hour at the school. Respondent said her lupus was in remission. In Ertle's opinion, based on her experience and observations, respondent was under the influence of drugs. About 2:45 p.m., an investigator arrived from District offices with a letter order from the superintendent to respondent to attend

Health Net with the school nurse for a drug screen. Respondent refused to go, saying she wanted to call her union or a lawyer. She left at dismissal time at 3:15 without complying with the directive. She still appeared unsteady, almost drunk, and swaying.

Under the circumstances, there appeared ample reasonable grounds for suspicion that respondent was under the influence of a controlled substance or alcohol and thus a reasonable basis for ordering her to undergo drug testing at Health Net.

Marie Morrissey, principal of school no. 38 and formerly assistant principal for 14 years, has known respondent as a third-grade teacher since November 1990. From December 1990 until February 1991, she said, respondent was late to school six times, and three times more than one hour late. Morrissey said latenesses by teachers affect students because classes must still be covered during school hours. Substitute teachers cannot do as well as regularly assigned teachers for lack of teaching continuity. Morrissey and principal Koval had both received parental complaints concerning respondent's latenesses and absences during December 1990 until January 1991. Discipline had become a problem with no effective teaching. On February 20, 1991, said Morrissey, she too noticed respondent's dazed and glazed condition. She was present when the investigator arrived with the directive. Respondent called her NJEA representative about 2:45 p.m. She then refused to go to Health Net in compliance with directive.

James Richardson, legal investigator for the District, testified to his delivery of the District directive to attend Health Net. He affirmed respondent's refusal. Exhibit B-7.

Robert Y. Schaefer, executive director of human resources for the District, testified that his letter to respondent of March 9, 1990 noted her ten-year record of absences for personal illness totaled more than the equivalent of two full school years: 406 and 1/2 days in 11 plus years. Exhibit A-26. Her situation was so extreme that he had by letter of May 16, 1990 suggested a disability retirement. Exhibit A-21. Schaefer noted too the report of excessive latenesses by respondent from principal Daniel R. Cupo on May 14, 1990. It had been necessary to deduct $362.89 from respondent's salary for them. Ultimately, he said, respondent was suspended with

pay on May 15, 1990 pending results of a medical examination. Exhibit A-20. Schaefer directed such an examination on August 16, 1990. Exhibit A-18.

A medical report of September 26, 1980 from Dr. S. Tobias said respondent could return to work. Exhibit A-17. She was reinstated for work in the latter part of November 1990. Exhibit A-16. Her reinstatement was coupled with an express warning, however, to improve her absenteeism. Exhibit A-15.

Catherine Coyle, who is principal of School No. 27 and who is author of a letter to Schaefer of May 11, 1990 (Exhibit A-23), noted she had seen respondent on May 11, 1990 with her head down, apparently asleep, and disoriented on being waked. At the time she should have been on assignment with her students according to school scheduling. She had seen respondent in that condition on other occasions. All concerned assumed respondent's condition of lupus erythematosus was responsible for her absences and conduct. No one had an inkling, she said, that respondent was on methadone or engaged in any illegal drug use. Her most recent annual performance report and PIP, dated April 24, 1990, explicitly indicated attendance and tardiness as performance areas needing improvement. Exhibit A-75.

After February 20, 1991, when respondent had refused the District order to attend Health Net for drug testing, she did submit to such testing. By report dated March 1, 1991, National Health Laboratories, Cranford, reported respondent tested positive for methadone.[1] That was the first time the District knew of respondent's involvement in methadone programming, according to Schaefer. Exhibit A-74.

II

Respondent Christine Pellagatti, who holds a B.S. in elementary education, testified she began work in the District in September 1972 as a second-grade

[1]Under the New Jersey Controlled Dangerous Substances Act, N.J.S.A. 24:21-1, 6, methadone is a Schedule II controlled dangerous substance with high abuse potential, current accepted medical use in treatment or currently accepted medical use with severe restrictions, abuse of which may lead to severe psychic or physical dependence.

teacher. She is a widow; her husband died September 11, 1989 and had been ill since 1981. He had been a teacher employed by the District for 17 years. She said her physical condition was that of remission from lupus erythematosus, from which she suffered since November 1981. Symptoms are enlarged heart, damage lungs, lesions on face and body, with general malaise. Her physician had prescribed the drug Prednisone and other drugs over the years; she now takes no drugs for the remissive lupus. But she is presently on methadone, and has been since May 1990, following addiction to drugs of Percodan and Percocet,[2] to which she had become addicted by usage between May and July 1990. The drugs had been prescribed for her husband, she said, but she began taking them. Her doctor suggested a methadone program in response to her addiction about August 1990. She denied ever taking any "street drugs" or ever having injected herself. Her methadone program involves monthly urine testing and counseling if testing fails. There is daily attendance for dosage of methadone, or five-day dosage with none on weekends if clear on urinalysis.

Respondent declared her observations and evaluations (R-1 through R-11) were uniformly without unsatisfactory markings and contained no cautions about her attendance record. She began to teach basic skills in 1990 and said she felt her students were all succeeding. On the October and May tests, her students always showed improvement on New York and California achievement tests.

She admitted she was suspended in May 1990 for attendance improvement, placed on leave of absence and was okayed by her doctor for reinstatement and return to work at school no. 38 in November 1990. Her reasons for absences in December 1990 and January 1991 included personal business, sickness from a cold, sickness because of a bad back from an accident, another cold and, on January 29, 1991, a doctor's appointment at the methadone clinic. She admitted she was late once when a friend was arrested in Newark, but she said she always called if she expected to be late--except once when she overslept.

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[2]Percocet is a trade name for medication containing oxycodone that can produce drug dependency of the morphine type, which has, therefore, potential for abuse with risk of psychic dependence, physical dependence and tolerance, subject to prescription and administration under doctor's orders, according to Physicians' Desk Reference, 46th Ed., 1992, at 950-1.

On February 19, 1991, she said, she was very sick. She had taken Contac and that caused her to be drowsy. She felt she was capable of teaching that day and, in fact, did so. On February 20, 1991, she was sick again. At lunch she was feverish and put her head down. In the afternoon she asked another teacher to take her class. She wanted to go home, but the nurse came in during a free period. She was on methadone at the time, she said, when the investigator came with orders to take a drug screening. She was afraid to do so because she feared the repercussions. Eventually, however, she said, she did take such a drug test. Her methadone clinic is Spectrum Health Clinic, 461 Frelinghuysen Avenue, Newark.

DISCUSSION

Respondent argued generally that District evidence in the cause failed preponderately to demonstrate her numerous absences over the years had deleterious effect on her students since all students had successfully passed periodic achievement testing, that respondent's increment had never been withheld by the District on the ground of excessive absenteeism and that the vice of excessive absence had never sufficiently been conveyed to her. Rm 2-10. She urged as well "there was not one shred of evidence that the District produced to prove [she] was incapacitated due to any condition or illness." Rm 11. As to the charge of insubordination, respondent contended, she refused drug screen testing only because she feared ramification once the District learned she was "on" methadone, refusal being in any case only a single isolated instance. Rm 11-13. Respondent urged dismissal of charges without disciplinary sanction because the District had put in place no standard or policy by which teaching staff members could be guided as to when or under what circumstances they would require District concern. Rm 14. Because respondent had no prior warning, she should not now, suddenly, be jeopardized. With regard to incapacity or allegedly being in a stupor, respondent thought no evidence had been adduced by the District to support the charge, the incident of February 20, 1990 being only a single day when she was not up to standard and on that day she excused herself from class. Rm 14-15.

District arguments were sharply to the contrary. It urged that respondent had been excessively absent from her duties for the past ten years, that she averaged 40 absences a year, that she had been counseled, warned and given "one last chance,"

with little or no improvement. Damage to the educational interests of the students was clear. Respondent had been cautioned often and continuously. A-12, 13, 14, 16, 20, 21, 25, 28, 75, 76-80. That is so, said the District, even where absences were for medical reasons like incapacity from or treatment for the disease lupus, for which she had been generously accommodated by the District in the past through medical leaves of absence. Pm 8-14. On this issue, in my view, District arguments have by far greater accuracy and cogency.

It has been declared pointedly by the Commissioner that chronic absenteeism seriously disrupts continuity of instruction in the classroom:

> Such absenteeism consistent with a long line of precedential authority is sufficient for removal . . . The rationale remains the same even where absences were medically legitimate.

See, Board of Ed., Township of Pequannock v. Malley, 1986 S.L.D. -- (Commissioner's decision, December 29, 1986), affirmed State Board (April 3, 1987). See also, In the Matter of Tenure Hearing of Sheila Green, State-operated School District of the City of Jersey City, Hudson County, 1991 S.L.D. -- (Commissioner's decision, July 31, 1991, slip op. at 15-20).

The conclusion is inescapable here that respondent's chronic and excessive absenteeism, despite an affliction now in remission, seriously disrupted continuity of the instructional process in her classroom. The degree and repetitiveness of such absenteeism of itself is sufficient ground for removal. Cf., Tenure Hearing of Williamson, School District of the City of Trenton, 1986 S.L.D. -- (May 28, 1986). See also, Trautwein v. Board of Ed., Bound Brook (New Jersey App. Div., April 8, 1989, A-2773-78 unpublished), cert. den. 84 N.J. 469 (1980); and Tenure Hearing of Edna Booth, 1985 S.L.D. -- (May 13, 1985), affirmed, State Board, 1986 S.L.D. --; affirmed, App. Div., unpublished opinion, November 13, 1987, Dkt. No. A-3985-86T8 (slip op. at 5-6). A conclusion of incapacity to perform duties assigned is a necessary corollary to a long record of excessive absenteeism. See, Tenure Hearing of Nancy Bacon, 1978 S.L.D. 776, 778.

District charges of insubordination and unbecoming conduct are interrelated; consideration of them prompts serious concern. That school districts must be free from exposing students to the ministrations of drug-addicted teachers merely states the obvious. That districts must be empowered promptly to detect ravages of drug abuse in teaching staff members is self-evident. Thus, when districts are given reasonable, individualized grounds to suspect addiction and abuse, they are well within fulfillment of sensitive obligations to students and the public to insist upon instantaneous, immediate testing measures. Random testing of public employees like teachers absent some reasonably individualized suspicion of abuse or addiction may be unconstitutional under the Fourth Amendment. See, Fraternal Order of Police v. City of Newark, 216 N.J. Super. 461, 476 (App. Div. 1987). But once there arises an apparent, reasonable, individualized suspicion, such as the suspicion engendered here from observations by coworkers and a school nurse on February 19 and 20, 1990, the need for quick, decisive testing becomes necessary in order that, should testing be positive, the teacher be immediately separated from the classroom and the risk of danger to students obviated. It follows necessarily, it seems to me, that any equivocation or refusal of what was a clear, written, direct, personally served order by her district superintendent constituted even in a single instance an egregiously insubordinate act. In face of such an order, respondent in equivocating risked loss of continued employment. That she feared "ramifications" is neither excuse nor extenuation.

That her disobedience was unbecoming is also plain. She refused testing in order to conceal not only methadone programming but illicit Percodan abuse that preceded it. Insubordination was a self-serving act of concealment; its vice is deception.

CONCLUSION

Based on the foregoing, I **FIND** all tenure charges against respondent have been fully and fairly sustained by documentary and testimonial evidence adduced by the District. I **FIND** respondent's absences in the degree and repetitiveness indulged, despite an acknowledged and accommodated illness, were inexcusable in face of consistent prior warning. I **FIND** respondent's insubordinate and unbecoming conduct in refusing a direct order to submit to drug screening was not extenuated by her later submission to testing, the need for prompt obedience being necessary for detection accuracy. Because refusal was admittedly and deliberately for the purpose of concealing substance addiction from her public employer, it was especially egregious; no rehabilitory accommodation of her condition may be indulged. Respondent's testimony and arguments in extenuation may not be credited. Her continued presence on the employment rolls of the District is insupportable. She is removed from her teaching staff position as of date of final agency decision herein.

The matter is referred to the State Board of Examiners under N.J.A.C. 6:11-3.6(a)(1) for such further action as thought appropriate.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 10, 1992
Date

James A. Ospenson
JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

2/13/92
Date

Maureen Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 14 1992
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

amr

LIST OF EXHIBITS

A-1 Attendance Record 1990-1991

A-2 Attendance Record 1989-1990

A-3 Attendance Record 1988-1989

A-4 Attendance Record 1987-1988

A-5 Attendance Record 1986-1987

A-6 Attendance Record 1985-1986

A-7 Attendance Record 1984-1985

A-8 Attendance Record 1983-1984

A-9 Attendance Record 1982-1983

A-10 Attendance Record 1981-1982

A-11 Attendance Record 1980-1981

A-12 Memorandum to Ms. Pellagatti from principal of James F. Murray School dated January 29, 1991, advising her that lateness and absence pattern adversely affects the children's learning, that there have been paternal complaints and recommending her removal from the teaching position.

A-13 Memorandum to Ms. Pellagatti from principal of James F. Murray School dated January 16, 1991 advising her of lateness and absenteeism.

A-14 Memorandum to Ms. Pellagatti from principal of James F. Murray School dated January 10, 1991 advising her that her attendance and punctuality must improve or she would be subject to disciplinary action.

A-15 Letter from executive director of human resources, dated November 21, 1990, advising Ms. Pellagatti that since she has been medically cleared to return to full-time work, there should be no recurrence of her problem with lateness and absenteeism. However, tenure charges would be recommended if her attendance and/or lateness became a problem.

A-16 Letter from executive director of human resources, dated November 19, 1990, assigning Ms. Pellagatti to school no. 38 effective November 28, 1990.

A-17 Letter from medical director, state-operated school district, to legal department dated September 26, 1990 confirming the diagnosis of Ms. Pellagatti as systematic lupus erythematosus, verifying that she had been asymptomatic for eight (8) months, was off medication and should be capable of performing her duties as a teacher.

A-18 Letter of executive director of human resources, dated August 16, 1990, advising Ms. Pellagatti that the attorney for the school district conferred with her physician respecting her request to return to work, and further advising that she would have to visit the school physician by August 29, 1990 to be evaluated absent which she could not report to school for the 1990-1991 school year, and which failure would result in the initiation of legal proceedings.

A-19 Letter from executive director of human resources, dated June 28, 1990, advising Ms. Pellagatti that she had not provided physician's prognosis concerning remission of her illness and the appropriateness of her return to school in September 1990 consistent with their May 16, 1990 conference. Thus, processing of her disability retirement on or before July 9, 1990 would commence.

A-20 Letter from state district superintendent, dated May 18, 1990, to Ms. Pellagatti expressing grave concern about her physical ability to teach, her excessive absences and latenesses, and suspending her with pay effective May 21, 1990 pending the results of a physical examination to verify her condition and ability to fully perform her duties.

A-21 Letter from executive director of human resources to Ms. Pellagatti memorializing their conference of the same date concerning Ms. Pellagatti's absenteeism due to lupus and what action she must take prior to being considered for a return to classroom teaching in September 1990.

A-22 Letter from principal of school no. 23 to Ms. Pellagatti, dated May 14, 1990, apprising her that she was being docked for 15 enumerated latenesses.

A-23 Letter from principal of school no. 23 to executive director of human resources and attested to by the assistant principal and nurse of P.S. No. 23, dated May 11, 1990, reporting that Ms. Pellagatti had been observed in her classroom with her head down on the table. When Ms. Pellagatti was called by name, she raised her head showing bloodshot eyes, spotted reddish discolorations on the face and open areas. She indicated she did not need medical assistance.

A-24 Letter from executive director of human resources to Ms. Pellagatti, dated May 1, 1990, requesting a meeting with her to discuss her absences and informing her that she was required to visit a district supplied physician.

A-25 Record from office of the principal, school no. 23, detailing the latenesses of Ms. Pellagatti from October 26, 1989 to March 21, 1990, a total of twenty-three (23) latenesses.

A-26 Letter from interim personnel director to Ms. Pellagatti, dated March 9, 1990, informing her that she had been absent 406 1/2 days in over eleven years and that advice of legal counsel was being sought.

A-27 Letter from state district superintendent to Ms. Pellagatti, dated March 9, 1990, granting her leave of absence for personal illness from January 18, 1990 to January 28, 1990.

A-28 Letter from principal of school no. 23 to interim personnel director, dated February 28, 1990, requesting a review of Ms. Pellagatti's record due to her excessive latenesses, absences and inability to function to full capacity.

A-29 Application for leave of absence for personal illness of Ms. Pellagatti, dated January 24, 1990, for the period January 18, 1990 to January 28, 1990.

A-30 Letter from state district superintendent to Ms. Pellagatti, dated November 15, 1989, granting her leave of absence for personal illness from September 19, 1989 to October 10, 1989.

A-31 Application for leave of absence for personal illness of Ms. Pellagatti, dated September 25, 1989, for the period September 19, 1989 to October 19, 1989.

A-32 Record from superintendent of schools, dated June 26, 1989, advising that the Board of Education at its meeting of June 21, 1989 granted a leave of absence for illness to Ms. Pellagatti from May 6, 1989 to May 14, 1989.

A-33 Application for leave of absence for personal illness of Ms. Pellagatti, dated May 12, 1989, for the period May 6, 1989 to May 14, 1989.

A-34 Record from superintendent of schools, dated April 27, 1989, advising that the Board of Education at its meeting of April 19, 1989 granted a leave of absence for illness to Ms. Pellagatti from February 11, 1989 to February 21, 1989.

A-35 Application for leave of absence for personal illness of Ms. Pellagatti, dated February 21, 1989, for the period February 11, 1989 to February 21, 1989.

A-36 Record from superintendent of schools, dated December 27, 1988, advising that the Board of Education at its meeting of December 21, 1988 granted a leave of absence for illness to Ms. Pellagatti from September 26, 1988 to October 3, 1988.

A-37 Application for leave of absence for personal illness of Ms. Pellagatti, dated October 5, 1988, for the period September 26, 1988 to October 3, 1988.

A-38 Record from superintendent of schools, dated May 6, 1988, advising that the Board of Education at its meeting of April 20, 1988 granted a leave of absence for illness to Ms. Pellagatti from February 13, 1988 to February 28, 1988.

A-39 Application for leave of absence for personal illness of Ms. Pellagatti, dated February 16, 1988, for the period February 13, 1988 to February 26, 1988.

A-40 Record from superintendent of schools, dated March 22, 1988, advising that the Board of Education at its meeting of March 16, 1988 granted a leave of absence for illness to Ms. Pellagatti from December 10, 1987 to December 20, 1987.

A-41 Application for leave of absence for personal illness of Ms. Pellagatti, dated December 18, 1987, for the period of December 10, 1987 to December 20, 1987.

A-42 Record from superintendent of schools, dated November 20, 1987, advising that the Board of Education at its meeting of November 10, 1987 granted a leave of absence for illness to Ms. Pellagatti from September 29, 1987 to October 12, 1987.

A-43 Application for leave of absence for personal illness of Ms. Pellagatti dated, December 5, 1987, for the period of September 29, 1987 to October 12, 1987.

A-44 Record from superintendent of schools, dated June 29, 1987, advising that the Board of Education at its meeting of June 17, 1987 granted a leave of absence for illness to Ms. Pellagatti from April 10, 1987 to April 26, 1987.

A-45 Application for leave of absence for personal illness of Ms. Pellagatti, dated April 15, 1987, for the period of April 10, 1987 to April 26, 1987.

A-46 Record from superintendent of schools, dated April 28, 1987, advising that the Board of Education at its meeting of April 22, 1987 granted a leave of absence for illness to Ms. Pellagatti from February 4, 1987 to February 9, 1987.

A-47 Application for leave of absence for personal illness of Ms. Pellagatti, dated February 11, 1987, for the period February 4, 1987 to February 9, 1987.

A-48 Record from superintendent of schools, dated February 24, 1987, advising that the Board of Education at its meeting of February 18, 1987 granted a leave of absence for illness to Ms. Pellagatti from December 18, 1986 to December 24, 1986.

A-49 Application for leave of absence for personal illness of Ms. Pellagatti, dated December 23, 1986, for the period December 18, 1986 to December 25, 1986.

A-50 Record from superintendent of schools, dated January 9, 1987, advising that the Board of Education at its meeting of December 17, 1986 granted a leave of absence for illness to Ms. Pellagatti from September 24, 1986 to October 5, 1986.

A-51 Application for leave of absence for personal illness of Ms. Pellagatti, dated October 29, 1986, for the period October 21, 1986 to October 27, 1986.

A-52 Record from superintendent of schools, dated November 26, 1986, advising that the Board of Education at its meeting of November 19, 1986 granted a leave of absence for illness to Ms. Pellagatti from September 24, 1986 to October 5, 1986.

A-53 Application for Leave of Absence for Personal Illness of Christine Pellagatti, dated September 29, 1986, for the period September 24, 1986 to October 5, 1986.

A-54 Record from superintendent of schools, dated July 30, 1986, advising that the Board of Education at its meeting of July 24, 1986 granted a leave of absence for illness to Christine Dougherty (Pellagatti) from May 23, 1986 to June 4, 1986.

A-55 Application for leave of absence for personal illness of Ms. Christine Dougherty (Pellagatti), dated May 30, 1986, for the period May 23, 1986 to June 4, 1986.

A-56 Record from superintendent of schools, dated March 24, 1986, advising that the Board of Education at its meeting of March 19, 1986 granted a leave of absence for illness to Christine Dougherty (Pellagatti) from January 17, 1986 to January 26, 1986.

A-57 Application for leave of absence for personal illness of Christine Dougherty (Pellagatti), dated February 5, 1986, for the period January 17, 1986 to January 26, 1986.

A-58 Record from superintendent of schools, dated November 26, 1985, advising that the Board of Education at its meeting of November 20, 1985 granted a leave of absence for illness to Christine Dougherty (Pellagatti) from October 24, 1985 to November 10, 1985.

A-59 Application for leave of absence for personal illness of Christine (Dougherty) Pellagatti, dated October 25, 1985, for the period October 24, 1985 to November 10, 1985.

A-60 Record from superintendent of schools, dated March 28, 1984, advising that the Board of Education at its meeting of March 21, 1984 granted a leave of absence for illness to Christine Dougherty (Pellagatti) from February 1, 1984 to March 1, 1984.

A-61 Application for Leave of Absence for Personal Illness of Christine (Dougherty) Pellagatti, dated February 3, 1984, form the period February 1, 1984 to March 1, 1984.

A-62 Record from superintendent of schools, dated February 8, 1984, advising that the Board of Education at its meeting of January 31, 1984 granted a leave of absence for illness to Christine Dougherty (Pellagatti) from December 5, 1985 to December 9, 1983.

A-63 Application for leave of absence for personal illness of Christine (Dougherty) Pellagatti, dated December 6, 1983, for the period December 5, 1983 to December 9, 1983.

A-64 Record from superintendent of schools, dated February 8, 1984, advising that the Board of Education at its meeting of January 31, 1984 granted a leave of absence for illness to Christine Dougherty (Pellagatti) from November 30, 1983 for the period November 14, 1983 to December 4, 1983.

A-65 Application for leave of absence for personal illness of Christine Dougherty (Pellagatti), dated November 30, 1983, for the period November 14, 1983 to December 4, 1983.

A-66 Record from superintendent of schools, dated July 23, 1982, advising that the Board of Education at its meeting of July 22, 1982 granted a leave of absence for illness to Christine Dougherty (Pellagatti) from May 22, 1982 to June 25, 1982.

A-67 Application for leave of absence for personal illness of Christine Dougherty (Pellagatti), dated May 26, 1982, for the period May 22, 1982 to June 25, 1982.

A-68 Letter from medical director, dated June 11, 1982, advising Ms. Dougherty (Pellagatti) that she would have to report to his office prior to approval of her application for leave of absence.

A-69 Record from superintendent of schools, dated March 26, 1981, advising that the Board of Education at its meeting of March 18, 1981 granted a leave of absence for illness to Christine Dougherty (Pellagatti) from January 5, 1981 to January 15, 1981 and from January 16, 1981 to February 3, 1981.

A-70 Application for leave of absence for personal illness of Christine Dougherty (Pellagatti), dated February 2, 1981, for the period January 5, 1981 to January 15, 1981.

A-71 Application for leave of absence for personal illness of Christine Dougherty (Pellagatti), dated February 4, 1981, for the period January 16, 1981 to February 3, 1981.

A-72 Letter to respondent from Robert Y. Schaefer, executive director of human resources, dated February 21, 1991, by certified mail, concerning appointment for drug screen at Health Net at 1:30 p.m., February 21, 1991.

A-73 Letter of Robert Y. Schaefer, executive director of human resources, to respondent, dated February 21, 1991, scheduling appointment for drug screen at 1:30 on February 20, 1991.

A-74 Results of drug screen by National Health Laboratories of respondent, dated March 1, 1991, showing test result as positive for methadone.

A-75 Annual written performance report of respondent, dated April 24, 1990, together with individual improvement plan, indicating attendance and tardiness as performance areas needing improvement.

A-76 Annual written performance report and PIP of respondent, dated May 1, 1991, indicating unsatisfactory attendance because of illness.

A-77 Annual written performance report and PIP of respondent, dated May 3, 1982, indicating attendance as performance area to be improved.

A-78 Annual written performance report and PIP of respondent, dated May 1, 1983, indicating attendance as performance area to be improved.

A-79 Annual written performance report and PIP of respondent, dated June 1, 1984, indicating attendance as performance area to be improved.

A-80 Annual written performance report and PIP of respondent, dated May 1, 1985, indicating attendance as performance area to be improved.

B-1 Memorandum, dated February 7, 1991, from Mr. J. Koval, principal school no. 38, to Dr. J. Howard, associate superintendent, regarding phone call from a concerned parent of a student in Christine Pellagatti's class.

B-2 Memorandum, dated February 19, 1991, from Ms. Mary Ertle, school nurse school no. 38, to Dr. E. Scambio, state district superintendent, regarding Ms. Pellagatti's absence from her classroom on the same date.

B-3 Memorandum, dated February 20, 1991, from Mr. J. Koval, principal school no. 38, to Dr. E. Scambio, state district superintendent, regarding Ms. Pellagatti's absence from her classroom on the same date.

B-4 Memorandum, dated February 20, 1991, from Ms. Mary Ertle, school nurse school no. 38, to Dr. E. Scambio, state district superintendent, regarding Ms. Pellagatti's behavior during school on the same date.

B-5 Memorandum, dated February 20, 1991, from Mr. J. Koval, principal school no. 28, to Dr. E. Scambio, state district superintendent, concerning his observation of the difficulty Ms. Pellagatti experienced while walking on the same date.

B-6 Letter, dated February 20, 1991, from Dr. E. Scambio, state district superintendent, to Ms. Pellagatti suspending her with pay pending a physical examination.

B-7 Memorandum, dated February 21, 1991, from Mr. James J. Richardson, legal investigator, to Dr. E. Scambio, state district superintendent, regarding Ms. Pellagatti's behavior at school on February 20, 1991.

B-8 Memorandum, dated February 20, 1991, from Mr. J. Koval, principal school no. 38, to Dr. E. Scambio, state district superintendent, informing Dr. Scambio that Ms. Pellagatti chose not to go to Health Net.

R-1 Observation/evaluation report of respondent, dated January 9, 1991, by Jack Koval, principal.

R-2 Observation/evaluation report of respondent, dated December 14, 1981, by Jack Schneider.

R-3 Observation/evaluation report of respondent, dated February 6, 1981, by Jack Schneider.

R-4 Observation/evaluation report of respondent, dated December 13, 1982, by Jack Schneider.

R-5 Observation/evaluation report of respondent, dated March 7, 1984, by Marion S. Winds.

R-6 Observation/evaluation report of respondent, dated November 16, 1984, by Marion S. Winds.

R-7 Observation/evaluation report of respondent, dated November 21, 1985, by Jack Schneider.

R-8 Observation/evaluation report of respondent, dated November 24, 1986, by Marion S. Winds.

R-9 Observation/evaluation report of respondent, dated December 15, 1988, by M. Cunningham.

R-10 Observation/evaluation report of respondent, dated March 31, 1988, by Marion S. Winds.

R-11 Observation/evaluation report of respondent, dated May 7, 1990, by Katherine D. Coyle.

R-12 Contract agreement between Jersey City Board of Education and Jersey City Education Association, for period September 1, 1988 to August 31, 1991.

Pm State-operated district memorandum of law filed December 19, 1991.

Rm Respondent's memorandum of law filed December 9, 1991

IN THE MATTER OF THE TENURE HEARING OF CHRISTINE PELLAGATTI, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by respondent, as were replies thereto by the Board of Education.

In her exceptions, respondent avers that the ALJ made several critical factual errors in his decision, all of which conspire to paint the worst possible picture of respondent. Specifically, respondent points to (1) a memo about her absences purportedly dated February 1980, when it was actually dated February 1990, thus making it appear that action was taken against her much sooner than it really was; (2) the ALJ's comment that she was "sent home" from school on May 11, 1990, thus inferring wrongdoing on her part, when the truth was that she excused herself; (3) the ALJ's comment about a lack of effective teaching, which is belied by an excellent evaluation report dating May 7, 1990 (Exhibit R-11); (4) erroneous comments about use of her husband's Percodan, engagement in 5-day rather than 7-day methadone treatments and lateness due to the arrest of a friend in Newark; and (5) refusal of

drug testing being related to an attempt to conceal Percodan use when the refusal was actually related to enrollment in a methadone program. In reply, the Board notes that the letter challenged by respondent (Exhibit A-28) does in fact date from 1990, but judges this and the other objections raised (none of which, it is noted, are supported by citations to transcripts of testimony) to be trivial in view of the overwhelming evidence supporting the Board's position and the findings of the ALJ that are not excepted to by respondent.

Upon careful review, the Commissioner fully concurs with the detailed and well-reasoned decision of the ALJ. Like the Board, the Commissioner finds no merit in respondent's exceptions and notes that even assuming arguendo that her allegations of factual error were correct in their entirety, they would in no way serve to alter the overwhelming balance of evidence in this matter. That evidence, the vast majority of which is undisputed, clearly and unequivocally demonstrates that respondent's continued employment as a teaching staff member is unsupportable for the reasons set forth by the ALJ. The Commissioner moreover finds this so notwithstanding that respondent may have been able, when present and not incapacitated by illness or drug use, to conduct acceptable, even successful classes.

Accordingly, the initial decision of the Office of Administrative Law dismissing respondent from tenured employment from the date of this decision is affirmed for the reasons expressed therein. This matter is further referred to the State Board of

Examiners for action against respondent's certificate pursuant to N.J.A.C. 6:11-3.6(a)1 as the Board may deem appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 30, 1992

DATE OF MAILING - MARCH 30, 1992

40-92

EDU #3722-91 AND #5300-91 (CONSOLIDATED)
C # 40-92
SB # 28-92

IN THE MATTER OF THE TENURE	:	
HEARING OF CHRISTINE PELLAGATTI,	:	STATE BOARD OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION ON MOTION
OF THE CITY OF JERSEY CITY,	:	
HUDSON COUNTY.	:	
	:	

Decided by the Commissioner of Education, May 30, 1992

For the Petitioner-Respondent, Murray, Murray & Corrigan
(David F. Corrigan, Esq., of Counsel)

For the Respondent-Appellant, Brown & Brown
(Raymond A Brown, Esq., of Counsel)

By decision of March 30, 1992, the Commissioner of Education sustained tenure charges of incapacity and of absenteeism against Appellant Christine Pellagatti (hereinafter "Appellant"). On May 14, 1992, Appellant filed a notice of appeal from that decision with the Appellate Division. On July 8, 1992, the Appellate Division dismissed the appeal on motion made on behalf of the State Board of Education that Appellant had failed to exhaust her administrative remedies. Appellant now moves to appeal to the State Board nunc pro tunc.

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

Oct. 8, 1992

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 30, 1992, and mailed to the parties on that date. Under the applicable regulations, the Commissioner's decision was deemed filed on April 1, 1992, and, pursuant to N.J.S.A. 18A:6-28, Appellant was required to file notice of appeal with the State Board by May 4, 1992. As stated, Appellant did not file her appeal with the State Board. Rather, she filed with the Appellate Division on May 14.

Appellant's counsel certifies that Appellant filed her appeal in the Appellate Division on his advice. He further certifies that this advice was based on his misreading of New Jersey Court Rule 2:2-3.[1] Although not timely filed under N.J.S.A. 18A:28-6, Appellant's appeal was timely filed under R. 2:4-1, which is the rule applicable to appeals to the Appellate Division made under R. 2:2-3.

Given that the appeal was timely filed with the Appellate Division under the rule of limitation applicable in that forum, and given that Appellant's counsel's certification convinces us that his error in choice of forum, while not excusable, was not an attempt to avoid our rule of limitation, we find that dismissal of this appeal is not the proper response. c.f. Kohlbrenner Recycling v.

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1 R. 2:2-3(a) provides in pertinent part that appeals may be taken to the Appellate Division as of right "... to review final decisions or actions of any state administrative agency or officer,...".

Burlington Cty., 228 N.J. Super. 624, 629 (Law Div. 1987). We therefore grant Appellant's motion and direct that she file her brief in support of her appeal 20 days from the date of this decision.

October 8, 1992

Date of mailing OCT 09 1992

40-92

EDU #3722-91 and 5300-91 (consolidated)
C # 40-92
SB # 28-92

IN THE MATTER OF THE TENURE	:	
HEARING OF CHRISTINE PELLAGATTI,	:	STATE BOARD OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF	:	DECISION
THE CITY OF JERSEY CITY, HUDSON	:	
COUNTY.	:	
	:	

Decided by the Commissioner of Education, March 30, 1992

For the Petitioner-Respondent, Murray, Murray & Corrigan
(David F. Corrigan, Esq., of Counsel)

For the Respondent-Appellant, Brown & Brown
(Raymond A. Brown, Esq., of Counsel)

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

January 6, 1993

Date of mailing JAN 08 1993

41-92

41-92

MARILYN CHANDROSS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE-MAPLEWOOD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MARCH 31, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6024-91
AGENCY DKT. NO. 158-5/91

MARILYN CHANDROSS,
Petitioner,
v.
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD,
Respondent.

Richard J. Kaplow, Esq., for petitioner
(Weinberg & Kaplow, attorneys)

Monica E. Olszewski, Esq., for respondent
(Young, Tarshis, Dimiero & Sayovitz, attorneys)

Record Closed: February 27, 1992 Decided: February 27, 1992

BEFORE **KEN R. SPRINGER,** ALJ

This matter was transmitted to the Office of Administrative Law on June 19, 1991 for a hearing pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.S.A.* 14F-1 *et seq.*

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Feb. 27, 1992
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

3/2/92
Date

Maureen Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 05 1992
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

al

YOUNG, TARSHIS, DIMIERO & SAYOVITZ, P.A.
Skyline Plaza
414 Eagle Rock Avenue
West Orange, New Jersey 07052
(201) 736-5200
Attorneys for Respondent

Marilyn Chandross,	Before the State of New Jersey Office of Administrative Law
Petitioner,	Department of Education
v.	
	OAL Docket No. EDU-06024-91
Board of Education of the School District of South Orange and Maplewood,	
	STIPULATION OF SETTLEMENT AND DISMISSAL
Respondent.	

WHEREAS, the Petitioner, Marilyn Chandross ("Chandross"), employed under the Title Instructional Aide, filed a Petition with the Commissioner of Education on May 20, 1991 charging that the Respondent Board of Education of the School District of South Orange and Maplewood ("Board") had violated Chandross's rights to tenure and seniority within the South Orange Maplewood School District ("District"); and

WHEREAS, The Respondent Board denied such allegations and raised defenses thereto; and

WHEREAS, the parties desire to amicably resolve this dispute and believe it is in the best interest of each party to settle the pending litigation, the parties stipulate and agree as follows:

1. Subject to Paragraph 3 herein, Board shall employ Chandross as a .3 District Basic Skills teacher until June 25, 1992; and

2. Subject to Paragraph 3 herein, Board shall employ Chandross as a .5 District Basic Skills teacher from September 2, 1992 to June 30, 1993; and

3. During the term of employment as set forth in Paragraphs 1 and 2, Chandross shall receive regular and objectiv evaluations in accordance with applicable law and shall be retained by the Board upon a finding of satisfactory performance; and

4. No retaliation against Chandross shall occur based upon this litigation; and

5. Chandross' employment service from January 4, 1988 to October 16, 1990 will be deemed, for all purposes including tenure, service as an Instructional Aide and Chandross absolutely waives any claim to count or consider such period of employment service towards the acquisition of tenure; and

6. Chandross releases and gives up any and all claims and rights which she may have against Board, as to her employment service prior to October 16, 1990; and

7. Chandross's Petition shall be dismissed with prejudice; and

8. Salary guide credit, previously in effect, will not be impaired by virtue of this settlement.

AGREED AND ACCEPTED BY:

Marilyn Chandross
MARILYN CHANDROSS

WITNESS:

Dated: 2/3/92

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD

WITNESS:

Eileen F. Quinn
A NOTARY PUBLIC OF NEW JERSEY
My Commission Expires March 3, 1992

Dated: 2/12/92

OAL DKT. NO. EDU 6024-91

MARILYN CHANDROSS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE-MAPLEWOOD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

MARCH 31, 1992

DATE OF MAILING - MARCH 31, 1992

42-92

42-92

FRANK X. BYBEL,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	
RESPONDENT.	:	
	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
IN THE MATTER OF THE TENURE	:	
HEARING OF FRANK X. BYBEL,	:	
SCHOOL DISTRICT OF THE CITY OF	:	
ENGLEWOOD, BERGEN COUNTY.	:	
	:	

APRIL 2, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10638-90
AGENCY DKT. NO. 366-11/90

FRANK X. BYBEL,
Petitioner,
v.
ENGLEWOOD BOARD OF EDUCATION

OAL DKT. NO. EDU 2491-91
AGENCY DKT. NO. 28-2/91

IN THE MATTER OF THE TENURE HEARING OF FRANK X. BYBEL

Sheldon H. Pincus, Esq., for Frank X. Bybel
(Bucceri & Pincus, attorneys)

Stephen L. Davis, Esq., for the Englewood Board of Education
(Gutfleish & Davis, attorneys)

Record Closed: February 25, 1992 Decided: February 26, 1992

BEFORE **KEN R. SPRINGER**, ALJ:

Procedural History

This is the proposed final resolution of ongoing litigation in which the parties have been engaged for more than a decade. In February 1981, Frank Bybel, a tenured high school teacher was hospitalized with a diagnosis of a treatable mental condition. The Englewood Board of Education ("Englewood") granted him a medical leave through the end of the school year. Initially, Bybel sought to resume teaching in September 1981, but Englewood imposed conditions, including medication which allegedly may have harmful side effects. Meanwhile, Bybel obtained another teaching position in New York for 1982-83.

In May 1983, Bybel appealed to the Commissioner of Education, culminating, after years of litigation, in a refusal by the New Jersey Supreme Court to disturb the school board's right to set "reasonable" conditions. Apparently, no finding was ever made whether the particular conditions set in this case were reasonable. Although in April 1986 Bybel indicated his willingness to abide by the conditions, he allegedly failed to submit requested medical records to the school board. Not much happened until January 1988, when Bybel requested a local hearing but again purportedly did not supply requested medical records.

After an interval of two years, in April 1990 Bybel indicated his readiness to return to work in September 1990. When Englewood denied his request, in November 1990 Bybel appealed to the Commissioner of Education seeking reinstatement and damages. On December 20, 1990, the Commissioner transmitted the case, (EDU 10638-90) to the Office of Administrative Law ("OAL"). Separately, on February 11, 1991, Englewood certified tenure charges, alleging that Bybel had abandoned his position and, alternatively, that he is medically incapacitated. Bybel filed his answer on March 4, 1991, denying the charges and raising various statutory and constitutional defenses. Subsequently, on March 12, 1991, the Commissioner transmitted the tenure case (EDU 2491-91) to the OAL for a hearing. At Bybel's request, the OAL entered an order consolidating the two cases for hearing.

The OAL has scheduled a two-day hearing on the abandonment issue for April 9 and 10, 1992. If Bybel prevails on that issue, there will be an opportunity for additional discovery and the matter will be continued for a hearing on the incapacity issue sometime in October 1992 at the earliest.

Both parties have agreed to a proposed settlement, subject to approval by the Commissioner of Education. In accordance with the decision of the *State Board of Education in Cardonick v. Brooklawn Bd. of Ed.,* 1983 *S.L.D.* _____ (St. Bd. April 6, 1983), the record of any proposed settlement must include:

> . . . the nature of the charges, circumstances justifying the settlement, consent or authorization by the board of education and the teacher to the proposed agreement, [and] the Administrative Law Judge's findings that the teacher entered into the agreement with a full understanding of his rights, and that the agreement is consistent with the public interest.

On February 19, 1992, the OAL held a public hearing on the issue of whether or not the proposed settlement should be accepted. Counsel for both parties set forth on the record the reasons why settlement would be in the public interest. Bybel testified that he fully understood and voluntarily agreed to the terms of settlement. Russell Major, Englewood Board member, who is familiar with this protracted dispute since its inception, expressed his view that the settlement would be in the best interest of the district and its students. In addition, the parties prepared the various settlement documents which are attached and fully incorporated as part of this decision.

Findings of Fact

Based on my review of the pleadings and the record, I **FIND** that the proposed settlement is consistent with the public interest for the following reasons:

1. The endless litigation has consumed the energies of both parties and it is clearly in the interest of all concerned to put this matter behind them. Both parties acknowledged this fact. As Bybel stated, he would like "to get on with [his] life." Similarly, Englewood complains that the litigation "keeps popping up" every few years and is a recurring drain on its financial resources.

2. Admittedly, Bybel suffered an incapacitating illness while employed by Englewood as a tenured teacher in the high school. None of the tenure charges against Bybel involve allegations of intentional wrongdoing or dishonest conduct. He has never been convicted of any crime.

3. Under the terms of the proposed settlement, Bybel will resign as a teaching staff. Further, the parties have executed general releases which will end this litigation once and for all.

4. In exchange, Englewood will make a lump sum payment of $24,000 to Bybel in satisfaction of any and all claims. This amount represents approximately six months of salary for a teacher of Bybel's qualification and experience. Both parties agree that this is a fair and reasonable amount.

5. If Bybel is successful in his suit against the Board, he would be entitled to damages, including back pay and fringe benefits, commencing in September 1990. Even if Bybel loses the suit, he may still assert a claim under *N.J.S.A.* 18A:6-14 for salary from September 1991 to the disposition of the tenure charges.

6. It will take at least another month until this case is reached for hearing.

7. In the event that it becomes necessary to litigate Bybel's medical fitness, the parties will present conflicting expert testimony. The Board's medical report is at least 18 months old and the information is outdated. Consequently, the Board will have to incur the additional expense of arranging for a current medical examination. Both sides will want to depose each other's medical experts in preparation for the hearing. These preparations will add to the costs of litigation.

8. Before deciding to enter into this agreement, Englewood considered the various risks and pitfalls of litigation, including the possibility that Bybel might be restored to his teaching position. Bybel fully understood his rights and had adequate opportunity to consult with legal counsel.

9. Bybel is aware that, pursuant to *N.J.A.C.* 6:11-3.6(a), the Commissioner may refer this matter to the State Board of Examiners for any action which it may deem appropriate.

I **CONCLUDE** that the terms of settlement are in the public interest.

It is **ORDERED** that the parties comply with the settlement terms and that the proceedings are hereby concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Feb. 26, 1992
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

2/28/92
Date

Maureen Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 03 1992
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

List of Witnesses

1. Frank X. Bybel

2. Russell Major, board member, Englewood Board of Education

List of Exhibits

No.	Description
J-1	Stipulation of settlement, dated February 19, 1992
J-2	Letter of resignation, dated February 19, 1992
J-3	Indemnification agreement, dated February 19, 1992
J-4	Mutual general releases, dated February 19, 1992
J-5	Certified copy of resolution of the Englewood Board of Education, adopted January 16, 1992

Filed 2 27 92

STIPULATION OF SETTLEMENT

This Agreement is made this 19 day of February, 1992, by and between the School District of the City of Englewood, with offices at 12 Tenafly Road, Englewood, New Jersey 07631, hereinafter referred to as the "Board",

AND

Frank X. Bybel, residing at 181 Woodland Avenue, Yonkers, New York 10703, hereinafter referred to as "Bybel."

WITNESSETH:

WHEREAS the Board and Bybel are parties to actions pending before the Commissioner of Education/Office of Administrative Law bearing captions and docket numbers as follows:

(a) Frank X. Bybel v. Englewood Board of Education, Agency Ref. No. 366-11/90, O.A.L. Docket No. EDU 10638-90N; and,

(b) In the Matter of the Tenure Hearing of Frank X. Bybel, School District of the City of Englewood, Bergen County, Agency Ref. No. 28-2/91, O.A.L. Docket No. EDU 2491-91; and,

WHEREAS, Bybel has indicated a willingness to tender his resignation from employment with the Board, upon certain terms and conditions to be stipulated in this Agreement, and to withdraw his claims for reinstatement as set forth in the Verified Petition referred to above that was filed on his behalf; and,

WHEREAS, in lieu of proceeding with the tenure charges it certified to the Commissioner of Education in accordance with the Tenure Employees' Hearing Law, and in recognition of the fact that the tenure charges do not involve moral turpitude and it is in the public interest that there by a settlement of these matters, the Board desires to enter into an agreement stipulating the terms of Bybel's separation from his employment with the Board as a teacher.

NOW, THEREFORE, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly noted below, it is agreed:

1. As evidenced by the attached, Bybel has submitted an irrevocable letter of resignation from all employment with the Board effective at the close of business on the day that the Commissioner of Education approves the stipulation of settlement in these matters. The Board will, by separate resolution, be permitted to accept this resignation at its next regularly scheduled Board meeting, or at a special meeting held prior to the regular meeting.

2. The Board agrees to withdraw, with prejudice, the tenure charges of incapacity and abandonment from position which it certified in the matter bearing Agency Ref. No. 28-2/91 and O.A.L. Docket No. EDU 2491-91.

3. Bybel agrees to withdraw, with prejudice, all claims relating to reinstatement to a tenured position of

employment which he filed in the matter bearing Agency Ref. No. 366-11/90 and O.A.L. Docket No. EDU 10638-90N.

4. The Board shall pay to Bybel the sum of Twenty Four Thousand Dollars ($24,000.00) as a full and complete settlement in lieu of litigation of the matters referred to above. This amount shall be paid as a lump sum without any payroll or other deductions taken from this sum.

5. The lump sum set forth in Paragraph 4 above shall be paid to Bybel immediately following the approval of this Stipulation of Settlement by the Commissioner of Education.

6. Pending the review and approval of this Stipulation of Settlement by the Commissioner of Education, the Board agrees that it shall continue to provide Bybel with all insurance coverages presently provided to other teaching staff members in the Englewood School District. The insurance coverages involved herein are set forth in the current collective negotiations agreement between the Board and the Englewood Teachers' Association.

7. Upon Bybel's separation from employment (the effective date of his resignation) and consistent with his rights under the Consolidated Omnibus Reconciliation Act of 1986 ("COBRA"), Bybel shall be able to purchase, at his own cost and expense, the insurance coverages presently provided to other teaching staff members in the Englewood School District. The insurance coverages involved herein are set forth in the current

collective negotiations agreement between the Board and the Englewood Teachers' Association.

8. It is understood that Bybel shall not receive any other benefits or emoluments of employment specified in the present collective negotiations agreement except as otherwise provided for in this Stipulation of Settlement.

9. Each party agrees that they shall be responsible for their own counsel fees and costs incurred in connection with this matter and any prior actions between them.

10. The Board and Bybel agree to exchange general releases releasing one another from all claims or actions which either may have against the other as a result of these actions, any prior actions, or anything else that occurred during Bybel's period of employment with the Board, subject only to the condition that neither party shall release any claims based upon enforcement of this Stipulation of Settlement. Bybel agrees to execute an Indemnification Agreement with respect to liability to any tax authority for withholdings.

11. The Board and Bybel acknowledge that the terms of this Agreement are contingent upon the review and approval of both the Office of Administrative Law and the Commissioner of Education. In the event that either agency disapproves of the terms of settlement, this Agreement shall be null and void and the parties shall return to the same positions which they held prior to this settlement.

12. The parties recognize that each has been represented by legal counsel of his or its own choosing and that each signs this Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

13. This Agreement shall be subject to the laws of the State of New Jersey.

14. All terms of this Agreement are deemed material. This document may not be altered, amended or modified or revoked except by an instrument executed in writing by the parties.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

ARTHUR [illegible] President
Englewood Board of Education
Dated: 2/19/92

RONALD PILIERE Secretary
Englewood Board of Education
Dated: 2/19/92

Steven L. Davis, Esq.
Attorney for Englewood Board of Education
Dated:

Frank X. Bybel
Frank X. Bybel
Dated: Feb. 19, 1992.

Sheldon H. Pincus, Esq.
Attorney for Frank X. Bybel
Dated: 2/19/92

FRANK X. BYBEL
181 WOODLAND AVENUE
YONKERS, NEW JERSEY 10703

~~January~~ 19, 1992

Englewood Board of Education
12 Tenafly Road
Englewood, New Jersey 07631

Re: Letter of Resignation

Dear Board of Education Members:

I hereby resign from my employment as a teaching staff member employed by the Englewood School District effective at the close of business on the date the Commissioner of Education approves the Stipulation of Settlement in the matters entitled Frank X. Bybel v. Englewood Board of Education, Agency Ref. No. 366-11/90, O.A.L. Docket No. EDU 10638-90N; and, In the Matter of the Tenure Hearing of Frank X. Bybel, School District of the City of Englewood, Bergen County, Agency Ref. No. 28-2/91, O.A.L. Docket No. EDU 2491-91. This resignation is expressly conditioned upon the Board's compliance with the Stipulation of Settlement dated ~~January~~ 19, 1992, between the Board and myself and shall be null and void if the terms of that Agreement are not met. This resignation is otherwise irrevocable.

Respectfully submitted,

Frank X. Bybel

/lg

INDEMNIFICATION AGREEMENT

FRANK X. BYBEL hereby agrees to hold harmless and indemnify the Board of Education of the City of Englewood, with respect to any litigation, claims, expenses (legal or otherwise) or investigation by the Internal Revenue Services or any other Federal or State Tax Agency, with respect to the agreement by the Board of Education to pay him the sum of $24,000.00 in consideration for his release of all monetary and other claims which he may have against the Board of Education as well as for his resignation from employment with the Board of Education

Frank X. Bybel

Dated: 2/19/92

OAL DKT. NO. EDU 10638-90 AND EDU 2491-91 (CONSOLIDATED)

FRANK X. BYBEL,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	
RESPONDENT.	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
IN THE MATTER OF THE TENURE	:	
HEARING OF FRANK X. BYBEL,	:	
SCHOOL DISTRICT OF THE CITY OF	:	
ENGLEWOOD, BERGEN COUNTY.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standard for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983) The matter is hereby dismissed, subject to compliance with the terms of the settlement.

APRIL 2, 1992

DATE OF MAILING - APRIL 2, 1992

COMMISSIONER OF EDUCATION

43-92

43-92

IN THE MATTER OF THE TENURE	:	
HEARING OF VINCENT PELLECCHIO,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF JERSEY CITY,	:	DECISION
HUDSON COUNTY.	:	
	:	

SYNOPSIS

State-operated school district certified charges of chronic and excessive absenteeism and incapacity against respondent, tenured basic skills teacher of mathematics.

Initial decision determined even though respondent was a good teacher, his absentee record prevented him from properly serving his students. ALJ concluded excessive or chronic absenteeism of a tenured teacher, even if related to legitimate medical or health problems, has been held to constitute "incapacity," "unbecoming conduct," and/or "just cause" within meaning of N.J.S.A. 18A:6-10 so as to warrant dismissal from employment. Thus, ALJ ordered respondent removed from his position.

Commissioner concurred with findings and determination by ALJ that respondent was aware of Board's concern about his abysmal attendance record and the detrimental effect of his absences on continuity of instruction for his students. Thus, charge of conduct unbecoming due to excessive absences was proven true and dismissal was warranted. Matter was referred to State Board of Examiners for further action.

APRIL 2, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5129-90
AGENCY DKT. NO. 118-5/90

STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,

Petitioner,

v.

VINCENT PELLECCHIO,

Respondent.

David Corrigan, Esq., for petitioner
(Murray, Murray & Corrigan, attorneys)

Philip Feintuch, Esq., for respondent
(Feintuch & Porwich, attorneys)

Record Closed: January 10, 1991 Decided: February 21, 1992

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

On or about May 4, 1990, the state-operated school district of Jersey City certified charges of chronic and excessive absenteeism and incapacity against respondent, Vincent Pellecchio Respondent filed an answer on June 11, 1990, denying certain of the allegations, asserting that the action by petitioner was arbitrary, capricious, and unreasonable, and requesting that the charges be dismissed.

On June 14, 1990, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law (OAL) for hearing 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 to all parties, a telephone prehearing conference was held on October 9, 1990. At that time, the issue was clarified and a hearing was scheduled for April 4, 5, 8, and 9, 1991, at the OAL, 185 Washington Street, Newark, New Jersey 07102. The April 4 and 5 hearing dates were adjourned at the request of attorney for petitioner because witnesses were unavailable due to closure of the school on those dates. In addition, the April 8 and 9 hearing dates were adjourned and were rescheduled for June 20 and 25, 1991.

At the request of respondent, whose father was ill, the matter was rescheduled to September 16 and 23, 1991. The hearing was held at that time. Witnesses who testified and exhibits received into evidence are listed in the attached appendix. The record closed on January 10, 1991, the date set for the submission of all briefs.

UNDISPUTED FACTS

It became clear at the hearing that a number of facts were essentially undisputed. The parties entered into a stipulation of facts (JJ-1) as to respondent's absentee record and, in addition, it is clear that the background facts are essentially not at issue. The undisputed facts are incorporated here and constitute this tribunal's findings of fact. They may be summarized as follows:

1. Pellecchio, a basic-skills teacher, teaches mathematics. He has been employed by petitioner for 14 years.

2. A basic-skills student is one that falls below the minimum level of proficiency in reading, math, or writing skills. A basic-skills student needs remediation in any or all of these areas.

3. The 1991-92 school year represents Pellecchio's tenth year at No. 38 school, where Jack Koval is principal and Marie Morrissey is assistant principal.

4. Pellecchio's record of absenteeism reveals the following:

Academic Year	Total Days absent
1981-82	25.5
1982-83	39.0
1983-84	11.0
1984-85	22.0, plus 2.5 hours of sick time
1985-86	17.0
1986-87	28.0
1987-88	49.0, plus 2.5 hours of sick time
1988-89	22.0
1989-90	29.0, plus 2.0 hours of sick time

5. Pellecchio's evaluations have been satisfactory. There is no doubt that he is a good teacher and that he is conscientious and works well with the students.

6. Koval authorized the instructional annual performance report dated June 1, 1990. It showed the strengths and weaknesses of Pellecchio, but did not mention his absences.

7. Koval admitted that the instructional annual performance report dated April 9, 1990, the evaluations he did during that year, the instructional annual performance report dated June 16, 1989, the evaluation dated April 14, 1989 (the annual evaluation), the teacher evaluation dated March 16, 1998, the instructional annual performance report for that year, the teacher evaluation report dated March 26, 1987, the instructional annual written performance report dated June 1985, the teacher evaluation dated March 27, 1985, and the teacher evaluation for 1982-83 similarly

did not refer to Pellecchio's absences. There was no mention of concern about attendance on any of these reports. No evaluations except for June 1987 and June 16, 1989, make any mention of attendance problems.

8. Pellecchio was never required to be examined by petitioner.

9. It is undisputed that Pellecchio was advised by letter dated June 20, 1988, that it was the intent of the school to recommend to the Board of Education that his employment increment be withheld for the school year 1988-89 because of excessive absenteeism. There is a letter by Louis Lanzillo advising of the Board meeting of June 30, 1988. Subsequently, on June 30, 1988, Pellecchio's increment was withheld by the Board of Education. The parties were unable to locate a Board resolution rescinding the action and restoring the increment. There is no letter in the file of the Board action of June 30, 1988, and the increment was never withheld.

10. Pellecchio was never denied an increment.

11. By contract, teachers are allowed to be absent 14 personal illness days and two personal business days.

TESTIMONY

In addition to the above undisputed facts, testimony was adduced from Marie Morrissey and Vincent R. Pellecchio. In addition, the parties stipulated as to the transcript of the deposition of Jack Koval. The testimony of the witnesses in substantial measure is summarized below.

First to testify was Marie Morrissey, assistant principal of No. 38 school for 14 years. Ms. Morrissey has known respondent for eight or nine years. Familiar with respondent's absentee record, Morrissey testified that it is unsatisfactory. She testified that respondent was absent more than 15 to 20 days and sometimes up to

49 days each year. She stated that as a basic-skills remedial teacher, the children whom Pellecchio instructs need his services more than the average child. His absence impacts negatively on students, interrupting the services that they receive. Although she stated that she discussed his attendance record with him over the years, she could not be specific as to when. She recalled that Pellecchio had indicated that his absences were all legitimate, but there was no improvement after these discussions. She noted that she had evaluated respondent, and she agreed that he is a good teacher.

On cross-examination, Morrissey alleged that she spoke to respondent during the 1989-90 and 1990-91 school years regarding his absences. She recalled that in January or February 1990, when Pellecchio was out on leave, she discussed his absenteeism with him. He indicated that he had suffered an asthma attack. She noted that it was part of her duty to speak to him but that she did not write a memo to him or recommend action against him. She indicated that she was concerned when a teacher was out one day. Mr. Koval addressed a pattern of absences. No particular number of days triggered this; it was based on a teacher's record. He sent letters to teachers advising of the number of days out. Morrissey indicated that of the 900 students in school, 130 are basic-skills students. She did not have the results of the standardized test and thus could not compare the results of respondent's students on the test versus other students, but she stood by her testimony that respondent's students (he had 30 to 40 each year) did less well.

Jack Koval was employed by respondent as a teacher in 1961. He served in that capacity for nine years and then served as assistant principal for six years. For the last 15 years, he has been the principal at No. 38 school. As a principal, it is his obligation to maintain the attendance record of the employees. Any time a teacher has an absence on his attendance record, it is not satisfactory because it has an adverse effect upon pupils' learning. There is a special significance to the attendance issue as it pertains to a basic-skills teacher.

Koval opined that Pellecchio was aware of his concern regarding his absenteeism and promised to improve it. He stated that in 1983-84, he gave Pellecchio a memo indicating the number of days that he had been absent during that school year. He discussed his attendance record with him at that time and the

issue of improving his attendance. Pellecchio responded positively that he would try to improve his attendance. Questioned as to whether he believed that Pellecchio recognized that his attendance was unsatisfactory, Koval indicated that he "would say yes."

On March 14, 1985, Koval sent a note to Pellecchio indicating the significance of improving teacher attendance and discussed it with him. Pellecchio gave his ill health as the reason for his attendance record. Koval stated that Pellecchio's absences were supported with doctor's documentation and he had no reason to doubt at that time that Pellecchio's reasons were not legitimate. Koval indicated that, based upon what Pellecchio had told him, the doctor's annotations, notes from the doctor, and indications on his leaves of absence, he opined that from 1984 through 1990, Pellecchio's illnesses were caused by his asthma.

Koval further testified that he wrote to Pellecchio, by memo dated December 13, 1985, because Pellecchio had not notified the school at an appropriate time that he would be absent for classes on that day. He did not believe that this was common and stated that Pellecchio generally called in when he was going to be absent. Koval identified other documents in which he dealt with the issue of Pellecchio improving his attendance and recalled other discussions with Pellecchio, who responded positively that he would attempt to improve. He further identified a document dated April 26, 1988, in which he recommended that Pellecchio's increment be withheld. He sent it to Pellecchio, Pellecchio received it, and he advised Pellecchio that he was going to make that recommendation because of the excessive absenteeism.

Pellecchio responded that he understood. Koval did not believe, however, that Pellecchio's increment was ever withheld but had no idea why. It was referred to the personnel director, Mr. Lanzillo. He identified a document dated February 20, 1990, which he had sent to Pellecchio regarding improving his attendance. Pellecchio admitted that his attendance was unsatisfactory and that it was due to his illness. He indicated that he would try to improve it.

On cross-examination, questioned as to the absenteeism policy of the Board of Education, Koval indicated that the written policy in existence as long as he could remember is that if a teacher is absent "x" number of days during the course of a

school term, charges could be brought or a recommendation brought for the withholding of an increment. He did not remember the number of days. He admitted that there is a proviso in the contract that if a teacher is absent beyond the limit of the contract, they get partial pay. He agreed that there is a Board policy that certain absences beyond the 16, upon approval by the Board, are paid for. Koval could not give a definitive answer as to whether any of the days that Mr. Pellecchio was absent were paid for by the Board.

Koval indicated that as far as he knew, the form required by him every time Pellecchio was absent had been supplied to the Board. He did not know of any leave of absence requested by Pellecchio that had ever been denied by the Board of Education. He further indicated that he did not recommend that charges be brought against Mr. Pellecchio. They were brought by the Board of Education and not with his recommendation. Asked who counseled Pellecchio concerning his absences, he indicated that he had, as had the assistant principal. Koval indicated that the annual performance reports and evaluations pertained to the evaluations of a teacher in a classroom.

Next to testify was Vincent R. Pellecchio. He alleged that he had not received notice of the Board meeting (his father signed the return receipt), had not seen the Board resolution of June 30, 1988, and had not had his increment withheld. In further testimony, he indicated that he believed that the students he taught were more proficient than the other students. He based this on their report cards and the fact that most of his students passed their math courses. Koval got upset if a teacher was absent over one day and would so advise the teacher. He recalled that he had had a conversation with Mr. Koval regarding improving attendance but had no conversation regarding his increment being withheld or loss of tenure. He had no recollection of a conversation with Marie Morrissey regarding his absenteeism. While on sick leave, Pellecchio received one-half salary. He opined that he qualified for partial pay and it was not questioned.

On cross-examination, he admitted that Mr. Koval told him he was upset about his attendance. He received notification of his absences and the need for improvement in 1983 and 1984 (J-19, J-20) and made an effort to do so. He admitted

that there was no improvement. He received notice on March 14, 1985 (J-21), stating that his attendance needed improvement. He tried to improve it and failed.

Respondent explained that he suffers from chronic lung disease, which began when he was 13 years old, and his doctor thinks that he should have a lung machine in his home. He stated that he was out for other reasons as well as for his lifelong illness. He admitted that on March 16, 1988, he received another notice to improve his attendance (J-25) and made an effort to improve. He opined that it might have improved that year.

Respondent admitted that he had received notice from Jack Koval dated April 26, 1988, informing him that Koval was recommending that his increment be withheld due to his excessive absenteeism (J-26). He stated that although he had received notice of the increment being withheld, the nurse had told him not to worry about it. He did not know what the Board of Education did and admitted that he had not filed a petition with the Commissioner of Education regarding his increment being withheld. He admitted, however, that those students in a basic-skills class have a special need for a teacher and that the students benefit more when the basic-skills teacher is in the classroom. When the teacher is not there, they remain with their regular teacher.

He admitted that he wrote a letter to Dr. Scambio, dated April 5, 1990, indicating that he intended to improve his attendance. He admitted, however, that during the 1990-91 school year, he requested a leave to take care of his father, who died in 1991, and was absent more than 40 days.

On redirect examination, he recalled that he had requested a leave of absence on April 15, 1991, which was not granted. He has a civil rights action pending against the Board alleging that he was entitled to a 90-day leave to take care of a family member. He stayed out after the Board denied his leave. Although he contended that he had been out of work for eight or nine days prior to his request for a leave, he admitted that he was actually absent 30 days until April 15, 1991. On redirect, he indicated that all the days he was absent in 1990-91 were not related to his present medical condition.

DISCUSSION

Essentially, petitioner filed tenure charges of conduct unbecoming a teacher and incapacity as a teacher against the respondent, Vincent Pellecchio, employed by the district as a basic-skills teacher. The aforementioned charges are predicated upon the respondent's alleged excessive or chronic absenteeism, supported by his absentee record.

Based upon the current record, it appears that the respondent is a long-time sufferer of chronic severe asthma and it appears that most of the respondent's absences were attributable to that condition. There is still a question as to whether the respondent's condition is now under control.

N.J.S.A. 18A:6-10, which governs dismissals of tenured teachers, such as the respondent herein, provides in relevant part that:

> No person shall be dismissed or reduced in compensation,
>
> (a) if he is . . . under tenure of office, position or employment during good behavior and efficiency in the public school system of the state. . . .
>
> * * *
> *except for* inefficiency, *incapacity, unbecoming conduct, or other just cause* . . . [emphasis added].

A survey of the relevant case law indicates that chronic or excessive absenteeism has been found to constitute both "incapacity" and "unbecoming conduct," within the meaning of *N.J.S.A.* 18A:6-10, such as to warrant dismissal from employment. It has also been held that chronic and excessive absenteeism amounts to "just cause" under *N.J.S.A.* 18A:6-10 such as to warrant dismissal from employment. *Trenton Bd. of Ed. v. Williamson*, OAL DKT. EDU 7335-85 (Apr. 14, 1986), aff'd by Comm'r (May 28, 1986).

In *In the Matter of the Tenure Hearing of Reilly*, 1977 *S.L.D.* 403, the Commissioner of Education affirmed the dismissal of a teacher, on grounds of incapacity and conduct unbecoming a teacher, whose absences ranged from five to 149 days a year over a 10-year period, notwithstanding the claim that most of the

absences were in connection with a physical ailment plaguing the teacher. *See also, Malley v. Bd. of Ed. of Pequannock Township,* OAL DKT. EDU 1858-86 (Nov. 19, 1986), aff'd Comm'r (Dec. 29, 1986), aff'd State Bd. of Ed. (April 1, 1987); *In the Matter of the Tenure Hearing of DeKrafft,* 1981 *S.L.D.* 1308, aff'd State Bd. of Ed. 1982 *S.L.D.* 1470, aff'd (N.J. App. Div., May 4, 1983, A-4641-81T2) (unreported).

With respect to determining what constitutes chronic or excessive absenteeism, it must be pointed out that the ALJ in *In the Matter of the Tenure Hearing of Sheets,* 1980 *S.L.D.* 1536, rev'g 1979 *S.L.D.* 790, held that "the point at which absenteeism is judged to be chronic falls within the prerogative and discretionary authority of the Board [of Education] subject to a determination by the Commissioner of Education in accordance with *N.J.S.A.* 18A:65-9 [which provides the Commissioner with jurisdiction to hear and determine all controversies and disputes arising under the school laws]."

The rationale underlying the principle that chronic or excessive absenteeism is conduct which warrants dismissal has been articulated in various ways. The ALJ in *Trenton Bd. of Ed. v. Williamson, supra,* in rather conclusive fashion, held that "there is no question that repeated and excessive absenteeism of regular teachers poses a threat to the integrity of the educational process." *Williamson* at 4, citing *Angelucci v. West Orange Bd. of Educ.,* 1980 *S.L.D.* 1066.

In *Reilly, supra,* the rationale was more fully set forth by the Commissioner. "Frequent absences of teachers from regular classroom activity disrupt the continuity of the instructional process. The benefit of regular classroom instruction is lost and cannot be entirely regained, even by extra effort, when the regular teacher returns to the classroom. Consequently, many pupils who don't have the benefit of their regular classroom teacher frequently experience great difficulty in achieving the maximum benefit of schooling. The regular contact of pupils with their assigned teachers is vital to this process." *Reilly,* 1977 *S.L.D* at 414.

Moreover, chronic or excessive absenteeism may be found to warrant removal even where the absences in question were for legitimate medical or health reasons. *Malley, supra,* at 14, referring to *Trautwein v. Bd. of Ed. of Bound Brook* (N.J. App. Div., April 8, 1980, A2773-78) (unreported), certif. denied 84 *N.J.* 469. *See, also, Reilly, supra,* wherein the dismissal was affirmed notwithstanding a claim that the

teacher had been suffering from chronic respiratory ailments during most leaves of absence, and *Sheets, supra,* in which the dismissal was affirmed despite the teacher's claim of having suffered from bronchitis, anxiety and depression, and/or hypertension during the periods of absence in question.

In *Angelucci,* a case dealing with the withholding of salary increments on account of chronic or excessive absenteeism, the Commissioner offered an explanation for this seeming indifference to the problems of teachers: "The Commissioner can only sympathize with teachers who suffer from debilitating illness but cannot agree that the continued absence of any teacher has no effect on the pupils. If such be true, the Commissioner is constrained to wonder the need for the presence of the teacher at all, which wonderment reduces to a legal absurdity." *Angelucci, supra,* 1980 *S.L.D.* at 1078. In light of the foregoing, it appears that the respondent in the case at bar may not rely on the fact that most of his absences were due to a physiological ailment as an argument in mitigation of the penalty of dismissal.

In sum, excessive or chronic absenteeism of a tenured teacher, even if related to legitimate medical or health problems, has been held to constitute "incapacity," "unbecoming conduct," and/or "just cause" within the meaning of *N.J.S.A.* 18A:6-10, so as to warrant dismissal from employment.

CONCLUSION

In the instant case, I have considered the evidence and am of the view that dismissal is warranted. While it is true that Mr. Pellecchio, a basic-skills teacher, is not only a satisfactory teacher but a good, conscientious teacher who works well with the students, it is necessary for him to be present in order to properly serve the students. His record of absences does not allow him to do so.

While I am of the view that his absences were, in fact, caused by his asthma-related problems and were, in fact, attributable to that condition, the important factor here is the effect that his illness and resulting absenteeism has on the students. In that regard, I have considered several factors. Pellecchio is a basic-skills teacher of mathematics. I am convinced from the testimony adduced that basic-skills students actually need respondent's services more than the average child. This is not

to say that the average child should be deprived of a teacher's presence, but simply to point out that if Mr. Pellecchio is not present, his students remain in their regular classes and do not reap the benefit of his expertise, so necessary to their education.

There is no doubt that there is a special significance to the attendance issue as it pertains to a basic-skills teacher. In any event, Mr. Pellecchio had been advised during a number of years, as is indicated in the record, that his absenteeism did not properly serve the district. Although he was aware of the concern of the district and indicated his willingness to improve his attendance, his record does not reflect the necessary improvement for the continued success of his students. While it may be that his increment was not withheld, he was advised on a continuing basis that his attendance was of concern and needed improvement.

I am not indifferent to Mr. Pellecchio's problems, but am compelled to stress that a teacher's purpose is to benefit the pupils. It is, thus, the effect on those pupils that must be considered. I therefore believe that Mr. Pellecchio, unable to improve his attendance, can no longer serve the needs of the district in the necessary manner. That being so, I **CONCLUDE** that his chronic and excessive absenteeism warrants his dismissal from petitioner district.

ORDER

Based upon the above findings of fact and conclusions of law, I **ORDER** that respondent be removed from his position as a basic-skills teacher, a tenured position, with petitioner.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 21, 1992
Date

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

2/25/92
Date

Maureen Kelley
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 27 1992
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

jrp/e

APPENDIX

LIST OF WITNESSES

For Petitioner:	Marie Morrissey Jack Koval
For Respondent:	Vincent R. Pellecchio

EXHIBITS IN EVIDENCE

P-1	Letter from Louis Lanzillo, dated June 20, 1998 to Vincent Pellecchio, with return receipt
P-2	Resolution of the Board of Education, dated June 30, 1988
P-3	Letter to Elena A. J. Scambio from Vincent R. Pellecchio, dated April 5, 1990 (3 pages)
P-4	Identification
JJ-1	Stipulation of Facts, dated September 16, 1991 (3 pages)
J-1	Teacher Attendance Record for Vincent Pellecchio, school year 1981-82
J-2	Teacher Attendance Record for Vincent Pellecchio, school year 1982-83
J-3	Teacher Attendance Record for Vincent Pellecchio, school year 1983-84
J-4	Teacher Attendance Record for Vincent Pellecchio, school year 1984-85
J-5	Teacher Attendance Record for Vincent Pellecchio, school year 1985-86
J-6	Teacher Attendance Record for Vincent Pellecchio, school year 1986-87
J-7	Teacher Attendance Record for Vincent Pellecchio, school year 1987-88
J-8	Teacher Attendance Record for Vincent Pellecchio, school year 1988-89
J-9	Teacher Attendance Record for Vincent Pellecchio, school year 1989-90
J-10	Application for leave of absence, dated March 15, 1982

J-11	Memo from Michael Ross, Superintendent of Schools, dated April 26, 1982, regarding leave of absence of Vincent Pellecchio
J-11A	Application for leave of absence for Vincent Pellecchio regarding leave of absence for February 8, 1983 to March 7, 1983
J11-B	Memo regarding Vincent Pellecchio from Michael Ross, dated May 17, 1983
J-12A	Application for leave of absence for Vincent Pellecchio, dated February 27, 1985
J-12B	Memo from Henry Prestub regarding leave of absence for Vincent Pellecchio, dated April 3, 1985
J-13A	Application for leave of absence for Vincent Pellecchio regarding leave of absence for March 25, 1984 to April 15, 1985
J-13B	Memo from Henry Prestub regarding leave of absence for Vincent Pellecchio, dated June 12, 1985
J-14A	Application for leave of absence for Vincent Pellecchio, dated December 3, 1986
J-14B	Memo from Franklin L. Williams regarding leave of absence for Vincent Pellecchio, dated February 2, 1987
J-15A	Application for leave of absence for Vincent Pellecchio for a period April 27, 1987 to May 11, 1987
J-15B	Memo from Franklin L. Williams regarding leaving of absence for Vincent Pellecchio, dated June 29, 1987
J-16A	Application for a leave of absence for Vincent Pellecchio, dated January 19, 1988
J-16B	Memo from Franklin L. Williams regarding leave of absence for Vincent Pellecchio, dated March 22, 1988

J-17A Application for leave of absence regarding Vincent Pellecchio, dated January 1989

J-17B Memo from Franklin L. Williams regarding leave of absence from Vincent Pellecchio, dated March 21, 1989

J-18A Application for leave of absence for Vincent Pellecchio, dated October 27, 1989

J-18B Letter to Mr. Pellecchio from Elena Scambio, dated December 6, 1989

J-19 Memo to Vincent Pellecchio to Jack Koval regarding absence for the 1982-83 school year

J-20 Memo from Jack Koval to Vincent Pellecchio, dated June 1984

J-21 Memo to Vincent Pellecchio from Jack Koval regarding teacher attendance, dated March 14, 1985

J-22 Memo to Vincent Pellecchio from Jack Koval, dated December 13, 1985

J-23 Memo to Vincent Pellecchio from Jack Koval, dated June 1986

J-24 Memo to Vincent Pellecchio from Jack Koval, dated February 23, 1987

J-25 Letter to Vincent Pellecchio from Jack Koval, dated March 16, 1988

J-26 Memo to Vincent Pellecchio from Jack Koval, dated April 26, 1988

J-27 Memo to Vincent Pellecchio from Jack Koval, dated February 20, 1990

J-28 Letter to To Whom It May Concern from B. Louie, dated March 20, 1990

J-29 Instructional Annual Written Performance Report regarding Vincent Pellecchio, dated June 1, 1990

J-30 Instructional Written Performance Report regarding Vincent Pellecchio, dated April 9, 1990

J-31 Jersey City Public Schools Instructional Observation Evaluation Report, dated March 23, 1990, regarding Vincent Pellecchio

J-32 Instructional Written Performance Report regarding Vincent Pellecchio, dated June 6, 1989

J-33 Jersey City Public Schools Instructional Observation Evaluation Report regarding Vincent Pellecchio, dated April 14, 1989

J-34 Instructional Written Performance Report regarding Vincent Pellecchio, dated June 1989

J-35 Jersey City Public Schools Instructional Observation/Evaluation Report regarding Vincent Pellecchio, dated March 16, 1988

J-36 Instructional Written Performance Report regarding Vincent Pellecchio, dated June 1987

J-37 Instructional Written Performance Report regarding Vincent Pellecchio, dated June 1987

J-38 New Jersey Public Schools Instructional Observation Evaluation Report regarding Vincent Pellecchio, dated March 26, 1987

J-39 Instructional Written Performance Report regarding Vincent Pellecchio, dated June 1985 (2 pages)

J-40 Jersey City Public Schools Instructional Observation/Evaluation Report regarding Vincent Pellechio, dated March 7, 1985

J-41 Jersey City Public Schools Instructional Observation/Evaluation Report regarding Vincent Pellecchio, date November 9, 1982

J-42 Transcript of Jack Koval, Principal, P.S. No. 38, dated August 26, 1991

IN THE MATTER OF THE TENURE	:	
HEARING OF VINCENT PELLECCHIO,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF JERSEY CITY,	:	DECISION
HUDSON COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Respondent filed timely exceptions and the Board submitted timely reply exceptions.

Respondent's exceptions are a nearly verbatim recitation of those arguments advanced in his post-hearing submission. He argues essentially that the Board's attendance policy provides no standard by which teaching staff members can be guided as to when and under what circumstances he or she is incurring the concern of the Board regarding absences. He claims further that he had no warning that his absences were of sufficient concern to the Board that his tenure was in jeopardy, and notes that neither of his supervisors recommended that tenure charges be filed. Citing withholding case law such as Vonita Smith v. Board of Education of the City of Trenton, Mercer County, decided by the Commissioner April 18, 1989, respondent further argues that the Board at no time conveyed its concern about his absences prior to its taking action to terminate

him. Finally, respondent contends no mention was made to him about the Board's or the principal's concern for the alleged lack of continuity of instruction.

The Board's reply exceptions counter that respondent's absence record was excessive for years, that he was warned both orally and in writing of the need to improve, and that he never did improve his record of absences. The Board avers that respondent's claims that the Board did not advise him of its concerns and that his absences were not excessive are belied by the record. The Board reiterates its stance that the needs of the pupils are paramount, and it advances the position that an absent teacher cannot effectively teach. Citing its earlier briefs, the Board submits that the tenure charges should be upheld.

Upon a careful and independent review of the record of this matter, which includes a review of the deposition of testimony taken of the principal, the Commissioner concurs with the findings of fact and conclusions of law advanced by the ALJ below in this tenure matter charging conduct unbecoming a teaching staff member due to excessive absenteeism. The Commissioner notes in particular his accord with the ALJ's conclusion that respondent was aware of the Board's concern about the effect his absences were having on the continuity of instruction for his pupils. (See Exhibits J-19 through J-27 and Tr. 14-21.) The facts extant in this tenure case lie in marked contrast to those brought to the record in the case captioned In the Matter of the Tenure Hearing of Patricia Marsden, School District of Toms River Regional, Ocean County, 1985 S.L.D. 1572, aff'd State Board November 4, 1987 wherein the Commissioner

found excessive absenteeism, but that insufficient measures had been taken by the administration "to counter respondent's deplorable attendance pattern***." (Marsden, at 1596) Thus, the Commissioner did not remove Ms. Marsden from her tenured employment but rather reduced her salary. In the case at bar, respondent was apprised in letters from the principal in June of 1984, March of 1985, and December of 1985 that his attendance was negatively affecting the continuity of instruction to his pupils. He also discussed his attendance record and the withholding of his increment in meetings with the principal. (See Tr. 14-15, 19-23, 42 and 44.) Moreover, although never actually carried out, respondent herein was noticed that his increment would be withheld in April 1988 for excessive absenteeism. Thereafter, in February 1990 respondent was again made aware by the principal, in writing, that his attendance was unsatisfactory and that his absences were impairing the continuity of instruction for his pupils. Respondent does not deny such notices having been sent him and he even admits to having written the State-operated Superintendent of his own attempts to improve his attendance, but to no avail. (See Initial Decision, at p. 8.) Thus, the Commissioner rejects respondent's contentions that he was unaware of the Board's concern with his excessive absences and its concern for the pupils' educational continuity.

Moreover, the Commissioner concurs with the ALJ's conclusion that dismissal is warranted in this matter, because the Board has demonstrated respondent has been unable to improve his attendance despite repeated notice to do so, and it has also

demonstrated that respondent's chronic absenteeism affects the pupils' educational continuity. Accordingly, for the reasons expressed in the initial decision as amplified herein, the Commissioner directs that respondent be dismissed from his tenured employment with the Board and that the matter be referred to the State Board of Examiners pursuant to N.J.A.C. 6:11-3.6(a)1 for further action as it deems appropriate.

COMMISSIONER OF EDUCATION

APRIL 2, 1992

DATE OF MAILING - APRIL 2, 1992

43-92

EDU #5129-90
C # 43-92
SB # 17-92

IN THE MATTER OF THE TENURE	:	
HEARING OF VINCENT PELLECCHIO,	:	STATE BOARD OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF JERSEY CITY,	:	
HUDSON COUNTY.	:	
	:	

Decided by the Commissioner of Education, April 2, 1992

For the Petitioner-Respondent, Murray, Murray & Corrigan
(David F. Corrigan, Esq., of Counsel)

For the Respondent-Appellant, Feintuch & Porwich
(Philip Feintuch, Esq., of Counsel)

For the reasons expressed by the Administrative Law Judge and the Commissioner, the State Board of Education finds that, while respondent's absenteeism as litigated in these proceedings does not establish incapacity, his chronic and excessive absenteeism was such as to warrant his dismissal. We therefore affirm the decision of the Commissioner.

November 4, 1992

Date of mailing NOV 05 1992

11-92

44-92

CAROL BROWN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY, AND ANGELA RIEMANN,	:	DECISION
RESPONDENTS.	:	
	:	

SYNOPSIS

Petitioner, Teacher-Coordinator of Cooperative Business Education terminated by Board, sought summary judgment on her claim that Board violated her rights by assigning Third-Party Respondent Riemann, who had neither tenure nor seniority as coordinator, to serve in coordinator position. Petitioner further contended that Respondent Riemann, who had been riffed from her tenured supervisory position, should have been placed in other available supervisory positions rather than in the coordinator position from which she "bumped" petitioner.

Commissioner concurred with petitioner that the statutory requirements governing effectuation of RIF's were misapplied and that petitioner's rights were violated by placement of Riemann in the position of Teacher-Coordinator of Cooperative Business Education. (Capodilupo, Bednar, and Schienholz) Commissioner determined Respondent Riemann was entitled by tenure to, and should have been placed in, available supervisory position and directed that petitioner be restored to her former coordinator position. Petitioner's request for interest was denied as Board did not act in bad faith. Petitioner was ordered restored to coordinator position with mitigated compensation.

APRIL 3, 1992

CAROL BROWN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY, AND ANGELA RIEMANN,	:	DECISION
RESPONDENTS.	:	
	:	

For Petitioner, Richard A. Friedman, Esq. (Zazzali, Zazzali, Fagella and Nowak)

For Respondent Board of Education, R. Joseph Ferenczi, Esq.

For Third Party Respondent, Wayne J. Oppito, Esq. (New Jersey Principals and Supervisors Association)

This matter was opened before the Commissioner of Education by way of a Petition of Appeal with request for summary judgment filed on June 24, 1991 and subsequently amended on July 22, 1991. In her original filing, petitioner alleged that respondent Board of Education had violated her tenure and seniority rights by terminating her employment as teacher-coordinator of cooperative business education (hereinafter "coordinator") while assigning Respondent Riemann, who had neither tenure nor seniority as coordinator, to serve in the coordinator position. Petitioner's amended filing further noted that other supervisory positions, to which Riemann was entitled by virtue of her tenure as supervisor, were available (i.e., held by nontenured persons) at the time when Reimann's supervisory position was eliminated, so that Riemann

should have as a matter of law been assigned to one of these positions rather than to the coordinator position from which she "bumped" petitioner. Petitioner sought summary judgment based on her belief that no facts were in dispute and her claim could be decided as a matter of law.

By way of answer, both the Board and Riemann claimed that Riemann had acquired tenure and seniority as a coordinator. The Board further claimed that Riemann had no entitlement to available supervisory positions, and that no violation of law or petitioner's rights occurred through Riemann's assignment to a coordinator position. Respondents further concurred that the matter was amenable to summary judgment and agreed to proceed accordingly.

On January 3, 1992, a jointly executed stipulation of facts was submitted to the Commissioner. Briefs and replies ensued, the last of which was filed on February 5, 1992, at which time the record of this matter was deemed closed.

FINDINGS OF FACT

The following have been stipulated to by the parties and are hereby adopted as the Commissioner's Findings of Fact in this matter.

1. Petitioner Carol Brown is a teaching staff member employed by Respondent. She holds an instructional certificate with endorsements as a teacher of business and data processing, an administrative certificate with endorsement as a supervisor, and an educational services certificate with an endorsement as teacher coordinator of cooperative business education.

2. Petitioner Carol Brown's employment history is as follows: 1968-69 through 1979-80 school years, teacher, assigned under instructional certificate-business endorsement; 1980-81 school year, leave of absence; 1981-82 through 1983-84 school years, teacher under instructional certificate business endorsement on a .6 basis,

1984-85 school year, same on full-time basis; 1986-87 through 1990-91 school years, teacher coordinator of cooperative business education assigned under said endorsement (on educational services certificate) at Edison High School.

3. Third Party Respondent Angela Riemann is a teaching staff member employed by Respondent.

4. Third Party Respondent Riemann holds the following certificates and endorsements: instructional certificate with endorsements as teacher of business education, social business studies, secretarial studies and data processing. Angela Riemann also holds an administrative certificate with a supervisory endorsement, and an educational services certificate with an endorsement as a teacher-coordinator of cooperative business education.

5. Third Party Respondent Riemann's employment history in the district is as follows: September 1, 1959 through October 31, 1964 and April 24, 1973 through June 30, 1973, teacher, serving under business endorsement; 1973-74 through 1978-79 school years, teacher of business, except that assignments for 1976-77 and 1977-78 were on .8 basis; 1979-80 school sabbatical; 1980-81 and 1981-82 school years, teacher of business; 1982-83 and 1983-84 school years, teacher coordinator of cooperative business education assigned under said endorsement to Edison High School; 1984-85 through 1990-91 school years, Department Head at Edison High School, serving under authority of supervisor endorsement; 1991-92 school year, reassigned by respondent to position of teacher-coordinator of cooperative business education under said endorsement at Edison high school.

6. Ms. Brown and Ms. Riemann have both been properly certified for each assignment that each of them has held.

7. Effective July 1, 1991, respondent abolished two positions of Department Chairperson - Business Education at Edison High School and John P. Stevens High School and reassigned the duties to the Supervisor of Related Arts. The abolished positions of Department Chairperson were supervisory positions requiring an administrative certificate with supervisory endorsement.

8. As a consequence of said reduction in force, respondent determined that Angela Riemann would be assigned to the position/category of teacher-coordinator (see paragraph 6), based upon her prior service therein, and consequently, assigned her to the teacher-coordinator position which had been held by Carol Brown for the 1990-91 school year.

9. Because of said assignment, respondent riffed Carol Brown and terminated her employment, but subsquently recalled her and assigned her to a teaching position, at a lesser salary than the salary she would have received if assigned as a teacher-coordinator.

10. Effective July 1, 1991, Angela Riemann was assigned to the position of teacher-coordinator, the position she held immediately prior to the abolished position of Department Chairperson - Business Education. At the time of this reassignment, there were four supervisory positions in the school district in which the incumbent had not attained tenure as a supervisor; Supervisor - English, Supervisor - Foreign Language, Supervisor - ESL/Bilingual and Department Chairpersons - Health/Physical Education, Mathematics, and Science.

11. Carol Brown filed this Petition of Appeal on June 24, 1991. By letter dated July 19, 1991, she requested that the Petition be deemed amended on the basis that in addition to the violation of her tenure and seniority rights as she alleged occurred from Ms. Riemann's assignment, that the statutory RIF and recall scheme required that Ms. Riemann be assigned on the basis of her tenure status to a supervisory position held by a non-tenured supervisor.

12. Said Petition also sought all salary and emoluments denied or reduced as a consequence of Ms. Brown's assignment as a teacher, rather than as a teacher coordinator.

13. For the 1990-91 school year, Carol Brown's salary was $64,156.00 in the teacher-coordinator position. For the 1991-92 school year, she is being compensated at the salary of $58,351.00 as a teacher. If she was assigned as a coordinator for the 1991-92 school year, she would be compensated at the salary of $64,156.00.

14. For the 1990-91 school year, Angela Riemann's salary was $60,889.00, as Department Head. For the 1991-92 school year, she is receiving the salary of $63,538.00 as a teacher-coordinator. The supervisory salary will be increased when there is a settlement of the collective bargaining agreement for Department Heads, retroactive to 1989.

PETITIONER'S POSITION

Petitioner asserts that at the time of her termination, she had acquired tenure and five years' seniority in her position as coordinator, having served therein from 1986-87 through 1990-91. Riemann, on the other hand, after eleven years of service a teacher, served as coordinator for two years (1982-83 and 1983-84) and thereafter (1984-85 through 1990-91) served in a position (department head) requiring a supervisory certificate.

Petitioner initially claims that because Riemann was tenured as a supervisor, the Board was required by the statutory scheme governing reductions in force to assign Riemann to another supervisory position when her own position was abolished. It is now well-established, petitioner argues, that in a RIF situation, before seniority even becomes relevant, a district must first fill positions by application of tenure status; indeed, a riffed teacher need not even apply for the position to which he or she is entitled. A tenured staff member whose position is abolished or reduced must be appointed to any other like tenure position over nontenured staff. Only after that procedure is followed does seniority come into play. Herbert v. Bd. of Ed. of Middletown, Superior Court App. Div. unreported, Docket No. A-318-90T1, decided May 22, 1991; Capodilupo v. West Orange Board of Education, 218 N.J.

Super. 510 (App. Div. 1987); Bednar v. Westwood Regional Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987); Mirandi v. Bd. of Ed. of West Orange, State Board of Education, decided April 5, 1989; Schienholz et al. v. Bd. of Ed. of Ewing Township, unreported Docket No. A-2905-89T3 Appellate Division November 19, 1990 Thus, in the present matter, the district should have assigned Riemann to a supervisory position held by a nontenured person and should have kept petitioner in, and must now restore her to, her coordinator position.

Alternatively, petitioner argues, Riemann never acquired tenure as a coordinator and therefore her displacement of petitioner violated petitioner's tenure and seniority rights. In order for Riemann to have obtained tenure as a coordinator, the plain terms of N.J.S.A. 18A:28-6 require that she have served for two academic years together with employment at the beginning the next succeeding academic year, a requirement which Riemann did not satisfy. N.J.S.A. 18A:28-6 also provides that a teaching staff member transferred to a new tenure-eligible position who does not serve in that position long enough to acquire tenure is to be returned to his or her former position with all service in the new position counting toward tenure and seniority in the former position. It neither envisions nor permits someone in Riemann's situation to tack service in a third position, in which she acquired tenure, onto service in the second position so as to reduce the tenure acquisition time for that position.

RESPONDENTS' POSITION

The Board and Third-Party Respondent Riemann argue that Riemann was in fact tenured as a coordinator and had greater

seniority in that position than petitioner. She acquired such tenure, they aver, on the first day of her new position as department head, because time in that position is to be included in determining tenure and seniority rights in her former position of coordinator by operation of the clear language of N.J.S.A. 18A:28-6. Respondents further rely on Van Wagner v. Board of Education of the Borough of Roselle, Union County, 1973 S.L.D. 488; Alan R. Sitek v. Board of Education of the Southern Regional High School District, Ocean County, decided November 15, 1988, aff'd State Board March 1, 1989; and Virginia Euell v. Board of Education of the Princeton Regional School District, Mercer County, 1978 S.L.D. 666, aff'd State Board 1979 S.L.D. 825, aff'd Appellate Division 1980 S.L.D. 1489, to demonstrate that the law is settled with respect to interpretation of the controlling statute.

The Board further argues that notwithstanding Riemann's undisputed tenure in her particular department head position, it was not required to place her in a supervisor or department head position held by a nontenured person for the 1991-92 school year. This is so, the Board contends, because Riemann does not qualify for the "available" positions (listed in Stipulated Fact No. 10). In the district's organizational scheme "supervisors" are placed above department heads, so that petitioner's argument would result in Riemann's being able to "bump up" to a position of higher rank than that in which she acquired tenure. The only available department head positions, on the other hand, entail teaching duties for which Riemann does not hold proper endorsements. Therefore, Riemann was not entitled to displace any of the nontenured incumbents in these

positions and was properly reassigned to her former position of coordinator.

Riemann disagrees with the Board's assessment of her right to a supervisory position, instead endorsing petitioner's arguments on this issue. She requests, in the alternative to a finding that she has tenure and greater seniority than petitioner in the position of coordinator, that the Commissioner find her entitled to one of the supervisory positions now held by nontenured staff.

COMMISSIONER'S DETERMINATION

The Commissioner concurs with petitioner that the statutory requirements governing effectuation of RIFs were misapplied in this instance and that petitioner's rights were violated as a result.

It is clear from the undisputed employment history of Third-Party Respondent Riemann (Stipulated Fact No. 5) that she has obtained tenure in the position of supervisor as the department head position required her to function under a supervisory certificate. Therefore, for purposes of tenure entitlement, she is tenured in the position of supervisor notwithstanding that the supervisory positions to which her tenure entitles her have Board- established organizational placements or subject endorsement requirements that are not encompassed within her experience and instructional certification. As both petitioner and Riemann observe, it is now well-established that organizational and subject endorsement requirements cannot be used to defeat tenure rights, so that proper operation of the statutory scheme would necessarily have resulted in appointment of Riemann to one of the supervisory positions held by nontenured staff. South River Education Association v. Board of

Education of South River, State Board decision of November 4, 1987, aff'd Superior Court Dkt. No. A-1695-87T8, April 16, 1990; Herbert, supra; Schienholz, supra Had Riemann been so appointed, petitioner would not have been bumped from her position as coordinator, as there would have been no need for Riemann to revert to a former position to preserve her rights. Therefore, as she claims, petitioner's tenure rights were violated by the Board's effectuation of its July 1991 RIF, and the appropriate remedy lies in restoring her to her former position.

Having so found, the Commissioner declines to reach the issue of Riemann's tenure and seniority status with respect to the coordinator position, as there is no need for application of those rights in view of the availability of supervisory positions to which Riemann is entitled by tenure. He further notes petitioner's request for pre- and post-judgment interest and finds with respect to pre-judgement interest that there is neither allegation nor evidence herein that the Board's actions were taken in bad faith or in deliberate violation of law, while any request for post-judgment interest is premature at this juncture. Petitioner therefore fails to meet the criteria for awarding of interest set forth in N.J.A.C. 6:24-1.16(c). Finally, he notes that the appeal herein seeks relief for petitioner and that directives as to the specific employment of Third-Party Respondent Riemann are inappropriate in this context, apart from a reiteration that Riemann's entitlement to a supervisory position held by a nontenured employee is inherent in the within decision, in the absence of Riemann's having filed a petition or counterclaim on her own behalf.

CONCLUSION

Accordingly, the Commissioner finds and determines that Carol Brown was, through misapplication of the statutory scheme governing RIFs, improperly removed from her position of Teacher-Coordinator of Cooperative Business Education and replaced by Third-Party Respondent Angela Riemann. He consequently directs the Board of Education of the Township of Edison to restore Brown to her position as if she had not been removed therefrom, with all back pay, benefits and emoluments of employment, less mitigation, lost as a result of the Board's actions.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 3, 1992

DATE OF MAILING - APRIL 3, 1992

(SB) 44-92

SB #44-92

IN THE MATTER OF THE REVOCATION	:	
OF THE TEACHING CERTIFICATE OF	:	STATE BOARD OF EDUCATION
PHILIP SHERIDAN BY THE STATE	:	DECISION
BOARD OF EXAMINERS.	:	

Decided by the State Board of Examiners, July 16, 1992

For the Petitioner-Respondent, David Powers, Deputy Attorney General (Deborah T. Poritz, Attorney General of New Jersey)

For the Respondent-Appellant, Wayne J. Oppito, Esq.

On February 6, 1992, the Commissioner of Education, finding that tenure charges of unbecoming conduct certified against Philip Sheridan (hereinafter "respondent"), a tenured teaching staff member, had been demonstrated by a preponderance of the credible evidence, dismissed the respondent from his tenured employment, a decision subsequently affirmed by the State Board of Education. In the Matter of the Tenure Hearing of Philip Sheridan, decided by the Commissioner, February 6, 1992, aff'd by the State Board, June 3, 1992. Those charges alleged that respondent had used profanity and made sexist and racist remarks in the presence of students and had slept in class. The Commissioner directed that the matter be forwarded to the State Board of Examiners (hereinafter "Board") pursuant to N.J.A.C. 6:11-3.6(a)(1) for appropriate action with respect to respondent's teaching certificates.

On April 2, 1992, the Board issued an order to show cause based on the Commissioner's decision. Respondent filed an answer

SEPT. 7, 1994

and brief in response to that order. Thereafter, by order dated July 16, 1992, the Board directed that respondent's certificates be suspended for the period from July 1, 1992 through July 16, 1997. The Board stated:

> At its meeting of July 16, 1992, the State Board of Examiners reviewed the brief from the respondent including letters from medical doctors and other appended documentation and found no basis or evidence to refute the findings of fact and recommendations adopted in the Commissisoner's [sic] Decision of February 6, 1992.
>
> Based on the foregoing, the State Board of Examiners FINDS and CONCLUDES that the appropriate action in this matter is suspension of the respondent's certificates...for a period of five years with reinstatement based on his physical and psychological fitness to teach.

State Board of Examiner's Decision, slip op. at 2.

Respondent filed the instant appeal to the State Board of Education.

After a thorough review of the record, we find it necessary to remand this matter to the State Board of Examiners for further proceedings.

The education laws confer upon the State Board of Examiners the authority to revoke certificates "under rules and regulations prescribed by the State Board." N.J.S.A. 18A:6-38. All actions of the Board of Examiners must be taken in accord with such rules. N.J.A.C. 6:11-2.2.

The procedures established by the State Board for revocation or suspension of certificates are set forth in N.J.A.C. 6:11-3.6. Section (a)(1) thereof, requiring the Commissioner to forward cases to the Board of Examiners which result in dismissal of a teaching staff member as the result of tenure charges, provides for the issuance of an order to show cause by the Board upon

determination that the offense as proven is of such a nature as to warrant consideration of revocation or suspension of certificates. The certificate holder may then file an answer thereto within 20 days. That regulation further provides that:

> After an answer has been filed on behalf of the certificate holder, the board shall refer the case to the Office of Administrative Law for a hearing in accordance with the Administrative Procedure Act (N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.). Where no answer is received to the allegations set forth in the Order to Show Cause, the State Board of Examiners shall proceed to a decision as to the revocation or suspension on the basis of the evidence before it. (Emphasis added.)

In this case, following his receipt of the order to show cause, the respondent filed a timely answer contesting revocation or suspension of his certificates. We reiterate that, in acting to revoke or suspend certificates, the Board of Examiners is obligated to act in accord with regulations prescribed by the State Board. N.J.S.A. 18A:6-38; N.J.A.C. 6:11-2.2.

Those regulations require the Board to refer a case in which revocation or suspension is contested to the Office of Administrative Law ("OAL") "for a hearing in accordance with the Administrative Procedure Act."[1] N.J.A.C. 6:11-3.6(a)(1). That

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[1] We note that a letter dated April 10, 1992 from the Acting Secretary of the Board of Examiners expressly acknowledged such obligation, advising respondent that "[a]fter your Answer has been received, this matter will be forwarded to the Office of Administrative Law for a hearing in accordance with the Administrative Procedure Act."

We note further that in his answer to the order to show cause, counsel for respondent requested that the Board "not revoke or suspend Sheridan's certificates or alternatively, refer this matter to the Office of Administrative Law for a determination that extenuating circumstances renders revocation or suspension of the certificates to be too harsh a penalty." Answer to Order to Show Cause, at 2.

act provides that "opportunity shall be afforded all parties [in contested cases] to respond, appear and present evidence and argument on all issues involved." N.J.S.A. 52:14B-9(c). "Any party in a contested case may present his case or defense by oral and documentary evidence, submit rebuttal evidence and conduct such cross-examination as may be required, in the discretion of the administrative law judge, for a full and true disclosure of the facts." N.J.S.A. 52:14B-10(a).

The Administrative Procedure Act further provides that "[n]o agency shall revoke or refuse to renew any license unless it has first afforded the licensee an opportunity for hearing in conformity with the provisions of this act applicable to contested cases....Any agency that has authority to suspend a license without first holding a hearing shall promptly upon exercising such authority afford the licensee an opportunity for hearing in conformity with the provisions of this act." N.J.S.A. 52:14B-11.

In this instance, the Board did not refer this contested case to OAL for such proceedings, and the only opportunity it provided respondent prior to suspending his certificates was to file a brief and appendix.[2] Given the State Board of Examiner's

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2 We note that the scheduling of a "hearing" before the Board "based entirely on written submission of evidence," see letter to respondent dated May 19, 1992 from the Acting Secretary of the Board of Examiners, did not satisfy the express requirement of N.J.A.C. 6:11-3.6(a)(1) for a hearing in OAL in accordance with the Administrative Procedure Act. See N.J.S.A. 52:14B-9 and 14B-10. There is no indication in the record that the "hearing" afforded respondent consisted of anything more than the Board's review of respondent's brief and appended documentation at its July 16, 1992 meeting. See id; State Board of Examiner's Decision, slip op. at 2.

failure to comply with its mandated procedure, we are compelled to reverse its decision in this matter and remand to the Board with direction that it transmit this case to OAL.

We emphasize that revocation or suspension of certificates serves a different purpose and involves a different consideration than removal of a staff member from a tenured position. Consequently, the responsibilities of the Commissioner under N.J.S.A. 18A:6-10 are distinct from those of the Board of Examiners under N.J.S.A. 18A:6-38. Cox v. State Board of Examiners, Docket #A-3527-81T3 (App. Div. 1983), slip op. at 2-3.

We have previously held that revocation or suspension of certification is not automatic following the dismissal of a staff member from tenured employment pursuant to N.J.S.A. 18A:6-10. In the Matter of the Revocation of the Teaching Certificates of Michael Gwaley, remanded by the State Board of Education, August 5, 1987, decision on remand by the State Board of Examiners, September 24, 1987, aff'd by the State Board of Education, January 6, 1988; In the Matter of the Revocation of the Teaching Certificates of John Ahern, remanded by the State Board of Education, August 5, 1987, decision on remand by the State Board of Examiners, September 24, 1987, aff'd by the State Board of Education, January 6, 1988.

In so holding, we emphasized that the responsibility imposed upon the State Board of Examiners under N.J.S.A. 18A:6-38 is a significant one both because revocation is not automatic and because the Board's decision to revoke or suspend certification precludes employment as a teacher in any school district in this

state. Gwaley, supra, at 4; Ahern, supra, at 3. We therefore concluded that in considering whether to revoke or suspend the certification of an individual dismissed from employment as the result of tenure proceedings, the State Board of Examiners is required to make an independent determination as to whether that individual should be precluded from employment in other districts, and that the determination must be based on all of the evidence relating to such question. Gwaley, supra, at 3-4; Ahern, supra, at 4. We further held that the decision of the Board of Examiners should reflect that it gave reasonable consideration to the relevant evidence and provide the basis upon which it reached its conclusion. Gwaley, supra, at 4; Ahern, supra, at 4.

In this case, the Board of Examiners did not indicate the basis for its conclusion that suspension of respondent's certificates for five years was warranted beyond the fact of the conduct established in the tenure proceedings. Moreover, rather than making an independent determination to preclude respondent from employment in other districts based upon its consideration of all the relevant evidence, the Board predicated its decision entirely upon its determination that respondent had failed to refute the findings of fact and recommendations adopted in the Commissioner's decision in the tenure proceedings as set forth in the show cause order.

In sum, given the Board's failure to transmit this contested matter to OAL for hearing, we reverse the Board's determination to suspend respondent's certificates and remand to the Board. In addition, as set forth above, we remind the Board of its

obligation to provide the basis for determinations to suspend or revoke certificates reflecting that it considered the relevant evidence.[3] We do not retain jurisdiction.

Margaret M. Bennett abstained.

September 7, 1994

Date of mailing SEP 09 1994

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[3] We note that in a contested case which has been referred to OAL, the State Board of Examiners has the option of adopting the findings and conclusions of an administrative law judge. In re Uniform Adm'n Procedure Rules, 90 N.J. 85, 91 (1982). See N.J.S.A. 52:14B-10(c).

45-92

45-92

CHERYL SNYDER AND THE NEW JERSEY EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF QUINTON, SALEM COUNTY, ET AL.,	:	DECISION
RESPONDENTS.	:	

APRIL 3, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7156-90

AGENCY DKT. NO. 228-7/90

CHERYL SNYDER AND THE NEW JERSEY EDUCATION ASSOCIATION

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF QUINTON, SALEM COUNTY, DONNA AGNEW, NEW JERSEY DEPARTMENT OF EDUCATION, AND WALTER J. MC CARROLL

Respondents.

Richard A. Friedman, Esquire, for petitioners, (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Gary Wodlinger, Esquire, for respondents, Quinton Township Board of Education and Donna Agnew, (Lipman, Antonelli, Batt & Dunlap, attorneys)

Arlene G. Lutz, Deputy Attorney General, for respondents, New Jersey Department of Education and Walter J. Mc Carroll, (Robert J. DelTufo, Attorney General of New Jersey, attorney)

Record Closed: October 9, 1991 Decided: February 21, 1992

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE
AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law on September 11, 1990, for a hearing pursuant to N.J.S.A. 52:14B-1 et. seq. and N.J.S.A. 52:14F-1 et. seq.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

21 February 1992
Date

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

2/27/92
Date

Maureen Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 3 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioners

CHERYL SNYDER, AND THE NEW JERSEY EDUCATION ASSOCIATION, Petitioners, v. BOARD OF EDUCATION OF THE TOWNSHIP OF QUINTON, SALEM COUNTY, DONNA AGNEW, NEW JERSEY DEPARTMENT OF EDUCATION AND WALTER J. MCCARROL, Respondents.	BEFORE THE OFFICE OF ADMINISTRATIVE LAW Docket No. EDU 07156-90 Agency Dkt. No. 227-7/90 STIPULATION OF SETTLEMENT/ SETTLEMENT AGREEMENT

The parties to this matter, through their respective counsel, hereby agree that the above matter shall be settled and resolved, as between all parties, subject to the following terms and conditions:

1. The parties agree that in view of the enactment of recent legislation, that portion of the Petition relating to the application of monitoring indicator 6.7 has been rendered moot for future years, so long as said monitoring indicator is not used. The parties further agree that the contents of Paragraph 1 shall not be binding on the Respondent Quinton Township Board of Education, should it become engaged in any future litigation.

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FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
GATEWAY I
NEWARK, N.J. 07102

2. Respondents Deparment of Education and McCarrol take no position on the terms of this paragraph. Petitioners and Respondents Quinton Township Board of Education and Donna Agnew agree to resolve all of their differences on the following basis:

A) Respondents Agnew and Quinton Township Board of Education shall provide a letter of recommendation to be issued on behalf of Cheryl Snyder, should any prospective employers contact it, which shall provide as follows relating to Ms. Snyder:

> This is to advise you that Cheryl Snyder was employed in our district as a Kindergarten Teacher from September 1987 to June 1990. She left our district and took advantage of a job opportunity at Burdette Tomlin Hospital in Cape May County as Director of their Child Care Center. Copies of her evaluations will be made available if specifically requested.
>
> While in our employ Cheryl assisted in the development of a curriculum and program for our first all day Kindergarten and initiated an annual Thanksgiving Feast and a Grandparents Day for our primary grade students.
>
> We hope this information has been of some assistance to you.

B) Respondents Agnew and Quinton Township Board of Education agree that should any persons or entities of any type or nature whatsoever contact them regarding the circumstances of Ms. Snyder's employment or termination, the above letter is the only document which shall be disseminated, and that no personal or supplementary letters placing Ms. Snyder in an unfavorable light shall be disseminated. In particular, their sole response to any inquiries from prospective employers shall be the provision of the

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above letter. In addition, the parties agree that upon written request by any such prospective employer, Ms. Snyder's teaching evaluations may be provided.

C) Said parties further agree that no information concerning Cheryl Snyder, except as authorized above, shall be provided to any person, entity, or prospective employer, except by written consent from Cheryl Snyder.

D) The parties agree that the provisions of Paragraph 2A through D shall apply to all of their officers, agents, and employees, when engaged in acts or omissions arising out of and in the course of the performance of the duties of their office, agency or employment.

3. Respondents Department of Education and McCarroll, although not participating in reaching the terms of Paragraph 2, agree to the inclusion of such terms in this agreement.

4. The parties agree that their agreement to this settlement agreement is contingent upon approval of all of the terms of the agreement by the Office of Administrative Law and the Commissioner of Education, and further, that if this settlement agreement or any term thereof is rejected by the Administrative Law Judge or Commissioner of Education, neither this settlement, or any term thereof shall be binding upon any party, and that this matter shall then be returned as a contested case before the Office of Administrative Law.

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NEWARK, N.J. 07102

5. This agreement represents the full and complete agreement of the parties, and shall not be altered except by written consent of all parties.

Dated: 10/9/91

Cheryl Snyder

Cheryl Snyder, Petitioner

Dated: 10/16/91

Richard A. Friedman, Esq.
Counsel for Petitioners,
Cheryl Snyder and New Jersey
Education Association

Dated:

Arlene Lutz, DAG
Counsel for New Jersey Department
Education and Walter McCarroll

Dated: 11-14-91

Gary Wodlinger, Esq.
Counsel for Quinton Township
Board of Education and Donna Agnew

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OAL DKT. NO. EDU 7156-90

CHERYL SNYDER AND THE NEW JERSEY EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF QUINTON, SALEM COUNTY, ET AL.,	:	DECISION
RESPONDENTS.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter, limited to the facts of this record. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

APRIL 3, 1992

DATE OF MAILING - APRIL 3, 1992

46-92

46-92

JOAN ROTH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Candidate for school psychologist endorsement lacking six credit hours in the educational foundations area appealed denial of certificate to Commissioner of Education.

ALJ concluded that petitioner had not made a sufficient showing that her training and experience were an appropriate alternative to the credit requirements in question. ALJ found petitioner to be lacking the six semester hours in educational foundations which were necessary for receipt of a school psychologist certification. Therefore, the decision of the State Board of Examiners denying certification as a school psychologist was not arbitrary, capricious or unreasonable.

Commissioner affirmed the determination of the ALJ dismissing the Petition of Appeal and upholding the determination of the State Board of Examiners.

APRIL 3, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2016-91
AGENCY DKT. NO. 18-1/91

JOAN F. ROTH,
Petitioner,
v.
STATE BOARD OF EXAMINERS,
Respondent.

Richard L. Bernstein, Esq., for petitioner

Arlene Goldfus Lutz, Deputy Attorney General, for respondent
(Robert J. Del Tufo, Attorney General of New Jersey, attorney)

Record Closed: January 14, 1992 Decided: February 26, 1992

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

PROCEDURAL HISTORY

This matter concerns petitioner's request to receive a school psychologist endorsement from the State Board of Examiners of the New Jersey Department of Education. Petitioner was denied such an endorsement by the State Board of Examiners and requested an appeal through the Commissioner of Education on June 23, 1990. The matter was transferred to the Office of Administrative Law on February 28, 1991, 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 hearing in the matter was held on December 17, 1991 at the Office of Administrative Law (OAL) in Newark. The record remained open until January 14, 1992. Both sides have concurred that although the applicable regulations were recodified in October 1990 the recodification does not

affect the issues in this case. Both sides agree that the changes were minor and do not affect the issues and that the former regulations apply to this case since the matter was heard by the Board of Examiners at its September 13, 1990 meeting prior to the recodification. A copy of the regulations then in effect were supplied to this ALJ by counsel by way of posthearing submission.

STIPULATIONS OF FACT

Prior to the beginning of the hearing both sides entered into certain stipulations of fact in this case. They are as follows:

1. Roth was employed by the Pearl River school district from February 16, 1984 through June 21, 1985 as a school psychologist. (J-1).

2. Roth was employed by the Bedminster, New Jersey Board of Education from February 2, 1987 through June 1987 as a school psychologist-consultant. (J-2).

3. Roth was employed by the Bedminster, New Jersey Board of Education from September 1987 through December 1988 as a school psychologist. (J-2).

4. Roth possesses a New York permanent certificate as a school psychologist effective September 1, 1988. (J-3).

5. Roth was awarded a masters degree from Pace University in 1982. (J-4).

6. Roth completed 63 credits as part of her masters program. (J-4).

7. Roth completed 19 courses as part of her graduate program at Pace. (J-5). The respondent does not agree to the distribution of courses on J-5, merely with the list of courses.

8. Roth completed three undergraduate education courses at Pace during the last two years as an undergraduate. (J-6).

9. Roth applied for New Jersey certification as a school psychologist in May 1987.

10. Roth's application for New Jersey certification was denied because she lacked six credits in educational foundations. *See, N.J.A.C.* 6:11-12.14(b()2)(i).

11. Roth applied to the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.23 to substitute her experience and/or education for the six credits she lacked in educational foundations.

12. The State Board of Examiners reviewed the packet she provided as a certification credentials review summary. (J-7 and J-1, J-2, J-3, J-4, and J-6). Roth did not appear at the meeting at which her credentials were reviewed.

13. After reviewing her packet the State Board of Examiners denied her application for certification. (J-8).

14. Roth was given credit for six credits of educational foundation courses. She was given three credits for her graduate course in School Field Experience (EDU 601) and three credits for her graduate course in Administration of Special Education Services. (EDU 628).

As these facts have been stipulated to by the parties, I **FIND** them to be operational facts of this case.

TESTIMONY

John T. Eckstine, Jr. testified on behalf of the respondent. He is a principal examiner for the State Board of Examiners and reviews credentials for people applying for certification. It is part of his job to look at transcripts and apply them to the regulations and compare to see whether or not one qualifies for any particular certification. He indicated at the time of the hearing that he has done this type of work for eight years. He is acquainted with the school psychologist certification and

a person with such a certification can work as a child psychologist in a school and as part of a child study team.

He stated that in order to qualify for a school psychologist certification it requires 60 graduate semester credits divided into a variety of areas. He stated that he reviewed the credentials for Joan Roth, the petitioner, and found her to be six credits short in the "educational foundations" area. As a result her application was denied.

Subsequent to this denial she then applied for consideration on the basis of her work experience. The items included for their consideration in the packet consisted of those items which were marked as joint exhibits 1, 2, 3, 4, 6 and 7 at the time of the hearing.

The cover sheet of the application outlines the requirement when using alternate experience as the criterion for applying for the certification. A column on the sheet is available for anything that the person wishes to present to the Board of Examiners. After a review of the application the State Board found that petitioner did not have the equivalent of six hours of educational foundations. He explained that a three credit course was the equivalent of 40 to 45 clock hours of class time He did credit petitioner for six credits of educational foundation courses which included three credits for a graduate course in School Field Experience numbered EDU 601 and three credits for a graduate course in Administration of Special Education Services numbered EDU 628. He stated that his review did not reveal other courses which were suitable to fill the portion of educational foundation. He stated that she received credit for an internship but that did not satisfy the requirement of educational foundation. He also stated that a course of Psychology 627 which involved learning disabilities diagnosis and remediation theory and practice was not accepted as filling an education foundation either. He indicated that all people in the program must do some form of internship but that those internships are not educational foundations.

The witness also indicated that it was not necessary for the petitioner go back to the institution where she had gained the majority of her credits in order to accomplish those courses which were still required. The witness explained the distribution of credits using J-5 in evidence. Of those courses allotted in that

particular exhibit EDU 602 which dealt with the exceptional child, field experience and seminar was allotted to a category of education of the handicapped. He also indicated that a course listed as Psychology 617 Learning and Behavior Theory was allotted to personality behavior although it had been the request of the petitioner that these two course filled three credits each of educational foundations. These were the only courses in which disagreement occurred.

The witness acknowledged that for Psychology 605 and 606 which were the school psychology internships and seminars levels 1 and 2, he had allotted four credits each however those went in a category other than that in dispute.

The witness explained that education of the handicapped which is the category to which he assigned education 602 exceptional child field experience and seminar was a specialized course and geared toward exceptional children and not the foundations of education which were broad and general in nature. He based this determination on the title of the course and the description from the course catalog.

The witness explained foundations of education type course as courses such as Introduction to Education, History of Education and courses of a broad and general nature. The witness was shown P-1 in evidence which was the course descriptions. He acknowledged that he did not have this document with him when he did the evaluation.

Joan Roth-Loft also testified at the time of the hearing. She stated that after notification of the denial based upon the lack of courses in educational foundation she contacted both Rutgers and Kean College two years ago. She stated that she was told if she was not matriculated she could not take those courses for credit. She indicated she had also called three or four months prior to the hearing. She was told both by Kean College and by Rutgers University that no one could take courses for credit if not matriculated in the school itself.

According to the witness these would be the only schools which she get to geographically without having to stay overnight in order to take course.

The witness described the Pace University course description which was marked P-1 in evidence and stated that although it was a current description of the courses

and she had gone to school there approximately ten years ago the description was approximately the same as the courses which she took at that time. She did acknowledge that the requirements are now different. At that time she was told that she was required to have Education 628 which according to J-5 in evidence is Administration and Supervision of Special Education.

According to the witness Pace University had accepted several undergraduate foundation courses at a graduate level for her.

She had worked as a school psychologist-consultant two days a week at Bedminster and did the same thing as a psychologist although not certified at that time. She later applied for an emergency certificate. She never saw it but thought she had received it.

The witness acknowledged that educational foundations are general introductory courses. According to her the Exceptional Child Field Experience and Seminar was more specific however was general with respect to dealing with exceptional children.

She stated that she had taken History of Education as an undergraduate and that Pace University gave her credit for taking that course. She further stated that the Learing and Behavior Theory that she took consisted of one-half of the content which would have fulfilled a requirement of educational foundation. She did acknowledge she was given credit for that course in a different category when the review was done.

Ms. Roth stated that in her senior undergraduate year she took two foundations courses that were not taught by the graduate department teachers. One was Principle and Problems of Education and the other was Analysis and Statics of Teaching. She also stated that she took a course in Drug Education and Youth. She used these as electives for credit in the graduate department and in her opinion these fulfilled the foundations requirement.

DISCUSSION

The only question presented in this case is whether the evidence provided by the petitioner shows either that she has met all the listed qualifications and a standard certificate in the appropriate field from another state, currently in full force and effect, the appropriate degree required for certificate by New Jersey regulations and preparation equivalent in total semester hours but not necessarily in specific content to the minimum standards outlined in the New Jersey Education Services Supplement to the standards for state approval for teacher education. This would be pursuant to *N.J.A.C.* 6:11-11.2(a)(4).

Alternatively, the petitioner attempts to show that there has been an appropriate substitution of alternative educational background and/or experience sufficient to cause the granting of a school psychologist certificate by the state of New Jersey.

It should first be pointed out that the petitioner's allegation that she is unable to take those courses necessary because of geographical limitations does not in any lessen the mandate of the regulation. That having been said it is necessary to turn to the substantive arguments.

In order to receive a school psychologist endorsement it is necessary pursuant to *N.J.A.C.* 6:11-12.14 that an individual meet the following requirements:

1. A bachelors degree from an accredited college with a minimum of 30 semester hour credits distributed in at least three of the following fields: English, social studies, science, fine art, mathematics, and foreign languages;

2. An advanced program of at least 60 semester hour credits in graduate courses in an accredited and approved college or university program or its equivalent as approved by the Secretary of the State Board of Examiners with the following distributions:

    i. Educational foundations - 12 semester hour credits selected from the following courses or their equivalence:

        1. Modern school practices
        2. Principles of curriculum construction
        3. Philosophy of education
        4. History of education

5. Education sociology
6. School administration and/or supervision
7. School community relationships
8. Principles of education methods of teaching

The other requirements for endorsement go on and are not at issue here. The only question is whether or not the educational foundations requirement has been met. It is clear from the testimony above that the two courses in dispute, those being the Exceptional Child, Field Experience and Seminar EDU 602 and Learning and Behavior Theory Psychology 617 are not general and fundamental in nature. They do not fit any of those courses listed in *N.J.A.C.* 6:11-12.14(b)2(i)1 through 8. As a result the petitioner is clearly lacking in six credits of the 12 required semester hour credits.

It should be noted that although these classes were not credited to her in the area of educational foundations she received credit for EDU 602 under Education of the Handicapped and credit for the Learning and Behavior Theory class Psych 617 under Personality and Behavior. Petitioner's second claim is that she has alternative education and/or experience that forms an adequate substitute for the six semester hours in educational foundation which were found lacking by her transcript review. It is petitioner's contention that although the requirements were not strictly met the fact that they were "almost met" is important in considering this remaining claim. While petitioner has, as shown by the stipulation of facts obtained work experience the question remains whether or not that is an adequate substitute for these educational foundation courses. Petitioner also points out that she took courses which would have been of a general nature as an undergraduate and later received credit for them and was able to pursue her degree without taking similar graduate level courses. To see whether that will suffice it is important to look back at the requirements. Under *N.J.A.C.* 6:11-12.14, the requirements were a bachelors degree from an accredited college with a minimum of 30 semester hour credits distributed in at least three of the listed fields and an advanced program of at least 60 semester hour credits in graduate courses (emphasis added) in an accredited and approved college or university program or its equivalent as approved by the Secretary of the State Board of Examiners with the descriptions and distributions as outlined above. Those undergraduate courses do not rise to the level of graduate education even though the petitioner was permitted to continue on without taking similar graduate

level courses. There is no doubt that they were undergraduate in level and do not meet the wording of the regulation.

The petitioner has both academic and vocational background however does not qualify under the New Jersey regulations for a certificate as a school psychologist. There is no question that she has field experience which formed a part of the curriculum however she does not provide sufficient evidence that she has alternative training which would suffice.

While under *N.J.A.C.* 6:11-2(a)(4) the petitioner has the essential elements of three years of out of state experience in the field, a current standard certificate in the field from another state, an appropriate masters degree it is clear that the preparation equivalent to the total semester hours required although not necessarily specific content must meet the minimum standards set forth in the regulations the petitioner has not made a sufficient showing that the actions of the Board of Examiners in reviewing her request for certification erred in their findings nor has she made a sufficient showing at the time of the hearing that her field experience should cause those particular provisions to be waived. As a result I **FIND** the petitioner to be lacking in six semester hours of educational foundations necessary for the receipt of a school psychologist certification. I further **FIND** that petitioner has no demonstrated adequate alternative experience necessary.

ORDER

It is hereby **ORDERED** that the decision of the State Board of Examiners, New Jersey Department of Education, denying a certification as a school psychologist to the petitioner, be and hereby is affirmed.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSISON OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

2/26/92
Date

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

2/28/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 03 1992
Date

OFFICE OF ADMINISTRATIVE LAW

am

WITNESSES

For petitioner:

Joan Roth-Loft

For respondent:

John T. Eckstine, Jr.

EVIDENCE LIST

J-1	October 3, 1985 letter from Ronald E. Becraft
J-2	Letter dated October 13, 1988 from Sybrigje Herman
J-3	Public School Teacher Certificate date 9/1/1988 State of NY
J-4	Pace University Scholastic Record
J-5	Course listing
J-6	Pace University Scholastic Record
J-7	State Board of Examiners Form February 9, 1989 course descriptions

OAL DKT. NO. EDU 2016-91

JOAN ROTH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	
	:	

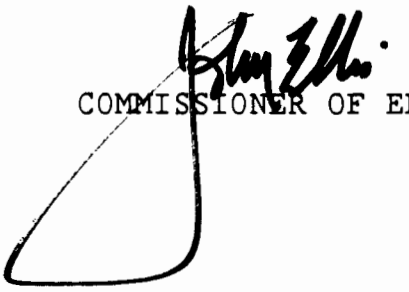
The record of this matter and the initial decision of the Office of Administrative Law have been reviewed.

Petitioner's exceptions were filed beyond the thirteen-day period permitted by N.J.A.C. 1:1-18.4, having been received on March 17, 1992 in response to an initial decision mailed on March 3, 1992. Consequently, they are not considered herein.

Upon review, the Commissioner affirms the determination of the ALJ for the reasons expressed by her in the initial decision. Petitioner has not borne her burden of demonstrating that any element(s) of her training and experience are equivalent to the two additional graduate-level courses in educational foundations she needs to successfully complete requirements for certification as a school psychologist.

Accordingly, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal and upholding the determination of the State Board of Examiners is adopted as the final decision in this matter.*

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

APRIL 3, 1992

DATE OF MAILING - APRIL 3, 1992

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* Respondent submitted a letter urging affirmance of the ALJ's initial decision, but noting that the ALJ erred at p. 9 in stating that petitioner had completed her out-of-state service requirement, as petitioner's out-of-state experience (in Pearl River, NY) totalled only sixteen (16) months and all remaining experience was in-state. Because the decision of the State Board of Examiners from which appeal is taken herein does not raise this issue, citing insufficient coursework as the Board's basis for refusing to issue petitioner her certificate, the Commissioner declines to make a finding as to petitioner's fulfillment of the out-of-state service requirement.

(SB) 46-92

SB #46-92

IN THE MATTER OF THE REVOCATION	:	
OF THE TEACHING CERTIFICATES OF	:	STATE BOARD OF EDUCATION
CHARLES VITOLA BY THE STATE	:	DECISION
BOARD OF EXAMINERS.	:	

Decided by the State Board of Examiners, July 16, 1992

For the Appellant, Thomas L. Murphy, Esq.

For the Respondent, David Powers, Deputy Attorney General
(Deborah T. Poritz, Attorney General of New Jersey)

On December 5, 1991, the State Board of Examiners (hereinafter "Board") issued an order to Charles Vitola (hereinafter "respondent") to show cause why his certificates should not be revoked or suspended. The show cause order was based on a notice of conviction indicating that respondent had been convicted on April 12, 1991 on charges of theft by deception. Respondent filed an answer in response to that order and was also given the opportunity to submit a brief for the Board's consideration. Thereafter, by order dated July 16, 1992, the Board directed that respondent's certificates be suspended for the period from July 16, 1992 through July 16, 1997. The Board stated:

> At its meeting of July 16, 1992, the State Board of Examiners reviewed the brief received from the respondent and all appended documentation.
>
> The Board finds insufficient evidence presented by the respondent to support the arguments set forth on his behalf that the behavior he engaged

Nov. 2, 1994

> in, while criminal, was not engaged in while he was employed as a teacher. N.J.A.C. 6:11-3.7 makes clear that a certificate may be revoked or suspended by the State Board of Examiners "for inefficiency, incapacity, conduct unbecoming a teacher, or other just causes." The Board finds the evidence presented by the Division of Criminal Justice to be compelling and based on the foregoing, the State Board of Examiners FINDS and CONCLUDES that the appropriate action in this matter is suspension of the respondent's certificate for a period of five years with reinstatement based on submission of sufficient evidence of rehabilitation to resume teaching.

State Board of Examiner's decision, slip op. at 2.

Respondent filed the instant appeal to the State Board of Education.

After a thorough review of the record, we find it necessary to remand this matter.

Revocation or suspension of a certificate is not automatic. The express language of the education laws confers upon the State Board of Examiners the authority to revoke certificates "under rules and regulations prescribed by the State Board [of Education]." N.J.S.A. 18A:6-38. All actions of the Board of Examiners must be taken in accord with such rules. N.J.A.C. 6:11-2.2.

The procedures established by the State Board for revocation or suspension of certificates are set forth in N.J.A.C. 6:11-3.6. Section (a)(2) thereof provides for the issuance of an order to show cause by the Board following the criminal conviction of the certificate holder, who may then file an answer thereto within 20 days. That regulation further provides that:

> After an answer has been filed on behalf of the certificate holder, the State Board of Examiners shall refer the case to the Office of Administrative Law for a hearing, in accordance with

> the Administrative Procedure Act (N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.). (Emphasis added.)[1]

In this case, following his receipt of the order to show cause, the respondent filed a timely answer contesting revocation or suspension of his certificates on the basis of mitigating circumstances. On May 19, 1992, respondent was advised by the Acting Secretary of the State Board of Examiners that a "hearing in the matter of your New Jersey certificates will proceed before the State Board of Examiners on or about July 16, 1992. The hearing will be based entirely on written submission of evidence." Respondent thereupon filed a brief and supporting documentation contending that he could not be disqualified from teaching on the basis of a conviction of theft by deception and that he had been rehabilitated.[2]

We reiterate that, in acting to revoke or suspend

---

1 We note that the regulation providing for the filing of a petition "by any person" for revocation or suspension of a certificate provides that upon the filing of an answer by the certificate-holder, "the board [of examiners] shall determine whether the matter is a contested case" and, if so, refer it to the Office of Administrative Law for a hearing. N.J.A.C. 6:11-3.6(a)(3) and (b). In contrast, the provisions of that regulation governing the procedure to be followed in cases brought to the Board of Examiners by reason of loss of tenure, N.J.A.C. 6:11-3.6(a)(1), or conviction, N.J.A.C. 6:11-3.6(a)(2), require the Board to refer such matters to the Office of Administrative Law after an answer has been filed. This distinction was retained when the regulations were amended and recodified in 1990. 22 N.J.R. 1873(a), 22 N.J.R. 3240(a).

We note further that as a result of such recodification, N.J.A.C. 6:11-3.6(b), formerly codified at N.J.A.C. 6:11-3.7(b)(1)(iii)(2), detailing the procedures to be followed upon the filing of a petition "by any person," was, apparently in error, separated from N.J.A.C. 6:11-3.6(a)(3).

2 We note that the documentary evidence submitted by respondent included recent letters from school officials attesting to his character.

certificates, the State Board of Examiners is obligated by statute to act in accord with regulations prescribed by the State Board of Education. N.J.S.A. 18A:6-38; N.J.A.C. 6:11-2.2. Those regulations permit the subsequent inclusion of new findings and require the Board to refer a case in which revocation or suspension is contested to the Office of Administrative Law ("OAL") "for a hearing, in accordance with the Administrative Procedure Act."[3] N.J.A.C. 6:11-3.6(a)(2). That act provides that "opportunity shall be afforded all parties [in contested cases] to respond, appear and present evidence and argument on all issues involved." N.J.S.A. 52:14B-9(c). "Any party in a contested case may present his case or defense by oral and documentary evidence, submit rebuttal evidence and conduct such cross-examination as may be required, in the discretion of the administrative law judge, for a full and true disclosure of the facts." N.J.S.A. 52-14B-10(a).

The Administrative Procedure Act ("APA") further provides that "[n]o agency shall revoke or refuse to renew any license unless it has first afforded the licensee an opportunity for hearing in conformity with the provisions of this act applicable to contested cases." N.J.S.A. 52:14B-11.

In this instance, the respondent filed an answer to the show cause order in which he contested revocation or suspension of his teaching certificates and offered mitigating circumstances as to why such action should not be taken. See In the Matter of the Revocation of the Teaching Certificate of Thadeus Pawlak, Docket

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[3] We note that a letter sent by the Acting Secretary of the Board of Examiners to respondent with the show cause order expressly acknowledged such obligation, advising respondent that "[a]fter your Answer has been received, this matter will be forwarded to the Office of Administrative Law for a hearing in accordance with the Administrative Procedure Act."

#A-3298-87T7, slip op. at 9 (App. Div. 1989). Upon receipt of such answer, however, the Board did not refer this contested case to OAL for a hearing in conformity with the provisions of the APA applicable to contested cases.[4] Instead, the Board scheduled its own "hearing," expressly limited to the "written submission of evidence," and the only opportunity it provided respondent prior to suspending his certificates was to file a brief.[5] Given the State Board of Examiner's failure to comply with its mandated procedure, we are compelled to reverse its decision in this matter and remand to the Board with direction that it transmit this case to OAL for a hearing.

Attorney exceptions are noted.

November 2, 1994

Date of mailing NOV 04 1994

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[4] To the extent that the State Board of Examiners has the authority to determine whether a particular case instituted under N.J.A.C. 6:11-3.6(a)(2) is "contested," see N.J.S.A. 52:14F-7, so as to require that a hearing be conducted in conformity with the provisions of the APA applicable to contested cases, there is no indication in the record that the Board made such a determination in this instance. See Quad Enterprises v. Paramus Bor., 250 N.J. Super. 256 (App. Div. 1991). Moreover, it is evident that respondent contested revocation or suspension in this case and asserted mitigating factors based upon specific factual circumstances. See Hills Development v. Bernards Tp., 229 N.J. Super. 318 (App. Div. 1988).

[5] Even to the extent that the Administrative Procedure Act might provide authority for the State Board of Examiners to conduct its own hearings in contested cases, see N.J.S.A. 52:14F-8, we note that the scheduling of a "hearing" before the Board "based entirely on written submission of evidence," see letter to respondent dated May 19, 1992 from the Acting Secretary of the Board of Examiners, did not satisfy the requirement of N.J.A.C. 6:11-3.6(a)(2) for a hearing in conformity with the provisions of the APA applicable to contested cases. See N.J.S.A. 52:14B-9 and 14B-10. There is no indication in the record that the "hearing" afforded respondent consisted of anything more than the Board's review of respondent's brief and appended documentation.

47-92

47-92

M.B., on behalf of S.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

APRIL 6, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 5118-91
AGENCY DKT. NO. 117-5/91

M.B., ON BEHALF OF S.B.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,
Respondent.

Fayth A. Ruffin, Esq., for petitioner

Matthew J. Michaelis, Esq., for respondent

Record Closed: February 10, 1992 Decided: February 24, 1992

BEFORE **MUMTAZ BARI-BROWN,** ALJ:

Petitioner, M.B., is the grandmother of S.B., a minor. Petitioner is a resident of the city of Passaic, Passaic County, New Jersey. In March or April 1991, petitioner attempted to register S.B. in the Passaic school district. A dispute arose between petitioner and respondent, the Board of Education of the city of Passaic (Board), concerning S.B.'s residency.

Pursuant to *N.J.S.A.* 18A:38-1, respondent requested verification of petitioner's domicile and certain other information pertinent to the domicile, custody, and support of S.B. Petitioner responded by submitting an affidavit. Upon review of the document, the Board determined that petitioner's affidavit did not comply with the mandates of *N.J.S.A* 18A:38-1. Thereafter, the Board advised petitioner of its determination, but permitted S.B. to enroll in the Passaic school district.

On April 27, 1991, petitioner requested a hearing before the Commissioner of Education to determine whether she had complied with the statutory mandates regarding S.B.'s residency and the child's right to attend the Passaic school district. On May 20, 1991, the matter was transmitted to the Office of Administrative Law (OAL) for hearing 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 plenary hearing was scheduled before the undersigned on December 17, 1991, at the OAL at 9:00 a.m.

At the commencement of the September 1991 school year, petitioner removed S.B. from the Passaic school district and informed the Board that she was sending her granddaughter to another school outside the Passaic school district.

On December 5, 1991, respondent moved for a dismissal of this matter. Respondent argues that since petitioner's grandchild is no longer in the Passaic school district, the question of whether the documents submitted by petitioner complied with *N.J.S.A.* 18A:38-1 is moot. Therefore, respondent requested that the matter be dismissed.

On December 17, 1991, the parties appeared before the undersigned for the evidentiary hearing. Petitioner appeared *pro se* and requested that the matter be adjourned. She had recently retained counsel to represent her in these proceedings and also to respond to respondent's motion to dismiss. Petitioner's motion for an adjournment was granted.

On January 7, 1992, Fayth A. Ruffin, Esq., filed an appearance on behalf of petitioner. Counsel also requested that copies of all correspondence and documents filed in this proceeding be forwarded to her attention. In response, on January 24, 1992, counsel for respondent forwarded the requested documents to Ms. Ruffin. Petitioner was given until February 10 to respond to respondent's motion to dismiss.

On February 11, 1992, the undersigned initiated a telephone conference call with counsel. The parties were informed that I would rule on respondent's motion to dismiss prior to the evidentiary hearing scheduled for February 28, 1992. Further, respondent was directed to submit an Order to the undersigned. Petitioner filed no response.

Pursuant to *N.J.A.C.* 1:1-12.5(b), a summary decision is appropriate

> if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.

Summary decision in administrative proceedings parallels summary judgment in the courts, which is

> designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact regarding disposition at a trial.
> *Judson v. Peoples Bank and Trust Co. of Westfield*, 17 *N.J.* 67, 74 (1954).

This purpose of this administrative proceeding is to determine whether petitioner submitted appropriate documentation in compliance with *N.J.S.A.* 18A:38-1 with regard to enrolling her granddaughter in the Passaic school district. However, petitioner subsequently withdrew her granddaughter from the Passaic school district and, as such, removed from this proceeding the need to determine whether or not she was in compliance with the statute. Consequently, the matter is ripe for summary decision as there no longer exists any issues to be resolved.

Having reviewed the whole of the record, I **CONCLUDE** that the issue of whether petitioner's affidavit complied with state law, *N.J.S.A.* 18A:38-1, is no longer in controversy.

It is therefore **ORDERED** that respondent's motion for a summary decision to dismiss this matter be **GRANTED**. It is further **ORDERED** that the evidentiary hearing scheduled for February 28, 1992, before the undersigned be adjourned for the reasons set forth in this decision.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 24, 1992
DATE

Mumtaz Bari-Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

2/25/92
DATE

Maureen Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 27 1992
DATE

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

md/e

M.B., on behalf of S.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Petitioner's exceptions object to the ALJ's having dismissed this matter by granting summary judgment to the Board. Petitioner claims there was a misunderstanding between her counsel and the ALJ regarding when the attorney's response to the Board's Motion to Dismiss was to have been submitted. Petitioner's counsel claims she understood her reply brief to the Board's Motion to Dismiss was due on February 13, 1992, and claims that during a telephone conference between her and the ALJ on February 10, 1992 she was informed that the deadline was that same day.

Thereafter, petitioner's exceptions advanced her position on the merits of her claim in this matter, which involved whether her granddaughter is entitled to a free public education in the City of Passaic, pursuant to N.J.S.A. 18A:38-1. Among said arguments on

the merits of her claim, petitioner advanced the information that she removed her granddaughter from the Passaic school system, but averred that she did so only to avoid having her granddaughter evaluated by the child study team, which she claimed the district required be done by its own team rather than by outside evaluation as she preferred. Petitioner's exceptions averred additionally that she was coerced into agreeing to the removal of her granddaughter who continues "to suffer with health problems that she didn't have before they kept ostracizing her and kicking her out of the Passaic School system." (Exceptions, at p. 5)

The Board's reply exceptions consist of a certification of the Director of Pupil Personnel Services of the Passaic Board filed by the Board's attorney addressing petitioner's arguments on the merits of the case at bar. In particular, the Board objects to petitioner's including any exceptions relative to the matter adjudicated by settlement by the Office of Adminsitrative Law as DKT. No. EDS 5488-91, under the provisions for special education due process matters. (N.J.A.C. 6:28-2.7 and N.J.A.C. 1:6A-1 et seq.) The Board claims such matter is not relevant to the within matter and should not be made a part of this case. Rather, the Board submits that the instant initial decision dismissing the case should be affirmed and no further action taken for the reasons expressed in the initial decision of the Honorable Mumtaz Bari-Brown. The Board affixed a copy of EDS 5488-91 to its reply exceptions because petitioner made reference to the matter in her exceptions.

Upon a careful and independent review of the record of this matter, the Commissioner must dismiss the instant matter for failure to state a cause of action for which relief can be granted. The

record of this case demonstrates that, in fact, petitioner herein "***in lieu of consenting to an evaluation by the child study team, states she [would] transfer the child, S.B., to a private school, commencing with the school year September 1991-1992," as part of a settlement to a due process matter under the provisions of N.J.A.C. 6:28 in a matter docketed as OAL Dkt. No. EDS 5488-91 and captioned City of Passaic Board of Education v. S.B., a minor, issued by the Office of Adminsitrative Law June 21, 1991. The Commissioner has no authority over such special education matters in that such decisions of the Office of Administrative Law are final pursuant to 20 U.S.C.A. sec. 1415(e)(1) and 34 C.F.R. sec. 300.509 (1989) and are appealable by filing a complaint and bringing a civil action either in the Superior Court of New Jersey or in a District Court of the United States, pursuant to 20 U.S.C.A. sec. 1415(e)2 and 34 C.F.R. sec. 300.511. Hence there is no relief to be granted petitioner in this forum.

In so stating, the Commissioner notes that even if petitioner's reply brief to the Motion to Dismiss had been submitted and reviewed by the ALJ in this matter, the ultimate conclusion to be reached by the Honorable Mumtaz Bari-Brown would have compelled granting the Board's Motion to Dismiss in the face of the undisputed fact that petitioner's granddaughter had been removed from the Passaic school district as part of a settlement agreement in a special education due process matter. This is so because the Commissioner's authority does not extend to allegations of coercion alleged to have been underlying a settlement agreement to which petitioner was a party under said due process regulations. See N.J.A.C. 1:6A-18.3.

Accordingly, the instant Petition of Appeal is dismssed, with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 6, 1992

DATE OF MAILING - APRIL 6, 1992

48-92

48-92

IN THE MATTER OF THE TENURE	:	
HEARING OF MICHAEL J. BOGART,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF JERSEY CITY,	:	
HUDSON COUNTY.	:	
	:	

APRIL 8, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3716-91
AGENCY DKT. NO. 53-3/91
OAL DKT. NO. EDU 3715-91
AGENCY DKT. NO. 17-1/91
(CONSOLIDATED CASES)

STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,

Petitioner,

v.

MICHAEL J. BOGART,

Respondent.

Kathleen S. Johnson, Esq., for petitioner

Gregory T. Syrek, Esq., for respondent
(Bucceri and Pincus, attorneys)

Record Closed: February 13, 1992 Decided: February 27, 1992

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

On or about March 6, 1991, the State District Superintendent of Schools of the State-Operated School District of Jersey City certified charges of unbecoming conduct against respondent, Michael Bogart, a tenured teacher employed in the district. On March 25, 1991, respondent filed an answer denying the charges and requesting that the tenure charges be dismissed.

On April 11, 1991, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter 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.*

On January 25, 1991, Michael J. Bogart filed a petition of appeal with the Commissioner of Education indicating that he had been notified in writing on January 10, 1991, by the State District Superintendent that he was suspended without pay effective immediately. He contended that his suspension without pay was arbitrary, capricious, and unreasonable. He further maintained that the suspension was void, in that respondent had not certified tenure charges to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:6-14, and that he was not the subject of an indictment within the meaning of *N.J.S.A.* 18A:6-8.3. He requested that the action of the State District Superintendent in suspending him without pay be declared null and void.

On or about March 6, 1991, the State-Operated School District of Jersey City filed an answer to the verified petition alleging that tenure charges had been filed against petitioner and were currently pending before the Commissioner of Education. On April 11, 1991, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter 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.*

A prehearing conference was held on June 10, 1991. At that time, the two cases were consolidated for purposes of hearing, the issues were isolated, and a hearing was scheduled for October 21 through 24, 1991, at the Office of Administrative Law.

On May 16, 1991, Michael Bogart filed a motion for summary decision regarding his suspension without pay prior to the certification of tenure charges. On July 30, 1991, the undersigned judge, after having considered the pleadings and affidavits of the parties submitted in support of and in opposition to the motion, ordered that respondent's suspension of petitioner without pay be declared null and void and respondent pay petitioner back pay from January 10, 1991 to March 4, 1991, based on the salary rate received by petitioner immediately prior to the suspension. It was further ordered that respondent not pay interest to the petitioner on the back pay, there being no adequate proof of bad faith by respondent.

On August 9, 1991, counsel for Michael Bogart moved to resume respondent's salary effective September 1, 1991, pursuant to *N.J.S.A.* 18A:6-14. The consent order, dated September 19, 1991, signed by the undersigned, ordered that petitioner resume the payment of full salary to respondent effective September 2, 1991. The hearing scheduled for October 21 through 24, 1991, was adjourned at the request of Mr. Bogart due to illness. It was rescheduled to December 16, 17, 19, and 20, 1991, at the Office of Administrative Law.

As a result of settlement conferences held between the parties on the dates of the hearing, a settlement was reached on or about December 19, 1991, and the hearing dates were adjourned. The parties have prepared a memorandum of agreement, which document is attached and fully incorporated herein.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 27, 1992
Date

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

2/28/92
Date

Maureen Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 03 1992
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

jrp/e

MEMORANDUM OF AGREEMENT

This Agreement is made this 18th day of December, 1991, by and between the State Operated School District of the City of Jersey City, with offices at 346 Claremont Avenue, Jersey City, New Jersey 07305, hereinafter referred to as the "District,"

AND

Michael Bogart, residing at 90 Mitchell Street, West Orange, New Jersey 07052, hereinafter referred to as "Bogart."

WITNESSETH:

WHEREAS, Bogart is a tenured teaching staff member employed in the State Operated School District of the City of Jersey City; and

WHEREAS, on January 23, 1991, a tenure charge of conduct unbecoming a teacher was filed against Bogart; and

WHEREAS, the tenure charge was certified to the Commissioner of Education on March 4, 1991; and

WHEREAS, in lieu of proceeding with the tenure charges in accordance with the Tenure Employees' Hearing Law, the District and Bogart desire to enter into an agreement stipulating the terms of Bogart's separation from his employment as a teacher with the District.

NOW, THEREFORE, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly noted below, it is hereby agreed:

1. Bogart will submit an irrevocable letter of resignation from all employment with the District effective at the close of business on January 15, 1992. This letter of resignation will be accepted by the District.

2. The District agrees to withdraw, with prejudice, the tenure charge of conduct unbecoming a teacher bearing Agency Docket No. 53-3/91 and O.A.L. Docket No. EDU 03716-91N.

3. The District agrees to continue to pay Bogart his full salary through the effective date of his resignation, January 15, 1992.

4. All continued salary payments made to Bogart between the date of this Agreement and January 15, 1992 shall be paid in the normal course of business, net of normal payroll deductions for State and Federal income taxes and pension contributions.

5. Until February 15, 1992, the District agrees to continue to provide Bogart with all health insurance coverages presently provided to other teaching staff members in the District. The insurance coverages involved herein are set forth in the current collective negotiations agreement between the District and the Jersey City Education Association.

6. Upon Bogart's resignation and consistent with his rights under the Consolidated Omnibus Reconciliation Act of 1986 ("COBRA"), Bogart shall be able to purchase, at his own cost and expense, the insurance coverages presently provided to other teaching staff members in the District. The insurance coverages

involved herein are set forth in the current collective negotiations agreement between the District and the Jersey City Education Association. As noted in paragraph 5, the District will provide insurance coverage through February 15, 1992 and Bogart's rights under COBRA will commence at that time.

7. The collective negotiations agreement between the District and the Jersey City Education Association provides for reimbursement for unused accumulated sick leave upon resignation. Bogart retains his right to such reimbursement and his rights will be determined by the express requirements of the collective negotiations agreement.

8. The District and Bogart agree that the settlement of the charge brought by the District is justified for the following reasons:

(a) The charge made by the District against Bogart represents a single, isolated incident in the course of a teaching career in the District of approximately twenty (20) years;

(b) The January 15, 1992 resignation of Bogart will result in an economic saving to the District in that Bogart's salary will terminate at that point. If the charge was fully litigated, Bogart would be entitled to salary until at least the issuance of the decision of the Commissioner of Education. Applying the normal timetable for such matters, the Commissioner's decision would not be issued until at least March, 1992.

(c) The parties will not be required to undergo the time and expense of further litigation.

(d) If fully litigated, this case would require the testimony of parents and children, both for the District and for Bogart. Such testimony would disrupt the educational process for the children involved.

(e) The public interest would best be served by resolving the present controversy.

9. Bogart is aware that, as a result of the charge brought against him, this matter may be referred to the State Board of Examiners. However, the State District Superintendent of Schools for Jersey City, Elena J. Scambio, recommends to the Commissioner of Education that such referral not take place under the circumstances of the present case. As previously noted, the charge represents an isolated incident, not a recurring problem in a twenty (20) year teaching career in the District.

10. The District and Bogart acknowledge that the terms of this Agreement are contingent upon the review and approval of both the Office of Administrative Law and the Commissioner of Education. In the event that either agency disapproves of the terms of settlement, this Agreement shall be null and void and the parties shall return to the same positions which they held prior to this settlement.

11. The parties recognize that each has been represented by legal counsel of his or its own choosing and that

each signs this Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

12. This Agreement shall be subject to the laws of the State of New Jersey.

13. All terms of this Agreement are deemed material. This document may not be altered, amended or modified or revoked except by an instrument executed in writing by the parties.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

Michael Bogart

Michael Bogart

Dated:

Elena J. Scambio,
State District Superintendent
Dated:

Gregory T. Syrek, Esq.
Attorney for Michael Bogart
Dated: 12/18/91

Kathleen S. Johnson, Esq.
Attorney for District
Dated:

BUCCERI AND PINCUS
COUNSELORS AT LAW
1200 ROUTE 46
CLIFTON, NEW JERSEY 07013-2490
TELECOPIER (201) 773-2170
(201) 773-5665

SHELDON H. PINCUS
MEMBER N.J. & D.C. BARS
LOUIS P. BUCCERI
GREGORY T. SYREK

MARY J. HAMMER
MEMBER N.J. & N.Y. BARS

12 35 P.M. '92

February 7, 1992

Hon. Elinor R. Reiner, A.L.J.
Office of Administrative Law
185 Washington Street
Newark, NJ 07102

Re: In the Matter of the Tenure
Hearing of Michael J. Bogart,
School District of Jersey City,
Hudson County
Docket Nos. EDU 3715-91

Dear Judge Reiner:

Enclosed please find an original and one copy of the fully signed settlement agreement in this case.

Very truly yours,
BUCCERI & PINCUS, ESQS.

By: Gregory T. Syrek

/lg
cc: Kathleen S. Johnson, Esq.
Michael Bogart

IN THE MATTER OF THE TENURE	:	
HEARING OF MICHAEL J. BOGART,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF JERSEY CITY,	:	
HUDSON COUNTY.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standard for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983) In this regard, the Commissioner's review of the record placed great weight upon the recommendation of the Superintendent of the State-operated school district that this matter not be referred to the State Board of Examiners pursuant to N.J.A.C. 6:11-3.6 under the circumstances which she states "[represent] an isolated incident, not a recurring problem in a twenty (20) year teaching career in the District." (Settlement, at p. 4)

Accordingly, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

APRIL 8, 1992

DATE OF MAILING - APRIL 8, 1992

49-92

49-92

CHARLES DRIGGINS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

APRIL 9, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 0694-91
AGENCY DKT. NO. 374-11/90

CHARLES DRIGGINS,
Petitioner,
v.
BOARD OF EDUCATION
OF THE CITY OF NEWARK,
Respondent.

Thomas J. Shamy, Esq., for petitioner
(Shamy & Shipers, attorneys)

Carolyn Ryan Reed, Associate Counsel, for respondent
(Marvin L. Comick, General Counsel, attorney)

Record Closed October 15, 1991 Decided: February 27, 1992

BEFORE **KEN R SPRINGER,** ALJ:

Statement of the Case

This is a claim by a tenured high school principal who was suspended without pay in connection with his criminal indictment for possession of illegal drugs. While the indictment and related tenure charges against him were still pending, petitioner voluntarily resigned from his tenured teaching position. After his acquittal at trial on all criminal charges, petitioner sought back pay up to the date of his resignation, other job-related benefits and pre-judgment interest.

Several issues are raised by the pleadings, including: (1) Whether petitioner is entitled to back pay upon acquittal on the underlying criminal charges; (2) Whether any back pay award should include a retroactive salary increment; and (3) Whether petitioner should be allowed pre-judgment interest.

Procedural History

Originally, on February 13, 1990, Charles Driggins ("Driggins") filed suit for damages in the Superior Court of New Jersey, Law Division, Middlesex County. By order entered on October 26, 1990, Superior Court Judge Charles Villanueva transferred the matter to the appropriate state administrative agency, with instructions that petitioner "file said complaint with the Commissioner of Education." Accordingly, on November 19, 1990, Driggins filed his petition of appeal, alleging violation of his tenure rights, with the Commissioner of Education ("Commissioner"). Respondent Newark Board of Education ("Board") filed its answer on December 4, 1990.

On his own motion, the Commissioner asked the parties to submit written argument on the timeliness of the petition under the 90-day rule, *N.J.A.C.* 6:24-1.2. Subsequently, on January 11, 1991, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for full proceedings on the merits. The OAL held a hearing on September 11, 1991. Witnesses and exhibits are listed in the appendix. Both sides filed post-hearing briefs, the last of which was received by the OAL on October 15, 1991. Time for preparation of the initial decision has been extended to February 27, 1992.

Findings of Fact

All of the relevant facts are undisputed. **I FIND**

Charles Driggins, age 57, is married and has three adult children. He holds a master's degree in school administration from Seton Hall University. Driggins has worked for the Newark public schools for nearly seventeen years. Starting in September 1971, he served the district in various administrative capacities, first as a curriculum specialist, later as a vice principal and, for many years, as a high school principal. For his last seven years in the district, he was the principal of an adult evening school. Before the arrest which led to his suspension from his duties, he had no prior involvement with the criminal justice system.

In the late afternoon of Saturday March 12, 1988, local police arrested Driggins and a male companion in a car parked in a driveway in the City of New Brunswick, New Jersey. Reportedly, Driggins and his companion were "nude from the waist down." A search of the vehicle and clothing uncovered "suspected cocaine and drug paraphernalia."

Shortly after the arrest, the Board acted to relieve Driggins of his responsibilities. On March 15, 1988, the Board notified him by letter that he was "suspended, *with pay*, from all duties and assignments" pending the outcome of the controlled dangerous substance charge. (Emphasis added). On June 3, 1988, a Middlesex County Grand Jury returned a single-count indictment against Driggins for unlawful possession of a controlled dangerous substance. In the interim, on May 24, 1988, the Board had already certified tenure charges of "unbecoming conduct" to the Commissioner and, in connection therewith, had directed that Driggins "be immediately suspended, *without pay.*" (Emphasis added). Driggins received his last paycheck at the end of May 1988. Ordinarily, Driggins' salary would have resumed on the 121st calendar day following certification of the tenure charges, as required by *N.J.S.A.* 18A:6-14. Due to the intervening indictment, however, the Board continued to suspend his salary on the theory that the criminal charge supersedes any immediate right to payment.

At the end of the school year, the Board voted on July 26, 1988 to withhold Driggin's salary increment and adjustment for the upcoming 1988-89 academic year.

The stated reason was that the increment withholding "is based upon your suspension during the 1987-88 academic year." Until his arrest, Driggins' annual performance ratings had always been satisfactory. Driggins, who was still awaiting trial on the criminal charges as well as a tenure hearing, did not file a timely appeal of the Board's action to the Commissioner.

Subsequent events made the tenure proceeding moot. On February 28, 1989, Driggins voluntarily tendered his written resignation from employment, "effective March 1, 1989." This document made no mention of any claim for back pay or other benefits. However, it was accompanied by the standard form in which the Board certified to the State Division of Pensions that Driggins' date of termination was "March 1, 1989" and that he had been previously suspended "from May 24, 1988 to the present."

Upon receipt of Driggins' resignation, the Board wrote to the OAL purportedly "withdrawing" its tenure charges. Once tenure charges are brought, however, only the Commissioner has the legal authority to dismiss them. Administrative Law Judge John Tassini issued an initial decision recommending withdrawal of the tenure charges and referral of the situation to the licensing board for possible revocation of Driggins' certificates. On May 1, 1989, the Commissioner issued a final decision adopting Judge Tassini's recommendations.

Ultimately, Driggins was acquitted of the original criminal charge. After a nonjury trial in Middlesex County held on October 31, 1989, Superior Court Judge Joseph Messina rendered a judgment of not guilty. Driggins' lawyer promptly advised the Board that his client was "now claiming all pay and employment benefits . . .from the date of his suspension without pay until his retirement date." Board counsel took the position that "the circumstances surrounding Mr. Driggin's retirement precludes him from receiving any additional compensation."

Both parties have stipulated the amount of lost salary and other benefits during the period of suspension. Without the 1988-89 salary increment, Driggins' salary loss totals $46,230. With the increment, his loss totals $50,489. On the date of his resignation, Driggins had 236 accumulated sick days and 3 personal days. Article VII of the collective negotiating agreement provides compensation for 1/4 of these unused days at the time of retirement, amounting to an additional $20, 279.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that Driggins is entitled to recover back pay, calculated without the 1988-89 increment or adjustment; that he is also entitled to contractual benefits for accumulated sick days and personal days; and that pre-judgment interest should be denied.

School boards have the acknowledged right to discontinue the salary of employees who are under current criminal indictment. *N.J.S.A.* 18A:6-8.3 impliedly confers such authority:

> 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 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 [which includes the Tenure Employees Hearing Law] (Emphasis Added).

In contrast, an unindicted school employee subject to a tenure charge is entitled to resumption of full salary after expiration of 120 calendar days from certification of the charge, unless he has requested a delay of the tenure hearing. "Should the charge be dismissed, the person shall be reinstated immediately with full pay *from the first day of such suspension.*" (Emphasis Added). *N.J.S.A.* 18A:6-14. Confusion arises because *N.J.S.A.* 18A:6-8.3 lacks similar express language restoring lost salary after acquittal on the criminal charges. Many similar statutes dealing with suspension of indicted public employees do contain specific language which requires reimbursement of back pay for those vindicated after criminal trial. *E.g., N.J.S.A.* 40A:14-23 (fire fighters); *N.J.S.A.* 40A:14-149.2 (police).

Recently, in what is described as a case "of first impression," the Commissioner was called upon to decide whether a suspended teacher should receive back pay following acquittal of criminal charges. *Beatty v. Newton Bd. of Ed.*, 1991 *S.L.D.* __ (Comm'r June 25, 1991) (slip op at 8). In *Beatty*, the school board suspended a teacher on the basis of an indictment alone. The *Beatty* board did not institute its own tenure charges until after the teacher was acquitted "of all charges in all

counts." (slip op at 2). Acknowledging that *N.J.S.A.* 8A:6-8.3 is silent with respect to back pay, the Commissioner held that "fundamental fairness" dictates that the teacher be granted back pay, including sick pay and vacation pay, "given that a trial by jury yielded a verdict of not guilty on the indictment." In support of that conclusion, the Commissioner emphasized, "At the present time, petitioner has not been found guilty of any wrongdoing and the indictment upon which the suspension is based has been disposed of in his favor." (slip op. at 8). Moreover, the Commissioner distinguished an earlier ruling in *Pawlak v. Hopatcong*, 12 *N.J.A.R.* 25 (St. Bd. June 1, 1988), aff'd No. A-5083-87T2 (N.J. App. Div. July 16, 1989), where there was no favorable disposition of the criminal charges, but merely successful completion of a pretrial intervention program.

Here Driggins was exonerated at the criminal trial and has not been adjudicated to have committed any wrongful act as a result of a tenure proceeding. Thus, he stands in essentially the same posture as the teacher in *Beatty*. The major distinguishing feature is that the Board brought its tenure charges before the criminal trial, whereas the *Beatty* board waited until after the trial. That circumstance does not justify different treatment of back pay claims by two individuals, both of whom were tried and found innocent of any crime.

Although the Board seems to think that it was tricked by Driggins' voluntary resignation, it did not necessarily have to withdraw its tenure charges. If it had wanted, the Board could have asked for the tenure charges to be held in abeyance and, after the outcome of the criminal trial, have established its tenure charges by the lesser civil burden of proof. *See, Ott v. Hamilton Twp. Bd. of Ed.*, 160 *N.J. Super.* 333 (App. Div. 1978), certif. den. 78 *N.J.* 336 (1978). *In re LaTronica*, 1983 *S.L.D.* __ (Comm'r Sept. 6, 1983). Of course, that route might have exposed the Board to potentially greater damages, in the event that it should be unable to sustain its charges at the tenure hearing. One advantage of the Board's acceptance of Driggins' resignation is that it cuts off any claim for future relief.

A much closer question is whether Driggins should receive the salary increment he might otherwise have earned had he not been suspended. As a general rule, "a fully vindicated employee must be made whole." *Eaddy v. Dept. of Transp.*, 208 *N.J. Super.* 156, 162 (App. Div. 1986). Some authority exists for the proposition that a prevailing teacher in a tenure case would be entitled to restoration of retroactive

salary increments, although that suggestion is only dicta since the particular matter had not yet been fully resolved on its merits. *In re Eberly*, 1987 *S.L.D.* __ (St. Bd. March 2, 1988). But the better approach is that a salary increment is not an automatic entitlement for which a teacher qualifies simply by showing up for work. Rather, an annual increment "is in the nature of a reward for meritorious service to the school district." *North Plainfield Ed. Ass'n v. North Plainfield Bd. of Ed.*, 96 *N.J.* 587, 593 (1984); *Bernards Twp. Bd. of Ed. v. Bernards Twp. Ed. Ass'n*, 79 N.J. 311, 321 (1979). Unaccrued increments are nothing more than expectancies, because "tenured employees have no vested right in any future increases in salary." *Williams v. Plainfield Bd. of Ed.*, 176 *N.J. Super.* 154, 162 (App. Div. 1980), certif. den. 87 *N.J.* 306 (1980). Increments are designed to reward "only those who have contributed to the educational process," and a suspended teacher has no entitlement to an "automatic raise" while litigation is in progress. *In re Castaldo*, 1986 *S.L.D.* __ (St. Bd. July 2, 1986) (slip op. at 8- 9). *See also, DeMarco v. Glassboro Bd. of Ed.*, 1981 *S.L.D.* 1034 (Comm'r 1981), aff'd 1982 *S.L.D.* 1471 (St. Bd. 1982). Since Driggins has no legally enforceable right to the increment, it is not a proper element of his damage claim.

Driggins urges that he should receive his gross rather than his net back pay, but cites no legal basis for such procedure. Instead, his argument is based solely on tax planning considerations. Any award to which he is entitled constitutes compensation for lost salary, as distinguished from a lump sum settlement, *Cf. In re Castaldo,* or a recovery for personal injury or pain and suffering. As such, the award is subject to the normal deductions which the Board applies to the pay checks of all its employees. Otherwise, the Board might incur legal liability for failure to comply with tax withholding laws. Should excess tax withholding occur, Driggins may obtain a refund from the appropriate tax authorities.

Additionally, Driggins wants the Board to certify pension credit for the period of his suspension. Jurisdiction over questions about the extent of any retirement allowance rests exclusively with the Board of Trustees of the Teacher's Pension and Annuity Fund ("Trustees"), rather than the Commissioner of Education. *Bd. of Trustees v. La Tronica*, 81 *N.J. Super.* 461 (App. Div. 1963), certif. den. 41 *N.J.* 587 (1964); *Taylor v. Westfield Bd. of Ed.*, 2 *N.J.A.R.* 350 (Comm'r Dec. 8, 1980). Hence, the Commissioner cannot determine whether or not Driggins is entitled to further pension credit. Nevertheless, the Commissioner can and should order the Board to

revise its earlier certification to the Division of Pensions to reflect that Driggins has been acquitted and that his back pay has been restored.

Finally, Driggins seeks pre-judgment interest accruing from the date of his resignation. Unquestionably the Commissioner possesses the power to fix pre-judgment interest in appropriately egregious cases, although, when the debtor is a government agency, "a showing of overriding and compelling equitable reasons must be made in order to justify the award." *Newark Bd. of Ed. v. Levitt*, 197 *N.J.Super.* 239, 244 (App. Div. 1984). Standards for the exercise of the Commissioner's discretionary power are codified at *N.J.A.C.* 6:24-1.16(c), which provides that pre-judgement interest should be awarded only if "the denial of the monetary claim was taken in bad faith and/or has been determined to have been taken in deliberate violation of statute or rule." Until recently, the salary rights of an indicted school employee after acquittal were a matter of unsettled law. As noted, the statute itself is silent on the question and *Beatty,* decided long after Driggin's resignation, was a case "of first impression." Regardless of the ultimate outcome here, the Board appears genuinely to have believed that Driggin's resignation ended their relationship and that, afterwards, neither one had any continuing obligation to the other. Under these circumstances, Driggins has not met the extremely heavy burden of demonstrating bad faith or contemptuous conduct by the school board.

Order

It is **ORDERED** that the Board pay to Driggins the sum of $46,230 in back salary and $20,279 for unused sick and personal days, minus the usual deductions and mitigation for any monies earned during the suspension period.

It is further **ORDERED** that, in the event that the Board fails to satisfy the award within 60 days of the date of the final agency decision, post-judgment interest shall accrue in accordance with *N.J.A.C.* 6:24-1.16.

It is further **ORDERED** that the Board shall submit a revised certification to the Division of Pensions as soon as the award has been paid.

And it is further **ORDERED** that Driggins' remaining claims are denied.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Feb. 27, 1992
Date

Ken R. Springer
KEN R. SPRINGER,,ALJ

Receipt Acknowledged:

2/28/92
Date

Maureen Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 03 1992
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

List of Witnesses

1. Charles Driggins

List of Exhibits

No.	Description
J-1	Stipulation of facts, dated September 10, 1991
J-2	Agreement between the Newark Board of Education and the City Association of Supervisors and Administrators, covering the period from July 1, 1985 to June 30, 1991
J-3	Agreement between the Newark Board of Education and the City association of Supervisors and Administrators covering the period from July 1, 1988 to June 30, 1991
P-1	Calculation of salary and benefits prepared by petitioner
P-2	Copy of a letter to the State Division of Pensions from the Middlesex County Prosecutor's office, dated November 21, 1989
P-3	Copy of a letter to Charles Driggins from the Newark Board of Education, dated March 15, 1988
P-4	Copy of statement of position on behalf of Charles Driggins, dated May 11, 1988
P-5	Copy of tenure charges, certified May 2, 1988
P-6	Copy of a board resolution, adopted on May 24, 1988

P-7 Copy of answer to tenure charges, dated July 1, 1988

P-8 Copy of indictment No. 1040-6-88 returnable in the New Jersey Superior Court, Middlesex County, filed June 3, 1988

P-9 Copy of a letter to Charles driggins from the Newark Board of Education, dated July 7, 1988

P-10 Copy of a letter to Charles Driggins from the Newark Board of Education, dated August 2, 1988

P-11 Copy of a letter to the Newark Board of Education from Thomas J. Shamy, Esq., dated October 21, 1988

P-12 Copy of a letter to the Newark Board of Education from Thomas J. Shamy, Esq., dated November 2, 1989

P-13 Copy of a letter to Thomas J. Shamy, Esq. from the Newark Board of Education, dated January 23, 1990

P-14 Copy of a letter to the Newark Board of Education from Thomas J. Shamy, Esq., dated January 26, 1990

P-15 copy of a civil complaint filed in the Superior Court of New Jersey, Middlesex County on February 13, 1990

P-16 Copy of an order entered by the Superior Court of New Jersey, Essex County, on October 26, 1990

R-1 Copy of calculation of salary and benefits prepared by the Newark Board of Education

R-2 (a) Copy of a letter to the Office of Administrative Law from the Newark Board of Education, dated March 9, 1989

(b) Copy of a letter to the Newark Board of Education from Charles Driggins, dated February 28, 1989

R-3 Copy of a certification of service and final salary, dated March 13, 1989

CHARLES DRIGGINS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by respondent pursuant to N.J.A.C. 1:1-18.4.

Upon review of respondent's exceptions and careful scrutiny of the record herein, the Commissioner finds that there remains sufficient question on the threshold issue of timeliness to warrant further consideration of that issue before reaching any determination on the merits.

Although application of the 90-day rule was identified, apparently without objection, as an issue in the prehearing order, and although respondent argued the question of timeliness in its post-hearing brief, the ALJ apparently did not address the issue in his initial decision because he believed that the Commissioner had disposed of the matter in petitioner's favor prior to forwarding the case for hearing.

While the Commissioner did direct the parties to submit briefs on the timeliness issue prior to transmittal and subsequently

determined to forward the matter to OAL, notwithstanding pre-transmittal correspondence and agency transmittal papers which concededly invited a contrary interpretation, the Commissioner did not conclusively resolve the time bar question or envision that his decision to transmit would necessarily foreclose further argument on that issue. Indeed, a review of the record clearly indicates the need for a more fully developed exposition in this area.

Specifically, the Commissioner seeks further argumentation and recommendations from the ALJ as to when petitioner's cause of action arose; whether his claim was exclusively within the Commissioner's jurisdiction or whether, as petitioner asserts, he had a choice of concurrent forums; and whether petitioner's filing in Superior Court absolved him from complying with, or warranted relaxation of, the requirements of N.J.A.C. 6:24-1.2. Should the Commissioner determine, after review of the ALJ's findings, that the matter herein is not time barred, he will make a final determination on the merits of petitioner's substantive claims.

Accordingly, the initial decision of the Office of Administrative Law is remanded for consideration, consistent with the above directives, of whether petitioner's claim is time barred pursuant to N.J.A.C. 6:24-1.2.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 9, 1992

DATE OF MAILING - APRIL 9, 1992

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CHARLES DRIGGINS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

SYNOPSIS

Petitioner, tenured high school principal who was acquitted of drug charges, sought back pay and compensation up to date of his resignation. Commissioner had remanded matter for consideration of whether petitioner's claim was time barred pursuant to N.J.A.C. 6:24-1.2.

On remand, Administrative Law Judge (ALJ) found suit was timely filed since original date of filing with Superior Court was within 90 days of the Board's action denying the claim. Matter was returned to Commissioner for review together with initial decision of February 27, 1992, wherein ALJ found that since petitioner was exonerated at criminal trial, he was entitled to pay withheld during indictment notwithstanding that he had since resigned from district. (Beatty) District was ordered to pay back salary less mitigation.

Commissioner affirmed findings and determination of ALJ both on remanded issue of timeliness and on merits of case.

MARCH 17, 1993

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3338-92

(OAL DKT. NO. EDU 0694-91 - On Remand)

AGENCY DKT. NO. 374-11/90

CHARLES DRIGGINS,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF NEWARK,

Respondent.

David P. Lonski, Esq., for petitioner
(Shamy & Shipers, attorneys)

Carolyn Ryan Reed, Associate Counsel, for respondent
(Marvin L. Comick, General Counsel, attorney)

Record Closed: December 21, 1992 Decided: February 3, 1993

BEFORE **KEN R. SPRINGER,** ALJ:

Statement of the Case

This is a remand by the Commissioner of Education for consideration of whether the petition should be dismissed for failure to comply with the ninety-day rule, *N.J.A.C.* 6:24-1.2.

Procedural History

Previously, on February 27, 1992, the Office of Administrative ("OAL") issued an initial decision, designated Dkt. No. EDU 0694-91, on the underlying merits of this dispute. By order entered on April 9, 1992, the Commissioner of Education ("Commissioner") remanded the case to the OAL for further proceedings regarding the timeliness of the filing of the petition. Specifically, the Commissioner directed that the administrative law judge hear further argument and make recommendations.

> . . . as to when petitioner's cause of action arose; whether his claim was exclusively within the Commissioner's jurisdiction or whether, as petitioner asserts, he had a choice of concurrent forums; and whether petitioner's filing in Superior Court absolved him from complying with, or warranted relaxation of, the requirements of *N.J.A.C.* 6:24-1.2. (slip op. at 15).

On or before November 4, 1992, counsel furnished the OAL with copies of their legal briefs which had previously been filed with the Commissioner. On November 18, 1992, counsel for petitioner submitted a supplemental legal brief. Counsel for the Newark Board of Education ("Board") elected not to file any supplemental brief. The OAL held oral argument on December 21, 1992. Exhibits are listed in the appendix to Dkt. No. EDU 0694-91.

Findings of Fact

Most of the material facts are set forth in Dkt. No. EDU 0694-91 and are incorporated here by reference. In addition, I **FIND** as follows:

At the very earliest, Driggins's cause of action for back pay and other job-related benefits did not arise until October 31, 1989, the date on which he was acquitted of any criminal charge by the Middlesex criminal court. Three days later,

on November 3, 1989, petitioner's counsel notified the Board of the outcome of the criminal trial and demanded payment of all back pay and benefits (Exhibit P-12). On January 23, 1990, the Board counsel responded in writing that "the circumstances surrounding Mr. Driggins' retirement preclude him from receiving any additional compensation." (Exhibit P-13). Both parties regard this letter as notice of the Board's denial of Driggins' claim.[1] Within three weeks, on February 13, 1990, Driggins filed a complaint against the Board in the Superior Court of New Jersey, Law Division, Middlesex County, seeking damages resulting from the denial of his claim (Exhibit P-15). Thereafter, on April 27, 1990, the court entered an order changing the venue from Middlesex to Essex County. At the Board's request, the court in Essex County determined that the matter "should be transferred to the Commissioner of Education" and entered an order on October 26, 1990 directing that the action be "remanded" to the Commissioner and that the "plaintiff file said complaint with the Commissioner[.]" (Exhibit P-16). In compliance with this order, Driggins filed a petition,seeking essentially the same relief, with the Commissioner on November 19, 1990.

Since virtually all of the facts necessary for disposition on the merits were stipulated, the Board concedes that Driggins' delay in filing the petition with the Commissioner has not hindered its defense.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the date of filing with the Commissioner relates back to the original date of filing with the

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[1]Actually, the letter itself is ambiguous. In the first paragraph, Board counsel asks petitioner to provide her with "the authority upon which his claim is based," thus leaving open the possibility that the Board might be willing to reconsider its position. In any event, the Board "assumes, for purposes of this brief only, that petitioner's claim for back pay did not accrue until January 23, 1990." (Respondent's Brief, at 6.)

Superior Court and, since the pleadings were filed within ninety days of the Board's action denying the claim, the suit is timely.

N.J.A.C. 6:24-1.2(b), as it existed in 1990, provided that, "[t]he petitioner shall file a petition no later than 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."[2] Driggins promptly filed his complaint in the Superior Court within three weeks of notice of the action from which he is appealing. Ultimately, the court transferred the matter to the appropriate state agency for exhaustion of administrative remedies. Although the Board has not suffered any prejudice, it urges that the ninety-day period of limitation must be "strictly" applied.

Regardless of whether the judicial and executive branch possess concurrent jurisdiction over the subject matter of this controversy, it would have been preferable if Driggins had initiated his appeal before the state administrative agency. Generally, available and appropriate administrative remedies should be fully explored before judicial action is sanctioned. *Abbott v. Burke,* 100 *N.J.* 269, 296 (1985). It is clear that the Commissioner has fundamental and indispensable jurisdiction over all disputes and controversies arising under the school laws. *Theodore v. Dover Bd. of Educ.*, 183 *N.J. Super.* 407, 412-413 (App. Div. 1982). While it is arguable that this dispute involves "only legal questions" and, hence, that the doctrine of exhaustion of remedies does not apply, *Abbott,* 100 *N.J.* at 298, the better approach is to require review by the Commissioner of an issue so intimately connected with tenure proceedings, which fall squarely within the the Commissioner's recognized area of expertise. See, for example, *In re Fulcomer,* 93 *N.J. Super.* 404 (App. Div. 1967), interpreting the Tenure Act as conferring on the Commissioner the duty of conducting tenure hearings. Indeed, it must have been

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[2]Effective February 4, 1991, this provision was renumbered as *N.J.A.C.* 6:24-1.2(c) and reworded to included appeals from actions by an individual party or an agency.

such considerations which led the trial court to defer to agency expertise and transfer petitioner's claim to the Commissioner.

It does not follow, of course, that the Commissioner should now dismiss the appeal on procedural grounds. Certainly that does not appear to have been the intent of the trial judge. If the judge had wanted to dismiss the suit as untimely, he could easily have done so directly. Moreover, the New Jersey Court Rules governing transfer of actions expressly preserve the continued viability of law suits which are timely filed in the wrong forum. *R.* 1:13-4(a) states, in pertinent part:

> . . . if any court is without jurisdiction of the subject matter of an action or issue therein . . . it shall, on motion or on its own initiative, order the action, with the record and all papers on file, transferred to the proper court, or administrative agency, if any, in the State. The action shall then be proceeded upon *as if it had been originally commenced in that court or agency.* (Emphasis added.)

Proper application of the rule is illustrated by *Townsend v. Great Adventure,* 178 *N.J. Super.* 508 (App. Div. 1981), where an employee brought suit against his employer in the Superior Court rather than in the Division of Workers' Compensation where the suit belonged. Holding that the dismissal of the suit against the employer was improper, the Appellate Division declared:

> [E]ven though appellant filed in the wrong forum, his complaint against Great Adventure should have been transferred, not dismissed. This is particularly true because a dismissal caused his claim to be barred without an adjudication on the merits, certainly a result not to be favored since his claim, though in the wrong forum, was timely brought. *Townsend,* at 518.

Cases on which the Board relies are readily distinguishable. In *Bernards Twp. Bd of Educ. v. Bernards Twp. Educ. Ass'n,* 79 *N.J.* 311 (1979), the New Jersey Supreme Court held that disputes concerning the withholding of a teacher's salary increment may be submitted to intermediate advisory arbitration, but cautioned that the teacher should also file a petition with the Commissioner to preserve the right of appeal to the final decision-making authority. Nothing in *Bernards Twp.* speaks to the question of timeliness when a litigant in good faith selects the wrong forum. Similarly, in *Riely v. Hunterdon Cent. High Sch. Bd. of Educ.,* 173 *N.J. Super.* 109 (App. Div. 1980), an untenured teacher who chose to proceed to binding arbitration under

the contractual grievance procedure could not revive her unsuccessful claim afterwards by filing with the Commissioner. Understandably, the appellate panel was reluctant to give her a second bite of the apple. As the opinion notes, "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." *Riely*, at 114. In the instant case, however, the Superior Court never reached the substantive issues of Driggins' complaint.

Both *West New York Bd. of Educ. v. Gilmartin,* 1990 *S.L.D.* 619 (Comm'r April 20, 1990) and *Rutherford Bd. of Educ. v. Karabaic*, 1987 *S.L.D.* 1989 (Comm'r Sept. 18, 1987) involved situations in which a board of education filed suit in the Superior Court well beyond the ninety-day limitation period. In each case, the court transferred the matter to the Commissioner, who dismissed the claim as untimely. These cases stand for the proposition that the doctrine of exhaustion of administrative remedies "can neither enlarge nor confer jurisdiction in the Commissioner." *Karabaic*, at 1997 Significantly, in *Karabaic* the Commissioner looked to the date of filing in the Superior Court and found that suit was not filed until "eight months after the Board's cause of action arose." *Id.* Here, of course, Driggins filed suit in the Superior Court promptly after the Board notified him of its denial of his claim.

In light of the fact that Driggins' suit was properly filed within the ninety-day time limit, it is unnecessary to consider whether there exist sufficient circumstances to justify relaxation of the rule.

Order

It is **ORDERED** that Driggins's petition is not time-barred under *N.J.A.C.* 6:24-1.2

And it is further **ORDERED** that this matter be returned to the Commissioner for review together with the recommendations made in EDU 0694-91

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Feb. 3, 1993
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

FEB 04 1993
Date

Maureen L. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 08 1993
Date

Joyce L. Vecchio
OFFICE OF ADMINISTRATIVE LAW

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CHARLES DRIGGINS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record of this remanded matter and the initial decisions of the Office of Administrative Law, both on the remanded issue of timeliness and the earlier decision on the merits incorporated by reference therein, have been reviewed. Although no exceptions were filed to the ALJ's decision on remand, the Commissioner takes note of the Board's March 12, 1992 exceptions to the initial decision on the merits, which, in addition to pursuing the question of timeliness, reiterated the Board's argument that petitioner lost any entitlement to back pay upon resigning from the district.

Upon careful review, the Commissioner concurs with the analysis and conclusions of the ALJ with regard to both the timeliness and the merits of petitioner's claim.

Accordingly, the initial decision of the Office of Administrative Law is affirmed for the reasons expressed in both the decision on remand and the February 27, 1992 decision on the

merits incorporated therein. The Board is directed to pay Driggins the sum of $46,230 in back salary and $20,279 for unused sick and personal days, minus deductions and mitigation for monies earned during suspension, subject to post-judgment interest pursuant to N.J.A.C. 6:24-1.16 in the event that the Board fails to satisfy its obligation within 60 days of the date of this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 17, 1993

DATE OF MAILING- MARCH 17, 1993

50-92

50-92

BOARD OF EDUCATION OF THE BOROUGH OF BRIELLE, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
DEBORAH FARRELL AND ROSELLE TRAVIS,	:	DECISION
RESPONDENTS.	:	
	:	

APRIL 10, 1992

BOARD OF EDUCATION OF THE BOROUGH OF BRIELLE, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
DEBORAH FARRELL AND ROSELLE TRAVIS,	:	DECISION
RESPONDENTS.	:	
	:	

For Petitioner, Wayne J. Oppito, Esq.

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed by the Brielle Board of Education on December 23, 1991. Said petition alleged that respondents had repeatedly failed to answer district requests for documentation to support their claim that the children of Respondent Farrell, a resident of Neptune, New Jersey, were living with Brielle resident Respondent Travis and supported by her gratis as required by law in order for the children to have entitlement to a free public education in the Brielle school district. The Board requested the Commissioner to direct respondents to provide the necessary information, and if such were found not sufficient to establish the Farrell children's entitlement to free education, that tuition be assessed for the time of their attendance at Brielle schools retroactive to September 1, 1990.

In reply to notices from this office requesting an answer to the petition, the attorney identified as representing respondents

advised by letter that she had not finally been retained and that respondents would be answering on their own behalf. Shortly thereafter, in a telephone conversation on or about February 4, 1992, Respondent Farrell confirmed the attorney's position and advised that an answer would be filed by herself and Ms. Travis directly.

When no answer was received by March 9, 1992, respondents were advised by letter sent regular and certified mail that should no answer be forthcoming within ten (10) days, the Commissioner would deem the Board's allegations admitted and decide the matter on a summary basis. The return receipt for the certified letter indicated that it was accepted by Respondent Travis on March 11, 1992. As of this date, no answer or other communication has been received from respondents.

Accordingly, the Board's allegation that Farrell's children do not reside in the district is deemed admitted and the Board is hereby authorized to assess respondents tuition for the attendance of said children in the Brielle school district pursuant to N.J.S.A. 18A:38-1(b).

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 10, 1992

DATE OF MAILING - APRIL 10, 1992

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C #50-92
SB #18-92

BOARD OF EDUCATION OF THE BOROUGH OF BRIELLE, MONMOUTH COUNTY,

PETITIONER-RESPONDENT,

V.

DEBORAH FARRELL AND ROSELLE TRAVIS,

RESPONDENTS-APPELLANTS.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, April 10, 1992

For the Petitioner-Respondent, Wayne J. Oppito, Esq.

For the Respondent-Appellant, Daniels & Davis-Daniels (Kevin E. Daniels, Esq., of Counsel)

Having considered all of the circumstances here, we find that relaxation of the rules is warranted so as to permit acceptance of respondent's Answer to the Petition of Appeal filed in this matter. N.J.A.C. 6:24-1.15. We therefore remand the matter to the Commissioner with direction that he accept the Answer, which is appended to respondent's Appeal Brief, and that he transmit the matter to the Office of Administrative Law for resolution.

November 4, 1992

Date of mailing NOV 05 1992

51-92

ALAN HOOK AND YVONNE HOOK, as guardians ad litem for Craig Hook, and CRAIG HOOK, individually,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parents challenged Board's denial of son's (Petitioner Hook) admission to National Honor Society. Board contended Petitioner Hook had not met required character rating of 4.0.

Initial decision determined Board did not act in bad faith nor did the result of its assessment process constitute an abuse of discretion. ALJ found faculty council's process of assessing character and submitting its decision to principal for final approval was in accord with recommendation of National Honor Society. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own. Commissioner added that faculty council's delegating responsibility for computing character rating to faculty advisors was a mere ministerial function that did not adversely affect faculty council's responsibility to assess candidates and to make selections.

APRIL 15, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6684-91
AGENCY DKT. NO. 177-6/91

ALAN HOOK and YVONNE HOOK, as Guardians ad Litem for CRAIG HOOK, and CRAIG HOOK, individually,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,
Respondent.

Appearances:

Richard J. Schachter, Esq., for petitioners, (Schachter, Trombadore, Offen, Stanton & Pavics, attorneys)

Robert J. Cirafesi, Esq., for respondent (Wilentz, Goldman and Spitzer, attorneys)

Record Closed: March 2, 1992 Decided: March 4, 1992

BEFORE **JAYNEE LaVECCHIA,** CHIEF ALJ:

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

Petitioners, Craig Hook and his parents, Alan Hook and Yvonne Hook, as Guardians ad Litem, appeal the determination by the respondent, Board of Education of the Borough of South Plainfield, denying Craig Hook admission into the South Plainfield High School chapter of the National Honor Society. This matter having been transmitted to the Office

of Administrative Law as a contested case proceeding 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 telephone on December 3, 1991. At that conference it was determined that the sole issue to be determined in this proceeding was whether respondent's procedure for assessing the character component for admission to the National Honor Society was violative of the National Honor Society's guidelines for procedures on admission selection. It is undisputed that Craig Hook was denied admission to the South Plainfield chapter of the National Honor Society solely on the basis of his score for character.

At the prehearing conference it was agreed that the facts in this matter are not in dispute and were capable of being set forth in a joint stipulation with accompanying exhibits. The parties agreed to proceed in this matter by way of cross-motions for summary decision. The joint stipulation having been filed, and the cross-motions and accompanying briefs having been received by the undersigned on February 19, 1992, and a reply by petitioner having been received on March 2, 1992, the record was closed.

FACTUAL DISCUSSION

During the 1990-91 school year, Craig Hook was a senior at South Plainfield High School and by virtue of his grade point average was among the students eligible for admission to the school's chapter of the National Honor Society. Eligibility criteria for membership and election of new members to the local chapter of the society is the responsibility of a faculty council in the South Plainfield School District. This faculty council consists of five faculty members appointed annually by the principal. The council must follow the requirements for admission for eligibility set by the National Honor Society handbook and as implemented in the student/parent handbook, subject to the principal's agreement. The student/parent handbook is distributed or made available to all students, faculty members and parents.

The procedures utilized by the faculty council to evaluate the character of a candidate for admission are as follows. A character evaluation rating sheet is sent to all faculty members. Faculty members rate a student's character on a scale of 1 to 5 and submit the rating sheet to the faculty council. The faculty council advisor reviews the forms and computes a character rating for each candidate. In

accordance with the guidelines published in the student/parent handbook, a student must receive a minimum rating of 4.0 to meet the character requirement.

When the faculty council computed Craig Hook's average character rating, his rating was 3.85, .15 less than the 4.0 standard. In calculating this rating, Craig Hook's score was adjusted by disregarding one evaluation where he received a score of "2" and interpreting one questionable marking as a score of "5". Had the council not counted the questionable "5" rating and not disregarded the score of "2", Craig Hook's average rating would have been 3.70. Craig Hook's parents were advised by the principal of the high school that Craig Hook was not admitted to the National Honor Society because his character rating was less than the 4.0 required in the student/parent handbook.

These facts were succinctly set forth in the joint stipulation submitted and they are found as fact for purposes of this proceeding.

LEGAL ANALYSIS

It is well established in school law decisions that the Commissioner has jurisdictional authority to determine disputes over admissions to the Honor Society. See *J.B.A. and A.M.A. v. Board of Education of the Borough of Bernardsville*, 4 *N.J.A.R.* 136, 145; *D.W. v. Board of Education of Pompton Lakes*, 1977 *S.L.D.* 12, 40; *Moore v. Board of Education of the City of Vineland*, 1975 *S.L.D.* 290; *Tiffany v. Board of Education of Cinnaminson*, 1974 *S.L.D.* 87. However, the Commissioner has maintained in matters brought before him in this area that his review is limited. The Commissioner has not and will not intervene in a determination regarding Honor Society eligibility unless the local board's action has been shown to be arbitrary, capricious or unreasonable. See *J.B.A. and A.M.A. v. Bernardsville Board of Education*, 4 *N.J.A.R.* at 152 (" ... It is not [the Commissioner's] desire or intention to substitute his judgment for that of local board of education, administrators or teachers carrying out the responsibilities in the many selection processes in which they are continually engaged".)

The Commissioner's decision in *J.B.A.* was one instance in which the Commissioner did become involved in a decision regarding eligibility for National Honor Society because of the particular factual pattern presented. In that instance, the Commissioner found that the factual circumstances contrasted dramatically with

the facts in *Tiffany, Moore* and *D.W.* where reasonable bases were presented by the boards to support their decision not to admit an individual to a local Honor Society chapter. In *J.B.A.*, the local board failed to present, by a preponderance of the credible evidence, a reasonable basis

> "for the stated reasons for the negative votes cast against [the student] by the eight members who voted against her ... This abuse was precipitated by the unfortunate, ill-advised and unwarranted umbrage taken by certain members of the teaching staff against a reported comment by A.H.A.'s parent about a grammatical error in the school's written English course of study."

In the initial decision, the ALJ who heard the case found the Board's decision to be inappropriately tainted, arbitrary, capricious, and deserving of being set aside. In reviewing the matter, the Commissioner first found fault with the Board's refusal to provide the petitioners in that case with a simple statement of reasons for the non-admission to the National Honor Society in violation of the directives of the National Honor Society. Further, the Commissioner agreed with the ALJ that the reasons eventually provided by the Board were so lacking in specificity as made it impossible for petitioners to refute them to correct the alleged deficiencies. No specific examples of conduct that was described as constituting "rudeness, arrogance and disregard for school rules" were presented by the Board.

The *J.B.A.* case stands in marked contrast with the issue presented herein. It is described in some detail because of the need to clearly demark what so disturbed the Commissioner in *J.B.A.* as to warrant the unusual step of interfering with a Board's decision not to admit a student to the National Honor Society. What was significant in *J.B.A.* was that the Board first refused to provide reasons for the non-admission and then, when required to do so as a result of legal action, provided reasons that were imprecise and lacking in specific support that they could not be found to have a reasonable basis in fact.

In the instant matter, the issue sharply posed by the parties goes not to the subjective quality of the decision made by the school district regarding the assessment of Craig Hook's character, but rather the method used for evaluating the character of a student eligible for admission. The petitioners have pointedly challenged the character portion of the admission procedure as constituting a "polling" of the entire faculty, which they argue, is consistent and impermissible

under National Honor Society rules. In support of this argument, petitioners cite to Appendix 2 of the National Honor Society's recommended selection procedure (J-7 in evidence), which provides as a recommended selection procedure the following:

> 4 (Optional). If additional faculty input would be beneficial, all faculty members could be invited to make comments on candidates. However, the actual selections must be made by the five appointed members of the faculty council. It is no longer permissible to take an entire faculty vote. [Emphasis added].

With this instruction from the National Honor Society in mind, review of the procedure followed by the South Plainfield Board of Education acting through its principal and faculty council, lead me to conclude that no such faculty vote occurred in this instance.

Based upon the undisputed facts, the faculty council distributes to all faculty members an attached list of the juniors and seniors qualifying for the National Honor Society based on their grade point average. Their assistance is solicited in the evaluation of these students' character. The direction to the faculty member quotes a portion of the handbook of the National Honor Society which instructs on those aspects of character which an evaluator may want to consider and provides a description of the "student of character" which is taken directly from the National Honor Society handbook. Importantly, faculty members are given the following direction:

> Please rate only those students with whom you have had sufficient contact to make a judgment. Please use the following scale for rating:
>
> 5: Outstanding
> 4: Above average
> 3: Average
> 2: Below average
> 1: Negative
>
> (J-4 evidence)

The above language is highlighted because I found this direction to the faculty to be telling on the issue of whether the South Plainfield School District was engaging in a faculty vote on a student's eligibility. I find that this instruction to the faculty member to only comment on students with whom they feel they can make an

assessment on this very important aspect of admission to the National Honor Society to be an adequate safeguard to reasonably insure that comments are received by faculty members who felt they had enough contact with the student to offer an opinion on character.

Nor am I persuaded by petitioners' argument that the use of numerical categories for grading a student's character constitutes an impermissible polling of faculty. The council could have merely solicited narrative responses by knowledgeable faculty members, but instead, chose to regularize the responses by describing an ideal "student of character' and asking for faculty member's assessment of a particular student against that standard. The assessments were further refined to identified descriptors, to which numerical grades were assigned and averaged. This process of attempting to regularize a somewhat subjective assessment is not the equivalent of a vote by the faculty - which would be impermissible under National Honor Society guidelines. Importantly further, these evaluations by number category were submitted to the faculty council which reviewed them and made discretionary assessments as to whether or not they should all be accepted. Indeed, it is undisputed in the record in this matter that one low score of 2, the only score of 2 which Craig Hook received, was disregarded in the assessment. And further, a questionable marking of 5, the highest rating, was included in his score. Despite this personalized review of the responses by the faculty council, in which the discretion of the council was exercised in favor of Craig Hook, he still did not obtain the 4.0 average which this school district requires for membership in its local chapter of the National Honor Society. I find no reason to disturb that judgment. Indeed, the National Honor Society handbook instructs that

> "In the absence of specific evidence to the contrary, however, the principal must assume that the members of the council are exercising their discretion in a legitimate manner and with the good faith expected of them".

In this instance, the principal reviewed this matter and determined to uphold the decision of the faculty council. I agree with the determination of the principal. I find nothing invalid with the process itself in terms of its assessment of character. Indeed, I am hard pressed to criticize a faculty council for soliciting additional information from teachers who may have had more contact with a student, in order to evaluate the somewhat subjective assessment of a student's character. It is difficult to imagine that a five member faculty council in any high school could,

without reaching beyond its membership, be able to satisfactorily assess a student's character. In this instance, the faculty council did reach out to other faculty members, asking first if they could express an opinion on the student's character, and then to rate the student's character based upon a scale established by the council with instruction directly from the National Honor Society handbook as to what attributes the student of character should exhibit. This process was not done in bad faith, nor did its result constitute an abuse of discretion.

In conclusion, I am persuaded by the arguments of the Board that petitioners have failed to state a claim upon which relief should be granted, and therefore, the petition of appeal in this matter is **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 4, 1992
Date

Jaynee LaVecchia
JAYNEE LaVECCHIA, CHIEF ALJ

Receipt Acknowledged:

3/5/92
Date

Maureen Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 09 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

ahk

EXHIBITS

J-1 Pages 9 through 15 of the National Honor Society Handbook.

J-2 Relevant pages concerning the local chapter of the Society as contained in the Student/Parent Handbook of the School.

J-3 Pages 31 and 32 of National Honor Society Handbook.

J-4 Evaluation rating sheet.

J-5 Service and Leadership reports completed by Craig Hook and the Data Sheets completed by faculty members.

J-6 Character Ratings submitted for Craig Hook.

J-7 Page 39 of the National Honor Society Handbook setting forth recommended selection procedure.

ALAN HOOK AND YVONNE HOOK, as guardians ad litem for Craig Hook, and CRAIG HOOK, individually,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioners filed timely exceptions pursuant to N.J.A.C. 1:1-18.4. No reply exceptions were filed.

Petitioners' exceptions first posit that the ALJ's perception of the initial character rating procedure in this National Honor Society selection challenge is erroneous. Petitioners suggest that the two faculty chapter advisors compute, average and adjust any and all of the character evaluations, not the faculty council, as the ALJ set forth in the initial decision. Petitioners suggest the faculty council does not receive the character evaluation forms but only the final average score. Thus, they claim, the character evaluations are not subject to discussion by the faculty council. Relying on Appendix 2, National Honor Society's selection procedures at paragraph 4, which states that "***the actual selections must be made by the five appointed members

of the faculty council" (emphasis in text) (Exceptions, at p. 2), petitioners contend that the use of the two faculty advisors to calculate the scores of the character rating averages "usurps the faculty council's obligations and responsibilities as recommended by the National Chapter of the National Honor Society." (Id.)

Additionally, petitioners except to the ALJ's finding that the use of numerical categories for grading a student's character is a permissible procedure. It is petitioners' contention that "standardizing" (id., at p. 3) the character evaluation forms by using a numerical scale fails to reach the larger and most damaging issue in this matter, that is, that any faculty member may rate a student's character without any requirement or commentary on the depth or length of the faculty member's knowledge of a candidate he or she is asked to rate. Petitioners aver that this anonymous and subjective rating system further deprives the faculty council from exercising its responsibilities.

Thus, petitioners submit that the use of the rating scale and what they claim is an entire faculty vote violates the procedures established by the National Honor Society. They seek Craig Hook's admittance to the South Plainfield Chapter of the National Honor Society forthwith.

Upon a careful and independent review of the record of this case, the Commissioner affirms the initial decision for the reasons expressed therein.

Petitioners' exceptions cast a slightly different light on their contentions from those raised before the ALJ as to the calculation of the character ratings. However, their newly argued

premise that because the faculty advisors may have calculated the character ratings and allegedly submitted only the average score to the faculty council fails in suggesting that this procedure violates the procedures of the National Honor Society or "usurps" the faculty council's obligation as recommended by the National Chapter of the National Honor Society.

First, it must be noted that the Joint Stipulation of Facts signed by petitioners states at paragraph 10 "When the faculty council computed Craig Hook's average character rating, his rating was 3.85, .15 less than the 4.0 standard.***" (emphasis supplied) (Stipulation of Facts, at p. 3) Thus, while petitioners argue in exceptions that the faculty council does not calculate the average character ratings, they have stipulated as a fact not in dispute that the faculty council did compute Craig Hook's average character rating. See also petitioners' reply brief wherein they state "***the Faculty Council***calculate[s] the average character rating.***" (Id., at p. 3) However, because paragraph 6(iii) of the Stipulation of Facts seems to contradict paragraph 10 in stating "The faculty council advisor reviews the forms and computes a character rating for each candidate," (at p. 2), further investigation of this new allegation advanced by petitioners need be undertaken.

In so doing, it is observed that the National Honor Society's own "Commentary on the Constitution" (Exhibit J-1, at p. 10) speaks to the faculty advisor's duties. Therein it states in pertinent part:

> ***the advisor promotes chapter activities, stimulates positive action by members, and

> provides information on local and national policies regulating chapter activities. In addition, the advisor approves chapter activities and attends all meetings and functions. The chapter advisor shall be an ex-officio, non-voting, sixth member of the faculty council.

Said "Commentary on the Constitution" further clarifies the role of the chapter advisor in the next paragraph wherein it describes the faculty council:

> The advisor works with the faculty council in selecting or dismissing members. The faculty council shall consist of five voting faculty members appointed annually by the principal. No principal or assistant principal may be on the faculty council. The advisor and the faculty council cooperate in developing and periodically reviewing selection and dismissal procedures not expressly provided for in the Constitution.*** (emphasis supplied) (Id.)

It is not debated and is, in fact, incorporated in the district's student/parent handbook (Exhibit J-2) that the faculty council selects new members, and that it acts in a screening capacity. (at p. 15)

The Commissioner's consideration of these provisions finds no inconsistency with the faculty council's delegating to the faculty advisor, under the clear provision of the National Constitution of the National Honor Society mentioned above that provides for such delegation, the preliminary task of reviewing the character forms submitted by faculty members and computing a character rating for each candidate.

It is the Commissioner's judgment that insofar as the advisor works with the faculty council in selecting members of the local chapter of the Society, the calculation of such character ratings for each candidate is a mere ministerial function that in no

manner compromises the council's duty to consider each candidate's qualification for membership and to make its selections, which are then subject to one final authority, the principal, who according to the National Honor Society Handbook has final say in selection matters. (J-3, at p. 31) Indeed, petitioners do not challenge the fact that the faculty council does in fact review each candidate's rating under the other established criteria for admission. See stipulation of Fact No. 7. Accordingly, the Commissioner rejects petitioners' argument raised in exceptions that because the faculty advisors calculate the character ratings submitted by faculty members, the faculty council's obligations and responsibilities are compromised as being without merit.

As to petitioners' second exception regarding the use of numerical categories for grading a student's character, the Commissioner finds that the ALJ fully and fairly considered such argument and concluded correctly that such process was not conducted in bad faith, nor did its result constitute an abuse of discretion. The Commissioner so finds for the reasons expressed by the ALJ at pages 6 and 7 of the initial decision. He notes in particular ALJ's point that "***the evaluations by number category were submitted to the faculty council which reviewed them and made discretionary assessments as to whether or not they should all be accepted***." (Id. at p. 6) It is further observed that the decision of the faculty council in the case of Petitioner Hook was affirmed by the principal, who according to the National Honor Society's recommendations is the final authority in such selection matters. A review of the mechanism by which faculty input was secured in respondent's district leads the Commissioner to conclude that the

process did not involve an entire faculty vote by virtue of the fact that faculty were instructed only to assess those students known to them and also by virtue of the discretionary assessments made by the council as to whether any such faculty gradings of students known to the individual faculty members were to be accepted or rejected. Moreover, the Commissioner finds that the discretion of the council, through its delegation of the computation of the faculty scores submitted to the faculty advisors in regard to Petitioner Hook's candidacy, was exercised in his favor, but that he failed to obtain the 4.0 average which respondent requires for membership in its local chapter of the National Honor Society.

Accordingly, for the reasons expressed in the initial decision as amplified herein, the Petition of Appeal is dismissed, with prejudice.

COMMISSIONER OF EDUCATION

APRIL 15, 1992

DATE OF MAILING - APRIL 15, 1992

51-92

EDU #6684-91
C # 51-92
SB # 21-92

ALAN HOOK AND YVONNE HOOK, as guardians ad litem for Craig Hook, and CRAIG HOOK individually, :

PETITIONERS-APPELLANTS, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY, : DECISION

RESPONDENT-RESPONDENT. :

:

Decided by the Commissioner of Education, April 15, 1992

For the Petitioners-Appellants, Alan Hook and Yvonne Hook, pro se

For the Respondent-Respondent, Wilentz, Goldman & Spitzer (Robert J. Cirafesi, Esq., of Counsel)

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

September 2, 1992

Date of mailing SEP 4 1992

52-92

MIGUEL DE BRITO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
PETER E. CARTER, ESSEX COUNTY SUPERINTENDENT OF SCHOOLS, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

APRIL 23, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 5787-91
AGENCY DKT. NO. 157-5/91

MIGUEL DE BRITO,
Petitioner,
v.
PETER E. CARTER, ESSEX COUNTY SUPERINTENDENT OF SCHOOLS,
Respondent.

Miguel De Brito, *pro se*

Arlene G. Lutz, Deputy Attorney General, for respondent
(Robert J. Del Tufo, Attorney General of New Jersey, attorney)

Record Closed: January 31, 1992 Decided: March 11, 1992

BEFORE **DIANA C. SUKOVICH,** ALJ:

On May 22, 1991, Miguel De Brito (petitioner) filed a petition with the Department of Education (Department) requesting a ruling that Peter E. Carter (respondent), the Essex County Superintendent of Schools, improperly denied certification for graduation to petitioner on approximately April 8, 1991. The matter was transmitted to the Office of Administrative Law by the Department on June 11, 1991, for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

New Jersey is an equal opportunity employer

A hearing was scheduled for February 19, 1992. By letters dated August 16, 1991 and October 17, 1991, the presiding judge advised the parties of the scheduled hearing date and requested that petitioner provide a telephone number where he could be reached so that a telephone conference could be conducted prior to the hearing. Petitioner never did so. By letter filed on January 15, 1992, counsel for respondent forwarded to the judge a letter dated December 30, 1990, which had been sent to her by petitioner. In that letter, petitioner stated that he was not able to continue his appeal and was no longer interested in pursuing the matter. On January 16, 1992, counsel for respondent filed a motion to dismiss the matter for failure by petitioner to respond to interrogatories. By letter dated January 24, 1992, this judge, referencing petitioner's December 30, 1991 letter, requested that he advise me within seven days as to whether or not he intended to withdraw his request for a hearing. Petitioner was also advised that, alternatively, he should file any reply to the previously filed motion to dismiss within seven days.

Petitioner did not file replies to the January 24, 1992 letter of this judge, nor any response to respondent's motion to dismiss. The record was therefore closed on January 31, 1992, and the previously scheduled hearing was adjourned. No further communications have been received from petitioner.

Based upon the foregoing, I **FIND** that petitioner is deemed to have withdrawn his request for a hearing and has failed to prosecute this matter. I therefore **CONCLUDE** that petitioner's petition of May 22, 1991 should be dismissed. It is hereby **ORDERED** that the petition filed by petitioner with the Department on May 2, 1991 be and hereby is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 11, 1992
Date

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

3/14/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 17 1992
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

le/e

OAL DKT. NO. EDU 5787-91

MIGUEL DE BRITO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
PETER E. CARTER, ESSEX COUNTY SUPERINTENDENT OF SCHOOLS, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by petitioner.

Accordingly, the Commissioner concurs with the ALJ that petitioner no longer seeks relief in this matter, which is hereby dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 23, 1992

DATE OF MAILING - APRIL 23, 1992

53-92

53-92

ANA P. DUARTE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
PETER E. CARTER, ESSEX COUNTY SUPERINTENDENT OF SCHOOLS, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

APRIL 23, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 6994-91
AGENCY DKT. NO. 130-5/91

ANA P. DUARTE,
Petitioner,
v.
PETER E. CARTER, ESSEX COUNTY SUPERINTENDENT OF SCHOOLS,
Respondent.

Ana P. Duarte, petitioner, *pro se*

Arlene G. Lutz, Deputy Attorney General, for respondent
(Robert J. Del Tufo, Attorney General of New Jersey, attorney)

Record Closed: February 3, 1992 Decided: March 11, 1992

BEFORE **DIANA C. SUKOVICH**, ALJ:

On May 6, 1991, Ana P. Duarte (petitioner) filed a petition with the Department of Education (Department) contesting a determination by Peter E. Carter (respondent), the Essex County Superintendent of Schools, made on or about April 8, 1991, denying petitioner's certification for graduation from East Side High School. The Department transmitted the matter to the Office of Administrative Law (OAL) on July 18, 1991, for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

New Jersey ... Opportunity Em...

Counsel for respondent subsequently filed a motion to dismiss petitioner's petition on January 24, 1992. Petitioner did not file a reply to this motion, and the record was deemed to have closed on February 3, 1992, the expiration of the applicable 10-day period for the filing of responsive papers to a motion. *N.J.A.C.* 1:1-12.2(c).

Based upon a review of the motion papers filed on behalf of respondent, as well as the case file, I **FIND** the following to be **FACTS**.

By letter dated August 20, 1991, this judge advised the parties that a hearing was scheduled for February 20, 1992, and requested that petitioner provide a telephone number where she could be reached so that a telephone conference could be conducted prior to the hearing date. The February 20, 1992 hearing date was subseqently adjourned at respondent's request. By letter dated November 13, 1991, counsel for respondent advised this judge that communications mailed by her to petitioner had been returned, with an indication that petitioner had moved and left no forwarding address. Counsel requested that the presiding judge attempt to contact petitioner and also requested that a prehearing conference be scheduled. By letter dated November 19, 1991, this judge again requested that petitioner provide a telephone number at which she could be reached. This letter was returned by postal authorities with an indication that the addressee had moved and left no address. By letter dated December 12, 1991, this judge advised the parties that an in-person conference was scheduled for 3:00 p.m. on January 16, 1992, advised petitioner that if she were not present or represented at the conference, her request for a hearing might be dismissed, and requested that counsel for respondent have her client review his records to determine if there were any other addresses indicated for petitioner or any other means by which to contact her. This letter was sent certified mail, return receipt requested. The receipt indicates that it was accepted, albeit apparently not by petitioner. Counsel informed this judge by letter dated December 19, 1991 that the only address available for petitioner was the one to which all correspondence had been sent. In addition to communications from this judge and counsel for respondent to petitioner, the OAL sent several notices to both parties. The OAL issued a notice of filing on July 24, 1991; a notice of plenary hearing scheduled for February 21, 1992 on October 30, 1991; and a notice of prehearing conference for January 16, 1992 on December 12, 1991.

Based upon the above findings of **FACT**, I **CONCLUDE** that the petition filed by petitioner with the Department on May 6, 1991 should be **DISMISSED** because of a failure to prosecute by petitioner. It is hereby **ORDERED** that the petition filed by petitioner with the Department on May 6, 1991 be and hereby is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 11, 1992
Date

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

3/14/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 17 1992
Date

James LaVecchia
OFFICE OF ADMINISTRATIVE LAW

le/e

OAL DKT. NO. EDU 6994-91

ANA P. DUARTE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
PETER E. CARTER, ESSEX COUNTY SUPERINTENDENT OF SCHOOLS, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by petitioner.

Accordingly, the Commissioner concurs with the ALJ that petitioner no longer seeks relief in this matter, which is hereby dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 23, 1992

DATE OF MAILING - APRIL 23, 1992

54-92

54-92

STEPHEN G. MURRAY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, riffed German teacher with certification in English who submitted notice of retirement upon learning that his position would be abolished, claimed Board violated his tenure and seniority rights when he was not notified about an available English teaching position for which he was duly certified. Board contended petitioner's resignation extinguished his tenure credit.

Initial decision determined under the circumstances of this case the Board had no duty or responsibility to notify petitioner in May 1990 or thereafter that an English teaching position for which he was certified would be open for school year 1990-91 as petitioner's retirement was accepted in October 1989. Petition was dismissed.

Commissioner modified findings and determination in initial decision. Commissioner found that English position claimed by petitioner resulted from one-year maternity leave of tenured teacher who intended to return to duty and was therefore not a vacancy for purposes of tenure entitlement. (Lammers State Board decision) Thus, even accepting petitioner's contention that his retirement was conditionally based on there being no available position for him in 1990-91, there was in fact no vacancy to which he was entitled or about which the Board should have notified him upon abolishment of his German position. Commissioner thus found petitioner to have no cause of action and dismissed claim on that basis. Commissioner stressed, however, that boards are obliged to notify riffed teachers who have not severed their relationship with the district through resignation or retirement of any vacancy which arises within their tenure entitlement subsequent to RIF. (Kaprow Appellate Division decision)

APRIL 23, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
185 WASHINGTON ST.
NEWARK, NEW JERSEY 07102
(201) 648-6186

INITIAL DECISION

SUMMARY DISPOSITION

OAL DKT. NO. EDU 7540-90

AGENCY DKT. NO. 292-8/90

STEPHEN G. MURRAY,

Petitioner,

v.

NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL BOARD OF EDUCATION,

Respondent.

Harold N. Springstead, Esq., for petitioner

James L. Plosia, Jr., Esq., for respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: March 21, 1991 Decided: March 4, 1992

BEFORE **GEORGE PERSELAY,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner filed a verified petition, dated August 10, 1990, with the Commissioner of Education, which petition was received August 14, 1990. The petition seeks an order directing the respondent (1) to immediately employ petitioner in an appropriate teaching position; (2) to retroactively compensate petitioner for all salary and/or benefits lost by petitioner as a result of its actions, with interest; (3) to retroactively credit petitioner for any and all seniority credit lost as a result of the respondent's actions; and (4) to provide such further relief as the Commissioner deems appropriate and just.

The respondent filed an answer dated August 23, 1990, which was received by the Commissioner of Education on August 24, 1990.

The Commissioner transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to the provisions of N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. The matter was marked filed at the OAL September 19, 1990. The matter was set for hearing on January 4, 1991, which was adjourned to allow the completion of discovery. The matter was rescheduled for March 20, 1991.

On February 19, 1991, the respondent filed an original and three copies of a respondent's brief in support of a motion for summary judgment, which briefs were received at the OAL on February 21, 1991. The petitioner filed a brief and appendix in opposition to the motion for summary judgment on March 11, 1991. Respondent filed a reply to petitioner's answering brief on March 21, 1991.

The matter has progressed on the basis of a motion for summary judgment, but no such motion has been received by the OAL to the best of the writer's information and belief. Both parties and this Administrative Law Judge have treated the matter as a pending motion for summary judgment.

The relevant facts are not in dispute. There is no genuine issue as to any material fact and the matter is ripe for summary disposition.

The undisputed facts in this case are as follows:

1. Petitioner joined the respondent high school staff as a German teacher in the fall of 1970.

2. He continued as a full-time teacher through the 1986-1987 school year.

3. Commencing September 1984 through the spring of 1987, the petitioner taught a total of four classes in Latin. The petitioner's certifications are in German, Latin, and English. The petitioner never taught an English class at the respondent high school between 1970 and June 30, 1990.

4. The respondent determined to eliminate German as a foreign language offering and the petitioner's full-time German teaching position was reduced to a four/fifth's position for the 1987-1988 school year. The four/fifth's position was reduced to a two/fifth's teaching position for the 1988-1989 school year.

5. At a meeting held February 13, 1989, the respondent board determined that it would no longer offer instruction in German but agreed to offer one final combination three/fourth's German class during the 1989-1990 school year and created a one/fifth teaching position in German, which was offered to the petitioner and which the petitioner accepted.

6. By letter dated September 25, 1989, the petitioner wrote to the Superintendent of Schools of the respondent as follows:

> Due to the fact that my position is being eliminated next year, I hereby give notice of my intent to retire, effective as of the end of this school year (1989-1990).

7. The board of education at its regular meeting on October 10, 1989 passed a resolution accepting with regret the resignation of the petitioner as a teacher of German, effective June 30, 1990. The vote was unanimous.

8. At the board's regular meeting of May 14, 1990, the board abolished a one-fifth teacher of German position and terminated the employment of Steve Murray, the petitioner, in that position, effective June 30, 1990.

9. By letter dated May 15, 1990, the Superintendent of Schools wrote to the petitioner advising that the board had abolished the position of one/fifth

teacher of German. The Superintendent further advised that the petitioner would be placed on a preferred eligibility list relative to the abolished position and that the petitioner would have recall rights in the event there would be a future opening. The petitioner was further advised that he would be notified in writing should the German language program be reinstituted.

8. The board at its public meeting held April 30, 1990, appointed the petitioner as a special two-day per week substitute teacher, May 1, 1990 through June 30, 1990. The purpose of this appointment was to qualify the petitioner for the State Health Benefits Program upon his retirement. Petitioner had made inquiry of the New Jersey Education Association (NJEA) as to his entitlement to State health benefits upon his retirement. In a letter dated April 18, 1990, the Director of Research and Economic Services of the NJEA advised the petitioner that because his hours had been reduced to under 20 hours per week, he was placed in the COBRA Program and continued to receive health benefits, but such extended coverage was to terminate on April 30, 1990. The letter further stated that it was necessary for the petitioner to be enrolled in the State health plan on his last day of employment and that the only means to preserve his benefits was for the respondent board to increase the petitioner's hours to 20 or more hours per week and to enroll the petitioner in the State plan at board expense. By appointing the petitioner for the period stated above, the petitioner qualified for the State Health Benefits Program, without any cost to petitioner, in his retirement.

9. The collective bargaining agreement in existence between the professional teaching staff and the respondent board of education provides that notice of intent to resign, if given to the respondent board prior to October 1 of any school year, would entitle the intended retiree to receive payment for unused sick leave upon retirement. In the instant case, the amount of the petitioner's unused sick leave was $4,780, which balance he received in full or in part upon his retirement.

10. Petitioner asserts in his argument that the stated provision for payment of unused sick leave placed pressure upon him in stating his intention to retire prior to October 1, 1989 (Interrogatory 16).

11. Petitioner states that because of the State health plan predicament, he had to retire directly upon termination of employment or lose the benefit he had obtained by the board appointing him a substitute teacher. "Since I have no position and since the outcome of this proceeding was several months down the road, I had no choice but to proceed with the retirement. Were it not for the fact that I would have lost the health insurance benefit - which is the primary reason I chose to take the early retirement - I would have considered rescinding my notice of intent (Answer to Interrogatory 22).

12. L.R., a tenured English teacher, was on a maternity leave of absence and was not going to be available for the 1990-1991 school year. By resolution dated June 11, 1990, the Board hired D.Z., a nontenured English teacher, who had been previously hired as an English teacher by the respondent to fill the position of L.R. The Board anticipated that L.R. would return from maternity leave for the 1991-1992 school year.

13. By letter dated February 1, 1989, the petitioner wrote a letter to parents of students in the German program. In that letter, he advised that the respondent would offer one section of German for "next year." He advised the parents that the Board wished to make clear that 1989-1990 will be the final year for German at Northern Highlands. The letter contains the following paragraph:

> I am very pleased that the Board has seen fit to allow the eight or nine students involved to more adequately complete their German studies. I am also grateful that I will have the opportunity to see the program through to its end, as next year will also be my 25th - and final - year of teaching.

DISCUSSION AND ANALYSIS

The petitioner argues that he should be permitted to rescind his notice of intent to retire which will give him the opportunity to fill an available English teaching position, for which he is duly certified. The petitioner recognizes that when a teacher submits a voluntary and unconditional letter of resignation, which is accepted by the Board, the individual has no automatic right to rescind the resignation. N.J.S.A. 18A:28-8 requires a tenured teaching staff member to give the employing board of education at least 60 days written notice of his/her intention of desiring to relinquish his/her position. The board may approve a release on shorter notice.

Petitioner seems to argue that there was no known waiver of his tenure rights and that he was available between October 10, 1989 and June 30, 1990 to fill the English teaching position. Petitioner has not moved, at any time, to rescind or extend his resignation, effective the end of the school year 1990. That date is June 30, 1990.

The petitioner, in the absence of a request to extend the date of his retirement or a request to rescind his intent to resign, confuses his continued tenure position with the timing of his resignation.

The petitioner's resignation was accepted on October 10, 1989. The date and time of that resignation was the end of the school year 1989/1990.

The petitioner takes the position that in the event the position of English teacher is offered to him, he will tender back the benefits he received from the board.

Petitioner argues in Point II that the respondent was under a duty to advise the petitioner of his right to teach English in the event of an available position. Under this point of argument, the petitioner imposes a requirement to submit the notice of intention to retire in order to receive the sum of $4,780 in unused sick days. The petitioner has failed to cite any authority for the respondent to notify the petitioner that his English certification could be used to teach English and that there was a position open. The petitioner argues that the respondent [sic] should be permitted to rescind his resignation

(Page 9 of petitioner's brief). It is obvious that petitioner has misidentified the resigning party. The answer to this argument is that the petitioner has never requested to rescind his resignation. His petition does not contain a prayer for such relief.

Thirdly, the petitioner argues that the issue of damages cannot be determined in a motion for summary judgment. This Administrative Law Judge agrees that on the facts as they presently exist in the record, damages have not been fully set forth. The question of damages does present a fact issue. Unfortunately, the question of damages does not arise nor survive the motion for summary judgment.

It is apparent that if the respondent's motion for summary judgment is granted, then the question of damages need not be determined.

In support of its motion for summary judgment, the respondent argues that the petitioner's resignation extinguished his tenure credit. It is well-settled that a teacher's resignation tendered and accepted, effectively terminates his previous tenured employment with a board of education and bars any claims to subsequent tenure or seniority entitlement. See Solomon v. Bd. of Ed. of the Princeton Regional School District, Mercer County, 1977 S.L.D. 650, 655-656, aff'd State Board of Ed. 1977 S.L.D. 657; see also Mishkin v. Mountainside Bd. of Ed., 84 S.L.D. 1975 (App. Div.); Bartz & Burke v. Greenbrook Bd. of Ed., Aug. 7, 1987 (State Board of Ed.); Pfeiffer v. Bellmawr Bd. of Ed., 83 S.L.D. 534; Misek v. Willingboro Bd. of Ed., 80 S.L.D. 98; Commins v. Woodbridge Bd. of Ed., 1967 S.L.D. 11.

A teaching staff member has tenure in all positions for which his instructional certificate qualifies him. A tenured teacher is entitled to retention as against a nontenured teacher regardless of seniority, in the event of a RIF. Ellicott v. Bd. of Ed., Twp. of Frankford, Sussex County, (N.J. App. Div., A-2286-90T5, October 24, 1991 (unreported).

Accordingly, had the petitioner not resigned and retired, he would have had tenure to teach the English course.

The respondent further argues that it had no duty to notify the petitioner of the available English teaching position and states that no law requires a board of education to notify a teacher who is RIF'd of his tenure protection rights to a teaching position in a certification area in which he has no seniority. For reasons to be stated later in this decision, the duty to notify the petitioner of the English teaching position opening, if any such duty exists, is negated by the actions of the petitioner, including his early pronouncements of retirement, his opting to seek the benefits of the collective bargaining agreement, and his failure to provide any indication of an intention to extend the date of his resignation or the rescission of his intention to resign.

The respondent has submitted substantial argument regarding petitioner's claim for compensatory damages. Because I shall make a determination upholding the petitioner's resignation, no discussion as to damages need be reviewed in this decision.

The facts in this case disclose an intention on the part of the petitioner to complete 25 years of teaching, to maximize his benefits, and to resign at the end of the 1989-1990 school year. His verified petition is dated August 10, 1990. The record is empty as to any communication between the petitioner and the respondent relating to the termination of this one-fifth German teacher on May 14, 1990; his placement on a preferential rehiring list if the German program was reinstated; objection to the hiring of a nontenured teacher to teach English on June 11, 1990 nor any request to teach English. The record does not contain any assertion of his right, tenured or otherwise, to such English teaching position, nor any request or notice to extend his date of retirement or rescind his notice of resignation. No communication was tendered relating to a withdrawal of his request for unused sick time nor was there any requesting the English teaching assignment or challenging the events as they enfolded.

This Administrative Law Judge places great importance as to the petitioner's state of mind on February 1, 1989 when he directed a letter to the parents of students enrolled in the German program. The letter contained the following:

> I am also grateful that I will have the opportunity to see the program through to its end, as next year will also be my 25th - and final -year of teaching. (Emphasis supplied)

Therein lies the petitioner's mindset. When it came time to submit his intention to resign, under the terms of the collective bargaining agreement, petitioner opted for the quid pro quo, of receiving the sum of $4,780, for unused sick time.

The advantages of the collective bargaining agreement relating to notice of intent to retire were most recently discussed in Hall v. Bd. of Ed. of Jefferson Twp., 125 N.J. 299, 305 (1991). I have not had the privilege of reading the provision of the agreement in this case. Such lack of opportunity is of no matter since the petitioner has not opted to extend, rescind or in any way modify the retirement effective June 30, 1990. Both Hall, supra, and Evaul v. Bd. of Ed., City of Camden, 35 N.J. 244 (1961) involve attempts to undue the results of voluntary resignations by school personnel, a teacher in one and a secretary in the other.

This case lacks such action on the part of the petitioner.

In the instant case, there is no such issue. It is also extremely significant that the petitioner will only consider rescinding his resignation and tender back the emoluments he received pursuant to collective bargaining agreement by his action prior to October 1, 1989 only if he is tendered the English teaching position.

This Administrative Law Judge interprets the failure to seek the extension of the effective date of his resignation as most significant. Judging by the documents included in the motion for summary judgment on behalf of both sides, I am certain that any communication between the petitioner and the respondent board of education between the dates of May 14, 1990 and June 30, 1990 would have been submitted, as well as any between July 1, 1990 and August 10, 1990.

In the absence of such documentation, I must **CONCLUDE** that no such documents exist. The absence of such documents lead me to believe that the issue as presented is less than bonafide. The simple timing of the filing of the petition, the timing of

response to the petition and the early setting of January 4, 1991 as a date for this hearing, all preclude the reality of the petitioner serving in such teaching position, if the board of education sought to meet petitioner's demand. In the eyes of this Administrative Law Judge, the issues here involved have become academic.

In reliance on the petitioner's notice of intent to resign and the respondent's acceptance of his resignation, the respondent gratuitously granted the petitioner's request to increase his working hours to enable him to qualify for the Sate health benefits program, at no cost to petitioner, during his retirement. Judging by the NJEA letter of April 18, 1990, the action of the respondent increasing petitioner's hours, allowed a suggested savings of over $8,000 per year if petitioner was to obtain Blue Cross/Blue Shield coverage on an individual contract. I have little doubt that the respondent's action in this regard was in recognition of the petitioner's outstanding contribution to the educational progam over 20 years of dedicated and devoted service.

I do not criticize respondent's action in this regard, but I recognize the respondent's change in position in reliance on petitioner's stated intention to retire on June 30, 1990.

Together with the petitioner's failure to request any change in his intent to retire, the respondent's action to provide the benefits of the State Health Benefits Program to petitioner and his family mandates that the petition should be dismissed.

CONCLUSIONS

Based upon the foregoing findings of fact and discussion, I **CONCLUDE:**

1. The issues presented in this matter are ripe for summary judgment.

2. The petitioner's notice of intention to retire, dated September 25, 1989, was consciously and intentionally delivered to obtain the appropriate benefits under the collective bargaining agreement.

3. The notice of intent to retire was accepted by the respondent on October 10, 1989.

4. The petitioner's retirement was effective on October 10, 1989, the date of said retirement being June 30, 1989.

5. The petitioner has not sought to extend, rescind, or in any way modify the date of his retirement.

6. In the absence of any stated authority, the respondent was, under the circumstances of this case and the dates as set forth in the discussion, under no duty or responsibility to notify petitioner in May 1990 or thereafter that an English teaching position, for which he was certified, would be open for the school year 1990-1991.

7. Respondent's reliance and change in position to accommodate petitioner's request to qualify for the State Health Benefits Program on his retirement would preclude any action by petitioner to seek a change in his retirement date or in his intention to retire.

8. On the facts herein presented, the respondent is entitled to a summary judgment on all matters in issue in this case.

ORDER

I hereby **ORDER** summary disposition in favor of the respondent.

I further **ORDER** that the petition be **DISMISSED**, with prejudice.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 4, 1992
DATE

GEORGE PERSELAY, ALJ

3/9/92
Date

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

MAR 11 1992
Date

Mailed To Parties:
OFFICE OF ADMINISTRATIVE LAW

njf

OAL DKT. NO. EDU 7540-90

STEPHEN G. MURRAY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of 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 respondent's replies thereto.

In his exceptions, petitioner argues that the ALJ should have reached to the issues of whether, in view of the Board's being put on notice through filing of the within petition that petitioner would rescind his retirement if offered a position, the Board was obliged to notify petitioner of his legal right to teach English, and whether petitioner had waived his tenure rights by submitting his resignation without knowledge of them. Had these issues been properly addressed, petitioner contends, the matter would have been decided in his favor.

In reply, the Board urges affirmance of the ALJ's decision, noting that petitioner never attempted to rescind his resignation, that there is no basis to compel an acceptance of such rescission in

that the Board had no affirmative duty to counsel petitioner as to the possible implications of retirement, that the Board acted in reliance on petitioner's resignation in granting him sick time benefits and making special accommodation for his health insurance, and that even if arguendo petitioner were found to have a cause of action, he had no damages and therefore is not entitled to relief.

Upon careful review, the Commissioner finds that petitioner's appeal must be dismissed because there was no vacancy to which he was entitled either at the time of his resignation or upon his retirement.

As well stated by the State Board of Education in its decision of June 5, 1991 in the matter of Catherine Lammers v. Board of Education of the Borough of Point Pleasant, Ocean County, a position unoccupied by a person on approved leave who contemplates a return to duty is not a vacancy for tenure entitlement purposes:

> ***N.J.S.A. 18A:28-12 provides that:
>
> > 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....(Emphasis added.)
>
> In Mirandi v. Board of Education of the Township of West Orange, decided by the State Board of Education, April 5, 1989, we recognized that that statute also controls reemployment by virtue of tenure of a teaching staff member dismissed in a RIF.
>
> It is well established, however, that an assignment which is temporarily unoccupied by an absent teaching staff member does not constitute a "vacancy." That distinction was made clear in

Sayreville Educ. Ass'n v. Board of Educ., Etc., 193 N.J. Super. 424 (App. Div. 1984), construing N.J.S.A. 18A:16-1.1, which authorizes district boards to "designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee..." The court stated:

> We construe the authorization of this provision [N.J.S.A. 18A:16-1.1] 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....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....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. (Emphasis added.)
>
> Sayreville, supra, at 428

It is undisputed in this case that Anthony was assigned to act in place of a teacher on an approved maternity leave. Thus, the place for which Anthony was employed was not vacant but only temporarily unoccupied by its incumbent, whose return to duty was contemplated. Since N.J.S.A. 18A:28-12 expressly limits reemployment rights for teaching staff members on preferred eligibility lists to "vacancies occurring in positions for which such person is qualified" (emphasis added), Petitioner would have no entitlement under this statute to employment in an assignment in which she would be filling the place of a regular teacher who was temporarily absent, nor has she cited any other provision of the school laws that would give her such entitlement. The fact that the controverted assignment was for a full academic year is of no moment. Although Sayreville makes it clear that a vacant position cannot be filled by use of a substitute on a long-term basis, there is no such constraint on a position which is filled as the result of the temporary absence, even if

> protracted, of a regular teacher whose return to duty is contemplated. (emphasis in text)
> (Lammers State Bd. Slip Opinion, at pp. 3-5)

In the matter herein, it is undisputed that the English "vacancy" claimed by petitioner was the result of a one-year leave of absence by a teacher who contemplated a return to duty, and papers submitted by the parties reveal no dispute over, or specified claim to, other positions held by nontenured staff. Thus, when petitioner stated his intention to retire as a result of his impending RIF, there was no position in which the Board failed to place him or about which the Board failed to notify him.

Moreover, even granting arguendo petitioner's contention that the Board should have advised him of the full potential scope of his tenure rights, at the time of petitioner's resignation (September 1989) it had not yet been clearly established that teachers' tenure protection extended to all endorsements on the instructional certificate, including those under which a teacher had never served. Joseph Grosso v. Board of Education of the Borough of New Providence, State Board decision, March 7, 1990. Under petitioner's own terms, then, the Board violated no known duty owed to petitioner.

Even under the interpretation most favorable to petitioner, that his retirement might have been deemed conditional because it was based on the presumption of an impending RIF, petitioner was not prejudiced by his lack of knowledge regarding the theoretical scope of his tenure rights. While Grosso had been decided by the time petitioner's position was actually abolished, there was no vacancy to which the Board could appoint him or about which it should have informed him as a result. Indeed, events transpired exactly as they

would have if petitioner had known or been informed about the possibility of an English entitlement sometime in the future: petitioner's German position was slated for elimination and there was no other position available to him by tenure right; because he had no prospect for teaching in 1990-91, he elected to retire and proceeded to resign, collect benefits and do all other things consistent with his stated intentions; an "opening" was created by an English teacher's 1990-91 maternity leave, but no vacancy existed and petitioner therefore had no entitlement to claim the position of the absent teacher or receive any notice from the Board as to its existence; petitioner's retirement duly took effect and his relationship with the district was severed. Thus, even with every inference granted to him, petitioner has no basis upon which to seek relief.

While the Commissioner fully concurs with the Board that it has no affirmative duty to act as "counselor" to retiring or resigning employees, he does note a potential for confusion in certain statements in the initial decision which could be read to imply that boards are not obliged to notify riffed tenured teachers who have not severed their relationship with the district through resignation or retirement when positions to which they are entitled by tenure right become available subsequent to RIF. To the contrary, the Court has specifically held that districts are so bound by the language of N.J.S.A. 18A:28-12, even when the position arises several years after RIF. Maurice S. Kaprow v. Board of Education of Berkeley Township, decided by the Appellate Division March 25, 1992, A-3362-90T2.

Accordingly, for the reasons stated herein, the Commissioner affirms the recommendation of the ALJ that petitioner's appeal be dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 23, 1992

DATE OF MAILING - APRIL 23, 1992

54-92

EDU #7540-90
C # 54-92
SB # 20-92

STEPHEN G. MURRAY,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, April 23, 1992

For the Petitioner-Appellant, Springstead & Maurice (Harold N. Springstead, Esq., of Counsel)

For the Respondent-Respondent, Apruzzese, McDermott, Mastro & Murphy (James L. Plosia, Jr., Esq., of Counsel)

Stephen G. Murray (hereinafter" petitioner"), a tenured teaching staff member, had been employed by the Board of Education of the Northern Highlands Regional High School District (hereinafter "Board") as a teacher of German since 1970. The Board determined to eliminate German as a foreign language offering at the end of the 1989-90 school year. On September 25, 1989, petitioner, citing the impending abolishment of his position, gave the Board notice of his intent to retire, effective at the end of the 1989-90 year. The Board accepted his "resignation" on October 10. On May 14, 1990, the Board abolished petitioner's position effective June 30 and terminated his employment therein.

On June 11, 1990, the Board approved an unpaid child care leave in 1990-91 for an English teacher in the district. The Board

Nov. 2, 1994

employed a non-tenured individual to act in her place during her absence. Petitioner, who held an endorsement in English, filed a petition with the Commissioner of Education alleging that the Board had violated his tenure rights in failing to appoint him to such assignment.

On March 4, 1992, an administrative law judge ("ALJ") recommended dismissing the petition. The ALJ stressed that petitioner had not sought to extend, rescind or modify the date of his retirement and that the Board had been under no duty to notify him that an assignment teaching English would be available in 1990-91.

On April 23, 1992, the Commissioner of Education dismissed the petition, concluding that petitioner had no entitlement by virtue of tenure to the position of the absent teacher. The Commissioner, in reliance upon the State Board's decision in Lammers v. Board of Education of the Borough of Point Pleasant, decided by the State Board, June 5, 1991, found that there was no "vacancy" pursuant to N.J.S.A. 18A:28-12 to which petitioner was entitled either at the time of his resignation or upon his retirement.[1] The Commissioner, citing Lammers, stressed that an assignment unoccupied by a staff member on approved leave who contemplated a return to duty was not a vacancy for tenure entitlement purposes.

---

1 N.J.S.A. 18A:28-12 provides, in pertinent part:

> If any teaching staff member shall be dismissed as a result of such reduction [in force], 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....

Observing that the assignment claimed by petitioner in this case was the result of a one-year leave of absence by a teacher who contemplated a return to duty, the Commissioner dismissed the petition. He asserted that since no vacancy existed, petitioner had no entitlement to claim the assignment of the absent teacher or to receive notice from the Board as to its existence. He also noted that petitioner's retirement duly took effect and his employment relationship with the district was severed.

The petitioner filed the instant appeal to the State Board.

While this appeal was pending, the Appellate Division reversed the State Board's decision in Lammers, which formed the basis for the Commissioner's decision in this matter. That decision, however, was subsequently reversed by the state Supreme Court, which reinstated the decision of the State Board. Lammers, supra, rev'd, Docket #A-5494-90T1 (App. Div. May 12, 1992), decision on reconsideration, Docket #A-5494-90T1 (App. Div. Nov. 17, 1992), rev'd, 134 N.J. 264 (1993).

After a thorough review of the record in light of the Supreme Court's decision in Lammers, we affirm the decision of the Commissioner.

Petitioner herein claimed entitlement to an assignment held by a teacher on an approved one-year maternity leave. In Lammers, the Supreme Court settled that a one-year leave of absence does not create a vacancy or temporary vacancy under N.J.S.A. 18A:28-12 so as to provide a tenured teacher whose position has been abolished as the result of a reduction in force with a statutory entitlement to the assignment of the absent teacher. As related by the Court, case law has established "that the word 'vacancy' is commonly understood

to mean an unoccupied position for which an incumbent does not intend to return, as contrasted with a leave of absence that 'connotes continuity of the employment status.'" Lammers, supra, 134 N.J. at 272. Consequently, the approved leave herein did not create a "vacancy" to which petitioner could claim entitlement under N.J.S.A. 18A:28-12.

Nor has petitioner established his entitlement to be placed on a preferred eligibility list for reemployment when a vacancy does occur for which he is qualified. As pointed out by the ALJ, petitioner has not requested to extend, rescind or modify his retirement. Rather, he maintains that his retirement was "forced" since he had not been made aware that his tenure rights would extend to assignments teaching English and that he should, in fairness, be placed on a preferred eligibility list pursuant to N.J.S.A. 18A:28-12. We find nothing in the education laws that would authorize such a result. Nor has petitioner indicated any provisions thereof that would provide him with such an entitlement.

Accordingly, as indicated herein, we affirm the decision of the Commissioner to dismiss the instant petition.

November 2, 1994

Date of mailing NOV 04 1994

55-92

BARBARA LEGUTKO,	:	
PETITIONER,	:	
V.	:	
NEW JERSEY DEPARTMENT OF CORRECTIONS, ADULT DIAGNOSTIC AND TREATMENT CENTER,	:	COMMISSIONER OF EDUCATION
RESPONDENT,	:	DECISION
- - - - - - - - - - - - - - - - - -	:	
IN THE MATTER OF THE TENURE	:	
HEARING OF BARBARA LEGUTKO,	:	
NEW JERSEY STATE DEPARTMENT OF	:	
CORRECTIONS.	:	
_____	:	

APRIL 23, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

(CONSOLIDATED)

BARBARA LEGUTKO,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF CORRECTIONS AND ADULT DIAGNOSTIC AND TREATMENT CENTER,

Respondent,

OAL DKT. NO. EDU 9295-90

AGENCY DKT. NO. 241-7/90

IN THE MATTER OF THE TENURE HEARING OF BARBARA LEGUTKO, NEW JERSEY STATE DEPARTMENT OF CORRECTIONS.

OAL DKT. NO. EDU 9296-90

AGENCY DKT. NO. 253-7/90

Lisa Morowitz, Esq., Communications Workers of America, AFL-CIO, on behalf of Barbara Legutko

Allan C. Roth, Deputy Attorney General, on behalf of New Jersey Department of Corrections (Robert J. Del Tufo, Attorney General of New Jersey, attorney)

Record Closed: March 10, 1992 Decided: March 11, 1992

BEFORE **STEVEN C. REBACK**, ALJ:

STATEMENT OF CASE

These matters were transmitted to the Office of Administrative Law on November 9, 1990, 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 agreed to settle these matters and have prepared a settlement agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

3/11/92
Date

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

3/14/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 18 1992
Date

OFFICE OF ADMINISTRATIVE LAW

rmp

LISA MOROWITZ, ESQ.
Communications Workers of
America, AFL-CIO
One Executive Drive, Suite 200
Somerset, New Jersey 08873
(908) 563-4565

In the Matter of the Tenure Hearing of Barbara Legutko, New Jersey State Department of Corrections, Adult Diagnostic & Treatment Center	BEFORE THE COMMISSION OF EDUCATION OAL Dkt. Nos. EDU 9295-90 EDU 9296-90 Agency Dkt. No. 253-7/90

SETTLEMENT AGREEMENT

Petitioner, Adult Diagnostic & Treatment Center ("ADTC") and the Department of Corrections ("DOC"), and Respondent, Barbara Legutko, desire to enter into the following settlement agreement in the public interest:

1. WHEREAS, Respondent, Barbara Legutko, a tenured teacher, has been employed by the DOC as an Art Instructor at ADTC since 1978; and

2. WHEREAS, Respondent has never been subject to any disciplinary proceedings in the course of that employment; and

3. WHEREAS, on June 19, 1990 DOC advised Respondent that the DOC was referring tenure charges to the Commissioner of Education ("Commissioner"), and in accordance with DOC Personnel Bulletin 84-17, the following charges were specified: 1) Subsection D, Safety & Security Precautions 7. Violation of administrative procedures and regulations involving safety and security; 2) Subsection E., General 1. Violation of rules, regulations, policy, procedure, order or administrative decision;

and 3) Subsection D, Safety and Security Precautions, 5. Failure to report loss of tools and equipment or articles; and

4. WHEREAS, beginning June 26, 1990 prior to certifying the charges to the Commissioner, the DOC suspended Respondent without pay for a 120-calendar day period; and

5. WHEREAS, on July 3, 1990 Respondent Legutko filed a Petition with the Commissioner of Education alleging that the DOC violated tenure laws by making a final determination to suspend her prior to filing written charges with the Commissioner of Education; and

6. WHEREAS, on July 20, 1990, the DOC filed written charges with the Commissioner requesting dismissal or reduction in salary of Respondent; and

7. WHEREAS, on October 11, 1990, then Director of the Bureau of Controversies and Disputes acknowledged in writing that both parties in this matter concurred that copies of certain supporting documents filed with the Commissioner were not provided to Respondent or her representative until October 4, 1990; and

8. WHEREAS, Respondent was not employed elsewhere during the course of her 120-calendar day suspension; and

9. WHEREAS, on October 23, 1990 at ADTC's request, Respondent returned to work from her 120-calendar day suspension; and

10. WHEREAS, Respondent has been working at ADTC as an Art Instructor without interruption and without incident since her return to work on October 23, 1990; and

11. WHEREAS, on October 1, 1991, new Policy and Procedures for the Art Program were put into effect which included guidelines for Art Program participation, attendance policies, program activities and scheduling, and which established security procedures for Art Room tools and equipment, thereby structuring the Art Program so as to insure greater security; and

12. WHEREAS, on January 16 and 22, 1992, tenure hearings began before Administrative Law Judge Steven Reback, and additional hearing dates were scheduled for March 10 and April 15, 16 and 23, 1992; and

13. WHEREAS, it was determined that the DOC's evaluations of Respondent's performance in her teaching duties were more than satisfactory;

IT IS THEREFORE AGREED that the DOC will withdraw the tenure charges against the Respondent subject to the approval of the Commissioner; and

IT IS FURTHER AGREED that the DOC will pay the Respondent a lump sum of $4,000.00 subject to approval of this settlement by the Commissioner of DOE; and

IT IS FURTHER AGREED that the DOC will not deduct funds from the $4,000.00 lumps sum and makes no representation concerning what Federal or State taxes, if any, said lump sum may be subject to: and

IT IS FURTHER AGREED that nothing in this settlement shall be deemed to be an admission of liability on behalf of either party.

HOWEVER, should the Commissioner of DOE or the State Board of Education refuse to approve the withdrawal of said tenure charges by the DOC or by Respondent, any such refusal shall not interfere with the rights of either party to pursue the matter further.

THE REASONS FOR ENTERING INTO THIS AGREEMENT ARE AS FOLLOWS:

(a) The costs of continuing to prosecute the tenure claims against the Respondent, as well as defending against the Respondent's Petition, are expected to be substantial; and

(b) In view of the revisions in Art Program policy and procedures, the opportunity for security violations is reduced. The revisions in Art Program policy are compatible with appropriate instruction; and

(c) Respondent is waiving her right to receive any back salary and attorney fees other than the $4,000.00 lump sum; and

(d) Even if Petitioner were to sustain its burden of proof, there is a question of penalties, since Respondent was suspended prior to filing of charges, and further proof of service of the charges and supporting documentation was not made till near

the expiration of the 120-calendar day suspension.

_____ Dated: March 10, 1992
BARBARA LEGUTKO
Respondent

ROBERT J. DEL TUFO
ATTORNEY GENERAL OF NEW JERSEY

BY: _____ Dated: March 10, 1992
ALLAN C. ROTH
Deputy Attorney General
for the Petitioner

_____ Dated: March 10, 1992
LISA MOROWITZ, ESQ.
For the Respondent

CERTIFICATION

I, Barbara Legutko, hereby certify that I have reviewed the Settlement Agreement attached hereto and fully understand the meaning and terms of said agreement. I have discussed this matter at some length with my representative and I am satisfied with my representation. It is also my understanding that if the agreement is approved by the Administrative Law Judge and by the Commissioner of Education, that my claims as set forth in the above captioned matter will terminate against the Department of Corrections as long as the terms and conditions of this agreement are met.

Barbara Legutko, Respondent

Dated: March 12, 1992

OAL DKT. NOS. EDU 9295-90 AND EDU 9296-90 (CONSOLIDATED)

BARBARA LEGUTKO,	:	
PETITIONER,	:	
V.	:	
NEW JERSEY DEPARTMENT OF CORRECTIONS, ADULT DIAGNOSTIC AND TREATMENT CENTER,	:	COMMISSIONER OF EDUCATION
RESPONDENT,	:	DECISION
- - - - - - - - - - - - - - - - - -	:	
IN THE MATTER OF THE TENURE HEARING OF BARBARA LEGUTKO, NEW JERSEY STATE DEPARTMENT OF CORRECTIONS.	:	

The record of these consolidated matters and the initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standard for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983) The matter is hereby dismissed, subject to compliance with the terms of the settlement.

APRIL 23, 1992 COMMISSIONER OF EDUCATION

DATE OF MAILING - APRIL 23, 1992

56-92

56-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
BOROUGH OF SEA BRIGHT,	:	
MONMOUTH COUNTY.	:	
	:	

APRIL 23, 1992

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
BOROUGH OF SEA BRIGHT,	:	
MONMOUTH COUNTY.	:	
	:	

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held April 7, 1992 in the School District of the Borough of Sea Bright, Monmouth County were as follows:

	AT POLLS	ABSENTEE	TOTAL
Carol Salomon	47	0	47
Anne Marie Sundberg	51	0	51
Harriet Primack (write-in)	11	0	11
Susan Feiring (write-in)	11	0	11

Pursuant to N.J.S.A. 18A:12-15c, because of a tie vote for membership on the school board, an authorized representative of the Commissioner of Education from the Office of the Monmouth County Superintendent of Schools was directed to conduct a recount of the ballots cast for the two candidates receiving the same number of votes. The recount was conducted on April 16, 1992, at the Office of the Monmouth County Superintendent of Schools on only the write-in votes cast, which were recorded on the paper roll from the voting machine used and placed in the sealed election envelope of the school district.

At the conclusion of the recount, the tally stood as follows:

	AT POLLS	ABSENTEE	TOTAL
Carol Salomon	47	0	47
Anne Marie Sundberg	51	0	51
Harriet Primack (write-in)	11	0	11
Susan Feiring (write-in)	12	0	12

This concludes the report of the Commissioner's representative.

* * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings set forth above.

Accordingly, the Commissioner finds and determines that Carol Salomon, Anne Marie Sundberg, and Susan Feiring were elected to full terms of three years each on the Board of Education of the School District of the Borough of Sea Bright.

COMMISSIONER OF EDUCATION

APRIL 23, 1992

DATE OF MAILING - APRIL 23, 1992

57-92

D.G.P., by his parents, D.P. and M.A.P.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
NORTHERN BURLINGTON REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

APRIL 23, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2096-92
AGENCY DKT. NO. 62-3/92

D.G.P. BY HIS PARENTS D.P. AND M.A.P.,
Petitioners,
v.
NORTHERN BURLINGTON REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,
Respondent.

Leonard L. Grasso, Jr., Esq., for petitioners (James Logan, Jr., attorney)

Stephen J. Mushinski, Esq, for respondent

Record Closed: April 9, 1992 Decided: April 10, 1992

BEFORE **STEVEN C. REBACK**, ALJ:

This matter was transmitted to the Office of Administrative Law on March 23, 1992, 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 agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

4·10·92
Date

Steven C. Reback
STEVEN C. REBACK, ALJ

Receipt Acknowledged:

4-10-92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 10 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

rmp

OFFICE OF ADMINISTRATIVE LAW
APR 3 3 05 PM '92

JAMES LOGAN, JR.
219 HIGH STREET
P. O. BOX 429
MOUNT HOLLY, NEW JERSEY 08060
(609) 267-3650
ATTORNEY FOR Petitioners
JLJR/wr 23,774J

DENNIS G. PONTANI, age 17 by his parents DENNIS and MARY ANN PONTAINI, Petitioneres,	OFFICE OF ADMINISTRATIVE LAW TRANSMITTING AGENCY: DEPARTMENT OF EDUCATION OAL DOCKET NO.: EDU 02096-92 S AGENCY REF. NO.: 62-3/92
vs.	
NORTHERN BURLINGTON COUNTY REGIONAL SCHOOL DISTRICT, Respondents.	**SETTLEMENT AGREEMENT**

Petitioners residing at 11 Hockey Drive, Columbus, Mansfield Township, Burlington County, New Jersey and the Respondents whose address is Mansfield Township, Burlington County, New Jersey hereby enter into the following settlement to the above captioned controversy.

The Respondents, Northern Burlington County Regional School District, will afford the Petitioner, Dennis G. Pontani, the opportunity to complete all courses begun on the home bound program which includes Computer Programming, Physical Education and Health, Keyboarding, Sociology and English IVB. Each course

carries a semester credit of 2.5 credits, with the exception of Physical Education and Health which is graded quarterly. The Petitioner has already been credited 1.25 credit hours for previous completion of the health requirement and therefore after satisfaction of the physical education portion, an additional 1.25 credit hours will be posted to the Petitioner's transcript. After satisfactorily completing these courses, Petitioner will be credited a total of 11.25 credits to his transcript.

The settlement provides that the Petitioner's instructors will solely decide how much work needs to be completed to receive the credit and if further work is needed, said work will be provided and/or further instruction will be provided to the Petitioner, Dennis G. Pontani, so that he is given the opportunity to complete each course. If the instructor is satisfied that the Petitioner has fulfilled all course requirements, the appropriate credit will be automatically applied to the student's transcript.

Petitioners will dismiss their Petition for Emergent Relief and appeal of the School Board's actions to the Commissioner in consideration of this settlement.

WE HEREBY CONSENT TO THE ENTRY OF THE FOREGOING.

LEONARD L. GRASSO, JR., ESQUIRE
LAW OFFICE OF JAMES LOGAN, JR.
Attorney for Petitioners

STEPHEN J. KOSHINSKI, ESQUIRE
Attorney for Respondents

APPROVED BY THE COURT

STEVEN REBECK, A.L.J.
DATED:

OAL DKT. NO. EDU 2096-92S

D.G.P., by his parents, D.P. and M.A.P.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
NORTHERN BURLINGTON REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision on Emergent Relief in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement. It is noted that the settlement reached by the parties fully disposes of all matters in controversy between the parties, eliminating the need for further hearings in the case.

APRIL 23, 1992

COMMISSIONER OF EDUCATION

DATE OF MAILING - APRIL 23, 1992

58-92

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH : DECISION
OF LAUREL SPRINGS, CAMDEN COUNTY. :
:

APRIL 24, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH : DECISION
OF LAUREL SPRINGS, CAMDEN COUNTY. :
:

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held on April 7, 1992, in the School District of the Borough of Laurel Springs, Camden County, were as follow:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Bryan Rodilosso	188	3	191
Andrew M. Seder	187	2	189
Michael J. Caccia	186	2	188
Veronica Mulhearn	187	1	188
Robert Thomas	171	0	171
Gina R. Solimeo	150	1	151

As there was a tie between two candidates for the third seat on the Board of Education, the Commissioner of Education directed an authorized representative to conduct a recount of the ballots cast pursuant to N.J.S.A. 18A:12-15c. The recount was conducted on April 16, 1992 at the Voting Machine Warehouse, South Jersey Port Corporation, Camden, New Jersey. The absentee ballots were also recounted by the Camden County Board of Elections on April 16, 1992.

At the conclusion of the recount, the tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Bryan Rodilosso	188	3	191
Andrew M. Seder	187	2	189
Michael J. Caccia	186	2	188
Veronica Mulhearn	187	1	188
Robert Thomas	171	0	171
Gina R. Solimeo	150	1	151

As there were no changes on recount, the tie for the third member was not broken and the results remain the same as those derived from the balloting of April 7, 1992. Therefore, it is recommended that a special election be held to decide the winner for the third seat on the Board of Education. This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts its findings as his own.

Accordingly, pursuant to the provisions of N.J.S.A. 18A:12-15c, the Commissioner directs the conduct of a special election to be held within sixty (60) days of April 7, 1992 and restricted to the two candidates receiving the same number of votes for the third Board seat as indicated above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 23, 1992

DATE OF MAILING - APRIL 23, 1992

59-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF WAYNE, PASSAIC COUNTY.	:	
	:	

APRIL 24, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF WAYNE, PASSAIC COUNTY. :
:

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held April 7, 1992 in the School District of the Township of Wayne, Passaic County, were as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Lawrence D. Katz	2,974	78	3,052
Leo David Pudup	2,846	74	2,920
Dr. Ki Hee Kim	2,642	62	2,704
Dianne Vreeland	2,655	33	2,688
William G. Pharo	2,600	19	2,619
Richard Mazloom	2,115	19	2,134
M. John Powell	1,945	16	1,961
Harry Sylvester	1,167	8	1,175
Marie Carol Cohen	595	7	602

Pursuant to a letter request dated April 7, 1992 from Dianne Vreeland, a defeated candidate, an authorized representative of the Commissioner of Education from the Office of the Passaic County Superintendent of Schools was directed to conduct a recount of the ballots cast. The recount was conducted on April 7, 1992, at the voting machine warehouse, Paterson.

At the conclusion of the recount, the tally stood as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Lawrence D. Katz	2,974	78	3,052
Leo David Pudup	2,846	74	2,920
Dr. Ki Hee Kim	2,642	62	2,704
Dianne Vreeland	2,655	33	2,688
William G. Pharo	2,600	19	2,619
Richard Mazloom	2,115	19	2,134
M. John Powell	1,945	16	1,961
Harry Sylvester	1,167	8	1,175
Marie Carol Cohen	595	7	602

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings set forth above.

The Commissioner finds and determines that Lawrence D. Katz, Leo David Pudup and Dr. Ki Hee Kim were elected to full terms of three years each on the Board of Education of the School District of the Township of Wayne.

COMMISSIONER OF EDUCATION

APRIL 24, 1992

DATE OF MAILING - APRIL 24, 1992

60-92

60-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
CLIFTON, PASSAIC COUNTY.	:	
	:	

APRIL 24, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION
CLIFTON, PASSAIC COUNTY. :
:

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held April 7, 1992 in the School District of the City of Clifton, Passaic County, were as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
John Marchioni	2,847	35	2,882
Kenneth Kurnath	2,467	38	2,505
Frank A. Pecci	2,211	39	2,250
Clyde R. Sherrow	2,190	18	2,208
Linda Teresa Geraci	1,174	31	1,205
Nunzio Orlando	776	11	787
WRITE-INS			
Havasy	3		
Eisenmenger	1		
R. Gibson	1		
A. Mattson	1		
Swietek	1		

Pursuant to a letter request dated April 7, 1992 from Clyde R. Sherrow, a defeated candidate, an authorized representative of the Commissioner of Education from the Office of the Passaic County Superintendent of Schools was directed to conduct a recount of the ballots cast. The recount was conducted on April 13, 1992, at the voting machine warehouse, Paterson.

At the conclusion of the recount, the ballots for Clyde R. Sherrow was changed from 2,208 to 2,198. Thus, the total number of votes for Clyde R. Sherrow stands at 2,198.

The tally stood as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
John Marchioni	2,847	35	2,882
Kenneth Kurnath	2,467	38	2,505
Frank A. Pecci	2,211	39	2,250
Clyde R. Sherrow	2,180	18	2,198
Linda Teresa Geraci	1,174	31	1,205
Nunzio Orlando	776	11	787
WRITE-INS			
Havasy	3		
Eisenmenger	1		
R. Gibson	1		
A. Mattson	1		
Swietek	1		

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of the authorized representative and adopts as his own the findings as set forth above.

The Commissioner finds and determines that John Marchioni, Kenneth Kurnath and Frank Pecci were elected to full terms of three years each on the Board of Education of the School District of the City of Clifton.

COMMISSIONER OF EDUCATION

APRIL 24, 1992

DATE OF MAILING - APRIL 24, 1992

61-92

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH : DECISION
OF CLIFFSIDE PARK, BERGEN COUNTY. :
:

APRIL 27, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH : DECISION
OF CLIFFSIDE PARK, BERGEN COUNTY. :
:

The announced results of the balloting for the Current Expense proposition of the Board of Education at the annual school election held on April 7, 1992, were as follows:

CURRENT EXPENSE	AT POLLS	ABSENTEE	TOTAL
Yes	616	8	624
No	623	6	629

Pursuant to a letter from Mr. Robert Palidino dated April 8, 1992, the Commissioner of Education directed his representative from the Office of the Bergen County Superintendent of Schools to conduct a recheck of the votes cast on the voting machines for the Current Expense proposition. This recheck was conducted on April 23, 1992, at the County Voting Machine Warehouse, Carlstadt, New Jersey.

At the conclusion of the recount, the tally of the votes cast on the voting machines was as follows:

CURRENT EXPENSE	AT POLLS	ABSENTEE	TOTAL
Yes	653	8	661
No	623	6	629

There was no request for a recount of the absentee ballots.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings as set forth above.

Accordingly, the Commissioner finds and determines that the result of the balloting for the Current Expense proposition indicates that the Current Expense budget passed by a vote of 661 votes in favor against 629 votes not in favor.

COMMISSIONER OF EDUCATION

APRIL 27, 1992

DATE OF MAILING - APRIL 27, 1992

62-92

62-92

CYNTHIA STICHMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF MORRIS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

APRIL 30, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9286-91

AGENCY DKT. NO. 343-9/91

CYNTHIA STICHMAN,

Petitioner,

v.

BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT,

Respondent.

Richard J. Kaplow, Esq., for petitioner
(Weinberg & Kaplow, attorneys)

Fredric J. Sirota, Esq., for respondent
(Wiley, Malehorn & Sirota, attorneys)

Record Closed: March 10, 1992 Decided: March 17, 1992

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE

Petitioner challenges the withholding of her salary increments for the 1991-1992 school year, and also seeks other relief based on other allegations.

This matter was transmitted to the Office of Administrative Law on October 1, 1991, for a hearing pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. The matter was assigned to the undersigned administrative law judge November 8, 1991. A prehearing conference was held on January 7, 1992, and a prehearing order was entered on January 10, 1992.

Prior to the commencement of the hearing scheduled for April 28, 1992, the parties agreed to settle this matter and have prepared the attached Stipulation of Settlement indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 17, 1992
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:
Maureen R. Kibler
DEPARTMENT OF EDUCATION

3/18/92
DATE

MAR 23 1992
DATE

Mailed to Parties:
Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

dgi/e

MAR 13 8 47 AM '92

WILEY, MALEHORN & SIROTA
250 MADISON AVENUE
P. O. DRAWER 210C
MORRISTOWN, NEW JERSEY 07960
(201) 539-1313
ATTORNEYS FOR Respondent, Board of Education of the Morris School District

CYNTHIA STICHMAN,	:	
Petitioner,	:	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
v.	:	
BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY	:	OAL Docket No.: EDU-9286-91 Agency Ref. No.: 343-9/91
Respondent.	:	STIPULATION OF SETTLEMENT AND WITHDRAWAL OF REQUEST FOR A HEARING

FINDINGS

1. Cynthia F. Stichman ("Petitioner") filed a Petition of Appeal dated September 13, 1991 alleging that the Board of Education of the Morris School District ("Respondent") withheld Petitioner's increments for the 1991-92 school year for reasons that were arbitrary, capricious, and without good cause.

2. On September 24, 1991 Respondent filed an Answer to the Petition denying all allegations of the Petition.

3. On October 1, 1991, this matter was transferred as a contested case to the Office of Administrative Law ("OAL").

4. The parties wish to resolve their differences amicably without a hearing and therefore, have entered into this Stipulation of Settlement and Withdrawal of Request for a Hearing ("Stipulation").

STIPULATION

NOW THEREFORE, IT IS HEREBY STIPULATED AND AGREED THAT:

5. Upon the approval by the Commissioner of Education of the within Stipulation, Petitioner shall be deemed to have irrevocably resigned her tenured teaching staff position and her current assignment as Librarian/Media

Specialist at the Woodland School in the Morris School District and her employment by the Respondent shall terminate effective as of the last day of the 1992-93 school year.

6. Petitioner shall be paid at the same salary rate for the 1992-93 school year as she is currently paid for the 1991-92 school year and shall receive all benefits available to other teachers except as herein provided.

7. Upon the approval by the Commissioner of Education of the within Stipulation, Petitioner shall immediately go on sick leave at the above-stated salary, including all benefits as are currently provided to Petitioner, until the expiration of the 1992-93 school year; provided, however, that Petitioner shall utilize all accumulated and allotted sick leave during this time and shall not receive any additional compensation for any unused accumulated sick leave.

8. In the event any prospective employer contacts Respondent regarding Petitioner's employment in the Morris School District, Respondent shall follow its practice with regard thereto.

9. Petitioner hereby withdraws her administrative hearing request for OAL Docket No. EDU-9286-91. Petitioner shall notify OAL of this withdrawal within ten (10) days after receipt of this executed Stipulation by filing a copy with the Honorable Joseph F. Martone, Administrative Law

Judge, Office of Administrative Law, 185 Washington Street, Newark, New Jersey 07102.

10. Petitioner executes this Stipulation voluntarily and after receiving and considering advice of counsel.

PETITIONER

Dated: March 4, 1992

Cynthia F. Stichman

Cynthia F. Stichman

RESPONDENT

Dated: 3/6/92

By:

M. Lee Pisauro,
Board Secretary
Board of Education of the
Morris School District

CYNTHIA STICHMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF MORRIS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law in the form of a joint stipulation of settlement have been reviewed. No exceptions were filed by the parties.

Upon a review of the terms of the settlement, the Commissioner must reject the accord reached between the parties because there is no demonstration in the record that petitioner is sick and therefore able to call upon her bank of sick leave "[u]pon the approval by the Commissioner of Education of the within Stipulation ***until the expiration of the 1992-93 school year***." (Proposed Stipulation of Settlement, at paragraph 7)

Additionally, the Commissioner notes the absence of explanation as to what constitutes the Board's policy in regard to disclosure of information to prospective employers as mentioned at paragraph 8 of the settlement's terms. Insofar as the stipulation indicates at paragraph 8 "[i]n the event any prospective employer contacts Respondent regarding Petitioner's employment in the Morris School District, Respondent shall follow its practice with regard

thereto" (emphasis supplied), the Commissioner is obliged to note that such information must conform to the requirements of law as set forth in such cases as John Salsberg v. Board of Education of the Town of Boonton, Morris County, decided by the Commissioner May 11, 1989.

Accordingly, for the reasons expressed herein, the instant settlement is rejected and remanded to the Office of Administrative Law for further action consistent with this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 30, 1992

DATE OF MAILING - APRIL 30, 1992

62-92

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(62-92)

CYNTHIA STICHMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

JULY 20 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3940-92
AGENCY DKT. NO 343-9/91
(OAL DKT. NO. 9286-91 -- On Remand)

CYNTHIA STICHMAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY,
Respondent.

Richard J. Kaplow, Esq., for petitioner
(Weinberg and Kaplow, attorneys)

Anne M. Siotka, Esq., for respondent
(Wiley, Malehorn & Sirota, attorneys)

Record Closed: June 16, 1992 Decided: June 22, 1992

BEFORE **JOSEPH F. MARTONE,** ALJ

STATEMENT OF THE CASE

In this matter, petitioner challenges the withholding of her salary increments for the 1991-1992 school year and also seeks other relief based on other allegations. In this matter, which previously had OAL DKT. EDU 9286-91, the parties agreed to

settle, and they prepared a stipulation of settlement indicating the terms of settlement.

By initial decision dated March 17, 1992, the stipulation of settlement was approved. However, by decision dated April 30, 1992, the Commissioner of the Department of Education rejected the settlement and remanded the matter to the OAL on May 27, 1992, for further proceedings, pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.*

Prior to the scheduling of further proceedings in this matter, the parties agreed to settle this matter and entered into a Stipulation of Settlement and Withdrawal of Request for Hearing. This Stipulation of Settlement was submitted to the OAL on June 16, 1992.

The decision of the Commissioner of Education on remand rejected the prior settlement reached between the parties because there was no demonstration in the record that petitioner was sick and therefore able to call upon her bank of sick leave. There is annexed to the stipulation of settlement in this matter attachments indicating that petitioner is sick and has been under treatment since May 1990.

In addition, the Commissioner's decision on remand noted the absence of an explanation as to what constitutes respondent's policy with regard to disclosure of information to prospective employers of petitioner. Since this paragraph has been eliminated and since the Commissioner's decision notes that such information must conform to the requirements of law of as set forth in such cases as John Salsberg v. Board of Education of the Town of Boonton, Morris County, decided by the Commissioner on May 11, 1989, this requirement shall be deemed to be imposed upon the parties.

Accordingly, I have reviewed the record and the terms of settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the terms of settlement and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 22, 1992
Date

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

6/23/92
Date

Maureen K. Kelly
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 25 1992
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

dgi/e

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OFFICE OF ... LAW
JUN 16 4 21 PM '92

WILEY, MALEHORN & SIROTA
250 Madison Avenue
P.O. Box 210
Morristown, New Jersey 07961-0210
(201) 539-1313
Attorneys For Respondent, Board of Education
of the Morris School District

CYNTHIA STICHMAN, Petitioner, v. BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL Docket No.: EDU-9286-91 Agency Ref. No.: 343-9/91 (ON REMAND) STIPULATION OF SETTLEMENT AND WITHDRAWAL OF REQUEST FOR A HEARING

FINDINGS

1. Cynthia F. Stichman ("Petitioner") filed a Petition of Appeal dated September 13, 1991 alleging that the Board of Education of the Morris School District ("Respondent") withheld Petitioner's increments for the 1991-92 school year for reasons that were arbitrary, capricious, and without good cause.

2. On September 24, 1991 Respondent filed an Answer to the Petition denying all allegations of the Petition.

3. On October 1, 1991, this matter was transferred as a contested case to the Office of Administrative Law ("OAL").

4. Petitioner has received psychological counseling from Dr. McCormick since May 1990. Her treatment is ongoing and in Dr. McCormick's opinion necessitates a Leave of Absence. (Exhibit A)

5. The parties wish to resolve their differences amicably without a hearing and therefore, have entered into this Stipulation of Settlement and Withdrawal of Request for a Hearing ("Stipulation").

STIPULATION

NOW THEREFORE, IT IS HEREBY STIPULATED AND AGREED THAT:

6. Upon the approval by the Commissioner of Education of the within Stipulation, Petitioner shall be deemed to have irrevocably resigned her tenured teaching staff position and her current assignment as Librarian/Media Specialist at the Woodland School in the Morris School District and her employment by the Respondent shall terminate effective as of the last day of the 1992-93 school year.

7. Petitioner shall be paid at the same salary rate for the 1992-93 school year as she is currently paid for the 1991-92 school year and shall receive all benefits available to other teachers except as herein provided.

8. Upon the approval by the Commissioner of Education of the within Stipulation, pursuant to the recommendation of Dr. McCormick, Petitioner shall immediately go on sick leave at the above-stated salary, including all benefits as are currently provided to Petitioner, until the expiration of the 1992-93 school year; provided, however, that Petitioner shall utilize all accumulated and allotted sick leave during this time and shall not receive any additional compensation for any unused accumulated sick leave.

9. This Stipulation is expressly subject to and shall comply with the provisions of N.J.S.A. 10:4-6 et seq. and

Executive Order No. 11 (1974).

10. Petitioner hereby withdraws her administrative hearing request for OAL Docket No. EDU-9286-91. Petitioner shall notify OAL of this withdrawal within ten (10) days after receipt of this executed Stipulation by filing a copy with the Honorable Joseph F. Martone, Administrative Law Judge, Office of Administrative Law, 185 Washington Street, Newark, New Jersey 07102.

11. Petitioner executes this Stipulation voluntarily and after receiving and considering advice of counsel.

PETITIONER

Dated: 6/2/92

Cynthia F. Stichman

RESPONDENT

Dated: 6/8/92

By:

M. Lee Pisauro,
Board Secretary
Board of Education of the
Morris School District

PSYCHOLOGIST

LICENSE NUMBERS:
NEW YORK STATE 1614
CALIFORNIA PL2567
NORTH CAROLINA 440

CHARLES G. Mc CORMICK, ED. D.
FORTY PARK AVENUE - APT. ~~36X~~ 34 2J
NEW YORK, N. Y. 10016

TELEPHONE 212 - 879-3736

May 13, 1992

To Whom It May Concern

Re Ms. Cynthia Stichman

This will certify that Ms. Cynthia Stichman has been using my services for consultation and treatment since May, 1990. The diagnosis (DSM-III-R): 309.89 Post-traumatic Stress Disorder. Her condition will require continued treatment for an indeterminate time.

Therefore, I believe that a leave of absence for the 1992-1993 school year is both necessary and appropriate.

Yours truly,

Charles G. Mc Cormick, Ed. D.

CGM:ehm
Encl. DSM-III-R Description of 309.89

designed to neutralize or vent, or it is clearly excessive

(3) the person recognizes that his or her behavior is excessive or unreasonable (this may not be true for young children; it may no longer be true for people whose obsessions have evolved into overvalued ideas)

B. The obsessions or compulsions cause marked distress, are time-consuming (take more than an hour a day), or significantly interfere with the person's normal routine, occupational functioning, or usual social activities or relationships with others.

309.89 Post-traumatic Stress Disorder

A. The person has experienced an event that is outside the range of usual human experience and that would be markedly distressing to almost anyone, e.g., serious threat to one's life or physical integrity; serious threat or harm to one's children, spouse, or other close relatives and friends; sudden destruction of one's home or community; or seeing another person who has recently been, or is being, seriously injured or killed as the result of an accident or physical violence.

B. The traumatic event is persistently reexperienced in at least one of the following ways:

(1) recurrent and intrusive distressing recollections of the event (in young children, repetitive play in which themes or aspects of the trauma are expressed)

(2) recurrent distressing dreams of the event

(3) sudden acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative [flashback] episodes, even those that occur upon awakening or when intoxicated)

(4) intense psychological distress at exposure to events that symbolize or resemble an aspect of the traumatic event, including anniversaries of the trauma

C. Persistent avoidance of stimuli associated with the trauma or numbing of general responsiveness (not present before the trauma), as indicated by at least three of the following:

(1) efforts to avoid thoughts or feelings associated with the trauma

(2) efforts to avoid activities or situations that arouse recollections of the trauma

(3) inability to recall an important aspect of the trauma (psychogenic amnesia)

(4) markedly diminished interest in significant activities (in young children, loss of recently acquired developmental skills such as toilet training or language skills)

(5) feeling of detachment or estrangement from others

(6) restricted range of affect, e.g., unable to have loving feelings

(7) sense of a foreshortened future, e.g., does not expect to have a career, marriage, or children, or a long life

D. Persistent symptoms of increased arousal (not present before the trauma), as indicated by at least two of the following:

(1) difficulty falling or staying asleep

Cont 309.89 PTSD

(2) irritability or outbursts of anger

(3) difficulty concentrating

(4) hypervigilance

(5) exaggerated startle response

(6) physiologic reactivity upon exposure to events that symbolize or resemble an aspect of the traumatic event (e.g., a woman who was raped in an elevator breaks out in a sweat when entering any elevator)

E. Duration of the disturbance (symptoms in B, C, and D) of at least one month.

Specify delayed onset if the onset of symptoms was at least six months after the trauma.

300.02 Generalized Anxiety Disorder

A. Unrealistic or excessive anxiety and worry (apprehensive expectation) about two or more life circumstances, e.g., worry about possible misfortune to one's child (who is in no danger) and worry about finances (for no good reason), for a period of six months or longer, during which the person

OAL DKT. NO. EDU 3940-92

CYNTHIA STICHMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

JULY 20, 1992

DATE OF MAILING - JULY 20, 1992

63-92

63-92

FRANK RENNIE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

APRIL 30, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7199-90
AGENCY DKT. NO. 254-7/90

FRANK RENNIE,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,

Respondent.

Sanford R. Oxfeld, Esq., for petitioner
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Steven B. Hoskins, Esq., for respondent
(McCarter & English, attorneys)

Record Closed: March 11, 1992

Decided: March 18, 1992

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE

Petitioner seeks seniority entitlement to a high school principal position.

This matter was transmitted to the Office of Administrative Law on September 12, 1990, for a hearing 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 on September 11, 1991, and a prehearing order was entered on September 13, 1991.

Prior to the commencement of the hearing scheduled for February 7, 1992, the parties agreed to settle this matter and have prepared the attached Settlement Agreement indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 18, 1992
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

3/19/92
DATE

Maureen R. Keller
DEPARTMENT OF EDUCATION

MAR 23 1992
DATE

Mailed to Parties:
Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

dgi/e

SETTLEMENT AGREEMENT

THIS AGREEMENT made the 21st day of February, 1992 between petitioner Frank Rennie and respondent Montclair Board of Education (the "Board").

WHEREAS, petitioner filed a petition with the Office of Administrative Law entitled Frank Rennie vs. Board of Education of the Township of Montclair, Essex County, OAL Docket No. EDU 07199-90 raising issues as to seniority and compensation as a principal in the school district; and

WHEREAS, the parties have agreed to settle the litigation and resolve various issues in dispute.

NOW, THEREFORE, the parties hereby agree as follows:

1. Petitioner agrees to retire as a teaching staff member employed by the Board effective June 30, 1992. Petitioner will promptly submit his written letter of resignation to the Superintendent of Schools.

2. The Board agrees to pay $2,000.00 to petitioner in reimbursement for certain out-of-pocket expenses incurred by petitioner relating to the production of a student produced and performed theatrical performance in the spring of 1990.

3. The Board agrees to increase the salary of petitioner by $3,000.00 for the school year 1991-92.

4. It is agreed that the pending petition will be withdrawn. Petitioner agrees to release the Board from any and

all claims asserted in this litigation. Petitioner is responsible to pay his own costs and attorney's fees.

BALK, OXFELD, MANDELL & COHEN
Attorneys for Petitioner
Frank Rennie

By: _____
SANFORD R. OXFELD
A Member of the Firm

McCARTER & ENGLISH
Attorneys for Respondent
Montclair Board of Education

By: _____
STEVEN B. HOSKINS
A Member of the Firm

OAL DKT. NO. EDU 7199-90

FRANK RENNIE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

APRIL 30, 1992

DATE OF MAILING - APRIL 30, 1992

64-92

64-92

JEANNE SASSE, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY, : DECISION

RESPONDENT. :

:

SYNOPSIS

Petitioner, riffed high school business teacher, alleged Board violated her tenure and seniority rights by retaining the services of a less senior teacher (intervenor) in a middle school computer skills position.

Initial decision dismissed petition as untimely based upon petitioner's failure to comply with provisions of N.J.A.C. 6:24-1.2(c) the 90-day rule. (Gordon; North Plainfield) ALJ found petitioner waited 18 months from notice of RIF before filing petition.

Commissioner adopted findings and determination in initial decision as his own. Moreover, Commissioner noted Superior Court recently addressed same arguments on 90-day rule in Kaprow. Petition was dismissed as untimely.

APRIL 30, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10365-90
AGENCY DKT. NO. 370-11/90

JEANNE SASSE

Petitioner,

v.

BOARD OF EDUCATION OF THE
BOROUGH OF POINT PLEASANT,
OCEAN COUNTY

Respondent.

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

Steven A. Pardes, Esquire, for respondent Board of Education (Sinn, Fitzsimmons, Cantoli, West & Pardes, attorneys)

Paul L. Kleinbaum, Esquire, for intervenor, Helen Phillips, (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Record Closed: February 18, 1992 Decided: March 12, 1992

BEFORE LILLARD E. LAW , ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Jeanne Sasse, who was subject to a reduction in force (RIF), avers that the action of the Board of Education of the Borough of Point Pleasant (Board) to retain the services of a teacher with less seniority than petitioner to perform teaching functions on a full-time basis, contravenes petitioner's tenure and seniority rights. Petitioner seeks, among other things, to be assigned to the controverted teaching position together with retroactive compensation for all salary and other benefits commencing with the 1990-91 school year, with interest. The Board denies petitioner's allegations and sets forth four affirmative defenses asserting, among other things, that: petitioner's Petition of Appeal is untimely and violates the provisions of *N.J.A.C.* 6:24-1.2; petitioner is not certified to teach the position she seeks; petitioner is guilty of laches; petitioner has never been employed by the Board under her certificate of teacher of data processing, therefore, petitioner has no seniority rights thereto.

The matter was transmitted 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.*

Intervenor Helen Phillips was granted the right to fully participate, as a party in interest, by way of an Order, dated May 14, 1991, pursuant to *N.J.A.C.* 1:1-16.1 *et. seq.*

The hearing was held on December 16, 1991, at the South Toms River Municipal Court. The parties requested and were granted leave to submit post hearing memoranda. The last submission was filed on February 18, 1992, which constitutes the close of the hearing record.

ISSUES

The issues to be resolved by this tribunal, and agreed upon by the parties, are these:

1. Whether petitioner's tenure and seniority rights were violated by the failure of the Board to employ her to a Computer Skills position at its Middle School?

2. Whether petitioner's Petition of Appeal is untimely filed and violates the provisions of *N.J.A.C.* 6:24-1.2?

3. Whether petitioner is certified to teach the position she seeks?

4. Whether petitioner is guilty of laches?

5. Whether petitioner has ever been employed by the Board in the capacity using her certificate as a teacher of data processing?

   a. If not, whether she has a legitimate claim of seniority rights to the position?

STIPULATED FACTS

The parties executed a Stipulation of Facts, with exhibits attached, which are included herein and made a part hereof, and are hereby adopted as **FINDINGS OF FACT** as follows:

The parties stipulate the following:

1. At all times relevant to the petition respondent Point Pleasant Board of Education operated a preschool handicapped Kindergarten through grade twelve public school district. Grades 7 and 8 at the Middle School are departmentalized.

2. The employment history of petitioner, Jeanne Sasse, is as follows:

   a. September 1, 1977 through June 30, 1978 served as a long term substitute for a secondary teacher of Business Education on approved leave (Mrs. Tylecki).

   b. September 1, 1978 through June 30, 1979 served as a long term substitute for a secondary teacher of Business Education on approved leave (Mrs. Bowes).

   c. March 1, 1980 through June 30, 1980 served as a long term substitute for a secondary teacher of Business Education on approved leave (Mrs. Bowes).

   d. September 1, 1980 through June 30, 1981 served as a long term substitute for a secondary teacher of Business Education (Mrs. Bowes).

   e. September 1, 1981 through June 30, 1988 served as a secondary teacher of Business Education.

   f. September 1, 1988 to October 10, 1988 served as a secondary teacher of Business Education.

g. October 11, 1988 to December 15, 1988 [petitioner] was on approved leave. She was paid through November 18, 1988 by using sick leave. The balance of her leave was unpaid.

h. December 16, 1988 to June 30, 1989 [petitioner] served as a secondary teacher of Business Education.

i. September 1, 1989 through this date, petitioner is on the district's preferred eligibility list. The Board of Education reduced the district's table of organization by one teacher on secondary Business Education beginning 1989-90 school year by its action at a meeting of April 13, 1989.

j. Petitioner was notified of the reduction in force affecting her employment by letter on April 14, 1989. Subsequently, by letter of June 1, 1989, petitioner was offered a part-time position as a secondary teacher of Business Education. She declined on July 21, 1989.

3. Intervenor, Helen Phillips, employment history in the District is as follows:

a. January 15, 1979 through June 30, 1979 served as a long term substitute for an elementary classroom teacher on approved leave (Mrs. Kiendel).

b. September 1, 1979 through March 3, 1980 served as an elementary classroom teacher, grade eight.

c. March 3, 1980 through May 16, 1980 was on an approved unpaid leave, returning to complete the 1980 school year.

d. September 1, 1980 through June 30, 1984 served as an elementary classroom teacher, grade eight.

e. September 1, 1984 through June 30, 1986 was on an approved unpaid leave. During the leave period intervenor was employed for two hours per day from February 1, 1985 through June 30, 1985.

f. September 1, 1986 through June 30, 1987 served as an elementary classroom teacher, grade eight.

g. September 1, 1987 through to the present served as an elementary teacher teaching computer literacy to students grades five through eight.

4. Jeanne Sasse was a tenured secondary teacher of Business Education holding the following certificates: Teacher of Bookkeeping and Accounting; Teacher of Secretarial Studies; Teacher of General Business Studies; Teacher of Data Processing; Teacher-Coordinator of Co-Op Vo-Tech Program; Business Education. Her seniority commenced on March 1, 1980.

5. Helen Phillips holds an Elementary School Teachers Certification. Petitioner Jeanne Sasse does not hold an Elementary School Teachers Certification.

6. The Point Pleasant School District does not maintain a traditional employment record card. Employment notations are kept on the front cover of each employee's personnel file. Attached hereto as Exhibit "A" is a copy of the employment notations from the front cover of the personnel file of Jeanne Sasse. Attached hereto as Exhibit "B" is a copy of the employment notations from the front cover of the personnel file of Helen Phillips.

7. Attached as Exhibit "C" is a list of all subjects taught by petitioner Jeanne Sasse during her years of employment with the Point Pleasant school system.

8. Helen Phillips' responsibilities include the teaching of a computer assisted learning computer laboratory. Attached as Exhibit "D" is a copy of the goals and content of such computer assisted learning computer laboratory.

9. Attached as Exhibit "E" are the employment contracts of Jeanne Sasse.

10. Attached as Exhibit "F" are the employment contracts of Helen Phillips.

11. Attached as Exhibit "G" is the Course of Study for Secretarial Office Practice.

12. Attached as Exhibit "H" is the Course of Study for Machine Transcription/Word Processing.

13. Attached as Exhibit "I" is the Course of Study for Office Education II.

FINDINGS OF FACT

Based upon the testimony and other evidence adduced at the hearing; and having given fair weight thereto, I **FIND** the additional **FACTS** in this matter:

14. Pursuant to Board Policy No. 6130, the Board has organized its schools, in part, as follows:

Elementary - Grades Kindergarten through five
Middle - Grades six through eight (elementary organization)
High - Grades nine through twelve

(R-3)

15. On or about July 1, 1987, Roy W. Feldman, Principal of the Board's Memorial Middle School, wrote a letter to Joseph E. Zach, Ocean County Superintendent of Schools, concerning the use of Intervenor Phillips in the Middle School Computer Program. (R-1)

16. On or about July 27, 1987, Ocean County Superintendent Zach addressed a letter to the Board's Superintendent of Schools, to acknowledge receipt of the letter from Principal Feldman and to advise the Board's Superintendent that the assignment of Intervenor Phillips to the Middle School Computer Program was approved. Superintendent Zach continued to state:

> ... Her [Phillips] New Jersey certification as an Elementary School Teacher, K-8, is the proper and correct certification for this job assignment. (R-2)

17. Petitioner was given notice of her RIF by way of letter dated April 14, 1989. Petitioner's Petition of Appeal before the Commissioner of Education (Commissioner) is dated November 5, 1990, and was received by the Commissioner on November 13, 1990.

TESTIMONIAL EVIDENCE

Petitioner testified, among other things, that after she had been advised of the abolishment of her teaching position and RIF in April 1989, she inquired of her school principal concerning the Computer Assisted Learning Computer Lab, (CALCL) position in the Board's Middle School held by Intervenor Phillips. Petitioner testified that Mr. Leo Baranowski, the High School Business Education Supervisor, also supervised Phillips' data processing course in the Middle School. Petitioner asserted that the high school principal told her "you did not understand these things" when petitioner inquired as to Phillips' seniority status. Petitioner did not appeal her RIF in April 1989, after receipt of the notice from the Superintendent of Schools; her discussion with her high school principal and representatives of the local teachers' association.

Petitioner testified that in or about July 1990, she received information from the president of her union that the computer program was still being offered at the Middle School and that petitioner should pursue litigation as a consequence of her

RIF. As set forth in the herein Findings of Fact, petitioner's appeal was filed before the Commissioner on November 13, 1990.

Superintendent George Kane testified, among other things, that the Board adopted Policy No. 6130 which organized its Middle School under an elementary school organization with grades 6 through 8. Grades 7 and 8 are semidepartmentalized and the teaching staff members possess elementary teaching certificates. Superintendent Kane asserted that Mr. Baranowksi did not supervise nor evaluate Ms. Phillips in the conduct of CALCL nor did he supervise or evaluate any Middle School teaching staff members. Nor was the Middle School CALCL program under the supervision of the High School. The Middle School principal was and is responsible for the supervision of the CALCL and the evaluation of Intervenor Phillips.

Intervenor Phillips testified about the CALCL program, among other things. There are 32 Apple computers in the laboratory for laboratory and classroom work. The program is organized to offer eight (8) fifth grade sections and eight (8) sixth grade sections where the basic use and care of computers is taught. There are seven (7) periods during the school day and Phillips teaches two of those periods. The seventh and eighth grade pupils have no specific computer course. Rather, the computer laboratory is used in conjunction with regular classroom instruction and activities; *i.e.,* reading, writing, mathematics, science, social studies, among others. Petitioner asserted that the regular classroom teacher is generally present when the pupils are engage in laboratory work. The pupils are assigned to the computer laboratory once every five weeks for every course taken.

ARGUMENTS OF THE PARTIES

I

The Timeliness of Petitioner's Petition of Appeal and Whether it Violated the Provisions of *N.J.A.C.* 6:24-1.2?

The following represents a summary of the legal arguments of the parties:

Respondent Board's Position

The Board relies upon and cites *N.J.A.C.* 6:24-1.2 (c) which provides that:

> 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.

The Board observes that the parties have stipulated the Board adopted a resolution on April 13, 1989 which abolished petitioner's teaching position thereby effectuating a RIF. The parties also stipulated that petitioner was advised by letter, dated April 14, 1989, of such RIF affecting petitioner's employment and her placement on a preferred eligible list in order of seniority for her reemployment. (J-1)

The Board observes that the Petition of Appeal in the instant matter is dated November 5, 1990, more than 18 months subsequent to the Board's resolution, which is the final action that is the gravamen of the petitioner's claim. Petitioner was given notice of the RIF on or about April 14, 1989. The herein Petition of Appeal was filed before the Commissioner more than 18 months subsequent to petitioner's receipt of said notice.

The Board further observes that the Commissioner has the authority to relax the rules in connection with the determination of controversies and disputes, pursuant to *N.J.A.C.* 6:24-1.15. It argues that the time bar for filing a petition should not be relaxed where the delay is so egregious as in the instant matter. The Board's research revealed few cases where the rule was waived subsequent to the State Board of Education having adopted the 90-day rule in 1976. Those cases cited by the Board, where a few post-rule cases survied lack of compliance, can readily be distinguished from the instant matter where petitioner herein filed her action almost 18 months after the official Board action and notice to petitioner and failed to explain her lack of compliance with *N.J.A.C.* 6:24-1.2.

The Board argues that time limitations for the assertion of claims, whether based on rule or statute, or whether based in equitable doctrines such as laches, serve salutary purposes which should not be regarded lightly. It cites the matter of *Flammia v. Maller,* 66 *N.J. Super.* 440 (1961), where the Appellate Court said:

> The rationale of the doctrine of laches is said to be the policy which requires, for the peace of society, the discouragement of stale demands. 19 *Am. Jur.,*

> *Equity,* §492, *p.* 340 (1939). It is the equitable counterpart of statutes of limitation. The adjudicated cases "proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned; and that, because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him now to assert them." *Galliher v. Cadwell,* 145 *U.S.* 368, 372, 12 *S. Ct.* 873, 36 *L. Ed.* 738 (1891)
>
> *Id.* at 453

The Board observes that the 90 day rule is based solely on chronological computation, regardless of any other factor, including the absence or presence of prejudice to opposing parties by reason of the delay. The authority of the Commissioner to waive the application of the rule, under *N.J.A.C.* 6:24-1.15, is a safety valve available to avert the harsh results that strict enforcement of a rule based exclusively on time elapsed might cause in some cases; *e.g., Shokey v. Board of Education of the Township of Cinnaminson,* 1978 *S.L.D.* 919, a mere 22 days past the filing deadline. In the instant matter, however, petitioner is guilty not only of late filing per the 90 day rule, but also of laches, since her delay has worked to the prejudice of the Board and Intervenor. In the case of *Borough of Park Ridge v. Salimone,* 36 *N.J. Super.* 485 (1955), aff'd 21 *N.J.* 28, the Appellate Bench observed, at 494-495, that:

> The courts have long recognized the need for prompt action by public employees in seeking judicial review of their discharge. The reason is obvious. It is important that public duties be carried on without interruption or with as little interruption as possible. A governing body must be allowed to fill the employment in the public service with all necessary dispatch free from unnecessary risk of double payment of wages. (citations omitted)

The Board requests, therefore, that the instant matter be dismissed for the failure by petitioner to comply with *N.J.A.C.* 6:24-1.2.

Intervenor's Position

Intervenor similarly argues, among other things, that the herein Petition should be dismissed grounded upon petitioner's failure to assert her claim in a timely manner under *N.J.A.C.* 6:24-1.2. Intervenor contends the instant matter is controlled

by the Supreme Court's decision in *North Plainfield Education Association v. North Plainfield Board of Education,* 96 *N.J.* 587 (1984), where it held that *N.J.A.C.* 6:24-1.2 applied to the denial of salary increments under *N.J.S.A.* 18A:29-11 and that the withholding did not constitute a continuing violation which would give rise to a new cause of action each year.

Intervenor observes that matters involving tenure and seniority rights are also subject to the 90 day rule. In the matter of *Gordon v. Passaic Township Board of Education,* 1985, *S.L.D.* 1929 (3/6/85), aff'd. (App. Div. Dkt. No. A-3294-84T7 (5/27/86) (unreported), aff'd. 105 *N.J.* 534 (1986), the Appellate Court held that the time limitations in *N.J.A.C.* 6:24-1.2 applied. In that case, the State Board held that tenure and seniority rights of teachers, like salary increments in *North Plainfield*, were predicated on the rendering of a teacher's services. 1985 *S.L.D.* at 1931. Accordingly, the State Board held that the statute of limitations in *N.J.A.C.* 6:24-1.2 applied to claims which alleged the violation of tenure or seniority rights. *Id.* The State Board also concluded that, consistent with case law, the 90 day rule is to be strictly applied and must be measured from the time when the cause of action accrued. *Id.*

In *Gordon,* the local board abolished petitioner's instrumental music position in April 1980. In December 1982, the petitioner became informally aware that the Board had created a new vocal/instrumental position. On May 17, 1983, more than four months after he became aware that the board had created a new position, petitioner filed his appeal with the Commissioner of Education asserting a violation of his tenure and seniority rights. The State Board held that petitioner's cause of action accrued in December 1982 when became informally aware that the board had created a new position. *Id.* at 1932. Because the petition was filed almost four months later, the State Board held that the petition must be dismissed and he was not entitled to retroactive or prospective relief. *Id.*

The Appellate Division affirmed the State Board of Education's decision (Slip op. at 4). The Court agreed with the reasoning of the State Board of Education that a reduction in force has a relationship to the services to be rendered by a teacher. The Court therefore agreed that the time limitations of the regulation applied. (Slip op. at 8).

It is Intervenor's position that petitioner's cause of action accrued in April 1989 when she was formally notified of the RIF. Because petitioner failed to comply with the time constraints in *N.J.A.C.* 6:24-1.2, her petition should be dismissed.

Petitioner's Position

Petitioner, among other things, sets forth three arguments that her claims are not time barred by *N.J.A.C.* 6:24-1.2. She contends: (1) that the 90 day rule was not properly promulgated by the State Board of Education; (2) that the 90 day limitation period is inapplicable to the statutory claims made by petitioner; and, (3) that her Petition of Appeal was timely filed.

First, petitioner argues extensively that statutes of limitations enacted by the State Legislature and related interpretive common law (no time was fixed for the bringing of an action) constitute the exclusive body of law which the Legislature intended to apply to petitioner's tenure rights and, therefore, notwithstanding the Legislature's delegation of any other powers to the State Board, the State Board is preempted from acting in the limitations area. Petitioner contends, among other things, that the promulgation of the 90 day rule by the State Board was unauthorized by the Legislature and, therefore, is *ultra vires.*

Second, petitioner argues that the 90 day limitations period is inapplicable to her asserted tenure/seniority rights. She observes that in *Lavin v. Hackensack Board of Education,* 90 *N.J.* 145 (1982), the Supreme Court held that the statute of limitations should not be applied to a statutory benefit. In *Lavin,* the Court held that "where the benefit is not directly related to the employment service, but is being awarded for a totally unrelated reason, the recipient is truly the beneficiary of a statutory entitlement quite apart from the employment as such." 90 *N.J.* at 150.

Petitioner observes that in *North Plainfield Education Association v. Board of Education, 96 N.J.* 587 (1984), the Supreme Court considered the statutory entitlement concept to determine whether the 90 day limitation would bar future statutory claims to credit on the (salary) scale for time spent on sabbatical. In *North Plainfield,* the Supreme Court distinguished its facts from those in *Lavin* by virtue of the fact that in *Lavin* the benefits accrued because of time spent in the military service without regard to performance as a teacher, whereas in *North Plainfield,* the benefit was subject to annual evaluation of teacher performance.

Petitioner cites *Polaha v. Buena Regional School District,* 212 *N.J. Super.* 628 (App. Div. 1986), where the Court found that case to be similar to *North Plainfield* and distinguishable from *Lavin,* by reasoning, among other things, that "the

rehiring decision necessary to confer tenure is undoubtedly carried out based on the evaluation of teacher performance, behavior and efficiency." 212 *N.J. Super* at 634.

Petitioner contends that in the instant matter, the Board has consistently averred that petitioner was terminated pursuant to a valid reduction in force. Clearly, for a reduction in force to be valid, it must be bereft of any motivation or consideration relating to a tenured employee's job performance. Similarly, a "Riffed" employee's rights to reinstatement is established by statute without any additional evaluation of his or her prior performance. Accordingly, a tenure employee's rights to reinstatement subsequent to a RIF is, in its purest sense, unrelated to teacher performance, behavior and efficiency. Thus, petitioner's tenure and seniority rights, in this context, constitute a statutory entitlement that is not subject to the time constraints set forth in *N.J.A.C.* 6:24-1.2 (b).

Third, petitioner contends that her Petition of Appeal should be determined to be timely filed and cites *N.J.A.C.* 6:24-1.15, Relaxing of Rules,, which states:

> The rules herein contained shall be considered general rules of practice to govern, expedite and effectuate the procedure before, and the actions of, the Commissioner in connection with the determination of controversies and disputes under the school laws. ***They may be relaxed or dispensed with by the Commissioner, in his or her discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.*** (emphasis supplied by petitioner)

Petitioner argues, given the above language, that each case should be evaluated on its merits before any conclusion is reached with regard to the issue of whether a Petition of Appeal is timely filed. Petitioner contends there are a series of factors that must be considered by this tribunal that mandate a conclusion that her Petition of Appeal, filed on November 5,1990, was timely in accordance with the appropriate administrative regulations. The factors to be considered, according to petitioner, are these:

One. In view of petitioner's reemployment rights under *N.J.S.A.* 18A:28-12, she is entitled to reemployment with the Board at any time a vacancy arises in a position for which she is properly certified.

Two. That Intervenor Phillips does not possess the appropriate endorsements to teach the computer skills course, and, therefore, is not qualified.

Three. Petitioner is qualified to teach the computer skills course at issue.

Four. Petitioner immediately made inquiry about the computer skills course upon receipt of her RIF Notice in April 1989. Based upon incorrect information to the Board received from the Ocean County Superintendent of Schools, petitioner was advised she had no claim to the position at issue. Therefore, the Board does not have "clean hands" because it misled petitioner and advised her she did not possess the appropriate certification or endorsements to teach the course at issue.

Five. There must be a balancing of the "equities" in applying the prescriptions of *N.J.A.C.* 6:24-1.2 (b) and *N.J.A.C.* 6:24-1.15 to the facts in this case and that the Board's and Intervenor's timeless contentions must be rejected.

Six. That the start of every new academic year concerned with petitioner's claim triggers a new 90 day period for the filing of a Petition of Appeal.

DISCUSSION AND CONCLUSION

The threshold issue to be determined is whether petitioner filed her Petition of Appeal before the Commissioner in a timely fashion. The Board and Intervenor contend she did not and rely upon the 90 day rule, pursuant to *N.J.A.C.* 6:24-1.2 (c) which provides that:

> 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, individual party, or agency, which is the subject of the requested contested case hearing.

The record is clear that the Board took official action to abolish petitioner's position at a duly constituted Board of Education meeting on April 13, 1989. Petitioner was subsequently advised of her RIF by way of letter dated April 14, 1989. The record is also clear that petitioner's Petition of Appeal is dated November 5, 1990, approximately 18 months subsequent to petitioner having been in "...receipt

of the notice of a final order, ruling or other action by the district board of education"... *N.J.A.C.* 6:24-1.2 (c).

Petitioner argues, among other things, that the State Board of Education's promulgation of *N.J.A.C.* 6:24-1.2, specifically subsection (c); commonly referred to as the 90 day rule, was unauthorized by the Legislature and, therefore, is *ultra vires.* I **FIND** and **CONCLUDE** that petitioner's arguments are without merit.

Chapter 24 of the Title 6 of the Administrative Code, "Controversies and Disputes" derives its authority from *N.J.S.A.* 18A:6-9, which provides that:

> The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and dispute arising under the school laws. ... or ***under the rules of the state board*** or of the commissioner.

N.J.S.A. 18A:4-15, provides the Legislative authority to the State Board to make and enforce rules. The statute states that:

> The State board shall make and enforce, and may alter and repeal, rules for its own government and for implementing and carrying out the school laws of this State under which it has jurisdiction.

In the matter of *Luba v. Newark Board of Education,* 23 *N.J.* 364 (1957), our Supreme Court said:

> *R.S.* 18:3-14 [now, *N.J.S.A.* 18A:6-9] provides that the State Commissioner shall decide all controversies and disputes under the School Laws; that the facts shall, if required by the Commissioner, be made known to him by the parties by written statements verified by oath; and that his decision shall be binding "until a decision thereon is given by the state board on appeal." While the statutory language leaves much to be desired it sufficiently evidences the legislative purpose to set up a comprehensive system of internal appeals with broad powers vested in the administrative tribunals to insure that controversies are justly disposed of in accordance with the School Laws. ***Absent specific***

> ***legislative direction, The administrative tribunals may mold their own procedures*** so long as they operate fairly and conform with due process principals. (citations omitted). (Emphasis supplied). *Id.* at 381-382.

Petitioner has failed to cite a "specific legislative direction" which supports her argument that the State Board's promulgation of the 90 day rule was done so without legislative authority. Too the contrary, the statute, *N.J.S.A.* 18A:4-15, clearly vests authority with the State Board to make and enforce rules consistent with the legislative purpose of *N.J.S.A* 18A:6-9. The Legislature has authorized jurisdiction to the Commissioner to hear and determine School Law matters. The State Board, on the other hand, is authorized to make and enforce rules and regulations in order for the Commissioner to carry out this jurisdictional duty. Consequently, the State Board promulgated Chapter 24 of Title 6 of the Administrative Code. Section 1.2 (c), the 90 day rule is just one part thereof.

The Commissioner and the courts have recognized the validity of *N.J.AC.* 6:24-1.2 (c). See *Board of Education Bernards Township vs. Bernards Township Education Association,* 79 *N.J.* 311 (1979); *Riely v. Hunterdon Central High Board of Education,* 173 *N.J. Super.* 109 (App. Div. 1980); *North Plainfield, supra; Gordon, supra; Mooreland v. Passaic Board of Education,* 3 *N.J.A.R.* 276 (November 26, 1980); *Scotch Plains Association v. Scotch Plains Board of Education,* 5 *N.J.A.R.* 175 (August 1, 1980). And, the 90 day rule has been applied in circumstances similar to the matter *sub judice.* In *Gordon, supra.,* the Passaic Township Board of Education abolished Gordon's position as teacher of instrumental music in April 1980 and he was then subject to a RIF. Gordon was certificated as "Teacher of Instrumental Music" and was eligible for the comprehensive certificate as a "Teacher of Music." However, he did not possess the latter certification. In December 1982, Gordon became aware that the Board created a new vocal/instrumental music position. Gordon was subsequently issued a "Teacher of Music" certificate on January 10, 1983. On or about May 17, 1983, more than four months after he became aware that the Board had created the new position, Gordon filed his Petition of Appeal with the Commissioner asserting a violation of his tenure and seniority rights.

After an OAL hearing, the administrative law judge recommended, which the Commissioner adopted, that Gordon's delay in instituting proceedings should only bar him from retroactive relief for the 1982-83 school year and that he be reinstated to the new position of "Teacher of Instrumental and Vocal Music." On appeal by the

Board, the State Board held that Gordon's cause of action accrued in December 1982, when he informally became aware that the Board had created the new position. The State Board, accordingly, reversed the Commissioner and held that Gordon's petition must be dismissed under *N.J.A.C.* 6:24-1.2 and that he was barred from both retroactive and prospective relief. Subsequently, the Appellate Division of Superior Court, in a *per curiam* opinion, affirmed the determination of the State Board substantially for the reasons stated in its decision of March 4, 1985.

In the instant matter, as in *Gordon,* a tenured teaching staff member, subsequent to a RIF, becomes aware of a teaching position to which she/he might be eligible to fill. Neither teacher immediately acts to make a claim for the position under *N.J.S.A* 18A:28-9 *et. seq.* and pursuant to *N.J.A.C.* 6:24-1.2 (c). Rather, there is a protracted delay in the filing of their respective Petition of Appeal (*Sasse*, 18 months; *Gordon* four months). As the Appellate Bench said in *Gordon:*

> There is no dispute that the petition was filed more than 90 days after petitioner learned of the hiring of someone to perform the work for which he claims entitlement and more than 90 days after the Township Board formally denied his application for appointment as teacher of vocal and instrumental music.
>
> We therefore hold that *N.J.A.C.* 6:24-1.2 is applicable in this case. We further conclude that the State Board did not act arbitrarily or unreasonably in declining to enlarge or relax the 90 day period embodied in the regulation. *See N.J.A.C.* 6:24-1.9. *See also Campbell v. Civil Service Department,* 39 *N.J.* 556, 562, (1963); *Dore v. Bedminister Township Board of Education,* 185 *N.J. Super.* 447, 453 (App. Div. 1982).

Based upon petitioner's failure to comply with the provisions of *N.J.A.C.* 6:24-1.2 (c), I **CONCLUDE** that her Petition of Appeal must be **DISMISSED**. *Gordon, supra; North Plainfield, supra.*

I **FURTHER CONCLUDE** that the beginning of each new academic year does not constitute a continuing violation of petitioner's claim to the controverted teaching position. *North Plainfield, supra;*

ORDER

Having arrived at this determination , I **CONCLUDE** it is unnecessary to address the remaining issues and the herein matter is hereby **DISMISSED WITH PREJUDICE.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

12 March 1992
Date

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

3/16/92
Date

Maureen R. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 19 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

DOCUMENTS IN EVIDENCE

STIPULATION OF FACTS WITH EXHIBITS "A" THROUGH "I"

PETITIONER:

P-1 Copy of a Certificate issued to the then Jeanne Noble. The endorsements include Teacher of Bookkeeping and Accounting; Teacher of Secretarial Studies; Teacher of General Business Studies; Teacher of Data Processing.

P-2 Copy of a Certificate issued to Jeanne Sasse for the position of Teacher Coordinator of Co-Op Vocational Education Programs; Business Education.

P-3 Copy of a document titled Endorsement Teacher of Bookkeeping and Accounting from the Regulations and Standards for Certification Book prepared by the State of New Jersey Department of Education.

P-4 Copy of a document titled Endorsement Teacher of Data Processing from the Regulations and Standards for Certification Book prepared by the State of New Jersey Department of Education.

P-5 Copy of a document titled Endorsement Teacher of General Business from the Regulations and Standards for Certification Book prepared by the State of New Jersey Department of Education.

P-6 Copy of a document titled Endorsement Teacher of Secretarial Studies from the Regulations and Standards for Certification Book prepared by the State of New Jersey Department of Education.

P-7 Copy of a document titled Endorsement Teacher Coordinator, Cooperative Vocational Technical Education Programs from the Regulations and Standards for Certification Book prepared by the State of New Jersey Department of Education.

P-8 Document listings subject taught by Jeanne Sasse during the course of her employment with the Point Pleasant Borough School District.

P-9 Copy of a portion of the Annual Performance Report for the then Jeanne Noble dated May 13, 1982.

P-10 A portion of an Observation Report prepared of the then Jeanne Noble dated December 21, 1982.

P-11 Copy of an Observation Report issued to Jeanne Sasse dated March 10, 1987.

P-12 Copy of an Observation Report issued to Jeanne Sasse dated February 1, 1988.

P-13 Copy of an Observation Report issued to Jeanne Sasse dated February 2, 1989.

P-14 Copy of a document entitled Assessing Pupil Progress and Growth (Worksheet) dated May 31, 1989.

P-15 Copy of a document, in part, referring to the curriculum of an Office Education I course.

P-16 Copy of a curriculum, in part, referring to the curriculum of an Office Education II course.

RESPONDENT:

R-1 Letter, July 1, 1987, to Joseph E. Zach from Roy W. Feldman.

R-2 Letter, July 27, 1987, to Dr. Lawrence DeBellis from Joseph E. Zach.

R-3 Policy No. 6130 School Organization.

INTERVENOR EXHIBITS

I-1 Certificate issued to Helen M. Rusch, Elementary School Teacher.

JOINT EXHIBITS

J-1 Letter, April 14, 1989, to Mrs. Jeanne Sasse from George H. Kane.

WITNESSES

PETITIONER:

JEANNE SASSE

RESPONDENT:

GEORGE KANE

INTERVENOR:

HELEN PHILLIPS

OAL DKT. NO. EDU 10365-90

JEANNE SASSE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and Intervenor Helen Phillips' reply were timely filed pursuant to N.J.A.C. 1:1-18.4. Reply exceptions by the Board were untimely filed and are not considered below.

In her exceptions, petitioner reiterates the arguments of her prior submissions, which are summarized by the ALJ in his initial decision and need not be restated herein. Petitioner further argues that notwithstanding his finding of untimeliness, the ALJ erred in not reaching to petitioner's statutory entitlement to the middle school computer assistant learning lab position, as sustaining petitioner's arguments on the point of proper endorsement for the position would necessarily entail removal of Intervenor Phillips, thus creating a vacancy to which petitioner would be entitled by operation of N.J.S.A. 18A:28-12. In reply, in addition to reiterating her contention that she is in any event properly

certified for her position, Intervenor Phillips endorses the ALJ's conclusion that the petition was untimely filed and that the rule barring its consideration on those grounds fully applies to tenure and seniority claims.

Upon careful consideration, the Commissioner affirms the recommendation of the ALJ for the reasons stated by him in his initial decision. It is clear that even granting every legitimate inference to petitioner as to when her cause of action arose, the petition was filed beyond the 90-day limitation period set by regulation. Moreover, no justification for relaxation was set forth beyond the claims, which the Commissioner deems to be entirely without merit, that petitioner's cause of action arose on the first day of the school year in which the contested appointment took effect, and that petitioner's legal position is so strong as to warrant relaxation on that basis alone.

The Commissioner further finds no merit to petitioner's contention that the ALJ should have gone on to reach her theoretical entitlement to the disputed position, as this would merely have been a "back-door" approach to litigating the very claim found to be barred as out of time. If a vacancy in middle school computer skills should again arise and the Board not appoint petitioner thereto, petitioner would be free to file a timely claim on the same grounds as the present claim; for purposes of challenging intervenor in her present appointment, however, petitioner has lost her opportunity through delay in asserting her rights.

Finally, the Commissioner notes that subsequent to the date of the initial decision in this matter, the Superior Court addressed virtually the same arguments on the 90-day rule as were raised by

petitioner herein and disposed of them in a way that comports entirely with the reasoning of the ALJ above. Maurice S. Kaprow v. Board of Education of Berkeley Township, decided by the Appellate Division March 25, 1992, A-3362-90T2

Accordingly, the initial decision of the office of Administrative Law dismissing the Petition of Appeal as untimely filed is affirmed for the reasons expressed therein.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 30, 1992

DATE OF MAILING - APRIL 30, 1992

---

* The Commissioner notes with reference to stipulation no. 4 at p. 4 of the initial decision, although not related to disposition of the within matter and apparently not disputed by the parties, that petitioner's seniority cannot have commenced on March 1, 1980, as service as a substitute does not count toward acquisition of tenure pursuant to N.J.S.A. 18A:16-1.1.

65-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF SAYREVILLE, MIDDLESEX COUNTY.	:	
_____	:	

APRIL 30, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH : DECISION
OF SAYREVILLE, MIDDLESEX COUNTY. :
:

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held on April 7, 1992 in the School District of the Borough of Sayreville, Middlesex County, were as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Elaine Kubacz	1,538	6	1,544
Harry Pachkowski	1,486	7	1,493
Alvah M. Cox Jr.	1,444	7	1,451
Evelyn A. Smith	1,440	6	1,446
Barbara Anderson (write-in)	1		1
Robert J. Saoaberg (write-in)	1		1

Pursuant to a letter request from Evelyn A. Smith dated April 10, 1992, an authorized representative of the Commissioner of Education from the Office of the Middlesex County Superintendent of Schools was directed to conduct a recount of the ballots cast for members of the Board. The recount was conducted on April 16, 1992 at the Voting Machine Warehouse, Edison, New Jersey.

At the conclusion of the recount, the tally stood as follows:

CANDIDATES	AT POLLS	ABSENTEE	TOTAL
Elaine Kubacz	1,538	6	1,544
Harry Pachkowski	1,486	7	1,493
Alvah M. Cox Jr.	1,444	7	1,451
Evelyn A. Smith	1,440	6	1,446
Barbara Anderson (write-in)	1		1
Robert J. Saoaberg (write-in)	1		1

There was no change in the announced results of the election. Absentee ballot counts were reported as provided by the Board of Education on the Regular/Combined Statement of Result of School Election.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts it as his own.

Accordingly, the Commissioner finds and determines that Alvah M. Cox, Elaine Kubacz and Harry Pachkowski were elected to full terms of three years each on the Board of Education of the School District of the Borough of Sayreville.

John Ellis
COMMISSIONER OF EDUCATION

APRIL 30, 1992

DATE OF MAILING - APRIL 30, 1992

66-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN-	:	DECISION
SHIP OF OLD BRIDGE, MIDDLESEX	:	
COUNTY.	:	
_____	:	

MAY 1, 1992

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for the Current Expense and the Capital Outlay Budgets of the Board of Education for the 1992-93 school year at the annual school election held April 7, 1992 in the School District of the Township of Old Bridge, Middlesex County, were as follows:

			AT POLLS	ABSENTEE	TOTAL
$44,882,082	Current Expense	For	1,381	16	1,397
	Current Expense	Against	1,422	12	1,434
$ 921,310	Capital Outlay	For	1,341	19	1,360
	Capital Outlay	Against	1,437	10	1,447

Pursuant to a letter request, dated April 16, 1992, from Board Secretary R. Gregory Quirk an authorized representative of the Commissioner of Education from the Office of the Middlesex County Superintendent of Schools was directed to conduct a recount of the ballots cast for the budget questions. The recount was conducted on April 20, 1992, at the Voting Machine Warehouse, Edison, New Jersey.

At the conclusion of the recount, the tally stood as follows:

			AT POLLS	ABSENTEE	TOTAL
$44,882,082	Current Expense	For	1,381	16	1,397
	Current Expense	Against	1,422	12	1,434
$ 921,310	Capital Outlay	For	1,341	19	1,360
	Capital Outlay	Against	1,437	10	1,447

There was no change in the announced results of the election. Absentee ballot counts were reported as provided by the Board of Education on the Regular/Combined Statement of Result of School Election.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts it as his own.

Accordingly, the Commissioner finds and determines that the Current Expense and Capital Outlay Budgets for the 1992-93 school year were defeated at the annual school election held on April 7, 1992 in the Township of Old Bridge.

COMMISSIONER OF EDUCATION

MAY 1, 1992

DATE OF MAILING - MAY 1, 1992

67-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
HACKENSACK, BERGEN COUNTY.	:	
	:	

MAY 1, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION
HACKENSACK, BERGEN COUNTY. :
:

The announced results of the balloting for the Current Expense proposition of the Board of Education at the annual school election held on April 7, 1992, were as follows:

CURRENT EXPENSE	AT POLLS	ABSENTEE	TOTAL
Yes	855	14	869
No	862	13	875

Pursuant to a letter from Mr. Peter Capone, dated April 14, 1992, the Commissioner of Education directed his representative from the Office of the Bergen County Superintendent of Schools to conduct a recheck of the votes cast on the voting machines for the Current Expense Proposition. This recheck was conducted on April 24, 1992, at the County Voting Machine Warehouse, Carlstadt, New Jersey.

At the conclusion of the recount, the tally of the votes cast on the voting machines was as follows:

CURRENT EXPENSE	AT POLLS	ABSENTEE	TOTAL
Yes	864	14	878
No	869	13	882

There was no request for a recount of the absentee ballots.

This concludes the report of the Commissioner's representative.

* * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings set forth above. Accordingly, the Commissioner finds and determines that the Current Expense question submitted by the Board at the annual school election held on April 7, 1992 was not approved by the voters.

COMMISSIONER OF EDUCATION

MAY 1, 1991

DATE OF MAILING - MAY 1, 1992

68-92

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

MAY 1, 1992

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held April 7, 1992 in the School District of the Township of Old Bridge, Middlesex County, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
David Nash	1,341	10	1,351
Susan P. Kaplan	1,221	9	1,230
Michael Hegarty	1,173	12	1,185
Brian J. Keenan	1,125	6	1,131
Joseph Criscuolo	1,071	6	1,077
Frank R. Weber	1,050	7	1,057
Edna Gordon	1,045	2	1,047
Ronald Condon	838	2	840
Barbara A. York	438	10	448
Lynne M. Weiss	364	6	370

Pursuant to a letter request from Joseph Criscuolo dated April 14, 1992 and Brian J. Keenan dated April 9, 1992, an authorized representative of the Commissioner of Education from the Office of the Middlesex County Superintendent of Schools was directed to conduct a recount of the ballots cast. The recount was conducted on April 16, 1992 at the Voting Machine Warehouse, Edison, New Jersey.

At the conclusion of the voting machine recount by the County Superintendent of Schools, there was no change in the vote reported by the Board Secretary on the Regular/Combined Statement of Result of School Election.

The absentee ballot counts were reported as provided by the Board of Education on the Regular/Combined Statement of Result of School Election.

The tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
David Nash	1,341	10	1,351
Susan P. Kaplan	1,221	9	1,230
Michael Hegarty	1,173	12	1,185
Brian J. Keenan	1,125	6	1,131
Joseph Criscuolo	1,071	6	1,077
Frank R. Weber	1,050	7	1,057
Edna Gordon	1,045	2	1,047
Ronald Condon	838	2	840
Barbara A. York	438	10	448
Lynne M. Weiss	364	6	370

This concludes the report of the Commissioner's representative.

* * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings set forth above.

Accordingly, the Commissioner finds and determines that Michael Hegarty, Susan P. Kaplan and David Nash were elected to full terms of three years each on the Board of Education of the School District of the Township of Old Bridge.

COMMISSIONER OF EDUCATION

MAY 1, 1992

DATE OF MAILING - MAY 1, 1992

69-92

JOSEPH DILISI AND PATRICIA DILISI,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PITMAN, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MAY 1, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9025-91
AGENCY DKT. NO. 330-8/91

JOSEPH DILISI AND
PATRICIA DILISI,
Petitioners,
v.
BOARD OF EDUCATION OF
BOROUGH OF PITMAN,
GLOUCESTER COUNTY,
Respondent.

B. Michael Borelli, Esq., for petitioners

Samuel H. Bullock, Esq., for respondent

Record Closed: March 19, 1992 Decided: March 20, 1992

BEFORE **NAOMI DOWER-LABASTILLE,** ALJ:

Petitioners disputed the Board's determination that their children were no longer domiciled in Pitman.

This matter was transmitted to the Office of Administrative Law on September 24, 1991 for a hearing pursuant to *N.J.S.A.* 52:14B-1 *et seq.*, and *N.J.S.A.* 52:14F-1 *et seq.*

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings by concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 20, 1992
Date

Naomi Dower LaBastille
NAOMI DOWER-LABASTILLE, ALJ

Receipt Acknowledged:

3/24/92
Date

Maureen R. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 27 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

/cae

B. MICHAEL BORELLI, ESQUIRE
40 N. Woodbury-Glassboro Road
Pitman, New Jersey 08071 (609)582-8288
Attorney for Petitioners

MAR 23 11 34 AM '92

DR. JOSEPH DILISI AND PATRICIA DILISI Petitioners, vs. BOARD OF EDUCATION OF THE BOROUGH OF PITMAN Respondent	Before the Commissioner of Education of the State of N.J. Case No. 330-8/91 **STIPULATION OF DISMISSAL**

The matter in difference in the above-entitled action, having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed without costs against either party.

The matter has been resolved, based upon the current state of the law and the answers to interrogatories exchanged between the parties. On that basis, the Respondent, the Board of Education of the Borough of Pitman, will return to the Petitioners, Dr. Joseph and Patricia DiLisi, the sum of $3,000.00, which has been held in escrow, plus interest which may have accrued thereon.

This Stipulation of Dismissal is with prejudice with regard to the issue of payment of tuition through the date this Stipulation is signed, and without prejudice to either party's rights after such date.

Dated: February 28, 1992

B. MICHAEL BORELLI, ESQUIRE
Attorney for Petitioners

SAMUEL H. BULLOCK, ESQUIRE
Attorney for Respondent

OAL DKT. NO. EDU 9025-91

JOSEPH DILISI AND PATRICIA DILISI,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PITMAN, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter.

In the absence of the interrogatories or case law cited in the terms of the settlement appearing in the file in this matter, in approving this settlement, the Commissioner makes no comment on the merits of petitioners' claim of entitlement to a free public education for their children in respondent's district.

Accordingly, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

MAY 1, 1992

COMMISSIONER OF EDUCATION

DATE OF MAILING - MAY 1, 1992

70-92

ARTHUR PAGE AND PASQUALE MAFFEI,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MAY 4, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6872-90
AGENCY DKT. NO. 231-7/90

ARTHUR PAGE AND PASQUALE MAFFEI,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,
Respondent.

Robert M. Schwartz, Esq., for petitioners

Jacob Green, Esq., for respondent (Green and Dzwilewski, attorneys)

Record Closed: March 25, 1992 Decided: March 25, 1992

BEFORE **STEVEN C. REBACK**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 29, 1990, 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 agreed to a settlement and have prepared a settlement agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

3/25/92
Date

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

3/27/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 01 1992
Date

OFFICE OF ADMINISTRATIVE LAW

rmp

SETTLEMENT AGREEMENT

THIS AGREEMENT, made on this 19th day of March, 1992 by and between Dr. Arthur Page ("Page"), Dr. Pasquale Maffei ("Maffei"), and the Board of Education of the City of Trenton ("the Board"):

WITNESSETH:

Whereas, the parties have been engaged in certain litigation involving claims by Page and Maffei arising out of their employment with the Board and they now desire to terminate and fully resolve all pending litigation among them; and

Whereas, the parties are satisfied that the terms hereof are fair to all concerned.

NOW THEREFORE,

In consideration of the promises and mutual covenants herein contained and for other good and valuable consideration, the sufficiency of which is hereby acknowledged by each of the parties hereto, it is agreed as follows:

1. Upon approval of this Agreement by the Board, appropriate Stipulations of Dismissal will be filed causing the dismissal, with prejudice and without costs, of the following pending matters:

   Arthur Page and Pasquale Maffei v. Board of Education of the City of Trenton, OAL Docket No. EDU 06872-90S, Agency Reference No. 231-7/90;

   Arthur Page v. Board of Education of the City of Trenton and Barbara Anderson, Mercer County Superintendent of Schools, Superior Court of New Jersey, Appellate Division, Docket No. A-922-91T3.

2. The annual salaries of Page for the 1989-90 and 1990-91 fiscal school years will be

adjusted to the following amounts, inclusive of base salary, longevity and doctoral stipend:

1989-90 Total Annual Salary of $83,543

1990-91 Total Annual Salary of $93,178

Page shall receive the salary increase of five (5%) per cent granted to confidential administrators for the 1991-92 fiscal school year, so that his Total Annual Salary as of July 1, 1991 shall become $97,664, inclusive of base salary, longevity and doctoral stipend.

3. The Total Annual Salary of Maffei for the 1990-91 fiscal school year will be adjusted to be $92,741, inclusive of base salary, longevity and doctoral stipend. Maffei shall receive the salary increase of five (5%) per cent granted to confidential administrators for the 1991-92 fiscal school year, so that his Total Annual Salary as of July 1, 1991 shall become $97,146, inclusive of base salary, longevity and doctoral stipend. In addition, Maffei shall be paid the sum of six thousand ($6,000.00), as additional consideration for the settlement of his claims in the matter in which he is a party, which sum is not includable as part of his salary base.

4. In consideration of the within settlement, Page and Maffei have submitted to the Board individual letters of retirement as of the close of the June 30, 1992 school day, which letters are deemed to be notice by them of their resignation from employment in the Trenton School District as of the close of the June 30, 1992 school day. Said retirements/resignations shall be deemed binding and irrevocable upon their acceptance by the Board and upon the Board's approval of the provisions of this Agreement.

5. The Board will make the salary adjustments in Sections 2. and 3. and the lump sum payment in Section 3. within thirty (30) days from the date of the filing of the Stipulations of Dismissals in the matters referred to in Section 1. of this Agreement. Approval by the

Board of this Agreement shall be deemed approval of a Salary Resolution by the Board adopting the salaries specified in this Agreement, subject to the filing of the referred-to Stipulations of Dismissal.

6. Page and Maffei shall execute and deliver to their Counsel, Robert M. Schwartz, Esq., for delivery to the Board's Special Counsel, Green & Dzwilewski, P.A., a duly executed and acknowledged General Release releasing the Board and its members from liability as to all matters, including all acts by the Board or any member, employee, or agent of the Board, relating to the employment or retirement/resignation from employment of Page or Maffei, in form and content acceptable to the Board's Special Counsel. The General Release will be delivered to the Board's Special Counsel upon the Board's performance of its obligations under Paragraphs 2. and 3. of this Agreement.

7. This Agreement is controlled by the laws of the State of New Jersey, and is binding upon the parties' heirs, assigns and successors.

WITNESS:

Elaine Adams Smith
Notary

ELAINE ADAMS SMITH
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires May 21, 1995

Arthur Page
DR. ARTHUR PAGE

Pasquale Maffei
DR. PASQUALE MAFFEI

BOARD OF EDUCATION OF THE
CITY OF TRENTON

By: Juanita Joyner

OAL DKT. NO. EDU 6872-90

ARTHUR PAGE AND PASQUALE MAFFEI, PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, RESPONDENT.	:	DECISION

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The Commissioner notes, however, that effectuation of the agreement appears to have been contingent on the Board's approval (see Stipulations 1 and 5) rather than on the Commissioner's. The Commissioner therefore reminds the parties that effectuation should properly have awaited the Commissioner's approval of the settlement terms.

That approval having now been given, this matter is hereby dismissed, subject to compliance with the terms of the settlement.

MAY 4, 1992

COMMISSIONER OF EDUCATION

DATE OF MAILING - MAY 4, 1992

71-92

SHARON VENEZIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent alleged her daughter was subjected to harassment at school and on the school bus which resulted in her daughter becoming extremely upset and physically ill. Parent withdrew her daughter for a period of time from school demanding that school officials send her daughter's books home in order to keep up with the work and requiring the Board to provide appropriate environment in the Board's or some other school district.

Initial decision concluded that the Board was responsible for providing petitioner's daughter with an appropriate education and environment. ALJ granted petitioner's demand for appropriate environment in school and the Board's demand for the daughter's continued attendance in school.

Commissioner adopted the recommended orders of the ALJ stated in initial decision. The Commissioner noted that if circumstances change and either side seeks to vacate the orders, a new petition of appeal must be filed. Petition was dismissed.

MAY 4, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10905-91
AGENCY DKT. NO. 395-10/91

SHARON VENEZIA,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN,
Respondent-Counterclaimant.

Sharon Venezia, petitioner, pro se

Peter Shebell, Esq., for the Board of Education of the Township of Ocean (Shebell & Schibell, attorneys)

Record Closed: March 11, 1992 Decided: March 17, 1992

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

The petitioner and her ten-year-old daughter reside in Ocean Township, where the respondent Board of Education operates the public school system.

The petitioner alleges that, on the Board's school buses and in the Board's schools, other students subjected her daughter to harassment such that her daughter became "extremely upset and physically ill." The petitioner then withdrew her daughter from school for a period of time and demanded orders (1) requiring the school officials to send her daughter's books home "so she can keep up with her work" and (2) requiring the Board to provide an "appropriate" environment in the Board's or "some other school district."

The Board (which sent the books to the petitioner during the period when she was keeping her daughter at home) submits that, since the parties have complied with my decision and orders for emergent relief entered on December 10, 1991, the petitioner's daughter has not experienced the alleged harassment. The Board also counterclaims for an order requiring the petitioner to continue her daughter's attendance in school and to cooperate with its (the Board's) efforts to assure her safety.

PROCEDURAL HISTORY

On or about October 24, 1991, the petitioner's petition was filed with the Commissioner of Education; on November 8, 1991, the Board's answer and counterclaim were so filed; and on December 3, 1991, the petitioner's "response" to the counterclaim was filed. See N.J.S.A. 18A:6-9 and N.J.A.C. 6:24-1.1 et seq. The Commissioner forwarded the matter to the Office of Administrative Law ("OAL") where, on December 4, 1991, it was filed as a contested case. See N.J.S.A. 52:14B-1 et seq.; N.J.S.A. 52:14F-1 et seq.; and N.J.A.C. 1:1-3.1. The parties' papers were treated as motions for emergent relief which were heard on December 10, 1991, and, on that day, I entered a decision in that regard wherein I (1) dismissed (as moot) the petitioner's demand for her daughter's books; (2) granted the petitioner's demand for an "appropriate" environment, with monitoring, etc., to assure the safety, etc., of petitioner's daughter; and (3) granted the Board's demand for an order requiring the return of petitioner's daughter to school. The parties complied with my order, which was affirmed by the Commissioner of Education in a January 10, 1992, written decision, and on March 11, 1992, a plenary hearing was held in the case.

FINDINGS OF FACT

Based upon the testimony of the witnesses, whose credibility I have evaluated, and the exhibits indicated, the following are assumed as **FACTS** for purposes of this decision:

The petitioner and her ten-year-old daughter reside in Ocean Township, Monmouth County, New Jersey.

Beginning in May 1991, in the petitioner's former apartment complex, a number of juveniles who are students in the Board's school system subjected the

petitioner and her daughter to hateful and obscene name-calling and gestures, as well as other disturbing conduct. See P-1, P-2 and P-3.

Before September 1991, when the petitioner's daughter was scheduled to begin attending the Board's intermediate school, the petitioner discussed with William Galatro, assistant principal of that school, her fear for her daughter's safety and the need for protection for her daughter.

Despite the petitioner's request for intervention by Mr. Galatro and Robert J. Mahon, superintendent of the Board's school system, during September 1991 the petitioner's daughter suffered further abuse by the same juveniles on the Board's school bus, when changing classes and in the lunch area.

By early October 1991, the petitioner's daughter was so distraught that she became physically ill and felt she could no longer take the bus to school.

During October, November and December 1991, the petitioner allowed her daughter to remain at home and the Board complied with the petitioner's request that it send to petitioner her daughter's school books, so that she could attempt to keep up with her schoolwork. The petitioner did not allege that an education equivalent to that provided in class could be provided at home.

As noted in the "procedural history," on December 10, 1991, the case was heard relative to the parties' motions for emergency relief; the petitioner named certain juveniles who have subjected the petitioner and her daughter to name-calling and other harassment; and I entered orders requiring that the Board monitor the the situation to assure the safety, etc., of petitioner's child. Thereafter, the petitioner returned her child to school and the parties complied with the emergency orders and it has not been shown by sufficient competent and credible evidence that after December 10, 1991, during times when the Board was responsible for her safety, the petitioner's child has suffered any further harassment. See N.J.S.A. 52:14B-10(c) and N.J.A.C. 1:1-15.5(b).

LEGAL DISCUSSION AND CONCLUSIONS

Consistent with N.J. Const. (1947), Art. VIII, § IV, par. 1, every parent having custody and control of a child between the ages of 6 and 16 years shall cause such child regularly to attend the public schools of the district or a day school in which

there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments or to receive equivalent instruction elsewhere than at school. See N.J.S.A. 18A:38-25. See also N.J.S.A. 18A:38-26.

Reasonably, however, this parental duty is conditioned on the safety of the child while traveling on a public school bus and while in school. Cf. Everson v. Bd. of Ed. of Ewing Twp., 133 N.J.L. 350, 355 (E. & A. 1945), aff'd, 330 U.S. 1 (1946), where three exceptions to the compulsory education statutes are described: physical disability of the child, mental disability of the child and adequate private teaching.

In this case, a remedy must be ordered which provides the petitioner's daughter with an appropriate education, while continuing to protect her from the above-noted harassment.

Given the above facts and law, I **FIND** and **CONCLUDE** that I must grant both petitioner's demand for an "appropriate" environment in school and the Board's demand for an order requiring the petitioner's daughter's continued attendance in school.

ORDERS

Consistent with the above findings and conclusions, I **ORDER** the following:

1. The Board will pick up and transport the petitioner's daughter to and from school in a motor vehicle other than a motor vehicle used to pick up and transport those students in the Board's school system who were previously named as having subjected the petitioner and her daughter to name-calling, etc., (or the petitioner may transport her daughter to school in her motor vehicle).

2. Superintendent Mahon will designate a specific teacher or teacher's aide who will be advised of the names and identities of those students alleged to have harassed the petitioner's daughter; who will observe the petitioner's daughter when she arrives at school and travels to her class, when she changes classes and during lunch period; who will confer with the petitioner's daughter at the close of each school day to confirm whether the petitioner's daughter alleges any harassment during that day; who will observe the petitioner's daughter as she travels to the bus

to go home from school; and who will keep records and report to Superintendent Mahon relative to any harassment alleged or observed.

3. Superintendent Mahon will investigate and take appropriate disciplinary action against any student who has engaged in harassment of the petitioner's daughter.

4. The petitioner will continue her daughter's attendance in the Ocean Township public school system, consistent with the above safeguards.

Also, consistent with the above, I **ORDER** the following:

(1) The petitioner's demand for her daughter's books is **DISMISSED** as moot.

(2) The petitioner's demand for an "appropriate" environment in the Board's school system is **GRANTED** as provided above.

(3) The Board's demand for an order requiring the return of petitioner's daughter to school is **GRANTED** as provided above.

Upon the motion of either party, upon a showing of changed circumstances other good cause, these orders may be vacated.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

3/17/92
Date

John R. Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

3/18/92
Date

Maureen R. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 23 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

jz

EXHIBITS

For petitioner:

P-1 Photograph (showing an egg thrown against the window of the petitioner's former apartment)

P-2 Photograph (showing an egg thrown against the window of the petitioner's former apartment)

P-3 Photograph (of juveniles gesturing, etc., outside the door of the petitioner's former apartment)

OAL DKT. NO. EDU 10905-91

SHARON VENEZIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, OCEAN 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, the Commissioner adopts the recommended orders of the ALJ for the reasons stated by him in his initial decision, these orders being both responsive to the demands of applicable law and fully dispositive of the within controversy so long as the parties continue to abide by them. In so finding, the Commissioner notes that if circumstances change and either side seeks to vacate the orders directed herein, a new petition of appeal shall be filed.

Accordingly, for the reasons expressed by the Office of Administration in its initial decision dated March 17, 1992, the instant Petition of Appeal is dismissed, with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 4, 1992

DATE OF MAILING - MAY 4, 1992

72-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
HARRISON TOWNSHIP SCHOOL	:	DECISION
DISTRICT, GLOUCESTER COUNTY.	:	
	:	

MAY 5, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
HARRISON TOWNSHIP SCHOOL : DECISION
DISTRICT, GLOUCESTER COUNTY. :
:

The announced results of the balloting for one member of the Board of Education for a one-year unexpired term at the annual school election held April 7, 1992, in the school district of Harrison Township were as follows:

ONE-YEAR TERM	AT POLLS	ABSENTEE	TOTAL
Cheryl A. Muller	191		191
C. Douglas Morgan	187	3	190
Robert L. Kiliany	162	1	163

Pursuant to a letter request from C. Douglas Morgan, dated April 9, 1992, the Commissioner of Education directed his authorized representative to conduct a recount. The recount was held on April 23, 1992 at 2 p.m. in the Gloucester County Office of Education.

The results of the recount were as follows:

ONE-YEAR TERM	AT POLLS	ABSENTEE	TOTAL
Cheryl A. Muller	191		191
C. Douglas Morgan	187	3	190

There were no questioned ballots.

This concludes the report of the Commissioner's representative.

* * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings set forth above. The Commissioner finds that Cheryl A. Muller was elected to fill a one-year unexpired term at the annual school election on the Board of Education of the School District of the Township of Harrison, Gloucester County.

COMMISSIONER OF EDUCATION

MAY 5, 1992

DATE OF MAILING - MAY 5, 1992

73-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
WILDWOOD, CAPE MAY COUNTY.	:	
	:	

MAY 5, 1992

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE CITY OF WILDWOOD, CAPE MAY COUNTY.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for the Current Expense School Budget question submitted by the Board of Education of the City of Wildwood at the annual school election held on April 7, 1992 were as follows:

PUBLIC QUESTION	AT POLLS	ABSENTEE	TOTAL
Yes	119	6	125
No	124	2	126

Pursuant to a letter request from the Board of Education filed on April 8, 1992, the Commissioner directed his representative from the Office of the Cape May County Superintendent of Schools to conduct a recount of the ballots cast on the voting machines for the Current Expense budget question. The recount was conducted on April 20, 1992 at the Cape May County Airport, Building #5. The recount was conducted by Rudy Hall and Gerald Thornton, members of the Cape May County Board of Elections. Also in attendance were Nancy Simpkins and Patricia Werner, Board of Elections registrars, Robert L. Kiliany, Office of the Cape May County Superintendent of Schools, Arthur Motz, Wildwood Superintendent of Schools and Guy Jensen, Wildwood Board Secretary.

At the conclusion of the recount, the tally stood as follows:

PUBLIC QUESTION	AT POLLS	ABSENTEE	TOTAL
Yes	119	6	125
No	124	2	126

The outcome of the election remained unchanged.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings set forth above.

Accordingly, the Commissioner finds and determines that the Current Expense Budget question submitted by the Board at the annual school election held on April 7, 1992 was not approved by the voters.

COMMISSIONER OF EDUCATION

MAY 5, 1992

DATE OF MAILING - MAY 5, 1992

74-92

74-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF RIVER EDGE, BERGEN COUNTY.	:	
	:	

MAY 5, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH : DECISION
OF RIVER EDGE, BERGEN COUNTY. :
:

The announced results of the balloting for the Current Expense proposition of the Board of Education at the annual school election held on April 7, 1992, were as follows:

CURRENT EXPENSE	AT POLLS	ABSENTEE	TOTAL
Yes	537	5	542
No	547	5	552

Pursuant to a letter dated April 8, 1992, from Mrs. Sheli Dansky, Board President on behalf of the Board, the Commissioner of Education directed his representative from the Office of the Bergen County Superintendent of Schools to conduct a recheck of the votes cast on the voting machines for the Current Expense proposition. This recheck was conducted on April 21, 1992, at the County Voting Machine Warehouse, Carlstadt, New Jersey.

The results of the recount were as follows:

CURRENT EXPENSE	AT POLLS	ABSENTEE	TOTAL
Yes	537	5	542
No	547	5	552

At the conclusion of the recount, the tally of the votes cast on the voting machines remained unchanged.

There was no request for a recount of the absentee ballots.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings set forth above.

Accordingly, the Commissioner finds and determines that the Current Expense question submitted by the Board at the annual school election held on April 7, 1992 was not approved by the voters.

COMMISSIONER OF EDUCATION

MAY 5, 1992

DATE OF MAILING - MAY 5, 1992

75-92

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE CLEARVIEW REGIONAL HIGH SCHOOL DISTRICT, CONSTITUENT DISTRICT OF MANTUA TOWNSHIP, GLOUCESTER COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

MAY 5, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE :
CLEARVIEW REGIONAL HIGH SCHOOL : COMMISSIONER OF EDUCATION
DISTRICT, CONSTITUENT DISTRICT OF : DECISION
MANTUA TOWNSHIP, GLOUCESTER :
COUNTY. :
:

The announced results of the balloting for two members of the Board of Education for full three-year terms at the annual school election held April 7, 1992, in the school district of Clearview Regional High School from the constituent district of Mantua Township were as follows:

THREE-YEAR TERM	AT POLLS	ABSENTEE	TOTAL
Raymond A. Daminger	299	6	305
Sharon Perpetuino	252	3	255
Lorraine Beckett	239	4	243

Pursuant to a letter request from Lorraine Beckett dated April 10, 1992, the Commissioner of Education directed his authorized representative to conduct a recount. The recount was held on April 22, 1992 at 3:00 p.m. in the Gloucester County Office of Education.

The results of the recount were as follows:

THREE-YEAR TERM	AT POLLS	ABSENTEE	TOTAL
Raymond A. Daminger	298	6	304
Sharon Perpetuino	252	3	255
Lorraine Beckett	238	4	242

One ballot was questioned. However, the disposition of the ballot will not change the outcome. Raymond A. Daminger and Sharon Perpetuino received the highest number of votes at the election and at the recount.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings set forth above.

Accordingly, the Commissioner finds and determines that Raymond A. Daminger and Sharon Perpetuino were elected to serve as members of the Board of Education Clearview Regional High School District, constituent district of Mantua Township for full three-year terms at the annual school election held on April 7, 1992.

COMMISSIONER OF EDUCATION

MAY 5, 1992

DATE OF MAILING - MAY 5, 1992

76-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF WILDWOOD CREST, CAPE MAY	:	
COUNTY.	:	
_____	:	

MAY 5, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH : DECISION
OF WILDWOOD CREST, CAPE MAY :
COUNTY. :
:

The announced results of the balloting for the public question concerning the construction of an addition to the Crest Memorial School submitted by the Board of Education of the Borough of Wildwood Crest at the annual school election held on April 7, 1992 were as follows:

PUBLIC QUESTION	AT POLLS	ABSENTEE	TOTAL
Yes	183	2	185
No	186	4	190

Pursuant to a letter request from the Board of Education filed on April 9, 1992, the Commissioner directed his representative from the Office of the Cape May County Superintendent of Schools to conduct a recount of the ballots cast on the voting machines for the public question. The recount was conducted on April 20, 1992 at the Cape May County Airport, Building #5. The recount was conducted by Rudy Hall and Gerald Thornton, members of the Cape May County Board of Elections. Also in attendance were Nancy Simpkins and Patricia Werner, Board of Elections registrars, Robert L. Kiliany, Office of the Cape May County Superintendent of Schools, and Dennis J. Anderson, Wildwood Crest Superintendent of Schools.

At the conclusion of the recount, the tally stood as follows:

PUBLIC QUESTION	AT POLLS	ABSENTEE	TOTAL
Yes	183	2	185
No	186	4	190

The outcome of the election remained unchanged.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings set forth above.

Accordingly, the Commissioner finds and determines that the public question concerning the construction of an addition to the Crest Memorial School submitted by the Board at the annual school election held on April 7, 1992 was not approved by the voters.

John Ellis
COMMISSIONER OF EDUCATION

MAY 5, 1992

DATE OF MAILING - MAY 5, 1992

77-92

77-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ASBURY PARK, MONMOUTH COUNTY.	:	
	:	

MAY 5, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION
ASBURY PARK, MONMOUTH COUNTY. :
:

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held April 7, 1992 in the School District of the City of Asbury Park, Monmouth County were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Joyce S. Cooke	563	98	661
Anthony G. Salerno	448	90	538
Ralph Apicelli	440	91	531
Edrine Carney	485	43	528
Susan Maynard	450	39	489
Bruce Donaldson	371	36	407

Pursuant to a letter request from Ms. Susan Maynard and Ms. Edrine Carney dated April 20, 1992, an authorized representative of the Commissioner of Education from the Office of the Monmouth County Superintendent of Schools was directed to conduct a recount of the ballots cast. The recount was conducted on April 27, 1992, at the Voter Machine Warehouse, 300 Halls Mills Road, Freehold, New Jersey.

At the conclusion of the recount conducted by the Commissioner's representative, the tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Joyce S. Cooke	563	98	661
Anthony G. Salerno	458	90	548
Ralph Apicelli	450	91	541
Edrine Carney	485	43	528
Susan Maynard	450	39	489
Bruce Donaldson	371	36	407

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the finding set forth above that there was no change in the announced results of the election.

The Commissioner finds and determines that Joyce S. Cooke, Anthony G. Salerno and Ralph Apicelli were elected to full terms of three years each on the Board of Education of the School District of the City of Asbury Park.

COMMISSIONER OF EDUCATION

MAY 5, 1992

DATE OF MAILING - MAY 5, 1992

78-92

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT, CONSTITUENT DISTRICT OF MANALAPAN TOWNSHIP, MONMOUTH COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

MAY 5, 1992

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT, CONSTITUENT DISTRICT OF MANALAPAN TOWNSHIP, MONMOUTH COUNTY.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for three members of the Board of Education, constituent district of Manalapan Township for full terms of three years each at the annual school election held April 7, 1992 in the Manalapan-Englishtown Regional School District, Monmouth County were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Alan Resnick	1,292	54	1,346
Maryanne Toto	1,120	13	1,133
Ellen Fischer	987	37	1,024
Lucille Benedetti	981	16	997
Steven Cohen	882	40	922
Gloria Close	863	13	876
Kenneth Portnoy	737	42	779
Mary Ann Robinson	578	7	585

Pursuant to a letter request from Ms. Lucille Benedetti dated April 13, 1992, an authorized representative of the Commissioner of Education from the Office of the Monmouth County Superintendent of Schools was directed to conduct a recount of the ballots cast in Election Districts 10, 11, 15 and 16 located at the Covered Bridge Clubhouse polling place. The recount was conducted

on April 27, 1992, at the Voter Machine Warehouse, 300 Halls Mills Road, Freehold, New Jersey.

At the conclusion of the recount, the tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Alan Resnick	1,292	54	1,346
Maryanne Toto	1,120	13	1,133
Ellen Fischer	987	37	1,024
Lucille Benedetti	981	16	997
Steven Cohen	882	40	922
Gloria Close	863	13	876
Kenneth Portnoy	737	42	779
Mary Ann Robinson	578	7	585

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the finding set forth above that there was no change in the announced results of the election.

The Commissioner finds and determines that Allan Resnick, Maryanne Toto and Ellen Fischer were elected to full terms of three years each on the Board of Education of the Manalapan-Englishtown Regional School District in the constituent district of Manalapan Township.

COMMISSIONER OF EDUCATION

MAY 5, 1992

DATE OF MAILING - MAY 5, 1992

79-92

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SHORE REGIONAL HIGH SCHOOL DISTRICT, CONSTITUENT DISTRICT OF WEST LONG BRANCH, MOMOUTH COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

MAY 6, 1992

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SHORE REGIONAL HIGH SCHOOL DISTRICT, CONSTITUENT DISTRICT OF WEST LONG BRANCH, MOMOUTH COUNTY.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for two members of the Board of Education, constituent district of West Long Branch, for full terms of three years each at the annual school election held April 7, 1992 in the Shore Regional High School District, Monmouth County were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Robert Strangia	507	15	522
Anthony Tomaine	449	12	461
Molly Berstein Burge	433	18	451

Pursuant to a letter request from Molly Berstein Burge dated April 8, 1992, an authorized representative of the Commissioner of Education from the Office of the Monmouth County Superintendent of Schools was directed to conduct a recount of the ballots cast. The recount was conducted on April 27, 1992, at the Voter Machine Warehouse, 300 Halls Mills Road, Freehold, New Jersey.

At the conclusion of the recount conducted by the Commissioner's representative, the tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Robert Strangia	507	15	522
Anthony Tomaine	449	12	461
Molly Berstein Burge	433	18	451

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the finding set forth above that there was no change in the announced results of the election.

The Commissioner finds and determines that Robert Strangia and Anthony Tomaine were elected to full terms of three years each on the Board of Education of the Shore Regional High School District, constituent district of West Long Branch.

John Ellis
COMMISSIONER OF EDUCATION

MAY 6, 1992

DATE OF MAILING - MAY 6, 1992

80-92

CHARLES MILLS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, nonrenewed industrial arts teacher, claimed to have acquired tenure and seniority rights.

Initial decision determined that petitioner did not acquire tenure as he had served initially as a substitute teacher for Mr. Abbamont. Notwithstanding that in March 1988 Abbamont applied for unemployment benefits which he was granted on appeal in August 1988, Board had proven that no vacancy in the position held by Abbamont existed until after June 30, 1988. Thus, petitioner's service between March and June 1988 could not be counted toward tenure because his service was that of a substitute and petitioner did not meet precise conditions of N.J.S.A. 18A:28-5 to have acquired tenure. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own. Commissioner stressed that petitioner failed in his burden of persuading the Commissioner that the Board recognized the existence of a vacancy insofar as Board continued Mr. Abbamont's employment through June 1988. Commissioner also noted that absent tenure, petitioner may not assert a seniority claim and the Commissioner need not reach the question of whether petitioner was properly certified for the position.

MAY 6, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7656-91
AGENCY DKT. NO. 259-7/91

CHARLES MILLS
Petitioner,
v.
PISCATAWAY TOWNSHIP BOARD OF EDUCATION,
Respondent.

Stephen E. Klausner,Esq., for petitioner (Klausner, Hunter & Cige, attorneys)
David B. Rubin, Esq., for respondent (Rubin, Rubin, Malgran & Kuhn, attorneys)

Record Closed: February 5, 1992 Decided: March 20, 1992

BEFORE **DANIEL B. McKEOWN**, ALJ:

Charles Mills (petitioner), formally employed by the Piscataway Township Board of Education (Board) as a teacher, claims to have acquired tenure and seniority. He alleges that when the Board terminated his employment following a reduction-in-force on May 21, 1991, those rights were violated because the Board continued to employ nontenure, non-certificated, or less senior teachers. The Board denies the allegations and asserts petitioner failed to serve the requisite period of time by law to have acquired tenure and, consequently he has no claim to seniority. After the Commissioner of Education transferred the matter on August 7, 1991 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 January 3, 1992 at the Middlesex County Court House after which the parties filed letter memorandum in support of their positions.

The finding is reached in this initial decision that petitioner did not serve more than three academic years as a teacher in the Board's employ. The conclusion is reached that petitioner did not acquire tenure and he failed to establish by a preponderance of credible evidence in the record that he is entitled to relief resulting from his termination of employment.

FACTS

The basic facts are not in dispute between the parties, except as otherwise noted, and they are as follows. On March 1, 1988 petitioner filed an application (R-1) as a substitute teacher with the Board 's Director of Staff Personnel , Gordon H. Moore. Petitioner reported he was certified as a teacher of industrial arts and that he preferred teaching metals, woods, drafting, and photography at grades 6 through 12. The then regularly employed teacher who had been assigned to teach metals at the Board's Quibbletown Middle School, Joseph Abbamont, was in his third year of employment with the Board. However, from on or about February 2, 1988 forward Abbamont failed to appear for duty although he had not tendered a resignation from his employment. Director Moore testified at hearing that during that time he could not contact Abbamont because Abbamont lived in Holland, Pennsylvania and commuted to his employment with the Board. Moore further explained that while he now knows Abbamont eventually claimed his absences were due to metal shop conditions which caused him respiratory illness, he is not certain he had such knowledge of that claim at the actual time of Abbamont's absences from work.

Petitioner was approved by the Board as a "substitute teacher" on March 21, 1988 (R-2) although he actually began substitute teaching specifically for Abbamont on March 9, 1988 at the Quibbletown Middle School. Each day that petitioner reported to substitute for Abbamont he registered his appearance on a Substitutes' Time Sheet, the dates, and the teacher for whom he was substituting. These time sheets were then submitted to the personnel office at the end of each pay period. It is noted that for services rendered, petitioner was paid at the rate of $103 per day which, petitioner says, was a higher rate than that paid a regular substitute. Petitioner claims his employment was that of a permanent substitute, as is stated on the "Substitutes' Daily Record" (R-6), specifically employed for the asserted vacancy caused by Abbamont's consistent absence from his duties. In this regard, petitioner notes that Abbamont had applied for unemployment compensation on March 13,

1988 upon which date he was disqualified from such benefits. That ruling was subsequently reversed on August 19, 1988 by the New Jersey Department of Labor Appeal Tribunal on the basis that petitioner "* * *did not live his job voluntarily without good cause attributable to such work." However, Abbamont did not notify the Board of any specific intention to terminate his third year employment contract before, or after, March 8, 1988.

Petitioner says that as Abbamont's substitute teacher, he knew "what was going on with Abbamont" from the Quibbletown Middle School principal. Petitioner says the principal commented on or about April 25, 1988 that Abbamont was not to be reemployed by the Board for 1988-89. In fact, by letter (R-3) dated April 26, 1988 Director Moore advised Abbamont as follows:

> Consistent with the recommendation of the Superintendent of Schools, the Board of Education has taken action at the public meeting on April 25, 1988 to terminate your employment, effective June 30, 1988 [the expiration of his third year employment contract].
>
> Please consider this letter to be formal notice of this Board's action, as well as notice that employment will not be offered in the 1988/89 school year. The reasons for this recommendation and action have been communicated to you in my previous letter and in the summary evaluation documents submitted by your principal * * *

This letter followed the referenced summary evaluation prepared March 24, 1988 on Abbamont's performance by the Middle School principal. The principal relates that he could not evaluate Abbamont's performance during his third probationary year because of Abbamont's extended absence from February 3, 1988 through the date the evaluation was prepared.

After having been notified of his employment would not be continued, Abbamont requested the reasons in writing. He also requested, and was granted, the opportunity to be heard by it. See N.J.S.A. 18A:27-3.2.

In the meantime, petitioner was employed full-time as a teaching staff member assigned to teach metal working for 1988-89, 1989-90, and 1990-91. During April,

1991 the Board reduced the number of teachers effective for 1991-92. The Board determined petitioner had not acquired tenure nor seniority. Thus, petitioner's employment was not continued.

Nevertheless, petitioner notes that in answers to interrogatories served and answered in a subsequent civil suit filed against it after June 30, 1988, the Board admits Abbamont 'voluntarily abandoned his employment' as a defense to his application for unemployment compensation. Thus, petitioner seeks to have that answer support his claim that the Board knew, or should have known, no later than March 8, 1988 Abbamont abandoned his employment and that a vacancy therefore existed.

The Board says to the contrary that that answer may not be viewed in a vacuum. The Board explains that by the time the civil suit was filed against it and its answers to interrogatories were served, the employment relationship with Abbamont was severed and then a vacancy was created. The Board says that after June 30 it then confidently knew Abbamont was not longer in its employ and when this one insert is seen in the context of other answers to interrogatories if filed in the same civil case, its filed answers support its position in this case.

Answers filed by the Board in a civil suit, to the extent relevant here on when it knew or should have known a "vacancy" existed because Abbamont either quit or abandoned his employment, are as follows:

> * * *
>
> 18. State specifically and in full factual detail all facts upon which you shall rely in support of the sixth paragraph of the Answer to the Complaint denying the allegations of the fourteenth and fifteenth paragraph of the complaint.
>
> Reason for Mr. Abbamont's absence was unexplained.
>
> (a) State specifically and in full factual detail all facts upon which you shall rely in support of your denial that on or about February 3, 1988, plaintiff did not return to work due to his pulmonary condition.

On February 3, 1988, the plaintiff did not explain any absence.

(b) State specifically and in full factual detail all facts upon which you shall rely in support of your denial that plaintiff informed the administration that he could return to work if he was placed in a properly ventilated room or if his shop's ventilation was fixed and there was an air quality report verifying that the room was safe to operate machinery.

Mr. Abbamont made no attempt to return to his employment.

* * *

(e) Mr. Abbamont did not communicate the reason for his absence.

* * *

State whether it is the Board's position that Mr. Abbamont's employment was terminated at a public meeting on April 25, 1988.

Yes, effective at the close of the school year.

* * *

(b) State in detail the position of defendant when it challenged the plaintiff's request for employment benefits.

Mr. Abbamont had voluntarily abandoned his employment.

(c) At the Unemployment hearing in which plaintiff's right to unemployment benefits were challenged, describe in detail the statements made by Mr. Moore and/or his representative

concerning whether or nor plaintiff was actually terminated from his employment.

Mr. Moore stated that Mr. Abbamont could have returned to work at any time prior to the end of the 1987/88 school year.

ARGUMENTS

Petitioner says when Abbamont filed for unemployment compensation benefits on or about March 8, 1988 that that act, coupled with his continuing absence, provided the Board sufficient notice he abandoned his employment with it. As such, petitioner says, Abbamont's employment contract was terminated and a vacancy existed. Petitioner reasons that because the Board knew such vacancy existed, and the fact he was employed as a permanent substitute assigned to Abbamont's class for the remainder of that school year, it may not now say that that time served does not count for the acquisition of tenure. This is so, petitioner says, because under Sayreville Education Association v. Sayreville Board of Education, 193 N.J. Super 424 (App. Div. 1984) boards of education may not employ a teacher who is fully certificated and assign that person as a "substitute teacher" to an existing vacancy which the board knows will exist for a "substantial balance" of the school year.

The Board contends it had no knowledge that Abbamont abandoned or voluntarily terminated his employment until it determined on April 25, 1988 not to renew his contract for 1988-89. The Board says the only knowledge it had at the time was that Abbamont was absenting himself from duty and that it could not communicate with him. Furthermore, the Board points to the fact that once it gave Abbamont notice of non-reemployment for 1988-89 he demanded, as is his right, to a statement of reasons for non-renewal and the opportunity to be heard. Consequently, the Board concludes that at the time the events were unfolding it neither had knowledge or reason to believe Abbamont abandoned, terminated or otherwise quit his employment. Thus, the Board asserts no vacancy in the position held by Abbamont existed until after June 30, 1988. Therefore, it says petitioner's service between March and June 1988 may not be counted for tenure because his status was that of a substitute in the teaching position held by Abbamont until June 30, 1988.

The Board notes that petitioner applied for the position of "substitute teacher" and that is the employment relationship created when, thereafter, he was engaged as a substitute for Abbamont. The Board says it had to manage the situation with Abbamont on a week-to-week basis because it had no knowledge of Abbamont's intentions.

The Board asserts that even if the Middle School principal commented on or about April 25, 1988 that Abbamont was not to reemployed for 1988-89, the legal fact remains that Abbamont did not vacate, nor was he removed from his position until June 30, 1988 which then created the vacancy to which petitioner was properly appointed as of September 1, 1988.

Finally, the Board maintains that its one answer to interrogatories served on it during the civil suit must be seen in the context of other related answers. Moreover, the Board reminds that the answer relied upon by petitioner was given after June 30, 1988 when it then had knowledge, due to its own action, that a vacancy existed.

ANALYSIS AND CONCLUSIONS

Service as a substitute teacher does not count towards service time necessary to acquire tenure under N.J.S.A. 18A:28-5. In order to acquire tenure as a teaching staff member as petitioner seeks here, one must meet the precise conditions of the statute. Unless one is employed on a 12 month calendar basis, the statute requires more than 30 months service as a teacher within either three consecutive academic years or within four consecutive academic years. In order to be appointed as a teaching staff member, a board of education must first have a vacancy in the position of teaching staff member to make a lawful appointment.

No more than one individual may be appointed to one teaching staff member position. Boards of education, however, may not employ a fully certificated teacher as a substitute, assign that person to an existing teaching vacancy but as a substitute, in order to avoid the effect of the tenure statute. Here, petitioner has an acknowledged 30 months service as a teaching staff member within three consecutive academic years. He needs one more day of service as a teaching staff member to have acquired the legislative status of tenure and hence seniority.

If, in this case, while petitioner was employed by the Board as a substitute teacher a vacancy existed in the position to which he was assigned exclusively, then

the inquiry would focus on the Board's motive for such an assignment. If, to the contrary, a vacancy did not exist in Abbamont's position at the time petitioner was employed as a substitute teacher, then this case need not proceed further because petitioner would not have acquired tenure and, hence, he would not have acquired seniority rights.

Based on an analysis of the facts in this case, I conclude that no vacancy existed in Abbamont's position until June 30, 1988 when, by force of the Board's conduct, the employment relationships with Abbamont was terminated. There is no evidence to show Abbamont ever revealed his intention to the Board to abandoned his position, to voluntarily quit his position, or in any manner to sever the employment relationship. Rather, the evidence and the facts do show that Abbamont believed he became ill as the result of working conditions within the school. Therefore, he absented himself from his duties but without communicating any intention to resign, quit, terminate or abandon his employment.

That Abbamont did not voluntarily terminate the employment relationship is evidenced by the fact when the Board advised him of its intention not to renew his employment for 1988-89, he demanded reasons for the non-renewal and the opportunity to heard. The Board's answers to interrogatories filed in the civil suit brought against it by Abbamont do not support petitioner's position that he filled a vacancy between March through June 1988. Rather, what is revealed by the answers to interrogatories reproduced here is that the Board simply had no knowledge as to Abbamont's intentions at the time the events were unfolding. The answers do not show that the Board knew, at the time, Abbamont had abandoned his position. Moreover, the facts reveal Abbamont did not abandon his position; rather, the Board did not continue his employment into 1990-91.

Consequently, having concluded that no vacancy existed in Abbamont's position until June 30, 1988, time served by petitioner as a substitute for Abbamont through June 30, 1988 may not be counted as service time for the acquisition of tenure. Therefore, petitioner has failed to meet the precise conditions of the statute, N.J.S.A. 18A:28-5, to have acquired tenure. Petitioner, not having acquired tenure, does not have enforceable seniority rights.

Therefore, the Petition of Appeal is **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 29 1992
Date

Daniel B. McKeown
DANIEL B. McKEOWN, ALJ

Receipt Acknowledged:

3/24/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 27 1992
Date

OFFICE OF ADMINISTRATIVE LAW

tmp

DOCUMENTS IN EVIDENCE

P-1 Unemployment Compensation Decision
P-2 Interrogatories served and answers filed
P-3 Letter, June 12, 1991

R-1 Substitute Teacher Application
R-2 Approval as substitute teacher
R-3 Letter, April 26, 1988
R-4 Substitutes' Time Sheet
R-5 Pension Enrollment Application
R-6 Substitute's Daily Record
R-7 Letter, August 30, 1988
R-8 Board action re: appointment as teacher
R-9 Teaching Certificate
R-10 Employment history
R-11 Permanent Record - Certificated Personnel
R-12 Letter, October 5, 1990
R-13 Letter, July 18, 1991
R-14 Summary Evaluation

CHARLES MILLS,	:	
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 filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Petitioner excepts to the ALJ's conclusion that he is not tenured, citing the decision of the Appeals Examiner from the Disability Insurance Appeals Tribunal dated August 19, 1988 and thereby suggesting that "[it] is axiomatic that an employer/employee relationship ceases to exist when the employee asserts, as Abbamont did, that he has been terminated and is, thus, eligible and obtains unemployment insurance." (Exceptions, at pp. 3-4) Petitioner claims that one cannot, at the same time, claim to be employed and claim to be unemployed, and thus be eligible for unemployment compensation. Petitioner submits that on March 13, 1988 when Abbamont made application for unemployment benefits, the Board had to know that Abbamont was publicly declaring that he was no

longer an employee. Petitioner further contends that because the Board actively participated in the unemployment proceedings, including the appeal hearing before the Appeals Examiner, principles of collateral estoppel compel the conclusion that Abbamont was unemployed as of March 13, 1988, when he made application for unemployment benefits. In this regard, petitioner cites Valasquez v. Franz, 123 N.J. 498 (1991).

Upon a careful and independent review of the record of this matter, the Commissioner adopts as his own the conclusions reached by the Office of Administrative Law.

As the Board notes in its post-hearing submission, petitioner bears the burden of persuasion in this matter by a preponderance of the credible evidence. To bear such burden petitioner must demonstrate that he filled a vacancy in March 1988 for a teacher who ceased to appear for work commencing in February 1988. Those documents brought to the record do not, in the Commissioner's considered opinion, demonstrate that the Board was aware, at any given time before June 10, 1988 that Abbamont had filed for unemployment compensation. Notwithstanding the Board's appearance on June 10, 1988 at the appeal of Abbamont's having been denied unemployment compensation as reflected in Exhibit P-1 and notwithstanding the Board's admission in interrogatories that its position at said appeal was that Abbamont abandoned his position (see Exhibit P-2) in applying for such benefits, the Board nonetheless maintained his employment status through June 30, 1988. The record demonstrates that the Board did not declare a vacancy until April 28, 1988, effective June 30, 1988, and provided Abbamont the opportunity to be heard on the reasons for his nonrenewal

sometime following June 30, 1988. (See Exhibits R-3 and R-14.) By conforming to the provisions of N.J.S.A. 18A:27-3.2, the Board successfully rebutted any inference to be drawn from petitioner's evidence in the form of after-the-fact interrogatories which attempted to reconstruct the state of mind of the Board and Abbamont during the period from March 13, 1988 through June 30, 1988 regarding whether a vacancy existed. Accordingly, the Commissioner finds, as did the ALJ, that the record herein is devoid of actual evidence to show that Abbamont made known his intention to the Board to abandon his position.

Consequently, because petitioner has failed to meet his burden of persuading the Commissioner that a vacancy existed in Abbamont's position until June 30, 1988, that time served by petitioner as a substitute for Abbamont through June 30, 1988 may not be counted as service time for the acquisition of tenure, and he thus fails to meet the statutory condition for the acquisition of same pursuant to N.J.S.A. 18A:28-5. Absent tenure, he thus may assert no seniority claim.

In so deciding, the Commissioner need not reach the question of whether petitioner was properly certified to teach in the position to which he would have been assigned commencing September 1, 1991.

Therefore, for the reasons expressed in the initial decision as amplified herein, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

MAY 6, 1992

DATE OF MAILING -- MAY 6, 1992

80-92

EDU #7656-91
C # 80-92
SB # 19-92

CHARLES MILLS,	:	
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, May 6, 1992

For the Petitioner-Appellant, Klausner, Hunter, Cige & Seid (Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Respondent, Rubin, Rubin, Malgran & Kuhn (David B. Rubin, Esq., of Counsel)

Charles Mills (hereinafter "petitioner") filed a petition with the Commissioner of Education alleging that the Board of Education of the Township of Piscataway (hereinafter "Board") had violated his tenure and seniority rights when it abolished his position at the end of the 1990-91 school year as the result of a reduction in force. The Board countered that petitioner had not satisfied the statutory conditions for the achievement of tenure and therefore had no tenure rights. Specifically, this case turns on whether petitioner's service during the 1987-88 school year was creditable for purposes of tenure achievement under N.J.S.A. 18A:28-5.

The basic facts herein are not in dispute. Petitioner began his service with the Board as a "substitute teacher" of

JAN. 4, 1995

industrial arts in March 1988. The regular teacher who had been assigned to teach industrial arts, Joseph Abbamont (hereinafter "Abbamont"), failed to appear for duty after February 2, 1988, although he did not tender a resignation from his employment or otherwise expressly notify the Board of any intention to terminate his employment.[1] The record indicates that Abbamont applied for unemployment compensation benefits on or about March 13, 1988, which application was initially denied on the ground that he had left his employment voluntarily without good cause attributable to such work.

On April 25, 1988, the Board acted to terminate the employment of Abbamont, who had not yet achieved tenure, effective June 30. On June 10, 1988, the Board was represented at a hearing before the State Division of Unemployment and Disability Insurance in which Abbamont appealed the denial of his unemployment benefits. The Board contested his entitlement to such benefits, contending that Abbamont had voluntarily abandoned his position.[2]

Petitioner continued to serve as a teacher of industrial arts for the remainder of the 1987-88 year. He was thereafter employed by the Board as a full-time teaching staff member during the 1988-89, 1989-90 and 1990-91 school years. On or about May 21, 1991, the Board, in effectuating a reduction in force, terminated petitioner's employment effective June 30, 1991, concluding that he had not yet achieved tenure.

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1 We note that there is also no indication that Abbamont had requested or been granted a leave of absence from the Board.

2 The initial denial of Abbamont's claim for unemployment compensation benefits was reversed on appeal and he was granted benefits retroactive to March 13, 1988.

On March 20, 1992, an administrative law judge ("ALJ") recommended dismissing the petition. The ALJ stressed that service as a substitute teacher was not creditable towards the achievement of tenure under N.J.S.A. 18A:28-5 and that, in order to serve as a "teaching staff member" eligible for tenure, there must have been a position "vacancy." The ALJ concluded that no vacancy existed in Abbamont's position until June 30, 1988 when, by force of the Board's conduct, the employment relationship was terminated. The ALJ found no evidence to indicate that Abbamont "ever revealed his intention to the Board to abandoned [sic] his position, to voluntarily quit his position, or in any manner to sever the employment relationship. Rather, the evidence and the facts do show that Abbamont believed he became ill as the result of working conditions within the school. Therefore he absented himself from his duties but without communicating any intention to resign, quit, terminate or abandon his employment." Initial Decision, slip op. at 8. Having found that no vacancy existed in Abbamont's position during 1987-88, the ALJ concluded that petitioner's service during that year could not be credited for tenure achievement purposes.

On May 6, 1992, the Commissioner adopted the conclusions of the ALJ and dismissed the petition. The Commissioner asserted that, notwithstanding the Board's appearance on June 10, 1988 at Abbamont's unemployment compensation hearing and its contention at such hearing that Abbamont had abandoned his position, a vacancy did not arise until June 30, 1988, the effective date of the Board's action terminating his employment.

Petitioner filed the instant appeal to the State Board.

After a thorough review of the record, we affirm with modification the decision of the Commissioner.

"[T]he word 'vacancy' is commonly understood to mean an unoccupied position for which an incumbent does not intend to return, as contrasted with a leave of absence that 'connotes continuity of the employment status.'" Lammers v. Bd. of Educ., 134 N.J. 264, 272 (1993). "An absence exists when the missing teacher is scheduled ultimately to return to the position." Id. at 268.

Thus, it is necessary to determine whether, under the particular facts in the record, the Board was on notice during the 1987-88 school year that the incumbent, Abbamont, did not intend to return to his position.[3] Such notice, however, need not necessarily have been an express termination of the employment relationship by Abbamont, as the Commissioner's decision would appear to indicate.

The undisputed facts in this case reveal that Abbamont applied for unemployment benefits in March 1988 and that the Board was on notice of such application by June 10. At that time, the Board took the express position in opposing such benefits that Abbamont had abandoned his position. However, as pointed out by the Commissioner, there is no indication in the record that the Board was aware of petitioner's application for unemployment benefits prior to June 10, 1988. Nor does the record establish that the Board was otherwise on notice that Abbamont did not intend to return. Inasmuch as service in a vacant position commencing on

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[3] We note that Abbamont's failure to appear for duty after February 2, 1988 did not in and of itself create a "vacancy." See Driscoll v. Board of Education of Clifton, 165 N.J. Super. 241 (App. Div. 1977), aff'd o.b. 79 N.J. 126 (1979).

June 10, 1988 would not provide petitioner with employment in a teaching staff position for the probationary periods delineated in N.J.S.A. 18A:28-5 by the time the Board acted to reduce its staff in May 1991,[4] we need not determine for purposes of deciding the instant appeal whether a "vacancy" arose on that date.

We therefore conclude that petitioner was not tenured at the time of the RIF and affirm the decision of the Commissioner as modified herein.

January 4, 1995
Date of mailing JAN 06 1995

[4] We note that a district board is required to recognize the tenure rights of affected parties as they existed at the time it acted to reduce its staff pursuant to N.J.S.A. 18A:28-9. Parker and Pellegrino v. Board of Education of the Matawan-Aberdeen Regional School District, decided by the State Board of Education, May 2, 1990.

31-92

IN THE MATTER OF THE TENURE HEARING OF JOHN LYDON, SCHOOL DISTRICT OF THE CITY OF HACKENSACK, BERGEN COUNTY,	:	
AND	:	
JOHN LYDON,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,	:	
RESPONDENT.	:	
	:	

MAY 7, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

IN THE MATTER OF THE TENURE HEARING OF JOHN LYDON, SCHOOL DISTRICT OF THE CITY OF HACKENSACK, BERGEN COUNTY

OAL DKT. NO. EDU 6806-91
AGENCY DKT. NO. 241-6/91

JOHN LYDON,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,
Respondent.

OAL DKT. NO. EDU 9178-91
AGENCY DKT. NO. 337-9/91

Mark J. Blunda, Esq., for John Lydon
(Sills Cummis Zuckerman Radin Tischman Epstein & Gross, attorneys)

Louis P. Bucceri, Esq., for Hackensack Board of Education
(Bucceri & Pincus, attorneys)

Record Closed: March 18, 1992 Decided: March 20, 1992

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

The Board of Education of the City of Hackensack, Bergen County, filed and certified on May 28, 1991 four tenure charges against John Lydon, a tenured teaching staff member, with specifications of unbecoming conduct Certification thereof was made to the Commissioner of the Department of Education on June 27, 1991; respondent was suspended without pay from his employment on May 28,

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1991. (Count V of tenure charges was not certified by the Board.) In answer filed in the Department of Education on June 20, 1991, respondent denied the charges generally, alleged the charges were unlawful retaliation for his pursuit of a workers compensation claim currently pending unheard and contended, as to Count IV, the charge and specification, to the extent it alleged and specified inefficiency, should be dismissed for failure of compliance with N.J.A.C. 6:24-5.1(c). The Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law on July 12, 1991, for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

On September 23, 1991, a prehearing conference was scheduled in the Office of Administrative Law and an order entered under OAL Dkt. No. EDU 6806-91.

John Lydon filed a petition in the Bureau of Controversies and Disputes of the Department of Education on September 6, 1991 challenging action of the Board in withholding his adjustment increment for 1991-92. The Commissioner transmitted that matter to the Office of Administrative Law on September 30, 1991, where it was assigned OAL Dkt. No. EDU 9178-91.

The two matters were consolidated for hearing by order dated October 31, 1991.

After hearing commenced on March 2, 1992, the parties advised the administrative law judge the matters at issue had been amicably resolved, subject to approval by the Board, the administrative law judge and the Commissioner of the Department of Education. The Board approved resignation and agreement, filed here on March 18, 1992, at its regularly scheduled meeting on March 10, 1992.

CONCLUSION

Based on the above, I **CONCLUDE** as follows:

1. The parties have voluntarily agreed to settlement as evidenced by their signatures or their representatives' signatures on the agreement;

2. Settlement fully disposes of all issues in controversy, is in the interest of parties and public and comports with Cardonick v. Bd. of Ed. Bor. of Brooklawn, 1983 S.L.D. -- (slip op. at 2); and

3. Lydon's petition under OAL Dkt. No. EDU 9178-91 and the Board's filing and certification of tenure charges under OAL Dkt. No. EDU 6806-91 are hereby **DISMISSED**, being in accordance with settlement pursuant to N.J.A.C. 1:1-19.1, subject to effectuation of its terms.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 20, 1992
Date

James A. Ospenson
JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

2/24/92
Date

Marianne K. Keller
DEPARTMENT OF EDUCATION

MAR 26 1992
Date

Mailed to Parties:
Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

amr

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PLEASE REPLY TO NEWARK

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◊ MA BAR ONLY

March 17, 1992

Honorable James Ospenson, ALJ
State of New Jersey
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

RE: In the Matter of the Tenure Hearing
of John Lydon, School District of the
City of Hackensack, Bergen County
Docket No. EDU 6806-91

MAR 18 9 51 AM '92

Dear Judge Ospenson:

This shall confirm that at its meeting on Tuesday, March 10, 1992, the Board of Education of the City of Hackensack formally approved the Settlement Agreement forwarded to you on March 13, 1992 and authorized execution of same by its President.

Very truly yours,

MARK J. BLUNDA

MJB:gj

c: Louis P. Bucceri, Esq.
Anthony Marseglia, Superintendent of Schools

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PLEASE REPLY TO NEWARK

March 13, 1992

Honorable James Ospenson, ALJ
State of New Jersey
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

RE: In the Matter of the Tenure Hearing
of John Lydon, School District of the
City of Hackensack, Bergen County
Docket No. EDU 6806-91

Dear Judge Ospenson:

In connection with the above-captioned matter, enclosed you will find the original and two (2) copies of the fully executed Agreement reached between Mr. John Lydon and the Hackensack Board of Education.

As you will note, the terms of the Agreement are those discussed with you during the course of the hearings and take into account the Commissioner's Cardonick standards. Given the circumstances of this case, and Mr. Lydon's years of service to the district, we trust that you will recommend this to the Commissioner of Education for swift approval.

3/13/92 to Chambers - Dick Becker

Thank you fo your assistance in this matter. If you have any questions, please feel free to call either me or Mr. Bucceri.

Very truly yours,

MARK J. BLUNDA

MJB:gj
Enclosure

c: Louis P. Bucceri, Esq.
Anthony Marseglia, Superintendent of Schools

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2490
(201) 773-5665
Counsel for Respondent

MAR 17 10 01 AM '92

IN THE MATTER OF THE TENURE:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF
HEARING OF JOHN LYDON, :	ADMINISTRATIVE LAW
SCHOOL DISTRICT OF THE :	AGENCY REF. NOS. 241-6/91 and 337-9/91
CITY OF HACKENSACK, :	O.A.L. DOCKET NO. EDU-06806-91 and EDU 9178-91N
BERGEN COUNTY. :	
	SETTLEMENT AGREEMENT

John Lydon, (hereinafter "Mr. Lydon") residing at 50 Euclid Avenue, Apt. 3F, Hackensack, New Jersey 07601, and The Board of Education of the School District of the City of Hackensack (hereinafter the "Board") with offices at 355 State Street, Hackensack, New Jersey 07601-5510, hereby stipulate and agree as follows:

WHEREAS, John Lydon is the subject of tenure charges certified by the Board on May 28, 1991; and,

WHEREAS, Mr. Lydon has served as a teacher in Hackensack since March, 1960, more than 30 years; and,

WHEREAS, during his service, he has, on repeated occasions, contributed his time and energies beyond the regular school day in such areas as community service and assisting students in trouble; and

WHEREAS, during the period from on or about 1988 to 1991, Mr. Lydon was afflicted with severe health problems as well

as enormous emotional stress due to unavoidable difficulties in his personal life; and,

WHEREAS, the allegations forming the basis for the charges in this matter arise during this latter period in his career; and,

WHEREAS, although the factual position of the parties differs as to whether each and every particular aspect of the pending charges actually took place, and as to Mr. Lydon's motivation and intent, the parties do agree that the further litigation of these charges, no matter what their outcome, would make it impossible for Mr. Lydon to return to the Hackensack school system in the future as a teacher; and,

WHEREAS, further litigation of these charges would necessitate the disruption of the Board's educational program due to the necessary absence of numerous teachers and administrators for testimony at the hearing; and,

WHEREAS, it would be necessary for additional young people to be compelled to appear by subpoena to testify, against their will, resulting in great emotional distress to them and to their families; and,

WHEREAS, further litigation of these charges, regardless of outcome, might also result in considerable distress in the Hackensack community at large due to the sensitive and volatile issues involved; and,

WHEREAS, the Board would incur substantial financial costs by continuing this litigation and it is probable that said costs would significantly exceed the cost of this settlement; and,

WHEREAS, Mr. Lydon was suspended without pay on or about May 28, 1991, and his suspension with pay resumed on or about September 25, 1991. Mr. Lydon is a veteran who served during the time of the Korean War. He will be 60 years old in June, 1992; and,

WHEREAS, in lieu of proceeding with the tenure charges in accordance with the Tenure Employees' Hearing Law, the Board and Mr. Lydon desire to enter into an agreement stipulating the terms of Mr. Lydon's separation from his employment as a teacher with the Hackensack school district;

NOW, THEREFORE, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly noted below, it is hereby agreed:

1. Mr. Lydon hereby resigns his position of employment with the Board, together with all tenure and seniority rights effective June 30, 1992, subject only to approval of this Agreement by the Board and by the Office of Administrative law and the Commissioner of Education. Mr. Lydon submits his resignation knowingly, voluntarily and irrevocably, free of coercion or duress, after consulting with counsel and receiving advice as to its ramifications.

2. The Board agrees to withdraw, with prejudice, the tenure charges bearing Agency Docket No. 241-6/91 and O.A.L. Docket No. EDU 06806-91, subject to the approval of this Agreement by the appropriate agencies.

3. The Board agrees to continue to pay Mr. Lydon his full salary through the effective date of his resignation, June 30, 1992.

4. All continued salary payments made to Mr. Lydon between the date of this Agreement and June 30, 1992, shall be paid in the normal course of business, net of normal payroll deductions for State and Federal income taxes and pension contributions.

5. Until June 30, 1992, the Board agrees to continue to provide Mr. Lydon with all health insurance coverages presently provided to other teaching staff members in the employ of the Board. The insurance coverages involved herein are set forth in the current collective negotiations agreement between the Board and the Hackensack Education Association.

6. If this Agreement is approved by the appropriate agencies, as of July 1, 1992, and consistent with his rights under the Consolidated Omnibus Reconciliation Act of 1986 ("COBRA"), Mr. Lydon shall be able to purchase, at his own cost and expense, such insurance coverages presently provided to other teaching staff members as he may require, for no more than 18 months. The insurance coverages involved herein are set forth in

the current collective negotiations agreement between the Board and the Hackensack Education Association and include dental insurance.

7. The collective negotiations agreement between the Board and the Hackensack Education Association provides for partial reimbursement for unused accumulated sick leave upon retirement. Mr. Lydon retains his right to such reimbursement and his rights will be determined by the express requirements of the collective negotiations agreement. Said monies will be paid to him upon his retirement, provided that no payment shall be made until this Agreement is approved by the appropriate agencies.

8. The litigation known as John Lydon v. Bd. of Ed., Hackensack, Agency Docket No. 337-9/91 and O.A.L. Docket No. EDU 09178-91N, which was consolidated with the tenure charges, is hereby settled as follows:

(a) The Board will retroactively restore Mr. Lydon's full 1991-92 salary increment;

(b) Mr. Lydon hereby agrees to withdraw and dismiss the aforementioned suit, with prejudice;

(c) Such retroactive monies which may be due shall be paid to Mr. Lydon as soon as possible, after normal payroll deductions are taken, provided that this Agreement has first been approved by the appropriate agencies.

9. In return for compliance with this Agreement, the Board will retroactively pay Mr. Lydon a sum equal to the gross salary withheld from him during the period of his suspension without pay (from on or about May 28, 1991 to on or about September 25, 1991). Said back pay shall be subject to normal payroll tax and pension deductions and shall be reported as such to the Teachers' Pension and Annuity Fund, representing pay due in June and September, 1991. Said sum shall not be paid until this Agreement is approved by the appropriate agencies.

10. Mr. Lydon is aware that, as a result of the charges brought against him, this matter may be referred to the State Board of Examiners for review regarding certification revocation proceedings.

11. The Board and Mr. Lydon acknowledge that the terms of this Agreement are contingent upon the review and approval of both the Office of Administrative Law and the Commissioner of Education. In the event that either agency disapproves of the terms of settlement, this Agreement shall be null and void and the parties shall return to the same positions which they held prior to this settlement.

12. The parties recognize that each has been represented by legal counsel of his or its own choosing and that each signs this Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

13. This Agreement shall be subject to the laws of the State of New Jersey.

14. All terms of this Agreement are deemed material. This document may not be altered, amended or modified or revoked except by an instrument executed in writing by the parties.

15. For all of the previously noted reasons, the parties agree that this settlement is in the public interest, as well as the best interests of the parties.

16. Mr. Lydon waives any and all other claims he has, or could have, against the Hackensack Board of Education, its agents and representatives, including, but not limited to, claims for: attorneys' fees; Age Discrimination under the NJLAD or ADEA; Employment Discrimination under State or Federal Law; Contract, Tort or Constitutional Violations. Excluded from this wavier are actions by either party to specifically enforce the terms of this Agreement or to pursue their respective rights in any pending workers' compensation proceeding. The parties shall execute and exchange mutual releases in the forms attached hereto as Schedule 'A' and 'B.' The originals of each party's release shall be held in escrow by the party's attorney. The escrow shall be released and the executed release shall be transmitted to opposing counsel upon approval of this settlement by the appropriate agencies. If the settlement is not approved, the releases shall become null and void and shall be destroyed.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

John Lydon
Dated: 3-9-92

Daniel E. Kirsch
Board President
Dated:

Louis P. Bucceri, Esq.
Attorney for John Lydon
Dated:

Peter J. Capone
Board Secretary
Dated: 3/10/92

Mark J. Blunda, Esq.
Attorney for Board
Dated: 3/10/92

IN THE MATTER OF THE TENURE HEARING OF JOHN LYDON, SCHOOL DISTRICT OF THE CITY OF HACKENSACK, BERGEN COUNTY,	:	
AND	:	
JOHN LYDON,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,	:	
RESPONDENT.	:	
	:	

The record of this matter and the initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

Upon review, the Commissioner cannot agree with the parties and the ALJ that the proposed settlement satisfies the standards of In re Cardonick, supra. The charges upon which the tenure proceedings herein were initiated, primarily arising from alleged overt and offensive racial, sexist, ethnic and sexual comments made to numerous students repeatedly over a significant period of time, are sufficiently serious, if true, to preclude any resolution allowing respondent to resume his teaching career outside the district. While the Commissioner could attempt to address such

concern through referral of this matter to the State Board of Examiners, the fact remains that a hearing would be necessary in either event and, in the absence of plenary proceedings before the Commissioner in which the Board must fully participate, the record able to be developed by the Board of Examiners may be insufficient to make any judgment as to suspension or revocation of respondent's certificate. In the Matter of the Tenure Hearing of Harold Kenner, School District of the City of Passaic, Passaic County, Commissioner's decisions of May 30, 1990 and February 22, 1991; In the Matter of the Certificate of Harold Kenner, State Board of Examiners decision, May 2, 1991

Should the Commissioner consent to the within settlement, then, it is entirely possible that respondent would be able to continue teaching not withstanding conduct which, if it actually did occur, the Commissioner cannot tolerate, let alone condone by acceptance of a settlement judged, by the very act of acceptance, to be in the public interest. While it is regrettable that supporting its allegations may prove sensitive, time-consuming and costly for the Board and difficult for district students and staff, the Commissioner must first and foremost be guided by his obligation to ensure that unfit teachers do not continue to serve in New Jersey's classrooms. He therefore cannot permit the Board to lay down its burden of demonstrating that the purported conduct occurred as alleged in the absence of a willingness on respondent's part to accept a revocation of certificate without opposition.

Accordingly, the Commissioner remands this matter to the Office of Administrative Law for revision of the proposed settlement

to indicate either that respondent does not oppose revocation of his certificate or that, if he does, the Board will refer its charges to, and diligently prosecute them before, the State Board of Examiners. Should such revision not be acceptable to the parties, notwithstanding any agreement that may be reached as to settlement of respondent's increment withholding claim, the within tenure charges are to proceed to a full hearing on the merits.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 7, 1992

DATE OF MAILING - MAY 7, 1992

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IN THE MATTER OF THE TENURE HEARING OF JOHN LYDON, SCHOOL DISTRICT OF THE CITY OF HACKENSACK, BERGEN COUNTY, AND JOHN LYDON, PETITIONER, V. BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION ON REMAND

AUGUST 24, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

IN THE MATTER OF THE TENURE HEARING OF JOHN LYDON, SCHOOL DISTRICT OF THE CITY OF HACKENSACK, BERGEN COUNTY

OAL DKT. NO. EDU 3627-92
AGENCY DKT. NOS. 241-6/91 & 337-9/91
(OAL DKT. NOS. EDU 6806-91 & EDU 9178-91 ON REMAND)

JOHN LYDON,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,
Respondent.

Mark J. Blunda, Esq., for Hackensack Board of Education
(Sills Cummis Zuckerman Radin Tischman Epstein & Gross, attorneys)

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

Record Closed: July 16, 1992 Decided: July 17, 1992

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

This matter is on remand by the Commissioner of Education who, in a decision of May 7, 1992, questioned terms of a settlement agreement between the parties, dated March 9, 1992, which, in turn, called for respondent's resignation as a teaching staff member in the district effective June 30, 1992 and a dismissal of tenure charges against him. An administrative law judge approved the settlement in

an initial decision on March 20, 1992 and forwarded it to the Commissioner of Education for final decision in accordance with N.J.S.A. 52:14B-10.

The Commissioner's remand expressed concern that should he consent to the settlement, it remained possible that respondent would "be able to continue teaching notwithstanding conduct which, if it actually did occur, [he] cannot tolerate. . ." Specifically, the Commissioner remanded the matter to the Office of Administrative Law "for revision of the proposed settlement to indicate either that respondent does not oppose revocation of his teaching certificate or that, if he does, the Board will refer its charges to, and diligently prosecute them before, the State Board of Examiners." Commissioner's decision, May 7, 1992, at 4-5.

The Commissioner's remand was transmitted to the Office of Administrative Law on May 15, 1992 in accordance with the Administrative Procedure Act and was assigned OAL Dkt. No. EDU 3627-92.

Acting on the letter and spirit of the remand, the parties have agreed to modification of the settlement agreement, evidenced by respondent's attorney's letter to the administrative law judge dated July 13, 1992 (R-1) and by a resolution of the Board of Education on June 9, 1992 as follows:

> Now therefore be it resolved that said settlement agreement be revised to include that the respondent, Mr. John Lydon, does not oppose revocation of his certification or, if he does, that the Hackensack Board of Education will refer and diligently prosecute its charges before the State Board of Examiners. [P-1.]

CONCLUSION

It may be of some assistance to recall that settlement by the parties was reached only after two and one-half days of testimony from eight witnesses, introduction of 16 documentary exhibits into evidence and the marking of eight more in identification. The Board's prima facie case on tenure charges against respondent was largely complete; the record of proceedings exists and may, if necessary, be of assistance to the State Board of Examiners should the matter be referred to it on decertification. Negotiations were led by the parties' attorneys of record and were conducted, as it were, in facie curiae.

It may also be of assistance to note the district's reporting responsibility to the State Board of Examiners under N.J.A.C. 6:11-3.5, a regulatory obligation recognized by respondent himself in paragraph 10 of the settlement agreement:

> In cases in which teaching staff members accused of misdemeanors, crimes or conduct unbecoming which might warrant revocation or suspension, resign or retire from their positions, either before tenure proceedings have been brought or prior to the conclusion of such proceedings, it shall be the responsibility of the chief school administrator of that district to notify the State Board of Examiners of the alleged conduct pursuant to N.J.A.C. 6:11-3.6(a)2. Should the Board of Examiners issue an order to show cause, it shall be the responsibility of the district which reported the conduct to cooperate with the Board of Examiners in ascertaining and presenting the facts underlying such obligations.

The regulatory obligation, it may be suggested, would of itself supervene any agreement of the parties that sought to evade it.

Based on the foregoing, I **CONCLUDE** as follows:

1. The parties have voluntarily agreed to settlement and modification thereof in accordance with the remand of the Commissioner of May 7, 1992, as evidenced by acceptance of the Board's resolution of June 9, 1992;

2. Settlement as modified fully disposes of all issues in controversy, is in the interest of the parties and public and comports with Cardonick v. Board of Ed., Borough of Brooklawn, 1983 S.L.D. -- (slip op. at 2); and

3. Lydon's petition under OAL Dkt. No. EDU 9178-91 and the Board's filing and certification of tenure charges under OAL Dkt. No. EDU 6806-91 are hereby **DISMISSED**, being in accordance with settlement pursuant to N.J.A.C. 1:1-19.1, subject to effectuation of its terms, and being in accordance with remand.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 17, 1992
Date

James A. OSpenson
JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

7/21/92
Date

Maureen R. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 23 1992
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

amr

LIST OF EXHIBITS

P-1 Resolution of Board of Education, dated June 9, 1992

R-1 Letter of attorney for John Lydon to administrative law judge, dated July 13, 1992

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P-1

RESOLUTION IN THE MATTER OF TENURE
HEARING OF JOHN LYDON

JUNE 9, 1992

WHEREAS a settlement agreement was reached in the matter of the tenure hearing of John Lydon; and

WHEREAS the Commissioner of Education has denied approval of the agreement unless "respondent does not oppose revocation of his certification or that, if he does, the Board will refer its charges to and diligently prosecute them before, the State Board of Examiners".

NOW THEREFORE BE IT RESOLVED that said settlement agreement be revised to include that the respondent, Mr. John Lydon, does not oppose revocation of his certification or, if he does, that the Hackensack Board of Education will refer and diligently prosecute its charges before the State Board of Examiners.

A motion approving the above resolution was made and seconded by Ms. Hurwitz and Mr. Albolino and carried unanimously after roll call.

A motion was made and seconded by Mr. Albolino and Mr. Kruse at 10:50 P.M. to adjourn the meeting and carried unanimously after roll call.

PJC:jd

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BUCCERI AND PINCUS
COUNSELORS AT LAW
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MEMBER N.J. & D.C. BARS
LOUIS P. BUCCERI
GREGORY T. SYREK

MARY J. HAMMER
MEMBER N.J. & N.Y. BARS

R-1

July 13, 1992

Hon. James A. Ospenson, A.L.J.
Office of Administrative Law
185 Washington Street
Newark, NJ 07102

Re: John Lydon and Hackensack
School District
O.A.L. Docket Nos.
EDU 03627-92/EDU 6806-91

Dear Judge Ospenson:

I am in receipt of Mr. Blunda's letter of June 16, 1992. Respondent agrees that the following language should be incorporated into the settlement agreement:

> The Hackensack Board of Education agrees to diligently prosecute the revocation of Mr. Lydon's teaching certificate before the State Board of Examiners in the event that Mr. Lydon should chose to contest that proceeding.

We would further request that an initial decision issue approving the settlement as revised.

Sincerely,

Louis P. Bucceri

/lg
cc: Mark J. Blunda, Esq.
John Lydon

OAL DKT. NO. EDU 3627-92 (EDU 6806-91 AND EDU 9178-91 ON REMAND)

IN THE MATTER OF THE TENURE HEARING OF JOHN LYDON, SCHOOL DISTRICT OF THE CITY OF HACKENSACK, BERGEN COUNTY, AND JOHN LYDON, PETITIONER, V. BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION ON REMAND

The record of these consolidated matters and initial decision on remand in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standard for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983) The matter is hereby dismissed, subject to compliance with the terms of the settlement.

AUGUST 24, 1992

DATE OF MAILING - AUGUST 24, 1992

COMMISSIONER OF EDUCATION

82-92

JOYCE ROTONDO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CARLSTADT-EAST RUTHERFORD REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Board member appealed Board's action in offering contract to music teacher not recommended for renewal by district superintendent.

Initial decision found superintendent recommended Board not rehire teacher stating his reasons including her refusal to teach summer music program and other difficulties. Board, however, influenced by parents and by excellent evaluations, determined to renew her contract. ALJ determined Board acted within scope of its authority in personnel matters upon the recommendation of its chief school administrator (CSA) as it did consider his recommendation. (Brescia) Moreover, the teacher's rehire was approved by recorded roll call majority vote of full membership of Board. (N.J.S.A. 18A:27-1) Petition was dismissed.

Commissioner set aside ALJ's determination noting ALJ relied on Brescia, holding Board was obliged to consider CSA's recommendation but was not bound by it. Commissioner reversed noting that under regulatory scheme and attendant State policy CSA controls flow of candidates from which employees are chosen. Board cannot act to employ any person not finally recommended by CSA, whether on first consideration or after the Board's rejection of other candidates or of the CSA's initial recommendation not to rehire. Therefore, Board's action in renewing contract was deemed ultra vires and thus null and void.

MAY 8, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 8298-91
AGENCY DKT. NO. 298-8/91

JOYCE ROTONDO,
Petitioner,
v.
BOARD OF EDUCATION OF CARLSTADT/EAST RUTHERFORD REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,
Respondent.

Joyce Rotondo, *pro se*

Dennis A. Maycher, Esq., for respondent (Maycher and Molinelli, attorneys)

Record Closed: February 13, 1992 Decided: March 23, 1992

BEFORE **EDITH KLINGER,** ALJ:

Petitioner, Joyce Rotondo, is a member of the respondent Board of Education of Carlstadt/East Rutherford Regional High School District, Bergen County (Board). On August 9, 1991, she filed a petition with the Commissioner of the Department of Education appealing the Board's action in offering a contract of employment to Mary K. Schneider as a teacher of music in the district, contrary to the recommendation of the district superintendent, Dr. Samuel Feldman.

The Board filed its answer to the petition on August 22, 1991, and on August 28, 1991, the Department of Education transmitted this matter to the Office of Administrative Law for hearing 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.*

New Jersey is an Equal Opportunity Employer

During a conference with the parties, the undersigned determined that the material facts could be stipulated and the matter could proceed to resolution without the necessity for a hearing. A joint stipulation of facts was submitted by the parties followed by briefs. The record was closed on February 13, 1992, at the time the last submission was received.

STIPULATED FACTS

The following facts were stipulated by the parties, and I **FIND** these **FACTS** to be uncontested.

On April 13, 1989, Mary K. Schneider (Schneider) was hired by resolution of the Board as a nontenured teacher of music through June 30, 1990. The duties of the position are set forth in the job description, which is part of the record. Schneider was rehired for the position from September 1, 1989 through June 30, 1990, pursuant to the same job description.

On May 3, 1990, Schneider was hired by a resolution of the Board as the director of the summer music program at the rate of $22 an hour. The job description of the summer music program director is also part of the record in this hearing.

On March 20, 1991, Dr. Samuel Feldman (Feldman), superintendent of the Carlstadt/East Rutherford Regional High School District, recommended to the Board that it not offer employment to Schneider as a nontenured music teacher for the 1991-92 school year.

At a Board work session on April 3, 1991, Feldman continued to recommend that Schneider not be offered a contract. On April 10, 1991, the Board voted publicly not to award her a teaching contract for the 1991-92 school year. On April 11, 1991, Feldman notified Schneider of the Board action. Schneider requested a statement of reasons for the nonrenewal of her contract on April 17, 1991.

On May 8, 1991, at a public meeting of the Board, there was a public outcry against the Board's decision not to rehire Schneider. An executive session of the Board was held, at which it decided to reconsider its nonhire decision.

On May 16, 1991, Feldman responded to Schneider's request for the statement of reasons for nonrenewal of her contract. She requested an informal hearing before the Board on May 21, 1991.

The informal hearing was held on June 12, 1991. The Board reviewed all of her teacher evaluations, which were excellent, and interviewed her evaluator, Mr. Walter Siri. The attorney for the Board advised it that the Board had final decision on hiring and did not have to abide by the superintendent's recommendation. On June 14, 1991, Feldman notified Schneider that the Board had not changed its prior decision not to renew her contract.

At a special meeting of the Board on June 26, 1991, the Board reversed its decision and voted to hire Schneider. Seven of the nine Board members voted in favor of her rehiring. Two Board members, including petitioner, were absent from the meeting.

It appears from a review of the minutes of the executive Board meeting of April 1991 in the record that Feldman conceded that Schneider's classroom work was excellent and that he had received no complaints about her. However, he felt that she should not be rehired because he believed that the district had an understanding with Schneider that she was also to teach the summer music program. When questioned by Board members at the public meeting held in May 1991, Feldman would not say that teaching the summer music program was part of Schneider's job. A Board member, Mrs. Joewono, asked Feldman whether or not Schneider had an option as to whether to teach the summer music program, but he did not respond directly to her inquiry. He expressed his opinion that the district could get a better music teacher than Schneider and refused to recommend her. The minutes of the executive meeting of April 1991 record that Feldman stated that Schneider ran the summer music program in the summer of 1990 and "ruined" it by her lack of enthusiasm.

According to the minutes, the Board did not refuse to recommend Schneider at its June 12 meeting. It listened to the evidence of her job performance, including the statement of her evaluator, Walter Siri, and placed the matter on its next agenda for official action. At its meeting of June 26, 1991, it decided to offer her a teaching contract. Rotondo, who was absent from the meeting, filed a petition objecting to the Board's action as contrary to the recommendation of the superintendent.

THE APPLICABLE LAW

The law governing the appointment of teaching staff members is set forth in *N.J.A.C.* 6:8-4.3(a)6vii:

> The chief school administrator shall recommend to the district board of education formal appointment of all teaching staff members.

The Commissioner of Education interpreted this regulation in the following manner:

> In the Commissioner's view, the requirements of *N.J.A.C.* 6:3-1.12(f) and more particularly *N.J.A.C.* 6:8-4.3(a)6vii, which defines one of the criteria which must be met by a district in order to be deemed certifiable in the area of staffing, make it imperative that a board of education act in personnel matters upon the recommendation of its chief school administrator. While a board pursuant to the above-cited regulation is within its legal right to reject such nomination, it may not arbitrarily act in the absence of a nomination from such chief school administrator. *Brescia v. Bd. of Ed. of the Tp. of Pemberton, Burlington Co.*, Decision of the Comm'r, p. 12 (April 12, 1991).

Consequently, although the Board is obligated to consider the recommendation of the superintendent, it is not bound by his recommendation. In fact, *N.J.S.A.* 18A:27-1 provides that no teaching staff member, tenured or nontenured, shall be appointed except by a recorded roll call majority vote of the full membership of the board of education appointing him or her.

The undisputed record shows that in this case, the superintendent recommended to the Board that Schneider not be offered a teaching contract for the 1991-92 school year and stated his reasons, including the fact that she refused to teach the summer music program as anticipated. The Board also had the opportunity to review Schneider's teaching evaluations, which were found to be excellent, and to question her evaluator. In addition, it was influenced by a significant demonstration of parental support for the reappointment of Schneider to the position of music teacher in the district.

I **FIND** the Board's decision to offer Schneider a contract to be reasonable in light of the teaching skills demonstrated by Schneider and the loyalty which she apparently engendered in the parents of her students, in spite of the fact that she would not conduct the summer music program.

Consequently, I **CONCLUDE** that the Board fulfilled its obligation under *Brescia, supra*, to "act in personnel matters upon the recommendation of its chief school administrator." It considered his recommendation, made its own investigation of Schneider's qualifications, and drew its own conclusions based upon its review of both sides of the question.

To require the Board to rigidly follow the recommendation of the superintendent would infringe its power to appoint teaching staff members as delegated to it by *N.J.S.A.* 18A:27-1. *See, DeFerrari v. Bd. of Ed. of the Town of Secaucus, Hudson Co.*, Comm'r of Ed. decision (Aug. 30, 1979).

The rehiring of Schneider was approved by a recorded roll call majority vote of the full membership of the Board as required by *N.J.S.A.* 18A:27-1. Seven of the nine Board members present for the vote were in favor of rehiring Schneider. The absence of Rotondo and another Board member did not affect the majority approval of the contract.

CONCLUSION

Based upon the above, I **CONCLUDE** that the Board operated within the scope of its authority when it approved the appointment of Schneider for the 1991-92 school year contrary to the recommendation of the superintendent, and its decision to rehire her was not arbitrary or capricious.

I therefore **CONCLUDE** that petitioner is entitled to no relief in this matter and that summary decision should be **GRANTED** in favor of the Board.

ORDER

It is hereby **ORDERED** that the petition of Joyce Rotondo be **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 23 1992
DATE

Edith Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

March 25, 1992
DATE

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 27 1992
DATE

Jayree LaVecchia
OFFICE OF ADMINISTRATIVE LAW

md/e

APPENDIX

EXHIBITS

A MInutes of Special Meeting of May 1991
B Minutes of Public Meeting of May 1991
C Minutes of Executive Meeting of April 1991
D Minutes of Public Meeting of May 1991
E Minutes of Final Fiscal Meeting of June 26, 1991
F Agenda of Final Fiscal Meeting of June 26, 1991

JOYCE ROTONDO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CARLSTADT-EAST RUTHERFORD REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions were untimely filed pursuant to N.J.A.C. 1:1-18.4 and are not addressed herein. Reply exceptions by the Board, urging affirmance of the ALJ and relying upon prior submissions, were timely filed.

Upon careful consideration, the Commissioner reverses the determination of the ALJ for the reasons set forth below.

The ALJ bases her analysis on the premise that a local board, which has the ultimate authority to hire staff pursuant to N.J.S.A. 18A:27-1, is obliged to consider the recommendation of its chief school administrator (CSA) but is not bound thereby. In so concluding, the ALJ relies on the Commissioner's decision in Brescia v. Board of Education of the Township of Pemberton, Burlington County, April 1, 1991.

Brescia, however, held that a board is free to reject a nomination brought forward by the CSA and to request presentation of another nominee, a process which might occur several times before a candidate is chosen; it did not hold that the board could consider the CSA's recommendation(s) and then appoint someone other than the person(s) recommended. To the contrary, Brescia was consistent with the Commissioner's view that, while boards of education are specifically authorized to ultimately select the persons who are employed in the district, the flow of candidates from which they choose is controlled by the CSA. This is so by virtue of the regulatory framework promulgated by the State Board through N.J.A.C. 6:11-9.3 (formerly codified as N.J.A.C. 6:3-1.12(f), powers and duties of the CSA) and N.J.A.C. 6:8-4.3, the monitoring standards currently in abeyance pending development of new regulations growing out of the Quality Education Act (P.L. 1990, c. 52), but still valid as an index of State policy on many operational issues, including the role of the CSA in staff decisions.*

In effect, then, a board cannot act to employ any person who has not finally been recommended by the CSA, whether on first consideration or after rejection of other candidates by the board. In the case of renewal of nontenured teachers, a board's rejection of the CSA's recommendation not to renew is tantamount to such action, as contracting a teacher not recommended for reemployment would result in the hiring of a person not acceptable to the CSA contrary to the regulatory scheme and State educational policy.

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* The Commissioner notes that the case primarily relied upon by the Board, Patricia DeFerrari v. Bd. of Ed. of the Town of Secaucus, Hudson County, 1979 S.L.D. 494, pre-dated these regulations.

While the Board has the ultimate authority to hire, in the case of nontenured contract renewal as in all other personnel decisions, the parameters within which the Board may act are controlled by the professional judgment of the CSA.*

Accordingly, the initial decision of the Office of Administrative Law is reversed for the reasons expressed herein. The Board's action in renewing the contract of Mary Schneider is deemed ultra vires and therefore null and void.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 8, 1991

DATE OF MAILING - MAY 11, 1992

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* Nor do these parameters impinge upon the rights of affected teachers, who have no entitlement to reemployment (absent, of course, decisions made on statutorily or constitutionally proscribed bases) and who retain the ability to appear before the Board pursuant to N.J.A.C. 6:3-1.20 to argue for reconsideration of decisions not to reemploy. Indeed, such an appearance was made by the affected teacher in the present matter with the result that the Board directed the CSA to reconsider his recommendation, although he elected not to alter his original determination.

82-92

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JOYCE ROTONDO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CARLSTADT-EAST RUTHERFORD REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

JULY 9, 1992

JOYCE ROTONDO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CARLSTADT-EAST RUTHERFORD REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

For Movant-Respondent Board of Education, Dennis A. Maycher (Maycher & Molinelli)

For Respondent-Petitioner, Joyce Rotondo, Pro Se

Whereas, the above-captioned matter was decided by the Commissioner of Education on May 8, 1992, with a ruling holding that the Board of Education could not renew the contract of a nontenured teacher in the absence of an affirmative recommendation from the chief school administrator and that the Board's action in so doing was ultra vires hence null and void; and

Whereas, on June 17, 1992, the Board moved to request a stay of the Commissioner's decision pending appeal to the State Board of Education, arguing that the affected teacher had worked during the pendency of prior proceedings and had acquired tenure, so that she would be severely prejudiced by the Commissioner's decision, as would staff and students whose orderly scheduling of class assignments would suffer if the Commissioner's decision were reversed on appeal; and that the basis for the superintendent's

reservations related to a summer music program that is now handled by another individual, so that no argument can be made of prejudice to students by retention of the affected teacher; and

Whereas, on June 26, 1992, petitioner replied to said motion, arguing that the Board would have the entire summer to appoint someone to the affected teacher's position for the coming academic year, thus avoiding a disruptive mid-year staff change if the Commissioner's decision is upheld; that allowing the teacher to remain on staff only compounds the Board's error of employing her for the entire 1991-92 school year; and that the superintendent believed the teacher's remployment not to be in the best interest of the district, so that students and staff would not benefit from her continued presence; and

Whereas, the Commissioner has considered the arguments of the parties and finds no basis on which a stay would be warranted, as the affected teacher can be made whole if the Commissioner's decision is reversed on appeal, and stability and continuity of operations can be maintained by prompt appointment of other staff to the affected position; now therefore

IT IS ORDERED this 9TH day of July 1992 that the Board's motion for stay is DENIED and that the Commissioner's decision in this matter shall stand unless and until reversed on appeal.

John C Woodbury

ACTING COMMISSIONER OF EDUCATION

JULY 9, 1992

DATE OF MAILING - JULY 9, 1992

8292

EDU #8298-91
C # 82-92
SB # 23-92

JOYCE ROTONDO,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CARLSTADT-EAST RUTHERFORD REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION ON MOTION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, May 8, 1992

For the Petitioner-Respondent, Joyce Rotondo, pro se

For the Respondent-Appellant, Maycher & Molinelli
(Dennis A. Maycher, Esq., of Counsel)

The Board of Education of the Carlstadt-East Rutherford Regional High School District ("Board") seeks a stay, pending disposition of its appeal to the State Board of Education, of the Commissioner of Education's decision in this matter dated May 8, 1992. In his decision, the Commissioner concluded that the Board could not act to employ or renew the employment of any person not recommended by its chief school administrator, and that the Board's action in renewing the contract of a teacher contrary to the recommendation of its district superintendent was therefore ultra vires.

In support of its motion, the Board argues that denial of a stay pending final determination by the State Board would work a severe prejudice on the orderly scheduling of its staff and classroom instruction.

Inasmuch as we find that the Board's application fails to meet the standards that would entitle it to relief under Crowe v De Gioia, 90 N.J. 126 (1982), we deny its motion for a stay. Under the circumstances, we find no necessity for a stay in this instance.

Therefore, we deny the Board's motion for a stay of the Commissioner's decision in this matter dated May 8, 1992. In so doing, we stress that we do not address or determine the merits of the underlying appeal.

September 2, 1992
Date of mailing SEP 4 1992

82-92

JOYCE ROTONDO,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CARLSTADT-EAST RUTHERFORD REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, May 8, 1992

Decision on motion by the Commissioner of Education, July 9, 1992

Decision on motion by the State Board of Education, September 2, 1992

For the Petitioner-Respondent, Joyce Rotondo, pro se

For the Respondent-Appellant, Maycher & Molinelli (Dennis A. Maycher, Esq., of Counsel)

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

October 8, 1992

83-92

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE BOROUGH OF ATLANTIC HIGHLANDS, MONMOUTH COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

MAY 8, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH : DECISION
OF ATLANTIC HIGHLANDS, MONMOUTH :
COUNTY. :
:

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held on April 7, 1992 in the School District of the Borough of Atlantic Highlands, Monmouth County, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Kathleen Masterson	419	7	426
Helen Marchetti	374	7	381
Marjorie Osborn	354	7	361
Michele Rast	355	5	360
Dalton Carhart	312	6	318
Dorothy Conn	222	6	228

Pursuant to a letter request from Michele A. Rast dated April 12, 1992, an authorized representative of the Commissioner of Education from the Office of the Monmouth County Superintendent of Schools was directed to conduct a recount of the machine ballots cast. The recount was conducted on April 27, 1992, at the Voter Machine Warehouse, 300 Halls Mills Road, Freehold, New Jersey.

At the conclusion of the recount, the tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Kathleen Masterson	419	7	426
Helen Marchetti	374	7	381
Marjorie Osborn	354	7	361
Michele Rast	355	5	360
Dalton Carhart	312	6	318
Dorothy Conn	222	6	228

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts it as his own. The Commissioner notes that Ms. Rast's letter request indicated that she was also pursuing a recount of absentee ballots through Superior Court, but that no indication has been received of such recount having actually been undertaken. The totals given above therefore reflect the count of absentee ballots as originally reported following the election and will stand unless and until changed by the result of any absentee ballot recount requested by Ms. Rast but not yet conducted or reported on.

Accordingly, subject to the above proviso, the Commissioner finds and determines that Kathleen Masterson, Helen Marchetti and Marjorie Osborn were elected to full terms of three years each on the Board of Education of the School District of the Borough of Atlantic Highlands.

COMMISSIONER OF EDUCATION

MAY 8, 1992

DATE OF MAILING - MAY 11, 1992

84-92

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF WATERFORD, CAMDEN COUNTY. :
:

MAY 8, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF WATERFORD, CAMDEN COUNTY. :
:

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held on April 7, 1992, in the School District of the Township of Waterford, Camden County, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Patricia Amatuzio	277	6	283
Paul Amatuzio, Jr.	273	6	279
Richard F. Murry	268	9	277
Mary L. Williams	277	11	288
Robert S. Outlaw	272	3	275
Lewis G. Belfer	225	9	234

Pursuant to a letter request from Mr. Richard Murry dated April 17, 1992, the Commissioner of Education directed an authorized representative from the Office of the Camden County Superintendent of Schools to conduct a recount of the machine ballots cast. The recount was conducted on April 29, 1992 at the Voting Machine Warehouse, South Jersey Port Corporation, Camden, New Jersey. The absentee ballots were recounted by the Camden County Board of Elections on the same date.

At the conclusion of the recount, the tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Patricia Amatuzio	277	6	283
Paul Amatuzio, Jr.	273	6	279
Richard F. Murry	268	9	277
Mary L. Williams	277	11	288
Robert S. Outlaw	272	4	276
Lewis G. Belfer	225	8	233

Although there were two minor changes, the names of the three winning candidates remain the same as those derived from the balloting of April 7, 1992. Therefore, it is recommended that the results as announced at the conclusion of the election remain unaltered.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts it is as his own.

Accordingly, the Commissioner finds and determines that Mary L. Williams, Patricia Amatuzio and Paul Amatuzio, Jr. were elected to full terms of three years each on the Board of Education of the Township of Waterford.

COMMISSIONER OF EDUCATION

MAY 8, 1992

DATE OF MAILING - MAY 11, 1992

85-92

85-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
MATAWAN-ABERDEEN REGIONAL	:	DECISION
SCHOOL DISTRICT, CONSTITUENT	:	
DISTRICT OF ABERDEEN TOWNSHIP,	:	
MONMOUTH COUNTY.	:	
	:	

MAY 8, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
MATAWAN-ABERDEEN REGIONAL : DECISION
SCHOOL DISTRICT, CONSTITUENT :
DISTRICT OF ABERDEEN TOWNSHIP, :
MONMOUTH COUNTY. :
:

The announced results of the balloting for two members of the regional Board of Education from the constituent district of Aberdeen Township, for full terms of three years each, at the annual school election held on April 7, 1992 in the Matawan-Aberdeen Regional School District, Monmouth County, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Irwin Ozer	501	5	506
Marilyn Brenner	399	4	403
Ronald Mirante	392	6	398
Robert Deegan	331	5	336
Mary Fankhauser	319	1	320
Jonathan P. Pauker	262	1	263

Pursuant to a letter request from Mr. Ronald Mirante dated April 9, 1992, an authorized representative of the Commissioner of Education from the Office of the Monmouth County Superintendent of Schools was directed to conduct a recount of the machine ballots cast. The recount was conducted on April 27, 1992, at the Voter Machine Warehouse, 300 Halls Mills Road, Freehold, New Jersey.

At the conclusion of the recount, the tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Irwin Ozer	501	5	506
Marilyn Brenner	399	4	403
Ronald Mirante	392	6	398
Robert Deegan	331	5	336
Mary Fankhauser	319	1	320
Jonathan P. Pauker	262	1	263

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his representative and adopts it as his own. The Commissioner notes that there was no indication of any request to Superior Court to recount absentee ballots and that there were no changes in the tally as a result of the machine recount.

Accordingly, the Commissioner finds and determines that Irwin Ozer and Marilyn Brenner were elected to full terms of three years each on the Board of Education of the Matawan-Aberdeen Regional School District.

COMMISSIONER OF EDUCATION

MAY 8, 1992

DATE OF MAILING - MAY 11, 1992

86-92

86-92

BOARD OF EDUCATION OF THE BORDENTOWN REGIONAL SCHOOL DISTRICT, BURLINGTON COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE BOROUGH OF FIELDSBORO AND MAYOR AND COUNCIL OF THE BOROUGH OF FIELDSBORO, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

MAY 12, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING EMERGENT RELIEF
OAL Dkt. No. EDU 2179-92
Agency Dkt. No. 52-2/92

BOARD OF EDUCATION OF THE BORDENTOWN REGIONAL SCHOOL DISTRICT, BURLINGTON COUNTY,

Petitioner,

v.

JOHN ELLIS, COMMISSIONER OF EDUCATION, MAYOR AND COUNCIL OF THE BOROUGH OF FIELDSBORO, BOARD OF EDUCATION OF THE BOROUGH OF FIELDSBORO,

Respondent.

Stephen J. Mushinski, Esq., for petitioner, Board of Education of the Bordentown Regional School District, Burlington County

Dennis M. DeSantis, Esq., for respondent, Mayor and Council of the Borough of Fieldsboro, (Destribats, Campbell, DeSantis and Magee, attorneys)

Brian M. Guest, Esq, for respondent, Board Secretary, Fieldsboro Borough School District, (Guest, Domzalski, Kurts, Landgraf and McNeill, attorneys)

For the reasons stated in the oral opinion rendered by the undersigned on April 3, 1992, the request for emergent relief made by petitioner is denied. This matter may be reviewed by the Commissioner of Education pursuant to *N.J.A.C.* 1:1-12.6(j).

April 3, 1992
DATE

Jaynee LaVecchia
JAYNEE LaVECCHIA, CHIEF ALJ

BOARD OF EDUCATION OF THE BORDENTOWN REGIONAL SCHOOL DISTRICT, BURLINGTON COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE BOROUGH OF FIELDSBORO AND MAYOR AND COUNCIL OF THE BOROUGH OF FIELDSBORO, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

The record of this emergent matter, which seeks payment of the Fieldsboro school district's state aid allotments directly to petitioner due to the likelihood of Fieldsboro not being able to timely meet contractual tuition obligations for petitioner's education of Fieldsboro students pursuant to a sending-receiving agreement, and the tape-recorded oral initial decision and written order of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful consideration, the Commissioner concurs with the ALJ that petitioner has failed to meet the criteria for emergent relief set forth in Crowe v. DeGioia, 90 N.J. 126 (1982) in that no demonstration of imminent harm to students was made and any financial harm to petitioner can be averted by expedition of this matter on its merits; in that petitioner's right to effectively claim precedence over Fieldsboro's other creditors and obligations

is not sufficiently settled for purposes of granting extraordinary relief; and in that the weighing of equities in this matter would most properly focus on students, whose well-being was not shown to be in any immediate jeopardy.

The Commissioner further concurs that while this matter is not amenable to emergent relief, it does demand significantly expedited proceedings on the merits, and he endorses the ALJ's plan to begin such proceedings at once.

Accordingly, the initial decision of the Office of Administrative Law denying emergent relief and directing immediate scheduling of expedited proceedings on the merits is affirmed for the reasons expressed therein.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 12, 1992

DATE OF MAILING -- MAY 12, 1992

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* The Commissioner notes an error in the listing of attorneys on the written order of the ALJ, as Mr. DeSantis represented the Board in this matter, and Mr. Guest the Mayor and Council.

87-92

ALBERT POLITO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF NORTH HUNTERDON REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MAY 12, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO.EDU 7369-91
AGENCY DKT. NO. 243-7/91

ALBERT POLITO,
Petitioner,
v.
BOARD OF EDUCATION OF NORTH HUNTERDON REGIONAL HIGH SCHOOL DISTRICT,
Respondent.

Richard A. Friedman, Esq., for petitioner
(Zazzali, Zazzali, Fagella & Nowak, attorneys)

Joseph R. Morano, Esq., for respondent
(Rand, Algeier, Tosti & Woodruff, attorneys)

Record Closed: March 31, 1992 Decided: March 31, 1992

BEFORE **KEN R. SPRINGER,** ALJ:

This matter was transmitted to the Office of Administrative Law on July 30, 1991 for a hearing pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.*

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 31, 1992
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

4/1/92
Date

Maureen C. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 03 1992
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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OFFICE OF ADMINISTRATIVE LAW
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ZAZZALI, ZAZZALI, FAGELLA & NOWAK
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioner

ALBERT POLITO, Petitioner vs. NORTH HUNTERDON REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OAL DOCKET NO. EDU 07369-91N AGENCY REF. NO. 243-7/91 **STIPULATION OF SETTLEMENT**

This matter having been opened by filing a Petition of Appeal with the Commissioner of Education, and having been transferred to the Office of Administrative Law, and the parties having resolved the differences between them, the parties present this comprehensive settlement to the Administrative Law Judge and Commissioner of Education for their consideration and approval.

WHEREAS, the parties, by acceptance of this agreement, signify their intent to enter into a complete and binding resolution of the various issues concerning Mr. Polito's salary; and

WHEREAS, the parties recognize the Mr. Polito's increment was withheld in April 1988, the withholding to take effect for the

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A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
GATEWAY I
NEWARK, N.J. 07102

1988-89 school year; and

WHEREAS, a bonafide dispute has arisen regarding Mr. Polito's placement on the Respondent's salary guides for the years thereafter, as a result of actions of the School Administration in establishing Mr. Polito's rate of compensation, and because of the parties' disagreement concerning the application of Probst v. Haddonfield Bd. of Ed. 249 NJ Super 222 (App. Div. 1991), Certification Granted ____ NJ ____ (1991) and Lulewicz v. Livingston Twp. Bd. of Ed., Essex County decided by State Bd. of Ed. June 1, 1989, as they relate to the placement of teaching staff members at maximum of the guide in years after the withholding of their increments; and

WHEREAS, the parties recognize that both parties have presented substantial and significant claims and defenses in this matter; and

WHEREAS, Respondent is desirous of exercising its discretion such to restore Mr. Polito to the maximum step on its current salary guide (although Petitioner disputes that such restoration is discretionary), the parties agree that this matter shall be settled on the following basis:

1. The Respondent Board shall reimburse Mr. Polito in the amount of $276 which was deducted from his compensation during the 1990-91 school year.

2. Mr. Polito shall waive any claim to the $48,304 salary he claims that he was entitled to based upon the notice he

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received for the 1990-91 school year.

3. The Respondent Board shall place Mr. Polito at the maximum step of it current salary guide, as of January 1, 1992, providing him with a prorated annual salary of $53,333.20.

4. Mr. Polito shall continue to be compensated on the current salary guide for each year of his employment, subject to any appropriate action that the Board may take in future years.

5. Mr. Polito waives any claim to the amount of (a) $2,734 by which his salary was reduced in the 1990-91 school year (calculated as $3,010 less the restored $276) and the amount of (b) $1,206 by which his salary has been reduced in the 1991-92 school year (September 1, 1991 through December 31, 1991).

6. Mr. Polito releases the Board and any of its agents, servants and employees from any and all claims arising out of any incidents previously referred to, or in the above entitled action, Docket No. EDU 07369-91.

7. The parties acknowledge that each has received independent legal advice of his or its own selection, each fully understands this agreement and that each has been fully informed as to his and its legal rights and obligations in connection with this matter.

8. The parties also acknowledge that all of the above numerical figures represent gross earnings and do not reflect appropriate salary deductions.

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IT IS FURTHER ACKNOWLEDGED by the parties that having had

such advice and knowledge, each is executing this Agreement freely and voluntarily in the best interest of their respective positions.

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IN WITNESS WHEREOF, the parties have set their hands and seals as of the date first above mentioned.

ATTEST:

NORTH HUNTERDON REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION

VERONICA MITCHELL, BOARD SECRETARY

RICHARD ALLEN, BOARD PRESIDENT

WITNESS:

RICHARD A. FRIEDMAN, ESQ.

ALBERT POLITO

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OAL DKT. NO. EDU 7369-91

ALBERT POLITO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF NORTH HUNTERDON REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

MAY 12, 1992

DATE OF MAILING - MAY 12, 1992

88-92

THOMAS J. MARSHELLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner alleged improper denial of credit for certain work experience as a substitute for required academic course work in connection with petitioner's eligibility for school business administrator's certificate.

Initial decision determined petitioner did not sustain his burden of proving that Board acted arbitrarily and unreasonably in determining that his work experience did not adequately substitute for the required course work. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

MAY 12, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8415-91
AGENCY DKT. NO. 206-6/91

THOMAS J. MARSHELLO,
Petitioner,
v.
NEW JERSEY STATE BOARD OF EXAMINERS,
Respondent.

Thomas J. Marshello, pro se

David Earle Powers, Deputy Attorney General, for respondent
(Robert J. Del Tufo, Attorney General of New Jersey, attorney)

Record Closed: March 23, 1992 Decided: March 31, 1992

BEFORE **STEPHEN G. WEISS,** ALJ:

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law by the Department of Education as a contested case on September 4, 1991, as the result of the filing by Thomas Marshello of a petition of appeal challenging the May 2, 1991 decision of the State Board of Examiners, which denied petitioner's application pursuant to N.J.A.C. 6:11-3.24 et seq. for approval of certain of his work experience as a substitute for required academic course work in connection with petitioner's eligibility for a school business administrator's certificate.

Marshello's application to the State Board of Examiners in February 1991 set forth that he lacked the requisite number of semester hour credits in the following areas:

(a) School business administration;
(b) School buildings;
(c) School finance;
(d) School law;
(e) Organization and administration of public education; and
(f) Curriculum of public schools.

After reviewing Marshello's application, the State Board of Examiners determined to credit him with equivalent work experience as a substitute for course work in two of those six areas -- "school finance" and "school law." However, it rejected his contention with respect to the areas of "school business administration," "school buildings and organization," and "administration of public education." Marshello had made no claim that his work experience entitled him to approval with respect to "curriculum of public schools."

Following transmittal of the case to the OAL, a telephone prehearing conference was conducted by Administrative Law Judge Edith R. Klinger on November 19, 1991. At that conference, it was agreed that the issue to be determined was whether, pursuant to N.J.A.C. 6:11-3.24 et seq., the refusal by the State Board of Examiners to credit petitioner for his work experience in lieu of courses was arbitrary and capricious. A plenary hearing was conducted before the undersigned administrative law judge on March 2, 1992, and the record closed on March 23, 1992.

DISCUSSION AND FINDINGS OF FACT

Testimony was presented at the hearing by Marshello and one witness on his behalf, Vincent B. Calabrese. Following the conclusion of his case, petitioner was briefly called as a witness by respondent.

At the outset of the hearing, the record before the State Board of Examiners was marked into evidence as "Joint Exhibit 1." The documents included Marshello's

application for certification with attachments (his resume, letters of support, a job description for the position of Auditor General in the Newark Public Schools, a position which he held from 1976 to 1984, and a credentials review summary sheet). Also marked into evidence as "Joint Exhibit 2" was the May 2, 1991 decision of the State Board of Examiners from which the instant appeal was taken.

Marshello testified that he is amply qualified to obtain approval for his work experience insofar as the areas of school business administration, school buildings, and organization and administration of public education are concerned. He pointed out in this respect that his work experience included the following: (a) from 1967 to 1973, he was an accountant with Touche Ross & Company; (b) from 1973 to early 1976, he was a supervising accountant in the Division of Budget and Accounting, New Jersey Department of the Treasury; and (c) most particularly, from early 1976 to March 1984, he served in the statutorily created position of Auditor General for the reorganized Newark school system. See, N.J.S.A. 18A:17A-9 and 17A-10 (Laws 1975, Chapter 169, Sections 9 and 10).

In connection with his eight plus years of service in Newark as Auditor General, Marshello emphasized that he was the State's fiscal monitor in the school district and therefore fully responsible for oversight authority in connection with all of the essential aspects of the operation and administration of the State's largest school system insofar as its fiscal affairs were concerned. Areas over which he exercised such authority included, he said, such critical elements as budgeting and accounting, capital construction, personnel fiscal matters, and many other activities associated with the business of carrying out the legislative mandate for Newark's school system.

With respect to the three specific areas in which the State Board of Examiners determined that Marshello failed to demonstrate equivalent work experience, petitioner maintained that he had as much, if not more, experience than any other school business administrator would have with respect to each of them. His experience in the area of "school business administration" was, he said, almost self-explanatory. With respect to "school buildings," he maintained that he was involved in vital decision-making with respect to repair and maintenance, custodial staffing, and capital construction, including development of contracts, funding, and planning. With respect to "organization and administration of public education," he pointed out that he was a member of the Governor's Task Force whose report led

to the creation of the new Newark school district in 1975, and his appointment to the critical statutory position of Auditor General reflected the substantial involvement which he had.

Basically, Marshello's main point was that his involvement as fiscal monitor in Newark for more than eight years required him to become familiar with and to engage in all aspects of the district's business affairs, aside from purely academic matters, and to say that such valuable experience did not qualify him for approval in the areas for which he sought the same was completely untenable. In short, it was his job, as the State's fiscal agent, to make sure that the school system operated efficiently, and he served successfully in that capacity.

Marshello also called Vincent B. Calabrese as a witness on his behalf. Calabrese had submitted a letter in connection with petitioner's application for the school business administrator's certificate, which was a part of Exhibit J-1. In it, Calabrese noted that between September 1975 and December 1988, he had served as Assistant Commissioner of Finance in the Department of Education and that Marshello was responsible through his office to the Commissioner of Education. According to Calabrese, petitioner was responsible as Newark's Auditor General for a variety of activities, including performance and compliance reviews of all areas involved with the financial operations of the district. Those reviews were intended, he said, to improve effective control over revenues, expenditures, property control, and the accounting of other assets, including the effective use of supplies and equipment. Marshello, he said, also was responsible for assuring that an adequate system of internal controls was in place and operating effectively.

Calabrese's testimony at the hearing amplified on his letter. He noted that the requirements imposed upon the Newark school system, except for size, were the same as those which were in place in every other district in the State and, as he put it, after serving just a few months in Newark, one could probably handle the same activities in any other district. The reverse would not be true. While Marshello did not have "hands-on" experience in all aspects of the business operation, he did have involvement with many areas as the result of his fiscal oversight functions.

With respect, however, to two of the areas of which the Board found Marshello deficient -- "school buildings" and "organization and administration of public

schools," -- Calabrese was less than enthusiastic about petitioner's credentials. Thus, with respect to "organization and administration of the public schools," he observed that Marshello's functioning as Auditor General did not necessarily provide experience in those important aspects which involved academic considerations As to "school buildings," Calabrese felt that petitioner's knowledge depended upon his degree of involvement, and while he may have had input into maintenance and finance, there was little indication of any actual experience in the planning aspect.

On cross-examination, Calabrese noted there was no indication that petitioner was experienced in various matters which normally fell within the jurisdiction of the school board secretary, whose functions often were combined with that of the school business administrator. For example, oversight of school election matters clearly was absent.

The respondent then called Marshello as its witness. Essentially, Marshello's testimony revealed that he had little experience with respect to the academic side of school business operations. For example, although he was familiar with fiscal aspects of the "school buildings" element, he was not involved in any planning from an academic viewpoint. On the other hand, Marshello maintained that the most important consideration in school business operations is the "bottom line," and that 85 percent of most school budgets are taken up by salary, a distinctly fiscal matter.

FINDINGS OF FACT

Based upon my review of the testimony and the documentary evidence, I herewith make the following findings of fact:

1. Petitioner, Thomas J. Marshello, was employed as an accountant for Touche Ross Company from 1967 to 1973.

2. From 1973 to early 1976, petitioner was employed as a supervising accountant in the Division of Budget and Accounting, Department of the Treasury. In that capacity, he served as a staff person in support of the activities undertaken by Special Agent Walter Wechsler at the direction of

Governor Byrne to develop a system of fiscal reforms attendant to the reorganization of the Newark school system.

3. In early 1976, petitioner was appointed Auditor General for the Newark school system, a position established pursuant to the provisions of N.J.S.A. 18A:17A-9 and 17A-10. The duties and responsibilities of that position were set forth in the statute as follows:

> In districts in cities of the first class with a population over 325,000 the commissioner shall appoint an auditor general, who, subject to the rules and regulations of the State board, shall:
>
> a. Perform post or concurrent audits of such transactions and accounts kept by or for the district as he may deem necessary;
> b. Perform management analysis of such transactions and activities of the district as he may deem necessary in order to improve the efficiency, productivity and performance of the district and to disclose and prevent inefficiency in the district;
> c. Conduct financial, operational and compliance reviews to improve effective control over income, expenditures, funds, property and other assets;
> d. Determine whether the financial transactions of the district have been consummated in accordance with laws, regulations or other legal requirements, and whether adequate internal financial control over operations is exercised;
> e. Keep and maintain such records as may be necessary to enable him to accomplish the duties of the office as in this act provided;
> f. Organize the office as he shall determine appropriate with the approval of the commissioner;
> g. Subject to the approval of the commissioner, appoint, employ, and with the limits of funds appropriated therefor, fix the compensation of such assistants and employees as the commissioner shall determine to be required to perform the duties and functions of the office;
> h. Report at least annually to the commissioner on the operations of the office;
> i. Perform such other duties as shall be directed by the commissioner.

4. Petitioner served as Newark's Auditor General until March 1984. In that capacity, he carried out all of the duties and responsibilities of the position as set forth in the statute.

5. Petitioner's work experience provided him with the equivalency of required course work in the areas of "school finance" and "school law."

6. Petitioner successfully carried out all of the obligations placed upon him under N.J.S.A. 18A:17A-9 and, in addition, successfully performed all of the duties and responsibilities set forth in the job description for the position.

7. Although, as part of his duties and responsibilities as Auditor General, the petitioner was involved, to some extent, in the area of "school buildings," his experience did not include certain of the essential aspects of that element. For example, he had little if any experience with respect to the development of plans for construction of new buildings or additions, and was not involved, at all, in consideration of the academic aspects of school building design.

7. Petitioner did not while serving as Auditor General engage in many of those activities which would normally be involved in the elements of "school business administration" or "organization and administration of public education." For example, acting as fiscal monitor for the school district did not require nor include participation in the vital substantive academic oriented decision-making which takes place during the budget process.

9. Petitioner conceded that he does not have equivalent work experience adequate to justify approval in lieu of course work for the element of "curriculum of public schools."

DISCUSSION

As counsel for respondent aptly observed, the elevated standard of review which applies to a matter of this sort makes it very difficult for a petitioner to establish a case sufficient to set aside a decision by the Board of Examiners. As set forth in the prehearing order, unless the Board's decision can be characterized as "arbitrary" or "capricious," and not "a reasoned exercise of [its] discretionary

authority," the decision must be affirmed. See, Babicz v. State Board of Examiners, 1978 S.L.D. 937, 940, aff'd State Board, 1979 S.L.D. 816. It simply is not within the province of an administrative law judge to substitute his or her judgment for the agency's determination. See also, Siefring v. N.J. State Board of Examiners, OAL DKT. EDU 6196-86, decided by the Commissioner June 2, 1987; Stoolmacher v. State Board, 1975 S.L.D. 951.

Based, then, upon my review and consideration of the documentary evidence and the testimony, I do not believe that petitioner has carried the substantial evidentiary burden placed upon him. Although he performed well as Newark's Auditor General, a substantial portion of his activities in that position were oriented strictly to the "fiscal side" and he had very little involvement in those aspects of school business operations which necessarily involve academic considerations and decision-making. While Marshello appears to have competently carried out the duties of Auditor General, that experience, while valuable, is not an adequate substitute for the required course work in those areas which the Board deemed petitioner to be deficient. Under the circumstances, the Board's exercise of the discretion given to it must be upheld.

CONCLUSION AND ORDER

Accordingly, for the reasons set forth herein, I **CONCLUDE** that petitioner has failed to carry his burden of proof and I **ORDER** that the petition of appeal should be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 31, 1992
Date

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

4/2/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 06 1992
Date

OFFICE OF ADMINISTRATIVE LAW

amr/e

WITNESS LIST

Thomas J. Marshello
Vincent B. Calabrese

EXHIBIT LIST

J-1	Record before State Board of Examiners
J-2	Decision of State Board of Examiners, May 2, 1991

OAL DKT. NO. EDU 8415-91

THOMAS J. MARSHELLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review, the Commissioner concurs with the ALJ that petitioner has not met his burden of demonstrating that the decision of the State Board of Examiners in this matter was arbitrary, capricious or unreasonable. To the contrary, the Board has properly exercised its sound discretion in determining that petitioner's experience was not a sufficient substitute for the academic course work required for eligibility for a school business administrator's certificate.

Accordingly, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

MAY 12, 1992

COMMISSIONER OF EDUCATION

DATE OF MAILING - MAY 12, 1992

89-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN-	:	DECISION
SHIP OF LACEY, OCEAN COUNTY.	:	
	:	

MAY 12, 1992

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE TOWNSHIP OF LACEY, OCEAN COUNTY.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held in the school district of Lacey Township, Ocean County, on April 7, 1992, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
James S. Knoeller	955	37	992
William Quist	675	14	689
Linda A. Downing	680	9	689
Thomas R. Palczewski	660	24	684
Linda C. Laffey	657	14	671
John Coppola	490	15	505
Eleanor D. Bennett	402	9	411
Anna M. Applegate	322	13	335
John M. Giebas	317	10	327

Pursuant to a letter request from candidate Thomas R. Palczewski dated April 9, 1992, an authorized representative of the Commissioner of Education from the Office of the Ocean County Superintendent of Schools was directed to conduct a recount of the machine ballots cast. The recount was conducted on April 30, 1992 at the Ocean County Voting Machine Warehouse, Dover Township, by the Ocean County Superintendent of Schools.

At the conclusion of the recount, the announced results were unchanged and the tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
James S. Knoeller	955	37	992
William Quist	675	14	689
Linda A. Downing	680	9	689
Thomas R. Palczewski	660	24	684
Linda C. Laffey	657	14	671
John Coppola	490	15	505
Eleanor D. Bennett	402	9	411
Anna M. Applegate	322	13	335
John M. Giebas	317	10	327

Absentee ballot tallies are given as reported on the Regular/Combined Statement of Result.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts it as his own.

Accordingly, the Commissioner finds and determines that James S. Knoeller, William Quist, and Linda A. Downing were elected to full terms of three years each on the Board of Education of the Township of Lacey.

COMMISSIONER OF EDUCATION

MAY 12, 1992

DATE OF MAILING - MAY 12, 1992

90-92

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF BOUND BROOK : DECISION
BOROUGH, SOMERSET COUNTY. :
:

MAY 12, 1992

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF BOUND BROOK BOROUGH, SOMERSET COUNTY.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held April 7, 1992, in the School District of Bound Brook Borough, Somerset County, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Carl Franzetti	593	8	601
Deborah A. Pikulin	484	10	494
Carlos Fuentes	639	16	655
Peter H. Jensen	532	8	540
Wendy Spinner	527	14	541
Paul Hasting	490	11	501

Pursuant to a letter request from Mr. Peter Jensen, a Bound Brook Borough Board of Education candidate, dated April 14, 1992, Eric D. Olandt, County School Business Administrator from the Office of the Somerset County Superintendent of Schools, was directed to conduct a recount of the ballots cast. The recount was conducted on April 29, 1992 at the Somerset County Board of Elections Warehouse.

At the conclusion of the recount it was determined that the original count was sustained.

The tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Carl Franzetti	593	8	601
Deborah A. Pikulin	484	10	494
Carlos Fuentes	639	16	655
Peter H. Jensen	532	8	540
Wendy Spinner	527	14	541
Paul Hasting	490	11	501

* * * *

The Commissioner finds and determines that the results were sustained and Carlos Fuentes (655), Carl Franzetti (601), and Wendy Spinner (541) were duly elected to the Bound Brook Borough Board of Education.

COMMISSIONER OF EDUCATION

MAY 12, 1992

DATE OF MAILING - MAY 12, 1992

91-92

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF SOUTH HUNTERDON REGIONAL HIGH SCHOOL, HUNTERDON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

MAY 12, 1992

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF SOUTH	:	DECISION
HUNTERDON REGIONAL HIGH	:	
SCHOOL, HUNTERDON COUNTY.	:	
	:	

The announced results of the balloting for the Current Expense proposition and the Capital Outlay proposal held April 7, 1992, in the School District of South Hunterdon Regional High School, Hunterdon County, were as follows:

	AT POLLS		ABSENTEE		TOTAL	
	YES	NO	YES	NO	YES	NO
CURRENT EXPENSE QUESTION	299	413	1	3	300	416
CAPITAL OUTLAY QUESTION	444	247	4	0	448	247

Pursuant to a letter request from the South Hunterdon Regional High School Board of Education dated April 14, 1992, an authorized representative of the Commissioner of Education from the Office of the Hunterdon County Superintendent of Schools was directed to conduct a recount of the ballots cast. The recount was conducted on April 16, 1992 at the Old City Jail, Lambertville, Stockton Municipal Building, and West Amwell Municipal Building.

At the conclusion of the recount, it was determined that the original count was sustained.

The tally stood as follows:

	AT POLLS		ABSENTEE		TOTAL	
	YES	NO	YES	NO	YES	NO
CURRENT EXPENSE QUESTION	299	413	1	3	300	416
CAPITAL OUTLAY QUESTION	444	247	4	0	448	247

There was a discrepancy between the Combined Statement of Result and the votes cast indicated on the front of the machines. It was noted that a total of 297 ballots were recorded for the YES vote for the Current Expense Question on the Combined Statement while 300 ballots were rendered on the machines. The Poll List and Authorization Slips were checked by all present and showed there was a total count of 300 ballots cast for the YES vote for the Current Expense Question. Also, upon checking the voting machines, it was noted that Machine #172706, Lambertville and Machine #172681, West Amwell had the Capital Outlay as Question #1 and Current Expense Question as #2 but on the SAMPLE BALLOTS it read Current Expense Question as #1 and Capital Outlay Question as #2 and was listed this way on Machine #172711, Lambertville and Machine #172712, Stockton.

This concludes the report of the Commissioner's representative.

* * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings set forth above.

Accordingly, the Commissioner finds and determines that the Current Expense Question submitted by the Board at the annual school

election held on April 7, 1992 was not approved by the voters. He also finds and determines that the Capital Outlay Question submitted by the Board at the annual school election held on April 7, 1992 was approved by the voters.

COMMISSIONER OF EDUCATION

MAY 12, 1992

DATE OF MAILING - MAY 12, 1992

92-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN	:	DECISION
OF NEWTON, SUSSEX COUNTY.	:	
	:	

MAY 12, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN : DECISION
OF NEWTON, SUSSEX COUNTY. :
:

The announced results of the balloting for one member of the Board of Education for a one-year term at the annual school election held on April 7, 1992 in the School District of the Town of Newton, Sussex County, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Mark Fiedorczyk	307	11	318
Janet Grace	314	7	321
G. Nolan (Write-In)	1	0	1
Bill Thorp (Write-In)	1	0	1
Markey Ramone (Write-In)	1	0	1
Eugene Williams (Write-In)	1	0	1

Pursuant to a letter request from Mark Fiedorczyk dated April 10, 1992, an authorized representative of the Commissioner of Education from the Office of the Sussex County Superintendent of Schools was directed to conduct a recount of the ballots cast. The recount was conducted on April 28, 1992 at 1:30 P.M. at the Sussex County Board of Elections.

At the conclusion of the recount, the tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Mark Fiedorczyk	308	11	319
Janet Grace	314	7	321
G. Nolan (Write-In)	1	0	1
Bill Thorp (Write-In)	1	0	1
Markey Ramone (Write-In)	1	0	1
Eugene Williams (Write-In)	1	0	1

There were 696 ballots, 696 coupons and 696 signatures in the election book (one signature designated as a replacement ballot). Four ballots were not counted because votes were cast for both candidates (Exhibits 4,5,6,7). One ballot was replaced and not counted due to write-in names not being punched (Exhibit 2) and one ballot was voided and not counted due to the person changing his/her vote (Exhibit 1). One vote was added to Mark Fiedorczyk's total (increase from 318 to 319) due to a ballot being marked and not counted by the computer (Exhibit 3). Several ballots, while valid, did not include votes for the one-year seat at issue herein and are therefore not reflected in the tallies given above. Absentee ballot counts are given as reported by the Board Secretary on the Regular/Combined Statement of Result.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts it as his own.

Accordingly, the Commissioner finds and determines that Janet Grace was elected to a one-year term on the Board of Education of the School District of the Town of Newton.

COMMISSIONER OF EDUCATION

MAY 12, 1992

DATE OF MAILING - MAY 12, 1992

93-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF VOORHEES, CAMDEN COUNTY.	:	
	:	

MAY 12, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF VOORHEES, CAMDEN COUNTY. :
:

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held on April 7, 1992, in the School District of the Township of Voorhees, Camden County, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Gary Bennett	720	11	731
Miriam Gilbert	586	9	595
Thomas D. Foy, Jr.	587	7	594
John R. Schmus	623	10	633

Pursuant to a letter request from Mr. Thomas D. Foy, Jr., dated April 8, 1992, the Commissioner of Education directed an authorized representative to conduct a recount of the ballots cast. The recount was conducted on April 29, 1992 at the Voting Machine Warehouse, South Jersey Port Corporation, Camden, New Jersey. The absentee ballots were recounted at the Camden County Board of Elections also on April 29, 1992.

At the conclusion of the recount, the totals were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Gary Bennett	720	11	731
Miriam Gilbert	586	9	595
Thomas D. Foy, Jr.	587	7	594
John R. Schmus	623	10	633

There were no changes on the recount, so the names of the three winning candidates remain the same as those derived from the balloting of April 7, 1992. Therefore, it is recommended by the Commissioner's representative that the results as announced at the conclusion of the election remain unaltered.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings set forth above.

Accordingly, the Commissioner finds and determines that Gary Bennett, Miriam Gilbert and John R. Schmus were elected to the Voorhees Township Board of Education at the election on April 7, 1992.

COMMISSIONER OF EDUCATION

MAY 12, 1992

DATE OF MAILING - MAY 12, 1992

94-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF GLEN RIDGE, ESSEX	:	DECISION
COUNTY.	:	
	:	

MAY 12, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
BOROUGH OF GLEN RIDGE, ESSEX : DECISION
COUNTY. :
_____:

The announced results of the balloting for a three-year term at the annual school election held April 7, 1992 in the School District of the Township of Glen Ridge were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Mary Lee	785	8	793
Lynn John	704	10	714
Joseph Palestina	669	10	679
Gerald E. Hespos	618	5	623
Ruby Siegel	598	5	603
George Diamond	546	6	552

Pursuant to a written request from Ruby Siegel dated April 20, 1992, an authorized representative of the Commissioner of Education from the Office of the Essex County Superintendent of Schools conducted a recount of the ballots cast. The recount was conducted on April 21, 1992 at the warehouse where the voting machines were stored located at 640 Frelinghuysen Avenue, Newark.

At the conclusion of the recount of the ballots, the tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Mary Lee	785	8	793
Lynn John	704	10	714
Joseph Palestina	669	10	679
Gerald E. Hespos	618	5	623
Ruby Siegel	598	5	603
George Diamond	546	6	552

The recount indicated no difference in the results of the election for the three-year term.

This concludes the report of the Commissioner's representative.

* * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings set forth above.

Accordingly, the Commissioner finds and determines that Mary Lee was elected to a three-year term at the annual school election held in the School District of the Township of Glen Ridge on April 7, 1992.

COMMISSIONER OF EDUCATION

MAY 12, 1992

DATE OF MAILING - MAY 12, 1992

95-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF CHESTERFIELD, BURLINGTON	:	
COUNTY.	:	
	:	

MAY 12, 1992

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE TOWNSHIP OF CHESTERFIELD, BURLINGTON COUNTY.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for the public question for current expense at the annual school election held April 7, 1992 in the School District of the Township of Chesterfield, Burlington County, were as follows:

		AT POLLS	ABSENTEE	TOTAL
CURRENT EXPENSE	Yes	116	0	116
CURRENT EXPENSE	No	118	0	118

Pursuant to a letter request from Melissa E. Raywood dated April 14, 1992, an authorized representative of the Commissioner of Education from the Office of the Burlington County Superintendent of Schools was directed to conduct a recount of the ballots cast. The recount was conducted on April 21, 1992 at the Burlington County Superintendent of Schools Office, Union and High Streets, Mount Holly, New Jersey.

At the conclusion of the recount, the tally stood as follows:

		AT POLLS	ABSENTEE	TOTAL
CURRENT EXPENSE	Yes	116	0	116
CURRENT EXPENSE	No	118	0	118

Two hundred and forty-five ballots were cast in the election for which 245 prenumbered ballot coupons were accounted. Additionally, 245 voter names appeared on the poll list.

Eleven of the 245 ballots cast did not have any mark either in support of, or in opposition to, the public question for current expense.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings set forth above.

Therefore, the Commissioner finds and determines that the public question for current expense was defeated for the School District of the Township of Chesterfield.

COMMISSIONER OF EDUCATION

MAY 12, 1992

DATE OF MAILING - MAY 12, 1992

96-92

96-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF MIDDLETOWN	:	DECISION
TOWNSHIP, MONMOUTH COUNTY.	:	
	:	

MAY 12, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF MIDDLETOWN : DECISION
TOWNSHIP, MONMOUTH COUNTY. :
:

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held on April 7, 1992 in the School District of Middletown Township, Monmouth County, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Karen Fenton	2,742	36	2,778
Donna J. Smith	2,617	36	2,653
John L. Sullivan	2,625	19	2,644
Ann H. Prewett	2,583	35	2,618
Cathy J. Sullivan	2,596	22	2,618
Theresa Kelly	2,554	20	2,574
David W. Mazur	836	12	848

Pursuant to a letter request from Ann H. Prewett dated April 9, 1992, an authorized representative of the Commissioner of Education from the Office of the Monmouth County Superintendent of Schools was directed to conduct a recount of the machine ballots cast. The recount was conducted on April 27, 1992, at the Voter Machine Warehouse, 300 Halls Mill Road, Freehold, New Jersey.

At the conclusion of the recount, the tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Karen Fenton	2,742	36	2,778
Donna J. Smith	2,617	36	2,653
John L. Sullivan	2,625	19	2,644
Ann H. Prewett	2,583	35	2,618
Cathy J. Sullivan	2,586	22	2,608
Theresa Kelly	2,554	20	2,574
David W. Mazur	836	12	848

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his representative and adopts it as his own. The Commissioner notes that there was no indication of any request to Superior Court to recount absentee ballots, which are reported herein as announced following the election. The Commissioner further notes that the ten-vote discrepancy in the recounted tally for Candidate Cathy J. Sullivan did not affect the outcome of the election.

Accordingly, the Commissioner finds and determines that Karen Fenton, Donna J. Smith and John L. Sullivan were elected to full terms of three years each on the Board of Education of the School District of Middletown Township.

COMMISSIONER OF EDUCATION

MAY 12, 1992

DATE OF MAILING - MAY 12, 1992

97-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
RIVER DELL REGIONAL SCHOOL	:	DECISION
DISTRICT, BERGEN COUNTY.	:	
	:	

MAY 12, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
RIVER DELL REGIONAL SCHOOL : DECISION
DISTRICT, BERGEN COUNTY. :
:

The announced results of the balloting for the Current Expense Proposition of the Board of Education at the annual school election held on April 7, 1992, were as follows:

CURRENT EXPENSE	AT POLLS	ABSENTEE	TOTAL
Yes	986	5	991
No	1,131	8	1,139

Pursuant to a letter request from Board Secretary David Montroni dated April 16, 1992, the Commissioner of Education directed his representative from the Office of the Bergen County Superintendent of Schools to conduct a recheck of the votes cast on the voting machines for the Current Expense Proposition. The recheck was conducted on April 27, 1992, at the County Voting Machine Warehouse, Carlstadt, New Jersey.

At the conclusion of the recount, the tally of the votes cast on the voting machines remained unchanged and stood as follows:

CURRENT EXPENSE	AT POLLS	ABSENTEE	TOTAL
Yes	986	5	991
No	1,131	8	1,139

Absentee ballots are reported as given by the Board Secretary on the Regular/Combined Statement of Result.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts it as his own.

Accordingly, the Commissioner finds and determines that the Current Expense Proposition of the River Dell Regional School District was defeated by the voters.

COMMISSIONER OF EDUCATION

MAY 12, 1992

DATE OF MAILING - MAY 12, 1992

98-92

LOUIS J. GAMBO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MAY 14, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4152-91
AGENCY DKT. NO. 71-4/91

LOUIS J. GAMBO,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,
Respondent.

Robert P. Martinez, Esq., on behalf of petitioner (Martinez and Jennings, attorneys)

Paul N. Daly, Esq., on behalf of respondent (Lenox, Socey, Wilgus, Formidoni & Casey, attorneys)

Record Closed: April 1, 1992 Decided: April 2, 1992

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of respondent's refusal to permit petitioner to rescind his letter of resignation. 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*. The parties have now reached a settlement, which is attached and incorporated herein.

Having reviewed the terms of settlement and it appearing that it was entered into voluntarily and fully disposes of all issues in controversy, I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

4/2/92
Date

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

4/6/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 09 1992
Date

OFFICE OF ADMINISTRATIVE LAW

/cae

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STATE OF N.J.
OFFICE OF ADM. LAW
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LENOX, SOCEY, WILGUS, FORMIDONI & CASEY
3131 PRINCETON PIKE
TRENTON, NEW JERSEY 08648
(609) 896-2000
ATTORNEYS FOR

Defendant, Board of Education of South River

LOUIS J. GAMBO, Plaintiff; vs. BOARD OF EDUCATION OF SOUTH RIVER, et als Defendant.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW DOCKET NO. EDU 04152-91S **STIPULATION OF SETTLEMENT**

IT IS ON THIS 12th day of March, 1992, agreed between petitioner, Louis Gambo and respondent, South River Board of Education that petitioner's claim before the Office of Administrative Law, Docket No. EDU-04152-91S, be hereby dismissed with prejudice;

It is further agreed that petitioner will accept $5,000.00 in complete and total settlement of his claim against the South River Board of Education as set forth in his claim petition referenced above;

It is further agreed that the payment is not in any way to be construed as an admission of any responsibility on behalf of the South River Board of Education and is made solely in

consideration of the expenses necessary to the continuing defens of the claim to such a time as a decision could be rendered.

DATE:

Solomon A. Metzger, A.L.J.

MARTINEZ & JENNINGS

By _____
Robert Martinez
Attorney for Petitioner

LENOX, SOCEY, WILGUS FORMIDONI & CASEY

By _____
Paul N. Daly
Attorney for Respondent

OAL DKT. NO. EDU 4152-91

LOUIS J. GAMBO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

MAY 14, 1992

DATE OF MAILNG - MAY 14, 1992

99-92

99-92

ZELDA MARANS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MAY 14, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4094-91

AGENCY DKT. NO. 41-2/91

ZELDA MARANS,

Petitioner,

v.

CITY OF PATERSON SCHOOL DISTRICT,

Respondent.

Robert B. Feuchtbaum, Esq., for petitioner

David Carroll, Esq., for respondent
(Carroll & Weiss, attorneys)

Record Closed: March 24, 1992

Decided: April 3, 1992

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE

This matter involves a claim by petitioner for salary and other benefits, pursuant to N.J.S.A. 18A:30-2.1, for work-related injuries.

This matter was transmitted to the Office of Administrative Law on April 23, 1991, for a hearing pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A telephone prehearing conference was held on September 25, 1991, and a Prehearing Order was entered on October 2, 1991.

Prior to the commencement of the hearing on March 24, 1992, the parties agreed to settle this matter and have prepared the attached Settlement Agreement indicating the terms of settlement. In addition, petitioner was placed under oath and she stated that she fully understood and consented to all of the terms and conditions of this settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 3, 1992
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

April 7, 1992
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 09 1992
DATE

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

dgi/e

SETTLEMENT AGREEMENT
March 24, 1992

ZELDA MARANS V PATERSON SCHOOL DISTRICT
OAL DKT. NO. EDU 4094-91

1. Paterson School District ("Paterson") agrees to pay into the Teachers' Pension and Annuity Fund (TPAF) both the employer and employee pension contributions for Zelda Marans ("Petitioner") for any period between September 1, 1986 and June 30, 1990, except for any periods for which pension contributions have already been made. For fiscal and school year 1986-87, pension contributions shall be based on her salary of $34,700. For 1987-88 and all years thereafter, pension contributions shall be based on an annual salary of $37,625.

2. Petitioner withdraws all remaining claims against Paterson (except for enforcement of the existing workers compensation award and judgment) with prejudice.

3. Petitioner shall, within 30 days of this Settlement Agreement, submit a letter of resignation and retirement to Paterson, such resignation/retirement to take effect June 30, 1992. Such letter of resignation shall be irrevocable, unless Paterson fails to meet its obligations under paragraph 1 above.

4. The Petitioner acknowledges that she has had an opportunity to review this Settlement Agreement with her attorney, that she understands and accepts the terms hereof, and that she does so knowingly and voluntarily.

5. The undersigned attorney for Paterson acknowledges that he has authority to enter into this Settlement Agreement on behalf of Paterson.

6. If Paterson fails to fulfill its obligations under paragraph 1, or if TPAF refuses to accept the above pension contributions for membership credit, this Settlement Agreement shall be rescinded and Petitioner may, within 60 days of notification of such failure by Paterson, or refusal by TPAF, reinstate her petition in this case; PROVIDED, however, that rescission shall not be available to her if TPAF accepts all of Paterson's pension contributions under paragraph 1 <u>except</u> for those contributions covering the period October 31, 1987 through April 1, 1988. Petitioner, however, shall retain any rights against TPAF to seek credit for such period, but Paterson's obligations shall have been met by paying for all the other periods.

7. Nothing in this Agreement shall affect Petitioner's right, at her sole option, to resign and retire earlier than June 30, 1992; provided that, in such instance, Paterson's liability for pension contributions under Paragraph 1 shall be until the earlier of June 30, 1992, or the date of her resignation or retirement.

March 24, 1992
PATERSON SCHOOL DISTRICT

By: /s/
David W. Carroll, Esq.

ZELDA MARANS

By: /s/

WITNESS:

By: /s/
Robert Feuchtbaum, Esq.

SETTLEMENT AGREEMENT
March 24, 1992
Zelda Marans v Paterson
School District
OAL Dkt No. EDU 4094-91

1. Paterson School District ("Paterson") agrees to pay into the Teachers' Pension and Annuity Fund (TPAF) both the employer and employee pension contributions for Zelda Marans ("Petitioner") for any period between September 1, 1986 and June 30, 1992, except for any periods for which pension contributions have already been made. For fiscal and school year 1986-87, pension contributions shall be based on her salary of $34,700. For 1987-88 and all years thereafter, pension contributions shall be based on an annual salary of $32,625.

2. Petitioner withdraws all remaining claims against ~~the Board~~ Paterson (except for ~~[illegible]~~ enforcement of the existing workers compensation award and judgment) ~~[illegible]~~ with prejudice.

3. Petitioner shall, within 30 days of this Settlement Agreement, submit ~~a resignation~~ a letter of resignation and retirement ~~to~~ ~~the~~ Paterson, such resignation/retirement to take effect June 30, 1992. Such ~~a~~ letter of resignation shall be irrevocable, unless ~~the~~ Paterson fails to meet its obligations under paragraph 1 above.

4. The Petitioner acknowledges that

she has had an opportunity to review this Settlement Agreement with her attorney, that she understands and accepts the terms hereof, and that she does so knowingly and voluntarily.

5. The undersigned attorney for Paterson acknowledges that he has authority to enter into this Settlement Agreement on behalf of Paterson.

6. If Paterson fails to fulfill its obligations under paragraph 1, or if TPAF refuses to accept the ~~above~~ above pension contributions for membership credit, this Settlement Agreement shall be rescinded and Petitioner may, within 60 days of notification of such failure by Paterson,

or refusal by TPAF, rescind to ~~the~~ petition in this case; PROVIDED, however, that rescission shall not be available to her if TPAF accepts all of Peterson's pension contributions ~~under~~ under paragraph 1 except for those contributions covering the period October 31, 1987 through April 1, 1988. Petitioner, however shall retain any rights ~~to~~ against TPAF to seek credit for such period, but ~~the~~ Peterson's obligations shall have been met by paying for all the other periods.

7. Nothing in this Agreement shall affect Petitioner's right, at her sole option, to resign and retire earlier than June 30, 1992; provided that, in such instance, ~~the~~ Paterson's liability for pension contributions under Paragraph 1 shall be ~~ended~~ with the earlier of June 30, 1992, or the date of her resignation or retirement.

March 24, 1992

PATERSON SCHOOL DISTRICT

By David W. Carroll
David W. Carroll, Esq

ZELDA MARA

Zelda Marano

Witness:

Robert Feuchtbaum, Esq.

OAL DKT. NO. EDU 4094-91

ZELDA MARANS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

MAY 14, 1992

DATE OF MAILING - MAY 14, 1992

100-92

DORIS A. WALSH,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF LAUREL SPRINGS, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board secretary alleged Board illegally terminated her in July 1991 violating her tenure rights. Board contended petitioner did not acquire tenure as her employment before October 1988 was part-time.

In light of definition of full-time in N.J.S.A. 18A:17-2, initial decision determined petitioner did not acquire tenure since she did not serve full-time for three consecutive years. Petitioner failed to prove Board acted improperly or unlawfully in terminating her employment. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own stressing that boards of education determine what constitutes full-time employment for a board secretary.

MAY 14, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8625-91
AGENCY DKT. NO. 315-8/91

DORIS A. WALSH,
Petitioner,
v.
BOROUGH OF LAUREL SPRINGS BOARD OF EDUCATION,
Respondent.

Paul E. Griggs, Esq., for the petitioner
Barbara E. Riefberg, Esq., for the respondent (Jeffrey I. Baron, attorney)

Record Closed: March 2, 1992 Decided: March 27, 1992

BEFORE **AUGUST E. THOMAS**, ALJ:

Petitioner served as a board secretary for the Board of Education of Laurel Springs (Board), and was terminated by notice dated July 29, 1991. Petitioner seeks reinstatement in her position, asserting that she is a tenured board secretary. This matter was filed with the Commissioner of Education on August 21, 1991, and was thereafter transferred 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.

ISSUE

The issue is whether or not petitioner acquired tenure as a board secretary.

The record shows that petitioner's employment began on July 1, 1977 and has been continuous through September 27, 1991, more than enough time to acquire a tenured status. However, the Board asserts that petitioner's employment

for most of these years was part-time; that the relevant statute confers tenure only for full-time board secretaries; and that her full-time employment was less than three consecutive years.

UNDISPUTED FACTS

1. Petitioner commenced employment as a board secretary on July 1, 1977, at a salary of $3,500. The contract contained a clause allowing for termination of the contract by either party notice in writing. Petitioner did not have an office in the school building, she worked out of her home a few blocks away. A full-time secretary and a superintendent were in the school building on a regular basis at that time.

2. Petitioner received similar contracts until July 1, 1982.

3. Her contracts and years of service are as follows:

1978-79	$ 5,000.
1979-80	5,500.
1980-81	6,500.
1981-82	7,200.
1982-83	10,800.
1983-84	11,664.
1984-85	13,350.
1985-86	14,552.
1986-87	15,862.
1987-88	17,290.
1988-89	18,845.
1989-90	25,962.
1990-91	28,000.
1990-91	32,000.*
1991-92	34,880.

* This second contract was issued on January 1, 1991, for the remainder of the school year.

DISCUSSION

Petitioner asserts that the resolution of this matter involves the factual question of the definition of "full time" as set forth in N.J.S.A. 18A:17-2, which reads as follows:

> a. Any secretary . . . of a board of education of any school district who has or shall have devoted his full time to the duties of his office and has or shall have served therein for three consecutive calendar years . . .
>
> shall 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 for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title.

Petitioner contends that the Board has designated the work hours constituting full time as 8:00 a.m. to 3:30 p.m. and that no such designation can be found in any statute or rule. She asserts that she was initially employed with the Board's and her understanding that she would work the number of hours necessary to carry out the duties of board secretary. None of her contracts mention part-time employment; neither do any of the Board minutes until petitioner's daytime hours were established by the Board in 1988, defining the number of hours that are required daily to be considered full time. The fact that her office was in her home was both accommodating to the Board and convenient to petitioner. Petitioner states that she devoted her "full-time to the duties of the office"; therefore, she carried out entirely the duties and responsibilities of the board secretary as set forth by the statute. Petitioner asserts that respondent is placing form over substance in this matter.

The Board argues that petitioner was a part-time employee initially, and as such could not meet the requirements of the statute which would confer tenure. In this regard the Board submitted in evidence a document prepared by petitioner (R-1) purportedly showing that her salary was based on the percentage of time required of the position. Likewise R-2 indicates an understanding that petitioner's sick days were prorated according to a part-time position; that is, for example, 6 days annually for a half-time position; 9 days for a 75-percent position and 12 days for a 100-percent position.

The record shows also that petitioner, while employed by the Board, gained employment as acting board secretary for the Merchantville School District for the years 1985, 1986 and 1987. It was her testimony that she worked 50-55 hours per week, i.e., 15 hours per week for Merchantville and 35-40 hours for the Board. She testified that Merchantville wanted her to work extra hours but that she could not do it because of her primary employment as board secretary in Laurel Springs.

Petitioner testified that from at least the 1982-83 school year, she was working at least 30-35 hours per week for the Board. A former Board president testified in her behalf that the percentages set forth in Exhibit R-1 were a rationale for increasing petitioner's salary and had nothing to do with the hours she worked. The former Board president testified that the Board expected petitioner to work whatever number of hours it took to carry out the duties of the board secretary.

Notwithstanding the above, at its meeting of July 29, 1991, the Board acted to terminate petitioner's employment in a manner consistent with the 60-days'-notice clause contained in her contract for 1991-92. The Board asserts that petitioner had not yet served the required time as full-time board secretary to attain a tenured status since her full-time employment did not commence until on or about October 17, 1988.

Her original contract salary for 1988-89 was $18,846. At its September 1988 meeting, the Board acted to increase the board secretary's time to full time effective October 15, 1988. A 10-percent salary increase was initially approved. Petitioner was to be moved into the school building as soon as office space could be made available and regular hours of 8:00 a.m. to 3:30 p.m. were established for the first time.

Shortly after the September 1988 Board meeting, petitioner requested that the Board consider an increase larger than 10 percent since she considered that her previous compensation was based on 79 percent of a "full-time" salary. She provided the Board with a chart to support this calculation. Based upon her protestations, her salary subsequently was increased for that year on a prorated basis to $23,710. Petitioner commenced working in the school building on a full-time basis on or about October 17, 1988.

Contracts were issued to petitioner for the next several years recognizing the position as full time. The contract for 1989-90 was for $25,962 and the contract

for 1990-91 specified an annual salary of $28,000. The 1991-92 contract was for $34,880. This contract was for the period July 1, 1991, through June 30, 1992, and contained a clause, as did every contract between petitioner and the Board of Education, that permitted the contract to be terminated by either party on 60 days' notice.

The Board argues that petitioner's initial salary was established considering that it would be based on 50 percent of the salary of a full-time 12-month employee. Further, she received half the sick days normally given to full-time 12-month employees, i.e., 6 as opposed to 12. This arrangement continued until July 1, 1982. Each increase in her salary until the 1981-82 school year was based on 50 percent or half of the full-time salary. For example, in the 1981-82 school year the "full-time" salary was established at $14,400, whereas petitioner's salary was $7,200. For the school years 1982-83 and 1983-84, petitioner's employment increased to 75 percent of "full-time." Her sick days were also prorated. In contracts for the school years 1984-85 through 1987-88, petitioner's compensation was calculated at 79 percent of the "full-time" salary.** Petitioner's contract for the 1988-89 year was also based on 79 percent of "full-time" until the Board acted at its September 1988 meeting to increase the position to full-time effective October 15, 1988. After negotiations, petitioner's salary was established at $23,710.

Subsequent contracts for 1989-1990 and 1990-1991 recognized the position as full-time. Based on this history, the Board concluded that petitioner's full-time employment lasted from October 15, 1988, through September 27, 1991, when she was terminated. Since this is less than a three-consecutive-year period, the Board concludes that petitioner has not acquired tenure and that she was terminated pursuant to the 60-days' clause in her contract.

** During 1985, 1986 and 1987, petitioner also worked as board secretary for the Merchantville School District 15 hours per week plus evening meetings.

FINDINGS OF FACTS

Based on a review of the documents in evidence and the testimony offered at hearing, I **CONCLUDE** that petitioner was initially employed to a part-time position and continued as such until the Board voted to establish a full-time position effective October 15, 1988 (R-6). I **FIND** no difference between a job which requires employment full time for two or three days per week and one which requires services five days per week for a portion of each day. Both are part-time.

The evidence leading to this conclusion follows:

1. The Job Description for the board secretary position states:

   Work Day: The normal work day for the part-time position will commence and conclude at times agreed upon between the appointee and the Board. R-4; emphasis added.

2. Regarding the above document, petitioner conceded under cross-examination, "that's how I was hired" (to a part-time position).

3. Petitioner testified further that for a period of two or three years she worked simultaneously for the Laurel Springs Board of Education, the Merchantville Board of Education, and H & R Block, and was self-employed in her home as a typist (R-3).

4. Petitioner testified that the superintendent's secretary performed some Board duties, including typing his agenda for Board meetings.

5. Petitioner testified that her initial employment required about 20 hours of her time each week. This time gradually increased until the Board voted to establish a full-time position.

6. Each of petitioner's contracts contained a termination clause. At some point she would have acquired a tenure status making further contracts unnecessary,

7. Petitioner prepared a document establishing that her salary was based on a portion of the work week (R-1).

8. Petitioner prepared a document establishing that her sick leave benefit was prorated as that of a part-time employee (R-2).

9. Petitioner requested increased salary based on the increase in time required by her job (R-1, R-2).

10. Petitioner's full-time employment began on October 15, 1988, and she was terminated on September 27, 1991, a period of time less than the three calendar years required to acquire tenure (N.J.S.A. 18A:17-2).

Based on my review of the documentary evidence and the testimony, I **CONCLUDE** that both litigants understood at the time of petitioner's initial employment that the position required part-time service and provided part-time compensation, including the part-time sick leave.

Although petitioner contends, correctly, that she devoted her "full time" to the duties" of her office, the small, single-building, K-6 elementary school district with a pupil population between 180 and 200 simply did not require the hours necessary for full-time employment.

Accordingly, petitioner was employed part-time until October 15, 1988, and did not serve the time necessary to acquire tenure pursuant to N.J.S.A. 18A:17-2.

Board Vote for Termination

The vote to terminate petitioner's employment was three yes; one no; and four abstentions. Petitioner asserts that although there is no state law which requires a recorded majority vote of the full membership of the Board to terminate the board secretary, the Board is bound by its own policy, number 200-7.5.4, which requires a majority vote of the members present to approve such a termination. She asserts, therefore, that her termination is improper and must be set aside.

Contrary to petitioner's argument, five assenting affirmative votes of the Board were not necessary to carry out the motion to eliminate petitioner's position. The four abstentions must be counted as affirmative votes. A quorum was present and the law has been established by the Commissioner who held in Farmer v.

Camden City Board of Education, 1967 S.L.D. 287, 290, quoting Mount v. Parker, 32 N.J.L. 341, 342 (Sup. Ct. 1867), that

> ***It being the well established law, that where no specified number of votes is required, but a majority of a board regularly convened are entitled to act, a person declining to vote is to be considered as assenting to the votes of those who do. ***

See also Jeanne Golden v. Board of Education of Manville, Commissioner of Education (April 22, 1985). Consequently, there is no impediment in the Board's vote to terminate petitioner pursuant to the terms of her contract.

Having considered the facts in this matter, together with the arguments of counsel and the applicable law, I **CONCLUDE** that petitioner has failed her burden of persuasion to demonstrate that the Board acted improperly or unlawfully in regard to its determination to terminate her employment.

Accordingly the petition of appeal is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

27 March 92
Date

August E. Thomas t/a
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

3/31/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 03 1992
Date

OFFICE OF ADMINISTRATIVE LAW

km

EXHIBITS IN EVIDENCE

For the Petitioner:

P-1	Employment Contract, 1977-78
P-2	Employment Contract, 1978-79
P-3	Employment Contract, 1979-80
P-4	Employment Contract, 1980-81
P-5	Board Minutes, July 29, 1991
P-6	Termination letter, dated July 31, 1991

For the Respondent:

R-1	Salary Guide
R-2	Sick Time Schedule
R-3	Income Summary
R-4	Job Description
R-6	Board Minutes , September 19, 1988
R-7	Employment Contract, 1989-90
R-8	Employment Contract, 1990-91
R-9	Employment Contract, 1991
R-10	Employment Contract, 1991-92

Joint Exhibits

J-1	Board Minutes, June 13, 1977
J-2	Board Minutes, July 18, 1977
J-3	Board Minutes, June 1, 1978
J-4	Board Minutes, June 18, 1979
J-5	Board Minutes, June 16, 1980
J-6	Board Policy Manual 200-7.5.4
J-7	Board Policy Manual 200-7.2.3

DORIS A. WALSH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LAUREL SPRINGS, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Petitioner avers in exceptions that the ALJ failed to define the meaning of a "FULL-TIME" (Exceptions, at p. 1) Board secretary and as such erroneously ruled on whether petitioner was tenured. Petitioner reasserts her claim that the issue in this case in not the label placed on the position but the number of hours worked and the number of hours which constitute full-time employment under N.J.S.A. 18A:17-2. In deciding the matter, petitioner contends the ALJ's conclusion that she was not a full-time employee in the Board's employ placed form over substance. In support of this proposition, petitioner contends her testimony stated that the level of her salary at the beginning of her employment and until the office was moved to the school took into consideration convenience

to the Board of Education in having no place to put the Board of Education office and convenience to petitioner in having the office at her home.

Petitioner further argues that the determination as to whether she was part-time or full-time cannot be made by using salary charts (R-1) alone. Relying on former Board President Ivans, who stated Walsh's salary had nothing to do with hours worked, petitioner claims that considering there were other factors that affected her salary, the only reasonable way to determine whether her salary was full-time is by analogy to N.J.A.C. 6:3-1.13 which defines how much time is required per day for a teacher to be considered full-time. That regulation states:

> The period of time in each day required for full-time employment shall be the number of hours prescribed by the district board of education but shall be not less than four clock hours.
> (N.J.A.C. 6:3-1.13)

It is petitioner's position that were the reasoning of the ALJ and the Board followed, and the Board of Education office remained in Ms. Walsh's home, even if she continued to work 30 to 40 hours per week including Board meetings, she would never acquire tenure unless the Board labeled her full-time. Petitioner finds this conclusion fundamentally unfair and contrary to the basic tenets of tenure acquisition which are based upon the duties performed and the time served in a position. In support of this contention petitioner again cites Robert F.X. Van Wagner v. Board of Education of the Borough of Roselle, Union County, 1973 S.L.D. 488 and Juanita Zielenski v. Board of Education of the Town of Guttenberg, 1971 S.L.D. 664.

The Board's reply exceptions reiterate its position that Ms. Walsh did not serve as a full-time Board secretary for the requisite time period to attain tenure because she did not begin full-time employment until October 17, 1988, and was terminated as of September 27, 1991. It claims that such termination was therefore proper.

The Board's position is that whether she worked in the school building or at home is not the critical issue herein. Rather it is whether she was employed as a full-time Board secretary. The Board relies on the documents prepared by Ms. Walsh herself to demonstrate that she considered herself to be a part-time employee, and refers to R-1 and R-2, the charts she submitted for the Board's consideration of her employment in support of this position. The Board further claims that the fact that petitioner asked for and received a substantial salary increase after having her hours increased in October 17, 1988 further establish that she was a part-time employee before that date. The Board avers that the ALJ did not simply accept a label placed upon the position by the Board, nor did he accept the label proffered by Ms. Walsh, but rather carefully and thoroughly reviewed the evidence in deciding the matter.

The Board would distinguish those two cases upon which petitioner relied to establish that she was actually full-time. It claims in both Grimm v. Board of Education of Hamilton, decided by the Commissioner April 19, 1945 and DePhillips v. Fairview Borough Board of Education, 1939-49 S.L.D. 102, the board secretaries in those cases were admittedly full-time employees in school positions. Those cases centered on whether their part-time outside employment precluded their attainment of a tenured status, the Board

argues. By contrast, the Board contends this matter does not present a situation wherein petitioner was prohibited from working for other employers. Rather, it claims the issue in this matter is whether petitioner was employed part-time or full-time, and toward a determination of that issue, the amount of time she spent in other employment is probative. It claims that the extensive nature of petitioner's outside part-time employment prior to October 1988 strongly supports the conclusion reached that petitioner was not employed in a full-time capacity before that date. In this regard the Board refers to R-1 and R-2, the charts petitioner prepared and submitted to the Board showing that she considered herself part-time before October 17, 1988.

The Board queries if petitioner were working the same number of hours at home before being moved into the school and having a regular schedule imposed upon her, why did she so vehemently demand additional compensation? The Board's response is that the October 17, 1988 change did amount to an elevation of the position from part-time to full-time and that the Board recognized this when it increased her compensation substantially.

The Board seeks affirmance of the ALJ's determination.

Upon a careful and independent review of the record of this matter, the Commissioner affirms the findings and conclusion of the ALJ for the reasons expressed in the initial decision.

It is within the Board's discretion and, indeed, is its responsibility to define what constitutes full-time employment for its teaching staff members. See N.J.A.C. 6:3-1.13. See also Middlesex County Educational Services Commission Education Association v. Board of Directors of the Middlesex County Education Services Commission, Middlesex County, decided by the State Board

January 7, 1987, at p. 18. However, the position of board secretary is not one requiring a teaching certificate, and therefore, falls outside of the prescriptions of N.J.A.C. 6:3-1.13 because a board secretary is not a teaching staff member. Although N.J.A.C. 6:3-1.13 does not apply to board secretaries, who are not teaching staff members, the fact remains that full-time versus part-time positions are defined by the Board. It is further clear from the record of this matter that in 1988 the Board acted to create a full-time position. See R-6. See also R-1 and R-2. That the Board failed to modify the job description in September 1988 to indicate that the new position was no longer part-time, but rather was full-time is de minimus. The issuance of yearly contracts, and the marked rise in petitioner's salary to $23,710 prorated for school year 1988-89, makes plain that petitioner's employment was part-time until October 1988. The Commissioner so finds and from such determination also concludes that she did not, serve the time necessary to acquire tenure pursuant to N.J.S.A. 18A:17-2.

Moreover, the Commissioner's review of the arguments of the parties pertaining to the second issue in this matter, that is the Board's vote for termination, comports with those findings and conclusions of law mentioned in the initial decision at pages 7-8.

Accordingly, for the reasons expressed by the ALJ as amplified herein, the initial decision is affirmed, and the instant Petition of Appeal dismissed, with prejudice.

MAY 14, 1992

COMMISSIONER OF EDUCATION

DATE OF MAILING - MAY 14, 1992

100-92

EDU #8625-91
C # 100-92
SB # 22-92

DORIS A. WALSH,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF LAUREL SPRINGS, CAMDEN COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, May 14, 1992

For the Petitioner-Appellant, Paul E. Griggs, Esq.

For the Respondent-Respondent, Jeffrey I. Baron, P.C.
(Barbara E. Riefberg, Esq., of Counsel)

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

September 2, 1992

Date of mailing SEP 4 1992

101-92

AMERICAN ATHLETIC INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST DEPTFORD, GLOUCESTER COUNTY, AND EARTHWORKS, INC.,	:	DECISION
RESPONDENTS.	:	
	:	

MAY 14. 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1715-92
AGENCY DKT. NO. 60-3/92

AMERICAN ATHLETIC INCORPORATED,
Petitioner,
v.
WEST DEPTFORD TOWNSHIP BOARD OF EDUCATION and EARTHWORKS, INC.,
Respondents.

John A. Almeida, Esq., for petitioner (Almeida & Hunt, attorneys)

Raymond Page, Esq., for respondent, West Deptford Township Board of Education

William C. Levine, Esq., for respondent Earthworks, Inc., (Katz, Ettin, Levine & Kurzweil, attorneys)

Record Closed: May 1, 1992 Decided: May 1, 1992

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter was transmitted to the Office of Administrative Law on March 10, 1992, 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 agreed to a settlement and have prepared a Consent Order indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 1, 1992
Date

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

MAY 4, 1992
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

Date

OFFICE OF ADMINISTRATIVE LAW

am

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

CONSENT ORDER
OAL DKT. NO. EDU 1715-92
AGENCY DKT. NO. 60-3/92

AMERICAN ATHLETIC INCORPORATED,
Petitioner,
v.
WEST DEPTFORD TOWNSHIP BOARD OF EDUCATION and EARTHWORKS, INC.,
Respondents.

This matter was commenced by American Athletic Incorporated on March 9, 1992, with the filing of a Petition of Appeal and an application for temporary emergent relief. West Deptford Township Board of Education and Earthworks, Inc., filed Answers and papers in opposition to the application, and oral argument on the emergent application was heard on March 13, 1992, by Daniel B. McKeown, the administrative law judge then assigned to the matter.

A temporary restraining order was issued against respondents by Judge McKeown on March 17, 1992, and was affirmed by the Commissioner of Education on April 10, 1992.

It now appears clear, upon further consideration of the applicable law, that petitioner lacks standing to assert the claims set forth in the Petition; specifically, petitioner, as an unsuccessful bidder, may not now challenge the legality of the specifications pursuant to which respondent school board awarded the contract to respondent Earthworks, Inc., the low bidder. *Camden Plaza Parking v. City of Camden,* 16 *NJ* 150 (1954); *Waszen v. City of Atlantic City,* 1 *NJ* 272 (1949); *Albert F. Ruehl Co. v. Bd. of Trustees, Industrial Ed,* 85 *NJ Super.* 4 (Law. Div. 1964).

OAL DKT. NO. EDU 1715-92

Accordingly, it is **ORDERED** that the temporary restraining order is hereby dissolved; petitioner American Athletic Incorporated hereby withdraws its Petition of Appeal and the within matter is hereby **DISMISSED WITH PREJUDICE**

May 1, 1992
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

We hereby consent to the form and entry of the within Order.

Almeida & Hunt
Attorneys For American Athletic Incorporated

4/30/92
DATE

BY John A. Almeida
John A. Almeida, Esq
A member of the firm

4/30/
DATE

Raymond T. Page, Esq.
Attorney For West Deptford Township Board of Education

Katz, Ettin, Levine & Kurzweil
Attorneys for Earthworks, Inc.

4/30/92
DATE

BY: William C. Levine
A member of the firm

OAL DKT. NO. EDU 1715-92

AMERICAN ATHLETIC INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST DEPTFORD, GLOUCESTER COUNTY, AND EARTHWORKS, INC.,	:	DECISION
RESPONDENTS.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

MAY 14, 1992

DATE OF MAILING - MAY 14, 1992

102-92

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH : DECISION
OF WASHINGTON, WARREN COUNTY. :
:

MAY 14, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH : DECISION
OF WASHINGTON, WARREN COUNTY. :
:

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held on April 7, 1992 in the School District of Washington Borough, Warren County, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Sharon Wescoe	195	0	195
Richard Feldman	199	0	199
Kathy T. Slawson	216	1	217
John King	168	0	168
John Kurdilla	69	1	70
Dan Sickler	163	0	163
Cindy Wiseburn	176	0	176
Anthony Capone	70	1	71
John Hoffman	1	0	1
Jeffrey Kuhlman	1	0	1
Michael Capone	1	0	1
John Capone	1	0	1
Donald Capone	1	0	1

These results indicate the approved candidates to be Kathy Slawson, Richard Feldman, and Sharon Wescoe. These candidates were printed on the ballot. All other candidates were write-ins.

Pursuant to a request by Cindy Wiseburn under N.J.S.A. 18A:14-63.2, a recount was conducted by a representative of the Commissioner of Education on April 30, 1992 in the offices of the Warren County Superintendent of Schools. The Warren County Board of Education submitted the absentee ballot count.

At the conclusion of the recount, the tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Sharon Wescoe	195	0	195
Richard Feldman	199	0	199
Kathy T. Slawson	217	1	218
John King	170	0	170
John Kurdilla	69	1	70
Dan Sickler	165	0	165
Cindy Wiseburn	184	0	184
Anthony Capone	66	1	67
John Hoffman	1	0	1
Jeffrey Kuhlman	1	0	1
Cindy Coleman	1	0	1
Michael Capone	1	0	1
John Capone	1	0	1
Donald Capone	1	0	1
Bruce Grega	1	0	1
E. Stickler	1	0	1
Al Capone	1	0	1
Ann Wiseburn	1	0	1
Carbo	1	0	1
Cathy Wiseburn	1	0	1
Anthony Kurdello	1	0	1
Mr. King	1	0	1
Kardillo	1	0	1
A. Capone	1	0	1
Felix Slean	1	0	1
Hill	1	0	1

The following ballots were not counted for the three-year term:

1. Two votes for Capone with no first name or initial.

2. A write-in for Kathy Slawson whose name was printed on the ballot as a candidate.

3. A ballot with four votes, one printed candidate checked and three write-ins listed.

4. A ballot with votes for Richard Feldman and Kathy Slawson where the checks next to their names had been erased. The checks were still visible but obviously erased.

With the recount votes as listed, these ballots not counted would not have changed the results of the election if the votes were tallied.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings set forth above.

Accordingly, the Commissioner finds and determines that the results of the election as announced are confirmed by the recount. Kathy Slawson, Richard Feldman, and Sharon Wescoe are the three winning candidates for seats on the Washington Borough Board of Education in Warren County.

COMMISSIONER OF EDUCATION

MAY 14, 1992

DATE OF MAILING - MAY 14, 1992

103-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
BUTLER SCHOOL DISTRICT, MORRIS	:	DECISION
COUNTY.	:	
	:	

MAY 14, 1992

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
BUTLER SCHOOL DISTRICT, MORRIS	:	DECISION
COUNTY.	:	
	:	

The announced results of the balloting for the Current Expense question proposed at the annual school election held on April 7, 1992 in the Butler School District of Morris County were as follows:

Current Expense	For	Against
At Polls	296	305
Absentee	7	1
Total	303	306

In response to a request from Ms. Annette Bunting, Business Administrator/Board Secretary of the Butler School District, for a recount of the ballots cast for the Current Expense question pursuant to N.J.S.A 18A:14-63.3, an authorized representative of the Commissioner of Education from the Office of the Morris County Superintendent of Schools was directed to conduct a recount of the ballots cast. The recount was conducted on April 28, 1992 at the Morris County Voting Machine Warehouse, Highview Avenue, Cedar Knolls.

At the conclusion of the recount, it was determined that the results of the ballots cast for the Current Expense question are as follows:

Current Expense	For	Against
At Polls	296	305
Absentee	7	1
Total	303	306

There was one polling place in the district with a total of two machines that were checked in the recount.

The recount determined that the votes recorded on the voting machines for this question were reported accurately and that the number of votes cast as indicated on the public counter agreed with the number of voting authority slips and the signatures on the poll list slips. The absentee ballot count was certified by the Morris County Board of Elections.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings set forth above.

The Commissioner hereby finds and determines that the Current Expense question on the ballot for the Butler School District was not approved by a majority of the voters and was therefore defeated.

MAY 14, 1992

COMMISSIONER OF EDUCATION

DATE OF MAILING - MAY 14, 1992

104-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
LINCOLN PARK SCHOOL DISTRICT,	:	DECISION
MORRIS COUNTY.	:	
	:	

MAY 14, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
LINCOLN PARK SCHOOL DISTRICT, : DECISION
MORRIS COUNTY. :
:

The announced results of the balloting for the Cap Waiver question proposed at the annual school election held on April 7, 1992 in the Lincoln Park School District, Morris County, were as follows:

CAP WAIVER	AT POLLS	ABSENTEE	TOTAL
Yes	376	2	378
No	373	7	380

In response to an April 15, 1992 letter request from Mr. Leonard Marano, Business Administrator/Board Secretary of the Lincoln Park School District, an authorized representative of the Commissioner of Education from the Office of the Morris County Superintendent of Schools was directed to conduct a recount of the machine ballots cast. The recount was conducted on April 28, 1992 at the Morris County Voting Machine Warehouse, Highview Avenue, Cedar Knolls.

At the conclusion of the recount, the tally stood unchanged and was as follows:

CAP WAIVER	AT POLLS	ABSENTEE	TOTAL
Yes	376	2	378
No	373	7	380

There were two polling places in the district with a total of four machines that were checked in the recount. The votes recorded on the voting machines for this question were reported accurately and the number of votes cast as indicated on the public counter agreed with the number of voting authority slips and the signatures on the poll list slips. The absentee ballot count was certified by the Morris County Board of Elections.

This concludes the report of the Commissioner's representative

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts it as his own.

Accordingly, the Commissioner finds and determines that the Cap Waiver question submitted by the Lincoln Park Board of Education was not approved by the voters at the annual school election of April 7, 1992.

COMMISSIONER OF EDUCATION

MAY 14, 1992

DATE OF MAILING - MAY 14, 1992

105-92

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRICT, MERCER COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

MAY 14, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
WEST WINDSOR-PLAINSBORO REGIONAL : DECISION
SCHOOL DISTRICT, MERCER COUNTY. :
:

The announced results of the balloting for the Current Expense proposition of the Board of Education at the annual school election held on April 7, 1992 in the West Windsor-Plainsboro Regional School District, Mercer County, were as follows:

CURRENT EXPENSE	AT POLLS	ABSENTEE	TOTAL
YES	922	10	932
NO	901	21	922

Pursuant to a letter from ten voters of the district dated April 12, 1992, the Commissioner of Education directed his representative from the Office of the Mercer County Superintendent of Schools to conduct a recheck of the votes cast on the voting machines for the current expense proposition. This recheck was conducted on April 27 and April 29, 1992 at the County Voting Machine Warehouses in Edison and Trenton respectively.

At the conclusion of the recount, the tally of the recheck of the voting machines stood unchanged and was as follows:

CURRENT EXPENSE	AT POLLS	ABSENTEE	TOTAL
YES	922	10	932
NO	901	21	922

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings set forth above.

Accordingly, the Commissioner finds and determines that the Current Expense question submitted by the Board at the annual school election held on April 7, 1992, was approved by the voters.

COMMISSIONER OF EDUCATION

MAY 14, 1992

DATE OF MAILING -MAY 14, 1992

106-92

106-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
EAST WINDSOR REGIONAL SCHOOL	:	DECISION
DISTRICT, MERCER COUNTY.	:	
	:	

MAY 14, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
EAST WINDSOR REGIONAL SCHOOL : DECISION
DISTRICT, MERCER COUNTY. :
:

The announced results of the balloting for the Current Expense proposition of the Board of Education at the annual school election held on April 7, 1992, were as follows:

CURRENT EXPENSE	AT POLLS	ABSENTEE	TOTAL
YES	1,078	8	1,086
NO	1,115	5	1,120

Pursuant to a letter request from ten registered voters of the district dated April 8, 1992, the Commissioner of Education directed his representative from the Office of the Mercer County Superintendent of Schools to conduct a recheck of the votes cast on the voting machines for the Current Expense proposition. The recheck was conducted on April 29, 1992 at the County Voting Machine Warehouse in Trenton.

At the conclusion of the recount, the tally stood unchanged and was as follows:

CURRENT EXPENSE	AT POLLS	ABSENTEE	TOTAL
YES	1,078	8	1,086
NO	1,115	5	1,120

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings set forth above.

Accordingly, the Commissioner finds and determines that the Current Expense question submitted by the Board at the annual school election held on April 7, 1992, was not approved by the voters.

COMMISSIONER OF EDUCATION

MAY 14, 1992

DATE OF MAILING - MAY 14, 1992

107-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
NEWARK, ESSEX COUNTY.	:	
	:	

MAY 14, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION
NEWARK, ESSEX COUNTY. :
:

The announced results of the balloting in the East Ward for three terms of three years each at the annual school election held April 7, 1992 in the School District of the City of Newark, Essex County, were as follows:

CANDIDATE	AT POLLS
Adam Kraemer	W I T H D R E W
Maryam Bey	330
Maritza Torres-Falu	386
D. Kim Thompson-Gaddy	328
Elmore T. Gaines	105
Charles A. Bell	1,372
Delcio S. DaSilva	424
James Parrillo	456
Bartholomew Padavano	511
Mary Darden	964
Stephen L. Petrillo	303
Cathy Cecere	W I T H D R E W
Charlotte Smith	99
John Mavilla	1,941

Pursuant to a written request from Maritza Torres-Falu dated April 10, 1992, an authorized representative of the Commissioner of Education from the Office of the Essex County Superintendent of Schools conducted a recount of the machine ballots cast in the East Ward. The recount was conducted on April 21, 1992 at the storage warehouse located at 640 Frelinghuysen Avenue, Newark.

At the conclusion of the recount, the tally for the East Ward was unchanged and stood as follows:

(EAST WARD ONLY)

CANDIDATE	AT POLLS
Adam Kraemer	W I T H D R E W
Maryam Bey	330
Maritza Torres-Falu	386
D. Kim Thompson-Gaddy	328
Elmore T. Gaines	105
Charles A. Bell	1,372
Delcio S. DaSilva	424
James Parrillo	456
Bartholomew Padavano	511
Mary Darden	964
Stephen L. Petrillo	303
Cathy Cecere	W I T H D R E W
Charlotte Smith	99
John Mavilla	1,941

It is noted that only "AT POLLS" tallies are given since absentee data is collected and reported for the district as a totality and not by ward.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts it as his own. The Commissioner notes that no requests were made for recounts of votes cast in other wards or in the district as a totality.

Accordingly, the Commissioner finds and determines that the results of the district election stand as originally announced, so that Charles A. Bell, D. Kim Thompson-Gaddy and John Mavilla were elected to full terms of three years each on the Newark Board of Education.

COMMISSIONER OF EDUCATION

MAY 14, 1992

DATE OF MAILING - MAY 14, 1992

108-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF MEDFORD, BURLINGTON COUNTY.	:	
_____	:	

MAY 14, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF MEDFORD, BURLINGTON COUNTY. :
:

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held April 7, 1992 in the School District of the Township of Medford, Burlington County, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Robert Criss	382	4	386
Kenneth S. Domzalski	655	4	659
Trudy Cole	823	3	826
Claude Doak	755	4	759
Constance L. Stewart	635	3	638

Pursuant to a letter request from Constance L. Stewart dated April 13, 1992, an authorized representative of the Commissioner of Education from the Office of the Burlington County Superintendent of Schools was directed to conduct a recount of the machine ballots cast. The recount was conducted on April 30, 1992 at the Burlington County Board of Election Office, 49 Rancocas Road, Mount Holly, and the Burlington County Superintendent of Elections Office, Eayrestown Road, Lumberton, New Jersey. Absentee ballots were recounted by the Burlington County Board of Elections.

At the conclusion of the recount, the tally stood unchanged and was as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Robert Criss	382	4	386
Kenneth S. Domzalski	655	4	659
Trudy Cole	823	3	826
Claude Doak	755	4	759
Constance L. Stewart	635	3	638

One thousand three hundred and twenty-eight voters cast ballots as indicated by both the public counter and protective counter numbers of the six voting machines used in the school election. At the time of the recount, the sealed election packets received from the school district were individually opened to compare the number of both the voting authorities issued and voter names appearing on the poll lists to the number of ballots cast. This comparison was made for each polling place. There were no irregularities noted. The following summarizes the comparisons made of the protective and public counter, poll lists and voting authorities:

Polling Place	Protective and Public Counters	Poll List	Voting Authorities	Voided Voting Authorities
I. Allen School	132	132	132	0
II. Cranberry Pines Sch.	490*	490	490	0
III. Haines School	246	246	246	0
IV. Taunton Forge Sch.	257	257	257	0
V. Medford Leas	202	203	203	1

The above comparison notes that one (1) voting authority was voided at the Medford Leas location. An examination of the

---

* Two (2) voting machines were utilized at the Cranberry Pines School location; the protective and public counter readings were 285 and 205, a total of 490 ballots cast.

contents of the sealed packet for Medford Leas revealed that voting authority number 003 was attached to a note stating that "Virginia Anderson signed the book, then left before she voted. Here is her voting authority." The note was signed by Claire Chilkotowsky, judge of election, and Marion M. Getsinger, inspector of election. The Commissioner's representative reviewed the poll list; Anderson's name appeared as the third name on the list with voting authority number 003 recorded beside Anderson's name and address. Therefore, the voting authority was properly accounted, and no discrepancies were found to exist.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts it as his own.

Accordingly, the Commissioner finds and determines that Trudy Cole, Claude Doak and Kenneth S. Domzalski were elected to full terms of three years each on the Board of Education of the School District of the Township of Medford.

COMMISSIONER OF EDUCATION

MAY 14, 1992

DATE OF MAILING - MAY 14, 1992

109-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF HAINESPORT, BURLINGTON	:	
COUNTY.	:	
	:	

MAY 14, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF HAINESPORT, BURLINGTON :
COUNTY. :
:

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held April 7, 1992 in the School District of the Township of Hainesport, Burlington County, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Shirley H. Powell	295	3	298
Raymond Hall	358	13	371
Carole Clark	314	14	328
John C. Bradley	333	13	346
Bill Evans	319	4	323

Pursuant to a letter request from William Evans dated April 10, 1992, an authorized representative of the Commissioner of Education from the Office of the Burlington County Superintendent of Schools was directed to conduct a recount of the ballots cast. The recount was conducted on April 30, 1992 at the Burlington County Board of Elections Office, 49 Rancocas Road, Mount Holly, and at the Burlington County Superintendent of Elections Office, Eayrestown Road, Lumberton, New Jersey.

At the conclusion of the recount, the tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Shirley H. Powell	295	3	298
Raymond Hall	358	13	371
Carole Clark	314	14	328
John C. Bradley	333	13	346
Bill Evans	319	4	323

Six hundred four voters cast ballots as indicated by both the public counter and protective counter numbers on the voting machine. At the time of the recount, the sealed election packet received from the school district was opened to compare the number of both the voting authorities issued and voter names appearing on the poll lists to the number of ballots cast. Two irregularities were notes as follows:

1) There were no voting authorities enclosed in the sealed election packet.

2) Six hundred five names appeared on the poll list, one more than than the number indicated by the voting machine counters.

On May 1, 1992, a memorandum and a sealed envelope were delivered to the Commissioner's representative at the Burlington County Superintendent of Schools Office from the Hainesport Board of Education Secretary. The board secretary stated in her memorandum (Exhibit A) that "I am enclosing in a sealed envelope the voter authorities which were not includes in the package from the election workers."

While the contents of the envelope were examined by the Commissioner's representative, the voting authorities were not found to be maintained on a string, in the order of issuance. Furthermore, the voting authorities were not placed under the proper controls immediately following the school election as required pursuant to N.J.S.A. 18A:14-61 and 18A:14-62. Due to the lack of

control exercised immediately following the election, the voting authorities could not be considered here.

Although there exists a disparity between the number of names appearing on the poll lists (605) and the number of ballots cast (604), it appears that one prospective voter did not cast a ballot.

Additionally, a review of all of the poll lists revealed one name without a voting authority number recorded. The statement of result of school election, Form A33, (Exhibit B) notes that 604 ballots were counted and one (1) ballot was voided. The voided ballot (voting authority) would account for the disparity noted at the time of the recount; however, the voting authorities are not being considered for the aforementioned reason. Nevertheless, the election workers have certified the results of the school election at the polls, and it appears that this irregularity can be attributed to a clerical oversight.

Additionally, sufficient mechanical controls exist within the confines of the voting machine which provide for two separate voter counts which, in this instance, did not exceed the number of names appearing on the poll lists.

While irregularities did exist in this matter, they are not of such a magnitude to have caused the will of the electorate to be thwarted.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings set forth above.

The Commissioner therefore finds and determines that Raymond Hall, John C. Bradley and Carole Clark were elected to full terms of three years each on the Board of Education of the School District of the Township of Hainesport, Burlington County.

COMMISSIONER OF EDUCATION

MAY 14, 1992

DATE OF MAILING - MAY 14, 1992

110-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF GLEN RIDGE, ESSEX	:	DECISION
COUNTY.	:	
	:	

MAY 14, 1992

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE BOROUGH OF GLEN RIDGE, ESSEX COUNTY.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for a bond referendum question held April 7, 1992 in the School District of the Township of Glen Ridge were as follows:

QUESTION #2	TOTAL
YES	651
NO	579

Pursuant to a written petition signed by ten or more voters dated April 20, 1992, an authorized representative of the Commissioner of Education from the office of the Essex County Superintendent of Schools conducted a recount of the ballots cast. The recount was conducted on April 21, 1992 at the warehouse where the voting machines were stored located at 640 Frelinghuysen Avenue, Newark.

At the conclusion of the recount, the tally stood as follows:

QUESTION #2	TOTAL
YES	644
NO	570

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings set forth above. The Commissioner notes that there was no indication of any request to Superior Court to recount absentee ballots and that there were minor changes in the tally as a result of the machine recount.

Accordingly, the Commissioner finds and determines that Question #2 dealing with a bond referendum submitted by the Board at the annual school election held on April 7, 1992 was approved by the voters.

COMMISSIONER OF EDUCATION

MAY 14, 1992

DATE OF MAILING - MAY 14, 1992

111-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF LODI, BERGEN COUNTY.	:	
_____	:	

MAY 14, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH : DECISION
OF LODI, BERGEN COUNTY. :
:

The announced results of the balloting for three members for the Board of Education for full terms of three years each were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Joseph Ciolino	1,552	71	1,623
Michele Appaluccio	1,590	49	1,639
Arlene A. Lisa	1,634	80	1,714
George Panagiotou	378	3	381
Michael J. Nardino	1,639	59	1,698
P. Vincent Lynch	1,559	45	1,604
Louis A. Pesenti	1,459	68	1,527

Pursuant to a letter of application from Joseph Ciolino dated April 9, 1992, the Commissioner of Education directed his representative from the Office of the Bergen County Superintendent of Schools to conduct a recheck of the votes cast on the voting machines. This recheck was conducted on April 21, 1992, at the County Voting Machine Warehouse, Carlstadt, New Jersey.

At the conclusion of the recheck of the votes cast on the voting machines, the tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Joseph Ciolino	1,552	71	1,623
Michele Appaluccio	1,588	49	1,637
Arlene A. Lisa	1,634	80	1,714
George Panagiotou	378	3	381
Michael J. Nardino	1,639	59	1,698
P. Vincent Lynch	1,559	45	1,604
Louis A. Pesenti	1,459	68	1,527

There was no request for a recount of the absentee ballots.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings set forth above.

Accordingly, the Commissioner finds and determines that notwithstanding minor changes in the recount totals, Arlene A. Lisa, Michael J. Nardino and Michele Appaluccio were elected to the three seats on the Board of Education of the Borough of Lodi at the election held on April 7, 1992.

COMMISSIONER OF EDUCATION

MAY 14, 1992

DATE OF MAILING - MAY 14, 1992

112-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE VILLAGE	:	DECISION
OF RIDGEFIELD PARK, BERGEN	:	
COUNTY.	:	
_____	:	

MAY 14, 1992

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE VILLAGE OF RIDGEFIELD PARK, BERGEN COUNTY.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for three members for the Board of Education for full terms of three years each were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Stephen M. Pollack	212	3	215
Diane Zanelli	389	4	393
Robert Cimmino	223	2	225
Doris Murray	265	7	272
Joseph J. Picone	356	4	360
Mary Ann Foldi	355	15	370
David Cathcart	370	9	379
Thomas A. Blumenthal	246	3	249
Benjamin J. Busby	175	2	177
Robert F. Binetti	451	6	457

The announced results of the balloting for one member for the Board of Education for the one-year unexpired term were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Edmond A. DeSantis	342	7	349
Madelaine Cappuccio	162	3	165
Catherine Mangano	527	18	545

Pursuant to a letter from Ms. Mary Ann Foldi of April 16, 1992, the Commissioner of Education directed his representative from the Office of the Bergen County Superintendent of Schools to conduct

a recount of the votes cast on the voting machines. This recount was conducted on Monday, April 27, 1992, at the Voting Machine Warehouse, Carlstadt, New Jersey.

At the conclusion of the recount, the tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Stephen M. Pollack	212	3	215
Diane Zanelli	388	4	392
Robert Cimmino	223	2	225
Doris Murray	265	7	272
Joseph J. Picone	356	4	360
Mary Ann Foldi	355	15	370
David Cathcart	370	9	379
Thomas A. Blumenthal	246	3	249
Benjamin J. Busby	175	2	177
Robert F. Binetti	451	6	457

The results of the recount for one member for the Board of Education for the one-year unexpired term remained the same.

There was no request for a recount of the absentee ballots.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings set forth above.

Accordingly, the Commissioner finds and determines that Robert F. Binetti, Diane Zanelli and David Cathcart were elected to the Board of Education of the Village of Ridgefield Park for full terms of three years each. The Commissioner further finds that Catherine Mangano was elected to the Board of Education of the Village of Ridgefield for the one-year unexpired term.

MAY 14, 1992

COMMISSIONER OF EDUCATION

DATE OF MAILING - MAY 14, 1992

113-92

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH : DECISION
OF WALLINGTON, BERGEN COUNTY. :
:

MAY 14, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH : DECISION
OF WALLINGTON, BERGEN COUNTY. :
:

The announced results of the balloting for three members of the Board of Education for full terms of three years each were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Joseph C. Smith	700	31	731
Anna Maciag	598	31	629
John L. Rebeckyino	577	5	582
Fred Zalewski	546	29	575
George J. Blumenshein	498	3	501
Anthony Janiec, Jr.	459	8	467

Pursuant to a letter of application from Fred Zalewski dated April 16, 1992, the Commissioner of Education directed his representative from the Office of the Bergen County Superintendent of Schools to conduct a recheck of the votes cast on the voting machines. This recheck was conducted on April 27, 1992, at the Counting Voting Machine Warehouse, Carlstadt, New Jersey.

At the conclusion of the recheck of the votes cast on the voting machines, the tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Joseph C. Smith	700	31	731
Anna Maciag	598	31	629
John L. Rebeckyino	577	5	582
Fred Zalewski	546	29	575
George J. Blumenshein	498	3	501
Anthony Janiec, Jr.	461	8	469

We call your attention to the Public Counter count for machine #93785. The count was 810, yet the Protective Counter reflected a count of 142. When a member of the Voting Machine Warehouse staff was questioned concerning this discrepancy, he replied that there was an irregularity, yet he further added they were experiencing trouble with this machine, but he was of the opinion that the votes cast for the candidate were accurate.

There was no request known to the County Superintendent for a recount to Superior Court of the absentee ballots.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings set forth above.

Accordingly, the Commissioner finds and determines that Joseph C. Smith, Anna Maciag and John L. Rebeckyino were elected to serve as school board members in the district of the Borough of Wallington at the school election held on April 7, 1992.

COMMISSIONER OF EDUCATION

MAY 14, 1992

DATE OF MAILING - MAY 14, 1992

114-92

IN THE MATTER OF THE TENURE	:	
HEARING OF DOUGLAS HEIL,	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF	:	DECISION
CORRECTIONS AND NEW JERSEY	:	
STATE PRISON.	:	
	:	

MAY 18, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11219-91
AGENCY DKT. NO. 414-11/91

IN THE MATTER OF THE TENURE HEARING OF DOUGLAS HEIL NEW JERSEY STATE DEPARTMENT OF CORRECTIONS AND NEW JERSEY STATE PRISON

Allan C. Roth, Deputy Attorney General for petitioner (Robert J. Del Tufo, Attorney General of New Jersey, attorney)

Lisa Morowitz, Esq., for respondent, Legal Office, Communications Workers of America

Record Closed: April 1, 1992 Decided: April 7, 1992

BEFORE **DANIEL B. McKEOWN,** ALJ:

This matter was transmitted to the Office of Administrative Law on December 17, 1991, 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 agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 7, 1992
Date

Daniel B McKeown
DANIEL B. McKEOWN, ALJ

Receipt Acknowledged:

April 9, 1992
Date

Maureen K. Kelly
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 14 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

tmp

Allan C. Roth
Deputy Attorney General
R.J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 984-0023

In the Matter of the Tenure Hearing of Douglas Heil New Jersey State Department of Corrections and New Jersey State Prison	)	BEFORE THE COMMISSIONER OF EDUCATION OAL Dkt No. EDU 11219-91 S **SETTLEMENT AGREEMENT**

Petitioner, New Jersey State Prison ("NJSP") and the Department of Corrections ("DOC"), and Respondent, Douglas Heil, desire to enter into the following settlement agreement in the public interest:

1. WHEREAS, Respondent, Douglas Heil, a tenured teacher, has been employed by the DOC as the Supervisor of Education at NJSP since March 1985; and

2. WHEREAS, Respondent has been employed in the Education Department for NJSP since September 1972; and

3. WHEREAS, Respondent has never previously been subjected to any disciplinary proceedings in the course of that employment; and

4. WHEREAS, on October 1, 1991, the DOC advised Respondent that it was referring tenure charges to the Commissioner of Education ("Commissioner"), and in accordance with N.J.S.A. 18A:6-9 et seq., the following charges were specified; 1) insubordination, 2) conduct unbecoming a teacher; and

5. WHEREAS, on November 18, 1991, the DOC filed written charges with the Commissioner requesting dismissal or reduction in

salary of Respondent; and

6. WHEREAS, on November 22, 1991, the Acting Director of the Bureau of Controversies and Disputes acknowledged in writing that the DOC properly certified the charges to the Commissioner; and

7. WHEREAS, Respondent filed his answer on December 10, 1991; and

8. WHEREAS, Respondent has not been suspended, but was on a voluntary leave of absence without pay; and

9. WHEREAS, there is an available Teacher Level I position at Mountainview Correctional Facility for a teacher of mathematics; and

10. WHEREAS, Respondent wishes to return to the position of teaching mathematics, and Petitioner is eager for him to return; and

11. WHEREAS, said position will have no supervisory responsibilities; and

12. WHEREAS, tenure hearings are scheduled before Administrative Law Judge Daniel B. McKeown for June 17 through June 30, 1992.

IT IS THEREFORE AGREED that the DOC will withdraw the tenure charges against the Respondent, subject to the approval of the Commissioner of DOE; and

IT IS FURTHER AGREED that the DOC will transfer Respondent to Mountainview Correctional Facility as a tenured Teacher Level I in mathematics with a corresponding reduction in

annual salary to $45,910.92 which is the maximum salary for said position effective upon the approval of this settlement by the Commissioner of DOE; and

IT IS FURTHER AGREED that Respondent agrees to be reassigned to the Mountainview Correctional Facility as a teacher of mathematics and the corresponding reduction in salary, after consultation with an attorney, subject to approval of this settlement by the Commissioner of DOE; and

IT IS FURTHER AGREED that by this settlement, Respondent does not waive his rights, if he is subject to a reduction in force, to employment in any category he is entitled to by seniority.

HOWEVER, IT IS ALSO AGREED that if he is subject to a reduction in force, Respondent will not apply to a Supervisor position within DOC, subject to approval of this settlement by the Commissioner of DOE; and

IT IS FURTHER AGREED that pursuant to N.J.A.C. 4A:6-1.5(b), Respondent will reimburse the DOC for 26.75 hours from which he owes the State of New Jersey for deficits in his sick/vacation/administrative leave fund which occurred during his voluntary leave, subject to approval of this agreement by the Commissioner of DOE; and

IT IS FURTHER AGREED that Respondent's personnel file will remain intact subject to approval of this agreement by the Commissioner of DOE; and

IT IS FURTHER AGREED that none of the allegations giving

rise to these charges will form the basis for later disciplinary action against Respondent, subject to approval of this agreement by the Commissioner of DOE; and

IT IS FURTHER AGREED that in response to inquiries regarding Respondent's personnel history, Petitioner will report only that Respondent served in the position of Supervisor of Education until he was transferred to the position of Teacher I, unless the Respondent authorizes the release of other information, subject to approval of this agreement by the Commissioner of DOE; and

IT IS FURTHER AGREED that this agreement, its contents and its terms do not constitute precedent of any kind to be used against the DOC; and

IT IS FURTHER AGREED that both parties waive the right to file exceptions and cross-exceptions; and

IT IS FURTHER AGREED that nothing in this settlement shall be deemed to be an admission of liability on behalf of either party.

HOWEVER, should the Commissioner of DOE or the State Board of Education refuse to approve any terms of this settlement, including the withdrawal of said tenure charges by the DOC or by Respondent, any such refusal shall not interfere with the rights of either party to pursue the matter further.

THE REASONS FOR ENTERING INTO THIS AGREEMENT ARE AS FOLLOWS:

(a) The costs of continuing to prosecute the tenure

claims against the Respondent are expected to be substantial;

(b) In view of the reduction to Teacher Level I and the transfer to Mountainview Correctional Facility, the opportunity for continuing violations is reduced;

(c) The charges did not involve abuse of students, inappropriate physical contact or any allegations of moral turpitude.

(d) Both parties after consultation with counsel, fully endorse the agreement and are anxious to implement said terms.

DOUGLAS HEIL
Respondent

Dated: April 1, 1992

ROBERT J. DEL TUFO
ATTORNEY GENERAL OF NEW JERSEY

BY: _____
ALLAN C. ROTH
Deputy Attorney General
for the Petitioner

Dated: April 1, 1992

_____
LISA MOROWITZ, ESQ.
For the Respondent

Dated: April 1, 1992

CERTIFICATION

I, Douglas Heil, hereby certify that I have reviewed the Settlement Agreement attached hereto and fully understand the meaning and terms of said agreement. I have discussed this matter at some length with my representative and I am satisfied with my representation. It is also my understanding that if the agreement is approved by the Administrative Law Judge and by the Commissioner of Education, that my claims as set forth in the above captioned matter will terminate against the Department of Corrections as long as the terms and conditions of this agreement are met.

Douglas Heil, Respondent

Dated: April 7, 1992

IN THE MATTER OF THE TENURE	:	
HEARING OF DOUGLAS HEIL,	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF	:	DECISION
CORRECTIONS AND NEW JERSEY	:	
STATE PRISON.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law in the form of a joint stipulation of settlement have been reviewed. A careful and independent review of the proposed terms reached by the parties requires rejection of the settlement and remand of this matter for further action before the Office of Administrative Law.

At page 4 of the settlement it is stated, inter alia,

> IT IS FURTHER AGREED that in response to inquiries regarding Respondent's personnel history, Petitioner will report only that Respondent served in the position of Supervisor of Education until he was transferred to the position of Teacher I, unless the Respondent authorizes the release of other information, subject to approval of this agreement by the Commissioner of DOE;

While the Department of Corrections is not specifically required to provide publicly the reasons for separation in its reasons for adopting the settlement terms, it must make such information available upon request, pursuant to Executive Order No. 11 (1974), which states, in pertinent part, that the following information be public:

a. An individual's name, title, position, salary, payroll record, length of service in the instrumentality of government and in the government, date of separation from government service and the reason therefor; and the amount and type of pension he is receiving;

b. Data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but in no event shall detailed medical or psychological information be released***. (emphasis supplied)

Moreover, the Commissioner cannot sanction terms in a settlement that would infringe in any way on the right of the Board to be fully forthcoming in responding to any inquiries that might arise concerning respondent's employment with the Department of Corrections. See, e.g., John Salsberg v. Board of Education of the Town of Boonton, Morris County, decided by the Commissioner May 11, 1989.

Thus the Commissioner rejects the instant settlement terms and remands the matter for further action consistent with this decision.

COMMISSIONER OF EDUCATION

MAY 18, 1992

DATE OF MAILING - MAY 18, 1992

EDU #11219-91
C # 114-92
SB # 24-92

114-92

IN THE MATTER OF THE TENURE :
HEARING OF DOUGLAS HEIL, NEW : STATE BOARD OF EDUCTION
JERSEY STATE DEPARTMENT OF : DECISION
CORRECTIONS AND NEW JERSEY :
STATE PRISON. :

Decided by the Commissioner of Education, May 18, 1992

For the Respondent-Appellant, Lisa Morowitz, Esq. (Steven P. Weissman, General Counsel)

For the Petitioner-Respondent, Allan C. Roth, Deputy Attorney General (Robert J. Del Tufo, Attorney General)

This is an appeal from a decision of the Commissioner rejecting a settlement in this matter. Although the Administrative Law Judge (ALJ) had approved the settlement, the Commissioner found that one of the terms, specifically that pertaining to the release of information regarding Respondent's personnel history, contravened Executive Order No. 11 (1974). We reverse.

Executive Order No. 11 provides in pertinent part that:

> 2. Except as otherwise provided by law..., an instrumentality of government shall not disclose..., personnel or pension records of an individual, except that the following shall be public:
>
> a. An individual's name, title, position, salary, payroll record, length of service in the instrumentality of government and in the government, date of separation from government service and the reason therefor; and the amount and type of pension he is receiving;...

The question in this appeal is whether provision 2(a) of Executive Order No. 11 applies to the matter before us so as to preclude the Board from agreeing that

June 2 1993

> ...in response to inquiries regarding Respondent's personnel history, Petitioner will report only that Respondent served in the position of Supervisor of Education until he was transferred to the position of Teacher I, unless Respondent authorizes the release of other information subject to approval of this agreement by the Commissioner of DOE...

The matter arose when the Department of Corrections filed tenure charges of insubordination and unbecoming conduct against Respondent, who was serving as Supervisor of Education at the New Jersey State Prison. Before hearing, the parties agreed that, rather than proceed on the charges, they would resolve the matter by transferring Respondent to a non-supervisory position teaching mathematics at Mountainview Correctional Facility with an attending reduction in salary.

The parties embodied their agreement in a Stipulation of Settlement which, as required by law, they submitted for the approval of the Administrative Law Judge. The ALJ found that the agreement was consistent with law and recommended that the Commissioner accept it. However, as set forth above, the Commissioner rejected the agreement because he found that the term at issue contravened Executive Order No. 11 (1974). The Commissioner further concluded that he could not "sanction terms in a settlement that would infringe in any way on the right of the Board to be fully forthcoming in responding to any inquiries that might arise concerning respondent's employment with the Department of Corrections." Commissioner's Decision, at 5.

Initially, we find that Executive Order No. 11 can not be read in isolation. Executive Order No. 11 was promulgated to limit the effect of Executive Order No. 9 (1963), which provided that all personnel records were deemed not to be public records and therefore

would not, as would otherwise be the case under the Right to Know Law, N.J.S.A. 47:1A-1 et seq., be subject to inspection and examination. As this indicates, Executive Order No. 9, in turn, created an exception to the Right to Know Law. The reason for creating this exception was the need to balance the right of the public to know against the risk of unintentional harm or injustice to individuals that might be occasioned by the indiscriminate exposure of certain records containing data of a sensitive or personal nature. Trenton Times Corp. v. Bd. of Ed. of Trenton, 138 N.J. Super. 357 (App. Div. 1976). The reason given in Executive Order No. 11 for restricting the scope of Executive Order No. 9's exemption of personnel records was that

> ...disclosure of the name, title and position of persons receiving pensions and of the type and amount of pension being received is an insignificant invasion of privacy outweighed by the public's right to know who it is employing, what jobs they are filling and the identities of those receiving government pensions.

Thus, as set forth above, Executive Order No. 11 mandated that the date of an individual's "separation from government service and the reason therefor" are public.

Quite simply, the settlement agreement here does not provide for Respondent's "separation from government service." Rather, the agreement provides that Respondent will continue to be employed by the same government agency, albeit in a different position. Consequently, Executive Order No. 11's exemption mandating that the "date of separation from government service and the reason therefor" shall be public does not apply. At the point at which Respondent ultimately does sever his employment by retirement or otherwise, the public will be entitled to know "the reason therefor."

No other provision of law would permit disclosure of even those documents in Respondent's personnel file which would otherwise be defined as "public records" under N.J.S.A. 47:1A-2. Executive Order No. 11, therefore, would prohibit disclosure except

> ...when essential to the performance of official duties or when authorized by a person in interest... to anyone other than a person duly authorized by this State or the United States to inspect such information in connection with his official duties...

Nor do we find that the agreement limits the Board's ability to respond appropriately to inquiries concerning Respondent's employment with the Department of Corrections. In this context, Respondent's privacy interest outweighs any interest of the public in the circumstances surrounding Respondent's transfer from a supervisory position to a teaching position. Cf. Rice v. Union Cty. Reg. High School Bd. of Ed., 155 N.J. Super. 64 (App. Div. 1977).

Therefore, for the reasons stated, we reverse the Commissioner's decision and direct that she accept the settlement in this matter.

Corinne M. Mullen opposed.

June 2, 1993

Date of mailing 04 JUN 1993

114-92

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IN THE MATTER OF THE TENURE	:	
HEARING OF DOUGLAS HEIL,	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF	:	DECISION ON REMAND
CORRECTIONS AND NEW JERSEY	:	
STATE PRISON.	:	
	:	

OCTOBER 4, 1993

OAL DKT. NO. EDU 3939-92

IN THE MATTER OF THE TENURE	:	
HEARING OF DOUGLAS HEIL,	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF	:	DECISION ON REMAND
CORRECTIONS AND NEW JERSEY	:	
STATE PRISON.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal given the June 2, 1993 decision of the State Board directing acceptance of the settlement of the tenure charges. Consequently, the matter is no longer deemed to be a dispute before her.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 4, 1993

DATE OF MAILING - OCTOBER 4, 1993

115-92

115-92

J.B. AND B.B. on behalf of their minor child, C.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	
RESPONDENT.	:	

MAY 18, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10442-91
AGENCY DKT. NO. 369-10/91

J.B. AND B.B. ON BEHALF OF THEIR MINOR CHILD, C.B.,
Petitioners,
v.
BOARD OF EDUCATION OF MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,
Respondent.

J.B. and B.B., *pro se*

Sidney Sayovitz, Esq., for respondent
(Young, Tarshis, DiMiero & Sayovitz, attorneys)

Record Closed: March 24, 1992 Decided: April 9, 1992

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

On October 8, 1991, J.B. and B.B. filed a petition of appeal with the Commissioner of Education alleging that C.B.'s grade for journalism for the 1990-91 school year was improper and should be changed. On November 4, 1991, respondent filed an answer contending that the Board's attendance policies were neither arbitrary nor capricious and were properly applied to C.B.

NEW JERSEY IS AN EQUAL OPPORTUNITY

A telephone prehearing conference was held on January 31, 1992. During the conference, an in-person settlement conference was scheduled for March 24, 1992, at the Office of Administrative Law (OAL), 185 Washington Street, Newark, New Jersey 07102. In addition, a hearing was scheduled for June 23 and 24, 1992, at the OAL. As a result of settlement conferences held on March 24, 1992, the parties agreed to settle this matter and the hearing dates were adjourned. The parties have prepared the attached Stipulation of Settlement indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 9, 1992
Date

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

April 13, 1992
Date

Maureen K. Reed
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 15 1992
Date

Jayree LaVecchia
OFFICE OF ADMINISTRATIVE LAW

jrp/e

STIPULATION OF SETTLEMENT
OAL DKT. NO. EDU 10442-91
AGENCY DKT. NO. 369-10/91

J. B. and B.B. on behalf of their minor child, C.B.,

Petitioners,

v.

BOARD OF EDUCATION OF MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,

Respondent.

It is hereby stipulated by and between the parties as follows:

1. The petition is hereby withdrawn with prejudice;

2. C.B.'s student records at Morris Hills High School will be altered to reflect that he withdrew from his journalism course for the 1990-91 school year, prior to the end of the first marking period. As a result of C.B.'s withdrawal from said journalism course:

   (i) no grade will be assigned for journalism,

   (ii) no credit will be awarded for journalism,

   (iii) his class rank and final grade point average will be modified to remove the effect of the prior grade of 50 for journalism, and

   (iv) all student records will reflect a "withdrawal" corresponding to a withdrawal prior to the end of the first marking period

OAL DKT. NO. EDU 10442-91
AGENCY DKT. NO. 369-10/91

3. The above changes to C.B.'s student records will be made as soon as possible and J.B. and B.B. will receive a correct transcript reflecting the changes on or before June 23, 1992.

4. This settlement is subject to the approval of the Commissioner of Education.

Jon Blume, Petitioner

Sidney Sayovitz, Esq.,
for Respondent, Morris Hills
Regional School District

Betsy Blume, Petitioner

March 24, 1992
Dated

jrp

OAL DKT. NO. EDU 10442-91

J.B. AND B.B. on behalf of their minor child, C.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

MAY 18, 1992

DATE OF MAILING - MAY 18, 1992

116-92

116-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF WALDWICK, BERGEN COUNTY.	:	
	:	

MAY 18, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH : DECISION
OF WALDWICK, BERGEN COUNTY. :
:

The announced results of the balloting for the Current Expense proposition of the Board of Education at the annual school election held on April 7, 1992, were as follows:

CURRENT EXPENSE	AT POLLS	ABSENTEE	TOTAL
Yes	881	15	896
No	922	6	928

Pursuant to a letter request from Board Secretary James Mallen dated April 9, 1992, the Commissioner of Education directed his representative from the Office of the Bergen County Superintendent of Schools to conduct a recheck of the votes cast on the voting machines for the Current Expense proposition. The recheck was conducted on April 27, 1992, at the County Voting Machine Warehouse, Carlstadt, New Jersey.

At the conclusion of the recount, the tally of the votes cast on the voting machines remained unchanged and stood as follows:

CURRENT EXPENSE	AT POLLS	ABSENTEE	TOTAL
Yes	881	15	896
No	922	6	928

Absentee ballot totals are given as reported by the Board Secretary on the Regular/Combined Statement of Result.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts it as his own.

Accordingly, the Commissioner finds and determines that the Current Expense proposition of the Board of Education of the Borough of Waldwick was defeated by the voters.

COMMISSIONER OF EDUCATION

MAY 18, 1992

DATE OF MAILING - MAY 18, 1992

117-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
NORTHERN HIGHLANDS REGIONAL	:	DECISION
SCHOOL DISTRICT, BERGEN COUNTY.	:	
	:	

MAY 18, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
NORTHERN HIGHLANDS REGIONAL : DECISION
SCHOOL DISTRICT, BERGEN COUNTY. :
:

The announced results of the balloting for Current Expense Proposition of the Board of Education at the annual school election held on April 7, 1992, were as follows:

CURRENT EXPENSE	AT POLLS	ABSENTEE	TOTAL
Yes	1,209	14	1,223
No	1,216	9	1,225

Pursuant to a letter from Mr. John Kowalsky, dated April 13, 1992, the Commissioner of Education directed his representative from the Office of the Bergen County Superintendent of Schools to conduct a recheck of the votes cast on the voting machines for the Current Expense Proposition. This recheck was conducted on April 23, 1992, at the County Voting Machine Warehouse, Carlstadt, New Jersey.

At the conclusion of the recheck, the tally of the votes cast on the voting machines remained unchanged.

Furthermore, upon request of the district, a court order was issued to conduct a recheck of the absentee ballots cast for the April 7, 1992 referendum. This recheck was held on Wednesday,

April 29, 1992 by members of the Bergen County Board of Elections, together with representatives of the Northern Highlands Regional High School.

At the conclusion of the recheck of the absentee ballots there was no change in the count.

CURRENT EXPENSE	AT POLLS	ABSENTEE	TOTAL
Yes	1,209	14	1,223
No	1,216	9	1,225

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings set forth above.

Accordingly, the Commissioner finds and determines that the current expense question submitted by the Board at the Annual School election held on April 7, 1992 was not approved by the voters.

COMMISSIONER OF EDUCATION

MAY 18, 1992

DATE OF MAILING - MAY 18, 1992

118-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF PENNSVILLE, SALEM COUNTY.	:	

MAY 18, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF PENNSVILLE, SALEM COUNTY. :

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held on April 7, 1992 in the School District of the Township of Pennsville, Salem County, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Guy M. Griscom	795	21	816
John E. Halstead	646	15	661
Donald K. Shaw	574	10	584
Roger A. Shaw	582	14	596
Nina Fue (Write-In)	0	1	1

Pursuant to a letter request from Donald K. Shaw dated April 13, 1992, an authorized representative of the Commissioner of Education from the Office of the Salem County Superintendent of Schools was directed to conduct a recount of the paper ballots cast. The recount was conducted on May 1, 1992, at the Office of the Salem County Superintendent of Schools.

At the conclusion of the recount, the tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Guy M. Griscom	797	21	818
John E. Halstead	648	15	663
Donald K. Shaw	575	10	585
Roger A. Shaw	582	14	596
Howard Stern (Write-In)	1	0	1
Ric Flair (Write-In)	1	0	1

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Randy Savage (Write-In)	1	0	1
Nina Fue (Write-In)	1	1	2

Four ballots were not counted (Exhibits C-1 through C-4), three because of misplaced or unclear markings and one because four candidates were voted for instead of three. The number of ballots counted (954) matched the number of voters on the poll list, so that the slight discrepancies in candidate tallies on recount, which did not affect the outcome of the election, appear to have been due to minor error in the original count. *Absentee ballot totals are given as reported in the Regular/Combined Statement of Result.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts it as his own.

Accordingly, the Commissioner finds and determines that Guy M. Griscom, John E. Halstead and Roger A. Shaw were elected to full terms of three years each on the Board of Education of the School District of the Township of Pennsville.

MAY 18, 1992

DATE OF MAILING - MAY 18, 1992

COMMISSIONER OF EDUCATION

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* The Commissioner notes that the Board Secretary listed one ballot as voided on the Regular/Combined Statement of Result, and thhat the Statement did not list the single write-in votes cast for media personalities Howard Stern, Ric Flair and Randy Savage. The Commissioner therefore concludes that the Board Secretary voided, while the county office duly recorded on recount, a single ballot casting one vote for each of these three persons.

119-92

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF HAMILTON, ATLANTIC COUNTY. :
:

MAY 18, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF HAMILTON, ATLANTIC COUNTY. :
:

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held in the school district of Hamilton Township, Atlantic County, on April 7, 1992, are as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
William B. Carll	317	3	320
Jeri-Lynn Gatto	401	3	404
Peter E. Fraleigh	445	3	448
Janet Smith (Write-in)	221	3	224
John Lenhart (Write-in)	184	0	184
Joseph G. Marshello, Jr. (Write-in)	71	0	71
Larry Fatcher (Write-in)	24	1	25
Harvey Kessalman (Write-in)	2	0	2
20 Write-In With One (1) Vote Each	20	0	20

Pursuant to a written request from write-in candidate Janet Smith, dated April 10, 1992, an authorized representative of the Commissioner of Education from the Office of Atlantic County Superintendent of Schools was directed to conduct a recount of the ballots cast. The recount was conducted by the Atlantic County Superintendent of Schools on May 1, 1992, at the Atlantic County Voting Machine Warehouse, in Northfield, New Jersey.

As a result of the recount, the announced results were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
William B. Carll	317	3	320
Jeri-Lynn Gatto	401	3	404
Peter E. Fraleigh	445	3	448
Janet Smith (Write-in)	226	3	229
John Lenhart (Write-in)	186	0	186
Joseph G. Marshello, Jr. (Write-in)	73	0	73
Larry Fatcher (Write-in)	23	1	24
Harvey Kessalman (Write-in)	2	0	2
Additional Write-In Votes, One Name Each	23	0	23

There were 102 votes invalidated during the recount. They were invalidated for the following reasons: multiple votes in the same write-in space = 97; votes for the same person three times in all three of the available write-in spaces = 2; votes for a published (petition) candidate in the write-in space = 2; use of the initials "J.S." in the write-in space = 1.

The recount resulted in the following changes: Janet Smith - 5 additional votes; John Lenhart - 2 additional votes; Joseph G. Marshello, Jr. - 2 additional votes; Larry Fatcher - 1 less vote; one name each - 3 additional votes.

It is my determination that William B. Carll, Jeri-Lynn Gatto and Peter E. Fraleigh were elected to full three-year terms on the Board of Education of the Hamilton Township School District at the annual school election held on April 7, 1992.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings set forth above. Accordingly, the Commissioner finds and determines that William B. Carll, Jeri-Lynn Gatto and Peter E. Fraleigh were elected to full three-year terms on the Board of Education of Hamilton Township, Atlantic County, at the annual school election held April 7, 1992.

COMMISSIONER OF EDUCATION

MAY 18, 1992

DATE OF MAILING - MAY 18, 1992

120-92

120-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF NEW MILFORD, BERGEN COUNTY.	:	
	:	

MAY 22, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH : DECISION
OF NEW MILFORD, BERGEN COUNTY. :
:

The announced results of the balloting at the annual school election on April 7, 1992 for three members of the Board of Education for full terms of three years each were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Barbara A. Barbagallo	1,006	20	1,026
Steven B. Day	1,096	25	1,121
Lori M. Barton	864	21	885
Cindy Aldighere	623	11	634
Randi Duffie	701	12	713
Eileen K. DeBari	868	19	887

Pursuant to a letter request from Lori M. Barton dated April 14, 1992, the Commissioner of Education directed his representative from the Office of the Bergen County Superintendent of Schools to conduct a recheck of the machine ballots cast. The recheck was conducted on April 24, 1992, at the County Voting Machine Warehouse, Carlstadt, New Jersey.

At the conclusion of the recheck, the tally remained the same and stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Barbara A. Barbagallo	1,006	20	1,026
Steven B. Day	1,096	25	1,121
Lori M. Barton	864	21	885
Cindy Aldighere	623	11	634
Randi Duffie	701	12	713
Eileen K. DeBari	868	19	887

There was no request to Superior Court for a recount of absentee ballots. The absentee tallies given above are as reported on the Regular/Combined Statement of Result.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts it as his own.

Accordingly, the Commissioner finds and determines that Steven B. Day, Barbara A. Barbagallo and Eileen K. DeBari were elected to full terms of three years each on the New Milford Board of Education.

COMMISSIONER OF EDUCATION

MAY 22, 1992

DATE OF MAILING - MAY 22, 1992

121-92

JOSEPH HAHN AND SALVATORE LOMBARDO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK, MIDDLESEX COUNTY, PAUL PAVONE, CRAIG ROSEVEAR AND ALAN DZWILEWSKI,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning citizens of the Township of North Brunswick claimed that because members of the Board's negotiating subcommittee were required to negotiate in opposition to the interests of their spouses, those Board members were placed in positions of conflict of interest and should not have participated in either the negotiating process or the vote on approving the negotiated Agreement. Petitioners also contended that adequate notice was not given for the special meeting at which the Agreement was approved, thus rendering the agreement null and void.

The ALJ concluded that no Board member whose spouse is employed by the Board and is a member of the Association, is by that fact alone in conflict of interest for purposes of negotiating a collective Agreement or in voting to approve or reject the Agreement. ALJ further concluded that there was no violation of the Open Public Meetings Act, N.J.S.A. 10:4-6. The Petition of Appeal was dismissed.

Commissioner affirmed the initial decision of the ALJ for the reasons expressed therein.

MAY 22, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7976-91
AGENCY DKT. NO. 265-7/91

JOSEPH HAHN and
SALVATORE LOMBARDO,
Petitioners,
v.
NORTH BRUNSWICK TOWNSHIP
BOARD OF EDUCATION, PAUL PAVONE,
CRAIG ROSEVEAR, and ALAN DZWILEWSKI,
Respondents.

Robert M. Adochio, Esq., for petitioners
Jack Borrus, Esq., for respondents (Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, attorneys)
Stephen E. Klausner, Esq., for Intervenor North Brunswick Education Association, (Klausner, Hunter & Cigy, attorneys)
Paul H. Green, Esq., for respondent Alan Dzwilewski (Green & Dzwilewski, attorneys)

Record Closed: March 7, 1992 Decided: April 7, 1992

BEFORE **DANIEL B. McKEOWN,** ALJ:

INTRODUCTION

On or about June 19, 1991, petitioners filed a Complaint in Lieu of Prerogative Writ in the Superior Court of New Jersey, Chancery Division, Middlesex County and applied for injunctive relief to restrain the North Brunswick Township Board of Education (Board) from ratifying or implementing a collectively negotiated agreement with the North Brunswick Township Education Association (Intervenor) which was to be effective as of July 1, 1991. On June 25, 1991 the Honorable Erminie S. Conley denied petitioner's application for injunction relief and ordered

the matter transferred to the Commissioner of Education under N.J.S.A. 18A:6-9. On June 27, 1991 the Appellate Division affirmed the decision of Judge Conley.

Petitioners filed a four count Petition with the Commissioner on July 18, 1991 along with an application for emergency relief seeking a temporary restraint against the Board from continuing to implement the Agreement. That application was denied, after which the Commissioner of Education transferred the matter August 19, 1991 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. On September 25, 1991 oral argument on an application to intervene by the North Brunswick Education Association was heard and granted. In addition, it was determined at that time that the Board would file a motion for summary decision on the merits and that the Intervenor Association would be considered as having joined in the application. The Board did move for summary decision on the merits to which petitioner responded in opposition thereto. The record closed on the motion March 7, 1992 after having received from the Board an application that Requests for Admissions served upon petitioner on or about November 22, 1991, but not properly answered within the allowable time of 15 days under N.J.A.C. 1:1-10.4(c), should be deemed admitted. No response to this application has been received by petitioner. The application shall be addressed post.

This initial decision concludes that the Board and Intervenor Association are entitled to summary decision on the merits and that the Petition of Appeal must be dismissed for failure to state a cause of action. The record on the motion consists of the pleadings filed in Superior Court, those pleadings redrafted for the filing of and answer to a Petition of Appeal before the Commissioner, affidavits, exhibits attached thereto, together with briefs and/or letter memoranda filed by the parties in support of their respective positions.

REQUESTS FOR ADMISSIONS

The Board's motion to consider as admitted all statements of fact within a Request for Admissions served on petitioners November 22, 1991, is based on N.J.A.C. 1:1-10.4(c) which, in part, provides:

> (c) No later than 15 days from receipt of a notice requesting discovery, the receiving party shall provide the requested information ***

> or in the case of a notice requesting admissions, each matter therein shall be admitted unless within the 15 days the receiving party answers, admits or denies the request or objects to it pursuant to N.J.A.C. 1:1-10.4(d).

N.J.A.C. 1:1-10.4(d) provides avenues of relief to a party who chooses to object to a discovery notice, or who wishes to compel a response to a discovery notice, or wishes to object to a response received. The Board acknowledges it received a response to its Request for Admissions from petitioner's counsel on February 28, 1992. Its motion was filed here March 6, 1992.

It is clear that petitioner's reply to the Board's request was beyond the time allowable by N.J.A.C. 1:1-10.4(c) with respect to requests for admissions served. No response to the Board's motion has been received from petitioner. Therefore, the statement of facts contained within the Request for Admissions shall be and is deemed admitted.

THE COMPLAINT

Petitioners, in their four count petition, claim that the negotiating process which culminated in a tentative agreement was impermissibly tainted because Board member Pavone, as a member of the Board's subcommittee, was negotiating on behalf of the Board while his spouse was a member of the Association with whom he was to have been negotiating. Moreover, petitioners say that Alan Dzwilewski as the Board's asserted labor negotiator, was negotiating for the Board while his spouse was also a member of the Association.

Petitioners contend that in addition to the process being tainted, the tentative agreement approved at a meeting held May 6, 1991 by a five-four vote, must be declared void because Board members Pavone and Rosevear voted in the affirmative despite the conflict of interest they had by virtue of their spouses' membership in the Association.

Next, petitioners complain that the Board meeting conducted May 6, 1991 was held in violation of the Open Public Meetings Act which, in turn, renders all action taken at the meeting voidable under law. Finally, petitioners complain that the local governing body had scheduled a meeting with the Board for May 8, 1991 in order to determine reductions in the Board's 1991-92 current expense budget which was defeated by the voters at the annual school election. Because the Board held its

ratification meeting on May 6, 1991 it individually, jointly, and severally breached the absolute fidelity it owes the public and the meeting and actions taken are, therefore, violations of public policy.

FACTS

While a formally executed Stipulation of Fact has not been submitted by the parties, relevant facts for purposes of the motion can be discerned from the record as well as from the party's respective view of what the facts are. Therefore, I find from a review of the pleadings, affidavits, exhibits, and Request for Admissions the following relevant facts to exist for purposes of this motion:

1. Petitioners Hahn and Lombardo are residents of North Brunswick Township.
2. Respondent Paul Pavone and Craig Rosevear are sitting Board members. Pavone had been a member of the Board since April 1988, while Rosevear has been a member of the Board since April 1990.
3. Respondent Pavone's wife, Janice, is employed by the Board as a teacher and, as such, is a member of the Association.
4. Since July 1989 respondent Rosevear's wife, Carol, is employed by the Board as an administrator of special projects and community services. As such, Carol Rosevear is a member of the administrators' and supervisors' collective negotiating unit. Prior to her appointment in this position in July 1989, Carol Rosevear had been employed by the Board as a teacher. In this former position, Carol Rosevear was a member of the North Brunswick Education Association. She has not been a member of the Association since her appointment as an administrator.
5. Alan Dzwilewski, an attorney, but not a board member, was engaged by the Board as a professional labor consultant. His wife is employed by the Board as a teacher and, as such, is a member of the Intervenor Association.
6. Board member William Tibbett is a sitting member of the Board as is Allan Sherman. Sherman is Board President. While Board member Tibbett's wife is employed by the Board as a

teacher and is a member of Intervenor Association, Tibbett voted against the subject Agreement.

7. During late November 1990, the Board appointed a subcommittee as a negotiating team in regard to the Agreement for July 1, 1991 forward.
8. The negotiating team was comprised of Board members Pavone and Sherman. While respondent Dzwilewski was not nor could he properly be a member of the Board's subcommittee, he was engaged in his role as a labor consultant for the two board members who were on the subcommittee, and ostensibly for the entire Board.
9. The Board called a special meeting to commence 8:00 p.m., Monday, May 6, 1991 to consider a tentative Agreement with the Association. This meeting was attended by all nine members of the Board.
10. Written notice of the meeting was prepared May 2, 1991 and posted at the Office of the Board and in each schoolhouse. Written notice of the specially called meeting was also sent on May 2, 1991 to The Star Ledger, The Home News, and The North Brunswick Post, the official newspapers of the Board and all of which are circulated within the district. On May 3, 1991, written notice of the meeting was posted at the North Brunswick Township Municipal Building at 9:05 a.m.
11. The Notice was not published by May 6 in any of the newspapers to which it had been submitted.
12. Earlier, the Board's proposed current expense budget for 1991-92 had been defeated by the electorate at the annual school election held April 30, 1991. The governing body, as the law requires, had scheduled a meeting for May 8, 1991 to meet with the Board to discuss reductions, if any, to the proposed current expense budget which had been defeated.
13. At the special meeting held May 6, 1991, at 8:00 p.m., the Board approved the tentative Agreement with the Association by five to four vote. Board members Pavone and Rosevear voted in favor of the tentative Agreement, while Board member Tibbett voted in opposition.
14. Thereafter, the Board held another special meeting on May 28, 1991 during which a motion was made to reopen negotiations

with Intervenor Association for purposes of renegotiating salary increases contained within the tentative Agreement. The motion was rejected four to three, with Board member Pavone abstaining.

15. All terms of the Agreement approved by the Board May 6, 1991 apply with equal effect to all employees in the collective negotiating unit similarly situated.

SUMMARY DECISION MOTION
BOARD/INTERVENOR ASSOCIATION

The Board argues it is entitled to summary decision because the relevant facts are not in dispute and that upon those facts Board member Pavone does not have a substantial and materially sufficient conflict of interest to have prohibited him from participating in the negotiating process or to have voted on the subject Agreement. Moreover, the Board says that it is clear Board member Rosevear is not in any conflict of interest regarding the subject Agreement because his spouse is not a member of the Association and has not been a member since July 1989. Consequently, his voting on the Agreement can not be considered a conflict of interest. Furthermore, the Board points out that it is uncontroverted that written notice of the special meeting it held May 6, 1991 was mailed its official newspapers on May 2, 1991; that written notices of the scheduled meeting were posted in its office as well as in schoolhouse throughout the district on may 2, 1991; and, that the clerk of the municipality posted a notice of the scheduled meeting May 3, 1991. Consequently, the Board concludes that no violation of the Open Public Meetings Act occurred because it did provide adequate notice of the special meeting.

Intervenor Association joins in the Board's argument for summary decision on the facts and on the law in this case.

Petitioners oppose the motion for summary decision on the grounds that they say material facts are in dispute and, as such, under Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67(1954), summary decision is inappropriate particularly where, as here, the Board and intervenor failed to clearly show no genuine issue of material fact is in dispute. Petitioner suggests that the record does not address factual issues which are vital to disposition of the merits of the case.

In this regard, petitioner recites that a public officer has a duty to the public and that abstention or disqualification are remedies for a conflict of interest which were available, but not used, by the Board here. Petitioners say that prior administrative decisions of the Commissioner of Education have recognized that a conflict of interest on the part of a board member is always a possibility when one spouse is a board member and the other is employed by that board. Petitioners state that no prior administrative decision has held that a conflict is not possible in the context of the negotiation of a collectively negotiated agreement between the board and teachers' association.

Petitioners recite that the issue of a conflict of interest is fact specific and they assert the facts in this case disclose the following:

***

> [C]ertain board members have significant personal or private interests that different from those held by the general public whom they have been entrusted to represent. The potential conflicts are as follows: Paul Pavone's wife is a teacher in elementary school in North Brunswick; Bill Tibbett's wife is a teacher in North Brunswick; Ann Petrocelli [a board member] is a science teacher in Franklin Township; Craig Rosevear's wife taught in North Brunswick and was recently promoted to a supervisory position; and Jerry Parillo's [board member] wife is a teacher at East Brunswick Vo-Tech.
>
> Based on the law in this area, it seems that certainly Paul Pavone, Bill Tibbett and Craig Rosevear had substantial and materially sufficient conflicts that should have resulted, at a minimum, in their abstention from voting on the contract in question in the instant case or, alternatively, that they be prohibited from holding the office of board member.

***

Finally, petitioners assert that because members of the board's negotiating subcommittee were required to negotiate directly in opposition to the interests of their spouses and, as a logical extension, themselves, those board members were placed unavoidably in positions of conflict of interest and, therefore, should not have participated in either the negotiating process or the vote on approving the Agreement May 6, 1991. No argument is presented why petitioners conclude that Alan Dzwilewski, in his role as labor consultant or negotiator, somehow tainted the entire process by virtue of the fact his wife is employed by this Board as a teacher.

Petitioners contend that because notice of the May 6, 1991 meeting was not published in any of the three newspapers to which it was sent, adequate notice of

the special meeting was not given thereby rendering approval of the tentative Agreement voidable.

ANALYSIS
CONFLICT OF INTEREST

N.J.S.A. 18A:12-2 provides that no board member shall be interested directly or indirectly in any contract with or claim against the board. As of this writing, there are no judicial opinions which apply this statute to a situation in which spouses of board members are in the board's employ. However, there have been a number of administrative decisions issued by the Commissioner which deal with the subject.

In Elms v. Mt. Olive Bd. of Ed., 1977 SLD 713, the Commissioner held that the existence of a collective bargaining agreement did not present a conflict of interest to those board members with close relatives employed by the Board. However, the Commissioner did recognize a distinction between a commercial contract which provides a specific benefit to an individual and a collectively negotiated agreement which benefits an entire class of employees. Therefore, in In re Bayless, 1974 SLD 595, rev'd St. Bd., 1974 SLD 603 the State Board of Education held that before a conflict of interest by a board member can be declared unlawful, it must be shown that there is a substantial and material conflict. In Bayless, the State Board found no unlawful conflict even though board member Bayless' husband was a board employee. In Salerno v. Old Bridge Bd. of Ed., 6 N.J.A.R. 405, a board member sought an order declaring that certain other board members were in a conflict of interest when they negotiate contracts with employee negotiating units since they have relatives in those negotiating units. The Commissioner held at 412-413:

> The negotiated labor agreement between a board and its employees obviously has an effect on all employees whether they be related to board members or not. However, as stated by the Commissioner in Elms it is not a commercial contract that would bestow special economic advantage on an individual. Rather, it affects all employees in a bargaining unit as a direct outgrowth of their statutory right to bargain collectively.
>
> ***
>
> Based upon the foregoing, I CONCLUDE that there has been no violation of N.J.S.A. 18A:12-2 or of policy of the Old Bridge Bd. of Ed. Potential conflicts of interests were averted when certain Board members abstained from voting. It appears, however, that their abstention from voting on a collective bargaining agreement was overly cautious. Under the ruling in Elms, above, their participation in that vote would have been proper.

In Larsen v. Woodbridge Twp. Bd. of Ed., 1985 SLD -, Larsen was taxpayer who sought an order setting aside a collectively negotiated agreement between the Woodbridge Board and the teachers' negotiating unit or, alternatively, directing a new vote on the agreement. Larsen complained that a conflict of interest existed because the spouses of two board members were employed by the Board as teaching staff members. The Commissioner concluded that the Board members who had spouses employed by the board were not in conflict of interest by that fact and that fact was no bar to the board members from voting on the ratification of the agreement reached between the board and the association.

The gravamen of the complaint here is that Board member Pavone whose spouse is employed by the Board as a teacher and who is a member of the Association, should not have participated in the negotiating process nor in the vote to ratify the agreement on May 6, 1991. In light of the prior administrative decisions, the fact that the spouse of a board member is employed by that board as a teacher and is a member of the teachers' association is no bar to the board member from participating in the negotiating process or in the vote to ratify the agreement reached. The essence of the complained of conflict is the employment of Board member spouses. If there is no essential conflict of interest on the part of the Board members because their spouses are employed by the Board, then there can be no basis upon which the Board members violated their duty to the public nor is there be any basis for the members to have abstained or disqualified themselves from participating in the process or approving the Agreement. Therefore, I **CONCLUDE** Board member Pavone is not in a conflict of interest by virtue of the fact his spouse is employed as a teacher and is a member of the Association. That being so, I also **CONCLUDE** that no other board member whose spouse is employed by the Board as a teacher and who is a member of the Association, or who is employed by the Board and is a member of some other negotiating unit, or board member whose spouse may be employed as a teacher in another school district, is in a conflict of interest for purposes of negotiating the Agreement or in voting to approve or reject the agreement.

In regard to the assertion that the Board failed to give proper notice of the special meeting it conducted May 6, 1991 and therefore, the meeting was held in violation of the Open Public Meetings Act, N.J.S.A. 10:4-6, et seq., the material facts in this case show that the Board complied with the law in all respects. Advance

written notice was sent May 2, 1991, to three official newspapers circulating within the municipality, and notices of the meeting were posted in the municipal building, schoolhouses, and the Board's offices.

In part, N.J.S.A. 10:4-9 provides that no public body shall hold a meeting unless adequate notice thereof has been provided to the public. "Adequate notice" is defined at N.J.S.A. 10:4-8(d) to mean

> *** written advance notice of at least 48 hours, giving the time, date, location and, to the extent known, the agenda of any regular, special, or rescheduled meeting, which notice shall accurately state whether formal action may or may not be taken and which shall be (1) prominently posted in at least one public place reserved for such or similar announcements, (2) mailed, telephoned, telegrammed, or hand delivered to at least two newspapers which newspapers shall be designated by the public body to receive such notices because they have the greatest likelihood of informing the public within the area of jurisdiction of the public body of such meetings, one of which shall be the official newspaper *** and (3) filed with the clerk of the municipality ***

It is recognized that in Worts v. Mayor and Council of Upper Township , 176 N.J. Super 78 (Chan. Div. 1980), it was held that although actual publication of the notice is not required, the transmittal of notice to a newspaper to at least 48 hours before a meeting is not enough to satisfy the requirements of the Open Public Meetings Act if the public body knew or reasonably could have ascertained that the newspaper's publishing schedule prevented it from printing the notice 48 hours in advance of the meeting. However, under Bernnards Tp. v. Dept. of Com. Affairs, 233 N.J. Super 1, 26 (App. Div. 1989) it was held

> The statute [N.J.S.A. 10:4-9a which requires adequate notice of a meeting] only requires 'adequate notice' to the public of a meeting; and N.J.S.A. 10:4-8d defines the term 'adequate notice' as giving written notice to newspapers at least 48 hours before the meeting. Unlike N.J.S.A. 40:55D-12a (required publication under the Municipal Land Use Law), and N.J.S.A. 40:53-2 (publication generally of public notice by municipalities), N.J.S.A. 10:4-9 and 10:4-8 do not require that notice be published by the newspapers, only that it be sent to the newspapers 48 hours before the meeting. See also Worts

v. Upper Tp., 176 N.J. Super 78, 81 (Ch. Div. 1980). (emphasis in original)

When one considers the Introductory Statement of the Assembly Report on the Act, N.J.S.A. 10:4-6, et seq., which states that adequate notice normally means 48 hours advance notice must be prominently posted, filed with a certain officer of the public body, and provided to two newspapers, the Bernard Tp. opinion is persuasive that so long as the public body provided notice to at least two newspapers 48 hours before the meeting, the requirements of the law have been met.

Therefore, in this case I **CONCLUDE** that the Board is entitled to summary decision on the allegation of an Open Public Meetings Act violation because the facts clearly show adequate notice of the meeting on May 6 was afforded by the Board.

Having found that the Board is entitled to summary decision on the issues raised regarding a conflict of interest and on the issue of the Open Public Meetings Act, the Petition of Appeal is hereby **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 7, 1992
Date

Daniel B McKeown
DANIEL B. MCKEOWN, ALJ

Receipt Acknowledged:

4/10/92
Date

Maureen R. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 15 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

tmp

OAL DKT. NO. EDU 7976-91

JOSEPH HAHN AND SALVATORE LOMBARDO, PETITIONERS, V. BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK, MIDDLESEX COUNTY, PAUL PAVONE, CRAIG ROSEVEAR AND ALAN DZWILEWSKI, RESPONDENTS.	:	COMMISSIONER OF EDUCATION DECISION

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

Upon review, the Commissioner concurs with the ALJ that there was no conflict of interest in the actions of the named Board members solely by fact of their spouses' employment in the district and membership in the bargaining unit(s) affected by the negotiations and contract votes at issue herein. He further concurs that the Board committed no violation of the Open Public Meetings Act in advertising the special meeting where the disputed contract vote actually took place.

Accordingly, the initial decision of the Office of Administrative Law dismissing the instant Petition of Appeal is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 22, 1992

DATE OF MAILING - MAY 22, 1992

122-92

IN THE MATTER OF THE TENURE	:	
HEARING OF BARRY TEKIRIAN,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF JERSEY CITY,	:	
HUDSON COUNTY.	:	
	:	

MAY 22, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9948-90
AGENCY DKT. NO. 348-10/90

IN THE MATTER OF THE TENURE HEARING OF BARRY TEKIRIAN, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY

David F. Corrigan, Esq., for State-operated School District of Jersey City
(Murray, Murray & Corrigan, attorneys)

Philip Feintuch, Esq., for Barry Tekirian
(Feintuch, Porwich & Feintuch, attorneys)

Record Closed: April 22, 1992 Decided: April 24, 1992

BEFORE **STEPHEN G. WEISS,** ALJ:

This tenure matter was transmitted to the Office of Administrative Law by the Department of Education on December 4, 1990. It concerns charges of incapacity and chronic and excessive absenteeism certified against respondent, Barry Tekirian, in August 1990, by Dr. Elena J. Scambio, State District Superintendent of the State-operated School District of the City of Jersey City.

An in-person prehearing conference was conducted by Administrative Law Judge Christopher R. Dietz on May 8, 1991, and the matter was scheduled for hearing by him on October 7, 1991. Shortly thereafter, Judge Dietz was nominated to be a judge of the Superior Court and in June 1991 was confirmed in that position. As a result, the file was reassigned to the undersigned administrative law judge.

Because of my own calendar constraints, the case could not be rescheduled for hearings until March 1992. Subsequently, and as a result of discussions between counsel, I was advised that the case had been settled. A settlement agreement has been submitted to me for review and recommendation for approval to the Commissioner.

Based upon my review and consideration of the file in this matter, and in light of the nature of the charges, I believe that the terms of the settlement are fair and reasonable, are in the public interest and should be approved. Essentially, in light of Tekirian's greatly improved record of attendance during the 1991-92 school year, the Board has determined to withdraw the charges of incapacity and chronic and excessive absenteeism rather than proceed to a lengthy and potentially costly hearing. Tekirian, for his part, has agreed no longer to contest the withholding of his 1990-91 increment because of his excessive absences.

Accordingly, having reviewed the file and the terms and conditions of the proposed settlement, I **FIND** that:

1. The parties voluntarily have agreed to the terms of the settlement as evidenced by the signatures of the parties and/or counsel which appear on the settlement agreement; and

2. The settlement fully disposes of all issues in controversy, is in the public interest and is consistent with law.

I therefore **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 24, 1992
Date

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

4/27/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 29 1992
Date

OFFICE OF ADMINISTRATIVE LAW

amr

RECEIVED
APR 22 10 42 AM '92

SETTLEMENT AGREEMENT TO RESOLVE PENDING TENURE CHARGES INVOLVING BARRY TEKIRIAN AND THE JERSEY CITY PUBLIC SCHOOLS
(DKT. NO. EDU 09948-90N)

(1) This Agreement is being entered into to resolve the tenure charges filed by the Jersey City Public Schools against Barry Tekirian. These tenure charges were filed on August 14, 1990 and alleged charges of incapacity and chronic and excessive absenteeism.

(2) Mr. Tekirian's increment was withheld for the 1990-1991 school year because of his excessive absenteeism. As part of the settlement in this matter, Mr. Tekirian agrees to accept this penalty for his excessive absenteeism.

(3) For the 1991-1992 school year (as of this date), Mr. Tekirian has been absent four (4) times. Because of this improvement in his attendance, the Jersey City Public Schools agrees to withdraw the pending tenure charges.

(4) Mr. Tekirian recognizes that the District remains concerned about his attendance record and understands that the District expects Mr. Tekirian's attendance to continue to improve. Mr. Tekirian understands that the District will continue to monitor his attendance and will file tenure charges for excessive absenteeism in the event circumstances warrant it.

(5) Mr. Tekirian further recognizes that the District is concerned about his lateness record and his leaving school unexcused during the 1991-1992 school year. Mr. Tekirian understands that nothing contained in this Agreement bars the District from taking any action regarding these instances.

(6) The parties recognize that this Agreement is subject to the approval of the Commissioner of Education and the State Board of Education of the State of New Jersey.

DATED: March 23, 1992

For the Jersey City Public Schools

DAVID F. CORRIGAN, ESQ.
Murray, Murray & Corrigan
Attorneys for the Jersey City Public Schools

For Barry Tekirian

PHILIP FEINTUCH, ESQ.

BARRY TEKIRIAN

OAL DKT. NO. EDU 9948-90

IN THE MATTER OF THE TENURE	:	
HEARING OF BARRY TEKIRIAN,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF JERSEY CITY,	:	
HUDSON COUNTY.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

John Ellis
COMMISSIONER OF EDUCATION

MAY 22, 1992

DATE OF MAILING - MAY 22, 1992

123-92

Y.A.L.E. SCHOOL, INC., AND JAMES PERRELLI,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION AND JOHN ELLIS, COMMISSIONER OF EDUCATION,	:	DECISION
RESPONDENTS.	:	
	:	

MAY 22, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL FOR FAILURE
TO PROSECUTE
OAL DKT. NO. EDU 4219-90
AGENCY DKT. NO. 81-4/90

Y.A.L.E. SCHOOL, INC. AND
JAMES PERRELLI,
Petitioners,
v.
STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION AND THE COMMISSIONER OF EDUCATION,
Respondents.

Timothy B. Middleton, Esq., for petitioners

Arlene Goldfus Lutz, Deputy Attorney General, for respondents (Robert J. Del Tufo, Attorney General of New Jersey, attorney)

Record Closed: April 15, 1992 Decided: April 16, 1992

BEFORE **STEVEN C. REBACK**, ALJ:

Following an order issued by my office on August 27, 1991, the parties in the matter were directed to consult with one another and advise me in respect to scheduling the case for further proceedings. Pursuant to my directions, my secretary was able to obtain the agreement of Deputy Attorney General Lutz to a variety of dates for a telephone conference. Repeatedly, telephone calls were placed to Mr. Middleton's office on March 11, March 17 and March 20, 1992, seeking to obtain cooperation from him in respect to attempting to schedule this matter at a time convenient to him. On none of these occasions did Mr. Middleton's office respond to these requests. Consequently and following repeated frustrations, my office was constrained to advise Mr. Middleton by letter of March 23, 1992 of the following:

> After repeated telephone calls placed by my secretary to Mr. Middleton's office, and her inability to get a convenient date to reschedule the telephone conference in the above matter, I have scheduled the matter for April 8,1992, commencing at 4:00 p.m. [Letter Administrative Law Judge to Counsel, March 23, 1992.]

Following sending the foregoing letter, my office did not hear anything further from Mr. Middleton until his secretary telephoned my office on the scheduled conference date at 12:40 p.m. At that time she requested of my secretary that the matter be adjourned for the scheduled conference and also that the matter be placed upon the inactive list for a period of five months. I advised my secretary that I would not entertain either request unless and until the deputy attorney general acquiesced and, even then, I would have to take it under advisement. This information was communicated to Mr. Middleton's office. No further communication from him was received on that date.

At 4:00 p.m., a telephone call was placed to Deputy Attorney General Lutz who indicated that she unequivocally opposed any further adjournment of the conference in this matter. She indicated that she had spent several hours in preparation for the conference by studying the substantive nature of this appeal and, since the case had previously been adjourned at Mr. Middleton's request, she believed that his request to postpone it again, coming as it did on the very date of the conference, was unreasonable. She also indicated that to the best of her knowledge no one from Mr. Middleton's office contacted her in respect to the requests which were directed to my office.

Following this telephone conversation and as a courtesy to Mr. Middleton, my secretary called his office, advised him that I would dismiss his appeal based upon the circumstances described above and that should he wish to oppose that he was to fax a letter to my office, copy to the Deputy Attorney General, immediately. To date, I have heard nothing further from Mr. Middleton in any regard.

Consequently, Mr. Middleton has abandoned his appeal rights in these proceedings. Accordingly, it is **ORDERED** that the appeal of the petitioners in this matter be and are hereby **DISMISSED** with prejudice for failure to prosecute.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

4/16/92
Date

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

April 21, 1992
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 24 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

rmp

OAL DKT. NO. EDU 4219-90

Y.A.L.E. SCHOOL, INC., AND JAMES PERRELLI,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION AND JOHN ELLIS, COMMISSIONER OF EDUCATION,	:	DECISION
RESPONDENTS.	:	
	:	

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

Accordingly, the Commissioner concurs with the ALJ for the reasons stated by him in the initial decision that petitioner has failed to prosecute this matter, which is hereby dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 22, 1992

DATE OF MAILING - MAY 22, 1992

124-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
CONSTITUENT DISTRICT OF STAFFORD	:	DECISION
TOWNSHIP, SOUTHERN REGIONAL	:	
SCHOOL DISTRICT, OCEAN COUNTY.	:	
	:	

MAY 28, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
CONSTITUENT DISTRICT OF STAFFORD : DECISION
TOWNSHIP, SOUTHERN REGIONAL :
SCHOOL DISTRICT, OCEAN COUNTY. :
:

The announced results of the balloting for one member of the Board of Education for a full term of three years, and for one member for an unexpired term of two years, at the annual school election held in the constituent district of Stafford Township, of the Southern Regional school district, Ocean County, on April 7, 1992, were as follows:

(1) THREE-YEAR TERM

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
William Power	407	16	423
Daniel Taylor	394	13	407

(1) UNEXPIRED TWO-YEAR TERM

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Carol Warr	398	12	410
Susan Olson	292	19	311

Pursuant to a letter request from Candidate Susan K. Olson dated April 8, 1992, an authorized representative of the Commissioner of Education from the Office of the Ocean County Superintendent of Schools was directed to conduct a recount of the

ballots cast. The recount was conducted on April 30, 1992 at the Ocean County Voting Machine Warehouse, Dover Township, by the Ocean County Superintendent of Schools.

At the conclusion of the recount, the announced results were changed as follows:

(1) THREE-YEAR TERM

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
William Power	407	16	423
Daniel Taylor	394	13	407

(1) UNEXPIRED TWO-YEAR TERM

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Carol Warr	398	12	410
Susan Olson	357	19	376

The discrepancy resulted from the failure of the election official at the Stafford Intermediate School polling place to correctly read the results on voting machine number 145268. The election officials read this machine as having no votes for Candidate Susan Olson, whereas the recount showed 65 votes for this candidate. Accordingly, Candidate Susan Olson's total tally at the polls increased from 292 to 357, and her total tally increased from 311 to 376. The correction of this error did not change the final results of the election for the unexpired two-year term.

Absentee ballot tallies are given as reported on the Regular/Combined Statement of Result.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts it as his own.

The Commissioner finds and determines that William Power was elected to the full three-year term and Carol Warr was elected to the unexpired two-year term on the Southern Regional Board of Education from the constituent school district of Stafford Township at the annual school election held on April 7, 1992.

COMMISSIONER OF EDUCATION

MAY 28, 1992

DATE OF MAILING - MAY 28, 1992

125-92

125-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF EAGLESWOOD, OCEAN COUNTY.	:	
	:	

MAY 28, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF EAGLESWOOD, OCEAN COUNTY. :
:

The announced results of the balloting for two members of the Board of Education for full terms of three years each at the annual school election held in the school district of Eagleswood Township, Ocean County, on April 7, 1992, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
John L. Woodland	86	1	87
Alvin Gaupp	54	2	56
Linda Blum	45	0	45
Gerry Kasavage	21	0	21
Denise Cervetto	1	0	1
Joyce Burgess Bartlett	1	0	1
Jan Blum	0	1	1

Pursuant to a letter request from Linda D. Blum dated April 10, 1992, an authorized representative of the Commissioner of Education from the Office of the Ocean County Superintendent of Schools was directed to conduct a recount of the machine and paper ballots cast. The recount was conducted on May 5, 1992 at the Ocean County Voting Machine Warehouse, Dover Township.

At the conclusion of the recount, the announced results were changed for one of the seven candidates. Accordingly, the recount tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
John L. Woodland	86	1	87
Alvin Gaupp	54	2	56
Linda Blum	44	0	44
Gerry Kasavage	21	0	21
Denise Cervetto	1	0	1
Joyce Burgess Bartlett	1	0	1
Jan Blum	0	1	1

Absentee ballot tallies are given as reported on the Regular/Combined Statement of Result.

The one voting machine at the sole polling place became inoperative shortly after the opening of the school election. The single candidate whose name appeared on the machine ballot received 6 votes on the machine counter, but also received 6 votes as a write-in candidate on the voting machine. Five other candidates received a total of 19 votes as write-in candidates. Paper ballots were used for the remainder of the school election, with numerous votes for the three major write-in candidates. The final tally represents a total of the ballots cast by machine, paper ballot and absentee ballot.

Although the recount resulted in altered tallies for the votes cast at the polls, the final results were not sufficiently different to change the outcome of the election.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts it as his own.

Accordingly, the Commissioner finds and determines that John L. Woodland and Alvin Gaupp were elected to full terms of three years each on the Board of Education of the Eagleswood Township School District.

COMMISSIONER OF EDUCATION

MAY 28, 1992

DATE OF MAILING - MAY 28, 1992

126-92

126-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF BRICK, OCEAN COUNTY.	:	
	:	

MAY 28, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF BRICK, OCEAN COUNTY. :
:

The announced results of the balloting for two members of the Board of Education for full terms of three years each at the annual school election held in the school district of Brick Township, Ocean County, on April 7, 1992, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Robert Cline	2,257	14	2,271
Herbert T. Stephens	2,073	24	2,097
Robert Collier	2,029	12	2,041
Joseph R. Wills	1,904	28	1,932
Kathy Russell	1,354	17	1,371
Edward C. Mueller	1,124	12	1,136
Richard Wiliamson	480	4	484
George Watson, Jr.	338	5	343
Bryan Romanow	310	4	314

Pursuant to a letter request from Candidate Joseph Rush Wills dated April 9, 1992, an authorized representative of the Commissioner of Education from the Office of the Ocean County Superintendent of Schools was directed to conduct a recount of the ballots cast. The recount was conducted on May 4, 1992 at the Ocean County Voting Machine Warehouse, Dover Township, by the Ocean County Superintendent of Schools.

At the conclusion of the recount, the announced results were changed for five of the nine candidates. Accordingly, the recount tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Robert Cline	2,287	14	2,301
Herbert T. Stephens	2,073	24	2,097
Robert Collier	2,029	12	2,041
Joseph R. Wills	2,005	28	2,033
Kathy Russell	1,354	17	1,371
Edward C. Mueller	1,124	12	1,136
Richard Wiliamson	380	4	384
George Watson, Jr.	347	5	352
Bryan Romanow	263	4	267

Absentee ballot tallies are given as reported on the Regular/Combined Statement of Result.

Although the recount resulted in altered tallies of the votes cast at the polls, the final results were not sufficiently different to change the outcome of the election.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts it as his own.

Accordingly, the Commissioner finds and determines that Robert Cline and Herbert T. Stephens were elected to full three-year terms each on the Board of Education of the Brick Township School District at the annual school election held on April 7, 1992.

John Ellis

COMMISSIONER OF EDUCATION

MAY 28, 1992

DATE OF MAILING - MAY 28, 1992

127-92

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF LAKEWOOD, OCEAN COUNTY. :
:

MAY 28, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF LAKEWOOD, OCEAN COUNTY. :
:

The announced results of the balloting for three members of the Board of Education for full terms of three years each, and one unexpired term of one year, at the annual school election held in the school district of Lakewood Township, Ocean County, on April 7, 1992, were as follows:

(3) THREE-YEAR TERMS

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Warren Deutsch	1,776	74	1,850
Thomas F. Hampton	1,781	52	1,833
Evelyn Feigin	1,484	65	1,549
Gerri Ballwanz	997	56	1,053

(1) ONE-YEAR TERM

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Donald Berkman	693	38	731
Edward R. Lowenstein	613	26	639
Charles M. Pugliese	306	26	332

Pursuant to a letter request from Candidate Edward R. Lowenstein dated April 10, 1992, an authorized representative of the Commissioner of Education from the Office of the Ocean County

Superintendent of Schools was directed to conduct a recount of the ballots cast. The recount was conducted on May 5, 1992 at the Ocean County Voting Machine Warehouse, Dover Township, by the Ocean County Superintendent of Schools.

At the conclusion of the recount, the announced results were changed for five of the seven candidates. Accordingly, the recount tally stood as follows:

(3) THREE-YEAR TERMS

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Warren Deutsch	1,772	74	1,846
Thomas F. Hampton	1,775	52	1,827
Evelyn Feigin	1,480	65	1,545
Gerri Ballwanz	997	56	1,053

(1) ONE-YEAR TERM

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Donald Berkman	692	38	730
Edward R. Lowenstein	611	26	637
Charles M. Pugliese	306	26	332

Absentee ballot tallies are given as reported on the Regular/Combined Statement of Result.

Although the recount resulted in altered tallies of the ballots cast at the polls, the final results were not sufficiently different to change the outcome of the election.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts it as his own.

Accordingly, the Commissioner finds and determines that Warren Deutsch, Thomas F. Hampton, and Evelyn Feigin were elected to full three-year terms each, and that Donald Berkman was elected to a one-year unexpired term on the Board of Education of the Lakewood Township School District at the annual school election held on April 7, 1992.

COMMISSIONER OF EDUCATION

MAY 28. 1992

DATE OF MAILING - MAY 28, 1992

128-92

128-92

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE TOWNSHIP OF MAPLE SHADE, BURLINGTON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

MAY 28, 1992

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE TOWNSHIP OF MAPLE SHADE, BURLINGTON COUNTY.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held April 7, 1992 in the School District of the Township of Maple Shade, Burlington County, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Claire Volpe	806	10	816
Joseph Walters	689	12	701
Constance Gillespy	692	10	702
Charles Ansert	726	10	736
Dawn Krohn (Write-In)	1	0	1

Pursuant to a letter request from Joseph T. Walters dated April 15, 1992, an authorized representative of the Commissioner of Education from the Office of the Burlington County Superintendent of Schools was directed to conduct a recount of the machine ballots cast. Absentee ballots were recounted by the Burlington County Board of Elections. The recount was conducted on April 30, 1992, at the Burlington County Board of Elections Office, 49 Rancocas Road, Mount Holly, and at the Burlington County Superintendent of Elections Office, Eayrestown Road, Lumberton, New Jersey.

At the conclusion of the recount, the tally stood unchanged and was as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Claire Volpe	806	10	816
Joseph Walters	689	12	701
Constance Gillespy	692	10	702
Charles Ansert	726	10	736
Dawn Krohn (Write-In)	1	0	1

One thousand two hundred and fifty-seven voters cast ballots as indicated by both the public counter and protective counter numbers of the eight voting machines used in the school election. At the time of the recount, the sealed election packets received from the school district were individually opened to compare the number of both the voting authorities issued and voter names appearing on the poll lists to the number of ballots cast. This comparison was made for each polling place. The following summarizes the comparisons made of the protective and public counter, poll lists and voting authorities:

Polling Place	Protective and Public Counters	Poll List	Voting Authorities	Voided Voting Authorities
I. Yocum School	227	227	227	0
II. Steinhauer School	480	718	480	0
III. Maple Shade H.S.	382	382	382	0
IV. Fox Meadows	168	168	168	0

The above comparison notes that 718 voter names were counted for the Steinhauer School location which served polling districts 2A and 2B. A discrepancy was noted for polling district 2B in that four (4) loose-leaf pages with 238 names thereon were included in the election packet along with a booklet marked poll lists for the same location. The booklet identified as the poll list had 237 names entered which corresponds to both the voting

machine protective and public counter readings (237) and the number of voting authorities issued (237). The board secretary of the Maple Shade Township School District explained at the time of the recount that prospective voters were asked to sign their names to the loose-leaf pages in addition to signing the poll list; the loose-leaf pages were then compared to the signature copy register provided by the Burlington County Superintendent of Elections. In comparing the total entries on the poll list (237) to those on the loose-leaf pages (238) the result is a difference of one (1).

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts it as his own.

Accordingly, the Commissioner finds and determines that Claire Volpe, Charles Ansert and Constance Gillespy were elected to full terms of three years each on the Board of Education of the School District of the Township of Maple Shade.

COMMISSIONER OF EDUCATION

MAY 28, 1992

DATE OF MAILING - MAY 28, 1992

129-92

IN THE MATTER OF THE TENURE	:	
HEARING OF ROSEANNE CARUSO,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF JERSEY CITY,	:	
HUDSON COUNTY.	:	
	:	

MAY 28, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION - SETTLEMENT
OAL DKT. NOS. EDU 637-91and
EDU 11215-91
AGENCY DKT. NOS. 356-10/90 and
388-10/91

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF JERSEY CITY,
HUDSON COUNTY,
Petitioner,
v.
ROSEANNE CARUSO,
Respondent.

Karen A. Murray, Esq., for petitioner (Murray, Murray & Corrigan, attorneys)

Philip Feintuch, Esq., for respondent (Feintuch and Porwich, attorneys)

Record Closed: April 13, 1992 Decided: 4/23/92

BEFORE **ARNOLD SAMUELS**, ALJ:

This matter was initiated on October 18, 1990, when the petitioner, State-Operated School District of the City of Jersey City, Hudson County, certified tenure charges with the Commissioner of Education against respondent. The charges alleged incapacity and chronic and excessive absenteeism warranting dismissal of the respondent from her tenured employment as a teaching staff member.

On January 16, 1991, the matter was transmitted to the Office of Administrative Law for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

A prehearing conference was held on April 8, 1991, fixing hearing dates, providing for discovery and dealing with other procedural matters in preparation for the forthcoming hearing. In January 1992, counsel advised that the hearing would no longer be necessary because the respondent would be resigning from her teaching position as of June 19, 1992. In the interim, a second set of tenure charges against respondent were filed with the Commissioner of Education. These charges alleged further incapacity and chronic and excessive absenteeism. The respondent denied the allegations in her answer and raised certain procedural defenses. This second matter was also transmitted to the Office of Administrative Law, on December 17, 1991 for consolidation with the earlier matter.

The parties entered into a written settlement agreement, a copy of which was filed in the Office of Administrative Law on April 13, 1992. The agreement contained the respondent's resignation from her position and provided for remuneration until the effective date of her resignation, at the end of the 1991-92 school year, June 19, 1992. A copy of the agreement is attached hereto and made a part hereof.

Having reviewed and considered the nature of the dispute and the respective positions of the parties, together with the settlement as set forth in the attached documents, it is **CONCLUDED** that the settlement is fully dispositive of all issues in controversy; and it **ORDERED** that the same be approved and the appeal **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 23, 1992
Date

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

4/28/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 30 1992
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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Apr 13 1 56 PM '92

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

MURRAY, MURRAY & CORRIGAN
25 Sycamore Avenue
Little Silver, New Jersey 07739
(908) 747-2300
Attorneys for Petitioner

In the Matter of the Tenure Hearing of Roseann Caruso and State Operated School District of Jersey City, Hudson County,	:	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY DOCKET NO. EDU 00637-91N DOCKET NO. EDU 11215-91N

SETTLEMENT AGREEMENT

The parties hereby agree as follows relative to the tenure charges filed against Roseann Caruso by the State Operated School District of the City of Jersey City:

1. Ms. Caruso will immediately tender her written resignation to be effective June 19, 1992.

2. Upon receipt of Ms. Caruso's written resignation, the State Operated School District will withdraw a) the tenure charges filed on October 16, 1990 with the Commissioner of Education, Agency Ref. No. 356-10/90, and transmitted to the Office of Administrative Law under Docket No. EDU 00637-91N, and b) the second set of tenure charges filed with the Commissioner of Education on October 30, 1991, Agency Ref. No. 388-10/91 and transmitted to the Office of Administrative Law under Docket No. EDU 11215-91N.

3. Ms. Caruso will remain on the School District's payroll without pay until February 28, 1992.

4. On February 29, 1992 Ms. Caruso will be returned to the payroll, on leave with pay until the end of the 1991-1992 school year, June 19, 1992.

5. The School District will remove all pleadings for the two (2) tenure charge cases from Ms. Caruso's personnel file.

6. Ms. Caruso submits her resignation and enters into this Settlement Agreement voluntarily and without coercion.

FOR THE RESPONDENT

ROSEANN CARUSO

DATED: 3/24/92

PHILIP FEINTUCH, ESQUIRE

DATED: 3/24/92

FOR THE STATE-OPERATED SCHOOL DISTRICT

DR. ELENA J. SCAMBIO
STATE DISTRICT SUPERINTENDENT

DATED:

KAREN A. MURRAY, ESQUIRE

DATED: April 3, 1992

OAL DKT. NOS. EDU 637-91 and EDU 11215-91 (CONSOLIDATED)

IN THE MATTER OF THE TENURE	:	
HEARING OF ROSEANNE CARUSO,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF JERSEY CITY,	:	
HUDSON COUNTY.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standard for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983) The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

MAY 28, 1992

DATE OF MAILING - MAY 29, 1992

130-92

ROSANN DORAN, DIAN PERKEL, AND NORMAN SCHWARTZ,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Three petitioning teaching staff members in the East Brunswick elementary and secondary schools claimed their tenure rights were violated when respondent Board failed to appoint them to summer school teaching positions. Petitioners applied to teach in summer of 1991 and were bypassed in favor of nontenured teaching employees or non-employees of the district. Each petitioner claimed qualification for appointment and each averred he or she had taught summer school in the past. Responding Board claimed that summer employment was viewed as temporary and that failure to appoint would not diminish petitioners in any way.

ALJ concluded that tenure laws did not limit Board's discretion in hiring summer school teachers, as summer school employment in New Jersey is considered temporary and part-time. Petition of Appeal was dismissed.

Commissioner adopted as his own the findings and conclusions reached by the ALJ.

MAY 28, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7971-91
AGENCY DKT. NO. 287-7/91

ROSANN DORAN, DIAN PERKEL, AND NORMAN SCHWARTZ,
Petitioners,
v.
EAST BRUNSWICK BOARD OF EDUCATION,
Respondent.

Randi Doner, Esq., on behalf of petitioners (Balk, Oxfeld, Mandell & Cohen, attorneys)

Joel G. Scharff, Esq., on behalf of respondent (Martin R. Pachman, attorney)

Record Closed: March 9, 1992 Decided: April 21, 1992

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of petitioners' complaint that their tenure rights have been infringed in violation of N.J.S.A. 18A:1-1 et seq. The Commissioner of Education transmitted the matter to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq The parties have now filed cross-motions for summary decision. N.J.A.C. 1:1-12.5

The question presented is whether respondent's failure to appoint petitioners to summer school teaching positions violated their tenure rights.

The facts are undisputed. Petitioners are tenured teachers employed by respondent in its elementary and secondary schools. Respondent offers summer

school courses at both the elementary and secondary levels to in-district students at no cost if taken for remedial purposes or for a fee if taken for enrichment purposes, and to out-of-district students on a tuition basis. Petitioners separately applied for appointments to teach in the summer of 1991 and were bypassed in favor of non-tenured teaching employees or non-employees of the district. Petitioners are each qualified for appointment and each has taught summer school in the past. This is the substance of the record.

Petitioners rely on a line of cases which protect tenured employees from diminishment in their positions as against non-tenured employees. Dennery v. Passaic Valley Regional High School Board of Education, 251 N.J. Super. 144 (App. Div. 1991); Capodilupo v. West Orange Tp. Ed. Bd., 218 N.J. Super. 510 (App. Div. 1987), certif. den. 109 N.J. 514 (1987); Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987), certif. den. 110 N.J. 512 (1988). In each of these cases, tenured employees were protected from loss due to reorganization, reduction in force, or reduction from full-time to part-time status. None of these cases are authority for the proposition advanced here. As respondent points out, summer employment is viewed as temporary, and the failure to appoint them did not diminish petitioners in any way. Strangia v. Jersey City Bd. of Educ., Comm'r of Educ., Dkt. # 101-84 (April 9, 1984), aff'd State Board of Educ., Dkt #40-84 (October 3, 1984); Blitz v. Bridgeton Bd. of Ed., 1980 S.L.D. 825, aff'd State Board of Educ., 1981 S.L.D. 1394; Reeves v. Westwood Reg. Bd. of Ed., 1981 S.L.D. 1051. In each of these cases the commissioner refused to consider summer school employment in the calculation of time necessary to achieve tenure, or seniority rights. Petitioners' brief does not seek to distinguish this authority.

The precedents cited by respondent lead me to conclude that the tenure laws do not limit respondent's discretion in hiring summer school teachers, and it is **ORDERED** that these consolidated petitions be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

4/21/92
Date

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

4/23/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 28 1992
Date

OFFICE OF ADMINISTRATIVE LAW

/cae

ROSANN DORAN, DIAN PERKEL, AND NORMAN SCHWARTZ,	:	
PETITIONERS,	:	
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. Petitioners filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4, and the Board filed timely reply exceptions.

Petitioners' exceptions are a nearly verbatim reiteration of their post-hearing brief. In arguing that failure to appoint them to summer school positions violated their tenure rights, petitioners add to their post-hearing contentions that the ALJ's reliance on Strangia v. Jersey City Bd. of Education, decided by the Commissioner April 9, 1984, aff'd State Board October 3, 1984; Blitz v. Bridgeton Board of Ed., 1980 S.L.D. 825, aff'd State Board of Education 1981 S.L.D. 1394; and Reeves v. Westwood Regional Bd. of Education, 1981 S.L.D. 1051, was misplaced. Petitioners aver Strangia stands for the proposition that summer service will not be included in the academic year and thus, will not be included in the calculation for tenure. Blitz, they argue, stands for the

proposition that summer school teaching cannot negate the seniority of full-time teachers. Finally, they submit, Reeves stands for the proposition that a teacher may not gain credit for summer school teaching either for seniority purposes or tenure purposes. Thus, petitioners submit, none of the cases cited by the ALJ in support of his decision are on point with the instant matter. Rather, they suggest, the Capodilupo v. West Orange Tp. Bd. of Ed., 218 N.J. Super. 510 (App. Div. 1987), cert. den. 109 N.J. 514 (1987) line of cases are apposite, and they contend their rights were violated when nontenured and/or non-employees of the Board were appointed to the summer school positions to which they had applied. Petitioners seek reversal of the initial decision

The Board's reply exceptions advance the position that the ALJ's decision is correct. The Board argues that petitioners can point to no holding or dicta in any of the Capodilupo, supra, line of cases which talk about or refer to summer school. Instead, the Board concurs with the ALJ's reliance on cases like Strangia, Blitz and Reeves, because they all specifically address summer school employment. It also points to a case entitled Barber v. Board of Education of the Town of Kearny, 1977 S.L.D. 125, arguing that the petitioner therein was not entitled to summer school employment as a matter of right. The Board submits that it has no policy of preferential hiring for summer school, thus leaving the temporary employment decision within its discretion.

The Board summarizes its reply exceptions by stating that petitioners in this matter have no right by any policy nor by any status they hold during the school year, to any summer school employment. The Board seeks affirmance of the ALJ's decision granting the Board's Motion for Summary Judgment.

Upon careful and independent review of the record of this matter, the Commissioner adopts as his own the findings and conclusions reached by the Office of Administrative Law in this case. As mentioned by the ALJ, summer school employment in New Jersey is considered temporary, part-time employment, and as such is not within the intendment of the protections afforded by N.J.S.A. 18A:28-5, 18A:28-6, 18A:28-13 or N.J.A.C. 6:3-1.10. See Blitz, supra, at 830. See also Barber, supra. (Commissioner found no justiciable issue in petitioner's seeking summer school employment as a matter of right or because nonappointment was for improper reasons.) Thus, by its very nature, summer school employment is not employment subject to application of the principles set forth in Capodilupo, supra, and its progeny which establishes that tenured employees shall be hired for academic year positions or full-year employment over nontenured employees.

Accordingly, for the reasons expressed by the Office of Administrative Law summary judgment is granted the Board and the Petition of Appeal is dismissed, with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 28, 1992

DATE OF MAILING - MAY 29, 1992

131-92

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

MAY 29, 1992

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN- : DECISION
SHIP OF PISCATAWAY, MIDDLESEX :
COUNTY. :

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held April 7, 1992 in the School District of the Township of Piscataway, Middlesex County, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Donna Rumelhart	862	6	868
Theodore Kruse	932	5	937
Paula Van Riper	961	6	967
Thomas R. Renahan	888	6	894
Dominic Ciardi	889	7	896

Pursuant to a letter request from Thomas R. Renehan dated April 13, 1992, an authorized representative of the Commissioner of Education from the Office of the Middlesex County Superintendent of Schools was directed to conduct a recount of the ballots cast. The recount was conducted on April 16, 1992 at the Voting Machine Warehouse, Edison, New Jersey.

At the conclusion of the voting machine recount by the County Superintendent of Schools, there was no change in the vote reported by the Board Secretary on the Regular/Combined Statement of Result of School Election.

The absentee ballot counts were reported as provided by the Board of Education on the Regular/Combined Statement of Result of School Election.

The tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Donna Rumelhart	862	6	868
Theodore Kruse	932	5	937
Paula Van Riper	961	6	967
Thomas R. Renahan	888	6	894
Dominic Ciardi	889	7	896

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings set forth above.

Accordingly, the Commissioner finds and determines that Dominic Ciardi, Theodore Kruse and Paula Van Riper were elected to full terms of three years each on the Board of Education of the School District of the Township of Piscataway. In so determining, it is noted for the record that Terence G. Van Dzura, attorney for Thomas Renahan, filed an Order to Show Cause in Superior Court, return date April 21, 1992, seeking a recount of the absentee ballots cast in the school election held in the School District of the Township of Piscataway. On May 26, 1992 Mr. Van Dzura provided the Commissioner the results of such absentee ballot recount, which results were unchanged.

COMMISSIONER OF EDUCATION

MAY 29, 1992

DATE OF MAILING -- JUNE 1, 1992

132-92

132-92

THERESA E. WARD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, riffed business education teacher, alleged Board wrongfully failed to appoint her to guidance counselor position for which she had appropriate certification. Petitioner claimed sexual harassment led to her not being appointed to said position.

Initial decision dismissed petition concluding petitioner did not file within 90-day limit set by N.J.A.C. 6:24-1.2(c). ALJ found since petitioner chose to file before the Commissioner (instead of Division on Civil Rights), she had to abide by 90-day limit of N.J.A.C. 6:24-1.2(c) instead of 180-day limit of N.J.S.A. 10:5-18 (under Law Against Discrimination). Moreover, petitioner failed to produce any specific facts showing a genuine issue in this matter. Further, ALJ found Commissioner had no authority to award pre-judgment and post-judgment interest.

Commissioner adopted findings and determination in initial decision dismissing petition as untimely. Commissioner stressed, however, that he does have the authority under certain circumstances to award pre-judgment and post-judgment interest under N.J.A.C. 6:24-1.16.

JUNE 1, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 10224-91
AGENCY DKT. NO. 361-10/91

THERESA E. WARD,
Petitioner,
v.
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN SCHOOL DISTRICT, SOMERSET COUNTY,
Respondent.

Sanford R. Oxfeld, Esq., for petitioner (Balk, Oxfeld, Mandell & Cohen, attorneys)

Daniel C. Soriano, Jr., Esq., for respondent (Soriano & Gross, attorneys)

Record Closed: March 16, 1992 Decided: April 23, 1992

BEFORE **EDITH KLINGER,** ALJ:

Petitioner, Patricia E. Ward, alleges that the Board of Education of Bridgewater-Raritan School District (Board) wrongfully failed to appoint her to a vacant position as a guidance counselor during the spring of 1990 and subjected her to a reduction in force (RIF) at the end of 1990-91 school year even though she is a tenured teacher and had the appropriate certification. Petitioner contends that the Board failed to appoint her and subjected her to the RIF because she had rejected the sexual advances of various individuals who are members of the building administration of High School East in the district.

Petitioner filed her appeal with the Commissioner of Education on October 2, 1991. The Board filed its answer on October 29, 1991. On November 4, 1991, the Commissioner of Education transmitted the matter 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.*

New Jersey is an Equal Opportunity Employer

At a prehearing conference held on December 17, 1991, the Board raised the following issues which it argued made the matter appropriate for summary disposition:

1. Petitioner did not file her petition within the 90-day limit set by *N.J.A.C.* 6:24-1.2(c).

2. The Commissioner of Education has no jurisdiction to award damages for emotional upset and pain and suffering resulting from the alleged sexual advances, comments, and unsolicited touchings.

3. Petitioner is barred by the Workers' Compensation Act from pursuing a claim against the Board for emotional distress. A claim of this type cannot be heard by the Commissioner.

The Board was directed by the undersigned to move for summary decision at the earliest possible time. The record closed on March 16, 1992, when the final submission was received from the parties.

THE MATERIAL FACTS

There is no dispute as to the material facts in this matter. The facts as set forth by petitioner are as follows:

1. Petitioner, Theresa Ward, was first employed by respondent in September 1972 as a business education teacher. At that time, Ward possessed a Comprehensive Business Education Certificate.

2. In January 1987, petitioner's husband died. Petitioner avers that at the funeral the principal of the high school approached her and, instead of offering his sympathy, rubbed against her in a suggestive manner. Later that year, the head of the guidance department grabbed her and kissed her.

3. In February 1989, Ward obtained certification as a guidance counselor. She applied for a vacant guidance counselor position in the spring of 1990; however,

it was given to an individual named Terry McDonald, who was not from within the district.

4. In May 1991, Ward received notice that due to a RIF, her full-time job would become two-fifths for the 1991-92 school year. It is her contention that had it not been for her refusal to acquiesce to the suggestions made by the principal and the head of the guidance department, she would have received the guidance position in 1990 and would not have been subject to the RIF in 1991. Both of these individuals were involved in the selection process for the guidance position in 1990.

5. Ward filed a petition of appeal with the Commissioner of Education on October 2, 1991.

As part of its motion for summary decision, the Board supplied the following facts which were uncontested by petitioner in her response.

1. By letter dated April 4, 1990 to the assistant superintendent of the district, Ward applied for the guidance counselor position and submitted her resume. By letter dated and mailed on June 4, 1990, the assistant superintendent notified Ward that she had not been selected for the position.

2. By letter dated May 29, 1991, the assistant superintendent notified Ward that the Board had abolished her full-time position as teacher of business education for the 1991-92 school year and that the Board was offering her a part-time position as a teacher of business education. The letter was delivered to Ward's school mailbox by means of the internal school district mail system no later than May 30, 1991.

3. There is a required procedure of the personnel department that when an employee exercises the right to review his or her personnel file, the employee must sign and date the file under the heading "Folder Review." Ward's personnel file reveals that she reviewed the file on December 16, 1991. There is no indication on the personnel file that Ward reviewed it during the three years immediately preceding that date.

Ward alleges only two specific incidents of sexual harassment or improper sexual conduct. Both occurred in 1987 and are described above. There was no subsequent incident alleged after December 1987.

THE POSITION OF THE PARTIES

Petitioner does not dispute that her petition of appeal, filed with the Commissioner on October 2, 1991, was not filed within the 90-day limit set by *N.J.A.C.* 6:24-1.2(c). She argues, rather, that her petition is brought within the Commissioner's jurisdiction under the New Jersey Law Against Discrimination (LAD), *N.J.S.A.* 10, Chapter 5 and, therefore, the limitation of *N.J.S.A.* 10:5-18 applies. This statute requires that any complaint filed pursuant to the LAD must be filed within 180 days after the alleged act of discrimination. Since the last act of discrimination occurred on May 29, 1991 and her petition of appeal was filed with the Commissioner on October 2, 1991, Ward is well within the 180-day limit of the LAD. Respondent argues that since Ward's complaint was brought before the Commissioner of Education rather than the Division on Civil Rights, it is the 90-day limit of *N.J.A.C.* 6:24-1.2(c) instead of the 180-day limit of *N.J.S.A.* 10:5-18 which applies.

Respondent has moved to dismiss the third count of Ward's complaint in which she alleges that due to the "sexual advances and comments, and unsolicited touchings," she has "suffered tremendous emotional upset, together with pain and suffering." She also alleges that her personnel file was altered and documents favorable to her were removed from it. For these reasons, she seeks damages and a cease-and-desist order preventing this type of conduct "from occurring to petitioner or anyone else in the district in the future."

The Board argues that this count should be dismissed for two reasons. The first is that the Commissioner of Education is not empowered to grant the relief requested by Ward. The second is that she is barred by the Workers' Compensation statute of the State of New Jersey from pursuing a claim against her employer for bodily injury, including emotional distress, arising out of and in the course of her employment.

In her responding papers, Ward, relying upon *Balsley v. No. Hunterdon Bd. of Ed.*, 117 *N.J.* 434, 443 (1990), argues only that the Commissioner should determine the merits of her claim and then the matter should ultimately proceed to the Division on Civil Rights which may determine and resolve claims for additional relief. It appears from this argument that petitioner is not seeking damages for her emotional upset or pain and suffering in this

forum but intends to pursue them at a future time with the Division on Civil Rights. Because petitioner's brief indicates that she seeks relief in this forum on the third count of her petition as to liability only, there is no need to address this matter in great detail.

The legal authority supports respondent's position that the Commissioner of Education is not authorized to award punitive damages or costs (*Winter v. Bd. of Ed. of the Tp. of No. Bergen,* 75 *S.L.D.* 236 (1975), prejudgment and postjudgment interest, and *Bd. of Ed., City of Newark v. Levitt,* 197 *N.J. Super.* 239, 246 (App. Div. 1984)) or reimbursement for legal fees (*Balsley, supra*). Since petitioner does not take issue with the Board's position, I **CONCLUDE** that, in this forum at least, the third count of petitioner's complaint does not state a cause upon which the relief sought can be granted by the Commissioner of Education.

I therefore **CONCLUDE** that the third count of petitioner's complaint should be dismissed as to damages. Insofar as the petitioner seeks a cease-and-desist order from the Commissioner preventing the conduct named, I **CONCLUDE** that this would be futile since no act of sexual advance, comments or unsolicited touchings was alleged by Ward after December 1987. I therefore **CONCLUDE** that no relief should be granted to her in this regard either.

THE APPLICABLE STATUTE OF LIMITATIONS

It appears that the only issue requiring discussion is whether the 180-day limit of *N.J.S.A.* 10:5-18 or the 90-day limit of *N.J.A.C.* 6:24-1.2(c) applies to Ward's petition. This determination will resolve the question of whether the merits of the petition should be reached at all.

It is clear from the petition and the documents submitted by respondent that if this were a matter solely involving questions arising under the education law presented before the Commissioner of Education, Ward's petition is out of time and should be dismissed. She was notified on June 4, 1990 that she would not be given the position as guidance counselor in the district. She was notified on May 29, 1991 that she would be subject to a RIF. She had not inspected her document file for three years prior to December 16, 1991 to discover documents missing. Her petition of appeal was not filed with the Commissioner until October 2, 1991, beyond the 90-day limit required by *N.J.A.C.* 6:24-1.2(c). I therefore **CONCLUDE** that insofar as any of the allegations of the complaint are brought under the

education laws, *N.J.S.A.* Title 18A, they are out of time and should be dismissed. I therefore **CONCLUDE** that respondent would be entitled to summary decision dismissing all of these claims.

With regard to the claims brought under the New Jersey LAD, petitioner essentially argues that since the Commissioner of Education and the Director of the Division on Civil Rights have concurrent jurisdictions, the same limitation should apply to both forums. This position is not supported by the LAD itself. *N.J.S.A.* 10:5-18 specifically states:

> The Attorney General shall establish rules of practice to govern, expedite and effectuate the foregoing procedure and his own actions thereunder. Any complaint filed in the division or in any municipal office pursuant to this act must be so filed within 180 days after the alleged act of discrimination. [Emphasis added.]

Since this matter was brought neither in the Division nor in any municipal office, there is no statutory authority for applying the 180-day rule to the present matter.

The Commissioner of Education and the Division on Civil Rights are vested with concurrent jurisdiction to hear complaints charging violations of the LAD in a number of areas, including employment discrimination and gender discrimination in public school courses of study and curricula. If the discrimination alleged by Ward involved public school courses of study and curricula, it would have to be heard by the Commissioner since "the educational interests of complainants, which cannot be disassociated from their discrimination grievances, can best be addressed by the Commissioner." *Hinfey v. Matawan Regional Bd. of Ed.*, 77 *N.J.* 514, 532-533 (1978). A complaint involving employment discrimination, however, may be brought in either forum. *Gilchrist v. Bd. of Ed. of Haddonfield,* 155 *N.J. Super.* 358, 366 (App. Div. 1978).

The present matter clearly involved employment discrimination based on sex. Petitioner charges that she was sexually harassed in 1987 by various school administrators, refused these advances, and, as a result, she was denied the position of guidance counselor in 1990 and subsequently subjected to a RIF. There is no exclusive jurisdiction in the Commissioner of Education to hear this matter. *See, Hinfey, supra,* at 528. Accordingly, I **CONCLUDE** that petitioner could have filed her appeal either in the Division on Civil Rights or with the Commissioner of Education. I therefore **CONCLUDE** that Ward had the

opportunity to choose the forum and is bound by the limitation appropriate to her forum of choice.

The 90-day period of limitation of *N.J.A.C.* 6:24-1.2(c) applies to all claims filed with the Commissioner of Education, including those alleging violation of the LAD. I therefore **CONCLUDE** that it applies to the petition filed by Ward on October 2, 1991.

Where civil rights are involved, the LAD recognizes an exception to the time limitations where "continuing violations" are involved. If the discriminatory conduct can be characterized as a continuing violation, the complaint may be timely even if the discrimination began well beyond the statutory time period. *Terry v. Mercer Co. Freeholders Bd.*, 173 *N.J. Super.* 249, 253 (App. Div. 1980). There is no allegation of a continuing violation here, nor do the facts alleged in the complaint support one, and I **CONCLUDE** that this exception does not apply. The last alleged act of discrimination occurred on May 29, 1991, 125 days before the petition was filed. This is in excess of the 90-day limitation of *N.J.A.C.* 6:24-1.2(c).

The 90-day limitation is generally strictly construed. *Riely v. Hunterdon Central H.S. Bd. of Ed., 173 N.J. Super.* 109 (App. Div. 1980). This rule may be relaxed in the discretion of the Commissioner where strict adherence thereto may be deemed inappropriate, unnecessary, or may result in injustice. I **CONCLUDE** that nothing in petitioner's allegations justifies such a relaxation of the rule. Ward complained of two specific, isolated incidents of alleged sexual harassment The first involved the principal and occurred in January 1987. The second involved the guidance counselor and occurred prior to the end of December 1987.

In her reply brief, petitioner merely reiterated these two instances and supplemented them with additional detail. She alleged that these two events resulted in her being denied the position of guidance counselor in June 1990. However, she did not appeal this action at that time. She was subject to a RIF on May 29, 1991, but did not appeal that action of the Board for 125 days, 35 days later than the time allowed for appeal. I **CONCLUDE** that there is no reason to relax the limitation of *N.J.A.C.* 6:24-1.2(c).

Petitioner has failed to produce any specific facts showing that there is a genuine issue here which can only be determined in an evidentiary proceeding as required by

N.J.A.C. 1:1-12.5(b). Consequently, for all of the above reasons, I **CONCLUDE** that the Board is entitled to summary decision in this matter.

It is therefore **ORDERED** that the petition of Theresa E. Ward be **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 23, 1992
DATE

Edith Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

Maureen K. Keller
DEPARTMENT OF EDUCATION

4/27/92
DATE

Mailed to Parties:

APR 29 1992
DATE

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

md/e

THERESA E. WARD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed exceptions pursuant to N.J.A.C. 1:1-18.4 on May 11, 1992. However, by telephonic communication from the Board's counsel, Daniel Soriano, Esq., to the Bureau of Controversies and Disputes on May 20, 1992 it was made known that the Board was not served a copy of said exceptions. Said information was confirmed through a postscript at the end of the exceptions which indicates that a copy of said exceptions was forwarded by petitioner's counsel only to petitioner and to NJEA. It is determined that petitioner failed to conform to the requirements of N.J.A.C. 1:1-18.4(a) and therefore such exceptions are not considered in the Commissioner's review of this case.

Upon a careful and independent review of the record of this case, the Commissioner adopts as his own those findings of fact and conclusions of law set forth in the initial decision, which established that the 90-day rule strictly applies to matters raised

before the Commissioner pursuant to his authority under N.J.S.A. 18A:6-9, and that no facts exist in the instant record to compel relaxation of such rule, notwithstanding that the Commissioner enjoys concurrent jurisdiction to hear matters arising under the Law Against Discrimination, N.J.S.A. 10:5-1 et seq.

Moreover, the Commissioner concurs that the issue of timeliness was the only matter properly brought before him in this matter insofar as the Commissioner is without authority to award punitive damages, costs or reimbursement of legal fees. See Initial Decision, at page 5. However, the Commissioner would note a technical correction in the ALJ's statement found on page 5, wherein she states that the Commissioner is without authority to award pre-judgment and post-judgment interest. In fact the Commissioner is embued with such authority "***in any circumstance in which a petitioner has sought such relief and has successfully established a claim to a monetary award." See N.J.A.C. 6:24-1.16. However, under the facts of this case the Commissioner does not reach the merits of petitioner's claims under any authority vested in him, and thus it is inappropriate to consider the issue of either pre- or post-judgment interest.

Accordingly, for the reasons expressed in the initial decision, the Commissioner adopts as his own the recommendation of the Office of Administrative Law dismissing the instant Petition of Appeal in its entirety, with prejudice.

COMMISSIONER OF EDUCATION

JUNE 1, 1992

DATE OF MAILING - JUNE 1, 1992

133-92

JOANNE LOWE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, executive secretary terminated by Board for abandonment of position following sick leave, sought accrued vacation pay. Petitioner contended that under provisions of collective bargaining agreement she was entitled to said vacation pay.

Initial decision concluded agreement was ambiguous on question of whether a tenured employee was entitled to payment for accrued vacation time. Moreover, in past practices Board paid such time to employees who retired. Therefore, ALJ ordered Board to pay petitioner for accrued vacation time.

Commissioner rejected initial decision finding petitioner did not resign (no letter of resignation, no Board action on resignation) and further finding petitioner failed to provide medical documentation for extended absence. Thus, because absence without leave is not a resignation as contemplated by such case law as Hall, it could not be construed as basis for providing benefits contemplated for those who resign from their employment as opposed to those terminated by Board for being absent without leave. (Bates) Petition was dismissed.

JUNE 10, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4958-91
AGENCY DKT. NO. 73-4/91

JOANNE LOWE,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,
Respondent.

Paul L. Kleinbaum, Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Ray Hamlin, Esq., for respondent (Ashley & Charles, attorneys)

Record Closed: March 17, 1992 Decided: April 27, 1992

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Petitioner, Joanne Lowe, seeks accrued vacation pay at the time of her termination from employment in November 1990. Respondent, the Board of Education of Orange (Board), argues that petitioner is not entitled to accrued vacation time because she was terminated for abandonment of her position.

On May 14, 1991, the matter was transmitted to the Office of Administrative Law for hearing 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 hearing was held on March 13, 1992, and at the conclusion of the hearing, the parties were given an opportunity to submit documents referenced in the testimony. The record closed on March 17, 1992.

The sole issue to be resolved in this matter is whether pursuant to Board policies and practices, petitioner is entitled to accrued vacation pay at the time of her termination in November 1990.

FINDINGS OF FACT

Based upon a review of the relevant testimonial and documentary evidence, including the stipulation of facts by the parties, I **FIND** the following as **FACT:**

1. Petitioner was employed with the Board since 1970 and held the position of executive secretary from 1986 to the time of her termination.

2. The position of executive secretary is not part of the bargaining agreement (J-1). However, all the terms of employment contained in the bargaining agreement are applied to and enjoyed by the executive secretary title, *e.g.*, sick leave, vacation time, and salary.

3. In June 1989, petitioner commenced a sick leave which continued until November 1990.

4. On November 14, 1990, the Board terminated petitioner for abandonment of position effective April 24, 1990 (J-2).

5. On November 26, 1990, petitioner requested accrued vacation pay (J-3).

6. Petitioner accrued 34 vacation days, or $3,978 (R-1).

LEGAL DISCUSSION

Petitioner argues that under the provisions of the collective-bargaining agreement between the Orange Education Secretaries Association and the Board of Education of Orange (Agreement), she is entitled to accrued vacation time notwithstanding the reason for her termination. Moreover, there is no express language in the Agreement or written Board policy denying an employee vacation

time on termination for abandonment. Consequently, she is entitled to the undisputed accrued 34 vacation days.

The Board argues that petitioner is not entitled to accrued vacation because she failed to provide notice of leave as required by the Agreement. Further, the Board's policy is that no accrued vacation time shall be paid to any employee who is terminated for abandonment.

It is stipulated that the Agreement applies to petitioner. Consequently, the terms and conditions set forth in the Agreement determine whether petitioner is entitled to receive her accrued vacation pay. The Agreement provides for the payment of vacation pay as follows:

> RESIGNATION: An employee who is resigning from her/his position shall give the minimum thirty (30) days' notice.
>
> Earned vacation shall be paid according to the proportion of full months worked to the total contract year, unless proper notice has not been given. (Exhibit J-1, at 17.)

The Board has interpreted the above provision to allow an employee resigning from her position to collect accrued vacation time provided that 30 days' notice is given. However, the Agreement is silent on the ability of the terminated employee to receive accrued vacation pay. Consequently, the Board maintains that under its policy, it properly denied petitioner accrued vacation time because she was terminated for abandonment. To resolve the ambiguity in the Agreement concerning payment of accrued vacation to employees who resign and those who are terminated, an interpretation of the terms and conditions of the Agreement must be made.

The ultimate purpose of a collective-bargaining agreement is a common understanding of the terms and conditions of employment. *Adams v. Jersey Central Power and Light Co.*, 21 *N.J.* 8 (1956). The intent of the parties must be made by considering the attendant circumstances and the relation and objectives of the parties. *Id.* at 13. Additionally, the agreement should be accorded a reasonable construction, and the provisions should be construed collectively so as to comport with the probable intention of the parties. *Kennedy v. Westinghouse Electric Corp.*,

16 *N.J.* 280 (1954). In construing the terms of an agreement, past practices of the parties in like situations is accorded great weight. *Id.* at 294.

An employee is granted vacation time based upon years of employment (J-1, at 27). Once the employee earns the vacation time, it cannot be forfeited or taken away except when the employee resigns from her position without giving 30 days' notice (J-1, at 17). It can reasonably be inferred that forfeiture of accrued vacation time upon failure to provide 30 days' notice for resignation was designed to prevent employees from leaving on short notice or no notice. When an employee leaves on short notice, it disrupts the work environment and may result in the employer incurring additional costs for temporary help during the search for replacement personnel. Therefore, it is reasonable for the Board to withhold accrued vacation pay from an employee who resigns on anything less than 30 days' notice.

However, the same rationale is not applicable to employees who are terminated. It would be an unreasonable interpretation of the Agreement to deny the benefits of accrued vacation pay to employees who are terminated. When an employer terminates an employee, it knows in advance the date of termination. Consequently, it has adequate time to find and prepare for the replacement of the employee. Moreover, the Agreement expressly limits the withholding of vacation pay only in instances where the employee resigns without 30 days' notice. To the contrary, there is no express condition withholding accrued vacation pay from employees who are terminated and, based upon the facts presented here, such condition cannot be implied.

CONCLUSION

Based on the above, I **CONCLUDE** that the Agreement is ambiguous on the question of whether a terminated employee is entitled to payment for accrued vacation time. In past practices, the Board has paid accrued vacation time to employees who terminated employment on the basis of retirement, although no express language is provided in the Agreement. In light of the Board's past practices and principles of reasonable construction, I **CONCLUDE** that the Board must pay the employee for accrued vacation time.

It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 21, 1992
DATE

Mumtaz Bari Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

4/24/92
DATE

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 01 1992
DATE

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

md/e

APPENDIX

WITNESSES

For Petitioner:

Joanne Lowe

For Respondent:

Maxine Pijeaux
Delores Merchant

EXHIBITS

J-1	Agreement
J-2	Letter, Pijeaux to Lowe, November 14, 1990
J-3	Note, Lowe to Lynnik, November 26, 1990
P-1	(Not in evidence)
P-2	Secretary and Teacher Aide Evaluation Form, April 10, 1987
P-3	Secretary and Teacher Aide Evaluation Form, June 1, 1988
P-4	Secretary and Teacher Aide Evaluation Form, February 27, 1989
P-5	Letter, Pelosi to Lowe, January 27, 1989
R-1	Memorandum, Merchant to Lynnik (undated)
R-2	Letter, Dr. Petrucelli to Pelosi, June 9, 1989
R-3	Note with attachment, Lowe to Christie, August 1, 1989
R-4	Letter, Petrucelli to Borgo, October 9,1989
R-5	Letter, Holmes to Lowe, October 10, 1989
R-6	Letter, Holmes to Lowe,October 17, 1989
R-7	Letter, Pijeaux to Lowe, April 10, 1990
R-8	Note, Lowe to Lawings, January 19,1990
R-9	Letter, Pijeaux to Lowe, January 31, 1990
R-10	Letter, Pijeaux to Lowe, February 26, 1990
R-11	Interrogatories and Request for Documents, November 18, 1991

JOANNE LOWE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF 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. For the reasons expressed below, the initial decision is reversed.

Initially, the Commissioner notes that his consideration of this matter deals solely with whether, according to Board policies and practices, petitioner, an executive secretary whose employment was terminated on November 14, 1990, effective April 24, 1990, is entitled to vacation pay. See transmittal to the Office of Administrative Law May 14, 1991. See also Petition of Appeal filed on April 3, 1991 and Answer filed May 8, 1991. As noted by the ALJ in the initial decision, certain facts in this matter are uncontested, among them that the position of executive secretary is not part of the bargaining agreement between Orange Education Secretaries Association and the Board, and that notwithstanding that fact, all the terms of employment contained in the bargaining agreement are applied to and enjoyed by the executive secretary

title, e.g., sick leave, vacation time and salary. (See Initial Decision at p. 2, Finding of Fact No. 2.) Further, the Commissioner notes that nowhere is an issue of tenure status raised by petitioner in these proceedings.

The Commissioner is cognizant that as a general proposition his authority pursuant to N.J.S.A. 18A:6-9 does not extend to consideration of controversies over the interpretation or enforcement of a collectively bargained employment contract. See, for example Michael Larsen v. Board of Education of the Township of Piscataway, Middlesex County, decided by the Commissioner February 18, 1982, rev'd State Board October 6, 1982. However, interpreting the express language of a collective bargaining agreement is not called for in this matter, contrary to the suggestion of the ALJ. Indeed, petitioner is not a member of a collective bargaining unit. Rather her claim to the fringe benefit of accrued vacation time is controlled instead by a board policy which holds that the terms of employment contained in the bargaining agreement are applied to and enjoyed by the executive secretary title, more specifically that payment of vacation is available to any employee who resigns, having given thirty (30) days' notice.

However, in determining whether the Board's policy as stated above applies to petitioner's circumstances, a threshold issue must be decided; that is, whether petitioner in fact resigned, and if not, if she may lay claim to accrued vacation pay. In the Commissioner's judgment, the record supports a finding that petitioner did not resign in that no evidence is brought to the record that she submitted a letter of resignation, that the Board received it or that it acted upon any such resignation, as required by such case law as Anne Hall v. Board of Education of the Township

of Jefferson, Morris County, decided by the Commissioner on Remand October 20, 1988, rev'd State Board May 3, 1989, aff'd Superior Court May 25, 1990, rev'd/remanded New Jersey Supreme Court July 30, 1991, 125 N.J. 299 (1991).

On the contrary, the record is plain that despite repeated notices from the Board asking petitioner to provide medical documentation for her extended absence from her duties, petitioner failed to comply with her employer's directives. See Exhibits R-5, R-6, R-7, R-8, R-9, R-10 and J-2. The Commissioner concludes from a careful review of such documents that it would be ludicrous to suggest that petitioner's refusal to specify when she would return to work or to provide medical verification does not constitute absence without official leave warranting termination of petitioner's employment with the Board. Because absence without leave is not a resignation as contemplated by such case law as Hall, supra, it cannot be construed as a basis for providing the benefits contemplated for those who resign from their employment as opposed to those terminated by the Board for being absent without leave. See In the matter of the Tenure Hearing of Robert C. Bates, School District of Lower Camden County Regional High School District No. 1, Camden County, decided by the Commissioner of Education March 28, 1985, affirmed with modification December 3, 1986, aff'd Superior Court November 16, 1987.

Accordingly, for the reasons expressed above, the Commissioner rejects the initial decision and dismisses the instant Petition of Appeal with prejudice.

COMMISSIONER OF EDUCATION

JUNE 10, 1992

DATE OF MAILING - JUNE 10, 1992

133-92

EDU #4958-91
C # 133-92
SB # 27-92

JOANNE LOWE,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 10, 1992

For the Petitioner-Appellant, Zazzali, Zazzali, Fagella & Nowak (Paul L. Kleinbaum, Esq., of Counsel)

For the Respondent-Respondent, Ashley & Charles (Ray Hamlin, Esq., of Counsel)

Petitioner in this case was terminated by the Board of Education of the City of Orange (hereinafter "Board") from her position as Executive Secretary for abandonment of her position on November 14, 1990, effective April 24, 1990. On November 26, 1990, petitioner, while not contesting her termination, requested accrued vacation pay from the Board. In the absence of a response, petitioner sought relief by Petition of Appeal filed with the Commissioner of Education.

It was petitioner's position that she was entitled to payment for accrued vacation time under the Board's policy as embodied in the terms of the collective negotiations agreement between the Secretaries Association and the Board (hereinafter "Agreement"). The Board concurred that pursuant to Board policy,

Oct. 6, 1993

the terms of the Agreement applied to petitioner although she was not a member of the collective negotiations unit. It countered, however, that she was not entitled to payment for her accrued vacation time because she had failed to give 30 days' notice to the Board that she was resigning from her position as provided by the Agreement. The Board further contended that it was its policy not to pay accrued vacation time to any employee who was terminated for abandoning her position.

The ALJ found that because the parties had stipulated that the Agreement applied to petitioner, petitioner's entitlement to receive accrued vacation pay was controlled by its terms and conditions. He further found that the Agreement was ambiguous because it expressly required 30 days' notice by an employee who was resigning in order for that employee to be entitled to payment for accrued vacation, but was silent with respect to employees who were terminated. He therefore based his interpretation of the terms and conditions of the Agreement on general principles of contract construction applicable to collective agreements.

Inferring that the provision providing for forfeiture of accrued vacation time upon failure to provide 30 days' notice of resignation was designed to prevent employees from leaving with little or no notice, the ALJ found that the same rationale did not apply to employees who were terminated. Emphasizing that the forfeiture provision was expressly limited to those situations where an employee had resigned without giving 30 days' notice and that there was no express condition concerning employees who were terminated for cause, the ALJ found that such condition could not be implied. Based on the Board's past practice of paying accrued

vacation time to employees who had retired and his reasonable construction of the Agreement, the ALJ concluded that the Board was required to pay petitioner for her accrued vacation time.

Before examining the merits of the matter, the Commissioner expressed his recognition that his authority did not extend to "consideration of controversies over the interpretation or enforcement of a collectively bargained employment contract," Commissioner's decision, at 8, and observed that his consideration of the matter before him was limited to whether petitioner was entitled to vacation pay under the Board's policies and practices, specifically the policy providing that payment for accrued vacation time is available to any employee who resigns having given 30 days' notice.

On this basis, the Commissioner found that the threshold issue was whether petitioner had resigned. Based on his examination of the record, the Commissioner determined that petitioner had not resigned, but had been terminated by the Board for being absent without leave. Finding that absence without leave was not a resignation, and that "it cannot be construed as a basis for providing the benefits contemplated for those who resign from their employment," the Commissioner rejected the ALJ's determination and dismissed the petition. Commissioner's decision, at 9.

Petitioner appealed to the State Board, arguing that the fact that she had been terminated rather than having resigned was not determinative of whether she was entitled to payment for accrued vacation. Rather, she argued that because she was terminated, the provision relating to resignation did not apply to her at all. Consequently, that provision could not be used to deprive her of

payment for vacation accrued under the Board's policy prior to the absence which resulted in her termination. We agree.

Initially, we find that the Commissioner erred in relying on In the Matter of the Tenure Hearing of Robert C. Bates, decided by the State Board, December 3, 1986, aff'd, Docket #A-2700-86T7 (App. Div. 1987) to resolve this dispute. The central issues in that case involved whether the respondent was guilty of tenure charges of abandonment and whether termination was the appropriate penalty for the conduct of which we found him guilty. Although not central to resolving the matter, in our decision in that case, we also reversed the Commissioner's determination that respondent was entitled to apply his accumulated sick leave to the period of absence which had resulted in the tenure charges or to accumulate sick leave during that period.

Obviously, the case now before us does not involve any questions relating to the propriety of petitioner's termination. Nor does it involve her entitlement to or the application of sick leave. Moreover, petitioner concedes that she did not accrue any vacation during her period of absence and does not question the Board's denial of her request to use accrued vacation as sick days so as to extend her sick leave. Rather, in these proceedings, petitioner merely seeks payment for those vacation days which she earned during her employment.

In contrast to sick leave, the education laws do not include any statutory provisions pertaining to vacation. Consequently, this particular case is to be resolved under the Board's policy as embodied in its written agreement with the

Secretaries Association. Under the terms of the Board's policy, 12-month employees receive earned vacation on a specific schedule as follows:

> All employees hired prior to June 30, 1971 shall be granted 22 working days of vacation per year.
>
> All employees hired after June 30, 1971 shall be granted vacation according to the schedule outlined below:
>
> 10 working days after first year
> 10 working days after second year
> 15 working days after third year
> 15 working days after fourth year
> 20 working days after fifth year and thereafter

Article XVII (E)(6).

In contrast to the specific provision for terminal pay for unused sick days, which provides a schedule for discounted payment upon termination of employment, Article XVII (E)(4), the Agreement makes no provision for payment for "earned" but unused vacation days, although under the employment procedures specified by Article IX of the Agreement, failure to provide 30 days' notice of resignation results in forfeiture of "earned" vacation. Article IX (B). Further, the record indicates that it is the practice of the Board to make full payment for unused vacation to employees upon retirement although the Agreement does not make any express provision for such payment.

Given the terms of the Board's policy and its past practice of making payment for earned vacation to employees who retire, we agree with the ALJ that petitioner is entitled to payment for accrued vacation under the Board's policy. We reject the Board's contention that she is not entitled to such payment because it is the Board's policy not to pay accrued vacation to any employee

terminated for abandonment. In point of fact, there is no indication in the record of such policy on its part, either by virtue of the Agreement or otherwise. Moreover, although petitioner is not contesting the validity of her termination and while the record indicates that she was in fact absent without leave, the record does not establish whether or not petitioner "abandoned" her position in the technical sense. See Bates, supra. The record, however, does show that petitioner requested to apply her unused vacation to the period of her sick leave so as to extend her sick leave and that the Board expressly denied this request. See R-8, R-9 and R-10.[1]

We find that under the circumstances here and given the Board's policy as embodied in its Agreement, petitioner is entitled to payment for vacation accrued during her employment, and for the reasons stated, we reverse the Commissioner's decision.

Attorney exceptions are noted.

October 6, 1993

Date of mailing 08 OCT 1993

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[1] The record establishes that petitioner was absent without leave after her sick leave expired, but does not show that she abandoned her position. In response to the Board's exceptions, we note that, as indicated above, there is a legally significant distinction between whether an employee abandoned her job or was terminated for being absent without leave. See Bates, supra. In that the question of whether petitioner in this case in fact abandoned her job was neither litigated nor decided in these proceedings, the issue involved here was whether an employee who was terminated by the Board for cause was entitled to payment for vacation accrued under the Board's policy.

134-92

IN THE MATTER OF THE TENURE	:	
HEARING OF CHARLES COURTNEY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
NEWARK, ESSEX COUNTY.	:	
	:	

SYNOPSIS

Board certified tenure charges of unbecoming conduct involving six separate incidents of corporal punishment within three years, verbal abuse of students and excessive absenteeism against respondent, industrial arts teacher.

Initial decision concluded Board sustained all charges except excessive absenteeism against respondent and that the appropriate penalty was dismissal. Citing Redcay, ALJ found unfitness for a position in school system may be shown by single incident but is "best shown by numerous incidents." Respondent was dismissed from his tenured teaching position.

Commissioner adopted findings and determination in initial decision. Commissioner determined ALJ properly found that most of the alleged incidents were proven to have occurred, that they constituted corporal punishment within meaning of controlling statute and case law, and that the several proven instances of corporal punishment and verbal abuse demonstrated respondent's unfitness for teaching. Respondent was dismissed from his employment as of date of Commissioner's decision and matter was referred to State Board of Examiners for appropriate action.

JUNE 12, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2889-91
AGENCY DKT. NO. 51-3/91

IN THE MATTER OF THE TENURE HEARING OF CHARLES COURTNEY

Samuel M. Manigault, Associate Counsel, for petitioner
(Marvin L. Comick, General Counsel, attorney)

Irving C. Evers, Esq., for respondent
(Giblin & Giblin, attorneys)

Record Closed: October 25, 1991 Decided: May 1, 1992

BEFORE **KEN R. SPRINGER**, ALJ:

(A) Incident On November 28, 1990

The most recent incident occurred on November 28, 1990, on which date Courtney was accused of attempting to restrain a young female student, S.W., from leaving his classroom and of pushing her in the chest area. At the time, S.W., an eighth grader in one of Courtney's hop classes, was only 14 years old, slightly taller

than five feet in height, and weighed less than 125 pounds. Now a year older and in high school, she still looked like a little girl at the time of her testimony. More to the point, she did not look like someone whom it would be necessary to restrain by means of force.

Admittedly, S.W. had been making noise in class that day, and when Courtney dismissed the rest of the students he told S.W. to remain behind. As S.W. and another student approached the doorway, Courtney put his hand on the door and allowed the other girl to pass. S.W. asked her classmate to wait outside for her. Courtney acknowledges that he stood in the doorway to block S.W.'s path.

Testimony differs on who initiated actual contact. According to S.W., Courtney pushed her in the chest area "at least two or three times." She said that the touching occurred "above but not on [her] breast" and that it felt "like he was poking me." She experienced "no pain" and the contact left "no marks on [her] body." On the other hand, Courtney insisted that S.W. first "tried to nudge [him] our of the way with her shoulder" and that he "put his arm up and pushed her back."

Statement of the Case

This is a teacher tenure proceeding under *N.J.S.A.* 18A:6-10 *et seq.* Tenured teaching staff members hold employment in the public school system "during good behavior and efficiency." Specifically, the Newark Board of Education ("Board") accuses respondent Charles Courtney ("Courtney") of engaging in a pattern of corporal punishment, involving six separate incidents within three years; of using inappropriate, and, occasionally, profane language toward his students; and of excessive absenteeism, totaling 65 days within years. The issue is whether the facts justify dismissal or reduction in compensation of a tenured teacher on the grounds of "unbecoming conduct" or "other just cause."

Procedural History

On February 8, 1991, the school administrators filed tenure charges and sworn statements of supporting evidence with the Board and served copies on respondent. At its meeting on February 26, 1991, the Board determined that there existed

probable cause to credit the supporting evidence and that the charges, if true, warranted some type of disciplinary action. Accordingly, the Board voted to certify the tenure charges to the Commissioner of Education ("Commissioner") and immediately to suspend Courtney, without pay. One week later, on March 6, 1991, the Board filed the tenure charges with the Commissioner. Courtney filed an answer, denying the charges, on March 14, 1992.

Subsequently, on March 21, 1991, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held hearings on September 19,20 and 24, 1991. Witnesses and exhibits are listed in the appendix. Both sides filed legal briefs by October 25, 1991. Time for preparation of the initial decision has been extended to April 23, 1991.

Findings of Fact

General Background Facts

The background facts are undisputed. Charles Courtney has been employed as an industrial arts teacher in the Newark public school system for almost eleven years. He has tenure as a teacher in the district. In the course of his career, he has taught at six different schools, starting at Camden Middle School in 1980-81, next at First Avenue School in 1985-86, then as an itinerant teacher at Martin Luther King and Cleveland Schools in 1986-87 and 87-88, and at Hawthorne Avenue and South 17th Street Schools from 1988-89 until his removal in late February 1991. As early as March 1988, Courtney received warnings about his excessive use of physical force, including a written reprimand in which he was "strongly urge[d]" to develop disciplinary procedures "which do not involve the use of corporal punishment" and to "[r]efrain from the use of profane or unsavory remarks to [his] students."

For convenience, the specific charges and evidence will be grouped under three headings: (1) corporal punishment; (2) verbal abuse of students; and (3) excessive absenteeism.

(1) Corporal Punishment

(A) Incident on November 28, 1990

The most recent incident occurred on November 28, 1990, on which date Courtney was accused of attempting to restrain a young female student, S.W., from leaving his classroom and of pushing her in the chest area. At the time, S.W., an eighth grader in one of Courtney's shop classes at Hawthorne School, was only 14 years old, slightly taller than five feet in height, and weighed less than 125 pounds. Now a year older and in high school, she still looked like a little girl at the time of her testimony. More to the point, she did not look like someone whom it would be necessary to restrain by means of force.

Admittedly, S.W. had been making noise in class that day, and when Courtney dismissed the rest of the students he told S.W. to remain behind. As S.W. and another student approached the doorway, Courtney put his hand on the door and allowed the other girl to pass. S.W. asked her classmate to wait outside for her. Courtney acknowledges that he stood in the doorway to block S.W.'s path.

Testimony differs on who initiated actual contact. According to S.W., Courtney pushed her in the chest area "at least two or three times." She said that the touching occurred "above but not on [her] breast" and that it felt "like he was poking me." She experienced "no pain" and the contact left "no marks on [her] body." On the other hand, Courtney insisted that S.W. first "tried to nudge [him] our of the way with her shoulder" and that he "put his arm up and pushed her back." About one week after the incident, Esther Elliott, the building principal, interviewed the other girl, who had seen the happening and corroborated that Courtney had pushed S.W. "in the chest area." Courtney gave the principal a different story difficult to reconcile with his later testimony, denying that he had any physical contact "at all" with S.W. However, he explained to the principal that S.W. had been "mouthing off to him" and that he "wasn't going to stand for it." Prior to this incident, S.W. had liked Mr. Courtney and had never been a disciplinary problem in his class.

I FIND that Courtney did intentionally push or poke S.W. in the chest area to prevent her from leaving the room and that, under the circumstances, such conduct constitutes the use of excessive force. A male teacher has no right to touch a pubescent female student for this purpose. No indication appears that use of force was justified to quell a disturbance, to obtain possession of weapons, for the purpose of self-defense, for the protection of persons or property, or for any other legitimate reason.

(B) Incident on April 12, 1990

A prior incident occurred at the South 17th Street School on April 12, 1990. A.S., then 13 years old and in seventh grade, was a student in Courtney's fourth period shop class. Both sides agree that Courtney sent A.S. and two other youths to the office for misbehaving, although A.S. maintains that they were only making noise and eating candy in class, whereas Courtney claims that the three were "taunting and teasing other students." Witnesses gave markedly different accounts of what transpired next. A.S. testified that he secured a note from the vice principal authorizing his readmittance to class, but Courtney insists the three returned without any note. Insofar as the truth can be independently ascertained, Vice Principal Donald Wright confirms that he sent A.S. back with a note allowing reentry.

For whatever reason, Courtney refused to readmit A.S. Courtney contends that the three boys remained outside his class room "cursing and hollering." A.S. says that a passing group of boys started banging on the door and that Courtney, mistakenly thinking that A.S. and the other two were responsible, warned them not to do it again. Depending on who is believed, either A.S. and friends "snuck" back into the classroom and deliberately destroyed several projects on which other students were working (Courtney's version); or A.S. knocked on the door and Courtney ordered three bigger and older students to chase him down the hallway (A.S.'s version).

In any event, three larger students did pursue A.S. and caught him on or near the stairs. Meanwhile, Courtney had been occupied with dangerous power machinery, which he had to turn off before he leave the room. By the time he got to the scene, the larger students were, in Courtney's words, "punching and slapping"

A.S. in retaliation "for [his] messing up their projects." Courtney claims that he intervened to protect A.S. and that he chastised the attackers "for taking the law into their own hands." A.S. paints an entirely different picture, claiming that Courtney "grabbed [A.S.'s] right arm," "twisted it back up," and forced him "to hit [himself] in the face" with his own hand until he started crying. He added that Courtney "pushed [him] down on his left leg," which was already sore due to an unrelated accident. Courtney denies that he ever grabbed A.S., and instead indicates that he physically removed the other children who were beating A.S. After the incident, the school nurse put an ice pack on A.S.'s bruised arm, and by the next morning he was feeling better.

I FIND that Courtney did twist A.S.'s arm and forced him to hit himself in the face in order to make him cry. Inappropriately, Courtney used force as a form of punishment rather than to protect one student from possible harm at the hands of others. A.S.'s testimony was credible because he candidly recognized when he was personally in the wrong, as when he admitted knocking on the door after having been told not to by his teacher. Moreover, A.S.'s version squares better with the vice principal's recollection of events leading up to the encounter and with the bruises on A.S.'s arm immediately afterwards. There is no evidence suggesting that A.S. bears any personal animosity against Courtney or had any ulterior motive to get him into trouble.

(C) Incident on March 13, 1990

Only one month earlier, during the last period on March 13, 1990, Courtney was implicated in a playground incident involving another of his students at the South 17th Street School. Courtney's class and a second class taught by a teacher named Mathews were sharing playground facilities. D.L., age 13, was in Mathews' class at that particular moment, although he also happened to be a student in one of Courtney's other classes. By all accounts, a fist fight broke out between D.L. and another boy under Courtney's supervision. Proofs indicate that D.L. left the area of Mathew's class and came over to pick a fight, even though the other boy was bigger than him. D.L. doesn't remember how or why the fight started, although he acknowledges that "punches were thrown."

Since Courtney was one of the teachers in charge, he properly interceded to stop the fight. Initially, he "grabbed each by their shirt collar and separated them." Both boys continued to swing at each other until Courtney, still holding onto each by the arm, managed to calm down his own student.

What happened next is the subject of controversy. D.L. testified that, after the fight had already ended and the two boys were apart, Courtney "grabbed me by the neck" and "put me in a choke hold." Although D.L. purportedly was not offering resistance, Courtney "applied pressure" until the other teacher, Matthews, told him "to let me go." As he "dragged [him] upstairs," Courtney informed D.L. that he was taking him to the office.

Courtney, on the other hand, asserts that D.L. "started swinging at me," "punching me in the stomach area" and "tried to kick me in the groin." At which point, Courtney says, he let go of the other student and put D.L. in what he described as a "head lock, not a choke hold." If Courtney is to be believed, somehow D.L. "worked his head underneath my arm." Equally unbelievable was Courtney's contention that D.L. somehow must have "twisted and wound up banging his head against my chest." Once D.L. quieted down, Courtney "released him, held onto his arm and took him to the office."

Contrary to Courtney's story, Vice Principal Wright recalled that, during an investigation following the incident, Courtney admitted that he had "grabbed [D.L.] by the neck." Further, Wright described D.L. as an "average student" who occasionally got into trouble but was "no more disruptive than any other student at school." It should also be noted that D.L. was small in stature, stood approximately five feet tall, and weighed about 100 pounds.

I FIND that Courtney intentionally put D.L. in a choke hold after the student fight was over and the use of force was no longer necessary. Additionally, the choke hold is an unacceptably severe form of force to employ against an unarmed little boy and had the foreseeable effect of causing gratuitous pain. Courtney was not truly acting in self-defense, but was attempting to escort the recalcitrant student to the office. Not only was Courtney's testimony inherently implausible, but also it was inconsistent with his own prior explanation shortly after the event.

(D) Incident on February 27, 1990

Courtney had been involved in a prior classroom incident with the same student only two weeks before, on February 27, 1990. As D.L. portrayed this incident, he was at his assigned table in shop class and wanted to borrow a magazine, belonging to Courtney, which the boy next to him was reading. While he was "reaching for it," the magazine "ripped." Courtney, who was seated nearby, came over and said words to the effect, "If you ripped my magazine, you have to pay for it." Then Courtney allegedly picked up a "ruler"or "yardstick" and struck D.L. with it on his left leg, causing him to cry out in pain. Even though D.L.wore long pants that day, the impact left a "red bruise" on his leg which lasted about a week. Vice Principal Wright verified that D.L. came to his office on the date in question and complained that Courtney "had hit him with a stick." School officials referred the matter for investigation by the state child welfare agency, as is the standard practice in such cases.

Remarkably, Courtney denied that the entire incident had ever occurred and, in his answers to interrogatories, stated that D.L. "was not in my roll book and was not scheduled for shop." At the hearing, he suggested that D.L. had been his student during the previous school year and not during 1989-90. However, he did not produce his roll book or other documentation which might help to substantiate his defense. Moreover, the testimony reveals that the classroom was occupied by combined shop and home economics classes on February 27, 1990, so even the absence of D.L.'s name in Courtney's roll book would not be conclusive proof that D.L. was missing from the room.

I FIND that Courtney hit D.L. on the leg with a ruler on February 27, 1990 in retaliation because D.L. had damaged the teacher's magazine. Again, the action was taken purely for punishment and not to protect the safety of persons or property.

(E) Incident on December 2, 1987

Neither the alleged victim nor any eye witness testified on behalf of the Board about the incident which occurred on December 2, 1987 at the Martin Luther King School. Instead, the Board's proofs consisted of hearsay statements, personal observations made after the event, and admissions by Courtney. Ernest Thompson, building principal for 22 years, reported that T.T., a seventh grader, came to his office with "some sort of markings on his neck." T.T. told Thompson that Courtney had "grabbed him by the neck." Shortly afterwards, on December 4, 1988, Thompson held a conference attended by T.T.'s mother and uncle. During that conference, Courtney claimed that he was only "playing" with T.T., but that T.T. "did not want to play." T.T., however, felt that Courtney "meant to hurt him" and the conference abruptly ended "when tempers got hot."

The Board's only other witness was investigator Lucie Rowlette. She took an unsigned statement from Courtney on January 14, 1988, in which Courtney acknowledged that he started the interaction when he lightly "cuffed" T.T.'s legs, that T.T. "jumped up in my face" and later "grabbed me by the collar," and that the episode escalated to the point where Courtney "picked up" T.T. and "set him on the counter."

In his testimony, Courtney embellished his story somewhat, but the essentials remained largely unchanged. Immediately before the encounter, T.T. had been "horsing around" in an area filled with electric saws, grinding wheels and other power tools. When T.T. deliberately hit another child in the neck, Courtney came over and "cuffed" or "patted" his legs. One thing led to another and before long T.T. had "kicked [Courtney] in the stomach" and Courtney had "reached up and grabbed him in the throat." While Courtney did not notice any marks or scratches on T.T.'s neck, he did not deny that they may have existed.

I **FIND** that there is insufficient competent evidence to establish that Courtney's conduct was unreasonable or that he intended to hurt T.T. Certainly the circumstances are highly suspicious and raise questions about the wisdom of Courtney's disciplinary techniques. Absent testimony by someone with first-hand knowledge, however, the only evidence introduced under a hearsay rule exception is Courtney's self-serving declaration that he acted to stop a dangerous situation and

meant no harm by his actions. There is not enough on the sparse record to make any other finding.

(E) Incident on September 22, 1987

Lastly, a reliable adult witness observed an encounter between Courtney and S.G., a seventh grade student. Julia McDowell was a teacher and co-worker of Courtney at the Martin Luther King School. On the morning of September 22, 1987, she was in the hallway talking to Courtney when S.G. came to the second floor to rejoin his class. Before her eyes, Courtney suddenly walked away, accosted S.G. and pushed him through the double doors. Ms. McDowell was standing only about 20 feet away and had a completely unobstructed view. She is certain that S.G. was not making any threatening moves and that Courtney initiated the confrontation. Ernest Thompson, the school principal, offered a possible motive for Courtney's unprovoked attack, namely that S.G. was on his way back to class after having complained to him about Courtney's abusive language.

Courtney's story was radically different and related to a separate episode involving an elbow shoving match, a chase down several flights of stairs, and the throwing of metal garbage cans. Whatever may have previously happened, it appears to be undisputed that S.G. was not doing anything wrong at the time Courtney nabbed him outside of McDowell's classroom.

I **FIND** that Courtney assaulted S.G. in the hallway, without apparent reason or provocation. Regardless of what transpired earlier, S.G. posed no immediate threat and the use of force cannot be justified. McDowell was a sincere and forthright witness. Despite dark intimations of McDowell's complicity in a plot against him, Courtney gave no good reason why she would fabricate her testimony.

(2) Verbal Abuse of Students

Numerous witnesses cited examples where Courtney made demeaning or degrading comments to impressionable young school children. Illustratively, McDowell mentioned that Courtney referred to students as "inferior, substandard or sub-human." Unable to recall his exact words, she testified that he compared children to "animals, or savages, or things of that nature." Esther Elliott, principal of

Hawthorne Avenue School, overheard Courtney tell a student to "get your ass in line." She immediately took Courtney aside and reprimanded him for using such vulgar language when talking to students. Courtney responded that it is the only language which they understand and that if "you speak nicely to them, they won't respond."

Even more dramatic was the reaction of the children themselves. S.W., the little girl, was understandably offended because her teacher used the "F-word" in class. On one occasion, he told her to "shut up." Another time, he told her friend to "get the hell out of the room." Although she acknowledged that kids use that kind of language, she realized that it is inappropriate "for a teacher to say it to a child." A.B., the door-banger, didn't like it when Courtney called him a "punk" or when he said "get your ass away from the girls." A.B. agreed that Courtney "cursed at most of the girls" and that he "used the F-word all the time."

I **FIND** that Courtney regularly used insulting language, engaged in name calling and spouted obscenities in the presence of his students. Young children are vulnerable to authority figures who treat them as if they are worthless and incapable of achieving success. Teachers are expected to be good role models and to instill positive values and attitudes in the students entrusted to their care and supervision. Courtney's lack of respect and his verbal abuse render him unfit to teach.

(3) Excessive Absenteeism

Attendance forms kept by the Board disclose that, in the last six months of the 1988-89 school year, Courtney took 8½ sick days; 9½ funeral days; 2 court days, and a ½ personal day. In the 1989-90 school year, he took 14 sick days; 3 personal days; and 7 funeral days. And in the 1990-91 school year until his suspension in February, he took 15½ sick days; 3 personal days; and 2 funeral days. All together, in the space of two years he was absent from work for 65 days. On its face, this absentee rate would appear excessively high.

Apart from the number of absences, however, the record is virtually barren of details regarding the legitimacy of these absences and the impact on continuity of instruction. No one has suggested that sick leave was being misused or that Courtney failed to furnish any medical substantiation which the Board requested. Very little evidence was presented regarding efforts to provide counseling or to warn Courtney that continued absences would not be tolerated. In November 1989, Esther Elliott, principal of Hawthorne Avenue School, sent Courtney a letter advising him that his absences exceeded the allowable state standard and expressing the hope that his attendance would improve. She also discussed the problem with him in two or three private conferences, but she cannot recall the dates. None of Courtney's supervisors sent any follow-up warnings or apprised him of the consequences if his attendance did not conform to district policy. Nor did the Board seek to impose any lesser disciplinary sanction for this offense, such as the withholding of Courtney's salary increment.

I FIND that Courtney has an unusually high number of absences which, in itself, raises serious doubts about his professional commitment and responsibleness. Nevertheless, the Board has failed to exhaust less drastic remedies for correcting the perceived problem.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the Board has sustained its tenure charge of unbecoming conduct against Courtney and that the appropriate penalty is dismissal.

Tenure protects teachers from arbitrary dismissal for "unfounded, flimsy or political reasons." *Spiewak v. Rutherford Bd. of Ed.*, 90 *N.J.* 63, 73 (1982). It is designed to aid in the establishment of "a competent and efficient school system" by affording to teachers a measure of security in the ranks they hold after years of service. *Viemeister v. Prospect Park Bd. of Ed.*, 5 *N.J. Super.* 215, 218 (App. Div. 1949). Toward that end, *N.J.S.A.* 18A:6-10 provides that no tenured individual shall be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct or other just cause." Additional procedural safeguards, including the right to a list of charges, a sworn statement of evidence, and an impartial hearing, are written into the law.

Physical and verbal abuse of students falls within the broader category of "unbecoming conduct." *In re Cowan*, 224 *N.J. Super.* 737 (App. Div. 1988). *N.J.S.A* 18A:6-1 prohibits school employees from inflicting "corporal punishment" on a student, without precisely defining that term. However, the statute provides clarification of its meaning by authorizing the use of such force as may be "reasonable and necessary" to quell a disturbance threatening injury to others; to obtain possession of weapons or other dangerous objects; for the purpose of self-defense; or for the protection of persons or property. Generally, the Commissioner equates "corporal punishment" with "any punishment causing or intended to cause bodily pain or suffering." *Craze v. Allendale Bd. of Ed.*, 1938 *S.L.D.* 185, 186.

Unfitness for a position in the school system may be shown by a single incident, if sufficiently flagrant, but is "best shown by numerous incidents." *Redcay v. State Bd. of Ed.*, 130 *N.J.L.* 369, 371 (Sup. Ct. 1934), aff'd 131 *N.J.L.* 326 (E. & A. 1944). Here the Board has successfully proven a series of five separate incidents in which Courtney has employed unnecessary roughness and violence to hurt children of tender years or "make them cry." In view of the fact that students, teachers and administrators at three schools brought similar accusations, the seriousness of the situation cannot be discounted as an isolated loss of control. School officials need not wait until some child is badly injured before removing a teacher prone to violence. *See, In Re Alfano*, 1979 *S.L.D* __ (Comm'r Oct. 23, 1979), upholding the dismissal of a shop teacher who used corporal punishment on a systematic basis. *Accord, In re Gaus*, 1980 *S.L.D.* 1490 (St. Bd. 1980), rejecting a monetary penalty and ordering dismissal of an elementary teacher who committed several instances of misconduct, including pulling the hair of a pupil, throwing a book at a student, handling two girls in a rough manner and knocking down a student.

Adding insult to injury, Courtney verbally abused his students by calling them vile names and regularly using four-letter words in class. Psychological damage from steady exposure to such verbal abuse from a teacher may be longer lasting than the scars from physical abuse. In determining what penalty is warranted, factors to be considered include the nature and gravity of the offense and any extenuating or aggravating circumstances. *In re Fulcomer*, 93 *N.J. Super.* 404, 420-422 (App. Div. 1967). The fact that Courtney mistreated some of his students verbally as well as

physically is an additional ground for removing him permanently from the classroom.

Order

It is **ORDERED** that the tenure charge of unbecoming conduct is sustained.

And it is further **ORDERED** that Charles Courtney is dismissed from his teaching position in the Newark school district.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 1, 1992
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

MAY 5, 1992
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 08 1992
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

APPENDIX

List Of Witnesses

1. Julia McDowell, elementary school teacher, Newark school district

2. Ernest Thompson, elementary school principal, Newark school district

3. D.L., student

4. A.B., student

5. David Wright, elementary school vice principal, Newark school district

6/ S.W., 9th grade student

7. Joseph Morano, assistant executive superintendent, Newark school district

8. Esther Elliott, elementary school principal, Newark school district

9. Vivian K. Lampkin, assistant executive superintendent, Newark school district

10. Charles H. Courtney

List of Exhibits

No.	Description
P-1	Copy of an incident phoned - in report, dated September 23, 1987
P-2	Copy of an incident report, dated September 27, 1987

P-3 Copy of an incident phoned-in report, dated December 2, 1987

P-4 id. Copy of an incident report, dated September 2, 1987

(a) Copy of a letter to Vivian Lampkin from Ernest Thompson, dated December 4, 1987

P-5 id. Copy of nurse's follow-up notes, dated December 2, 1987

P-6 id.(a) Copy of a memorandum to Vivian Lampkin from Layton Swinney, dated January 28, 1988

id.(b) Copy of a memorandum to Thomas Baldwin from Lucia Rowlette, dated January 22, 1988

id.(c) Copy of a statement of T.T., dated January 14, 1988

id.(d) Copy of a statement of K.S., dated January 14, 1988

id.(e) Copy of a statement of K.C., dated January 14, 1988

(f) Copy of a statement of Charles Courtney, dated January 14, 1988

P-7 id. Copy of a memorandum to Gene A. Foti from Vivian K. Lampkin, dated March 14, 1988

P-8 Copy of a letter to Charles Courtney from Vivian K. Lampkin, dated March 14, 1988

P-9 Copy of a letter to Vivian Lampkin from Ernest Thompson, dated February 23, 1988

P-10 Copy of a letter to Gerard J. Morano from Ernest Thompson, dated February 19, 1988

P-11 id. Copy of an incident phoned-in report, dated February 28, 1990

P-12 id. Copy of a memorandum to Charles Courtney from David Wright, dated February 28, 1990

P-13 id. Copy of a report of accident to pupil, dated February 23, 1990

P-14 id. Copy of a memorandum to Joseph Morano from Layton Swinny, dated March 26, 1990, with attached investigation report

P-15 id. Copy of an incident phoned-in report, dated March 15, 1990

P-16 Copy of a memorandum to Charles Courtney from John L. Jenkins, dated March 15, 1990

P-17 id. Copy of a memorandum to Joseph Morano from Layton Swinny, dated may 24, 1990, with attached investigation report.

P-18 id. Copy of a letter to Charles Courtney from Joseph G. Morano, dated November 29, 1990

P-19 id. Copy of an incident phone-in report, dated April 12, 1990

P-20 id. Copy of an accident report, dated April 12, 1990

P-21 id. Copy of a memorandum to Joseph Morano to Layton Swinny, dated June 4, 1990, with attached investigation report

P-22 id. Copy of a memorandum to Joseph Morano from Gene A. Foti, dated November 27, 1990

P-23 id. Copy of a letter to Charles Courtney from Joseph G. Morano, dated November 30, 1990

P-24 id. Copy of an incident report, dated November 30, 1990

P-25 id. Copy of a memorandum to Eugene C. Campbell from Gene A. Foti, dated December 17, 1990

P-26 id. Copy of a letter to Gerard J. Morano from Ernest Thompson, dated February 16, 1988

P-27 id. Copy of a memorandum to Gene A. Foti from Vivian K. Lampkin, dated August 29, 1988

(a) Copy of a letter to Charles Courtney from Ernest Thompson, dated October 6, 1987

P-28 id. Copy of a letter to Charles Courtney from Esther Elliott, dated October 11, 1988

P-29 id. Copy of a memorandum to Charles Courtney from John L. Jenkins, dated May 11, 1989

P-30 id. Copy of a teacher annual evaluation report, dated June 9, 1989

P-31 Copy of a letter to Charles Courtney from Esther Elliott, dated November 3, 1989

P-32 id. Copy of a memorandum to Charles Courtney from John L. Jenkins, dated February 22, 1990

P-33 id. Copy of a memorandum to Charles Courtney from John L. Jenkins, dated February 6, 1990

P-34 id. Copy of a memorandum to Charles Courtney from David Wright, dated February 27, 1990

P-35 id. Copy of a memorandum to Joseph Morano from Gerard J. Morano, dated March 8, 1990, with attached teacher observation report

P-36 id. Copy of a memorandum to Charles Courtney from Esther Elliott, dated December 6, 1990

P-37 id. Copy of a memorandum to Charles Courtney from Esther Elliot, dated December 6, 1990

P-38 id. Copy of a memorandum to Charles Courtney from Esther Elliott, dated December 6, 1990

P-39 Copy of employee attendance record for September 1, 1989 to February 1, 1990

(a) Copy of employee attendance record for September 1990 to February 4, 1991

P-40 id. Copy of memorandum to Samuel Manigault, Esq. from Hattie Black, dated February 8, 1991

(a) Copy of employee attendance record for February 4, 1990 to June 1990

P-41 Copy of respondent's answers to interrogatories propounded by petitioner, certified on September 9, 1991

R-1 Copy of statement of evidence by Joseph G. Morano, dated February 8, 1991

R-2 Copy of a set of interrogatories propounded by respondent

R-3 Copy of petitioner's answers to interrogatories propounded by respondent, certified on June 20, 1991

IN THE MATTER OF THE TENURE HEARING OF CHARLES COURTNEY, SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by respondent (hereinafter "Courtney"), to which no reply was submitted by the Board.*

Courtney contests the initial decision primarily on the grounds that insufficient evidence was produced to warrant the ALJ's findings on the alleged incidents of corporal punishment. He further contends that in order for charges of corporal punishment to be sustained, there must be an indication of causing or intending to cause bodily injury or suffering, and no such indication was given herein. Specifically, Courtney cites the following deficiencies as fatal to the ALJ's conclusions: the Board's failure to produce the student who allegedly witnessed the November 28, 1990 incident, the three boys involved in the chase that allegedly occurred on April 12, 1990, the teacher who purportedly was present at the time

* The Commissioner here notes a printing error in the initial decision, wherein a section of page 4 is incorrectly reproduced at pages 1-2, so that the initial decision should be read beginning at the middle of page 2 ("Statement of the Case").

of the March 13, 1990 incident, any witness to the alleged incident of February 27, 1990, and the student allegedly accosted in September 1987; the ALJ's failure to properly weigh D.L.'s instigating conduct; and the Board's failure to demonstrate that the pushing/accosting incident of September 22, 1987 resulted in any injury to the alleged victim. Finally Courtney contends that the incidents of "verbal abuse" cited by the ALJ do not rise to the level of warranting dismissal from tenured employment.

Upon careful review of the record, the Commissioner adopts the recommendation of the ALJ for the reasons expressed by him in his initial decision. The objections raised by Courtney above were previously argued before the ALJ (in a post-hearing brief) and considered by him in his weighing of the evidence brought at hearing. Based on credibility determinations which the Commissioner has no basis on which to challenge (it is noted that transcripts were not provided) and on convincing corroboration in the evidence that was presented, the ALJ properly found that most of the alleged incidents did in fact occur, that they constituted corporal punishment within the meaning of controlling statute and case law, and that, taken together, they and the proven incidents of verbal abuse amply proved Courtney's unfitness for teaching. (Initial Decision, at pp. 12-15)

Accordingly, the initial decision of the Office of Administrative Law dismissing Charles Courtney from tenured employment as of the date of the Commissioner's decision is affirmed for the reasons expressed therein. This matter is further referred to the State Board of Examiners pursuant to N.J.A.C. 6:11-3.6(a)1 for action against Courtney's certificate as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 12, 1992

DATE OF MAILING - JUNE 12, 1992

135-92

NANCY MANTONE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HANOVER, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JUNE 12, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7646-91
AGENCY DKT. NO. 257-7/91

NANCY MANTONE,
Petitioner,
v.
BOARD OF EDUCATION OF HANOVER TOWNSHIP, MORRIS COUNTY,
Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Lester Aaron, Esq., for respondent (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: April 24, 1992 Decided: May 8, 1992

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 7, 1991 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 hearing was to be held on June 19, 1992 at the Office of Administrative Law in Newark.

Prior to the date of the hearing, the parties agreed to settle this matter and submitted the attached Stipulation of Settlement and Dismissal indicating the terms of settlement.

I have reviewed the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement disposes of all issues in controversy, is in the interest of the parties and public, and comports with *Cardonick v. Bd. of Ed. Boro. of Brooklawn*, State Board Decision (April 8, 1983).

I therefore **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and **ORDER** that the parties comply with the terms of settlement and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 8 1992
DATE

Mumtaz Bari-Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

5/12/92
DATE

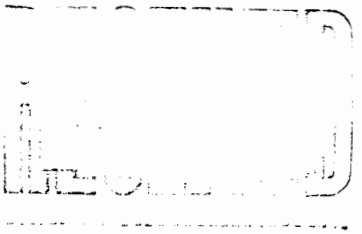
Maureen R. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 14 1992
DATE

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

md/e



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OFFICE OF ADMINISTRATIVE LAW

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioner

NANCY MANTONE Petitioner, v. BOARD OF EDUCATION OF HANOVER TOWNSHIP, MORRIS COUNTY, Respondent.	BEFORE THE OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. EDU 07646-91 STIPULATION OF SETTLEMENT AND DISMISSAL

Respondent having reassigned Petitioner to a full-time position as a teacher under an instructional certificate teaching under her elementary endorsement before the commencement of the 1991-92 school year, and this matter having thereby been rendered moot, the parties agree to resolve this matter on the following basis:

1. Petitioner agrees to withdraw the Petition of Appeal, and acknowledges that she suffered no loss of pay or benefits.

2. Said withdrawal does not constitute a waiver of Petitioner's claim that her tenure status included the right to be assigned to a position requiring an elementary endorsement, as alleged in the Petition, or of any tenure or seniority rights that she has under her elementary endorsement.

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
GATEWAY I
NEWARK, N.J. 07102

3. Respondent does not waive any defenses that it asserted to the Petition of Appeal.

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
Attorneys for Petitioner

Dated: 4/20/92

By: _____
Richard A. Friedman Esq.

SILLS, CUMMIS, ZUCKERMAN, RADIN,
TISCHMAN, EPSTEIN & GROSS
Attorneys for Respondent

Dated: April 3, 1992

By: _____
Lester Aaron, Esq.

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
GATEWAY I
NEWARK, N.J. 07102

OAL DKT. NO. EDU 7646-91

NANCY MANTONE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HANOVER, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

JUNE 12, 1992

DATE OF MAILING - JUNE 12, 1992

136-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF PENNSAUKEN, CAMDEN	:	
COUNTY.	:	
_____	:	

SYNOPSIS

Petitioning unsuccessful candidate in the annual school election held in the Pennsauken Township School District on April 30, 1991 requested an inquiry into alleged violations of election law.

ALJ found illegal ballots were cast but petitioner did not carry his burden of proving for whom the illegal votes were cast or that they affected the outcome of the election. Petition of Appeal was dismissed.

Commissioner adopted findings and determination in initial decision.

JUNE 12, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9655-91
AGENCY DKT. NO. 365-10/91

I/M/O THE INQUIRY INTO THE 1991 ANNUAL SCHOOL ELECTION HELD IN THE PENNSAUKEN TOWNSHIP SCHOOL DISTRICT

Lee B. Laskin, Esq., for petitioner Bernard Kirshtein (Laskin & Botcheos, attorneys)
Thomas Parker, Esq., for Pennsauken Board of Education (Parker, McCay & Criscuolo, attorneys)

Record Closed: March 18, 1992 Decided: May 4, 1992

BEFORE **DANIEL B. McKEOWN**, ALJ:

Bernard Kirshtein (appellant) was an unsuccessful candidate in the annual school election held in the Pennsauken Township School District on April 30, 1991. He requested of and was granted by the Commissioner of Education a recount of the ballots cast which affirmed as follows the results announced by the Board Secretary on April 30, 1991 following the election:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Mark Schott	1,095	6	1,101
Margie Baxendale	1,073	10	1,083
Timothy M. Robinson	1,055	7	1,062
Bernard Kirshtein	1,049	10	1,059
Ester Bliss	928	12	940
Robert E. Terres	537	10	547

Candidates Schott, Baxendale, and Robinson were declared successful candidates for election to membership on the Board.

Petitioner then requested of the Commissioner that an inquiry be conducted into alleged violations of school election laws which were to have occurred during the conduct of the election. After the Commissioner dismissed the request for an inquiry on the grounds that it was not filed timely, the State Board of Education reversed and ordered that an inquiry be conducted because

> The violations alleged by petitioner, which include the filing of false voting affidavits, are of such character as not to have been facially apparent at the time of the election *** Moreover, we find these allegations to be of such in nature and gravity as to warrant further proceedings in the public interest. Petitioner, who lost by three votes, cites six specific instances of alleged voting fraud, which, if demonstrated, could alter the outcome of this election.
>
> (State Bd. of Ed., Slip Opinion, Oct. 2, 1991)

Thereafter, the matter was transferred October 16, 1991 to the Office of Administrative Law as a contested case under the provision of N.J.S.A. 52:14F-1 et seq. A hearing was scheduled to be conducted December 12, 1991 but was adjourned at petitioner's request because he was scheduled out of town. The matter was rescheduled and heard February 28, 1992 at the Pennsauken Municipal Court, Pennsauken.

Findings are reached in this initial decision that certain irregularities occurred and certain illegal votes were cast during the conduct of the election but that the record contains insufficient proof to show the will of the electorate was thwarted. Therefore, the conclusion is reached that the announced results of the election must stand.

ISSUE PRESENTED

During January 1992 a telephone conference call was conducted with the parties, the substance of which was memorialized in writing as, in part, follows:

> The substance of the case appears to be that Mr. Kirshtein argues six individuals cast ballots who were not properly registered to do so and that the ballots so cast had an effect upon the results of the election to the extent that the will of the electorate was thwarted. It was pointed out to Mr. Kirshtein that he has the burden to establish the truth of his allegations by a preponderance of credible evidence. Such proof may be by way of documentation and/or live testimony from individuals who have personal knowledge surrounding the factual allegations made. Mr. Kirshtein appears to have well understood his burden.
>
> (Letter to parties, January 17, 1992)

FACTS

The basic facts established at hearing are not is dispute between the parties and they are as follows. Of the six individuals who cast disputed ballots, one voted by way of absentee ballot. The allegation is that a James R. Carr received an absentee ballot based on an affidavit he filed stating a particular street address in Pennsauken. Petitioner alleges that Mr. Carr had not lived at that address for several years but, in fact, resides in Cinnaminson. Consequently, petitioner says that Mr. Carr filed a false affidavit.

The Board moved to strike petitioner's allegations regarding James R. Carr and the false affidavit from consideration on the basis the Commissioner has no jurisdiction regarding absentee ballots.

The Board's motion to strike from consideration the absentee ballot, and the asserted false affidavit filed by Mr. Carr, must be granted. While absentee ballots are authorized for use in annual school elections, N.J.S.A. 18A:14-25, et seq., the application for such a ballot is to made under the provisions of the Absentee Voting Law (1953), L. 1953, c. 211, N.J.S.A. 19:57-1 et seq. N.J.S.A. 19:57-24 provides in part as follows:

> Disputes as to the qualifications of military service or civilian absentee voters to vote or as to whether or not or how any such military or civilian absentee ballot shall be counted in

> such elections shall be referred to the Superior Court for determination.

The Commissioner has consistently held he is without jurisdiction to review absentee ballots. See In re Annual School Election Held in the School District of the Township of Monroe, 1973 S.L.D. 212, 216, aff'd St. Bd. of Ed., 1974 S.L.D. 1413. Consequently, allegations surrounding the impropriety of an absentee ballot which may have been filed by James R. Carr shall not be considered here.

Facts surrounding allegations leveled against the five remaining voters, Delma Perez, Martin Barrett, Gertrude Barrett, Michael Jaffe and Mary Jo Jaffe, are these.

Delma Perez presented herself to election officials to cast a ballot at this election. Election officials could not locate her permanent registration form. Consequently, Delma Perez completed and filed with the election officials an affidavit (C-1, at p.5) in which she attests that she is qualified to vote at the annual school election held in Pennsauken April 30, 1991 and that she was permanently registered at 2818 Raritan Avenue in Pennsauken. Tom Conley, the assistant superintendent of elections in Camden County, testified at hearing that his search of permanent registrations revealed no such registration for "Delma Perez" now or in the past. Mr. Conley did locate permanent registrations for three individuals with the Perez surname at 2818 Raritan Ave, Pennsauken, but no such registration exists for "Delma Perez". Delma Perez signed the school election poll list at school election district number six (C-1A, at p.3) and, presumably, received a voter authorization slip, and cast a ballot. Delma Perez was not subpoenaed to testify under oath regarding the circumstances of filing the affidavit, nor is there any evidence to disclose for whom Delma Perez may have voted other than petitioner's testimony which is unrevealing. Petitioner testified that the evening before the hearing he telephoned a Delma Perez, asked for whom she voted, to which Delma Perez was to have responded she did not know but that she thinks she voted for a "white women" and was uncertain of her other choices.

Michael and Mary Jo Jaffe, whose ballots are also contested here, are married to each other. Presently, they reside at 2645 Corbett Avenue, Pennsauken. Their previous residence was at 2661 Union Avenue which is within the same general election district of Pennsauken Township.

According to Mr. Conley, his search of permanent registrations maintained by the Camden County Board of Elections revealed that Michael Jaffe, while he was a resident on Union Avenue, had permanently registered during September 1986. Mr. Jaffe cast ballots at the 1986, 1988 and 1989 general elections. In 1990 when the County Board of Elections mailed sample ballots to registered voters in the Pennsauken District, the sample ballot addressed to the Jaffes was returned to the Board of Elections. As is the practice, the Board of Elections caused to be published the names of the Jaffes in newspapers. An election investigator confirmed that the Jaffes no longer resided at 2661 Union Avenue. Consequently, the names of Michael and Mary Jo Jaffe were removed from the permanent registry.

It is agreed that Michael and Mary Jo Jaffe presented themselves at the 1991 annual school election for Pennsauken and claimed their right to vote. Election officials could not find their permanent registration cards in the official signature copy register. Consequently, Michael and Mary Jo Jaffe filed affidavits (C-2, pp. 3, 4) claiming they were qualified to vote at the election and were permanently registered at 2645 Corbett Avenue, Pennsauken. Mary Jo Jaffe signed the annual school election poll list (C-1, p. 15) and, presumably, received a voter authorization slip and cast a ballot. While it is agreed between these parties that Michael Jaffe also cast a ballot, I cannot locate his name in the school election poll list. Nevertheless, for purposes of this case it is presumed Michael Jaffe also cast a ballot.

Because the Camden County Board of Elections had removed the names of Michael and Mary Jo Jaffe from the signature copy register which contains permanent registrations in 1990, petitioner says their filed affidavits claiming their right to vote and permanent registration are false and therefore their ballots should not be counted. It is noted there is no evidence in this record for whom the Jaffes cast their ballots other than petitioner's testimony that Michael Jaffe was to have told him he, Michael, "pleads the fifth amendment" and will not otherwise disclose how he voted. According to petitioner, Michael also told him that his wife, Mary Jo, would say the same thing if subpoenaed.

The Board maintains that votes cast by the Jaffes are proper under N.J.S.A. 19:31-11 because they moved from one residence to another within the same general election district and the last time both had cast ballots was in 1990. The 1991 annual school election was within two years from the date of their moving. Consequently, the Board concludes that the ballots cast by the Jaffes are proper.

Martin Barrett and Gertrude Barrett are married to each other. Presently,

they reside at 2656 Manall Avenue, Pennsauken. Prior addresses listed for the Barretts individually and jointly include an address on 43rd Street, Grant Street, and finally the Manall Avenue address.

Mr. Conley explained that his search of County records revealed Martin Barrett had been a consistent voter in general elections through 1982. There is no record of his having participated in elections from 1983, though he cast ballots in elections conducted between 1984 and 1988. Mr. Conley says that Michael Barrett's name was removed from the signature copy register in 1990 while he was at the Grant Avenue address because the 1990 sample ballot was returned because Michael Barrett changed his residence. Mr. Conley testified he located no registration for Gertrude at anytime at any address. Martin Barrett re-registered at his present Manall Avenue address on May 6, 1991 while Gertrude Barrett registered at her present Manall Avenue address on July 15, 1991. There was testimony from Mr. Conley that either at the time of registration or at some subsequent time, both Barretts came to his office very upset because of petitioner's contention here that they illegally cast ballots at the annual school election. Mr. Conley testified that he overheard a remark from the Barretts that the only reason petitioner was filing a complaint against them was because he knew for whom they worked. Aside from that assertion, the record is absent of any evidence with for whom the Barretts cast ballots other than petitioner's testimony as to his perception of Martin Barrett during the election.

In this regard, petitioner testified that he happened to be present at the time Martin Barrett claimed his right to vote by way of affidavit at the annual school election. Petitioner acknowledges when the election officers could not locate Martin Barrett's permanent registration in the signature copy book, he advised Barrett that if he were truly registered he could always file an affidavit which Mr. Barrett did. Martin Barrett works with petitioner's son-in-law. When petitioner had asked Martin Barrett whether he had talked to his son-in-law, Martin Barrett was to have turned away in a "rough" manner. In petitioner's view Martin Barrett's body language suggests to him that Martin Barrett cast his ballot for Timothy Robinson who, petitioner claims, was supported by the Democratic Party of Pennsauken.

On the foregoing facts regarding the Barretts, petitioner claims they filed false affidavits and, as such, their votes may not count.

The Board says that while the Barretts may have filed false affidavits and cast illegal ballots there is no evidence to show for whom either Barrett or Delma Perez voted for and, consequently, the election results as earlier announced and as confirmed by the recount must stand.

ANALYSIS

New Jersey Rules of Evidence, R. 31, provides "Every person has a privilege to refuse to disclose the tenor of his vote at a political election unless the judge finds that the vote was cast illegally." In this case, petitioner was separated from a winning candidate in total number of votes received by three votes. Furthermore, in this case, it is obvious that Delma Perez, Martin Barrett, and Gertrude Barrett filed affidavits in which they individually attest to their being permanently registered at their present addresses. The facts disclose such affidavits are false in that they were not permanently registered at their present addresses and, in fact, Gertrude Barrett was never registered at any address. Thus, the affidavits are false under N.J.S.A. 18A:14-66 which provides "Any person signing any affidavit pursuant to section 18A:14-52, which includes false statement of fact, shall be guilty of a misdemeanor." N.J.S.A. 18A:14-44 states that no person shall be permitted to vote at any school election unless, in part, he shall have been registered to vote in an election district included within the school district prior to the election. Here, neither the Barretts nor Delma Perez were registered to vote prior to the election. Consequently, their votes are illegal.

Whether, as the Board contends, N.J.S.A. 19:31-11b applies to the Jaffes thereby rendering valid the ballots they cast need not be decided here for this reason. Despite the finding above that the ballots cast by Delma Perez, and Martin and Gertrude Barrett being illegal as contrary to Title 18A, Education Law, and even if the Jaffes' vote be declared illegal, there is no competent evidence in this record to show for whom these five individuals voted nor is their any showing by petitioner that any attempt had been made to obtain their testimony. What this record does show is that petitioner had requested and was authorized to serve subpoenas on Delma Perez, Martin and Gertrude Barrett, Michael and Mary Jo Jaffe on January 28, 1992. However, and for whatever reason, petitioner elected not to serve the authorized subpoena in order to compel their attendance.

In Application of Murphy, 101 N.J. Super 163, 167 (App. Div. 1968), cert. den., 52 N.J. 172 (1968) N.J.S.A. 19:29-1(e) was interpreted to require that "[w]hen *** an

election is contested on the sole grounds that 'illegal votes have been received *** the contestant has not only the burden of showing that illegal votes were cast in numbers sufficient to change the result *** but also the burden of showing, to the extent possible under the circumstances, for whom the illegal votes were cast." See, also, Matter of Mallon, 232 N.J. Super 249 (App. Div. 1989).

While I have reviewed a recent administrative decision, In the Matter of the Annual School Election Held in Chesilhurst, OAL DKT. EDU 4952-91 regarding the voiding of an election where fraud exists, that case is distinguishable. Here, petitioner did not carry his burden to attempt to show for whom the illegal votes were cast. No subpoenas were served to anyone of the five individuals involved and insufficient evidence is presented upon which his desired inferences as to how the five individuals did vote could be drawn.

For all the foregoing reasons, while I find illegal ballots were cast in this election, the results of the election earlier announced by the Board Secretary as affirmed by the recount of the ballots cast, must be and are **AFFIRMED**. The matter of affidavits which, on this record, appear to be false as filed by Delma Perez, Martin Barrett and Gertrude Barrett are referred to the Camden County Prosecutor for whatever action is deemed appropriate. No such referral is made regarding Michael or Mary Jo Jaffe.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 4, 1992
Date

Daniel B McKeown
DANIEL B. McKEOWN, ALJ

Receipt Acknowledged:

5/6/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 11 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

tmp

DOCUMENTS IN EVIDENCE

P-1 Photocopy of filed affidavits

C-1 Poll Lists, pages 1 through 20
C-1A Poll Lists, pages 1 through 3
C-2 Original filed affidavits

OAL DKT. NO. EDU 9655-91

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF PENNSAUKEN, CAMDEN	:	
COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed pursuant to N.J.A.C. 1:1-18.4.

Upon careful review of the record, the Commissioner concurs that notwithstanding the demonstration of certain ballots having been illegally cast in this matter, no showing was made as to how the individuals involved voted or that their votes affected the outcome of the election. There is, therefore, no basis on which to conclude that the will of the electorate was thwarted.

Accordingly, the initial decision of the Office of Administrative Law affirming the announced results of the April 30, 1991 school election in the Township of Pennsauken is adopted as the final decision in this matter, which is hereby referred to the Camden County Prosecutor's Office consistent with the directives of the ALJ.

IT IS SO ORDERED.

JUNE 12, 1992

DATE OF MAILING - JUNE 12, 1992

COMMISSIONER OF EDUCATION

137-92

RUTH M. ROZANSKY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF KINGWOOD, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 15, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1044-92
AGENCY DKT. 2-1/92

RUTH M. ROZANSKY,
Petitioner,
v.
BOARD OF EDUCATION OF
THE TOWNSHIP OF KINGWOOD,
Respondent.

Ruth M. Rozansky, petitioner, pro se

Gaetano M. DeSapio, Esq., for respondent

Record Closed: May 1, 1992 Decided: May 4, 1992

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

STATEMENT OF CASE

Ruth M. Rozansky, petitioner, a member of the Kingwood Township Board of Education, alleged Open Public Meetings Act violations, inconsistencies and improprieties in minutes, violations of Board policies and procedures, and other irregularities by one or more other Board members.

This matter was transmitted to the Office of Administrative Law on February 7, 1992 for a hearing pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

A series of prehearing conferences and status conferences was held by telephone. On May 1, 1992, the parties reported the matter settled and supplied the attached stipulation of settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

CONCLUSIONS

Settlements are favored under the Uniform Administrative Procedure Rules and the policy of the State. It is preferred that parties settle contested cases rather than proceed to adjudication, particularly if the parties must continue a relationship after the case. Such are the circumstances here. The parties have agreed to resolve the matter amicably and to refrain from public exchanges concerning the settlement. Given the nature of the working relationship between and among Board members, this is appropriate.

The parties are reminded that the good offices of the Hunterdon County Superintendent of Schools are available to them.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

4 MAY 1992
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

5/6/92
Date

Maureen R. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 11 1992
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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GAETANO M. DE SAPIO, ESQ.
Frenchtown East
7 Kingwood Avenue at the Bridge
Post Office Box 40
Frenchtown, New Jersey 08825
Telephone: (908) 996-6240

STATE OF NEW JERSEY

OAL DOCKET NO: EDU 01044-92 S

AGENCY REF NO: #2-1/92

TRANSMITTING AGENCY:
DEPARTMENT OF EDUCATION

FILING DATE: 02/07/92

****
ROZANSKY, RUTH M.

VS.

BOE TOWNSHIP OF KINGWOOD, HUNTERDON CO.
****

STIPULATION OF SETTLEMENT

RUTH ROZANSKY filed this petition with the Commissioner on January 3, 1992. It was transmitted to the Office of Administrative Law on February 7, 1992.

The matter was scheduled for a prehearing conference. At the conference, the petitioner and the attorney for the respondent indicated that a settlement was possible. The parties had discussions and reported to the Court that a settlement had been concluded.

Therefore the parties agree as follows:

1. Neither the petitioner nor the respondent admit any wrongdoing or fault.

2. The petitioner withdraws her petition.

3. The respondent withdraws its request for counsel fees.

4. Neither party will discuss this settlement nor the circumstances surrounding the filing of the petition or its withdrawal. The parties have drafted the attached press release which will be issued as the sole comments of the parties. All board members and the Superintendent and Board Secretary/Business Administrator including the petitioner agree to be bound by this confidentiality provision. Each of the individuals acknowledge acceptance of this provision by signing the stipulation.

5. This stipulation will be included in a recommended decision of the Administrative Law Judge assigned to this case.

6. This settlement does not become final until the initial decision of the Administrative Law Judge is approved by the Commissioner of Education.

Dated: April , 1992

RUTH ROZANSKY, PETITIONER

GAETANO M. DE SAPIO, ATTORNEY FOR KINGWOOD TOWNSHIP BOARD OF EDUCATION

ATTEST:

KINGWOOD TOWNSHIP BOARD OF EDUCATION

ALYSON LILAND, SECRETARY

BY: ALLETTE WOOLEY, PRESIDENT

INDIVIDUAL ACCEPTANCES:

ALLETTE WOOLEY, PRESIDENT

BETTY KENNY, VICE PRESIDENT

JOHN KOCOT, BOARD MEMBER

JAMES SHERRON, BOARD MEMBER

DEBORAH STANCHAK, BOARD MEMBER

JOSEPH ABEL, BOARD MEMBER

PAMELLA PETRONKO, BOARD MEMBER

SUSANNE ADIPIETRO, BOARD MEMBER

ALYSON LILAND, SECRETARY

C. EDWIN SMITH, III

PRESS RELEASE

On January 3, 1992, Ruth Rozansky filed a Petition with the Commissioner of Education. In that Petition, Mrs. Rozansky questioned certain practices and procedures of the Kingwood Township Board of Education.

The Board of Education filed an Answer to the Petition. In its Answer, the Board denied that it violated any State law, rule, regulation, or the policies of the Board.

Mrs. Rozansky and the Board both acknowledge that the best interests of the students and their education are their primary concern. Neither intend to let differences of perspective and/or personalities interfere with that objective. For that reason Mrs. Rozansky and the Board agree that the continued pursuit of the Petition through the hearing process does not serve the best interests of the students. Legal costs in defense of the Petition could be better utilized for other important educational needs of the students.

Therefore, Mrs. Rozansky and the Board have agreed to file a Stipulation of Settlement with the Commissioner of Education.

Mrs. Rozansky and the Board agree that it serves no useful purpose for either side to discuss these matters publicly. Therefore, they have agreed to issue this joint press release and Mrs. Rozansky and all members of the Board have agreed not to discuss the Petition, the circumstances surrounding its filing, or resolution. This press release articulates their common collective sentiments.

OAL DKT. NO. EDU 1044-92

RUTH M. ROZANSKY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF KINGWOOD, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law in the form of a joint stipulation of settlement have been reviewed.

Upon review, the Commissioner accepts the settlement terms and adopts them as the final decision in this matter, subject to the express understanding that settlement term no. 4 pertains to discussion of the case by the parties and does not amount to a sealing of the record, so that all documents open to public disclosure, including the Petition of Appeal, answer, initial decision of the Office of Administrative Law and the instant decision, will remain so open.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 15, 1992

DATE OF MAILING - JUNE 15, 1992

139-92

R.T., on behalf of E.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTHERN REGIONAL HIGH SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

JUNE 17, 1992

R.T., on behalf of E.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTHERN REGIONAL HIGH SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

For Petitioner, Michael Molinaro, Esq. (Doner, Coffey & Doner)

For Respondent, Robert Budesa, Esq. (Berry, Kagen & Sahradnik)

This matter has come before the Commissioner by way of a Petition of Appeal for Emergent Relief filed by Petitioner R.T., seeking an Order from the Commissioner that her daughter, E.M., who was diagnosed in 1989 as having multiple sclerosis but is not classified as having an educationally handicapping condition, be permitted to attend the graduation ceremonies to be held on Wednesday, June 17, 1991, notwithstanding her admission that E.M. has failed to complete the graduation requirements in that she failed English 4, and is thus two and a half credits short of meeting the state's high school graduation requirements.

The matter was transmitted to the Office of Administrative Law without Answer June 12, 1992, and the hearing on emergent relief was conducted on Tuesday, June 16, 1992.

No exceptions were filed by the parties pursuant to N.J.A.C. 1:1-18.4.

The Commissioner of Education has designated his authority to hear and decide this matter to Deputy Commissioner John C. Woodbury pursuant to N.J.S.A. 18A:4-33.

Upon a careful and independent review of the tape of the oral proceedings on emergent relief conducted by the Office of Administrative Law, the Deputy Commissioner affirms the findings and conclusions of the ALJ below that petitioner has failed to meet her burden of demonstrating those standards articulated by the Court for pendente lite restraints as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982).

The Deputy Commissioner concurs with the ALJ that based on the record developed at hearing petitioner has failed to establish a likelihood of success on the merits in that no basis has been advanced to hold that the Board's denying E.M. participation in the district's graduation ceremonies was unreasonable given E.M.'s long history of absences, the genesis of which predated her diagnosis of multiple sclerosis by approximately three years and given the fact that when it became aware of such condition, the Board made extraordinary efforts to accommodate E.M.'s circumstances. In so finding, the Commissioner notes with approval the ALJ's observation in her oral decision that despite the existence of E.M.'s poor attendance record, petitioner has failed to demonstrate sufficient proof that such absences were related to her daughter's illness in that while she was absent from school without excuse for prolonged periods of time, particularly from December 1991 through February 2, 1992, she held a part-time job as a cashier at a supermarket and thereafter, despite continuing school absences, she continued to participate in school-sponsored social activities.

Moreover, the Commissioner finds that petitioner has failed to demonstrate irreparable harm. Case law has consistently held that attendance at graduation ceremonies is a privilege, not a right, that may be withheld in the interest of maintaining an orderly and efficient school system. See R.H., a minor by his parent and guardian ad litem v. Board of Education of the Township of Delanco, Burlington County, 1974 S.L.D. 655. See also, James Kenngott v. Lower Camden County Regional Board of Education, Camden County, 1975 S.L.D. 489, 490.

Finally, in balancing the equities of this matter, the Commissioner finds and determines that the Board's interest in maintaining its academic standards outweighs petitioner's interest in having her daughter be included in the graduation ceremonies under circumstances where the Board has contended that no student has ever been permitted participation in the graduation exercises who has not completed the graduation requirements, and where petitioner does not contest that E.M. is two and one half credits short of meeting the state and local high school graduation requirements.

Accordingly, for the reasons expressed in the oral decision rendered by the Office of Administrative Law in this matter, as augmented herein, the Motion for Emergent Relief is DENIED, and because the prayer for relief sought will be extinguished by the Decision on Motion herein, the instant Petition of Appeal is dismissed, with prejudice.

John C. Woodbury

DEPUTY COMMISSIONER OF EDUCATION

June 17, 1992

DATE OF MAILING - JUNE 18, 1992

139-92

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(139-92)

R.T., on behalf of her minor child, E.M.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE SOUTHERN REGIONAL HIGH SCHOOL DISTRICT, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

AUGUST 10, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4335-92
AGENCY DKT. NO. 266-6/92

R.T. ON BEHALF OF HER DAUGHTER, E.M.,
Petitioners,
v.
BOARD OF EDUCATION OF THE SOUTHERN REGIONAL HIGH SCHOOL DISTRICT, OCEAN COUNTY,
Respondent.

Michael K. Molinaro, Esq., for the petitioner (Doner, Coffey & Doner, attorneys)

Robert D. Budesa, Esq., for the respondent (Berry, Kagan & Sahradnik, attorneys)

Record Closed: June 16, 1992 Decided: June 29, 1992

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

R.T., on behalf of her daughter, E.M., filed a petition with the Commissioner of Education (Commissioner) requesting emergency relief, specifically that her daughter be allowed to participate in the graduation ceremonies with her classmates on June 17, 1992. Permission to participate in the graduation ceremonies was denied by the respondent, the Board of Education of the Southern Regional HIgh School District, Ocean County, on the basis that E.M. did not have enough credits to graduate. R.T. did not dispute that E.M. needed to repeat an English course during the summer in order to get a diploma; however, she requested that her daughter be allowed to participate in the graduation ceremony.

The matter was transmitted to the Office of Administrative on June 12, 1992, for a determination pursuant to N.J.S.A. 52:14B-1 e seq. and N.J.S.A. 52:14F-1 et seq.

On June 16, 1992, I heard the parties' oral arguments regarding the petitioner's request for emergency relief, and on that date, I issued an oral order denying said emergent relief.

Since E.M.'s participation in the graduation ceremony is the only issue in this matter, I hereby **CONCLUDE** and **ORDER** that the matter is now moot.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 29, 1992
Date

BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

6/30/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 06 1992
Date

OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioners:

None

For the Respondent:

None

WITNESSES:

For the Petitioners:

None

For the Respondent:

Dr. Robert J. Daria

OAL DKT. NO. EDU 4335-92

R.T., on behalf of her minor child, E.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTHERN REGIONAL HIGH SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner concurs with the ALJ that this matter has been rendered moot by the Commissioner's prior decision on motion for emergent relief, wherein he denied petitioner's request to participate in impending graduation ceremonies. As such participation was the sole issue in controversy herein, no further proceedings are warranted.

Accordingly, the initial decision of the Office of Administrative Law is affirmed for the reasons expressed therein and the instant Petition of Appeal dismissed for reason of mootness.

IT IS SO ORDERED.

AUGUST 10, 1992

COMMISSIONER OF EDUCATION

DATE OF MAILING - AUGUST 10, 1992

140-92

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE ROSELLE BOARD OF : COMMISSIONER OF EDUCATION
EDUCATION, UNION COUNTY. : DECISION
:

JUNE 18, 1992

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE ROSELLE BOARD OF : COMMISSIONER OF EDUCATION
EDUCATION, UNION COUNTY. : DECISION
:

Nathanya Simon, Esq., for petitioner (Schwartz, Simon & Edelstein)

This matter was opened before the Commissioner on April 10, 1992 through the Roselle Board of Education's filing of an appeal of the cap waiver defeated by the voters of the Roselle School District on April 7, 1992. The Board's amended petition naming the governing body of the Borough of Roselle as a participant was filed on April 21, 1992. On May 28, 1992 notification was received from the Board that the governing body did not choose to participate in the matter based upon the certification of John Fleretino, Borough Administrator. Having received the Board's position statement relative to the appeal, the record in the matter closed on May 28, 1992 given the decision of the governing body not to participate in the matter.

It is the Board's contention that in addition to the current expense and capital outlay budget approved by the voters of the Borough of Roselle on April 7, 1992 in the amount of $12,035,697 and $25,093 respectively, the cap waiver in the amount of $1,000,178 which was defeated by the voters at said election is necessary for it to provide a thorough and efficient education to the students of

the Roselle School District. Hence the amount of tax levy in contention in this matter before the Commissioner is as set forth below.

Proposed tax levy adopted by Board of Education		Amount of tax levy approved by the voters
Current Expense	$12,035,697.00	$12,035,697.00
Capital Outlay	$ 25,093.00	$ 25,093.00
Cap Waiver	$ 1,075,178.00	$ -0-

Amount in dispute before the Commissioner of Education:

Current expense	$ -0-
Capital outlay	$ -0-
Cap Waiver	$1,000,178.00

On March 4, 1992 Acting County Superintendent Michael Maddaluna conditionally approved the Roselle School District's proposed 1992-93 school budget subject to the cap waiver of $1,000,178 as set forth below which was deemed necessary for a thorough and efficient education. An additional $75,000 in cap waiver monies, although allowed to be put before the voters, was not deemed necessary for a thorough and efficient education by the acting county superintendent and is, thus, not appealable to the Commissioner.

Current Expense		$1,000,178
Salary, Instructional	213	496,586
Salary, Other Inst.	214	71,148
Salary, Other Aides	216	43,310
Textbooks, Instructional	220	47,573
Library/AVM	230	12,774
Supply, Instructional	240	6,711
Other Expense, Instructional	250	18,674
Purchase Tech Services	260b	5,250
Other Expense, Health	420	10,000
Trips, Field	520c	14,120
Insurance/Judgments	820	274,032
Capital Outlay		0

Pursuant to the Opinion of the State of New Jersey Attorney General rendered on July 8, 1991, the Commissioner has not only the authority but the duty to review the cap waiver appeal of a school budget conditionally approved by the county superintendent to determine what monies, if any, are necessary for the provision of a thorough and efficient education to the students of the Roselle School District.

In support of the need for the $1,000,178 cap waiver sought by the Board, the following information is provided by the Board.

Line 213 - $496,586.00

> At the Board meeting held Tuesday, April 28, 1992, the Roselle Board of Education adopted a resolution providing written notice of non-renewal to 38 of its employees, 25 of which are certified and 13 of which are non-certified support staff. This action was necessary in light of the lack of the monies identified above to support the continued employment of approximately 16 instructional personnel teaching students from K through 12.*** Included on this list and part of the dollars represented in the Cap Waiver identified in this section include, 2 art teachers, 2 librarians, 1 music teacher, a Guidance Counselor, a speech teacher, and a special education teacher. It must be specifically emphasized that the art and music programs will be severely and negatively impacted as a result of this reduction.
>
> Additionally, library services will not be available to each child in each building as a result of this cut. The necessary social/ guidance services represented by the work of one Guidance Counselor will be negatively affected by the loss of one Guidance Counselor. The Roselle School District submits that equal opportunity education will not be available in Roselle if these cuts must be sustained into the 1992-93 school year.

Line 214 - $71,148.00

> This sum supports the services of personnel whose primary responsibility is in the area of Basic Child Study Team Services. The Board has RIF'd two School Psychologists, one Learning Disability

Teacher Consultant, and one Social Worker. This will devastate severely the provision of Special Education Services to the students of Roselle. Additionally, it could place the Board in serious jeopardy with the Federal and State legal requirements concerning time lines for referral classification, development of IEP's and implementation of placement and program. As of October 15, 1991, the total student population numbered 2,374 of which 246 utilized Special Education Services. Further, it is noted that 172 Special Education students are eligible for transportation and there are 100 Special Education students placed out-of- district. As of December 1991, there are 364 students who have been identified as eligible for Special Education Services. An additional 136 students receive speech correction services. In the past, the Board has employed four full teams which, would be dramatically reduced to less than 3 full teams in the absence of restoration of the funding requested in this Cap Waiver appeal. The district needs to maintain these positions as part of the basic Child Study Team services in order to assure compliance with federal and state law in this very critical area, as well as to maintain services already established in IEP's and other programs.

Line 216 - $43,310.00

This money represents the support of employment of non- certificated support staff of teacher aides. In many instances these aide positions are required as a matter of Federal and/or State law due to class size. In other instances the aide may be required due to an individualized educational plan for a particular student. These teaching aide positions are critically needed to maintain programs and ensure compliance with law.

Line 220 - $47,573.00

This money is needed in order to replace, maintain and provide appropriate text books to the students. Specifically, the money will be utilized for the following:

K to 4 - to implement a comprehensive modern day reading program and complement with an expressive writing program.

Science - to replace text books which are over ten years old in order to meet course

objectives per curriculum guides. Also, to purchase additional texts due to increased enrollment.

Social Studies - to replace text books which are over ten years old and to meet course objectives per curriculum guides. Psychology texts need to be replaced completely because current text is no longer in print.

Physical Education - To update text to go with curriculum as follows: First Aid and Personal Safety (Grade 10); Understanding Your Sexuality (Grade 12); and What You Should Know About Drugs (Grade 9).

Grades 8, 9, and 10 - text books, particularly in mathematics, now being used do not address the skills which are tested on the new statewide standardized 8th grade (Early Warning test) and 11th grade HSPT.

Furthermore, current text books in use in Roselle are not in line with the State Core course grades 9 through 12 proficiencies or the NCTM Standards. This also includes monies for all college preparatory texts damaged or lost which need to be replaced.

Industrial Arts - to replace, maintain and continue up-dating departmental program in accordance with current vocational trends.

Business - replacement additions are needed of new/additional texts in the areas of shorthand, keyboarding, and automatic accounting for the micro-computer.

Reading - "Best Short Stories" is a middle-level text which provides a particular literature focus currently unavailable in Roselle. Additional text which would be purchased if this money were available include viewpoints on "Drugs and Sports," "Alcohol: Understanding Words in Context." These are critical thinking texts in that relevant social, economic and political issues are addressed. These materials are essential for our students being prepared to pass the 8th grade Early Warning tests and grade 11 HSPT.

Line 230 - $12,774.00

This money will be utilized in the library of the School District. The collection at the library

now shows significant signs of age and neglect. Many materials are extremely out-dated (over 10 years old) and thus of little or no appeal to young readers. The fiction sections are inadequate concerning topics such as Holidays, The United States and Nations of the World. It is absolutely critical that the collection at the library be expanded and strengthened by way of update. Video tapes/film strips are needed to incorporate and illustrate the rich multi-cultural heritage of the student body and to reinforce literature utilized in the classroom. Software is needed to enhance and reinforce target language vocabulary and to expose students to State of the Art learning technology.

Line 240 - $6,711.00

This money is earmarked for educational supplies which are expendable on a yearly basis. These daily teaching supplies are needed for implementation of Board approved and state mandated programs. For example, business materials are necessary to operate the Business Department's time-testing in typewriting skills and shorthand.

Line 250 - $18,674.00

This money is also earmarked for educational supplies which are expendable on a yearly basis. The supplies in this account would include report cards for each student in the district. These supplies are needed to maintain and continue educational programs through supporting effective instructional tools. It should also be noted that the original Cap Waiver request included an additional $10,000.00 in this line item which cannot be appealed due to the current status of the law as set forth in the applicable controlling Attorney General's opinion regulating Cap Waiver appeal. Thus the Board will need to adjust this line by a reduction of $10,000.00 below anticipated need even if the line is fully funded pursuant to this appeal. Any further cut would significantly and detrimentally affect the operation of the school district with respect to the provision of educational supplies.

Line 260[b] - $5,250.00

This money is needed to purchase CSI Computer Technical Services. These services keep all attendance records in the Attendance Office for all our students and serve as the basis for our

ASSA State Reports. The use of these Computer Services saves many, many, hours of manual labor. Additionally it assures accuracy and efficiency with respect to the record keeping of student attendance. This contract is truly a critical and mandatory aspect of the district operation.

Line [420] - $10,000.00

This money is utilized for related services as mandated by N.J.A.C. 6:28 et seq. in the areas of occupational therapy, physical therapy, and medical evaluations. The Board could be in serious jeopardy with respect to meeting Federal and State statute and regulation requirements in this area if these monies are not available.

Line 520c - $14,120.00

This money will be utilized to reinforce and enhance instruction in the areas of English, computers, science, and music by allowing students to participate in off-grounds educational activities. Additionally, this money would be utilized to provide the students an opportunity to visit local colleges in order to expose the students to admission and financial procedures. Some of the field trips planned include the opportunity to see a Shakespeare play, to visit the Franklin Institute in Philadelphia, the IBM Think Innovation, AT&T Infoquest, and the Museum of Natural History and Hayden Planetarium in New York. It would also provide the funding for students to participate in various academic and artistic competitions, participate in choral performances before selected groups, and participate in local, regional, and statewide parades of importance. It has been noted over the years by the Commissioner of Education that a field trip is an integral part of the instructional program employed by teachers as a device for teaching and learning. Field trips are an important ingredient in the instructional program and the expenses of such approved expeditions are required to be furnished without cost to pupils. The learning and educational value of these experiences is beyond question.

> "Teaching is more effective and learning is enhanced when it is not confined to activities within the classroom and the school building, but [moves] out into the child's environment and employs actual observation and experience

> to supplement and enrich classroom procedures. Such a field trip is a proper and desirable element of the school curriculum. It is not a holiday, recess, a reward or a vacation from school work even though it might be a welcome change from ordinary routine, and pupils may find it interesting, exciting and enjoyable. Learning occurs most effectively when such conditions are present. A field trip is, or should be, a valuable learning experience, planned, carried out, and followed up as an integral part of the course of study with clearly understood objectives and terms of learning. ... The Commissioner holds that field trips which supplement and enrich pupils' classroom learning are an important and desirable element of the school's program of instruction and as such are a proper cost of instruction. . . ."

Willett vs. Board of Education of the Township of Colts Neck, 66 SLD 202, 205-206. Accord Matrick vs. Board of Education of the Township of Springfield, 79 SLD 420, 423.

Line 820 - $274,032.00

Pursuant to current agreement as the result of negotiations between the various bargaining units and the Board of Education, the Board has agreed to provide individual and full family health care insurance coverage for all employees of the Board whose regular assignments exceed 20 hours per week, which shall include: Blue Cross, Blue Shield, Major Medical and Rider "J". Additionally, the Board contributes approximately $425.00 per employee for a Family Dental Plan. Additionally, the Board pays for a Family Prescription Plan which is $3.00 co-pay for named drugs and $-0- co-pay for generic drugs.

The increase in premium costs for the 1992-93 school year to continue these coverages, far exceed the Cap imposed upon the spending level in Roselle. Based upon current projected premium costs, it is estimated that the district will expend $8,000.00 per employee per year to maintain current level of benefits. Reference is made to memo of January 1992 to participating employers of the State Health Benefits Program from the State Health Benefits Bureau concerning State Health Benefits premium rates effective July 1, 1992.*** It is noted therein that the

State advises its participating public employers that "the overall premium rate increase for the traditional plan is 16.8%." It should be additionally noted that this line item has already been cut $65,000.00 as the result of the defeat of the Cap Waiver question and the inability of this Board to appeal that amount due to the controlling applicable Attorney General's opinion concerning Cap Waiver appeals. It is respectfully submitted that this money as part of this Cap Waiver appeal is critically needed in order to insure maintenance of health coverage currently in place and guaranteed by negotiated contracts with the various bargaining units in the school district. See Cliffside Park Board of Education vs. Mayor and Council of Cliffside Park, 100 N.J. Super. 490 (App. Div. 1968).
(Board's Position Statement, at pp. 2-8)

COMMISSIONER'S DETERMINATION

In reviewing the record of this cap waiver appeal submitted by the Roselle Board of Education, the Commissioner finds and concludes that the Board has borne its burden of demonstrating that the additional $1,000,178 in current expense tax levy sought for the 1992-93 school year is necessary for the provision of a thorough and efficient education to the students of that district for the expenditures specifically set forth herein. East Brunswick Township Board of Education v. East Brunswick Township Council, 48 N.J. 94 (1966), Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305 (1989)

Accordingly, IT IS ORDERED that the Union County Board of Taxation adjust the Roselle current expense tax levy for the 1992-93 school year to reflect an increase of $1,000,178.

COMMISSIONER OF EDUCATION

JUNE 18, 1992

DATE OF MAILING - JUNE 18, 1992

if not permitted to attend graduation tonight, has a likelihood of prevailing on the merits of his claim and that the balance of equities enures in his behalf in seeking pendente lite restraints.

The matter was transmitted from Superior Court for hearing on Monday, June 22, 1992 to the Office of Administrative Law without Answer. The Board's Answer was thereafter faxed to the Commissioner on June 22, 1992. No exceptions were filed by the parties.

The Commissioner of Education has designated his authority to hear and decide this matter to Deputy Commissioner John C. Woodbury pursuant to N.J.S.A. 18A:4-33.

Upon a careful and independent review of the record gathered in this matter, the Deputy Commissioner finds that petitioner has failed to meet those standards for pendent lite restraints articulated in Crowe v. DeGioia, supra. Accordingly, for the reasons expressed by the ALJ in his oral decision of June 22, 1992, emergent relief is DENIED.

IT IS SO ORDERED.

John C Woodbury

DEPUTY COMMISSIONER OF EDUCATION

JUNE 23, 1992

DATE OF MAILING - JUNE 23, 1992

141-92

141-92

C.C. on behalf of her minor child, T.C.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF HARRISON, GLOUCESTER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

JUNE 22, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NOS. EDU 9287-91
AND EDU 1167-92
AGENCY DKT. NOS. 359-10/91
AND 359-10/91
(REMANDS)
(CONSOLIDATED)

C.C., ON BEHALF OF HER MINOR CHILD, T.C.,
Petitioner,
v.
BOARD OF EDUCATION OF TOWNSHIP OF HARRISON, GLOUCESTER COUNTY,
Respondent.

J.R. Powell, Esq., on behalf of petitioner

Russell E. Paul, Esq., on behalf of respondent

Record Closed: May 13, 1992 Decided: May 13, 1992

BEFORE **NAOMI DOWER-LABASTILLE**, ALJ:

Petitioner sought emergent relief against the cessation of courtesy busing in OAL Dkt. No. EDU 9287-91. The procedural history of the remands is stated in the attached order.

This matter was transmitted to the Office of Administrative Law on October 2, 1991 for emergent relief pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.* OAL Dkt. No. EDU 1167-92, the second remand, was transmitted on February 13, 1992.

After lengthy negotiations, the parties have agreed to settle this matter and have prepared the attached consent order indicating the terms of settlement.

I have reviewed the record, the stated procedural history, and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement terms as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and recommend that the consent order be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms if and when the Commissioner approves them. I **ORDER** the proceeding concluded. The parties have waived filing of exceptions.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

May 13, 1992
Date

Naomi Dower-LaBastille
NAOMI DOWER-LABASTILLE, ALJ

Receipt Acknowledged:

MAY 15, 1992
Date

Maureen L. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 20 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

/cae

C. C., on behalf of her minor child, T.C.,

PETITIONER,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HARRISON, GLOUCESTER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

CONSENT ORDER

May , 1992.

C.C., on behalf of her minor child, T.C.

PETITIONER,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HARRISON, GLOUCESTER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

CONSENT ORDER

For Petitioner, J. R. Powell, Esq.

For Respondent, Russell E. Paul, Esq.

On September 16, 1991 the respondent, Board of Education of the Township of Harrison, took Board action to rescind its existing busing policy. On October 3, 1991 the Petitioner, C.C. on behalf of her minor child, T.C., brought a Petition of Appeal with Motion for Emergent Relief before the Office of Administrative Law acting on behalf of the Commissioner of Education. Petitioner sought a stay of the Board decision of September 16, 1991 rescinding its existing busing policy.

On October 3, 1991 the Commissioner of Education issued a Decision on Motion which granted a preliminary injunction to the petitioner during the pendency of the transmittal of this matter to the Office of Administrative Law for a hearing to determine whether, under the facts of this case, the respondent, Board of Education, failed to give adequate notice and whether the Board's action in ceasing its discretionary practice was arbitrary, capricious or unreasonable due to insufficient notice, and if so, what remedy would be appropriate under the circumstances.

Subsequent, thereto, on October 11, 1991 the petitioner filed a Motion for Interlocutory Appeal, with Brief, to the State Board of Education (Docket No. 51-91). Petitioner contended that the Commissioner of Education had failed to hear and decide certain alleged Constitutional issues. The respondent contended that the matter was moot in that the Commissioner of Education had heard and decided the case except as to adequate notice.

On February 5, 1992 the State Board of Education issued a decision in the above captioned matter (Docket No. 51-91) and remanded the entire matter back to the Commissioner of Education through the Office of Administrative Law for a full hearing on the merits of the substantive claims raised by the petitioner subject to any jurisdictional limitations as to constitutional matters , and also a hearing as to the question of adequate notice. Said hearing before the Office of Administrative Law was scheduled for April 14, 1992. Pending the recommendation of the Administrative Law Judge to the Commissioner of Education and the Commissioner's of Education Decision, the status quo is to be maintained and the Board of Education is not permitted to amend its existing busing policy.

Prior to the aforementioned hearing then scheduled for April 14, 1992, the respective parties have held settlement conferences in an effort to resolve the instant matter to the satisfaction to all parties without the necessity of further proceedings. The parties recommend to the Commissioner of Education and the State Board of Education that they adopt a rule embodying the procedure set forth below for all school districts in the State of New Jersey which seek to change existing busing policy.

Based on the above, for purposes of judicial efficiency, for deciding this matter pursuant to the entire controversies doctrine, and for good cause shown

THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY does hereby on this day of April, 1992 ORDER as follows:

1. The Commissioner of Education shall and does hereby rescind its injunction restraining the respondent, Board of Education of the Township of Harrison, from amending its existing busing policy for the purpose of permitting said respondent to adopt a proposed amendment to its busing policy as attached hereto and as set forth on Schedule "A" being Transortation Policy 7:9 and Transportation Policy 7:10.

2. The Commissioner of Education further Orders the proposed amendment to the busing policy as set forth on Schedule "A" shall be adopted in accordance with the following procedures which shall be deemed to be mandatory in the future for adoption of the particular changes to the existing busing policy as set forth on Schedule "A" and shall also be mandatory in the future for any change in any busing policy.

Respondent shall be required prior to any change in any busing policy to adopt any proposed change to any busing policy at a regularly scheduled school board meeting on **first reading**, and prior to any final adoption a **second reading** must be held at a regularly scheduled school board meeting, which second meeting shall be no less than 20 days or no more than 40 days after the first reading, and a **third and final reading** of said proposed change to any busing policy shall be held at a regularly scheduled meeting of the board of education which shall be no less than 50 days and no more than 70 days after the first reading of same, and that any actions taken at the aforesaid three regularly scheduled meetings shall be in accordance with the Open Public Meetings Act of New Jersey (N.J.S.A. 10:4 et seq), and notice of the aforesaid change in any busing policy must be publicly placed at the place adopted by the board of education for public notices immediately following the first reading.

3. Upon the respondent carrying out the procedures as above set forth for a proposed change in its existing busing policy as set forth in Schedule "A" attached hereto, the within captioned action shall be dismissed with prejudice.

JOHN ELLIS,
COMMISSIONER OF EDUCATION

DATED: , 1992.

The attorneys for the Petitioner and the Respondent having read the above proposed Consent Order do hereby consent to same as to form and content.

J. R. Powell, Esq., Attorney for Petitioner,
C.C. on behalf of her minor child, T.C.

Russell E. Paul, Esq., Attorney for Respondent,
Board of Education of the Township of
Harrison, Gloucester County.

TRANSPORTATION - ELIGIBLE PUPILS

The Harrison Township Board of Education will provide transportation for public school pupils eligible under New Jersey Law remote from the school as well as the following:

A. Those students who are educationally handicapped, and have transportation specified in their Individual Educational Program (I.E.P.).

B. Those students whose routes to school are deemed hazardous by the Board of Education.

C. All approved field trips between the hours of 8:30 AM and 3:00 PM.

D. All eligible non-public school pupils who meet the necessary specifications, as prescribed by law.

Legal Reference N.J.A.A. 18A:39

TRANSPORTATION - ROUTES & SERVICES

Responsibility for developing all transportation routes lies with the Transportation Coordinator, with final approval of these routes the responsibility of the Board of Education. The Transportation Coordinator will be responsible for the development of all runs, including transportation to locations other than legal residences on established routes, taking into consideration safety, time elements, and economics. All regular routes shall be established after July 1, and up to the regularly scheduled Board of Education meeting held in August, taking into consideration the transportation needs of all students.

Any adjustments to the regular routing procedures after school opens in September will only be made under the following circumstances:

A. All special transportation requests after school opens in September must be limited to those that can be made within the limits of established bus transportation routes, and must exclude those buses which are filled to capacity.

B. In the event a need exists to have a child picked up and dropped off from other than the legal residence, a special transportation request form must filed no later than July 1 with the details of this request placed in writing. The new designated stop must be the same stop for the pick-up and/or drop-off each school day (180 days). Once approved, this stop will remain in effect for the entire year.

C. In the event of an unforeseen change on the part of the parents' circumstances, a formal written special transportation request asking for the change will be presented to the Board of Education for their consideration in regard to approval, which shall not unreasonably be withheld.

D. If a parent/guardian provides a written special transportation request to the Superintendent, and the request is approved by the Superintendent, a pupil may exit or enter from his/her regularly assigned bus at a different, already-established stop along that approved route.

E. No special transportation requests for changes in bus assignment will be considered on a daily basis.

C.C. on behalf of her minor child, T.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HARRISON, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered in the form of a joint stipulation of settlement have been reviewed. No exceptions were filed by the parties.

Upon review of the terms of the document submitted by the parties, the Commissioner must reject the following aspects of the accord and remand for further action.

Term No. 2 of the stipulation states:

> 2. The Commissioner of Education further Orders the proposed amendment to the busing policy as set forth on Schedule "A" shall be adopted in accordance with the following procedures which shall be deemed to be mandatory in the future for adoption of the particular changes to the existing busing policy as set forth on Schedule "A" and shall also be mandatory in the future for any change in any busing policy. (emphasis supplied)

While the Board is within its authority to adopt a policy governing transportation in the district, this Board may not bind a future board in carrying out its responsibilities to the district as it deems appropriate. Thus, the instant Board, no matter how laudable it believes its procedural position on the matter may be,

has no authority to dictate to future boards what procedure shall be used in revising a policy extant in the district. See, e.g., Skladzien v. Bayonne Bd. of Ed., 12 N.J. Misc. 602 (Sup. Ct. 1934), aff'd 115 N.J.L. 203 (E.&A. 1935).

Of a more technical drafting nature, the Commissioner notes that the accord of the parties represents a stipulation of settlement, not a consent order. Therefore it is inappropriate to declare that the "Commissioner of Education Orders the proposed amendment." Rather, his review is to ensure that that agreement reached by the parties is in accord with law, not to order the parties.

Finally, and also of a technical nature, should the parties arrive at terms agreeable to them upon remand of this matter, it is noted that the Commissioner of Education is not bound to accept the recommendation suggested in the paragraph preceding the terms of the settlement that he and the State Board of Education adopt a rule embodying the procedures set forth in the parties' proposed settlement for all school districts in New Jersey which seek to change existing busing policy.

Accordingly, for the reasons expressed above, the instant settlement is rejected and the matter is remanded for further action consistent with the decision herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 22, 1992

DATE OF MAILING - JUNE 22, 1992

142-92

142-92

C.D.P. (J.), a minor,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

JUNE 23, 1992

C.D.P. (J.), a minor,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

For Petitioner, Joan Embrey-Johnson, pro se

For Respondent, Michael Gross, Esq., (Kenny, Gross & McDonough)

This matter was opened before the Commissioner of Education on June 19, 1992 by way of a Petition of Appeal and Motion for Emergent Relief filed on behalf of petitioner by his parent, Joan Embrey-Johnson, seeking an order that he be allowed to graduate on June 22, 1992, notwithstanding his having failed to pass physical education (PE).

Petitioner seeks an order that he be allowed to graduate based upon the fact that in February 1992, after he failed PE with a grade of 49 the first marking period and received a grade of 62 the second marking period, he was informed by his guidance counselor and PE teacher that he would still be able to graduate if he passed the remainder of the year. The basis for the failing grade was failure to come prepared to class (no gym clothes) and failure to participate in gym for approximately 30 days.

On June 18, 1992, petitioner was informed that he was not graduating because, even though he subsequently improved his grade during the last marking period, he had failed the course since his final grade was only 60. Petitioner was further informed that he could attend summer school for PE, at a cost of $250, and graduate in August.

Petitioner seeks reversal of this decision because he does not have $250 and attendance at summer school will interfere with his work and post-secondary education plans. Moreover, he argues that he did not participate in gym during the marking period in question because it dealt with activities that involved small balls (tennis and badminton) and he has an eye condition which causes difficulty with certain physical activities since it creates an inability to focus on small objects. While acknowledging that he is at fault for not communicating this difficulty to school personnel, he believes that extenuating circumstances exist warranting the grant of emergent relief.

On June 19, 1992, the matter was transmitted to the Office of Administrative Law. A hearing on the Motion for Emergent Relief was conducted on June 22, 1992 resulting in an oral decision by the Administrative Law Judge granting emergent relief in part to petitioner to participate in the graduation ceremonies because of petitioner's good faith effort to improve based on what he was told by his guidance counselor and PE teacher.

The Commissioner, pursuant to his authority under N.J.S.A. 18A:4-33 designated John Woodbury, Deputy Commissioner of Education, to decide the Motion for Emergent Relief.

Upon review of the record, including the papers submitted by the Board at hearing, the oral argument of the parties and the ALJ's oral decision, the Deputy Commissioner finds and determines that emergent relief shall be DENIED due to petitioner's failure to meet the standards for emergent relief set forth by the New Jersey Supreme Court in Crowe v. DeGioia, 90 N.J., 126 (1982) given that he has failed to demonstrate (1) a likelihood of prevailing on the merits of his claim; (2) he will suffer irreparable harm in that attendance at graduation ceremonies is a privilege, not a right; (3) in balancing the equities he will be harmed greater than respondent who has to uphold standards of academic achievement, order and uniformity of policy; or (4) the public interest compels granting the relief sought. The matter shall proceed, therefore, for hearing on the claims for issuance of a diploma.

IT IS SO ORDERED this 22nd day of June 1992.

John C Woodbury

DEPUTY COMMISSIONER OF EDUCATION

JUNE 23 1992

DATE OF MAILING - JUNE 23, 1992

143-92

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G.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL HIGH SCHOOL DISTRICT,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

JUNE 23, 1992

G.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL HIGH SCHOOL DISTRICT,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

For Petitioner, Joseph R. Morano, Esq. (Rand, Algeier, Tosti & Woodruff)

For Respondent, JoAnne Butler, Esq., (Young, Tarshis, Dimiero & Sayovitz)

This matter has come before the Commissioner of Education by transfer from Superior Court, Chancery Division, Morris County, dated Monday, June 22, 1992 on Motion for Emergent Relief averring that the Board's action in prohibiting G.S. from participating in the graduation ceremonies scheduled for tonight, June 22, 1992, was arbitrary and in violation of its own policies. Said Motion for Injunctive Relief avers G.S. was stricken by the instigator of a fight, was suspended short term, reinstated by the principal, but was thereafter denied participation in graduation ceremonies as well by said principal without a full Board hearing as G.S. claims is required by Board Policy 5610, paragraph 3 of the Student Handbook. Petitioner contends that pursuant to the standards enunciated in Crowe v. DeGioia, 90 N.J. 126 (1982) he will suffer irreparable harm

if not permitted to attend graduation tonight, has a likelihood of prevailing on the merits of his claim and that the balance of equities enures in his behalf in seeking pendente lite restraints.

The matter was transmitted from Superior Court for hearing on Monday, June 22, 1992 to the Office of Administrative Law without Answer. The Board's Answer was thereafter faxed to the Commissioner on June 22, 1992. No exceptions were filed by the parties.

The Commissioner of Education has designated his authority to hear and decide this matter to Deputy Commissioner John C. Woodbury pursuant to N.J.S.A. 18A:4-33.

Upon a careful and independent review of the record gathered in this matter, the Deputy Commissioner finds that petitioner has failed to meet those standards for pendent lite restraints articulated in Crowe v. DeGioia, supra. Accordingly, for the reasons expressed by the ALJ in his oral decision of June 22, 1992, emergent relief is DENIED.

IT IS SO ORDERED.

John C Woodbury

DEPUTY COMMISSIONER OF EDUCATION

JUNE 23, 1992

DATE OF MAILING - JUNE 23, 1992

144-92

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF MULLICA TOWN- : DECISION
SHIP, ATLANTIC COUNTY. :
:

SYNOPSIS

This matter concerned conduct of an inquiry into alleged violations of statutorily prescribed election procedures.

Initial decision found vacancy in the membership of the Board was as a consequence of improper election procedures. (N.J.S.A. 18A:12-15(d)) Moreover, ALJ concluded notwithstanding Mr. Butterhof's superior write-in vote, he could not automatically fill the seat on the Board under N.J.S.A. 18A:12-15. ALJ concluded a special election was required to fill the single vacant seat on the Board.

Commissioner adopted findings and determination in initial decision since by law the vacancy must be filled by the electorate.

JUNE 25, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2837-92
AGENCY DKT. NO. 93-4/92

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF MULLICA TOWNSHIP, ATLANTIC COUNTY

William Cappuccio, Esquire, for the Board of Education of the Township of Mullica
Anthony Butterhof, the Challenger

Record Closed: May 22, 1992 Decided: May 29, 1992

BEFORE LILLARD E. LAW, ALJ:

On April 7, 1992, the solicitor for the Board of Education of the Township of Mullica, Atlantic County (Board) addressed a letter to the Commissioner of Education (Commissioner) requested that the Commissioner conduct an inquiry into certain alleged irregularities concerning the annual school election held on April 7, 1992, pursuant to *N.J.S.A.* 18A:14-63.12.

On April 8, 1992, Anthony Butterhof, a write-in candidate for a seat on the Board also addressed a letter to the Commissioner asserting, among other things, that he had received the third highest number of votes cast in the Board's annual school election and, therefore, should fill one of the three seats on the Board for a three year term.

This matter was transmitted to the Office of Administrative Law (OAL) on April 22, 1992, for the conduct of an inquiry into alleged violations of statutory prescribed election procedures. *N.J.A.C.* 6:24-6.1(c). The hearing and inquiry was held on May 22, 1992, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey. The hearing record closed on May 22, 1992.

FINDINGS OF FACT

The relevant facts in this matter are neither contested nor in dispute. Therefore, the following constitutes my **FINDINGS OF FACT:**

The Mullica Township School District is a Type II with an elected Board of nine (9) members, each member to serve a term of three (3) years.

On or about January 27, 1992, the Board accepted the resignations of two seated Board members; Susan Franklin and Herman Henderson. Susan Franklin's term on the Board expired in April 1992 while Herman Henderson's term is to expire in April 1993.

The Board advertised the two vacancies in newspapers seeking individuals to apply to it to fill the unexpired terms of the members who had resigned. Subsequently, the Board interviewed those individuals who demonstrated, in writing, an interest in serving on the Board.

On February 10, 1992, the Board, pursuant to *N.J.S.A.* 18A:12-15f., filled the two vacancies by appointing John Gandy and Maryann Agnew to the Board. The Board did not, however, specify which vacant seat Mr. Gandy or Ms. Agnew were to fill.

Nomination petitions for election to a seat on the Board were required to be filed with the Board's Secretary no later than February 13, 1992 for the election to be held on April 7, 1992. *N.J.S.A.* 18A:14-9. Three seats on the Board were to be filled as a consequence of the annual school election to be held on April 7, 1992. However, only two incumbents filed nomination petitions; *i.e.,* Barbara H. Para and Shellie Panarello.

Prior to the date of the election (April 7, 1992) Anthony Butterhof, Jr., became aware that only two individuals were nominated to fill seats on the Board and that one seat remained open. Mr. Butterhof had previously served on the Board but was not a sitting Board member in 1991-92. Mr. Butterhof commenced a campaign to have his name on the ballot as a write-in candidate for a seat on the Board.

The announced results of the balloting for seats on the Board of the annual school election held on April 7, 1992 in the Mullica Township were as follows:

Candidates by Petition	At Polls	Absentee	Total
Barbara Para	171	1	172
Shellie Panarello	154	1	155
Write-in Candidates			
Anthony Butterhof	9	--	9
Tony Butterhof	4	--	4
Butterhof	2	--	2
Butterhof	1	--	1
Albert Butterhof	1	--	1
A. Butterhof	1	--	1
Butterhof, Anthony J.	1	--	1
Butterhof, Anthony, Jr.	1	--	1
Grunow, Joni	1	--	1
Galli, Marcia	1	--	1
Polk, Al	1	--	1
Stewart, Robert	1	--	1

On April 9, 1992, the Board called a special meeting at which it ratified the appointments of appointed Board members John Gandy to fill the seat of Susan Franklin and Maryann Agnew to fill the set of Herman Franklin. Consequently, Ms. Agnew, to remain on the Board, should have filed her nominating petition for the position on or before February 13, 1992. Ms. Agnew did not do so. Therefore, as of the Board's reorganization meeting, Ms. Agnew's seat on the Board was declared vacant and she no longer sits on the Board.

Mr. Butterhof seeks to fill the vacancy on the Board as a consequence of the number of write-in votes he received at the annual school election held on April 7, 1992.

Martin Ney served as the Superintendent of Mullica Township Board of Education during the period in January 1992 when the two Board members resigned and the two replacement Board members were appointed by the Board. In or about April 1992, Martin Ney assumed the position of Atlantic County Superintendent of Schools.

DISCUSSION AND CONCLUSIONS

The controlling statute in this matter is found at *N.J.S.A.* 18A:12-15, which provides as follows:

> Vacancies in the membership of the board shall be filled as follows:
>
> a. By the county superintendent, if the vacancy is caused by the absence of candidates for election to the school board or by the removal of a member because of lack of qualifications, or is not filled within 65 days following its occurrence:
>
> b. By the county superintendent, to a number sufficient to make up a quorum of the board if, by reason of vacancies, a quorum is lacking;
>
> c. By special election, if in the annual school election two or more candidates qualified by law for membership on the school board receive an equal number of votes. Such special election shall be held only upon recount and certification by the commissioner of such election result, shall be restricted to such candidates shall be held within 60 days of the annual school election, and shall be conducted in accordance with procedures for annual and special school elections set forth in chapter 14 of Title 18A of the New Jersey Statutes. The vacancy shall be filled by the county superintendent if in such special election two or more candidates qualified by law for membership on the school board receive an equal number of votes;
>
> d. By special election if there is a failure to elect a member at the annual school election due to improper election procedures. Such special election shall be restricted to those persons who were

> candidates at such annual school election, shall be held within 60 days of such annual school election, and shall be conducted in accordance with the procedures for annual and special school elections set forth in chapter 14 of Title 18A of the New Jersey Statutes;
>
> e. By the commissioner if there is a failure to elect a member at the annual school election due to improper campaign practices; or
>
> f. By the board in all other cases.
>
> Each member so appointed shall serve until the organizational meeting following the next annual election unless he is appointed to fill a vacancy occurring within the 60 days immediately preceding such election to fill a term extending beyond such election, in which case he shall serve until the organizational meeting following the second annual election next succeeding the occurrence of the vacancy, and any vacancy for the remainder of the term shall be filled at the annual election or the second annual election next succeeding the occurrence of the vacancy as the case may be.

Mr. Butterhof argues that by virtue of his superior count of votes at the polls as a write-in candidate, the Commissioner should certify him as a member of the Board under section e. of the statute. Butterhof contends, and the facts bear him out, that he was in receipt of the third highest number of votes cast for a seat on the Board at the annual school election. There is no issue as to Butterhof's write-in votes which identified him as "Tony," "Butterhof," "Butterhof," "Albert Butterhof," "A. Butterhof," among other names. In his letter brief, Mr. Butterhof asserts he is known in the community as both Tony and Anthony, as well as Anthony J. Butterhof, Jr. He acknowledges that Albert Butterhof is his brother, however, he believes the votes were cast for him because he was the only candidate who campaigned for the seat on the Board by way of write-in votes. In any event, the Commissioner has, on many occasions, validated the write-in votes of candidates under similar facts and circumstances. *In the matter of the Annual School Election Held in the Township of Hopewell, Cumberland County,* 1978 *S.L.D.* 204, 206. *In the Matter of the Annual School Election Held in the School District of the Borough of Victory Gardens,* 1978 *S.L.D.* 272, 273. See also, *In re: Fifteen Registered Voters County of Sussex,* 129 *N.J. Super.* 296 (App. Div. 1974).

I **CONCLUDE**, therefore, that the write-in votes cast for Anthony J. Butterhof at the polls on April 7, 1992, numbered twenty (20) votes and represents the third highest vote count in the election.

The Board contends, among other things, that the Commissioner should fill the vacancy on the Board under section e. of the statute or, in the alternative, the Board should be granted the authority pursuant to section f. It rejects Butterhof's request to fill the vacancy by asserting that the vacancy was not advertised and, therefore, the vacant seat on the Board was not on the ballot. Butterhof did not petition for the seat nor did he demonstrate any interest in the vacancies which occurred in January 1992.

The Board argues that the Atlantic County Superintendent of Schools should not fill the vacancy under section a. of the statute. The Board contends that a selection by the County Superintendent could be viewed as a conflict because he served as the Board's Superintendent of Schools during the period of January to April 1992. Such a conflict of interest, whether real or imagined, would not serve the best interest of the Board.

The Board rejects the notion of a special election under section d. of the statute. It contends that its annual school election is generally held in cooperation with the Oakcrest High School with which it has a sending-receiving relationship. The cost of the election is shared between the two school districts. A special election would cost the Mullica Board between $3,000 and $4,000; an amount which would be prohibitive under its present budget.

The Board asserts there was no bad faith on its part when its Secretary failed to advertise for the election of the third seat then held by Ms. Maryann Agnew. It requests, therefore, that rather than a special election, the Commissioner or the Board fill the vacant seat on the Board.

A close reading of *N.J.S.A.* 18A:12-15 would necessarily focus on sections a. and d. of the statute under the circumstances of this matter. While the Board contends the vacancy was caused by the absence of candidates for election, Mr. Butterhof argues that his superior write-in votes was sufficient to establish his candidacy and, therefore, his election to the vacant seat on the Board.

On the other hand, was the failure to elect a member of the Board due to "improper election procedures?" *N.J.S.A.* 18A:12-15 d. The facts clearly demonstrate that the Board's Secretary failed to give proper notice of the offices to be filled at the annual school election as required by *N.J.S.A.* 18A:14-19 (2). This failure to give proper notice cannot be attributed to the Board's failure to specify which of the two newly appointed members in February 1992 were to replace which of the two resigned members seat on the Board. Rather, one of the two seats became vacant by operation of law. The Board Secretary, therefore, should have given notice that three seats on the Board were to be filled by the annual school election held on April 7, 1992. *N.J.S.A.* 18A:14-19 (2).

I **CONCLUDE** that the vacancy in the membership of the Board was as a consequence of improper election procedures. *N.J.S.A.* 18A:12-15 d.

Notwithstanding Mr. Butterhof's superior write-in vote, I **CONCLUDE** he may not automatically fill the seat on the Board under the prescription of *N.J.S.A.* 18A:12-15.

I **CONCLUDE** that the election of Barbara H. Para and Shellie Panarello was proper, in accordance with the law and, therefore, should not be disturbed.

I **CONCLUDE** that the application of section e. of the statute is inappropriate because the failure to elect was not due to improper campaign practices.

I **CONCLUDE,** moreover, that due to the vacancy having been caused by improper election procedure, a special election is required to fill the single vacant seat on the Board. *N.J.S.A.* 18A:12-15 d.; *In the matter of the Annual School Election Held in the School District of the Borough of Victory Gardens, supra.*

ORDER

Accordingly, it is **ORDERED** that the Board Secretary of the Board of Education of the Township of Mullica immediately advertise such notices for the special election to held in accordance with the procedures for annual and special school election as set forth in chapter 14 Title 18A of the New Jersey Statutes.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

29 May 1992
Date

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

6/2/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 3 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

FOR THE BOARD:

NONE

FOR THE CHALLENGER:

ANTHONY J. BUTTERHOF, JR.

DOCUMENTS IN EVIDENCE

FOR THE BOARD:

B-1 MULLICA TOWNSHIP BOARD OF EDUCATION PUBLIC NOTICE
B-2 SAMPLE BALLOT
B-3 SCHOOL ELECTION BALLOT
B-4 A33 REGULAR/COMBINED STATEMENT OF RESULTS OF SCHOOL ELECTION

FOR THE CHALLENGER:

LETTER BRIEF BY ANTHONY BUTTERHOF

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF MULLICA TOWNSHIP, ATLANTIC COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

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 adopts the findings and conclusions of the Administrative Law Judge. Accordingly, for the reasons set forth in the initial decision, the Mullica Township Board of Education shall conduct a special election to fill the vacancy for the Board seat which expired in April 1992, a seat for which the Board improperly failed to give notice for election on April 7, 1992. The requirements of law, N.J.S.A. 18A:12-15(d), mandate that the vacancy be filled by the electorate, not, as the Board would have it, by the Commissioner or the Board

* A letter was filed by the Board's counsel on June 16, 1992 stating the Board did not authorize the filing of exceptions but he wished to reiterate the request that the Commissioner or county superintendent fill the vacancy since the cost of a special election was economically unfeasible under its current budget.

itself. That the Board believes the costs for a special election ($3,000 - $4,000) are not economically feasible under its school budget does not provide a legal basis for the statutory requirements of N.J.S.A. 18A:12-15(d) to be set aside.

COMMISSIONER OF EDUCATION

JUNE 25, 1992

DATE OF MAILING - JUNE 25, 1992

145-92

ELIZABETH MARKULIN AND THE NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning teacher, who intervened in breaking up a fight between two pupils, requested Neptune Board of Education to conduct expulsion hearing for alleged pupil assault. Board sought dismissal as the incident did not constitute an assault within the meaning of N.J.S.A. 18A:37-2 and N.J.S.A. 2C:12-1.

ALJ applied Kaprow, finding and determining petition was filed untimely. Petition of Appeal was dismissed.

Commissioner agreed with and adopted as his own the findings and conclusion of the ALJ granting summary judgment to the Board for the reasons stated in the initial decision.

JUNE 29, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION

OAL DKT. NO. EDU 1425-92
AGENCY DKT. NO. 24-1/92

ELIZABETH MARKULIN AND
THE NEPTUNE TOWNSHIP
EDUCATION ASSOCIATION,

Petitioners,

v.

BOARD OF EDUCATION OF THE
TOWNSHIP OF NEPTUNE,
MONMOUTH COUNTY,

Respondent.

Brian M. Cige, Esquire, for petitioners, (Klausner, Hunter & Cige, attorneys)

James T. Hundley, Esquire, for respondent, (Patterson & Hundley, attorneys)

Record Closed: April 20, 1992 Decided: May 20, 1992

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners Elizabeth Markulin and the Neptune Township Education Association (Association) allege that Ms. Markulin was assaulted by a pupil under the direction and control of the Neptune Township Board of Education (Board) and

seeks, among other things, an order from the Commissioner of Education (Commissioner) to require the Board to convene and conduct an expulsion hearing regarding the pupil assault, pursuant to *N.J.S.A.* 18A:37-2.1.

Petitioners filed a verified Petition of Appeal before the Commissioner on January 29, 1992. Issue was joined with the filing of the Board's Answer on February 14, 1992. The matter was transmitted to the Office of Administrative Law (OAL) on February 25, 1992, 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 Board advanced a Motion for Summary Decision Dismissing the Petition of Appeal before the Commissioner, on February 21, 1992. The Commissioner's representative transmitted the Motion to the OAL on or about February 26, 1992. On April 6, 1992, the undersigned was in receipt of petitioners' brief and exhibits. Oral argument was held on April 20, 1992, which constitutes the close of the record.

MOTION

The Board's Motion for Summary Decision seeking Dismissal of the Petition of Appeal is grounded upon the following:

1. No sufficient cause for determination has been advanced by petitioners within the meaning of *N.J.A.C.* 6:24-1.9.

2. The Petition of Appeal was filed beyond the 90 day time limitation established by *N.J.A.C.* 6:24-1.2.

Petitioners oppose the Board's Motion.

BACKGROUND FACTS

The relevant facts are neither contested nor disputed and are set forth as follows:

1. On June 14, 1991, A.S., a sixth grade pupil in the Neptune Middle School, was involved in a fight with S.C. , a pupil attending the school.

2. Approximately, 20 to 30 pupils were gathered at the scene and some pupils attempted to separate A.S. and S.C.

3. Pupil N.S., A.S.'s sister was one of the pupils attempting to separate the fighting pupils.

4. Petitioner Elizabeth Markulin, a teaching staff member in the employ of the Board, heard the commotion and hurried to the scene of the fight.

5. Petitioner Markulin commenced to escort pupils A.S. and S.C. to the school's Vice Principal's office. During the escort, pupil A.S. continued to verbally and physically assault pupil S.C.

6. Pupil A.S. picked up a metal garbage can and raised it above her head in an attempt to throw it in the direction of S.C. who was standing behind petitioner Markulin.

7. N.S., A.S.'s sister, and another pupil grabbed the garbage can and removed it from A.S.

8. A.S. continued her assault on S.C. who was behind petitioner Markulin. A.S. could not reach S.C. and began kicking in S.C.'s direction.

9. During this kicking in the direction of S.C., A.S. kicked petitioner Markulin.

10. Subsequently, petitioner Markulin executed a Worker's Compensation incident report in which she stated, among other things, "student kicked me when trying to kick another student" (Board's Exhibit B).

11. On June 4, 1991, while petitioner Markulin was on escort with pupils A.C. and S.C., teaching staff member Richard Wright appeared upon the scene and agree to complete the escort to the Vice Principal's office.

12. During Wright's escort, pupil S.C. intentionally assaulted Mr. Wright.

13. Pupil S.C. was immediately suspended from school and the Board instituted expulsion proceedings against S.C., pursuant to *N.J.S.A.* 18A:37-2.1.

14. As a consequence of the expulsion proceedings, S.C. was placed in an out of district school commencing the 1991-92 school year.

15. On August 28, 1991, Lucille Alfano, president of the Association, wrote a letter to Superintendent of Schools Michael T. Lake requesting a date and time for the expulsion hearing of pupil A.S. (Board's Exhibit E, Petitioners Exhibit N)

16. On September 4, 1991, Superintendent Lake advised Association President Alfano by letter that, "■■■we have no record of any further Board of Education proceedings in the matter of Middle School or High School pupils." (Board's Exhibit F, Petitioners' Exhibit O).

17. On September 5, 1991, petitioners attorney wrote to the Board's attorney requesting advice as to what course of action the Board was taking concerning expulsion hearings Ms. Markulin, Mr. Penchuk and other staff members who have been assaulted by pupils but who had not yet received the "statutory required expulsion hearing." Mr. Cige expressed his hope to shortly receive a listing of hearings with possible dates. (Board's Exhibit G, Petitioners' Exhibit P).

18. On November 11, 1991, Mr. Hundley wrote to Mr. Cige wherein he stated, among other things, that:

> Both the accident report signed by Mrs. Markulin and the statement given to Mr. Torres indicate that Mrs. Markulin was inadvertently kicked by the student (sic) while breaking up a fight. No serious injury was suffered by the teacher. It is the Administration's opinion that the incident did not constitute an assault within the meaning of *N.J.S.A.* 18A:37-2.1 and *N.J.S.A.* 2C:12-1. As a result, no expulsion proceedings were instituted in this case. (Board's Exhibit H, Petitioners' Exhibit Q).

19. On January 27, 1992, petitioners filed a Petition of Appeal before the Commissioner seeking, among other relief, an order declaring that the Board had violated the provisions of *N.J.S.A.* 18A:37-2.1 by failing to institute expulsion proceedings against pupil A.S. as a consequence of the June 14, 1991, incident.

20. The Petition of Appeal was filed 227 days after the June 14, 1991, incident and 206 days subsequent to the expiration of the 21 day limitation for instituting expulsion proceedings under *N.J.S.A.* 18A:37-2.1.

ARGUMENTS OF THE PARTIES

The Board's Position

POINT I

The Board cites the regulation at *N.J.A.C.* 6:24-1.2 (c),which provides as follows:

> 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, individual party, or agency, which is the subject of the requested contested case hearing.

In the instant matter, the "action by the district board of education ... which is the subject of the requested contested case hearing" is the alleged failure of the Board to comply with the provisions of *N.J.S.A.* 18A:37-2.1 to institute expulsion proceedings against pupil A.S., as a consequence of the June 14, 1991, incident involving petitioner Markulin. The statute, *N.J.S.A.* 18A:37-2.1 mandates that the local board of education institute expulsion proceedings "...no later than 21 calendar days following the day on which the pupil is suspended."

The Board observes that petitioner Association was aware that an expulsion hearing had been held in the matter of pupil S.C., the other pupil involved in the June 14, 1991, incident. Both the petitioners, President Lucille Alfano, and petitioners' attorney appeared at pupil S.C.'s August 14, 1991, expulsion hearing.

Thereafter, the Association President wrote to the Superintendent on August 28, 1991, requesting information concerning the date and time for the expulsion hearing of A.S. Superintendent Lake responded by letter dated September 4, 1991, asserting that the Board had no record of any further proceedings.

The Board contends that the September 4, 1991, letter from the Superintendent to the Association President clearly advised petitioners that

expulsion proceedings had not been instituted against pupil A.S. It argues that the September 4, 1991, letter was a notice of "action by the district board of education" within the meaning of *N.J.A.C.* 6:24-1.2 (c). The Board observes that the Petition of Appeal was filed on January 27,1992; 145 days subsequent to the September 4, 1991 notice and 55 days after the 90 day limitation imposed by the regulation.

POSITIONERS' POSITION

Petitioners reject the Board's contention that the Superintendent's letter to Association President Alfano dated September 4, 1991, constitutes the Board's official notice. Petitioners observe that Superintendent Lake's September 4, 1991 letter is in response to Ms. Alfano's letter dated August 28, 1991, wherein the Association President specifically refers to the alleged pupil assault on petitioner Markulin and requests information as to the date and time of the expulsion hearing for pupil A.S. Moreover, petitioners contend that the Superintendent does not refer to Ms. Markulin by name but, rather, merely states that based upon a review of " student disciplining cases" the Board had no record of any further Board proceedings. Petitioners assert that the Superintendent's letter is unclear as to what "student disciplining cases" or what "have no record" means. Due to the lack of clarity, petitioners' counsel wrote to the Board's attorney on September 4, 1991 as follows:

> Please advise what course of action is being taken toward scheduling expulsion hearings for Mrs. Markulin, Mr. Penchuk and other staff persons who were assaulted by students (sic) but who have not yet received the statutory required expulsion hearing. I would hope to receive a listing of hearings with possible dates shortly. (Petitioners' Exhibit P).

Petitioners observe they did not receive a response from attorney Cige's September 5, 1991 letter until Board attorney Hundley's response dated November 11, 1991. Therein, Mr. Hundley stated, in part, as follows:

> Both the accident report signed by Mrs. Markulin and the statement given to Mr. Torres indicate that Mrs. Markulin was inadvertently kicked by the student (sic) while breaking up a fight. No serious injury was suffered by the teacher. It is the administrator's opinion that the incident did not constitute an assault within the meaning of *N.J.S.A.* 18A:37-2.1 and *N.J.S.A.* 2C:12-1. As a result, no expulsion proceedings were instituted in this case.

> The student (sic) was suspended and it is believed that this constituted a proper disposition under the circumstances of this incident. (Petitioners' Exhibit Q)

Petitioners argue that the Board's attorney letter of November 11, 1991, is the only real notice that no action was being taken by the Board and, consequently, the 90 days clearly starts to run from this point. Petitioners contend that the September 4, 1991 letter from Superintendent Lake did not clearly advise the petitioners that expulsion proceedings would not be instituted against pupil A.S., only that nothing had been done to date. The November 11, 1991, letter, however, did clearly advise the petitioners that the Board did not contemplate instituting expulsion proceedings against A.S. Thus, petitioners argue, November 11, 1991, constitutes the "notice" which triggered the running of the 90 day rule.

Petitioners contend, therefore, that their Petition of Appeal was filed with the Commissioner on January 27, 1992, within the 90 day time constraint pursuant to *N.J.A.C.* 6:24-1.2 (c).

The Board's Rebuttal

The Board contends that Superintendent Lake's letter of September 4, 1991, was in response to a direct inquiry by Association President Alfano of August 28, 1991, concerning petitioner Markulin and pupil A.S. The September 4, 1991 letter constitutes the Board's notice of its action. The November 11, 1991 letter from the Board's attorney to the Association's attorney is merely an explanation of the reasons why the Board did not institute expulsion proceedings against pupil A.S.

DISCUSSION AND CONCLUSIONS

I

The Board seeks to dismiss the instant matter by way of summary decision, pursuant to *N.J.A.C.* 1:1-12.5. Petitioners oppose the Board's motion contending, among other things, that the instant matter is not ripe for summary decision.

The Administrative Rule, *N.J.A.C.* 1:1-12.5, concerning summary decision is substantially similar to New Jersey Court Rules, *R.* 4:46-1 *et. seq.* *R.* 4:46-2, which has

been subject to judicial interpretation and provides that upon motion duly filed, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

In *Judson v. Peoples Bank & Trust Company of Westfield,* 17 *N.J.* 67 (1954), the Supreme Court set forth the purpose of the Summary Judgment Rule and established the standards a court should follow in applying the rule. The Court emphasized that the movant has a very heavy burden to clearly establish that no genuine issue of material fact exist. Justice William J. Brennan, writing for the Court observed, among other things, that the role of the judge on a motion for summary disposition is first to determine whether there is a genuine issue of material fact, but not to decide the issue if he/she finds it to exist. *Judson* at 73.

Justice Brenner continues in *Judson* to observe that summary judgment procedure is designed to provide for the prompt, businesslike and inexpensive method of disposing of any cause which clearly shows no genuine issues of material fact requiring disposition at a trial, after a discriminating search of the merits of the pleadings, depositions and admissions on file, together with affidavit submitted. *Id.* at 74. The Court also held, among other things, that where the party opposing a motion for summary disposition offers only facts which are immaterial or of an insubstantial nature, the court may grant summary judgment, "...taking as true the statement of uncontradicted facts in papers relied upon by the moving party, such papers themselves not otherwise showing the existence of any issue of material fact." *Id.* at 75.

More recently, the Supreme Court noted that "excessive caution would undercut the purposes of a motion for summary judgment, which provides a means for piercing the allegations in the pleadings to determine whether there are issues requiring disposition at trial." *Pierce v. Ortho Pharmaceutical Corp.* 84 *N.J.* 58, 65 (1980)

Having carefully examined the whole record before me, I **CONCLUDE** there are no genuine issues of material fact extant in the instant matter.

Accordingly, I **CONCLUDE** that the herein matter, pursuant to the Board's motion, meets the *Judson* criteria for summary disposition.

II

The threshold issue is whether the Petition of Appeal is time barred by *N.J.A.C.* 6:24-1.2, which requires that such petition be filed with the Commissioner within 90 days of the challenged action of the Board.

The Appellate Division of Superior Court dealt with this issue most recently in the matter of *Maurice S. Kaprow v. Board of Education of Berkeley Township,* 255 *N.J Super.* 76 (App. Div. 1992), wherein Kaprow, a tenured Assistant Superintendent was terminated as the result of reduction in force (RIF) on June 30, 1981, pursuant to *N.J.S.A.* 18A:28-9. The Board did not advise Kaprow of any position for which he might qualify by virtue of his tenure status nor did it create a preferred eligibility list at the time of the RIF and as required by *N.J.S.A.* 18A:28-12. Subsequently, on September 9, 1986, the Board appointed a new Assistant Superintendent for Administrative Services. The Board did not advise Kaprow of such appointment. The new Assistant Superintendent remained in the position until July 1, 1987, at which time he was appointed Superintendent of Schools by the Board.

On February 23, 1988, Kaprow inquired of the Board as to whether any administrative appointments had been made subject to his RIF. On the same day, the Board's secretary advised Kaprow of the September 9, 1986 appointment.

On February 28, 1988, Kaprow replied to the Board's secretary's letter asserting his right to the position of Assistant Superintendent, among other positions. Kaprow received no response to his letter, consequently he wrote a second letter dated April 25, 1988, again asserting his claim to the position. Kaprow stated that he did not believe any purpose would be served in an adversarial proceeding and, therefore, requested the Board to respond by May 16, 1988.

The Board did not respond by May 16, 1988, however, its attorney addressed a letter to Kaprow dated June 14, 1988. replying to both the February 28 and April 25, 1988 letters.

Thereafter, Kaprow filed his verified petition before the Commissioner on August 1, 1988, asserting his claim to the position of Assistant Superintendent, among others.

With respect to the issue of the 90 day rule, the Appellate Division disagreed with Kaprow that the Board's attorney's letter of June 14, 1988, constituted the order, ruling or action taken by the local Board on his claim. The official action occurred on September 9, 1986, when it appointed the new Assistant Superintendent. However, because of the Board's unexplained failure to create a preferred eligibility list and its failure to notify Kaprow of the position opening, the Appellate Court sustained the State Board and held that the Board's secretary's letter of February 23, 1988, constituted the controversy to which Kaprow was obliged to file his Petition of Appeal within 90 days. Kaprow waited until August 1, 1988, more than five months after receipt of the February 23, 1988 letter from the Board's secretary. Thus, Kaprow's claims were time barred. See also *Paul Gordon v. Passaic Township Board of Education,* 1983 *S.L.D.* 1141, aff'd in part/rev'd in part, 1985 *S.L.D.* 1929 (State Board), aff'd App. Div. Dkt. A-3294-84T7 (May 27, 1986), *cert. den.* 105 *N.J.* 534 (1986); *Riely v. Hunterdon Central High Board of Education,* 173 *N.J. Super.* 109 (App. Div. 1980).

The instant matter is similar to the *Kaprow* case. Here, the Superintendent responded on September 4, 1991 to a specific request by Association President Alfano concerning petitioner Markulin and pupil A.S. Thus, petitioners had 90 days from September 4, 1991, in which to file their Petition of Appeal before the Commissioner. Ninety days from September 4, 1991 fell on December 3, 1991. The herein record demonstrates that the Petition of Appeal was filed on January 27, 1992.

I **CONCLUDE,** therefore, that the herein Petition of Appeal is time barred, pursuant to *N.J.A.C.* 6:24-1.2.

I **CONCLUDE** that it is not necessary to address the remaining issues raised by petitioners' Petition of Appeal.

I **CONCLUDE** that Summary Decision must be entered on behalf of the respondent Board.

ORDER

Accordingly, it is hereby **ORDERED** that **SUMMARY DECISION** be entered on behalf of the Board of Education of the Township of Neptune and that the herein Petition of Appeal be and is hereby **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

20 May 1992
Date

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

5/20/92
Date

Maurice K. Killer
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 26 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

OAL DKT. NO. 1425-92

ELIZABETH MARKULIN AND THE NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review of the record and the exceptions filed by petitioners, the Commissioner agrees with and adopts as his own the findings and conclusion of the Administrative Law Judge granting summary judgment to the Board for the reasons stated in the initial decision. Contrary to petitioners' exceptions, the Commissioner finds the ALJ appropriately applied Kaprow, supra, because the circumstances in the instant matter are similar to those in Kaprow not Polaha v. Buena Regional Sch. Dist. 212 N.J. Super. 628 (App. Div. 1986) wherein circumstances existed for relaxation of the 90-day filing requirement of N.J.A.C. 6:24-1.2(c).

Accordingly, the Peititon of Appeal herein is dismissed.

John Ellis
COMMISSIONER OF EDUCATION

JUNE 29, 1992

DATE OF MAILING - JUNE 29, 1992

146-92

IN THE MATTER OF THE TENURE	:	
HEARING OF CHRISTINE BRADY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF MORRIS,	:	DECISION
MORRIS COUNTY.	:	

SYNOPSIS

Board certified charges of unbecoming conduct against special education teacher due to her alleged offensive and irrational actions during incidents both in the classroom and at school-related events.

In light of testimony from students and supervisor and audio-tape of respondent's classroom, ALJ found respondent did engage in rude and ill-mannered conduct at in-service meeting and toward supervisor, did act emotionally and irrationally with students and as representative of school at fashion show event, and did engage in crude language with students. ALJ noted conduct unbecoming can be established by series of incidents or one incident. (Fulcomer) ALJ found respondent did have propensity to yell, to lose control and to participate in conversations of a sexual nature with students. Respondent was ordered dismissed from her tenured position.

Commissioner adopted the findings and determination in initial decision. Respondent was ordered dismissed as of the date of Commissioner's decision. Commissioner directed that matter be referred to State Board of Examiners for appropriate action.

JUNE 29, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT NO. EDU 8030-90
AGENCY DKT NO. 325-9/90

MORRIS SCHOOL DISTRICT
BOARD OF EDUCATION,
Petitioner,
v.
CHRISTINE BRADY,
Respondent.

Fredric J. Sirota, Esq., for petitioner (Wiley, Malehorn & Sorota, attorneys)

Sheldon H. Pincus, Esq., for respondent (Bucceri & Pincus, attorneys)

Record Closed: December 10, 1991 Decided: March 10, 1992

BEFORE **DANIEL B. McKeown,** ALJ:

At a meeting held on August 27, 1990 the Morris School District Board of Education (Board) certified charges to the Commissioner of Education under N.J.S.A. 18A:6-10 against Christine Brady (respondent), a teacher with a tenure status in its employ. Respondent filed an Answer to the charges with the Commissioner on September 20, 1990 after which the matter was transferred October 2, 1990 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. The case was then assigned to former administrative law judge Christopher Dietz who, during the pendency of the matter, was confirmed for appointment to the New Jersey Superior Court. Before his confirmation, Judge Deitz had scheduled, but then adjourned, several hearing dates. Upon Judge Dietz's final confirmation, the case was then assigned this judge to conduct a plenary hearing. A hearing was conducted on ten separate days between September 16 through October 25, 1991, after which the parties filed briefs in support of their respective positions. The record closed December 10, 1991. An extension of time within which to issue this initial decision was granted.

Findings are reached in this initial decision that the Board established by a preponderance of credible evidence respondent has engaged in a certain course of conduct upon which the conclusion is reached that that conduct justifies the extreme sanction of her dismissal as a teacher in the Board's employ.

CHARGES

The statement of charges certified by respondent by the Board as filed with it by her immediate supervisor, Gayle Conlin who holds the position of department chair for special education grades six through 12 at Morristown High School where respondent had been assigned, is attached hereto and incorporated herein as if set forth in full. Because of the length of the statement of charges, it is sufficient to note here that a thorough reading of the statement discloses seven instances of alleged conduct by respondent which, individually or collectively, the Board contends demonstrates respondent's unfitness to continue as a teacher in its employ. A brief overview of the background facts of the matter will be helpful prior to a consideration of the record proofs.

OVERVIEW

Respondent, who is and has been during all relevant times in possession of an instructional certificate with endorsements as a teacher of English and as a teacher of the handicapped, began her employment with the Board September 1, 1984 as a teacher of supplemental instruction. According to the record evidence, respondent's performance during 1984-85 and 1985-86 was, at the very least, satisfactory for her employment was renewed for 1985-86 and for 1986-87. Gayle Conlin began her initial employment with the Board September 1, 1986 as department chair of special education and, as such, became respondent's immediate supervisor. During 1986-87 respondent was assigned to a self-contained perceptually-impaired class from her prior assignment as supplemental teacher.

During 1986-87 supervisor Conlin formerly evaluated (R-7, R-1, R-2) the classroom performance of respondent on three separate occasions and, on each occasion, found her performance to be, at the very least, satisfactory if not more than satisfactory on each occasion. Conlin's annual, or summary, evaluation of respondent's performance for 1986-87 was, again at least satisfactory for she

recommended the continued employment of respondent into 1987-88. Respondent's continued employment into 1987- 88 resulted, of course, in respondent acquiring a tenure status under N.J.S.A. 18A:28-5. In addition to the positive evaluations of respondent's performance during 1986-87, supervisor Conlin also authored at least seven memoranda (R-9, R-10, R-11, R-12, R-13, R-14, R-15) throughout that year complimenting respondent on her lesson plans. Conlin also sent a memorandum (R-8) to high school administrators complimenting respondent on her cooperation and because respondent is a "pleasure to work with".

Despite the apparent foregoing praise of respondent's performance by Conlin during 1986-87, three of the eight instances now used as the bases of tenure charges were simultaneously occurring during the 1987 spring months. While the incidents will be addressed in more detail later, it suffices here merely to refer to those three incidents as (1) the N.C. incident, (2) the S.B. incident, and (3) the incident which was to have occurred during an in-service meeting on April 28, 1987 for which, it is noted, respondent received a written reprimand (R-41) the following day.

Respondent was reappointed by the Board for 1987-88 upon the recommendation of Conlin which recommendation was approved by high school vice- principal James Galbraith, the high school principal and superintendent before reaching the Board. Thus, respondent acquired tenure the first day she reported to work in September 1987. Conlin's formal evaluations (R-21, R-22) of respondent's teaching performance during 1987-88, and an evaluation (R-20) done by the high school principal, were at least satisfactory as was Conlin's annual or summary evaluation (R-23) of her performance. There are no incidents of conduct in which respondent engaged during 1987-88 which forms the bases of any complaint in the statement of charges.

The 1988-89 year, at least for purposes of this case, was a repeat of 1987-88. That is, supervisor Conlin found respondent's classroom performance to be at least satisfactory (R-24, R-25), and in the annual or summary evaluation (R-26) found respondent's performance to be at least satisfactory. Moreover, in a separate memorandum (R-27) to respondent, supervisor Conlin commended her on an "excellent statement of plans * * *". The statement of charges does not set forth any incidents in which respondent was to have been involved during 1988-89.

The 1989-90 academic year is the year in which certain conduct engaged in by respondent was found to be so offensive by Conlin that she filed the tenure charges

with the Board. The charges were filed despite statements in Conlin's formal evaluations (R- 28) on November 29, 1989 that respondent presented an "excellent class" and on March 1, 1990 (R-29) in which respondent's performance was at least found to be satisfactory by Conlin. The four incidents which occurred during 1989-90, which when coupled with the three incidents in 1986-87, total the seven incidents complained of in the statement of charges. The 1989-90 incidents may be regarded to as (1) the G.H. incident, (2) the police department matter, (3) the Project graduation matter, and (4) verbal exchanges between respondent and male pupils which were surreptitiously audio recorded by a female pupil who was in class attendance during May 1990.

This then presents an overview of the background in which the charges were certified against respondent. The proofs of the parties on each incident will now be presented, followed by a finding on each incident.

THE N.C. INCIDENT

Supervisor Conlin recalls that during March 1987 executive vice-principal Galbraith advised her that one of respondent's pupil, N.C., reported he and respondent were not getting along. Galbraith directed Conlin to follow-up on the matter. Upon her departure from Galbraith's office, Conlin happened to meet respondent in the corridor at the bottom of the senior stairs. According to Conlin five or six teachers and/or pupils were nearby when she told respondent of the so-called N.C. report and asked respondent to come to her, Conlin's, office. As both began walking towards Conlin's office, respondent's voice became loud and she began waving her arms while exclaiming in a loud, crying voice that she, Conlin, always takes the side of pupils against her. Respondent screamed at Conlin that N.C. had struck her or pushed her the day before. Eventually both reached Conlin's office where respondent explained that she likes N.C. but that N.C.'s conduct is the cause of any problem which exists between them. Conlin recalls that she and respondent did me with vice-principal Galbraith to discuss N.C.'s complaint and to discuss respondent's outburst near the senior stairs.

Respondent's recollection of the incident is that Conlin came to her classroom immediately upon the conclusion of the school day and stated that executive vice-principal Galbraith wanted to see her immediately. When she asked why, Conlin said she would explain on the way. On the way to the office, Conlin explained that

N.C. claimed she had hit him. Respondent recalls explaining to Conlin that N.C. had struck her two times in the chest after a fire drill; that she had assigned N.C. one week of detention for such conduct; that N.C.'s allegation she, respondent, had hit him was his effort to escape punishment for his own conduct; and, that N.C. was "manipulating" her and vice-principal Galbraith. Respondent says she was shocked at the allegations against her and stated her "dismay" to Conlin near the senior stairs in a voice, she says, which may have been elevated. Respondent acknowledges that students were nearby but that she did not want to appear in distress. Consequently, respondent says she does not believe she was screaming as Conlin says she was.

Respondent says that both she and Conlin went directly to the conference room of vice-principal Galbraith's office where N.C. was already present. According to respondent, vice-principal Galbraith repeated N.C.'s assertion that she had hit her to which respondent replied N.C. had hit her at the end of the school day. However, as respondent was testifying at hearing she now claims that N.C. had hit her two times on her arm, not her chest as she had earlier explained. Nevertheless, according to respondent, the vice-principal was satisfied with her explanation that she did not hit N.C. but both Conlin and the vice-principal had asked her to try to be friends with N.C.

Respondent denies screaming at either supervisor Conlin or vice-principal Galbraith and she claims that her earlier conduct at the senior stairs did not create any disturbance between and among the students and/or staff members who were present despite the fact she was "tearful".

FINDINGS

This charge is not at all concerned with whether N.C. struck respondent or respondent struck N.C., although it is recognized that respondent's claim N.C. struck her is presented as justification or mitigation of whatever conduct she did engage in during the conversation with Conlin near the senior stairs. This charge does concern respondent's asserted conduct of raising her voice, or yelling, or screaming at or to Conlin during their conversation regarding N.C. before having reached the office.

I am persuaded by the testimony of supervisor Conlin and respondent's own testimony that respondent did, in fact, raise her voice as she manifested her 'shock'

and 'dismay' at having been informed of N.C.'s claim. I further find that the level to which respondent raised her voice may be fairly characterized as 'screaming' and in a very emotional state. While respondent seems to justify this conduct on the basis that N.C. had struck her the day before and upon her belief, not proven true in this record, that Conlin takes the side of the pupils against respondent and that consequently she was emotionally upset , such justification is wholly rejected. Screaming at a supervisor who had merely related a complaint registered by a pupil is not the type of discourse expected of a mature adult. Such conduct is all the more offensive when it occurs in a school corridor with teachers and staff present.

It is recognized that a respondent asserts she generally speaks in a loud voice and that perhaps Conlin erroneously believed she was screaming or yelling when she was merely speaking loudly to this charge and other charges is rejected. At no time during the hearing did respondent speak in a manner that may be fairly characterized as yelling or screaming nor is there evidence that respondent normally speaks in a screaming, yelling manner as charged and as proven true here.

In summary I find the essence of paragraphs one and two to allege that respondent screamed in an emotional state at supervisor Conlin regarding the N.C. incident. I find that charge to be proven true by a preponderance of credible evidence. I further find that respondent's conduct of screaming at Conlin occurred in the presence of staff and students.

THE S.B. INCIDENT

Supervisor Conlin testified that one day during the 1987 spring semester near the end of the school day while she was in her office, she received a telephone call from respondent who was supposed to be teaching a class. Respondent was crying and, in Conlin's view, emotionally upset. Respondent began complaining to Conlin that student S.B. went the office to complain to the "man" regarding her, respondent. Respondent then said that she believed that the "man" to whom S.B. was going to complain was vice-principal Galbraith. Despite the fact respondent's class was still in session, Conlin did not know from which telephone or where the telephone was located from which respondent placed the call. Conlin specifically recalls that respondent was screaming on the phone regarding S.B. and the "man". Conlin recalls meeting later with respondent in the main office with vice- principal Galbraith and S.B. The matter was discussed between and among all. Respondent,

in Conlin's words, finally calmed down from the crying and screaming voice with which respondent began the meeting.

Respondent's recollection of the S.B. matter is substantially similar to that of supervisor Conlin's recollection and Conlin's testimony reported above. Respondent acknowledges telephoning Conlin on or about April 24, 1987 while her class was in session because, as respondent says, S.B. was acting out. Respondent tried to discipline S.B. but he left the classroom in order to report her to the "man". Respondent then telephoned Conlin from an office phone which, at the time, was the special education office located three steps, according to respondent, from her classroom. While respondent left her classroom, she testified that an aide, Peggy Stack, was in the classroom with her pupils.

Respondent acknowledges that when she telephoned Conlin she was annoyed, agitated, and that her voice was elevated. However, respondent absolutely denies yelling.

FINDINGS

Respondent's own testimony that she was annoyed, agitated, and her voice was elevated belies her denial that she was not yelling during this telephone conversation with supervisor Conlin. Moreover, to the extent the telephone from which the call was placed by respondent was located three steps from her classroom leads to the strong inference that more likely than not those in the classroom together with anyone who happened to walk by the office would have heard respondent's complaints regarding S.B. during the time she was yelling at Conlin.

I find the essence of the charges contained within the paragraphs three and four to be respondent left her classroom during the regular school day, though an aide was present, in order to use a telephone in an adjoining office to call supervisor Conlin and in a yelling manner complained to her of a student in her class. I find that the essence of this charge has been proven true by a preponderance of credible evidence.

IN SERVICE MEETING INCIDENT

On April 28, 1987 supervisor Conlin arranged for a Dr. Bergner, the sister of a teacher of special education at the high school, to speak at an in-service staff

meeting for the teachers of special education. All 14 teachers were in attendance at this staff meeting and were seated in a semi-circle facing Dr. Bergner. Respondent was in attendance as well. Supervisor Conlin complains that respondent was rude and ill-mannered during the presentation because she, respondent, turned her body to the side during the general presentation. She did not look at Dr. Bergner during the presentation though she otherwise engaged herself by completing an application for a summer job; she talked to others around her, she joked and laughed all the while Dr. Bergner was putting on her presentation. According to supervisor Conlin, all others in attendance were trying to pay attention to Dr. Bergner.

After the in-service meeting ended, Conlin says that Dr. Bergner and her sister who was the teacher of special education at the high school, Elaine Lewis, expressed embarrassment at the conduct of respondent. The following day supervisor Conlin issued respondent a memorandum (R-41) which may be fairly characterized as a reprimand for her conduct during the in-service meeting.

Respondent's recollection of the in-service meeting is as follows. At one time respondent and Elaine Lewis were friends. In fact, respondent lived with Ms. Lewis during 1986-87 for about three weeks while respondent searched for her own apartment. However, friction developed between the two when respondent lost her keys after she had moved out of Ms. Lewis' home. According to respondent, supervisor Conlin became aware of the friction when Ms. Lewis took over her classes one day. Ms. Lewis was to have circulated a petition to support another teacher for tenure acquisition in special education at or about the same time respondent was being considered for tenure.

When the in-service program occurred on April 28, 1987 respondent knew Dr. Bergner was Ms. Lewis' sister. During the meeting respondent says she was seated at a table with her back to the door while her side was to the speaker. Respondent says that about 18 people were present. She was at the table because she had to leave the meeting at 3:30 p.m. in order to go on home instruction for a pupil in the district. At or about the beginning of the meeting or during the meeting a colleague had told her of a summer job opening. Respondent explained that she then began draft writing a letter application and continued to do so a few minutes after Dr. Bergner had begun her presentation because she wanted to get the application in that day. At one point during the meeting, respondent says Dr. Bergner asked her the pointed question "Are you leading [this discussion] or am I?"

Respondent says she replied "Pardon me. I thought I was in a group discussion" Beyond that, however, respondent denies making faces, gestures, or laughing. Respondent acknowledges receiving the letter of reprimand accusing her of unprofessional conduct and she claims she wrote a two or three paragraph memorandum in response. However, a copy of such a document is not now available.

After Ms. Lewis and Dr. Bergner had subsequently complained to supervisor Conlin, and a meeting then occurred between Conlin and respondent, respondent says Conlin had asked her to telephone Ms. Lewis in order to patch up their differences. Respondent agreed and placed the telephone phone call to Ms. Lewis from Conlin's office telephone. However, Ms. Lewis rebuffed respondent's attempt at reconciling their differences. Consequently, respondent became agitated, embarrassed, and angry and told Conlin not ever to make her "do that again".

FINDINGS

The essence of the charge contained within paragraph five is that respondent conducted herself at the in-service meeting held April 28, 1987 in an unprofessional manner and that her conduct was rude and unacceptable. The finding is reached, based upon the testimony of respondent and of supervisor Conlin, that respondent engaged in activities more to her liking than being attentive at the in-service meeting arranged by supervisor Conlin, and that respondent adopted a course of conduct to manifest her displeasure at being obligated to attend a meeting being conducted by the sister of Elaine Lewis with whom respondent was not then getting along. The evidence shows that respondent engaged in writing a job application during the time Dr. Bergner was speaking; that she engaged in unilateral conversation in an attempt to encourage her colleagues to respond; that more likely than not she did "make faces" and engage in various conduct designed to let her irritation be known. I **CONCLUDE** that such conduct is rude and ill-mannered conduct and, as such, I further conclude that given the circumstances in which such conduct occurred, a professional staff meeting, respondent conducted herself in an unprofessional manner.

Despite the preceding three occurrences during respondent's third year of probationary employment during 1986-87, supervisor Conlin ultimately recommended respondent's continued employment for the 1987-88 year and, hence, tenure acquisition. Prior to that recommendation being acted upon by the

Board, but after Conlin had made it to vice-principal Galbraith and the high school principal, a meeting was held in Galbraith's office to discuss respondent's behavior. Mr. Galbraith recalls that he was concerned that respondent would from time-to-time demonstrate irrational conduct and she would become emotional. The meeting was attended by Conlin, Galbraith, respondent, James Ward who is a representative of the Morris County Teachers Association, and the high school principal. It is agreed by the parties and by those who appeared before me that the meeting was held for the purpose of discussing respondent's conduct within the context of rescinding the earlier recommendation to award tenure. The result of the meeting, and recollections differ as to how this result came about, was for respondent to attend a Board sponsored Employee Assistance Program carried out through Family Service of Morris County. (See, R-16 and R-34) Respondent did attend the Program though no record of treatment given, if any, is available.

The fact remains respondent was continued in her employment for 1987-88 and, hence, she did acquire tenure. As noted earlier, nothing untoward occurred during 1987-88 nor in 1988-89. 1989-90, however saw five earlier referenced incidents occur. The proofs of the parties regarding the five occurrences in 1989-90 shall now be addressed.

THE G.H. INCIDENT

The essence of the charge surrounding this incident is that one of respondent's pupils G.H., was accused by respondent of bringing weapons into class and while supervisor Conlin was to have made good faith efforts to catch G.H. with weapons she was unsuccessful in so doing. Nevertheless, the charge is that respondent's conduct between October through December 1989 regarding the G.H. incident was marked by screaming and yelling at Conlin as well as a high state of emotional and irrational behavior. (See paragraphs 9 through 22 of the Statement of Charges)

Supervisor Conlin testified that in or about October 1989 she received a telephone call from respondent requesting her to come to the classroom because G.H. had a knife in his position. Conlin went to respondent's classroom and found vice-principal Galbraith and school security personnel there. Respondent was there with her class. Respondent said that G.H. had had a knife in his possession, although she did not see the knife. Respondent believed it was a knife because G.H. had something in his pocket which he would not show her. In the meantime, G.H. went home. Respondent was upset and was loud though Conlin admits on this occasion

respondent was not as loud as she could have been. When G.H. reported to school the next day, Conlin summoned him to her office and directed him to empty his pockets. G.H. emptied his pockets though he had no knife in his possession. G.H. did tell Conlin that he had a "pen knife" on his person the previous day. Conlin admonished him not to bring any such instrument to school again.

Conlin requested the school psychologist, Margaret Meltzer, to evaluate G.H. to determine whether he presented a threat to himself or to others. Ms. Meltzer interviewed G.H. for approximately 30 minutes in an effort to determine whether he had negative feelings toward respondent. Ms. Meltzer concluded that G.H. had no negative feelings toward respondent nor did she consider him a threat to respondent. However, Ms. Meltzer acknowledged under oath that during the day of the interview G.H. did show her what she considered to be a key ring, or a Ninja-like T shaped instrument. Ms. Meltzer concluded that the Ninja-like T is what respondent thought was a weapon so she, Meltzer, asked G.H. not to bring that instrument to school again. Ms. Meltzer, despite the fact the horizontal portion of the T was approximately one inch in size, she considered it to be a toy because G.H. said he had a wall full of similar instruments at home (See R-49).

When supervisor Conlin learned of the conclusion reached by Ms. Meltzer, she told respondent of Meltzer's conclusion. Respondent, according to Conlin, became annoyed and upset and said that she, Conlin, did not care what happened to her; that Conlin was nonsupportive; that Conlin was going to allow her to be killed; that Conlin sounded like the police when her, respondent's, husband use to beat her; and that she, Conlin, would not do anything until someone was dead. According to Conlin, respondent did say that another teacher, Hilda Weitzman, had also seen G.H. in possession of a knife. Conlin, however, did not talk to Ms. Weitzman.

Thereafter, Supervisor Conlin met with the mother of G.H. to relate the concerns of respondent that G.H. was bringing 'weapons' to school. The mother advised Conlin that her son, G.H. had a room full of such items. After this conference, supervisor Conlin personally appeared at respondent's classroom in order to observe the interaction between respondent and G.H. According to Conlin, G.H. was standing at lectern when she entered the classroom presenting a paper of some type to the class. Respondent made several corrections as G.H. was making his presentation and, in Conlin's view, he was receptive to those corrections. He continued with his presentation through conclusion and when he took his seat he began making the corrections to his written work as recommended by respondent.

Conlin testified that she perceived both G.H. and respondent to be in harmony with each other and that G.H. was actively involved in the educational process because he was cooperative and respective to constructive criticism from respondent.

On November 17, 1989 supervisor Conlin wrote respondent an informal memorandum (P-8) advising that she believes G.H.'s behavior has improved between the time of the meeting with his mother and her, Conlin's, recent visit to her class. Conlin referred to the conduct of G.H. during her class visit as that of a well-behaved student who complied with classroom standards of behavior and living up to teacher expectation. Conlin did add that if reality painted a different picture, to please advise. It appears that respondent, having received Conlin's memorandum, wanted to meet with Conlin. Prior to that meeting, however, another special education teacher requested Vice-principal Galbraith to report to respondent's classroom to quiet her down because she was hysterical. Apparently a meeting then occurred among respondent, Galbraith and Conlin during which respondent became very upset and emotional, crying and screaming. Respondent stated that G.H. had said he was going to kill her although she did not recall when that threat was made and that no one was doing anything to help her meet that threat.

In the meantime Supervisor Conlin frequently checked to determine if G.H. was in possession of any knives or weapons and only on one occasion, early on in this incident, did she find the Ninja key ring on his person as was described above by the psychologist, Ms. Meltzer. Ultimately, G.H. was reassigned from respondent's classroom to another classroom to a teacher who had had him prior to his assignment to respondent. According to Conlin, the new teacher had no difficulty with G.H. being assigned to her classroom.

In or about December 1989 another pupil had told respondent that G.H. had a knife on his person. Respondent says she attempted to report this to supervisor Conlin but could not locate her. When Conlin checked G.H. she found nothing. When Conlin had advised respondent in early December 1989 that G.H. was to be reassigned from her classroom, respondent screamed at her "whose life are you putting in jeopardy now." This screaming occurred in or about the teacher's work office, with teachers present, which is located three steps away from Conlin's office. According to Conlin, respondent was hysterical, screaming, and crying.

Respondent testified that she was very "worried and scared" for her safety, the safety of other pupils, and the safety of G.H. because the weapons he was bringing

to school. Respondent says that on several occasions she overheard G.H. discuss his "Ninja" collection and the fact he was bringing weapons to school. Respondent says that on four separate occasions G.H. brought weapons into school and, despite a school policy (R-33) which calls for discipline to be imposed upon weapon-carrying pupils, neither supervisor Conlin nor any other administrator took any such action against G.H.

Respondent described the four in-school weapon possession incident by G.H. as follows. The first incident occurred in mid-October 1989 when a teaching colleague whispered to her as she entered her classroom to check what G.H. had in his pocket. Respondent asked G.H. what he had in his pocket and he said "nothing". Respondent said she asked "is it a weapon?", to which G.H. replied " "nothing". Respondent says she merely said to G.H. that he was forcing her to take him to the office. Respondent says her fellow teacher used her key to telephone the office, in response to which supervisor Conlin came to her classroom. Despite the absence of testimony from respondent that she actually saw what was in the pocket of G.H., she testified that she explained to Conlin that she and her teaching colleague "saw a black metallic object that he slipped in this pocket ***". Moreover, respondent testified, which testimony I find incredible, that she then said to supervisor Conlin "[l]et's not jump to conclusions. I really wasn't sure [of what the object is]".

The incident occurred toward October when G.H., according to respondent, was to have arrived in class with handcuffs and a metal pronged item with a key chain on the end of it. Ostensibly, in response to a demand from respondent, G.H. handed her the metal pronged item and refused to return it to G.H. According to respondent, G.H. then lifted up the desk and threw it across the room which was supposed to have been witnessed by another student. Thereafter, respondent was to have escorted G.H. to supervisor Conlin's office with the handcuffs and the metal pronged item where Conlin took possession of them.

The third incident occurred when, according to respondent, G.H. appeared at school with a "ninja star." A ninja star is described as a star shaped metal item with points in the shape of a star. Respondent says she asked G.H. why he continues to bring such items to high school in response to which G.H. was supposed to have said out of fear. According to respondent, G.H. was subject to daily emotional ups and downs with significant mood swings.

It was supposed to have been after these three incidents occurred that she met psychologist Meltzer in the hallway sometime before Thanksgiving. Respondent acknowledge having raised her voice to Ms. Meltzer, although she denies screaming, yelling, or being out of control.

The last, or fourth, incident regarding G.H. occurred in early December when another student, E.E., reported to her that the day before G.H. had displayed a knife to him. In response, respondent says she took all three of her students to the office to speak with supervisor Conlin who was not available. She then told her students to sit down and she then called vice-principal Galbraith on the phone and told him exactly what E.E. had told her regarding G.H. possession a knife the day before.

While respondent claims she wrote a report of the first incident and personally put a copy of the report of supervisor Conlin's desk as well as the desk of Vice-principal Galbraith's secretary, no copy of that report is available. Regarding G.H. possessing handcuffs and a ninja key ring, respondent says she took G.H. to supervisor Conlin's office where she, supervisor Conlin, and G.H. met. Supervisor Conlin, according to respondent, immediately telephoned G.H.'s mother and advised her of what G.H. was bring to school and that she, Conlin, wanted to have a conference with her.

Respondent denied at any time yelling or screaming or having raised her voice to a level which characterized as yelling or screaming to either supervisor Conlin or Vice-principal Galbraith regarding G.H. and his weapons. Respondent denies ever having manifested a state of being out of control regarding the entire incident, although she acknowledges having raised her voice, albeit in fear, during a meeting with Conlin and Galbraith when she expressed her concern regarding G.H. Respondent also acknowledges having "confronted" supervisor Conlin after E.E. had told her of G.H. having possessed a knife in school, of having "projected" her voice into supervisor Conlin's office; and, having raised her voice to supervisor Conlin because the two of them were debating the issue of danger presented by G.H.

FINDINGS

Having considered the evidence regarding the G.H. incident, I specifically find respondent's testimony to be incomplete, close to having been manufactured to meet the evidence of the Board, because the essence of this charge has to do with her controlling what may be loosely referred to as her temper. While

respondent claims she raised her voice, that she confronted supervisor Conlin, that she projected her voice into Conlin's office, or that she engaged Conlin in a debate, respondent's insistence that she never screamed, yelled, or lost control rings hollow. Particularly in light of the persuasive testimony of supervisor Conlin. There is no evidence to suggest supervisor Conlin has any reason whatsoever to misrepresent under oath what it is that she specifically and clearly recalls regarding respondent's conduct surrounding the G.H. incident. It must be remembered that this charge has to do with respondent's control of her emotions when handling a particular situation in school.

While media reports of pupils carrying weapons into our schools are becoming all to frequent, the fact is that until such time school authorities find a way to get the cooperation of society in general to control such conduct, teachers must use rational and nonemotional behavior in recognizing that a problem may exit in any given situation. Respondent surely could have handled this entire matter with G.H. in an entirely different manner other than screaming, yelling, and simply losing control when she was expressing her concerns to either Conlin or to Galbraith. No benefit is to be achieved by a teacher becoming highly emotional when a particular problem is confronting them regarding any pupil under their charge.

To the extent that this charge alleges, once again, that respondent screamed, yelled, and lost control of her emotions surrounding the entire G.H. incident, I find such charge to be true in fact by a preponderance of credible evidence.

THE POLICE INCIDENT

The essence of the tenure charge against respondent flowing from this incident in contained in the last sentence of paragraph 23 of the Statement of Charges which is reproduced here.

> This advice to her class as to this investigation, as well as her behavior in police custody, was inappropriate and unprofessional particularly under the circumstances from which it apparently evolved [being arrested for driving under the influence].

Supervisor Conlin testified that between 3:00 and 4:00 a.m. on April 5, 1990 she received a telephone call from the Morris Township Police who had respondent

in custody for driving under the influence and, subsequently, for refusal to submit to a breathalyzer test. The police advised Conlin that the superintendent of schools told them to call her in an effort to calm respondent down. Conlin heard respondent screaming in the background during this conversation with the police officer. The officer told Conlin that respondent needed a ride home because she refused their offer to take her home and that unless someone calmed respondent down not to expect her at school the next day. Apparently respondent did calm down because her son eventually went to the police station and took her home. The following day respondent did report to school.

The evidence in this record shows respondent did not refuse to take a breathalyzer test; rather, she did take the test while in custody and on two separate occasions her breathalyzer reading was .01. Both readings refute the charge of refusal to take a breathalyzer test and neither reading would not support a charge of driving while under the influence of alcohol. (See R-35, R-36) On April 10, 1990 respondent gave a statement (R-38) to the Morris County Prosecutor regarding her allegation that she was sexually assaulted on April 5, 1990. The fact is a suspect in the assault has been indicted for sexual assault upon respondent, and other females, and is to be tried on those charges.

Respondent testified that she gone out to a night club on April 5, 1990 when she met a man with whom she danced for awhile. When they left the dance floor, the man asked her if she wanted another drink and as she went to sit at the table the man went to the bar to order her drink. The next thing respondent knows is that she began to get dizzy, the man suggested he take her outside for some air, and she vaguely recalls being placed into a vehicle were she says she was sexually assaulted. When the Morris Township police officer pulled her over she was driving home from that incident. She was in a highly agitated state because what had occurred to her though no claims of sexual assault was made that evening. When the police officer was convinced she was driving under the influence of alcohol, she was taken to police headquarters where she was processed for the offense charged. Respondent acknowledges that the Morris Township police officer called supervisor Conlin and the police attempted to have her take the telephone to talk with Conlin she simply said "no" meaning that she did not want to talk to Conlin.

It is noted that the evidence in this record shows that the charges of refusing to take a breathalyzer test and driving under the influence were subsequently dismissed.

In regard to that portion of the charge regarding 'advice to her class', supervisor Conlin testified that pupils told her that respondent told them the police had put a tap on her home telephone because of crank calls she was receiving and that she, respondent, has caller identification. Respondent, to the contrary, testified that at no time did she mention to any of her pupils the fact that police had a tap on her home telephone or that she had caller identification. Respondent explains that the police did, in fact, have a tap on her telephone and that she does have caller identification due to numerous calls she received April though June 1990 from individuals who, when she answered the phone, would hang up on her.

Having considered the proofs in support of this charge, I find no evidence to suggest respondent's behavior while in police custody was inappropriate or unprofessional. The police officer who telephoned Conlin did not testify. Conlin's testimony she heard respondent yelling in the background does not by itself support such a finding. Furthermore, there is no competent evidence to support supervisor Conlin's charge that respondent made any mention to her class regarding "this investigation". Therefore, this charge must be and is **DISMISSED.**

PROJECT GRADUATION FASHION SHOW INCIDENT

This charge relates to respondent's asserted conduct at a local womens' clothing store which was providing clothes to worn by teacher volunteer models during a PTA sponsored fashion show to be held on school premises. The fashion show was one of several fund-raising events held in support of "Project Graduation", a drug and alcohol free graduation party held on school property for graduating seniors at the evening of Graduation Day.

Respondent volunteered to be a model for the fashion show. Joanne Ruffing, who is affiliated with the clothing store, coordinated the fashion show.

Respondent volunteered to be a model for the fashion show. She went to the clothing store to select whatever outfit she chose to wear for the show. Supervisor Conlin testified that when respondent did go to the store, the store keepers were unable to find clothes for her which fit her to her liking. According to Conlin, she was later told that respondent removed shoulder pads from clothing, through hangers about in the dressing room, and screamed profane things. Conlin asked both the store owner, Doris Crater, and the fashion show coordinator, Joanne Ruffing, to send her a letter regarding respondent's conduct. (See P-18, P-19)

Joanne Ruffing testified that it was she who scheduled respondent's appointment to appear at the clothing store at a particular 1990 spring evening at 7:30 p.m. Two other models were present along with Ms. Crater, the store owner, and another student from a local private school. According to Ms. Ruffing respondent appeared at the store and she was asked to look around to see if she was attracted to anything. As respondent was looking about the store, she began voicing complaints regarding the merchandise, referring to it as "cheap" and "teeny bopper". In Ms. Ruffing's view respondent was agitated and very angry. She refused to try on certain merchandise and when she finally agreed to at least try on some outfit, she went into the dressing room. Respondent was still very angry and while she was in the dressing room alone it sounded to Ms. Ruffing as if respondent was arguing with someone though no one else was in the dressing room with her. Ms. Ruffing did hear respondent slamming hangers about the dressing room when respondent emerged from the dressing room, Ms. Ruffing testified she was still agitated and angry though Ms. Ruffing had no idea why. Eventually, respondent exclaimed that she did not want to be in the fashion show any longer because she could make $200 a night. With that, Ms. Ruffing testified that respondent exited the store and slammed the front door so hard she thought the plate glass windows were going to break. When Ms. Ruffing went into the dressing room after respondent's exit, she found hangers strewn about on the floor, one hanger was broken, and shoulder pads were seeming ripped from the new merchandise being tried on by respondent.

Respondent's recollection of this incident is to the contrary from that reported above. That is, respondent testified that when she was asked to look around for outfits that attracted her she did do so. In the meantime, respondent said that Ms. Ruffing was busy with someone else in the dressing room. Respondent says that she then selected four outfits only to be told by Ms. Ruffing that she cannot use any one of those four because other models had already selected them. Ms. Ruffing then selected an outfit and respondent went into the dressing room, tried it on and discovered she was not satisfied with its fit. According to respondent, the outfit contained a mini skirt which she refused to wear and the jacket "exposed her person." Respondent continued to look around, found a black silk jumpsuit, tried it on and, having looked at herself in a three way mirror in the front of the store, declared she did not like the fit of this outfit either. Respondent says she told Ms. Crater and Ms. Ruffing that she does not need a fashion consultant to tell her if she does not look good in something. Ms. Ruffing, according to respondent, then told her the store would be closing. Respondent went back to the dressing room and

changed into her own clothes. Respondent says she not only placed the black silk jumpsuit on a hanger but she also brought the suit out of the dressing room with her. Respondent denies removing shoulder pads from any garment, she denies throwing hangers about the dressing room, she does not believe she raised her voice to either Ms. Crater or Ms. Ruffing, and the only other thing she said was that in her view the clothes at the store were geared to younger people. Respondent explained that she did say she would not return to the store because she had an evening job teaching the Scholastic Aptitude Test review course and that by not going to class that evening she lost about $200. Respondent denies having slammed the front door on her exit from the store, although she did hear the rattling of glass which she attributes to her catching one of her heels on the step outside the door. Finally, respondent says that at no time from that evening until the time charges were filed against her did supervisor Conlin call to her attention any concern regarding her conduct in that store that evening.

FINDINGS

There is no doubt in my mind that the evidence here supports the charge that respondent removed shoulder pads from clothing, threw hangers about in her dressing room, screamed, raised her voice, uttered comments about merchandise that in the ordinary normal discourse one would not expect to hear in a retail clothing store, and in other ways conducted herself in an obnoxious manner. Ms. Ruffing had no reason to fabricate her testimony while respondent has every reason in the world to fabricate her testimony regarding the incident at this clothing store. Respondent's recollection of this incident, I am convinced, has been tempered by her own self interest in preserving her employment with the Board. Thus, I find the evidence sufficient to establish that respondent's conduct this particular 1990 spring evening at the women's clothing store was as charged.

RESPONDENT'S CONDUCT IN A CLASSROOM AS REVEALED BY AN AUDIO -TAPE RECORDING

Paragraphs 25 through 27, except the last paragraph of the Statement of Charges, essentially allege that despite having been forewarned of the use of sexually explicit and gutter-type language by male pupils in her class, respondent tolerated the use of such language and, moreover, used such language in a particular class during May 1990 as revealed in an audio-tape recording (P-25) surreptitiously made by a female pupil.

According to supervisor Conlin's testimony, the background to this charge is as follows. On or about May 17, 1990 Conlin received a telephone call from Ms. A., the mother of L. A. who was in respondent's resource room English class. This class, it is noted, had four pupils in it, three boys and L.A.. In anticipation of the requested conference with Ms. A., Conlin informally met with respondent for about 30 minutes prior to the meeting to inquire whether anything occurred in class that, she, Conlin should know about for the meeting.

While paragraphs 25 though 27 suggest that some relationship exists between respondent's classroom conducted as revealed by the audio-tape and a meeting during February 1990 regarding respondent having made derogatory comments to the son of Mrs. W., there is no evidence whatsoever in this record to support that assertion. Moreover, there is no legally competent evidence to establish that respondent was hysterical on March 21, 1990 when the same Mrs. W. appeared at a parent-teacher conference during the evening to have a meeting with respondent. While it is true supervisor Conlin attended the conference between Mrs. W. and respondent that evening, her testimony is that the conference went smoothly and respondent was calm and that nothing untoward happened. To the extent the Board views the conference with Ms. W. as a separate charge, this charge is dismissed.

However, the proofs do reveal that Ms. A. telephoned supervisor Conlin for a conference May 17, 1990 because of her real concerns with what was happening in her daughter's English class, which contained four pupils. Ms. A. had advised Conlin that her daughter, L.A. had taped an actual class being conducted by respondent. After listening to that audio-tape, Ms. A. concluded that the students were out of control. Respondent was in attendance at this meeting.

The following day, Ms. A. called and told supervisor Conlin that she was concerned with the entire class, not just the boys, and she wanted a second meeting because things were said on the tape by the teacher which she found very offensive. However, Ms. A. would not bring the audio-tape with her, although she did bring her notes of what she heard on the tape for Ms. Conlin's review. The following day, Ms. A. contacted vice-principal Galbraith. A meeting between and among Ms. A., Conlin, and the vice-principal was held. Finally, Ms. A. released the audio-tape to supervisor Conlin for her review. L.A. made the tape in reaction to respondent's persistent advice to the boys in the classroom that they would be shocked if they

heard themselves on tape. L.A. decided to put a tape recorder in her book bag which she placed on the floor behind her desk in order to tape record exactly what occurred in the class. A transcript of both sides of the audio-tape, as is discernible to this judge is attached as Exhibit B and incorporated herein as if set forth in full.

Suffice it to say here that male pupils can clearly be heard discussing in class, while respondent was in charge, "hot looking chicks", "naked women", crude references to a female vagina and a male penis, while respondent, whose voice is clearly identifiable on the tape, asked the boys if the women in the picture at which they were looking were naked. In apparent response to the question whether respondent wanted to look at the naked women, replied "Why do I want to look at naked * * * naked men I might be interested in or seeing, you know * * *"

Elsewhere, the audio tape reveals the tolerance respondent had for the male pupils to discuss their sexual fantasies with females as well tolerating the boys suggesting that respondent was involved with a married man. As respondent introduced the lesson for the day, the long short story, the tape discloses that the boys particularly had full run of the classroom in the sense that they continuously focused on matters dealing with their sexual interest. At one point, the audiotape discloses that respondent, having been challenged by one of the boys that she "couldn't get anything from nobody that night at the prom", explained that she did go out after the prom and did not get home until 3:00 a.m. and that she had gone out on a date "last night" with a man she had just met several nights earlier and that she was going out with another man Thursday night that week. Finally, the tape reveals respondent did make the following comments to one of the two boys who were then present in the classroom:

> You are, do you realize that you are literally led around by your sexual organ, [Mr. W.], that you don't have the mental growth to be able to keep your brain on anything other than your dick? Does it ever occur to you that something is really the matter with you?

Finally, the tape discloses that respondent had been urging one of the boys, A.V. ,to remove a hat he had been wearing in the classroom. A.V. resisted attempts by the respondent to remove his hat, saying such things as it his "thinking cap". A.V. is of Cuban heritage because his father was born in Cuba. Respondent finally made the following comment directly to A.V.

> You are not comprehending, does it have to be Spanish? Would you take that hat off or I'll have you down in ESL [English as a Second Language] where they'll speak to you in any language they you can comprehend, which at this point may be Martian.

A.V. appeared at hearing and testified under oath. He was graduated from Morristown High School during June 1991 and during his junior year 1989-90, respondent was his teacher. A.V. recalls that respondent would from time-to-time discuss in class a male teaching colleague whom respondent claimed was good looking, that she could make him very happy, despite the fact that person was already married. While he cannot recall respondent ever using "cuss words" in class, he does recall her making the claim that she could snap her fingers and have any man that she wanted.

A.V. acknowledges that he and D.W., the other male pupil in the class at the time it was tape recorded, always talk of sexual matters as is revealed on this particular tape. He recalls that respondent would kind of smile or laugh but would take no action to stop their conversation. While A.V. believed that this tape recording was made by L.A. at the beginning or the middle of the school year around Christmas time, there is no reason for me to dispute L.A.'s testimony or the testimony of Mrs. A., or for that matter supervisor Conlin, that the tape was made sometime in May 1990.

L.A., who made the tape recording, told respondent after class of the tape recording. According to L.A. respondent asked her to destroy it because she would get into trouble. The following day, after L.A. had played the tape for her mother, she told respondent who asked her again to destroy the tape. In L.A.'s view, respondent was very nervous regarding the existence of the tape. With respect to the language recited above, attributed to respondent regarding 'thinking only with their sexual organ', L.A. testified that this was the only occasion she heard respondent use such language and she otherwise thought respondent was a "good teacher".

Respondent testified that both male pupils, A.V. and D.W., did talk consistently about sex before this audiotape was made. However, respondent denies ever

having talked in the manner captured on the tape on any prior occasion. She specifically denies telling L.A. to destroy the tape and claims L.A. is lying.

In regard to sexual talk by D.W. and A.V., respondent claims to have reported her concern over the total attention on sexual matters to the school social worker and to the learning disability teacher consultant. Furthermore, respondent says that she privately talked to the boys in the corridor and told them to stop such talk. Prior to L.A. taping the class, respondent claims that she herself tried to tape the class so that the boys could hear how terrible they sounded.

In mitigation of the language respondent is heard to use on this tape, she claims she was under great stress because of the asserted sexual assault upon her person and the fact that her mother died December 29, 1989.

FINDINGS

I specifically reject respondent's claims of mitigation that she was under great stress because of the sexual assault and the fact that her mother had died during December 1989. There is no corroborating evidence whatsoever from respondent, or from the record as a whole, that respondent was under any greater stress than any public school teacher is, or any other citizen is, in dealing with daily life. When one considers the testimony of A.V., which I find believable, that respondent would from time-to-time discuss her relationships with men and discuss specifically men she finds attractive, I find it difficult to accept respondent's position that two boys were continuously talking about sex in her classroom and that despite her good efforts she could not prevent it. To the contrary, I find that because respondent tolerated such conversation in her classroom the boys continued with it. Furthermore, it is of little importance that respondent may not have used the slang term used here for the male sexual organ on any prior occasion. Rather, by the mere fact respondent allowed boys to use sexual innuendoes as well as gross sex terms, as are liberally sprinkled through the transcript of this tape recording, leads me to believe that anyone who may have been assigned to respondent's resource room English class who did no appreciate such language would in fact be subjected to it without control by respondent. L.A. herself is subjected to crude remarks by these two boys and yet respondent, as the teacher, took no action whatever to stop it. Reference to A.V.'s heritage is simply not justified. A.V., hopefully, will have learned that his crude, rude, and offensive language is not acceptable.

I find that a preponderance of credible evidence shows respondent did, in fact, acquiesce to the use of derogatory comments by students about students and acquiesced to extraordinary gutter and sexually explicit language, as well as actively participating in such conversations with those students. That it is to say, I specifically find respondent discussed her personal life, dates, her ability to get "anything" she wants by snapping her fingers, and making highly inappropriate comments to students regarding sexual organs, as well as tolerating sexually-laden 'gutter-talk' in her classroom.

Prior to presenting a summary of findings, mention must be made of the classroom observations and evaluations of respondent's performance prepared by supervisor Conlin in the absence of comment therein on any of the incidents from which these tenure charges have emerged.

Supervisor Conlin explained that when she began with the Board in July 1986, she was instructed by her superiors only to record in observations that which she actually observed in the classroom setting and to prepare the evaluations only upon that basis. Consequently, supervisor Conlin made no mention of any of these incidents in any observation or evaluation because she did not observe such conduct while in a formal observation setting. Vice-principal Galbraith, respondent's direct supervisor, received copies of all observations and evaluations of teaching staff members as prepared by Conlin and, because he was involved in several of these incidents, was equally as aware of that standard under which Conlin observed and evaluated respondent because no mention was made by him to Conlin regarding the absence of comment of incidents with which he had personal knowledge. While vice-principal Galbraith now takes the position that he would not have recommended respondent receive tenure, and was only persuaded by the positive recommendation received by supervisor Conlin, the fact is at the time he had the choice of whether to recommend to his supervisor, the high school principal, respondent receive tenure. That he did recommend respondent receive tenure suggests that supervisor Conlin was fulfilling her task of observation and evaluation of teaching staff members in a manner expected of her.

The absence of comment in evaluations of respondent's performance regarding the incidents now forming the tenure charges does not render the tenure charges invalid. There is no suggestion by respondent that she was prejudice in any manner because the incidents were not mentioned in her formal evaluations. It is recognized that most, if not all, evaluations of her performance are positive as was recited earlier in this decision.

SUMMARY OF FINDINGS

In sum, I find that respondent screamed, yelled, and became emotional as charged in the N.C. incident, the S.B. incident, and that respondent engaged in rude and ill-mannered conduct at an in service meeting conducted April 28, 1987. Furthermore, I **FIND** respondent engaged in screaming, yelling, emotional, and irrational behavior regarding the G.H. incident and the Project Graduation fashion show incident. In regard to the latter incident I **FURTHER FIND** respondent conducted herself in an obnoxious manner by removing shoulder pads from clothing, throwing hangers about a dressing room, screaming, raised her voice, and conducted herself in a generally obnoxious manner while representing the Morristown Public Schools. I **FIND** respondent did engage in highly inappropriate conduct by acquiescing to the use of derogatory comments by students and about students during a regularly scheduled class and she acquiesced to the pupils' use of extraordinary gutter, sexually explicit language, and that she participated in such language with male pupils. Finally, I **FIND** that respondent in an inappropriate manner discussed her personal life, evening hours, her ability to get "anything" she wants by snapping her fingers, and that she used highly inappropriate references to the male sexual organ in class.

ANALYSIS

The issue, obviously, to be resolved is whether respondent's conduct as proven true by a preponderance of credible evidence constitutes conduct unbecoming a teacher or other just cause for which some discipline must be imposed. As noted by the Board, the Commissioner had this to say regarding the standard against which a teacher's conduct is to be measured when, in In the Matter of Tenure Hearing of Jacque L. Sammons, 1972 S.L.D., 302, 321, he said

> [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 his trust will result in the maximum educational growth and development for 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.

There is no doubt, as pointed out by respondent, that charges against an individual may not be examined in a vacuum; rather, the charges must take into account relevant events leading up to the allegations made against an employee which may help to explain the situation. This is so for a teacher, who has acquired a tenure status, is to be protected in employment when subjected to unfair and improper charges or when they are unable to perform efficiently because of conditions not of their own making or beyond their control. Within that context, it is also acknowledged that conduct unbecoming or other just cause for imposing some discipline upon a tenure employee may be established either through a series of incidents or the occurrence of one incident, if sufficiently serious and flagrant. In re Fulcomer, 93 N.J. Super 404, 421- 42 (App. Div. 1967). That some of these incidents occurred away from school grounds or outside the view of pupils does not render such charges meaningless. In In the Matter of the Tenure Hearing of Robert H. Beam, 1973 S.L.D. 157, the Commissioner said

> The teaching profession is chosen by individuals who must comport themselves as models for young minds to emulate. This heavy responsibility does not begin at 8:00 a.m. and conclude at 4:00 p.m., Monday through Friday, only when school is in session. Being a teacher requires, inter alia, a consistently intense dedication to civility and respect for people as human beings ***

Against this backdrop, the issue becomes clear whether respondent's proven conduct constitutes conduct unbecoming or other just cause for which some discipline should be imposed. Initially, recall that the three incidents in 1986-87 essentially address respondent's propensity to yell, scream, engage in irrational behavior, and to lose self-control when presented what may reasonably be called routine situations occurring in any high school throughout the state. Surely there was no need for respondent to scream in a very emotional state at supervisor Conlin near the senior stairs with other teachers and pupils present regarding the N.C. incident. Such conduct is not the conduct pupils should be encouraged to emulate. The S.B. incident also essentially addresses respondent's loss of self-control, and,

more critically, the fact that the loss of self-control by yelling at supervisor Conlin occurred within earshot of her classroom. The in-service meeting incident in April 1987 in which respondent engaged in rude and ill-mannered conduct during a professional staff meeting is symptomatic of respondent's inability to control her emotion when something does not go her way or when respondent is in a situation which she does not particularly enjoy.

Note that these preceding three incidents occurred well before respondent's mother died during December 1989 and well before respondent's asserted sexual assault in April 1990. Obviously, the conduct proven true after her mother's death and after the asserted sexual assault was very similar to the conduct in which respondent engaged during 1986-87. It is recognized that there is an absence of evidence surrounding similar conduct engaged in by respondent during the intervening years of 1987-88 and 1988-89. Nevertheless, the bridge between 1986-87 and 1989-90 in which respondent engaged in such conduct is a relatively short period of time particularly in light of the fact respondent has but five years teaching experience in this district.

As noted earlier, recent media reports regarding pupils carrying weapons into schools are becoming more and more prevalent. In fact, there have been recent reports of pupils doing harm, including homicide, against other pupils with weapons brought into the schoolhouse. However, the incident of G.H. bringing weapons into the school is not the real issue presented in this charge. Rather, the Board urges that respondent's proven conduct of yelling, screaming, loss of control, and irrational behavior is again showing to be characteristic so ingrained within respondent that she has lost her effectiveness as a teacher. Respondent justifies her proven conduct by arguing that she was put in mortal danger for her physical wellbeing and whatever conduct she engaged in was solely as the result of that fear. Respondent's expressed fear of being put in mortal danger and that that fear prompted her to confront Conlin, to project her voice into Conlin's office, to elevate her voice a little bit, to debate Conlin, are rejected as defenses to the fact she did yell, scream, lose control, and acted irrationally in her reaction to this entire incident. There is no competent evidence to suggest any reasonable basis upon which respondent feared G.H. or that G.H. was attempting to harass her in any sense. Recall that this entire matter began when a teaching colleague whispered to respondent to check what was in G.H.'s pocket and from that point forward respondent's emotion overtook her good sense.

The Project Graduation matter is a situation in which respondent behaved in a highly offensive manner and she was doing do while being a representative of the Morristown school district. It cannot be said under any argument that that kind of conduct is expected or to be tolerated by a mature, well educated, intelligent teacher who is entrusted to mold the minds of our youth so that we all may continue to live a civilized society.

Finally, the matter of respondent's tolerance for and participation in dialogue as was audio-recorded by L.A. Respondent's explanation that that was an aberration of true character or that she was under great stress because of the death of her mother and/or the asserted sexual assault is not at all persuasive. Recall that this dialogue occurred in a resource room English class with three pupils present, two boys and one female. The fact that such dialogue occurred in a resource room shows that these three pupils were in need of special education. For a teacher to tolerate clearly made comments from pupils, male or female, regarding 'hot looking chicks', 'naked women', crude references to a vagina or a penis, an acknowledgement that she might be interested in seeing naked men, tolerating a suggestion by a pupil in hearing of the entire class that she may be involved with a married man, that respondent was willing to respond to a pupil who commented she 'couldn't get anything from nobody', or that a pupil is being led around by his sexual organ, or sarcastically asking a pupil if he would understand if she spoke in Spanish, suggests that this occurrence is not the first occurrence of similar nature with respondent. Such conduct is outrageous, abhorrent, and clearly conduct unbecoming a teacher under law.

In short, the conduct proven true against respondent Christine Brady, ranging from the N.C. incident to the latest incident regarding her acquiescence to and participation in a conversation with pupils with significant gross sexual comments and overtones, constitutes inexcusable conduct unbecoming a teacher and other just cause to impose some discipline.

DISCIPLINE

It was noted earlier that conduct unbecoming can be established either through a series of incidents to the occurrence of one incident, if sufficiently serious and flagrant. Fulcomer, Supra. In this case, if the incidents regarding screaming and yelling and loss of control were the only instances of unbecoming conduct in which respondent engaged, a discipline short of termination of employment would more

likely than not be imposed. However, when one considers those instances from 1986-87 and including those in 1989-89, in the context of the gross sexual dialogue in which she participated during May 1990, such conduct taken as a whole, the screaming, yelling loss of control, and irrational behavior coupled with the dialogue, constitutes such outrageous behavior that termination of employment must be imposed. It cannot be said on this record that respondent's behavior is an aberration, nor can it be said that more likely than not such conduct would not be repeated in the future. Respondent's testimony has already been declared to be incomplete and manufactured which reveals to this judge her refusal to accept responsibility for the conduct complained of herein.

Therefore, in consideration of the seriousness of the conduct proven true against Christine Brady it is **ORDERED** that respondent Christine Brady forfeit her tenure employment as a teacher in the employ of the Morris School District Board of Education. It is so **ORDERED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 10, 1992
Date

Daniel B. McKeown
DANIEL B. McKEOWN, ALJ

Receipt Acknowledged:

3/12/92
Date

Maureen P. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 17 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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LIST OF EVIDENCE

P-1	Identification only
P-2	Memorandum, May 11, 1987
P-3	Memorandum, May 11, 1987
P-4 through 7	Identification only
P-8	Memorandum
P-9 through P-24	Identification only
P-25	Audio Tape
P-26	Identification only
P-27	Letter July 31, 1990
P-28	Interrogatories
P-29	Answer to Interrogatories
P-30	More specific answers to interrogatories
R-1	Observation, January 9, 1987
R-2	Observation, February 27, 1987
R-3	Evaluation, March 11, 1987
R-4	Identification only
R-5	Evaluation. March 25, 1985
R-6	Evaluation, undated
R-7	Observation, September 30, 1986
R-8	Memorandum, September 22, 1986
R-9	Memorandum, September 29, 1986
R-10	Memorandum, November 2, 1986
R-11	Memorandum, December 1, 1986
R-12	Memorandum, February 6, 1987
R-13	Memorandum, March 1
R-14	Memorandum, June 6, 1987

R-15	Memorandum, June 18
R-16	Employee Assistance Program Policy
R-17	Schedule
R-18	Schedule
R-19	Tentative Teaching Schedule
R-20	Observation, October 30, 1987
R-21	Observation, January 29, 1988
R-22	Observation, March 30, 1988
R-23	Evaluation, March 30, 1988
R-24	Observation, November 3, 1988
R-25	Observation, March 27, 1989
R-26	Evaluation, March 29, 1989
R-27	Memorandum, May 31, 1988
R-28	Observation, November 29, 1989
R-29	Observation, March 1, 1990
R-30	Memorandum, February 25, 1990
R-31	Identification only
R-32	Memorandum, April 27, 1990
R-33	Student Handbook
R-34	Letter, June 5, 1987
R-35	Lease report
R-36	Copy of citations
R-37	Identification only
R-38	Recorded voluntary statement of respondent
R-39	Detention Assignment
R-40	Pupil Progress Report
R-41	Memorandum, April 29, 1987
R-42 through R-48	Identification only
R-49	Photographs

EXHIBIT A
STATEMENT OF CHARGES

Gayle M. Conlin, Department Chairperson for Grades 6-12 within the Special Education Department for Morristown High School and Frelinghuysen Middle School, makes written Tenure Charges against Christine Brady, a teacher primarily assigned during the 1989-90 school year as a Teacher of the Handicapped at Morristown High School, and recommends dismissal of said teacher for reasons including incapacity, unbecoming conduct and other just cause and as otherwise provided in accordance with N.J.S.A. 18A:6-10 et seq.

1. On or about March 10, 1987, the undersigned was advised by N.C., a student in Ms. Brady's class, that she was unable to get along with the teacher although she was trying very hard. The undersigned stopped Ms. Brady at the senior stairs of Morristown High School and requested a meeting with Ms. Brady and N.C. to address these concerns. Ms. Brady immediately responded by screaming extremely loudly and generally creating a significant disturbance in the school hallway in the presence of students and staff.

2. On or about March 11, 1987, the undersigned met with Ms. Brady, in her office, to discuss the unprofessional behavior exhibited by Ms. Brady the previous day. Ms. Brady again began screaming and crying in an uncontrollable fashion at the undersigned. She refused to calm down when requested and generally disturbed numerous guidance counselors, secretaries and students in the surrounding guidance department.

3. On or about April 24, 1987, the undersigned received a telephone call during the school day from Ms. Brady. Ms. Brady had abandoned her class, gone to a nearby telephone and called the undersigned. She was also uncontrolled and yelling that a particular student, S.B. had told her that he was going to report her to "the man", and apparent reference to Mr. Galbraith. This occurred between 1:06 p.m. and 2:15 p.m.

4. On or about April 24, 1987, the undersigned met with Ms. Brady in her office to discuss the problem of her responding to student behavioral problems. Ms. Brady became hysterical, and began screaming uncontrollably at the undersigned. Although the door was closed, the undersigned was advised that others had heard what she said.

5. During the 1986-87 school year, Ms. Brady had been involved with a dispute with another teacher, Ms. Elaine Lewis. Ms. Brady had been cautioned on a number of occasions that her vociferousness with respect to this dispute was unprofessional. Notwithstanding the foregoing, on or about April 28, 1987, during a department meeting attended by approximately fifteen (15) teachers for purposes of being addressed by an expert in the teaching of the handicapped, Dr. Babbett Bergner, Ms. Brady was rude, unprofessional and conducted herself in a manner unacceptable. All the participants in the meeting were in a circle and Ms. Brady continually turned away from the speaker, speaking out loud to various persons about subjects irrelevant to the meeting. The foregoing was apparently related to the fact that Dr. Bergner was the sister of Mr. Lewis. Once again Ms. Brady was advised that her behavior was unprofessional and unacceptable.

6. On or about May 11, 1987, the undersigned met with Ms. Brady together with Mr. Galbraith, the Executive Vice-Principal of Morristown High School. Ms. Brady was advised that this conduct was unprofessional, unbecoming a teacher and unacceptable.

7. On or about May of 1987, a meeting was conducted attended by Mr. Telesco, then director of the handicapped program in the Morris School District, presently Assistant Superintendent of Schools, the undersigned, Ms. Brady and Ms. James Ward, an officer of the teacher's union, T.E.A.M. and Mr. Galbraith, Vice-Principal at the high school. Ms. Brady was advised that her behavior and activity was unbecoming conduct and unprofessional and would not be countenanced. She was advised and she agreed to take advantage of the employee assistance program.

8. On or about May of 1987, the undersigned in a meeting with Mr. Galbraith, assigned Ms. Brady classes with a less difficult or aggressive group of students which was the case particularly for the 1989-90 school year during which time Ms.Brady appeared to the undersigned to show the requisite capacity and not to show conduct unbecoming a teacher. Ms Brady continued to be assigned classes with the less difficult group of students for the 1989-90 school year.

9. On or about the end of October 1989, Ms. Brady contacted the main office to indicate that a student in her 9th period class had a

weapon. Ms. Brady stated that although she did not see a weapon the student had something in his pocket which he refused to show her. Mr. Galbraith, a security guard and the undersigned immediately went to Ms. Brady's classroom to find that the student had left. All security was advised to "be on the look-out for G.H. and to bring him to the main office when found." Mr. Galbraith and the undersigned checked the grounds outside during the search. The student had gone home.

10. On or about October 1989, school psychologist Meg Meltzer, at the request of the undersigned, interviewed G.H. to assess the problem described by Ms. Brady. Ms. Meltzer did not feel that the student poses any threat to the teacher or the other students in the class. She found him cooperative and pleasant.

11. On or about November 1, 1989, the undersigned met with G.H.'s mother, Mrs. S. to address concerns raised by Ms. Brady. G.H. was interviewed by the undersigned, exhibited no knowledge or no appearance of knowledge as to any dislike for Ms. Brady. The undersigned did ask whether he had anything in his pocket and without any reluctance he pulled all the contents of his pockets out. There was so-called "Ninja key ring" which Ms. Brady viewed as a weapon; although clearly the student did not see it as such. He was advised by the undersigned that it was inappropriate that this be brought to school, and was told to keep it at home. He was subsequently searched a number of times by the undersigned and nothing was found.

12. On or about October 1989, Ms. Meltzer was met by Ms. Brady in the hallways of Morristown High School. Ms. Brady was extremely agitated and was behaving in a manner unprofessional and unbecoming a teacher. She expressed her concern that no one in the school was going to do anything about G.H. until she was dead. Upon request of the undersigned, Ms. Meltzer, the school psychologist, observed the class on or about November 1989 and observed no problem in the interaction or behavior of G.H. in this very small class. The class was a resource room class containing only two students working on their papers with no interaction with the teacher at all.

13. On or about November 16, 1989, the undersigned observed G.H. in Ms. Brady's class. Three students were present in the class. G.H. was observed at the front of the room reading his journal entry aloud to the

class. The student corrected his work when advised by the teacher, took his seat when requested, and independently began seat work.

14. On or about November 17, 1989, the undersigned directed to Ms. Brady a memo wherein she confirmed the apparent lack of substantial problem with G.H. after the activities that had been carried out including the parent conference with Mrs. S., the mother, to resolve any perceived problem.

15. On or about November 21, 1989, Ms. Brady requested a conference with the undersigned during Period 7. During the undersigned's fifth period observation of another teacher, Special Education teacher Daphne Iglesias requested that Mr. Galbraith come to Room 319 to quiet Ms. Brady, who was hysterical. Subsequently, Ms. Brady was uncontrollable, crying and screaming during a sixth period meeting with the undersigned and Mr. Galbraith. Her concern related to the student, G.H. Mr. Galbraith instructed Ms. Brady to report all incidences, which would be handled appropriately. Ms. Brady then informed Mr. Galbraith and the undersigned that the student had said he would kill her. Ms. Brady stated that she did not remember when he had made the statement. When pressed she advised he had threatened her sometime between the conference with the student's mother on November 1 and the meeting which is the subject of this paragraph, November 21, 1989. The undersigned requested that Ms. Brady make specific notes of the student's behavior and provide her with a copy of the same and to tell her immediately of any behavioral problem or any threat. The undersigned again met with Ms. Brady during Period 7 to reinforce the foregoing. Despite the aforementioned request, no such notification or notes were ever received from Ms. Brady.

16. Notwithstanding the foregoing, and the apparent lack of any problem, the undersigned made the decision to remove the relevant student from Ms. Brady's ninth period class till a scheduled change could be implemented. The undersigned also spoke to prior teachers.

17. On or about December 4, 1989, the undersigned called Mr. Reedy of Morris County Vocational-Technical High School, where the student took some classes, to ask the student's status. The discussion was positive including a statement that the student had received the highest in a recent class test and seemed happy. The only discipline issue was that

he had brought two "Walkmans" into school. These, apparently, are radios.

18. On or about December 5, 1989, a meeting was conducted between the student's mother, Mrs. Rosendorf, Child Study Team member and Mr. Simmons, Guidance Counselor and the undersigned, so as to facilitate the change in program that would permit the student to be assigned from Ms. Brady's ninth period class permanently. This was successfully completed and subsequently, the student, who had not been in Ms. Brady's class since near the end of November, was assigned to another teacher. The teacher to whom the student was assigned was told of the circumstance. She advised that she had no problem taking the student and that she knew him to be no particular problem. Subsequently there have been no problems with respect to this student.

19. On or about December 6, 1989, Ms. Brady, again extremely agitated, approached the undersigned and advised her that one of Ms. Brady's freshman students had told her that G.H. had been seen in Ms. Brady's classroom with a knife. The undersigned interviewed the student who made the allegation immediately. He described the "knife" as looking like a gun handle that opened and that G.H. had showed it to him and put it back in his jacket pocket making no threats. The undersigned met with G.H. and asked him to hand over this apparent Ninja toy. He said he didn't have it with him, that he had brought it yesterday by accident and had left it home today. He was told never to bring these items to school. His locker was also checked by Mr. Galbraith. Once again he was advised never to bring any of these key chain type items to school because they may be perceived by people as weapons. This student G.H. has been checked many times subsequently and none of these items have been found.

20. During the undersigned's interview with the student who had seen the "weapon", he stated, that Ms. Brady had told his class that this student was bringing weapons to school. This statement to her class by Ms. Brady, that a student was carrying a weapon, is extremely unprofessional.

21. On or about December 6, 1989, Ms. Brady, in a meeting with the undersigned, was advised that the student, G.H., had in fact been transferred to another class pending county office approval. After this

meeting Ms. Brady screamed at the undersigned from her office in Room 319 to the undersigned's office (not in the same room), "Whose life are you putting in jeopardy now?! I cannot believe the cavalier way in which the administration has dealt with this." She began crying loudly and screaming, "My family will sue you if anything happens to me. He is going to kill me. I'm a single parent." The undersigned asked Ms. Brady to come to her office, and when she did, Ms. Brady was asked to stop screaming. She was asked to calm down and act in a professional fashion. Ms. Brady's reply, still screaming, was "Do you want me to die professionally? My family is very upset. My ex-husband used to threaten me. The police said there was nothing they could do -- Gayle dear, do you know what you sound like. You sound just like the police. You're all lucky I've haven't been killed" Ms. Brady continued crying and screaming. It was again repeated that G.H. was out of her class and she should calm down. She was inconsolable and continued crying and screaming. She was cautioned not to discuss these things in class; she denied doing so, but did not object when the undersigned advised that a student had told her that, in fact, Ms. Brady had discussed this with her class. She was also not to discuss this matter, involving a handicapped student, with other departments except as necessary. She said she didn't and was advised she had, in fact, told members of the English Department. Ms Brady responded that she could not help it if the members of the English Department were listening while she was having a conversation with a friend. She continued crying and yelling, and Mr. Galbraith was called. When she could not be controlled, the undersigned requested that she go home for the day; her class was covered by another teacher. G.H., of course was kept out of her class and as mentioned, subsequent checks of his pockets found no weapons or even items that may be used as such.

22. On or about December 8, 1989, after receipt of the County Office waiver permitting the transfer of G.H., the undersigned met with Mrs. Hazelwood, a teacher of the handicapped who would provide English instruction to G.H. The circumstances, including the allegations as to G.H.'s behavior, were described. Mrs. Hazelwood was asked if she was comfortable with G.H. in her class. She advised that she had him in the previous year and there had been no problem. The undersigned asked Ms. Hazelwood to notify her immediately if there was a weapon or any

threat or problem. Mrs. Hazelwood indicated that she expected none. In fact, subsequent to that date, no problem has been noted.

23. On or about April 5, 1990, the undersigned received a telephone call at 4 o'clock in the morning from a police officer advising that Ms. Brady was in the custody of the police. They had called first the school superintendent and now her to determine whether something could be done for Ms. Brady who was in their custody as a result of being arrested for driving while impaired. The police officer told the undersigned they could expect that Ms. Brady would not be in school tomorrow and that she was being abusive and offensive to the police officers. Ms. Brady could be heard in the background yelling and crying. The undersigned has no knowledge as to the resolution of the claims resulting from that evening's arrest. However, Ms. Brady has advised her classes that the police had a wiretap on her phone as a result of claims she had made relating, apparently, to that evening and unwanted telephone calls she had received. This advice to her class as to this investigation, as well as her behavior in police custody, was inappropriate and unprofessional particularly under the circumstances from which it apparently evolved.

24. On or about April of 1990, Ms. Brady once again acted in a manner unacceptable to a teaching staff member of the Morris School District. Annually, Morris School District high school students hold a drug and alcohol-free graduation party called "Project Graduation". To raise money for this effort, among other events, a fashion show is held with respect to which Morris School District teachers, among others, participate. With respect to the participation in this school project, Ms. Brady was sent to D.J. Crater, a small clothing store in Chatham, for a fitting. During this fitting, she behaved in a totally unacceptable and unprofessional manner. She yelled and screamed insults at the owner and made derisive comments about the clothing. She ripped out portions of the clothing she was trying on and threw hangers around forcefully in the changing room.

25. On or about May 17, 1990, the undersigned received a telephone call from a parent of a student assigned to Ms. Brady's English class. The parent asked for a conference with the undersigned. The undersigned told Ms. Brady that the parent wanted to discuss her child, L.A.'s English class. Ms. Brady then told the undersigned that two

students had been using sexually explicit language in the class. The undersigned immediately recalled that on or about February of 1990, a parent, Mrs. W., had contacted the undersigned with respect to complaints that Ms. Brady had made derogatory comments to her son, D.W. The undersigned had told Mrs. W. that this district was very concerned about self-esteem and said that she would check with the teacher. Ms. Brady advised that there was no substance to the charges and that the relationship with the son, D.W. was acceptable. Notwithstanding the foregoing, however, on March 21st, the evening Parents' Night, just before Mrs. W. was to meet with Ms. Brady, Ms. Brady literally began screaming in the school that she wouldn't meet with Mrs. W. without the undersigned being present. Another teacher who heard the screaming, came to the undersigned to advise as to the uncontrollable screaming and the apparent substance of the problem. The undersigned attended the conference with Mrs. W. and Ms. Brady.

26. As mentioned, the undersigned recognized that Mrs. A. was calling with concerns about the same class which had been the subject of Mrs. W.'s concern. A meeting was conducted with Mrs. A., Ms. Brady and the undersigned on 11 a.m. on or about May 18, 1990. Mrs. A. advised that students in the class, in particular two boys, were continually using sexual explicit and gutter type language in the class. One of the boys was the aforementioned D.W. Ms. Brady said that she had tried to stop this language but had been unsuccessful. The boys were suspended and later apologized to the class and others involved.

27. On or about May 22, 1990, Mrs. A. again met with the undersigned. She brought with her a friend, apparently for support, and was obviously shaken and upset. She advised, as she mentioned earlier, that her daughter had made a tape of the class in question and that she was, to put in mildly, greatly concerned with the behavior and statements of the teacher, Ms. Brady. She advised that Ms. Brady had talked about taping the class and that her daughter and simply taken her up on it. After a number of different requests to Mrs. A., the undersigned was permitted to listen and make a copy of the tape of the class. The review of the tape by the undersigned, and conference with some of the children, evidenced not only substantial acquiescence to the use of derogatory comments about the students and extraordinary gutter,

sexually explicit language by the students but active participation, in a substantial number of instances by the teacher, Ms. Brady. Ms. Brady's discussion of her personal life, her evening hours, her ability to get sex anytime she wants by just picking up the phone, statements of student such as "you are literally led around by your sexual organs" and "don't have annual growth to keep your brain on anything other than your dick" and many other comments constitute incapacity, unbecoming conduct and other just cause for dismissal as a teaching staff member of the Morris School District.

I have considered this Tenure Charge very carefully. My responsibility is to the students of the Morris School District and in this case, in particular, handicapped students who are significantly fragile. My conclusion is that Ms. Brady, despite a multitude of warnings and expressions of concern, is a person who is inappropriate and unacceptable as a teaching staff member in the Morris School District. The foregoing constitutes reasons for her dismissal including incapacity, unbecoming conduct and other just cause.

EXHIBIT B

Side 1:

S- Payroll office of the twentieth of what?. . . . . .

S- . . . . need enough money . . . . . .

T- No, I'm very greedy, I like to make a lot of money.

S- You're cheating? Are you cheating on your timesheet? That's why I do work.

T- I don't

S- I do (inaudible)

S- Want to see some pictures?

T- Of what?

S- You want to see some hot looking chicks?

T- Yeah, . . (inaudible)

T- I'm good, I am a good photographer . . . . Penthouse is just about to . . . . . hire me.

T- (inaudible)

S- Since when do you look at naked women?

T- Are they naked?

S- (inaudible)

T- Why do I want to look at naked . . . naked men I might be interested in for seeing, you know? (inaudible) but naked women. . .

S- You got both here. . . I got, I got an awesome shot of this beaver (slang) sitting here like this, she's all spread out and everything. This guy's slide (slang) goes right into it. It's all sparkly. . . .

T- (inaudible)

Announcement over loud speaker: . . . . . to the nurse please. . . to the main office

S- (inaudible) - going on during announcements

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* S = Students

T = Teacher (Respondent)

. . . they're hot, hot like fire. . . .smoking like dire. . . Yo babes. . . like fire. Oh, Oh, Oh, Oh, you're doing it so hard. So Lynn, did you do anything with him that night? You busta move on him? (inaudible)

Office sounds, rustling papers, trucks, burping, door slams

S- . . it's too hot to go out in the sun and play ball.

S- (inaudible)

S- sure, you want to see

Announcement: . . . . to the main office, please. . . . . to the main office

BEEP

S- (inaudible)

S- . . .whose car is that?

S- Mine.

S- (inaudible)

S- Somebody told me if you do your own repair work on your car, you take . . . .

S- (inaudible)

S- Yeah.

S- (inaudible)

S- Yeah.

Announcement: Please stand and join me in saying the Pledge of Allegiance

Announcements follow

S- Brady, do you want to see some of these pictures?

(inaudible)

S- burp. . . .shutup! (inaudible)

T- No, no way

(inaudible)

S- Do you think I care?

T- Another disruption.

S- (inaudible)

S- (inaudible)

T- We're gonna be reading a long short story.

S- Oooooh!

T- I'm gonna try to get my hands on the movie for us as well. . . . . .it's in your book.

S- A long short story.

T- That's what it's called, a long short story. I'd like to um, I'd like to start by telling you and having you understand the elements of a long short story. A lot of you are pretty familiar with already. Some of them may be new. I want you to open you books please, your literature book to page . . .

S- You want out homework?

T- . . .if you've got it done, yeah. . . . by now, you can just consider yourself having a "F" because I am absolutely not going to take any today. . . . by 2:30pm today I might accept it. . .you don't have yours in. I don't have Darrin's, I don't have Lynne's you two I have. . . . . .

S- (inaudible)

S- I'm getting a woody. . .(inaudible)

S- Why?

T- He's thinking about those pictures here.

S- [Laughter, ... screaming]

T- (inaudible)

S- What?

T- (inaudible)

S- . . . .you gotta keep going

S- (inaudible)

T- I saw you this morning in the car, combing your hair in the car.

S- You did?

T- Yeah?

S- Did you see my babes in there?

T- No, it was just you all be yourself.

S- On wait, where did you see me? (inaudible) . .brushing my hair . . . . . .you mean down there by the courthouse, down by the McDonald's Pontiac?

T- Um, no.

S- (inaudible) I only got one copy (inaudible)

T- (inaudible)

S- Yup.

T- (inaudible) . . .couldn't get enough of her.

S- . . . . .I would eat her out.

S- Would you make a copy?

S- Sure. Why do you want a copy?

T- (inaudible)

S- (inaudible)

S- I'd eat her out. Brady, Brady was getting jealous cause I was holding her.

T- Jealous?

S- Brady was like, I wish I was there, I wish Mr. Kenner would hold me like that (inaudible)

T- Mr. Kenner is a married man.

S- So what? A married schleit feels very comfortable. (inaudible)

T- We're going to be talking about a long short story, guys.

S- Brady, Lynne's smoking. Saw smoke (inaudible)

T- Did you take pictures of yourself?

S- Hell yeah, I took pictures of myself, I took loads of them.

T- (inaudible)

S- (inaudible) . . .my tux with my slide hangin' out.

S- David (inaudible) . .I'll show you pictures that will make . . . . . .

T- I don't want to see them.

S- (inaudible) ..I know, don't I look hot?

S- Oh, Oh, right there (inaudible) . . . .pinstripe.

T- (inaudible)

S- (inaudible) Lions and tigers and bears, oh my. Lions and tigers and bears, oh my. Lions and tigers and bears, oh my. (inaudible) (Screaming sound) (inaudible) . . . .

(inaudible)

T- Can you please turn to page 502 please, get your notebooks out. You will be responsible for the information.

S- (inaudible)

T- Excuse me.

S- (inaudible)

T- You're going to be having to spend some time writing logs, reviews of characters. We're reading a novel, a short novel, or a long short story depending on how you want to look at it. Listen up!

S- What!

T- You're gonna be responsible for each, um, segment of this in a summary of character and what happens. Ten sentence minimum.

S- Aw, come on!

T- (inaudible) summary and a list of characters, and who they are and how they are related to each other for each segment. You will be having quizzes on each segment. O.K., so, this is also going to be on your final exam. I suggest you make sure you take notes. You're gonna need literary terms, you're gonna have to answer questions and you're gonna be responsible for a lot.

S- (inaudible)

T- So you'll read it and understand it.

S- (inaudible) . . .so where did you see me this morning Brady while I was brushing my hair?

T- You were in your car, hardly paying attention to the road, mostly paying attention to your hairdo. . . .down the hill, on the corner, making the turn by McDonald's Pontiac. As I was about turning the bend myself and I thought yep, that's Dave. Watch out everybody else. Dave. . . (inaudible)

S- You're supposed to be watching the road not you're. . . . . .

S- Dude, my hair, dude, my hair has to be brushed before I pick up any girls. My hair has to be. . . .

S- Shutup! (inaudible) . .and Brady was there all jealous again.

T- Jealous? (inaudible) . . . . .what did you say? What did you say? I can't get what?

S- You couldn't get anything from nobody that night at the prom.

T- Sweetheart, I went out after the prom and I didn't get home until three in the morning. What do you think I (inaudible)

S- (inaudible)

T- As a matter of fact, last night I went out with a man that I met on Saturday night, and I'm going out with another man on Thursday night.

S- (inaudible)

T- What?

S- Big ol' dukie face.

T- I can get anything I want whenever I want. All I have to do is pick up the phone sweetheart, I can get anything I want (inaudible) So, ya know, I don't what you think you're looking at here, kid.

S- Laughter. Oh, we got a senior citizen. Laughter.

T- Yeah, well give me another eight or nine years. At any rate, moving on. You guys are just beginning (inaudible)

S- Brady, I'm in my sexual prime. Laughter (inaudible)

T- Yeah, well just image this is your prime before . . . . . (inaudible)

S- What did you say is like wine?

S- You age like wine.

T- You age like wine, yeah, it depends whether or not you have a rotten batch of grapes to begin with.

S- That's not what I heard of. This is what I heard is, the tender it is the tastier it goes. (inaudible) Hi ho silver! Bronco Billy!

T- I can't image any woman reducing herself to be with a man like. . . .

S- (inaudible) . . . . . what's your handle, big buddy? Stiff peters or big weeners.

T- Can we go on?

S- Yes, Chris you may go on.

T- (inaudible)

S- No, Lynne likes it. . . . . .

T- . . . . . thinking that those four men are so hopeless they absolutely cannot think about anything else.

S- Yeah, but look, Lynne likes it.

T- You are, do you realize that you are literally led around by your sexual organ, Mr. Waldren, that you don't have mental growth to be able to keep your brain on

anything other than your dick? Does it ever occur to you that something is really the matter with that?

S- (inaudible) . . what was that movie I saw the other night. . . .

T- Can we get on, please, our topic at hand here?

S- (inaudible) . . . . topic here. And the girls was there and, and . . . . . Laughter (inaudible she's nude. . . . . .Laughter. Oh shit, do you remember that movie, um, that movie you were telling us about . . . . . that was on Monday?

S- Yeah, I know, I saw that last night (inaudible)

T- The questions for the final exam on information that I am going to impart now, if you don't listen, you don't get it. OK? Lynne I think you better turn around and stop paying attention to these two clowns. The more we give them the floor the more they think they can chat. So, those who want to pay attention will learn something, those who don't will never learn something. (inaudible) So if we can move on, um, what is a long short story? If you turn to page 502 you'll know what I'm starting to refer to. Page 502, Lynne.

S- Where did you get these books from Brady?

T- The shelf.

Laughter.

S- The shelf. Hey look, (inaudible)

T- If you turn to page 502 . . . the elements of a long short story which will. . . . .

S- Brady, we done all of this at the beginning of the year.

T- We did some of it, yes. Some of it you did have, some of it you didn't. A short story has some elements of a long short story has too, but I want you to understand (inaudible)

S- Brady, what is this about?

T- I am about to impart that to you if I could just have the floor for a little while.

S- It's wide open at any rate. (inaudible)

T- I suggest that you head your notebook paper the long short story.

S- No, we are not going to head it a long short story on the notebook paper. (inaudible)

T- Lynne, do you have a piece of paper?, pencil, let's get one out.

S- (inaudible)

T- Take you hat off, or it's mine.

S- It's my thinking cap, how many times do I have to tell you?

T- If you don't take it off, the only thing you will be thinking about is how you are gonna get it back. Now would you please take it off.

Laughter.

S- (Inaudible)

T- You are not comprehending, does it have to be in Spanish? Would you take that hat off or I'll have you down in ESL where they'll speak to you in any language they think you can comprehend, which at this point may be martian.

S- (inaudible)

T- You're gonna comprende alright, senor.

S- (inaudible Este Loca! (inaudible) . . . twenty of. . .

T- We're staying here 'till the bell rings (inaudible)

S- A long short story. .

T- A long short story. Sometimes a story is too long to be read in one sitting and so we have either the short novel or the long short story.

S- You can't have those two put together, Brady. It's either long or short. (inaudible) So what you're saying is that I can read one page and stop.

T- No, that's not what I am saying (inaudible)

S- I gota zit right here, man. . . . . if I pop it.

S- I'll piss in your damn nose. (inaudible)

. . . . . your evil eyes. . . . . .(inaudible)

T- I didn't even know it was there (inaudible) Oh shit,

S- (inaudible)

T- a BMW? (inaudible) Man, I wouldn't trust you with a oil filter, air cleaner or anything else.

(inaudible) Can we get moving now please?

S- No man, ... (inaudible)

T- OK.

S- I approach to work about (inaudible)

T- Like the short story, the long short story (inaudible) it's not simple and not complicated, every detail counts just as in a short story. . . . . a kind of a short story but a little bit longer than a . . . . . um, it's similar to not only the long short story is similar to a short story, it's also similar to a novel. Novels first appeared . . . . . 18th century but they differed from earlier literature in that they told about lives of ordinary people like you and me. Novels covered long periods of time and dealt with dozens of different intimate settings and characters. A long novel

(inaudible) one of my favorite long novels in Gone With the Wind . . . tremendous amount of years . . . time and you get to know a lot of characters rather intimately well and they are very, very, intimately, intimately developed. . . . . .Great stuff . . . Occasionally . . . . . developed a story that was not clearly even a novel or a short novel. They were not as complex as novels, but the were not short enough to be called short stories, so they called them long, short stories. So, they are pretty good reading in any case. The elements of a short story you are responsible for, elements, guys, write this down. Elements of a short story, a long short story.

S- How do you spell elements of a short story?

(inaudible)

Side 2:

T- . . . . . .sit down and don't open your mouth, unless I ask you to. (Moving of desks) You made me break a nail, twisting your rearend back where it belongs. (inaudible) You're being insubordinate on top of everything else, now you're being insubordinate.

S- I'm in the row.

T- You'll sit right there, you budge and you can see Mrs. Conlin, you got that one?

S- (Inaudible)

T- You're sitting right there.

S- Brady I'm not even in the row

T- You are now. Move the row, right behind you, make you real happy. OK?

S- (inaudible)

. . . . . .If there's a fire drill I ain't tripping

T- If there's a fire drill I might make you trip.

S- (inaudible)

T- You're gonna open your book, take some paper out and get busy and . . . . . with the students

S- It's my prerogative if I want to learn.

T- It's my prerogative to get you out of here if you're gonna disrupt everybody else and insult everybody else in this room. And you'll be next there Mr. _____, you are on the next list.

S- No, don't even think about trying that.

T- Don't start, you and he are having a ball together, don't even try to open your mouth.

S- (inaudible)

T- (inaudible) I didn't do nothing.

T- You did enough. I didn't do nothing.

S- (inaudible)

T- Right here in this second, no, but you have been doing it all period. And you have been doing it for months and months and months.

S- 10 months Brady.

T- OK? So you are not going to do it anymore and neither is this clown. Take that hat off, off!

S- It's it's my thinking cap! God!

T- You're not gonna need a thinking cap if you don't have a head there kid. OK?

Laughter

T- You don't have a head, you have no need for a hat and you don't have any need for a thinking cap.

S- Brady, you look cute when you're mad.

T- I know. Well, you're about to see me get down right beautiful because I'm gonna get furious in about three seconds.

S- Is that possible?

T- (inaudible)

S- (inaudible)

T- You have to understand that a conflict, that you have an external conflict. What's an external conflict, do you remember this? From the short stories we read? What's an external conflict?

S- You never told us what conflicts are.

T- Yes, I did. I told you, they are right here.

(inaudible)

S- between what?

T- Forces.

S- Right.

T- Fine, don't learn it.

S- It's my preogative.

T- An external character is between characters or a character and an outside force.

S- Brady, I can't think with that motor going.

Laughter.

S- Brady? Can I change my seat, there are people walking through the halls and its disturbing me.

T- Internal characters, internal conflicts.

S- Alright, I'll behave.

T- What's that? Anyone know what that is? What?

S- (inaudible) I want to move back, move over.

T- . . . .conflict, a mental conflict.

S- C'mon Brady, (inaudible)

T- I don't care about your complaints. I don't care if you're miserable sitting there because you're sitting there. You have made everybody else miserable where you were sitting before so now you can be miserable and the rest of us might learn something.

S- (inaudible) Brady, can you please move your torso. Thank you. Watch out for your chair. Brady, is that new. nute?

S- Where?

S- I don't know, like I don't understand that letter there. It's like a reversed "n", we're not in Russia (inaudible)

T- Point of view, v-i-e-w.

S- Well how the hell was I supposed to know? I can't help that I can't understand your writing. (inaudible)

T- Sharon may pass, you may not.

S- Pass, yes, hello. Already got connections already lined up.

T- You do?

S- Yup.

T- Oh yeah, who are you paying off?

S- (inaudible) . . . two hundred dollars for a one minute job. (inaudible)

T- A point of view is the view, refers to the eyes and mind from which somebody. . . .

S- Oh, this really stinks, man. It's great out. Crap.

S- The clouds are supposed to come.

S- (inaudible) Is that true Brady?

T- I'm not a doctor.

S- (inaudible)

T- First person point of view, uh, as a narator, um, of the person telling a story is (inaudible)

S- Someone just threw a piece of chalk at me, Brady. I don't appreciate it very much. So Brady, are you recording today some comments?

T- Third person point of view . . . . . (inaudible)

S- What's the that word? to wins, to what?

T- Wait, I'll (inaudible)

S- It's 10 o'clock, have you called your children yet?

T- . . . . . What, what do you want to know?

S- Is it ten o'clock?

S- Eyes and mind through which . . .

T- Eyes and mind through which someone, something is written.

T- Um, third person point of view is someone outside the story (inaudible)

S- (inaudible)

S- Brady, I have a headache, can I lay down?

T- No.

S- Why not?

S- (inaudible)

T- (inaudible) You have to know the difference between dynamic and . . . characters.

Whistling.

S- Aw, shit!

T- . . character stays the same throughout the story. Another character, um, changes (inaudible)

S- Brady, what's the whole point of this?

T- I suggest that you know, this is elements of how you read a short, the elements of a short story. (inaudible)

S- I already know how to read a story. (inaudible)

T- Well, when I tell you how to do it you don't want to listen about it. This is why you have to know this, Dave. Tomorrow you're gonna have a quiz on all the information. I am gonna ask you, I'm gonna list these terms and you're gonna have to give the definition. So I suggest you get them down. You can be sure that there will be a quiz on this tomorrow when you walk into class and it won't be open book.

S- I'll have an open book

S- Are we actually gonna use this in life?

T- You gonna use it in here mister, in your English class, so I suggest you get to know it good. (inaudible)

S- I'm getting the hell outta here.

T- You can leave, right now.

S- (inaudible) get the hell out of here.

S- It's 9:56 and 24 seconds leave me alone.

(inaudible)

S- So what else do we have to write, Brady?

S- Well I'm out of here then, audi 9000.

S- Where do we put this?

T- In your notebook.

S- I don't have one. I lost mine (inaudible) Darrin touched it. Is that it for today's lesson?

T- I don't want this, Dave. It's for you.

S- I don't want no extra paper riding around with me.

T- (inaudible) . . . gonna start reading the story. . . .

S- Thank God.

S- (inaudible) . . .kowabunga dudes! I'm gonna go see if my girlfriend is out there, ...wants me to give her a ride in her chair (inaudible)

S- Brady, what's wrong? (inaudible)

T- Nothing is wrong, get bust (inaudible)

S- You should have heard what Dave said about Mrs. Brady.

(inaudible)

End of Side 2

OAL DKT. NO. EDU 8030-90

IN THE MATTER OF THE TENURE	:	
HEARING OF CHRISTINE BRADY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF MORRIS,	:	DECISION
MORRIS COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative law have been reviewed. Respondent filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4, and the Board filed timely reply exceptions.

Respondent cites seven exceptions. Point I speaks to the G.H. incident, and excepts, inter alia, to the ALJ's finding that respondent "manufactured" (Exceptions, at p. 1) evidence concerning the possession of weapons by G.H.; that respondent's conduct in relation to her supervisor's lack of appropriate action towards G.H. was improper; and that Supervisor Conlin had no reason to misrepresent the facts concerning this charge under oath. Rather, respondent argues, the ALJ ignored an affidavit from another teacher who was subsequently assigned to have G.H in her class expressing that she observed G.H. carrying a weapon, that she did a write-up of that fact to Supervisor Conlin and Executive Vice Principal Galbraith but that nothing was done. Respondent cites Exhibit A-6, paragraph 22, and Tr. IV-7, Tr. VII-63 and R-49 in support of her claim that the new teacher's testimony was evidence of Supervisor Conlin's having lied under oath, because she testified that after G.H. was transferred to the new teacher's classroom, there was no

further difficulty with G.H. Respondent then recites passages from the transcript in support of her contention that G.H. was seen with weapons in school for a period of 2 1/2 months, that the student flaunted the district policy against weapons in school and that the ALJ erred in concluding that "respondent surely could have handled this entire matter with G.H. in an entirely different manner other than screaming, yelling and simply losing control when she expressed her concerns to either Conlin or to Galbraith." (Exceptions, at p. 13, quoting the Initial Decision at p. 15) It is respondent's contention that this charge should have been dismissed and the administration sanctioned for having considered respondent's behavior to be inappropriate under the circumstances whereby she claims G.H. was in possession of deadly weapons in school and the administration turned a blind eye and deaf ear. She claims that under such circumstances, to the extent respondent raised her voice, it was justified.

Point II avers that while the ALJ properly dismissed the charges relating to the police incident, he failed to properly weigh and credit respondent's affirmative proofs that the aftermath of her having been drugged and sexually assaulted directly impacted on her conduct in school for the balance of the school year. Respondent summarizes that testimony adduced at hearing, which she claims demonstrates she was victimized by a series of harassing telephone calls, sexual assaults and numerous other offenses against her and other women victims. She claims a multi-count indictment was filed against an individual alleged to have committed such offenses. Along with the fact that her mother had died during January 1990 and in light of the incident concerning G.H., respondent suggests that it was improper for the ALJ to reject such evidence as mitigation of

the charges and as relevant to the assessment of penalty. She cites In the Matter of the Tenure Hearing of Jude Martin, School District of the Township of Union Beach, 1985 S.L.D. 1800, among others in support of this proposition.

At Point III, respondent contends that the acceptance of inferences in favor of the Board when no competent evidence existed, while at the same time failing to accept inferences favorable to respondent when competent proof did exist constitutes reversible error. Respondent offers examples in exceptions suggesting that the ALJ inferred certain facts notwithstanding a complete absence of competent proof from which to infer said facts. Respondent also faults the ALJ for having made inferences that because she referred to the existence of reply memoranda she wrote that were not available at trial that either they did not exist or that she was manufacturing the evidence. Finally, in regard to this point, respondent harkens back to her earlier point that Supervisor Conlin allegedly lied about G.H. and that upon his having been reassigned to another teacher, nothing else happened. Respondent claims that the other teacher's testimony represents "***clear evidence of clandestine attempts to squelch favorable documentary evidence to respondent." (emphasis in text) (Exceptions, at p. 19) Respondent avers this exception supports the conclusion that the ALJ's determinations were against the weight of the evidence and thus constitute reversible error.

At Point IV, respondent submits that the ALJ's findings and conclusions concerning the 1986-87 incidents are against the weight of the evidence adduced at hearing and should be reversed upon review by the Commissioner. In exceptions respondent makes two points about the three incidents involving N.C., S.B. and the

in-service meeting. She claims that in the charges and at trial, Supervisor Conlin sought to show that all three incidents preceded her tenure recommendation, all had been deemed unprofessional and warranting group meetings, and all had played a part in respondent's participation in the Employee Assistance Program (EAP). Respondent submits however, that the Board's post-hearing briefs did a complete "about-face" (Exceptions, at p. 19) concerning the 1986-87 incidents. Respondent avers that the Board's brief "effectively admitted" that Conlin had both the sequence and import of these events jumbled. (Id.) Respondent submits with that being so, it was error for the ALJ not to find that respondent's affirmative proof as to the de minimis nature of these events and that they were improperly pled because they were "non-events." (emphasis in text) (Id.) Respondent strongly contends that she demonstrated justification for her actions in these three incidents and that her responses were not unmanageable or widely disproportionate as cast by the Board.

Secondly, respondent contends that the Board's post-hearing brief sought to diminish the probative worth of the system of evaluation of tenured staff mandated by N.J.A.C. 6:3-1.21, because every observation and evaluation performed on respondent was superlative. Such records and Conlin's admissions of their authorship, respondent avers, undermined the Board's claims of incapacity or claim of a teaching staff member who was consistently out of control. Respondent argues strongly against the Commissioner's accepting the Board's contention that "the process of compiling personnel records means nothing because it was 'not until recently did Ms. Colin become aware of the appropriateness of including documentation, other than classroom observations, in

preparing annual evaluations.'" (Id., at p. 20, quoting the Board) Respondent submits that the Board's arguments in this respect were "an exercise in contortionistic semantics" (emphasis in text) (id.) and that the ALJ had to twist and contort the record evidence to make something out of the 1986-87 incidents. Respondent submits that her proposed findings of fact as stated in her post-hearing brief in regard to these three episodes should be adopted as the Commissioner's own in regard to the 1986-87 incidents.

At Point V, respondent avers the ALJ's findings and conclusions concerning the Project Graduation fashion show are against the weight of the evidence adduced at trial and should be reversed. Respondent avers the ALJ made inappropriate inferences, such as that she removed shoulder pads from clothing, threw hangers and engaged in other assorted conduct one would not expect to see in a retail store. Referring to her own Proposed Findings of Fact, respondent seeks reversal of the ALJ's conclusion that her behavior in the dress shop demonstrated conduct unbecoming a teaching staff member.

At Point VI, respondent contends that notwithstanding her admission of having made the statement she did on the audio-tape recording, the ALJ failed to credit additional mitigating factors concerning this incident. Respondent cites those conditions extant in her life at that time of the audio-tape recording mentioned in her post-hearing submission. (Respondent's Brief, at p. 35) She thereafter submits her proposed findings of fact as found in her post-hearing submission and in her reply brief as alleged facts the ALJ failed to note in his decision regarding the taping issue. She

seeks the Commissioner's consideration of such aspects of the testimony and his adopting her position regarding the taping incident.

Finally, at Point VII of her exceptions, respondent contends that based on all of the record, which she asks the Commissioner to review de novo, the sanction of dismissal is not warranted in this case. She submits that other than the taping incident, all other charges against her should have been dismissed because the Board failed to prove conduct unbecoming, incapacity or other just cause. She claims the conduct on the day of the taping was an aberration which occurred in the face of unique mitigating circumstances. While advancing that she does not expect that conduct to be excused, she submits that in the face of her employment record, she should not be dismissed. Averring that her evaluations, memoranda and observations conducted of her show she is an excellent teacher, respondent seeks a reversal of the initial decision and a finding that she is an excellent teacher.

The Board's reply exceptions cast respondent's exceptions as alleging bias on the ALJ's part, which it claims is not the pivotal issue, and that such allegation is without support.

The Board further posits that respondent's points in exceptions are restatements of the same arguments previously set forth at hearing and in respondent's post-hearing submissions. It claims repetition of her position does not establish or support the alleged merit of respondent's mitigation claim or prove Ms. Conlin was lying. The Board contends instead that analysis of the relevant facts and credibility determinations made by the ALJ, as well as the applicable case law, proves that there is no content to respondent's

arguments and that the ALJ accorded her and other witnesses' testimony the proper weight. It argues for affirmance of the ALJ's decision.

Upon a careful and independent review of the record of this matter, which includes transcripts of the hearing below, the tape (Exhibit P-25) of Ms. Brady's Special Education class, recorded by L.A. and the briefs and exceptions filed by the parties, the Commissioner adopts as his own those findings and determination of the Office of Administrative Law. In reviewing those arguments raised by respondent in her post-hearing submission, mirrored in her exceptions, the Commissioner will address the incidents made the subject of the instant tenure charges in the order presented in the initial decision.

The Board's reply exceptions encapsule well the essence of the concern that formed the basis of the count regarding N.C. "***the problem with Brady's conduct was the manner in which she handles situations. It simply is not appropriate for a teacher to raise her voice, or yell or scream in manifesting her 'shock' and 'dismay' with regard to a student's version of an incident." (Reply Exceptions, at p. 10) Similar concern is evident in the incidents concerning S.B. and G.H.. All three episodes add the dimension of whether respondent's reaction to a situation involving a student was appropriate where respondent feared retaliation from a student.

The Commissioner's review of the transcripts comports with the ALJ's assessment that in all three cases, respondent's conduct bordered on hysteria, was overreactive and professionally inappropriate. See Initial Decision, at pp. 6-7 and 14-15.

Respondent's exceptions regarding the N.C. incident focus on objecting to the ALJ's crediting Supervisor Conlin's charge that the alleged screaming by the senior staircase occurred in the presence of students and staff, causing disturbance of others. While respondent also denies having screamed at all, or in any way having conducted herself inappropriately, the Commissioner, like the ALJ, finds Ms. Conlin's testimony more credible regarding respondent's shrieking tone of voice when confronted with information from her supervisor that a pupil alleged respondent struck her, than respondent's contention that this incident constituted a "non-event" (Exceptions, at p. 19) merely because no other witnesses of this incident were called by the Board. Executive Vice Principal Galbraith testified credibly that Supervisor Conlin approached him following this episode to arrange a meeting in March 1987 to discuss respondent's outburst at her on the steps. See Tr. IV-86-88. Similarly, a second meeting was held, Mr. Galbraith credibly testified, in April 1987 to discuss "***concerns about Ms. Brady's behavior*** [b]ehavior which often was irrational, sometimes extremely emotional,*** and "concerned [me] about *** her dealings with students***." (Tr. IV-91) The Commissioner accepts as the Board's concerns at such second meeting Ms. Brady's "outbursts*** hysterical behavior with emotional ranklings" which the Executive Vice Principal was concerned "might be projected into the classroom." (Tr. IV-95) From such meetings, it is noted, a plan was agreed to by respondent to attend the Employee Assistance Program (EAP) for counseling, which she attended for at least four sessions. (Tr. IV-97) (See also Tr. VII-46, 48, Tr. IX-62 and Tr. X-4.) From such testimony, the Commissioner

concludes as did the ALJ that notwithstanding whether anyone observed the fracas on the senior staircase, or in the hall concerning S.G., respondent was guilty of temperamental outbursts in the incident regarding N.C. that constitutes unbecoming conduct.

The same can be said of the S.B. incident. Whether or not any other student was actually witness to the conversation between respondent and Supervisor Conlin regarding S.B.'s alleged threat to report respondent to "the man," the Commissioner finds Supervisor Conlin's recitation of the incident more credible than respondent's for the reasons expressed in the initial decision in the absence of further documentation from respondent as to the memo she purportedly filed with Conlin on the incident.

Similarly, although respondent may have had cause to be concerned about G.H.'s brandishing "toy" (Tr. IV-30) ninja paraphernalia, possession of which may have constituted violation of school policy, careful review of all the witnesses' accounts of the events that transpired over the course of more than two months concerning G.H.'s behavior nonetheless convinces the Commissioner that respondent's reactions to this situation in October through December 1989 were likewise marked by excessiveness bordering on irrationality. Like the ALJ, the Commissioner finds respondent's testimony regarding these episodes fractured, ringing hollow particularly in that she admits she confronted her supervisor, projected her voice into Supervisor Conlin's office and engaged her in a debate over the subject, while yet adamantly denying that she screamed, yelled or lost control. See Tr. IX-89-90, 93-94, 98, 101, 104-105. Despite respondent's conviction that she "***may have raised [my] voice in the firmness of my convictions, yes" (id., at

105), Mr. Galbraith's credible evidence of such meetings regarding G.H's behavior indicates that respondent was "extremely upset and I would say emotionally distraught." (Tr. IV-102) When asked to describe the volume of respondent's voice, Mr. Galbraith answered, "It was very loud, penetrating.*** I found it almost to the level of being offensive, sir ***an exaggeration of the normal." (Id.) Supervisor Conlin's testimony comports with that of Executive Vice President Galbraith's. See Tr. IV-71. Inarguably, weapons of any sort will not be tolerated in the public schools. The record reveals that the administration took all measures possible to both seek out the truth of the allegations levied by respondent against G.H., and to remove the student from her class. Thus, the Commissioner concurs with the ALJ's finding that to the extent that the charge concerning G.H. levied against respondent alleges that respondent screamed, yelled, and lost control of her emotions, the charge is found to be true by a preponderance of the credible evidence, and that such behavior is deemed to represent conduct unbecoming a teaching staff member.

Little needs to be added to the ALJ's concise recitation of the events concerning the Project Graduation fashion show. Like the ALJ, the Commissioner's review of Ms. Ruffing's testimony supports a finding that in this case as well, respondent, who was acting in a capacity as an agent of the school district, lost her temper, and conducted herself in a highly offensive and obnoxious manner, but in an atmosphere unlike those concerning S.B., N.C. and G.H where she alleged fear for her safety or physical contact with a student. While it is not clear from the Commissioner's review whether, in fact, she removed shoulder pads from clothing, or broke hangers in

the dressing room, it is clear from the testimony elicited from a witness who was entirely objective, that respondent's behavior represented conduct unbecoming a teaching staff member. The Commissioner so finds.

Likewise, the Commissioner concurs with the ALJ that sufficient evidence was brought to the record to sustain a finding that respondent's behavior at the in-service meeting was "rude" and unprofessional. (Initial Decision, at p. 9) Respondent does not contest the fact that she chose to disregard the speaker and instead fill out an application for summer employment, and engaged in asking questions of her colleagues rather than paying attention to the speaker. (Tr. IX-43, 44) For the reasons expressed by the ALJ, as evidenced by respondent's own testimony as stated above, the Commissioner concludes that such charge is sustained and constitutes conduct unbecomimg a teaching staff member.

However, the Commissioner concurs that the charge levied against respondent involving the police on April 5, 1990 cannot be sustained, for the reasons set forth in the initial decision. Yet, he finds scant evidence in the record to suggest that due to the events of that evening or due to her mother's death, during that school year, respondent's behavior from April 1990 is somehow to be excused or is mitigated by such events, more specifically relative to the allegations as evidence on the audio-tape of respondent's class made by L.A. (Tr. III-46) Not only was testimony adduced from A.V. that similar coarse or obscene comments were not uncommon from respondent and that explicit conversations were commonplace in the classroom, (Tr. VI-5-7) but also, the tape indicates that respondent seemed at ease talking of her personal life, which belies her assertion that her alleged sexual assault on April 5, 1990 or her

mother's death produced aberrant behavior warranting mitigation of the seriousness of the charge concerning the audio-tape. The Commissioner thus concurs with the ALJ that respondent failed to meet her burden of demonstrating that she was under "any greater stress than any public school teacher is or any other citizen is, in dealing with daily life" (Initial Decision, at p. 23) warranting mitigation of the charge concerning the taping of her special education class.

In regard to such charge, the Commissioner cannot express strongly enough the inappropriateness of respondent's conduct in her class composed of special education students. Such commentary as is reproduced on the L.A. tape would be unacceptable under any circumstances in a school setting, but becomes an absolutely reprehensible breach of professional behavior -- indeed highly shocking -- among students whose handicapping conditions could have been based on emotional, psychological or learning disabilities that would render them particularly sensitive and vulnerable to use of or exposure to sexually explicit and racist language. In this regard, the Commissioner concurs with the Board's evaluation of respondent's behavior in that class as exhibiting a total lack of judgment, restraint and teaching skills during such class. Accordingly, based on the preponderance of credible evidence adduced at hearing regarding this incident, the Commissioner finds the charge to be true as stated and the behavior exhibited by respondent highly unbecoming a teaching staff member.

Accordingly, for the reasons expressed in the initial decision and accepting the findings of fact and conclusions of law established by the ALJ below, the Commissioner adopts the initial

decision. In consideration of the seriousness of the conduct proven true in this case by a preponderance of the credible evidence, and notwithstanding her otherwise commendable teaching record in the district, the Commissioner hereby directs that respondent be dismissed from her tenured employment as a teacher in petitioner's district as of the date of this decision. He further directs that this matter be referred to the State Board of Examiners pursuant to N.J.A.C. 6:11-3.6(a)1 for further action as it deems necessary.

COMMISSIONER OF EDUCATION

JUNE 29, 1992

DATE OF MAILING - JUNE 29, 1992

147-92

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(147-92)

JUDITH APOLLONY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, SOMERSET COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

SEPTEMBER 24, 1992

JUDITH APOLLONY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, SOMERSET COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

For the Board, Martin R. Pachman, Esq.

For Petitioner, Zazzali, Zazzali, Fagella and Nowak
(Richard A. Friedman, Esq., of Counsel)

This matter has come before the Commissioner of Education on motion for stay of the decision of the Commissioner of Education rendered in the above-captioned matter on July 2, 1992. Said motion was filed by the Board in the Bureau of Controversies and Disputes on August 20, 1992, having been misdirected and filed by mistake with the State Board Office of Appeals on July 29, 1992. Similarly, petitioner filed an answer and affidavit in response to the Board's application for stay on August 10, 1992, which was also misfiled with the State Board Office of Appeals on August 6, 1992. The Bureau of Controversies and Disputes received such submission on August 20, 1992.

As noted above, the Commissioner decided this case on July 2, 1992 with a ruling holding that petitioner, having met the precise requirements of the tenure statute, N.J.S.A. 18A:28-5, was

tenured, notwithstanding her having taken sick leave during the 1988-89 and 1989-90 school years. The Board was ordered to reinstate petitioner with mitigated compensation, based on Dorothy Kletzkin v. Board of Education of the School District of Spotswood, decided by the Commissioner July 30, 1990, aff'd with modification State Board February 5, 1992.

The Board's moving papers seek a stay of the Commissioner's decision pending appeal to the State Board of Education noting that the State Board decision in Kletzkin is now on appeal to the Appellate Division of the New Jersey Superior Court. The Board believes it has a likelihood of success in its appeal of this matter to the State Board based on the exceptions it filed previously before the Commissioner, including allegations of misinterpretation and misapplication of the State Board ruling in Kletzkin to this matter; the likelihood that the Appellate Division will modify, if not overturn the State Board decision in support of the Commissioner's decision in Kletzkin; and the alleged inappropriate retroactive application of Kletzkin to the instant matter.

Further, the Board's moving papers suggest it will suffer immediate and irreparable harm if a stay is denied and the Board is forced to reinstate petitioner prior to a final ruling in this matter because it has selected and hired a teacher, whom it wants, to teach the classes to which petitioner now claims entitlement. Further, it argues that if the stay is not granted, and the Board reinstates petitioner, but the Commissioner's decision is later reversed by the State Board, it will suffer irreparable harm in having to find a new teacher to replace petitioner, because it could

not force petitioner to return salary she has already been paid and, finally, because petitioner could also not compensate the district for having a teacher in the classroom whom it did not want there. Thus, the Board could not be made whole.

Finally, the Board argues the public interest in having only those teachers in classrooms who it has determined are needed is compelling. It claims that until a final ruling is made that the Board's determination to not rehire petitioner is illegal, the citizens of Bernards Township are best served by having only those teachers, whom it has hired, teaching its children. By contrast, the Board claims that petitioner's damages, if she prevails, are purely financial, and thus she can be made fully whole.

Petitioner's affidavit submitted in opposition to the Board's request for stay contends the Board cannot make the requisite showing for the grant of a stay pursuant to the standards set forth in Crowe v. DeGioia, 90 N.J. 126 (1982) and she finds support for such proposition in the Commissioner's decision rendered on July 2, 1992. She claims that both the ALJ and the Commissioner rejected the Board's claims in this case, and thus, that it cannot make a showing of a likelihood of success on the merits, or that Kletzkin, supra, does not govern this matter.

Further, petitioner claims it is she, not the Board, who would suffer irreparable harm were the stay granted, arguing, inter alia, that because the Commissioner rendered his decision in this case on July 2, 1992, the Board can still easily reinstate her without interfering with the continuity of instruction, and further that if she does prevail on appeal, but the Board hired someone else to her position in the interim, the Board would have expended two

salaries unnecessarily. Petitioner claims that such an expenditure of funds is unwise and unwarranted.

Finally, petitioner argues the equities of the matter favor her position, not the Board's, for the reasons expressed above and also because the law favors her position, even prior to the State Board's earlier decision in Kletzkin because similar leave had been held in other cases to be creditable for tenure. Thus, petitioner claims, the Board acted at its own peril in this matter, and the equities do not favor it.

The Commissioner has considered the arguments of the parties and finds no basis on which a stay would be warranted, as the Board has failed to meet those standards articulated by the court in Crowe, supra, for the extraordinary relief afforded by the grant of a stay, particularly because the Commissioner's decision rendered on July 2, 1992 fully considered and rejected those arguments now advanced by the Board in its request for stay, and because a Commissioner's decision is final unless and until reversed on appeal. See N.J.S.A. 18A:6-25.

Accordingly, IT IS therefore ORDERED on this 24TH day of September 1992 that the Board's Motion for a Stay is DENIED and that the Commissioner's decision in this matter shall stand unless and until reversed on appeal.

ACTING COMMISSIONER OF EDUCATION

SEPTEMBER 24, 1992

DATE OF MAILING - SEPTEMBER 24, 1992

147-92

EDU #6833-91
C # 147-92
SB # 31-92

JUDITH APOLLONY,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, SOMERSET COUNTY,	:	DECISION ON MOTION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, July 2, 1992

For the Petitioner-Respondent, Zazzali, Zazzali, Fagella & Nowak (Richard A. Friedman, Esq., of Counsel)

For the Respondent-Appellant, Martin R. Pachman, Esq.

The State Board of Education grants the motion by the New Jersey School Boards Association to appear as amicus curiae in this matter. The Association's brief shall be due ten days from the date of this decision.

April 7, 1993

Date of mailing 12 APR 1993

147-92

EDU #6833-91
C # 147-92
SB # 31-92

JUDITH APOLLONY,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, SOMERSET COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, July 2, 1992

For the Petitioner-Respondent, Zazzali, Zazzali, Fagella & Nowak (Richard A. Friedman, Esq., of Counsel)

For the Respondent-Appellant, Martin R. Pachman, Esq.

For the amicus curiae New Jersey School Boards Association, Sheila Dow Ford, Esq.

The State Board of Education has reviewed the proposed settlement agreement submitted by the parties in this matter and finds it to be in accord with the principles expressed in In the Matter of the Tenure Hearing of Frank Cardonick, decided by the State Board of Education, April 6, 1983. The State Board therefore approves the settlement and dismisses the appeal.

October 5, 1994

Date of mailing OCT 07 1994

147-92

JUDITH APOLLONY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, teaching staff member, sought reinstatement with back pay and interest, claiming Board violated her tenure rights. Board contended petitioner was not reemployed because she was not tenured.

In light of Kletzkin State Board decision, ALJ found the two-month sick leave taken by petitioner did not deprive the Board of adequate time to evaluate petitioner's performance. State Board stated that N.J.S.A. 18A:28-5 sets forth in plain terms that tenure is achieved after "employment" for a specified period with no limitations upon the word "employment." Thus, petitioner met precise requirements of statute and was awarded tenure. ALJ ordered Board to reinstate petitioner with mitigated compensation. Interest was not granted as it was not proven that Board acted in bad faith.

Commissioner adopted findings and determination in initial decision noting that leaves for both 1988-89 and 1989-90 were less than a year in duration. Board was ordered to reinstate petitioner with mitigated compensation.

JULY 2, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 6833-91
AGENCY DKT. NO. 222-6/91

JUDITH APOLLONY,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, SOMERSET COUNTY,
Respondent.

Richard A. Friedman, Esq., for petitioner
(Zazzali, Zazzali, Fagella & Nowak, attorneys)

Martin R. Pachman, Esq., for respondent

Record Closed: April 20, 1992 Decided: May 14, 1992

BEFORE **STEPHEN G. WEISS,** ALJ:

This tenure and seniority case was transmitted to the Office of Administrative Law by the Department of Education on July 12, 1991, as the result of the filing by Judith Apollony of a petition of appeal wherein she alleged that the failure by the respondent Board to continue her in employment for the 1991-92 school year was in violation of her tenure rights under N.J.S.A. 18A:28-5, 18A:28-10 et seq., and 18A:6-10 et seq., as well as in violation of her seniority rights in her category of employment under N.J.A.C. 6:3-1.10 et seq. Accordingly, Apollony demanded reinstatement with back pay and all other benefits, together with pre- and post-

judgment interest. The Board then filed an answer denying petitioner's allegations or her entitlement to any relief.

A telephone prehearing conference was conducted by the undersigned administrative law judge on November 26, 1991, and it was agreed that the following issue was to be resolved: "Did petitioner acquire tenure and/or seniority in the respondent school district and, if so, to what relief is she entitled?" During the course of the prehearing conference, it also was agreed that the matter was susceptible to disposition by way of cross-motions for summary decision. Accordingly, a schedule for the filing of such motions was set forth in the prehearing order and, thereafter, a detailed joint stipulation of facts and cross-motions for summary decision were filed.

In a letter opinion, dated April 8, 1992, I reviewed the undisputed facts and the applicable case law cited by counsel. Attached hereto is a copy of that letter opinion, which is incorporated by reference. As I explained in that letter, in light of the Commissioner's decision in Kletzkin v. Board of Education of Spotswood, 1990 S.L.D. ____, decided July 30, 1990 (OAL DKT. EDU 4064-89), both motions for summary decision had to be denied. My determination rested upon the view that the joint stipulation of facts did not provide an adequate enough record for me to rule comfortably in connection with one of the decisional criteria which the Commissioner's decision in Kletzkin set forth in matters of this sort; namely, the impact of leave time upon the ability of the school district to have adequate time to evaluate the staff member's performance. Although I determined that none of the other criteria mentioned by the Commissioner in Kletzkin stood in the way of summary decision, that particular factor, in light of the circumstances, required live testimony.

On the day following the mailing of my letter opinion to counsel, I received a telephone call from the attorney for the respondent, who advised me that the Commissioner's decision in Kletzkin, which had been the primary focus of attention by both sides in their briefs, had been reversed in February 1992 by the State Board of Education and neither counsel had been aware of the reversal. Thus, at my request, a copy of the State Board's decision in Kletzkin was forwarded to me for review. Also, I directed counsel to submit supplementary memoranda setting forth their respective positions in light of the State Board's decision.

The underlying facts essential to a determination in this case are set forth in the letter opinion attached hereto and need not be repeated. Suffice it to say that the issue addressed by me in that opinion related to the question of whether the Board's decision not to continue Apollony in its employment following the conclusion of the 1990-91 school year was a violation of her tenure rights. More particularly, the issue narrowed to whether or not an approximate two-month sick leave taken by Apollony during the period October 28, 1989 to January 3, 1990 deprived the Board of the ability to adequately evaluate her performance and, therefore, the time could not be counted toward acquisition of tenure. If that period was included, then, pursuant to N.J.S.A. 18A:28-5(c), she would have accumulated more than three academic years within four consecutive academic years of employment in the district.

The analysis which I set forth in my letter opinion tracked that articulated by the Commissioner in his decision in Kletzkin. The State Board reversal on appeal in Kletzkin rejected that analysis. Specifically, the State Board found that the Commissioner's decision failed to employ the correct legal standard. Contrary to the Commissioner's view, the State Board held that acquisition of tenure depends solely upon fulfillment of the precise conditions set forth by the Legislature in the tenure statutes, and the administrative agency was not free to create exceptions to that clear and unambiguous language based upon its own "policy" considerations.

In particular, the State Board stated that N.J.S.A. 18A:28-5 sets forth in plain and unambiguous terms that tenure is achieved after "employment" for a specified period — there are no exceptions to or limitations upon the word "employment." Thus, relying upon the language of the New Jersey Supreme Court in the case of Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982), that neither the courts nor the Commissioner are at liberty to presume that the Legislature intended anything other than that which is expressed plainly in the tenure statute, the State Board in Kletzkin held that the Legislature meant exactly what it said when it determined that a period of mere employment for the equivalent of more than three academic years within a period of any four consecutive academic years provided a sufficient period of scrutiny to evaluate the suitability of a teaching staff member.

Specifically, the State Board noted that given the liberal construction to be applied to the Tenure Act, it would not presume that the Legislature intended its express language to "impose special requirements on the relationship so as to exclude periods of sick leave such as involved here from the calculation of time creditable towards tenure." Kletzkin, State Board decision, at 11. In light of the State Board's decision overruling the Commissioner, I believe that I must now grant summary decision in favor of the petitioner.

In the supplemental memorandum filed by the Board, two arguments were raised. First, since the State Board decision in Kletzkin will be appealed to the Appellate Division, I should take no action until that appeal is decided. Second, that the facts in Kletzkin differentiate that case from the matter sub judice since Apollony was not "terminated"; rather, she simply was not "reemployed."

Neither argument is persuasive. The decision by the State Board represents the present state of the law and I will follow it. Moreover, I see no meaningful difference between the facts in this case and those in Kletzkin insofar as the legal issues are concerned It is undisputed that Apollony has been "employed" within the meaning of the Tenure Act for more than three academic years within a period of four consecutive academic years. Thus, since the precise requirements of the tenure statute have been met, Apollony should be awarded tenure.

Accordingly, for the reasons set forth herein, I **FIND** that the petitioner, Judith Apollony, has acquired tenure as a teaching staff member in the respondent school district. Accordingly, Apollony's motion for summary decision is granted and she should be reinstated to a teaching position, provided that her seniority qualifies her for the same. Also, she should be awarded such back pay and other emoluments of which she was deprived, minus any mitigation by way of other employment, etc. I will not recommend the award of any interest since the Board's action was taken in good faith and, indeed, was in accord with the established case law prior to the State Board's Kletzkin determination. The Board's cross-motion for summary decision is denied.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 14, 1992
Date

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

May 18, 1992
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 20 1992
Date

OFFICE OF ADMINISTRATIVE LAW

amr/e

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

185 Washington Street
Newark, NJ 07102
(201) 648-6036

Stephen G. Weiss
Administrative Law Judge

April 8, 1992

Richard A. Friedman, Esq.
Zazzali, Zazzali, Fagella & Nowak
150 West State Street
Trenton, NJ 08608

Martin R. Pachman, Esq.
60 East Main Street
Freehold, NJ 07728

Re: Judith Apollony v. Board of Education of Bernards Township
OAL DKT. NO. EDU 6833-91

Dear Counsel:

The following letter opinion constitutes my decision with respect to the pending cross-motions for summary decision in this case.

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law by the Department of Education as a "contested case" on July 12, 1991, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. It concerns a petition of appeal filed by Judith Apollony alleging that by virtue of her total creditable service as a teaching staff member employed by the respondent school district between September 1987 and June 1991 she has obtained tenure. In addition to seeking reinstatement, Apollony also requests back pay, benefits and both pre- and post-judgment interest. The Board's answer denied Apollony's claim that her total creditable service was sufficient to give her tenure and maintained that its decision not to renew her employment for the 1991-92 school year was proper.

A telephone prehearing conference was conducted by the undersigned administrative law judge on November 26, 1991, at which time the following issue was set forth: "Did petitioner acquire tenure and/or seniority in the respondent

school district and, if so, to what relief is she entitled?" During the course of the prehearing conference, both counsel indicated that possibly the matter could be submitted on a joint stipulation of facts and cross-motions for summary decision. See, N.J.A.C. 1:1-12.5. Thereafter, a joint stipulation of facts was filed, together with cross-motions for summary decision.

JOINT STIPULATION

The joint stipulation sets forth the following facts which, together with certain attached documents, provide according to counsel an adequate basis for the grant of summary decision. Those agreed facts are as follows:

1. Petitioner is an appropriately certified teaching staff member.

2. Petitioner was initially employed by respondent in September of 1987 for the 1987-88 school year.

3. Petitioner worked the entire 1987-88 school year, utilizing one sick leave day.

4. Petitioner was re-employed for the 1988-89 school year.

5. By letter dated October 2, 1988, petitioner applied for a "maternity leave" to commence December 12, 1988 and to continue through the end of the school year. By that same letter, petitioner advised the Board of her intention to exhaust all accumulated sick leave with pay (19 days) prior to the commencement of her unpaid leave, so her actual last date of work was to be November 11, 1988 (Exhibit A). A medical note followed on October 5 (Exhibit B).

6. At its meeting of October 24, 1988, the Board granted the requested unpaid "maternity" leave and acknowledged petitioner's right to use her sick leave for disability (Exhibit C). No additional paid leave was requested by petitioner or granted by the Board.

7. Notwithstanding the planned leave as set forth above, petitioner suffered an emergency hospitalization on October 28 and did not return to work until January 3, 1989 (Exhibits D and E). From that date until the end of the school year, petitioner was absent on three additional days due to illness.

8. Thus, during the 1988-89 school year, petitioner worked during the month of September, worked all but one day during the month of October, and did not work during the months of November and December, and worked January through June except for three days missed due to illness.

9. As a result of a clerical error, petitioner suffered no loss of pay throughout the 1988-89 school year. This clerical error was not discovered until January of 1990.

10. Petitioner was re-employed for the 1989-90 school year and began to work in of September 1989.

11. Petitioner was out ill for one-half day on October 12 and full days on October 13, 16 and 17, 1989. On October 18, 1989, petitioner was hospitalized and did not return to work for the balance of the 1989-90 school year.

12. On November 27, 1989, the Board, pursuant to a request dated November 8, 1989 (Exhibit F), granted a medical leave without pay retroactive to October 18, 1989 and continuing through January 24, 1989 (Exhibit G and H).

13. On January 22, 1990, the Board, pursuant to a request dated January 14, 1990 (Exhibit I), granted a child rearing leave effective January 25, 1990 and extending through June 30, 1990 (Exhibit J). No paid leave was requested or granted for either leave.

14. Thus, during the 1989-90 school year, petitioner worked only from the beginning of school in September through October 12 (one-half day).

15. As a result of a clerical error, petitioner was paid for all absences through the month of November. This error was discovered in January of 1990.

16. Petitioner was contacted regarding the 1989-90 overpayment in February of 1990 and, after negotiations by mail and telephone, was granted credit for ten sick days and two personal business days. Petitioner reimbursed respondent for one month and 1.5 days of net salary (Exhibits K-O).

17. Petitioner was re-employed for the 1990-91 school year.

18. Petitioner worked the entire 1990-91 school year except for the sporadic use of four sick leave days.

19. On April 29, 1991, respondent voted not to renew the employment contract of petitioner for the 1991-92 school year (Exhibit P).

20. There are no issues of procedural irregularity pursuant to N.J.S.A. 18A:27-10 et seq. The sole issue herein is whether, upon the above outlined work record, petitioner acquired a tenure status within the meaning of N.J.S.A. 18A:28-5 et seq.

DISCUSSION

As counsel for Apollony aptly observes in the brief in support of her motion for summary decision, the "$64,000 question" in this case is whether any portion of petitioner's leaves during the 1988-89 or 1989-90 school years can be credited for tenure purposes. Indeed, the inquiry is even more limited. As set forth in the joint stipulation, petitioner's absences during the 1989-90 school year equaled more than eight months, the bulk of the school year. Thus, petitioner concedes that, ". . . it seems logical not to credit it [the 1989-90 leave time] for tenure purposes. . . ." Brief of Petitioner, p. 5. However, if Apollony's 1988-89 leave of about two months' duration is credited, she claims she should have been considered tenured. See, N.J.S.A. 18A:28-5(c).

Petitioner correctly observes that the Tenure Employees Hearing Act is to be liberally construed, and all reasonable doubts concerning acquisition of tenure are to be resolved in an employee's favor. See, e.g., Spiewak v. Board of Ed. of Rutherford, 90 N.J. 63 (1982). The most recent case concerning the type of issue involved in the matter sub judice, and one which Apollony believes should be "controlling," is the Commissioner's decision in Kletzkin v. Board of Ed. of Spotswood, 1990 S.L.D. _____, decided July 30, 1990 (OAL DKT. NO. EDU 4064-89). In Kletzkin, the Commissioner articulated standards which he believed govern the question of whether leave time should be counted toward acquisition of tenure and he observed that none of the prior cases established absolute standards for crediting leave time. Rather, they stand for the proposition that each must be judged in accordance with the specific facts applicable to it. Specifically, the significant factors to be considered include: (1) The length, placement and nature of the disputed leave; (2) its concomitant impact on the district's ability to evaluate the affected staff member; and (3) the type of position from which the leave was taken. Kletzkin, supra, at p. 14. In determining, in Kletzkin, that the employee's disputed leave time was creditable for tenure purposes, the Commissioner concentrated on the second factor, the ability of a Board to evaluate the employee's performance. Thus, the Commissioner noted that in prior cases crediting leave time, the inquiry properly focused on whether the break in service materially interfered with the district's obligation to evaluate. Of particular importance to the Commissioner was that the board had, ". . . ample opportunity to evaluate her over the past three years, and it is difficult to conceive that much would have changed if the Board had been able to conduct one last evaluation just prior to the tenure acquisition date." Kletzkin, supra, at p. 15.

Thus, the first element to be considered in determining the tenure acquisition consequences on Apollony of her leave is its "length, nature and placement." Again, the leave in question was for child birth purposes and originally was to commence on December 12, 1988, and continue to June 30, 1989. Unfortunately, petitioner had to be hospitalized on October 28, 1988 for pre-term labor. On November 30, 1988, she dispatched a letter to the superintendent setting forth the circumstances

surrounding the unanticipated early commencement of the leave and asked that she be permitted to return to her teaching position on January 3, 1989. The Board granted that request and Apollony returned to work on that latter date. Thus, according to petitioner, the "length, nature and placement" of this two-month leave does not militate against her since the leave arose out of a medical matter of emergent proportions and occurred at a time during the school year wherein Apollony missed relatively few days in respect to the total number of work days in the school calendar.*

In response, the Board maintains that an analysis of the length, placement and nature of Apollony's 1988-89 leave reveals that it was significantly adverse to the public interest. First, petitioner missed approximately 20 percent of the entire school year, and while it is true that certain holidays and professional leave days fell within that time period (Veterans' Day, Teacher's Convention and the Christmas-New Year's break), the days missed were consecutive and fell in the middle of the school year. In essence, according to the Board, since the absence encompassed the last half of the "fall semester," it interfered substantially with the notion of continuous teaching for a full academic year and the first element noted in Kletzkin must be resolved in its favor.

The second element to be considered with respect to the impact of Apollony's leave during 1988-89 is whether it interfered materially with the opportunity to evaluate her performance in a meaningful way. This was the area upon which the Commissioner concentrated in Kletzkin.

Petitioner maintains that the stipulated facts demonstrate beyond reasonable debate that her leave did not significantly interfere with the District's ability to evaluate her. Thus, petitioner notes that not only was she evaluated three times during the 1988-89 school year, she also received a favorable year-end evaluation and a PIP which was discussed with her at the beginning of the 1989-90 school year (Exhibits Q-5, Q-6, Q-7, Q-8 and R-2). Beyond that, evaluation of her performance during that school year led to a recommendation for reemployment for 1990-91. Given these "positives," petitioner questions how respondent can claim that its inability to evaluate her during two months in 1988-89 was so significant. Also, Apollony notes that in Kletzkin, too, the disputed leave was for a period of only two months, and since there was no impermissible interference with the Board's ability to evaluate Klētzkin, the same result should obtain here.

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*Petitioner therefore missed two school days in October, 18 school days in November and 16 school days in December. There were 186 school days for staff in 1988-89. Thus, the absences constituted 36/186 or 19 percent of the total (Exhibit S-2).

The Board, in response, maintains that the three evaluations it conducted in 1988-89 were not sufficient to provide it with an adequate opportunity to gauge petitioner's overall performance since there are less than the number of evaluation-type contacts which the Board expects to take place. To that end, the Board points to the provisions of the collective negotiations agreement in effect during 1988-89 which provided that there would be a minimum of two visitations per semester, or four per year. So too, the Board notes that a policy in effect at the same time also required four observations.

Finally, the Board again observes that the particular timing of the 1988-89 leave represented a significant break in the continuity of Apollony's service and therefore precluded the administration from, ". . . conducting sequential evaluations throughout a consecutive period of years . . . ." See, Brief of Respondent, p. 7.

The third standard referenced by the Commissioner in Kletzkin has to do with the "type of position" involved. Apollony maintains that this element is of minor significance since she was not an administrator and her leave had no meaningful impact on the overall operations of the school district. The Board counters that consideration of the "type of position" must take into account the other criteria mentioned by the Commissioner in Kletzkin. Accordingly, since Apollony was a 10-month employee rather than a 12-month employee, it had less time to undertake its evaluation. Compare with, Goebel v. Board of Education of Maywood, 1984 S.L.D. 1638.

As the result of my review and consideration of the stipulated facts, the briefs of counsel and the principles applicable to motions for summary decision, for the reasons which follow I do not believe that given the present posture of the case I can render summary decision in favor of either petitioner or the Board. Accordingly, the cross-motions are denied and this matter will proceed to a plenary hearing on the date previously scheduled--July 20, 1992.

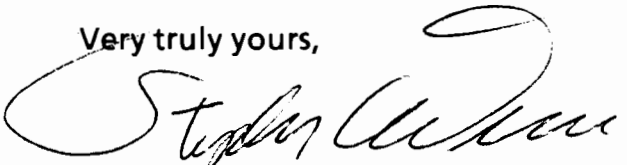
The principles applicable to motions for summary decision are set forth in N.J.A.C. 1:1-12.5(b). Basically, summary decision may be rendered where the moving papers, together with any affidavits, show that there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law. See also, Rule 4:46-2. There is not, in this case, a mere "metaphysical" doubt as to a material fact. See, Matsushita Elec. Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-587 (1986). Specifically, a very real issue persists as to the nature and extent of the Board's opportunity to evaluate petitioner's performance during 1988-89. That inquiry depends upon a variety of factors which are subjective in nature, particularly suited to live testimony and not yet addressed adequately. There is, in short, ample reason for me to exercise caution with respect to granting summary decision. See, Baer v. Sorbell, 177 N.J. Super. 182, 1985 (App. Div. 1981), certif. den. 87 N.J. 388 (1981); Shadel v. Shell Oil Co., 195 N.J. Super. 311, 316-317 (Law Div. 1984).

Simply put, there appears to me to be a genuine, unresolved dispute as to an important evidentiary fact--the ability of the Board to carry out an effective evaluation during the 1988-89 school year. The fact that both sides have moved for summary decision does not create any obligation to grant summary decision to one party or the other. See, e.g., Home Insurance Co. v. Aetna Casualty and Surety Co., 528 F.2d 1388 (2nd Cir. 1976); Rhoads v. McFerran, 517 F.2d 66 (2nd Cir. 1975). After reviewing the joint stipulation and drawing all reasonable inferences, I am convinced that with respect to the second standard articulated by the Commissioner, there is a need to take live testimony to determine whether the Board had the full opportunity it claims it needed to evaluate the petitioner. While "excessive caution" can undercut the purposes of the summary decision rule, see, Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 65 (1980), that situation does not pertain in this case.

I appreciate the efforts made by counsel in developing the detailed joint stipulation of facts and in preparing the briefs. However, I must reiterate that absent from the record is what I believe to be a critically important element--live testimony from Board personnel responsible for the evaluation process concerning how Apollony's 1988-89 absence impacted adversely and in a significant way on their ability to analyze her performance. At this point, the "evidence" in respect to that critical issue is mainly theoretical and consists primarily of conclusory arguments of counsel. In order for an adequate record to be made for review by the Commissioner, I believe it is necessary for such testimony to be offered as to this major fact issue, and an opportunity provided for examination and cross-examination by counsel and, if appropriate, questions from the undersigned administrative law judge. In light, therefore, of the importance which the 1988-89 leave has in this case, I would be remiss if I granted summary decision to one side or the other on the present record.

Accordingly, both the motion by petitioner for summary decision, and respondent's cross-motion, are denied. Counsel will prepare an appropriate order embodying this determination, incorporating this letter by reference and providing for interlocutory appeal by either party to the Commissioner if they so desire. See, N.J.A.C. 1:1-14.10. This letter should be attached to the order.

Very truly yours,



Stephen G. Weiss
Administrative Law Judge

SGW/amr

JUDITH APOLLONY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board filed timely exceptions and petitioner provided timely reply exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

The Board argues that the ALJ incorrectly applied Dorothy Kletzkin v. Board of Education of the School District of Spotswood, Middlesex County, decided by the Commissioner of Education July 30, 1990, aff'd with modification State Board February 5, 1992, and that the State Board did not address what is "the equivalent of more than three academic years." (emphasis in Exceptions, at p. 3, quoting N.J.S.A. 18A:28-5(c)) The Board finds that there is no reason to carry over the State Board's analysis in Kletzkin to this matter because that case was based on a consecutive employment pattern which began just shortly after Kletzkin's start of the 1986 calendar year. The Board argues that to follow such reasonings would, in its extreme, grant tenure to a teaching staff member who worked one day at the beginning of each year of his/her contract for four

consecutive academic years, with no consideration of what the equivalent of an academic year is. The Board argues that to follow Kletzkin to its extreme, petitioner in this case is to be credited for a full academic year of teaching in 1989-90 after working only 27 1/2 days and having only one evaluation.

Citing Canfield v. Bd. of Ed. of Pine Hill Borough, 51 N.J. 400 (1968), the Board further argues that Kletzkin contradicts the well-established case law that if a nontenured teacher is contracted for a fourth academic year, assuming a subsection b situation, but that contract is rescinded by the Board before the date on which the teacher would have received tenure, the result is that tenure is not acquired. The Board contends that while the facts of Canfield are not similar to the facts in this matter, it cites the case for the point that the Supreme Court in Canfield clearly indicates that the two words "employment" and "contract" are not synonymous and that under N.J.S.A. 18A:28-5(c) "employment *** for the equivalent of more than three academic years" means an employee must provide services for the equivalent time requirement, not just be under a contract.

The Board also reiterates its argument that the State Board decision in Kletzkin is on appeal to the Appellate Division and thus is not a final controlling decision. The Board suggests the ALJ erred in deciding the matter based on the State Board decision in Kletzkin and should rather proceed to take facts at the hearing in the instant matter, which can then be applied to any Appellate Division decision.

Further, the Board argues that the ALJ should have granted its Motion for Summary Judgment based on the Commissioner's decision

in Kletzkin, and that he should have found, based on the Commissioner's decision, that there was a significant break in petitioner's service that requires denial of her Motion for Summary Judgment.

Finally, petitioner argues assuming arguendo that the ALJ correctly interpreted the Kletzkin decision, it should be applied only retroactively and not in the instant matter. The Board suggests those criteria established by the New Jersey Supreme Court in Rutherford Educ. Assoc. v. Bd. of Educ., 99 N.J. 8 (1985) to be used to determine when a ruling should be applied prospectively only. It claims those prongs are: (1) evaluating whether a new rule of law has actually been announced by the case; (2) evaluating the reliance placed on the old rule by the parties and communities; and (3) evaluating the effect the new rule of law would have on the administration of justice. The Board submits that permitting petitioner's reinstatement under these criteria would "create administrative chaos involving not only that teacher but also other teachers in the system." (Exceptions, at p. 12, citing Rutherford, at 29) Thus, the Board contends the rule of Kletzkin, whatever it is, or becomes, is not applicable to the case at bar.

The Board seeks reversal of the initial decision.

Petitioner's reply exceptions first suggest that the ALJ's initial decision should be affirmed. She argues that the Board is wrong in contending that the State Board decision in Kletzkin is not controlling, and she cites Tietjen v. Bd. of Ed. of the Township of Bethlehem, Hunterdon County, decided by the Commissioner June 3, 1983, rev'd/rem'd St. Bd. October 26, 1983, Decision on Remand May 1, 1984 for the statement that the Commissioner could not assume

that the Court would reverse the Appellate Division's decision because current law is that set forth by the State Board and Appellate Division decisions.

Second, petitioner submits that the State Board decision in Kletzkin controls this case. She contends the principle of that case is that if an individual is issued an employment contract and takes leave of absence for part of the school year, the individual acquires tenure credit. She claims the Board's contention that Kletzkin applies only in cases arising out of one section of the Tenure Act is "absurd." (Reply Exceptions, at p. 2) Petitioner contends the same term, "employment" (N.J.S.A. 18A:28-5) is used in each section of the Act and there exists no basis to distinguish among the sections of the statute in determining when Kletzkin applies. She adds that the hypotheticals suggested by the Board are not likely to arise because most collective bargaining agreements do not permit nontenured teachers to take extended leaves of absence for part of a school year, if at all.

As to the Board's reliance on Canfield, supra, petitioner submits that regardless of the Board's reading of Canfield, the Commissioner is bound by the State Board's reading in Kletzkin. Moreover, she contends that if a Board is not satisfied with a teacher's services or wishes to preclude a teacher on leave of absence from acquiring tenure, it can do what the Board did in Canfield, terminate the nontenured teacher in accord with the contractual notice provisions. In such event, petitioner argues, the Board is responsible only for contractual mandated pay, but tenure would not be acquired.

Further, in response to the Board's retroactivity argument, petitioner suggests that under the case law as it existed before the State Board's decision in Kletzkin, she was entitled to prevail noting that in the Commissioner's decision in Kletzkin, petitioner prevailed, and Goebel, a case noted in Petitioner Apollony's brief, was decided and affirmed by the State Board in 1985.

Also, petitioner submits that even if the Board's argument of retroactivity is relevant, the instant matter stands in contrast to Rutherford. She claims in Rutherford, in determining that its prior decision in Spiewak v. Bd. of Ed. of Rutherford, 90 N.J. 63 (1982) should not apply retroactively to teachers terminated before Spiewak, the Supreme Court overruled that line of cases holding that Title I teachers cannot acquire tenure. Thus, petitioner claims, the law was clearly different from that applied in Spiewak, which overruled all prior law. By contrast, petitioner suggests that the State Board did not overrule prior law, but rather affirmed a Commissioner's decision which had concluded that a teacher on leave of absence acquired tenure credit for the period of the leave. Thus, petitioner argues, under circumstances similar to those at bar, the Commissioner found petitioner's leave was creditable for tenure, and the law favored petitioner in this matter even before the Board riffed her, the Commissioner having decided Kletzkin over a year before she was terminated. Accordingly, petitioner finds the Board's reliance on Rutherford, supra, misplaced because the law was already in her favor and because there was no real change or break in the prior law.

Petitioner submits the ALJ acted correctly in granting petitioner summary judgment. In the event, however, that the

Commissioner deems there is to be a retroactivity issue, petitioner claims she would at minimum be entitled to the benefit of the Kletzkin rule as enunciated by the ALJ, and the case would have to be remanded for further proceedings, through use of the test articulated by the Commissioner in his Kletzkin decision. She seeks affirmance, however, of the initial decision.

Upon careful and independent consideration of the record of this matter, the Commissioner affirms the initial decision of the Office of Administrative Law.

Initially, the Commissioner rejects the Board's retroactivity argument. The Commissioner is compelled to apply the time of decision rule and to decide this matter in the face of the State Board's decision in Kletzkin, which it is noted, merely modified the Commissioner's holding in favor of Petitioner Kletzkin. See, e.g., Tietjen, supra. The modification articulated by the State Board spoke to the point that because the leave of absence enjoyed by petitioner in that matter was less than a full year in duration, no such considerations, such as number of evaluations during the time served during that year, could impact on the acquisition of tenure. See State Board decision in Kletzkin at pp. 6-7. Accordingly, the Commissioner rejects both the Board's retroactivity argument and its Rutherford position as being inapposite to this matter.

Similarly, the Commissioner agrees with the ALJ in his assessment that notwithstanding the time petitioner herein was on leave of absence, both in the 1988-89 school year and in the 1989-90 school year, she served for more than three academic years within a period of four consecutive years and, thus, she has fulfilled the

precise requirements of the tenure statute, N.J.S.A. 18A:28-5(c). Accordingly, the Commissioner rejects the Board's break-in-service argument as being without merit.

Accordingly, for the reasons expressed in the initial decision signed May 14, 1992, as amplified herein, the Commissioner directs that petitioner be restored to her tenured position with back pay and all other benefits due and owing her. However, like the ALJ, the Commissioner denies pre- and post-hearing interest insofar as no showing of bad faith has been made and no unnecessary delay in the rendering of the initial decision has been demonstrated.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 2, 1992

DATE OF MAILING - JULY 2, 1992

148-92

148-92

JOHN KEVIN MC GLYNN, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF SEA GIRT AND WILLIAM J. PENTONY, SUPERINTENDENT, MONMOUTH COUNTY, : DECISION

RESPONDENTS. :

SYNOPSIS

Petitioning social studies teacher alleged violation of his tenure and seniority rights by the Board when it reduced him from full-time to part-time position, failed to assign him to other part-time teaching positions which would have provided him full-time employment and was also allegedly subjected to retaliation from Superintendent for pursuing tenure and seniority rights.

ALJ concluded that petitioner should have been retained as kindergarten teacher for 1990-91 school year instead of nontenured teacher. Capodilupo, Bednar. ALJ determined there was no proof that the Superintendent maneuvered petitioner's reduction from full-time to part-time hoping to force resignation of petitioner. ALJ concluded that Ms. Carey's seniority was superior to that of petitioner's in elementary education and therefore her appointment to basic skills teacher was correct and not an abuse by Board.

Commissioner affirmed in part and rejected in part the initial decision rendered by the Office of Administrative Law. Commissioner did not agree with the ALJ's assessment that Ms. Carey had accrued seniority in the elementary category. Because her service was in a departmentalized sixth, seventh and eight grade setting, seniority was accrued in the secondary category. N.J.A.C. 6:3-1.10(1)(19) Commissioner affirmed findings and conclusion of ALJ that petitioner was entitled to kindergarten position and therefore directed the Board afford petitioner all back pay which he would have earned for the 1990-91 school year and all other emolument lost as a consequence of this Board action.

JULY 2, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10363-90

AGENCY DKT. NO. 376-11/90

JOHN KEVIN McGLYNN

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF SEA GIRT AND WILLIAM J. PENTONY, SUPERINTENDENT, MONMOUTH COUNTY

Respondents.

Joel D. Rosen, Esquire, for petitioner, (Wills, O'Neill & Mellk, attorneys)

Frank M. McDonough, Esquire, for respondent, (Kenney, Gross & McDonough, attorneys)

Record Closed: April 29, 1992 Decided: May 18, 1992

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner alleges that the Board of Education of the Borough of Sea Girt (Board) violated his tenure and seniority rights when it reduced him from a full-time to a part-time position and failed to assign him to other part-time teaching positions

which would have provided him full-time employment; and, that the Superintendent retaliated against him for pursuing his tenure and seniority rights.

The instant matter was transmitted to the Office of Administrative Law (OAL) on December 3, 1990, 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.* Subsequent to two adjournments requested by counsel for the parties, a telephone prehearing conference was held on September 24, 1991.

Thereafter, respondent Board propounded and served a Notice of Motion for Summary Decision alleging a violation of the 90 day rule with regard to three claims in Count One of the Petition of Appeal and that the Commission of Education (Commissioner) lacked subject matter jurisdiction over claims in Count Two. Having considered the parties arguments, the undersigned advised the parties by letter dated January 7, 1992, that the matter was not ripe for summary decision and, pursuant to the criteria in *Judson v. Peoples Bank & Trust Company of Westfield,* 17 *N.J.* 67 (1954), denied the Board's motion.

The hearing was held on March 18, 1992, at the Spring Lake Municipal Court. The parties requested, and were granted, leave to submit post hearing memoranda. The last submission was received on April 29, 1992, which constitutes the close of the hearing record.

ISSUES

The issues to be determined by this tribunal, as agreed upon by the parties, are these:

1. Whether the Board violated petitioner's tenure and seniority rights by reducing him from a full-time to a part-time teaching position for the 1990-91 school year?

2. Whether the Board violated petitioner's tenure and seniority rights by denying him a position for which he held greater seniority when the Board employed a nontenured teacher for the position of halftime kindergarten teacher for the 1990-91 school year?

3. Whether the Board's Superintendent of Schools wrongfully, intentionally and/or maliciously interfered with petitioner's present and future

economic advantage by reason of the following acts which were arbitrary, capricious, unreasonable and beyond the statutory and regulatory authority vested in the Superintendent:

a. Whether the Superintendent maneuvered petitioner's reduction from full-time to part-time position in hopes of forcing petitioner to resign?

b. Whether the Superintendent denied to petitioner teaching positions for which petitioner held greater seniority, in hopes of forcing petitioner from the Sea Girt School District?

c. Whether the Superintendent wrongfully influenced the Board to deny petitioner's application for sabbatical leave of absence for educational purposes?

d. Whether the Superintendent intentionally created for petitioner a 1990-91 teaching schedule which required petitioner to teach longer hours than the afternoon session, while receiving payment for a halftime position?

e. Whether the Superintendent manipulated the schedules to continually deny petitioner's request for a full-time teaching position for which he was qualified for the 1990-91 school year?

f. Whether the Superintendent threatened petitioner that he would never forget petitioner's alleged challenge to the authority of the Superintendent?

4. Whether petitioner's claims, are barred by the 90-day rule? *N.J.A.C.* 6:24-1.2(c).

5. Whether petitioner's claims,as set forth in Count II, are barred by lack of subject matter jurisdiction?

6. Whether petitioner's claims for relief are barred by subject matter jurisdiction?

BACKGROUND FACTS

Based upon the testimony and other evidence adduced at the hearing the following background facts are adopted as my **FINDINGS OF FACT:**

1. The Board operates an elementary school district comprised of grades kindergarten through eight (8) with a 1991-92 school year enrollment of 147 pupils.

2. The school is organized around three divisions; *i.e.:* Primary - grades Kindergarten through grade two (2); Intermediate - grades three (3) through five (5); prehigh school - grades six (6) through eight (8), which are departmentalized.

3. Petitioner has been in the Board's employ since on or about September 1, 1975 under a standard New Jersey instructional certificate with an endorsement in grades K-12 social studies issued in June 1976. In December 1988 petitioner was issued an endorsement in Elementary Education.

4. Petitioner acquired a tenure status effective September 1, 1978.

5. As a consequence of the defeat at the polls of the Board's 1989-90 current expense budget and a decline in pupil enrollment, the Board determined to reduce teaching staff size and increase pupil class size. (Enrollment in social studies classes in grades 6 through 8 averaged between seven (7) and nine (9) pupils).

6. On April 9, 1990, the Board took official action to abolish the following full-time teaching positions: one science teacher for grades 6-8; one social studies teacher for grades 6-8; and, one teacher aid for grades 2 and 3. As a consequence, petitioner's full-time position as a social studies teacher was abolished with the Board taking action to terminate petitioner and Jeanne Carey, science teacher for grades 6-8. Petitioner spoke at the public Board meeting in opposition to the Reduction in Force (RIF).

7. The Board thereafter created two, half-time positions and, by virtue of their respective tenure status, appointed petitioner to the half-time social studies 6-8 grades position while appointing Ms. Carey to the half-time science grades 6-8 position.

8. On April 10, 1990, petitioner was given notice of the RIF and the offer for the half-time teaching position.

9. On April 11, 1990, petitioner applied for a sabbatical leave commencing September 1990 for the 1990-91 school year. Petitioner wished to obtain certification in student personnel services (guidance and counseling) and learning disability instruction (reading and mathematics basic skills).

10. On April 30, 1990, petitioner accepted the one half-time social studies teaching position for the 1990-91 school year.

11. In or about May 1990, Mary Wassmer Gleason, formerly a prehigh school team leader, now teacher of grade one; prepared the 1990-91 schedule of classes for the entire elementary school. The schedule included, among other things, providing teachers with planning periods, balancing the teaching schedules of full-time and part-time staff members; *i.e.,* reading and art, among others.

12. Grades 6, 7 and 8 had a combined enrollment of approximately 50 pupils. A class of 24 pupils might result in 12 different schedules.

13. Petitioner requested that his one-half social studies teaching class schedule be scheduled in the morning in order to provide him the opportunity to acquire outside employment in the afternoons.

14. Ms. Gleason complied with petitioner's request and completed the school schedule prior to the close of the 1989-90 school year for distribution to the teaching staff members before the summer recess.

15. On May 17, 1990, petitioner was advised by letter the Board had rejected his request for a sabbatical leave on May 7, 1990, for the 1990-91 school year.

16. On July 17, 1990, petitioner wrote a letter to the Superintendent to apply and be considered a candidate for two newly created teaching positions; *i.e.,* supplementary teacher and basic skills teacher.

17. On July 19, 1990, Superintendent Pentony advised petitioner the Board had assigned Jane Richards to the half-time position of supplementary teacher and Jeanne Carey as the half-time basic skills teacher. Superintendent Pentony asserted that both of these tenured teaching staff members had seniority rights superior to petitioner under their K-8 instructional certificates.

18. As a consequence of Ms. Richards' assignment to the half-time position of Supplementary Teacher, a half-time vacancy in the Kindergarten class was created.

19. On July 24, 1990, petitioner informed the Superintendent by letter of his intention to apply for the half-time kindergarten position. (Superintendent Pentony was unaware that petitioner held an endorsement in K-8 Elementary Education).

20. On July 30, 1990, Superintendent Pentony responded to petitioner by letter as follows:

> Thank you for your letter of July 24, 1990, expressing an interest in the kindergarten position. As you know, the half-time position of Kindergarten Teacher has always been a morning session situation in this school. There are several educational reasons for this, including developmental needs of five year olds, total instructional time advantages, productive a.m. hours vs. p.m. hours, etc.
>
> Your intention to apply for the kindergarten slot would conflict with your half-time social studies assignment in this school since, at your request and for various educational purposes, the social studies schedule is concurrent with the morning kindergarten schedule. Any further alteration of these schedules would impact negatively upon the continuity of instruction, cause a ripple effect on elements of the K-8 curricula and generally vitiate the educational program.

21. On August 14, 1990, petitioner wrote to the Superintendent asserting he was ready and willing to discuss a full day teaching position consisting of the morning kindergarten and afternoon social studies/computer class. Petitioner was certain a schedule could be arranged. Petitioner also asserted he intended to contact his lawyer.

22. On August 17, 1990, the Superintendent responded to petitioner's letter of August 14, 1990 asserting, among other things, that the reasons expressed in his letter dated July 20, 1990, (P-3) foreclosed any further discussion relative to a change in petitioner's schedule.

23. On August 27, 1990, the Board appointed Ms. Maria Schloeder, a nontenure teacher, to the position of half-time kindergarten teacher for the 1990-91 school year.

24. On August 27, 1990, the Board appointed Jane Richards to the half-time position of supplementary teacher and Jeanne Carey to the half-time position of basic skills teacher.

25. On November 20, 1990, the Commissioner was in receipt of petitioner's Petition of Appeal alleging, among other things, a violation of his tenure and seniority rights.

26. Jane Richards possesses a standard New Jersey instructional certificate with an endorsement as a K-8 teacher.

27. Jane Richards served as a half-time kindergarten teacher with the Board from September 1, 1966 until June 30, 1990.

28. Jane Richards acquired a tenure status with the Board on or about September 1969.

29. Jeanne Carey possesses a standard New Jersey instructional certificate with an endorsement as a K-8 teacher.

30. Jeanne Carey served as a full-time science teacher in a departmentalized sixth, seventh and eight grade organization from September 1985 through June 30, 1990.

31. Jeanne Carey acquired a tenure status on or about September 1988.

DISCUSSION AND CONCLUSIONS

I

WHETHER THE BOARD VIOLATED PETITIONER'S TENURE AND SENIORITY RIGHTS BY REDUCING HIM FROM FULL-

TIME TO A PART-TIME TEACHING POSITION FOR THE 1990-91 SCHOOL YEAR?

Petitioner concedes that his RIF is not at issue in this matter. (See, Petitioner's Proposed Findings of Fact and Conclusions of Law, para. 2) Therefore, there is no need to consider the Board's legal arguments with regard to its managerial rights, discretionary authority and good faith in authorizing the RIF, pursuant to *N.J.S.A.* 18A:28-9.

Accordingly, I **CONCLUDE** that the Board's authority effecting a RIF to reduce petitioner from a full-time to part-time teaching position for the 1990-91 school year is not at issue in the instant matter.

II

WHETHER THE BOARD VIOLATED PETITIONER'S TENURE AND SENIORITY RIGHTS BY DENYING HIM A POSITION FOR WHICH HE HELD GREATER SENIORITY WHEN THE BOARD EMPLOYED A NONTENURED TEACHER FOR THE POSITION OF HALF-TIME KINDERGARTEN TEACHER FOR THE 1990-91 SCHOOL YEAR?

The facts of this matter demonstrates that at the time of petitioner's initial employment commencing September 1, 1975, petitioner did not possess a valid New Jersey teacher certificate. Petitioner had taught in the States of California and Oregon prior to moving to New Jersey. Subsequently, in June 1976, petitioner was issued a K-12 Social Studies endorsement under a standard New Jersey instructional certificate by the Board of Examiners.

Petitioner was assigned by the Board to teach social studies in grades six, seven and eight in a departmentalized organization under his special field endorsement. Subsequently, petitioner acquired an endorsement in elementary education on his instructional certificate in December 1988. He, however, did not teach in a contained classroom setting for the Board under this elementary education endorsement. Rather, petitioner continued to teach social studies in the departmentalized organizational structure.

The facts further demonstrate that subsequent to the Board' abolishing petitioner's full-time social studies position and petitioner's acceptance of a part-time social studies teaching position, petitioner requested that his part-time social studies classes be scheduled in the morning. Petitioner made this request in order that he might pursue employment outside of the school district in the afternoons.

The record also shows that Mary Gleason was assigned to prepare and publish the school's master schedule for the 1990-91 school year. This preparation, which took two full weeks to complete, involved requests of teaching staff members to state their preference of schedule as to time and days for classes and class preparation periods. Ms. Gleason attempted to accommodate the requests where special circumstances demanded; *i.e.,* one teaching staff member taught both reading and art. Petitioner approached Ms. Gleason concerning his special request and Ms. Gleason was able to accommodate petitioner by arranging his 1990-91 social studies classes in the morning. Ms. Gleason prepared, and with the approval of the Superintendent, distributed the master schedule and individual teaching schedules for the 1990-91 school year to all teaching staff members prior to the close of the 1989-90 school year, which ended in June 1990.

On July 24, 1990, after the close of the 1989-90 school year and Ms. Gleason, a ten month employee, was no longer on duty; petitioner advised the Superintendent of petitioner's intention to apply for a part-time kindergarten teaching position occasioned by the transfer of Ms. Richards from part-time kindergarten to part-time Supplementary Teacher. For educational reasons, the kindergarten classes had always been scheduled for morning sessions. In general, the younger pupils were more alert and receptive to learning in the mornings rather than afternoons, among other things. On July 30, 1990, Superintendent Pentony responded to petitioner by letter asserting the educational reasons for morning kindergarten classes and observed the conflict with petitioner's requested and established morning schedule of his social studies classes for the 1990-91 school year. The Superintendent asserted the negative impact a change in schedule would impose upon the continuity of the instructional program. This negative impact of a schedule change at this late date was also observed by Ms. Gleason in her testimony at the hearing. Ms. Gleason testified, credibly, that it was not possible to change the schedule of one class. Rather, a change of one class would impact the whole school schedule. Therefore, no change in schedule resulted.

It is well settled that the reduction in force (RIF) of tenured or nontenured teachers is entirely within the authority of the board of education if done for reasons of economy. *Klinger v. Cranbury Township Board of Education,* 190 *N.J. Super.* 354, 357 (App. Div. 1982); *In re Maywood Board of Education,* 168 *N.J. Super.* 45, 55 (App. Div. 1979); *Jamison v. Morris School District Board of Education,* 198 *N.J. Super.* 413, 415 (App. Div. 1985); *Page v. Board of Education of the City of Trenton, et al ,* 1973 *S.L.D.* 704, 707 (1973); *N.J.S.A.* 18A:28-9, 10. Reduction in force includes reduction in hours or compensation as well as abolishment of position. *Klinger* 190 *N.J. Super.* at 357; *Page* 1973 *S.L.D.* at 706. The rights of a tenured teacher are entitled to prevail over the rights of a nontenured teacher with the same certification in a reduction in force. *Capidilupo v. West Orange Township Board of Education,* 218 *N.J. Super.* 510, 515 (App. Div. 1987). A requirement of "good faith" on the part of school boards has also been implied into the statute. *Popovich v. Board of Education of the Borough of Wharton, Morris County,* 1975 *S.L.D.* 737, 739 (1975).

In *Klinger v. Cranbury Township Board of Education,* petitioner was a tenured teacher whose full-time physical education teaching position was reduced to 3 1/2 days per week and seven-tenths salary as a bona fide RIF. *Klinger,* 190 *N.J. Super.* at 356. Petitioner challenged the Board's hiring of a second, nontenured part-time teacher with the same reduced teaching load rather than retraining petitioner as a full-time teacher in charge of the physical education program. *Id.* at 357.

Despite Klinger's tenure and greater seniority, the Appellate Division affirmed the State Board's decision upholding the action of the school board, citing its language with approval:

> The law is well established that unless the local board's action to reduce full time positions to part-time was taken in bad faith or constituted an abuse of discretion, its determination to abolish or change positions may not be disturbed by the Commissioner or the courts. We do not find it arbitrary for a local board to decide when having to reduce its physical education program to have two part-time teachers rather than one full-time. ***The tenure and seniority rights of an incumbent cannot prevail against the authority of the board when exercised in good faith and with some rational basis. The mere fact that petitioner was qualified to handle the entire physical education program is not material; nor is the fact that the Board might have organized its physical education differently.*** *Id.* at 357 (emphasis supplied)

The court further affirmed the school board's right to effect a reduction in force, and held that so long as petitioner had not been treated in an inferior manner, he had no legitimate complaint. *Id.* at 358.

This language has been interpreted to mean that a board of education has no obligation to reorganize its program at the expense of other tenured teachers in order to accommodate the subject of a RIF, *Sheridan v. Board of Education of the Black Horse Pike Regional School District, Camden County,* OAL Dkt. EDU 6899-83 (June 7, 1984) adopted, Commissioner of Education (July 20, 1984). *Klinger* has been recognized as "a case in which the petitioning teacher's rights could not be accommodated without changing the board 's longstanding educational approach and the existing pupil schedules." *Valinski v. Board of Education of Garwood, Union County,* OAL Dkt. EDU 5930-84 (January 22, 1985), rev'd, Commissioner of Education, (March 11, 1985), rev'd, State Board of Education, (November 8, 1985). In addition,

> Case law has clearly established that there is an obligation on the Board's part to accommodate an individual's tenure and seniority rights so long as it does not require the Board to take extraordinary steps to provide that person with a position in the category within which he or she may have entitlement. *Balczun v. Board of Education of Medford Lakes, Burlington County,* OAL Dkt. No. EDU 8077-86 (June 1, 1987), rev'd, Commissioner of Education, July 16, 1987.

However, in Capidilupo *v. West Orange Township Education Board* 218 *N.J. Super.* 510 (App. Div. 1987), the Appellate bench agreed with the State Board of Education that a tenured teacher is entitled to retention (after a RIF) as against a nontenured teacher under the tenure law. The *Capidilupo* court said:

> ... To hold otherwise would defeat the purpose of tenure which was to give a measure of security to teachers after the prescribed number of years of service. *Id* at 515 (citation omitted)

The Appellate Court continued to state:

> Our review of the record satisfies us that the State Board was within its delegated authority when it ruled that a tenured teacher seeking reinstatement within the endorsements on his or her certificate is

> entitled to preference in a RIF as against a nontenure applicant with the same certification ... Id. at 515

Moreover, in *Ellicott v. Board of Education,* 251 *N.J. Super.* 342 (App. Div. 1991), the Appellate Court endorsed the State Board's determination in *Capidilupo* that a tenured teacher is entitled to retention as against a nontenured teacher regardless of seniority, in the event of a RIF. 218 *N.J. Super.* at 514-515. The *Ellicott* court continued to say that:

> We held that "a tenured teacher seeking reinstatement ***within the endorsements on his or her certificate*** is entitled to preference in a RIF as against a nontenured applicant with the same certification." *Id.* at 515, 528 *A.2d.* 73 (emphasis added). This was so despite the fact that the tenured teacher had no "demonstrable experience" under the endorsement. *Id.* at 513, 528 *A. 2d.* 73 ... 251 *N.J. Super.* 349

The tension between the authority of a local board of education not to change its pupils schedules to accommodate a tenured teacher subject to a RIF and the entitlement of a RIFFED tenured teacher to preference of retention within the endorsements on his or her certificate as against a nontenured teacher remains unsettled. The courts have sustained both views. However, the latter position appears to be more persuasive. This is so because our Supreme Court in *Spiewak v. Rutherford Board of Education,* 90 *N.J.* 63 (1982) observed the well-established principle that tenure is statutory, 90 *N.J.* at 72, and, "The Tenure Act should be liberally construed to achieve its beneficent ends." 90 *N.J.* at 74. "To hold otherwise would be to defeat the purpose of tenure..." *Capidilupo,* 218 *N.J. Super.* at 515.

In *Capidilupo,* the Appellate Division of Superior Court agreed with the State Board that petitioner Capidilupo had acquired a tenure status "in all positions for which his instructional certificate qualified him ..." *Id.* at 514. The Court also agreed with the State Board that district boards of education are obliged to take into consideration the tenure right of individuals affected by a RIF.

In the instant matter little, if any, consideration was afforded petitioner's tenure status by the Superintendent or Board with regard to the kindergarten class opening. The Board created the kindergarten vacancy after petitioner's RIF and subsequent to the close of the school year. The Superintendent, in response to petitioner's expressed interest in the kindergarten position, failed to consider

petitioner's tenure. Rather, the Superintendent relied upon the established class schedules as the reason not to consider petitioner's application. There is nothing on the record to demonstrate that the Superintendent attempted to revise or modify the 1990-91 class schedule in any fashion. Instead, the Superintendent ignored petitioner's tenure as an elementary teacher and, used the established class schedule as the reason, without more, to reject petitioner's claim to the part-time kindergarten position.

I **CONCLUDE** that the Superintendent and Board erred when they failed to consider petitioner's tenure status with regard to the kindergarten vacancy for the 1990-91 school year.

I **CONCLUDE** that petitioner should have been retained as the kindergarten teacher as against a nontenured teacher for the 1990-91 school year.

III

WHETHER THE BOARD'S SUPERINTENDENT OF SCHOOLS WRONGFULLY, INTENTIONALLY, AND/OR MALICIOUSLY INTERFERED WITH PETITIONER'S PRESENT AND FUTURE ECONOMIC ADVANTAGE BY REASON OF THE FOLLOWING ACTS WHICH WERE ARBITRARY, CAPRICIOUS, UNREASONABLE AND BEYOND THE STATUTORY AND REGULATORY AUTHORITY VESTED IN THE SUPERINTENDENT.

a. WHETHER THE SUPERINTENDENT MANEUVERED PETITIONER'S REDUCTION FROM FULL-TIME TO PART-TIME POSITION IN HOPES OF FORCING PETITIONER TO RESIGN?

Petitioner failed to prove this allegation. The facts clearly demonstrates that the school district had experienced a decline in pupil enrollment. This decline in enrollment, coupled with a defeat of its 1990-91 current expense budget at the polls by the electorate, compelled the Board to abolish two (2) full-time teaching positions and one (1) full-time teacher aid position. Petitioner was one of the two full-time teachers subject to the RIF. There was no showing or proof that the Superintendent "maneuvered petitioner's reduction from full-time to part-time position in hopes of forcing petitioner to resign." The facts are too the contrary.

The Board caused the RIF of petitioner's full-time position based upon a legitimate and good faith reason of economy.

I **CONCLUDE,** therefore, there is no merit to petitioner's allegation with regard to this issue.

I **FURTHER CONCLUDE** that this allegation be **DISMISSED.**

b. WHETHER THE SUPERINTENDENT DENIED TO PETITIONER TEACHING POSITIONS FOR WHICH PETITIONER HELD GREATER SENIORITY IN HOPES OF FORCING PETITIONER FROM THE SEA GIRT SCHOOL DISTRICT?

Petitioner argues that by reason of his tenure and seniority he was entitled to the part-time positions of basic skills teacher, and/or kindergarten teacher under the rational expressed in *Grosso v. Board of Education, Borough of New Providence, Union County,* (decided, State Board, March 7, 1990); *Capidilupo v. West Orange Township Board of Education,* 218 *N.J. Super.* 510 (App. Div. 1987), *cert. den.* 109 *N.J.* 514 (1987); *Bednar v. Westwood Board of Education* 221 *N.J. Super.* 239 (App. Div. 1987), *cert. den.* 110 *N.J.* 512 (1988). Petitioner contends that Maria Schloeder, who was employed as the kindergarten teacher, had no prior teaching experience in the school district, thus, she had no tenure or seniority. He asserts that Jeanne Carey, who was hired as the Board's basic skills teacher, did not achieve a tenure status until September 1, 1988. Petitioner, on the other hand asserts he achieved tenure with the Board on or about October 1, 1978.[1] Petitioner, therefore, claims that his seniority is superior to both Schloeder and Carey and, thus, he should have been appointed to one of the two part-time positions.

Petitioner's claim as to the kindergarten part-time position has been discussed in detail in Section II above. Therefore, no further discussion is required here.

---

[1] Petitioner abandoned his seniority claim against Jane Richards' assignment to the part-time position of supplementary teacher.

The Board observes that petitioner has served his entire teaching career in the Sea Girt School District under the social studies endorsement of his instructional certificate. He has taught exclusively in a departmentalized organization, assigned to to grades six, seven and eight. Petitioner has never been assigned to teach all of the subject areas in a contained classroom under his elementary education endorsement of his instructional certificate with the Board. The Board argues that petitioner's assignment and K-8 social studies certificate places him in the category of secondary teacher and he did not accrue seniority within the elementary category for the period prior to the issuance of the elementary education endorsement in or about December 1988.

The Board cites the regulations for determining seniority at *N.J.A.C.* 6:3-1.10, which provides at *N.J.A.C.* 6:3-1.10(1)

> 19. Secondary. The word "secondary" shall include ... grades seven and eight in junior high schools and grade seven and eight in elementary schools having departmental instruction.
>
> i. Any person holding an instructional certificate with subject area endorsements shall have seniority within the secondary category only in such subject areas endorsement(s) under which he or she has actually served.

The regulations continue to provide, at *N.J.A.C.* 6:3-1.10(1)

> 20. Elementary. The word "elementary" shall include Kindergarten, grades one through six and grades seven and eight without departmental instruction.

The Board observes that Jeanne Carey acquired a tenure status under her elementary K-8 teacher certificate on or about September 1, 1988, some three months prior to petitioner. Notwithstanding that Ms. Carey taught science in a departmentalized six, seventh and eighth grade organization; by virtue of her teaching under her K-8 certificate, her seniority in the elementary category is superior to that of petitioner.

The Board also argues that petitioner's seniority claim with respect to the part-time supplemental teacher position was out of time, pursuant to *N.J.A.C.* 6:24-1.2(c), commonly referred to as the "90-day rule." The Board grounds its argument upon the Superintendent's letter to petitioner, dated July 19, 1990, wherein Superintendent Pentony advised petitioner of the Board's intention to assign Ms. Carey to the position of supplemental teacher and that Ms. Carey had seniority rights superior to petitioner.

The facts in this matter clearly demonstrate that the Board took official action to assign Ms. Carey to the position of supplemental teacher on August 27, 1990. The applicable regulation, *N.J.A.C.* 6:24-1.2(c), provides, in pertinent part, as follows:

> The petitioner shall file a petition no later than the 90th day from the date of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

The operative term is "final order." Here petitioner's Petition of Appeal is dated November 19, 1990. It was received by the Commissioner in his Bureau of Controversies and Disputes on November 20, 1990. The 90th day from the Board's final action to appoint to the position of Supplemental Teacher on August 27, 1990, was November 25, 1990. Therefore, the Superintendent's letter to petitioner dated July 19, 1990, is of no moment. Rather, the significant date of November 20, 1990, was well within the 90th day from the Board's action on August 27, 1990.

Accordingly, the Board's argument that the Petition of Appeal was filed out of time, pursuant to *N.J.A.C.* 6:24-1.2(c) is without merit and must be **DISMISSED**.

I **CONCLUDE** that petitioner's Petition of Appeal with regard to his seniority claim concerning the part-time position of supplemental teacher was filed with the Commissioner within the time prescribed by *N.J.A.C.* 6:24-1.2(c).

There is neither question nor doubt that petitioner acquired a tenure status in the positions of social studies teacher and elementary teacher by virtue of the endorsements on his instructional certificate. See, *Ellicott v. Board of Education,* 251 *N.J. Super.* 342 (App. Div.. 1991); *Bednar v. Westwood Board of Education,* 221 *N.J. Super.* 239 (App. Div. 1987); *Capidilupo v. West Orange Township Education Board,* 218 *N.J. Super.* 510 (App. Div. 1987). The threshold issue is whether petitioner acquired superior seniority over Ms. Carey to lay claim to the position of

supplemental teacher. The Appellate Court observed in *Bednar* that, "under current regulations, seniority is measured by years of employment in specific job categories which are normally narrower than the subject fields which are endorsed on teachers' certificates. See *N.J.S.A.* 18A:28-5; *N.J.A.C.* 6:3-1.10(b)"

In the instant matter, Ms. Carey acquired a tenure status as an elementary teacher under he K-8 elementary education endorsements on or about September 1988, notwithstanding that she had taught science in grades six through eight in a departmentalized organization. Petitioner, on the other hand, did not acquire the K-8 elementary education endorsement to his instructional certificate until December 1988. Although petitioner acquired tenure as a social studies teacher under his social studies teacher certificate in or about September 1978, he did not have seniority superior to Ms. Carey in the field of elementary education. Ms. Carey's seniority is superior to that of petitioner by approximately three months.

Petitioner's argument that he acquired tenure in all positions for which his instructional certificate qualified him without regard to whether he had any demonstrable experience under the endorsement is not disputed. *Ellicott, supra.* Conversely, petitioner's argument that it is of no consequence that Jeanne Carey had greater seniority in the elementary category than petitioner is rejected. Prior to December 1988, petitioner was not properly certificated to be employed by the Board as an elementary teacher in a contained classroom "authorized to teach the common branch subjects such as reading, writing, arithmetic, and spelling ..." *N.J.A.C.* 6:11-6.2(a)6.

I **CONCLUDE**, therefore, that Ms. Jeanne Carey's seniority is superior to that of petitioner's in the field of elementary education.

Consequently, I **CONCLUDE** that the Board's action to appoint Ms. Carey to the position of basic skills teacher over petitioner was correct and not an abuse of its authority.

I **CONCLUDE** that petitioner's claim to the position of basic skills teacher on the basis of superior seniority is without merit and must be **DISMISSED.**

Petitioner presented no proofs to support the changes as set forth in Issue #3 c.d.e. and f.

ISSUE 3.c

Petitioner produced no evidence that Superintendent Pentony had influenced the Board to deny petitioner's request for a sabbatical leave of absence. The Board's proofs demonstrate that it had no need for the program of study petitioner wished to pursue at the Board's expense. *See, George Cafarelli and the Long Beach Island Teacher's Association v. Long Beach Island Board of Education, Ocean County,* 1976 *S.L.D.* 989. The Board, therefore, rejected petitioner's application for the sabbatical leave in good faith and within its discretionary authority.

I **CONCLUDE** there is no basis in fact to support petitioner's allegation that the Superintendent influenced the Board to deny petitioner's request for a sabbatical leave.

ISSUE 3.d.

The facts are to the contrary with regard to petitioner's allegation that the Superintendent created a schedule which required petitioner to teach longer hours in his part-time position while receiving payment for a half-time position. The facts clearly demonstrate that the Superintendent provided petitioner with a teacher assignment which exceeded one-half of the school day in order that petitioner would be eligible for health benefits. Petitioner admits that he received such health benefits during the 1990-91 school year. Petitioner concedes that had he been assigned to less than one-half time teaching assignments, he would not have been eligible for the benefits.

I **CONCLUDE** that petitioner's allegation as set forth in Issue #3, d., are without merit and must be **DISMISSED.**

ISSUE 3.e.

The record clearly shows that it was petitioner who requested and was granted a morning schedule to teach his social studies classes. There was absolutely no showing that the Superintendent manipulated petitioner's teaching schedule for the 1990-91 school year. The record does demonstrate, however, that there was no review or reconsideration of the 1990-91 school schedule subsequent to petitioner's request to be considered for the kindergarten class and/or the basic skills teacher position.

I **CONCLUDE**, however, that the proofs fall far short of supporting an allegation that the Superintendent "manipulated" petitioner's teaching schedule for the 1990-91 school year, and, therefore, this charge must be **DISMISSED.**

ISSUE 3.f.

This issue was not addressed at the hearing nor briefed by the parties. Accordingly, I **CONCLUDE** there is no substance to support the allegation and, therefore, it is hereby **DISMISSED.**

MITIGATION

In *In the Matter of Juanita Zielenski v. Board of Education of the Town of Guttenberg, Hudson County,* 1981 *S.L.D.* 759, 769, the Commissioner recognized the common law principal of mitigation of damages where the illegally dismissed teaching staff member sought full recovery of her salary and other emoluments withheld from her. See, *White v. North Bergen,* 77 *N.J.* 538 (1978); *Talman v. Board of Trustees of Burlington County College,* 169 *N.J. Super.* 535 (App. Div. 1979). Mitigation is the deduction of other income received from the amount of back pay otherwise recoverable and, where other income is not actually received, the amount of back pay that may be reduced by the amount the discharged employee could or should have received by reasonable and sincere efforts to locate other employment. *Zielenski* at 762.

In the instant matter petitioner testified, credibly, concerning his efforts in attempting to find part-time employment in the field of education. Petitioner's testimony was supported by Superintendent Pentony who wrote letters of recommendation for petitioner and inquired of other Monmouth County school administrators of position openings on petitioner's behalf. (Under the doctrine of mitigation, petitioner was not obligated to seek employment in any line of service other than that which he was employed by the Board as a teacher. *Edgecomb v. Traverse City School District,* 341 *Mich.* 106, 67 *N.W.* 2d. 87 (1954)). Petitioner was unsuccessful in his attempts to secure part-time employment to supplement his part-time tenured position with the Board. (P-8).

Petitioner claims that his loss of earnings amounted to $23,000 due to the Board's action to employ a nontenured kindergarten teacher over him. The Board, on the other hand, seeks to strike petitioner's evidence relative to the issue of mitigation based upon petitioner's lack of response to discovery requests by the Board. The facts demonstrate that petitioner denied the Board any discovery relating to the issue of mitigation prior to the scheduled hearing asserting that the Board's inquiry was "irrelevant and not reasonably calculated to lead to the production of relevant material." Board's Initial Interrogatories ; Question #12, *et. seq.* notwithstanding the Board's arguments, this tribunal ruled that no prejudice was visited upon it by petitioner's tardiness in supplying the Board with documents relating to mitigation. Consequently, I **CONCLUDE** the Board's request to strike petitioner's evidence relative to the issue of mitigation is without merit and is **DISMISSED.**

Having fairly considered all of the evidence in this matter and having concluded that the Board should have appointed petitioner, a tenured teaching staff member, to the part-time position as kindergarten teacher rather than a new nontenured employee, I now **CONCLUDE** that petitioner has successfully demonstrated his attempt to mitigate damages as a result of his RIF and nonretention in the position to which he was entitled.

ORDERED

Accordingly, it is hereby **ORDERED** that the Board afford petitioner all back pay which he would have earned for the 1990-91 school year had the Board properly assigned petitioner to the part-time position of kindergarten teacher together with all other emoluments lost as a consequence of the Board's action.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

18 May 1992 — Lillard E. Law
Date — **LILLARD E. LAW, ALJ**

Receipt Acknowledged:

MAY 19, 1992 — Maureen K. Kelly
Date — DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 26 1992 — Jaynee LaVecchia
Date — OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

PETITIONER:

JOHN KEVIN McGLYNN

RESPONDENT:

WILLIAM J. PENTONY
MARY GLEASON

DOCUMENTS IN EVIDENCE

PETITIONER

P--1 Letter, April 10, 1990 to McGlynn from Pentony
P-2 Letter, July 19, 1990 to McGlynn from Pentony
P-3 Letter, July 30, 1990 to McGlynn from Pentony
P-4 Regular BOE meeting Agenda, August 27, 1990 (9 pages)
P-5 Letter, April 26, 1990 to McGlynn from Calhoun
P-6 Letter, April 10, 1990 to Pentony from McGlynn
P-7 Letter, June 4, 1990 To Whom It May Concern from Pentony
P-8 McGlynn Job Search, April 1990 to June 1991;
Letters, July 20, 1990 to McGlynn from Merce, Little Silver;
July 23, 1990 from McConnell, Cental Regional Middle School; and
August 20, 1990 from Brown, East Windsor Regional School District
P-9 Letter, March 16, 1992, To Whom It May Concern, Tedeschi
P-10 Letter, December 17, 1992, to McGlynn from Pentony
P-11 Letter, March 9, 1992, to SGEA from Calhoun

RESPONDENTS

R-1 Letter, January 9,1987 to Pentony from McGlynn
R-2 Letter, April 27, 1989 to Pentony from McGlynn
R-3 Teacher Observation and Evaluation - McGlynn - Nov. 29, 1988
R-4 Teacher Observation and Evaluation - McGlynn - Nov. 7, 1989
R-5 Annual Written Performance Report - McGlynn - May 4, 1990
R-6 BOE Minutes, April 9,1 990
R-7 Letter, April 11, 1990 to Pentony from McGlynn

R-8 Letter, May 17, 1990 to McGlynn from Pentony
R-9 Article XVI, Sabbatical Leaves
R-10 Letter, August 14, 1990 to Pentony from McGlynn
R-11 Letter, March 20, 1990 to Kevin from Pentony
R-12 Board Resolution, April 9, 1990
R-13 Letter, September 11, 1990 to Calhoun from McGlynn
R-14 Letter, May 3, 1989 to McGlynn from Pentony
R-15 Letter, December 15, 1989 to McGlynn from Pentony
R-16 List of Teaching Staff Members

subjects in an elementary school. Yet, neither Ms. Carey nor petitioner has seniority entitlement to bump a basic skills or supplemental instructor who is tenured and has accrued seniority in the elementary category.

In this regard, the Commissioner rejects the initial decision which found that Ms. Carey's seniority accrued in the elementary category as a result of her holding an elementary endorsement. In all other regards, the initial decision is adopted, for the reasons set forth therein.

Accordingly, the Commissioner directs the Board afford petitioner all back pay which he would have earned for the 1990-91 school year had the Board properly assigned him to the part-time position of kindergarten teacher together with all other emolments lost as a consequence of this Board action. Because petitioner has been made whole as a result of his prevailing on the issue of his entitlement to the kindergarten position, there is no need to address any entitlement petitioner might have to the basic skills position held by Ms. Carey, an entitlement, it is noted, that petitioner did not seek among his prayers for relief.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 2, 1992

DATE OF MAILING - JULY 2, 1992

149-92

IN THE MATTER OF THE CAP WAIVER	:	
APPEAL OF PEMBERTON TOWNSHIP	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION, BURLINGTON	:	DECISION
COUNTY.	:	
	:	

JULY 2, 1992

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF PEMBERTON TOWNSHIP : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION, BURLINGTON : DECISION
COUNTY. :
:

For Petitioner, Frederick W. Hardt, Esq.

For Respondent, John C. Gillespie, Esq., (Ferg, Barron & Gillespie)

This matter was opened before the Commissioner on April 27, 1992 through the Pemberton Township Board of Education's (Board) filing of an appeal of the cap waiver defeated by the voters of the Pemberton Township School District on April 7, 1992. On June 22, 1992, the Mayor and Council of the Township of Pemberton submitted notification that there was no objection to the relief requested in the cap waiver appeal. On that date as well, the Board submitted its position statement setting forth its basis for the need for the cap waiver monies sought; thus, it was on June 22, 1992 that the record in this matter closed.

It is the Board's contention that in addition to the current expense and capital outlay budgets approved by the voters of Pemberton Township on April 7, 1992 in the amount of $8,097,556 and $901,350 respectively, there is a need for an additional $1,134,257 in current expense and $383,048 in capital outlay in order for the district to provide a thorough and efficient education to its

students. The amount in contention in this matter before the Commissioner is set forth below:

	Proposed tax levy adopted by Board of Education	Amount of tax levy approved by the voters
Current expense	$ 8,097,556	$8,097,556
Capital Outlay	$ 901,350	$ 901,350
Current expense	$ 1,134,257	-0-
Capital expense	$ 383,048	-0-
Total	$10,516,211	$8,998,906

On March 5, 1992, County Superintendent Arthur Merz conditionally approved the Pemberton Township School District's budget subject to the cap waiver amounts set forth below which were deemed necessary for a thorough and efficient education by him.

Current Expenses

Account Title	Account No.	Amount
Administrative Salaries	010110	$ 20,497
High School Teacher Salaries	0102131	40,000
Elementary Teacher Salaries Grades 6-8	0102132	33,000
Elementary Teacher Salaries Pre-School/1st	0102134	160,000
Textbooks	010220	196,751
Library Books	010230	49,000
Teaching Supplies	010242	48,000
Inservice Other Expenses	0102507	80,000
Contracted Services	010720	335,009
New Equipment	010732	80,000
Food Service Breakfast Program	010930	16,000
Student Body Activities Salaries	011010	66,000
Special Projects - Latch Key	011113	10,000
Additional Current Expense Appropriation		$1,134,257

Capital Outlay

Account Title	Account No.	Amount
Improvement to Site	031220	$ 211,870
Remodeling	031230	171,178
Additional Capital Outlay Appropriation		$ 383,048

Upon review of the record of this matter, including the extensive documentation provided by the district in support of the necessity of the current expense and capital outlay cap waiver funds, which is incorporated herein by reference, the Commissioner finds and determines that the requested relief shall and is hereby granted, as the Board has borne its burden of demonstrating that these funds are required for the provision of a thorough and efficient education to the students of this special needs school district. (N.J.S.A. 18A:7D-3) East Brunswick Township Board of Education v. East Brunswick Township Council, 48 N.J. 94 (1966); Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305 (1989)

Accordingly, the Burlington County Board of Taxation is hereby ordered to adjust the Pemberton Township tax levy for the 1992-93 school year to reflect an increase of $1,134,257 for current expense and $383,048 for capital outlay which results in a total tax levy of $10,516,211, $9,231,813 of which is for current expense and $1,284,398 for capital outlay.

COMMISSIONER OF EDUCATION

JULY 2, 1992

DATE OF MAILING - JULY 2, 1992

150-92

IN THE MATTER OF THE CAP WAIVER	:	
APPEAL OF THE MANALAPAN-	:	COMMISSIONER OF EDUCATION
ENGLISHTOWN REGIONAL SCHOOL	:	DECISION
DISTRICT, MONMOUTH COUNTY.	:	
	:	

JULY 6, 1992

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE MANALAPAN- : COMMISSIONER OF EDUCATION
ENGLISHTOWN REGIONAL SCHOOL : DECISION
DISTRICT, MONMOUTH COUNTY. :
:

For Petitioner, John I. Dawes, Esq. (Cerrato, Dawes, Collins, Saker & Brown)

For Respondent Township of Manalapan, Robert F. Munoz, Esq. (Lomurro, Davison, Eastman & Munoz)

For Respondent Borough of Englishtown, Mitchell J. Ansell, Esq. (Ansell, Zaro, Bennett, Kenney & Grimm)

This matter was opened before the Commissioner on May 11, 1992 through the Manalapan-Englishtown Regional Board of Education's (Board) filing of an appeal of the cap waiver defeated by the voters of the Manalapan-Englishtown Regional School District on April 7, 1992. On June 1, 1992, the Mayor and Council of the Township of Manalapan submitted notification that took no position on the cap waiver appeal. On June 15, 1992, notification was received from the Borough of Englishtown that while it was not filing an Answer to the cap waiver appeal, it wanted to officially state it was opposed to the cap waiver being requested by the Board. Of this it states that while the budget was passed by the voters of the Borough of Englishtown, it is clear the public is opposed to the cap waiver, not only by the voters' defeat of the cap waiver referendum but by the public outcry at various public meetings in connection

with the budget. On June 19, 1992, the Board notified the Commissioner that it would rely on its submissions which accompanied the petition to set forth its basis for the need for the cap waiver monies sought rather than filing a position statement; thus, it was on June 19, 1992 that the record in this matter closed.

It is the Board's contention that in addition to the current expense budget approved by the voters of the Manalapan-Englishtown Regional School District on April 7, 1992 in the amount of $17,519,744, there is a need for an additional $500,000 in current expense in order for the district to provide a thorough and efficient education to its students.

On March 5, 1992, Milton Hughes, Monmouth County Superintendent of Schools, conditionally approved the Manalapan-Englishtown Regional School District's budget subject to the cap waiver amounts set forth below which were deemed necessary for a thorough and efficient education by him.

Current Expenses	213	Teacher Salaries - K	$ 30,800
	213	Teacher Salaries - 1 thru 5	277,200
	213	Teacher Salaries - 6 thru 8	154,000
	810C	Social Security	5,000
	820	Insurance	33,000
		TOTAL	$500,000

In addition to the foregoing, there was $220,000 in current expense cap waiver monies sought by the Board at the April 7, 1992 annual school election but those monies were not deemed necessary for a thorough and efficient education by the county superintendent. The amount of tax levy in contention in this matter is, therefore, as set forth below:

	Proposed tax levy adopted by Board of Education	Amount of tax levy approved by the voters
Current expense	$17,519,744	$17,519,744
Capital Outlay	-0-	-0-
Cap waiver (T&E)		
Current expense:	$ 500,000	-0-
Capital expense:	-0-	-0-
Total	$18,019,744	$17,519,744

The Board urges that the $500,000 in cap waiver monies set forth above is necessary for it to try to keep existing programs and staffing and to provide a new district alignment, including a new 235,000 square foot middle school. Opening the new middle school will complete a three-year T&E objective which was necessary to vacate sub-standard facilities (rooms and modular classrooms) as required by statute and to accommodate increased enrollment. It is the Board's belief that without the $500,000 to hire the additional professional staff for the middle school and fringe benefits, it will have to reduce staff and cut current programs well below existing levels.

Upon review of the record of this matter, including the documentation provided by the district in support of the necessity of the cap waiver funds, which is incorporated herein by reference, the Commissioner finds and determines that the requested relief shall and is hereby granted as the Board has borne its burden of demonstrating that these funds are required for the provision of a thorough and efficient education to the students of the Manalapan-Englishtown Regional School District. East Brunswick Township Board of Education v. East Brunswick Township Council, 48 N.J. 94 (1966);

Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305 (1989)

Accordingly, the Monmouth County Board of Taxation is hereby ordered to adjust the Manalapan-Englishtown Regional School District's tax levy for the 1992-93 school year to reflect an increase of $500,000 for current expense which results in a total current expense tax levy of $18,019,744.

COMMISSIONER OF EDUCATION

JULY 6, 1992

DATE OF MAILING - JULY 6, 1992

151-92

IN THE MATTER OF THE CAP WAIVER	:	
APPEAL OF THE ALPINE BOROUGH	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION, BERGEN	:	DECISION
COUNTY.	:	
	:	

JULY 9, 1992

IN THE MATTER OF THE CAP WAIVER	:	
APPEAL OF THE ALPINE BOROUGH	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION, BERGEN	:	DECISION
COUNTY.	:	
	:	

For Petitioner, J. Dennis Kohler, Esq.

For Respondent, James P. Logan, Esq. (Logan and Logan)

This matter was opened before the Commissioner of Education on May 6, 1992 through the Alpine Borough Board of Education's (Board) filing of an appeal of the cap waiver defeated by the voters of the Alpine School District on April 7, 1992. On May 29, 1992, notification was received from the Borough of Alpine that the Alpine governing body had determined that it was in the best interest of the citizens of the Borough to take no active participation in the matter.

It is the Board's contention that in addition to the budget for current expense, capital outlay and the capital outlay cap waiver approved by the voters of the Borough of Alpine on April 7, 1992 in the amounts of $2,241,635, $4,700 and $100,000 respectively, the cap waiver in the amount of $114,895, which was defeated by the voters at said election, is necessary for the Board to provide a thorough and efficient education to the students of the Alpine School District. The amount of tax levy in contention in this matter before the Commissioner is as set forth below:

	Proposed tax levy adopted by Board of Education	Amount of tax levy approved by the voters
Current expense	$2,241,635	$2,241,635
Capital Outlay	$ 4,700	$ 4,700
Cap waiver:		
Current expense	$ 114,895	$ -0-
Capital expense	$ 100,000	$ 100,000
Total:	$2,461,230	$2,346,335

Acting County Superintendent Alfred Marbaise conditionally approved the Alpine School District's proposed 1992-93 school budget subject to the current expense cap waiver of $114,895 and capital outlay cap waiver of $100,000 which were deemed necessary for a thorough and efficient education. The current expense cap waiver which is the subject of appeal herein was approved for the following purposes:

ACCOUNT TITLE	ACCOUNT NO.	AMOUNT
Salaries Grades Pre K - K	213	$ 3,667
Salaries Grades 1-5	213	64,580
Salaries Grades 6-8	213	21,404
Insurance	820	10,508
Basic Skills	210	14,736
		$114,895

Excerpts from the Board's resolution relative to the need for a current expense cap waiver summarize the basis upon which the Board seeks the above-referenced $114,895.

> (1) Whereas, the Alpine Board of Education has an obligation to fund the following mandated costs, and
>
> (2) Whereas, the Alpine Board of Education will experience an increase of 5% in the number of students sent to Tenafly High School (up from 60 budgeted in 1991-1992 to 63 for 1992-1993), and

(3) Whereas, Tenafly has notified the Alpine Board of Education that the per pupil tuition rate is to increase by 6.5% ($7735 to $8240), and

(4) Whereas, the budgeted tuition to Tenafly High School has increased by $49,815 representing a 10.6% increase over the 1991-1992 budget, and

(5) Whereas, K-8 enrollment in 1991-1992 increased by 5% and will increase by 7% in 1992-1993, and

(6) Whereas, the Alpine Board of Education has budgeted for the 1992-1993 the addition of the equivalent of one full-time teaching position K-8 to meet expanded enrollment, and

(7) Whereas, budgeted mandated transportation for costs to the district for non-public school students have increased by 24% or $16,555, and

(8) Whereas, costs to the district for State Health Benefits Premiums have increased by 16.8% or $25,868, and

(9) Whereas, the Alpine Board of Education anticipates a shortfall in tuition income and interest of $30,000 for the current year and must anticipate the remaining free balance will be $84,259 which represents 3% of the total budget and should not be further dissipated, and

(10) Whereas, the following reductions, amounting to $110,600 have already been made in the proposed 1992-1993 budget:

- reducing two full-time positions (Assistant Principal and Child Study Team Chair/ Learning Disabilities Teacher Consultant) into one and one third positions,
- combining two prekindergarten classes into one class,
- eliminating one transportation aide, and

(11) Whereas, a CAP Waiver is necessary to allow the Alpine School District to:

- provide two first grade classes,
- maintain local support of Basic Skills Improvement Programs in mathematics, writing and reading that will enable

pupils to acquire mathematics, reading and communication skills appropriate to grade level and individual ability,
- maintain differentiated mathematics classes that permit pupils to acquire knowledge and facility in mathematics appropriate to grade level and ability,
- maintain foreign language instruction that allows pupils to acquire an understanding of a foreign language, geography and culture and develop basic communication skills in that language,
- maintain general and instrumental music classes that enable pupils to acquire knowledge necessary for further education and skill and understanding that permit him/her to play a satisfying role as producer and consumer, as well as develop an understanding of his/her own worth, abilities, potentialities and limitations, and

(12) Whereas, these programs are necessary for the Alpine School District to achieve the following "Thorough and Efficient Outcome Goals" of the State of New Jersey that will enable each pupil to:***

(13) Whereas, these programs are necessary for the Alpine School District to achieve the following State approved "Thorough and Efficient Outcome Goals" of the district which will enable each pupil to:
- acquire reading skills appropriate to grade level and individual ability,
- achieve communication skills necessary to become proficient in listening, speaking and writing appropriate to grade level and individual ability,
- acquire knowledge and facility in mathematics appropriate to grade level and ability
- acquire an understanding of a foreign language, geography and culture and develop basic communication skills in that language,
- acquire effective study skills appropriate to grade level and individual ability. Now

(14) THEREFOR, be it resolved that the Alpine Board of Education hereby requests a CAP Waiver for the 1992-1993 school year in the amount of $114,895 for current expense to achieve State and District "Thorough and Efficient Outcome Goals" through

- two first grade classes
- local support of Basic Skills Improvement Program in mathematics, writing and reading
- maintain differentiated mathematics instruction
- maintain foreign language instruction
- maintain general and instrumental music instruction***.

In reviewing the record of this cap waiver appeal submitted by the Alpine Board of Education, the Commissioner finds and determines that the Board has borne its burden of demonstrating that the additional $114,895 in current expense tax levy sought for the 1992-93 school year is necessary to provide a thorough and efficient education to the students of the Alpine School District. East Brunswick Township Board of Education v. East Brunswick Township Council, 48 N.J. 94 (1966); Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305 (1989)

Accordingly, IT IS ORDERED that the Bergen County Board of Taxation adjust the Alpine current expense levy for the 1992-93 school year to reflect an increase of $114,895 which results in a total tax levy of $2,461,230, $2,356,530 of which is for current expense purposes and $104,700 for capital outlay.

ACTING COMMISSIONER OF EDUCATION

JULY 9, 1992

DATE OF MAILING - JULY 9, 1992

152-92

IN THE MATTER OF THE CAP	:	
WAIVER APPEAL OF THE BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION OF THE BOROUGH OF	:	DECISION
ALLENHURST, MONMOUTH COUNTY.	:	
	:	

JULY 9, 1992

IN THE MATTER OF THE CAP :
WAIVER APPEAL OF THE BOARD OF : COMMISSIONER OF EDUCATION
EDUCATION OF THE BOROUGH OF : DECISION
ALLENHURST, MONMOUTH COUNTY. :
:

For Petitioner, Sanford D. Brown, Esq. (Cerrato, Dawes, Collins, Saker & Brown)

This matter was opened before the Commissioner of Education on May 1, 1992 through the Board of Education of the Borough of Allenhurst's (Board) filing of an appeal of the cap waiver defeated by the voters of the Allenhurst School District on April 7, 1992. On June 4, 1992, notification was received from Vito D. Gadaleta, Clerk-Administrator of the Borough of Allenhurst, that the Allenhurst governing body had determined through resolution not to participate in the matter by letting the record, including the resolution regarding the defeated budget (Resolution 6) and the resolution relative to the cap waiver (Resolution 7), speak for itself.

It is the Board's contention that in addition to the current expense budget rejected by the voters of the Borough of Allenhurst on April 7, 1992 in the amount of $172,716, the cap waiver in the amount of $82,547, which was defeated by the voters at said election, is necessary for it to provide a thorough and efficient education to the students of the Allenhurst School

District. Since the Allenhurst governing body reduced the budget by only $1.01 to $172,714.99, the amount of tax levy in contention in this matter before the Commissioner is limited solely to the cap waiver as set forth below.

Proposed tax levy adopted by Board of Education		Amount of tax levy in dispute before the Commissioner
Current Expense	$172,716	-0-
Cap Waiver	$ 82,547	$82,547
Total	$255,263	$82,547

On March 4, 1992, County Superintendent Milton Hughes conditionally approved the Allenhurst School District's proposed 1992-93 school budget subject to the cap waiver of $82,547 which was deemed necessary for a thorough and efficient education, $78,335 of which was deemed necessary in Account 520: Transportation-Contracted Services and $4,212 in Account 550: Transportation-Other Expenses.

The affidavit of the Board Secretary, Nancie Senet, indicates the need for the cap waiver monies for transportation is related to increased transportation costs because the State has increased the nonpublic school transportation maximum by 24%. Based on past practice, this would increase actual costs in the same proportion. Increases were also necessary in light of added special education requirements.

In addition to the above, the Board was advised subsequent to the annual school election that new expenses in the amount of approximately $19,000 would be incurred for special education tuition which had not previously been anticipated.

In reviewing the record of this cap waiver appeal submitted by the Allenhurst Board of Education, the Commissioner finds and determines that the Board has borne its burden of demonstrating that an increase in current expense tax levy is necessary for the 1992-93 school year to meet the transportation obligations of the district as approved by the county superintendent. East Brunswick Township Board of Education v. East Brunswick Township Council, 48 N.J. 94 (1966); Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305 (1989) In reaching this determination, the Commissioner has taken into consideration the resolutions of the Allenhurst governing body but finds that the record more than adequately documents the need for the cap waiver revenues for transportation. However, given that the recent enactment of P.L. 1992, c. 33, adopted June 30, 1992, sets the maximum reimbursement for nonpublic school transportation for 1992-93 at $675 rather than $836, it is determined that $5,635 (35 students x $161) of the cap waiver request for transportation is no longer necessary. Consequently, a $76,912 increase in current expense tax levy is approved as opposed to the $82,547 requested.

Accordingly, it is ordered that the Monmouth County Board of Taxation adjust the Allenhurst current expense levy for the 1992-93 school year to reflect an increase of $76,912 which consequently sets Allenhurst's current expense tax levy for 1992-93 at $249,626.99.

John C Woodbury

ACTING COMMISSIONER OF EDUCATION

JULY 9, 1992

DATE OF MAILING - JULY 9, 1992

153-92

IN THE MATTER OF THE TENURE HEARING OF JOSE BARRIOS, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

JULY 9, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11214-91
AGENCY DKT. NO. 357-9/91

IN THE MATTER OF THE TENURE HEARING OF JOSE BARRIOS, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY

Philip Feintuch, Esq., for petitioner
(Feintuch, Porwich & Feintuch, attorneys)

Karen A. Murray, Esq., for respondent
(Murray, Murray & Corrigan, attorneys)

Record Closed: May 22, 1992 Decided: May 28, 1992

BEFORE **STEPHEN G. WEISS**, ALJ:

This tenure case was transmitted to the Office of Administrative Law by the Department of Education on December 17, 1991, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. The matter arose as a result of the filing by the respondent of tenure charges of incapacity and chronic and excessive absenteeism against Barrios, which charges were certified to the Commissioner in September 1991.

A prehearing conference was conducted by the undersigned administrative law judge on January 30, 1992, and hearings were scheduled to take place before me on March 24, 1992 and March 25, 1992

New Jersey is an Equal Opportunity Employer

Prior to the dates scheduled for commencement of the hearing, the undersigned was advised that the matter had been the subject of successful settlement negotiations. Thereafter, a stipulation of settlement was submitted to me for review.

The settlement agreement provides that respondent immediately will submit his written resignation, to be effective June 19, 1992. Upon receipt of that resignation, the State-operated School District will withdraw the tenure charges. Also upon receipt of the resignation, Barrios will be considered to have been returned to the payroll, effective March 1, 1992, and will be placed on a leave with pay status until June 19, 1992, the effective date of his resignation.

I have reviewed the record and the terms of the settlement, and I **FIND**:

1. The settlement agreement has been entered into voluntarily by respondent and without any coercion.

2. The agreement, signed by the parties and by counsel, is fair and reasonable and in the public interest.

In recommending this settlement to the Commissioner for approval I am aware of the requirements set down by the Commissioner and State Board regarding this process. In particular, no settlement should be approved where, for example, there is a gift of public funds or where no basis exists in the record to support such a resolution. In this case the charges against Barrios stemmed from his lengthy absences over a period of time while employed in the respondent State-operated School District. Those absences increased substantially during the 1989-90 and 1990-91 school years. In his answer, respondent maintained, inter alia, that they were due to legitimate illness. Trial of this matter would have taken at least two days and the cost in terms of financial considerations and human resources would substantially have exceeded the amount involved in the settlement. Accordingly, in light of the totality of the circumstances, I am satisfied, as set forth above, that this settlement agreement is an appropriate one for the Commissioner's approval.

I therefore **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 28, 1992
Date

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

June 1, 1992
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 03 1992
Date

OFFICE OF ADMINISTRATIVE LAW

amr

RECEIVED
MAY 22 2 35 PM '92
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

MURRAY, MURRAY & CORRIGAN
25 Sycamore Avenue
Little Silver, NJ 07739
(908) 747-2300
Attorneys for Petitioner

In the Matter of the Tenure Hearing of José Barrios	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
-and-	
State-Operated School District of the City of Jersey City, Hudson County	DOCKET NO. EDU 11214-91N AGENCY REF. NO. 357-9/91

SETTLEMENT AGREEMENT

The parties hereby agree as follows relative to the tenure charges filed against José Barrios by the State-Operated School District of the City of Jersey City:

1. Mr. Barrios will immediately tender his written resignation to be effective June 19, 1992.

2. Upon receipt of Mr. Barrios' written resignation, the State-Operated School District will withdraw the tenure charges filed on September 30, 1991 with the Commissioner of Education, Agency Ref No. 357-9/91, and transmitted to the Office of Administrative Law under Docket No. EDU 11214-91N.

3. Mr. Barrios will remain on the School District's payroll without pay until February 28, 1992.

4. Upon receipt of Mr. Barrios' written resignation, he will be returned to the payroll, effective March 1, 1992, on leave with pay until the end of the 1991-1992 school year, June 19, 1992.

5. Mr. Barrios submits his resignation and enters into this Settlement Agreement voluntarily and without coercion.

FOR THE RESPONDENT

JOSE BARRIOS

Dated:

PHILIP FEINTUCH, ESQ.

Dated:

FOR THE STATE-OPERATED SCHOOL DISTRICT

DR. ELENA J. SCAMBIO
State District Superintendent

Dated:

KAREN A. MURRAY, ESQ.

Dated:

OAL DKT. NO. EDU 11214-91

IN THE MATTER OF THE TENURE HEARING OF JOSE BARRIOS, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standard for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983) The matter is hereby dismissed, subject to compliance with the terms of the settlement.

ACTING COMMISSIONER OF EDUCATION

JULY 9, 1992

DATE OF MAILING - JULY 1992

155-92

155 92

IN THE MATTER OF THE TENURE HEARING OF CONRAD ANDRIOLA, SCHOOL DISTRICT OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY.

COMMISSIONER OF EDUCATION

DECISION

JULY 9, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2019-91
AGENCY DKT. NO. 21-2/91

IN THE MATTER OF THE TENURE HEARING OF CONRAD ANDRIOLA, SCHOOL DISTRICT OF THE CITY OF ORANGE, ESSEX COUNTY

Thomas R. Ashley, Esq., for petitioner
(Ashley & Charles, attorneys)

Sheldon H. Pincus, Esq., for respondent
(Bucceri & Pincus, attorneys)

Record Closed: May 14, 1992 Decided: May 27, 1992

BEFORE **STEPHEN G. WEISS,** ALJ:

This tenure matter was transmitted to the Office of Administrative Law by the Department of Education as a contested case on February 20, 1991, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. Respondent is a tenured custodian employed by the Orange School District who had been arrested in March 1990 on a charge of illegal possession of cocaine. A few days later, respondent appeared in Orange Municipal Court, admitted the conduct, and in light of the totality of the circumstances, including the fact that he was a "first offender," was admitted into a pretrial intervention program. See, N.J.S.A. 24:21-27(b). Nevertheless, the Board thereafter certified a charge of unbecoming conduct against Andriola.

A telephone prehearing conference was conducted with counsel by the undersigned administrative law judge on May 29, 1991, and hearings were scheduled to take place on January 13 and 14, 1992. Andriola had not been suspended and he continued in employment during the entire pendency of the proceedings.

Prior to the scheduled commencement of the hearing on January 13, 1992, counsel conferred with their respective clients concerning the possibility of settlement. As a result of those discussions, an amicable resolution of the dispute tentatively was achieved.

Thereafter, counsel submitted a stipulation of settlement signed by the president of the Board of Education, by the respondent and by respondent's attorney. Attachments to that stipulation of settlement included the municipal court complaint against respondent, copies of evaluations of his work performance, an excerpt from the transcript of the municipal court proceedings, a letter from respondent's probation officer attesting to Andriola's successful completion of supervisory treatment and attendance at "AA" meetings, a letter of commendation from the Board's director of special services, a letter of commendation from the former superintendent of schools attesting to respondent's positive performance, an order terminating Andriola's supervisory treatment for the six-month period between March and September 1990, a copy of his latest performance evaluation and a copy of his 1990-91 attendance record.

There is no doubt that employees of boards of education who become involved in drug-related activities, including custodians, place their employment in extreme jeopardy by such conduct. See, e.g., Arocha and Gonzalez v. Board of Education of the Hudson County Area Vocational-Technical School District, Hudson County, OAL Docket No. EDU 9293-83, 1985 S.L.D. _____, decided April 8, 1985. The Legislature, of course, has clearly expressed its strong position regarding the special nature of the school setting vis-a-vis drug offenses by establishing a "drug free school zone" concept. See, N.J.S.A. 2C:35-7; State v. Ogar, 229 N.J. Super. 459, 467 (App. Div. 1989); see also, N.J.S.A. 18A:40A-1 et seq.

Nevertheless, involvement by a school employee in drug activity does not automatically require termination of employment. Where, for example, a substitute

teacher convicted of possession of controlled substances demonstrated over a five-year period that she had not used drugs or alcohol, had become extremely active in AA, had sought private counseling and successfully completed a lengthy Mercer County TASC project, the Commissioner determined that she had demonstrated such rehabilitation that her teaching credentials could be restored. See, Dept. of Education v. Skwanek, OAL Docket No. EDU 1045-91, decided October 25, 1991. Thus, each case must be reviewed on its own individual set of facts.

The stipulation of settlement submitted in this case reveals the following positive aspects of the proposal to maintain respondent in his employment. First, even though Andriola was charged with possession of a controlled dangerous substance, there was no criminal conviction and the Board after certifying the charge determined not to suspend him from his custodial duties. He has continued to perform as head custodian assigned to the Board's administration building.

When respondent appeared in Orange Municipal Court, he was permitted to enter the pretrial intervention program and was placed on supervisory treatment for a period of six months, during which time he reported to the Essex County Probation Department The reports of his probation officer all note his positive adjustment, his openness and honesty as to his weekend drinking problem as well as the isolated, one-time instance of cocaine possession. During that supervisory period he submitted to urine monitoring on a random basis which showed no evidence of further drug use. He also attended AA meetings and has agreed to continue to attend them on a regular basis.

In addition, both before and after the incident, respondent has received positive assessments of his performance and his attendance at work has been excellent. As of September 1, 1991, he had accumulated 55 sick days. Commendations on respondent's behalf also have been submitted by the Board's director of special services and by its former superintendent of schools. Respondent's work station is the administration building and therefore he has no regularized, significant contact with the student population.

Finally, at no time throughout these proceedings has respondent denied the conduct complained of, or otherwise attempted to justify it. To the contrary, he has

taken the position that he is most fortunate to have been able to obtain help for his substance abuse and is convinced that he has demonstrated total rehabilitation.

In respect to the specific terms of the proposed settlement, respondent agrees that for a period of six months following the date of the Commissioner's approval, he shall continue to submit himself to a schedule of alcohol and drug testing and counseling as determined by the Director of the Orange Drug and Alcohol Abuse Program. Respondent will pay the entry and session fees for participation in this program. For its part, the Board has determined that in consideration of its agreement to withdraw the tenure charge, Andriola will not contest the withholding of his 1992-93 salary and adjustment increments.

The stipulation of settlement and the supporting documents are attached to this initial decision and speak for themselves. Clearly, on its face, the drug-related conduct in which respondent engaged in March 1990 was serious. As noted, the Commissioner, the State Board, the courts and the legislature all look severely upon conduct by school employees which involves drugs. Nevertheless, given the totality of the circumstances, I agree that Andriola has demonstrated that he is rehabilitated and no purpose would be served by rejecting the settlement and requiring this case to proceed to plenary hearing with its attendant costs in terms of fiscal and human resources. Certainly, Andriola's employment as a custodian poses no threat to the student body, particularly given his work station at the administration building.

In recommending that the Commissioner approve the settlement in this case, I am aware of decisions wherein the Commissioner has rejected settlements which involve, as here, agreement by the respondent to have increments withheld. See, e.g., In the Matter of the Tenure Hearing of Mary Katherine Kennedy, School District of the Township of Barnegat, Ocean County, decided August 21, 1981; In the Matter of the Tenure Hearing of Fred Calabrese, School District of the Borough of Ridgefield, Bergen County, decided April 5, 1982; Sisto v. Bd. of Ed. of Kenilworth, OAL Docket No. EDU 3942-87, decided February 9, 1988. In those cases the Commissioner rejected settlements of tenure cases which involved the withholding of an increment as an alternative penalty upon the basis that such a resolution either presupposes a finding of malconduct whereby the Board would improperly step into the role of prosecutor and judge, or where the approval would bind a future board to restore an increment.

However, I believe the particular circumstances of this case are distinguishable. In this case, unlike in Kennedy and Calabrese, there was no denial by Andriola of the facts underlying the charge of unbecoming conduct. Thus, there is no factual dispute requiring a plenary hearing on the "merits." Here, the conduct was admitted and I believe the Commissioner fairly can review the documentation to determine that a fitting sanction would be the withholding of an increment rather than dismissal or some other alternative penalty.

So too, the problem in Sisto was that the successor Board would have been obliged to reinstate a previously withheld increment if the teacher's performance was satisfactory. Here, of course, Andriola is agreeing in advance to the withholding and thus there is no prejudice to the Board's or to the public interest.

In short, the terms of the settlement reached by the parties are appropriate and result in a resolution which is in the best interests of the Board, Andriola and the public, including the students in Orange. I therefore recommend that the Commissioner approve the settlement.

Accordingly, I have reviewed the record and terms of the settlement and **FIND**:

1. The parties voluntarily have agreed to the terms of the settlement as evidenced by the signatures of the parties and/or counsel which appear on the stipulation of settlement; and

2. The settlement fully disposes of all issues in controversy, is in the public interest and is consistent with law.

I therefore **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 27, 1992
Date

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

5/29/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 02 1992
Date

OFFICE OF ADMINISTRATIVE LAW

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OFFICE OF ADMINISTRATIVE LAW
MAY 14 9 45 AM '92

STIPULATION OF SETTLEMENT

This Agreement is made this 13th day of April 1992, by and between the Board of Education of the City of Orange, with offices at 369 Main Street, Orange, New Jersey 07050, hereinafter referred to as the "Board"

AND

Conrad Andriola, residing at 18 South Jefferson Street, Orange, New Jersey 07050, hereinafter referred to as "Andriola"

WITNESSETH:

WHEREAS, Andriola is a tenured custodian employed in the School District of the City of Orange, and

WHEREAS, on December 18, 1990, tenure charges of conduct unbecoming a custodian were filed against Andriola based upon:

(a) Andriola's arrest, in March, 1990 for possession of a controlled dangerous substance to wit: cocaine (one white druggist fold) in violation of N.J.S.A. 2C:35-10) (Exhibit R-1);

(b) Andriola's subsequent application for, and admission to, The Pretrial Intervention Program, as a first offender, and

WHEREAS, on January 22, 1991, the Board certified the charge of conduct unbecoming a custodian to the Commissioner of Education for a hearing, and

WHEREAS, at the time the Board resolved to certify the charge to the Commissioner of Education, it did not elect to suspend Andriola from his custodian's duties pursuant to N.J.S

18A:6-14, and consequently, he has continued to perform his duties as Head Custodian assigned to the Board's Administration Building, and

WHEREAS, in lieu of proceeding with the tenure charges in accordance with the Tenure Employee's Hearing Law, the Board and Andriola desire to enter into an agreement settling the dispute and, subject to certain conditions, permitting Andriola to remain in the employ of the Board, and

WHEREAS, the Board and Andriola acknowledge that the terms of this Agreement are contingent upon the review and approval of both the Office of Administrative Law and the Commissioner of Education, and

WHEREAS, in reviewing and determining whether to approve the terms of settlement in this matter, Andriola, without objection from the Board, submits the following facts and exhibits in demonstration of why this Settlement Agreement should be approved:

1. Andriola was placed on supervisory treatment by the Orange Municipal Court for a period of 6 months (R-1)(R-4) during which time he reported to the Essex County Probation Department (R-5)- (R-8);

2. The reports of the probation officers notes his positive adjustment, and his openness and honesty as to what was a weekend drinking problem, as well as an isolated instance of cocaine use. During his supervisory treatment Andriola submitted himself to urine monitoring, which testing showed no evidence of

further drug use. Moreover, he regularly attended Alcoholics Anonymous Meetings for purposes of addressing the alcohol problem (R-5) (R-8);

3. Andriola has and will continue to attend Alcoholics Anonymous on a regular basis. He was, moreover, prepared to produce witnesses attesting to his regular attendance and positive efforts and adjustments in this respect;

4. Before the filing and certification of tenure charges, Andriola received extremely positive assessments of his work performance (R-3);

5. During the pendency of these tenure charges, Andriola has continued to receive extremely positive assessments of his work performance (R-2) (R-9);

6. During the pendency of these tenure charges, Andriola's attendance at work has been excellent (R-10) (R-11) and he has 55 accumulated sick days as of September 1, 1991;

7. Andriola has received positive character references from the Board's former Superintendent of Schools (R-7) and its Director of Special Services (R-6). Moreover, Andriola's present direct Supervisor was prepared to testify about Andriola's good work performance and why he is an asset to the district.

8. Andriola's work station at the school district's Administration Building does not require his regular or frequent contact with students. There is no evidence to suggest that any students have knowledge of this incident, or that Andriola's

continued employment, in the face of his addressing his health problem, would serve to portray an improper role model.

9. At no time throughout these proceedings has Andriola sought to deny the conduct complained of. To the contrary, it has been Andriola's position that he is thankful he was able to obtain help and that the above facts and evidence show clearly and convincingly that he has rehabilitated himself in accordance with N.J.S.A. 18A:6-7.1(e); and

WHEREAS, in view of the above, the parties reasonably believe that interests of the Commissioner of Education and the public shall be served by the settlement of this matter,

NOW, THEREFORE, in consideration of the mutual promise of the parties and in exchange for the consideration more particularly noted below, it is hereby agreed:

1. Andriola agrees that for a period of six (6) month from the date the Commissioner of Education approves this matter he shall submit himself to a schedule of alcohol and drug testing and counseling as determined by the Director of the Orange Drug and Alcohol Abuse Program, 301 Main Street, Suite #1, Orange, New Jersey. Andriola shall be responsible for paying the entry fee and session fees for his participation in this program.

2. Andriola agrees to a withholding of his 1992-93 salary and adjustment increments in accordance with N.J.S.A. 18A:29-14.

3. Andriola shall continue in the employ of the Board as a tenured custodian.

4. The Board and Andriola acknowledge that the terms of this Agreement are contingent upon the review and approval of both the Office of Administrative Law and the Commissioner of Education. In the event that either agency disapproves of the terms of settlement, this Agreement shall be null and void and the parties shall return to the same positions which they held prior to this settlement.

5. The parties recognize that each has been represented by legal counsel of his or its own choosing and that each signs this Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

6. This Agreement shall be subject to the laws of State of New Jersey.

7. All terms of this Agreement are deemed material. This document may not be altered, amended or modified or revoked except by an instrument executed in writing by the parties.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

President
Orange Board of Education
Dated: 2/11/92

2-11-92
Board Secretary
Dated:

Conrad Andriola
Dated: 1/31/92

Sheldon H. Pincus, Witness

FEB 15 rec'd M19342

The State of New Jersey
vs.

COURT: Municipal Court of Orange

COUNTY OF: Essex N.J.

COURT DOCKET NUMBER(S): C — 055865

COURT CODE NUMBER:

Defendant: Andriola, Conrad, D.

Address: 385 Park Ave. apt b2

City, State: Orange, N.J. 07050

Defendant one of _____ defendants

Date of birth 11-11-58 Date of arrest 3-12

COMPLAINT

Complainant: Det. Mc Cauley, Sgt. Gannon of OPD
(NAME OF COMPLAINANT) (IDENTIFY DEPARTMENT OR AGENCY REPRESENTED)

Residing at _____
(ADDRESS OF PRIVATE CITIZEN COMPLAINANT)

Upon oath says that, to the best of (his) (her) knowled
mation and belief, the named defendant on or abo

12 day of Mar 19 90, in the city Orange MUNICIPAL CODE NO. 0071700 County of Ess

did;

within the jurisdiction of this court have within his possession and un
his control, a controlled dangerous substance to wit: cocaine(one white
druggist fold) in violation of N.J.S. 2C:35-10

INDICTABLE

amended 2C:35-10(a)

Charge Number 1 N.J.S.	Charge Number 2 N.J.S.	Charge Number 3 N.J.S.
2C:35-10		

Subscribed and sworn to before me this 13 day of March 19 90

Signed Capt R Tulerano
(NAME AND TITLE OF PERSON ADMINISTERING OATH)

Signed Det. Mc Cauley / Sgt. M. Gann
(COMPLAINANT)

To any peace officer or other authorized person: Pursuant to this warrant, you are hereby commanded to arrest the named defendant and bring (h
forthwith before this court to answer the foregoing complaint.

Bail has been fixed by _____ in the amount of $ _____ or _____
(Specify condition of release, e.g.

Date Warrant Issued 3-13-90

Court Appearance Date 3-15-90 Time 9:30 AM/PM XX

_____
SIGNATURE OF JUDGE OR CLERK

DATE OF FIRST APPEARANCE R.3:4-2: 3-15-90

COURT ACTION (Cases wherein judgment or Conditional Discharge is entered in this c

CHARGES	WAIVER INDICT. / ACCT	PLEA	DATE OF PLEA	AMENDATION OR LESSER INCL.	DATE	JAIL TERM	SUSP	FINE	SUSP	COSTS	SUSP	PROBATION	STATE	LAB
Number 1		(G)	3/15/90									1 yr		
Number 2														
Number 3										50				

OTHER ACTION BY THIS COURT

Violent Crimes Penalty. Amt.

DATE	1	DEFENDANT DISCHARGED AS TO PROBABLE CAUSE, PROSECUTION GIVEN PRIOR NOTICE	2	DEFENDANT HELD FOR GRAND JURY, CRIMINAL COMPLAINT, RECORD, BAIL TRANSMITTED	3	NO ACTION BY THIS COURT, COMPLAINT REFERRED TO PROSECUTOR	INSTITUTION TO WHICH SENTENCED:
	4	Other (specify)	500 DEDR 50 LAB 45 copy fee				

BAIL INFORMATION

DATE	AMOUNT BAIL SET	10% OF BAIL 1	R-O-R 2	COMMITTED DEFAULT 3	COMMITTED WITHOUT BAIL 4	PLACE COMMITTED

SURETY COMPANY — PERSON POSTING BAIL — RELEASED IN CUSTODY OF — ADDRESS

PROSECUTING ATTORNEY AND DEFENSE COUNSEL INFORMATION

PROSECUTING ATTORNEY	NONE 1	STATE 2	COUNTY 3	MUNICIPAL 4	OTHER 5	DEFENSE COUNSEL	NONE 1	RETAINED 2	PUBLIC DEFENDER 3	ASSIGNED 4

MISCELLANEOUS INFORMATION

List Companion CDR numbers (Including Co-defendants).

B-1

Frederick D. Wolf 3/15

FEB 15 rec'd H19342

The State of New Jersey
vs.

COURT: Municipal Court of Orange

COUNTY OF: Essex N.J.

COMPLAINT-WARRANT NUMBER: C-055865

COURT CODE NUMBER:

Defendant: Andriola, Conrad, D.

Address: 385 Park Ave. apt b2

City, State: Orange, N.J. 07050

Defendant one of _____ defendants

Date of birth 11-11-58 Date of arrest 3-12-

COMPLAINT

Complainant: Det. Mc Cauley, Sgt. Gannon of OPD
(NAME OF COMPLAINANT) (IDENTIFY AGENCY REPRESENTED)

Residing at _____
(ADDRESS OF PRIVATE CITIZEN COMPLAINANT)

Upon oath say[illegible]t, to the best of (his) (her) knowled[illegible] mation and belief, the named defendant on or abou[illegible]

12 day of Mar 19 90, in the city Orange MUNICIPALITY CODE 00/1700 County of Ess[illegible]

did;

within the jurisdiction of this court have within his possession and un[illegible] his control, a controlled dangerous substance to wit: cocaine(one white druggist fold) in violation of N.J.S. 2C:35-10

INDICTABLE

amended 2C:35-10(c)

Charge Number 1 N.J.S.	Charge Number 2 N.J.S.	Charge Number 3 N.J.S.
2C:35-10		

Subscribed and sworn to before me this 13 day of March 19 90

Signed Capt R Talarico (NAME AND TITLE OF PERSON ADMINISTERING OATH)

Signed Det R McCauley / Sgt. M. Gann (COMPLAINANT)

To any peace officer or other authorized person: Pursuant to this warrant, you are hereby commanded to arrest the named defendant and bring (h[illegible] forthwith before this court to answer the foregoing complaint.

Bail has been fixed by _____ in the amount of $ _____ or _____ (Specify condition of release, e.g.

Date Warrant Issued 3-13-90

Court Appearance Date 3-15-90 Time 9:30 (AM/PM) XX

SIGNATURE OF JUDGE OR CLERK

DATE OF FIRST APPEARANCE R.3:4-2 3-15-90

COURT ACTION (Cases wherein judgment or Conditional Discharge is entered in this c[illegible]

CHARGES	WAIVER INDT / INFT	PLEA	DATE OF PLEA	AMEND AFFIRM OR COMPLAINT	DATE	JAIL TERM	SUSP	FINE	SUSP	COSTS	SUSP	PROBATION	[illegible]
Number 1		G	3/15/90									1 yr	
Number 2													
Number 3													

OTHER ACTION BY THIS COURT

Violent Crimes Penalty. Amt.

DATE									
	1	DEFENDANT DISCHARGED AS TO PROBABLE CAUSE. PROSECUTOR GIVEN PRIOR NOTICE	2	DEFENDANT HELD FOR GRAND JURY ORIGINAL COMPLAINT, RECORD, BAIL TRANSMITTED	3	NO ACTION BY THIS COURT. COMPLAINT REFERRED TO PROSECUTOR	INSTITUTION TO WHICH SENTENCED.		
	4	Other (specify)	500 DEDR 50 LAB 45 copy fee						

BAIL INFORMATION

DATE	AMOUNT BAIL SET	REL ON BAIL 1	R.O.R. 2	COMMITTED DEFAULT 3	COMMITTED WITHOUT BAIL 4	PLACE COMMITTED

SURETY COMPANY — PERSON POSTING BAIL — RELEASED IN CUSTODY OF — ADDRESS

PROSECUTING ATTORNEY AND DEFENSE COUNSEL INFORMATION

PROSECUTING ATTORNEY	NONE 1	STATE 2	COUNTY 3	MUNICIPAL 4	OTHER 5	DEFENSE COUNSEL	NONE 1	RETAINED 2	PUBLIC DEFENDER 3	ASSIGNED 4

MISCELLANEOUS INFORMATION

List Companion CDR numbers (Including Co-defendants).

B-1

[illegible] 3/15

COPY DISTRIBUTION
Original -Personn
Canary -Princip.
Pink -Employe
Goldenrod -Evaluat

ORANGE PUBLIC SCHOOLS

CUSTODIAN/MAINTENANCE PERFORMANCE EVALUATION

NAME: Conrad Andriola SCHOOL: Colgate Bldg. DATE: 7/30/91

Rating Scale :

1. Strong: exceeds expectations for the position
2. Effective : meets expectations for the position
3. Needs Improvement : performs below expectations for the position. (Indicate specific reasons for rating of #3.)

NA. Not applicable to this evaluation report.

I. PERSONAL QUALIFICATIONS:	1	2	3	NA
-APPEARANCE/GROOMING	—	x	—	—
-ATTITUDE TOWARDS JOB	—	x	—	—
-INITIATIVE	—	x	—	—
- USE OF INTER-PERSONAL SKILLS	—	x	—	—
-USE AND CARE OF UNIFORMS	—	x	—	—
-COMPLETION OF DAILY CHORES	—	x	—	—
-KNOWLEDGE	x	—	—	—
-RECEPTIVE TO NEW IDEAS/PROCEDURES	—	x	—	—
HEALTH AND SAFETY:				
-SAFETY - CONSCIOUSNESS (Accepts responsibility for maintaining safest possible environment.)	—	x	—	—
-ACTIVE IN SAFETY PRECAUTION (Keeps hall clear of obstructions. Prevents floors from becoming slippery. Keeps stairwells free of debris.	x	—	—	—
-FIRE PREVENTION AWARENESS (Inspects and maintains fire fighting equipment, removes and prevents fire hazards.)	—	x	—	—
-SAFE USE OF EQUIPMENT (Understands and practices the safe use of heating equipment, ventilation and lighting, cleaning compounds, power tools.)	—	x	—	—
CARE OF PROPERTY:	—	x	—	—
-REPORTS/ MAINTAINS SIMPLE REPAIRS. (Shows willingness to make minor repairs, protects property against misuse and				

B-2

CUSTODIAN/MAINTENANCE PERFORMANCE EVALUATION
(Cont'd)

(2)

	1	2	3	N/
I. -Understand value of preventive maintenance	-	x	-	--
-Secures property against theft and illegal entry	-	x	-	--
COOPERATION:				
-With Staff	x	-	-	—
-With Administrators	x	-	-	—
-With Fellow Workers	-	-	-	x
-With Parents	-	-	-	x
-With Students	-	-	-	—
WORK HABITS:				
-Starts Jobs Promptly Each Day	-	x	-	—
-Follows Directions/ Schedule	-	x	-	—
-Realizes Importance of Clean, Attractive and Orderly Surroundings to Learning	-	x	-	—
-Cleans Up Area After Job Completion	-	x	-	—
-Does Each Job Thoroughly	-	x	-	—
-Reports For Snow Duty When Needed	-	x	-	—
-Works Safely With Tools, Self and Others	-	x	-	—
-Prepares Building For Public Meetings	x	-	-	—
I. ECONOMICAL OPERATION:				
-Attempts to Conserve Electrical and Heating Costs	-	x	-	—
-Uses Supplies Economically	-	x	-	—
-Cooperates In Correcting Wasteful Conditions	-	x	-	—

CUSTODIAN/MAINTENANCE PERFORMANCE EVALUATION

VII. ATTENDANCE AND PUNCTUALITY	1	2	3	NA
- ATTENDANCE: # OF OCCASIONAL ABSENCES TO DATE	___	x	___	
- PUNCTUALITY: # OF DAYS TARDY TO DATE	x	___	___	

VIII. OVERALL SUMMARY STATEMENTS OF THE EVALUATION AREAS

Mr. Andriola accepts the daily challenge of keeping his facility in tip top shape. He is aware of the importance of first impressions by visitors to the Colgate Bldg..

IX. EMPLOYEE RESPONSE: (Additional pages may be attached if necessary)

CUSTODIAN/MAINTENANCE PERFORMANCE EVALUATION
(Cont'd)

(4)

X. RECOMMENDED EMPLOYMENT STATUS:

1. X CONTINUED EMPLOYMENT

2. ____ CONTINUED EMPLOYMENT WITH ADDITIONAL IMPROVEMENT PLAN
(If plan exists, indicate interim progress:)
1. X Satisfactory
2. ____ Unsatisfactory

3. ____ GRANT TENURE

4. ____ WITHHOLD INCREMENT

5. ____ TERMINATE, OR (BEGIN TENURE CHARGE PROCEEDINGS)

REVIEW WITH PRICNIPAL AND/OR SUPERVISOR

Charles B. Gatling, Supervisor
PRINCIPAL DATE

SUPERVISOR DATE

I HAVE READ AND RECEIVED A COPY OF THIS EVALUATION

I AGREE: yes

I DISAGREE: ____

I AM ATTACHING A REBUTTAL: ____

I AM SUBMITTING A REBUTTAL WITHIN TEN (10) DAYS: ____

Conrad Andriola 10/29/
EMPLOYEE'S SIGNATURE DATE

REVISED 4/89

BOARD OF EDUCATION
Orange, New Jersey

APR 11 1983

BUILDING SERVICE PERSONNEL EVALUATION

Name CONRAD ANDRICAN
Position CUSTODIAN
Date of Evaluation 3-83 & ON GOING
Evaluator MARY G. CURRY
Site CENTRAL ELEM. SCHOOL

Instructions for completing evaluation:

Indicate rating by placing the number attached to one of the below descriptors for each category of evaluation.

Comments should include commendations, areas of concern and suggestions for improvement. Upon completion of evaluation the supervisor must have a conference to review all the comments and suggestions in the evaluation.

Ratings:
1. Superior - Outstanding in most of areas mentioned in category.
2. Average - Satisfactory meets our standards. Compares well with most employees in this classification.
3. Below Average - Not satisfactory in many of areas in category. Does not show improvement.
4. Poor - Consistently unsatisfactory over a period of time. All efforts to bring about improvement have failed.

I. PERSONAL CHARACTERISTICS

Makes good appearance - well groomed.
Cheerful, cooperates with fellow employees and supervisors.
Right attitude towards job. Exercises initiative. Does not need constant supervision. Pride in work. Tries to do his best.
Gets along well with teachers, pupils, parents. Understands lines of authority. Uses discretion in relationships. Rating: 1
Loyal to school system.

Comments:

II. CARE OF PROPERTY

Alert in spotting repairs necessary, willing to do minor repairs.
Aware of need to protect property against misuse, vandalism.
Security conscious, alert to need to prevent illegal entry.
Interested in eliminating fire hazards.
Understands value of preventive maintenance, preserving property from excessive deterioration. Rating 2

Comments:

III. HEALTH AND SAFETY

Understands role in protecting health of occupants and importance of proper heating, adequate ventilation, satisfactory light control.
Safety conscious - accepts responsibility for maintaining safest possible building and equipment.
Engaged in such activities as keeping corridors clear of obstructions, repairing stair treads, inspecting heating equipment safety controls, preventing floor surfaces from becoming slippery.
Reviewing all accidents in building as possible precaution to prevent future accidents. Rating: 2

Comments:

IV. CLIMATE FOR LEARNING

Realizes importance of clean, attractive, comfortable, and orderly surroundings to learning.
Makes an effort to understand classroom activities and works with teachers and pupils in effort to create wholesome school atmosphere. Rating: 2

Comments:

V. DEVELOPING GOOD WILL

Understands importance of keeping school grounds and building attractive as perhaps the only impression many will get of the school or school system.
Prepares building for public meetings. Cooperates with all groups using school facilities. Understands school policies regulating school use by outside organizations.
Uses tact and diplomacy in adjusting to situations as they arise.
Understands operation of school and makes reasonable answers to questions about the school - does not attempt to interpret the educational program.
Loyal to school and school system, does not criticize fellow workers, teachers, principal, or administration. Has a sense of pride in his work and feeling of being a co-partner in education. Rating: 2

Comments:

VI. MAINTAINING CLEANLINESS AND NEATNESS

Has high personal standards of cleanliness.
Aware of good example as influence on children in this area of high standards of cleanliness, neatness and orderliness.
Has pride in his work and wants his school to be a source of pride for pupils, teachers, and parents in his school community. Rating: 2

Comments:

VII. EFFECTING OPERATING ECONOMIES

Interested in improving his work, learning new techniques and procedures. Does not regard the old method as the best.
Takes advantage of any training program available: studies the materials published on custodial services and pamphlets of manufacturers of products in schools.
Cooperates in correcting conditions which cause waste in heat, electricity, water, and gas.
Makes proper use of supplies and equipment; takes care of tools.
Reads directions before using new materials. Doesn't experiment in areas where he has no competence. Rating: 2

Comments:

VIII. ATTENDANCE AND PUNCTUALITY

_____ Consistently absent and/or often late
_____ Often late and/or absent
_____ Usually present and on time
__✓__ Very prompt - regular attendance
_____ Always present and prompt - regular attendance
_____ Always present and prompt

DAYS ABSENT: _____
DAYS LATE: _____

Rating: 2

Comments:

SUPERVISION (TO BE COMPLETED FOR HEADMAN ONLY)

Is capable of planning and directing the work of others.
Has good relationships with those responsible to him and can work on friendly, informal basis.
Has ability to do the work he supervises and is willing to work with men under his supervision in training them.
Ability to develop work schedules for his men.
Plans ahead - does not operate on "crisis to crisis" basis.
Has respect and support of his staff. Rating:_____

Comments:

_____

ITIONAL COMMENTS:_____

_____

_____

_____

_____

_____

:RVISOR'S GENERAL RECOMMENDATIONS:_____

_____

_____

_____

\TURE OF SUPERVISOR COMPLETING EVALUATION:

_____ DATE:_____

:RENCE DATE:_____

)YEE COMMENTS:_____

_____

_____

_____

\TURE OF EMPLOYEE:

Conrad Andrews DATE 4/8

Municipal Court

ESSEX COUNTY
ORANGE, NEW JERSEY
Docket No. C-65865

THE STATE OF NEW JERSEY

Plaintiff,

vs.

CONRAD ANDRIOLA,

Defendant

TRANSCRIPT OF PROCEEDINGS

SENTENCING

Place: Orange Municipal Court
593 Lincoln Avenue
Orange, New Jersey 07050

Date: March 15, 1990

BEFORE:

HON. FREDDIE POLHILL, J.M.C.

B-4

Lee Blackwell
Tape Reporters P.O. BOX 623 EAST ORANGE, N.J. 07018
(201) 674-8600

THE COURT: Conrad Andriola.

DEFENSE ATTORNEY: Your Honor, Mr. Andriola is -- has no priors of any kind. I'm asking you to consider -- permitting him to enter into a conditional discharge program without benefit of --

THE COURT: No.

DEFENSE ATTORNEY: The Shackleford option?

THE COURT: I wouldn't care about the Shackleford option. We treat each case independently. And Mr. Andriola is entitled to first offender.

DEFENSE ATTORNEY: Yes, he is.

THE COURT: But what bothers me more than anything else --

DEFENSE ATTORNEY: Yes? Is what?

THE COURT: And I think you know what it is.

DEFENSE ATTORNEY: What?

THE COURT: What do you do for a living?

DEFENSE ATTORNEY: Board of Education.

THE COURT: Yeah. Around the kids.

DEFENSE ATTORNEY: Well, what --

THE COURT: That bothers me more than anything else.

DEFENSE ATTORNEY: What gives rise to your --

THE COURT: I mean, that bothers me that --

MR. ANDRIOLA: I'm not with the kids, Your Honor. work in the administration building.

THE COURT: Okay.

MR. ANDRIOLA: I'm not around kids all day.

THE COURT: I'll give him first offender. What about that?

DEFENSE ATTORNEY: All right.

THE COURT: First offender.

MR. ANDRIOLA: And I'm receiving treatment as soon as possible.

DEFENSE ATTORNEY: That's true. I mean, the man is 31 years old, no priors of any description. He's admitting himself voluntarily.

THE WITNESS: I tried for three weeks. It seems when I drink I get in trouble. But I know I can't do it by myself so I'm going to get help.

THE COURT: If he's going to go to a rehab --

DEFENSE ATTORNEY: Yes.

THE COURT: -- I don't know which one it is. He says there's alcohol.

MR. ANDRIOLA: They have out patient recovery centers.

THE COURT: He's been charged with --

THE WITNESS: And they do both.

THE COURT: Both?

MR. ANDRIOLA: Yes.

THE COURT: You're going to have to tell them this, both. The problem is there on both.

MR. ANDRIOLA: Yes, both, definitely. It seems, Your Honor, when I do get in trouble is when I, when I'm drinki And I know I have a problem and I want to take care of it.

DEFENSE ATTORNEY: You wouldn't consider suspending the proceedings pending the -- his release from the --

THE COURT: Uh.

DEFENSE ATTORNEY: -- treatment center? You know, there aren't too many people who come before you with a plan. You know, most people just want to get the minimum in penalties. He's already arranged to address his problem.

You could attach that as a condition of his probation.

Judge, --

MR. ANDRIOLA: Your Honor?

THE COURT: Yes?

DEFENSE ATTORNEY: This is his dad. He'd like to say a few words.

MR. ANDRIOLA: This is my son, and this is the first time he's ever been in trouble with the, with the law. And I will take full responsibility to make sure that he goes to the rehabs and whatever is necessary. He has been really a good kid all these years.

And this is the first time he's really been in trouble. And it's the drinking problem. And I would make sure that he attends all these classes. And anything else I c possibly do.

DEFENSE ATTORNEY: Judge, I wouldn't ask you for the extremely -- for the extreme option of no plea if it wasn't for the fact that he does have this support and this plan. This is not something I would ask on behalf of every defendant.

The first offender program is breaking up. Except in this case I think he deserves a little more.

THE COURT: All right. I'll tell you what, I'll do it just the same way Judge Fullilove did it.

DEFENSE ATTORNEY: Thank you.

THE COURT: He's admitting that it was drugs, and he knew what it was.

DEFENSE ATTORNEY: Yes.

THE COURT: I'll give him six months supervisory. $500 DETA, $50 laboratory, $45 application fee.

Let the record indicate I'm giving him a copy of the complaint.

DEFENSE ATTORNEY: Thank you very much, Your Honor.

MR. ANDRIOLA: Thank you, Your Honor, for your leniency. We really appreciate it.

THE COURT: Let him have this. Let him see the probation officer. He has to pay the $45.

DEFENSE ATTORNEY: Today.

MR. ANDRIOLA: Thank you, Your Honor.

* * * *

CERTIFICATION

I, the undersigned transcriber do hereby certify that the foregoing Transcript of Proceedings in the Orange Municipal Court, March 15, 1990, in the matter of Conrad Andriola, Tape No. 60-90, is a true and accurate record of the proceedings to the best of my ability and knowledge.

DATED: 3/5/91

Lee Blackwell

LEE BLACKWELL AOC #280

Tape Reporters, Inc.

ESSEX C UNTY PROBATION .PARTMENT JAN 22 ,
4

110 SO. GROVE STREET
EAST ORANGE, N.J. 07018

Grove Street Branch Office

(201) 677-8000

William Street Branch Of
3-5 William Street
Newark, N.J. 07102
(201) 621-6164

January 10, 1991

Re: Conrad Andriola
385 Park Ave Apt-B2
Orange, NJ 07050

To whom it may concern:

The above captioned person was placed on supervisory treatment on 3/15/90 - 9/15/90 for Possession of CDS. Mr. Andriola successfully completed his term while at the same time attended Alcohol Annonymous meetings on a daily basis.

If there are any further questions you may want to ask, please feel free to call 677-8035.

Respectfully Yours,

NICHOLAS FIORE
VICINAGE CHIEF PROBATION OFFICER

R. Huntbey

Per: Rosemary Huntbey
Probation Officer, GN3B

NF:RH:bc

cc

R-5

BOARD OF EDUCATION
Department of Student Services/Special Education
ORANGE PUBLIC SCHOOLS
ADMINISTRATION BUILDING, 300 MAIN STREET
ORANGE NEW JERSEY 07050
201-677-4027

NOV 4 R

113

Charles E. Williams, Ph.D
Director

October 24, 1991

RE: Conrad Adriola

To Whom It May Concern:

I have known the above named person (custodian) for the past eight (8) years as an employee of the Orange Board of Education. During these years he was always courteous, very responsible and responsive to all request from my office. At no time during the eight years was there any evidence of him being under the influence of controlled substance. Therefore, I do not hesitate to recommend him for continuance of employment.

Since my Department is responsible for staff assistance I was unaware that he needed any such help. His demeanor and appearance did not suggest he needed this kind of assistance.

If you need any further information please feel free to call me.

Sincerely,

Charles E. Williams, Ph.D.
Director of Student Services/
Special Education

CEW/aj
CA

R-6

Wanaque Borough Schools
Rhinesmith Administration Building
547 Ringwood Avenue
Wanaque, New Jersey 07465

(201) 835-8202
Fax (201) 835-1316

Patrick J. Pelosi
Superintendent

NOV 14 Rec'd
4/13

November 12, 1991

To Whom It May Concern:

This letter is being written on behalf of Conrad Andriola whose job performance I had knowledge of from 1983 until my leaving in 1989 in my previous position as central office administrator for the Orange Public Schools.

During that time, Conrad consistently demonstrated an above average, if not exceptional, work ethic. He was conscientious, dedicated, productive, considerate and honest! I recall Conrad always both willing and able to do everything that was asked of him.

In my role as Superintendent of Schools, I worked many days late into the night. Conrad was always present and never complained. One of many things I remember about Conrad was that he always kept working during these late hours, even when all he was responsible for was to unlock and lock the doors. Weekends were no different. If we needed him, he was always there.

As a person I found Conrad to be genuine in his love for the system, in his respect for the staff and his concern for the children. His loyalty and dedication to the system, in my opinion, was second to none. If I were given the opportunity, I would hire Conrad to work for me right now.

It is without reservation that I give Conrad Andriola my highest endorsement and rate him in the top ten percent of custodians I have known in my twenty six years as an administrator.

Sincerely,

Patrick J. Pelosi
Superintendent of Schools

PJP:evh

B-7

FIRST OFFENDER (C.D.S.)
ORDER TERMINATING SUPERVISORY TREATMENT

JAN 10 Rec'd

NICHOLAS FIORE
VICINAGE CHIEF PROBATION OFFICER

ESSEX COUNTY PROBATION DEPARTMENT

Name ANDRIOLA, Conrad — Docket No. 65865 — Court Orange — No. 90-05502

JUDGE Freddie Polhill — OFFENSE: C.D.S. (1st Offense) — On Supervisory Treatment Date: 3|5|90

Term of Supervision 6 MONTHS — Conditions: Standard

Fine $ 500.00 @ week — DEDR — Lab Fee $50.00 — Court Costs $ @ $ week

COURT REVIEW

Date	Cause of Review	Result
None		

Home Visits	Other Visits	Personal Reports	Total Payments	Arrears
3	3	6	$550.00 (✓)	-0-

Present Status: (Objectives)

Defendant is a 31 year old single male who lives at 385 Park Ave., Orange, New Jersey. He was placed on supervisory treatment for possession of cocaine and since 3/15/90 he has made a positive adjustment. Defendant reported and submitted to urine monitoring. Two urine samples taken on 5/23/90 and 6/14/90 has shown no evidence of drug use. Defendant has remained very open and honest with the undersigned.

[X] A check of the NJSP Bureau of Identification indicates no new convictions.

Recommendation: Discharge from Supervision With Improvement (Before Exp. of Term)
ADMINISTRATIVE DISCHARGE

RH:ms 8/21/90

Requested by _____
Probation Officer
Rosemary Huntbey GN3B

Approved Nicholas Fiore
Vicinage Chief Probation Officer

Date AUG 28 1990

G-59 A Rev. 12/84
#37

ORANGE PUBLIC SCHOOLS

CUSTODIAN/MAINTENANCE PERFORMANCE EVALUATION

COPY DISTRIBUTIO
Original -Pers
Canary -Prin
Pink -Empl
Goldenrod -Eval

NAME: CONRAD ANNICCA SCHOOL: CUGNAC DATE: JANUARY 5

Rating Scale :

1. Strong: exceeds expectations for the position
2. Effective : meets expectations for the position
3. Needs Improvement : performs below expectations for the position. (Indicate specific reasons for rating of #3.)

NA. Not applicable to this evaluation report.

		1	2	3	NA
I.	PERSONAL QUALIFICATIONS:				
	-APPEARANCE/GROOMING	—	✓	—	—
	-ATTITUDE TOWARDS JOB	—	✓	—	—
	-INITIATIVE	—	✓	—	—
	- USE OF INTER-PERSONAL SKILLS	—	✓	—	—
	-USE AND CARE OF UNIFORMS	—	✓	—	—
	-COMPLETION OF DAILY CHORES	✓	—	—	—
	-KNOWLEDGE	—	✓	—	—
	-RECEPTIVE TO NEW IDEAS/PROCEDURES	—	✓	—	—
II.	HEALTH AND SAFETY:				
	-SAFETY - CONSCIOUSNESS (Accepts responsibility for maintaining safest possible environment.)	—	—	—	—
	-ACTIVE IN SAFETY PRECAUTION (Keeps hall clear of obstructions. Prevents floors from becoming slippery. Keeps stairwells free of debris.	✓	—	—	—
	-FIRE PREVENTION AWARENESS (Inspects and maintains fire fighting equipment, removes and prevents fire hazards.)	—	✓	—	—
	-SAFE USE OF EQUIPMENT (Understands and practices the safe use of heating equipment, ventilation and lighting, cleaning compounds, power tools.)	—	✓	—	—
I.	CARE OF PROPERTY:	—	✓	—	—
	-REPORTS/ MAINTAINS SIMPLE REPAIRS. (Shows willingness to make minor repairs, protects property against misuse and vandalism.)				

CUSTODIAN/MAINTENANCE PERFORMANCE EVALUATION

VII. ATTENDANCE AND PUNCTUALITY	1	2	3	NA
- ATTENDANCE: # OF OCCASIONAL ABSENCES TO DATE	___	/	___	
- PUNCTUALITY: # OF DAYS TARDY TO DATE	___	/	___	

VIII. OVERALL SUMMARY STATEMENTS OF THE EVALUATION AREAS

Custodial Services Area is responsible for ensuring that the College - (Administrative) Building and Grounds are clean and reflect a professional environment. Garbage and Obstructions in the hallways are always kept. He is a mature individual. He has an easy going attitude and relationship with employees.

IX. EMPLOYEE RESPONSE: (Additional pages may be attached if necessary)

Employee felt that the evaluation was very satisfactory and was pleased with the evaluation

CUSTODIAN/MAINTENANCE PERFORMANCE EVALUATION

(Cont'd)

(2)

	1	2	3	NA
-Understand value of preventive maintenance	-	-	-	--
-Secures property against theft and illegal entry	-	✓	-	--

IV. COOPERATION:

-With Staff	✓	-	-	—
-With Administrators	✓	-	-	—
-With Fellow Workers	-	-	-	—
-With Parents	-	-	-	—
-With Students	-	✓	-	—

V. WORK HABITS:

-Starts Jobs Promptly Each Day	✓	-	-	—
-Follows Directions/ Schedule	-	✓	-	—
-Realizes Importance of Clean, Attractive and Orderly Surroundings to Learning	-	-	-	—
-Cleans Up Area After Job Completion	✓	-	-	—
-Does Each Job Thoroughly	-	✓	-	—
-Reports For Snow Duty When Needed	-	✓	-	—
-Works Safely With Tools, Self and Others	-	✓	-	—
-Prepares Building For Public Meetings	✓	-	-	—

VI. ECONOMICAL OPERATION:

-Attempts to Conserve Electrical and Heating Costs	-	✓	-	--
-Uses Supplies Economically	-	✓	-	—
-Cooperates In Correcting Wasteful Conditions	-	✓	-	—

CUSTODIAN/MAINTENANCE PERFORMANCE EVALUATION
(Cont'd)

(4)

X. RECOMMENDED EMPLOYMENT STATUS:

1. X CONTINUED EMPLOYMENT

2. ___ CONTINUED EMPLOYMENT WITH ADDITIONAL IMPROVEMENT PLAN
(If plan exists, indicate interim progress:)
1. _____Satisfactory
2. _____Unsatisfactory

3. ___ GRANT TENURE

4. ___ WITHHOLD INCREMENT

5. ___ TERMINATE, OR (BEGIN TENURE CHARGE PROCEEDINGS)

REVIEW WITH PRICNIPAL AND/OR SUPERVISOR

12/3/91
~~PRINCIPAL~~ Administrator DATE

SUPERVISOR DATE

I HAVE READ AND RECEIVED A COPY OF THIS EVALUATION

I AGREE: V

I DISAGREE: ___

I AM ATTACHING A REBUTTAL: ___

I AM SUBMITTING A REBUTTAL WITHIN TEN (10) DAYS: ___

EMPLOYEE'S SIGNATURE DATE 12/3/91

REVISED 4/89

R-10

ORANGE BOARD OF EDUCATION

NAME Andrula Conrad
Last First Middle

School Year 19 89-90

Social Security Number 153-42-9163 Department _____ Date Hired 11-1-83

Sick Days Due _____ Personal Days Due 3 Vacation Days Due 15

EMPLOYEE ATTENDANCE RECORD

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31
July																		P													
Aug.																		V			V	V	V	V	V						
Sept																															
Oct.				C	C																										
Nov.																															
Dec.																															
Jan.					V												F														
Feb.	S																														
March									V						,																
Apr.																															
May																V	V	V													
June																			V	V	V	V					P				

Monthly Totals

A	C	D	F	J	L	P	S	V	U
						1			
								6	
	3								
			1				·	1	
							1		
						1		1	
								5	
						1		4	
						3	1	13	

Yearly Totals Current Year

A - Accident on Duty
C - Compensation
D - Discipline
F - Family Death/Funeral
J - Jury Duty
L - Leave of Absence
P - Personal Business
S - Sick
V - Vacation
U - Unexcused
/ - Thru Code for 1/2 Day

R-11

ORANGE BOARD OF EDUCATION

NAME Andriola Conrad
Last / First Middle

School Year 1990-91

Social Security Number _____ Department _____ Date Hired 11-1-83

Sick Days Due _____ Personal Days Due 3 Vacation Days Due 15

EMPLOYEE ATTENDANCE RECORD

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31
July																J	J	J	J	J										V	V
Aug.	V	V	V																												
Sept																															
Oct.																															
Nov.	P																									A	A	A	A	A	
Dec.			A	A	A	A	A			A	A	A	A	A			A	A	A	A	A											
Jan.		A	A																												
Feb.				P																											
March																															
Apr.																															
May																															
June																															

Monthly Totals										
A	C	D	F	J	L	P	S	V	U
				5				2	
								3	

A - Accident on Duty
C - Compensation
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F - Family Death/Funeral
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L - Leave of Absence
P - Personal Business
S - Sick
V - Vacation
U - Unexcused
/ - Thru Code for 1/2 Day

Yearly Totals Current Year

As of Sept 1, 1991
55 SICK DAYS ACCUM.

OAL DKT. NO. EDU 2019-91

IN THE MATTER OF THE TENURE HEARING OF CONRAD ANDRIOLA, SCHOOL DISTRICT OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standard for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983) The matter is hereby dismissed, subject to compliance with the terms of the settlement.

John C Woodbury

ACTING COMMISSIONER OF EDUCATION

JULY 9, 1992

DATE OF MAILING - JULY 9 1992

156-92

156-92

EDWARD CERATO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JULY 9, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION - SETTLEMENT
OAL DKT. NO. EDU 7370-91
AGENCY DKT. NO245-7/91

EDWARD CERATO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Anthony P. Sciarrillo, Esq., for petitioner

Robin T. McMahon, Esq., for respondent
(Marvin L. Comick, General Counsel, Newark Board of Education)

Record Closed: May 19, 1992 Decided: 5/29/92

BEFORE **ARNOLD SAMUELS**, ALJ:

On July 2, 1991, petitioner Edward Cerato filed a verified petition with the Commissioner of Education, which contested the respondent's withholding of his salary for the period from May 6, 1991 to May 31, 1991. (Two additional claims contained in the petition were previously resolved between the parties and were no longer considered to be contested issues.) In defense of its action against petitioner, the Board claimed that salary was not paid to petitioner for the period in question because of his failure to report to a new assignment in a different location.

On July 30, 1991, the Commissioner of Education transmitted the matter to the Office of Administrative Law for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.* A prehearing conference was held on November 4, 1991, and a prehearing order was entered, defining and limiting the issue to be decided, fixing a hearing date on March 26, 1992, providing for discovery and regulating other procedural aspects of the forthcoming hearing.

The hearing was held, as scheduled, on March 26, 1992 at the Office of Administrative Law in Newark, New Jersey. Four witnesses testified, including the petitioner. Documentary exhibits were also marked in evidence, and the hearing was concluded. Posthearing briefs and memoranda were requested from counsel within 30 days after the hearing. However, the parties continued to confer for purposes of settlement, and on April 16, 1992, this judge was informed by counsel that a settlement had been reached. A written stipulation of settlement was prepared, signed by the parties, and filed with the Office of Administrative Law on May 19, 1992. A copy of the stipulation of settlement is attached hereto and made a part hereof.

Having reviewed and considered the issue involved in the dispute, it is **CONCLUDED** that the parties have voluntarily and knowingly agreed to the settlement, as evidenced by the attached stipulation. It is further **CONCLUDED** that the settlement is fair and fully dispositive of all issues in controversy between the parties.

It is therefore **ORDERED** that the settlement be approved and the matter dismissed.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 29, 1992
Date

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

JUNE 1, 1992
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 03 1992
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

ms

RECEIVED
MAY 19 11 53 AM '92
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

MARVIN L. COMICK
GENERAL COUNSEL
BOARD OF EDUCATION
OF THE CITY OF NEWARK
2 CEDAR STREET
NEWARK, NEW JERSEY 07102
(201) 733-7139

EDWARD CERATO Petitioner, vs. BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAL DOCKET NO. EDU 7370-91 AGENCY REF. NO. 245-7/91 STIPULATION OF SETTLEMENT AND DISMISSAL

This matter involves a claim for restoration of salary. The parties, by and through their respective counsel, have resolved their differences and hereby settle this matter on the following terms:

1. Petitioner hereby withdraws his petition of appeal with prejudice.
2. In consideration thereof, respondent agrees to pay petitioner the sum of $2,750.00, less ordinary deductions from salary.
3. This settlement is subject to and shall take effect upon approval by the Commissioner of Education.

Petitioner

By: _____
Anthony P. Sciarrillo, Esq.

Respondent

By: _____
Marvin L. Comick
General Counsel

OAL DKT. NO. EDU 7370-91

EDWARD CERATO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

John C. Woodbury

ACTING COMMISSIONER OF EDUCATION

JULY 9, 1992

DATE OF MAILING - JULY 9, 1992

157-92

IN THE MATTER OF THE TENURE	:	
HEARING OF ANNE BOYD, MATAWAN-	:	COMMISSIONER OF EDUCATION
ABERDEEN REGIONAL SCHOOL	:	DECISION
DISTRICT, MONMOUTH COUNTY.	:	
	:	

SYNOPSIS

Board certified charge of conduct unbecoming a teacher against respondent, tenured elementary teacher with 25 years of service, for alleged use of corporal punishment in violation of N.J.S.A. 18A:6-1.

In light of testimony of witnesses and such cases as In re Ostergren, ALJ found unbecoming conduct charge was true but as it was a single incident and not premeditated, cruel, or vicious, the conduct did not warrant dismissal from position. ALJ concluded proper penalty was forfeiture of 120 days' pay already withheld and denial of increments for 1991-92 school year.

Commissioner adopted findings and determination in initial decision.

JULY 10, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6394-91
AGENCY DKT. NO. 219-6/91

IN THE MATTER OF THE TENURE HEARING OF ANNE BOYD, MATAWAN-ABERDEEN SCHOOL DISTRICT.

Vincent C. DeMaio, Esq., for petitioner (DeMaio & DeMaio, attorneys)

Arnold M. Mellk, Esq., for respondent (Wills, O'Neill & Mellk, attorneys)

Record Closed: April 13, 1992 Decided: May 21, 1992

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

Tenure charges against a teaching staff member alleging corporal punishment of pupils.

On April 15, 1991, the deputy superintendent of schools of the Matawan-Aberdeen Regional School District preferred tenure charges against Anne Boyd, respondent. On June 10, 1991, the Matawan-Aberdeen Regional School District Board of Education (Board) reviewed a copy of the charges, the evidence in support of the charges and a copy of Boyd's sworn statement in opposition. The Board determined that the charges and the evidence in support of the charges are sufficient, if true in fact, to warrant dismissal or reduction in salary. The Board secretary filed the charges and all papers in support thereof with the Commissioner of Education on June 14, 1991. The respondent filed her answer on June 21, 1991.

On June 27, 1991, the Department of Education transmitted the matter 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 prehearing conference was held, by telephone, on September 20, 1991. It was determined that the issue to be resolved is whether the charges or any of them are true in fact and, if true in fact, sufficient to warrant reduction in salary or removal from position.

The specific charges are:

1. Anne Boyd did on March 11, 1991, administer corporal punishment at the Lloyd Road Elementary School, Aberdeen, New Jersey to a student E.B., by the use of unnecessary and unwarranted force and with the intent to punish him in violation of N.J.S.A. 18A:6-1.

2. Anne Boyd did during the week of March 11, 1991 engage in conduct unbecoming a teacher in violation of N.J.S.A. 18A:6-10, by the following conduct:

   (A) Discussing with her classes and/or with groups of students the March 11 incident with E.B. in a manner which was ridiculing in nature and which prompted concern on the part of the students;

   (B) By interrogating students who participated in the follow-up investigation by the school administration of the incident involving E.B.; said interrogation by the teacher was done in a threatening and intimidating manner and created a hostile environment in her classroom;

   (C) By taking an individual student out of the classroom and discussing with that student a claim that the student was circulating rumors about the teacher and the incident involving E.B.

3. Anne Boyd, at various times prior to the week of March 11, 1991 did engage in conduct unbecoming a teacher in violation of N.J.S.A. 18A:6-10, by addressing students in an inappropriate manner, ridiculing individual students/staff by calling them "stupid" and/or "jerk", or referring to them in other belittling terms.

The matter was heard on February 18 and 26, 1992, at the Aberdeen Township Municipal Court. Counsel filed posthearing memorandums and the record closed on April 13, 1992.

RELEVANT EVIDENCE

Counsel provided the following joint stipulations of facts and documents admitted in evidence by consent.

1. Anne Boyd is a tenured teacher in the Matawan-Aberdeen Regional School District.

2. Charges were filed against her by Michael K. Klavon, Deputy Superintendent of Schools and were certified by the Board of Education (Exhibit A, Charges; Exhibit B, Certificate of Determination).

3. The written statement of position of Anne Boyd (Exhibit C).

4. Anne Boyd was suspended without pay.

5. Anne Boyd has received unemployment compensation from the state of New Jersey.

Fourteen pupils witnesses testified. E.B., the pupil principally involved, stated that on March 11, 1991, he was in front of the respondent's classroom door during a class change. He and another pupil blocked the door with their feet. Pupils in the classroom could not exit. The respondent approached the door and E.B. and his friend backed away. The first pupil at the door exited, followed by the respondent. The respondent stated, "How dare you?" and struck E.B. on his left cheek with her open right hand. She pushed him farther away and he hit a drinking fountain. The respondent directed him to the school office and he went.

E.B. spoke to the school nurse who called the principal. E.B. stated that a teacher hit him. He was crying while at the nurse's office. The principal took E.B. to the principal's office where they talked for a brief time.

E.B. recalled speaking to the deputy superintendent of schools several times, but could not recall the dates other than to say that it was soon after the incident. The witness also reported a meeting with his parent, the Board attorney, the deputy assistant superintendent and a court reporter. E.B. called blocking the door a game and acknowledges that he was suspended from school in connection with the incident.

The deputy superintendent who investigated the charges made by E.B. stated that the child's mother came to his office and complained. The deputy superintendent spoke to the building principal, the school nurse, a representative from the Division of Youth and Family Services (DYFS), the Board attorney and E.B.'s parents' attorney.

The witness set up interviews and received names of pupils who were in or near the area. He contacted their parents and interviewed the pupils one-by-one, with at least one parent present in each case. As pupils gave statements, additional names came up. The respondent's union representative wanted all pupils in her class interviewed. The deputy superintendent set up those interviews through the building principal. The respondent was not present at pupil interviews.

The witness interviewed the respondent with a union representative present. He then filed the present charges.

The 13 other children who testified, some of them emotionally, varied in their recollection of the event. J.S. testified similarly to E.B. He also stated the respondent did not discuss the matter in class that day. Later, however, she tried to make a joke of it.

The witness now recalls the respondent "bumped" K.C., a pupil in her room, out of the way in order to get at the door. The witness also recalled a meeting with the deputy superintendent, Board attorney, parents and children. He recalls the deputy superintendent and Board attorney stressed the importance of telling the truth.

M.O. testified that he was approaching the respondent's classroom when the incident occurred. He saw E.B. block the door with a foot. He also stated he saw the respondent exit and strike E.B. She pushed E.B. into a water fountain and ordered E.B. to the school office. The witness did not notice E.B. crying. He recalled that the water fountain was to the left of the classroom door, that the door opens into the hallway toward the right as one faces the door. There were perhaps six pupils in the area and some noise. There was less noise when the respondent appeared. The witness did not see the respondent strike E.B. He stated he heard a slap and saw a push. He returned to the respondent's class after the incident. She did not discuss the incident that day. However, on another day, she asked pupils

what they said to school authorities. The respondent said words to the effect that she knew pupils gave information to the principal.

J.O'H. stated she was in the hallway near the respondent's room at the time of the incident. She saw the respondent exit, and push or strike E.B.'s chest. E.B. went into the water fountain and moved to one side. The respondent sent him to the office with S.J. E.B. was in front of her and, in her opinion, looked scared. The witness could not say how many pupils were in the hall at the time. She did see E.B.'s foot against the door. Pupils inside the classroom could not open the door. The witness could not recall any exchange of words between E.B. and the respondent. There was no discussion among pupils in the hallway.

K.C. stated he was the first pupil at the respondent's door trying to leave the classroom immediately before the incident. The door has a window and the witness saw E.B. outside. The witness tried to open the door and E.B. blocked it. Both boys were laughing. K.C. pushed the door firmly. The respondent came to the door, pushed him aside and forced the door open. The respondent made a slap toward E.B.'s face and pushed him backward. He went into the water fountain. The respondent sent E.B. to the office and the witness could not recall anyone going with E.B. The witness recalled no further mention of the incident by the respondent.

S.J. stated he was in the hallway coming from one class, going to another. He and E.B. blocked the door to the respondent's classroom. The respondent came to the door, pushed aside a pupil who was standing there and forced the door open. As she exited the room, she shoved E.B. who went backwards, but did not fall. The respondent said only, "How dare you?" E.B. said, "What about him?" meaning the witness. The respondent sent both boys to the school office.

In a subsequent class, the respondent mentioned the incident. She asked S.J. what he said about the incident to the deputy superintendent and principal. The witness was fairly sure the respondent mentioned statements under oath. She told her class, "I'm not in trouble."

Both in deposition and at hearing, the witness stated he does not believe the respondent slapped E.B.

W.H. stated he had the respondent for mathematics. He was immediately behind her in the classroom near the door at the end of the period. K.C. was in front

of him. K.C. tried to open the door, but could not. The witness could not see from his vantage point why K.C. could not open the door. The respondent came over, told K.C. to move and tried to open the door. She "put a lot of force into it." The door opened rapidly. The respondent saw E.B., grabbed him at the shoulders, shook him and pushed him into lockers. The witness could not recall the exchange between the respondent and E.B. He does recall that E.B. was sent to the school office. This witness stated the water fountain was to the right of the door. He did not see E.B. go into the water fountain. He saw the respondent push hard to open the door and later learned that E.B. was holding the door closed. He saw no slap, but saw the respondent's hands on E.B.'s shoulders. He heard no exchange at that time.

He later learned of a rumor about the respondent being fired when the respondent mentioned it. The witness recalled that the respondent spoke to other children at the time of the incident, but he cannot remember who they were.

A.C. testified about coming from reading class and going to the respondent's classroom. She saw E.B. next to the door with other pupils. She saw the respondent open the door and ask E.B. what he was doing. The witness stated the respondent "abused" E.B. She hit his face and pushed him into a fountain. The witness recalls no conversation other than the respondent asking, "What are you doing?" The respondent sent E.B. to the office. She believes E.B. went with S.J. She could recall no discussion of the incident in class that day or on any subsequent day.

This witness believed the water fountain was to the left of the door. The witness made statements to the assistant superintendent but did not discuss the matter with E.B. or S.J.

C.B. testified that she recalled the incident. She was going to the respondent's class and saw nothing of the incident. Upon entering the classroom everything seemed normal. There was some conversation about the incident among pupils, but the witness cannot recall what was said.

On a subsequent occasion, the respondent talked about the incident. Although the witness could not recall exactly what was said, she believed the gist was that it was unfair for people to say the respondent had done something. The witness recalls the respondent brought up the subject. She also asked pupil witnesses what they thought about the incident.

K.G. testified that she was in the respondent's classroom at the time of the incident. The first pupil at the door could not open it. Then a male pupil, K.C., opened the door, but it closed again. The respondent told pupils to get out of the way and opened the door. She took two boys outside and pushed one into the water fountain.

The witness sits by the door at the end of a table. She could not see all of the action in the hallway. She heard the respondent yell and saw the respondent "take" E.B. by the neck and push him around the doorway. From that point forward she could see nothing.

The witness recalled no discussion that day of the incident. A few days later, the respondent stated that she should have started taking karate lessons. The witness spoke to the deputy superintendent after the respondent made the karate remark. The witness believes E.B. put his foot into the open doorway. She also believes K.C. opened the door and did not actually see the respondent touch E.B.

J.S. stated she was in the respondent's classroom at the time of the incident. Because taking a test, she sat near the door. The respondent asked her to open the door. The pupil opened the door and turned around. Almost immediately, the door closed. The respondent asked her again to open the door. K.C. opened the door before she could get to it. E.B. stopped the door with his foot. The witness then turned as the respondent went through the doorway. She could not see into the hallway. She heard the respondent yell and heard E.B. "like cry."

The witness had more classes with the respondent that day. Nothing was said about the incident. Approximately a week later, the respondent asked pupils what office personnel had asked them. She told pupils to raise their hands if they had been called to the school office about the incident. The respondent said she was not getting into one bit of trouble and that she would get a whole script of what pupils had said. The witness told one of her friends not to say anything.

The witness also recalled that people from another classroom came into the hall at the time of the incident to see what was going on. She was firm in her testimony that K.C. opened the door part way and E.B. caught it. The respondent then pushed it completely open. Although the incident caused much conversation in the school, that conversation did not influence her testimony.

D.C. stated that she was in the respondent's classroom during the incident. She saw the respondent try to open the door. The witness had a clear view of the door. The door eventually opened, but the witness could not see or hear the event. A few days later, the respondent said something about the incident. She can't recall if the respondent asked questions. The witness recalled speaking to the deputy superintendent but can't recall telling him about the respondent questioning her. The respondent did say witness were spreading rumors about her. The respondent asked the witness about spreading rumors and the witness denied it. The respondent seemed to accept her answer.

K.M. stated she was inside the classroom near the door at the time of the incident. K.C. tried to open the door but could not. The respondent did. The witness could not see outside into the hallway. After the respondent opened the door, the witness heard some things but did not see the incident. She does not believe there was any comment or question by the respondent on the day of the incident. She did recall the respondent making a remark about karate. The witness took it as a joke or at least an exaggeration.

T.W. testified that she was inside the respondent's classroom in the corner near the doorway. She could see people at the door, but could not see the door itself. She saw the respondent come to the door and move someone out of the way. The respondent leaned against the door and then fell through the doorway. As the witness left the room, she saw the respondent hug E.B. and say, "I'm sorry, I'm sorry." The respondent and some pupils were laughing.

The witness could recall no discussion of the door incident. There were rumors around the school about the incident and at one point the respondent announced to her class that the rumor was not true that the respondent had slapped a child purposely. The witness stated she did not know what rumor the respondent was talking about until the respondent explained it involved E.B.

Anne Boyd testified that she has been a teacher for more than 25 years and for 23 years in Aberdeen-Matawan. She has had no previous disciplinary action against her, no increments withheld and there have been no accusations of corporal punishment or improper touching. The Board alleges she corporally punished E.B. unnecessarily and with unwarranted force. She did not do so. She had no intent to punish E.B. physically.

On the date of the incident, she was teaching mathematics. As the period ended, K.C., at the door, could not open the classroom door and he so advised her.

She tried the door and could not open it. She told whoever was holding the door to stop. She pushed as hard as she could for perhaps a minute. The door suddenly opened. She flew through the door into E.B. in the hallway. Their bodies collided, but there was no other physical contact at that time. She may have put an arm on his shoulder and said "I'm sorry you did this, you must go to the office" or words to that effect.

The respondent denies slapping, pushing or striking E.B. She denies any intent to punish or to physically hurt him. She sent E.B. to the school office and he returned to class later that day. She told him that what he did could have been dangerous to others.

The respondent denies any discussion or use of ridicule at any time. Although she did discuss the incident with her homeroom class, she did not interrogate, threaten or intimidate pupils. Pupils were upset. DYFS personnel were in the building. Pupils asked if the respondent were going to be fired. The witness responded that she was not. Pupils wanted to discuss the matter and the witness stressed the importance of telling the truth. Later, and during a mathematics class, she took D.G. into the hallway and asked her about rumors. D.G. denied telling rumors and the respondent returned the child to class. The respondent did tell her class, "I want you to know I did not hit E.B. and I am not going to be fired" or words to that effect.

In recounting the incident a second time, the witness was quite specific about not being able to open the door on her first attempt. She did not know E.B. was on the other side at that time. She again tried to open the door and the door opened suddenly. As it flew open, she flew out into the hallway with it. Many pupils were present in the hallway because classes were changing. The witness does not know if any pupils were close enough to be touched by the door. She flew into E.B., but does not recall if the door hit him. Before the door opened she surmised someone was holding it closed. After it opened, she knew E.B. had held the door because as she was flying into him, he was flying backwards. The witness believes E.B. was the closest pupil to the door. The respondent says she did not grab or touch E.B. When she flew into him, she probably touched him somewhere, and it could have been his neck because "I was propelled into him." When she collided with E.B.,

she believes he went sideways. She has no recall that he hit a water fountain or lockers. She does not recall saying, "I'm sorry." She may have said, "How dare you?" She believes she said, "I'm sorry, you'll have to go to the office." E.B. said S.J. "was doing it, too." S.J. approached her and said he was also blocking the doorway. E.B. went to the office when sent.

When the witness went to the office to write a disciplinary slip, S.J. was there; however, she cannot remember sending him to the office.

At some point, the respondent learned the deputy superintendent was interviewing many or all pupils. She did not ask pupils what they said and she did not ask pupils what they were asked. She did discuss the matter with her class because they were expressing concern. She believed it was appropriate to discuss in class because many children were upset. She did ask if anyone wanted to say something. No one volunteered and some expressed a fear of questioning. The witness told her class that it was important to tell the truth in this matter.

The respondent probably made the karate remark in the hallway coming from lunch. She cannot recall exactly what she said. Her remark had nothing to do with the E.B. incident.

The witness questioned D.G. in the hallway about spreading rumors because she did not want to discuss the matter in class. The witness hoped she could quell talk about disciplinary action. D.G. did not appear nervous at the time of the conversation.

The witness could not recall if the deputy superintendent asked her if she discussed the incident with her class. Nor could she recall the deputy superintendent saying anything about class discussions. She denies she told the deputy superintendent that she mentioned karate in class. She could not recall telling the deputy superintendent that the karate remark was a joke.

Photographs were introduced showing the interior and exterior views of the respondent's classroom door (R-1, R-2). The photographs show that the glass portion of the door is nearly, but not completely, obscured by posters.

On rebuttal, the deputy superintendent stated that he had a question and answer session with the respondent on March 14, 1991. Two union

representatives were present. He asked the respondent to describe the incident. He asked if she could identify who was holding the door and she stated that she could. While the door was being opened she saw a sneaker and knew the child was E.B. because he wore unique sneakers. She opened the door and came through the doorway. E.B. was going backwards. She grabbed him to steady him. She may have touched his neck. While opening the door and moving forward she said, "What you're doing is dangerous."

The respondent told the deputy superintendent she had had no discussion of the incident with her class and it would be inappropriate to do so. She stated she made a comment about karate but as a joke. She stated that she had asked questions of only one child.

ARGUMENTS

Petitioner's Arguments

The Board maintains there is agreement on some matters. As a sixth grade class was about to change classrooms, E.B. and perhaps one other pupil engaged in a prank. E.B., who was about to enter the respondent's room as the pupils in her prior period were about to leave, placed his foot against the door in a way that kept it from opening. E.B. was fully aware that another pupil was trying to open the door so that he and his classmates could exit. E.B. admits all of this and was suspended from school for his conduct. It is also undisputed that the respondent ultimately opened the door and entered into the hallway where E.B. was.

What is disputed are the events that took place in the hallway. The witnesses were E.B., the respondent and several students, some of whom were in the hallway and some of whom were in the classroom. The pupil testimony was inconsistent on some details. This is completely understandable in consideration of the fact that they did not all have the same viewing angle and that human observation is less than perfect. Sixth grade pupils do not make poised, articulate witnesses, particularly in the presence of an authority figure such as their teacher. This is perhaps accentuated in the strange environment of a courtroom. Notwithstanding the variances in testimony, something more than an accidental collision took place in the hallway. While the respondent may contend that students have colluded and collaborated against their teacher, the Board submits that if they had done so, their stories would much more nearly match than they do.

The respondent claims she did not lose her temper and yell, despite testimony to the contrary. In order to cover that base, she remained breathless and silent for a while. Only subsequently did she recover enough to ask E.B., "How dare you?" The physical contact with E.B., she states, was accidental and unintended. However, on balance, the testimony of the pupils establishes that the respondent lost her temper as a result of the prank played by E.B. and that she did have inappropriate physical contact with him. Slapping in anger without anything more is sufficient to constitute corporal punishment.

Further, the respondent engaged in unbecoming conduct in the classroom subsequent to the incident. Her testimony attempted to minimize her participation in interrogating her pupils as to what they told the administrator who was investigating the initial charge. She further denied that she had ever discussed the charges in a ridiculing manner, specifically stating that her discussion about karate took place in the hall coming from lunch and did not take place in the classroom. She had no clear recollection of what triggered the conversation, but stated clearly it had nothing to do with E.B.

One pupil said there was a discussion of karate but that she felt the respondent was joking or exaggerating. Another pupil testified that the respondent made an in-class comment about karate and that the pupil believed the respondent was serious. These varying reactions demonstrate the inappropriateness of the comment and that, contrary to the respondent's fussy recollection, the comment was made in class.

With respect to her alleged out-of-class interrogation of pupils, she admitted that she called one pupil, D.G., out of class into the corridor to inquire about spreading rumors. With respect to in-class interrogation, the respondent said the only time there was an in-class discussion was when it was triggered by questions from the pupils. As a response, she asked if anyone wanted to talk about anything that was bothering them and "Nobody seemed to want to. So then what I said was, I said, well, you know, the important thing is to tell the truth in these situations and not tell a falsehood. An that was the extent of the discussion . . . ." (T II 68).

However, this was inconsistent with the testimony of several pupils. One, for example, testified that on the day following his meeting with the deputy superintendent who was investigating the incident, the entire class was interrogated

by the respondent. Another pupil testified that the respondent asked him about his testimony in class and she stated she was "not in any trouble because I really didn't really mean to hurt him. I just want you to know that." (T II 93-94).

Still another member of the class stated that after everyone was questioned at the office, the respondent asked them what questions they were asked. (T II 157).

The testimony of the pupils establishes that the respondent's recollection of in-class interrogation is faulty. It clearly took place and not in the context she attempted to create. Instead of trying to alleviate student concerns about her, what occurred was that she was determined to find out what the pupils had told the administrator about her. This is inappropriate behavior for a classroom teacher. If, as the respondent testified, only some of the pupils had already spoken to school authorities, her behavior clearly intended to intimidate and influence by warning the pupils that she would find out what they had said about her. Even those who had testified were intimidated and that is why J.S. warned a friend not to tell anything. Pupils realize that teachers with their ability to impose discipline and their influence over grades and extra curriculur activities can affect them in very important ways.

The respondent stated it was not appropriate to discuss the E.B. incident in class when she said, "Normally I don't believe I would have, but I was upset that day." (T II 65).

The Board submits that the respondent was guilty of both corporal punishment and conduct unbecoming a teacher and that appropriate discipline should be imposed.

Respondent's Arguments

The respondent argues that she did not administer corporal punishment to E.B. N.J.S.A. 18A:6-1 forbids any person engaged or employed in a school or educational institution to inflict or cause to be inflicted corporal punishment upon a pupil, but any such person may, within the scope of his employment , use and apply such force as is reasonable and necessary to quell a disturbance threatening physical injury to others, to obtain possession of weapons or other dangerous objects upon the person or within the control of the pupil, for the purpose of self defense and for

the protection of persons or property. These acts are not construed as corporal punishment in the meaning of the statute.

The respondent contends that intent is an essential ingredient of the offense of corporal punishment by analogy to assault. Liability cannot attach in the absence of either guilty intent or negligence. State v. Chiarello, 69 N.J. Super. 479, 494 (App. Div. 1961), certif. den. 36 N.J. 301 (1962). Also, the corporal punishment statute, being in derogation of common law and a penal act, must be strictly construed. Marley v. Borough of Palymra, 193 N.J. Super. 271, 291 (Law Div. 1983).

Because liability is precluded in the absence of guilty intent, the relevant standard for the finding of assault applies. A person is guilty of simple assault if he/she "attempts to cause or purposely, knowingly or recklessly causes bodily injury to another." N.J.S.A. 2C:12-1 (a). Culpability requires that the respondent has acted knowingly. The lack of culpability standard in N.J.S.A. 18A:6-1 requires knowing conduct. State v. Demarest, 252 N.J. Super. 323, 326-334 (App. Div. 1992). The appellate panel, in construing the offense of endangering the welfare of a child, N.J.S.A. 2C:24-4(a), held that the statute's lack of a culpability standard required proof that the defendant acted knowingly in order for there to be a conviction of endangering the welfare of a child. In the present case, the respondent can only be found to have violated N.J.S.A. 18A:6-1 if she intended to punish E.B. corporally

It is uncontradicted that E.B. was holding the respondent's classroom door closed with his foot. It is also uncontradicted that two of the respondent's pupils said they could not open the door because of E.B.'s action. In these circumstances, the respondent went to the door and tried to open it but could not do so. She pushed as hard as she could and the door flew open, E.B. obviously having jumped away. The respondent "flew out the door", colliding with E.B. Shortly thereafter, she [illegible]er arm on E.B.'s shoulder and sent him to the office for his misbehavior. She has categorically denied slapping him, putting her hand on his throat, grabbing his shirt and pushing him, choking him, hitting him or striking him in anger.

Touching E.B. in these circumstances was an accidental collision caused by E.B.'s own inappropriate behavior. The respondent simply did her duty in trying to open the door. She intended no harm or corporal punishment.

Against the respondent's description of the event is the testimony of several pupils. E.B. said the respondent hit him across the face with an open hand, pushed him and grabbed his shirt. He added that he hit the water fountain. He denied discussing the incident with his classmates or friends at any time whatsoever.

J.S. testified that he saw the incident from the hallway outside the classroom. He told the deputy superintendent that the respondent hit K.C. inside the classroom. On cross-examination he changed his story and said the respondent bumped E.B., but did not hit him. Inspection of the photographs of the subject doorway suggest there could be no clear view of events in the classroom from the hallway. J.S. also contradicts E.B. regarding discussion of the incident between them. He admits to having talked about the incident with E.B. The remarkable similarity of description by the two youths of the incident certainly allows a negative inference to be drawn from their testimonies.

M.O., who was in the hallway, stated he could not see much because of the number of pupils who were outside the classroom door waiting to get in. He did state that he saw the respondent push E.B. into the water fountain.

J.O'H. was in the hallway at the time of the incident and saw E.B. holding the classroom door closed. She saw the respondent fly out of the room. The respondent contacted E.B. with her right hand, four to five inches below his throat.

K.C., a friend of E.B., was in the classroom when E.B. was holding the door closed. K.C. had been attempting to open the door and could not do so. Although K.C. had to have been behind the respondent at the time she exited the classroom, he said the respondent slapped E.B. He also admitted talking to other children about the incident. J.S., however, who was in the hall, testified about K.C. and the respondent leading one to the conclusion that K.C. and J.S. prepared their stories together.

S.J., who was identified as E.B.'s cohort in the door holding incident and was therefore in close proximity to E.B. at the time of his contact with the respondent, did not see the respondent slap E.B. In addition, S.J. testified that after the contact, he did not think that E.B. hit anything.

B.H. was in the classroom and saw that the respondent had to "put a lot of force" into getting the door open, and the door opened rapidly. He then stated

that the respondent grabbed E.B. by the shoulders and started shaking him and pushed him into the lockers. He further stated he never saw the respondent slap E.B. Rather, the respondent went into E.B. with her hands on his shoulders.

A.C. testified she was in the hallway and she saw E.B. "standing next to the door and [K.] was next to him. Ms. Boyd comes to the door, opens the door and asks him what he was doing, on the side of the door, and she was abusing him." She added that "she hit him on the face, choking him with her hand on his throat and pushing him into the water fountain." However, A.C.'s lurid description is either false or confused. It can be assumed the E.B. and A.C. prepared their versions of the event together.

C.G. testified that she was in the classroom at the time the door was being held closed. She described the opening of the door as follows, "and then [K] . . . came and he opened the door and [E.B.] pushed free and the door and the teacher came over and they took, and she took and put him into the water fountain." She reiterated that K.C. opened the door and that it was open when the respondent got to it. She further said she saw the respondent take E.B. by the neck. However, on cross-examination, she admitted that she did not see anything that happened in the hallway between the respondent and E.B. The witness further admitted that her testimony was the result of having talked to other children about the incident.

T.W. testified that she was in class on the date of the incident and saw the respondent "trying, leaning against the door trying to get it open and all of a sudden she fell through . . . ." The next thing she observed was the respondent "hugging [E.B.] saying, I'm sorry . . . ."

The Commissioner of Education has long recognized the need to examine the testimony of children with great caution. Such caution is required here all the more because of the wildly conflicting statements of the pupil witnesses, their bias and the circumstances and fears created by the deputy superintendent's investigation.

The Board has made no principled argument in support of the corporal punishment charge. The respondent did not contravene N.J.S.A. 18A:6-1, even if it were to be determined that her physical contact with E.B. was not inadvertent.

In this case, the Board has presented no credible evidence that can support a charge of corporal punishment. In fact, this charge is unwarranted and should be dismissed.

The Board has shown neither unbecoming conduct nor other just cause pursuant to N.J.S.A. 18A:6-10. The charge simply adds insult to injury. Accusing the respondent, as it does, of ridiculing students and intimidating and threatening them is beneath contempt. It is abundantly clear that any concern on the part of the pupils prompted by the incident of March 11 was due to the sledgehammer approach of the deputy superintendent in responding to Ms. B.'s complaint that her son had been hit.

Subsequently, the deputy superintendent spoke to the building principal, the nurse, called the Board's secretary, called DYFS, spoke to the superintendent, arranged for a court reporter to come to the school, spoke to E.B.'s attorney, proceeded to contact the parents of children whose names he obtained and arranged for the interrogation of the pupils at the grammar school. The deputy superintendent got around to contacting the respondent after he preferred the charges against her. In this context, the children came to the respondent with their concerns, a reasonable response given the circumstances.

In support of this charge, the Board has relied upon the testimony of five pupils. The Board apparently has referred to the respondent's discussion concerning karate as her discussing the charges in a ridiculing manner. The Board cites testimony of K.M. The relationship between the discussion and the ridiculing charge is incomprehensible. It should be noted that K.M. understood any discussion of karate to be a joke and an exaggeration. In addition, K.M. never believed that the respondent was learning karate in order to hurt the children.

C.G. testified that the respondent mentioned she should start karate lessons. The witness was led by counsel to testify that she took the discussion to be serious. She had nothing further to say about the discussion and remembered nothing further about any conversation in the classroom.

M.O.'s testimony did not go to intimidation or threats. According to M.O., when the respondent allegedly asked pupils what they had said to school authorities, he did not answer.

S.J.'s testimony about discussion in class after interrogations at the school office explains nothing more than the respondent has testified to herself. S.J. said that the respondent informed him in class that she was not in trouble, that she did not mean to hurt E. B. and she wanted S.J. to know that. This is consistent with the respondent's explanation of the need to deal with the matter.

Finally, the Board in support of subpart C of this charge presented D.G. Her testimony was that the respondent spoke to D.G. privately, out of the classroom, concerning rumors that the respondent was going to be fired because she had struck E.B., and that D.G. was spreading the rumor. D.G. was, in fact, aware of the rumors although she denied spreading them. Thereupon, the conversation with the respondent ceased.

Consistent with its lack of argument as to the corporal punishment charge, the Board has here made no principled argument in support of the unbecoming conduct charge. It has not meaningfully analyzed the testimony presented or cited any authority in support of its conclusion. Communications between the respondent and her students were the direct result of the deputy superintendent's response to Ms. B.'s complaint. The Board having certified these charges, in these circumstances, is a manifest abuse of its discretion.

The tenure charges against the respondent must be dismissed in their entirety. The Board has completely failed to prove the charges. The Board must be ordered and directed to reinstate the respondent to her teaching position along with her back pay, interest thereon, and all benefits and emoluments to which she is entitled.

DETERMINATION

Initially, the respondent's argument that intent is an essential ingredient of the offense of corporal punishment by analogy to assault is rejected. Chiarello, above, states, as argued, that intent is an essential ingredient of the crime of assault. The offered analogy, however, does not follow. N.J.S.A. 18A:6-1 is a civil statute and N.J.S.A. 2C:12-1(a) is a criminal statute. As the respondent correctly notes, the corporal punishment statute must be strictly construed. Marley, above. However, it is to be strictly construed but not in a way that defeats the legislative purpose. Id. at 291. The legislative purpose has been explained in Tenure Hearing of Lomakin, 1971 S.L.D. 331, 334:

> 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 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. Tenure Hearing of Ostergren, 1966 S.L.D. 185, 186. [Emphasis added.]

and

> [T]hat 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. Ibid.

and, also

> 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." Ibid.

This language was approved again in Tenure Hearing of Jackson OAL DKT. EDU 3438-87 (Mar. 7, 1988), adopted Comm'r of Ed. (Apr. 18, 1988), aff'd St. Bd. of Ed. (Nov. 1, 1988).

The respondent's argument that she was simply doing her duty in trying to open the door is also rejected. Accepting her testimony as true for the purposes of this aspect of the analysis, the respondent told whoever was holding the door to stop holding the door when she discovered she could not open it. Yet, she pushed as hard as she could against the door. The two acts are inconsistent with common sense. One better course of action was simply to demand that whoever was holding the door open it. It was likely that a teacher could discover who was holding the door closed in a variety of ways. One of those ways was to look through the unobscured portion of the window in the door. Yet neither the respondent nor any pupil testified that the respondent attempted this simple expedient.

As a result of both demanding that the door be opened and pushing against it, the respondent flew, in her words, into the hallway when the door was released. That was not doing her duty. E.B.'s so-called prank was ill-conceived, ill-bred and potentially dangerous. Appropriately, he was punished for it. Nevertheless, this precisely the type of situation teachers are called upon to deal with. More than 20 years ago, the Commissioner said

> [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." [Emphasis added.] Tenure Hearing of Sammons, 1972 S.L.D. 302, 321.

It is also true, as the respondent contends, that the Commissioner recognizes the need to examine the testimony of children with great caution. In this case, testimony conflicts in some areas and is consistent in others. This is to be expected in consideration of the number of pupils involved and the different prospectives they had. This does not render their testimony incompetent, however.

This case turns to a certain extent on the credibility of the witnesses. Credibility does not depend on the number of witnesses and the finder of fact is not bound to believe the testimony of any witness. In re: Perrone, 5 N.J. 514 (1950). In an administrative proceeding, testimony may be disbelieved but it may not be disregarded. Middletown Tp. v. Murdoch, 73 N.J. Super. 511 (App. Div. 1962). The best evidence, of course, is a credible witness coupled with credible testimony. State v. Taylor, 38 N.J. Super. 6 (App. Div. 1955). The trier of fact may accept or reject, in whole or in part, the testimony of any witness. Application of Howard Sav. Bank, 143 N.J. super. 1 (App. Div. 1976).

Generally, I **FIND** the testimony of pupils other than E.B. and S.J. credible and worthy of belief. The respondent's recall was selective. Although I believe the bulk of her testimony, I do not accept it all, particularly her version of what occurred in the hallway immediately after the door opened. Nor does the weight of the evidence support her contention that she did not discuss the matter, except in a very limited way, with pupils in the days following the incident.

Having considered the entire record, I **FIND**:

1. On March 11, 1991, pupils E.B. and S.J. held closed the respondent's classroom door as a change of classes was about to take place.

2. A pupil trying to exit could not and he advised the respondent of the fact.

3. The respondent went to the door.

4. The respondent did not strike or push out of the way the first pupil attempting to exit.

5. The respondent did not attempt to see through the unobscured portion of the door window who was preventing the door from being opened.

6. The respondent simultaneously demanded that the door be released and pushed on the door with considerable force.

7. When the pupils released the door, it opened quickly.

8. The respondent's own efforts propelled her into the hallway.

9. The respondent struck E.B. at or near the shoulders with at least one hand.

10. E.B., who was already moving away from the door, was further propelled by the blow.

11. The respondent discussed the event with pupils on at least two occasions in the days following the incident.

12. The respondent took a pupil from the classroom and asked the pupil if the pupil were spreading rumors about the respondent and the incident.

The third charge was dismissed at hearing upon motion and oral argument. The judge found no evidence adduced in support of the charge.

I **CONCLUDE** that the respondent inappropriately touched E.B. on March 11, 1991, that she inappropriately discussed the event with pupils on at least two occasions and that she removed a pupil from a class and questioned the pupil about spreading rumors concerning the incident.

These determinations are serious. For the following reasons, however, I do not recommend dismissal. The respondent already has paid a very heavy penalty as a consequence of these charges. She has suffered professional and personal embarrassment and has lost 120 days' salary. She will have to work with careful and unremitting attention to all her actions to restore her professional reputation. This

penalty does not condone any of the acts proved in this case. Nor does it trivialize or treat as a justification the underlying pupil behavior.

Rather, it recognizes 25 years of unblemished service. As the Appellate Division of Superior Court remarked in In re: Fulconer,

> 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. 404, 421 (App. Div. 1967).

And, as in Ostergren above, the primary tenure charge here does not arise from a series of incidents. It constitutes one incident which comprised no more than a few minutes. Of course, a single incident may be the basis for dismissal of a tenured teaching staff member. See, Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), aff'd o.b. 131 N.J.L. 326 (E. & A. 1944). Nevertheless, it is necessary to take into consideration the nature of the offense, any mitigating circumstances and the teacher's record. Tenure Hearing of Kittell, 1972 S.L.D. 535, 541.

Having considered all of these factors, I **CONCLUDE** that the respondent's actions were rash, but not premeditated, cruel or vicious. While there undeniably was a ripple effect from the incident, there is nothing in the record to show that the respondent's actions had any lasting effect on the operation of the school or on the pupils involved.

I further **CONCLUDE** that the conduct of the respondent herein, although serious and unprofessional, does not warrant the forfeiture of tenure. Therefore, I **ORDER** that the respondent be continued in her tenure status as an employee of the Matawan-Aberdeen School District, that she forfeit 120 days' pay already withheld and that she be denied her salary and adjustment increments for the 1991-92 school year.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

21 MAY 1992
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

5/26/92
Date

Maureen Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 29 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

km

WITNESSES

E.B.
Michael K. Klavon
J.S.
M.O.
J.O'H.
K.C.
S.J.
W.H.
C.A.
C.B.
K.G.
J.S.
D.G.
K.M.
T.W.
Anne Boyd

EXHIBITS

R-1	Photographs (2), outside of classroom door taken in April 1991
R-2	Photographs (2), inside of classroom door taken in April 1991

IN THE MATTER OF THE TENURE HEARING OF ANNE BOYD, MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Respondent filed timely exceptions and the Board filed timely reply exceptions pursuant to the provisions of N.J.A.C. 1:1-18.4.

Respondent first claims the ALJ's penalty, forfeiting 120 days' pay and denying her salary and adjustment increments for the 1991-92 school year, is too severe. Additionally, respondent submits the ALJ should have made a specific finding that this matter did not concern corporal punishment pursuant to N.J.S.A. 18A:6-1.

Citing In re Eddie Lee Harrell, 1979 S.L.D. 479, 485, respondent claims the Commissioner held that the appropriate penalty for "the 'use of undue physical force *** to maintain discipline ***' was the loss of two weeks' pay." (Exceptions, at p. 1 citing Harrell, at 485) Respondent claims there is no reason why Harrell should not guide this case in the event the Commissioner affirms the ALJ's findings at paragraphs 9, 11 and 12, which constitute the basis, she claims, for his conclusion that she behaved improperly.

Respondent further argues that review of the testimony and proofs leads to the conclusion that she neither violated N.J.S.A. 18A:6-1 nor 18A:6-10, and that she should be held harmless in the circumstances. In support of this contention respondent affixes her post-hearing brief.

The Board's reply exceptions seek affirmance of the initial decision, and the ALJ's findings that respondent inappropriately touched E.B., did enlarge the area of confrontation to include her class when she made the incident with E.B. a matter of class discussion, and acted inappropriately when she removed a pupil from class and interrogated the pupil about spreading rumors concerning the incident.

The Board disagrees with respondent's exception that the penalty meted by the ALJ was too severe. Noting that the ALJ found respondent's behavior to be "serious" (Reply Exceptions, at p. 1, quoting Initial Decision at p. 21), the Board cites In the Matter of the Tenure Hearing of Frederick L. Ostergren, School District of Franklin Township, Somerset County, 1966 S.L.D. 185 for the proposition that when "teachers *** resort to unnecessary and inappropriate physical contact with those in their charge, [they] must expect to face dismissal or other severe penalty." (Reply Exceptions, at pp. 1-2, quoting Ostergren at 187) In response to respondent's argument that her conduct was not found to be premeditated, cruel or vicious, and that therefore, the penalty was too harsh, the Board submits respondent's comment sets much too low a standard for acceptable conduct of adequate teaching performance. Under all the circumstances, the Board submits that the ALJ's conclusion both on the merits and as to penalty are proper and should be affirmed.

Upon a careful and independent review of the record of this matter, the Commissioner adopts as his own those findings and conclusions of the Office of Administrative Law in this matter. It is noted that the record does not include a transcript of the proceedings below. See In re Morrison, 216 N.J. Super. 143, 158 (App. Div. 1987).

The Commissioner concludes that respondent is guilty of conduct unbecoming a teaching staff member and assesses a penalty of forfeiture of her 1991-92 salary and adjustment increments and 120 days' pay already withheld.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

JULY 10, 1992

DATE MAILING - JULY 10, 1992

158-92

THOMAS DARRAH, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF AVON, RESPONDENT. AND IN THE MATTER OF THE TENURE HEARING OF THOMAS DARRAH, SCHOOL DISTRICT OF THE BOROUGH OF AVON, MONMOUTH COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

JULY 13, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NOS. EDU 10000-91
and EDU 10225-91 (Consolidated)
AGENCY DKT. NOS. 362-10/91
and 372-10/91

THOMAS DARRAH,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF AVON, MONMOUTH COUNTY,
Respondent,
and
IN THE MATTER OF THE TENURE HEARING OF THOMAS DARRAH, SCHOOL DISTRICT OF THE BOROUGH OF AVON.

Peter Shebell, Jr., Esq., for the Board of Education (Shebell & Schibell, attorneys)

Patricia L. Ratner, Esq., for Thomas Darrah (Wills, O'Neill & Mellk, attorneys)

Record Closed: June 1, 1992 Decided: June 2, 1992

BEFORE **JOSEPH F. FIDLER**, ALJ:

STATEMENT OF THE CASE

Thomas Darrah filed a verified petition of appeal with the Commissioner of Education, challenging the withholding of his 1991-92 increments by the Board of

Education of the Borough of Avon. The Board then certified to the Commissioner charges of conduct unbecoming a teacher and inefficiency against Thomas Darrah, a tenured teaching staff member, pursuant to *N.J.S.A.* 18A:6-10 *et seq.* Darrah filed a counterclaim, alleging that the Board suspended him from his teaching posotion and sought to termiante his employment discriminatorily

These matters were transmitted from the Commissioner to the Office of Administrative Law on October 28 and November 4, 1991, for determination as a contested cases. Counsel for the Board moved for consolidation of these matters. Counsel for Thomas Darrah consented and consolidation was granted during the telephone prehearing conference which was held on January 16, 1992.

Prior to commencement of the scheduled hearing on June 1, 1992, counsel and the parties engaged in discussion concerning the possibility of a settlement disposition. To avoid the burden, expense, delay and uncertainties of the pending litigation, the parties agreed to settle and resolve the matter in a manner fair to the parties and consistent with the public interest and the law. After discussing the matter with legal counsel, the parties agreed to the following settlement terms on the record:

1. Thomas Darrah shall submit a letter of resignation and shall resign from his position as a tenured teaching staff member with the Board, effective June 30, 1992, which resignation shall be accepted by the Board. The Board will continue to pay Thomas Darrah until the effective date of his resignation.

2. Thomas Darrah shall execute and submit a release of his counterclaim against the Board charging discrimination. Upon receipt of the executed release and approval of the settlement terms by the Commissioner of Education, the Board shall pay Thomas Darrah the sum of $10,000 in full payment for making the release.

3. In conclusion of the matter, the parties agree that the above-captioned actions pending before the Commissioner of Education shall be withdrawn with prejudice.

Counsel for the Board of Education represented on the record that the Board consents to all of the terms and conditions of this settlement. After being placed under oath, Thomas Darrah stated that he fully understood and consented to all of the terms and conditions of the settlement. Darrah understood that he was entitled

to a full hearing if he had not voluntarily agreed to the settlement terms. The parties understand that the proposed settlement agreement will only become effective if and when it is approved by the Commissioner of Education.

THE CARDONICK STANDARD

In Re Cardonick, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, states in part:

> We believe a proposed tenure settlement or a withdrawal of tenure charges with its attendant terms and conditions, should be submitted to the Commissioner of Education for his prior scrutiny and approval. The proposed tenure settlement or withdrawal should be accompanied by supporting documentation as to the nature of the charges, circumstances justifying a settlement, consent or authorization by the Board of Education and the teacher to the proposed agreement, the Administrative Law Judge's findings that the teacher entered into the agreement with a full understanding of his rights, and that the agreement is consistent with the public interest.

The nature of the charges in this matter are fully described in the Board's certification to the Commissioner. The charges are related to the teacher's physical condition and handicap and problems arising therefrom. The settlement is fully justified based upon the teacher's age and many years of service and it is fully consistent with the public interest.

FINDINGS AND CONCLUSIONS

Having reviewed and considered the entire record before me in this matter, including the terms and conditions of the settlement agreement described above, I **FIND** that:

1. The parties have voluntarily agreed to the settlement on the record.

2. Thomas Darrah has entered into the agreement with a full understanding of his rights and obligations.

3. The settlement agreement is fair to all parties, fully disposes of all issues in controversy, and is consistent with the public interest and the law.

Therefore, I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the matter is no longer a contested case before the Office of Administrative Law. I further **CONCLUDE** that the settlement should be approved.

ORDER

Accordingly, it is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, 225 West State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 2, 1992
Date

Joseph F Fidler
JOSEPH F. FIDLER, ALJ

Receipt Acknowledged:

6/4/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 9 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lam

EXHIBITS

None

WITNESSES

Thomas Darrah

OAL DKT. NOS. EDU 10000-91 and EDU 10225-91 (CONSOLIDATED)

THOMAS DARRAH,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF AVON,	:	
RESPONDENT.	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
IN THE MATTER OF THE TENURE HEARING OF THOMAS DARRAH, SCHOOL DISTRICT OF THE BOROUGH OF AVON, MONMOUTH COUNTY.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standard for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983) The matter is hereby dismissed, subject to compliance with the terms of the settlement.

John C Woodbury

ACTING COMMISSIONER OF EDUCATION

JULY 13, 1992
DATE OF MAILING - JULY 13, 1992

159-92

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE SEASIDE HEIGHTS : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT, OCEAN COUNTY. : DECISION
:

JULY 10, 1992

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE SEASIDE HEIGHTS : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT, OCEAN COUNTY. : DECISION
:

For Petitioner, David M. Casadonte, Esq.

For Respondent, Thomas M. Savon, Esq. (Gilmore & Monahan)

This matter was opened before the Commissioner on June 8, 1992 through the Board of Education's (Board) filing of an appeal of the cap waiver defeated by the voters of the Seaside Heights School District on April 7, 1992. On July 8, 1992, respondent filed an answer to the cap waiver appeal. However, on July 10, 1992, respondent notified the Commissioner that it no longer opposed the cap waiver appeal because it agreed that the monies were necessary for the roof replacement sought by the Board.

On March 5, 1992, Joseph Zach, Ocean County Superintendent of Schools, conditionally approved the Seaside Heights School District's budget subject to $150,000 in capital outlay cap waiver monies being available for roof replacement which were deemed necessary for a thorough and efficient education by him.

On July 10, 1992, the Board requested that the matter be decided on an emergent relief basis because of the water damage being sustained and the need to have an immediate order of the Commissioner for an increase in the tax levy so as to enable the Board to secure immediately the roof replacement.

Upon review of the record of this matter, the Commissioner finds and determines that the requested relief shall and is hereby granted as the Board has borne its burden of demonstrating that these funds are necessary for the provision of a thorough and efficient education to the students of the Seaside Heights School District. East Brunswick Township Board of Education v. East Brunswick Township Council, 48 N.J. 94 (1966); Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305 (1989)

Accordingly, the Ocean County Board of Taxation is hereby ordered to adjust the Seaside Heights School District's tax levy for the 1992-93 school year to reflect an increase of $150,000 for capital outlay.

John C Woodbury

ACTING COMMISSIONER OF EDUCATION

JULY 10, 1992

DATE OF MAILING - JULY 13, 1992

160-92

160-92

DENNIS TOWNSHIP BOARD OF EDUCATION,	:	
PETITIONER,	:	
V.	:	
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF DENNIS, CAPE MAY COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT.	:	DECISION
AND	:	
IN THE MATTER OF THE CAP WAIVER APPEAL OF THE DENNIS TOWNSHIP SCHOOL DISTRICT, CAPE MAY COUNTY.	:	
	:	

JULY 13, 1992

DENNIS TOWNSHIP BOARD OF EDUCATION,

PETITIONER,

V.

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF DENNIS, CAPE MAY COUNTY,

RESPONDENT.

AND

IN THE MATTER OF THE CAP WAIVER APPEAL OF THE DENNIS TOWNSHIP SCHOOL DISTRICT, CAPE MAY COUNTY.

COMMISSIONER OF EDUCATION

DECISION

Robert F. Garrett, III, Esq., for Petitioner (Loveland, Garrett, Russell, & Young)

Paul J. Baldini, Esq., for Respondent

This consolidated matter was opened before the Commissioner on June 2, 1992 through the filing of an amended Petition of Appeal of a defeated budget by the Dennis Township Board of Education (Board) pursuant to the provisions of N.J.A.C. 6:24-7.1 et seq. and a Petition of Appeal of its defeated cap waiver. On June 5, 1992, respondent submitted its Answer to the petitions. Position statements were filed by the Board and respondent on June 5 and June 15, 1992 respectively. The record closed on July 1, 1992 upon receipt of all papers of the parties.

On April 7, 1992, the voters of the Dennis Township School District defeated the current expense tax levy proposed by the Board

in the amount of $2,762,740. They likewise defeated a proposed current expense cap waiver of $217,669, a cap waiver which the Cape May County Superintendent of Schools, Patricia Horton, approved on March 6, 1992 as necessary for a thorough and efficient education of the students of Dennis Township and which resulted in Dr. Horton granting only a conditional approval of the district's budget for the 1992-93 school year. The specific line item accounts for the T&E cap wavier are as follows:

Account Title	Account No.	Amount
Grades K-8 Salaries - Teachers	213	$137,190
Custodial Salaries	610	16,000
Insurance/Judgments	820	29,000
Transportation (Contract)	520A	7,000
Student Body Activities	1010	15,500
Supplies	250	6,000
Staff Development	250	6,979
	TOTAL	$217,669

Subsequent to the defeat of the budget by the voters of Dennis Township, the Board and respondent, pursuant to the requirements of N.J.S.A. 18A:22-37, consulted on the defeated budget whereupon respondent reduced the current expense budget by $45,000. Consequently, the monies in contention in this consolidated matter are as set forth below:

	Proposed tax levy adopted by Board of Education	Amount of tax levy certified by governing body
Current Expense	$2,762,740	$2,717,740
Capital Outlay	-0-	-0-
Cap Waiver:		
Current Expense	$ 217,669	
Capital Outlay	-0-	
Total	$2,980,409	$2,717,740

Amount in dispute before Commissioner:

Defeated Budget	$ 45,000
Cap Waiver	217,669
Total	$ 262,669

I. DEFEATED BUDGET

In rendering judgment relative to budget appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient education to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by governing bodies. East Brunswick Board of Education v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989)

In reviewing such appeals the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient education.

In the instant matter, respondent, upon defeat of the 1992-93 current expense budget established the aforesaid tax levy by imposing the following line item reductions:

Line Item		Amount
510	Bus Drivers Salaries	$ 8,000

This reduction was based upon the fact that in reviewing the 1991-92 budget, respondent found

Line Item		Amount
	that $8,000 was unexpended. It therefore believed that an appropriation of a similar amount for the 1992-93 school year would also go unspent since there was no staff increase from the prior year.	
530	Replace Vehicle	$35,000
	Upon review of the 1991-92 budget, respondent believed it became obvious that there was sufficient excess funds for the replacement of vehicles. It therefore concluded there was no reason for the replacement of the vehicles for the 1992-93 school year.	
550A	Other Expenses (Transportation)	$ 2,000
	Respondent reduced this line item because it believed that there was an excess balance for the salaries for bus drivers in the 1991-92 budget and when a similar amount was budgeted for 1992-93, respondent concluded that with no additional planned routes, there would be a similar amount of funds unspent in the 1992-93 budget. Consequently, respondent concluded a reduction in that budget was necessary.	

In presenting its position relative to the budget reductions made by respondent, the Board states, inter alia, that:

> The Dennis Township Board of Education has consistently spent less money per student than any school district in Cape May County according to per pupil cost figures certified by the New Jersey Department of Education pursuant to provisions of N.J.A.C. 6:20-3.1. The most recent figures available show Dennis Township spent $3,990 per pupil in 1990. Figures released by the Department of Education in the 1992 School Report Card show Dennis Township spends on average less per child than other districts in the region and state. The proposed 1992-93 current expense budget reflects an increase of only 1%. The Board of Education anticipates a free balance of only $38,000. The Board has sincerely made an excellent attempt to limit budget growth despite a 16.8% increase in insurance costs, a 34% increase in tuition for high school students, and a 3.5 - 4% inflation rate. Additionally, the Board of Education's negotiated agreement with the local NJEA affiliate expires in June, 1992. The current expense budget includes salary increases of only

> 5 - 5.5% for all employees. The Board of Education has clearly proposed a budget that reflects current difficult economic conditions.
> (Board's Position Statement, at p. 1)

As to Line Item 510, Bus Drivers Salaries, the Board urges that the monies reduced by respondent are necessary because the contract with the Dennis Township Education Association, which represents the drivers, expired on June 30, 1992. The current expense budget reflects a 5% increase in negotiated salaries which the Board contends is demonstrative of its "frugal approach to spending." (Id., at p. 2) The Board also avers that student population increases may necessitate the addition of a part-time driver.

The governing body denies that there will be an increase in such salaries for current bus drivers, an assertion which the Board rejects as being unreasonable. Respondent denies as well that there will be an additional one-half route.

With respect to Line 530, replacement of vehicles, the Board avers that contrary to respondent's position delaying the purchase of a bus will necessitate the purchase of three buses in the 1993-94 budget rather than only two as planned. Moreover, the bus identified for replacement during this school year meets the requirements set forth in N.J.A.C. 6:21-1.4 which stipulates that buses "shall not be utilized for pupil transportation purposes beyond the end of the twelfth year from the year of manufacture *** or at the end of the school year in which that year falls, whichever is later.***" The manufacture date of the targeted bus is 1979. Further, it is the Board's contention that it is not cost effective to spend thousands of dollars on a bus to enable it to pass in-depth Division of Motor Vehicle inspection.

The Board likewise urges that the $2,000 reduction effectuated by respondent in Line Item 550A, Other Expenses (Transportation), cannot be sustained because $3,000 had already been reduced from the 1992-93 budget and it points to the fact that the buses travel not only many miles in the Township, but also transport high school students approximately 20 miles round trip. Further, it avers that continued increases in student population, concurrent with increases in gasoline, oil, tires, etc., would not justify a further reduction to this line item.

Respondent argues, however, that since there was a balance of $2,000 in the gasoline account in the 1991-92 budget, and since no additional routes were planned for the ensuing school year, a reduction is warranted.

COMMISSIONER'S DETERMINATION

Upon review of the record of this matter, the Commissioner finds and determines that the $45,000 reduced by the governing body must be restored. The Board's position relative to the replacement of a bus (Line Item 530) this school year is both reasonable, prudent and consistent with state regulation. As to the remaining line items for transportation, the Commissioner finds and determines that the amounts allocated by the Board in both accounts are necessary for the thorough and efficient operation of the district's transportation program. As correctly pointed out by the Board, it is reasonable and prudent to plan for an increase in Line Item 510 for drivers' salaries for the 1992-93 school year, as well as the possibility that another half-route may be called for the ensuing year, given the increased enrollment the district has had and continues to experience. In view of the fact that there is an

anticipated free balance of only $38,000 out of a net budget of nearly $7 million dollars, the $2,000 reduction for other transportation expenses (Line Item 550A) and the $8,000 reduction for drivers' salaries (Line Item 510) cannot be sustained.

II. CAP WAIVER

In setting forth its position with respect to the $217,669 it seeks in current expense cap waiver monies, the Board emphasizes that the amount is not for additional staff or programs but to maintain existing educational staff and programs. It reiterates that it is a district that spends less per pupil than all other districts in Cape May County and is below both the regional and state average in per-pupil expenditures. The cap waiver monies would provide for the following:

- 4 full time equivalent teachers
- 1 custodian
- instructional supplies
- staff development
- student body activities
- transportation
- insurance

More specifically, the Board urges that the elimination of four classroom teachers would adversely impact on the provision of a thorough and efficient education because of the negative effect on class size that would occur. It urges, inter alia, that:

> Pupil enrollment continues to increase in the Dennis Township School District. Available district data shows there has never been a decrease. A two million dollar addition was opened in September 1989 to ease over-crowding and that is filled. The Board of Education is currently negotiating to acquire land to build a new school. The existing facility, with the

> recent addition, is filled to capacity causing the Board to apply each year to use substandard classrooms. Five substandard classrooms are now being utilized for instructional purposes. The Board Office was moved out of the school to create classroom space. Basic skills teachers are forced to move their "classrooms" according to where space can be found. The Pinelands Commission established the school's maximum occupancy at 699. The occupancy is currently over 800. The district's Long Range Facility Plan *** shows enrollment figures demonstrating the need for more staff, not less.
>
> ***Dennis Township's socioeconomic status places it in the bottom third of all districts in the state. Our children, regardless of their socioeconomic condition, need to be given an opportunity to participate in these activities. (May 26, 1992 Letter from Superintendent, at pp. 2-3)

As to staff development, the Board stresses that it spends less than 1% of its budget for staff development and has reduced this line item each of the past three years, a trend it seeks to reverse given the importance of staff development to the professional growth of its staff. Regarding this, the Board asserts that further reduction of opportunities for its staff to receive training is not consistent with the priority such training must have. In support thereof, it cites to portions of the Quality Education Report (1992) which speaks to the need for teachers to have high quality of continuing professional development opportunities.

The Board seeks $15,500 for extracurricular activities, the basis for which is set forth below.

> Student body activities are scheduled to be eliminated if the cap waiver is not approved. It is clear some children come to school to participate in extra-curricular activities (i.e. basketball, field hockey, soccer), and this motivates them to perform in academic subjects. Additionally, while the primary purpose of our school is to teach academic subjects, effective

> schools research points out the need for children to have positive experiences in school that can be transferred to other aspects of the child's schooling experience. Extra-curricular activities is sometimes the vehicle to effect that positive transfer. Again, the $15,500 allocated for student body activities is indicative of the Board's frugality. (Board's Position Statement, at p. 5)

The governing body neither admits nor denies the contentions of the Board with respect to the requested cap waiver monies and leaves the issue for the Commissioner to determine. (Answer, at p. 1, No. 2)

Upon review of the Board's position and supporting documentation, the Commissioner finds and determines that the record amply establishes that the $217,669 in current expense cap waiver monies sought by the Board are necessary for the district to provide a thorough and efficient education to the students of the Dennis Township School District. East Brunswick, supra; Deptford Township, supra

Accordingly, the Commissioner directs that the Cape May County Board of Taxation increase the 1992-93 current expense tax levy for Dennis Township to reflect a restoration of the $45,000 reduction effectuated by the governing body and an additional $217,669 in cap waiver monies, which sum amounts to $262,669. Therefore, the total 1992-93 current expense tax levy for Dennis Township shall be $2,980,409.

COMMISSIONER OF EDUCATION

JULY 13, 1992

DATE OF MAILING - JULY 14, 1992

161-92

161-92

IN THE MATTER OF THE CAP WAIVER APPEAL OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

JULY 14, 1992

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE SOUTH ORANGE- : COMMISSIONER OF EDUCATION
MAPLEWOOD SCHOOL DISTRICT, ESSEX : DECISION
COUNTY. :
:

For Petitioner, Sidney Sayovitz, Esq. (Young, Tarshis, Dimiero & Sayovitz)

This matter was opened before the Commissioner on April 10, 1992 through the South Orange-Maplewood Board of Education's (Board) filing of an appeal of the cap waiver denied by the Board of School Estimate of the South Orange-Maplewood School District. On April 14 and May 12, 1992, the Board of School Estimate of South Orange-Maplewood was notified of the timelines for responding to the petition. Having received no response thereto, the Board of School Estimate was informed on June 2, 1992 that unless an Answer to the petition was received within ten days, the matter would be decided by the Commissioner on a summary judgment basis with each count of the petition being deemed admitted. No such Answer was received; thus, the record in the matter closed on July 7, 1992 upon receipt of the Board's position statement required under N.J.A.C. 6:24-7.8(a)2.

It is the Board's contention that in addition to the $33,970,314 local tax levy approved for current expense by the Board of School Estimate for the 1992-93 school year and $65,402 in

capital outlay, there is a need for an additional $266,718 in current expense in order for the district to provide a thorough and efficient education to its students.

On March 4, 1992, Peter Carter, County Superintendent of Schools, conditionally approved the South Orange-Maplewood School District's budget subject to the cap waiver amounts set forth below which were deemed necessary for a thorough and efficient education by him.

Current Expenses: $266,718

Line Account	Amount
213 (Grades 1-5)	$ 37,500
213 (Grades 9-12)	102,500
214 (G&T)	80,000
220 (Textbooks)	14,000
810 (Employee Benefits)	21,000
1020 (Student Activities)	45,000*

*less $33,282 (to be appropriated from surplus)

In addition to the foregoing, there was an additional $33,282 in current expense cap waiver monies (Student Activities) sought by the Board. However, the county superintendent determined that those monies could be made available through a reallocation from surplus. The monies in contention in this matter are, therefore, as set forth below.

Proposed Tax Levy adopted by the Board	Amount of Tax Levy Certified by Governing Bodies
1. Current Expenses	1. Current Expenses
$33,970,314.00	$33,970,314.00
plus 266,718.00.00 (CAP Waiver)	
Total $34,237,032.00	
2. Capital Outlay	2. Capital Outlay
$ 65,402.00	$ 65,402.00

Amount of reduction by Board of School Estimate

Current Expense	-	$266,718.00
Capital Outlay	-	-0-

Amount of reduction in dispute before the Commissioner

Current Expense	-	$266,718.00
Capital Outlay	-	-0-

The reasons for the cap waiver monies sought by the Board are summarized below.

A. ACCOUNT 213 (GRADES 1-5) - $37,500

In the Jefferson School, 112 students are enrolled for the fourth grade beginning September, 1992. Four more students are expected to enroll thereby bringing the total fourth grade class in the Jefferson School to 116 students. The budget, excluding the CAP Waiver, provided only four fourth grade teachers which would result in 28-29 students per class, in excess of Board policy limiting fourth grade class to 25 students. The requested amount of $37,500 will permit the Board of Education to employ another teacher thus creating five sections of the fourth grade and permitting the Board to provide services in accordance with Board policy relating to class size.

B. ACCOUNT 213 (GRADES 9-12) - $102,500

The requested Cap Waiver of $102,500 concerns the employment of 2.8 teachers in grades 9-12. Without the requested CAP Waiver, 1.5 vocational positions would be eliminated in the industrial arts portion of the high school. Specifically, courses in commercial art, desk-top publishing and woodworking and other wood/carpentry courses would be eliminated. The remaining 1.3 positions are in the basic skills area for English and math. If 1.3 basic skills positions were eliminated, the small class sizes required for remedial type instruction would be significantly increased. As a result of such increases, the effectiveness of the basic skills program would be severely reduced. The Board of Education strongly believes that the 2.8 positions at the high school would impact upon (i) those students who often do not attend college and choose vocational programs and (ii) those students who are most in need and require basic skills programs. The Board of Education has concluded that the elimination of 2.8 positions will have a material adverse effect on these students.

C. ACCOUNT 214 (GIFTED AND TALENTED) - $80,000

The rejection of the CAP Waiver of $80,000 will result in the elimination of 2.3 gifted and talented teachers. This program would be severely impacted and would result in alternatives which are clearly unacceptable to the Board of Education. The in-school program would be eliminated and after school activities may have to be substituted. The 2.3 positions are required for the implementation of a gifted and talented program.

D. ACCOUNT 220 (TEXTBOOKS) - $14,000

The school district has adopted a new mathematics curriculum. New textbooks must be ordered, and the existing budget line item does not contain sufficient funds for the required textbooks. Unless $14,000 is provided through the CAP Waiver, a significant number of students will be left without the required textbooks.

E. ACCOUNT 810 (EMPLOYEE BENEFITS) - $21,000

The $21,000 contained in this line item represents the health benefit premiums associated with the 6.1 employees referred to earlier in this position paper. These employees are as follows: 1 teacher at Jefferson School; 1.5 vocational teachers; 1.3 basic skills teachers; and 2.3 gifted and talented teachers. The $21,000 is a conservative estimate of the premiums associated with the aforementioned teaching positions.

F. ACCOUNT 1020 (STUDENT ACTIVITIES) - $45,000

The loss of these monies from the student activities account will have the following results: (a) the marching band will be unable to travel to the away football games and other away events; (b) the district will be unable to pay the entry fees for students who participate in certain track meets; and (c) the interscholastic football team will be unable to participate in certain scrimmages which have [been] found to be an important part of the training program.

Upon review of the record of this matter, including the extensive documentation provided by the district in support of the necessity of the cap waiver funds, which is incorporated herein by reference, the Commissioner finds and determines that the requested

relief shall and is hereby granted as the Board has borne its burden of demonstrating that these funds are required for the provision of a thorough and efficient education to the students of the South Orange-Maplewood School District. East Brunswick Township Board of Education v. East Brunswick Township Council, 48 N.J. 94 (1966); Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305 (1989)

Accordingly, the Essex County Board of Taxation is hereby ordered to adjust the South Orange-Maplewood School District's tax levy for the 1992-93 school year to reflect an increase of $266,718 for current expense which results in a total current expense tax levy of $34,237,032.

COMMISSIONER OF EDUCATION

JULY 14, 1992

DATE OF MAILING - JULY 14, 1992

162-92

- 162-92

DONALD C. BACKER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ROXBURY, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, industrial arts instructor, claimed Board improperly withheld his increment and pay increase for 1990-91 school year due to alleged improper supervision of classroom and insubordination for failure to sign and return letter of reprimand.

ALJ found good cause existed for recommendation to withhold employment increment. Board's action to withhold increment was a reasonable exercise of its discretion. Petition was dismissed.

Commissioner set aside findings and determination in initial decision. Commissioner determined that the performance-related aspect of the Board's withholding was arbitrary and unreasonable, leaving only alleged insubordination as its basis for action. Commissioner declined to render judgment on this aspect as withholding for disciplinary reasons is subject to contractural grievance procedure negotiated pursuant to N.J.S.A. 34:13A-5.3 and subsequent appeal to PERC. Commissioner remanded matter to Roxbury Board for consideration of whether alleged insubordination was itself reasonable basis for withholding. Commissioner did not retain jurisdiction.

JULY 14, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
185 WASHINGTON ST.
NEWARK, NEW JERSEY 07102
(201) 648-6186

INITIAL DECISION
OAL DKT. NO. EDU 8530-90
AGENCY DKT. NO. 333-9/90

DONALD C. BACKER,
Petitioner,
v.
TOWNSHIP OF ROXBURY BOARD OF EDUCATION, MORRIS COUNTY,
Respondent.

Paul E. Griggs, Esq., for petitioner

David B. Rand, Esq., for respondent
(Rand, Algeier, Tosti & Woodruff, attorneys)

Record Closed: July 29, 1991 Decided: May 27, 1992

BEFORE **GEORGE PERSELAY,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner appeals the withholding of his increment and pay increase for the 1990-1991 school year by the respondent.

By letter dated June 12, 1990, the petitioner was advised by the superintendent of schools that the respondent board of education would conduct a closed conference session on June 25, 1990, at 7:30 p.m., to consider the administration's recommendation that petitioner's salary for the 1990-1991 school year be frozen at the 1989-1990 level. Petitioner was further advised that he could make a presentation and that final action would be taken on June 25, 1990.

By letter dated June 26, 1990, the petitioner was advised that the respondent board of education adopted a resolution which froze his salary for the 1990-1991 school year at the 1989-1990 level. The reasons for the board action was stated and a copy of the resolution was attached.

By petition dated September 17, 1990 and mailed September 20, 1990, the petitioner filed an appeal with the Commissioner of Education. By letter dated October 10, 1990, the respondent filed an answer to the petition which was received by the Commissioner of Education on October 11, 1990. The Commissioner of Education transmitted the matter to the Office of Adminstrative Law (OAL) where the matter was marked filed on October 17, 1990.

Hearings were held on April 2, 1991 and June 11, 1991, at which time the record closed.

The issue to be determined in this matter is set forth in an agreement between the parties dated February 20, 1991, as follows:

> "Was the withholding of petitioner's increment and pay increase for the 1990-1991 school year by respondent arbitrary, capricious and unreasonable and in violation of N.J.S.A. 18A:29-14?"

STATEMENT OF FACTS

Based upon the testimony and evidence received at the hearing, I make the following findings of fact:

1. The petitioner has been employed as a tenured member of the teaching staff of the respondent board of education since September 1976, serving as an industrial arts instructor.

2. On March 29, 1990, the superintendent of schools observed an incident of alleged improper supervision in petitioner's classroom, as more fully set forth in a letter to petitioner dated April 9, 1990 (Exhibit A) attached to the petition and (P-5) in evidence. The said letter is attached hereto as Exhibit A and made a part hereof as though fully set forth herein.

3. I **FIND** the superintendent's statement of his observations to be the facts in this case relating to the petitioner's conduct in the classroom at the time of the superintendent's several observations on March 29, 1990. I further **FIND** that the superintendent acted appropriately, in the absence of the petitioner's supervision of his students at the work tables, when students were about to engage in reasonably unsafe activities but were stopped by the actions of the superintendent, and not by the actions of the petitioner.

4. On March 30, 1990, the superintendent met with the principal of the school, the petitioner, and a teacher's representative to discuss the incident. During the discussion, the superintendent indicated an intention to withhold a salary increment. The principal of the school requested the opportunity to speak with the petitioner. As a result of the principal's meeting with the petitioner, the principal issued a memorandum to the superintendent, dated March 30, 1990 (P-4).

5. In the principal's memorandum of March 30, 1990, signed by the petitioner, there is a recitation of undisputed facts concerning supervision of the class. The petitioner's signature appears thereon as to knowledge of the memorandum, but not necessarily agreement with the memorandum.

6. The petitioner testified and set forth his version of inaccuracies relating to the superintendent's recitation of events. In his testimony, the petitioner stated that P-4 is accurate and was signed by him. He further testified that discussion of withholding his salary increment was discussed in several conferences with the superintendent and others. As a result of the meeting

with the superintendent, as stated in P-5, the superintendent said he would seek no further disciplinary action other than the letter of April 9, 1990, being placed in the petitioner's personnel file.

7. The petitioner had previously received two letters of reprimand, dated March 1, 1989 and March 22, 1989. He had attached his written rebuttal to both of them.

8. The petitioner failed to return the April 9, 1990 letter of reprimand signed by him as having been read. He was aware that a copy was being placed in his personnel file. On April 30, 1990, the superintendent advised the petitioner that he had not received a copy of the April 9, 1990 letter (R-5). By letter dated May 7, 1990, the petitioner advised the superintendent that the April 9, 1990 letter was under attorney review (R-6).

9. By letter dated May 9, 1990, the superintendent wrote to the petitioner stating the purpose of his signature upon the letter and stating that there was no reason for further delay. The letter requested the immediate return of a signed copy (R-7). This letter was responded to by petitioner with a handwritten note dated June 8, 1990, again advising that the matter was under attorney review and that the requested information would be forwarded as soon as possible. By date of June 11, 1990, counsel for the petitioner advised the superintendent of his representation and referred to the April 9, 1990 letter indicating that the attorney would respond, including the acknowledgment of the letter, by the end of the month. The counsel's letter was received by the superintendent on June 13, 1990.

10. On June 12, 1990, before the receipt of R-9, counsel's letter of June 11, 1990, the superintendent forwarded a memo to the board withdrawing his recommendation for a salary increase for petitioner for the 1990-1991 school year.

11. The petitioner and his attorney attended the respondent's meeting on June 25, 1990, submitted the letter of April 9, 1990 with the petitioner's signature appended thereto and set forth the petitioner's rebuttal to the factual statements contained in the superintendent's order of April 9, 1990.

12. The petitioner received notice of appointment to the staff for the 1990-1991 school year at a salary of Step 12 in the BA guide and was requested to return three copies of the form by May 4, 1990, which he accepted and returned (P-25).

13. The superintendent was critical of the "free time" provided the petitioner's class in which the incidents of March 29 occurred. He stated that the students were to be in an educational mode at all times. As a result, the petitioner's plan book was reviewed which disclosed the "free day due to tremendous effort on their part. Few students to finish projects. No machines or hand tools to be used. Projects are to be handed in today." The petitioner testified that it was the last day of a cycle and that the free time was a common practice within the school. The school principal corroborated petitioner's testimony as to free time as positive discipline and as reward for good production, behavior and achievement.

14. As a result of the review of the petitioner's plan book, the petitioner admitted in his testimony that there was a lack of individual class plan set forth in the plan book for the months of January and February for the 7th and 8th grades. The plan book does contain various entries under grade 8 during that period of time and some entries for the 7th grade.

15. At the time the superintendent entered the class room on March 29, 1990, none of the students were wearing safety glasses.

DISCUSSION

The petitioner admitted the accuracy of the principal's report to the superintendent, dated March 30, 1990. He further acknowledged discussion about withholding a salary increment. He was further aware of the superintendent's understanding and acknowledgment that the letter of reprimand would be the sole action taken as a result of the events of March 29, 1990.

The petitioner had been reprimanded twice before. He had signed and returned those letters of reprimand. No reasonable explanation was extended by the petitioner as to his failure to sign and return the April 9, 1990 letter to the superintendent between his receipt on April 9, 1990 (personally delivered) and June 25, 1990 other than review by his attorney. Indeed, counsel's letter to the superintendent (R-9) dated June 11, 1990, indicates that the letter would be acknowledged by the petitioner and returned to the superintendent.

The superintendent stated that it was the practice of his administration to receive a copy signed by the teacher relative to matters being placed by the administration into the personnel record of the teacher. The practice was the suggested preferred policy recommended by the New Jersey Association of School Administrators for record purposes only. The acknowledgment by the teacher constituted no admission of the facts therein alleged or contained.

Having submitted to the practice on two prior occasions, the uncertainty of the petitioner in this instance is, in the opinion of this Administrative Law Judge, without foundation. The administrator indicated that when he made a request of a teacher, he anticipated that the request would be fulfilled. In that sense, the failure to abide the request, without in any way compromising his position, constitutes insubordination on the part of the petitioner.

Insubordination is defined by Black's Law Dictionary, 720 (5th Ed. 1979), as being "disobedience to constituted authority; refusal to obey some order which a superior officer is entitled to give and have obeyed. The term imports a willful or intentional disregard of the lawful and reasonable instructions of the employer."

"Disobedience" is defined in the Random House College Dictionary, 382 (Rev. Ed. 1980) as neglect or refusal to obey. "Obey" is defined in the same dictionary as:

1. To comply with or follow the commands, restrictions, wishes, or instructions of

2. To comply with or follow (a command, restriction, guiding principle, etc.)

My understanding of insubordination is as set forth in the cited definitions. In my mind, it involves an order or instructions or request as to one's employment responsibility or duty to perform a certain task which is reasonable and lawful and which the employer can reasonably expect to be performed.

At the hearing, the petitioner acknowledged the accuracy of the principal's report relating to his lack of supervision of the class and failure to ensure that students wear proper eye safety equipment on March 29, 1990, at the time of the superintendent's visit. Between April 30, 1990 and June 11, 1990, the petitioner had advised his principal that he had in fact returned the letter to the superintendent. The superintendent requested the office staff to search for the letter bearing the petitioner's signature. It was not found. At the hearing in this matter, the petitioner acknowledged he had never sent the letter.

The issue to be determined in this case is whether the act of withholding the increment was arbitrary, capricious or unreasonable. N.J.S.A. 18A:29-14, which authorizes the withholding of increments uses the word "may" and states the reasons for withholding as "inefficiency or other good cause." The withholding requires a majority vote of the full membership of the board of education recorded by a roll call vote. When such occurs, the board shall notify the member concerned with written notice of such action within ten days. The scope of review by the Commissioner of Education is not to substitute his judgment for those who made an evaluation, but to determine whether they had reasonable basis for their conclusion. It is not for the Commissioner of Education to determine for himself whether the teacher had, in fact, been unsatisfactory. Kopera v. Bd. of Ed., West Orange, Essex Cty., 60 N.J. Super. 288, (App. Div. 1960).

A review of the evidence in this case reveals that the 1986-1987 evaluation report of the petitioner contains the following:

> 3. I recommend that Mr. Backer arrive in all classes ahead of students so that no student is left unsupervised.
>
> 10. Plans need to be completed on a regular basis.
>
> 12. Safety is No. 1 priority and is stressed in all aspects of the shop environment. Rules and procedures are clearly stated and enforced consistently.

The petitioner was late in filing a signed copy of his letter of reprimand dated March 22, 1989.

The petitioner had submitted as P-14 the Summative Evaluation Report of 1988-1989. In paragraph 2, entitled Performance Areas Needing Improvement, the first paragraph relates to "bell to bell activity period" for the learner. Secondly, the second paragraph deals with a "follow-up adjustment to your planning that will allow for student participation for a full 41-minute period."

In P-15, the Summative Evaluation Report for 1987-1988, the Performance Areas Needing Improvement reads as follows:

> "A continual recommendation for professional development of Mr. Backer is to arrive to class on time and to provide constant supervision of the learners in the instructional area. This area is of paramount importance where learners are exposed to dangerous machinery, shop equipment, and materials. This growth area was highlighted during the 1986-1987 evaluation cycle and further refinement is still apparent."

The petitioner filed a memo dated March 4, 1988 in which he set forth comments on the Summative Evaluation Report. He did not agree with the comments in section 2, Performance Areas Needing Improvement.

In a teacher observation form dated October 16, 1986, the observer complimented the petitioner for his adherance to safety rules and general decorum. The following appears:

> "Plans have not been presented to administration on a regular basis. Those which were presented are not complete in the format requested. I have suggest [sic] that we discuss the format and frequency of presenting the daily lesson plans."

In an observation report (P-19) dated January 25, 1988, the growth objective reads as follows:

> "Maintain constant supervision of each student assigned to you in the confines of the classroom for the duration of each class period."

In an observation report dated January 9, 1989 (P-20), the growth objective reads as follows:

> "Give some thought to planning that allows for bell-to-bell teaching in each of your classes. Class makeups are such that, in certain instances, some classes will complete tasks much more quickly than others."

The Summative Evaluation Report 1989-1990 compliments the petitioner for well-planned lessons which do not deviate from selected objectives. The 1990 report indicates that there are no performance areas needing improvement. This evaluation is most complimentary. The report is dated March 15, 1990 by the supervisor and March 16, 1990 by Mr. Backer. The evidence which formed the basis of this petition occurred two weeks later.

The import of the evaluations referred to in the preceding portion of this decision suggests that supervision and planning for "bell-to-bell" are sometime concerns of the petitioner in his performance and presentations. These observations give credibility to the observations made by the superintendent for which the letter of reprimand was issued.

Count 2 of the petition claims that the withholding of the employment increment was in direct retaliation for petitioner's failure to acknowledge the said letter in a timely way. It must be noted that the petitioner's conduct in advising the return of the letter on or about May 8, 1990 was conduct less than that to be anticipated from a professional. It was a simple prevarication which the petitioner acknowledged at the hearing in this matter. The petitioner's failure of forthrightness suggests that the imposition of the penalty imposed was a penalty which considered the petitioner's length of service to the educational district.

Count 3 alleges retaliation for the petitioner's seeking advice of an attorney, thereby depriving him of fundamental due process in his rights under the constitutions of the State of New Jersey and the United States. As I have indicated previously in this decision, the signed acknowledgment of having read the letter of April 9, 1990 could have accompanied counsel's letter of July 11, 1991. Accordingly, I **FIND** the allegation in Count 3 to be without merit.

The petitioner was adequately notified of the respondent's intention to consider withholding his employment increment pursuant to N.J.S.A. 18A:29-14 by the June 12, 1990 letter addressed to the petitioner (Exhibit G of the petition).

The petition sets forth the offer of employment in April 1990 (P-25) and suggests that the respondent is committed to the salary therein set forth. While the document may constitute an offer and acceptance, therefore a contract in basic terms, it necessarily follows that the contract is conditioned upon continued satisfactory performance of the petitioner.

At the time of P-25, the gravamen of petitioner's insubordination had not yet taken place. The petitioner admits misstating the events between May 4, 1990 and June 12, 1990: 1) returning the letter of April 9, 1990 with his signature thereon; 2) stating that Dr. Elovitz suggested petitioner should see a lawyer (R-6); 3) failing to respond to the

superintendent's order contained in the May 9, 1990 letter (R-7). The suggestion that respondent was not free to act as it did because of the offer and acceptance in P-25 is clearly without merit. Petitioner's admissions in his testimony speak for themselves.

CONCLUSIONS

Based upon the foregoing findings of fact and discussion, I **CONCLUDE** that good cause existed for the recommendation to withhold the employment increment of the petitioner for the 1990-1991 school year. The resolution indicates that a recorded roll call majority vote of the full membership of the board of education approved the resolution withholding the petitioner's employment increment.

I further **CONCLUDE** that petitioner was insubordinate in not responding to the superintendent in a timely manner in response to the superintendent's May 9, 1990 letter, having previously indicated to the principal that he had signed and returned the letter.

The use of the word "may" supplies discretion in the board of education. I cannot **CONCLUDE** that the exercise of discretion by the respondent board of education in a proper meeting was arbitrary, capricious or unreasonable. I **CONCLUDE** the respondent's action to withhold petitioner's increment was a reasonable exercise of that discretion under the circumstances of this case.

I further **CONCLUDE** that the petitioner was not deprived of nor denied fundamental fairness or due process as set forth in Counts 2 and 3 of the petition.

ORDER

It is **ORDERED** that the action of the respondent board of education in withholding the employment increment of the petitioner for the school year 1990-1991 is **APPROVED** and **AFFIRMED.**

It is further **ORDERED** that the petition of the petitioner be **DISMISSED** with prejudice.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 29, 1992
DATE

GEORGE PERSELAY, ALJ

June 1, 1992
Date

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

JUN 03 1992
Date

Mailed To Parties:
OFFICE OF ADMINISTRATIVE LAW

njf

APPENDIX

WITNESSES:

For Petitioner—

Donald Backer
Jim McDowell
Roy Knapp
Howard William Drake III

For Respondent—

Seymour Elovitz, Ph.D.

EVIDENCE:

P-1 N.J.S.A. 18A:40-12.2 — Re: Protective Eye Devices
P-2 Clean-up assignment chart (blank form)
P-3 General shop safety rules — student conduct
P-4 Memo dated March 30, 1990 from Knapp to Elovitz Re: Backer
P-5 Letter Elovitz to Backer dated April 9, 1990
P-6 Energy 80's Magazine
P-7 Lesson plan book of Mr. Backer
P-8 Letter of Paul E. Griggs, Esq., to Elovitz dated June 25, 1990, returning April 9, 1990 letter signed by Mr. Backer.
P-9 Letter from Board Secretary to Backer, dated June 26, 1990, advising of Board of Education action, Resolution 223-90

P-10 Letter of reprimand, dated March 1, 1989, signed by Backer

P-11 Backer rebuttal to P-10, dated March 31, 1989

P-12 Letter of reprimand to Backer, dated March 22, 1989:
Re: Supervision of students during class time; signed by Backer on March 25, 1989

P-13 Backer rebuttal to P-12, dated April 1, 1989

P-14 Summative Evaluation Report 1988-1989

P-15 Summative Evaluation Report 1987-1988
with Backer rebuttal attached

P-16 Teacher observation form, dated October 16, 1986

P-17 Teacher observation form, dated February 4, _____

P-18 Observation report dated October 21, 1987

P-19 Observation report dated January 25, 1988

P-20 Observation report dated September 8, 1989

P-21 Observation report dated January 25, 1989

P-22 Observation report dated October 12, 1989

P-23 Observation report dated December 8, 1989

P-24 Summative Evaluation Report 1989-1990

P-25 Appointment and Acceptance for 1990-1991 school year

P-26 Diagram of class room

R-1 Evaluation report 1986-1987

R-2 Memo of April 6, 1989 from Visioli to Backer

R-3 Letter of April 12, 1989 from Backer to Toale

R-4 Memo of April 25, 1989 from Visioli to Backer

R-5 Memo of April 30, 1990 from Elovitz to Backer

R-6 Letter of May 7, 1990 from Backer to Elovitz

R-7 Letter of May 9, 1990 from Elovitz to Backer

R-8 Letter of June 8, 1990 from Backer to Elovitz

R-9 Letter of June 11, 1990 from Griggs to Elovitz

R-10 Confidential memo of June 12, 1990 from Elovitz to members of the board of education

R-11 Page 40 of Teachers Manual RE: staff leaving classes—students leaving classes.

ROXBURY TOWNSHIP PUBLIC SCHOOLS

P-5

25 MEEKER STREET, SUCCASUNNA, NEW JERSEY 07876

LEONARD H. ELOVITZ
Superintendent of Schools

201-584-6867

FRANKLIN L. HEIM
Assistant Superintendent for
Personnel & Administration

201-584-6799

April 9, 1990

Mr. Donald Backer
67 Four Corners Road
Blairstown, N.J. 07825

Dear Mr. Backer:

On Thursday, March 29, 1990, at approximately 11:45 A.M. while walking through the halls at the Middle School, I noticed you sitting at your desk leafing through a magazine while the class was present. I walked down the hall and returned a few minutes later and observed that you were still sitting there and that the students were sitting around the worktables. One girl was in the back of the room working on a band-saw. On both occasions you lifted your head and saw me pass by. After the second observation, I started towards Mr. Knapp's office to inform him of what I had observed. It should be noted, that earlier in the year, I observed you reading a book while your class was in progress and had reported what I had seen to Mr. Knapp.

While heading for Mr. Knapp's office, I changed my mind and turned to return to your class. When I entered the room I observed you standing and talking to another adult whom I did not recognize. You acknowledged my presence and walked over to a student with the magazine in your hand. As I scanned the room, I noticed very few students engaged in any type of activity. At the table nearest the door, I observed a student with a screwdriver in one hand and a hammer in the other prepared to strike at a small cube of wood which appeared to be attached to another piece of wood on the worktable. Approximately six other students surrounded this boy, some with their chins on their hands on the table directly at eye level with the cube to be struck. Only one other student at that table appeared to be working on something that looked like a paper model. I walked over to the boy with the hammer, put my hand on his shoulder to stop him and asked the students where their protective goggles were. The boy responded that his glasses contained safety lenses. I indicated that I was concerned for all of the students around the table. At that point, you overheard what was happening and began to yell at the students and admonished them for not wearing their glasses. One comment was, "Haven't I told you that you are to wear safety glasses any time I'm wearing mine?" At that point I left the room and proceeded to my next scheduled appointment.

When I returned to Central Office, I shared the incident with Mr. Heim and called the Middle School to schedule an appointment with you for the very next day. Mr. Knapp was not in and I spoke with Mr. Toale. I outlined the incident with him and told him that I wanted to see you during your preparation period the very next day and to inform you that you may be represented by the Association. That evening I called and discussed the incident with Dr. Markowitz.

The next day, Frida I met wi you, Knapp Mrs. Vignola to discuss the incident and listen to your de of story. The comments began with my asking you to explain what I saw. u became indignant and offensive immediately saying, "I don't know what you saw, why don't you tell me what you saw." I proceeded to relate my observation of the previous day being interrupted numerous times by you. You waved the magazine, raised your voice and all in all did not take the allegations very seriously. You informed me that the students had all been given instructions in safety, held up copies of the contracts that the students sign, and the copy of the law on eye safety that is distributed to them. When I indicated that nobody in the classroom was wearing safety glasses, you said I was wrong that you were wearing safety glasses. I indicated that my concern at that time was more for the students and that your lack of supervision placed the safety of students in jeopardy. You did not agree with my estimation and felt that you were performing properly because you were looking through a magazine at your desk for a student instead of walking around and supervising the tables. You indicated that it was the day before the end of the marking period as an excuse for why almost all of the students in the class were not engaged in any learning activity. You also indicated that there was not another adult in the room as I entered, which is totally untrue.

I told you that I would listen to everything you had to say and when that was finished I thanked you and said I would consider your comments when deciding upon any further discipline.

During the conference, I brought to your attention the fact that there are two letters of reprimand already in your file regarding improper supervision of students. You dismissed this with the idea that you had sent letters of rebuttal to both of the documents. You also indicated that in your 13 years in the district, you never had an accident in your room.

After you and Mrs. Vignola left, I discussed disciplinary actions with Mr. Knapp. Mr. Knapp requested a chance to bring you around to understanding the dangers that your lack of supervision could lead to and the fact that you were placing yourself personally and the school district at jeopardy by not properly supervising students. I indicated that I would take no action until I heard from Mr. Knapp.

On Friday, March 30, 1990, you met with Mr. Knapp and Mrs. Vignola to discuss the incident further. A memorandum outlining what took place at that time is attached. Shortly thereafter you called and made an appointment to speak with me further about the incident. During that meeting, attended by Mr. Heim, you indicated your own concern for the safety of your students and an understanding of what might have occurred. You agreed that, in the future, you will not sit behind your desk for any reason while students are involved in activities at their worktables. You also indicated that activities will be provided to ensure that the students are meaningfully engaged through the last day of the cycle. Also, that you would step up your efforts to ensure that students were wearing safety glasses whenever they are required.

Because I believe that you were sincere, and that you will make a concerted effort to ensure that your students are well supervised and meaningfully engaged, I have decided to impose no discipline further than this letter. However, any future incident of this nature may result in further disciplinary action. I am confident that this will not be necessary.

Sincerely,

Leonard H. Elovitz, Ed.D.
Superintendent of Schools

I have read this letter and am aware that a copy has been entered in my personnel file.

Donald C Barber
Signature

LHE/djs

cc: Mr. Knapp

DONALD C. BACKER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ROXBURY, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions were timely field by petitioner pursuant to N.J.A.C. 1:1-18.4. No reply was filed by the Board.

While taking issue with certain factual details and noting the ALJ's delay in issuing his initial decision, petitioner's exceptions essentially allege the following: 1) Petitioner was specifically advised in writing on April 9, 1990 (Exhibit P-5, at p. 3, appended to initial decision) that no further disciplinary action would be taken against him if future incidents of the same type did not recur, and no such incidents did occur prior to the superintendent's June 12, 1990 decision to reverse his prior determination and instead recommend withholding of petitioner's increment. 2) Petitioner's refusal to return a signed acknowledgement did not constitute insubordination, as no law or written district policy required such return and petitioner was given neither a definite time frame in which to respond nor an

indication that failure to respond would be considered insubordination. 3) Finally, the superintendent's recommendation, having no other good basis for determination, was obviously made in retaliation for petitioner's deciding to consult an attorney.

Upon consideration of this matter, the Commissioner initially observes that the increment withholding under dispute herein is based on multiple grounds, three of which relate to teaching performance and one of which arises from petitioner's alleged insubordination in failing to sign and return a letter of reprimand.

With respect to the withholding as it arose from petitioner's teaching performance, the Commissioner cannot sustain the Board's action. The record is clear that petitioner's performance remained unchanged between the time the superintendent determined, in writing, not to take further disciplinary action based on the matters discussed in the crucial April 9, 1990 letter of reprimand (Exhibit P-5, supra), provided that the problems specified did not recur; those problems, including references to petitioner's prior letters of reprimand on related issues, were precisely those listed as the first three bases for the instant withholding. Neither did the Board find any reason not to offer petitioner, later in April, continued employment at a salary that did not reflect a withheld increment. The Board's June 25, 1990 decision and the superintendent's recommendation upon which it was based, then, to the extent that they relied on performance factors, must be deemed arbitrary and unreasonable.

What did change in the intervening weeks, and what clearly prompted the superintendent to reconsider his prior determination,

was petitioner's repeated failure to sign and return the letter of reprimand, which failure the superintendent and Board deemed to be an act of insubordination. The ALJ recognized at pp. 10-11 of the initial decision that this omission was the turning point in the chain of events leading to the disputed withholding, and indeed, relies upon it as the lynchpin of his finding that the Board had reasonable cause and the gave petitioner reasonable notice of the disputed withholding. However, with the performance-related aspects of the withholding rejected by the Commissioner above, the question of petitioner's alleged insubordination now becomes the central issue of this matter. Whether viewed narrowly as a response to petitioner's failure to return the reprimand or more broadly as a judgment that petitioner's actions in so failing did not reflect the cooperative attitude anticipated in the letter of reprimand, the withholding as it arose from petitioner's handling of the reprimand can only be viewed as disciplinary in nature. As such, and notwithstanding that it came before the Commissioner in a context initially characterized as performance-related, as a discrete issue it is outside the Commissioner's jurisdiction pursuant to P.L. 1989, c. 269, which provides that withholdings for disciplinary reasons shall be subject to the contractual grievance procedure negotiated pursuant to N.J.S.A. 34:13A-5.3 and subsequent appeal to the Public Employment Relations Commission.

The Commissioner determines, therefore, to remand this matter to the Roxbury Board of Education for consideration of whether petitioner's alleged insubordination was itself a reasonable basis for withholding his 1990-91 increment. Should it so determine

and once again vote to withhold the increment, petitioner's recourse is the contractual grievance procedure with appeal to PERC as set forth in P.L. 1989, c.269.

Accordingly, the initial decision of the Office of Administrative Law affirming the Board's action in withholding petitioner's 1990-91 increment is set aside, as the Commissioner cannot sustain the Board's performance-related bases for withholding and the sole remaining basis is outside the scope of his authority to decide. The matter is remanded to the Board as set forth above and the Commissioner does not retain jurisdiction.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 14, 1992

DATE OF MAILING - JULY 14, 1992

162-92

EDU #8530-90
C # 162-92
SB # 30-92

DONALD C. BACKER,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ROXBURY, MORRIS COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, July 14, 1992

For the Petitioner-Respondent, Paul E. Griggs, Esq.

For the Respondent-Appellant, Rand, Algeier, Tosti & Woodruff (David B. Rand, Esq., of Counsel)

This case was initiated when Donald Backer (hereinafter "petitioner") filed a petition with the Commissioner of Education challenging the action taken by the Roxbury Township Board of Education (hereinafter "Board") to withhold his salary increase for 1990-91. This action was rooted in several incidents involving petitioner's performance in supervising students.

The first incident occurred during lunch period on February 23, 1989, when petitioner was assigned to cafeteria duty, and resulted in a letter of reprimand from the Assistant Principal on March 1, 1989. P-10, in evidence. On March 21, 1989, another incident occurred, this one involving supervision of petitioner's

SEPT. 7, 1994

classroom. As a result of this incident, a letter of reprimand from the principal was issued on March 22, 1989. P-12, in evidence.

Then, on March 29, 1990, the District Superintendent observed an incident where petitioner's attention was diverted and one of his students engaged in an activity which threatened the safety of the others. This incident led to three meetings. The first involved the District Superintendent, the Principal, and petitioner, who was accompanied by his union representative. The second was between the Principal and petitioner and his union representative. The third, held at petitioner's request, was between petitioner and the District Superintendent.

Following the second meeting, the Principal issued a memorandum addressed to the District Superintendent, which was placed in petitioner's file after he signed it.

Following the third meeting, which involved petitioner and the Superintendent, the Superintendent wrote a letter which was to be included in petitioner's file. P-5, in evidence. This letter synopsised events from the time of the March 29 incident. The Superintendent concluded this letter as follows:

> Because I believe that you were sincere, and that you will make a concerted effort to ensure that your students are well supervised and meaningfully engaged, I have decided to impose no discipline further than this letter. However, any future incident of this nature may result in further disciplinary action. I am confident that this will not be necessary.

Although, as per the District's practice, petitioner had signed the past letters of reprimand, he did not sign this one. As reflected by the Superintendent's memorandum of June 12, 1990 to the

members of the district board, petitioner's failure to return a signed copy of the letter caused the Superintendent to withdraw his previous recommendation that petitioner be "granted a salary increase for the 1990-91 school year." R-10, in evidence.

After apprising the Board members that he was withdrawing the recommendation, the Superintendent summarized events from the March 29 incident he had observed and provided the Board members with copies of the letters and memorandum pertaining to that incident. He also supplied the Board members with copies of the letters of reprimand relating to the two earlier incidents, indicating that he believed that these documents also supported petitioner's deficiencies. The Superintendent then detailed those deficiencies as follows:

1. Failure to supervise students properly.

2. Failure to plan educational activities to keep students engaged through the entire cycle.

3. Failure to ensure that students wear proper eye safety equipment.

4. Insubordination in not signing and returning the letter of reprimand as requested.

R-10, in evidence.

The Superintendent ended his memorandum with the recommendation that, therefore, petitioner's salary should be maintained at its then current level for 1989-90. Id.

On June 25, 1990, the Roxbury Board acted by resolution to "freeze" petitioner's salary at his 1989-90 level. As previously indicated, petitioner challenged that action by Petition of Appeal filed with the Commissioner of Education.

The matter was transmitted to the Office of Administrative Law (OAL). Following two days of hearings, the Administrative Law Judge (ALJ) issued his Initial Decision, finding that the Superintendent's observation of the March 29 incident, which had resulted in the April 9 letter, was accurate. After examining petitioner's failure to return a signed copy of the letter and concluding that this failure constituted insubordination, the ALJ turned his attention to whether the Board's action in withholding petitioner's increment was arbitrary or capricious.

The ALJ found that petitioner's problems in the area of supervision had been reflected in his evaluation report for 1986-87, his Summative Evaluation Reports for 1987-88 and 1988-89, as well as in observation reports from 1986, 1988 and 1989. The ALJ acknowledged that petitioner's 1989-90 evaluation was most complimentary, but concluded that the earlier evaluations supported the observations of petitioner's performance which the Superintendent had made in relation to the incident on March 29, 1990. The ALJ rejected petitioner's claims that the Board's action was in retaliation either for his failure to return a signed copy of the Superintendent's letter of April 9 or for seeking an attorney's advice. He also rejected petitioner's contention that the Board's offer to him in April 1990 of a teaching contract barred the subsequent withholding of his increment. The ALJ therefore recommended that the Commissioner "approve" the Board's action.

The Commissioner rejected the ALJ's recommendation. He reasoned that except for petitioner's failure to return a signed copy of the Superintendent's April 9 letter saying that he would

take no further disciplinary action, petitioner's performance remained unchanged, and that, therefore, to the extent the Board's action was based on petitioner's performance, it was arbitrary and unreasonable.

The Commissioner then determined that petitioner's alleged insubordination could "only be viewed as disciplinary." He concluded that although the case had come before him in a context characterized as performance related, the disciplinary aspect of the matter was outside of his jurisdiction. The Commissioner therefore remanded the matter to the district board so that it could decide whether petitioner's alleged insubordination was itself a reasonable basis for withholding his 1990-91 increment. The Commissioner stressed that should the Board once again vote to withhold his increment, petitioner's recourse would be to the contractual grievance procedure.

For the reasons that follow, we reverse the Commissioner's decision.

Under N.J.S.A. 18A:29-14, "[a]ny 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...." The leading case setting forth the standards to be applied and the factors to be weighed in evaluating a decision by a local board to withhold a teacher's increment is Kopera v. Board of Education of the Town of West Orange, 60 N.J. Super. 288 (App. Div. 1960), in which the court emphasized that the only question open for review in such cases is whether the board had a reasonable basis for its factual conclusion. Id. at 295. Accordingly, in reviewing a

board's action in withholding an increment, the Commissioner of Education and State Board may not substitute their judgment for that of those who made the evaluation, but should only 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. Id. 296-97. The burden of proving unreasonableness is upon the party challenging the Board's action. Id. at 297.

After a thorough review of the record, we conclude, as did the ALJ, that petitioner in this case has not met his burden of proving the unreasonableness of the Board's action in withholding his increment for the 1990-91 school year.

We emphasize that it is the district Board's action which is under review and not the recommendation of the Superintendent. Although we do not read the Superintendent's April 9 letter as precluding him from updating his recommendation, we reject the notion that the Superintendent's letter could have barred the Board from withholding petitioner's increment under the circumstances here.

The Board's action was based not on the Superintendent's recommendation alone, but also on documentation of the March 29 incident, the letters of reprimand issued in the two earlier incidents, and petitioner's previous evaluations and observations. As the ALJ found, the evaluations and observation reports show that petitioner had ongoing problems in the area of student supervision. These deficiencies were not eradicated by the fact that petitioner's 1989-90 evaluation was complimentary, especially in view of the March 29 incident. Clearly, the information it had before it provided the Board with a reasonable basis to withhold petitioner's

increment for 1990-91 whether or not he returned a signed copy of Superintendent's April 9 letter. The fact that petitioner did not return the letter merely reinforces the reasonableness of the Board's action.

Given this conclusion, we do not pass upon the Commissioner's determination that this agency would not have had the jurisdiction to decide the disciplinary aspects of this matter had we agreed with him that petitioner's performance alone did not provide a reasonable basis for the Board's action.[1]

Margaret M. Bennett abstained.

Attorney exceptions are noted.

September 7, 1994

Date of mailing SEP 09 1994

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[1] The Commissioner's determination was apparently made in consideration of amendments to N.J.S.A. 34:13A which became effective January 4, 1990. We note that, as amended, the statutes provide that any increment withheld for predominately disciplinary reasons are subject to the grievance procedure. N.J.S.A. 34:13A-26. The statutes entrust the Public Employment Relations Commission with the jurisdiction to resolve any dispute as to whether a withholding of an increment is predominately disciplinary. N.J.S.A. 34:13A-27(c). If the Commission determines that the reason, as was the case here, relates predominately to teaching performance, the individual affected may then file a petition of appeal to the Commissioner of Education, who then would decide the matter in its entirety. N.J.S.A. 34:13A-27(d).

163-92

163-92

BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning Board challenged Division of Finance's determination to assign four pupils incarcerated in state correctional facilities (J.F., E.R., A.J. and W.W.) as residents of the Board's school district under The State Facilities Education Act of 1979 (N.J.S.A. 18A:7B-1 et seq.).

ALJ determined entire matter was based upon hearsay evidence. The Board, however, did produce two competent and credible witnesses. Thus, ALJ found Board met its burden of meeting the residuum rule and of demonstrating that the information supplied by Department of Human Services upon which State made its determination was unreliable as to three of the four pupils at issue. ALJ concluded J.F.'s residence was within Board's jurisdiction and Board was ordered to assume fiscal responsibility for his tuition. ALJ concluded there was insufficient evidence to determine residences of E.R., A.J. and W.W. Thus, the State was ordered to assume fiscal responsibility for them.

Commissioner adopted findings and determinations in initial decision.

JULY 15, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6175-91; EDU 6176-91; EDU 6251-91; EDU 6253-91 **(CONSOLIDATED)**
AGENCY REFS. NOS. 147-5/91; 148-5/91; 150-5/91; 149-5/91

BOARD OF EDUCATION OF THE
CITY OF ATLANTIC CITY,
ATLANTIC COUNTY,
Petitioner,

v.

NEW JERSEY DEPARTMENT OF
EDUCATION, DIVISION OF FINANCE,
Respondent.

Joseph M. Jacobs, Esquire, for petitioner,

Arlene G. Lutz, for respondent, (Robert J. DelTufo, Attorney General of New Jersey, attorney)

Record Closed: May 4, 1992 Decided: May 27, 1992

BEFORE LILLARD E. LAW , ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Board of Education of the City Atlantic City (Board) challenges the determination of the New Jersey Department of Education, Division of Finance (Division) to assign four pupils incarcerated in State correction facilities as residents of the Board's school district, under The State Facilities Education Act *N.J.S.A.* 18A:7B-1 *et. seq.*

The four matters were transmitted to the Office of Administrative Law (OAL) for determination as contested cases, pursuant to *N.J.S.A.* 52:14B-1 *et. seq.* and *N.J.S.A.* 52:14F-1 *et. seq.* This administrative tribunal consolidated the four cases, *sua sponte*. A prehearing conference was held on November 21, 1991, followed by a plenary hearing held on May 4, 1992. The hearing record closed on May 4, 1992.

ISSUE

The sole issue to be determined by this tribunal is whether the four named pupils by the Division were bona fide residents of the Board's school district on September 30, 1990?

TESTIMONIAL EVIDENCE

Donna Epperson, Program Coordinator for the New Jersey Department of Corrections (Department) testified on its behalf asserting, among other things, that she was responsible to oversee all educational programs conducted in all Department facilities. Educational programs are conducted for pupils who are incarcerated in State facilities as a consequence of a court of competent jurisdiction placement of the pupil.

Each year, prior to October 1, Ms. Epperson is responsible for the conduct of a survey of all school-aged children under the direction and control of the Department for the purpose of identifying each pupil's home school district for funding of the Department's educational programs. The Department conducts educational programs in 15 major facilities and 45 day programs, among others. The survey consists of the pupil's name and home address which is then submitted to the Division. The Division thereafter calculates the amount to be deducted from the pupil resident school district for the cost of education at the State facility.

Ms. Epperson testified she submitted the names of the four pupils under the Department's care to the Division. The Board challenged the assigned educational costs of the named pupils. As a consequence, Ms. Epperson conducted a second review and, satisfied that the original information was correct, she resubmitted the names of the four pupils to the Division as Atlantic City resident pupils.

Ms. Epperson testified, on inquiry by this tribunal, as to the source of information which formed the basis of the Department's assigning a pupil under its care to the resident school district. Ms. Epperson asserted that two sources of information were in use; (1) directly from the pupil or, (2) court commitment papers.

Ms. Epperson did not submit any court commitment papers as proof of any of the four pupil's resident address at the hearing. Moreover, she testified she did not know whether or not the commitment papers were in the pupils files at the Department's facility.

Ms. Epperson's investigation of the Board's challenge was to telephone the Department's facility in which the pupil was incarcerated and a representative of the facility would confirm the pupil's resident address. The Division does not send its personnel to investigate or verify addresses supplied to it.

Pupil J.F. (EDU 6176-91).

J.F. is a 17 year old male assigned to the Department's Ocean Residential Group Center, Forked River, New Jersey. The Department's Residential Intake Form (R-2) indicates, among other things, that J.F.'s residential address to be 31 South Connecticut Avenue, Atlantic City, New Jersey. It also states that J.F.'s parents are divorced and that his father's address is 126A Metropolitan Avenue, Atlantic City, New Jersey. The Department's Exhibit R-2, was used by it to verify J.F.' s address. No further investigation was conducted by the Department. It is noted here that the Department's Exhibit R-1 lists J.F.'s address as 301 South Connecticut Avenue.

The Board's School Social Worker, Rosemary Czech, testified that she, personally, went to the address, 31 South Connecticut Avenue where she met and talked with a custodian of the known premises. The custodian asserted that the police had conducted a drug raid at the known premises prior to October 1990 and that V.C., J.F.'s legal guardian, had left the premises and returned to Puerto Rico.

Subsequent to the Board's first challenge, Ms. Czech returned to 31 South Connecticut Avenue where she was unable to locate anyone who knew J.F. or V.C. Ms. Czech then went to the 126A Metropolitan Avenue address, identified as J.F.'s father's address (R-2). The Social Worker testified that she talked with J.F.'s aunt who reported that J.F. 's father did not live at the address and that J.F.'s mother lived in Puerto Rico. She testified that J.F.'s father now lived in Mays Landing, New Jersey. Ms. Czech testified she had a conversation with J.F. who related to her that his mother moved to Puerto Rico shortly after J.F. entered the Ocean Residential Group Center in August 1990.

Pupil E.R. (EDU 6251-91)

Pupil E. R. was 15 years of age when he was placed in the Lloyd McCorkle Training School for Boys/Girls, Skillman, New Jersey, on July 13, 1990. On his initial admission, E.R.'s address was listed as 36 North Maryland Avenue, Atlantic City, New Jersey and his parent/legal guardian as J.H. (R-3)

Subsequent to the Board's challenge of E.R.'s residence, Ms. Epperson telephoned the Training School and was advised of a change of address for E.R. The Training School forwarded to the Department its "New Admission Notice" (R-4) which indicated the change of address to E.R.'s grandmother at 25 Rhode Island Avenue, Atlantic City, New Jersey.

Sylvia B. Harris, School Social Worker for the Board, testified that E.R.'s mother, J.H., was E.R.'s legal guardian. In or about October 1990, Ms. Harris made a home visit to 36 North Maryland Avenue where she met and talked with E.R.'s sister who asserted that the mother did not live at that address. E.R.'s sister reported that the grandmother was E.R.'s legal guardian and she lived at Collins Lake. The telephone number listed for the grandmother on the "New Admission Notice" (R-4), is an exchange in the Hammonton, New Jersey area.

Pupil A.J. (EDU 6253-91)

Ms. Epperson testified she relied upon the State Facilities Pupil Count and Assignment Report as of October 15, 1990 (R-5) for the address of pupil A.J. The Report indicated pupil A.J.'s address to be 402 North New York Avenue, Atlantic City, New Jersey. On October 15, 1990, pupil A.J. was 20 years of age and he had been assigned to the Mountainview Correctional Center since October 13, 1989. (R-5).

Ms. Epperson testified that the Board challenged the Department's assignment of A.J. as a resident of Atlantic City. Thereafter, Ms. Epperson contacted Mountainview which sent to her its Intake Interview form. (R-6) The Intake Interview Form indicated, among other things, A.J.'s nearest relative was A.J.'s sister, Y.J., and gave the address as 402 North New York Avenue, Atlantic City. The Intake Interview form also indicated that A.J.'s father was deceased and that his mother, J.J., " was somewhere in Atlantic City." (R-6)

School Social Worker Harris testified that J.J., A.J.'s mother, was A.J.'s legal guardian. In early November 1990, Ms. Harris made several visits to the premises known as 402 North New York Avenue and was unable to make contact with anyone. On her fourth visit, Ms. Harris was advised that J.J. had never lived at the address. However, A.J.'s sister occasionally babysat at the address.

The Board offered A.J.'s Atlantic City Schools cumulative record which demonstrated that on January 5, 1982, when A.J. was a pupil in the sixth grade, A.J. was voluntarily transferred from the Atlantic City Schools to Elwood, New Jersey, Mullica Township School District. (P-1) There is no further school record for A.J. in the Atlantic City School District.

Pupil W.W. (EDU 6175-91)

Pupil W.W. was 18 years of age on October 15, 1990, and had been admitted to the Pinelands Residential Group Center, Chatsworth, New Jersey, approximately ten (10) months. Ms. Epperson testified she relied upon the State Facilities Pupil Count and Assignment Report as of October 15, 1990, as the source of her information that W.W.'s address was 4437 Kingston Avenue, Atlantic City, New Jersey (R-7). The Report also indicated that W.W.'s sister, B.S., was W.W.'s legal guardian.

Ms. Epperson produced a letter, dated January 16, 1990, from the Pinelands Regional Group Center Social Worker addressed to W.W.'s sister, B.S., at 4437 Kingston Avenue, Atlantic City, New Jersey. (R-8) Ms. Epperson did not produce a response to the letter

Ms. Epperson also produced an unsigned memorandum dated June 21, 1991 (R-9) which indicated the most recent address for B.S. was 2603 Atlantic Avenue, Atlantic City.

The Board's School Social Worker Czech testified she attempted to locate W.W.'s sister, B.S. However, there is no such address as 4437 Kingston Avenue, Atlantic City. Thereafter, Ms Czech believing an error had been made, attempted to locate alternative properties at 44 North and South Kingston Avenue and 37 North and South Kingston Avenue, without success. Subsequently, Ms. Czech could not locate B.S. at the 2603 Atlantic Avenue address and contacted the Social Worker at the Division of Youth and Family Services (DYFS) in the attempt to locate B.S. The DYFS Social Worker advised Ms. Czech that B.S. is not W.W.'s legal guardian but, rather, W.W.'s father, who lives in Mays Landing, is W.W.'s legal guardian.

FINDINGS OF FACT

Based upon the testimony of the witnesses and other evidence adduced at the hearing, I **FIND** the following **FACTS** in this matter:

1. The Department offered a Residential Intake Form (R-2) as evidence that pupil J.F. resided at 31 South Connecticut Avenue, Atlantic City, prior to his admittance to the Ocean Residential Group Center on August 9, 1990.

2. There is no indication on R-2 as to who completed the Residential Intake Form nor who supplied the information contained thereon.

3. The Board's School Social Worker discovered that J.F. 's mother, V.C., had left the known premises prior to October 1990 to return to Puerto Rico.

4. It is presumed that J.F.'s mother is J.F.'s legal guardian.

5. Nonetheless, the Board's School Social Worker investigated J.F.'s father's whereabouts and discovered that the father lived in Mays Landing, outside of the Board's jurisdiction.

6. The Board offered no affidavits or other documents to support its claims that J.F.'s mother moved to Puerto Rico prior to October 1990 and/or that J.F.'s father resided in Mays Landing.

7. The Department offered a New Admission Notice (R-4) as evidence that pupil E.R. resided at 36 North Maryland Avenue, Atlantic City, prior to his admission to the Lloyd McCorkle Training School for Boys/Girls on July 13, 1990.

8. The Department's New Admission Notice (R-4) indicates that pupil E.R.'s mother, J.H., is E.R.'s legal guardian. It also indicates an address change of E.R.'s residence to his grandmother, at 25 Rhode Island Avenue, Atlantic City.

9. The Department offered no evidence as to who completed the New Admission Notice (R-4) nor who supplied the information as to R.F.'s guardian, the guardian's address or the change of address to R.F.'s grandmother.

10. The Board's School Social Worker made a home visit to 36 North Maryland Avenue address where E.R.'s sister was to have asserted that E.R.'s mother did not reside at this address.

11. The Board's School Social Worker was also advised by E.R.'s sister that E.R.'s grandmother is E.R.'s legal guardian and that the grandmother resides in Collins Lake, outside the Board's jurisdiction.

12. The Board offered no written documents, by way of affidavits, that E.R.'s mother did not reside at 36 North Maryland Avenue; that E.R.'s grandmother is E..R.'s legal guardian; or that E.R.'s grandmother resides at Collins Lake outside of the Board's jurisdiction.

13. The Department offered its Intake Interview form (R-6) as proof that pupil A.J. resided at 402 North New York Avenue, Atlantic City prior to his admission to the Mountainview Youth Correction Facility on October 13, 1989.

14. The Department's Intake Interview form (R-6) indicates that A.J.'s mother, J.J., is "somewhere in Atlantic City" and that A.J.'s sister, Y.J., resides at 402 North New York Avenue.

15. The Board produced A.J.'s Atlantic City School cumulative record which demonstrated that A.J. transferred to the Mullica Township School District, Elwood, New Jersey, on or about January 5, 1982 (P-1).

16. The Board's School Social Worker asserted that J.J., A.J.'s mother, was A.J.'s legal guardian.

17. The Board contends that A.J. had never resided at the premises known as 402 North New York Avenue. Rather, it asserts that A.J.'s sister, Y.J., occasionally babysat at the address.

18. Neither the Department nor the Board proffered affidavits with regard to the information each had in their possession with respect to the residence at 402 North New York Avenue. The Department's Intake Interview form indicates a Social Worker signature dated 11-9-89. However, it produced no documentation as to who supplied the information which is recorded on its Intake Interview form (R-6). Similarly, the Board produced no sworn documentation with regard to the residents of 402 North New York Avenue.

19. The Department relies upon a letter written on January 16, 1990 and addressed to B.S., pupil W.W.'s legal guardian (R-8) in support of its contention that W.W. is a resident of the Atlantic City Board. The letter is addressed to B.S. at 4437 Kingston Avenue, Atlantic City.

20. In addition, the Department executed the State Facilities Pupil Count and Assignment Report as of October 15, 1990 (R-7) and listed B.S. as W.W.'s legal guardian at the 4437 Kingston Avenue address.

21. The Board's School Social Worker testified, credibly, that the address of 4437 Kingston Avenue does not exist.

22. The Department did not produce any evidence that B.S. responded to its letter dated January 16, 1990 (R-8).

23. The Department produced a handwritten Memo, date stamped 21 June 1991, indicating a change of address for B.S. to 2603 Atlantic Avenue, Atlantic City, New Jersey (R-9).

24. The Board's School Social Worker testified, credibly, that she could not locate B.S. at the 2603 Atlantic Avenue address.

25. The Board's School Social Worker contacted DYFS in an attempt to locate B.S., and was advised that B.S. was not W.W.'s legal guardian but, rather, W.W.'s father who resides in Mays Landing is W.W.'s legal guardian.

26. The Board produced no affidavits or written statements from DYFS, B.S. or W.W.'s father to support its position that W.W.is not a resident of the Atlantic City Board.

DISCUSSION

This entire matter is based upon hearsay evidence. The rule governing hearsay evidence is found at *N.J.A.C.* 1:1-15.5, *Hearsay evidence; residuum rule* and provides as follows:

> (a) Subject to the judge's discretion to exclude evidence under *N.J.A.C.* 1:1-15.1(c) or a valid claim of privilege, hearsay evidence shall be admissible in the trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.
>
> (b) Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.

The Department complains that the Board's hearsay evidence is absent a residuum of legally competent evidence and, therefore, it has failed to meet its burden of proof.

In his treatise on *Administrative Law and Practice,* the Honorable Steven L. Lefelt, ALJ (now JSC) addressed the issue of the Residuum Rule at §209 and said, in part:

> The residuum rule applies to evidence which is inadmissible under the Court rules of evidence but is allowed into evidence in an administrative proceeding where the strict rules of evidence do not apply. The residuum rule is most often associated with the admissibility of hearsay evidence in administrative hearings. Notwithstanding the

> admissibility of hearsay evidence, the residuum rule requires some legally competent evidence exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. [1] Under this rule, hearsay, "may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it." [2]
>
> The residuum rule does not require each fact to be based on a residuum of legally competent evidence. Such a reading of the rule would seriously undermine the APA's dictate that all relevant evidence is admissible. What the rule does focus on is the entire decision or ultimate findings of fact. ▪▪▪
>
> 39 S. Lefelt, New Jersey Practice, Administrative Law and Practice, §209 (1988)

At Section 208, Judge Lefelt observes that the regulation *N.J.A.C.* 1:1-15.5 provides that hearsay "shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and generally, its reliability." Judge Lefelt continues to observe that outrageous and/or improbable assertions will, therefore, receive little weight.

> Evidence that responsible persons are accustomed to rely on in the cause of important affairs may be given equal weight with non-hearsay evidence, even if technically hearsay. [*Western v. State, supra.*] Thus statements by a teller to a bank official will receive greater weight than would rumors from unknown sources. Statements by nameless, faceless declarants may be admissible but will carry minimal persuasiveness.
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> 39 S. Lefelt, New Jersey Practice, Administrative Law and Practice, §208 (1988)

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1. *N.J.A.C.* 1:1-15.5(b)

2. *Western v. State,* 60 *N.J.* 36, 51, 286 (1972)

In the instant matter, the Department's claims against the Board is hearsay without a residuum of legally competent evidence to support such claims. The record demonstrates the Department's Program Coordinator contacted each of its facilities subject to the Board's challenge of the pupil assignment to the Board's school district. The Division offered no affidavits sworn under oath, that the addresses of each of the assigned pupils were, in fact, the bona fide address for that pupil. Rather, the Department proffered a series of hearsay documents, by unknown declarants for the purpose of proving the addresses asserted. In one instance, the address given for pupil W.W. was nonexistent (R-7). This error in address was subsequently modified by a second hearsay document (R-9).

The Department could not assert, with any degree of certainty, as to how, or by whom, the information concerning the pupils addresses was derived. It suggested that the information could have been supplied by the pupil, the pupil's guardian or a duly executed court order. It produced no court orders with regard to any of the four identified pupils. Nor could it produce any information as to how the addresses for each of the pupils was transmitted. Further, the Division engaged in no independent investigation to ascertain the truth of the information asserted.

The Board, on the other hand, produced two competent and credible witnesses who testified as to their personal knowledge and observations with regard to each of the reported pupil addresses and/or the location of the pupils' legal guardian. *Mattero v. Silverman,* 79 *N.J. Super.* 449 (App. Div. 1963) *cert. den. N.J.* 115 (1963). I **FIND and CONCLUDE** that such personal knowledge and observations is competent evidence and satisfies the Board's burden of meeting the residuum rule.

THE LAW

The State Facilities Education Act of 1979 provides at *N.J.S.A.* 18A:7B-2 as follows:

> For each child who is resident in a district and in a State Facility on her last school day in September of the prebudget year, the Commissioner of Education shall deduct from the State Aid payable to such district an amount equal to the State average net current expense budget per pupil plus the appropriate categorical program support ....

Section 12 of the Act provides, in pertinent part, that:

> For school funding purposes, the Commissioner of Education shall determine district residence as follows:
> ▪▪▪▪
>
> b. The district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, private schools or out-of- state facilities, shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to the State facility or most recent placement by a State agency.
>
> If this cannot be determined, the district of residence shall be the district in which the child resided prior to such admission or placement.
>
> c. If the district of residence cannot be determined according to the criteria contained herein ▪▪▪ the State shall assume fiscal responsibility for the tuition of the child.

CONCLUSIONS

Pupil J.F. (EDU 6176-91)

The facts concerning pupil J.F. demonstrates that prior to October 1990, V.C., J.F.'s legal guardian resided at 31 South Connecticut Avenue prior to her return to Puerto Rico. The Board's witnesses, School Social Worker Rosemary Czech testified she was in conversation with the custodian of the known property who advised Ms. Czech of V.C.'s former presence.

Notwithstanding that the Board's School Social Worker was able to ascertain that J.F.'s father lived in Mays Landing, Ms. Czech was not able to identify which of the parents had legal custody of J.F. Giving the Department all favorable inference with respect to the guardianship issue, I **CONCLUDE** that its assertion that J.F.'s mother, V.C, is J.F.'s legal guardian, must stand.

I **CONCLUDE** that under the circumstances, J.F.'s residence is within the jurisdiction of the Board by virtue of §12b. of the Act for the purposes of *N.J.S.A.* 18A:7B-2.

Accordingly, it is **ORDERED** that the Board assume the fiscal responsibility for the tuition of J.F. at the Ocean Residential Group Center for the 1990-91 School Year.

Pupil E.R. (EDU 6251-91)

I **CONCLUDE** there is insufficient evidence to demonstrate, under the criteria set forth in §12b of the Act, that pupil E.R.'s parent or guardians resided within the jurisdiction of the Board or, that E.R. resided in Atlantic City prior to his admission to the Lloyd McCorkle Training School. The Department was uncertain as to who supplied it with the information of the original address given for pupil E.R. or the subsequent change of address.

The Board's School Social Worker, Sylvia Harris, through a direct contact and observation, was able to ascertain that neither E.R.'s mother, J.H., nor his grandmother lived at either of the reported addresses at 25 Rhode Island Avenue or 36 North Maryland Avenue. The record establishes that E.R.'s sister resides at 36 North Maryland Avenue. It also demonstrates that she advised Ms. Harris that E.R.'s grandmother was E.R.'s legal guardian who resided at Collins Lake, outside of the Board's jurisdiction. The telephone number supplied for the grandmother by the Department does, in fact, show a telephone exchange for Hammonton, New Jersey.

Consequently, I **CONCLUDE** that E.R.'s residence within the Board's jurisdiction has not been established pursuant to the criteria under §12b of the Act.

I **CONCLUDE** that E.R.'s school district of residence cannot be determined and, therefore, "the State shall assume fiscal responsibility for the tuition of" E.R. for the 1990-91 school year. *N.J.S.A.* 18A:7B-12c.

IT IS SO ORDERED.

Pupil A.J. (EDU 6253-91)

The facts in this matter clearly shows that the address of pupil A.J., as provided to the Department, was not nor could it have been the pupil's address at any time.

The direct observation of School Social Worker Harris demonstrates that the only contact A.J.'s family had with 402 North New York Avenue was A.J.'s sister occasionally providing babysitting service there.

In addition, the Board produced A.J.'s Atlantic City School cumulative record which demonstrated that A.J. voluntarily transferred out of the Board's jurisdiction on January 5, 1982. Neither party proffered any evidence to show that A.J. had reentered the jurisdiction of the Board.

I **CONCLUDE,** therefore, it has not been established that A.J.'s residence is within the jurisdiction of the Board for purposes of tuition to the Mountainview Youth Correction Center, pursuant to §2 of the Act.

Accordingly, under §12c of the Act, it is **ORDERED** that the State assume fiscal responsibility for A.J.'s tuition for the 1990-91 school year.

Pupil W.W. (EDU 6175-91)

The herein record demonstrates that the Department had been given a fictitious address for pupil W.W. upon his admittance to Pinelands Residential Group. The Board's School Social Worker diligently search for W.W.'s sister at the reported address without success. It was through Ms. Czech's diligence that she discovered it was W.W.'s father who is W.W.'s legal guardian and lives in Mays Landing outside of the Board's jurisdiction.

I **CONCLUDE** there is no proof that W.W. is or has been a resident of the Board's School District.

I **CONCLUDE,** therefore, that pupil W.W.'s school district of residence cannot be determined.

Accordingly, it is **ORDERED** that the State shall assume the fiscal responsibility of W.W. pursuant to ***N.J.S.A.*** 18A:7B-12c. for the purposes of ***N.J.S.A.*** 18A:7B-2.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

27 May 1992
Date

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

6/2/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 5 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

PETITIONER:

ROSEMARY CZECH, BOARD'S SCHOOL SOCIAL WORKER
SYLVIA B. HARRIS, SCHOOL SOCIAL WORKER

RESPONDENT:

DONNA EPPERSON, PROGRAM COORDINATOR

DOCUMENTS IN EVIDENCE

PETITIONER:

P-1 ANTHONY JONES, STUDENT RECORD - A.C. (EDU 6253-91)

RESPONDENT:

R-1 EDU 6176-91, STATE FACILITIES PUPIL COUNT, JOSELITO FELICIANO
301 S. CONNECTICUT AVENUE, ATLANTIC CITY

R-2 EDU 6176-91 RESIDENTIAL INTAKE; JOSELITO FELICIANO
31 S. CONNECTICUT AVENUE, ATLANTIC CITY

R-3 EDU 6251-91 STATE FACILITIES PUPIL COUNT, ENRIQUE RIVERA
36 N. MARYLAND AVENUE, ATLANTIC CITY

R-4 EDU 6251-91 NEW ADMISSION NOTICE, ENRIQUE TORRES/RIVERA
36 N. MARYLAND AVENUE, ATLANTIC CITY

R-5 EDU 6253-91 STATE FACILITIES PUPIL COUNT, ANTHONY JONES
402 NORTH NEW YORK AVENUE, ATLANTIC CITY

R-6 EDU 6253-91 INTAKE INTERVIEW (4 PAGES), ANTHONY JONES
(PAGE 3, LAST ADDRESS) 402 NORTH NEW YORK AVENUE, ATLANTIC CITY

R-7 EDU 6175-91 STATE FACILITIES PUPIL COUNT, WILLIAM WARREN
4437 KINGSTON AVENUE, ATLANTIC CITY

R-8 LETTER, JANUARY 16, 1990 TO MS. BARBARA SMITH FROM KATHY STECKMAN,
DEPARTMENT OF CORRECTIONS

R-9 MEMO 6/19; 21 JUNE 1991, DONNA J. EPPERSON RE: WILLIAM WARREN

BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the office of Administrative Law have been reviewed. Respondent Division of Finance of the New Jersey State Department of Education (Finance) filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Finance agrees with the ALJ's determination that the Atlantic City Board of Education is responsible for the tuition for J.F. because his mother clearly resided in Atlantic City before returning to Puerto Rico and because the Board could not prove that the mother moved before September 30, 1990. However, as to the other three children at issue in this matter, and the matter of which entity is responsible for tuition pursuant to N.J.S.A. 18A:7B-2, Finance avers the ALJ erred in assessing the burden of proof in this matter. Finance asserts it was not incumbent upon the Department to prove where the child lived prior to commitment to a state facility or to have to present any case at all. Neither, it claims, was it charged with having to do an independent

investigation to prove that the information provided to establish residence of the parent or guardian with whom the child lived prior to admission to a state facility was correct.

Rather, Finance submits, in choosing to appeal the matter, the burden was on the Board to convince the court that the district of residence decision by Finance was incorrect, because it was the Board which sought to prove that the district of residence determination made by the Department of Education based on the information provided by the Department of Human Services was in error. Further, Finance argues that in meeting its burden, the Board failed to meet the residuum rule in seeking to demonstrate that the district of residence of the three remaining cases was not Atlantic City.

Finance claims the ALJ erred in concluding that there is insufficient evidence to demonstrate that any of the three remaining pupils' parents or guardians lived in Atlantic City, because the ALJ accepted the hearsay testimony of the social worker, without more in the way of affidavits or documentation to support the social worker's unsubstantiated testimony regarding her interviews concerning each child's former residence.

Finance avers the Board failed to provide anything except hearsay testimony that the district of residence determination was improper, and for that reason, Finance seeks reversal of the ALJ's determination as to E.R., A.J. and W.W. for failure to meet its burden of proof in this matter.

Upon a careful and independent review of the record of this matter, the Commissioner adopts as his own those findings and determinations as set forth in the initial decision. The

Commissioner concurs with Finance's assessment that the ultimate burden of proof in this matter rests with petitioner, because the Board challenges the determination regarding domicile made by the Department of Education based on the information provided by the Department of Human Services. However, the Commissioner finds and determines that a mere reiteration of its original documentation relied upon by the State is simply inadequate in the cases of E.R., A.J. and W.W. to withstand the inferences to be drawn against the State's determination by virtue of testimony elicited from the social worker assigned to investigate the circumstances of the domicile of each child's parent or guardian.

The Commissioner so finds taking into account the cogent discussion proffered by the ALJ on the residuum rule. The Commissioner finds such explication dispositive of the Division of Finance's exceptions regarding the residuum rule and adopts such findings as his own.

Accordingly, for the reasons expressed by the ALJ, as supplemented herein, the Commissioner adopts the initial decision as the final decision in this matter. He directs that the State assume fiscal responsibility for W.W., A.J. and E.R. pursuant to N.J.S.A. 18A:7B-12c, and that petitioner assume fiscal responsibility for J.F.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 15, 1992

DATE OF MAILING - JULY 16, 1992

164-92

164-92

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE RIDGEFIELD PARK : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT, BERGEN COUNTY. : DECISION
:

JULY 16, 1992

IN THE MATTER OF THE CAP WAIVER :

APPEAL OF THE RIDGEFIELD PARK : COMMISSIONER OF EDUCATION

SCHOOL DISTRICT, BERGEN COUNTY. : DECISION

_____:

For Petitioner, James L. Plosia, Jr., Esq. (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross)

For the Village of Ridgefield Park, Michael T. Durkin, Esq.

This matter was opened before the Commissioner on May 13, 1992 through the Ridgefield Park Board of Education's (Board) filing of an appeal of the cap waiver defeated by the voters of the Ridgefield Park School District on April 7, 1992. On June 24, 1992, Michael T. Durkin, Attorney for the Village of Ridgefield Park, notified the Commissioner that it would not participate in the appeal because under the provisions of Chapter 62 of the Laws of 1991, it believes the Legislature has not conferred on it the authority to so participate and given that the budget was not submitted to the governing body for its review, it believes that any participation in the proceeding would be largely procedural, not substantive. It further states that:

> Furthermore, the Governing Board of the Village of Ridgefield Park does not question the authority of the Commissioner of Education in his role to mandate expenditures for a school district where those expenditures are necessary for a thorough and efficient education of the students within the district. Indeed, in our particular case, according to the information

> that has been received by the Governing Body through newspapers and informal discussions with the members of the Board of Education, a number of teachers within the School District will be laid off if the cap waiver is not granted. We believe, however, that the Commissioner of Education has a duty to make that determination and the Governing Body of the Village of Ridgefield Park has no authority in this particular matter because of the statutory language on cap waivers.(Durkin's Letter, at p. 2)

On July 7, 1992, the Board submitted its position statement pursuant to the requirements of N.J.A.C. 6:24-7.8(a), thus it was on that date that the record in this matter closed.

It is the Board's contention that in addition to the current expense budget approved by the voters of the Ridgefield Park School District on April 7, 1992 in the amount of $8,440,810, there is a need for an additional $238,000 in current expense in order for the district to provide a thorough and efficient education to its students.

On February 27, 1992, Alfred Marbaise, Bergen County Acting Superintendent of Schools, conditionally approved the Ridgefield Park School District's budget subject to the cap waiver amounts set forth below which were deemed necessary for a thorough and efficient education by him.

ACCOUNT TITLE	ACCOUNT NO.	AMOUNT
Business Teacher Junior-Senior High School	04-213	$ 54,829
Foreign Language Teacher Junior-Senior High School	04-213	54,829
Elementary Music Teacher	02-213	37,202
Elementary Guidance Teacher to go to full time	05-214	21,140
Director of Curriculum	05-211	70,000
Total		$238,000

In addition to the foregoing, there was an additional $26,000 in current expense cap waiver monies sought by the Board at

the April 7, 1992 annual school election but those monies were not deemed necessary for a thorough and efficient education by the acting county superintendent. The monies in contention in this matter are, therefore, as set forth below.

	Proposed tax levy adopted by Board of Education	Amount of tax levy approved by the voters
Current expense	$8,440,810	$8,440,810
Capital Outlay	-0-	-0-
Cap waiver: (T&E)		
Current expense	$ 238,000	-0-
Capital expense	-0-	-0-
Total	$8,678,810	$8,440,810

The reasons for the Board's belief that the $238,000 in cap waiver monies set forth above are necessary for the provision of a thorough and efficient education to its students is set forth in specific and comprehensive detail for each line item in the affidavit of Robert J. Sipos, the Interim Superintendent of Schools, and the Board's brief in support of its cap waiver appeal, both of which are incorporated herein by reference. In summation, the Board states, inter alia:

> ***The funds Ridgefield Park seeks to have restored exclusively provide certified personnel and, as such, go to the very heart of a school district's mission: the offering of educational services. Second, not only are the positions being lost in conjunction with a zero-growth budget and with numerous reductions in other line items, but the District is being asked to provide services for a growing student population with a considerably smaller staff than before. See Exhibit P-6.
>
> Finally, even if the cap waiver is granted in its entirety and the funds are thereby restored to the District, the overall budgetary increase with

> the cap waiver funds only amounts to an increase of approximately 1.7% over the 1991-1992 budget. See Sipos Cert. at Para. 23. Given the increase in fixed costs inherent in any school budget, this increase even with the cap waiver funds will not prevent the Board from losing ground in terms of educational offerings. The cap waiver funds, however, will at least allow the Board to stave off the most drastic and educationally damaging changes for the 1992-1993 school year, thereby allowing the Board to have an educationally viable base from which it can hopefully build in future budget years. (Board's Brief, at pp. 10-11)

Upon review of the record of this matter, including the extensive documentation provided by the district in support of the necessity of the cap waiver funds, which is likewise incorporated herein by reference, the Commissioner finds and determines that the requested relief shall and is hereby granted as the Board has borne its burden of demonstrating that these funds are necessary for the provision of a thorough and efficient education to the students of the Ridgefield Park School District. East Brunswick Township Board of Education v. East Brunswick Township Council, 48 N.J. 94 (1966); Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305 (1989)

Accordingly, the Bergen County Board of Taxation is hereby ordered to adjust the Ridgefield Park School District's tax levy for the 1992-93 school year to reflect an increase of $238,000 for current expense which results in a total current expense tax levy of $8,678,810.

COMMISSIONER OF EDUCATION

JULY 16, 1992

DATE OF MAILING - JULY 16 1992

165-92

165-92

RICHARD BRAZIL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH	:	DECISION
OF ROSELLE, UNION COUNTY,	:	
RESPONDENT.	:	
	:	

JULY 16, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4366-91
AGENCY DKT. NO. 77-4/91

RICHARD BRAZIL,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY,
Respondent.

James M. Weinberg, Esq., for petitioner
(Weinberg and Kaplow, attorneys)

Nathanya G. Simon, Esq., for respondent
(Schwartz, Simon & Edelstein, attorneys)

Record Closed: June 2, 1992 Decided: June 9, 1992

BEFORE **STEPHEN G. WEISS,** ALJ:

This matter was transmitted by the Department of Education 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. on April 29, 1991. The petitioner, Richard Brazil, is a custodian employed by the respondent who alleged that the Board's intention to terminate his employment would be in violation of his tenure. The case originally was assigned to Administrative Law Judge Steven Lefelt. However, following Judge Lefelt's appointment to the New Jersey Superior Court, the matter was reassigned to the undersigned administrative law judge

As a result of discussions between counsel, the terms and conditions of a tentative settlement were negotiated and an agreement containing those provisions, signed by the parties, has been submitted to me for review.

Based upon my review and consideration of the entire file in this matter, I believe that the terms of the attached settlement are fair and reasonable and should be approved. That agreement provides in essential part that for purposes of acquisition of tenure, the Board will recognize Brazil's periods of service, except for a certain six-month suspension period, and his tenure will be as of January 16, 1992. Also, he will be placed upon the step on the guide that he would have been on but for the suspension. Brazil will dismiss, with prejudice, his petition of appeal, as well as a request for arbitration he previously filed with the American Arbitration Association.

Accordingly, I **FIND** that:

1. The parties voluntarily have agreed to the terms of the settlement as evidenced by the signatures which appear on the settlement agreement; and

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I therefore **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 9, 1992
Date

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

June 11, 1992
Date

Maureen A. Kelley
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 15 1992
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

amr

SCHWARTZ, SIMON & EDELSTEIN
293 Eisenhower Parkway
Suite 300
Livingston, New Jersey 07039
(201) 740-1600

RECEIVED
OFFICE OF ADMINISTRATIVE LAW
STATE OF NJ
JUN 2 8 36 AM '92

RICHARD BRAZIL, Petitioner vs. BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW/ COMMISSIONER OF EDUCATION OAL DOCKET NO. EDU 04366-91N AGENCY REF. NO. 77-4/91
ROSELLE EDUCATION ASSOCIATION, (On behalf of Richard Brazil) Petitioner vs. ROSELLE BOARD OF EDUCATION, Respondent.	AMERICAN ARBITRATION ASSOCIATION DOCKET NO. 18 390 00224 91D

SETTLEMENT AGREEMENT

This Settlement Agreement is executed this 26 day of May 1992 by and between Richard Brazil (hereafter "Brazil"), Roselle Education Association (hereafter "Association"), and Roselle Board of Education (hereafter "Board");

WHEREAS, on or about December 20, 1990, Brazil was suspended with pay based on an incident at Harrison School on December 19, 1990; and

WHEREAS, on January 15, 1991, Brazil was suspended without pay effective January 15, 1991 to June 30, 1991; and

WHEREAS, effective July 1, 1991, Brazil returned to employment with the Board; and

WHEREAS, a petition of appeal was filed before the Commissioner of Education contesting the Board's actions and further the actions taken by the Board were grieved to arbitration on behalf of Brazil by the Association; and

WHEREAS, Brazil, Association and the Board desire to fully and finally resolve and settle all claims between them arising out of the incident involving Brazil which occurred on or about December 19, 1990 at Harrison School.

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, the parties do hereby agree as follows:

1. For purposes of acquisition of contractual tenure as set forth in Article IV, Paragraph E of the negotiated Agreement between the Board of Education and the Roselle Education Association, the Board of Education will recognize all periods of service by Brazil except for his six (6) month suspension without pay. Thus, tenure will attach on or about January 16, 1992 pursuant to the following formula:

October 1, 1988 to October 1, 1989 = 1 year credit; October 1, 1989 to October 1, 1990 = 1 year credit; October 1, 1990 through January 15, 1991 = .35 credit; July 1, 1991 to January 16, 1992 = .65 credit; for a total of three (3) years of service.

2. For the 1991-92 school year, Brazil shall be given credit for purposes of step movement on the guide such that he shall be placed on the step he would have been on but for the suspension without pay. Brazil shall receive the pay differential for the 1991-92 school year for days worked.

3. Brazil and the Association will withdraw and dismiss with prejudice the Petition of Appeal now pending before the Commissioner of Education/Office of Administrative Law, and the request for arbitration filed with the American Arbitration Association.

4. Brazil and the Association do hereby release and discharge the Board from any and all claims, rights and causes of action of any nature whatsoever arising from or in anyway connected with the facts and circumstances surrounding the employment actions taken by the Board, its agents, servants or employees, in December 1990 and January 1991. This Release expressly terminates all proceedings which Brazil and the Association now have, and includes any and all claims for any expenses, damages, salary, fringe benefits and/or other expenses incurred by Brazil and/or the Association on behalf of Brazil to date. However, it is specifically acknowledged and agreed that this settlement does not waive any rights either party may have based on any new employment situation and/or action.

5. Each party hereto expressly acknowledges that each has had appropriate competent representation concerning the terms and conditions of this settlement, that each knows and understands the contents hereof and enter into this Agreement voluntarily and without any undue influence or duress. This Release and Settlement Agreement contains the entire understanding of the parties. This Agreement is binding on the parties, their heirs, executors, administrators and assigns. This Release and Settlement Agreement shall be governed by the Laws of the State

of New Jersey. This Agreement shall not be modified except by a writing to be signed by both parties.

IN WITNESS WHEREOF, the parties hereunder set their hands and seal.

Witness by:

_____

Date:

RICHARD BRAZIL

ROSELLE EDUCATION ASSOCIATION

By: David R. Shaw

Date:

Witnessed by:

ROSELLE BOARD OF EDUCATION

Diana Mac Neil

DIANA MAC NEIL
Administrative Assistant/
Board Secretary

By: William Smith

BOARD PRESIDENT

Date:

OAL DKT. NO. EDU 4366-91

RICHARD BRAZIL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH	:	DECISION
OF ROSELLE, UNION COUNTY,	:	
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

JULY 16, 1992

DATE OF MAILING - JULY 16, 1992

166-92

166-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE TOMS	:	COMMISSIONER OF EDUCATION
RIVER REGIONAL SCHOOL DISTRICT,	:	DECISION
OCEAN COUNTY.	:	
	:	

SYNOPSIS

Petitioning defeated candidates for school board requested inquiry into alleged violations of education law in connection with certain mailing which did not identify the sending party as required by law. Petitioners did not challenge the outcome of the election.

ALJ determined that petitioners identified and made public the existence of a violation of N.J.S.A. 18A:14-97 but that the record was inconclusive regarding who was responsible. Petition was dismissed.

Commissioner concurred with the ALJ that the mailing in question did not meet the requirements of N.J.S.A. 18A:14-97, and that a violation of election law occurred but was not sufficient to affect the outcome of the election. However, regarding personal responsibility for the violation, the Commissioner was unable to render a decision as his role is limited to determining solely whether a violation has occurred. (Old Bridge) Commissioner further noted that petitioners were free to bring allegations regarding campaign contributions to the Election Law Enforcement Commission, which has jurisdiction over such matters pursuant to N.J.S.A. 19:44A-22.

JULY 16, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2998-92
AGENCY DKT. NO. 104-4/92

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY

Martin Fotusky and **Vincent DeGennaro**, petitioners, appearing *pro se*

Milton H. Gelzer, Esq., on behalf of Toms River Regional School District (Gelzer, Kelaher, Shea, Novy & Carr, attorneys)

Record Closed: May 28, 1992 Decided: June 3, 1992

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of a complaint filed by petitioners, defeated candidates in the April 1992 School Board Election held by the Toms Regional School District. The matter was transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.* An inquiry was conducted on May 28, 1992, at the Pine Beach Municipal Hall, after which the record closed.

The question presented is whether violations of the education law were committed during the April 1992 school board election in connection with a certain mailing.

Initially petitioners stipulated that their complaint did not seek to disturb the results of the election. This satisfied the interests of the Toms River Regional School District. After a brief legal presentation concerning the proofs necessary to overturn a school board election, and the undisputed representation that the candidates who prevailed did so by substantial margins, Mr. Gelzer and his client withdraw from the proceeding.

Petitioner Martin Fotusky testified that he received a postcard in the mail advancing the candidacy of the incumbents and suggesting passage of the budget without any attribution. He believed that this was likely sent by a coalition of local teachers and submitted a newsletter called "United School Employees" Volume III, No. 2, dated March 23, 1992 to support this assessment. This newsletter endorses the incumbents as "people we can work with" and sets out a campaign strategy. The newsletter indicates that letters would be sent to New Jersey Education Association (NJEA) members who live within the Toms River School District to be followed by postcards just before the election as a reminder.

Mr. Fotusky testified that he brought this matter to the attention of the county prosecutor; an investigation was commenced, but apparently no action was taken.

Vincent DeGennaro testified that he too received this postcard without attribution. He believed that the incumbents bear responsibility, whether they had actual knowledge of the mailing or not; it was done for their benefit.

Harold Eccles testified that the cost of this mailing should have been reported to the Election Law Enforcement Commission (ELEC) as an "in kind" contribution and this was not done.

Robert L. Kernasovic is one of the incumbents who was reelected. He testified that he spoke for himself as well as for the other two candidates, Thomas Baxter and Thomas D. Miserendino, who were unable to attend the hearing because they were working. Mr. Kernasovic testified that the literature he prepared or authorized contained all proper disclosures and that he was not aware of where the postcard in question came from. He does not know who prepared it, paid for it, or mailed it. This is the substance of the record.

N.J.S.A. 18A:14-97 *et seq.* provides that campaign materials used in connection with school board elections must be attributed in a prescribed manner. The postcard in question does not provide a clue as to its orgin, and thus I **FIND** that there has been an infraction of the school laws. The record is, however, inconclusive on the question of who is responsible. We cannot simply deem the candidates responsible; they deny involvement and there are no proofs to the contrary. The record suggests that the United School Employees may have had a role in this, but no one from that organization appeared, and apparently no subpoenas were issued in the matter. The newsletter alone is an insufficient link.

Thus petitioners' have correctly identified and made public the existence of a violation; they must be satisfied with this as the compensation for their efforts. As the matter has already been referred to the prosecutor there is no point in pursuing that avenue; the Commissioner may wish to consider referring the matter to ELEC for further inquiry.

Based on the foregoing, it is **ORDERED** that this matter be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6/3/92
Date

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

6/5/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 10 1992
Date

OFFICE OF ADMINISTRATIVE LAW

/cae

LIST OF EXHIBITS

Joint Exhibits:

J-1 Copy of the postcard sent to Mary-Barb E. Fotusky and Kevin Leahey

J-2 Copy of a Publication from United School Employees

J-3 Copy of an Article from the Ocean County Observer, dated Friday, April 3, 1992

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE TOMS	:	COMMISSIONER OF EDUCATION
RIVER REGIONAL SCHOOL DISTRICT,	:	DECISION
OCEAN COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioners' exceptions, which attempt to bring further information to the record, request a hearing transcript and urge the Commissioner to undertake an independent investigation to determine who was responsible for the contested mailing, were timely filed pursuant to N.J.A.C. 1:1-18.4.

Upon review of the matter, the Commissioner concurs with the ALJ that the mailing in question clearly did not meet the requirements of N.J.S.A. 18A:14-97, so that a violation of election law occurred but was not, as conceded by all parties, sufficient to affect the outcome of the election. With respect to the question of personal responsibility for the violation, however, the Commissioner cannot pass judgment; rather, his role is limited to determining, as he has herein, if a violation occurred and whether it affected the outcome of the election. As the State Board of Education held in In the Matter of the Annual School Election Held in the Township of Old Bridge, Middlesex County, decided July 6, 1988,

> ***N.J.S.A. 18A:14-63.12 does not entrust the Commissioner with the responsibility for or the authority to adjudicate the guilt of individuals who may be responsible for violations of N.J.S.A. 18A:14-97 occurring during an election subject to inquiry pursuant to that statute.***
>
> Accordingly, that aspect of the Commissioner's decision relating to whether Mr. Hagerty was responsible for the irregularity at issue must be considered to be merely dicta, and his decision does not in any way represent a legal conclusion as to the culpability of any individual for purposes of imposition of the penalties prescribed by N.J.S.A. 18A:14-104.***
>
> (Slip Opinion, at pp. 4-5)

Because the question of whether a violation occurred and if it affected the outcome of the election was answered to petitioners' satisfaction by the ALJ in findings adopted herein, no purpose would be served by further proceedings as requested by petitioners. The Commissioner is under no obligation to review hearing transcripts when he takes no exception to the ALJ's factual findings and transcripts have not been provided to him by the parties pursuant to N.J.A.C. 1:1-14.11. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987) Further, in matters of election inquiry, the Commissioner's role is an adjudicative, not an investigative one, so that the burden to prove allegations would rest with petitioners even if the Commissioner did have authority to make a determination of personal guilt.

Finally, the Commissioner notes that the initial decision makes reference to testimony suggesting possible violation of laws governing campaign contributions. While no conclusions can be reached as to that matter herein, the Commissioner observes that petitioners are free to bring their allegations to the Election Law Enforcement Commission, which has jurisdiction over such matters pursuant to N.J.S.A. 19:44A-22.

Accordingly, the initial decision of the Office of Administrative Law, finding that a violation of N.J.S.A. 18A:14-97 occurred but otherwise dismissing the instant inquiry as a controversy before the Commissioner, is affirmed as amplified herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 16, 1992

DATE OF MAILING - JULY 16, 1992

167-92

167-92

CAROL M. FLETCHER, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY, RESPONDENT.	:	DECISION

JULY 17, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT/WITHDRAWAL
OAL DKT. NO. EDU 1427-92
AGENCY DKT. NO. 30-2/92

CAROL M. FLETCHER,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY,
Respondent.

Carol M. Fletcher, *pro se*

Kathleen M. Noonan, Esq., for respondent
(Ribis, Graham & Curtin, attorneys)

Record Closed: June 3, 1992 Decided: 6/18/92

BEFORE **ARNOLD SAMUELS,** ALJ:

On February 4, 1992, the petitioner, Carol M. Fletcher, filed a verified petition with the Commissioner of Education, alleging that she was entitled to retroactive pay for services rendered as a cafeteria worker prior to her termination by the respondent, and that respondent did not remit the amount claimed along with her termination pay.

Respondent filed an answer on February 18, 1992, and on February 25, 1992, the Commissioner of Education transmitted the matter to the Office of Administrative Law for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

On May 29, 1992, counsel for respondent advised that the matter had been amicably resolved. On June 3, 1992, a written stipulation of settlement and withdrawal of request for hearing was filed with the Office of Administrative Law. A copy of the document, signed by the petitioner and respondent's attorney, is attached hereto and made a part hereof.

Based on the foregoing, it is **CONCLUDED** that the dispute has been resolved, and that petitioner has withdrawn her request for hearing and relief

It is therefore **ORDERED** that the withdrawal be approved pursuant to *N.J.A.C.* 1:1-19.2. Therefore, I **ORDER** the Clerk to return this matter to the agency for appropriate disposition.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 16, 1992
Date

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

6/22/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties.

JUN 23 1992
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

RIBIS, GRAHAM & CURTIN
Attorneys at Law
4 Headquarters Plaza
P. O. Box 1991
Morristown, New Jersey 07962-1991
(201) 292-1700
Attorneys for Respondent,
BUTLER BOARD OF EDUCATION

CAROL M. FLETCHER,	:	BEFORE THE OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	DOCKET NO. EDU-1427-92N
v.	:	STIPULATION OF SETTLEMENT AND WITHDRAWAL OF REQUEST FOR HEARING
BUTLER BOARD OF EDUCATION,	:	
Respondent.	:	

WHEREAS, on February 4, 1992, Petitioner Carol M. Fletcher ("Petitioner") filed a petition with the State of New Jersey Department of Education, bearing docket number 30-2/92, alleging that she is entitled to retroactive pay for services rendered as a cafeteria worker prior to her termination; and

WHEREAS, on February 18, 1992, Respondent Board of Education of the Borough of Butler ("Board") filed an answer denying Petitioner's allegations; and

WHEREAS, on February 25, 1992, the matter was transferred to the Office of Administrative Law for hearing as a contested case; and

WHEREAS, the parties hereto wish to resolve this matter without the necessity of a hearing.

NOW, THEREFORE, it is hereby stipulated and agreed as follows:

1. The Board shall pay Petitioner the sum of $309.25 representing the retroactive salary increase for the hours Petitioner actually worked during the 1990-91 school year.

2. In exchange for payment of $309.25, Petitioner will dismiss the Petition currently pending before the Office of Administrative Law and withdraw her request for a hearing.

3. Both Petitioner and Board acknowledge that they are entering into this stipulation knowingly and voluntarily.

4. Petitioner shall notify the Office of Administrative Law within ten (10) days of receipt of the fully-executed Stipulation.

DATED: May 31, 1992

BY: Carol M. Fletcher
CAROL M. FLETCHER, PETITIONER

RIBIS, GRAHAM & CURTIN
Attorneys for Respondent,
BOROUGH OF BUTLER
BOARD OF EDUCATION

DATED: June 2, 1992

BY: Kathleen M. Noonan
KATHLEEN M. NOONAN

OAL DKT. NO. EDU 1427-92

CAROL M. FLETCHER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

JULY 17, 1992

DATE OF MAILING - JULY 17, 1992

168-92

168-92

J.T.M., ON BEHALF OF HIS MINOR CHILD, J.A.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY, AND PHILLIP ESBRANDT, SUPERINTENDENT, RICHARD LEVY, SUPERVISOR OF SECONDARY EDUCATION, AND JAMES GALLAGHER, PRINCIPAL,	:	DECISION
RESPONDENTS.	:	

RECORD SEALED - DECISION REMOVED

JULY 17 1992

169-92

169-92

ELLEN FRANCEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF SALEM, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Following RIF, petitioner, who served as home economics teacher for 17 years, acquired endorsement on her instructional certificate to serve as an elementary teacher. Petitioner contended respondent therefore was obligated to rehire her for position of elementary school teacher whenever one became available. Respondent argued petitioner did not acquire endorsement until after RIF.

ALJ found Board improperly and illegally denied petitioner an elementary teaching position and, further, failed to notify petitioner of vacancy. Board was ordered to reinstate petitioner with compensation regardless of her lack of experience.

Commissioner reversed findings and determination in initial decision and dismissed petition of appeal. Commissioner found petitioner had no entitlement to the claimed elementary position as date of employee's RIF must serve as date certain on which the employee's rights are reckoned for future entitlement purposes. (Marshall Appellate Division decision; Fitzpatrick decision; Dorothy Godwin Davis decision)

JULY 22, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10219-91
AGENCY DKT. NO. 360-10/91

ELLEN FRANCEY,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF SALEM,
Respondent.

Steven R. Cohen, Esq., for the petitioner (Selikoff & Cohen, attorneys)

John T. Barbour, Esq., for the respondent (Barbour & Costa, attorneys)

Record Closed: May 4, 1992 Decided: June 8, 1992

BEFORE **AUGUST E. THOMAS,** ALJ T/A:

A petition of appeal was filed with the Commissioner of Education in this matter on October 1, 1991. Thereafter the matter was transferred 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.

Petitioner is tenured, having served as a home economics teacher for 17 consecutive years beginning on or about September 1972. In April 1989, petitioner's position was terminated by the Board of Education (Board) in a reduction in force (RIF), effective for the 1989-90 school year. In January 1991, the New Jersey Department of Education, State Board of Examiners, issued to petitioner an "emergency certificate" authorizing her to serve as a teacher of the handicapped from January 1991 through July 1991. Petitioner was employed by the Board as a teacher of the handicapped at its Salem High School from January 2, 1991, through June 30, 1991. While so employed, the State Board of Examiners in April 1991 issued

to petitioner an endorsement on her instructional certificate to serve as an elementary school teacher.

Subsequent to petitioner's acquisition of her elementary school teacher endorsement, a vacancy occurred in respondent's school district in the position of elementary school teacher. Additionally, other vacancies occurred in the district. Nevertheless, petitioner was notified in July 1991 that she would not be offered employment in the school district in the coming year. The Board hired nontenured teachers (six) to fill the vacant positions.

Petitioner demands employment in the district under the tenure laws stating that she is qualified to teach and that teachers who lose positions as a result of a RIF are to be placed upon a "preferred eligible list" for reemployment in their districts whenever a vacancy occurs.

Respondent, while admitting petitioner's history regarding her employment in the district, denies that she is qualified there for employment and moved to enjoin in this litigation the nontenured teachers employed after petitioner received notice that she would not be employed, asserting that their rights may be affected if petitioner is reinstated.

Respondent moved for a hearing arguing that there are "educationally sound reasons" for the Board's actions and that petitioner did not have the required certification at the time of the events that now trigger her claim to entitlement to the contested positions.

The State Board of Examiners has determined that petitioner is qualified as an elementary school teacher and is authorized to teach in the public schools of New Jersey. Therefore, in my judgment the question to be answered is whether or not the endorsement earned on petitioner's teaching certificate after the termination of her position as the result of a RIF meets the legal requirement for her continued employment under the tenure statutes. This is not a factual dispute.

Based on this rationale, respondent's motion to enjoin the six nontenured teachers and to hold a hearing in this matter was denied by Order dated March 11, 1992. There was no appeal.

Petitioner seeks reinstatement in any position for which she is qualified, back pay, and pre-judgment interest pursuant to N.J.A.C. 6:24-1.16. Petitioner asserts that the Board acted in bad faith after being notified of her statutory entitlement to the position she requested (see Exhibits 1 & 2 attached to petitioner's letter brief in support of summary decision).

DISCUSSION

Statutory law in New Jersey allows for a reduction in force for economic reasons in a school budget. Specifically, N.J.S.A. 18A:28-9, Reduction of force; power to reduce and reasons for reduction, states:

> 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.

Here, for economic reasons, the Board abolished its home economics department.

Petitioner is a "teaching staff member" defined in N.J.S.A. 18A:1-1 as:

> 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 . . . .

Petitioner acquired tenure in the school district. Therefore, she had tenure in all positions for which her instructional certificate qualified her In Ellicott v. Board of Education of Frankford, 251 N.J. Super. 342, 349 (App. Div. 1991), a teaching staff member filed a petition with the Commissioner of Education asserting her tenure right to a newly created position as a full-time learning disabilities teacher, which the school board had filled with a nontenured teaching staff member. The Superior Court, Appellate Division, held that she was entitled to the position since she had the endorsement on her teacher's certificate, regardless of her experience in the position, stating that "a teaching staff member has tenure in all positions for which his instructional certificate qualifies him."

New Jersey's statutes afford protection for tenured individuals who lose their jobs as a result of a RIF. Specifically, courts have held that the tenure act should be liberally construed to achieve its beneficial ends. Spiewak v. Rutherford Board of Education, 90 N.J. 63, 74 (1982); see also, Bednar v. Westwood Board of Education, 221 N.J. Super. 239, 241 (App. Div. 1987), where the court held that, the tenure statute "should be liberally construed to further its beneficial purpose of affording security to teaching staff who meet its standard of length of service." Additionally, the court has stated that "the tenure provisions in our school laws were designed to aid in the establishment of a competent and efficient school system by affording to principals and teachers a measure of security in the ranks they hold after years of service." Viemester v. Board of Education of Prospect Park, 5 N.J. Super. 215, 218 (1949). According to N.J.S.A. 18A:28-12, Dismissal of persons having tenure on reduction; reemployment:

> 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 . . . . [Emphasis added]

Thus, when a teaching staff member loses her position due to a reduction in force, it is mandatory that the individual be placed on a waiting list to be placed in a position for which she is qualified. Petitioner acquired an endorsement on her teacher's certificate for teaching elementary school. Hence, after losing her position as a home economics teacher as a result of a RIF, respondent was obligated to rehire petitioner for the position of elementary school teacher when it became available.

Respondent's main argument for not hiring petitioner as an elementary school teacher is that petitioner is not qualified since she does not have experience. Specifically, respondent argues that educational standards must be met, such as "certain student performance levels on State mandated testing at the third and sixth grade levels. . . . In order to meet these student proficiencies, it is crucial, particularly in the respondent's setting, to have the strongest elementary teachers possible." Respondent's brief at 4. Petitioner allegedly scored poorly in her National Teacher's Exam. Thus, respondent argues, it has a right to reject her application since the Board's emphasis is on strong preliminary education. Further, respondent argues that petitioner did not acquire her endorsement until after the RIF.

It is necessary to note herE, that petitioner successfully passed the National Teacher's Exam and was determined qualified by the State Board of Examiner which issued the elementary school teacher endorsement on her instructional certificate.

Respondent's arguments are not supported by case law, where the court has held that a tenured teacher is to be provided the opportunity for reemployment. In Dennery v. Passaic Valley High School, 251 N.J. Super. 144 (App. Div. 1991), the court held that a former guidance counselor's tenure rights were violated when she was denied a position as class supervisor after her position was abolished following a RIF and the school board hired another applicant from outside of the school district who never held such a position and did not have tenure rights in that school district. "A tenured teacher is entitled to retention against a nontenured teacher . . . in the event of a RIF." Ellicott, supra, at 349.

A case similar to the present matter is Capodilupo v W. Orange Tp. Education Board, 218 N.J. Super. 510 (App. Div. 1987), in which the court held that a tenured secondary school physical education teacher was entitled to reinstatement to an elementary school teaching position held by nontenured teachers, upon a reduction in force of teaching staff, even if he had not acquired any demonstrable experience. "[A] tenured teacher seeking reinstatement within the endorsements on his or her certificate is entitled to preference in a RIF as against a non-tenured applicant with the same certification." Id., at 515. See also, Ellicott, supra, at 349, where the court held that "a tenured teacher seeking reinstatement within the endorsements on his or her certificate is entitled to preference in a RIF as against a nontenured applicant with the same certification . . . despite the fact that the tenured teacher had no 'demonstrable experience' under the endorsement." Thus, the tenured physical education teacher was entitled to reinstatement as an elementary school physical education teacher.

In dictum, the court has noted that a board of education may balance a tenured person in a RIF against "sound educationally based reasons for its decision to retain a non-tenured teacher." Capodilupo, supra, at 515-516. However, this approach was questioned in Ellicott, in which the court stated that even if the board balances tenure against "'sound educational policy,' it erodes tenure rights 'which appear plain on the face of the statute, which [the Court is] bound to recognize and which can be removed only by the Legislature.'" Ellicott, supra, at 351, quoting Bednar, supra.

SUMMARY

In this matter, after being "riffed," petitioner acquired an endorsement on her certificate, making her eligible to teach handicapped children. She was temporarily reemployed by the respondent, teaching handicapped children, during which time she acquired an endorsement to teach elementary school. Subsequently, six elementary school teacher positions became available in the district and petitioner, by statute, had a right to be offered one of those positions. Respondent, however, did not offer a position to petitioner. Rather, respondent hired six nontenured individuals. This action was inappropriate. As previously stated, statutory and case law require that respondent offer one of these positions to petitioner, who is tenured and has the appropriate endorsement on her teacher's certificate, regardless of the fact that she lacks experience in elementary education.

Accordingly, a tenured teacher who is riffed and acquires an endorsement on her teacher's certificate subsequent to a RIF can seek reinstatement against nontenured teachers in her new job category. After a RIF, the statutes and case law require that the school board rehire a tenured teacher with the appropriate endorsement over a nontenured teacher, regardless of whether the individual has had any actual experience in that category. In the present matter, petitioner has the appropriate certification but does not have any actual experience in elementary education. Nonetheless, respondent is required to rehire her in one of the elementary school teacher positions now available.

CONCLUSION

Based on the analysis of the above-cited cases and the undisputed facts in the present case, I **FIND** that the Board improperly and illegally denied petitioner an elementary teaching position when one first became available. The Board failed to notify petitioner of the vacancy, which it was obligated to do.

Accordingly, petitioner is to be reinstated immediately to any position for which she is qualified in accordance with the statutes and the above-cited cases. Her reinstatement shall include all back pay and emoluments she would have received had she been reemployed at the time of the initial vacancy.

PRE-JUDGMENT INTEREST

The Commissioner may award pre-judgment interest in any circumstance in which a petitioner has sought such relief and has successfully established a claim to a monetary award. N.J.A.C. 6:24-1.16. Subsection (c) of this regulation specifies that pre-judgment interest shall be awarded by the Commissioner "when he or she has concluded that the denial of the monetary claim was an action taken in bad faith and/or has been determined to have been taken in deliberate violation of statute or rule."

In the pre-judgment interest application I **FIND** the following facts:

1. The Board was aware of petitioner's tenure status.

2. The Board was aware that petitioner had acquired an endorsement on her instructional certificate to serve as an elementary school teacher.

3. The Board had employed petitioner as a teacher of the handicapped at its Salem High School between January 2, 1991, and June 30, 1991, and knew that petitioner was available for reemployment.

4. The Board was put on notice of petitioner's claim and legal position by letter dated August 13, 1991, from petitioner's counsel (Exhibit "1").

5. Petitioner advised the Board and its counsel that she would seek pre-judgment interest by letter dated December 9, 1991 (Exhibit "2").

However, I also **FIND** as fact that the Board believed that petitioner had no legitimate claim to the elementary teacher position for which she earned an endorsement on her instructional certificate after she lost her position due to a RIF. I **FIND** also that the Board screened and/or interviewed 109 applicants for the six positions and judged petitioner to be less qualified than all of the successful candidates.

Therefore, I **CONCLUDE** that there is no showing of bad faith or deliberate violation of the statutes. Accordingly, petitioner's application for pre-judgment interest is **DENIED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties

8 June 92
Date

August E. Thomas
AUGUST E. THOMAS, ALJ t/a

Receipt Acknowledged:

6/10/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 15 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

km

ELLEN FRANCEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF SALEM, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions were timely filed by both parties pursuant to N.J.A.C. 1:1-18.4. Petitioner also submitted a timely reply to respondent's exceptions.

In its exceptions, the Board contests the conclusions of the ALJ and reiterates its prior arguments that 1) no statute, regulation or case law prohibits it from considering valid educationally based reasons in determining whether to appoint petitioner to the positions disputed herein, and that 2) existing case law as relied upon by petitioner (and the ALJ) is inapposite to the instant circumstances, where the necessary certification was obtained by claimant subsequent to her RIF from the position out of which her entitlement arises. In reply, petitioner urges acceptance of the ALJ's decision and reiterates precedent decisions establishing the broad scope of statutory tenure protection, particularly as against nontenured employees.

Petitioner's exceptions urge rejection of that portion of the initial decision finding that pre-judgment interest was not warranted, arguing instead that the Board had clear and continuous notice of petitioner's rights and cannot be deemed not to have acted in bad faith in denying her a position.

Upon review, the Commissioner initially notes that the instant case is one of first impression, raising the threshold question of whether a tenured employee's rights to recall are frozen at the time of RIF or continually expandable through acquisition of subsequent additional endorsements. Upon consideration of this question, the Commissioner cannot concur with the ALJ that petitioner is entitled to a position for which she was undisputedly not qualified at the time of her RIF.

In applying the protections of the tenure statutes, which concededly confer a preferred status upon tenured employees who lose their employment through no fault of their own, the Commissioner must also balance the Board's legitimate need to be able to rely upon the determinations of individual employee entitlement made at the time of a RIF. Within the statutory scheme, it is clear that the act of reducing a tenured staff member's employment is the distinct and self-limited event that triggers the affected party's entitlement, the evaluation of his or her individual entitlement status and the consequent assignment to either another position in the district or the preferred eligibility list; nor is it of any import that the latter is strictly speaking a creature of seniority entitlement, as the concept of a fixed list from which subsequent vacancies are to be filled is applicable to tenure entitlement as well.

In this context, the date of an employee's RIF can be the only reasonable date certain on which the employee's rights can be reckoned for future entitlement purposes. To deprive boards of this certainty by permitting riffed staff to continually revise and expand their entitlements at will would at the very least pose an unreasonable administrative burden on the district, and, of more concern, would likely lead to amassing of endorsements following RIF, reduce to chaos any attempt by a district to ascertain its legal responsibilities upon the arising of a vacancy, and unduly restrict boards in their efforts to provide a thorough and efficient education by choosing the most qualified staff for open positions. Nor do the protections of the tenure statutes require such a result, as the Commissioner and Courts have recognized that changed legal status does not confer enhanced or retroactive entitlement on one whose rights had been duly determined at the appropriate time of calculation and that boards of education need not go to extremes to accommodate employment rights when all known and reasonable entitlements have been honored at the time of RIF. Thomas S. Marshall v. Board of Education of Township of Neptune, Monmouth County, Superior Court Appellate Division, Dkt. No. A-2595-85T1, unpublished, March 10, 1987; Paul Fitzpatrick et al. v. Board of Education of the Township of Weehawken, 1982 S.L.D. 1500 (App. Div.); Dorothy Godwin Davis v. Board of Education of the Township of Ewing, Mercer County, decided by the Commissioner April 29, 1985, aff'd State Board September 4, 1985

Having thus found that petitioner had no entitlement to the claimed elementary position(s), it is unnecessary to reach herein to

the issues of valid educationally based reasons for denying such entitlement and awarding of pre-judgment interest.

Accordingly, the initial decision of the Office of Administrative Law is reversed for the reasons expressed above and the instant Petition of Appeal consequently dismissed.

IT IS SO ORDERED.

Thomas A Henry

ACTING COMMISSIONER OF EDUCATION

JULY 22, 1992

DATE OF MAILING - JULY 22, 1992

169-92

EDU #10219-92
C # 169-92
SB # 33-92

ELLEN FRANCEY,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE CITY OF SALEM, SALEM COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 22, 1992

For the Petitioner-Appellant, Selikoff & Cohen
(Stephen R. Cohen, Esq., of Counsel)

For the Respondent-Respondent, Barbour & Costa
(John T. Barbour, Esq., of Counsel)

Ellen Francey (hereinafter "petitioner") was a tenured teaching staff member who held an instructional certificate with an endorsement in home economics and had served for 17 years as a home economics teacher. Petitioner's teaching position was abolished in April 1989 by the Board of Education of the City of Salem (hereinafter "Board") as the result of a reduction in force ("RIF") effective for the 1989-90 school year.[1] In April 1991, petitioner acquired an additional endorsement on her instructional certificate in elementary education. Thereafter, vacancies occurred in the district for elementary school teachers. Petitioner sought such employment, but the Board hired six nontenured individuals to fill those vacant positions. Petitioner alleged that such action violated her tenure rights.

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1 We note that petitioner does not challenge in these proceedings the legitimacy of the Board's decision to reduce its staff.

August 7 1994

On June 8, 1992, an Administrative Law Judge ("ALJ") agreed with petitioner, finding that the Board had been obligated to offer her one of the elementary teaching vacancies since she had acquired an endorsement in elementary education and was entitled to reinstatement as against nontenured individuals. The ALJ recommended that petitioner be reinstated with back pay and emoluments to any position for which she was qualified. The ALJ denied petitioner's request for pre-judgment interest, finding that there had been no showing that the Board had acted in bad faith or in deliberate violation of statutes. N.J.A.C. 6:24-1.16.

On July 22, 1992, the Acting Commissioner of Education rejected the Initial Decision, concluding that petitioner was not entitled to reinstatement in a position for which she had not been qualified at the time of the RIF in 1989. The Acting Commissioner found it necessary, in applying the protections of the tenure statutes, to balance the preferred status conferred upon tenured employees who lost their employment through no fault of their own with the Board's need to be able to rely upon determinations of individual employee entitlement made at the time of a RIF. The Acting Commissioner reasoned that the date of an employee's RIF could be the only reasonable date certain on which the employee's rights could be reckoned for future entitlement purposes. He also found that the tenure laws did not support petitioner's position, pointing out that changed legal status did not confer enhanced or retroactive entitlement on a staff member whose rights had been duly determined and that it was not necessary for district boards to go to extremes to accommodate employment rights when all known and reasonable entitlements had been honored at the time of the RIF. Consequently, the Acting Commissioner dismissed the petition.

Petitioner has filed the instant appeal to the State Board from the decision of the Acting Commissioner, arguing that, since she had obtained an elementary endorsement, the Board had been obligated to reemploy her in one of the elementary teaching vacancies held by nontenured individuals. Simply stated, petitioner seeks to expand the scope of the position in which she had achieved tenure to encompass an endorsement obtained on her instructional certificate after her tenured position was abolished in a reduction in force.

After a thorough review of the record, we agree with the ultimate determination of the Acting Commissioner that petitioner had no entitlement to the controverted elementary assignments. We, however, modify the Acting Commissioner's analysis. In so doing, we find it necessary to revisit some of the basic concepts embodied in the tenure laws.

Tenure is a legislatively conferred right, Spiewak v. Rutherford Bd. of Ed. 90 N.J. 63, 72 (1982), and is achieved only upon satisfaction of the precise statutory conditions. Howley v. Board of Education of the Township of Ewing, decided by the Commissioner of Education, 1982 S.L.D. 1328, aff'd by the State Board of Education, June 1, 1983. In order to be eligible to achieve tenure, the Tenure Act, N.J.S.A. 18A:28-1 et seq., requires that an individual be a "teaching staff member," i.e., employed in a position of such character that the qualifications therefor require possession of the appropriate certificate, N.J.S.A. 18A:1-1, and serve in such capacity for a specified probationary period. N.J.S.A. 18A:28-5. The purpose of the tenure laws is to protect teaching staff members from dismissal for unfounded, flimsy or political

reasons and prevents schools boards from abusing their superior bargaining power over teachers in contract negotiations. Spiewak, supra, at 73.

In Capodilupo v. West Orange Bd. of Ed., decided by the State Board of Education, 1986 S.L.D. 3010, aff'd, 218 N.J. Super. 510 (App. Div. 1987), certif. den., 109 N.J. 514 (1987), we concluded that, by virtue of his tenure status, a teaching staff member whose position as a high school physical education teacher had been abolished in a reduction in force was entitled to an assignment teaching physical education at the elementary level as against a nontenured individual, although he had no seniority in the elementary category. We emphasized that tenure was achieved in a particular "position," see Howley, supra, and that the category or categories in which a staff member accrued seniority were not necessarily congruent with the position in which tenure was achieved. The scope of the position to which tenure protection attached was initially limited by the scope of the certificate the staff member was required to possess in order to satisfy the qualifications for such employment. Further definition of the scope of a position in which tenure could be achieved was provided by N.J.S.A. 18A:28-5.

We pointed out that while a district board could not transfer a teaching staff member from one separately tenurable position to another without his or her consent, it could reassign teachers to serve in any capacity in which they were qualified by virtue of their endorsements so long as such assignment was within the scope of the certificate required for the tenurable position. We explained that because the assignments that a staff member was qualified to fill were limited by the scope of his or her

endorsements, the scope of the position in which such staff member would be entitled to the security of tenure protection was likewise limited by the scope of his or her endorsements.

Consequently, tenure is achieved in and tenure protection attaches to all endorsements upon a staff member's instructional certificate, and not just those under which the individual has actually served for the requisite period of time pursuant to N.J.S.A. 18A:28-5 or 18A:28-6. Grosso v. Board of Education of the Borough of New Providence, decided by the State Board of Education, 1990 S.L.D. 1750, appeals dismissed, Dockets #A-4360-89T5 and A-4359-83T5 (App. Div. 1990); accord, Dennery v. Board of Educ., 131 N.J. 626 (1993).

Rights emanating from the achievement of tenure are triggered at the time of a RIF. Edison Township Education Association v. Board of Education of the Township of Edison, decided by the Commissioner of Education, 1984 S.L.D. 1073, 1083, aff'd by the State Board of Education, 1984 S.L.D. 1085, aff'd, Docket #A-2030-84T7 (App. Div. 1986). As a result, district boards are required to recognize the tenure rights of affected parties as they existed at the time of its action. Parker and Pellegrino v. Board of Education of the Matawan-Aberdeen Regional School District, decided by the State Board of Education, May 2, 1990.

The precise conditions for the achievement of tenure rights are provided in Article 1 of the Tenure Act, "Acquisition and Effect of Tenure," particularly N.J.S.A. 18A:28-5, "Tenure of teaching staff members," and 18A:28-6, "Tenure upon transfer or promotion." Article 3 of that Act, "Effect of Reduction of Force Upon Persons Under Tenure," provides for effectuation of the rights achieved under Article 1, authorizing boards to reduce the number of their

teaching staff members for reasons of economy, N.J.S.A. 18A:28-9, but requiring that dismissals resulting from such reductions be made on the basis of seniority. N.J.S.A. 18A:28-10. N.J.S.A. 18A:28-12 mandates that those staff members who are dismissed be placed on preferred eligibility lists for reemployment in order of seniority in vacancies for which they are qualified.[2] It does not provide authorization for the acquisition of rights beyond those achieved pursuant to the specific provisions of Article 1, but, rather, establishes the mechanism for reemployment of those tenured staff members dismissed as the result of a reduction in force.

Accordingly, while the rights afforded a tenured teaching staff member affected by a reduction in force are not diminished by the mere fact that the vacancy occurs while the individual is on a preferred eligibility list, rather than at the precise time of the RIF, Mirandi v. Board of Education of the Township of West Orange, decided by the State Board of Education, April 5, 1989, there is no authority in the statutory scheme to accrue additional rights in a tenured position after dismissal therefrom in a RIF.

Petitioner herein achieved tenure as the result of her service in the district in satisfaction of the precise conditions set forth in N.J.S.A. 18A:28-5. The inchoate rights emanating from such status were triggered by the Board's determination in April 1989 to reduce its teaching force pursuant to N.J.S.A. 18A:28-9 and, therefore, to abolish petitioner's position. As a result of her

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2 We note that, notwithstanding a staff member's seniority rights in the applicable regulatory category, such individual must still satisfy the threshold qualifications for service in an assignment by holding the certification required in order to be authorized by statute and regulation to perform the duties attending that particular assignment.

achievement of tenure in a teaching position, petitioner's attendant rights and protection triggered by the RIF attached to those endorsements then upon her instructional certificate. Since petitioner did not obtain an elementary endorsement until April 1991, two years after her position was abolished, the scope of her tenure protection at the time of the RIF did not extend to the assignments now sought. Likewise, since she was not qualified therefor by virtue of her certification, the Board could not have reassigned her during her employment in the district to an assignment requiring an elementary endorsement, a limitation on the scope of protection afforded staff members by the achievement of tenure. Capodilupo, supra.

To grant the relief sought herein would be to recognize a statutory entitlement to reemployment by virtue of tenure in an assignment outside the scope of the tenure protection acquired pursuant to N.J.S.A. 18A:28-5. In that the statutory scheme does not provide for the extension of such entitlement, we conclude that the scope of petitioner's tenured position was determined at the time of the RIF, when her rights were triggered, and her subsequent acquisition of an elementary endorsement did not operate to enlarge the tenure rights she had achieved pursuant to the Tenure Act during, and as a result of, her employment in the district.

Consequently, while we agree with the ultimate determination of the Commissioner to dismiss the petition in this matter, we do so for the reasons expressed herein.

Attorney exceptions are noted.

August 3, 1994

Date of mailing AUG 04 1994

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170-92

MORRIS-UNION JOINTURE COMMISSION, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY, RESPONDENT.	:	DECISION

SYNOPSIS

Petitioning jointure commission sought order compelling South River Board of Education to pay for bedside instruction provided by commission to one of respondent's students at cost of $2,000. Respondent contended charge was excessive and that petition was untimely filed.

ALJ found letter of July 3, 1991 issued by South River to petitioner was sufficient to constitute notice of final action of refusal to pay fee. Thus, petition, which was filed beyond the 90-day period from said cause of action, was untimely. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

JULY 22, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING RESPONDENT'S MOTION
FOR DISMISSAL
OAL DKT. NO. EDU 1693-92
AGENCY DKT. NO. 34-2/92

MORRIS-UNION JOINTURE COMMISSION,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,
Respondent.

Evelynn S. Caterson, Esq., on behalf of petitioner (Martin R. Pachman, attorney)

Gordon J. Golum, Esq., on behalf of respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: May 1, 1992 Decided: June 8, 1992

BEFORE **STEVEN C. REBACK**, ALJ:

This is an appeal by the petitioner (Morris-Union) resulting from a petition which it filed before the Commissioner of Education on February 7, 1992. The petition seeks an order compelling the respondent (South River) to pay for bedside instruction provided by Morris-Union to one of respondent's students, for the months of February and March 1991, totaling approximately $2,000.00. Petitioner

requests that payment be ordered by the State Board of Education pursuant to a formula utilized and reflecting the actual billing.

On February 27, 1992, respondent filed its answer, which among other things, denies any obligation on its part to pay petitioner for the services at issue, asserting as well that if arguendo such obligation did exist, the rate sought by the petitioner is excessive. In addition, and central to the opinion, respondent argues that the petition should be dismissed as untimely pursuant to N.J.A.C. 6:24-1.2.

On March 6, 1992, the Commissioner of Education transmitted the matter to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. and N.J.S.A. 52:14B-1 et seq.

On April 2, 1992, South River submitted its brief in support of its motion for dismissal, which was received by the Office of Administrative Law on April 6, 1992. On April 10, the OAL received Ms. Caterson's brief in opposition to the motion for dismissal, dated April 9, 1992. It was not until April 16, 1992 that the case file in this matter was transferred directly to my office. On April 22, 1992 Mr. Golum submitted a reply brief and on May 1st, Ms. Caterson submitted a sur-reply. Finally also on May 1, 1992, Mr. Golum submitted a letter brief responding to Ms. Catersons sur-reply brief. Accordingly the record in this matter closed upon receipt of both counsels final arguments, May 1, 1992.

The fact in this matter as they relate to the motion by South River to dismiss the petition as untimely pursuant to N.J.A.C. 6:24-1.2 are as follows. I **FIND**:

The first relevant correspondence in this appeal between Morris-Union and South River was initiated by the petitioner in a letter dated February 25, 1991 (petitioner's attachment B). This letter informed respondent that a student from its district had begun receiving bedside instruction and enclosed a contract for use in authorizing this instruction. On March 4, 1991, a telephone call between the parties involved a discussion of the costs for such services. On March 5, 1991, the bill for February services ($504) was sent to South River. (Petitioner, Att. C). Respondent then sent a letter, dated March 7, 1991, to Fair Oaks Hospital (copy to petitioner) which stated that the contract request would not be finalized. (Petitioner, Att. D). It also stated that South River did not feel responsible for the "exhorbitant charge" submitted by petitioner, while indicating that it might be open to other options not to exceed a maximum payout of $180 per week. Respondent followed this with

another letter, this one addressed to petitioner, dated March 18, 1991, stating that it never approved or expected any of the petitioner's services. (Petitioner, Att. E).

The petitioner responded with a letter on March 19, 1991 informing South River that it had stopped bedside instruction for the student as of March 19. (Petitioner, Att. F). Respondent replied with a letter, dated March 25, 1991, again stating that it never requested the petitioner's services and that the petitioner had overstepped its authority. (Respondent's Exh. A). On March 28, the bill for March services ($1,512) was sent. (Petitioner, Att. G).

An "Account Overdue" letter, for the total amount $2,016, was sent to petitioner on May 30, 1991. (Respondent's Exh. B). Petitioner contends and South River admits for purposes of this motion that such "Accounts Overdue" letters were sent monthly. In response to the bill, South River sent a letter, dated June 5, 1991, reminding petitioner that it did not authorize the services and requesting petitioner to give it a "credit memo" on its account. (Respondent's Exh. C). The petitioner's reply, dated June 13, 1991, informs respondent that the bill "remains valid." (Respondent Exh. D). Also, it is acknowledged that during this time period discussions of a possible compromise had been conducted.

On July 3, 1991, South River, through its Superintendent of Schools, informed petitioner that it believes that it is "not responsible for this charge" on the basis of four reasons listed. (Respondent's Exh. E). This letter also states, in closing, that respondent regrets to inform the petitioner that it does "not accept responsibility for the unauthorized service."

Subsequent to this letter, the petitioner sent respondent four "unanswered" letters--(1) July 10, 1991: containing responses to the four reasons along with the mention of seeking possible parental payment and a reminder of the petitioner's lack of authority to accept less than full payment; (2) November 4, 1991: from petitioner's attorney, stating that counsel had been advised of South River's refusal to reimburse and that a continuance of such refusal would prompt legal action; (3) November 21, 1991: containing citations and reasons why respondent should pay; (4) January 10, 1992: declaring that if no response is made by January 31, 1992 the petitioner will consider such non-response to be a refusal to pay. (Respondent's Exhibits F-1).

South River did not respond by January 31, 1992; instead, it sent a letter dated February 3, 1992, which refers to the July 3, 1991 letter as indicating then that it had no intention of paying the claim. (Respondent's Exh. H). This letter also mentions that a possible compromise had been discussed prior to the July 3rd letter but that no negotiations had taken place since then. The petitioner, however, contends that there had been continuing contact, noting especially the "Accounts Overdue" letters.

N.J.A.C. 6:24-1.2 prescribes that "[t]he 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, individual party, or agency, which is the subject of the requested contested case hearing." Prompt filing of actions before the Commissioner serves to preserve the immediacy of the record and to stabilize existing relations, thereby avoiding disruption of the educational process. Newman v. Bd. of Ed. of Spring Lake Heights, 1984 S.L.D. _____ (Comm'r Jan. 19, 1984).

Neither party disputes the application of the 90-day provision to this action seeking reimbursement for the bedside instruction of the South River student. The parties, however, disagree as to when the 90-day period commenced. Petitioner urges that the 90 days began to run on January 31, 1992, after the petitioner had received no response to its letter of January 10, 1992, which stated that it would deem a non-response by that date to be a refusal to pay. South River maintains that petitioner's cause of action accrued as early as March 1991 (upon receipt of Dr. Marino's March 7, 1991 letter) and at the latest upon receipt of its superintendent's July 3, 1991 letter.

The key to deciding the timeliness question is obviously determining when the cause of action did accrue. A cause of action accrues and the 90-day period begins only after receipt of notice by petitioner of the action concerning which the hearing is requested. See, e.g., Delk v. Pemberton, BOE, 1985 S.L.D. _____, (Comm'r Aug. 19, 1986). It has also been stated that a cause of action accrues, so that the applicable period of limitation commences to run, when the party seeking to bring the action has an enforceable right. Andreaggi v. Relis, 71 N.J. Super. 203, 235-36 (Ch. Div. 1979).

In the instant case, South River argues that the four letters it wrote concerning this matter, beginning with the one written March 7, 1991, to Fair Oaks Hospital

(copy to petitioner), should each have been sufficient to put petitioner on notice of respondent's refusal to pay. Respondent further asserts that even if these four letters did not provide notice, the letter of July 3, 1991, written by South River's Superintendent, and sent to Dr. Parmelee, Morris-Union Director of Operations, provided clear notice to the petitioner of respondent's action.

When was the petitioner reasonably placed on notice of South River's refusal to pay? While the latter may assert that the March 7, 1991 letter and the three subsequent letters were sufficient to provide such notice, the various attempts to possibly compromise and settle the claim made during this time period undercut such assertion. Clear notice of an absolute refusal to pay could not be accomplished amidst the receipt of these various mixed signals. The position, however, of South River that the July 3, 1991 letter unequivocally reiterating the position that it would not accept responsibility for the services is in my view sufficient to have reasonably placed the petitioner on notice as of that date that respondent was absolutely refusing to pay for the disputed charges.

The terms of the July 3rd letter should have reasonably conveyed to Morris-Union that South River refused to pay and refused to entertain any compromise. The letter from petitioner's counsel of November 11, 1991 noting that counsel had been advised of South River's refusal to reimburse would also reasonably indicate that the petitioner was on such notice of refusal to pay. In my judgment the July 3, 1991 letter was sufficiently unambiguous to constitute notice of action by South River so as to commence the running of the 90-day statute of limitations set forth at N.J.A.C. 6:24-1.2. If, following the July 3, 1991, letter an action were instituted by Morris-Union for breach of contract, no reasonable argument could have been made that such cause of action had not yet accrued. Also, merely because an argument might be raised that settlement discussions could have indeed continued and followed the July 3, 1991 letter would not in any way eviscerate the determination that the letter was tantamount to a refusal to pay, resulting in the joinder of issue for purposes of a cause of action possessed by the petitioner.

Based upon the foregoing, I **CONCLUDE** that the July 3, 1991 letter issued by South River to the petitioner was sufficient to constitute a notice of final action of refusal to pay so as to commence the running of the 90 day period under N.J.A.C. 6:24-1.2.

Petitioner argues that if a determination were made that the 90-day period had expired under the foregoing regulation, the rule should be relaxed in the present case. The Commissioner of Education does have the authority under N.J.A.C. 6:24-1.15 to relax the application of the 90-day rule "where strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." Exceptions to the 90-day rule should, however, be granted sparingly, and only where there exists compelling circumstances to justify enlargement or relaxation of the time limit. See, e.g., Riely v. Bd. of Ed. of Hunterdon Cent. H.S., 173 N.J. Super. 109 (App. Div. 1980). The Commissioner of Education has described these circumstances as follows:

> Where a substantial constitutional issue is presented, where judicial review is sought of an informal administrative determination, and where a matter of significant public interest is involved. (Citations deleted). Miller v. Morris School District, 1980 S.L.D. _____ (February 25, 1980).

In the instant case, none of these circumstances apply since the matter involves the mere payment for services. Additionally, while it may be said that no real injustice will be done to South River in requiring it to go through a hearing on this matter at a time somewhat beyond the 90-day period from the accrual of the cause of action (since the components that will go into the record will not have gone stale), it is petitioner's burden to show that it will suffer injustice if the 90-day rule is strictly enforced. Here, the petitioner presents no such compelling reasons--its arguments concerning a continuing duty to pay and that petitioner somehow relied upon South River's settlement attempts are not persuasive. The Respondent's Reply Brief effectively distinguishes the cases cited in support of these tenuous arguments. See, Respondent's Reply Brief, pp. 12-16.

Accordingly and based upon the foregoing the respondent's motion for dismissal is **GRANTED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6/18/92
Date

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

6/10/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 15 1992
Date

OFFICE OF ADMINISTRATIVE LAW

cad

OAL DKT. NO. EDU 1693-92

MORRIS-UNION JOINTURE COMMISSION, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY, RESPONDENT.	:	DECISION

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

Upon review, the Commissioner concurs with the ALJ that petitioner's cause of action arose no later than its receipt of respondent's July 3, 1991 letter, wherein petitioner was clearly and unequivocally informed that respondent did not accept responsibility for the bill in question. The Commissioner further concurs that there is no significant public interest or other consideration that would warrant relaxation of the 90-day rule in this matter.

Accordingly, the initial decision of the Office of Administrative Law dismissing the instant Petition of Appeal for reason of untimeliness is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

Thomas A Henry

ACTING COMMISSIONER OF EDUCATION

JULY 22, 1992

DATE OF MAILING - JULY 22, 1992

171-92

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MARJORIE STEVENS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SPOTSWOOD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, nontenured supervisor, claimed her nonrenewal was improper.

Initial decision found that although petitioner's performance generally improved while she was employed by the Board, and the superintendent did recommend her reappointment, the Board has virtually unlimited discretion in hiring or renewing nontenured teaching staff members. (Dore) Moreover, her nonrenewal violated neither procedural due process nor any other constitutional right. (Donaldson) Petition was dismissed.

Commissioner adopted findings and determinations in initial decision emphasizing applicability of Dore and distinguishing Brescia and Rotondo. Board has authority to reject the recommendation of the chief school administration (CSA) to renew an individual and based upon its own considered information, decide not to renew but the Board may not employ an individual who has not been affirmatively recommended by the CSA.

JULY 22, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6392-91
AGENCY DKT. NO. 172-6/91

MARJORIE STEVENS,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF SPOTSWOOD,
Respondent.

Robert M. Schwartz, Esq., for petitioner (Lake and Schwartz, attorneys)

Philip H. Shore, Esq., for respondent, (Shore & Zahn, attorneys)

Record Closed: June 9, 1992 Decided: June 11, 1992

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

Marjorie Stevens, petitioner, claims her dismissal as a nontenured teaching staff member in the Spotswood Public Schools (respondent) was improper. She seeks reinstatement with all emoluments.

This matter was opened before the Commissioner of Education when the petitioner filed a verified petition of appeal on June 4, 1991. The Spotswood Board of Education (Board) filed an answer on June 21, 1991. On June 27, 1991 the Department of Education transmitted the matter 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 prehearing conference was conducted, by telephone, on December 9, 1991 and the matter was set down for hearing on June 5, 8 and 9, 1992 at the Office of Administrative Law facility at Quakerbridge Plaza, Mercerville. Upon the parties' representation that certain witnesses were not available, the June 5 hearing date only was adjourned. The matter was heard on June 8 and 9, 1992. The record closed on June 9.

PRELIMINARY MOTIONS

The petitioner survived a motion to dismiss for failure to state a claim and, after the petitioner's opening statement, a motion for involuntary dismissal on the basis that the opening statement must set forth allegations that would make a prima facie case. Reilly v. Spiegelhalter, 100 N.J. Super. 276 (App. Div. 1968).

RELEVANT EVIDENCE

The parties provided a stipulation of 15 facts with nine exhibits attached. All were deemed admitted in evidence by consent. The stipulated facts are these:

1. Petitioner began her employ with the Respondent, Spotswood School District on March 17, 1988 as a Supervisor of Social Studies, Health and Physical Education.

2. Petitioner continued serving as the Supervisor of Social Studies, Health, and Physical Education from March 17, 1988 through July of 1989.

3. In or about July of 1989, petitioner was named as the Supervisor of Social Studies and Fine Arts.

4. Petitioner continued to serve as the Supervisor of Social Studies and Fine Arts through March 14, 1991.

5. Petitioner's last evaluation was completed on January 18, 1991. In each of the categories found in the evaluation Petitioner was determined to have either met "standard" performance or exceeded standard performance. Exhibit A.

6. Petitioner was then recommended for reemployment by the Superintendent of Schools, Ronald Chiste and William Dunigan, the Director of Curriculum and Instruction.

7. On February 5, 1991, Petitioner was advised by Ronald Chiste, Superintendent of Schools, that she would be the subject of discussion by the Board of Education on February 12, 1991. Exhibit B.

8. On or about February 8, 1991, Petitioner advised Mr. Chiste that she wished to have the discussion as it related to her employment, take place in executive session with her present at the meeting with a representative of her professional association. Exhibit C.

9. On February 27, 1991 Petitioner was again advised that the Board of Education would discuss her employ on March 12, 1991. Said discussion had been carried from the earlier February 12, 1991 date. Exhibit D.

10. On or about March 4, 1991 Petitioner advised Mr. Chiste that she wished to have the discussion of her employ scheduled for March 12, 1991 to take place in public. Exhibit E.

11. At its public meeting of March 12, 1991, the Spotswood Board of Education initially voted to discontinue petitioner's employ as a Supervisor beyond March 20, 1991. At the same meeting, in a second action, the board rescinded its original resolution terminating petitioner's employ as of March 20, 1991 and thereafter passed another Resolution terminating her employ as an employee of the Spotswood Board of Education effective March 14, 1991. Petitioner was so advised by the Superintendent of Schools by a letter dated March 21, 1991. Exhibit F.

12. On or about March 15, 1991 petitioner requested a written explanation of the reasons for the termination of her employ. Exhibit G.

13. By way of a letter dated April 12, 1991 the Superintendent of Schools advised petitioner of the reasons for the respondent's determination to discontinue her employ. Exhibit H.

14. On or about April 24, 1991 petitioner asked for a public hearing before the Board of Education to discuss the reasons for her non-renewal. Exhibit I.

15. Thereafter, petitioner was given a public hearing before the Board of Education.

Marjorie Stevens, petitioner, testified that she met with the director of curriculum and instruction in December 1990 or January 1991. The director evaluated her on January 18, 1991. They met again on January 25, 1991 and discussed the

evaluation. At the meeting, the director stated he would recommend her for reemployment.

Stevens also met with and discussed her evaluation with the superintendent in early January 1991. The superintendent told her would recommend her reemployment but there might be problems with the Board.

As seen in the stipulations, above, there were problems. On March 12, 1991 the Board voted to discontinue the petitioner's employment effective March 14. The petitioner requested reasons for the termination and was supplied Exhibit H.

At hearing, Stevens and the director both testified concerning Exhibit H. The petitioner stated her director assured her that her level of performance in the areas covered by items 2-10 was satisfactory. The petitioner also testified with more particularity as to each of the areas The director stated he had seen Exhibit H, but had not been asked for input. In the winter and spring of early 1991 he believed the petitioner was performing properly. He also testified concerning items 2-10 and stated the petitioner's performance was at least satisfactory in each area.

The petitioner also testified that she had some teaching duties when she joined the district but that, subsequently, all supervisors were assigned full-time to supervision. It was known among staff that the Board wanted better articulation and communication between and among its schools and curriculum areas. The petitioner also stated that earlier evaluations done by the high school principal and a former superintendent of schools mentioned her need to improve oral communication skills. At or near the beginning of her last year, her Personal Improvement Plan created as a goal the provision of model lessons to teachers she supervised. This is related to communication skills in that her November 1990 evaluation mentions anxiety when speaking before a group and that this interferes with her model lesson presentations.

After wide examination on several aspects of her job, the petitioner stated that her superiors expressed to her their satisfaction with her performance in early 1991. The director's testimony was generally consistent with the petitioner's.

The superintendent testified, among other things, that he notified the Board in May 1990 that the Board would have to discuss petitioner's tenure early in

the coming school year because of her hire during March rather than July or September as is the usual case. In a February 1991 memorandum to Board members he stated he would recommend the petitioner for tenure. The Board sent appropriate notices to the petitioner concerning the discussion of her employment.

Concerning Exhibit H, the superintendent stated that he signed the document but did not write the specifics. Neither did he assist in formulation of any of the reasons for dismissal. He was not asked for input. He had, however, been asked at times prior to preparation of the letter about some of the topics covered. He had, for instance, observed that the petitioner was too much a teacher representative and not enough an educational leader. He discussed this with her. In February 1991, supervisors came under the superintendent's direct control through a reorganization. Shortly thereafter, the Board decided, against his recommendation, not to give a tenure contract to the petitioner. Ordinarily, the Board Secretary would have answered the request for reasons for nonrenewal. However, because of injury, the secretary was not available. The document had to be sent to the petitioner, so the superintendent signed Exhibit H. This is the only case he can recall of a request for a statement of reasons for nonrenewal. He signed the letter as the Board's representative knowing what the Board had voted and knowing that the petitioner had requested reasons for nonrenewal. He did not discuss the contents with any Board member or with the director.

When the superintendent recommended reemployment, he did not give specific reasons. He stated he thought he had seen growth and saw potential. The January 18, 1991 evaluation of petitioner had some support value for his recommendation.

The high school principal who had been the petitioner's immediate superior until the February 1991 reorganization testified about the petitioner's strengths and weaknesses mentioned in earlier evaluations. The evaluations pointed out several areas where the petitioner could make improvement. The principal would have expected any new supervisor to exhibit areas in which improvement could be made. Generally, the evaluations from May 1988 through November 1990 do show improvement and growth while, concededly, showing additional room for professional growth. His April 1989 evaluation showed two areas in need of improvement. He characterized the overall evaluation as positive. The December 1989 evaluation showed a need for improvement in decision making, yet stated the petitioner met standards in that area. All supervisory areas were

deemed at least satisfactory in that evaluation. Similarly, later evaluations showed the petitioner meeting standards while pointing out areas that could be improved farther.

The principal supported the petitioner's reappointment without qualification. He saw professional growth, believed she took direction well, thought programs under her supervision were moving forward and had a generally positive feeling about her abilities.

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM ON WHICH THE COMMISSIONER CAN GRANT RELIEF

Upon conclusion of the petitioner's case, the Board moved to dismiss arguing that the facts presented when measured against the law show no case for the petitioner. Absent constitutional infirmity or procedural deficiency, which the parties agree are not present here, the petitioner has shown nothing to justify disturbing the Board's decision not to award a tenure contract. The best picture possible is of an improving supervisor, someone with potential. The Board did not want to take a risk with a person who needed more time and experience.

The petitioner opposed, arguing that the system of evaluation of nontenured teaching staff members is in place for good reasons. It gives the administration and Board some measure of a member's performance. It illuminates the members also. It tells them how supervisors view their performances and how those performances can be improved.

There are protections against arbitrariness, as well. Personnel decisions must be based on evaluations and recommendations made by the administration. The petitioner came into the district in March 1988. She was evaluated soon after by the high school principal and the former superintendent. She was later evaluated by the director of curriculum and instruction. The evaluations were not perfect and showed room for growth. Over nearly three years, growth was demonstrated. As of January 1991, her performance was commendable. Three supervisors directly and the superintendent indirectly agreed she should be recommended for reemployment. In personnel matters, the Board must act upon the recommendation of an administrator. Administrators are paid to make judgment calls. The Board can reject an administrator's recommendation, but cannot evaluate teachers. Here, the statement of reasons given the petitioner was based on performance. The reasons

given in Exhibit H do not come from the superintendent or the director. The Board must have reached to something else.

While the Board is free to disagree with its administration, it cannot come up with reasons based on performance when there are layers of administration between the Board and the teaching staff member. Here, all administrators recommended tenure based on observations of and their work with the petitioner. The Board came up with reasons not based on the January 18, 1991 evaluation that is a summation of the road the petitioner traveled. The reasons stated in Exhibit H are stipulated to show they exist, not for the truth or falsity of what they say.

DETERMINATION

The petitioner relies on Brescia v. Pemberton Bd. of Ed., OAL DKT. EDU 1333-90 (Dec. 27, 1990), rev'd, Comm'r of Ed. (Apr. 1, 1991). In that matter, the Commissioner specifically stated that a board of education must act in personnel matters upon the recommendation of its chief school administrator. It is within its legal right to reject such a nomination, but it may not arbitrarily act in the absence of a nomination. I can see no infirmity here. The chief school administrator made a nomination and the Board rejected it.

The Board relies on Bd. of Ed., Tp. of Wyckoff v. Wyckoff Ed. Assoc., 168 N.J. Super. 497 (App. Div. 1979), certif. den. 81 N.J. 349 (1979), for the proposition that virtually any grounds for nonrenewal are permissible except constitutionally protected ones. This includes general and subjective reasons. See, Donaldson v. North Wildwood Bd. of Ed., 65 N.J. 236, (1974).

Even though the petitioner's last evaluation showed some improvement in communications, this area alone could constitute sufficient reason for nonrenewal. The Board has virtually unlimited discretion in hiring or renewing nontenured teaching staff members, or not. Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 453-54 (App. Div. 1982). For this reason, the petitioner's argument that the Board cannot "evaluate' must be rejected. While rules require observations to be conducted by and formal evaluation instruments to be completed by appropriately certified personnel, a Board certainly does evaluate personnel, both formally and informally. Donaldson, above. Here, the superintendent reliably testified that Board members had access, within his offices, to teaching staff evaluations and that some Board members did review evaluations. That being

established, the rest lies within the discretion given to boards of education by statute and case law.

On the basis of this record, I **FIND** and **CONCLUDE** that the petitioner has shown that her performance generally improved while she was in the employ of the Spotswood Board of Education. She has not made out a case sufficient to clear the hurdles created by Wyckoff and Donaldson, above. Inasmuch as her nonrenewal violated neither procedural due process nor any other constitutional right, the Board's motion to dismiss must be **GRANTED**. It is so **ORDERED**.

I hereby file this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

11 JUNE 1992
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

6/15/92
Date

Maureen K. Kelley
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 19 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

km

WITNESSES

Marjorie Stevens
William Dunigan
Ronald L. Chiste
Peter F. Karycki

EXHIBITS

For the Respondent:

R-1a	Job Description, District Supervisor, adopted December 19, 1984, 2 pp.
R-1	Evaluation of Stevens by Karycki, May 19, 1988, 2 pp.
R-2	Evaluation of Stevens by Karycki and Byrne, May 1988, 2 pp.
R-3	Response by Stevens to Dr. Byrne, November 28, 1988 (re: R-4), 2 pp.
R-4	Evaluation of Stevens by Karycki and Byrne, November 1988, 2 pp.
R-4a	Evaluation of Stevens, January 1989, second page missing. (Mr. Karycki testified he and Dr. Byrne conducted this evaluation)
R-5	Evaluation of Stevens by Karycki and Byrne, April 24, 1989, 5 pp.
R-6	Evaluation of Stevens by Karycki, December 15, 1989, 5 pp.
R-7	Evaluation of Stevens by Karycki, April 5, 1990, 5 pp.
R-8	Evaluation of Stevens by Dunigan, November 15, 1990, 5 pp.

Joint Exhibits

A	Evaluation of Stevens by Dunigan, January 25, 1991, 5 pp.
B	Letter, Chiste to Stevens, February 5, 1991
C	Letter, Stevens to Chiste, February 8, 1991
D	Letter, Chiste to Stevens, February 27, 1991
E	Letter, Stevens to Chiste, March 4, 1991
F	Letter, Chiste to Stevens, March 21, 1991
G	Letter, Stevens to Brennan, March 15, 1991
H	Letter, Chiste to Stevens, April 12, 1991, 2 pp.
I	Memorandum, Stevens to Brennan, April 24, 1991

MARJORIE STEVENS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SPOTSWOOD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Petitioner's exceptions state she does not challenge the Board's ultimate authority to employ or not employ personnel. Rather, relying on her interpretation of Brescia v. Board of Education of the Township of Pemberton, Burlington County, decided by the Commissioner of Education April 1, 1991, petitioner submits the Board erred in relying on its own statement of reasons without the benefit of advice of its chief school administrator (CSA) in making its decision to terminate her employment.

Petitioner dismisses the ALJ's conclusion that in terminating her employment, the Board merely rejected the superintendent's recommendation. Rather, she claims that a more accurate description is that the Board ignored the superintendent's recommendation, the evaluation of January 18, 1991 and the

recommendation of Mr. Karycki, petitioner's previous supervisor. She claims the Board acted on its own without the recommendation of those charged with supervising her, and thus, she claims that the Board's action to terminate her oversteps the bounds between policy and administration, just as in the Brescia matter.

Petitioner seeks reversal of the initial decision and requests reinstatement to the position of supervisor with all back pay and emoluments owing.

The Board's reply exceptions aver petitioner misapplies Brescia, and argues that the Board fulfilled the obligation of Brescia which it contends stands for the proposition that a precondition to action by a board to transfer, appoint or by extension, terminate a teaching staff member, must be a recommendation from the CSA. Like the ALJ, the Board claims, the Board received such recommendation, but rejected it.

Further, the Board reiterates its position that a series of cases, including Dore v. Bedminster Township Board of Education, 185 N.J. Super. 447 (App. Div. 1982) and Donaldson v. Board of Education of North Wildwood, 65 N.J. 236 (1974) holds that a board has virtually unlimited discretion, absent constitutional infirmity or procedural deficiency, with respect to renewing nontenured teachers, and the board's right to reach its decision may be premised on a broad base of input derived from a variety of people including members of the public, a board member's own knowledge of a teacher even if that knowledge is acquired through having a child in the teacher's class. Thus, the Board contends these cases refute

petitioner's argument regarding the board of education's obligation to make a nonrenewal determination based solely on performance evaluations.

Also, the Board claims petitioner's version of the evidence elicited at hearing has been subtly modified, perhaps due to the lack of a written transcript. In refutation, the Board relies on the recording of the proceedings and the findings of the ALJ.

Finally, the Board contends that the position espoused by petitioner would effectively make boards of education rubber stamps for their administrative staff. The Board herein rejects such position and insists on the right to exercise its judgment.

Accordingly, the Board submits that the initial decision should be affirmed.

Upon careful and independent review of the record of this matter, which, it is noted, does not include a transcript or a tape of the proceedings below, the Commissioner affirms the initial decision for the reasons stated therein, and adds the following.

The Commissioner agrees with the ALJ that in the instant matter, the Board received the recommendation of the superintendent of schools pursuant to N.J.A.C. 6:8-4.2(a)6vii. It merely rejected such recommendation and asserted its own authority pursuant to Dore, supra, to choose not to reemploy petitioner.

In so deciding, the Commissioner notes that the instant matter is distinguishable from Brescia, supra. In Brescia, the Commissioner held that a board may not act to transfer a teaching staff member under circumstances where the CSA did not recommend such transfer. In another recently decided matter, Joyce Rotondo v. Board of Education of the Carlstadt-East Rutherford Regional High

School District, Bergen County, decided by the Commissioner May 8, 1992, the Commissioner held that a board may not act to employ any person not finally recommended by the CSA, whether on first consideration or after the board's rejection of other candidates or after the CSA's initial recommendation not to rehire.

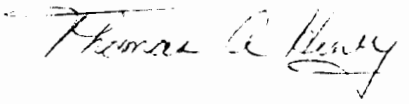
Such case law is opposite the facts of this matter, wherein the CSA did recommend the renewal of petitioner's contract. Under such circumstances, the Board was entirely within its province to reject such recommendation and, based upon its own considered information, decide not to renew. In other words, a board may reject a recommendation of a CSA to employ an individual, but may not employ an individual who has not been affirmatively recommended by the CSA. The only restriction upon a board's prerogative in nonrenewing an individual with the superintendent's recommendation to hire is when there is an allegation, not present in the instant matter, of violation of the employee's constitutional or statutory rights. See, Dore, supra:

> ***[board is within its] right to reach its conclusion about a nontenured teacher on a broad base of input received from a variety of people, including members of the public, parents of students and a board member's own knowledge of a teacher even if that knowledge is acquired through having a child in the teacher's class. (at 454)

> ***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. (at 456)

See also Donaldson, supra.

Accordingly, for the reasons expressed in the initial decision, as amplified herein, the initial decision is adopted and the Petition of Appeal dismissed, with prejudice.



ACTING COMMISSIONER OF EDUCATION

JULY 22, 1992

DATE OF MAILING - JULY 23, 1992

172-92

172-92

ITALO N. UBALDINI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
PEDRO CANCEL AND THE SCHOOL DISTRICT OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

SYNOPSIS

Petitioner, Board member and retired police officer, sought declaratory judgment alleging a conflict of interest on part of Respondent Cancel who was member of juvenile bureau of police department (assigned as security guard at high school) and elected member of school board.

Initial decision found there was no "substantial and materially sufficient" conflict of interest as to bar respondent from holding office. (Bayless) Respondent was not paid by school board and potential conflicts of interest could be cured by abstention in voting. (Elms) Petition was dismissed.

Commissioner adopted findings and determination in initial decision emphasizing Elms language.

JULY 24, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
185 WASHINGTON ST.
NEWARK, NEW JERSEY 07102
(201) 648-6186

INITIAL DECISION

OAL DKT. NO. EDU 7115-90

AGENCY DKT. NO. 123-5/90

ITALO N. UBALDINI,

Petitioner,

v.

PEDRO CANCEL, AND THE SCHOOL DISTRICT OF THE CITY OF PASSAIC, PASSAIC COUNTY,

Respondents.

Italo N. Ubaldini, pro se petitioner

Richard P. Blender, Esq., for respondent Pedro Cancel

Matthew J. Michaelis, Esq., for respondent School District of the City of Passaic, Passaic County

Record Closed: December 17, 1990 Decided: June 17, 1992

BEFORE **GEORGE PERSELAY,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner filed a petition for declaratory judgment alleging a conflict of interest on the part of Mr. Cancel, who is a member of the juvenile bureau of the City of Passaic Police Department (Police Department) and an elected member of the City of Passaic Board of Education (Board). The alleged complaint arises from Mr. Cancel's assignment as a security officer at the Passaic High School where he may be called upon to investigate criminal acts and allegations by juveniles against school personnel or by school personnel against juveniles.

The petition is dated May 8, 1990 and was received at the Commissioner of Education's office on May 11, 1990. The Board was not a named party and upon request by the Commissioner, the petitioner joined the school district of the City of Passaic.

By letter dated September 8, 1990, the Commissioner advised all parties that upon review of the petition for declaratory judgment, he had determined not to decide the matter on a declaratory judgment basis. The Commissioner stated issues raised in the petition are fact sensitive, necessitating the creation of a factual record, and that the matter was being transmitted to the Office of Administrative Law (OAL) for a hearing.

The matter was transmitted to the OAL and marked filed at OAL on September 10, 1990.

A hearing was held December 12, 1990, and the record remained opened until December 17, 1990 when the Board submitted a copy of a resolution concerning appointments list, confidential employees and nonbargaining employees.

The date for filing the initial decision was extended to June 22, 1992.

The issue to be determined in this case is whether a conflict of interest exists on the part of respondent Pedro Cancel because he is a member of the juvenile bureau of the City of Passaic Police Department and he is assigned as a security officer at the high school which is under the jurisdiction of the respondent Board of Education.

STATEMENT OF FACTS

Based upon the testimony and evidence received at the hearing, I make the following findings of fact:

1. The petitioner at the time of hearing was an elected member of the Board and was a retired officer of the City of Passaic Police Department.

2. Respondent Pedro Cancel at the time of hearing was a member of the City of Passaic Police Department and was an elected member of the City of Passaic Board of Education.

3. Officer Cancel was elected to the Board on April 5, 1988 for a three-year term. He was assigned to the juvenile division of the city police department approximately two years prior to the date of hearing and was assigned as a security officer at the high school for the school year 1989-1990. Prior to his assignment in the juvenile division, he was assigned to the patrol division.

4. The wife of the Police Chief of the police department is a tenured confidential employee of the Board whose salary, prior to the year 1990-1991 was a "gray employee" whose salary was set on an individual basis by the Board. She is a confidential administrative secretary to the superintendent of the City of Passaic Board of Education.

5. Since school year 1990-1991, the confidential administrative secretary, the police chief's wife, has been represented by a bargaining unit and her salary is no longer set individually by the Board.

6. Shortly prior to the filing of the petition in this matter, there was an incident in which a copy of the High School Proficiency Test (HSPT) was stolen and the petitioner alleges that respondent Cancel was responsible for the investigation or was part of the investigative unit that investigated the incident, sat in judgment of the student involved and participated in the verdict in the case which was guilty. As a result, the unanimous Board determination was to expel that student.

7. Mr. Cancel did not participate in the investigation nor was he given any knowledge of the investigation nor any related event prior to the presentation to the entire Board. The investigation was conducted by Detective Sergeant Henderson of the juvenile division.

8. Any juvenile complaints are referred to the detectives assigned to the juvenile division "downtown" (at police headquarters) and are not referred to the security officers at the high school, such as respondent Cancel.

9. The petition was amended at the opening of the hearing to allege a conflict of interest on the part of Mr. Cancel in voting for salaries for the wife of the chief of police.

DISCUSSION

Based upon the testimony received at the hearing, respondent Cancel was not involved in any manner other than in his official capacity as a Board member in the incident involving the theft of the HSPT test. The allegations of the petition in this matter assume his possible involvement in the investigation, his predetermination or a position to prejudge for or against the subject being investigated, and that he may make a predetermined disposition of any case because he is assigned to the juvenile division.

The allegations of the petition are purely speculative, and, in fact, are erroneous speculations, in the matter of the HSPT theft.

The petition contains an allegation of conflict of interest on the part of Mr. Cancel because his salary is allegedly paid one-half by the City of Passaic and one-half by the Board of Education. I am satisfied from the evidence presented that Officer Cancel's salary is paid by the City of Passaic and that he is paid as a police officer and member of the police department.

The respondent Board provided background information on a contribution made to the City of Passaic by the Board of Education for security officer reimbursement. While it is true that the Board receives its funding from the City, there came a time in 1983

when the salary of crossing guards was the subject of concern to both the Board and the municipality. At that time, the Board was advised that it could not provide crossing guards and pay their salaries as a Board expense. The Board was advised by the Assistant Commissioner of Education at the time that they could enter into an agreement with the municipality and reimburse the municipality for the cost of such services. As a result of that information, the City of Passaic and the Board agreed, with the approval of the Director of Local Government Services, that the Board would provide the sum of $46,000 for security officer reimbursement; and the municipality passed Resolution No. 5340-89, dated May 30, 1989, including the sum of $46,000 to be received from the Board for security officer reimbursement to be included as an item of general revenue in the 1989 budget.

The evidence is clear that respondent Cancel receives his salary from the City of Passaic Police Department. The City receives the sum of $46,000 for security officer reimbursement from the Board as an item of general revenue. The salary of respondent Cancel is not paid by the Board. Accordingly, any conflict of interest based on this allegation must necessarily be dismissed.

The amended charge that Cancel is in a conflict of interest because he votes on the salary of the wife of the chief of police is moot; that matter is moot because the employee is now a member of a bargaining unit. As to any votes which may have been taken prior to her inclusion in the bargaining unit, Mr. Cancel testified that he had never met the chief of police, had never had any conversations with the chief of police, no conversations regarding the chief's wife's position and salary, and that he had never received a request of any kind dealing with the matter. He testified that he abstained from a vote at a closed session of the Board, and that he abstained publicly at a meeting of the committee of the whole with regard to the salary resolution. He stated he was present at the time the salary resolution was presented for passage, but he did not recall whether he voted or abstained at that time. His reason for such action was a suggestion by several teachers that any vote by him would be a sign of impropriety because of his presence in the school.

A conflict of interest must be "substantial and materially sufficient," to bar a person from holding office. In re Bayless, 1974 S.L.D. 595, rev'd St. Bd. of Ed., 1974 S.L.D. 603.

In Elms v. Mt. Olive Bd. of Ed., 1977 S.L.D. 713, the Commissioner held that potential conflicts of interest on the part of Board members can be cured by abstention.

The petitioner has submitted a letter dated June 14, 1989 from the then-Attorney General of the State of New Jersey to an assistant prosecutor in the Camden County Prosecutor's Office relative to an inquiry concerning a possible "prohibition of political activity by municipal police officers." I have attached that letter of suggested guidelines as an appendix to this decision. The suggestion is made that the prosecutor recommend to municipal police chiefs certain possible restrictions with respect to political activities by police officers. The guideline appears on page 2 of the letter as Guideline 1. There is no evidence of such guideline being a State policy, or a policy of the Attorney General of the State New Jersey having application to every police officer or department throughout the State. It is true that such a guideline may have application to any police department in the State, but there has been no showing that the chief of police of the City of Passaic has issued such guideline prior to the filing of the petition, and, indeed, the election of the respondent Cancel on April 5, 1988.

I am satisfied that Mr. Cancel is a person of substantial credibility. The allegations of conflict of interest made against him, based on the evidence, appear to be without foundation.

CONCLUSIONS

Based upon the foregoing findings of fact, general discussion, and the evidence presented at the hearing, I **CONCLUDE** that there is no evidence of a substantial and materially sufficient conflict of interest on the part of respondent Pedro Cancel which

should disqualify him from being a member and participating in Board of Education determinations nor serving as an elected member of the City of Passaic Board of Education. I further **CONCLUDE** that the petition in this matter should be **DISMISSED**, with prejudice.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 17, 1992
DATE

GEORGE PERSKAY, ALJ

Receipt Acknowledged:

6/22/92
Date

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 23 1992
Date

OFFICE OF ADMINISTRATIVE LAW

njf

APPENDIX

WITNESSES

For Petitioner:

Italo N. Ubaldini

For Respondent:

Pedro Cancel
Detective-Sergeant Henderson

EVIDENCE

P-1 Letter dated June 14, 1989, Attorney General of New Jersey to Norman P. Muhlbaier

RB-1 Extract from the minutes of the City of Passaic Board of Education, held June 25, 1990

P1

State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CRIMINAL JUSTICE
25 MARKET STREET
CN 085
TRENTON, NEW JERSEY 08625-0085
TELEPHONE 609-984-6500

PETER N. PERRETTI, JR.
ATTORNEY GENERAL

ROBERT T. WINTER
DIRECTOR

RECEIVED
JUN 15 1989
PROSECUTORS SUPERVISORY SECTION

June 14, 1989

Norman P. Muhlbaier
Assistant Prosecutor
Camden County Prosecutor's Office
Parkade Building
518 Market Street
Camden, New Jersey 08101

Dear Mr. Muhlbaier:

As requested in your letter of May 17, 1989, we have reviewed your inquiry concerning a possible prohibition of political activity by municipal police officers. In particular, you asked that such a prohibition could extend to: campaigning; donating funds; and endorsing candidates for office in any general or primary election or for the adoption or rejection of any public question in any election.

There is very little precedent or authority specifically treating this subject concerning municipal police officers. Nevertheless, we believe that, in general, it is necessary to strike a balance between the rights of a public employee and the legitimate interest of the public employer. " . . . it has been settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." Conmick v. Meyers, 103 S.Ct. 1684 (1983).

It would appear that the trend in recent years has been to afford the public employee greater latitude with respect to participation in political activities. For example, the 1986 revision of the civil service laws eliminated the former prohibition against a person holding a position in the classified service from participating in political activities or campaigns at any time ". . . so as to impair his usefulness in the position in which he is employed . . ." N.J.S.A. 11:7-2 (c.f. N.J.S.A. 11A:2-23).

More specifically, with respect to law enforcement personnel, this year the Department of Law and Public Safety revised its Code of Ethics. This revision liberalized permissible political activities by Department employees, including those with authority to enforce criminal laws, compared with the prior Code which incorporated the regulations adopted by the County Prosecutors' Association.

Mindful of the paucity of authority, but at the same time aware of a trend toward less restriction on permissible political activities by public employees, we would suggest the following as guidelines for the Prosecutor to recommend to municipal police chiefs with respect to political activities by police officers:

1) a police officer shall not be a candidate for or hold office in an elective public position or political organization within or inclusive of the jurisdiction in which he is employed. But, for example, it would be permissible for a police officer in one municipality to be on the school board in another municipality. This proposal is adopted for the reasons set forth in Fitzgerald v. Mathesius 136 N.J.Super. 93 (Law Div. 1975) and on the grounds that a police officer's responsibilities and those of an elected public official or political party officer could result in incompatibility of offices. See also Hickman v. City of Dallas, 475 F.Supp. 137 (1979); MacKenzie v. Snow, 675 F.Supp. 1333 (1987);

2) a police officer may contribute funds or any other thing of value to a candidate for public office subject to the provision of any law governing such contributions;

3) a police officer shall not engage in any political activity while on duty or at any other time if to do so would conflict with his official duties, interfere with the operation of his department or impair his ability to perform his duties;

4) a police officer shall not directly or indirectly use or seek to use his official position to influence the political activity of another person;

5) a police officer shall not engage in any polling duties except in the performance of his official duties; and

6) a police officer shall not display any political campaign material on any government property or on his person while on duty or in uniform.

In recommending the above, we are also aware of the decision of the New Jersey Supreme Court In the Matter of Randolph, 101 N.J. 425 (1986) in which the Court upheld its own Rule 1:17-1 which bans political activity by all court personnel. However, it would appear that this opinion is restricted to an interpretation that the New Jersey Constitution requires " . . . the complete separation of politics from the judiciary . . ." and is not intended to necessarily apply to all governmental employees. Moreover, the constitutionality of this Rule is at present being challenged in the federal court.

Lastly, we would suggest that in acting upon the above guidelines, the Prosecutor should take into consideration the appropriateness of any municipal ordinances, police department rules and regulations or contractual provisions regarding this subject.

Very truly yours,

James M. Keating, Jr.
Deputy Attorney General
Police Legal Advisor Section

/rs
c: Gregory Sakowicz, DAG
Alvin Shpeen, DAG

ITALO N. UBALDINI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
PEDRO CANCEL AND THE SCHOOL DISTRICT OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	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 a careful and independent review of the record of this matter, the Commissioner affirms the findings and conclusions of the Office of Administrative Law that petitioner has failed to meet his burden of demonstrating, by substantial credible evidence in the record, that Respondent Cancel stands in conflict of interest in that he is employed by the Passaic County Police Department attached to the juvenile bureau, and serving as a security officer at Passaic High School, while a member of the Board of Education of the same district. In this regard, the Commissioner relies on the findings of facts adduced by the ALJ at hearing and upon careful inspection of the exhibits brought to the record.

Further, the Commissioner concurs with the ALJ's conclusion that petitioner's claim, made by way of amendment of his Petition of Appeal, that Respondent Cancel is in conflict of interest because he

votes on the salary of the wife of the city chief of police, is moot by virtue of the fact that the employee is now a member of a bargaining unit. See, for example, Patsy Salerno v. Board of Education of the Township of Old Bridge, Middlesex County, decided by the Commissioner April 23, 1984.

Finally, it is noted that while the record closed in this matter on December 17, 1990, the initial decision was not rendered until June 17, 1992. The record establishes that Respondent Cancel was elected to the Board on April 5, 1988 for a three-year term. Such term would have expired in April 1991. The record does not make plain whether Respondent Cancel sought or was elected to office as a board member thereafter, raising the spectre of whether this matter in toto is moot. However, if Respondent Cancel currently is a member of the Board of Education in Passaic while assigned as a security officer at Passaic High School by the Passaic Police Department, he should be guided, in general, in the event that he is assigned to investigate a student infraction, by the principle that a board member should not only avoid conflicts of interest, but also potential conflicts of interest or even the appearance of a conflict of interest. See Elms et al. v. Mt. Olive Twp. Bd. of Ed., 1977 S.L.D. 713. See also N.J.S.A. 18A:12-2. The rule of thumb to be followed in potential conflicts of interest on the part of board members can be cured by abstention in voting. Thus, were he to be involved in the investigation of a student in his capacity as a police officer, Respondent Cancel should abstain from voting on such incident should it come before the Board for action to avoid the appearance or potential of a conflict of interest.

With such caveat extended, the Commissioner adopts the initial decision for the reasons stated therein and dismisses the Petition of Appeal.

Thomas A Henry

ACTING COMMISSIONER OF EDUCATION

JULY 24, 1992

DATE OF MAILING - JUY 24, 1992

174-92

EDU #3719-91
C # 174-92
SB # 35-92

IN THE MATTER OF THE TENURE :
HEARING OF DR. PETER J. ROMANOLI, : STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF WILLINGBORO, BURLINGTON :
COUNTY. :
:

Decided by the Commissioner of Education, July 29, 1992

For the Petitioner-Respondent, Hill Wallack
(Rocky L. Peterson, Esq., of Counsel)

For the Respondent-Appellant, Margaret C. Murphy, Esq.

For the reasons expressed in the decision below, the State Board of Education affirms the Commissioner's determination that Respondent engaged in unbecoming conduct warranting dismissal from his tenured position as superintendent of schools. In affirming this determination, we stress, as did the Commissioner, the seriousness of Respondent's conduct in absenting himself from the district for vacation during the period in which the Board was preparing its 1990-91 budget. This breech of professionalism is of such consequence that, in our view, it alone justifies Respondent's dismissal.

John T. Klagholz opposed.

S. David Brandt abstained.

December 2, 1992

Date of mailing DEC 04 1992

175-92

175-92

SALLY PRIMKA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF JAMESBURG, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, former full-time learning disability teacher-consultant (LDT-C), alleged Board improperly abolished her full-time position despite recommendation of the superintendent. Petitioner contended RIF was not for reasons of economy.

ALJ found Board did improperly abolish her full-time LDT-C position. Board changed special education plan without approval. Board was ordered to reinstate full-time LDT-C position for 1992-93 or immediately secure approval on its changes. No back pay was awarded to petitioner as she rejected other full-time employment. Otherwise, petition was dismissed.

Commissioner adopted findings and determination in initial decision noting that Brescia and Rotondo are not implicated in this matter, which dealt with a reduction in force.

JULY 30, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7454-91
AGENCY DKT. NO. 239-6/91

SALLY PRIMKA,
Petitioner,
v.
JAMESBURG BOROUGH BOARD OF EDUCATION,
Respondent.

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

Ralph V. Furino, Jr., Esq., for respondent

Record Closed: March 19, 1992 Decided: June 19, 1992

BEFORE **DANIEL B. McKEOWN,** ALJ:

Sally Primka (petitioner), employed by the Jamesburg Borough Board of Education (Board) as a learning disability teacher-consultant (LDT/C), filed a three count Petition of Appeal to the Commissioner of Education alleging that following a reduction in force for asserted reasons of economy which resulted in her full-time employment being reduced to part-time the Board refuses to properly recognize her tenure and seniority, that the Board abolished her full-time position in the first instance because of her refusal to amend four individual educational programs (IEPs) in order to return out-of-district pupils to in-district, and that the asserted reasons of economy are false, and that contrary to N.J.A.C. 6:8-4.3(a)(6)(bii) the Board alone determined to abolish her full-time position as LDT/C despite the contrary recommendation of the then superintendent. After the Commissioner transferred the matter August 1, 1991 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 conducted January 30, 1992 at the Jamesburg Municipal Building after which the parties filed

memoranda in support of their respective positions. Requested extensions of time within which to issue this initial decision have been granted.

Findings are reached in this initial decision that petitioner failed to establish the Board's reduction of her full-time position to part-time was in anyway retaliation against her asserted refusal to amend four IEPs; that the Board did entertain the then superintendent's contrary recommendation regarding the reduction of petitioner's full-time position to part-time but determined to initiate the reduction; but, petitioner did establish the Board violated her tenure rights. Nevertheless, petitioner is not entitled to back pay for her failure to mitigate lost wages.

FACTS

Having considered the testimony of witnesses produced at the hearing, together with having reviewed all documents, I find the following facts:

1. Petitioner has been employed by this Board for more than 19 years as a teacher. During that time she has been assigned as a teacher of reading at the elementary level, a resource room teacher, and since 1979 she has been employed on a full-time basis as the LDT/C.

2. On or about November 2, 1989, the Board, as obligated under N.J.A.C. 6:28-1.2, filed with the Department of Education through the Middlesex County Superintendent of Schools its three part special education plan for 1990-91, 1991-92 and 1992-93.

3. The Board states in Part One of the plan that it intended for those three years "To maintain existing child study team personnel." (P-2A)

4. Part Two of the Plan states that at the time of filing the Board's child study team consisted of a full-time LDT/C, a full-time school social worker, and a part-time school psychologist.

5. This special education plan was implemented as stated above during the 1990-91 school year. However, during that same

year when the Board was putting together its proposed 1991-92 current expense budget which ultimately was to be placed before the electorate at the annual school election, it determined to reduce the full-time positions of its child study team, including petitioner's full-time LDT/C position to part-time, for reasons of economy.

6. The then superintendent of schools, Anthony Nami who retired July 1, 1991 disagreed with the reduction of the LDT/C position from full to part-time. Nami let that view be known to the Board and to the Middlesex County Superintendent of Schools.

7. Nami told the Middlesex County Superintendent of Schools in a letter dated March 28, 1991 (P-9) that he would not sign the proposed 1991-92 budget until the Board explained to him why his recommendation on how to maintain the LDT/C position on a full-time basis would not be followed.

8. Nami's recommendation as explained to the County Superintendent is reproduced here in full:

> The elimination of one tuition student from Monroe High School resulting in a $36,000.00 savings, should provide the necessary funding to return three part-time special education aids to the budget. The return to the district of three more out-of-district placements will result in a savings of another $80,000.00 (approximately) which can restore the Child Study Team to full-time and secure another teacher to facilitate bringing the above mentioned students back to the district. This was and continues to be my recommendation to the Board of Education.

9. A three-way telephone conversation between and among Board President, the Board Secretary, J.M. Main, and the Middlesex County Superintendent of Schools was had. The Board secretary believed following that conversation that

Nami would sign the proposed budget if his recommendation were followed.

10. The Board Secretary explained to the Board in a memorandum (P-3) to it on April 9, 1991, a date prior to the public hearing on the proposed 1991-92 current expense budget, amendments to the budget which would have to be made in order to follow Nami's recommendation. Petitioner was in attendance when the Board discussed the memorandum and learned of the intention to reduce her full-time employment.

11. The superintendent signed the budget. The Middlesex County Superintendent of Schools approved the proposed budget, as signed by the superintendent, but with funds available only for a part-time LDT/C. (But see P-10)

12. Superintendent Nami left active employment with the Board on April 21, 1991. The Board named Allan Drapczuk as acting superintendent of schools.

13. Initially, Drapczuk believed that a full-time child study team was necessary. However, he changed his view based on his observation of how the child study team and the LDT/C functioned efficiently during 1991-92.

14. The Board entered the 1991-92 year with a part-time LDT/C and other part-time child study team positions. The Board also appointed a new coordinator of special services, Stephanie Belinker. Belinker assumed administrative duties otherwise performed by petitioner when she was a full-time LDT/C which, in the Board's view, allowed petitioner to devote her part-time LDT/C position to performing the functions of that job. (But see P-16 on petitioner's case status.)

15. Petitioner filed this action against the Board on June 24, 1991.

16. During June 1991 counsel to the parties entered discussions regarding full-time employment for petitioner. These

discussions were memorialized in writing (R-3) by Board counsel to petitioner on July 26, 1991 wherein he requested petitioner to either accept or reject a proffer of full-time employment or to make a reasonable counteroffer.

17. By letter (R-4) dated August 1, 1991 petitioner advised the Board that she would accept a 3/5 LDT/C position along with a 2/5 resource room position.

18. By letter (R-5) dated September 4, 1991 the Board reminded petitioner of a conversation had during the middle of August regarding its counteroffer of 3/5 LDT/C position with a 2/5 teacher of reading in the six, seventh, and eighth grades. Petitioner, it appears, was out-of-state at the time. Nevertheless, the Board advised petitioner's counsel that it determined on September 3, 1991 to formally appoint petitioner to the position of a 3/5 LDT/C and as a 2/5 teacher of reading at a combined salary of $39,525, or the amount she otherwise would have received had she continued as a full-time LDT/C.

19. In a near identical letter (R-7), the superintendent advised petitioner of the action taken by the Board at its meeting September 3, 1991. The superintendent also included in that letter the reading assignment schedule she would be following. That reading assignment schedule had petitioner teaching three reading classes each day, Monday through Friday with her LDT/C duties being performed after her reading assignments ended each day.

20. There is no dispute that had the part-time reading schedule and LDT/C schedule been followed as outlined above, petitioner would have been teaching more than a full-time teacher is otherwise assigned. However, the evidence shows that not only did petitioner refuse all offers of full-time employment at the salary she otherwise would have made had her LDT/C position not been reduced to part-time, petitioner made no effort to adjust the schedule so that she would not be

teaching more periods per day than a regularly employed full-time teacher.

21. Petitioner's calculation (P-5) that with federal aid her position as LDT/C on a full-time basis would cost the board in local money $30 more than it costs on a part-time basis is accurate on its face. Nevertheless, that figure by itself does not undercut the Board's abolition of a full time LDT/C for reasons of economy.

22. There is no evidence in this record that the Board ever moved before the Department of Education to amend its special education plan filed on November 2, 1989.

23. Despite requests from the County Superintendent for information on the composition of the child study team for 1991-92, the Board failed to respond. (See P-11, P-12, P-13, P-14)

24. There is no evidence in this record whatsoever that either the Board or present school administration ever attempted to force, coerce, or manipulate petitioner or the child study team to redraft individual educational plans for any child out-of-district in order to place them in-district. The only evidence in this regard is that that was the sole recommendation of former superintendent Nami who was called by petitioner to testify in support of her position in this case.

25. Though the Board apparently did not take the official action until October 15, 1991 (P-15) to reduce petitioner's employment to part-time, petitioner does not allege nor does she argue that timeliness of official action is an issue here.

ANALYSIS

Initially, it is noted that the Board erroneously states in its reply memorandum that petitioner is not a "tenure" LDT/C because "there is no statute or regulation for a tenure LDT/C". Tenure is conferred by statute, N.J.S.A. 18A:28-1 to 18, which

"should be liberally construed to achieve its beneficent ends." Spiewak v. Board of Educa. of Rutherford., 90 N.J. 63, 74 (1982). N.J.S.A. 18A:28-5 defines with specificity the conditions under which teaching staff members are entitled to the security of tenure. It provides that the services "all teaching staff members including *** teachers *** and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners," shall be under tenure upon satisfying one of the requisite statutory probationary terms set forth in the statute. See Ellicott v. Board of Educ. of Frankford Tp., 251 N.J. Super. 342, 347 (App. Div. 1991). Consequently, petitioner has acquired a tenure status in the position of LDT/C.

In count one of the petition, petitioner complains at paragraph six that the Board refuses to recognize her seniority by permitting nontenure, or less senior teachers, to remain in the district. On that basis, petitioner says her seniority was violated. There is no evidence in this record that the Board retains in its employ any nontenure teacher to the detriment of petitioner. Consequently, it cannot be said on petitioner's argument that her seniority was violated.

Petitioner alleges in count two that on or about March 25, 1991 "respondent" advised her it would reduce her full-time LDT/C position unless she and other members of the child study team redrafted individual educational plan for four out-of-district pupils. The evidence brought forward by petitioner does not support that allegations in any manner.

Count three of the petition alleges that because the Board reduced petitioner's LDT/C position to part-time and such determination was not made upon the recommendation of the then superintendent, the Board violated N.J.A.C. 6:8-4.3(a)(6)(vii). That rule provides

> The chief school administrator shall recommend to the District Board of Education formal appointment of all teaching staff members.

Petitioner reads the regulation to mean that the Board may not abolish full-time positions in favor of part-time positions without the affirmative recommendation of the superintendent.

The Board is obligated to consider the recommendation of the superintendent under this rule and under the Commissioner's interpretation of the rule in Brescia v. Board of Ed Pemperton Tp., 1991 SLD-(April 12, 1991). The Board is not bound by the recommendation of the superintendent. N.J.S.A. 18A:28-9 provides boards of education with the authority to reduce the number of teaching staff members when, in its judgment, it is advisable to do so for reasons of economy. To require the Board to rigidly follow the recommendation of the superintendent would infringe its power to abolish positions under that statutory authority. Moreover, in this case, recall that the superintendent's recommendation was based solely upon his plan to change the placement of youngsters out-of-district to in-district placements. To arbitrarily determine that the placement of a youngster in need of special education shall be changed, without prior consultation of the parents involved, appears on its face to be highly improper. Consequently, I conclude on the evidence in this record that while the Board received the recommendation of the superintendent, there is no evidence produced by petitioner which would show that it arbitrarily rejected that recommendation.

Petitioner contends that the Board had no real reasons of economy upon which to reduce the full-time LDT/C to part-time because, in essence, it only saved $30. The Board says, to the contrary, that the operation of its child study team is more efficient now with a coordinator of special services that it had been when petitioner was a full-time LDT/C. I am more inclined to accept the argument of the Board that the efficiency of the child study team is higher now than it had been earlier without more evidence from petitioner that somehow the Board's reasons for economy are false. It is petitioner who carries the burden of persuasion and, in this regard, there is simply insufficient evidence and argument produced by petitioner for her to prevail on this point.

Despite all the foregoing, the Board committed a grave error by unilaterally changing its filed and approved special education plan during 1991-92 without the prior approval of the Department of Education through the Middlesex County superintendent of schools. This is so for N.J.A.C. 6:28-1.2(c) specifically states "If there are any changes to parts one or three of the plan they shall be prepared in accordance with the requirements of this section. " The rule requires each district board of education to develop a written plan for special education which shall conform with the State plan for the educationally handicapped. The plan once developed, with reasonable opportunity for the participation of professional staff, parents, community members, handicapped individuals and groups representing the

handicap population, shall be submitted for approval to the Department of Education through its county office. While the Board had in existence an approved plan, the very fact it determined not to maintain its child study team personnel at the level which existed at the time the plan was approved constitutes a change in the plan. The change in the plan occurred when the Board determined to reduce the LDT/C position to full-time to part-time. Consequently, the Board is out of compliance with N.J.A.C. 6:28-1.2. Thus, it abolished petitioner's full-time LDT/C position improperly and, therefore, violated her tenure rights.

Notwithstanding this turn of events by which the conclusion is reached the Board failed to comply with N.J.A.C. 6:28-1.2 in regard to the reduction of the LDT/C position from full to part-time and the consequent violation of petitioner's tenure rights, petitioner is not entitled to back pay for this reason. The evidence demonstrates the Board had every intention of insuring petitioner full-time employment during 1991-92 by its two separate offers to her. Petitioner is properly certificated to teach reading at the elementary level and to be a LDT/C. Petitioner rejected the last proffered assignment because her schedule would have called for her to teach more than a full day. There is little doubt that once that situation was called to the attention of the superintendent, it could have been adjusted so that she would be teaching a full schedule. Petitioner rejected the offered full-time employment out of hand. Consequently, to award petitioner back pay in these circumstances would be to expend public funds for services not rendered.

In summary, while a board of education has authority to abolish positions for reasons of economy, when the position abolishment affects special education the Board must take special care to adjust its plan for special education accordingly and to get the adjustments approved. In this case, because the Board failed to adjust its plan and to receive approval on that adjustment, it must either restore the position of LDT/C to full-time for 1992-93 or, alternatively, immediately secure approval on its change. In all other respects, the petition of appeal is **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 19, 1992
Date

Daniel B McKeown
DANIEL B. McKEOWN, ALJ

Receipt Acknowledged:

6/23/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 26 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

tmp

DOCUMENTS IN EVIDENCE

P-1	Identification only
P-2A	Special Education Plan, Part One
P-2B	Special Education Plan Part Two
P-2C	Needs Assessment Survey
P-2D	Handicapped pupils enrollment
P-2E	Special Education Plan, Part Three
P-3	Memorandum, April 9, 1991
P-4	Performance Report, flow-through funds
P-5	Comparison of costs
P-6	Identification only
P-7	Minutes Parent Community Meeting
P-8	Budget Statement
P-9	Letter, March 28, 1991
P-10	Letter, April 25, 1991
P-11	Letter, June 27, 1991
P-12	Letter, July 1, 1991
P-13	Letter, July 16, 1991
P-14	Letter, July 23, 1991
P-15	Minutes, October 15, 1991
P-16	Status of cases assigned petitioner

R-1	School District Budget Statement
R-2	Letter, July 15, 1991
R-3	Letter, July 26, 1991
R-4	Letter, August 1, 1991
R-5	Letter, September 4, 1991
R-6	Identification only
R-7	Letter, September 4, 1991

SALLY PRIMKA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF JAMESBURG, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were untimely filed at the Department of Education pursuant to N.J.A.C. 1:1-18.4 in that the express mail, next-day-service verification indicates the exceptions were mailed on July 9, 1992, the due date for the exceptions. The time-receipt stamps in the Commissioner's office and in the Bureau of Controversies and Disputes denote that the exceptions were filed on July 10, 1992, one day beyond the regulatory period provided for by N.J.A.C. 1:1-18.4 by virtue of the decision having been mailed on June 26, 1992. By faxed transmission received in the Bureau of Controversies and Disputes on July 20, 1992, petitioner's attorney submitted his certification stating that notwithstanding three calls to OAL between June 23, 1992 and June 30, 1992, he did not receive a copy of the decision with the cover letter, which showed that the decision was mailed on June 26, 1992, until July 7, 1992 although he indicates in said certification

that OAL faxed him a copy of the decision on June 30, 1992. It is clear from such certification that petitioner's counsel was obligated by no later than July 9, 1992, to contact Controversies and Disputes to seek an extension to file exceptions if he believed he could not meet the regulatory deadline. N.J.A.C. 1:1-18.8(b) No such request was timely forthcoming. Consequently, such exceptions and the Board's reply exceptions are not made part of the Commissioner's review.

Upon careful and independent review of the record of this matter, the Commissioner adopts as his own the findings of fact and conclusions of law established by the ALJ. In so concluding, the Commissioner would clarify that the holdings in Brescia v. Board of Education of the Township of Pemberton, Burlington County, decided by the Commissioner April 1, 1991 and in the recent case captioned Rotondo v. Carlstadt-East Rutherford Regional High School District, Bergen County, decided by the Commissioner May 8, 1992 address the superintendent's role under N.J.A.C. 6:8-4.2(a)(6)vii, which states the chief school administrator shall recommend to the district board of education formal appointment of all teaching staff members. Brescia dealt with the transfer of a teaching staff member, Rotondo with a nonrenewal. Because the instant matter deals with a reduction in force, neither N.J.A.C. 6:8-4.2(a)(6)vii nor such cases as Brescia or Rotondo are implicated in this matter.

With such clarification, the Commissioner adopts the initial decision of the Office of Administrative Law for the reasons stated therein and directs either the restoration of the position of

LDT/C to full time for the 1992-93 school year or, alternatively, to immediately secure approval on its special education plan.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 30, 1992

DATE OF MAILING - JULY 31, 1992

175-92

EDU #7454-91
C # 175-92
SB # 34-92

SALLY PRIMKA,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF JAMESBURG, MIDDLESEX COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 30, 1992

For the Petitioner-Appellant, Klausner, Hunter, Cige & Seid
(Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Respondent, Schwartz, Simon & Edelstein
(Nathanya G. Simon, Esq., of Counsel)

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

December 2, 1992

Date of mailing DEC 04 1992

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176-92

S.R., by his guardian ad litem, J.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF MORRIS REGIONAL HIGH SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

AUGUST 3, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT NO. EDU 2890 92
AGENCY DKT. NO. 159-4/92

S.R. BY HIS GUARDIAN AD LITEM, J.R.,
Petitioner,
v.
BOARD OF EDUCATION OF MORRIS REGIONAL HIGH SCHOOL DISTRICT,
Respondent.

Paul M. Selitto, Esq., for petitioner
(Pitman, Senesky, Nicola & Selitto, attorneys)

Sidney A.Sayovitz, Esq., for respondent
(Young, Tarshis, Dimiero & Sayovitz, attorneys)

Record Closed: June 10, 1992 Decided: June 15, 1992

BEFORE **RONALD I. PARKER,** ALJ

STATEMENT OF THE CASE

In this matter, petitioner, S.R. by his guardian ad litem, J.R., through a Petition of Appeal with Motion for Emergent Relief, sought to stay the respondent's action of expelling S.R. and sought to reinstate S.R.'s tutoring program during pendency of a hearing on the merits.

On April 23, 1992, I was assigned by the Director of the Office of Administrative Law (OAL), pursuant to *N.J.S.A.* 52:14F-5o, to hear this emergent relief matter. The hearing was originally scheduled to be held at the OAL, Newark, New Jersey, at 1:30 p.m. on April 27, 1992, but was adjourned at the request of the parties. A response brief was received on April 27, 1992, and a status conference was held on April 30, 1992.

At that time, respondent's counsel indicated and subsequently confirmed later that day that the respondent would continue to provide tutoring services while the parties attempted to negotiate a settlement. On May 8, 1992, during a continued status conference, the undersigned was notified that the matter had tentatively been settled subject to the approval of parties.

On June 10, 1992, an executed Stipulation of Settlement (see J-1, attached) was received by the undersigned. Counsel for both parties have by their signatures indicated that their clients have fully agreed to the terms of the agreement and that it was entered into freely and voluntarily.

I have reviewed the terms of settlement, and I **FIND**:

(a) that the settlement is voluntary,
(b) that it is consistent with the law, and
(c) that it is fully dispositive of all issues in controversy

CONCLUSION AND ORDER

Consequently, I **CONCLUDE** that the attached Stipulation of Settlement meets the requirements of *N.J.A.C.* 1:1-19.1, and I approve same. In conjunction therewith, I **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED.**

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 18, 1992
DATE

Ronald I. Parker
RONALD I. PARKER, ALJ

Receipt Acknowledged:

6/19/92
DATE

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 23 1992
DATE

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

tw/e

EXHIBITS

J-1 Signed Stipulation of Settlement, dated June 3, 1992

PITMAN, SENESKY, NICOLA & SELITTO
64 Diamond Spring Road
Post Office Box 67
Denville, New Jersey 07834
(201) 627-0800
Attorneys for Petitioner

S. R., a Minor by his Guardian Ad Litem, JULIA RYAN, Petitioner,	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
vs.	DOCKET NO.: EDU-2890-92
MORRIS HILLS REGIONAL DISTRICT BOARD OF EDUCATION, Respondent.	STIPULATION OF SETTLEMENT

The matter in controversy having been amicably resolved between the parties, it is agreed as follows:

1. Morris Hills Regional District Board of Education shall permanently remove any and all records from the school files of S. R. indicating that he had been expelled on April 13, 1992;

2. That S. R. shall receive tutoring until the end of the 1991-92 school year. Said tutoring shall be administered with a frequency to allow S. R. to complete and receive final grades for all of the school subjects in which he was registered as of January 13, 1992;

3. That S. R. shall dismiss the Complaint filed under Docket No.: EDU-2890-92;

4. That S. R. shall be excluded from any schools operated by Respondent, effective immediately, and S.R. shall withdraw from said schools effective June 30, 1992;

5. That S.R. shall never return to nor enroll at any public school operated by the Board of Education of the Morris Hills Regional School District and hereby waives any rights that he may have, now or in the future, to return to the aforementioned public school system; and

6. That neither party shall make disclosure of the contents of this agreement to any third party, including but not limited to, any newspaper or publication which may be circulated among the general public. However, S.R. shall be permitted to disclose information as necessary to further his admission into other educational institutions.

PITMAN, SENESKY, NICOLA & SELITTO
Attorneys for Petitioner

By: _____
Paul M. Selitto, Esq.

YOUNG, TARSHIS, DIMIERO & SAYOVITZ
Attorneys for Respondent

By: _____
Sidney A. Sayovitz, Esq.

Dated: June 3, 1992.

S.R., by his guardian ad litem, J.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF MORRIS REGIONAL HIGH SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law in the form of a joint stipulation of settlement have been reviewed. No exceptions therefore, were filed by the parties.

Upon careful and independent review of the record of this matter, the Commissioner rejects the instant settlement for the reasons that follow.

Paragraph one of the settlement states:

> Morris Hills Regional District Board of Education shall permanently remove any and all records from the school files of S.R. indicating that he had been expelled on April 13, 1992.

Paragraph six of the settlement states:

> That neither party shall make disclosure of the contents of this agreement to any third party, including but not limited to, any newspaper or publication which may be circulated among the general public. However, S.R. shall be permitted to disclose information as necessary to further his admission into other educational institutions.

The Commissioner is constrained to prevent in this case what amounts to the withholding of information in a pupil record that S.R. was expelled. Indeed, the terms of the instant settlement would preclude any other public school district in New Jersey in which S.R. may seek enrollment from acquiring knowledge of such expulsion. The Commissioner will not condone the deliberate suppression of the kinds of information required to be kept as a mandated record. (N.J.A.C. 6:3-2.1 et seq.) N.J.A.C. 6:3-2.1(a)iii, requires that a pupil's mandated record include a description of pupil progress. In this case, S.R.'s mandated record would reflect the reasons for which his program assignment while attending respondent's schools was terminated, i.e. as a result of explusion. Such information at the present time is unquestionably, educationally relevant for any local district to which he may seek enrollment.

Pursuant to N.J.S.A. 18A:36-19a such mandated records are subject to transfer as part of the pupil's record upon request from the chief school administrator of a district where a child seeks to enroll. Thus, they may not be suppressed.

Moreover, as regards the terms of the instant settlement, it must be emphasized that such terms are part of the Commissioner's decision in this matter and are also public information pursuant to N.J.S.A. 47:1A-1 et seq., absent a determination to seal a record, which the Commissioner finds inappropriate under the circumstances of this matter.

Accordingly, the Commissioner rejects the instant settlement and remands for further action. Should the parties not

be able to amicably reach terms of a settlement in accord with the observations noted herein, the matter is to proceed to an adjudication on the merits of all claims.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 3, 1992

DATE OF MAILING - AUGUST 3, 1992

176-92

EDU #2890-92
C # 176-92
SB # 39-92

S.R., by his guardian ad litem, J.R.,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL HIGH SCHOOL DISTRICT, MORRIS COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 3, 1992

For the Petitioner-Appellant, Pitman, Senesky, Nicola & Selitto (Paul M. Selitto, Esq., of Counsel)

For the Respondent-Appellant, Young, Tarshis, Dimiero & Sayovitz (Sidney A. Sayovitz, Esq., of Counsel)

For the reasons expressed therein, the State Board of Education affirms the decision of the Commissioner.

S. David Brandt and John T. Klagholz opposed.

December 2, 1992

Date of mailing DEC 04 1992

177-92

177-92

NEW JERSEY EDUCATION ASSOCIATION, (PARTICIPANT), ABDUL-MALIK ALI, JAMILH ALI AND K.A., MINORS BY THEIR GUARDIAN, ABDUL-MALIK ALI,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

RESPONDENT,

AND

WHITTLE COMMUNICATIONS, L.P.,

INTERVENOR-RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent and Participant New Jersey Education Association (hereinafter petitioner) sought declaration that Board violated N.J.S.A. 18A:51-13 and 14, perverted compulsory attendance laws of New Jersey, and failed to provide thorough and efficient system of free public schools in favor of commercial interests by entering into contract with Whittle Communications Educational Network for reception of Channel One news program. Channel One consists of a 12-minute news and information program and two minutes of commercial advertising. New Jersey School Boards Association (NJSBA) was also granted participant status.

Having found this case turns on application of education laws, and in light of testimony of witnesses and exhibits submitted in evidence, ALJ concluded the commercial content of Channel One broadcasts is inappropriate for use in homeroom or any other school day period. An arrangement that cumulatively takes more than a school day of instructional time (over a year) from children for commercial purposes is not efficient. Thus, it violates art. VIII, sec. 4, para. 1 of New Jersey Constitution (thorough and efficient clause). ALJ further found nonprofit educational statues N.J.S.A. 18A:51-13 were not violated by the contract. ALJ determined compulsory attendance statute (N.J.S.A. 18A:38-25) is offended as even the indirect benefits to Board cannot justify compulsory viewing of commercial advertisements by children who are compelled

to attend school. ALJ dismissed pupil records argument under N.J.A.C. 6:3-2.1 et seq. as being without merit because Whittle's access to data regarding pupils was limited to general numerical data related to numbers of pupils attending the school. ALJ also dismissed constitutional challenge under art. VIII, sec. 3, pars. 2 and 3 of New Jersey Constitution of 1947 because arguments and clause were improperly raised. ALJ ordered Board to cease performance under contract or to reform the Whittle contract to remove infirmities.

Commissioner affirmed in part/reversed in part the ALJ's initial decision. Initially, the Commissioner concurred with the ALJ's dismissal of the pupil records argument because petitioner did not prove violation of N.J.A.C. 6:3-2.5. In addition, Commissioner concurred that constitutional challenge under art. VIII, sec. 3, pars. 2 and 3 was untimely lodged. Commissioner adopted as his own ALJ's conclusion that N.J.S.A. 18A: 51-13 et seq. was not relevant to type of contract under examination in this matter as that statute provides for nonprofit television contracts. In all other regards, the initial decision was rejected and the petition was dismissed. Commissioner found Board had discretionary authority pursuant to N.J.S.A. 18A:11-1 to contract for Whittle's services and that Board's determination that benefits gained by such contract with Whittle outweighed exposing pupils to two minutes of commercials was not arbitrary, capricious or unreasonable. Moreover, construing N.J.S.A. 18A:38-25, the compulsory education statute, the Commissioner determined that pupils are not actually compelled to watch the Channel One programming. Further, Commissioner rejected ALJ's analysis and conclusion that art. VIII, sec. 4, para. 1 of the New Jersey Constitution of 1947 was violated because, allegedly, students lose instructional time by watching commercials, finding that instructional time remains the same with or without Channel One because programming is not shown during instructional period. Moreover, Commissioner relied on State v. Whittle Communications, 328 N.C. 456, 464 (1991), finding that no student is compelled to even pay attention to the programming or the commercials. Therefore, the thorough and efficient clause of the New Jersey Constitution was not implicated in this case. Commissioner limited holding to facts of this case and cautioned that under facts where more commercial intrusion existed, decision could find board's action unreasonable and arbitrary. Commissioner recognized the need not to impair a board of education's ability to avail itself of modern technology. However, he further emphasized the sanctity of the continuity of instruction and his concern for the abuse of intrusion on instructional time. Therefore, Commissioner cautions boards of education that they must assiduously guard against the potential for abuse that exists relative to the intrusion of commercialism within the schoolroom setting, especially as it impacts on instructional time.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4095-91
AGENCY DKT. NO. 39-2/91

NEW JERSEY EDUCATION ASSOCIATION, ABDUL-MALIK ALI, JAMILH ALI AND K. A., MINORS BY THEIR GUARDIAN, ABDUL-MALIK ALI,
Petitioners,
v.
TRENTON BOARD OF EDUCATION,
Respondent,
AND
WHITTLE COMMUNICATIONS, L.P.,
Intervenor-Respondent.

Arnold M. Mellk, Esq., for petitioners and participant New Jersey Education Association (Wills, O'Neill & Mellk, attorneys)

Thomas W. Sumners, Jr., Esq., for respondent (Sumners, Council & Inniss, attorneys)

Michael J. Herbert, Esq., for Intervenor-Respondent (Picco, Mack, Herbert, Kennedy, Jaffe & Yoskin, attorneys)

Kim Chapman Belin, Esq., for participant New Jersey School Boards Association

Record Closed: May 8, 1992 Decided: June 22, 1992

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

Prior to commencement of the 1990-91 school year, the Trenton Board of Education (Board) entered into a contract with Whittle Communications Educational Network (Whittle), under which Whittle installed equipment, including wiring and television sets within classrooms, for transmittal and reception of Channel One news programs. Channel One consists of a 12-minute news and information program "designed to make the news relevant to the concerns and studies of teenagers." Whittle Affidavit at 2. The program contains approximately two minutes of commercial advertising. The Network offers other educational programs without commercial advertising.

The petitioners filed a verified petition with the Commissioner of Education (Commissioner) dated February 22, 1991, seeking a declaration that the Board perverted the compulsory attendance laws of New Jersey; failed to provide a thorough and efficient system of free public schools within its district; abrogated its mandated duties and responsibilities in favor of commercial interests, and breached the privacy rights of petitioners Jamilh Ali and Khadijah Ali. The petitioners additionally sought a judgment declaring the contract between the Board and Whittle null and void as against the public policies and laws of New Jersey and the United States. The petitioners seek to enjoin and restrain the Board from performing upon the contract with Whittle. The petitioners filed an amendment to the verified petition, dated March 19, 1991, requesting that the Commissioner hear and determine that the matter is a controversy under school law and the contract between the Board and Whittle is incompatible with the policies, rules or regulations governing public education in New Jersey established by the State Board of Education.

The Board filed its answer and separate defenses on March 22, 1991.

Whittle filed a motion to intervene with the Commissioner dated March 26, 1991. The petitioners filed a brief in opposition alleging that Whittle's interest in the case is inconsequential and not connected logically or inherently to the issues.

The Department of Education transmitted the case to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. After reviewing the arguments regarding the motion to intervene, this judge ordered Whittle admitted as a party intervenor.

After notice, a prehearing conference was held on August 27, 1991. Among other things, it was agreed that the Board and Whittle would file prehearing motions on NJEA's standing and the Commissioner's jurisdiction over a contract issue.

On September 24, 1991, before moving papers were received, the petitioners amended their petition pursuant to N.J.A.C. 1:1-6.2 to add as a petitioner Aginah Ali, the daughter of petitioner Abdul-Malik Ali, who entered Trenton Central High School in September 1991. The amendment conforming to the rule, this judge approved it by letter order dated October 31, 1991.

On November 25, 1991, this judge issued an order dismissing so much of the appeal as goes to the commercial contract between the Board and Whittle and dismissing the New Jersey Education Association as a party.

On December 20, 1991, the Commissioner affirmed, having reviewed the judge's decision on an interlocutory basis at the request of the petitioners. The Commissioner stated that the judge's decision did not dispose of the case in that the claims of the petitioning parent and his children remained. The Commissioner concluded those claims did not arise from the terms of the contract but reached to the provision of a thorough and efficient education and to the nature of public schooling in the State. The Commissioner also found that the context in which the constitutional questions arose was such as to call for the Commissioner's expertise in interpretation.

Whittle moved before the State Board for leave to appeal, seeking dismissal of the matter entirely. The State Board considered the appeal and decided that the remaining claims in the case turn on application of the education laws. Therefore, the matter falls within the Commissioner's jurisdiction. The State Board agreed that there was no jurisdiction over purely contractual disputes. However, the State Board emphasized that the Commissioner does have incidental jurisdiction to interpret the contract so as to fulfill his obligation to resolve the education claims involved. While recognizing that the Commissioner and State Board do not have jurisdiction to decide constitutional claims, the Board emphasized its responsibility to make the administrative determinations necessary for proper disposition of the matter and to ensure an adequate record on appeal.

The State Board concluded

> Finally, in affirming the determination that NJEA has not demonstrated a direct interest sufficient to provide it with standing as a petitioner, we note, as did the ALJ, that NJEA may apply for participant status in this matter. (Slip opinion at 4).

The New Jersey School Boards Association (NJSBA) had previously applied for and been granted participant status. Subsequently, NJEA was granted participant status.

The matter was heard on March 18, 19 and 24, 1992, at the Office of Administrative Law, Trenton. The matter was thoroughly briefed and the record closed on May 8, 1992.

RELEVANT EVIDENCE

Seven persons testified and nine exhibits were admitted in evidence.

Abdul-Malik Ali testified that two of his children attend Trenton Public Schools and that he is familiar with the Channel One program. He does not want his children exposed to commercial advertisement. He was not involved in the decision making process until the Board decided to let the contract to Whittle. He and others were called in on "the last day" for a screening. He believes he was asked to be there because he is considered a parent-teacher organization leader.

On the day of viewing he protested the entire concept. He also tried to raise the question through parent-teacher organizations and personal contacts with school personnel. He stated he received no response. His objections go to the news content as well as what he calls subliminal messages in the advertising. He believed current event news is "slanted." He does not send his children to school to watch commercials.

He has never asked that his children be excused from the homeroom period in which Channel One is watched. He does not want his children branded as different or stigmatized in any way. He has never, on any grounds, tried to exempt or remove his children from any class or activity.

A.A., petitioner's daughter, testified. She attends Trenton Central High School and sees Channel One in her homeroom period which runs from 8:35-8:45

a.m. She does not like the commercials, but has never asked to be excused. She has never been advised by school personnel that she could be excused from watching the program. Announcements are made routinely on a variety of matters, but the witness has never heard an announcement that she could be excused from watching the program. Homeroom period attendance is mandatory. The witness recalled one incident when a few pupils asked if they could leave homeroom period and were denied permission. She could not say, however, why they wanted to leave homeroom. She candidly stated that pupils are required to be in homeroom, but are not required to pay attention to Channel One.

Program volume is always audible throughout the room. The Trenton Central High School update immediately follows Channel One. The update includes announcements of activities, events, important dates and the like. The witness watches the update and finds it valuable. It tells her what is going on in her school.

Laura Eshbaugh, vice chairman of Whittle for more than 20 years testified. She performs and has performed a wide range of duties in the corporation. She knows the workings of the education division. She is familiar with Channel One.

The contract between the Board and Whittle (J-1) is typical. All equipment is provided free of charge and free maintenance is provided. Equipment is installed in each school building and the district provides a person to be available during installation only. This person usually is consulted in matters of equipment placement.

Teachers are users of the equipment. Whittle trains an equipment operator for the district. Usually one or more school people are involved in screening and operating programs. Pupil viewing is required. If there were no pupil viewers, there would be no contract.

The programs are provided to impart information. The advertisements are separate and are used to underwrite the costs of programing. The network is funded by commercial sponsors, "like ads in a magazine."

According to the contract, the school must show the broadcast each day in its entirety or not at all. This includes the advertisements. In an affidavit dated

March 25, 1991, the witness stated the contract does not require any pupil to view Channel One (J-2). The contract does provide, however, that Whittle may terminate the agreement if the number of pupils in the school declines at any time during any three-year term of the contract by more than 15% from the number of pupils at the outset or if the school shows Channel One on fewer than 92% of the days on which the school is in session and the program is available in any calendar month or on fewer than 95% of the number of days on which school is in session and the program is available in any calendar quarter. Whittle may also determine that installation of the school is not economically justified to Whittle and, on that basis, terminate the contract.

This does not mean that every child must watch the program. A Board can specify, for example, that 50% of its rooms will be equipped. For however many rooms are equipped, Whittle wants pupils watching.

The witness does not know the ratio of pupils to sets in Trenton. Whittle knows how many pupils are in school when a contract is entered into. If Whittle can terminate because of a drop in viewership, it has to know the numbers of pupils watching. The witness does not, however, provide information to sponsors concerning individual schools. If a school does stop participating, there are other schools on a waiting list. The witness does tell sponsors of the total number of pupils reached daily. Presently that number is approximately 6,000,000.

Whittle's termination clause (J-1 at 6) is a condition of contract. The witness made these requirements because Whittle wants to be sure schools that want Channel One get it. Rates charged to sponsors, however, do directly relate to the numbers of pupils in the audience. Audience age also relates to rates. If advertisements were shown at a different time and place during the school day, that is, not during the Channel One program, that would depress the rates charged.

Although Whittle requires boards to give it access to monthly attendance figures (J-1), that is not the practice. The clause is in the contract because that is how the contract originally was drawn--to provide for many contingencies. In practice, Whittle does not need monthly figures. It may ask for annual update figures.

Concerning advertisements, the witness stated they are geared to a teenage audience. Some products have been excluded from advertising by

corporate decision. Whittle used a teacher panel for input in deciding the question. Some advertisements may directly promote sales; others may just keep the product in pupils' minds. The witness cannot speak with expertise about the advertisements.

Teachers' Guides and Media Specialists' Guides (I-1, I-2) are sent to all schools that use Channel One. The guides deal with Channel One and with the Classroom Channel and the Educators Channel, which are also transmitted to the schools and do not contain commercial messages. During installation, the schools' operator is instructed in how these channels work and how the schools may use them.

Whittle now has about 9,500 schools equipped and approximately 1,000 waiting. There are 240 systems in New Jersey, approximately 50 of which are parochial schools. The witness is not aware of any terminations anywhere. Whittle has never sought personnel records, only statistical information. The data they mainly need are annual attendance figures and changes in enrollment.

Channel One was tested in 1989 and went into operation nationally in March 1990. Whittle has three educator panels. An advisory panel deals with policy, an educators' panel deals with program content and an advertising review panel made up of parents and educators screens all prospective advertisements for appropriateness to the audience. The contract lists proscribed products.

A brochure (I-3) giving an overview of services and programming options is provided to schools while they are considering Channel One.

David H. Winogron, a video specialist in the Trenton Public Schools, testified. He serves 23 buildings and is familiar with the Whittle contract.

Before the district entered the contract, Winogron attended several meetings, viewed programs with district administrators and parents and provided input. One of his responsibilities was to look over technical requirements. He testified that concerns about commercial content were "for the most part" addressed in the contract.

The witness believes the Trenton Schools received their first reception in autumn 1990. The system has been expanded so that the district can broadcast over an open access cable channel. (Addendum to J-1).

Channel One is broadcast each morning at about 8:30 a.m. at the high school and four middle schools. Local school news follows. Prior to the Channel One contract, there was a once-a-week broadcast at the high school only. Each school is equipped with one color television per 23 pupils.

The district has used many programs from commercial sources including films and video tapes. There is usually a message at least identifying the company sponsoring production and what the company sells. The witness believes the commercial messages in Channel One are in good taste and appropriate to the pupils' age levels. The Channel One audience is the commercials' target. Television and VCR use has greatly expanded since the contract was entered into. If the sets are removed, the district will suffer irrespective of the reason.

Julie D. Thomas, executive director of school operations and a 35-year district employee testified. She oversees the work of principals, is involved in board policy, programs in schools and public relations. She is knowledgeable of the Whittle contract.

The witness stated she was involved initially when the superintendent put her in contact with Whittle. She got materials ready and set up meetings with staff and parents. She evaluated the program and spoke with Whittle's representatives. Because advertising is present, the witness decided community involvement was necessary. Meetings were held to which she invited all parent-teacher groups, teacher groups, pupil groups, administrators and other community groups. Two or three meetings were held. The groups saw a tape supplied by Whittle. Mr. Ali attended one session and expressed concern about the portrayal of Arabic/Muslim countries. He also objected to a soft drink commercial.

The witness contacted districts using Channel One. She had some concern about the commercial component in that it was new and different. She got parent and pupil feedback. She weighed the news and educational content against a maximum of two minutes of advertising.

Channel One is shown in homeroom periods. These periods are to accomplish attendance taking and announcement making. They are not instructional. Pupils are required to attend homeroom, but may be out for legitimate reasons. Pupils are not required to watch the television sets while

Channel One is being broadcast. The witness stated that early in the process she told principals in writing that there was no requirement of pupils to look at the television sets while Channel One was being broadcast.

The witness has observed homerooms many times. There is a great range of interest among pupils. She cannot say how much they are taking in. She has received no complaints concerning advertisements since the program began and knows of no pupil requests to be excused.

Concerning homeroom excuses, a pupil would have to approach the teacher and present a parent note or an oral reason. The principal would usually make a decision and, if there were a problem, would contact the witness. There are rooms in each school to which pupils could be sent that do not have television sets. Homeroom excusal, in the witnesses' opinion, is not stigmatizing. Many pupils are out of homeroom on any given day.

The witness has surveyed staff and student opinions of Channel One (R-1a through 1e). Results were compiled by her office from responses from the high school and middle schools. The witness considers feedback necessary. On an objection to admission, this judge ruled that the district should produce the original results rather than distillations, if they exist, on March 24. The documents can be admitted to show what the district had done. They are not per se unreliable.

So far as the witness knows, the only data provided to Whittle were provided preinstallation.

The district uses many contributed resources. For example, attendance incentives are provided by the McDonalds Corporation. Publications such as Time and Sports Illustrated provide incentives. Core States Bank, as one example, is involved in an adopt a school program. No advertisements are removed from Sports Illustrated magazines used in the incentive program. Nor are advertisements removed from newspapers used in current events classes. Any support for instruction is important. If Channel One were removed, that would represent a loss to the instructional program.

When the witness gave her professional input to the Board prior to letting the contract, the Board considered and addressed commercials. Commercials are not consistent with educational goals and the educational environment.

However, they were discussed in the total context of values. The witness knows of no writings to pupils carrying any cautions or instructions concerning advertisements.

A school year consists of approximately 1,170 hours. If Channel One were shown on 180 days, that would total 30 hours of news and six hours of commercials.

On March 24, it was represented that the originals of Ms. Thomas' survey were not available. This judge admitted Exhibits R-1a through -1e for the limited purpose of showing followup that the district had done.

The respondents presented James Caulfield, Union Township Superintendent of Schools. The witness testified as to his involvement with Whittle Communications. Union Township has a contract similar to Exhibit J-1. The witness also serves on Whittle's Educators' Advisory Committee. Exhibit I-3 describes the Educators' Advisory Board. Members view programs and send comments to Whittle periodically (I-5). He attends two meeting per year of the advisory board and is compensated for his time. His travel costs are paid by Whittle.

Murray H. Rothman, a Pennsauken teacher for 22 years testified. He is television coordinator in that district which has entered into a contract with Whittle. The witness also is a member of the Educators' Advisory Board. He regularly previews programs and provides comments to Whittle (I-5).

He has been a member of the Advisory Board for one year and has met with the Board twice. Advertising is discussed at meetings. He can recall no specific objections to advertisements, but they know "people out there" object to advertisements of any kind. Some of the advertisements in the two-minute segment are public service advertisements as distinguished from pure commercials.

ARGUMENT

Petitioners

The petitioners maintain that the contract between the Board and Whittle is illegal. N.J.S.A. 18A:51-13 provides:

> Every board is hereby authorized to make use of television as an educational aid by contracting for the services of any noncommercial, nonprofit educational television station located within or without the state but such contract shall not require the board to incur expenses in any one year. In excess of an amount equal to $2.00 per pupil in resident enrollment in the district.

This limitation, permitting contracts only for the services of noncommercial, nonprofit educational television stations has been in effect since 1962. Its language is plain. Therefore, it must be enforced according to its terms. It is a limitation on a board's powers because N.J.S.A. 18A:51-14 sets forth additional authority to participate in the organization and operation of noncommercial, nonprofit educational television stations. Channel One is a commercial and profit making television network. The contract, therefore, is ultra vires the Board and defies a clear statutory proscription.

New Jersey school children cannot be compelled to attend a school in order to be "sold" to commercial advertisers. "The right of a sovereign state to adopt legislation to direct the paths of its children to seek education for enlightenment and literacy, so as to enjoy full and complete life, is so fundamental as to relieve the need for judicial citation." Knox v. O'Brien, 7 N.J. Super. 608, 610 (Cty. Ct. 1950). N.J.S.A. 18A:38-25 compels parents to cause children between the ages of six and 16 to regularly attend the public schools. A parent who fails to comply with the compulsory attendance law is subject to prosecution. In New Jersey, compelled attendance is grounded in the State's duty to educate children. N.J.Const., (1947), Art. VIII, §IV, par. 1. This public purpose circumscribes the duties and obligations of those bodies entrusted with implementation of a thorough and efficient system of public schools. It is a limitation on what can be done to children when they attend free public schools.

Laura Eshbaugh, Vice Chairman of Whittle, testified, "I do tell my advertisers that I have a program that is reaching--the school is reaching 6,000,000 students." The purpose for which this information is given to advertisers is obvious. Exhibit J-1, p. 6, para. 5 sets forth the circumstances in which Whittle may cancel a contract. The most important factor is the provision of school children to watch commercial advertisements. In return for equipment and programing, the Board has given Whittle's advertisers exclusive access to its pupils for two minutes per day 180 times a year. This is not a legitimate use of the time for which children are compelled by law to attend school.

The Board has given Whittle the right of access to pupil records, contrary to N.J.S.A. 18A:36-19. In the contract (p. 5, para. 8), the Board agrees to maintain reasonable records showing its conformity to the agreement and will permit Whittle reasonable access to its premises, pupils, teachers and monthly attendance records. In its summation, Whittle argued that the statute is not enforceable by private petitioners. This is not so. The purpose of the statue is to provide the right of both pupil and parent or guardian to reasonable privacy as against other persons and the opportunity for the public schools to have the data necessary to provide a thorough and efficient system of education for all pupils. N.J.S.A. 18A:36-19.

Granting Whittle access to mandated pupil attendance records is incompatible with the limited use to which the records may be put; that is, to allow public schools to have the data necessary to provide a thorough and efficient educational system. The Board's pupil records cannot, on demand, be given to Whittle or any other corporate enterprise for the evident purpose of validating its advertising rates.

The contract between the Board and Whittle contravenes paragraphs two and three of Section 3 of Article VIII of the New Jersey Constitution. The Constitution prohibits, specifically, any governmental subdivision to give money, property or credit to or in aid of any corporation. It also prohibits donation of land or appropriation of money for the use of any corporation. Section 3 is designed to ensure that public money is used for public purposes. The mere fact that a public expenditure benefits a private party does not mean it violates this clause. However, the determination of violation or not must be reached with reference to the object sought to be accomplished and to the degree and manner in which the object affects the public welfare. Here, the object is Whittle's equipment and programming. But the price is too high. The Board's infrastructure--its buildings, pupils, employees--all to be utilized for the profit of Whittle. "If Whittle determines that installation of the School is not economically justifiable to Whittle," it may terminate the contract (J-1). This is not a purpose envisioned by New Jersey's system of compulsory public education.

The contract also is incompatible with Article VIII Section 4, para. 1 of the Constitution. That paragraph states

> The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children in the State between the ages of five and eighteen years.

The concept of a thorough and efficient education continually evolves. Nevertheless, there is one constant. All of the money that supports education is public money, local money no less than state money. It is authorized and controlled, in terms of source, amount, distribution, and use, by the State. Abbott v. Burke, 119 N.J. 287, 375 (1990). Funding is a State obligation and cannot be supplemented by a scheme that depends on the economic self-interest of private corporations. If television sets and satellite communications are good educational tools, then it is the State's obligation to make certain that the money for such equipment is provided. Robinson v. Cahill, 62 N.J. 473, 520 (1973). Furthermore, the Commissioner has authority to compel a local district to meet the financial commitments necessary to satisfy thorough and efficient education standards. Robinson v. Cahill, 69 N.J. 449, 461 (1976).

The obligation to fund public schools is statewide, not local. It is the obligation of government through taxation. The scheme between the Board and Whittle, with its taxation upon the children accessed to Channel One is unprincipled and unconstitutional.

The Board

The Board argues that its contract with Whittle does not violate the petitioners' right to a thorough and efficient education under the New Jersey Constitution. The education clause does state that the legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools. The ultimate goal is recognized and articulated by the Legislature in the Public School Education Act of 1975, N.J.S.A. 18A:7A-1 et seq. That statute, commonly called the Thorough and Efficient or T. and E. legislation, provides a State program to implement a thorough and efficient system of free public schools.

The petitioners' reliance on the clause is misplaced and subrogates the constitutional and statutory meaning of what constitutes a thorough and efficient system of public education. The services provided to the Board under the Whittle contract promote and further a thorough and efficient education.

The meaning of a thorough and efficient education system has been articulated in two major Supreme Court decisions, Robinson v. Cahill, 62 N.J. 473 (1973) (Robinson I), and Abbott v. Burke, 119 N.J. 287 (1990). In Robinson I, the Court addressed the then existing system of school financing:

> The Constitution's guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market. 62 N.J. at 515.

More recently, the Abbott Court held that the Public School Education Act was unconstitutional as applied to poor, urban districts. The Board says the Court stated

> The constitutional requirement of a thorough and efficient education encompasses more than instruction and the basic communications and computational skills, but also requires that students be given at least a modicum of variety and a chance to excel. 119 N.J. at 365. [This language appears in a headnote, not on p. 365, but does convey the essence of that part of the decision.]

These standards, in the Board's opinion, are not violated by the Board's contract for Channel One and other services. The petitioners apparently argue that because the Board has contracted with a corporation that provides services financed by commercial advertising, it violates its duty to provide the same services without commercial advertising. The statutes, Constitution and judicial decisions do not restrict the board from providing educational and instructional video services through private corporate sponsorship. Here, the educational and instructional services provided through the effort of a partnership with a private corporation enhance rather than undermine the scheme of a thorough and efficient education.

Thorough and efficient education requires that pupils be provided programs and activities that give them a solid foundation for successful adult lives. Channel One programming of current events and information is consistent with this goal. The Board decided that the educational benefits derived from Channel One and related programs and equipment far outweigh the two-minute commercial component of Channel One that enables Whittle to provide the services. This decision is appropriately made by a board of education. The Board thoroughly analyzed the positive and negative aspects of Channel One. The programming was reviewed by parents, teachers, principals and other administrators to determine whether the Board should contract with Whittle. The Board continued to evaluate Channel One by surveying students, teachers and principals four months after

programming commenced. The Board uses the equipment provided by Whittle for many purposes. As one example, pupils have been able to view live news coverage of noteworthy events such as the Gulf War and Supreme Court nomination proceedings.

The Board denies that its contract with Whittle violates N.J.S.A. 18A:51-13. It rejects the petitioner's arguments relying on the statute. The Board argues that the clear intent of the statute is to provide that a board of education may contract with the noncommercial, nonprofit educational television system for a maximum amount of money per pupil. This does not prohibit boards from contracting with profit making educational television producers or companies to provide educational programming and equipment free of charge because the program is financed through limited advertising.

New Jersey boards of education have broad powers to supervise, control and manage public schools and public school property. N.J.S.A. 18A:11-1. Similarly, boards are authorized to make rules and regulations for the government of the public schools and the public school property in their districts provided such actions are not arbitrary, capricious or unreasonable. The broad and expansive nature of board powers was set forth in Att'y Gen. Form. Op., 1962-No. 2. The opinion determines that local boards of education have implied powers to enter into contracts with educational television systems for a maximum per pupil cost. In reaching this decision, the Attorney General determined there are powers of a board that may be fairly implied from or incidental to expressly conferred powers. A board would have the power to enact programs or regulations that were incident to powers expressly conferred provided that they are not inconsistent with or prohibited by Constitution or statute.

N.J.S.A. 18A:51-13 prescribes the standard by which a Board may charge pupils for an educational television program. It is necessary to authorize a fee for educational services because of the underlying scheme of a free public education that students are not charged for educational programs. The statute does not limit or prohibit a board from providing educational television services provided by profit making corporations where there is no charge to the students.

The Board also argues that its contract with Whittle does not violate the compulsory attendance laws. The petitioners contend that they are compelled to watch commercial advertising in school in violation of the statutory requirement

that children between the ages of six and sixteen must regularly attend school. Because they must attend school, they should not be forced to watch the two minutes of commercial advertising shown in the 12-minute Channel One broadcast.

The law requiring compulsory attendance does not place any limitation on the content of educational programs and activities that can be provided to students. The sole purpose of the statute requires children between the ages of six and sixteen to attend school to obtain an education. The petitioners have cited no legal basis for arguing that the law supports any other requirement. The petitioners also argue that showing commercials exploits school children for commercial purposes. This argument is not supported by any testimony produced at hearing. The petitioners are required to attend school; they are not required to view the Channel One program. Nor is there any support for their allegations that students are a captive audience. One of the petitioners has admitted that she has not requested to be excused from watching Channel One programs even though she believes the commercials attempt to influence her to purchase the advertised products. No pupils have requested nor have parents requested that their children be excused from watching Channel One.

The Board's executive director of school operations testified that pupils would be excused if a request were made to be excused from watching Channel One because of its advertising content. There currently is no Board policy to address a request to be excused from having to watch Channel One. There is no such policy because there has not been any need for one. No request to be excused has ever been received even though the Board showed the Channel One program with its two-minute commercial component to parent leaders. Not one excuse from watching Channel One has been received in the year and a half that the program has been viewed in the district. Policies are enacted when there is a need or a perceived need that must be addressed. Policies are not created in a vacuum where no need has existed or been perceived. Presently, there is no policy allowing pupils to be excused on the basis of the two-minute commercial component of Channel One because there has been no indication whatsoever that any excuse was requested.

Petitioner Ali testified he did not want his children stigmatized by being excused from watching Channel One. However, there is no factual support for this allegation. The Board's director testified there would be no stigmatization if a pupil were excused from homeroom because this happens routinely for a variety of reasons. Homeroom class does not serve any educational or instructional benefit

outside of showing Channel One. Attendance is taken and announcements made. Excusal would have no impact on the educational or instructional programs provided by the Board as required by law and the reason students are required to attend school.

No pupil record confidentiality is violated by the Board's contract with Whittle. The petitioners contend the contract provision providing Whittle with reasonable records concerning attendance violates the confidentiality of pupil records required by N.J.S.A. 18A:36-19. The statute, and the regulations that flow from it, limit access to pupil records to maintain individual privacy. The contractual provision the petitioners claim violates the privacy of pupil records pertains to total numbers of pupils in a respective school, not individual records. No records of petitioners have been revealed or are contemplated by the contract to be revealed. Both the Board's director and Whittle's vice chairman underscored this.

The petitioners contend that the New Jersey Constitution is offended because the Board is giving a benefit of value to a corporation. This argument was not raised in the pleadings or during the hearing. Without waiving any objections to the improper raising of this issue, the Board maintains these constitutional provisions are irrelevant and do not bar the contract in question. They prohibit the use of public resources to benefit a private corporation. However, the New Jersey Supreme Court has held in Whalen v. N.J. Power & Light Co., 45 N.J. 237 (1965) this constitutional provision prohibits the use of public property where the public benefit is secondary to the success of the private corporation aided by a contract. Moreover, a government decision that a contract meets the needs and demands of the public is consistent with the constitutional provisions the petitioners point out even though a private corporation receives a profit from the agreement.

In the present case, the Board has not expended any public money or property under the contract. In addition, the Board has properly determined that the benefits it derives from the contract outweigh any benefits that Whittle derives from the contract.

Intervenor

Whittle asserts the legislative history of N.J.S.A. 18A:51-13 acknowledges boards of education have implied powers to enter into contracts for educational television services and to incur the necessary expenses for such services. The statute

removes any doubt as to the authority of boards to operate in this sphere and also to limit the expenditure of public funds for educational television services to $2.00 per pupil.

The Attorney General's opinion adverted to above reviewed this very issue and stated that local boards of education have the implied authority to enter into contracts if the purpose is within the scope of local board purposes. Thus, there is no doubt that local boards have plenary authority to enter into contracts with commercial enterprises for various services required by the schools and to make decisions concerning their school systems. Local board decisions will not be interfered with unless shown to be arbitrary, capricious or unreasonable.

The petitioners' contention that there must be a specific statutory authorization before a board may enter into a contract is baseless. Boards are to be granted the same powers of home rule as municipalities under Article IV, § 7 of the New Jersey Constitution. If a contract is related to an educational purpose, it can be limited only by a specific statutory prohibition.

N.J.S.A. 18A:51-13 does not prohibit local boards from entering into contracts with commercial enterprises; rather, its sole purpose is to limit the amount of funds to be expended for participation in educational television programs. On its face, it does not apply to the contract between the Board and Whittle. The petitioners cannot dispute that Whittle provides the necessary equipment, maintenance and programming free of charge (J-1). The statute simply does not apply in the absence of a public expenditure.

It is clear that the Board entered the contract after extensive research and investigation. It solicited feedback from all sectors of the community. The director's testimony affirms that the Board took careful steps to ensure that a proper decision was made that would address needs and concerns of the district. The Board got feedback on the program. Thus, it did not act arbitrarily or capriciously or unreasonably.

Statutes cannot be interpreted to infer an absurd result. Yet, this is what the petitioners seek. They would have N.J.S.A. 18A:51-13 construed to mean that a "cap" on per pupil expenditures for educational television programs is an absolute bar to providing a school district with tens of thousands of dollars worth of television equipment and programming, without any expenditure of public funds.

This tribunal has been asked to terminate an invaluable educational program that has been applauded by students, teachers and administrators. It should be noted that the North Carolina Supreme Court held an identical Whittle contract was consistent with the provisions of a free public education in that state. State v. Whittle Communications, 402 S.E. 2d 556 (N.C. 1991). That Court found boards to have discretion to contract for such services in the absence of specific statutory prohibition.

The petitioners have failed to demonstrate a violation of the compulsory education law. The petitioners' argument is that pupils are compulsorily required to watch Channel One. Not even the petitioners' own testimony supports this argument. There is little case law that defines the dimensions of compulsory education. Yet, there can be no doubt that in the context of this case there is simply no compulsion to view Channel One. As the North Carolina Supreme Court noted, "[T]he contract clearly provides that students are not required to watch the program, and the students do not have to 'spend their time' watching the program if they do not wish to do so." 402 S.E. 2d at 564.

All testimony in this case has shown that pupils are not required to watch Channel One. It is broadcast in the Trenton district during homeroom period, a time for taking care of the housekeeping details of the day. Pupils are not required to view Channel One and may take care of other school matters during homeroom period. The Board's director stated she has instructed the principals that pupils are not required to watch Channel One. Whittle's vice chairman confirmed there is nothing in the contract that requires pupils to view the program.

NJEA, participant, has never protested a commercial learning and educational tool that is similar to Channel One. Scholastic magazine (I-6), devotes approximately 30% of its content to commercial advertising, while Channel One contains less than 20%. In addition, the Whittle network provides a host of other telecommunication services, such as The Classroom Channel with no advertising at all. Ironically, it is Scholastic magazine that is the beneficiary of the compulsory education law as it is assigned reading in Trenton School District English Classes.

Whittle maintains that the petitioners' argument seems to be that while pupils are in the school building, any exposure to commercialism or advertising somehow violates the compulsory education law. If that position were upheld, then all materials with any advertisement, logo or trademark references to a commercial

enterprise would be banned from public schools. The petitioners' position would require the elimination of sport shoes bearing conspicuous names or labels donated to an athletic team, scoreboards containing a sponsor logo, food products with advertisements on the containers, Scholastic magazine and a multitude of other goods and services. The point is the school district would be unable to replace these goods and services from its own resources. If the Commissioner construes the compulsory education law as prohibiting exposure to the commercial advertising within a public school, it would follow that all forms of advertising must be eliminated as well, without consideration of educational impact.

This argument is unreasonable and unacceptable. The petitioners' assertion of a violation of the compulsory education law must fail as baseless and untenable.

The confidentiality provision of the pupil record law has never been violated by the contract between the Board and Whittle. The petitioners assert that somehow there has been a violation of N.J.S.A. 18A:36-19. The claim is merely an assertion and is devoid of any evidential support. In contrast, the consistent testimony has been that there is no violation of the confidentiality provisions of the statute. Eshbaugh verified, without dispute, that the information Whittle seeks is purely statistical. It relates to the number of pupils enrolled on an annual basis. The Board is not authorized to release any confidential student information and any such release would be contrary to law.

The yearly enrollment information provided by the Board to Whittle does not rise to the level of a pupil record as that term is defined and understood. N.J.A.C. 6:3-2.1 defines "pupil record" as

> information related to an individual pupil gathered within or outside the school system and maintained within the school system, regardless of the physical form in which it is maintained. Essential in this definition is the idea that any information which is maintained for the purpose of second party review is considered a pupil record. Therefore, information recorded by any certified school personnel solely as a memory aid, not for the use of a second party, is excluded from this definition.

In GBD v. Ramapo-Indian Hills Bd. of Ed., 6 N.J.A.R. 480 (1983) the judge noted there were no decisions, administrative or court, construing the meaning of pupil records. He looked to the Family Educational Rights and Privacy Act of 1974

(FERPA), 20 U.S.C. 1232g, for the definition of pupil records. The federal definition is

> Those records, files, documents and other materials which,
>
> (i) contain information directly related to a student; and
>
> (II) are maintained by a educational agency or institution or by a person acting for such agency or institution.

The judge stated that while there were distinctions between the New Jersey administrative code definition and the FERPA definition, the rule making history of N.J.A.C. 6:3-2.1 shows an intent to harmonize the New Jersey definition with the federal. The judge concluded

> Therefore, pupil record information must relate to an individual as a pupil or student in the school. . . . for any document to be a pupil record, the document must relate to an individual in his/her status as a pupil in the school which has maintained the document. Id. at 493.

Information must relate directly to an individual pupil. The Board here provided Whittle with statistical information on the number of pupils annually enrolled. Information regarding the number of pupils enrolled in a school district on an annual basis cannot be considered information relating to an individual in his/her capacity as a pupil. Whittle has never sought access to sensitive or confidential pupil information. The "report cards" required by the Quality Education Act of 1990, encompass a socio-economic profile of students and their parents, specific standardized testing results, student performance data and other highly subjective materials. All of this data is available to the press and the public. Inasmuch as this disclosure is mandated, it cannot be argued that the enrollment summaries provided to Whittle violate student privacy.

The petitioners have presented an argument that Article VIII § 3 of the New Jersey Constitution has been violated. Yet, the argument was not raised in prehearing motions and orders for the express purpose of defining the issues in this hearing. Despite the posture of this case, the petitioners now argue for the first time that the contract somehow violates Article VIII, §§ 2 and 3 of the New Jersey Constitution.

The Attorney General opinion referred to above clearly holds that contracts between the school board and a commercial enterprise are valid if supported by adequate consideration. The New Jersey Supreme Court has held that

Article VIII prohibits the donation of public property where the public benefit is secondary to the success of an entrepreneur aided by a contract. Whelan v. N.J. Power & Light Co., 45 N.J. 237 (1965). However, when the government has decided on a course of action that will meet the needs and demands of citizens, Article VIII does not prohibit a contract merely because the private contracting party may make a profit. The Board has not incurred any expense pursuant to its contract with Whittle. This newly coined argument fails to salvage the petitioners' strained interpretation of N.J.S.A. 18A:51-13.

In fact, in the North Carolina case reported above, the Court rejected the very argument that public funds were being spent to support a commercial enterprise in violation of the North Carolina Constitution. The North Carolina constitutional provision at issue in that case is analogous to Article VIII of the New Jersey Constitution. In rejecting that argument, the Court stated

> Plaintiffs cite no authority for their contention that this contract results in the expenditure of tax money, and we find no authority which supports their contention. Aside from the money which is spent to furnish the electricity to run the machinery required for showing the Channel One program, which would be nothing more than a de minimis expenditure, we see no expenditures of tax money for showing the program. The contract provides that Whittle will furnish all of the equipment necessary to show the program, and the school system only provides the records showing the number of days the program is shown and the number of students watching it. The money spent for running busses and paying teachers is the same amount that would be spent if the local school board did not contract with Whittle to show Channel One; no further tax money is being expended to support this contract. Thus, the plaintiff's original premise that tax money is being spent to subsidize private business is incorrect. 402 S.E. 2d at 563.

Raising a new argument in the post-hearing brief violates the prehearing order of August 28, 1991. During the interim, counsel, the administrative law judge, the Commissioner and the State Board of Education relied on that order in disposing of prehearing motions framing the proper scope of this matter. It is fundamentally unfair for the petitioners to preclude Whittle from exploring examples of the expansive uses of Whittle equipment by various school districts and then to raise the alleged inadequacy of consideration for the first time in its post-hearing brief.

The Whittle Network aids in the fulfillment of a thorough and efficient education. The concept of a thorough and efficient education must necessarily

evolve with changing needs. In Robinson v. Cahill, 63 N.J. 473 (1973), the Court considered this requirement and stated, "The Constitution's guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and competitor in the labor market." Id. at 515. That decision recognized that the concept of a thorough and efficient education must develop to meet changing needs. Contrary to the petitioners' assertions that the Whittle Network somehow violates the provisions of a thorough and efficient education, the testimony of two experienced Trenton educators confirms that the Whittle Network enhances the educational curriculum. The Whittle Network also assists 190 other public schools throughout the State. Any voiding of the Whittle contract would not only undermine rather than advance the principle of a thorough and efficient education, but would do so on a wide-scale basis throughout New Jersey.

Participant NJSBA

The New Jersey School Boards Association (NJSBA) asserts that the Commissioner is not the proper forum to determine the constitutionality of a contract between a local board and a private entity. The Commissioner's expertise is limited to matters bearing directly upon education and not commercial matters. Padukow v. Jackson Township Bd. of Ed., 1968 S.L.D. 263. While this matter involves a local board, the rule making authority for the Department of Education has held that a dispute does not arise under school laws merely because one of the parties is a board of education. Larsen v. Piscataway Bd. of Ed., OAL DKT. EDU 1445-81 (Jan. 7, 1982), aff'd, Comm'r of Ed. (Feb. 18, 1982), rev'd, St. Bd. of Ed. (Oct. 6, 1982).

The Commissioner's authority over educational matters flows from Title 18A. At N.J.S.A. 18A:6-9, the Legislature gives the authority to hear and determine controversies and disputes under the education laws. The participant concurs that the Commissioner's authority over education matters is broad and his powers to effectuate a thorough and efficient education in the public schools are expansive. In re: Trenton Bd. of Ed., 176 N.J. Super. 553 (App. Div. 1980), aff'd 86 N.J. 327 (1981). However, in recent cases, the Commissioner has defined and limited that jurisdiction to matters directly arising under the school laws. The Commissioner does not have jurisdiction to decide issues arising from an employment contract between a janitor and a school board. Larsen, above. He does not have jurisdiction to decide issues arising from a contract between a milk supplier and a board. Rainer's Dairies v. Bd. of Ed. of Collingswood, 1967 S.L.D. 260. Nor can he exercise jurisdiction over a

contract dispute between an architect and a board of education, Poole v. Passaic, 1978 S.L.D. 1039 or interpret a contract in a tenure dispute, Salley v. Newark, 1984 S.L.D. 1714.

The Commissioner may decide matters alleging violations of the Open Public Meetings Act, N.J.SA 10:4-6 et seq. as they relate to the termination of a school employee. Sukin v. Northfield Bd. of Ed., 171 N.J. Super. 184 (App. Div. 1979). And the Commissioner and the Division on Civil Rights have concurrent jurisdiction over complaints alleging discrimination in public school curriculum. Hinfey v. Matawan Regional Bd. of Ed., 77 N.J. 514 (1978). Similarly, concurrent jurisdiction over complaints alleging discrimination in employment by a school district. Jameison v. Bd. of Ed. of Rockaway Tp., 171 N.J. Super. 549 (App. Div. 1979). In this case, the petitioners elected to bring the complaint before the Commissioner pursuant to N.J.S.A. 18A:7A-1 et seq.; 18A:38-25; 18A:36-19, and 18A:51-13. However, the participant asserts that the essence of this case involves the validity of a commercial contract. That issue must be resolved through application of general contract law principles. There is no primary education issue presented that requires the Commissioner's administrative expertise.

The State Board first disclaimed the Commissioner's jurisdiction in contract matters in Rainer's, above. The Board challenged the Commissioner's jurisdiction, stating that the controversy did not arise under school laws. The Commissioner ruled that his jurisdiction arose from his authority to control school cafeterias. The State Board reversed and dismissed, stating

> We believe that the traditional jurisdiction of the courts in matters involving contracts, breach, damages and specific performance should not be disturbed except in cases arising directly under school laws. 1976 S.L.D. 260.

The participant states that in instances such as the present case, where the essential issues involve a determination and interpretation of a contract, the Commissioner is without jurisdiction.

Participant NJEA

N.J.E.A. joins in and urges this judge to accept and adopt the positions the petitioners set forth in their posthearing brief. The participant also cites a news report published in the New York Times, April 23, 1992 concerning a study done by the University of Michigan's Institute for Social Research, paid for by Whittle, that

attempts to measure the impact of Channel One, educationally, on pupils watching it. The newspaper reports that Whittle refused to pay the researchers to study the impact of commercials. Whittle has attempted to argue that the benefits of Channel One far outweigh its commercial aspects. This is not so. The teachers of this State should not be required to lend themselves to making profits for Whittle and its advertisers.

DETERMINATION

Jurisdiction

The State Board decision on motions of March 4, 1992 is clear that this case turns on application of the education laws. If this were purely a contract case, all agree that neither the State Board nor the Commissioner could exercise jurisdiction. However, incidental interpretation of the contract necessary to resolve the education claims is properly done by the Commissioner. In addition, the initial decision and Commissioner's decision--and the State Board decision, if there is one--must include such administrative determinations as are necessary to proper disposition of the matter and necessary to ensure an adequate record on appeal. See, Abbott v. Burke, above.

Jurisdiction, as delineated in the State Board decision, necessarily resides in the Commissioner and, derivatively, this tribunal.

N.J.S.A. 18A:51-13 and 14

In 1962 and 1967, respectively, the Legislature passed and the governor signed into law two measures dealing with nonprofit educational television. The statutes provide

> 18A:51-13
>
> Every board is hereby authorized to make use of television as an educational aid by contracting for the services of any noncommercial, nonprofit educational television station located within or without the state but such contract shall not require the board to incur expenses in any one year period in excess of an amount equal to $2.00 per pupil in resident enrollment in the district.

18A:51-14

Every board, in addition to the powers set forth in section 18A:51-13 and subject to the rules and regulations of the state board, may participate in the organization and operation of a noncommercial, nonprofit, educational television station in this state and utilize the services therefrom, and in order to effectuate such purpose, every board is authorized:

(1) To enter into any contractual arrangement agreeable to the board with any other public or private agencies or organizations, including membership in a noncommercial, nonprofit corporation or association duly organized under the laws of this state to operate such a station;

(2) To designate one or more representatives to the board of trustees of such corporation or association, and otherwise to participate in its affairs in compliance with the charter and bylaws of such organization;

(3) To procure for the public schools under the board's jurisdiction the services of such a station, by subscription or otherwise, and

(4) To incur such expenses as the board may deem advisable for such purposes, by way of dues, subscription charges, assessments, capital contributions and otherwise, but in amounts not exceeding in any one year $2.00 per pupil in resident enrollment in the district.

These statutes accomplish just what a plain reading of them reveals and no more. They authorize, and place some limitations on, school district contracts with noncommercial, nonprofit educational television stations and school district participation in organizing and operating the same. There is nothing here to even suggest that the Legislature intended, by express authorization of involvement with noncommercial enterprises, to exclude all involvement with commercial entities. The oft-quoted maxim, expressio unius est exclusio alterius (the expression of one thing is the exclusion of another), is to be used only with great caution. Petition of Keogh-Dwyer, 106 N.J. Super. 567, 573 (Law Div. 1969), aff'd 54 N.J. 523 (1969). There are many statutes dealing with a board's powers. To read one or two in isolation can lead, as here, to an inappropriate result.

Briefly stated, a reading of the statutes prescribing board powers reveals nothing that prohibits a contract of the type under examination here. If an untoward educational effect flows from the contract, that is another matter.

Finally, the Board seems to misread N.J.S.A. 18A:51-13: "It is necessary to authorize a fee for educational services because of the long standing underlying scheme of free public education is that students are not charged for educational programs." Board's brief at 13. The statute does not contemplate a charge to children. It authorizes boards to make expenditures on a per pupil basis in return for educational television use.

Compulsory attendance

N.J.S.A. 18A:38-25 provides

> Every parent, guardian or other person having custody and control of a child between the ages of six and 16 years shall cause such child regularly to attend the public schools of the district or a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments or to receive equivalent instruction elsewhere than at school.

The statute has existed in more or less the same form since 1914. It has been tested and approved. Everson v. Bd. of Ed. of Ewing Tp., 133 N.J.L. 350 (E. & A. 1945), aff'd 330 U.S. 1 (1947); Stephens v. Bongart, 15 N.J. Misc. 80, 189 A. 131 (D. Ct. 1937); Knox, above.

In Knox, the court stated

> The right of a sovereign state to adopt legislation to direct the paths of its children to seek education for enlightenment and literacy, so as to enjoy full and complete life, is so fundamental as to relieve the need for judicial citation. 7 N.J. Super. at 610.

And in Jackson v. Hankinson and Bd. of Ed. of New Shrewsbury, 51 N.J. 230, 235 (1968), the Court stated

> It must be borne in mind that the relationship between the child and the school authorities is not a voluntary one but is compelled by law. The child must attend school and is subject to school rules and disciplines. In turn the school authorities are obligated to take reasonable precautions for his safety and well-being. (Citations omitted).

Thus, the compulsion to attend cuts both ways.

In a large sense, pupils are a captive audience. The Board maintains, "The law requiring compulsory education attendance does not place any limitation on the

content of educational programs and activities [that] can be provided to students." Board's brief at 14. The assertion is too broad. There are limitations that the State can create and enforce. The State has the power to require that certain studies plainly essential to good citizenship be taught and that nothing be taught which is manifestly inimical to the public welfare. 79 C.J.S., Schools, § 485 at 428. In State Bd. of Ed. v. Bd. of Ed. of Netcong, N.J., 108 N.J. Super. 564 (Ch. Div. 1970), a religious exercise case, the court asked a provocative question

> There is an absolute duty . . . to teach to our youth honesty, cooperativeness and truthfulness and to impart sound moral consciousness. If this is the prime purpose of the Netcong Board . . . why then should any student be allowed to absent himself from so important a part of the educational process -- something that should be common and compulsory for all children . . . ?

The same question may be asked here. If Channel One is of educational value, why may pupils, as the Board's director testified, so easily be excused? Surely Whittle does not want pupils excused. If Whittle exercises its rights under the contract and determines that a particular installation "is not economically justified to Whittle," because too many pupils are excused from watching the program, Whittle incurs a cost. Whittle either leaves behind equipment or it pays to remove and retain equipment. Whittle wants "The Channel One program . . . shown by the School in a single showing at a single time set by the School when students are present in class or homeroom. . . ." "The School agrees to receive the Channel One daily broadcasts from Whittle and to show the daily broadcast on all installed television sets in its entirety or not at all (i.e. the School will not show only a portion of any broadcast and will not show the broadcast on fewer than all installed television sets)." (J-1).

The right to education is subject to some restrictions. Pupils must submit to the authority of their teachers, must pursue their prescribed courses of study and must comply with the rules established for governance of their schools. N.J.S.A. 18A:37-1. To pupils attending public schools today, television is no novelty. When a teacher turns on a television set in the classroom, pupils may logically presume that what they see and hear is part of their studies. But what of commercial advertisements?

It is too glib to say pupils will skim over televised advertisements as they will magazine advertisements. Colored light can enrapture, even at 8:30 a.m. Is there any direct or incidental educational effect?

Viewing the tape recordings in evidence, one sees advertisements for bubble gum, a deodorant, electronics products, an acne preparation and a candy bar. The advertisements are not clustered, but appear at two different points in the 12-minute programs. They are clearly advertisements and there is little likelihood they would be confused with the news and current affairs parts of the programs. Yet, they are commercial advertisements. This judge can so no direct educational benefit in them.* The indirect benefit is that they pay the bill for the other things Whittle provides. Even though the indirect benefit represents a great deal of money, that alone cannot justify compulsory viewing of commercial advertisements. It must be noted here that the record shows unrebutted testimony that principals were advised, in writing, that there was no requirement for pupils to view television during homeroom period. The writing was not produced. There is also a stipulation on the record that there is nothing in the contract that does not require pupils to watch Channel One programs. This may be an area in which social science research does or will give insights. No party or participant has cited any.

Lacking clear statutes or rules covering the situation, the Board was faced with an alluring dilemma: shall we trade six hours of each involved pupil's instruction time each year for equipment and programs. The answer was yes, but only after the Board solicited input from staff and community--although the record fails to show how many persons were involved and in what distribution. It is black letter law that a board is responsible for the legality of its acts to the Commissioner and State Board and responsible for the wisdom of its acts to its constituents. The segment of the community touched by the Board, except for petitioner Ali, may have believed the trade wise. As a matter of law, this judge cannot say the Board acted in the best interests of its charges.

If one removes pieces of candy from a box one piece at a time, each decrement seems inconsequential. But at the end of an interval, the cumulative effect is seen. This judge does not believe parents or professional staff would approve putting pupils before televisions and subjecting them to more than a school

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*Advertisements of many kinds can be used for educational purposes, of course. Comparison of two supermarket advertisements can aid in arithmetical comparisons--"Which is the better buy?" All advertisements can be examined from an artistic point of view and can be analyzed for pursuasive technique and copy style, to name only a few. There is no suggestion the subject commercial advertisements are used in this way.

day of commercial advertisements. The allure is surely less when the matter is viewed as taking more than a whole school day from legitimate educational pursuits and turning it over to commercial interests, irrespective of the quid pro quo.

As a matter of educational policy, this cannot be approved. The scheme is offensive to the sound reasons for compulsory attendance.

The Board's assertion that there was no testimonial support for this argument is irrelevant. If something offends the law, it does so irrespective of the quantum of parol evidence about the thing.

I **FIND** and **CONCLUDE** that the commercial content of the Channel One broadcasts is inappropriate fare in homeroom or any other school day period.

N.J. Const., (1947), Art. VIII. § 3, pars. 2 and 3

As the respondents correctly point out, these clauses were not raised in the pleadings or at prehearing. The argument concerning them will not be addressed because improperly raised.

Similarly, NJEA's attempt to introduce a newspaper article through its posthearing memorandum and Whittle's attempt to inject what Caulfield would have testified through a footnote in its posthearing submission..

Pupil records

Exhibit J-1, § C, par. 8 states

> The School agrees to maintain reasonable records showing its conformity to this agreement and will permit Whittle reasonable access to its premises, students, teachers, and monthly attendance records to monitor implementation of the Educational Network.

Nothing defines monthly attendance records. Presumably, these could be provided in summary form. Nothing in the record indicates that Whittle has ever asked for more than enrollment numbers. The contract nevertheless creates the right to reasonable access, again an underfined term.

I **FIND** there has been no abuse of pupil records in this matter. I **also FIND** the potential exists for conflict between the contract and N.J.S.A. 18A:36-19 and

N.J.A.C. 6:3-2.5. If the board maintains a contractual relationship with Whittle, it must be vigilant that whatever data the contract says Whittle may have access to and whatever data the Board provides do not run afoul of the statute and administrative code.

N.J.Const., (1947), Art. VIII, 4, par. 1

The paragraph reads

> The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children in the State between the ages of five and eighteen years.

For the reasons set forth in the compulsory attendance section, above, the Channel One scheme cannot be efficient even if it were, arguendo, thorough. An arrangement that takes more than a school day of instructional time from children for commercial purposes is not efficient. A fortiori where the quid pro quo is not merely equipment and programs, but includes pecuniary profit to a corporation organized for profit making. Children are paying for the equipment and programs just as surely if they were asked for money, but the specie is more dear: it is time that could be instructional time.

The states, under the Tenth Amendment, are not limited to enumerated powers, but have all legislative powers capable of being exercised by any government. The exceptions are a limitation or bar imposed by the U.S. Constitution or federal preemption of the particular subject matter. Under this broad police power concept, the states may, in all their law making, promote the health, safety, morals, peace and good order of their people. New Jersey did that in the education area by, among other things, N.J.Const., (1947), Art VIII, § 4, par. 1 and N.J.S.A. 18A:38-25. Children--and their parents--accept some limitation of their rights in entering the public school relationship. But all rights and protections are not shed at the schoolhouse door. Tinker v. Des Moines School District, 393 U.S. 503 (1969). Nothing in the law suggests that the right to be protected from commercial exploitation is surrendered. Inasmuch as the benefits that derive from the Whittle contract are not free or paid for from ordinary school district revenues, I **FIND** and **CONCLUDE** that the contract violates Art VIII, § 4, par. 1 of the New Jersey Constitution.

Other matters

The Board argues it has no policy concerning excusal from watching Channel One broadcasts because there has been no need for one. Good educational practice would have been to have such a policy in place knowing that children would be required to watch commercial advertisements. The testimony indicates the Board anticipated no objections based on its two or three meetings with community and staff. Hindsight, usually 20/20, shows the decision was incorrect. That, however, can be corrected. More importantly for today's consideration, the lapse violates no constitutional, statutory or administrative code provision.

Peculiarly, the Board argues that excusal from watching Channel One "would not have any impact upon the educational and instructional programs provided by the Board. . . . " Board's brief at 16. If this is so, Channel One has, in the Board's view, no particular value to its educational and instructional programs. Therefore, compelling pupils to watch it is all the more a gratuitous act.

In its last argument, the Board asserts it "has not expended any public property under the contract with Whittle. In addition, . . . the Board has properly determined that the benefits its students derived from the Whittle contract, such as Channel One, Classroom Channel, Educators Channel and the television monitors outweigh any benefits that Whittle derives from the contract." Board's brief at 19. These leave out a step. The first question should always be do the advantages to pupils outweigh the disadvantages to pupils. Then the consideration is whether a contract improperly benefits a corporation.

CONCLUSION AND ORDER

This decision finds and determines that the Commissioner and State Board of Education have jurisdiction over the educational effects of a contract between a board of education and a commercial enterprise; that the educational television statutes N.J.S.A. 18A:51-13 and -14 are not violated by the subject contract; that the compulsory attendance statute is offended by the present contract; that the potential exists for pupil record problems, but no problem has been demonstrated; that paragraphs 2 and 3 of Article VIII, § 3 of the New Jersey Constitution have not been properly raised in this case, and that the free, thorough and efficient clause, Article VIII, § 4, par. 1, of the New Jersey Constitution is violated

by the contract between the Trenton Board of Education and Whittle Communications, L.P.

Accordingly I **ORDER** the Trenton Board of Education to either cease performance under the contract or to reform the contract with Whittle Communications, so as to remove the infirmities set forth above.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

22 JUNE 1992
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

6/23/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 29 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

km

WITNESSES

Abdul Malik Ali
Aginah Nadirah Ali
Laura Eshbaugh
Dave H. Winogron
Julie D. Thomas
James M. Caulfield
Murray H. Rothman

EXHIBITS

For Petitioner:

P-1a Tape recording of Channel One broadcast, October 31, 1991
P-1b Tape recording of Channel One broadcast, November 15, 1991

For Respondent:

R-1a-e Compilation of responses from Middle Schools and High School re: Channel One

For Intervenor:

I-1a-g Teachers' Guide, August 1991-March 1992
I-2a-g Media Specialists' Guide, August 1991 - March 1992
I-3 Whittle Educational Network brochure, 8 pp.
I-5 Channel One evaluation form, March 9-13, 1992
I-6 SCHOLASTIC VOICE, May 19, 1989

Joint:

J-1 Contract between Whittle and Board, February 21, 1990, 12 pp. plus two single-page attachments
J-2 Affidavit of Laura Eshbaugh, March 25, 1991

OAL DKT. NO. EDU 4095-91

NEW JERSEY EDUCATION ASSOCIATION (PARTICIPANT), ABDUL-MALIK ALI, JAMILH ALI AND K.A., MINORS BY THEIR GUARDIAN, ABDUL-MALIK ALI, PETITIONER, V. BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, RESPONDENT, AND WHITTLE COMMUNICATIONS, L.P., INTERVENOR-RESPONDENT.	COMMISSIONER OF EDUCATION DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. All parties, including Participant New Jersey School Boards Association (NJSBA), filed timely exceptions and timely reply exceptions pursuant to N.J.A.C. 1:1-18.4.

Petitioner and Participant NJEA (hereinafter petitioner) find the ALJ correctly determined that the relationship between Whittle Communications, L.P. (hereinafter Whittle) and the Board of Education of the City of Trenton, (hereinafter Board) violates N.J.S.A. 18A:38-25, violates art. VIII, sec. 4, para. 1 of the New Jersey Constitution (1947) and violates, in potentia, N.J.S.A. 18A:36-19. However, petitioner avers the ALJ did not correctly decide the impact of N.J.S.A. 18A:51-13 et seq. upon the Whittle contract.

Petitioner contends the ALJ's reliance on the maximum "expressio unius est exclusio alterius" (the expression of one thing is the exclusion of another) (initial decision, at p. 26) for the proposition that N.J.S.A. 18A:51-13 does not address the Board's involvement with all noncommercial entities, may not be used to the exclusion of the principle that "'It is the sole function of the courts to enforce [a statute] according to its terms.' Sherran v. Nationwide Mutual Insurance Co., Inc., 80 N.J. 548, 556 (1979)." (Petitioner's Exceptions, at p. 2) Stressing that N.J.S.A. 18A:51-13 permits school boards to contract for the services of any noncommercial, nonprofit, educational television station, petitioner submits that the limitation on a board's powers created by N.J.S.A. 18A:51-14 makes it clear that the Legislature recognized in passing this legislation, that the general grant of power of a board is not broad enough to authorize boards to participate in television-based programming. Thus, petitioner claims, the Legislature created these television statutes, limiting the boards' participation in such activity, which position, petitioner claims, is supported by reference to Attorney General's Formal Opinion 1962-No. 2. Therein, petitioner advances, it is stated that in discussing the legality of a board's entering into an agreement for educational television, that consideration "should be given to the prohibitions found in Article VIII, Section 3, par. 2 and par. 3 of the New Jersey Constitution of 1947." (Exceptions, at p. 3, citing Attorney General's Formal Opinion 1962-No. 2) Petitioner claims these constitutional proscriptions preclude boards from aiding private corporations through use of public money, property, credit and the like. Petitioner further claims that such aid is exactly what the

Trenton Board of Education has done through the provision of public resources including buildings, utilities and even its school children to Whittle Communications for its profit making. Thus, petitioner submits, the educational television statutes preclude, by exclusion, the Whittle contract.

Petitioner seeks reversal of that portion of the initial decision below interpreting N.J.S.A. 18A:51-13 et seq. as not precluding the subject contract.

Intervenor Whittle contends that in reaching his recommended initial decision, the ALJ failed to apply the proper standard of review, instead substituting his personal judgment for that of the Trenton Board, misapplied statutory and constitutional provisions, exceeded his authority and relied upon clearly erroneous factual findings. Whittle requests that the Commissioner reject the recommended findings and conclusions of the ALJ and conclude that the contract between Whittle and the Board does not offend the compulsory attendance statute, N.J.S.A. 18A:38-25, and that the Commissioner lacks jurisdiction to determine whether the Trenton Board's agreement with Whittle violates the thorough and efficient education clause as set forth in art. VIII, sec. 4, para. 1 of the New Jersey Constitution. Alternatively, if the Commissioner determines that he may decide the constitutional question, Whittle requests that he conclude that the Educational Network agreement with the Board is consistent with the thorough and efficient clause of the New Jersey Constitution.

More specifically, Whittle avers the ALJ made fundamental errors of law which require rejection of his initial decision. The first error, Whittle claims, is that he applied the wrong standard

for administrative review of local school board decisions. Claiming actions of boards cannot be disturbed unless there is an affirmative showing that the action is arbitrary, on which the petitioner bears the burden of proof, Whittle contends the ALJ substituted his judgment for that of the local board, which constitutes error. Whittle contends if the ALJ had applied the proper standard of review to the facts, he could not have concluded that the Board's decision to contract with Whittle violated the compulsory attendance law or the thorough and efficient clause of the New Jersey Constitution because there was no evidence that the Board's action was arbitrary, capricious or unreasonable.

Second, Whittle claims the ALJ erred in excluding relevant evidence showing bias for the local Board's exercise of its decision to enter into the Whittle contract including testimony about educational programming in addition to Channel One and testimony from educators outside Trenton who are using the Whittle Network in their schools. Intervenor submits the error of the ALJ in failing to review the Board's decision to contract with Whittle in light of the arbitrary and capricious standard is magnified by his error in excluding relevant evidence bearing directly on the basis for that decision.

Third, Whittle contends the law is clear that the ALJ did not have jurisdiction to rule upon the constitutionality of the Board's action. Contending that it is a fundamental principle of administrative law in New Jersey that the courts, not administrative tribunals, have exclusive jurisdiction to rule upon constitutional issues, Whittle argues that the ALJ exceeded his authority and jurisdiction by concluding that the Whittle contract violates art. VIII, sec. 4, para. 1 of the New Jersey Constitution.

Fourth, Whittle avers the ALJ misapplied both the thorough and efficient clause and the compulsory attendance law to the facts of this case. The thorough and efficient constitutional provision, Whittle submits, concerns equitable funding among school districts, not a school board's curriculum and equipment decisions. Similarly, Whittle advances, the compulsory attendance law is a penal statute designed only to ensure school attendance by students of a certain age. It submits the Whittle program is contrary to neither the express language nor the purpose of the compulsory attendance statute.

Whittle's exceptions further advance its position that the ALJ's decision regarding the compulsory attendance statute and the thorough and efficient clause was predicated on two factual findings for which there is no evidence in the record. Whittle alleges that the ALJ's conclusion that the Board's contract with Whittle violates the compulsory attendance law and the thorough and efficient clause is predicated upon his findings 1) that students are required to watch advertisements included in Channel One newscasts; and 2) that the time during which Channel One newscasts are shown reduces instructional time. Whittle claims these findings are erroneous. Citing the transcript, Whittle contends the uncontroverted testimony in the record is that students are not required to watch commercial advertising and that Channel One is shown in homeroom when no instruction takes place.

Further, Whittle avers the ALJ also erred by mischaracterizing or ignoring evidence concerning (a) the effect that the loss of the Whittle program would have on the Trenton School District; (b) a Board witness' testimony that the Whittle

program saved instructional time; (c) professional and community input into the Trenton Board's decision; and (d) the actual terms under which Whittle or a school board may terminate the contract.

The Board's exceptions reflect many of the same arguments brought to bear by Whittle. In emphasizing that the contract between the Board and Whittle does not violate the compulsory attendance act, N.J.S.A. 18A:38-25, the Board suggests the initial decision misapplies court decisions to justify invalidation of the contract. It counters the ALJ's reliance on Jackson, supra, which it claims, deals with a district's obligation to take reasonable precautions for pupil safety and well-being, by citing State v. Massa, 95 N.J. Super. 382 (Law Div. 1967) for the proposition that the compulsory attendance act is not intended to deal with curriculum content or instructional activities; rather, it ensures that all children attend school to receive an education.

Further citing Smith v. Ricci, 89 N.J. 514 (1982) wherein the Board avers the State Supreme Court upheld a regulation, N.J.A.C. 6:29-4.2, requiring each local school district to develop and implement a family life education program from which students could be exempt based on conscientious objection to sincerely held religious beliefs, the Board claims permitting pupils to be excused from objectionable parts of the program did not diminish the educational value of the family life program and did not violate religious freedom of Free Exercise and the Establishment Clause of the First Amendment of the United States Constitution. Therefore, the Board rejects the ALJ's reasoning that "If Channel One is of educational value, why may pupils, as the Board's director testified, so easily be excused?" (Initial Decision, at p. 28), (Board's Exceptions, at p. 5)

The Board also objects to the ALJ's purported misapplication of the facts in holding that the benefits derived from the Whittle contract do not justify compulsory viewing of commercial advertisements. (Board's Exceptions, at p. 6), (Initial Decision, at p. 29) It claims this holding is confusing because it contradicts the acknowledgement by the ALJ on page 29 of the initial decision that the evidence presented at the hearing proves that students are not compelled to view Channel One. Since there is no requirement that students view the program, the Board submits, there is no basis to conclude that there is compulsory viewing of commercial advertisements. In so stating, the Board emphasizes that except for Petitioner Ali, there has been no measurable objection to Channel One programming or its commercial advertisement content. Thus, it claims, there is no basis for the ALJ to state he does not believe parents or professional staff would subject students to a school day of commercial advertisements. The Board objects, therefore, to what it casts as the ALJ's imposing his own personal belief as to whether he feels pupils should be permitted to view commercial advertisements.

In so stating, the Board notes its awareness that commercial advertising is not foreign to other educational components provided to students in the past. It refers to Scholastic Magazine, and Voice, two magazines containing advertising which are used for all English classes at Trenton Central High School, as well as Sports Illustrated, Time, and Yes, which are distributed to students for educational purposes. These publications, too, contain advertisements, the Board admits. Additionally, corporations such as MCI, McDonald's, Burger King, and

Wendy's, together with local corporations, such as CoreStates and Deborah Heart and Lung Hospital, also provide incentive and adopt-a-school programs for the district's students.

The Board claims that the effect of the initial decision is that all aspects of commercial advertisements in public schools would be prohibited. Hence, the Board casts the ALJ's conclusion that "the Board did not act in the best interest of its charges" as inconsistent with the compelling and uncontroverted evidence presented by the Board, as well as the laws governing a local school board's authority. (Exceptions, at p. 10) It cites N.J.S.A. 18A:11-1 and Parsippany-Troy Hills Ed. Ass'n. v. Bd. of Ed., 188 N.J. Super. 161, 166-167 (App. Div. 1983) for the proposition that boards of education in New Jersey have broad powers to supervise, control and manage public schools and public school property in this district.

Referring to Attorney General of New Jersey, Formal Opinion 1962-No. 2, for a statement of the broad, extensive nature of boards of education's powers, including the power to enter into contracts with educational television systems for a proposed pupil cost of $.50, the Board submits that in contracting with Whittle, it made the decision that the educational benefits derived from Channel One, 220 or more television monitors, Classroom Channel and Educators Channel, outweighed the two minutes of commercial advertisement of Channel One, which enable Whittle to provide the service. The Board urges that this is a decision which should be made by a board of education. Given the multitude of valued uses that the Board derives from the contract with Whittle, the Board claims it would be devastating to lose Whittle. It submits it appropriately determined

the educational policy in this district, and its decision should not be disturbed by the ALJ's initial decision.

The Board's second exception alleges there is no basis in law or fact that the contract with Whittle violates a thorough and efficient education pursuant to art. VIII, sec. 4, para. 1 of the New Jersey Constitution of 1947, in that there is no basis in law or in the evidence presented to conclude that the contract is not efficient, thereby violating a thorough and efficient system of public schools by taking away more than a school day of instructional time.

Claiming there is no statutory reference or case law which provides any guidelines as to what is meant by "efficient," the Board claims the ALJ's contention that Channel One is not efficient appears to be fictionalized because the ALJ provides no legal analysis of any statutory or constitutional scheme which reasonably or even remotely suggests that commercial advertising under the Channel One scheme is not efficient. Further, the Board stresses that its students are not deprived of any instructional time, because Channel One is shown during homeroom period which occurs between 8:30 a.m. and 8:45 a.m. each school day during a time when "***one takes care of the minutia[e] for the day***" and where students are regularly excused from homeroom. (Board's Exceptions, at p. 14) Given such testimony as that of Ms. Thomas, Executive Director of School Operations, the Board claims there is no factual basis to conclude that instructional time is being used for commercial purposes. The Board contends the ALJ overlooked this uncontroverted testimony and further failed to address the "thorough" part of the constitutional concept.

The Board claims its decision to contract with Whittle is consistent with the goal of providing a thorough and efficient system because it felt that the news and information benefits provided by Channel One were valuable and that the 200 or more television monitors enabled the district to keep up with the contemporary video age.

In response to petitioner's attempt to raise the argument that the contract violates art. VIII, sec. 3, pars. 2 and 3 of the New Jersey Constitution because it uses public resources to benefit a private corporation, the Board claims the initial decision's analysis of the alleged violation of the thorough and efficient clause of the constitution while using the standards which apply to art. VIII, sec. 3, of the New Jersey Constitution is confusing. The Board alleges that while this constitutional provision prohibits the use of public resources to benefit a private corporation, a contract is valid where the use of public property for private benefit is secondary to the success of the public agency aided by the contract. The Board cites Whelan v. New Jersey Power & Light Co., 45 N.J. 237, 247 (1965) in support of this proposition, and concludes that there is thus no prohibition against a contract between a public and private corporation.

The Board finds the ALJ's rationale misplaced which suggests that the children of the district are paying for the equipment and program by losing time that could be instructional time by watching advertisements on Channel One for two reasons. First, it states again that instructional time is not being used to show Channel One. Second, it claims there is no legal support for concluding that art. VIII, sec. 3, pars. 2 and 3 of the New Jersey

Constitution equates students' time with public property. Thus, the Board submits there is no basis for determining that the contract herein violates such section of the Constitution. Since there are no public funds used to primarily benefit the private entity, the contract between the Board and Whittle is valid, it claims.

The Board seeks a reversal of the initial decision.

Participant NJSBA's exceptions seek reversal of the decision below. NJSBA concludes in exceptions that the effect of the ALJ's ruling is to undermine the local board's authority to determine the content of its curriculum, a duty clearly delegated to the local board by the Legislature. Participant NJSBA submits that to carry out its duty, the board must be able to look to nontraditional sources for the most up-to-date technology to keep pace with the changing nature of our society. It submits the fundamental question in this case is whether the daily "benefits" of accessibility to current events and availability of video equipment outweigh the "burden" of daily review of two minutes of commercials. (NJSBA's Exceptions, at p. 13) It is NJSBA's position that in this instance, the benefits clearly prevail. Said exceptions also ask the Commissioner to review the timely brief submitted April 30, 1992 which NJSBA claims the ALJ neglected to consider before making his determination, relying instead on an earlier brief, submitted on different issues on September 26, 1991.

COMMISSIONER'S DETERMINATION

Upon a careful and independent review of the record, the Commissioner affirms in part and rejects in part the initial decision rendered by the Office of Administrative Law in this matter.

Initially, the Commissioner adopts as his own that conclusion of the ALJ that because petitioner's arguments, predicated upon the New Jersey Constitution, art. VIII, sec. 3, pars. 2 and 3 were not raised in petitioner's pleadings or at prehearing, they will not be addressed because they were belatedly and, therefore, improperly raised for the first time in post-hearing submission. Similarly, the Commissioner does not address petitioner's exception to the ALJ's conclusion concerning the lack of applicability of N.J.S.A. 18A:51-13 et seq. to the Whittle-Trenton contract to the extent that petitioner relies on and provides for the first time a copy of the Attorney General's Formal Opinion 1962-No. 2. The Commissioner deems such exhibit inappropriately before him in the absence of the ALJ's having considered it admissible to the record.

Likewise, the Commissioner rejects the attempt on the part of Whittle to submit exhibits into the record via reply exceptions in the form of legislative statements and a Governor's Conditional Veto Message insofar as such exhibits were not brought to the record timely before the ALJ. The Commissioner also rejects such exhibits because they are offered in support of Whittle's arguments rebutting petitioner's claims under art. VIII, sec. 3, pars. 2 and 3, in the event that the Commissioner chooses to consider petitioner's arguments in this regard. Because the Commissioner adopts the ALJ's conclusion that arguments related to art. VIII, sec. 3, pars. 2 and

3 of the New Jersey Constitution are untimely, Whittle's belated submissions are not considered in the disposition of this matter.

In considering the remainder of the issues before him in this case, the Commissioner adopts as his own the ALJ's conclusion that N.J.S.A. 18A:51-13 et seq. is not relevant to disposition of this case. The Commissioner concurs with the ALJ, Whittle and the Board that "[t]hese statutes accomplish just what a plain reading of them reveals and no more. They authorize, and place some limitations on, school district contracts with noncommerical, nonprofit educational television stations and school district participation in organizing and operating the same." (Initial Decision, at p. 26) It is well established that the meaning of a statute first must be sought in the language of the statute. (Sheeran v. Nationwide Mutual Insurance Company, Inc., 80 N.J. 548 (1979) If the language of a statute is clear and unambiguous on its face, we may not go beyond the words of the statute in order to devine the Legislature's intent. State v. Butler, 89 N.J. 220 (1982) In such cases, the language of the statute is the full expression of what the Legislature intended, and although legislative history may be used to provide reassuring confirmation of literally apparent meaning, e.g., Gauntt v. City of Bridgeton, 194 N.J. Super. 468 (App. Div. 1984), extrinsic materials may not be used to create ambiguity or to determine that the Legislature intended something other than that which it actually expressed. Safeway Trails, Inc. v. Furman, 41 N.J. 467 (1964), appeal dismissed and cert. denied, 379 U.S. 14 The Commissioner finds the words of the statutes involved here are clear and unambiguous -- the statutes are limited in their application to noncommerical, non-profit

enterprises. As stated by the ALJ, there is nothing therein even suggesting that the Legislature intended, by express authorization of involvement with noncommerical enterprises, to exclude all involvement with commercial enterprises. Should it so seek to address the interaction between New Jersey school districts and for-profit business interest, it lies within the Legislature's power to do so. Accordingly, the Commissioner adopts as his own the ALJ's findings and conclusions that N.J.S.A. 18A:51-13 et seq. have no application to the type of contract under examination here.

Having determined that no statutory bar exists under N.J.S.A. 18A:51-13, it is found and determined that the Board had discretionary authority pursuant to N.J.S.A. 18A:11-1 to determine whether to contract for the services provided by Whittle. However, the Commissioner is persuaded that if any alleged untoward educational effect flows from such exercise of that discretionary authority in entering into such contract as the one between Whittle and the Board of Education of the City of Trenton, it lies squarely within his authority pursuant to N.J.S.A. 18A:6-9 to address any educational concerns flowing from the education laws. In this regard, the Commissioner is duly sensitive to his obligation and that of the boards of education of this state to jealously guard against intrusions of any kind into the instructional process, not just with respect to commercial instrusions. It cannot be overemphasized that instructional time is precious. Therefore, zealous protection of instructional time is a major responsibility of all boards of education. In this sense, boards of education have the duty and responsibility to monitor and preserve instructional

time for teachers to instruct in a coherent fashion without undue intrusion on that instruction by excessive announcements, excusal of students from instruction or cancellation of instruction.

It is with this mantle of concern that the Commissioner examines the instant matter. Under such examination the Commissioner is mindful, too, of the State Board's determination in this matter dated March 4, 1992 emphasizing his incidental jurisdiction "***to interpret the contract between Whittle and the Board so as to fulfill his obligation to resolve the education claims that are the subject of this litigation. [Citation omitted]*** [and] to make the administrative determinations necessary for proper disposition of the matter and to ensure an adequate record on appeal" on constitutional claims over which he has no jurisdiction. (State Board Decision on Motions, dated March 4, 1992, at p. 4)

In accord with these parameters, the Commissioner agrees with the Board that it has properly adjudged, under its plenary authority, pursuant to N.J.S.A. 18A:11-1, that the benefits of contracting for Whittle's services, including securing expensive and highly technical equipment for which the Board has many worthy uses in promoting education in its schools, coupled with the educational benefits the Board feels are imparted to the students by contracting for Channel One was not arbitrary, capricious or unreasonable when weighed carefully through the Board's planned review by educational professionals and the local community. (See TR. II 163, 164, 166-167 and TR. IV-29-38, 65 and 71-75.) The Commissioner is convinced upon careful review of such screening process and the testimony of the witnesses that the Board did not exceed its

authority nor act inconsistently with the goals of public education in striking the contract with Whittle.

The Commissioner has previously said in Boult and Harris v. Board of Education of the City of Passaic, 1939-49 S.L.D. 7 (1946), aff'd State Board of Education 15, 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E.&A. 1948):

> ***it is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards. Finally, boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions.*** (at 13)

In so determining, the Commissioner has also carefully considered petitioner's claim that the contract between Whittle and the Board violates N.J.S.A. 18A:38-25, the compulsory education act. In the Commissioner's judgment, such statute has not been compromised or violated by the instant contract.

Here, again, a plain reading of the statute in question bespeaks a requirement imposed upon parents and guardians to submit children between the ages of six and sixteen for regular attendance at school. (State v. Massa, supra) N.J.S.A. 18A:38-25 states:

> Every parent, guardian or other person having custody and control of a child between the ages of six and 16 years shall cause such child regularly to attend the public schools of the district or a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments or to receive equivalent instruction elsewhere than at school.

The ALJ would derive authority from this statute to prevent the Board from entering into said contract because students, who are

required to attend school, and are thus a "captive audience" (initial decision, at p. 27), should not be subject to commercial advertisements while in school, especially because the effect of the two-minute periods of advertising in the 12-minute segments of Channel One programming is cumulative and compulsory, amounting over the course of a school year, to a full day of what could be instructional time. (Initial Decision, at p. 29)

Such authority is lacking under the circumstances herein factually and legally. First, the record establishes that homeroom is not an instructional module. See Tr.III-101. Further, it is uncontested that students are regularly excused from homeroom for various reasons. Tr.III-102 Moreover, the ALJ acknowledged and referred to testimony stating that even for students who are present in homeroom, none are required to actually watch the Channel One broadcasts (initial decision, at pp. 5, 6, 8, 9, and 19), and that there are rooms without television in each school to which those students who do not wish to watch the Channel One broadcasts may be sent. See Initial Decision, at p. 9. Thus, the ALJ's conclusion that the two minutes of commercials embodied in the Channel One programs amount to a full day of instructional time over the course of a school year is suppositional, at best, made in reliance upon a false premise that homeroom time is instructional time. Such conclusion cannot be sustained because the record establishes no compulsion directed by the Board for students to actually watch the programming.

Further, the ALJ's reliance on N.J.S.A. 18A:38-25 in questioning the value of the programming of Channel One results in too tenuous a nexus between the State's obligation, shared with the

parents through application of N.J.S.A. 18A:38-25 to oblige children between the ages of six and sixteen to attend school, and the Board's inherent authority to establish rules for its own governance and to do all things proper for the conduct of its district. As noted above, such Board managerial prerogative more accurately derives from N.J.S.A. 18A:11-1, N.J.S.A. 18A:7A-1 et seq. and N.J.A.C. 6:8-1 et seq. The Commissioner concurs with Whittle and Participant NJSBA that the ALJ's citation of such cases as Everson, supra, and Netcong, supra, are inapposite to this matter. Everson concerned transportation of parochial school students in Trenton, with the issue being separation of church and state under our federal and state constitutions. Netcong dealt with whether a period for the free exercise of religion via a meditation period represented an unconstitutional establishment of religion in the schools. (Id., at 566, 568) Both cases are cited by the ALJ as a foundation to question the educational value of the Channel One programming, purportedly under the guise that Netcong and Everson bespoke moral and educational safeguards with which a board must be concerned in providing a free, public education.

However, the Commissioner finds that the fact that students may be excused from programs offered by a board is no necessary reflection on the merit of the content of such subject matter. See Smith v. Ricci, 89 N.J. 514 (1982), wherein the New Jersey Supreme Court upheld a regulation, N.J.A.C. 6:29-4.2, dealing with a requirement that districts develop a family life education program, while remaining cognizant of N.J.S.A. 18A:35-4.6, the Right of Conscience Act, which permits parents to remove their children from any objectionable part of the family life program, pursuant to the

Free Exercise Clause and the Establishment Clause of the First Amendment of the United States Constitution. (N.J.A.C. 6:29-4.1(e)4) Thus, the Commissioner finds no relationship between permitting pupils to be excused from Channel One programming and its educational value.

The Commissioner further finds and determines that the contract herein does not violate N.J.S.A. 18A:38-25 because the programming in Channel One is not part of the curriculum of the Board. The Commissioner finds Channel One information as bespoken in the record before him to be comprised of informative current events and news, intended to be a supplement to the overall educational environment created by the Board for the enrichment of its pupils, notwithstanding the two minutes of commercials. Thus, no argument can reasonably be made that pupils "indirectly" (initial decision, at p. 29) "pay the bill for the other things Whittle provides." The Commissioner so finds.

As to the two minutes of commercials during the 12-minute Channel One programming, the Commissioner agrees with that statement made in Participant NJSBA's brief filed on April 30, 1992 wherein it contends:

> ***[T]he presence of advertising is not a new concept for today's public schools. As indicated by counsel for Whittle, the Trenton Board and witness testimony, many other media are present within the schools which contain some form of advertisement. [TR. III-32-40, and 138-142] In the face of dwindling federal and state aid for education, schools must search for new and innovative relationships with business entities to provide necessary services. Many districts contract with outside vendors for services and/or equipment, which may bear the logo or slogan of the sponsor. Amicus submits that this exposure to advertising does not rise to the level of exploitation petitioners allege. Petitioners' Brief p. 7. If this court invalidates this

> contract, the impact would affect all forms of advertising within the schools regardless of the educational value. (emphasis in Brief)
> (Id., at p. 9)

In this district, it is a matter of record that Scholastic Magazine, Time and Newsweek are used as supplements to the instructional program. All three such publications include advertisements. See TR. III-139. Another program finds the Board purchasing and providing local newspapers, which contain advertisements, to pupils. See TR. III-140. Similarly, school boards are encouraged to establish partnerships with businesses as a means of obtaining quality supplies, equipment and data that might otherwise be beyond the reach of local district budgets. See TR. III-138 regarding Trenton Board of Education's adopt-a-school program for the district's students. As noted earlier under the facts extant in this matter, the Commissioner finds and determines that the Board's procedure for screening Channel One broadcasts, including its commercials, both before entering into the contract with Whittle and thereafter, reveals no abuse of its authority to manage and provide services to the pupils of the district to the extent warranting the Commissioner's substituting his judgment for the Board's in this regard. See TR. III-12, 13, 99-100.

Neither can the Commissioner find that the thorough and efficient clause of our New Jersey Constitution, art. VIII, sec. 4, para. 1, is implicated in this matter.

The Channel One arrangement herein cannot be cast, as the ALJ would have it, as "inefficient" use of instructional time. (Initial Decision, at p. 31) The amount of instructional time students receive at Trenton High remains the same, whether Channel One newscasts are shown or not. The ALJ notes under the section of

the initial decision captioned "RELEVANT EVIDENCE" at pp. 8-9 of the initial decision the testimony of Ms. Thomas, Executive Director of School Operations, that homeroom is not instructional. Rather, homeroom has been demonstrated to be a short, 15-minute module, separate from the instructional periods of the school day intended to efficiently dispose of ministerial housekeeping, "where one takes care of the minutia[e] of the day" (TR. III-101). Similarly, Mr. Winogron, the district video specialist, testified that students are allowed to do other things while in homeroom than watch Channel One. See TR. III-20. Hence, no instructional time is lost by providing pupils exposure to the Channel One programming, particularly where there is no requirement that they pay attention to it.

Further, the Commissioner does not accept the ALJ's reasoning that the Whittle contract violates art. VIII, sec. 4, para. 1 of New Jersey's Constitution because the benefits of Channel One are not free, "[c]hildren are paying for the equipment and programs just as surely [as] if they were asked for money, but the specie is more dear: it is time that could be instructional time." (Initial Decision, at p. 31) The ALJ relies, apparently, on that portion of the thorough and efficient clause of art. VIII which provides that the Legislature will provide "***a thorough and efficient system of free public schools***." (emphasis supplied) The Commissioner notes that argument presented in the Whittle exceptions citing the North Carolina Supreme Court decision dealing with Whittle Communications which rejected the same argument as raised under art. VIII, sec. 4, para. 1 of our constitution

regarding whether the services provided by Channel One are free. Therein the North Carolina Court stated:

> According to plaintiffs, the equipment provided by Whittle to the schools is not free because students pay for it with the time they spend watching commercial advertising for Whittle's financial benefit and the benefit of the Channel One advertisers.***
>
> ***[P]laintiffs provide no authority for their contention that the students are being "charged" to watch Channel One by the time they spend watching the program. Furthermore, the contract clearly provides that students are not required to watch the program, and the students do not have to "spend their time" watching the program if they do not wish to do so. *** We do not find convincing plaintiffs' argument that students are being made to pay for the contract through their time spent in watching the program, and we reject this argument. (State v. Whittle Communications, 328 N.C. 456, 464 (1991))

The Commissioner notes with accord Whittle's argument herein that in addition to the contract provisions in the Trenton contract indicating students do not have to watch the Channel One programming if they choose not to, they are likewise not required to watch the commercials. (See TR. III-56, 110, TR. III-20 and 102.) Accordingly, the Commissioner rejects the ALJ's conclusion that the Channel One programming is not free because students are exposed to two minutes a day of commercials as part of the Channel One programming shown in homeroom.

While stating that children and parents accept some limitation on their rights when entering the public schools, the ALJ suggests that our state constitution provides protection through its police power to promote health, safety, morals, peace and good order for the proposition that "[n]othing in the law suggests that the right to be protected from commercial exploitation is surrendered"

(initial decision, at p. 31), the Commissioner concurs with NJSBA wherein it states that there exists no constitutional right to be free from commercials.

> To merely articulate that an individual possesses some right, does not make it so, and does not automatically elevate such a "right" to the same level as those guaranteed by the federal constitution. The ALJ engages in "bootstrapping" to reach this conclusion, for which he has provided no support.
> (NJSBA's Exceptions, at pp. 10-11)

The Commissioner concurs that the ALJ's attempt to analogize the right to be free from "commercial exploitation" is insubstantial, and thus is rejected. (Initial Decision, at p. 31)

Finally, the Commissioner concurs with the ALJ's findings and conclusions that there has been no abuse of pupil records in this matter, but that, pursuant to N.J.A.C. 6:3-2.5, boards must be ever vigilant to ensure that whatever data is to be provided to Whittle, if the contactual relationship is to continue, does not run afoul of the statute and administrative code concerning pupil records and confidentiality.

In this case, the Commissioner has determined that the Trenton Board of Education has not abused its managerial authority pursuant to N.J.S.A. 18A:11-1 by contracting with Whittle to provide Channel One programming to its students. However, it must be clearly understood that this decision is reached based upon the factual circumstances prevailing in this matter, i.e., a 12-minute segment with two minutes of commercials offered during homeroom, a noninstructional period in the Trenton school district. It must be emphasized that such a ratio of commercials to news content is, in the Commissioner's judgment, the limit tolerable to justify use in the schoolroom setting, even during a noninstructional module such

as homeroom herein. Were a fact pattern presented anew to the Commissioner which had a more extensive commercial intrusion, it might give rise to a determination that a board of education's actions were unreasonable in permitting such programming because the balance of educational value would be overwhelmed by commercial intrusion. The Commissioner so states notwithstanding his full appreciation that in this era of rapid technological change, particularly in the area of audiovisual technology, boards of education should not be unduly restricted in acquiring those technological benefits a contract of the sort herein discussed can bring to a district and its students.

In summary, while there are troubling questions associated with the issue of commercial television and intrusion on the sanctity of instructional time in our public schools, it is the Commissioner's judgment that under the facts of this matter they do not rise to the level of finding the Trenton Board's actions unreasonable or arbitrary.

In so ruling, let it be clearly understood that this decision does not represent an unfettered right of boards of education to engage in contracts with commercial television companies. Therefore, the Commissioner cautions boards of education that they must assiduously guard against the potential for abuse that exists relative to the intrusion of commercialism within the schoolroom setting, especially as it impacts on instructional time.

Accordingly, the initial decision is affirmed insofar as the ALJ found that N.J.S.A. 18A:51-13 is not applicable to the contract in question in this matter. The initial decision is also

affirmed in finding that arguments related to art. VIII, sec. 3, pars. 2 and 3 (1947) were not raised in the pleadings or at prehearing and thus are not addressed in this decision, and further that the pupil records law, N.J.S.A. 18A:36-19, and N.J.A.C. 6:3-2.1 et seq. have not been implicated under the facts of this matter. In all other regards, however, the initial decision is rejected.

Accordingly, the instant Petition of Appeal is dismissed, with prejudice.

COMMISSIONER OF EDUCATION

AUGUST 6, 1992

DATE OF MAILING - AUGUST 6, 1992

177-92

EDU #4095-91
C # 177-92
SB # 37-92

NEW JERSEY EDUCATION ASSOCIATION, ABDUL-MALIK ALI, JAMILH ALI AND K.A., minors by their guardian, ABDUL-MALIK ALI,

PETITIONERS AND PARTICIPANT-APPELLANTS,

V.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

RESPONDENT-RESPONDENT,

AND

WHITTLE COMMUNICATIONS, L.P.,

INTERVENOR/RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 6, 1992

For the Petitioners and Participant-Appellants, Wills, O'Neill & Mellk (Arnold M.Mellk, Esq., of Counsel)

For the Respondent-Respondent, Sumners, Council & Innis (Thomas W. Sumners, Jr., Esq., of Counsel)

For the Intervenor/Respondent-Respondent, Pico, Mack, Herbert, Kennedy, Jaffe & Yoskin (Michael J. Herbert, Esq., of Counsel)

For the Participant New Jersey School Boards Association, Sheila Dow Ford, Esq.

The State Board of Education affirms the decision of the Commissioner. In so doing, we emphasize, as did the Commissioner, that our decision is based strictly on the facts of this particular case and does not stand for an unfettered right of district boards to enter into contracts with commercial television companies.

Ronald K. Butcher opposed.

December 2, 1992

DEC 04 1992

Date of mailing _____

178-92

178-92

JOHN RIZZO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSIAC COUNTY,	:	
RESPONDENT.	:	
	:	

AUGUST 5, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10222-91
AGENCY DKT. NO 367-10/91

JOHN RIZZO,
Petitioner,
v.
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,
Respondent.

Louis P. Bucceri, Esq., for petitioner
(Bucceri and Pincus, attorneys)

Russell J. Schumacher,General Counsel, for respondent

Record Closed: June 25, 1992 Decided: June 29, 1992

BEFORE **JOSEPH F. MARTONE,** ALJ.

STATEMENT OF THE CASE

This action involves a challenge by petitioner to his assignment to a teaching position following the abolishment of his prior position, and alleges a violation of his tenure and seniority rights for failure to appoint him as a vice-principal.

This matter was transmitted to the Office of Administrative Law on November 4, 1991, for a hearing pursuant to *N.J.S.A.* 52:14B-1 et seq. and *N.J.S.A.* 52:14F-1 et

seq. A telephone prehearing conference was held on January 16, 1992, and a prehearing order was entered on January 21, 1992, scheduling the hearing in this matter for June 25 and 26, 1992.

Prior to the scheduled hearing date, the parties agreed to settle this matter and have prepared the attached Settlement Agreement indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the terms of settlement and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 29, 1992
Date

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

July 1, 1992
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 02 1992
Date

OFFICE OF ADMINISTRATIVE LAW

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LEGAL DEPARTMENT
The Paterson Public Schools
33-35 Church Street
Paterson, New Jersey 07505
Telephone (201) 881-6229
Fax (201) 881-6388

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

General Counsel
Russell J. Schumacher

June 24, 1992

The Honorable Joseph F. Martone
Administrative Law Judge
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: John Rizzo vs. State-Operated
School District of Paterson
OAL Docket No. EDU 10222-91
Agency Ref. No. 367-10/91

Dear Judge Martone:

Please find enclosed an original and one (1) copy of a settlement agreement executed by the parties in the above-referenced matter.

The parties request that the hearing in this matter be adjourned and that you recommend that the Commissioner of Education approve the settlement.

Respectfully yours,

Russell J. Schumacher, Esq.
General Counsel

RJS:amt
Enc.
cc: Louis P. Bucceri
w/enc.

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2490
(201) 773-5665
Counsel for Petitioner

JOHN RIZZO,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
v.	:	O.A.L. DOCKET NO. EDU 10222-91 AGENCY REF. NO. 367-10/91
STATE OPERATED SCHOOL DISTRICT OF PATERSON,	:	
Respondent.	:	**SETTLEMENT AGREEMENT**

John Rizzo, residing at 70 Swamp Road, Phillipsburg, New Jersey, and the State Operated School District of the City of Paterson with offices at 33-35 Church Street, Paterson, New Jersey, desiring to amicably resolve this dispute, hereby agree as follows:

1. Effective July 1, 1992, Mr. Rizzo shall be appointed to a vice-principal position.

2. Effective July 1, 1992, Mr. Rizzo shall be paid at the step 4 of the high school vice-principal salary guide (doctor equivalency level) pending negotiations with the Paterson Administrators Association for the 1992-93 school year. Mr. Rizzo will also receive longevity of $2,200 based upon his years of service in the District in addition to his base salary of $60,191. Unless a new collective agreement is in effect as of July 1, 1992, Mr. Rizzo will be compensated $62,391 per annum effective July 1, 1992. Any right to additional salary in the

event of a subsequent collective agreement will be the same as for any other vice-principal.

3. Mr. Rizzo will accrue seniority credit as a vice-principal from the date of his original appointment as vice-principal, August 1, 1988.

4. Mr. Rizzo hereby expressly releases any and all claims he may have for any additional compensation or other benefits for the 1991-92 school year and any prior years. Mr. Rizzo does not release his tenure or seniority rights.

5. This agreement is subject to the approval of the Office of Administrative Law and the Commissioner of Education.

6. In return for compliance with this Agreement, Mr. Rizzo agrees to the dismissal, with prejudice, of the litigation known as John Rizzo v. The State-Operated School District of the City of Paterson, Agency No. 367-10/91, O.A.L. Docket No. EDU 10222-91.

Witnessed

John Rizzo
Dated: 6/5/92

Louis P. Bucceri
Attorney for Petitioner

Laval Wilson
State Superintendent
of Schools
Dated:

Russell J. Schumacher
District General Counsel

OAL DKT. NO. EDU 10222-91

JOHN RIZZO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSIAC COUNTY,	:	
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

AUGUST 5, 1992

DATE OF MAILING - AUGUST 5, 1992

179-92

179-92

ANTHONY FORTUNA,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

AUGUST 5, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7745-91
AGENCY DKT. 246-7/91

ANTHONY FORTUNA,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY,
Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Joseph F. Betley, Esq., for respondent (Capehart & Scatchard, attorneys)

Record Closed: June 23, 1992 Decided: June 29, 1992

BEFORE **AUGUST E. THOMAS**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 9, 1991 for a hearing pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

29 June 92
Date

August E. Thomas
, ALJ

Receipt Acknowledged:

July 1, 1992
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 07 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

km

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioner

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ANTHONY FORTUNA, Petitioner, v. BOARD OF EDUCATION OF DEPTFORD TOWNSHIP, GLOUCESTER COUNTY, Respondent.	: BEFORE THE OFFICE OF OF ADMINISTRATIVE LAW : : OAL Docket No. EDU 07745-91S : : STIPULATION OF SETTLEMENT/ WITHDRAWAL

The parties agree that this matter shall be deemed resolved and shall be withdrawn, subject to the following provisions.

1. Petitioner shall withdraw all claims pending in this matter as the result of the termination of his employment which was effective June 30, 1991.

2. The withdrawal of this Petition by Petitioner shall not constitute a waiver or abandonment of any rights that Petitioner may have to employment because of his tenure or seniority status, with the exception of Petitioner's claim that Respondent violated his tenure and seniority rights when it terminated his employment effective June 30, 1991.

3. The parties agree to hold each other harmless, and to waive, abandon and release each other from all claims and

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
GATEWAY I
NEWARK, N.J. 07102

liabilities which were or could have been asserted against each other as a result of the termination of Petitioner's employment effective June 30, 1991, and as the result of the filing of this Petition of Appeal.

4. In consideration of the foregoing terms, the parties request that this matter be deemed withdrawn and resolved.

Dated: 5/8/92

Richard A. Friedman, Esq.
Attorney for Petitioner

Dated: 5/4/92

Anthony Fortuna, Petitioner

Dated: 5/13/92

Joseph Betley, Esq.
Attorney for Respondent

Dated: 6/2/92

Catherine Park
Board President

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FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
GATEWAY I
NEWARK, N.J. 07102

OAL DKT. NO. EDU 7745-91

ANTHONY FORTUNA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY,	:	
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

AUGUST 5, 1992

DATE OF MAILING - AUGUST 5, 1992

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WILLIAM SCHWENCK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

AUGUST 5, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7077-91
AGENCY DKT. NO. 230-6/91

WILLIAM SCHWENCK,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF SUMMIT,
Respondent.

Richard J. Kaplow, Esq., for petitioner
(Weinberg and Kaplow, attorneys)

Brenda C. Liss, Esq., for respondent
(McCarter & English, attorneys)

Record Closed: June 10, 1992 Decided June 23, 1992

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

On or about June 21, 1991, petitioner, William Schwenck, filed a Petition of Appeal with the Commissioner of Education alleging that respondent, the Board of Education of the City of Summit, arbitrarily, capriciously, and without good cause withheld his salary and adjustment increments.

Respondent filed an answer on July 19, 1991, denying the allegations and alleging that the Board's action was permitted pursuant to *N.J.S.A.* 18A:29-14 and within its discretion as part of its management prerogative to operate the school district.

On July 23, 1991, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter 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.* A telephone prehearing conference was held on October 30, 1991, at which time the issues were isolated and a hearing scheduled for May 21, 26, and 27, 1992, at the Office of Administrative Law. Settlement conferences were held and the parties agreed to a settlement. As a result of the settlement having been reached, the hearing was adjourned.

The parties have prepared the attached Stipulation of Settlement indicating the terms of settlement. I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be and are hereby concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 23, 1992
Date

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

6/25/92
Date

Maureen M. Richter
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 29 1992
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

jrp/e

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

WEINBERG AND KAPLOW, P. A.
A PROFESSIONAL CORPORATION
80 MORRIS AVENUE
SPRINGFIELD, NEW JERSEY 07081
(201) 379-5757
ATTORNEYS FOR Petitioner

BEFORE THE STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

Petitioner,

WILLIAM SCHWENCK

vs.

Respondent,

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SUMMIT

Docket No. OAL EDU-7077-91

CIVIL ACTION

STIPULATION OF SETTLEMENT

This matter having come before the Office of Administrative Law for trial on May 21, 1992, the Petitioner having been represented by Weinberg and Kaplow, P.A. (Richard J. Kaplow, Esq. appearing), and Respondent having been represented by McCarter & English (Brenda C. Liss, Esq. appearing), and the parties having reached an amicable settlement of the pending matters in dispute, and the parties further desiring to set forth the terms and conditions of their agreement upon the record,

IT IS, on this 1st day of June, 1992, agreed by and between the parties as follows:

1. Beginning with the commencement of the 1992-93 school year, Petitioner will be paid in accordance with the collective bargaining agreement between Respondent and the Summit Education Association, with the effect that Petitioner's salary for said 1992-93 year shall be $54,564.00. Petitioner's longevity and adjustment increments previously withheld for the 1991-92 school year shall not be restored.

2. Petitioner shall take any and all steps necessary to withdraw the Petition of Appeal with prejudice and without costs.

3. The parties agree that the within Stipulation of Settlement shall not be construed by or against either party as any form of admission or adjudication regarding any of the issues raised by either party in the case.

Richard D. Kaplow, Esq.
Attorney for Petitioner

Brenda C. Liss, Esq.
Attorney for Respondent

OAL DKT. NO. EDU 7077-91

WILLIAM SCHWENCK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

AUGUST 5, 1992

DATE OF MAILING - AUGUST 5, 1992

181-92

181-92

BOARD OF EDUCATION OF THE UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION
RUDOLPH H. HENDEL AND CATHERINE G. LIN-HENDEL,	:	
RESPONDENTS.	:	

AUGUST 5, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9156-91

AGENCY DKT. NO. 348-9/91

BOARD OF EDUCATION
OF THE UNION COUNTY
REGIONAL HIGH SCHOOL
DISTRICT NO. 1,
Petitioner,
v.
RUDOLPH H. HENDEL &
CATHERINE G. LIN-HENDEL,
Respondents

Franz J. Skok, Esq., for petitioner
(Johnstone, Skok, Loughlin & Lane, attorneys)

John J. Sarno, Esq., for respondents
(Robinson, St. John & Wayne, attorneys)

Record Closed:June 29, 1992 Decided: June 29, 1992

BEFORE **KEN R. SPRINGER**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 27, 1991 for a hearing pursuant to *N.J.S.A.* 52:14F-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.*

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 29, 1992
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

July 1, 1992
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 02 1992
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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ROBINSON, ST. JOHN & WAYNE
One Gateway Center
Newark, New Jersey 07102
(201) 622-3700
Attorneys for Respondents

BOARD OF EDUCATION, UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1,	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
Petitioner,	OAL DKT. NO.: EDU-09156-91N
v.	AGENCY REF. NO.: 348-9/91
RUDOLF H. HENDEL and CATHERINE G. LIN-HENDEL,	STIPULATION OF SETTLEMENT AND DISMISSAL
Respondents.	

The parties having amicably adjusted their dispute in the above-captioned matter hereby agree on this 12th day of June, 1992, to settle and dismiss the matter, with prejudice as follows:

1. Petitioner Board of Education, Union County Regional High School District No. 1, its agents, employees and representatives (the "Board") and Respondents Rudolf H. Hendel and Catherine G. Lin-Hendel (the "Hendels") shall exchange mutual Releases;

2. In consideration for the Release given by the Board, the Hendels shall pay the sum of Three Thousand Dollars ($3,000), which payment shall be held in the Trust Account of Robinson, St. John & Wayne, pending approval of this Stipulation of Settlement and Dismissal ("Settlement"), by the Commissioner of Education for the State of New Jersey ("Commissioner");

3. In consideration for the Release given by the Hendels, the Board shall dismiss all claims that it has brought or could have brought against the Hendels and their representatives in the civil action entitled Board Education Regional High School Dist. No. 1 v. Hendel, Superior Court of New Jersey, Union County, Law Division UNN-1-620-91, and transferred to the Office of Administrative Law, docketed as EDU-09156- 91N; and

4. Fully executed Releases shall be held in escrow by counsel and, within five (5) days of the approval of this Settlement by the Commissioner, the Releases shall be exchanged and the sum of $3,000 shall be simultaneously delivered to the Board.

Robinson, St. John & Wayne
By: John J. Sarno
One Gateway Center
Newark, NJ 07102
Attorneys for Respondents

Johnstone, Skok, Loughlin & Lane
By: Franz J. Skok
324 East Broad Street
Westfield, NJ 07091
Attorneys for Petitioners

OAL DKT. NO. EDU 9156-91

BOARD OF EDUCATION OF THE UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION
RUDOLPH H. HENDEL AND CATHERINE G. LIN-HENDEL,	:	
RESPONDENTS.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

AUGUST 5, 1992

DATE OF MAILING - AUGUST 5, 1992

182-92

182-92

JOSEPH CHIECO,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWN OF GUTTENBERG, HUDSON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

AUGUST 5, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2017-91
AGENCY DKT. NO. 23-2/91

JOSEPH CHIECO,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWN OF GUTTENBERG, HUDSON COUNTY,
Respondent

Richard D. De La Roche, Esq., for petitioner

John L. Schettino, Esq., for respondent
(Giblin & Giblin, attorneys)

Record Closed: June 16, 1992 Decided: June 22, 1992

BEFORE **STEPHEN G. WEISS,** ALJ:

This matter was transmitted to the Office of Administrative Law by the Department of Education on February 28,1991, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq In his petition, Joseph Chieco maintained that he enjoyed tenure as a custodial/janitorial employee pursuant to N.J.S.A. 18A 17-3 and that the respondent's determination to terminate that employment was in violation of his tenure rights. Petitioner further maintained that the Board's effort in April 1990 to place him on a six-month probationary period was ineffective.

Respondent filed an answer in opposition to the petition alleging that its action in his case was in conformity with established statutory and case law.

The matter originally was assigned for hearing to Administrative Law Judge Christopher R. Dietz. However, upon his appointment as a judge of the New Jersey Superior Court, the matter was reassigned to the undersigned administrative law judge whose own schedule required an adjournment of the original hearing dates. Accordingly, hearings were established for January 1992.

On the date scheduled for the hearing, I met with counsel and, as a result, the parties reached agreement on the terms and conditions of a tentative settlement. Thereafter, a copy of a fully executed settlement agreement was submitted to me which is attached hereto and made part hereof.

The agreement provides in essential part that petitioner will dismiss his petition with prejudice. In consideration for the withdrawal of his petition, the respondent will pay to petitioner the sum of $15,000 in full and final payment.

I have reviewed the file in this matter and the terms and conditions of the proposed settlement. I **FIND** that:

1. The parties voluntarily have agreed to the terms of the settlement as evidenced by the signatures which appear on the settlement agreement; and

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I therefore **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 22, 1992
Date

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

June 24/1992
Date

Maureen K. Kelley
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 26 1992
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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SETTLEMENT AGREEMENT

Agreement made this 2nd day of April, 1992, between the Guttenberg Board of Education, Township of Guttenberg, County of Hudson and State of New Jersey, referred to as "Respondent" and Joseph Chieco, residing at 218 New York Avenue, City of Union, County of Hudson and State of New Jersey, referred to as "Petitioner."

Petitioner had been employed by the Respondent as a custodian. Petitioner was terminated from his position as a custodian in the Guttenberg School District on or about November 14, 1990.

A controversy exists between the Respondent and Petitioner as to the circumstances surrounding the termination of said Petitioner.

The parties desire to avoid the costs and uncertainties of litigation by compromising and settling all claims and controversies between them.

It is understood that the Respondent, by agreeing to this compromise and settlement in no way admits liability to Petitioner of any kind. Petitioner understands that the Respondent has not agreed or promised to do or omit to do any act or thing not contained in this Agreement.

Now, therefore, in consideration of the several covenants and releases by each of the parties set forth in this Agreement, Petitioner and the Respondent agree with one another as follows:

1. Petitioner for himself and his heirs, legal representatives and assigns, hereby releases and forever discharges the Respondent, its members, servants, agents

and/or employees, both jointly and severally, or in the alternative or individually, its successors and assigns, of and from any and all manner of action and causes of action, suits, claims and demands whatsoever, whether in law or in equity, which now exist or may hereafter arise from any matter, fact, circumstance, happening or thing whatsoever occurring or failing to occur from the beginning of Petitioner's employment to the present specifically including, but not limited to whatever rights Petitioner may have had pursuant to the tenure laws.

2. Petitioner agrees to dismiss his petition filed with the State of New Jersey, Office of Administrative Law, with prejudice thereby relinquishing any and all rights and claims he may have had as a custodian in the Guttenberg School District.

3. Petitioner agrees to not disclose any information regarding the terms of settlement agreement nor comment on said settlement agreement.

4. Petitioner will be paid a total of $15,000.00 in full payment for making this Release and agrees not to seek anything further, including any other payment and any additional covenants, terms and conditions.

5. Petitioner hereby agrees that any breach of this Agreement specifically with regard to paragraph four concerning nondisclosure will result in the forfeiture of his settlement monies in the amount of $15,000.00 and

shall entitle the Respondent to damages and such other relief as may be deemed equitable.

6. Petitioner states that no representation of fact or opinion was made to him by the Respondent or anyone on the Respondent's behalf to induce this compromise as to any rights the Petitioner may have. Petitioner understands that the $15,000.00 to be paid by the Respondent was agreed to as a compromise to avoid expense and to terminate all controversy or claims for damages of any nature, known or unknown, in any way growing out of or in connection with the facts and claims set froth above. Petitioner expressly agrees that his acceptance of such payment by the Respondent shall be a complete bar to all claims or suits for damages of any nature resulting or to result from the employees termination.

DATED:

Witness

4/2/92

Joseph Chieco, Petitioner

DATED: 3/22/92

Witness

Ellen Zoller
Board President
On Behalf of Respondent

OAL DKT. NO. EDU 2017-91

JOSEPH CHIECO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF GUTTENBERG, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as his final decision in this matter. The Commissioner notes with respect to settlement term number three, however, that while petitioner may agree not to disclose information relating to the settlement, the settlement document itself is a matter of public record and access thereto may not be restricted by action of the parties.

With the above proviso, this matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

AUGUST 5, 1992

DATE OF MAILING - AUGUST 5, 1992

183-92

183-92

SANFORD LUBER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

AUGUST 5, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
ORAL DECISION ON MOTION
FOR EMERGENCY RELIEF
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DKT. NO. EDU 4993-92
AGENCY DKT. NO. 294-7/92

SANFORD LUBER,
Petitioner,
v.
BOARD OF EDUCATION OF
TOWNSHIP OF LAKEWOOD,
OCEAN COUNTY,
Respondent.

9 Quakerbridge Plaza, CN 049
Mercerville, New Jersey 08625
Monday, July 6, 1992

Sanford Luber, petitioner, pro se

Richard K. Sacks, Esq., for respondent

BEFORE **STEVEN C. REBACK**, ALJ:

The following is a transcript of an oral ruling which I issued on July 6, 1992, in chambers, as an incident to an order which was issued by my office on the same date, denying the motion submitted by Sanford Luber for emergent relief in the above-entitled matter.

The Commissioner of Education transmitted Mr. Luber's appeal to the Office of Administrative Law on July 1, 1992, on his petition seeking emergent relief

in the form of a stay of action contemplated by the respondent Board of Education. The action of the Board which is the subject of Mr. Luber's motion has not yet taken place; a decision by way of a vote and resolution is not expected before the evening of July 6, 1992. Essentially Mr. Luber is anticipating a resolution of the Board inconsistent with his position and is seeking a stay of the Board's action which, in his view, would result in the privatization or "out-sourcing" of various support services to private contractors. These services include busing, custodial, maintenance and security. In support of his motion, Mr. Luber has submitted a 12-page petition and supplemented that by way of oral argument. Mr. Sacks, counsel to respondent Board, submitted an answer on July 6, 1992, denying that Mr. Luber has in any way set forth facts upon which any relief can be granted and, further, that the action of the Board which is the subject of Mr. Luber's motion are presumed to be correct and were not arbitrary and/or capricious.

The standard in governing the current motion is similar to, if not identical to the standard set forth by court rule. Pursuant to N.J.A.C. 1:1-12.6 a motion for emergent relief shall be granted only if the moving party can demonstrate: (1) that he will suffer immediate and irreparable harm should the relief be denied; and (2) a reasonable likelihood of prevailing on the merits. See, Crowe v. DeGioia, 90 N.J. 126 (1982). Should the moving party fail to establish both these criteria by a preponderance of the relevant credible evidence, then the motion for emergent relief must be denied.

Addressing first the issue of whether Mr. Luber has established that immediate and irreparable harm will befall him should his application for emergent relief be denied, it is my view that he has failed to establish this criterion. Mr. Luber, as a taxpayer of Lakewood Township, is attacking action which the Board has not yet taken. He is speculating that on the evening of July 6, 1992, the Board will vote to privatize the various services described. But as Mr. Sacks, counsel for the Board represents, there is no way of knowing at this time exactly what it is the Board will do. Its choices are varied. It may vote to privatize some but not all of the services at issue. It may vote to privatize all of the services at issue. It might vote to modify the process of privatisation. Or it may vote not to privatize any of the services at issue and to maintain the status quo. Unless and until the Board acts through appropriate vote and resolution, it is to engage in crystal-ball gazing to determine the injury Mr. Luber alleges he will suffer much less its immediacy and irreparability. Furthermore, Mr. Sacks has represented that even were the Board to vote to privatize, in respect to the issue of busing, that contract will not be executed until

September 1992. In respect to the various other services provided for, it will be a full two-week period between the vote of the Board and its execution of a variety of contracts before those services will result in out-sourcing. Given the speculative nature of what the Board will or might or might not do, there is a serious question as to whether Mr. Luber has raised a justiciable issue in these proceedings.

Secondly and in respect to the substantive issue underlying the motion, it is also my judgment that Mr. Luber has been unable to successfully demonstrate that there is a reasonable likelihood that he will prevail on the merits. It should at the outset be noted that the scope of review by the administrative law judge (ALJ) in respect to whether the action (at this time only contemplated) by the Board in respect to privatization should be upheld is not a de novo standard; rather, it is the ALJ's obligation to determine whether the action of the Board is reasonable rather than arbitrary and capricious. Thus even were the ALJ to disagree with the decision of the Board to privatize (at this time, again, hypothetical) that would not, as a matter of law, serve as a basis for the ALJ's decision to reverse the Board. In addition, of course, if the Board's actions are those with which Mr. Luber disagrees, that also does not provide a legal basis to overturn its decision.

One must engage in the presumption that the actions and activities of the Board are reasonable unless and until evidence is forthcoming to demonstrate the contrary. I have reviewed Mr. Luber's petition. Much of it is conclusory. In addition, much of it is an expression, albeit sincere, of Mr. Luber's personal disagreement with action that the Board contemplates. It should also be noted that Mr. Sacks stated for the record that the Board contracted with a consulting firm which prepared a report directing itself to both the transportation and maintenance issues and it is upon this report that the Board presumably will exercise its discretion and make a judgment. Mr. Sacks also formally represented on the record that this report was not based on inaccurate or erroneous information. Mr. Sacks also reaffirmed the principle that public entities are permitted to out-source and privatize a variety of services provided that they comply with a variety of procedures. See In re IFPIE Local 195 v. State, 88 N.J. 393 (1982). Mr. Sacks further represented that these various procedures were complied with by respondent Board in respect to the issues before me.

Thus while Mr. Luber may indeed have legitimacy in disagreeing with a decision (which may or may not ensue) resulting in privatization, that disagreement is not necessarily legally actionable unless it is also intertwined with unlawful

activity. Mr. Luber has not made a showing of unlawful activity such that the law would conclude that he has a reasonable likelihood of prevailing on the merits.

Lastly it should be noted that Mr. Luber's argument that a significant number of Lakewood citizens have signed a petition opposing the possible privatization is unavailing. Merely because the electorate may disagree with a position taken by a public governing entity does not mean that the entity is acting improperly or unlawfully. If a constituency is dissatisfied with policies formulated by an elected official or an elected body, the remedy is not to seek an adjudication (unless of course the activity of the body rises to the level of unlawfulness); the remedy is to elect other representative officials. If the Township of Lakewood is so dissatisfied with the actions of its Board of Education, they must make that dissatisfaction known through the ballot box.

Accordingly, and based upon the foregoing, I **CONCLUDE** that the petitioner has failed to establish by a preponderance of the relevant, credible evidence that he has a reasonable probability of prevailing on the merits of this matter should it proceed to plenary hearing.

Based upon the foregoing, it is **ORDERED** that the petitioner's motion seeking emergent relief be and hereby is **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

7/7/92
DATE

STEVEN C. REBACK, ALJ

END OF TRANSCRIPT

I, Rose Marie Patti, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Steven C. Reback's oral decision rendered in the above matter on July 6, 1992.

DATED 7/7/92

Rose Marie Patti
ROSE MARIE PATTI

7/7/92
Date

STEVEN C. REBACK, ALJ

rmp

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON MOTION FOR EMERGENT RELIEF
OAL DKT. NO. EDU 4993-92
AGENCY DKT. NO. 294-7/92

SANFORD LUBER,
Petitioner,
v.
BOARD OF EDUCATION OF TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,
Respondent.

Sanford Luber, petitioner, pro se

Richard K. Sacks, Esq., for respondent

BEFORE **STEVEN C. REBACK**, ALJ:

This matter having come before me on July 6, 1992, pursuant to an application made by the petitioner for a motion seeking emergent relief in the form of a stay of respondent's action to contract out services for busing, custodial, maintenance, and security pursuant to Board action contemplated on July 6, 1992, and good cause not having been shown, it is **ORDERED** that petitioner's motion for a stay be and is hereby **DENIED**.

A tape recording of an oral ruling which I issued in chambers setting forth the basis of this order is made part of this record and is forwarded to the Commissioner of the Department of Education for his review.

It is further **ORDERED** that the petitioner shall advise the Office of Administrative Law by not later than July 8, 1992, whether he wishes to pursue this matter to plenary hearing.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

July 6, 1992
DATE

STEVEN C. REBACK, ALJ

rmp

SANFORD LUBER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this matter, including a tape recording of proceedings at hearing, the transcript of the ALJ's oral decision on motion, and the ALJ's written order denying emergent relief, have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the ALJ that petitioner has not met the standard for grant of emergent relief in this matter, which appears to be essentially a disagreement regarding Board policy decisions for which the appropriate remedy is, as noted by the ALJ, the ballot box rather than legal action.

Moreover, the Commissioner has confirmed that, in accord with the directive of the ALJ's written order, petitioner has notified the Office of Administrative Law that he does not wish to pursue this matter to plenary hearing.

Accordingly, the initial decision of the Office of Administrative Law denying emergent relief is affirmed for the

reasons well expressed in the ALJ's oral decision on motion; and, in view of petitioner's communication with the ALJ regarding further proceedings, the instant matter is deemed withdrawn as a controversy before the Commissioner.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 5, 1992

DATE OF MAILING - AUGUST 5, 1992

184-92

184- 92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF HAMILTON	:	DECISION
TOWNSHIP, ATLANTIC COUNTY.	:	
	:	

SYNOPSIS

Petitioner, unsuccessful candidate for seat on the Board, requested inquiry into alleged violations of annual school election pursuant to N.J.S.A. 18A:14-63.12.

ALJ found that not all violations void election results; however in this matter there was evidence of significant misinstruction and substantial confusion regarding the write-in ballot process resulting in disqualification of 97 write-in votes, 87 of which had been cast for petitioner, placing her within 4 votes of winning. ALJ found will of electorate was thwarted. ALJ recommended that Board conduct new election as soon as practicable.

Commissioner concurred with ALJ that new election was warranted, citing closeness of result and evidence of significant error in instructing voters. (Green Brook)

AUGUST 6, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2993-92
AGENCY DKT. NO. 106-4/92

IN THE MATTER OF THE ANNUAL SCHOOL BOARD ELECTION HELD IN THE TOWNSHIP OF HAMILTON, ATLANTIC COUNTY

Janet Smith, petitioner, *pro se*

Joseph M. Assan, Esquire, for respondent, Hamilton Township School Board (Lisitski & Assan, attorneys)

Record Closed: June 15, 1992 Decided: June 22, 1992

BEFORE JOSEPH E. KANE , ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Janet Smith, an unsuccessful candidate for a seat on the Board of Education of Hamilton Township, submitted a written request to the Commissioner of Education on April 10, 1992, requesting an inquiry into alleged violations of the annual School Board election held on April 7, 1992, pursuant to *N.J.S.A.* 18A:14-63.12. The matter was transmitted to the Office of Administrative Law on April 29, 1992 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 hearing was conducted at the Office of Administrative Law, Superior Courthouse, 1201 Bacharach Boulevard, Atlantic City, New Jersey on June

10 and 15, 1992. The record was closed on June 15, 1992, and a decision was rendered on June 22, 1992.

ISSUES

Petitioner alleges that the following irregularities occurred in the conduct of the school board election held on April 7, 1992.

1. The school board erred in not extending the poll hours longer than 5:00 p.m. to 9:00 p.m.
2. The voting machines were not inspected by poll workers after each vote was cast and the voting machines were not in their proper location as prescribed by *N.J.S.A.* 19:52-2.
3. A mechanically operated model of the voting machine was not on display for instructional purposes in violation of *N.J.S.A.* 19:53A-11.
4. Poll workers were not instructed, by the school board, in the use of the voting machine in violation of *N.J.S.A.* 18A:14-6.1.
5. Names of voters were not properly checked, and addresses were not completed on the voting registration books in violation of *N.J.S.A.* 18A:14-101.
6. Poll workers intervened, or impeded the voting process, by providing voters with incorrect information as to how to register a write-in vote on the voting machine.

FINDINGS OF FACT

Approximately two weeks before the election held on April 7, 1992, petitioner decided to seek a seat on the Hamilton Township School Board. Having missed the filing deadline which would have placed her name on the ballot, she decided to mount a write-in campaign. This was the first time petitioner had ever sought public office.

The three incumbents, whose names were on the ballot, were all returned to office. Petitioner received the fourth highest number of votes.

The results of the election, as certified by the Commissioner of Education were as follows;

Candidate	At Polls	Absentee	Total
William B. Carll	317	3	320
Jeri-Lynn Gatto	401	3	404
Peter E. Fraleigh	445	3	448
Janet Smith (write-in)	221	3	224
John Lenhart (write-in)	184	0	184
Joseph G. Marshello, Jr. (write-in)	71	0	71
Larry Fatcher (write-in)	24	1	25
Harvey Kessalman(write-in)	2	0	2
20 Write-in with one (1) Vote Each	20	0	20

All of the witnesses that testified for both petitioner and respondent agreed that the lines at the polls were very long from the time voting began at 5:00 p.m., until the polls closed at 9:00 p.m. A poll worker considered this voter turnout to be the heaviest she had seen in many years, primarily due to the proposed 32 cent tax increase.

Two elections were being conducted simultaneously. One was for the Regional Board of Education while the second was for the local Hamilton Township School Board. As a result, there were two voting machines at each location. After voters registered to vote, they were given a white and a blue authority. Witnesses testified, and poll workers agreed, that the voting machines were not marked with a designation of either regional or local election. Many voters surmised that the machine with the longest line was the local election; however many voters were not aware of which line they were in until they entered the voting machine.

The combination of the long and slow moving lines, and the non-designation of the voting machines, caused many voters to leave the voting line prior to casting their ballot. Witnesses for the petitioner testified that several voting locations were in a state of confusion caused by a general misunderstanding on the part of voters as to how write-in ballots should be cast. Frustrated voters were urging other voters not to hold up the line by casting write-in ballots. Witnesses for the petitioner, as

well as poll workers, uniformly testified that many voters were unaware of how to implement the write-in process for more than one candidate.

The voting machines utilized in this election are supplied by the Atlantic County Board of Elections, and are manufactured by Shouptronic.

In this election, there were three seats available on the school board. As a result, a voter had the option of casting a ballot for any one of the three candidates whose names appeared on the face of the Shouptronic voting machine. The voter also had the option of casting a ballot for three write-in candidates, or splitting the ballot between any number of write-in candidates, and those appearing on the ballot.

The Shouptronic, which is an electronic voting machine, is programmed to accept only three ballots in any combination of either write-in or a name appearing on the ballot.

The write-in instructions appearing on the voting machine read "Press write-in button associated with office. Press flashing red button in upper right hand corner of machine. Write-in slot will open. Write-in your vote. Close write-in slot."

Frances L. Hagel has been a poll worker in various elections for the last 18 years. In this election, she was an election judge of districts one and five, the voting location at the Duberson School. As the election judge, she supervised the other poll workers whose duty it was to check names and signatures when voters registered, and to oversee the operation of the voting machines. She arrived at the polling location at approximately 4:15 p.m. She described the lines as long, with many voters being confused as to how to implement the write-in process.

Mrs. Hagel testified that the Atlantic County Board of Elections instructs her, and other poll workers, on a yearly basis concerning the use of the voting machines. She recalled that Atlantic County had been utilizing the Shouptronic machine for approximately six years.

Mrs. Hagel testified that the Atlantic County Board of Elections instructed her in the method to be used when a voter wanted to cast one write-in ballot; however, she stated that the Board of Elections never went over the procedure when multiple write-in ballots were to be cast.

Ms. Hagel testified that she, and other co-workers at the Duberson School, as well as other locations, were instructing voters who wanted to cast multiple write-in ballots to place all the names on one ballot.

The instructions given by Mrs. Hagel, as well as other co-workers, were in contravention of the procedure utilized by the Shouptronic voting machine. Each polling place is supplied with a booklet which sets forth answers to questions concerning the operation of the machine. The instructions contained therein at page 12 state:

> "2. HOW DO I CAST A WRITE-IN VOTE? ANSWER: The place for "writing-in" a person's name is provided on the Shouptronic voting machine behind a sliding window located near the top above the ballot. To cast a write-in vote, the voter must do the following:
>
> a. Push the button in the write-in block on the ballot for the appropriate office. (Note: The voter may at this point change his mind by pressing the button **again** thereby canceling the write-in selection. The voter may not change his mind after he completes stop; "b" below).
>
> b. Go to the top of the machine, above the ballot, and press the blinking red button which will open a window exposing a paper roll. (Note: As stated, the voter may not change his mind once the window is open).
>
> c. Next, the voter may write the name of the person of his choice onto the paper roll and pull the window to its down position to cover said name.
>
> d. Write-in voting is now complete for the office selected and the voter may proceed to cast his ballot for other offices, etc.

NOTE: THE VOTER MUST COMPLETE HIS WRITE-IN PROCEDURE AND CLOSE THE WRITE-IN WINDOW BEFORE HE WILL BE ABLE TO CONTINUE VOTING.
THIS PROCEDURE MUST BE FOLLOWED FOR EACH WRITE-IN. "

Several witnesses for the petitioner testified that when using the write-in procedure the door would not open and they had to force the door to open and to close. Of the voters who experienced this difficulty, all testified that they were able to complete the voting procedure.

Lawrence Bouchonville testified that he contacted the Board of Education in advance of the election, to inquire into the procedure to utilize when casting write-in ballots. He said that the instructions provided to him by the School Board were incomplete, in that he was not instructed to cast more than one write-in ballot. Mr. Bouchonville's wife, Antoinette, asked a poll worker how to file a write-in ballot, to which the poll worker responded "I don't know."

Poll worker Deborah Doernbach assigned to the Duberson School voting location districts seven and eight testified that at some point between 5:00 p.m., and 9:00 p.m. she copied the write-in instructions, found on the face of the Shouptronic voting machine, onto the blackboard which was located in the room where voting was occurring. She remembers at one point a voter commented to her that the instructions were not clear, at which point Mrs. Doernbach added further explanatory instructions. She did not remember the exact language however she believes that it was to the effect that when conducting a multiple write-in, the process would have to be repeated several times.

Jay McKeen, a detective with the Hamilton Township Police Department, voted at the Duberson School, districts seven and eight. He arrived at this polling location approximately 6:00 p.m. and was through voting at approximately 7:45 p.m.

While standing in line inside the room where the voting machine was located, he recalled that a poll worker stated to the line of voters "You have to stop the write-in votes, it's holding up the line." The poll worker went on to ask "How many of you are going to cast write-in votes." One of the voters in the line responded "That's none of your business." Detective McKeen then stated to the poll worker that he intended to cast a write-in ballot. At this point, the poll worker stated to

DetectiveMcKeen "You are holding up the line." Detective McKeen testified that he was able to successfully cast a write-in ballot.

Two poll workers and one election judge assigned to Duberson School, district seven and eight, testified that they themselves never told any voters not to cast write-in ballots. They were unaware whether any other poll workers may have made such a statement, however, no such instructions were given in their presence that they were able to hear.

Angie Johnson, election judge of district seven and eight, corroborated the testimony of all the witnesses that appeared in this matter that the lines were long, and the voters waiting in line were frustrated, and noisy. Deborah Doernbach testified that in her opinion, there were more people in the room at any one time waiting to vote then the Fire Marshall would allow. On an average, it took the voters who testified in this matter from a minimum of one hour up to two hours to vote from the time they arrived until the time they exited the voting machine.

Witnesses for the petitioner testified, and the poll workers corroborated the fact, that the voting machines were not marked as to whether they were for the local or the regional election. As a result, those voters who had intended to vote in the local election, but had mistakenly waited in the regional line, left without voting, because they had to get to work.

Petitioner has complained that the conditions within the rooms where voting occurred was very cramped, crowded and that the voting machines were not located as prescribed by *N.J.S.A.* 19:52-2. Witnesses and poll workers agreed that the voting machines at the Duberson Avenue School were not placed three feet from a wall or partition and were not at least four feet from a table where election officers were registering voters. Election judge Francis Hagel testified that for most of the night, she was standing shoulder to shoulder between the two machines, and that one machine was only two feet away from the registration table.

A poll worker and an election judge testified that due to the crowded conditions, and the amount of individuals waiting to vote, machines were not inspected after each voter cast his or her ballot as required by *N.J.S.A.* 19:52-2.

The poll workers observed that one of the machines had been defaced when a voter wrote the name of a candidate directly on the write-in box door. Election

judge Francis Hagel noticed this vandalism and immediately took steps to remove the name from the voting machine.

All of the poll workers testified that they had been trained in the use of the voting machine, including election law procedures, at least once a year. Many of the poll workers had extensive experience in all forms of elections.

Witnesses for the petitioner observed that several individuals voted by placing their names in the voter registration books, but did not include their address. These witnesses conceded however, that these voters were voting in the proper district.

At the Laureldale Fire House voting location, voting began approximately ten minutes late because the election judge wanted additional books to be delivered. The secretary to the Board testified that each voting machine displayed a sample ballot on the outside, as well as on the inside.

All of the voters who testified in this manner uniformly agreed that despite the long lines, crowded conditions and confusion over the write-in ballot process, they all were able to vote.

CONCLUSIONS

The voters in this election were subjected to long lines and frustrating conditions. This in and of itself is not sufficient to void an election. Not all violations rise to such a level that it could be stated that the will of the people and the election process has been thwarted. It can not be anticipated that every election will be conducted in accordance with the letter of the law. Minor deviations from statutory requirements are not sufficient, in an of themselves, to void election results.

In the instant matter, however, there was substantial confusion over the method by which write-in ballots were to be cast. One of the election judges testified that she specifically instructed voters who wanted to cast multiple write-in ballots to affix each name to a single ballot. These were the instructions which were also carried out by poll workers which ultimately resulted in the disqualification of 97 write-in votes due to multiple names appearing on one ballot.

Additionally, misinformation provided to voters, coupled with confusion over the write-in process, caused some voters to register only one write-in ballot, when the voter intended to cast two to three write-in ballots.

The testimony of Detective McKeen demonstrates that one poll worker within the election process, admonished voters not to hold up the line by casting write-in ballots. Three poll workers, present at McKeen's voting location, testified that they never told him, nor any other voter not to cast a write-in ballot. They admitted, however, that they were very busy processing voters, and it is possible that they did not hear the statements of co-workers at all times. I **FIND** that the testimony of Detective McKeen to be unrefuted, and credible.

It was reasonable for the Board of Elections to anticipate a heavy voter turnout considering the proposed 32 cent tax increase, which was the highest increase ever proposed within Hamilton Township. As such, since the Board was unable due to school schedules to expand the voting hours beyond the statutory periods set forth in *N.J.S.A.* 18A:14-63.12, additional voting machines should have been provided. At the very least, if only two voting machines were to be utilized, they should have been clearly marked with a designation of local or regional election. In this manner, voters who only had time to stand in one line would have been given an opportunity to cast their ballots in the election of their choice. A wait of one to two hours is excessive within the context of a school board election. The board had been advised prior to the election that a heavy turnout was anticipated, however, a request made at a school board meeting to extend the voting hours was denied.

In stepping back and examining the entire election, it is clear that voters were confused by the write-in process and were provided with incorrect instructions by poll workers which resulted in invalidation of 97 votes. Voters, while standing in line, at one point were advised by a poll worker that they should stop the write-in process.

Accordingly, I **FIND** that such conduct has interfered with the full and free expression of the popular will, and has influenced the result of the election. I herein recommend that the School Board of Hamilton Township conduct, as soon as practicable, a new election.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

22 June 92
Date

JOSEPH E. KANE, ALJ

Receipt Acknowledged:

JUNE 26, 1992 Maureen K. Keller
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 29 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

PETITIONER:
JOHN W. LENHUART, III
ALINE DIX
FRANCES L. HAGEL
LEE ANN MIGALSKI
KATHLEEN COE
LAWRENCE BOUCHONVILLE
ANTOINETTE BOUCHONVILLE
JAY McKEEN

RESPONDENT:
ROBERT M. GRAY
NANCY ECLES
AVROMO VALLESE
ANGIE JOHNSON
DEBBIE DOERNBACH
DORIS SCRUCI

DOCUMENTS IN EVIDENCE

PETITIONER:

P-1 Copies of Hamilton Township Board of Education
Voter sign-in sheets (4 packets)

P-2 Color photographs of the instructions on the Shouptronic voting machine at the Laureldale Fire House and Duberson Avenue School, date 4/7/92

RESPONDENT:

R-1 Copy of electronic voting machine cartridge tapes

R-2 Copy of recount done at voting machine warehouse

R-3 Copy of complete detained count of all names

R-4 Election Manual Poll Officials Handbook

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF HAMILTON	:	DECISION
TOWNSHIP, ATLANTIC COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by the Board, as was a brief reply thereto by petitioner urging acceptance of the findings and conclusions of the ALJ, pursuant to the provisions of N.J.A.C. 1:1-18.4.

In its exceptions, the Board contends that the ALJ ignored the testimony of some witnesses, accorded undue weight to others and incorrectly concluded that the will of the electorate had been thwarted when in fact there was no evidence that petitioner's allegations, to the extent that they were true, had affected the outcome of the election.

With regard to allegations of poll workers harassing voters about casting write-in votes, the Board argues that Officer McKeen's testimony was refuted by the testimony of poll workers in the room where McKeen voted, and that there is evidence to show that the comments in question were actually made by voters rather than poll workers. Moreover, even if the alleged harassment had occurred exactly as McKeen described, there still was no evidence to show that it affected the outcome of the election. (Board's Exceptions, at pp. 4-11)

With regard to improper instructions being given by poll workers, the Board argues that this occurred only at certain locations, and even then it did not affect the outcome of the election. As the results of the election on recount and the testimony of witnesses undisputedly showed, the lowest vote-getting incumbent was elected with 320 votes, while petitioner received 229.* She therefore would have needed 91 additional votes to tie the successful incumbent, and the Board's exhibits clearly demonstrate that only 87 of the 97 multiple-name write-in votes discarded on recount included a vote for petitioner. Moreover, the Board avers, it cannot be assumed that all the discounted write-in votes were the result of instructional error, as more votes were cast in the polling districts where correct instructions were given than in the two locations where the instructions were admittedly faulty. (Id., at pp. 12-14)

With regard to petitioner's remaining allegations, specifically that the Board and/or its agents provided for insufficient polling hours, confused voters by failing to clearly differentiate regional machines from local, neglected to ensure that voting machines were inspected after each vote, placed machines in a manner not in compliance with statute, failed to display a mechanically operated voting machine model for instructional purposes, neglected to instruct poll workers in the use of voting

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* The Commissioner here notes that the election results cited by the ALJ at page 3 of the initial decision are those originally announced, not the results certified by the Commissioner in his decision on recount dated May 18, 1992. On recount, as correctly stated by the Board in its exceptions, petitioner received 229 votes rather than 224. Other minor variances in tally also occurred, but none significant for purposes of the within inquiry.

machines and failed to properly check names of voters and obtain addresses for registration books, the Board argues that even in the few instances where minimal violations may have occurred, there was absolutely no basis on which to conclude that such violations affected the outcome of the election. (Id., at pp. 16-20)

Turning to its legal arguments (Id., at pp. 20-24), the Board contends that the established standard for deciding matters of this type requires petitioner to prove not only that irregularities occurred, but also that they specifically affected the outcome of the election; that is, that the results of the election would have been different but for the demonstrated irregularities. The Board argues that even gross irregularities, when not amounting to fraud, do not vitiate an election and that election worker errors are insufficient grounds for voiding an election where the will of the people has not been thwarted. Rather, an election will be set aside only when deviations from statutory procedure are so gross as to produce illegal votes which would not otherwise have been cast or so as to defeat legal votes which otherwise would have been counted, thereby making it impossible to determine the will of the people; mere speculation that the results of an election might have been different if conditions were different is insufficient to meet this standard. Love v. Board of Chosen Freeholders, 35 N.J.L. 269 (1871); Stone et al. v. Wyckoff et al., 102 N.J. Super. 26 (App. Div. 1968); Petition of Clee, 119 N.J.L 310 (Sup. Ct. 1938); In Re Livingston, 83 N.J. Super. 98 (App. Div. 1964); In re Wene, 26 N.J. Super. 363 (Law Div. 1953); In re Hackensack Recall Election, 31 N.J. 592 (1960); In the Matter of the Election Inquiry Held in the School District of the City of Garfield, Bergen County, 1977 S.L.D.

771; In the Matter of the Annual School Election Held in the School District of Riverside Township, Burlington County, 1968 S.L.D. 73

The Board further cites a number of school law decisions where confused conditions and irregularities, which the Board characterizes as much like those at issue herein, were specifically found insufficient to warrant a new election because the number of contested votes, even granting every inference to the challenger, could not have changed the results of the voting. In the Matter of the Annual School Election Held in the Matawan-Aberdeen Regional School District, Monmouth County, Commissioner's decision of October 20, 1987; In the Matter of the Annual School Election Held in the Bridgewater-Raritan Regional School District, Somerset County, Commissioner's decision of October 23, 1986, affirmed State Board January 7, 1987; In the Matter of the Annual School Election Held in the School District of the Borough of Emerson, Bergen County, Commissioner's decision of June 4, 1987; In the Matter of the Annual School Election Held in the School District of Ringwood, Passaic County, 1974 S.L.D. 591. These cases are distinguished from others where the number of votes discounted was large enough to alter the result of the election. In the Matter of the Annual School Election Held in the Borough of Middlesex, Middlesex County, Commissioner's decision of May 14, 1987, and In the Matter of the Annual School Election Held in the School District of the Township of Green Brook, Somerset County, 1985 S.L.D. 1933 (State Board decision reversing Commissioner's decision at 1984 S.L.D. 1358) As petitioner herein has failed to demonstrate that anyone was intimidated or otherwise prevented from voting as the result of alleged improprieties and has moreover been shown to have received

insufficient votes to be elected even if she were granted all 87 ballots rejected for multiple listings but including her name, the Board concludes the ALJ's determination that a new election is warranted must be set aside by the Commissioner.

Upon careful review and consideration, the Commissioner concurs with the assessment of the ALJ and affirms his recommendation that the will of the electorate in this matter was thwarted so as to require the conduct of a new election.

As the Board rightly argues in its exceptions, two conditions must be met for such relief to be warranted: that irregularities be proven to have occurred and that they be further shown to have specifically affected the outcome of the election. In this case, the first five irregularities alleged by petitioner (initial decision, at p. 2) were duly examined by the ALJ and, even where violations were found to have occurred, these were judged insufficient in themselves, either singly or collectively, to warrant a new election. (Initial Decision, at pp. 8-9) The Commissioner concurs with this assessment, and in so doing, finds the Board's exceptions in these regards actually to be consonant with the decision of the ALJ.

With respect to petitioner's allegations of the voting process being impeded or thwarted by the actions of election officials regarding the casting of write-in votes, however, the Commissioner rejects the Board's contention that the facts of this matter do not meet the two-prong standard set forth above. It is undisputed that erroneous instructions for the casting of write-in votes were given by poll workers, including the judge of elections, at at least two of the five polling places. While the correctness

of the instruction given at the other three locations is disputed by the parties, the numbers of incorrect multiple-vote ballots cast at those locations (Exhibits R-2 and R-3), together with the confusion and varied attempts at explanation attested to by poll workers and voters present there, support the ALJ's fact finding and credibility assessments, thereby undermining the Board's arguments that erroneous or confusing instructions cannot be directly linked to more than a few of the rejected ballots.

The Commissioner likewise rejects the Board's attempt to argue that, even if the alleged erroneous or confusing instruction did occur, the undisputed fact that only 87 of the 97 rejected multiple-name ballots included a vote for petitioner defeats any claim that such error affected the outcome of the election because petitioner needed 91 votes to tie the lowest number of votes received by an incumbent. Given the total number of votes cast in this election, the significant number of rejected ballots and the combined effect of the proven erroneous instructions, mass confusion and other violations (notwithstanding that the latter were not in themselves fatal to the election), the Commissioner judges a four-vote margin too close a result to permit any conclusion other than that the will of the electorate was unable to be fairly expressed or determined in this matter. Green Brook, supra Accordingly, a new election is fully warranted even under the more carefully refined legal standard articulated by the Board.

Nor is this conclusion altered by, or inconsistent with, the line of cases cited by the Board to demonstrate that election results will not be overturned by the Commissioner, even where irregularity is proven, if such irregularity cannot be shown to have

directly and specifically affected the outcome of the voting. Bridgewater-Raritan, supra, dealt with casting of three illegal votes, none of which could be proven to have been cast for the incumbent who defeated petitioner by one vote; Emerson, supra, dealt with electioneering which could not be directly linked to any votes actually cast; Ringwood, supra, dealt with confusion regarding write-in votes, but the effect of the error (having to do with the set-up of machines) was to prevent votes for the winning candidates rather than to preclude write-ins, so that the error did not alter the outcome of voting. The case mainly relied upon by the Board, Matawan-Aberdeen, supra, while similar in some respects, is distinguishable from the instant matter in that in Matawan, petitioners were unsuccessful in demonstrating that alleged irregularities, other than minimal infractions having little or no effect on voting, actually occurred; based on evidence and assessment of witness credibility, the ALJ and Commissioner concluded that there had been no widespread error or omission by election officials with regard to instruction for write-in voting and that, at most, only 34 instances of rejected ballot or inability to vote could reasonably be construed to have been the result of the sporadic difficulties that did occur. Those 34 votes, even when fully credited arguendo to the tally of the highest vote-getting challenger, left a margin of over 100 votes between that challenger and the successful candidate; thus leading the ALJ and Commissioner to the conclusion that the errors proven had no effect on the outcome of the election. In the instant matter, in contrast, widespread error and omission were proven in the area of instructing voters on casting of multiple write-in votes, and 97 of 102 rejected

ballots were discarded for this reason, 87 undisputedly cast for petitioner; thereby leaving her with a four-vote margin of loss in an election pervaded by confusion and misinformation regarding write-in balloting. This situation, in the Commissioner's view, cannot be dismissed as mere speculation that results might have been different if different conditions had prevailed.

Accordingly, the initial decision of the Office of Administrative Law directing the Hamilton Township school district to conduct as soon as practicable a new election for members of the Board of Education is affirmed for the reasons expressed therein as further explicated above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 6, 1992

DATE OF MAILING - AUGUST 6, 1992

185-92

185-92

TERRENCE KATONA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BLACK HORSE PIKE REGIONAL HIGH SCHOOL DISTRICT, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

AUGUST 10 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4466-92
AGENCY DKT. NO. 273-6/92

TERRENCE KATONA,
Petitioner,
v.
BLACK HORSE PIKE REGIONAL HIGH SCHOOL DISTRICT, CAMDEN COUNTY,
Respondent.

Jamie Epstein, Esq., for the petitioner

John D. Wade, Esq., for the respondent

Record Closed: June 18, 1992 Decided: June 29, 1992

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

Petitioner, an 18 year old senior at Highland High School, filed a petition with the Commissioner of Education (Commissioner) requesting emergency relief, specifically that he be allowed to participate in the graduation ceremonies, on June 18, 1992, as a National Honor Society student. The respondent, the Black Horse Pike Regional High School District, Camden County, argued that the petitioner was not entitled to this privilege since his membership in the National Honor Society had been revoked, after a hearing. The matter was transmitted to the Office of Administrative on June 17, 1992, for a determination pursuant to N.J.S.A. 52:14B-1 e seq. and N.J.S.A. 52:14F-1 et seq.

On June 18, 1992, I heard the parties' oral arguments regarding the petitioner's request for emergency relief, and on that date, I issued an oral order denying said emergent relief.

Since petitioner's participation in the graduation ceremony as a National Honor Society student is the only issue in this matter, I hereby **CONCLUDE** and **ORDER** that the matter is now moot.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 29, 1992
Date

BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

6/30/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 06 1992
Date

OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioners:

P-1 Memorandum from Mrs. Anderson to the National Honor Society members regarding dismissal policy

For the Respondent:

R-1 Page 20 of the National Honor Society Handbook
R-2 Page 21 of the National Honor Society Handbook

WITNESSES:

For the Petitioners:

None

For the Respondent:

None

TERRENCE KATONA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BLACK HORSE PIKE REGIONAL HIGH SCHOOL DISTRICT, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon review, the Commissioner concurs with the ALJ that the issue of petitioner's participation in graduation ceremonies as a member of the National Honor Society has been rendered moot by the Commissioner's prior decision denying petitioner's motion for emergent relief. While a review of petitioner's papers in that matter leaves some question as to whether petitioner intended to pursue his dismissal from the National Honor Society and seek a plenary hearing on the merits of that issue apart from the question of participation in graduation exercises, in view of petitioner's failure to submit exceptions to the ALJ's determination of mootness herein, the Commissioner must assume that petitioner no longer wishes to pursue this matter.

Accordingly, the initial decision of the Office of Administrative Law is affirmed and the instant Petition of Appeal dismissed for reason of mootness.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 10, 1992

DATE OF MAILING - AUGUST 10, 1992

186-92

186-92

MARJORIE LEVY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning teaching staff member claimed she acquired tenure as Learning Disabilities Teacher/Consultant (LDT/C), and that Board violated her seniority rights by continuing employment of those with lesser seniority. Board held she acquired seniority only in the elementary category.

ALJ found that petitioner did not serve the requisite period of time as an LDT/C to have acquired tenure. ALJ concluded that service as a Learning Specialist could not be used as basis upon which petitioner acquired tenure as LDT/C. ALJ also concluded county school business administrator is without authority to consider or decide what certification and qualifications are required in an unrecognized title because such responsibility lies solely with the county superintendent of schools pursuant to N.J.A.C. 6:11-3.3.

Commissioner affirmed that part of the initial decision finding that duty to review and determine qualifications and certification for unrecognized titles is vested solely in county superintendent of schools. Pursuant to his authority to review such matters when there has been a failure to do so by the county superintendent or where an error is alleged (Pezzullo), Commissioner rejected ALJ's finding that the Learning Specialist position in respondent district and that of the LDT/C position were distinguishable for seniority purposes. Commissioner found LDT/C position comports with those functions of Learning Specialist and noted that an LDT/C does not serve exclusively on the child study team. N.J.A.C. 6:11-11.13(c) and 6:28-3.1(a)5(c) Commissioner directed Board to acknowledge petitioner's tenure and seniority rights and that she be assigned to a position as an LDT/C if her seniority so warrants. Commissioner also directed retroactive compensation for salary lost according to her proper placement on the salary scale, as result of Board's failure to properly appoint her to such a position effective with the start of the 1990-91 school year. Commissioner denied award of interest.

AUGUST 10, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10633-90
AGENCY DKT. NO. 391-11/90

MARJORIE LEVY,
Petitioner,
v.
MIDDLETOWN TOWNSHIP BOARD OF EDUCATION,
Respondent.

Stephen B. Hunter, Esq., for petitioner (Klausner, Hunter & Cige, attorneys)
Frances J. Campbell, Esq., for respondent (Kalac, Newman, Lavender & Campbell, P.C.)

Record Closed: April 4, 1992 Decided: June 22, 1992

BEFORE **DANIEL B. McKEOWN,** ALJ:

Marjorie Levy (petitioner), who is employed by the Middletown Township Board of Education (Board) as a teaching staff member, was assigned during 1990-91 as a reading teacher at the 8th grade level and in 1991-92 as a resource room teacher. She claims that she had acquired tenure as learning disability teacher-consultant (LDT/C) and following an unchallenged reduction-in-force effective 1990-91 the Board continued one or more LDT/C with lesser seniority than she. Consequently, petitioner concludes that the Board violated her seniority rights. The Board, to the contrary, denies petitioner acquired tenure as LDT/C and maintains that whatever seniority she may have is limited to the category of elementary.

After the Commissioner transferred the matter December 20, 1990 to the Office of Administrative Law as a contested under the provisions of N.J.S.A. 52:14F-1 et seq., a plenary hearing was scheduled to be conducted July 24, 1991. However, that hearing was canceled upon the representation of counsel to the parties that the matter more likely than not would be settled. The matter did not settle. The

parties nevertheless agree that the issues presented may be adjudicated on cross-motions for summary decision including agreed upon facts, exhibits of the parties, and memoranda of law.

Findings are reached in this initial decision that petitioner did not acquire tenure in the position of LDT/C. Consequently, the conclusion is reached that the Board did not violate petitioner's seniority following a reduction in the number of LDT/C positions effective with the 1990-91 year.

FACTS

The following facts are not in dispute between the parties and they are as set forth in petitioner's memorandum, as amended.

1. Petitioner is a tenure teaching staff member in the employ of the Board.

2. Petitioner's employment with the Board is as follows:

   1984-89 learning specialist
   1989-90 LDT/C
   1990-91 eight grade reading teacher
   1991-92 resource room teacher

3. Petitioner possess the following endorsements:

   LDT/C
   Elementary
   Social worker/visiting teacher
   Teacher of Reading
   Reading specialist
   Principal/supervisor
   Nursing school
   Teacher of English
   Teacher of the handicapped

4. During the course of petitioner's employment with the Board her responsibilities included the monitoring of basic skills

program, the development of intervention plans for students, coordination of computer programs involving in-service staff work shops, the coordination of work responsibilities with resource persons in the district, the selection and purchase of instructional materials in special and mainstreamed areas, curriculum development in all areas, performing consultant responsibilities for the administrative staff, students, and parents, and the assistance of staff with grant writing assignments.

5. The job description for the position of learning specialist which petitioner held between 1984 through 1989 required her to have a minimum of five years experience, three of which had to be in an elementary classroom. In addition, petitioner had to possess a masters degree, an elementary endorsement on an instructional certificate, although an LDT/C and/or reading certifications were preferred.

6. As a learning specialist, petitioner reported directly to her assigned building principal and she had the overall job goals of serving student and teacher needs as a curriculum and program resource specialist.

7. The job description for learning specialist (Exhibit A) lists 12 functions related to the overall job goals, only one of which specifically mentions a child study team. Function four states that the learning specialist is

> To recommend with teacher's assistance program services for students such as Child Study team referral English as a Second Language, basic skills and Gifted and Talented.

8. The position, learning specialist, is not a recognized title for purposes of N.J.A.C. 6:11-3.3. That rule obligates boards of education to seek approval of the county superintendent of schools to use unrecognized titles before making appointments thereto.

9. Sometime in the 1989 Spring, an assistant superintendent of schools for the Board requested approval from the county superintendent of schools to use the learning specialist title. On June 14, 1989 the county school business administrator wrote the assistant superintendent as follows:

> Based upon my review of the Learning Specialist job description, this position would not be considered unrecognized since it would be covered under the endorsement Learning Disabilities Teacher/Consultant (N.J.A.C. 6:11-12.15). The person occupying the position of Learning Specialist would would (sic) be considered to have the recognized job title Learning Disabilities Teacher/Consultant for seniority purposes.

10. As noted above, petitioner was assigned as LTDT/C for 1989-90. She was assigned as a reading teacher at the eighth grade level for 1990-91 and as a resource room teacher for 1991-92.

11. Petitioner does not challenge the reduction in force regarding the number of LDT/C positions for 1990-91. Petitioner does say there are individuals with lessor seniority than she who continue in the position of LDT/C.

12. In response to a written request after memoranda of the parties were filed, the Board submitted its job description for the position LDT/C which it had adopted on August 16, 1985. That job description states that the qualification for appointment as an LDT/C requires a master's degree, LDT/C certification, and three years successful teaching experience. One who is appointed as a LDT/C reports directly to the director of Special Services. The overall job goals of the LDT/C states that the primary responsibility

> [I]s to assist school personnel in helping students develop behaviors which will assist in their

acquisition of subject matter and/or skills that will contribute to their development as mature, able and responsible men and women. Using their professional expertise and other resources provided, the learning disability teacher/consultant assists school personnel in accordance with the goals, policies and curriculum adopted by the Board of Education. These primary responsibilities include the following:

1. Serves as a member of the basic Child Study Team.

2. Assesses and analyzes the learning characteristics and achievement levels of students referred to the basic child study team.

3. Acts as an educational consultant to school personnel, parents, students and other professionals.

4. Demonstrates evidence of professional development and growth.

5. Performs other appropriate functions of LDT/C nature as assigned by the Director of Special Services and [G]uidance.

ANALYSIS

On the foregoing facts petitioner says she acquired tenure as an LDT/C and, as such, following a reduction in force the Board may not continue the employment of an LDT/C with lesser seniority than she nor may it continue the employment of one who has not yet acquired tenure. The strength of petitioner's case, or lack thereof, depends in large measure on the legal efficacy of the determination reached by the Monmouth County school business administrator that the learning specialist position constitutes the recognized titled position of LDT/C.

The determination reached by the Monmouth County business administrator is of no legal consequence for two reasons. One, only the county superintendent of schools is authorized, subject to appeal, to approve the use of unrecognized professional titles or determine that the duties of a position with an unrecognized title is, for seniority purposes, the duties of a specific position with a recognized title. N.J.A.C. 6:11-3.3. Two, even if the letter (Exhibit B) of the county business administrator could be read that he was merely conveying a determination reached by the county superintendent, and it cannot be so read, the determination is erroneous.

Reviewing the job description (Exhibit A) of learning specialist with the subsequent job description filed for the position of LDT/C, the primary responsibilities of an LDT/C focus on a select pupil population; that is, youngsters in need of special education, their parents, teachers, and administrators. The primary focus of a learning specialist as that position is defined in the job description is on the pupil population in general of the school district. Moreover, the job description is specific that a learning specialist required only an elementary endorsement on an instructional certificate. While an LDT/C endorsement, or reading specialist endorsement, was preferred, the fact remains that under the job description learning specialist as it was presented and as the duties are so described, an elementary endorsement was sufficient for one to be appointed learning specialist.

The duties of a learning specialist are not the duties of an LDT/C whose primary focus is on the needs of youngsters in need of special education. That petitioner is certified as an LDT/C and was employed one year as a LDT/C does not translate into having acquired a tenure status under N.J.S.A. 18A:28-5 nor 18A:28-6. Petitioner simply did not serve the requisite period of time as an LDT/C to have acquired tenure. Petitioner's service as a learning specialist cannot be used as a basis upon which it can be fairly said she acquired tenure as an LDT/C. The Board's argument that even if petitioner had acquired tenure as an LDT/C, her seniority would not begin to count until after the date of the county school business administrator's letter, June 14, 1989, on the strength of N.J.A.C. 6:11-3.3 need not be considered in light of the above conclusion.

For all the foregoing reasons, the petition of appeal is **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 22, 1992 — Daniel B. McKeown
Date — **DANIEL B. McKEOWN**, ALJ

Receipt Acknowledged:

June 24, 1992 — Maureen K. Kelly
Date — DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 29 1992 — Jaynee LaVecchia
Date — OFFICE OF ADMINISTRATIVE LAW

tmp

MARJORIE LEVY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

Petitioner reasserts in exceptions two arguments considered below.

Exception #1 claims:

> THE ADMINISTRATIVE LAW JUDGE ERRED IN CONCLUDING THAT A DECISION SIGNED BY A DESIGNEE OF THE COUNTY SUPERINTENDENT OF SCHOOLS WAS NOT BINDING ON THE BOARD OF EDUCATION PURSUANT TO N.J.A.C. 6:11-3.3

Petitioner claims it is axiomatic that department heads and other high-ranking administrators in public service internally delegate many decision-writing functions. Petitioner claims that an otherwise appropriate opinion rendered pursuant to N.J.A.C. 6:11-3.3 should not be rendered a nullity for purposes of seniority entitlements solely because the county school business administrator, not the county superintendent of schools, signed his name instead of the

name of the county superintendent, to a memorandum prepared in response to school board inquiries made pursuant to N.J.A.C. 6:11-3.3. Petitioner adds that because Mr. Miklus' letter finds the position of Learning Specialist would not be considered an unrecognized title because it would be covered by the endorsement for Learning Disabilities Teacher/Consultant (LDT/C) under N.J.A.C. 6:11-12.15, the prescriptions of N.J.A.C. 6:11-3.3 were not violated because someone other than a county superintendent issued an opinion with regard to a recognized title.

Last, under this exception, petitioner claims at no point did the Middletown Board seek to challenge the statements contained in the June 14, 1989 letter issued by Mr. Miklus, by filing a petition for declaratory judgment before the Commissioner of Education, nor did it challenge the ability of Mr. Miklus to approve the renewal of several unrecognized job titles for the 1989-90 school year which were the subject of a renewal request from the Middletown Township's superintendent's office.

Exception #2 states:

> ASSUMING THAT THE PRESCRIPTIONS OF N.J.A.C. 6:11-3.3 WERE FULLY APPLICABLE TO THE INSTANT MATTER THE DECISION OF A DESIGNEE OF THE COUNTY SUPERINTENDENT WAS BINDING ON THE MIDDLETOWN TOWNSHIP BOARD OF EDUCATION FOR SENIORITY PURPOSES

Relying on the case law cited in her brief, petitioner contends the ALJ ignored the deference accorded to the county superintendent's office pursuant to N.J.A.C. 6:11-3.3 in his decision holding that the duties of a Learning Specialist differed from those of an LDT/C. Petitioner also claims the ALJ erred in finding that in light of the differences in job functions, Mr. Miklus' opinion was in error which found that "the person

occupying the position of Learning Specialist -- would be considered to have the recognized job title Learning Disabilities Teacher/ Consultant for seniority purposes." (Exceptions, at p. 3, Citing Exhibit B) She claims a review of the decisions cited in her brief establishes that there can be substantial differences in the duties and functions of employees with different titles whose seniority entitlements are still subsumed within the same position for seniority purposes.

Petitioner also claims that case law establishes that an administrative law judge cannot simply disagree with decisions of the county superintendent of schools, based upon the prescriptions of N.J.A.C. 6:11-3.3 solely because the ALJ concludes that the duties of the position at issue are different. She relies again on those cases cited in her post-hearing brief in support of this proposition.

Finally, because the Board failed to seek clarification of the June 14, 1989 letter from Mr. Miklus or to ask for a declaratory judgment from the Commissioner, the Board should be bound by the decision set forth within such letter. She seeks an order assigning her to an LDT/C or Learning Specialist position within the district, retroactive compensation for any economic loss effective with the start of the 1990-91 school year with interest, and appropriate adjustment to her seniority entitlements consistent with the decision sought in this matter.

Upon a careful and independent review of the record of this matter, the Commissioner affirms in part and rejects in part the initial decision of the Office of Administrative Law.

The Commissioner adopts that finding of the ALJ below that only the county superintendents of schools are authorized, subject to appeal, to approve the use of unrecognized professional titles or to determine that the duties of a position with an unrecognized title are, for seniority purposes, the duties of a specific position with a recognized title. N.J.A.C. 6:11-3.3(b) The regulation permits no exceptions, delegations or substitutions of the county superintendents' assumption of such duties and evaluations.

However, should the county superintendent fail to conduct such a review upon being solicited by a board to consider an unrecognized title, or if an error has occurred such as those alleged under the facts of this matter, that is, that the review of the job description was assigned to and determined by other than the county superintendent, the Commissioner is vested under his plenary authority to hear and adjudicate controversies arising under the education laws, N.J.S.A. 18A:6-9, to consider what certification is appropriate for any unrecognized title and in what category seniority accrues under such unrecognized title. See State Board decision at page 7 in Joseph Pezzullo v. Board of Education of the Township of Willingboro, Burlington County, decided by the Commissioner January 23, 1987 and November 5, 1987, affirmed with modification State Board March 1, 1989. Hence, rather than remand the matter, the Commissioner herein undertakes a review of the job description for a Learning Specialist submitted to the record, as well as the stipulation of facts provided by the parties and made a part of the initial decision at pp. 2-5.

Upon review of such documents and stipulations, the Commissioner rejects that finding of the ALJ that the position held

by petitioner herein as a Learning Specialist is that of a teacher rather than one of educational services as an LDT/C. In this regard, the Commissioner specifically rejects that statement of the ALJ found on page six of the initial decision wherein he states that an LDT/C's primary focus is on the needs of youngsters in need of special education. The State Board regulations do not limit either the training or function served by an LDT/C as to serving on a child study team as an advisor to special education pupils exclusively or primarily. See also N.J.A.C. 6:11-11.13(c). See, for example, N.J.A.C. 6:28-3.1(a)5(c).

In the instant matter, a review of the Learning Specialist position in this case indicates that the requirement that such title "serve as a consultant to teachers, administrators and parents in the ***evaluation of educational data and programs" is well beyond the training and responsibility of one who holds solely an elementary instructional certificate. (Exhibit A) The Commissioner finds and determines that those duties specified in Exhibit A comport with those functions provided by an LDT/C.

Petitioner concedes that as Learning Specialist within the Middletown School District, she "perform[ed] certain duties vis-a-vis classified students in addition to the other duties assigned to this particular position." (Petitioner's Brief, at p. 25) The Commissioner concurs with her argument that blending the two roles for seniority purposes is required under the circumstances extant in this matter. The Commissioner concurs with petitioner also, that insofar as the Board assigned her after the abolition of the Learning Specialist position to the position of LDT/C in 1989-90, the inference is strong that the positions, Learning

Specialist and LDT/C, and petitioner's qualifications and certificates were amenable to construing both positions as the same for calculating seniority entitlements.

Accordingly, the Commissioner affirms that portion of the initial decision finding that Exhibit B, the letter signed by the county business administrator, does not meet the requirements of N.J.A.C 6:11-3.3 for the reasons expressed in the initial decision. However, he reverses that portion of the initial decision finding that the position of Learning Specialist cannot be used as a basis upon which it can be fairly said that petitioner acquired tenure as an LDT/C.

Thus, the Commissioner hereby directs that the Board acknowledge petitioner's having acquired tenure and seniority rights as an LDT/C, that she be assigned a position as a Learning Disabilities Teacher/Consultant within the district if her seniority based on the above conclusion so warrants. He further directs that she be retroactively compensated for any salary lost according to her proper placement on the salary scale, as a result of the Board's failure to properly appoint her to such a position effective with the start of the 1990-91 school year. In so concluding, however, the Commissioner denies petitioner's request for interest on such salary insofar as she has failed to make the requisite showings pursuant to N.J.A.C. 6:24-1.16.

IT IS SO ORDERED.

AUGUST 10, 1992

COMMISSIONER OF EDUCATION

DATE OF MAILING -- AUGUST 11, 1992

186-92

EDU #10633-90
C # 186-92
SB # 38-92

MARJORIE LEVY,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, August 10, 1992

For the Petitioner-Respondent, Klausner, Hunter, Cige & Seid (Stephen B. Hunter, Esq., of Counsel)

For the Respondent-Appellant, Kalac, Newman, Lavender & Campbell (Francis J. Campbell, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. In so doing, we emphasize that our decision is based strictly on the facts of this particular case and applies solely to the parties before us.

January 6, 1993

Date of mailing JAN 08 1993

187-92

187-92

PATRICIA MONAGHAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF KEARNY,	:	
HUDSON COUNTY,	:	
RESPONDENT.	:	
	:	

AUGUST 12, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8194-91
AGENCY DKT. NO. 266-7/91

PATRICIA MONAGHAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF KEARNY, HUDSON COUNTY,
Respondent

Richard A. Friedman, Esq., for petitioner
(Zazzali, Zazzali, Fagella & Nowak, attorneys)

Frederick R. Dunne, Esq., for respondent
(Dunne & Thompson, attorneys)

Record Closed: July 8, 1992 Decided: July 9, 1992

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

Patricia Monaghan, a tenured elementary teaching staff member in the employ of the Board of Education of the Township of Kearny, Hudson County, was given notice by the Board on April 26, 1991 that her employment would be terminated at the end of the school term and thereafter would not be renewed for 1991-92. In a petition of appeal filed in the Bureau of Controversies and Disputes of the Department of Education on July 17, 1991, she alleged Board action in retaining less senior/non-tenured elementary staff contravened her rights of tenure and

seniority under N.J.S.A. 18A:28-5 and 28-10. Petitioner sought reinstatement and differential back pay.

In answer, the Board admitted her employment and notice of termination but denied its action contravened petitioner's statutory rights.

Before hearing, the parties advised that the matter had been settled amicably. Thereafter, a stipulation of settlement and dismissal was submitted.

I have reviewed the record and stipulation of settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the agreement;

2. The settlement fully disposes of all issues in controversy, is in the interest of parties and public and should be implemented forthwith.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and accordingly I approve the settlement and **ORDER** that the parties comply with the terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. . If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 9, 1992
Date

James A. Ospenson
JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

July 13, 1992
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 15 1992
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

amr

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ZAZZALI, ZAZZALI, FAGELLA & NOWAK
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioner

PATRICIA MONAGHAN, Petitioner, v. BOARD OF EDUCATION OF THE TOWNSHIP OF KEARNY, HUDSON COUNTY, Respondent.	BEFORE THE OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDU 08194-91N AGENCY DKT. NO. 266-7/91 STIPULATION OF SETTLEMENT AND DISMISSAL

Respondent having reassigned Petitioner to a full time position as a teacher for the 1991-92 school year, and recognizing that Petitioner will be re-employed for the 1992-93 school year, and having reached agreement with Petitioner regarding the nature of all of Petitioner's service in the Respondent school district, the parties hereby agree to resolve this matter on the following basis:

1. Petitioner agrees to withdraw the Petition of Appeal, and acknowledges that she suffered no loss of pay or benefits;

2. The parties agree and recognize that all of Petitioner's employment in the Respondent district, commencing with her employment on September 1, 1985, was as a teaching staff member, in a position requiring an instructional certificate, and was

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A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
GATEWAY I
NEWARK, N.J. 07102

creditable for tenure and seniority;

3. Petitioner agrees to accept her current assignment, and does not challenge the propriety of such assignment;

4. The withdrawal of the petition does not constitute a waiver of Petitioner's claims regarding her seniority calculation. The parties recognize that Petitioner is tenured, that all of her service counted toward the acquisition of tenure in the Respondent school district, and that all of it was creditable for seniority;

5. If it becomes necessary to calculate Petitioner's seniority, the parties agree that such seniority shall be computed in accord with the requirements of N.J.A.C. 6:3-1.10 et seq.

6. This agreement shall not constitute a waiver or reduction of any tenure rights that Petitioner may have, in the event of a future reduction in force or of hours, relative to any other teachers.

Dated: 6/19/92

Richard A. Friedman, Esq.
Attorneys for Petitioner

Dated: 6/26/92

Frederick R. Dunne, Esq.
Attorneys for Respondent

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NEWARK, N.J. 07102

OAL DKT. NO. EDU 8194-91

PATRICIA MONAGHAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF KEARNY,	:	
HUDSON COUNTY,	:	
RESPONDENT.	:	
	:	

The record of this matter and the initial decision in the form of a joint stipulation of settlement have been reviewed.

Upon review, the Commissioner accepts the terms of the settlement and adopts them as the final decision in this matter. In so doing, however, he emphasizes that such acceptance is strictly contingent upon the assignment, referred to in Item No. 3 of the settlement, being within the scope of petitioner's certification.

Accordingly, the Petition of Appeal is hereby dismissed subject to compliance with the terms of the settlement as indicated above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 12, 1992

DATE OF MAILING -- AUGUST 13, 1992

188-92

133-92

LYNN JOHNSTONE AND C. GLORIA HEBERLEY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners, two riffed tenured teachers, alleged their tenure rights were violated by Board's employment of nontenured staff to fill vacancies for which they held proper endorsements. The endorsements, however, were acquired subsequent to their RIF's.

Commissioner rendered his decision on a summary basis. Commissioner dismissed consolidated petitions, finding petitioners had no entitlement to positions requiring elementary endorsement as they obtained their endorsements following the Board's action to reduce their employment. Citing Francey, Commissioner found tenured employee's rights to recall are frozen at time of the Board's decision to RIF and are not continually expandable through acquisition of subsequent additional endorsements.

AUGUST 12, 1992

LYNN JOHNSTONE AND C. GLORIA HEBERLEY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

For Petitioners, Richard A. Friedman, Esq. (Zazzali, Zazzali, Fagella & Nowak)

For Respondent, Stephen J. Mushinski, Esq.

This matter was opened before the Commissioner of Education by way of Petitions of Appeal filed by Petitioner Johnstone and Petitioner Heberley on August 12, 1991 and August 27, 1991, respectively, against Respondent Cinnaminson Board of Education. Both alleged violation of their tenure rights by the Board's employment of nontenured staff to fill vacancies for which they held the necessary endorsements, those endorsements having been obtained in Johnstone's case subsequent to her RIF determination but prior to actually leaving the Board's employ and in Heberley's case subsequent to cessation of her employment; but in both cases prior to the effective dates of the vacancies to which they claimed tenure entitlement. The Board filed answers denying that petitioners had

tenure in, or entitlement to, the positions in question, averring instead that the Board had in all respects acted pursuant to applicable law.

The Commissioner subsequently granted the parties' request that the two matters be consolidated and decided on a summary basis, as they involved closely related questions of law and no disputed facts. A joint stipulation of facts was filed on November 8, 1991, followed by briefs and replies according to the schedule established for this purpose.

On December 3, 1991, petitioners proposed to amend their filings to include entitlement to a newly posted Basic Skills/ English position. On February 13, 1992, petitioners advised the Commissioner of respondent's acceptance of this amendment and of the parties' intention to rely on briefs previously submitted notwithstanding the amendment. On May 18, 1992, petitioner submitted additional comments on a recently decided case (Lammers, infra), to which the Board replied on June 19, 1992. At this time, the record of these consolidated matters was deemed closed.

FINDINGS OF FACT

The following facts have been stipulated by the parties and are adopted herein as the controlling facts of this matter.

1. Lynn Johnstone, as of August 4, 1991 held an Instructional Certificate issued by the State Board of Examiners with endorsements as a Teacher of French, K-12, Spanish, K-12 and Elementary Education, K-8.

2. Lynn Johnstone acquired these certificates as follows: Teacher of Spanish (April, 1979), Teacher of French (April, 1979), Elementary School Teacher (June, 1991), a notice of certificate issuance being received by the Burlington County Superintendent of Schools on July 8, 1991 and brought to respondent on the same date.

3. C. Gloria Heberley holds an Instructional Certificate, issued by the State Board of Examiners with endorsements of General Business Studies, Data Processing, Bookkeeping/Accounting, Distributive Occupations, Business Occupations, Teacher Coordinator/Business Education/ Cooperative Vocation, and Elementary Education, K-8.

4. C. Gloria Heberley acquired these certificates on the following dates: General Business Studies (February, 1981), Data Processing (February, 1981), Bookkeeping/Accounting (February, 1981), Distributive Occupations (September, 1981), Business Occupations (February, 1982), Teacher Coordinator/Business Education/Cooperative Vocation (August, 1987) and Elementary School Teacher (July, 1990), a notice of certificate issuance being received by the Burlington County Superintendent of Schools on July 30, 1990.

5. Lynn Johnstone commenced employment with respondent on or about December 1, 1981. She did not teach during the school year 1982-83. Lynn Johnstone taught Foreign Language as a part-time (.4) Teacher in 1983-84 and 1984-85. She taught Foreign Language as a part-time (.8) Teacher in 1985-86 and 1986-87. She became a full-time Foreign Language Teacher in 1987-88 and held that position until an April, 1991 reduction in force, which was effective June 30, 1991.

6. C. Gloria Heberley became employed in September, 1984 as a part-time (.4) Business Education Teacher. She remained as a part-time (.4) Business Education Teacher until being riffed on April 24, 1990, effective June 30, 1990.

7. Both petitioners held the requisite Instructional Certificates with the proper endorsements for each assignment during the course of their employment with the respondent.

8. Both petitioners obtained tenure in their respective employment positions with respondent.

9. Petitioner Heberley, on or about May 5, 1990, took the National Teachers' Examination in an effort to acquire an Elementary Endorsement. Petitioner Johnstone took this exam on May 4, 1991.

10. Respondent's Superintendent of Schools, Joseph Carol, on November 29, 1990 offered Heberley full-time employment in an elementary

position in September, 1991, said offer being withdrawn prior to April, 1991.

11. Since the date of their respective RIFs, neither petitioner has been employed by respondent.

12. Prior to June 20, 1991, four (4) teaching positions requiring Elementary Endorsements became vacant in respondent's school district, such vacancies all being for the 1991-92 school year.

13. One teaching position was filled on or about June 18, 1991, the second position was filled on or about July 16, 1991 and the third and fourth positions were filled on or about August 13, 1991 through the hiring of nontenured teachers under Instructional Certificates with Elementary Endorsements.

14. Petitioner Heberley requested appointment to a position by letter dated October 15, 1990 but did not receive such appointment. Heberley also verbally requested appointment to the vacant positions enumerated in Paragraph 16, but did not receive such appointment.

15. Petitioner Johnstone, by letter dated June 11, 1991 requested appointment to "available positions" under an elementary certification, but did not receive such appointment.

16. The salary of Petitioner Lynn Johnstone for the 1990-91 school year was $31,500.00.

17. The salary of Petitioner C. Gloria Heberley for the 1989-90 school year was $10,540.00.

Based upon the papers filed in conjunction with petitioners' amendment, the Commissioner further finds the following as fact.

18. On or about November 22, 1991, a vacancy effective January 6, 1991 was posted for a split position encompassing .5 Basic Skills (Reading/Language Arts) and .5 English at the middle school level. Elementary endorsement was required with Reading or Reading Specialist preferred. Sometime before February 11, 1992 the position was filled by a nontenured teacher.

PETITIONERS' POSITION

In essence, petitioners claim that because they acquired tenure under instructional certificates which now have elementary endorsements thereon, they are entitled to vacancies arising under those endorsements notwithstanding that the endorsements were acquired after they were riffed from their prior positions. Over and above the settled principle that tenure rights are to be liberally construed, petitioners contend, it is now well established that teachers acquire tenure under their instructional certificates and that such tenure extends to all endorsements thereon. Capodilupo v. West Orange Board of Education, 218 N.J. Super. 510 (App. Div. 1987), cert. denied 109 N.J. 514 (1987); Bednar v. Westwood Board of Education, 221 N.J. Super. 239 (App. Div. 1987), cert. denied 110 N.J. 512 (1988); Grosso v. Board of Education of New Providence, State Board decision March 7, 1990; Ellicott v. Board of Education of Frankford, State Board decision November 19, 1990, aff'd Superior Court 251 N.J. Super. 342 (App. Div. 1991) It is further established, they aver, that this rule applies regardless of the date on which the endorsement was obtained, as a tenured teacher who begins employment under one endorsement and later acquires additional endorsement(s) is tenured under those endorsements as well. Grossman v. Board of Education of the Borough of Ramsey, Superior Court, App. Div. unreported, Dkt. No. A-3270-88T1 (decided May 17, 1990)

In petitioners' view, the fact that endorsements were acquired after petitioners were riffed does not alter this holding, as the disputed vacancies arose after the RIF determination and involve application of recall rights, so that petitioners' tenure

entitlements are not controlled by their status at the time of RIF, but rather by their status at the time of the relevant vacancy. Marshall v. Board of Education of the Twp. of Neptune, State Board decision January 10, 1986, aff'd Superior Court App. Div., Dkt. No. A-2595-85T1 unreported (decided March 10, 1987); Mirandi v. Board of Education of West Orange, State Board decision April 5, 1989; Schienholz et al. v. Board of Education of Ewing Township, unreported, App. Div. Dkt. No. A-2905-89T3 (decided November 19, 1990), cert. denied __ N.J. __ 1991; Herbert v. Board of Education of Middletown, unreported, App. Div. Dkt. No. A-318-90T1 (decided May 22, 1991). Petitioners hold that all that is necessary for them to claim the disputed positions by tenure right is for them to have been riffed, to have expressed their interest in the vacancies at issue and to hold the requisite certification for them; liberal construction and the clear intent of the law to protect tenured teachers who lose their employment through no fault of their own can permit no other result. Bodine v. Board of Education of the Twp. of Burlington, Commissioner decision February 23, 1989, aff'd State Board July 6, 1989; Catherine Lammers v. Bd. of Ed. of Borough of Pt. Pleasant, Superior Court, App. Div. Dkt. No. A-5494-90T1, unpublished, May 12, 1992. Neither can the Board claim surprise or prejudice by the necessity to honor petitioners' entitlements, they claim, as it was fully aware of both their interest and their certification status before it filled the disputed vacancies; consequently it faced no risk of conflicting commitments or liabilities in so acting. Cf. Marshall, supra.

BOARD'S POSITION

The Board in turn argues that tenure protection should not extend to endorsements which were never served under nor held at the time of RIF; neither should it extend to endorsements held for less than the requisite period for tenure acquisition or endorsement under which claimant has served. Initially, the Board contends that the major cases relied on by petitioners, Capodilupo, supra, Bednar, supra, and Gross, supra, stand for the proposition that tenure protection extends to all instructional endorsements held at the time of RIF and can be distinguished from the present matter in that petitioners herein did not acquire their endorsements until after riffing. It is well established, the Board avers, that a RIF is accomplished when a Board has properly acted to abolish a position, and it is at this point that the Board must determine the entitlement of affected teachers to other positions within the district. Marshall, supra; Carmen DiSimoni v. Board of Education of Passaic County Regional High School District No. 1, Commissioner decision November 20, 1990, aff'd State Board April 3, 1991. To hold otherwise, the Board claims, would allow riffed teachers to continually broaden their tenure priority by amassing additional endorsements and certificates after being riffed, with the result that members of one privileged group would be allowed to claim any vacancy that happened to arise in the district and thereby continually narrow the number of potential positions available to nontenured applicants, even those with better qualifications and more experience in the position sought.

The Board further cites a number of cases which it believes support the proposition that persons without the requisite certification, or persons who have not served in the position to

which they lay claim, cannot seek entitlement to such position by tenure right and that tenure priority should not extend to endorsements which are substantively different from any endorsement under which the claimants have served. Maurice Kaprow v. Board of Education of the Township of Berkeley, Ocean County, Commissioner decision November 29, 1989; Savarese v. Board of Education of the Borough of Bernardsville, Somerset County, Commissioner decision July 24, 1989; Grossman v. Board of Education of Ramsey, Somerset County, Commissioner decision November 7, 1988, aff'd State Board March 1, 1989; Bosco v. Board of Education of the Northern Highlands Regional School District, Bergen County, Commissioner decision August 3, 1990; Dennery v. Board of Education of Passaic County Regional High School District No. 1., Passaic County, decided July 2, 1990; Thomas L. Brusky v. Neptune Township Board of Education, Monmouth County, Commissioner decision February 1, 1990 Finally, the Board rejects Lammers, supra, as inapposite in that it deals with a vacancy claimed by a person properly certificated for the position at issue at the time of her RIF.

COMMISSIONER'S DETERMINATION

The threshold question of this matter, whether the scope of a tenured employee's rights to recall are frozen at the time of RIF or continually expandable through acquisition of subsequent additional endorsements, was recently addressed by the Commissioner in the matter of Ellen Francey v. Board of Education of the City of Salem, Salem County, decided on July 22, 1992. In that decision, which the Commissioner noted to be one of first impression, the Commissioner considered arguments similar to those raised by petitioners herein and concluded as follows:

In applying the protections of the tenure statutes, which concededly confer a preferred status upon tenured employees who lose their employment through no fault of their own, the Commissioner must also balance the Board's legitimate need to be able to rely upon the determinations of individual employee entitlement made at the time of a RIF. Within the statutory scheme, it is clear that the act of reducing a tenured staff member's employment is the distinct and self-limited event that triggers the affected party's entitlement, the evaluation of his or her individual entitlement status and the consequent assignment to either another position in the district or the preferred eligibility list; nor is it of any import that the latter is strictly speaking a creature of seniority entitlement, as the concept of a fixed list from which subsequent vacancies are to be filled is applicable to tenure entitlement as well.

In this context, the date of any employee's RIF can be the only reasonable date certain on which the employee's rights can be reckoned for future entitlement purposes. To deprive boards of this certainty by permitting riffed staff to continually revise and expand their entitlements at will would at the very least pose an unreasonable administrative burden on the district, and, of more concern, would likely lead to amassing of endorsements following RIF, reduce to chaos any attempts by a district to ascertain its legal responsibilities upon the arising of a vacancy, and unduly restrict boards in their efforts to provide a thorough and efficient education by choosing the most qualified staff for open positions. Nor do the protections of the tenure statutes require such a result, as the Commissioner and Courts have recognized that changed legal status does not confer enhanced or retroactive entitlement on one whose rights had been duly determined at the appropriate time of calculation and that boards of education need not go to extremes to accommodate employment rights when all known and reasonable entitlements have been honored at the time of RIF. Thomas S. Marshall v. Board of Education of Township of Neptune, Monmouth County, Superior Court Appellate Division, Div. Dkt. No. A-2595-85T1, unpublished, March 10, 1987; Paul Fitzpatrick et al. v. Board of Education of the Township of Weehawken, 1982 S.L.D. 1500 (App. Div.); Dorothy Godwin Davis v. Board of Education of the Township of Ewing, Mercer County, decided by the Commissioner April 29, 1985, aff'd State Board September 4, 1985 (Slip Opinion, at pp. 10-11)

Applying these holdings to the matter within, it is clear that petitioners have no entitlement to positions for which they were undisputedly not certified at the time of the Board's action to reduce their employment. Nor is it of any import that, in Petitioner Johnstone's case, the necessary certificate was acquired while petitioner was still in the Board's employ, as she neither held nor was eligible for the certificate at the time of the Board's action to reduce her employment (April 1991), which action served as the point at which her entitlement rights were set notwithstanding that the effective date of the reduction was June 30, 1991.

With regard to the Board's arguments to the effect that even when the required endorsement is duly held, a staff member must have served under it in order to claim a position by tenure right, although these arguments are rendered superfluous in the instant matter by the holdings above, the Commissioner is obliged to observe that it is now well established that tenure protection extends to all endorsements on the instructional certificate regardless of whether or not a teacher has actually served under them. Grosso, supra

Accordingly, the Commissioner finds and determines for the reasons set forth above that petitioners have no entitlement to position(s) in the Cinnaminson School District requiring the elementary endorsement. The Petitions of Appeal in this consolidated matter are hereby dismissed.

IT IS SO ORDERED.

AUGUST 12, 1992

DATE OF MAILING - AUGUST 13, 1992

COMMISSIONER OF EDUCATION

188-92

C #188-92
SB # 36-92 and #56-92 (consolidated)

LYNN JOHNSTONE AND C. GLORIA HEBERLEY,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, August 12, 1992

Decided by the Commissioner of Education, October 21, 1992

For the Petitioners-Appellants, Zazzali, Zazzali, Fagella & Nowak (Richard A. Friedman, Esq., of Counsel)

For the Respondent-Respondent, Stephen J. Mushinski, Esq.

The facts herein are not in dispute. Petitioner Lynn Johnstone commenced employment with the Board of Education of the Township of Cinnaminson (hereinafter "Board") in 1981 and taught Foreign Language until her position was abolished in a reduction in force ("RIF") in April 1991, effective June 30, 1991. Johnstone was issued an elementary endorsement on her instructional certificate in June 1991. Petitioner C. Gloria Heberley commenced employment with the Board in 1984 and served as a Business Education teacher until her position was abolished in a reduction in force on April 24, 1990, effective June 30, 1990. She received an elementary endorsement in July 1990. Both petitioners achieved tenure status in the district.

Oct. 5, 1991

In August 1991, the petitioners each filed a petition with the Commissioner of Education alleging that the Board had violated their tenure rights in appointing nontenured individuals to elementary teaching vacancies for the 1991-92 school year. Petitioners claimed that since they had achieved tenure under their instructional certificates and had obtained elementary endorsements thereon, their tenure rights entitled them to assignments requiring possession of elementary endorsements notwithstanding the fact that they had not acquired such endorsements until after the Board had acted to abolish their positions.

On June 10, 1992, the petitioners jointly filed another petition with the Commissioner in which they asserted similar tenure claims to vacancies for the 1992-93 school year requiring elementary endorsements.

The Commissioner granted the parties' request to consolidate the petitions claiming entitlement to vacancies in 1991-92 and to decide them on a summary basis. On August 12, 1992, the Commissioner dismissed those consolidated petitions, relying on the decision of the Acting Commissioner in Francey v. Board of Education of the City of Salem, decided by the Commissioner of Education, July 22, 1992, aff'd with modification by the State Board of Education, August 3, 1994, appeal pending (App. Div.). In a letter decision dated October 21, 1992, the Commissioner dismissed petitioners' joint petition asserting entitlement to vacancies in 1992-93 on the ground of res judicata, concluding that the underlying issue of petitioners' legal entitlement to assignments claimed under their elementary endorsements had already been addressed and determined in his decision of August 12.

Petitioners have filed the instant appeals to the State Board of Education from the August 12 and October 21, 1992 decisions of the Commissioner.

Initially, we consolidate these two appeals so as to decide them together.

After a thorough review of the record, we affirm the ultimate determination of the Commissioner that petitioners' tenure rights did not provide them with entitlement to elementary teaching assignments. However, in view of our modification of the Acting Commissioner's analysis in Francey, supra, we also modify the Commissioner's analysis in this case.

In Francey, a tenured teaching staff member who acquired an endorsement on her instructional certificate in elementary education two years after her position as a home economics teacher had been abolished in a RIF, alleged that she was entitled by virtue of tenure to reemployment in an elementary teaching vacancy as against non-tenured individuals. The Acting Commissioner concluded that petitioner was not entitled to reinstatement in a position for which she had not been qualified at the time of the RIF.

In applying the protections of the tenure statutes, the Acting Commissioner balanced the preferred status conferred upon tenured employees who lost their employment through no fault of their own with the district board's need to be able to rely upon determinations of individual employee entitlement made at the time of a RIF. The Acting Commissioner reasoned that the date of an employee's RIF could be the only reasonable date certain on which the employee's rights could be reckoned for future entitlement purposes. He also found that the tenure laws did not support the

position of the petitioner therein, pointing out that changed legal status did not confer enhanced or retroactive entitlement on a staff member whose rights had been duly determined and that it was not necessary for district boards to go to extremes to accommodate employment rights when all known and reasonable entitlements had been honored at the time of the RIF.

We modified the Acting Commissioner's analysis. We stressed that while the rights afforded a tenured teaching staff member affected by a reduction in force were not diminished by the mere fact that the vacancy occurred while the individual was on a preferred eligibility list, rather than at the precise time of the RIF, Mirandi v. Board of Education of the Township of West Orange, decided by the State Board of Education, April 5, 1989, there was no authority in the statutory scheme to accrue additional rights in a tenured position after dismissal therefrom in a RIF. We pointed out that the rights emanating from the achievement of tenure were triggered at the time of a RIF and that, as a result, district boards were required to recognize the tenure rights of affected parties as they existed at the time a board acted to reduce its force.

Reiterating that tenure was a legislatively conferred right which was achieved only upon satisfaction of the precise statutory conditions, we explained:

> The precise conditions for the achievement of tenure rights are provided in Article 1 of the Tenure Act, "Acquisition and Effect of Tenure," particularly N.J.S.A. 18A:28-5, "Tenure of teaching staff members," and 18A:28-6, "Tenure upon transfer or promotion." Article 3 of that Act, "Effect of Reduction of Force Upon Persons Under Tenure," provides for effectuation of the rights achieved under Article 1, authorizing

> boards to reduce the number of their teaching staff members for reasons of economy, N.J.S.A. 18A:28-9, but requiring that dismissals resulting from such reductions be made on the basis of seniority. N.J.S.A. 18A:28-10. N.J.S.A. 18A:28-12 mandates that those staff members who are dismissed be placed on preferred eligibility lists for reemployment in order of seniority in vacancies for which they are qualified. It does not provide authorization for the acquisition of rights beyond those achieved pursuant to the specific provisions of Article 1, but, rather, establishes the mechanism for reemployment of those tenured staff members dismissed as the result of a reduction in force.

Francey, supra, slip op. at 5-6.

Petitioners in the instant case achieved tenure as the result of their service in the district in satisfaction of the precise conditions set forth in N.J.S.A. 18A:28-5. The inchoate rights emanating from such status were triggered by the Board's determinations to reduce its teaching force pursuant to N.J.S.A. 18A:28-9 and, therefore, to abolish petitioners' positions. As a result of their achievement of tenure in teaching positions, petitioners' attendant rights and protection triggered by the RIF's attached to those endorsements then upon their instructional certificates. Since they did not obtain elementary endorsements until after the Board had acted to abolish their positions, the scope of their tenure protection at the time of the RIF's did not extend to the assignments now sought. Likewise, since they were not qualified therefor by virtue of their certification, the Board could not have reassigned them during their employment in the district to assignments requiring an elementary endorsement, a limitation on the scope of protection afforded staff members by the achievement of tenure. See Capodilupo v. West Orange Bd. of Ed., decided by the

State Board of Education, September 3, 1986, aff'd, 218 N.J. Super. 510 (App. Div. 1987), certif den., 109 N.J. 514 (1987).

To grant the relief sought herein would be to recognize a statutory entitlement to reemployment by virtue of tenure in an assignment outside the scope of the tenure protection acquired pursuant to N.J.S.A. 18A:28-5. In that the statutory scheme does not provide for the extension of such entitlement, we conclude that the scope of petitioners' tenured positions was determined at the time of the RIF's, when their rights were triggered, and their subsequent acquisition of elementary endorsements did not operate to enlarge the tenure rights they had achieved pursuant to the Tenure Act during, and as a result of, their employment in the district. See Francey, supra.

As in Francey, the petitioners herein obtained elementary endorsements on their instructional certificates after the Board had determined to reduce its teaching force pursuant to N.J.S.A. 18A:28-9 and, therefore, to abolish their positions. Consequently, the scope of their tenure protection at the time of such RIF's did not extend to elementary teaching assignments. In that the statutory scheme does not provide for reemployment by virtue of tenure in an assignment outside the scope of the tenure protection acquired pursuant to N.J.S.A. 18A:28-5 and 18A:28-6, petitioners' subsequent acquisition of elementary endorsements did not operate to enlarge the tenure rights they had achieved in the district pursuant to the precise terms of the Tenure Act.

Nor is it of any moment that petitioner Johnstone received her elementary endorsement in June 1991, prior to the effective date of her RIF. The scope of her tenure protection was determined at

the time of the RIF in April 1991, when her rights were triggered. See Francey, supra.

Consequently, while we agree with the ultimate determination of the Commissioner to dismiss the petition in this matter, we do so for the reasons expressed herein.

Attorney exceptions are noted.

October 5, 1994

Date of mailing OCT 07 1994

189-92

189-92

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF HAINESPORT, BURLINGTON COUNTY. :
:

SYNOPSIS

Following review of letters of complaint from defeated candidates, Commissioner determined to conduct inquiry into annual school election as to arrangement of polling places and presence of candidate in polling area.

ALJ concluded no irregularity sufficient to alter result of election occurred but Board was directed to correct certain practices for future elections.

Commissioner concurred with findings and conclusions of ALJ, noting that situations complained of did not rise to level of serious irregularity and that no evidence was presented to support claims that will of electorate was thwarted. (In re Wene) Petition was dismissed; however, Commissioner endorsed ALJ's prospective remedial directives to guard against recurrence of certain situations in future elections.

AUGUST 12, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 2996-92
AND EDU 2997-92
AGENCY DKT. NOS. 110-4/92
AND 111-4/92

IN THE MATTER OF THE
ANNUAL SCHOOL ELECTION
HELD IN THE SCHOOL DISTRICT
OF THE TOWNSHIP OF HAINESPORT.

Janet Law, Esq., for Shirley H. Powell and others (Schlesinger, Mintz & Merovitz & Pilles, attorneys)

John A. Zohlman, Esq., on behalf of poll workers (Ferg, Barron & Gillespie, attorneys)

William Evans, complainant, pro se

Record Closed: June 10, 1992 Decided: June 26, 1992

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

Pursuant to letters of complaint, one from several voters including defeated candidate Shirley H. Powell and one from defeated candidate William Evans, the Commissioner of Education determined to conduct an inquiry in the annual school election held on April 7, 1992, in the school district of the Township of Hainesport.

The matter was transmitted to the Office of Administrative Law pursuant to N.J.S.A. 52:14F-1 et seq. An inquiry was conducted by the undersigned on June 10, 1992 in the Mount Holly Municipal Court. Nine persons were heard and one document was admitted in evidence.

Three seats for full terms of three years each were to be filled at the annual school election held on April 7, 1992. The announced results of the balloting were:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Shirley H. Powell	295	3	298
Raymond Hall	358	13	371
Carole Clark	314	14	328
John C. Bradley	333	13	346
Bill Evans	319	4	323

By letter dated April 10, 1990, candidate William Evans requested a recount of the ballots cast. The recount was conducted on April 30, 1992, at the Burlington County Board of Elections office in Mount Holly and at the Burlington County Superintendent of Elections' office in Lumberton. At the conclusion of the recount, the tally stood unchanged.

Two irregularities were noted. First, there were no voting authorities enclosed in the sealed election packet. Second, 605 names appeared on the poll list, one more than the number indicated by the voting machine counters.

The Commissioner's representative determined that although there was a disparity between the number of names appearing on the poll lists (605) and the number of ballots cast (604), it appeared that one prospective voter did not cast a ballot. There was also one name on the poll list without a voting authority number recorded next to it. It appeared that the irregularity was attributable to a clerical oversight.

In addition, there were sufficient mechanical controls within the voting machine that provide for two separate voter counts which, in this instance, did not exceed the number of names appearing on the poll lists. The Commissioner's

representative concluded that, while irregularities did exist in this matter, they are not of such magnitude to have caused the will of the electorate to be thwarted. The Commissioner adopted his representative's report and declared Raymond Hall, John C. Bradley and Carole Clark elected to three-year terms on the Hainesport Board of Education. The Commissioner's determination is dated May 14, 1992.

At the inquiry, two general complaints pervaded the testimony. The first was that candidate Bradley was one of the persons conducting a bake sale at the entrance to the voting room. The second was that the voting machines for the Hainesport election and referendum and the voting machine for the Rancocas Valley Regional School Board election and referendum were only some five to eight feet apart (P-1). Candidate Clark was operating the regional board machine as she has in past elections. Most witnesses objected to the fact that voters standing in line to use the machines had to pass Clark in order to reach the Hainesport machine. Candidate Clark was observed, and does not deny, speaking to persons waiting in line.

Several witnesses, including the Hainesport Board secretary testified that in prior years the machines were in the same room but at a great distance from each other. The secretary stated that after last year's vote, she was advised that the regional board poll workers could not check signature registers. She conferred with the business administrator at the regional district. She learned that a nearby district puts one local and one regional district person on each signature copy register.

This year, there were not enough workers. Three workers had to cover four signature registers. The room was set up as indicated in P-1 to compensate for the shortage of poll workers. The election ran smoothly even though lines were long at times.

The secretary also stated that candidate Clark has been an election worker for Rancocas Valley Regional three times. The witness has checked to see if this presents any problem. Inasmuch as Rancocas Valley Regional hires Clark, the witness checks with them. They have advised her that there is no problem. This year, however, Hainesport voters did have to pass Clark to get to the Hainesport voting machine. Clark did speak to many persons in the line, but the witness was unaware of any electioneering.

There was other testimony from voters and from Ms. Clark that conversation consisted entirely of exchanging pleasantries.

Ms. Clark also testified that she asked the business administrator at Rancocas Valley Regional if there were any problem with her being a poll worker for the regional election. The business administrator checked with the Board attorney and replied that there was no problem provided she "did not work the books." The witness freely conceded that she spoke to almost everyone in line.

William Evans, who failed to take a seat on the Board by five votes believed Clark's mere presence was improper. Bradley, who "ran with" Clark was also present. The witness stated that he was asked to leave the voting room by Joan S. Lynch. He was conversing with a friend and perhaps overstayed his time in the poll area. When reminded by Lynch, he left immediately. Clark and Bradley, he maintains, were in or near the polls throughout voting hours. The witness went to the Board secretary and asked why Bradley and Clark were not instructed to leave the polling area. The secretary replied that Clark's machinery responsibilities were proper. Bradley injected, "I left when I heard Lynch tell you to leave."

Evans also maintains that the lines were long because only one machine was in use. A statute provides that if greater than 500 persons voted in the prior two elections, more than one machine should be provided. Using one machine, thereby creating long lines, discouraged older voters. Clark was advantaged by standing near the machine with her name on it. The witness also stated he believes absentee ballots were forged. At this point in the inquiry I advised Mr. Evans that such a claim was not within the Commissioner's jurisdiction or mine.

By way of rebuttal, the Board secretary stated that the use of more than one machine is mandated when more than 500 voters in a voting district vote in two consecutive elections. Last year, the Board did use two machines and found the process cumbersome. The Board returned to using one machine upon her recommendation.

DETERMINATION

Elections with voting machines are conducted as far as possible in the same way as general and municipal elections. N.J.S.A. 18A:14-40. At a regular meeting at least 40 days before the election, the Board must appoint such election officers as are necessary. The officers must be chosen from the members of the

district election boards comprised within the boundaries of the polling districts insofar as practicable. N.J.S.A. 18A:14-6.

Polls must be open between the hours of 5:00 and 9:00 p.m. and during additional time which the Board may designate between the hours of 7:00 a.m. and 9:00 p.m., and as much longer as is necessary to permit those present to vote. N.J.S.A. 18A:14-45.

In this case, there clearly was some confusion at the polls. It is also clear that the confusion was in great measure caused by requiring the voters, in a single line, to pass the tables containing poll lists and signature registers and then to file past the regional and local voting machines. This does not, however, rise to the level of an irregularity. Even if it were an irregularity, however, it would have had to be the producing cause of illegal votes which would not otherwise have been cast or of defeating legal votes which would have been counted but for the irregularity, and to such an extent as to change the result of the election. Alternatively, the irregularity would have to be shown to have influenced the election in some other way so as to repress a full and free expression of the popular will. In re Wene, 26 N.J. Super. 363 (Law Div. 1953).

That the arrangement of the polling place did not thwart the will of the electorate does not mean that it cannot and should not be addressed. The Hainesport Board of Education is **directed** to assure an adequate number of poll workers who are adequately prepared at future elections. The Board is further directed to consult with the Board of Education of the Rancocas Valley Regional School District and, if necessary, to consult the County Superintendent of Schools, to insure that both districts' voting machines are adequately staffed so that they may be physically separated as in the past.

Last, the matter of candidate Bradley's presence at a parent-teacher group bake sale immediately outside the polling area. There is no evidence in this record that the candidate engaged in improper activity. However, he cannot have failed to know that his mere presence and visibility to voters was an advantage not available to other candidates. As a Board member with many years' experience, he may be presumed to know that N.J.S.A. 18A:14-81 prohibits electioneering within the polling place or room or within a distance of 100 feet of the outside entrance to the polling place or room. John Bradley is **DIRECTED**, if he shall choose again to be a candidate, to refrain from the activity complained of here or any similar activity that

would put him in or within 100 feet of a polling place for longer than the time ordinarily required to cast a ballot.

In consideration of the foregoing, I **FIND** and **CONCLUDE** as a result of this inquiry that no irregularity that could have changed the result of this election occurred. Accordingly, this inquiry is **ADJOURNED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

26 JUNE 1992
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged

6/30/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 06 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

km

WITNESSES

George Gauvry
Joanne Pryer
Joan S. Lynch
Virginia Cliber
Vincent J. Giordano
Shirley H. Powell
Dorthea M. Myers
Carole A. Clark
William Evans

EXHIBIT

P-1 Diagram of Polling Place, not to scale

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE TOWNSHIP OF HAINESPORT, BURLINGTON COUNTY.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. A letter of exception was timely filed by petitioners pursuant to the provisions of N.J.A.C. 1:1-18.4; however, it gave no indication of service upon the Board and raised no new arguments for consideration herein.

Upon review, the Commissioner concurs with the findings and conclusions of the ALJ for reasons well stated by him in his initial decision. While it is clear that the logistical arrangements for the instant election should have been better and that Candidate Bradley's presence at the parent-teacher bake sale was contrary to the spirit of the law if not its letter, it is equally clear that these situations did not rise to the level of serious irregularity and that no evidence was presented to support claims of their having thwarted citizens' ability to vote or having impacted on the outcome of the election within the meaning of that standard as applied to grant of the extraordinary relief sought by petitioners. In re Wene, supra Further, the ALJ's prospective remedial directives, which are hereby fully adopted and endorsed by the Commissioner,

adequately address any legitimate concerns that the situations complained of might be permitted to recur in future elections.

Accordingly, the initial decision of the Office of Administrative Law dismissing the instant Petition of Appeal is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 12, 1992

DATE OF MAILING - AUGUST 13, 1992

190-92

190 92

IN THE MATTER OF THE TENURE HEARING OF DIANE ADAMS, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

AUGUST 12, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8619-91
AGENCY DKT. NO. 310-8/91

IN THE MATTER OF THE TENURE HEARING OF DIANE ADAMS, STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY

Karen A. Murray, Esq., for State-operated School District of Jersey City
(Murray, Murray & Corrigan, attorneys)

Philip Feintuch, Esq., for Diane Adams
(Feintuch, Porwich & Feintuch, attorneys)

Record Closed: June 22, 1992 Decided July 7, 1992

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

The State-operated School District of Jersey City, Hudson County, on August 14, 1992 filed and certified to the Commissioner of the Department of Education tenure charges of incapacity and chronic and excessive absenteeism against Diane Adams, a tenured teaching staff member in its employ, which, if sustained, were sufficient to warrant her dismissal or reduction in salary, in accordance with the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. Respondent was suspended without pay. The charges were filed in the Department of Education on August 16, 1991. Respondent's answer in general denial was filed there on September 5, 1991. The Commissioner transmitted the matter to the Office of Administrative Law on September 11, 1991, for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

On December 19, 1991, a telephone prehearing conference was held and an order entered.

At the request of counsel for the school district, hearing dates scheduled for April 1992 were adjourned. Prior to rescheduling, the parties advised the administrative law judge the matters at issue had been amicably resolved, subject to approval of the administrative law judge and the Commissioner of the Department of Education.

CONCLUSION

Based on the above, I **CONCLUDE** as follows:

1. The parties have voluntarily agreed to settlement as evidenced by their signatures or their representatives' signatures on the agreement, as well as the signature of the superintendent of of the school district;

2. Settlement fully disposes of all issues in controversy, is in the interest of parties and public and comports with Cardonick v. Bd. of Ed. Bor. of Brooklawn, 1983 S.L.D. -- (slip op. at 2); and

3. The school district's filing and certification of tenure charges are hereby **DISMISSED**, being in accordance with settlement pursuant to N.J.A.C. 1:1-19.1, subject to effectuation of its terms.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

full entitlement for any wages and/or benefits for that year. She agrees that she has no actual and/or potential claims against the District and will make no claims for any compensation of any kind and/or benefits beyond what she has already received.

5. In consideration for the District not litigating further the tenure charges filed against her, Ms. Adams agrees that if she uses, without written authorization from her appropriate supervisor, any leave time, paid or unpaid, beyond the paid sick and personal days provided under the Collective Bargaining Agreement, she shall be deemed to have resigned her position, effective the day she uses any leave time beyond the paid sick and personal days provided under the CBA.

6. Ms. Adams agrees to request and use any and all leave time, paid or unpaid, consistent with the applicable provisions of the contract. Ms. Adams agrees that if she uses any leave time, paid or unpaid, without the required authorization, she shall be deemed to have resigned her position, effective the day she takes any unauthorized leave.

7. The tenure charges certified by the State District, the suspension and all pleadings and documents related thereto shall remain part of Ms. Adams personnel file along with this settlement agreement.

8. Should Ms. Adams be deeded to have resigned under the terms of Paragraphs 5 and/or 6, such resignation shall be immediate and unconditional, with no provision for severance

beyond what the Collective Bargaining Agreement might then provide.

9. The terms of this Agreement, especially Paragraphs 5 and 6 shall continue in effect for the duration of Ms. Adams employment with the State Operated School District or the Jersey City School District.

For the State-Operated School District

Dr. Elena J. Scambio

Dated: 6/17/92

Karen A. Murray, Esq.

Dated:

For Ms. Adams:

Diane Adams

Dated: 6/10/92

Philip Feintuch, Esq.

Dated: 6/10/92

OAL DKT. NO. EDU 8619-91

IN THE MATTER OF THE TENURE HEARING OF DIANE ADAMS, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standard for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983) The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

AUGUST 12, 1992

DATE OF MAILING - AUGUST 13, 1992

191-92

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

SYNOPSIS

Petitioner, former Chairperson of Industrial Arts Department, claims right to newly created position of Department Chairperson for Careers and Occupations as he was a tenured supervisor.

ALJ granted summary decision to petitioner and ordered Board to appoint petitioner to Department Chairperson position with compensation. ALJ found petitioner held appropriate certification and met the tenure requirement so as to have acquired tenure in position of supervisor. (N.J.S.A. 18A:28-5 and 6)

Commissioner adopted findings and determination in initial decision, further noting that petitioner's industrial arts endorsement met Board's "area content" instructional certification requirement. (Timko State Board decision)

AUGUST 12, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11371-91
AGENCY DKT. NO. 390-11/91

RONALD SNACK,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,
Respondent.

Robert M. Schwartz, Esq., for petitioner
(Lake & Schwartz, attorneys)

Raymond L. Hamlin, Esq., for respondent
(Ashley & Charles, attorneys)

Record Closed: June 3, 1992 Decided: June 25, 1992

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE

Petitioner, a former chairperson of the industrial arts department, challenges respondent's failure to appoint him to the newly-created position of chairperson of the career/occupational department as violative of his rights of tenure and seniority

protected by *N.J.S.A.* 18A:28-5 and -6. He seeks appointment to that position together with back pay and emoluments.

The matter was transmitted to the Office of Administrative Law (OAL) on December 24, 1991, for hearing 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 assigned to the undersigned administrative law judge (ALJ) on January 31, 1992, and was scheduled for a telephone prehearing conference on March 24, 1992. On that date, a telephone prehearing conference was held and a Prehearing Order, settling the procedures to be followed in this matter, was entered on April 3, 1992. The Prehearing Order scheduled a hearing for September 1, 1992.

On April 28, 1992, attorney for petitioner filed a Notice of Motion for Summary Decision. On May 26, 1992, respondent filed a brief in opposition thereto together with a certification of Dr. Maxine J. Pijeaux. Attorney for petitioner filed a responding letter memorandum on June 3, 1992, whereupon the record was closed and the matter was submitted to the undersigned ALJ for decision.

FACTUAL DISCUSSION

For purposes of deciding this motion, the following facts are not disputed. Petitioner is an employee of respondent's school district and was initially employed in 1961 as a classroom teacher. Beginning with the 1983-1984 school term, petitioner served as department chairperson for industrial arts. A position description established the duties and requirements for this position (Exhibit A), which required a supervisor's certificate.

Petitioner continued to serve as department chairperson until July 24, 1991, when respondent adopted a new organization structure. Petitioner's former position of department chairperson for industrial arts was combined with business under a new position called department chairperson for careers and occupations. A position description for this new position was established (Exhibit B).

Petitioner applied for the new position, and he was interviewed on September 5, 1991. However, on September 10, 1991, Ms. Bernice Woods-Brown was selected to fill the position because she held teaching certificates in cooperative education

and business and she had extensive experience in both fields at the secondary level. (Certification of Dr. Pijeaux.) Ms. Brown has never held a position in respondent's school district which required a supervisor's certificate, although she held a principal/supervisory certificate as of June 8, 1986.

LEGAL DISCUSSION AND ANALYSIS

Tenure is a legislative status, not acquired in any specific assignment, but in the "positions" enumerated in *N.J.S.A.* 18A:28-5. This statute provides in relevant part that teaching staff members may acquire tenure in the positions enumerated in the statute and in such other positions which "require them to hold appropriate certificates issued by the Board of Examiners. . . ."

In this case, petitioner held a certificate as supervisor when he served as a department chairperson from the 1983-84 school term until July 24, 1991. Thus, based on his years of service in a supervisory position, petitioner has met the tenure requirement so as to have acquired tenure in the position of supervisor.

Notwithstanding the fact that petitioner has acquired tenure as a supervisor, respondent appointed a nontenured teaching staff member, Ms. Brown, to the position of department chairperson in charge of the department of careers and occupations. Petitioner asserts that since Ms. Brown has never served as a department chairperson or in any other supervisory capacity, she does not have tenure as a supervisor, citing *N.J.S.A.* 18A:28-5 and *N.J.S.A.* 18A:28-6.

Consequently, petitioner contends that as compared to the nontenured individual currently in the position of department chairperson for careers and occupations, he has a greater entitlement to be appointed to the position. Petitioner relies upon *Capodilupo v. West Orange Board of Education*, 218 *N.J. Super.* 510 (App. Div. 1987); *Bednar v. Westwood Board of Education*, 221 *N.J. Super.* 239 (App. Div. 1987); *Grossman v. Board of Education of Ramsey*, (N.J. App. Div., A-3270-88T1, May 17, 1990) (unreported); *Schienholz v. Ewing Township Board of Education*, (N.J. App. Div., A-2905-89T3, Nov. 19, 1990) (unreported); *Herbert v. Board of Education of the Township of Middletown*, (N.J. App. Div., A-318-90T1, May 22, 1991) (unreported).

In his brief in opposition to petitioner's motion for summary decision, attorney for respondent argues that when respondent determined that petitioner should not be appointed to the newly-created position, it determined that petitioner did not possess the requisite qualifications to support such an appointment. Moreover, respondent determined that the person appointed to the position was more qualified to fill the vacancy.

In support of its position in this matter, respondent refers to the provisions of *N.J.S.A.* 18:28-9, which authorizes a board to reorganize its district by reducing the number of teaching staff members 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.

In addition, respondent relies upon language found in *Capodilupo, supra,* where the court stated that

> the Board's obligation to consider tenure in a [reduction in force] could be balanced by "sound educationally based reasons for its decision to retain a non-tenured teacher. . . ."
> *Id.* at 515-16.

Attorney for petitioner responded to this argument in his letter memorandum dated May 29, 1992, by referring to *Herbert, supra*, and *Schienholz, supra*. I have reviewed these cases as well as the *Capodilupo* case, and I agree with petitioner's position.

In *Capodilupo*, *supra*, the court upheld the decision of the State Board of Education that a tenured teacher seeking reinstatement within the endorsements on his or her certificate is entitled to preference in a RIF as against a nontenured applicant with the same certification. The full text of the language used by the court, *id.* at 515-516, is as follows:

> We recognize that, in upholding the Board's decision to retain Savage, the State Board also made a finding that the Board's obligation to consider tenure in a RIF could be balanced by "sound educationally based reasons for its decision to retain a non-tenured teacher." Savage's retention, however, is not the subject of a cross-appeal and the Board advanced no "educationally based reasons" to retain Reilly, beyond his

> experience as an elementary teacher. Accordingly, we find it both unnecessary and inappropriate to address the merits of this portion of the State Board's opinion.

From the above language, it is clear that the court in *Capodilupo* never reached the issue as to whether the State Board of Education was legally correct in its finding that a local board's obligation to consider tenure in a RIF could be balanced by sound educationally-based reasons for its decision to retain a nontenured teacher. The subsequent decisions by the Appellate Division, albeit unreported, clearly indicate that the Appellate Division has rejected such a balancing. Thus, in the *Schienholz* case, *supra*, the Appellate Division indicated:

> We can only remind one, however, that the Legislature, in its wisdom, has chosen to protect such a [tenure] right in omnibus fashion with the passage of *N.J.S.A.* 18A:28-12 and we are not privileged to change that basic decision, even if we were inclined to do so.
> *Id.* at 6.

In the *Herbert* case, the Appellate Division quotes from the *Schienholz* case and confirms the results.

In this case, the certification of Dr. Pijeaux indicated that the nontenured applicant was selected to fill the vacancy because she had certifications in cooperative education, business, and supervision, and because she had extensive experience in both fields at the secondary level. Dr. Pijeaux indicated that the newly-created position is geared toward preparing students for a professional career as opposed to a vocational career, and that the nontenured applicant was better able to relate educational and occupational objectives necessary for entry into the workplace, in addition to a vast array of programs and activities which Ms. Brown devised in order to accomplish that goal.

Dr. Pijeaux also states that Ms. Brown has experience in both the public and private sector and that she demonstrated extensive knowledge with respect to business-systems procedures and methods and that the implementation of her knowledge was extensive, innovative, and contemporary. On the other hand, Dr. Pijeaux indicated that the petitioner demonstrated little if any knowledge concerning many fields and was found not to possess any of the qualifications necessary to assist the district in achieving its goals.

Despite the foregoing, petitioner is certified and has tenure in a supervisory position, and the nontenured appointee does not. As was indicated in the *Schienholz* and the *Herbert* case, the problem is created not by the tenure statute, but with the implementing regulations concerning the certifications. If a certification existed for the position of department chairperson of careers and occupations, and if petitioner held a certification as a department chairperson for industrial arts, we would not be involved in this controversy. However, that is not the case.

Based upon the undisputed facts in this matter, I **FIND** that there is no genuine issue as to any material fact in dispute. I **FIND** that based upon the undisputed facts, petitioner has tenure as a supervisor and is entitled to appointment to the position of chairperson of the department of career and occupations over a nontenured supervisor. Accordingly, I **CONCLUDE** that petitioner is entitled to summary decision as a matter of law.

DECISION AND ORDER

Based upon the foregoing, it is hereby **ORDERED** that petitioner's motion for summary decision is **GRANTED** and that respondent shall forthwith appoint petitioner as chairperson of the career/occupational department. It is further **ORDERED** that petitioner is entitled to back pay and emoluments effective as of September 10, 1991.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 25, 1992
Date

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

JUNE 29, 1992
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 01 1992
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

dgi/e

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

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

Upon review, the Commissioner concurs with the analysis of the ALJ and concludes that the Board's desire to appoint a candidate of different background and experience cannot serve to defeat petitioner's tenure right to a position for which he is properly certificated. Further review in light of the State Board's July 1, 1992 decision in Michael Timko and John J. Mikush v. Board of Education of the Bridgewater-Raritan Regional School District, Somerset County, confirms this conclusion, as the job description for the newly created position of Department Chairperson for Careers and Occupations calls for supervisory and "area content" certification and exhibits no basis upon which the endorsement in industrial arts could be rejected as an inappropriate area content certification. Robert Herbert v. Board of Education of the Township of Middletown, Monmouth County, State Board decision of August 1,

1990, affirmed N.J. Superior Court Appellate Division, May 22, 1991, Dkt. No. A-318-90T1

Accordingly, the initial decision of the Office of Administrative Law, directing the Board to appoint petitioner forthwith to the position of Department Chairperson for Careers and Occupations, together with back pay and emoluments from September 10, 1991, is affirmed for the reasons expressed therein, along with the additional reasons set forth above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 12, 1992

DATE OF MAILING - AUGUST 13, 1992

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ELIZABETH EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY.	:	DECISION
RESPONDENT.	:	
	:	

AUGUST 12, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1714-91
AGENCY DKT. NO. 10-1/91

ELIZABETH EDUCATION ASSOCIATION,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,
Respondent.

Sanford R. Oxfeld, Esq., for petitioner
(Balk, Oxfeld, Mandel & Cohen, attorneys)

David F. Corrigan, Esq., for respondent
(Murray, Murray & Corrigan attorneys)

Record Closed: June 24, 1992 Decided: July 7, 1992

BEFORE **ELINOR R. REINER**, ALJ

On January 22, 1991, petitioner filed a petition of appeal with the Commissioner of Education requesting that the Commissioner determine that the attendance patterns policy of the Elizabeth Board of Education adopted on or about

September 14, 1989, is void. It further asks that the Commissioner direct that any letters of conference reports placed in teaching staff personnel files as an outgrowth of the policy be removed.

On February 13, 1991, respondent filed an answer alleging, in essence, that its actions were proper and requesting that the petition be dismissed with prejudice. On February 21, 1991, this matter was transmitted to the Office of Administrative Law for a hearing pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.* The case was assigned to the undersigned judge on April 15, 1991, and a telephone prehearing conference was scheduled for May 16, 1991.

On that date, the issues were isolated and the parties indicated that no hearing was necessary. A stipulation of facts was to be filed on June 28, 1991, and cross-motions for summary decision filed on July 26, 1991, to be answered on or before August 23, 1991. By letter dated August 13, 1991, counsel for respondent requested an extension of the time limitations set out in the prehearing order. Thereafter, a conference call was held and the case was scheduled for hearing on January 2, 1992.

On December 30, 1991, the parties advised that a settlement had been reached, and the hearing was adjourned. The settlement was subject to ratification by the parties. The parties have prepared the attached settlement agreement and amendment, indicating the terms of settlement. Upon request of the undersigned, the parties advised by letter dated June 23, 1992 that all the terms of the agreement have been met.

I have reviewed the record and the settlement terms, and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be and are hereby concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 7 1992
Date

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

July 9, 1992
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

JUL 15 1992
Date

Mailed to Parties:

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

le/e

SETTLEMENT AGREEMENT

BETWEEN

ELIZABETH BOARD OF EDUCATION

AND

ELIZABETH EDUCATION ASSOCIATION

(1) This Agreement is being entered into to resolve the pending dispute between the Elizabeth Board of Education ("Board") and the Elizabeth Education Association.

(2) The Association agrees that the present "Attendance Patterns" Policy of the Board is valid. The Association agrees not to challenge this policy in any administrative or judicial proceeding.

(3) The Board agrees not to use for disciplinary purposes any letter in any Association member's personnel file that was issued pursuant to the predecessor "Attendance Patterns" Policy.

(4) This Agreement is subject to ratification

SETTLEMENT AGREEMENT

BETWEEN

ELIZABETH BOARD OF EDUCATION

AND

ELIZABETH EDUCATION ASSOCIATION

(1) This Agreement is being entered into to resolve the pending dispute between the Elizabeth Board of Education ("Board"), and the Elizabeth Education Association ("Association").

(2) The ~~Elizabeth Education~~ Association agrees that the present "Attendance Patterns" Policy of the ~~Elizabeth~~ Board ~~of Education~~ is valid. The Association agrees not to challenge this policy ~~and any appeals regarding~~ in any administrative or judicial ~~challenge~~ proceeding.

(3) The Board agrees not to use for disciplinary purposes any letter in ~~any~~ any Association's members' personnel ~~policy~~ file that was issued pursuant to the predecessor "Attendance Patterns" Policy.

(4) This Agreement is subject to ratification

by its principals

Dated 12/30/20

For the Board

David F. Carrigan

For the Association

Sharbel Nicholas

OAL DKT. NO. EDU 1714-91

ELIZABETH EDUCATION ASSOCIATION, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY. RESPONDENT.	:	DECISION

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

AUGUST 12, 1992

DATE OF MAILING - AUGUST 13, 1992

— Amend Settlement

ELIZABETH EDUCATION ASSOCIATION
Petitioner
vs
Bd. of Ed. of the City of ELIZABETH
Respondent

Office of Administrative Law
State of New Jersey
OAL Docket No. EDU 01717-01N

In addition to the items contained in the Settlement Agreement between the parties, dated 12/30/91, the following paragraph is hereby added:

(5) Once the settlement has been ratified by both principals, this matter shall be deemed resolved and the Petitioner shall be deemed to have withdrawn the instant Petition. Sanford R Oxfeld, attorney for the Petitioner shall: (1) notify the O.A.L. when the Settlement is ratified, and (2) withdraw the matter.

Dated 12/31/91

David R Corrigan

Sanford R Oxfeld

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IN THE MATTER OF THE TENURE	:	
HEARING OF GEORGE FASCIANO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF PALISADES	:	DECISION
PARK, BERGEN COUNTY.	:	
	:	

AUGUST 12, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 101-90
AGENCY DKT. NO. 347-11/89

PALISADES PARK BOARD OF EDUCATION,
Petitioner,
v.
GEORGE FASCIANO,
Respondent.

Joseph Rotolo, Esq., for petitioner

Margaret C. Murphy, Esq., for respondent

Record Closed: June 22, 1992 Decided: July 14, 1992

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

On or about November 20, 1989, the Board of Education of Palisades Park certified charges of unbecoming conduct against respondent, George Fasciano, Superintendent of Schools. On December 28, 1989, respondent filed an answer denying the charges and requesting that the tenure charges be dismissed. On January 5, 1990, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law (OAL) for hearing 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 telephone prehearing conference was scheduled for February 27, 1990, before Judge Ken Springer, and was rescheduled to March 13, 1990, before Judge Ward Young. A prehearing conference was held with Judge Young, and a hearing was scheduled for August 1, 2, 6, 7, 8, 9, 13, 14, 15, and 16, 1990, at the OAL. The matter was reassigned to the undersigned judge on June 21, 1990, and was scheduled for hearings at the OAL on January 8, 9, 10, 11, 14, 15, 16, 17, 22, and 23, 1991.

As a result of settlement conferences held between the parties, a settlement was reached on January 8, 1991, and the hearing dates were adjourned. By letter dated January 14, 1991, Mr. Schwartz, attorney for Nicholas Rotonda, confirmed that the Board of Education had adopted a resolution agreeing to the settlement. As a result of a request by the undersigned judge, a signed settlement agreement was filed on June 22, 1992. The parties have prepared a settlement agreement, which is attached and fully incorporated herein, indicating the terms of settlement.

I have reviewed the record and the settlement terms, and I **FIND** that:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 14, 1992
Date

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

7/15/92
Date

Maureen R. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 17 1992
Date

OFFICE OF ADMINISTRATIVE LAW

le/e

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

SETTLEMENT AGREEMENT
OAL DKT. NO. EDU 00101-90
AGENCY REF. NO. 347-11/90

IN THE MATTER OF THE TENURE HEARING OF GEORGE FASCIANO, SCHOOL DISTRICT OF PALISADES PARK, BERGEN COUNTY

WHEREAS , the charges do not allege moral turpitude, corporal punishment or incompetency, but involve one incident in which the incoming Board believed the Superintendent should have used his discretion and statutory authority in a different way;

WHEREAS, the aforementioned charge did not result in a suspension of the Superintendent;

WHEREAS, the parties have reviewed the Commissioner's decision in *In the Matter of the Tenure Hearing of Frank Cardonick, School District of the Borough of Brooklawn, Camden County.*

WHEREAS, the parties hereto recognize that if the charges were to proceed to a hearing, it would undermine the effective administration of the school district and would cause to be incurred substantial costs at taxpayer expense;

WHEREAS, the Superintendent and the Board agree to continue the work that they have begun that has resulted in a better Board/Superintendent relationship in the past eighteen months;

WHEREAS, the parties to the above matter have determined that it is in the best interest of the respective parties and the taxpayers of the Borough of Palisades Park to voluntarily settle all the issues which are, or could have been involved in the above-captioned matter;

WHEREAS, the parties hereto have been represented by independent legal counsel of their respective choice;

WHEREAS, none of the parties hereto makes any admissions as to any liability or wrongful conduct; and

WHEREAS, the parties hereto desire to reduce their voluntary consent, settlement and stipulation of dismissal with prejudice to writing and to submit the agreement to the Commissioner of Education for review and adoption as to the final order and decision in this matter;

NOW, LET IT BE KNOWN that the parties hereto do hereby voluntarily agree as follows:

1. Petitioner will withdraw its tenure charges against respondent filed on November 15, 1989 with the Commissioner of Education.

2. Nicholas Rotonda will withdraw his federal action entitled *Rotonda v. Fasciano and Zuckerman*, 892777AMW, U.S. District Court, District of New Jersey, and defendant Janette Zuckerman will withdraw her counterclaim against Rotonda. All third party actions against the Board of Education will be dismissed.

3. The Palisades Park Board of Education agrees to submit all reasonable legal costs to its insurance carrier for reimbursement. All parties will fully cooperate in obtaining said insurance coverage. In the event, however, they are not covered the Board agrees to reimburse the Superintendent for all reasonable expenses incurred in any legal action which has arisen out of the same facts and circumstances as the instant matter.

4. The Superintendent agrees that he will not bring any action in any court of law against the Board with respect to the facts and circumstances surrounding the instant matter.

5. The Superintendent believes that his actions at the time of the suspension were in accordance with *N.J.S.A.* 18A:25-6, though there may have been some error in judgment as to its implementation. If his actions caused anyone unnecessary hardship, he expressly states his understanding and empathy for the aggrieved parties.

1/12/91
Date

Palisades Park Board of Education, President

Joseph Rotolo, Esq., Attorney for
Palisades Park Board of Education

George Fasciano
George Fasciano, Respondent

Margaret C. Murphy
Margaret C. Murphy, Esq., for Respondent

Nicholas Rotonda

Robert Schwartz, Esq.
Attorney for Nicholas Rotonda

Janette Zuckerman
Janette Zuckerman

Daniel N. Shapiro, Esq. Gregory C. Hart, Esq.
Attorney for Janette Zuckerman

OAL DKT. NO. EDU 101-90

IN THE MATTER OF THE TENURE HEARING OF GEORGE FASCIANO, SCHOOL DISTRICT OF PALISADES PARK, BERGEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standard for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983) The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

AUGUST 12, 1992

DATE OF MAILING - AUGUST 13, 1992

194-92

194-92

JOSEPH WEIST,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF WOOD-RIDGE, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

AUGUST 12, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6681-91
AGENCY DKT. NO. 194-6/91

JOSEPH WEIST,
Petitioner,
v.
BOROUGH OF WOOD RIDGE,
BOARD OF EDUCATION,
Respondent.

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

Mark T. Janeczko, Esq., for respondent
(Janeczko & Cedzidlo, attorneys)

Record Closed: June 26, 1992 Decided: July 7, 1992

BEFORE **DIANA C. SUKOVICH,** ALJ:

On June 11, 1991, petitioner filed a petition with the Department of Education (Department) concerning rejection by respondent of his application for the position of head football coach for the 1991-92 school year. The Department transmitted the

matter to the Office of Administrative Law on July 8, 1991, for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

Several telephone conferences were conducted. The parties were ultimately able to reach a settlement of the matter, and an executed settlement agreement was filed on June 26, 1992. Attached herewith is a copy of the settlement agreement.

I have reviewed the record and the settlement terms, and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this settlement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be and are hereby concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration. This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Aug 7, 1992
Date

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

July 9, 1992
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 14 1992
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

le/e

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JUN 26 11 46 AM '92
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

JANECZKO & CEDZIDLO
ATTORNEYS AT LAW
109 HACKENSACK STREET
P.O. BOX 123
WOOD-RIDGE, NEW JERSEY 07075
(201) 939-8800
ATTORNEYS FOR RESPONDENT

JOSEPH WEIST,
Petitioner

vs.

WOOD-RIDGE BOARD OF EDUCATION,
Respondent

BEFORE THE COMMISSIONER
OF EDUCATION

DOCKET NO. 194-6/91

SETTLEMENT AGREEMENT

WHEREAS, the parties hereto wish to amicably resolve the dispute between them and terminate all litigation, it is hereby stipulated and agreed, as follows:

1. In return for compliance with this Agreement, petitioner hereby withdraws his application for varsity head football coach for the 1992-1993 season.

2. The Board agrees to pay petitioner the sum of $6,261.00 representing the stipend that would have been paid to the petitioner had he been named varsity head football coach for the 1991-1992 season, 1991 summer weight coach and 1991-1992 winter weight coach. Petitioner waives interest on said sum.

3. Inasmuch as the petitioner is the only district employee who has applied for the position of 1992 summer weight

coach, 1992-1993 winter weight coach, and 1993 spring weight coach, the Board agrees to appoint petitioner to said positions at its June 17, 1992, regular school board meeting.

4. The parties acknowledge that the within settlement must be approved by the assigned Administrative Law Judge and the Commissioner of Education. In the event that this Agreement, or any part of it, shall fail to be so approved, or if a Court or Agency of competent jurisdiction shall at any time declare this Agreement, or any part of it to be illegal, null, void or of no force or effect, then the entire Agreement shall be rendered null and void and the parties shall be returned to the status quo existing prior to the Agreement as to all of their respective rights, claims and defenses.

For Petitioner:

Joseph Weist
Dated: June 15, 1992

Sheldon H. Pineus, Esq.
Dated: 6/15/92

For Respondent:

Ronald O'Grady, President
Dated: June 17, 1992

Mark T. Janeczko, Esq.
Dated: June 17, 1992

OAL DKT. NO. EDU 6681-91

JOSEPH WEIST,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOOD-RIDGE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

AUGUST 12, 1992

DATE OF MAILING - AUGUST 13, 1992

195-92

195-92

IN THE MATTER OF THE SPECIAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH OF : DECISION
LAUREL SPRINGS, CAMDEN COUNTY. :
:

AUGUST 14 1992

IN THE MATTER OF THE SPECIAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH OF : DECISION
LAUREL SPRINGS, CAMDEN COUNTY. :
:

The announced results of the balloting for one member of the Board of Education for a full term of three years at the special school election held on July 7, 1992, in the School District of the Borough of Laurel Springs, Camden County, were as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Veronica Mulhearn	173	7	180
Michael J. Caccia	165	18	183

Pursuant to a letter request from Veronica Mulhearn dated July 14, 1992, the Commissioner of Education directed an authorized representative from the Office of the Camden County Superintendent of Schools to conduct a recount of the paper ballots cast. The recount of paper ballots was conducted on July 29, 1992 at the Camden County Board of Elections, Pennsauken, New Jersey, as was a recount of the absentee ballots by the Superintendent of Elections.

At the conclusion of the recount, the tally stood as follows:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Veronica Mulhearn	173	8	181
Michael J. Caccia	166	17	183

Although there were some minor changes on recount, the name of the winning candidate remained the same as derived from the balloting of July 7, 1992. Therefore, it is recommended by the Commissioner's representative that the results as announced at the conclusion of the election remain unaltered.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the report of his authorized representative and adopts it as his own.

Accordingly, the Commissioner finds and determines that Michael J. Caccia has been elected to a full term of three years on the Board of Education of the Borough of Laurel Springs, Camden County.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 14, 1992

DATE OF MAILING - AUGUST 14 1992

196-92

196-92

DR. JOAN BYOREK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD SCHOOL DISTRICT, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, high school teacher with 37 years of experience in district, alleged Board improperly withheld her increment on basis of an incident involving herself and a student (K.W.), which resulted in filing of assault charges that were later withdrawn.

ALJ found Board properly withheld increment. Although Board failed in past to take any action against petitioner for problems in dealing with students, an April 1989 incident with student K.W. was the "straw that broke the camel's back." ALJ affirmed the increment withholding.

Commissioner adopted findings and determination in initial decision, emphasizing that the withholding was not for the single incident discussed (which occurred in the prior school year) but for petitioner's ongoing inflexibility, insensitivity and lack of rapport with students as noted in her 1989-90 evaluations. Petition was dismissed.

AUGUST 14, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6814-90
AGENCY DKT. NO. 229-7/90

DR. JOAN BYOREK,
Petitioner,
v.
THE BOARD OF EDUCATION,
THE SCOTCH PLAINS-FANWOOD
SCHOOL DISTRICT, UNION COUNTY,
Respondent.

Sanford R. Oxfeld, Esq., for petitioner Dr. Joan Byorek (Balk, Oxfeld, Mandell & Cohen, attorneys)

Casper R. Boehm, Jr., Esq., for respondent Board of Education, Scotch Plains-Fanwood School District, Union County

Record Closed: June 12, 1992 Decided: June 30, 1992

BEFORE **WALTER F. SULLIVAN**, ALJ:

This matter concerns the withholding of a salary increment for Dr. Joan Byorek (Byorek) for the 1990-1991 school year. Byorek, a high school teacher with 37 years' experience in the district, had enjoyed a previously unblemished record with respect to salary increments before the Board withheld this increment for reasons in the general area of insensitivity and lack of compassion towards students. The Board acknowledged that one incident involving a student of Byorek's (K.W.) was the "straw that broke the camel's back." Byorek appealed and, after a period of inactivity during which Byorek exhausted administrative remedies in another state agency, the matter was heard on April 29, 1992. Briefs were submitted and the record closed on June 12, 1992.

Kopera v. The Board of Education of West Orange, 60 *N.J. Super.* 288 (App. Div. 1960) sets forth in both general and particular terms the scope of review pertinent to the Commissioner's responsibilities with respect to the reviewing of increment determinations. The court noted:

> As the Attorney General's brief says, "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." We hold that the quoted statement accurately defines the review required here. 60 *N.J. Super.* 288, at 295, 296.

As indicated in the statement of the case, the Board acknowledged that one incident involving the student K.W. led to the determination to withhold Byorek's increment. I will discuss this incident first and then turn to the supportive evidence which the Board adduced to conclude that the withholding was justified.

The exact details of the Byorek's J.W. incident are not susceptible to total resolution. K.W., for example, did not testify in this matter. On the other hand, the broad outline of the incident is ascertainable and was the object of testimony by Byorek together with that of Mr. Travlos Assistant Principal at the time. The incident gave rise to a complaint and (for all practical matters) a counter complaint between Byorek and K.W. in the Scotch Plains Municipal Court and an expulsion hearing for K.W., following which K.W. was returned to student status.

The incident arose in the school library or multi-media room on an afternoon when Byorek was assigned essentially monitoring duties. Byorek testified that she saw two pairs of feet occupying the ground under the same library carousel, which she understood to be contrary to school policy. She went to the students, who turned out to be K.W. and her boyfriend, I.D., and admonished them to study properly. Byorek testified that at this point K.W. approached her and pushed her with both of K.W.'s arms on both of Byorek's shoulders. Byorek then stated that she telephoned the vice principal for discipline, who asked her to write up a report of the incident. At this time (and for the subsequent 45 minutes) K.W. was engaged in conversation with teacher's aide Jennings.

The record does not show the nature of that conversation, but it suffices to observe that no one fled or acted with or proffered further physical contact.

Byorek testified that she then telephoned Dr. Riegel, the school principal, to seek help. Dr. Riegel was unreachable at the moment and his secretary stated that he would call back. He did not do so and Byorek testified that she telephoned the

Scotch Plains police department to seek help. The Scotch Plains police officer arrived in about ten or fifteen minutes and offered her the opportunity to fill out a complaint.

Byorek did not submit the complaint immediately, but instead waited five days for K.W. to apologize, an event which has never occurred. With this, Byorek filed charges against K.W. and the case proceeded into the Scotch Plains municipal court.

Testifying on behalf of the Board, Travlos indicated his firm belief that K.W. had done little and had been bated into it by Byorek, who had telephoned her home to object to K.W.'s boyfriend. Byorek indicated that he learned this from K.W.'s mother who was offended by Byorek's call. There is no competent evidence of the mother's words but Travlos indicated that he saw a pattern of harassment of Byorek upon K.W.

Byorek testified that after she filed charges, she was the subject of constant pressure from different people to withdraw them. Indeed, it is her theory of the withholding that she was denied the increment because she had refused to withdraw the charges. (As a matter of law it is not quite clear to me how a complainant has the capacity to withdraw charges, but apparently everyone in the school system thought they did.) Byorek indicated that the nature of the pressure arose from varied sources, such as board members, Dr. Riegel, the principal, Dr. Travlos and others who urged her to do the same course of action. I would not characterize this as pressure, unless there is some thing proposed as a sanction or and act of harassment.

Byorek offers two observations that addressed the Board's position on the K.W. incident. In the first place, Byorek cites *Pierce v. Ortho Pharmaceutical Corp.,* 84 *N.J.* 58 (1980) that an employee has a valid cause of action when an employer takes an adverse action contrary to public policy. Byorek argues that she was assaulted by K.W. and that criminal behavior is not to be sanctioned and that a complaint arising from criminal behavior are not to be punished.

Be this as it may, there is no criminal behavior on the part of K.W. that can be shown through a judgment of any court of competent jurisdiction in the state of New Jersey. The record here reveals that both K.W. and Byorek withdrew their complaints and that the withdrawal was approved by the municipal court. Hence, just as I declined to determine that K.W. was in the right since that issue was not heard in full before me, I decline to determine that K.W. was in the wrong.

For practical purposes, the Board of Education, which had a legitimate interest in reviewing K.W.'s status, determined her to be without blame and Byorek's testimony indicated that she withheld filing a criminal complaint in the hope and expectation that K.W. would apologize.

Byorek is free to take the means she might to gather her apology, but upon the dismissal of the criminal complain in the only court in which it was filed, the allegations of criminal activity evaporate.

Byorek's second contention against the withholding arises from *Borrelli v. Rutherford Board of Education (State Board of Education, September 26, 1983),* which is cited for the proposition that a 1990-91 withholding must be based on activities taking place within that year. Byorek is correct that the K.W. incident occurred in the prior school year. Byorek is further correct in noting that the Board's witnesses described the K.W. incident as the straw that broke the camel's back.

Be that as it may, I do not read the camel's back metaphor to indicate causation. Riegel testified that the Board had seen alot of negativity in Byorek over the decades and had not done a great deal about it. Certainly the Board never withheld an increment. Read in this context, Riegel's comment addresses the question of why the Board, having failed to take action over the decades, chose a different path at this time. *Borrelli* is cited accurately in the unfairness of reaching back in time for incidents upon which to impose a sanction, but I find Riegel's testimony to be candid as a statement of why the Board acted in a way different from its past history. Therefore, I **CONCLUDE** that while the K.W. incident might have been either a motive or a crystallization of what the Board did not find agreeable in Byorek's performance, it was not a sanction for the performance.

As to the performance itself, Byorek gave evidence of how she was a harsh disciplinarian. Neither my views nor the views of the *Kopera supra*. suggests that teacher personnel policy on these matters is within the range of review. What is within the range of review is whether or not the Board activity withstood the criticism of Byorek. I **FIND** that it did since it is one thing it be harsh and another thing to be self defeating in demanding typing excellence standards of perfection that have no counterpart in the world outside Byorek's classroom, that is to say letter perfect typing.

As a result, I **CONCLUDE** that Byorek's salary was properly withheld and the decision of the Board is **AFFIRMED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6/30/92
Date

WALTER F. SULLIVAN, ALJ

Receipt Acknowledged:

7/2/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 09 1992
Date

OFFICE OF ADMINISTRATIVE LAW

slf

EXHIBITS

On behalf of the Petitioner:

P-1	Complaint of Joan Byorek against K.W. dated May 1, 1989
P-2	Evaluation of Dr. Joan Byorek dated February 27, 1989
P-3	Classroom observation report respecting Dr. Joan Byorek dated November 8, 1989
P-4	Letter from Robert Raiford to Dr. Joan Byorek dated March 30, 1990 with spelling and typographical notations
P-5	Letter of Robert Raiford to Dr. Joan Byorek dated April 26, 1990
P-6	Personnel Agenda for the Scotch Plains-Fanwood Board meeting of April 25, 1990

On behalf of the Respondent:

R-1	Interim Evaluation Report of Dr. Joan Byorek dated January 22, 1990
R-2	Dr. Terry Reigel's Summary Report of March 16, 1990 respecting Dr. Byorek
R-3	Memorandum from Art Travlos to Dr. Byorek dated February 6, 1990
R-4	Handwritten note undated
R-5	Letter from Joan Byorek to Dr. Reigel dated January 10, 1990
R-6	Memorandum to File by Terry Reigel dated January 16, 1990
R-7	Letter from Terry Reigel to Dr. Joan Byorek dated January 23, 1990
R-8	Classroom observation report respecting Dr. Joan Byorek dated January 10, 1991
R-9	Complaint #S105595 dated May 15, 1990 signed by K.W.
R-10	Adjournment notice of the municipal court of the township of Scotch Plains
R-11	Letter from Brian Siege to Dr. Joan Byorek dated June 15, 1989

On behalf of the Court:

C-1	Letter of Carolyn Bentley, Regional Manager, Division of Civil

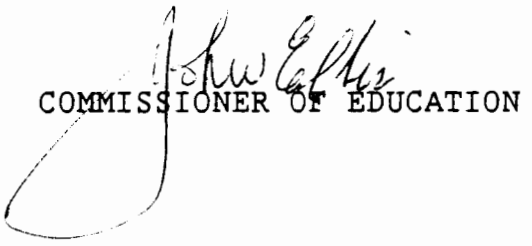
DR. JOAN BYOREK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD SCHOOL DISTRICT, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner concurs with the ALJ that the Board acted within the scope of its lawful discretion in withholding petitioner's increment. While the April 1989 incident involving K.W. may have been a catalyst for the district's determination to finally take action in view of petitioner's long history of problems with students, it is clear that the actual basis for the 1990-91 withholding was not that incident itself but rather petitioner's ongoing "insensitivity, lack of concern for the well-being of***students and inflexibility" (Letter of Board intent to discuss petitioner's employment, Exhibit P-4) and her continuing "lack of respect, compassion and understanding of students, and a lack of proper rapport with students" (Notice of Board action to withhold increment, Exhibit P-5) as discussed in her 1989-90 interim and summary evaluations of teaching performance (Exhibits R-1 and R-2).

Accordingly, for the reasons expressed by the ALJ as further explicated above, the Commissioner affirms the initial decision of the Office of Administrative Law dismissing the instant Petition of Appeal.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

AUGUST 14, 1992

DATE OF MAILING - AUGUST 14, 1992

197-92

197-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	
MAINLAND REGIONAL SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT, CONSTITUENT DISTRICTS	:	DECISION
OF SOMERS POINT AND LINWOOD,	:	
ATLANTIC COUNTY.	:	
	:	

SYNOPSIS

Petitioner, unsuccessful candidates for Board membership, requested inquiry into alleged violations of laws governing school elections. (N.J.S.A. 18A:14-63.12)

Initial decision found violations involving electioneering and improper campaign flyers did exist but were not shown to have thwarted the will of the people. ALJ determined outcome of election was not affected and petition was dismissed.

Citing In re Wene, Commissioner adopted findings and determination in initial decision. Further citing In the Matter of Old Bridge, this matter was referred to County Prosecutor for appropriate action regarding violations of N.J.S.A. 18A:14-81 and 18A:14-97.

AUGUST 17 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2992-92
(SOMERS POINT)
AGENCY DKT. NO. 115-4/92
CONSOLIDATED WITH
EDU 2995-92 (LINWOOD)
AGENCY DKT. NO. 94-4/92

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION IN THE MAINLAND REGIONAL SCHOOL DISTRICT; SOMERS POINT AND LINWOOD IN ATLANTIC COUNTY

Richard L. Press, Esquire, representing Thomas Oliver, Somers Point candidate and Edward Michael, Linwood candidate

Louis Greco, Esquire, appearing on behalf of Mainland Regional School District

Robert Beakley, Esquire, appearing for various employees of the School Board and Les Lindenbaum personally, a member of the Board

Record Closed: June 3, 1992 Decided: June 24, 1992

BEFORE EDGAR R. HOLMES , ALJ:

The Cities of Linwood and Somers Point are sending districts to the Mainland Regional School District. Tom Oliver was an unsuccessful write-in candidate for membership on the Regional Board from Somers Point in the annual school election held on April 7, 1992. Edward Michael was an unsuccessful candidate for membership on the Regional Board from Linwood in the same election. Both

candidates submitted a written request to the Commissioner of Education (Commissioner) requesting an inquiry into alleged violations of the statutes and regulations governing school elections. The matters were transmitted to the Office of Administrative Law (OAL) on April 29, 1992, pursuant to *N.J.S.A.* 52:14B-1 *et. seq., N.J.S.A.* 52:14F-1 *et. seq. , N.J.A.C.* 18A:14-63.12 and *N.J.A.C.* 6:24-6.1 *et. seq.* A plenary hearing was scheduled for May 26, 1992, and postponed at the request of the candidates. The matters were convened on June 3, 1992, and the inquiry was completed.

Somers Point

Judith Wolf, a Somers Point resident and voter, testified that on April 7, 1992, she voted at the Jordan Road School and handed out Tom Oliver literature. She said when she was in the polling place she observed Les Lindenbaum, later identified as the president of the Mainland Regional School Board, standing with Melvin Clark, a candidate for the School Board and eventual winner of the seat from Somers Point. She said that Les Lindenbaum, apropos of nothing, said in a loud voice: "Who called you a nigger?" Clark responded: "Mr. Oliver." She identified Clark as an African-American (she said "black"). She observed that several persons expressed shock. She recalled that earlier Clark asked her if she knew that Oliver had called him a nigger. She also recalled that some persons present said that they "did not know that Oliver was a racist."

Rita Montagno voted in Somers Point at the New York Avenue School. She was handing out literature there for Tom Oliver from 2:00 p.m. until 9:00 p.m. She observed that Les Lindenbaum was a challenger for Clark and that he greeted voters within 15 feet of the polling place.

Montagno also reports that at 8:55 p.m. she peered through the school windows and observed a person named Schulties standing behind a voting machine and making notes. She concluded that he was taking a tally from the machine; she sought to enter, and was ordered out of the premises by election officials because the polls were still open. On cross examination Montagno acknowledged that she did not hear anything Lindenbaum may have said to any voter.

Joanne (Jody) Youngblood is a Linwood resident and voter. She assisted Tom Oliver by writing and printing his campaign literature. She also distributed literature for Oliver at the Jordan Road School in Somers Point. She said that Mel Clark

approached her, examined her literature for Oliver and complimented her on its quality. Immediately thereafter, she reports, he moved to within less than 100 feet of the polling place to approach a voter with the literature and tell her that Oliver and the people who wrote his literature are saying: "vote for the white man, don't vote for the nigger." Youngblood reports that she immediately confronted him and the woman voter with the news that she personally wrote the literature and neither she nor Oliver ever used the expression "nigger."

Tom Oliver testified that he did not "run a racial campaign." He said Clark approached him and accused him of telling voters: "don't vote for the nigger -- vote for the white boy." He said to Clark: "You must have started that." He said at least fifteen people confronted him with the statement and others reported to him that Les Lindenbaum and a person named Ludeke were saying it in the polling place. He was also concerned that some voters wrote his name in the Somers Point election rather than the Mainland Election because the two polling booths were not identified. He also reported that when one supporter exited the voting booth, Lindenbaum told him, according to the voter, "I hope you forgot how to write." Oliver also said that Mrs. Ludeke was a judge of the election, and that she allowed her husband to roam about the polling place at will, electioneering.

Linwood

Alfred Arena is the Superintendent at the Mainland Regional School District. He received a tip that two employees of the district were coming into the school before the election to photocopy campaign literature. Arena and a private detective videotaped the culprits and seized the literature. The literature extolled the virtues of Jack Helmer, a retired teacher and Linwood candidate to the Regional Board. The literature bore the legend "Authorized for Publication By Committee to Elect Jack Helmer, 503 Davis Avenue, Linwood, NJ 08221." (There was testimony from candidate Edward Michael that his copy was deposited in his mailbox without the legend). The culprits were disciplined by the Board.

When Youngblood testified concerning the Somers Point election, she also testified to events concerning the Linwood election. She had also written and prepared Michael's literature and was active in his campaign. When she learned that the Mainland School employees had used school facilities and equipment on behalf

of Jack Helmer, Michaels opponent, she made the information public. On Tuesday, April 1st, 1992, she received a telephone call warning her that if she "went public with the information, there would be repercussions to her children." She panicked and called an FBI agent who gave her erroneous information about tracking telephone calls. She received a second call on the next night. On the third and following night, she received the telephonic message "we have your child." She felt frightened and intimidated.

Edward Michaels testified that Youngblood told him that his children were also threatened in the telephone calls made to Youngblood. He reported the telephone threats to the Prosecutor's Office. He testified, as did Youngblood, concerning the Helmer literature and opined that it did not meet the requirements of the law. He also reported his confrontation with Helmer concerning the veracity of statements contained in Helmer's literature.

The uncontested testimony of the unsuccessful candidates was that Oliver lost by approximately 100 votes and Michaels lost by approximately 50 votes.

STATUTE AND RULE

N.J.S.A. 18A:14-63.12 provides for an inquiry "into alleged violations of statutorily prescribed procedures for school elections, to determine if such violations occurred and if they affected the outcome of the election."

The regulation implementing the statute is *N.J.A.C.* 6:24-6.5 It requires the Commissioner to order appropriate relief if irregularities occurred in the election "sufficient to influence the outcome."

In order therefore, for the Commissioner to order appropriate relief, the unsuccessful candidates must meet two tests. (1) Was there a violation of the statutes governing school board elections (an irregularity); and (2) was it sufficient to affect or influence the outcome of the election?

The facts of this case satisfy the first part only. The violations of statute, and the irregularities, did not affect the outcome of the election.

There was credible testimony that "electioneering" occurred within 100 feet of a polling place or room contrary to *N.J.S.A.* 18A:14-81. This occurred when Clark criticized his opponent in the polling room by alleging that he, Clark, had been called a nigger by Oliver. Youngblood immediately confronted Clark, and denied the allegations.

There is also credible evidence that some flyers advertising candidate Helmer were released to the public without the name and address of the person causing it to be printed or the name of the person bearing the cost for such printing on the material contrary to *N.J.S.A.* 18A:14-97.

Youngblood testified that she had been threatened on the phone with harm to her children and to candidate Michael's children if she "went public" with the information concerning the flyers for Helmer which were photocopied on the school's equipment.

While the threats were a serious violation of law and ought to be vigorously pursued by the County Prosecutor, it did not appear as though it influenced either Michael's or Youngblood's vote. No one else was threatened.

While electioneering inside polling rooms is a violation of the statutes governing school board elections, it does not necessarily follow that the outcome of school elections is affected thereby.

Citizens who are interested enough to vote in school elections do not vote for the last name they hear on their way into the booths, nor are they intimidated by electioneering. They may be offended by it, but it is rare, if ever, that electioneering inside a polling room affects the outcome of an election. It is mere disorderly conduct and recognized as such by the legislature which provided a proper penalty enforceable in the municipal court.

I **FIND and CONCLUDE** that statutes governing school elections was violated in the Somers Point and Linwood elections for the Mainland Regional School Board.

It is however, not sufficient that violations occur in order to set aside an election. The will of the people must be thwarted. That is the ultimate test of

whether the outcome of an election was affected by the irregularities. ***In the Matter of the Annual School Election Held in the Township of Pittsgrove, Salem County,*** 1976 *S.L.D.* 585 at 589.

I **FIND and CONCLUDE** that violations which occurred in the annual school elections of 1992, in Somers Point and Linwood for the Mainland Regional School District **DID NOT AFFECT** the outcome of that election.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

24 June 92
Date

Edgar R. Holmes, ALJ
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

7/2/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 09 1992
Date

OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

JUDITH WOLFE
RITA MONTAGNO
JOANNE YOUNGBLOOD
THOMAS OLIVER
ALFRED ARENA
EDWARD B. MICHAEL

DOCUMENTS IN EVIDENCE

PETITIONER:

P-1 VOTER'S COMPLAINT
P-2 PROMO LITERATURE CLARK
P-3 PROMO LITERATURE OLIVER
P-4 PROMO LITERATURE MICHAEL
P-5 PROMO LITERATURE HELMER
P-6 PROMO LITERATURE HELMER
P-7 LETTER MICHAELS TO ARENA
P-8 LETTER NEY TO MICHAEL
P-9 PROMO LITERATURE HELMER
P-10 PROMO LITERATURE HELMER

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE MAINLAND REGIONAL SCHOOL DISTRICT, CONSTITUENT DISTRICTS OF SOMERS POINT AND LINWOOD, ATLANTIC COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioners pursuant to the provisions of N.J.A.C. 1:1-18.4. A reply to these by various school employees and Board Member Lindenbaum was untimely filed and consequently is not considered herein.

In their jointly submitted exceptions, petitioners argue that the ALJ erred in having found incumbent Helmer's campaign materials to be in violation of statute and then failing to provide any remedy for those violations. In particular, they argue that since these materials were submitted to Linwood voters in mass mailings, they of necessity must be found to have so tainted the campaign results that the conduct of a new election is required. In a separate letter included with the joint exceptions, Petitioner Michael further argues that, since his literature would have been the only material received by Linwood voters had Helmer's improperly produced and labeled literature not been disseminated, it is not

unreasonable to suppose that he might have gotten sufficient additional votes to win the election if circumstances had been different.

Upon careful review, the Commissioner concurs with the ALJ that violations of election law were proven to have occurred in this matter, but no demonstration was made that they affected the outcome of the election within the meaning of that standard as long interpreted by the courts. With regard to the proven violations, as properly pointed out by the ALJ, the Legislature has specified both the means of prosecuting such violations and the appropriate penalties to be imposed upon violators; both statute and case law preclude the Commissioner from usurping that function for himself. N.J.S.A. 18A:14-72, 18A:14-104; In the Matter of the Annual School Election Held in the Township of Old Bridge, Middlesex County, State Board decision July 6, 1988.*

With regard to petitioners' claims that the violations demonstrated herein necessarily tainted the results of the election, the Commissioner emphasizes that in order for the extraordinary remedy of a new election to be granted, petitioners must prove that the violations at issue either produced illegal votes which would otherwise not have been cast, or defeated legal votes which would have been counted but for the violation, and which would, if counted, have changed the outcome of the election. In re Wene, 26 N.J.Super. 363 (Law Div. 1953), aff'd 13 N.J. 185 (1953) Mere

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* The Commissioner notes that where persons are duly convicted of violating election laws, the County Prosecutor is free to consider applicability of N.J.S.A. 2C:51-2, which provides for forfeiture of public office upon conviction of crimes and offenses under certain circumstances.

speculation that results might have been different if conditions had been different will not suffice to meet this standard. In the Matter of the Annual School Election Held in the School District of Riverside Township, Burlington County, 1968 S.L.D. 73

Accordingly, the initial decision of the Office of Administrative Law is affirmed for the reasons expressed therein and the instant matter referred to the Atlantic County Prosecutor for action as deemed appropriate regarding the aforementioned violations of election law.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 17, 1992

DATE OF MAILING - AUGUST 18, 1992

198-92

198-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL BUDGET ELECTION HELD IN	:	COMMISSIONER OF EDUCATION
THE MORRIS SCHOOL DISTRICT,	:	DECISION
MORRIS COUNTY.	:	
	:	

SYNOPSIS

Board sought to have school budget election declared null and void by the Commissioner and a new election ordered due to use of inaccurate net valuation figure used in tax impact projection provided to taxpayers.

Commissioner concluded he was unable to grant extraordinary relief sought by Morris Township Board of Education. The result of an election is unimpeachable where acts and omissions on part of local election officials are void of evidence of malconduct, fraud or corruption. (Chesilhurst School Elect) Further, there was no proof of violation of statutorily prescribed election procedures for school elections and no proof that will of the people was thwarted (Matawan-Aberdeen Regional School District)

Commissioner concluded there was no provision in law upon which the Commissioner could grant a new election under factual circumstances presented herein. Petition was dismissed.

AUGUST 18, 1992

IN THE MATTER OF THE ANNUAL	:	
SCHOOL BUDGET ELECTION HELD IN	:	COMMISSIONER OF EDUCATION
THE MORRIS SCHOOL DISTRICT,	:	DECISION
MORRIS COUNTY.	:	
	:	

For Petitioner, Fredric J. Sirota, Esq., (Wiley, Malehorn and Sirota)

For Morris Township, John M. Mills, III, Esq. (Mills, Hock, Dangler & Mills)

This matter was opened before the Commissioner of Education through the filing of a Petition of Appeal by the Board of Education of the Morris School District (Board) on May 13, 1992. The Board seeks to have the April 7, 1992 school budget election declared null and void by the Commissioner and a new election ordered. Such relief is sought because subsequent to the election it was learned that the tax impact projection provided to the taxpayers by the Board prior to the election was based on an inaccurate net valuation figure for the Town of Morristown.

Upon review of the petition, the Board was notified that (1) the petition must be served on the governing bodies of the Township of Morris and the Town of Morristown informing them of their right to participate in the proceedings and (2) that the matter would be decided by the Commissioner as a petition for declaratory judgment. The Board was also informed that it was

required to submit a memorandum of law or letter brief addressing the basis upon which the Commissioner has the statutory authority to order a new election under the facts presented in this matter. The governing bodies were accorded the opportunity to submit replies to same.

On May 15, 1992, the Deputy Town Clerk of the Town of Morristown, Matthew Stechauner, submitted three certified copies of Resolution No. R-68-92 of the governing body supporting the action of the Board in seeking a new election.

On June 1, 1992, the Board submitted its brief and affidavits. On June 1, 1992, Robert L. Mast, Fourth Ward Councilman of the Town of Morristown, submitted correspondence in support of the Commissioner authorizing a new election. On June 12, 1992, John M. Mills, III, Esq., entered his appearance on behalf of the Township of Morris and reserved the right of the Township of Morris to take a position with respect to the Board's petition, although at the time it chose not to do so.

The basis upon which a new election is sought is set forth below.

> 1. On April 7, 1992, an annual school election was held wherein the voters of the Morris School District voted upon a school budget pursuant to N.J.S.A. 18A:22-33.
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> 2. Prior to the school budget election, the Board of Education of Morris School District held public hearings on the school budget pursuant to N.J.S.A. 18A:22-32. During these hearings and up until the time of the election on April 7, 1992, the Board provided the voters with certain information regarding the tax consequences of the proposed budget for each of the Township of Morris and the Town of Morristown.
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> 3. Specifically, the Board informed the voters of Morris School District that, if the school budget was approved, the result would be that

taxpayers of the Town of Morristown would receive an estimated tax decrease in the amount of 3.5 cents per hundred of assessed valuation. The voters were advised simultaneously that adoption of the budget would create an identified increase in the Township of Morris taxes.

4. On April 7, 1992, each category of the budget was approved; the majority of voters in both the Town of Morristown and Township of Morris voting in favor of the budget as follows:

Town of Morristown

A.	Current expenses:	359	Yes
		237	No
B.	Capital outlay:	343	Yes
		244	No

Township of Morris

A.	Current expenses:	792	Yes
		613	No
B.	Capital outlay:	765	Yes
		613	No

5. Subsequent to ten (10) days after the school election on April 7, 1992, the Board was made aware by its Deputy Superintendent that the information provided voters with respect to the affect of the proposed budget on the Town of Morristown taxes had been incorrect because an inaccurate net valuation taxable figure for the Town of Morristown had been utilized in the projection. The taxpayers of Morristown received an estimated tax increase of 4.7 cents per hundred of assessed valuation rather than the estimated decrease. The projection of the effect on the Morris Township taxpayers by the budget was confirmed to have been accurate.

6. It did not become known to the Board of Education that an erroneous net valuation taxable figure had been used when calculating the projected impact of the proposed school budget upon the taxpayers of the Town of Morristown until substantially after the school budget had been passed on April 7, 1992. Once the Board learned of the error, it immediately informed the public.

7. At a minimum, the process used by the District to obtain the net valuation taxable figure relating to the Town of Morristown was

seriously flawed and the District feels itself responsible for the error and the unintentionally incorrect information offered the voters of the Town of Morristown. The figures relating to the Morris Township net valuation taxable were accurate and Morris Township taxpayers were informed of the correct estimated tax impact.

8. The Morris School District, prior to the election, informed taxpayers that those residing in the Town of Morristown would receive a tax decrease of 3.5 cents per hundred of assessed valuation, resulting in a $35.00 tax decrease per $100,000.00 of assessment. However, because of the unintentional use of the incorrect figure for net valuation taxable, the taxpayers of the Town of Morristown will in fact be affected by an estimated tax increase of 4.7 cents per hundred thousand dollars of assessed valuation. The total discrepancy of the impact upon the taxpayers of the Town of Morristown is that they will receive an estimated tax increase of 4.7 cents per hundred of assessed valuation resulting in a tax increase in the amount of $47.00 per hundred thousand dollars of assessed valuation rather than a $35.00 reduction. Thus, the projection was off by an approximate total of 8.2 cents per hundred.

9. Although the time to challenge the election has expired, the Board of Education of Morris School District requests that the Commissioner consider the impact that this unintentional error will have upon the voters and the election process and, based thereon, declare the April 7, 1992 budget election null and void and order a new budget election.

10. The Board of Education of Morris School District is, by terms of the New Jersey Constitution, required to provide a thorough and efficient education to its students. The Board's adopted budget, it is felt, meets those needs. The 1992-93 budget included tightly controlled spending as well as a reduction in the number of employees. This was the budget that was voted upon by the voters of Morris School District and passed. Nonetheless, voters of the Town of Morristown had been advised that they would be receiving a tax decrease if they approved the budget - a statement which was, albeit unintentionally, untrue.

11. The Board of Education of Morris School District believes that it is imperative that it maintain its credibility with the voters not only

> with respect to the 1992-93 budget but for future budget elections and other requests of the voters. It is important that the voters maintain their faith in the credibility of the Board of Education so that the Board may operate in the best possible manner to provide a thorough and efficient education to its students. The Board believes a new election would secure the voters' faith in the election process and assure the credibility of the Board and would therefore be in the best interest of its students.

As to the basis upon which the Commissioner is authorized to order a new election under the facts of this matter, the Board argues, inter alia, that the New Jersey Supreme Court has recognized the broad authority of the Commissioner of Education. Jenkins et al. v. Tp. of Morris School District and Bd. of Ed., 58 N.J. 483 (1971) Such "powers [include] the 'supervision of all schools of the state receiving support or aid from state appropriations' and the enforcement of 'all rules prescribed by the State Board.'" (Id. at 494, citing N.J.S.A. 18A:4-23)

The Board also points to the fact that the Commissioner has jurisdiction over school elections as evidenced by N.J.S.A. 18A:14-63.12 which provided that the Commissioner "shall inquire into alleged violations of statutorily prescribed procedures for school elections, to determine if such violations occurred and if they affected the outcome of the election." It likewise points out that the Commissioner has the authority to "order such relief as is appropriate" if he finds an error on the recount of the election vote which altered the results of the election. N.J.S.A. 18A:14-63.13

Further, the Commissioner has not only been granted jurisdiction by the Legislature over controversies and disputes arising out of the school election process, but he is also vested

with the power to decide budget disputes between a board of education and governing body as to whether the budget fulfills the requirements of a thorough and efficient education. Such authority includes the power to direct appropriate corrective action by the governing body or to fix the budget on his own within the limits of the budget originally proposed by the board of education. Bd. of Ed. of East Brunswick Tp. v. Tp. Council, E. Brunswick, 48 N.J. 94 (1966)

The Board acknowledges that there is no specific statutory authority which empowers the Commissioner to declare an election null and void and order a new election because of the unintentional dissemination of incorrect information. However, it urges that the Commissioner does have such authority under the broad powers vested in him by the legislature. In support of this it cites In the Matter of the Application of the Bd. of Ed. of Upper Freehold, Monmouth County, 1978 S.L.D. 300, wherein the Commissioner authorized the issuance of bonds even though there was no statute which authorized him to do so. It cites, inter alia, the following ruling of the Commissioner:

> ***There exist, however, no directives of the courts and no specific statutory delegation of power which directs the Commissioner to review and certify to a county board of taxation any or all of a supplemental budget appropriation proposed by a board at a special school election and defeated by the voters. Nevertheless, the courts have held in certain instances that, despite a lack of specific statutory provision, the Commissioner's authority as delegated by the Legislature was sufficiently broad to require that he act in compelling circumstances to effectuate the constitutional and statutory mandates as applied to the public schools. In the Matter of the Application of the Upper Freehold Regional Board of Ed., Monmouth County, 1978 S.L.D. 300, 312.(Petitioner's Brief, at p. 8)

The Board further argues that a new election is necessary for it to provide a thorough and efficient education to its students as set forth below.

> ***In order for the Board of Education of the Morris School District to provide a thorough and efficient education to its students, it must be able to carry out its functions. It is important that the credibility of the election process be maintained so the Board can perform its duties. If the voters do not have faith in the credibility of the Board of Education and the election process, the Board will be unable to operate with respect to future budget elections and other requests of the voters.
>
> Without the voters' faith in the election process and the Board's credibility, the Board will be unable to operate in the best possible manner to provide a thorough and efficient education to its students. The Commissioner has the authority to exercise his broad powers and declare the election null and void and order a new election so as to enable the Morris School District to provide a thorough and efficient education to its students.
>
> As a result of the flaw in the process used by the District to obtain the net valuation taxable figure relating to the Town of Morristown, a cloud lingers over the election results. This cloud could prove to be damaging for future budget elections which are so vital to the provision of a thorough and efficient education. A new election would secure the voters' faith in the election process and remove the cloud from the school budget election held on April 7, 1992. Further, it would restore the credibility of the Board and therefore, be in the best interest of the students of the Morris School District. The Commissioner has jurisdiction to inquire into alleged violations of statutorily prescribed procedures for school elections and may order such relief as he deems appropriate. Since the Legislature has seen fit to delegate this responsibility to the Commissioner, it was their intent to delegate to the Commissioner supervision of school budget elections. Therefore, because compelling circumstances exist, the Commissioner should exercise his broad authorities and discretion and exercise jurisdiction of this controversy arising out of the 1992 school budget election held in the Morris School District on April 7, 1992.
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> (Id., at pp. 9-10)

The Mayor and Council of Morristown, as indicated in the resolution set forth in pertinent part below, urge that the Commissioner grant a new election.

> ***WHEREAS, the Board of Education have authorized a petition to John Ellis, the Commissioner of Education, to permit a new election for submission of the School District budget to the district voters based upon correct information being provided to the voters relative to the impact of the school budget on the Morristown tax rate; and
>
> WHEREAS, the Mayor and Council of the Town of Morristown believe that the voters relied upon the incorrect tax rate information presented by the School District and that the voters are entitled to have an accurate statement of the impact of the School District budget upon the Morristown tax rate prior to their vote to approve or disapprove the School District budget; and
>
> WHEREAS, the Mayor and Council support the action taken by the Morris School District to petition for said new budget election; and
>
> WHEREAS, the Mayor and Council believe that it is in the best interest of the Morristown community for the Commissioner to approve the School Board's petition and to order a new budget election; and
>
> WHEREAS, the Mayor and Council of Morristown further believe that democratic institutions of our society are disserved when the electorate is misinformed by public officials conducting an election of material facts relating to the proposition voted upon; and
>
> WHEREAS, the Mayor and Council further believe that the credibility of the Morris School District will be greatly enhanced by the approval of the petition seeking a new School District budget election;
>
> NOW THEREFORE, BE IT RESOLVED, by the Town Council of the Town of Morristown that the New Jersey Commissioner of Education, John Ellis, is urged to grant the Morris School District petition seeking a new School District Budget election for the fiscal year commencing July 1, 1992.

COMMISSIONER'S DETERMINATION

The Commissioner has undertaken a thorough examination of the Board's factual recitation in this matter. He has likewise carefully considered all of the Board's arguments and the information submitted by the governing bodies in light of the laws with respect to school elections set forth in state statute, regulation and legal decisions.

Upon such review, the Commissioner is in full agreement with the Board that he is vested with broad powers with respect to the provision of a thorough and efficient system of public education in New Jersey, including the power to order whatever relief he deems warranted with respect to school elections if there are irregularities in the school election procedures. That authority flows specifically from N.J.S.A. 18A:14-63.12 which reads:

> Upon written request within 5 days of the announcement of the result of an election by any defeated candidate, or, in the case of a question, proposition or referendum, upon petition of 10 qualified voters at any school election, the Commissioner of Education or his authorized representative shall inquire into alleged violations of statutorily prescribed procedures for school elections, to determine if such violations occurred and if they affected the outcome of the election.

It must be emphasized, however, that in deciding election matters it is the clear intent of the law that elections must be given effect whenever possible because the Courts of New Jersey have held that even gross irregularities, when not amounting to fraud, do not vitiate an election. Love v. Bd. of Chosen Freeholders, 35 N.J.L. 269 (Sup. Ct. 1871); Stone et al. v. Wyckoff et al., 102 N.J. Super. 26 (App. Div. 1968)

Hence, the voiding of a school election is an extraordinary relief which can be ordered only under the most stringent of circumstances as set forth by the Courts of New Jersey in In re Wene, 26 N.J. Super. 363 (Law Div. 1953), aff'd 13 N.J. 185 (1953) which reads in pertinent part:

> The rule in our State is firmly established that if any irregularity or any other deviation from the election law by the election officials is to be adjudged to have the effect of invalidating a vote or an election, where the statute does not so expressly provide, there must be a connection between such irregularity and the result of the election; that is, the irregularity must be the producing cause of illegal votes which would not have been cast or of defeating legal votes which would have been counted, had the irregularity not taken place, and to an extent to challenge or change the result of the election; or it must be shown that the irregularity in some other way influenced the election so as to have repressed a full and free expression of the popular will.***
> (26 N.J. Super. at 383)

Thus, absent malconduct or fraud, a concluded election will not be overturned "***unless in all human likelihood the irregularity has interfered with the full and free expression of the popular will, and has thus influenced the result of the election." In re Hackensack Recall Election, 31 N.J. 592, 595 (1960) Wene, supra 13 N.J. at 196

Further, as set forth by the Administrative Law Judge in In re Annual School Election Held in the District of Chesilhurst, 92 N.J.A.R. 2d (EDU) 213, 216, aff'd State Board July 1, 1992.

> ***It is only when the deviations from statutory procedure are so gross as to produce illegal votes which would not have been cast or to defeat legal votes which would have been counted, so as to make impossible a determination of the will of the people, that an election will be set aside. In re Garfield, 1977 S.L.D. 771, 775-776.
>
> Acts and omissions to act on the part of local election officers may render them liable to

> indictment. Yet, absent malconduct, fraud or corruption, the election result is unimpeachable. Wene v. Meyner, supra at 196. Irregularities pleaded must be sufficient, if established by proof, to warrant the relief sought. Proofs must operate per se to disqualify a nominee or alter the results of the election. Id. at 197-198.

Given the above, the threshold issue to be decided herein is whether or not there has been violation of statutorily prescribed election procedures for school elections. If shown to exist, it then becomes necessary to ascertain if there has been a demonstration that the will of the people was thwarted. Moreover, as set forth in In the Matter of the Annual School Election Held in the Matawan-Aberdeen Regional School District, Monmouth County, decided October 20, 1987, a determination as to whether petitioner has borne its burden of proof "***is a case by case determination on evidence which leads a reasonably cautious mind to a given conclusion, Bornstein v. Metropolitan Bottling Company, 26 N.J. 263 (1958). Guess or conjecture is insufficient, and the evidence must demonstrate that the offered hypothesis is a rational inference permitting a conclusion grounded in a preponderance of probabilities according to common experience. Joseph v. [Passaic] Hospital Ass'n, 26, 557 (1958)" (at p. 22)

As to the first inquiry, it becomes apparent that there has been no violation of statutorily prescribed election procedures for school elections alleged in this matter. Although tax impact is an important piece of information provided to the voters by a board of education in explaining its proposed school budget to the educational community of the school district, the fact remains that the projected impact of a proposed school budget on the local tax

levy is not required to be on an election ballot. Nor is such information required to be part of the mandatory school budget information which must be advertised prior to the school election. N.J.S.A. 18A:22-8 and 11

At the annual school election, the electorate is asked to vote either in favor of or against the amount of the proposed budget which the district board of education believes is necessary to provide a thorough and efficient education to its students, a budget which has to be approved by the Commissioner through the county superintendent as sufficient for such purpose (N.J.S.A. 18A:7D-27, N.J.A.C. 6:8-4.2(a)10). Thus, tax impact information cannot be properly characterized as a statutorily prescribed election procedure.

Of even more importance, perhaps, is the fact that no allegation has been made that the erroneous tax impact information was the result of willful malconduct or fraud. On the contrary, it is undisputed that it was not learned until after the election that district personnel had relied upon erroneous net valuation information received to calculate tax impact and that such error was unintentional.

There is likewise no allegation of malconduct or fraud on the part of the unknown individual who provided the erroneous information. What appears to have occurred in the instant matter is that school personnel relied upon the information without further verification or update. This is unfortunate in that the misinformation resulted in the electorate of the Town of Morristown voting on a proposed budget with the belief that their taxes would decrease $35.00 per $100,000 assessed valuation when in fact there

was an increase of $47.00 per $100,000 of such valuation. As regretable as this may be, it does not, however, alter the finding and determination that no illegality or irregularity in statutorily prescribed election procedures has occurred under the facts of this matter.

To reiterate Chesilhurst, supra, as quoted above, the result of an election is unimpeachable where acts and omissions on the part of local election officials are void of evidence of malconduct, fraud or corruption. No less can be said of acts, omissions or misinformation by the Board or school personnel absent a demonstration of malconduct, fraud, corruption or other willful action that affects the outcome of the school budget election.

Accordingly, for the reasons set forth above, the Commissioner is unable to grant the extraordinary relief sought by the Morris Township Board of Education, namely the voiding of the April 7, 1992 annual school budget election and the conduct of a special election. This determination is reached only after the most thorough examination of the issues and the Board's grave concern that the ability to provide a thorough and efficient education in the future would be jeopardized because of a lack of faith on the part of the electorate next year. It is hoped, however, that the electorate of the Morris School District will cast their vote for the 1993-94 school budget with the knowledge that the Board of Education of the Morris School District has done everything in its power to forthrightly acknowledge the unfortunate error that occurred with respect to the 1992-93 budget question and to attempt to correct for that error by seeking the conduct of a new election on the school budget. The Board's deep sense of responsibility and

sincere regret over the mistaken information provided to the voters are commendable. There is, however, simply no provision in law upon which the Commissioner can grant a new election under the factual circumstances presented herein.

Consequently, the petition is hereby dismissed.

COMMISSIONER OF EDUCATION

AUGUST 18, 1992

DATE OF MAILING — AUGUST 19, 1992

199-92

199-92

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH : DECISION
OF WALDWICK, BERGEN COUNTY. :
:

SYNOPSIS

Petitioning qualified voters sought inquiry into alleged violations of school election laws.

Initial decision found irregularities (mechanical difficulties and trouble with casting affirmative vote for current expense portion of budget) did not affect outcome of election. ALJ further found that superintendent's action in attempting to identify for purposes of the within inquiry parents who may not have been able to vote did not constitute a violation of N.J.S.A. 18A:42-4. ALJ affirmed results of annual school election and dismissed petition.

Commissioner adopted findings and conclusions of ALJ, emphasizing, however, that boards and their agents should avoid actions which may violate the spirit of school election laws.

AUGUST 21, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3006-92

AGENCY DKT. NO. 126-4/92

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE BOROUGH OF WALDWICK, BERGEN COUNTY

Aleta V. Adler, Anne McCarthy, and **Robert C. Taschler,** petitioners, appearing pro se

Rodney T. Hara, Esq., for respondent school district (Fogarty and Hara, attorneys)

Record Closed: June 19, 1992 Decided: July 10, 1992

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

By petition signed by 12 qualified voters at the annual school election held on April 7, 1992 (Exhibit C-1), and by a letter signed by petitioner Robert C. Taschler, a qualified voter at the annual school election held on April 7, 1992 (Exhibit C-2), filed with the Commissioner of Education on April 15, 1992, petitioners requested that the Commissioner of Education inquire into alleged violations of statutorily prescribed procedures for school elections to determine if such violations occurred and if they affected the outcome of the election. The petition and letter were filed on April 15, 1992, and the matter was transmitted to the Office of Administrative Law (OAL) on April 29, 1992, for hearing 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.

Since the Commissioner of Education requested that the matter be scheduled as expeditiously as possible, the matter was scheduled for hearing on June 4, 1992. On that date, a hearing was held and concluded and the record was closed.

On June 9, 1992, following the close of the record, the undersigned administrative law judge (ALJ) received a facsimile transmission from the Director of the Bureau of Controversies and Disputes (Exhibit C-3). This requested that I consider the allegations set forth in a letter from Ms. Shirley Feldman, a citizen of Waldwick, to the Commissioner of Education (Exhibit C-4) in the inquiry being conducted in this matter. Accordingly, the record was reopened for the limited purpose of considering these allegations. For reasons indicated in this Initial Decision, no additional hearing was scheduled regarding these allegations. Accordingly, the record closed on June 19, 1992.

FACTUAL DISCUSSION

The essential facts in this matter are not disputed. Accordingly, the facts set forth herein are determined to be findings of fact.

At the commencement of these proceedings, it was noted that Robert C. Taschler did not execute the petition filed with the Commissioner of Education (Exhibit C-1). However, Mr. Taschler submitted a letter to the Commissioner (Exhibit C-2) forwarding the petition and alleging facts which supported the request for an inquiry. Accordingly, it was determined that Robert C. Taschler is also to be designated as a petitioner in these proceedings.

Three of the petitioners who signed the petition and letter attended these proceedings.

The first petitioner to testify was Aleta Adler, a registered voter who resides in the Borough of Waldwick. The essence of Mrs. Adler's testimony is that on April 7, 1992, she arrived at the designated polling place at the Traphagen School to vote in the school

election held on that date. She explained, by referring to a sample ballot (Exhibit R-1), that there was no candidate for membership to the Board of Education for an unexpired one-year term. When she attempted to write in the name of a candidate for this position in the personal-choice column, the write in window in the column would not open.

After consulting with election workers, she was advised to insert the name of her write-in choice in the personal-choice space located immediately to the left of the current expense question. When Ms. Adler's slid open this window and wrote in the name of her personal choice at this location, she found that the current expense voting levers would not move. Ms. Adler notified the election worker of this, and the worker attempted to resolve the problem. In the meantime, Mrs. Adler was in the voting booth in excess of 15 minutes.

Ms. Adler testified that when she first went into the voting booth, there were four or five people behind her. While she was in the voting booth, the line of people waiting to vote grew until there were approximately 15 to 20 people. Many of the people in line were yelling to her that her two minutes were up, and were telling her to vote and get out. However, she refused to leave until efforts were made to try to resolve the problem.

Eventually, because she had a committment to pick up her daughter from school and transport her to a previously scheduled appointment, she was forced to record her vote and leave. However, she testified that she was prevented from voting on the current expense portion of the budget, for which she would have voted in the affirmative. Ms. Adler indicated that she did not see any of the prospective voters in the line leaving; however, because she was not paying close attention, they could have left without her noticing. Ms. Adler also signed a certification as to her inability to cast her vote concerning the current expense portion of the budget (Exhibit R-7).

Anne R. McCarthy, a registered voter and resident of the Borough of Waldwick, also testified in this matter. She voted at the annual school election held on April 7, 1992, by going to her polling place at the Crescent School. She arrived at approximately 2:00 p.m., and she was the second or third person to vote. She indicated that she attempted to write

in the name of an individual for membership on the Board of Education for the one-year unexpired term, but she was unable to do so. She then called to the election judge, Mrs. Washofer, indicating that she was having a problem moving the personal-choice window.

Mrs. Washofer began to look through instruction material. In addition, the election clerk who was collecting voting authority certificates from voters came into the voting booth and attempted to assist Mrs. McCarthy by moving slots. In the meantime, Mrs. Washofer contacted the Election Board in Hackensack and spoke to Mrs. Feldner, Superintendent of Elections. Eventually, Mrs. McCarthy attempted to push the current expense lever down but was unable to move it.

Mrs. McCarthy testified that she was in the voting booth for over one-half hour. During this period, the line was getting quite long. A great deal of confusion occurred and she was quite vocal in her assertion that she intended to cast her ballot. As a result, the other voters were quite aware of the problem. During this time, there were two lines of voters with 12 to 15 people in each line. She personally observed three or four other prospective voters come in, look at the line, and leave. In addition, she is aware that one or two voting authority certificates were given back to election workers by people who indicated they were leaving and would come back. Eventually, she was required to leave the voting booth after waiting one-half hour because she had a prior commitment. As a result, Mrs. McCarthy was unable to vote on the current expense portion of the budget and was unable to cast a write-in vote for board membership for the one-year unexpired term.

Robert C. Taschler testified that he is a resident of the Borough of Waldwick and is a registered voter therein. He indicated that on April 7, 1992, he was an unpaid alternate challenger at the Traphagen School polling place. He arrived at the school at 1:55 p.m. to commence his duties as a challenger. He testified that he had no authority to participate, but simply observed what was going on.

Mr. Taschler testified that the third or fourth voter who attempted to vote had a problem casting a write-in ballot. He indicated that the election workers were unsure as to what to do. They indicated that they had a manual as to procedures to be followed but that they were unfamiliar with the voting machines. As a result, a call was made to the school business administrator, Mr. Mallen, for instructions. In the meantime, the election workers continued to permit voters to vote. When voters advised the election workers of a problem with write in votes, the election workers advised the voters to open up the window of the next slot down in the personal-choice column and write in the name of their choice. It was his understanding that using this procedure would lock out the current expense levers. As a result, the voting continued, but there was much confusion and tension and there was no clear order. Because of delays in voting, he observed a number of people leave, and he also indicated that some people surrendered their voting authority tickets.

Eventually, a voting machine mechanic, escorted by a Sheriff's officer, showed up at the polling place. He worked on the machines while prospective voters stood by waiting to vote. The voting mechanic advised the election workers that the machines had not been set up properly. By 4:30 p.m., all of the machines had been fixed. Mr. Taschler indicated that he remained at the Traphagen School polling place until approximately 6:15 p.m.

Mr. Taschler testified that the election workers were all well-meaning and that they encouraged voters to vote. However, their training was meaningless because they did not know how to deal with the mechanical problems being experienced with the voting machines.

Mr. Taschler indicated that while he observed the problems with the machines, the voting lines grew to 20 to 25 voters. He was aware that some of the voters left and that some of them indicated that they would return. However, quite a few prospective voters left the polling place. He personally observed four people who directly told him that they were leaving. He observed another four or five people leaving. He indicated that there could have been others who failed to vote because of the mix-up.

Mr. Taschler then testified that he went to vote at his voting district's polling place at the Waldwick High School, Greenberg Center. When he arrived there, everything was fine. He had no problem with a write-in vote or a vote with regard to the current expense portion of the school budget. However, he spoke to the election workers there, and they indicated that there had been problems, buth that they were corrected by an election machine mechanic.

Mr. Taschler testified that quite a few people contacted him after the election and advised him that the above-described problem lasted approximately two hours on election day. Mr. Taschler testified that all 12 petitioners who signed the petition in this matter had difficulty casting an affirmative vote on the current expense budget in the school election. Others who had problems because they were unable to cast their write-in votes were not permitted to sign the petition since the petition was narrowly written to deal only with the current expense budget vote.

Paul E. Cottrell, a resident of and registered voter in the Borough of Waldwick, also testified. Mr. Cottrell is the president of the School District Board of Education. He testified that on April 7, 1992, he went to vote in the annual school election at the Waldwick High School, Greenberg Center. He indicated that he arrived at 2:20 p.m., signed in, and was given a voting authority ticket. He was accompanied by his wife, who voted first. While voting, his wife indicated that she had a problem with a write-in vote but that she was able to cast her vote on the current expense portion of the budget. However, she was unable to cast a write-in vote for the one-year unexpired term on the school board.

When Mr. Cottrell entered the voting booth and attempted to vote, he could only vote on the top two of the three candidates for membership to the Board of Education for three-year terms. Neither the third lever nor any other lever on the machine was able to be moved. When he advised the election worker of this, he was told to try again. When the levers were unable to be moved, the election judge was contacted. She then contacted the County Election Board and arranged to have an election machine mechanic repair the machine. Mr. Cottrell waited in the voting machine for the repair to be made.

Mr. Cottrell testified that when he first entered the machine, there were three or four people in line. The lines grew to approximately 20 people at about 2:50 p.m. At that point, the election officials stopped taking voters and stopped issuing voting authority tickets. Some of the voters who had been waiting in line surrendered their voting authority tickets, with certain of them indicating that they would return later.

At 3:10 p.m., the election judge received authority to allow District 6 voters to use the District 2 voting machine. Mr. Cottrell testified that he personally observed that some voters had trouble with the personal-choice column of the District 2 voting machine.

Mr. Cottrell indicated that an election machine mechanic arrived at approximately 3:20 p.m., looked at the machine, and made various adjustments. Approximately 10 minutes later, the mechanic advised the election judge that it would be necessary to clear Mr. Cottrell's vote. He was then permitted to obtain a new voting slip. At 3:50 p.m., Mr. Cottrell was finally able to vote and make the selections that he wished. He was able to cast a write-in vote as well as to vote on the current expense portion of the budget.

Mr. Cottrell testified that he was subsequently made aware of problems concerning the column personal-choice with other machines, because he was a challenger at the Traphagen School polling place commencing at 4:00 p.m. When he arrived there, the election workers advised him of problems with the machines. The workers had advised voters to use another column for any write-in votes.

Mr. Cottrell testified that he had been involved in campaigning for the write-in candidate, Mrs. Phyllis Bieger. Mrs. Bieger received 201 write-in votes for the unexpired one-year term. However, in a prior election, she had received over 1,100 votes. Mr. Cottrell also indicated that he observed at least 12 people leave the polling place, and he felt that this had an impact on the election.

James Mallen, school business administrator and board secretary, testified for respondent. He indicated he is responsible for receiving nominating petitions. As a result

of the receipt of nominating petitions, three candidates were included in the school election of April 7, 1992, for membership on the Board of Education for the full three-year term. However, the position for membership on the Board of Education for an unexpired one-year term was not the subject of a nominating petition; therefore, no nominee appeared on the ballot (Exhibit R-1).

Mr. Mallen indicated that he was aware of a campaign by incumbent trustee Phyllis Bieger to be elected as a write-in candidate for the one-year unexpired term. Because of this, he wrote to Mr. Bill Branagh, chief custodian of voting machines, on March 3, 1992 (Exhibit R-2). At that time, he advised Mr. Branagh that he expected a large number of write-in ballots and requested that Mr. Branagh insure that the voting machines would be able to accommodate a large number of such votes. Mr. Mallen also advised the election workers that he expected a large number of write-in ballots and recommended that they attend an election worker's seminar to be conducted by the Bergen County Board of Elections (Exhibit R-3).

Mr. Mallen indicated that on the day of the election, voters called his office complaining about voting problems. Mrs. Anne McCarthy called his office and he spoke to her concerning the problems she encountered. Mr. Mallen then contacted Superintendent of Elections Eileen C. Feldner. Specifically, Mrs. McCarthy had inquired as to whether she would be permitted to vote again since she was unable to vote on the current expense proposition. However, Mrs. Feldner advised that voters could not be permitted to vote twice.

Mr. Mallen then contacted Mr. Branagh, who apologized profusely and advised Mr. Mallen that a mechanic had been dispatched since election workers had also called him. Mr. Mallen indicated that he later contacted Mr. Branagh again and confirmed that Mr. Branagh had received his letter of March 3, 1992. Mr. Branagh advised Mr. Mallen that he specifically instructed his technicians to make sure that the voting machines had been set up to accommodate write-in votes, and he was profusely apologetic for the error in the voting machines. Mr. Mallen indicated that Ms. Branagh did not dispute that there was an error in the setup of the voting machines.

Mr. Mallen testified that if the personal-choice slide is opened in order to permit a voter to write in the name of a candidate, the voting levers on the same line are locked and unable to be voted. He indicated that this is to prevent someone from writing in the name of a candidate, not pulling the lever for that write-in vote, and then voting for another candidate whose name appears on the ballot.

Mr. Mallen testified that as a result of the election, Phyllis Bieger was elected to the school board as the write-in candidate for the one-year unexpired term. However, the current expense portion of the budget was defeated by a vote of 896 yes, 928 no. It should be noted that the total number of votes counted on the current expense question was 1,824, and the total number of votes counted in the election was 1,826 (Exhibit R-4).

Mr. Mallen indicated that there was a recount conducted on April 27, 1992, which confirmed the initial election results. At that time, Mr. Mallen met with the head mechanic, who admitted that the machines had been set up improperly and that there had been human error, on the part of the voting machine technicians. Mr. Mallen indicated that Mr. Branagh and Michael Gass, the mechanic who worked on the machines, were supposed to be present at the hearing of this matter, but they did not appear.

Superintendent of Schools Dr. Patrick Piegari also testified. He indicated that he is involved with voter turnout and voter registration, and he maintained that it is important to get the parents of school children out to vote. As a result, he generated school activities and programs designed to have parents visit the schools in order that they would be able to vote on the day of the election.

Dr. Piegari testified that he became aware of voting problems and that these were very upsetting to him because of his efforts. He communicated with individual parents after the election and they told him that the timing of the problems could not have been worse. It was during the voting hours when parents would pick up their children and would vote that the machine problems occurred. He indicated that he is aware that the machine malfunction impacted on the ability of many voters to vote.

Dr. Piegari testified as to efforts he made to contact the parents of school children to determine the impact of the voting machine malfunction on their vote. He indicated that on May 27, 1992, he sent a letter addressed to the parents of school children (Exhibit C-5) inquiring whether they had experienced problems when voting. The letter was sent home with students, and he acknowledged that this is not a reliable way of getting information. As a result, he received from 14 individuals certifications concerning the impact of the malfunction on their ability to vote.

LEGAL DISCUSSION AND ANALYSIS

This proceeding was commenced pursuant to the provisions of N.J.S.A. 18A:14-63.12, which provides that upon written request within five days of the announcement of the result of a question, proposition, or referendum, upon petition of 10 qualified voters, the Commissioner of Education or his authorized representative shall inquire into alleged violations of statutorily prescribed procedures for school elections, to determine that such violations occurred and if they affected the outcome of the election.

Elections with voting machines are conducted as far as possible in the same manner as general and municipal elections. N.J.S.A. 18A:14-40. Polls must be open between the hours of 5:00 p.m. and 9:00 p.m. and during any additional time which the Board may designate between 7:00 a.m. and 9:00 p.m. and as long as it is necessary to permit those present to cast ballots. N.J.S.A. 18A:14-45. A board member, or the absence of a board member, the judge of the election, or, in the absence of both, the secretary of the board, declares the polls open and voting continues without recess until the time the polls close. N.J.S.A. 18A:14-46.

School elections may not be set aside in the absence of conclusive proof that irregularities constituted so major a factor as to nullify the expression of the voters. In re Wene, 26 N.J. Super. 363, 383 (Law Div. 1953); Sharrock v. Keansburg, 15 N.J. Super. 11, 19-20 (App. Div. 1951). Elections are to be given effect whenever possible, and irregularities and deviations from election laws by election officials provide insufficient

ground for voiding an election if the will of the people has been fairly exposed and determined and has not been thwarted. In re Livingston, 83 N.J. Super. 98, 107 (App. Div. 1964).

Petitioners have the burden of establishing that the will of the people has been suppressed. Mere speculation that improved conditions would have afforded a different result is not enough. In the Matter of the Annual School Election held in the Matawan-Aberdeen Regional School District, Monmouth County, 1987 S.L.D. 254, October 20, 1987. The real intent of the voters must be established and such expression of intent must be read in light of the surrounding circumstances proven by reliable evidence. In re Fifteen Registered Voters, County of Sussex, 129 N.J. Super. 296, 300-301 (App. Div. 1974). Petitioners must show this by a preponderance of the credible evidence. In re Polk, 90 N.J. 550 (1982). It is not necessary to show how the rejected voters would have voted, but merely that the number of votes rejected was sufficient to have altered the outcome. See, Application of Murphy, 101 N.J. Super. 163 (App. Div. 1968), certif. den. 52 N.J. 172 (1968).

Voters discouraged by long lines are not rejected under N.J.S.A. 19:29-1(e). "A voter who fails to vote because instant access to a polling booth is not provided cannot claim 'rejection' under the election contest statute." In re 1984 Maple Shade General Election, 203 N.J. Super. 563, 590 (Law Div. 1984). The term "rejection" for the purposes of the election statutes has been defined "to include any situation in which qualified voters are denied access to the polls including a denial because of shutdown of a voting machine." Magura v. Smith, 131 N.J. Super. 395, 399 (Law Div. 1974). The Appellate Division has clearly stated that where "a voter must wait in line to vote" and where he "gives up his suffrage right because of inpatience or inconvenience," such circumstances "could not serve as a ground for setting aside an election on the basis that a legal vote was rejected." In re Petition of Hartnett, 163 N.J. Super. 257, 268-69 (App. Div. 1978). Such a vote is not considered "rejected" but is, rather, the result of the voter's voluntary decision. Id. at 269. Thus, petitioners cannot rely upon the mechanical difficulties resulting in voters allegedly leaving the polling place to contest the election.

It is now necessary to examine the evidence produced in this matter to determine if it is sufficient to change the election results. During the hearing of this matter, only two voters, Adler and McCarthy, testified that they were prevented from voting on the current expense question. Thirteen other individuals submitted certifications in lieu of affidavits (Exhibit R-7) asserting that they were unable to cast a vote in favor of the current expense portion of the budget. It is noted that Ms. Adler testified in this matter and signed a certification. In addition, eight other individuals signed the petition which gave rise to these proceedings. It is noted that four signatories to the petition also signed certifications. Thus, a total of 23 individuals have come forward asserting that as a result of their casting a write-in ballot, they were unable to vote in the affirmative on the current expense portion of the budget question. Setting aside the question of whether the certifications of 13 of the voters and the execution of the petition by eight of the voters is legally competent evidence upon which to base a determination that their votes were not accepted, it is clear that this number of votes is not sufficient to have altered the outcome of the school election on the current expense budget question. The margin of defeat on this question was 32 votes.

All of the witnesses indicated that they believed that there were other voters whose voting attempts were thwarted. However, to attempt to determine from this testimony the impact on the election would be speculation. It may have been that certain of these other voters who did not come forward attempted a write-in vote and were unable to cast a negative vote on the current expense portion of the budget. Others may have been able to cast an affirmative vote on the current expense question, but may have been thwarted in attempting to write in the name of a candidate. Or, it may be that few, if any, voters were thwarted in such a manner. Such speculation serves no useful purpose and should not form the basis for deciding to void an election.

ALLEGATIONS OF VIOLATION OF N.J.S.A. 18A:42-4

As indicated above, I have been requested to consider in the within inquiry the allegations set forth in the letter from Ms. Shirley Feldman dated June 1, 1992 (Exhibit C-4). In her letter, Ms. Feldman alleges that Waldwick School Superintendent Dr. Patrick

Piegari, by letter dated May 27, 1992 (Exhibit C-5), actively and selectively solicited the parents of the children in Waldwick's schools to make formal complaint of either an inability to vote because of inconvenience or an inability to properly record their votes because of machine malfunction.

Ms. Feldman further asserts that the parent who informed her of Dr. Piegari's actions was outraged and felt intimidated, afraid that her child would be regarded as uncooperative if the parent did not respond positively to the letter. The parent additionally felt that because challengers were present at the polling places, the superintendent knows which parents did not vote, and many of the parents would feel obliged to provide the superintendent with the cooperation requested in his letter.

In her letter, Ms. Feldman further asserts that Dr. Piegari's actions violated N.J.S.A. 18A:42-4 by requesting school children to carry the certification forms back to school, and by stating in the letter that school personnel will witness the forms. Finally, she alleges that the use of public funds and publicly paid school personnel to print and mail the letter of May 27, 1992, and its attachments constitutes another violation of N.J.S.A. 18A:42-4

N.J.S.A. 18A:42-4 provides as follows:

> No literature which in any manner and in any part thereof promotes, favors or opposes the candidacy of any candidate for election at any annual school election, or the adoption of any bond issue, proposal, or any public question submitted at any general, municipal or school election shall be given to any public school pupil in any public school building or on the grounds thereof for the purpose of having such pupil take the same to his home or distribute it to any person outside of said building or grounds, nor shall any pupil be requested or directed by any official or employee of the public schools to engage in any activity which tends to promote, favor or oppose any such candidacy, bond issue, proposal, or public question. The board of education of each school district shall prescribe necessary rules to carry out the purposes of this section.

Ms. Feldman also refers to Citizens to Protect Public Funds v. Bd. of Ed. of Parsippany-Troy Hills Tp., 13 N.J. 172 (1953) as authority for her assertion that the use of school funds

to espouse an adversarial position on a public matter is forbidden.

Ms. Feldman's letter raises a number of questions regarding the propriety of Dr. Piegari's actions in this matter. However, not a single one of Ms. Feldman's assertions involves an allegation that the school election held on April 7, 1992, violated statutorily prescribed procedures for school elections. All of her allegations involve conduct on the part of Dr. Piegari which occurred approximately seven weeks after the school election. In addition, Dr. Piegari admitted to engaging in the conduct alleged by Ms. Feldman. It is for these reasons that no additional hearing was scheduled regarding these allegations.

The request of the Department of Education that I consider these allegations requires some analysis of their import. The above-quoted language of N.J.S.A. 18A:42-4 prohibits the use of public school pupils for the purpose of distributing literature or engaging in any activity which promotes, favors, or opposes any candidate or proposal at any election. However, the clear implication of this language is that this activity is prohibited before an election. In the present case, Dr. Piegari's actions were undertaken after the election for the purpose of determining whether potential voters were discouraged or prevented from exercising their right to vote. On its face, this does not appear to be a violation of N.J.S.A. 18A:42-4. In fact, his purpose appears to be laudable since he was attempting to identify voters who may have been thwarted in their attempts to vote for a candidate or question according to their choice.

On the other hand, Dr. Piegari's efforts appear to have been directed solely to those voters who were more likely to favor the approval of the current expense portion of the school budget, i.e., parents of school children. In addition, the language of the certifications prepared by Dr. Piegari would permit them to be executed only by those voters who favored the school budget. Such an inquiry should be directed at all voters, and not only at those who favor one position or the other. However, even such a one-sided inquiry does not appear to violate N.J.S.A. 18A:42-4.

Based upon the above reasons, I **FIND** that Dr. Piegari's conduct did not violate the provisions of N.J.S.A. 18A:42-4. and did not cause a violation of statutorily prescribed procedures for the school election held on April 7, 1992. Finally, I **FIND** that Dr. Piegari's actions had no impact upon the outcome of this inquiry.

FINDINGS AND CONCLUSIONS

Based upon the foregoing legal discussion and analysis, I make the following findings and reach the following conclusion in connection with this matter:

1. Any voters who may have been discouraged by long lines caused by mechanical difficulties experienced by other voters using the voting machines are not "rejected" voters and the election may not be set aside on this basis.

2. Assuming that it was established by legally competent evidence in this matter that the 23 voters who either testified, executed certifications in lieu of affidavits, or signed the petition were prevented from voting in the affirmative on the current expense question of the school budget, their 23 affirmative votes would not have affected the outcome of the election.

3. Under all the facts and circumstances set forth in this matter and based upon the finding that the irregularities did not affect the outcome of the election, the election results should be affirmed.

DECISION AND ORDER

Based upon the foregoing, it is hereby **ORDERED** that the results of the annual school election held in the school district of the Borough of Waldwick, Bergen County, on April 7, 1992, is **AFFIRMED**, and petitioners' request for an inquiry in this matter be and the same is hereby **DISMISSED.**

OAL DKT. NO. EDU 3006-92

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 10, 1992
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

7/14/92
DATE

Maureen A. Kelly
DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 16 1992
DATE

Jayne L. Wilson
FOR OFFICE OF ADMINISTRATIVE LAW

g/e

APPENDIX

List of Witnesses

For Petitioner:

Aleta V. Adler
Anne N. McCarthy
Robert C. Taschler

For Respondent:

Paul E. Cottrell
James Mallen
Dr. Patrick Piegari

List of Exhibits

C-1 Petition of 12 qualified voters and residents of the Borough of Waldwick
C-2 Letter of Robert C. Taschler dated April 9, 1992
C-3 Letter from Maureen R. Keller, Director, Bureau of Controversies and Disputes dated June 9, 1992
C-4 Letter of Shirley Feldman dated June 1, 1992
C-5 Letter of Patrick Piegari, Ed. D. dated May 27, 1992

R-1 Sample Ballot for School Election, Borough of Waldwick, April 7, 1992
R-2 Letter of James Mallen to Mr. Bill Branagh dated March 3, 1992
R-3 Memo from James Mallen to Election Workers dated March 12, 1992
R-4 Regular/Combined Statement of Result of School Election dated April 7, 1992
R-5 Letter of James Mallen to Mrs. Eileen C. Feldner, Superintendent of Elections dated April 14, 1992
R-6 Voting Authority Certificates returned to election workers

R-7 Certification of:

Aleta V. Adler
Jacob J. Bieger
Barbara Dilger
Kim Lauren Natelli
Susan K. Vroom
Jeffrey A. Vroom
Paul H. Wagner
Denise Borgess
Patricia E. Byrne
Arthur P. Corby
Karen Godfrey
Cindy Huepler
Susan Rogers
Angela Schankberger

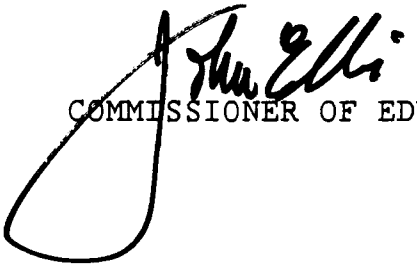
IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF WALDWICK, BERGEN COUNTY.	:	
	:	

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

Upon review, the Commissioner concurs with the ALJ for the reasons stated by him in his initial decision that the difficulties experienced by a number of voters in attempting to vote on the current expense budget were insufficient to warrant setting aside the election in this matter and that mere speculation as to a different outcome if conditions had been different cannot serve to void the within election results. He further concurs that the superintendent's actions in attempting to seek out parents who may have been prevented from voting for the school budget neither had a bearing on the outcome of the election nor constituted a violation of N.J.S.A. 18A:42-4. In so doing, however, the Commissioner strongly cautions boards of education and their agents against actions which may violate, or even have the appearance of violating, the spirit of laws which are clearly intended to ensure that school district involvement in matters relating to public elections is strictly nonpartisan.

Accordingly, the initial decision of the Office of Administrative Law dismissing petitioners' request for inquiry is affirmed for the reasons expressed therein as amplified above.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

AUGUST 21, 1992

DATE OF MAILING - AUGUST 21, 1992

200-92

200-92

M.M., through and with his guardian and father, M.M., SR.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE SOUTHERN GLOUCESTER REGIONAL SCHOOL DISTRICT ET AL., GLOUCESTER COUNTY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent requested change of a failing grade in physical education received by his child for the first semester of the 1990-91 school year.

ALJ found the grading policy for physical education was reasonable and nondiscriminatory, and that it was properly applied to petitioner's child. ALJ further concluded that the Board of Education need not have adopted a formal codification of its grading system for physical education in order for that system to be found valid and enforceable. Petition was dismissed.

Commissioner concurred with the ALJ and dismissed Peition of Appeal for reasons stated in the initial decision.

AUGUST 24, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5713-91
AGENCY DKT. NO. #100-5/91

M.M. THROUGH AND WITH HIS GUARDIAN AND FATHER, M.M., SR..,

v.

DANIEL DEMERS, ET AL AND THE SOUTHERN GLOUCESTER REGIONAL SCHOOL DISTRICT, GLOUCESTER COUNTY

Brian S. Belson, Esquire, for petitioner, (Belson and Rapposelli, attorneys)

Charles R, Iannuzzi, Esquire, for the respondents

Record Closed: June 4, 1992 Decided: July 14, 1992

BEFORE EDGAR R. HOLMES, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Daniel Demers, respondent, is the petitioner's gym teacher at the Delsea Middle School of the respondent Southern Gloucester Regional School District (Board). M.M. Sr. sought to obtain a change of his child's physical education grade, a 69, for the first semester of the 1990-91 school year. He alleges that the policy under which the grade was determined was not adopted by the Board or, in the alternative, he argues that the policy is too discretionary and is open to abuse by individual teachers. M.M. filed his petition on May 2,1991 and the matter was transmitted to the Office of Administrative Law (OAL) on June 7, 1991, to be heard as a contested case pursuant to *N.J.S.A.* 52:14B-1 *et. seq., N.J.S.A.* 52:14F-1 *et. seq.*

and *N.J.S.A.* 18A:6-9 *et. seq.* The record closed on June 4, 1992, after briefs were received from the parties.

The prehearing Order inartfully described the issues to be resolved in this hearing. At the hearing and in final arguments the parties redefined the issues in accordance with the proofs and the law: whether the grading system in physical education classes at the Delsea Middle School was formally adopted by the Board and whether it was unreasonable or discriminating.

Respondents Daniel Demers and Terry Ann Vanaman, who is the Middle School principal, testified that the grading policy used in physical education classes at the Delsea Middle School had developed over a period of twenty years and was adapted from a policy developed at the high school. It is a simple system which recognizes the great disparity in children's ability to perform in athletic contests. Each child begins the marking period with 100 points, a perfect grade, and loses points for behavior which does not conform to a code of conduct. The code of conduct is explained to the pupils in the beginning of the year and is also explained to parents at various PTA and home and school functions during the year. The code of conduct stresses proper attire, sportsmanship and promptness in arriving at the playing field. Under sportsmanship was a subcategory which penalized the player for swearing. (profane language)

Demers produced his calculation for deducting points from the petitioner's initial grade of 100. It revealed that M.M. was not dressed properly on September 18, was late in arriving at the playing field on September 28, October 11, 12, 22, 25, 31 and November 5, used profane language on September 26, October 2, October 18 and November 7. On October 18, M.M. did not properly participate in a game. He said that five points were deducted for improper dress, up to five points were deducted for profane language or not playing fairly and one point was deducted from a student's score for lateness in arriving at the playing field.

Demers further distinguished between profane language on the basis of the shock value of the exact profanity used, I presume, because he said "the "F" word was worth five points but the "S" word was worth two points."

When Demers was cross examined as to the difference between the marking policy and discipline he explained that if a student used profanity in the heat of the contest, that was not sportsmanship, but if a student directed the profanity at him,

that was an occasion for administrative discipline. The difference appeared to be crucial because parents are notified when a child is disciplined but not notified when a child loses grade points in physical education until the report card arrives.

M.M. testified that his son was unable to dress appropriately on September 18 because his gym clothes were stolen. This was however, news to Demers. M.M. also explained that his sons subsequent high grades in physical education were the result of his telling his son to "kiss Demer's ass." This may reveal why his son lost points for profane language; he did not consider it to be unacceptable. However, every indication was that M.M., Jr. was a well qualified student in all classes and respects. Demers had testified that M.M., Jr. was also a good football player.

M.M., Sr.'s and his wife's major complaint was that they just did not know their son was losing points in physical education class until it was too late. They did not, however, meet with the gym teacher on back to school night. It would have been the better practice for Demers to have sent home a note so that the matter could have been corrected earlier rather than later, but he did not. This does not render the policy unsound however. More home and school communication is what is required.

Counsel for petitioners was unable to point to any requirement of law that the Board publish it's grading policy. The grading system is the prerogative of local school boards and need not be formally codified; although it must be reasonable and nondiscriminating. *Dooner v. BOE of Toms River,* 1976 *SLD* 619; *Tarlarsky v. Edison Twp. BOE,* 1977 *S.L.D.* 862; *Salutz,* 1979 unpubished opinion.

This grading policy was reasonable and nondiscriminating. It addresses sports related issues. As counsel for the Board pointed out in his brief:

> Everyday experience is replete with examples of penalties being assessed to the individual, and consequently to the team, for behavior that is beyond the scope of the event. For example, technical fouls are frequently assessed in a basketball game for the use of profanity during the course of the event. This is certainly, if not written, an unwritten rule of the event.
>
> Another example would be that a team is required to be in a position to compete when the event is set to begin. For example, one must understand that in a football game everyone must be in a position to play

> before the competition can begin. Failure to do so results in a penalty assessed by the referee.
>
> Finally, it is obvious that one must be appropriately attired for the event in almost every sport. Failure to have the appropriate equipment in place can result in a penalty and/or disqualification.

While I **FIND** that the grading policy for physical education at the Delsea Middle School is reasonable and nondiscriminating, Demers' variations on the policy ought to be curtailed. Demers made some attempt to discriminate between expletives; between the "F" word and the "S" word. One is reminded of Mort Sahl's treatment of television's ban on seven words. But if the "F" word is more shocking to Demers, the "C" word may be more shocking to another teacher. Mere use of profanity ought to be the measure, not the shock value of the word employed. There does not appear to be anything unreasonable or discriminating about teaching students that a school playground is not a proper place to engage in profanity which might be offensive to other students, to faculty or to parents.

I **CONCLUDE** that the petitioners have failed to prove by a preponderance of the credible evidence, that the Board of Education of respondents Daniel Demers et al and the Southern Gloucester Regional School District, were required to formally adopt a grading policy for physical education.

I **FURTHER CONCLUDE** that the petitioners failed to prove by a preponderance of the credible evidence that the grading policy was unreasonable and discriminating.

I **DISMISS** the petition and **ORDER** that the grade of 69 remain.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 14, 1992
Date

Edgar R. Holmes
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

July 17, 1992
Date

Maureen L. Kellin
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 22 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

PETITIONERS:

M.M., SR.
T.M.

RESPONDENTS:

BOYD SANDS, SUPT.
TERRY ANN VANAMAN, PRIN.
DANIEL DEMERS, PHYSICAL EDUCATION TEACHER

DOCUMENTS IN EVIDENCE

JOINT EXHIBITS:

J-1 DELSEA REGIONAL SCHOOL DISTRICT HANDBOOK, 1990-91
J-2 CURRICULUM HANDBOOK, 1990-91

PETITIONERS' EXHIBITS:

P-1 SAME AS J-1

REPONDENTS' EXHIBITS:

R-1 BOARD MINUTES 7201, 7202, AND 7203
R-2 BOARD MINUTES 7437 AND 7540
R-3 POLICY 517
R-4 REGULATIONS 5170
R-5 CURRICULUM HANDBOOK PAGES 33 TO 36
R-6 GRADE BOOKS FROM PAST YEARS PULLED AT RANDOM
R-7 M.M.'S INFRACTION SHEET

OAL DKT. NO. EDU 5713-91

M.M., through and with his guardian and father, M.M., SR.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE SOUTHERN GLOUCESTER REGIONAL SCHOOL DISTRICT ET AL., GLOUCESTER COUNTY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

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

Upon review, the Commissioner concurs with the ALJ that the grading policy at issue herein need not have been formally codified by the Board and that it was reasonable and nondiscriminatory both in itself and as applied to M.M.

Accordingly, the initial decision of the Office of Administrative Law dismissing the instant Petition of Appeal is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 24, 1992

DATE OF MAILING - AUGUST 24, 1992

201-92

IN THE MATTER OF THE TENURE :
HEARING OF PATRICIA JO MURPHY, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION
NEW BRUNSWICK, MIDDLESEX COUNTY. :
:

SYNOPSIS

Board certified tenure charges against respondent, first grade teacher, for two counts of alleged corporal punishment.

ALJ concluded corporal punishment did occur both in the February 1989 and the April 1990 incidents. However, without sufficient evidence in first count as to respondent's intent and in light of respondent's past unblemished record and her admission that during the second incident she was physically unwell and trying to control a disruptive child, ALJ found dismissal from employment was not warranted. ALJ upheld suspension but ordered respondent reinstated with salary frozen without any adjustment or increment.

Commissioner adopted findings in initial decision regarding incidents underlying tenure charges but imposed a heavier penalty. To impress on respondent and others the seriousness of conduct at issue, Commissioner modified ALJ's determination to include forfeiture of 120 days' salary withheld during respondent's suspension upon certification of tenure charges.

AUGUST 27, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 894-91
AGENCY DKT. NO. 381-11/90

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK,
Petitioner,
v.
PATRICIA JO MURPHY,
Respondent.

Ralph F. Stanzione, Esq., City Attorney, for petitioner

Stephen E. Klausner, Esq., for respondent (Klausner, Hunter & Cige, attorneys)

Record Closed: June 10, 1992 Decided: July 16, 1992

BEFORE **JEFF S. MASIN**, ALJ:

The Board of Education of the City of New Brunswick certified charges to the Commissioner of Education asserting probable cause to take action against the tenure held by Patricia Jo Murphy, who was employed as a teacher in the district. The Commissioner transferred the case to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52:14F-1*et seq.* Following transmittal a prehearing conference was held on April 11, 1991 before Honorable Steven L. Lefelt, ALJ. A prehearing order was issued by Judge Lefelt on April 22, 1991. Thereafter, Judge Lefelt recused himself from the case and the matter was transferred for hearing to Administrative Law Judge Jeff S. Masin. A hearing was held on September 11, 1991. Thereafter, at the request of the respondent the matter was

continued in order to permit certain examinations. Once these were concluded the matter was heard again on February 24 and 25, 1992 at the Sayreville Municipal Court. The record closed following submission of briefs, the last of which was received by the Administrative Law Judge on June 10, 1992.

THE CHARGES

According to the statement filed in support of the tenure charges by Steven Farkas, Assistant to the Superintendent/Personnel of the New Brunswick Board of Education, the board charged Ms. Murphy with having engaged in conduct unbecoming a teaching staff member on February 24, 1989 and April 30, 1990 when it alleged that she had failed to act appropriately within her classroom in a manner which expressed a lack of self-control within the classroom and a lack of good judgment. Specifically, the charges were

> (a) On February 24, 1989 Ms. Murphy allegedly struck a student on the head. She also allegedly shook a student by the arms. These allegations were reported to the Institutional Abuse Investigation Unit/Central Office, New Jersey Division of Youth and Family Services by a confidential source.
>
> (b) On April 30, 1990 Ms. Murphy allegedly struck a student on the leg and grabbed the student by both shoulders and struck her. The student struck her head against the radiator, causing a bump behind her left ear.

Following the incident of February 24, 1989 Ms. Murphy was verbally reprimanded by the superintendent of schools and the school principal and instructed that such incidents were not to be repeated. Following the April 30, 1990 incident Ms. Murphy was sent home with pay and on May 15, 1990 was suspended with pay by the board.

The prehearing order entered by Judge Lefelt listed the following issues for consideration at the hearing

> A. Whether Ms. Murphy on February 24, 1989 and April 30, 1990 conducted herself in a manner that was unbecoming a tenured teaching staff member and, if so, what is the appropriate punishment?

B. Whether the New Brunswick Board of Education discriminated against Ms. Murphy because of a larynx and menopausal physical handicap in violation of *N.J.S.A.* 10:5-1 *et seq.* and 29 *U.S.C.* 701-794?

C. Whether the charges must be dismissed because the New Brunswick Board of Education failed to comply with the tenure law, *N.J.S.A.* 18A:6-10 *et seq.*, by (a) providing Ms. Murphy with a packet of evidence which differed from the packet of evidence which was filed with the Commissioner; and (b) suspending Ms. Murphy with pay in the spring of 1990 but not certifying charges against her until the fall of 1990?

On the first day of hearing counsel for Ms. Murphy advised that he was withdrawing issue B. from consideration. Although issue C. was never withdrawn the respondent does not appear to have argued this claim. Therefore, it appears that the primary issues for consideration in this decision revolve around the evidence concerning the incidents of February 24, 1989 and April 30, 1990 and whether they, individually or taken together, indicate that the respondent had conducted herself in a manner which was unbecoming a tenured teaching staff member and therefore required that some action be taken against her tenure.

BOARD'S EVIDENCE

The board presented testimony from Rashidah Ali, a secretary for the Demonstration Daycare Center in Redshaw School, a school building operated by the New Brunswick Board of Education. Ms. Ali is the grandmother of T.G., who attended Redshaw as a first grade student in Ms. Murphy's class. Ms. Ali works in the basement of the building, but on April 30, 1990 she had occasion to come up to the classroom and look inside the closed, partially glass door. At that time she noted that her granddaughter was seated at a desk and was whining. She heard Ms. Murphy tell the child to "please be quite" and to come up to the chair by her desk. At that point Murphy yelled at the child, who stopped crying. Murphy then slapped the child's thigh and then slapped her face and grabbed her. When she did so the child went backwards, hitting her head on a radiator.

Ms. Ali acknowledged that her granddaughter suffered from Attention Deficit Hyperactivity Disorder("ADHD") and that sometimes she acted out her

behavior. It was because of this that Ms. Ali occasionally came up to the classroom to check on her.

According to the witness there is a window in the doorway and she was able to hear both her granddaughter whining and also hear voices from inside the classroom. When she observed Murphy slap the child on the leg she thought that this might possibly stop the child's behavior, but then Murphy appeared to "lose it."

After observing all of this, Ms. Ali entered the classroom and said "Ms. Murphy, will you please send T. to me." She started to take the child to the office of Mr. Lawrence Falzone, the school principal. When she met him and told him about the incident she asked that Ms. Murphy be removed from the building. She took the child to the nurse, "Pat," who observed a bump on the back of her left ear. The nurse applied an ice pack and told her to call her doctor.

Later that day Ms. Ali passed Ms. Murphy in the hallway. Murphy said that she was "very, very sorry about what happened." Mr. Falzone was present at this time and Ali asked Falzone to "get her out of my face."

Prior to the incident of April 30 Ali and Murphy had a "good relationship." When Ali first became aware of the possibility that her granddaughter suffered from ADHD she advised Mr. Falzone and Ms. Murphy about this possibility and asked them to keep a behavior chart on T. in order to see if they "could modify her behavior."

When Ms. Ali observed Murphy hit her granddaughter she did not observe that T. was kicking or swinging, but she was sitting in her chair "moving about." No one was in the classroom except the students and the teacher.

The witness testified that the teacher's desk was situated opposite the door "diagonal right where you can look in the classroom, all the children were facing the front, there was a small chair to the left of Ms. Murphy's desk." She estimated that the desk was 2 1/2 to 3 feet from the chair and that the chair was not far from the cast iron radiator, approximately 9 inches. The radiator was approximately 3 feet high and had no cover on it. Ms. Murphy was seated. At first she called T. up to her desk where the chair was and told T. to sit in the chair.

Murphy remained at her desk, reached across the desk "moved back from her desk and went to hit her on the leg. . ." She further described the incident by stating that Ms. Murphy slapped T. on the thigh and then

> T. got a little bit louder, she turned back to her, whap like that, she grabbed her hands and pushed her back.

The witness was questioned as to whether Murphy had gotten up from her chair when she did this. She never actually answered the question directly. When asked

> Q And she pushed her while she was seated?

she answered

> A Grabbing, jerk like that. That's what I saw.

The chair in which T. was seated did not topple over, but instead went backwards and at that point T., who was still in the chair, hit her head on the radiator.

T. G., who is a second-grader at the Lincoln School, testified that Ms. Murphy was her teacher in first grade. She recalled that she was seated in a chair by the radiator and that she hit her head on the radiator. When asked how her head got on the radiator she said that she thought that Ms. Murphy "pulled me." She said that there was a math problem and that she, T. kept bugging Ms. Murphy. The child recalled having been taken to the school office by her grandmother.

Mr. Lawrence Falzone, an employee of the board of education for 32 years and principal of the A. Chester Redshaw School for 8 years, testified that on the morning of April 30, 1991 he arrived at work prior to 9:00 and heard Ms. Murphy yelling and screaming. His office was about 60 feet from Murphy's classroom and he went there to see if there was a problem. He asked her if she needed a break. She said that she did not and that she would be all right. She then seemed to calm down.

At about 10:45 a.m. Ms. Ali came into Falzone's office with her granddaughter, claiming that she had been slapped by Ms. Murphy. Ali said that she had seen the slapping occur. Mr. Falzone went to Ms. Murphy's room. Murphy seemed "a little nervous" and said that she "didn't know what happened to her."

She told Falzone that she "tapped the child in the face, saying that the child was not paying attention and that she didn't know why she did it. She mentioned something about being on medication. I mentioned I noticed she was uptight this morning, if there was a problem."

Mr. Falzone noted that he had gone to Murphy's room within two minutes of Ms. Ali bringing the incident to his attention. When he arrived Ms. Murphy appeared as if nothing had happened. He agreed that Ms. Murphy has a tendency to speak loudly.

When Falzone spoke with Murphy he asked her whether she would like to write up an incident report regarding what had occurred in her classroom. He never received any response in writing.

Mr. Falzone acknowledged that he had previously reprimanded Ms. Murphy regarding an incident in February 1989 which had resulted in an investigation by DYFS. He was present when children were interviewed by an investigator from DYFS.

When the hearing resumed on February 24, 1992 Mr. Falzone was recalled for further examination. He testified that after he learned of the incident he asked Ms. Murphy to step into his office where he told her what had been explained to him by Ms. Ali. She responded

> I don't know why I did it. I've been on some medication and I just don't know why I did it.

Falzone further clarified this following additional questioning and said that Ms. Murphy told him "'I don't know why I slapped her.' That she said to me directly." When Falzone asked the student what had happened she said that the teacher shook her and slapped her and she banged her head against the radiator.

Mr. Falzone testified about the prior incident of February 1989. At that time a DYFS investigator came to the school and said that he was there to investigate some allegations. He was present when the DYFS worker interviewed a child. Apparently a student from Rutgers University serving as an intern in Ms. Murphy's class had seen something occur which he had reported to a professor who reported

the matter to DYFS. Falzone was not permitted to testify as to the details of what he heard the child say to the DYFS worker because of the confidentiality of the DYFS investigation.

On cross-examination the witness was queried concerning the physical setup of the classroom. He noted that there was a desk to the rear of the room on the left-hand side, but that Ms. Murphy rarely sat there. There was a reading table by the front left side of the room. T.G. had advised him that she was sitting by the radiator near the window where he believed there was a desk and a chair about one foot from the radiator. The radiator was parallel, not directly behind the desk. He estimated that the edge of the desk might be a foot from the radiator and the chair approximately 18 inches. He thought that the radiator was approximately 28 to 30 inches high and that the chair was a typical first grade chair approximately 15 inches high. There were student desks by the window and a large meeting table in the front of the room. It was at this table that T.G. was originally seated before she was asked by the teacher to move.

When Mr. Falzone first saw T.G. after Ms. Ali told him about the incident, he did not observe any redness on her face. He believes that she had hit her head on the radiator behind the left ear. T.G. did not attend school the following day. No claim was ever received for medical reimbursement from the grandmother.

At the time that Mr. Falzone spoke with Ms. Murphy she did not tell him that T.G. was kicking or that she, Ms. Murphy, had grabbed the child's leg in order to stop her from kicking. Mr. Falzone did not interview any other children from the classroom. Later in the day he spoke to Mrs. Brenda Hughes, a basic school teacher assistant, to see whether she had been present in the room. She said that she had been, but was assisting other children and didn't observe anything. She said that "she heard Mrs. Murphy raising her voice and she heard her yell out, but she didn't observe the incident." She did not indicate that she heard any slapping or that she heard a "crash or bang" on the radiator.

Mr. Falzone testified that he observed a bump behind the child's ear, but he did not see any bruising. He could not recall exactly what the nurses report showed.

Victoria DeAngelo, of Mount Holly, now employed as a special education teacher at the Ridgeway School, testified that she was a student at Rutgers College, New Brunswick, until May 1990. She was involved in a pre-student teaching program at Redshaw Elementary School in February 1989. In that capacity she would perform some minor tasks assigned to her by the classroom teacher, but she was not performing official teaching duties. She worked on one occasion in Ms. Murphy's classroom in February of 1989. At that time she observed Murphy yelling at a student. The noise caused her to look up from what she was doing and she heard Murphy tell the class that the child was not living with her mother or something to that affect. At that point she saw Murphy hit the child on the head with a book. DeAngelo was seated in the back of the classroom and had been taking notes when this incident began. Ms. Murphy was in the front of the classroom, teaching the students who were coming up to her one or a couple at a time. Ms. DeAngelo did not recall the name of the student who was hit, except that she was a small black girl. The child reacted to being hit on the head by crying. The girl just "stood there" and then the class was dismissed because the bell rang. Ms. DeAngelo was scheduled to have another observation in another classroom and she therefore left Murphy's classroom as well. Ms. DeAngelo did not report this incident to anyone until her next class at Rutgers with the professor for whom she was doing this observation and at that time she told the professor about what she had observed. The professor was quite upset and DeAngelo believes that it was the professor who called DYFS. DeAngelo was never contacted by DYFS and this was the last she heard of the incident. Although she made some notes about what had occurred she no longer has them. She did not speak to Mr. Farkas about the matter.

On cross-examination the witness asserted that the book with which the child was hit was a "thick, red book." She specifically heard the sound when the book hit the child's head. She did not recall Ms. Murphy having told her before class began that she was having problems with certain students in the class. However, she did remember that Murphy told her that the girl who ultimately was involved in the incident "had been left with her aunt by the mother about a week before." She described the entire incident as taking about three to five minutes. She did not recall whether Murphy was engaged in a reading lesson with the entire class when the incident supposedly occurred. She recalled that the other teacher whose class she had to attend was a Miss Lewis, who was teaching a special education class.

Counsel queried Ms. DeAngelo on the reason for her failure to report what she had observed to anyone until she attended the professor's class some time later on after the incident. She explained that she was "personally . . . very intimidated by authority and my professor seemed to be the least threatening to me." She acknowledged being rather hazy about what she had done the rest of the school day, but believed that she had gone to another class in the building that day.

Mr. Falzone was cross-examined following Ms. DeAngelo's testimony. He had no direct knowledge of the first incident. With regard to T.G., he testified that he saw a bump behind the ear, but that it did not look to him to be a keloid scar.[1]

With regard to Ms. DeAngelo, Mr. Falzone noted that DeAngelo worked for half a day with Ms. Murphy's class and half a day with the daycare center. She believed that the program worked out with Rutgers called for 13 to 14 visits, half a day a week per class. He thought that the incident involving Ms. Murphy had occurred somewhere in the middle of this and that her visits to Murphy's class were abbreviated because of the incident. He did not recall Ms. DeAngelo working with the special education teacher because Ms. DeAngelo suffers from cerebral palsy and has a speech impediment which he believed would be a distraction. He recalled having driven Ms. DeAngelo from school to George Street in New Brunswick where she was able to get a college bus back to campus. Ms. DeAngelo never told him about any problem regarding Ms. Murphy.

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1. A keloid is defined in Stedman's Medical Dictionary as "a nodular, frequently lobulated, unusually firm, moveable, nonencapsulated, generally linear mass of hyperplastic scar tissue . . ." which "occur in the dermis and adjacent subcutaneous tissue, usually after a traumatic injury or a burn . . ."

Falzone asserted that if one were looking into the classroom from outside the closed door, which is contained in a recessed alcove about 30 inches deep, one can see all of the classroom except the far left-hand corner. He acknowledged that teachers do decorate doors, but teachers are asked to keep a section open so that someone from the outside can look into the classroom. He had no reason to believe that Ms. Murphy's door did not conform to this requirement and one looking in would have a "pretty good wide view." Mr. Falzone also noted that while he did not immediately recall her he did remember that there was a Mrs. Lewis assigned to his school as a special education teacher for a short time before she went out on maternity leave. This woman was teaching learning disabled students and although Ms. DeAngelo was not directly assigned to her she was in her classroom in order to get exposure to these students.

Steven Farkas, Assistant to the Superintendent for Personnel for the board since January 1988 and an employee of the district since 1956, testified that with regard to the April 30, 1990 incident he received a telephone call from Mr. Falzone on that morning regarding the allegations that Ms. Murphy had struck T.G. He advised Falzone to have Murphy report to his office, which he did. He spoke to her and related to her the nature of the allegation which had been made against her. She told him that she did strike the student and that she was on medication for her larynx and a menopausal problem and that "perhaps she would have been better off not having been at work, and she should have been at home for the last several weeks." When he advised her that he understood that she had struck a student and that this had been witnesses by Rashidah Ali "she (Murphy) indicated she did do it. She didn't know why she did do it." Ms. Murphy appeared to be very upset and in an emotional state. Mr. Farkas contacted the superintendent of schools and told him about the incident and the fact that she had admitted her involvement. Farkas and the superintendent then met with her and asked her to hand in a written report regarding the incident. She was suspended with pay. He understood that she had a doctor's appointment scheduled for the next morning.

Following the initial interview there were several meetings held concerning the matter. Ms. Murphy, the school superintendent and Mr. Totten, the union president at the time, were present. During these meetings Ms. Murphy continued "to affirm that she did do it in the early stages of the conferences."

Mr. Farkas explained that no charges were brought against Murphy in regard to the initial incident of February 1989 because she was a "good teacher, had been for a long time, and it had been the first incident and the understanding was that we were hoping that it was an isolated incident and that things would work out." The charges were brought in regard to the second incident

> Because it was a repeated incident where there was an eyewitness, and we felt that after two incidents within a one-year span charges had to be filed.

Mr. Farkas was not aware of whether the letter of reprimand which had been prepared by the superintendent of schools in regard to the February 1989 incident had ever been given to Ms. Murphy.

Mr. Farkas could not recall whether Ms. Murphy had told him during his meeting with her on April 30 that the child was "disruptive." She did indicate that she had asked the child to come up to the front of the room, but he could not recall whether she stated that the child started kicking another student and shouting. She told him that she slapped the child's "thigh, her leg." She then indicated that she grabbed the child by the shoulders, but did not say why she did it.

The school board voted to suspend Ms. Murphy in May 1990. Thereafter, the DYFS report was received in September. According to Farkas that report was used to verify the incident. The charges were not certified to the Commissioner until November 1990. According to Farkas the reason for waiting from May until the end of November was

> because we felt at that time we had an agreement with the union president acting as a liaison with Ms. Murphy that she would retire.

This understanding was not in writing.

Dr. Ronald F. Larkin, superintendent of schools for New Brunswick for 11 years, testified that he received a call from DYFS regarding the 1989 incident and helped them with their investigation. After it was concluded he issued a letter with a strong warning to Ms. Murphy that if such an incident occurred again sterner

actions would be taken against her. This letter was placed in her file and was ultimately removed due to an ongoing procedure with the union to expunge such documents if requested. Mr. Totten had requested its removal. Mr. Larkin explained that the letter was to be issued by the principal at the time of the conference when he would provide the warnings to Ms. Murphy under direction from Larkin. In Larkin's view the letter of reprimand issued was appropriate and no further action was necessary following that incident. The reason for this was that there are times that a teacher will engage in inappropriate behavior in a classroom, but given Ms. Murphy's length of service it was agreed that the particular action "did not warrant any more than a bawling out by the principal . . ."

With regard to the second incident involving T.G., Mr. Larkin became aware of this incident from Mr. Farkas and Mr. Falzone. He met with Rashidah Ali and told her that he would investigate the situation. When Mr. Farkas advised him that Ms. Murphy had come to Farkas' office and that she was quite upset he met with Murphy and asked her what had happened. He noted that she was "highly agitated and in an emotional state." He continued

> She told me she was on medicine, that she should not have come to school, that she is a dedicated teacher, she should have just taken off.
>
> That she, in fact, did hit the youngster, but denied banging her head against the radiator, said that she was upset, she was sick, and she apologized at that time for hitting the youngster, but the youngster was screaming and she didn't know how to settle her down.
>
> She was out of control and that she felt she took appropriate action, that she knew it was wrong, but she had to do something to quiet the youngster.

Mr. Larkin explained that following the incident he had some meetings with Mr. Totten and an attempt was made to work out an arrangement that would allow Ms. Murphy to finish one more year of service so that she would have 25 years and could retire. This thought that was in consequence of her being "a good teacher." The arrangement would be that Ms. Murphy would not work with children in the schools of New Brunswick and that no criminal charges would be pursued against her by Ms. Ali. Although there was some thought that this

arrangement had been consummated, in November it became apparent that Ms. Murphy was not indicating any intention of submitting her retirement and as a result the board proceeded to certify charges. In further discussion of the reasons for the board's action following the second incident, Mr. Larkin explained

> We have a teacher who served us well that was out of control. She was not herself. She had now admitted to hitting a child. This was the second time.
>
> I had assured DYFS and others that I would take appropriate action based upon the first time I heard it. If I let it go a second time, I don't know what would have happened. I had to take the appropriate action. She was at that time in my opinion asking us for help. There was no reasons why we didn't offer it to her.
>
> She was still an employee of the Board of Education. We were concerned about her, but at the same time youngsters had to come first in our mind and that's why I did it.
>
> I mean one time I could allow it. Two times I just could not allow and the Board when I presented it to them based upon the fact we had worked through this idea about a settlement we were not going to take her certificate away from her. She could if, in fact, get herself together, go on teaching some place else, but just not New Brunswick. That's why we took the action and then when that fell apart, I had no choice.

On cross-examination Mr. Larkin noted that he was aware that Ms. Murphy had advised Mr. Falzone that she was in the habit of hugging students and patting them on the head because they needed encouragement. However, when asked whether he had any reason not to believe her he said that he did. He explained that she was told following the DYFS investigation of the first incident that children were not to be tapped on the head in the future.

Mr. Larkin acknowledged that the reading books used in the first grade classrooms are soft-covered and about 1/4-inch in thickness. However, other books used in the classroom may not be soft-cover.

Mr. Larkin was asked a hypothetical question as to whether a teacher was supposed to physically restrain and try to calm down a hyperactive child who "loses it." He would not agree with that statement. Finally, he did not have any

documents to corroborate that Mrs. Murphy sent T.G. to the school office at 10:00 a.m. that morning.

RESPONDENT'S EVIDENCE

Patricia Jo Murphy testified that she has been a teacher with the board of education for 26 years and is certified as an elementary school teacher, K-8, and is a special education teacher, K-12. She was employed as a first grade teacher during the winter of 1989 when Mr. Falzone approached her about taking on a student observer from Rutgers. Falzone told her that the student had a handicapping problem and that it would be best for her to be involved with students on a lower grade level. The purpose was to see what the student was capable of doing. Ms. Murphy agreed to take on the student as a "favor" to Falzone. She was introduced to Ms. DeAngelo in January 1989. She explained her classroom and its workings to Ms. DeAngelo, who was to come in half a day in the mornings. According to Ms. Murphy's recollection, Ms. DeAngelo came in more than two or three times. Ms. Murphy had to sign some paper work from Rutgers regarding Ms. DeAngelo's activities. When Mr. Falzone advised her that Ms. DeAngelo was not coming back to the classroom any more, he came and took the paper work from her.

Regarding the alleged incident of February 24, 1989, Ms. Murphy claimed to have had no knowledge of any such incident, except what she heard from Ms. DeAngelo at the hearing. She noted that the first grade reading and spelling books are soft-covered and that she has a large teacher's manual notebook which weighs about five or six pounds, but that she doesn't carry it around because of it's weight. She noted that the procedure for reading instruction involved first grade reading groups and home group instruction. During the home group instruction all students are in their seats and Murphy goes through a program where she introduces vocabulary words and then a story is read orally or silently following which questions are reviewed. After this instruction the class would go into the study book program where the children would work with her, going through different skills in a reading program. The reading book itself is about a 1/4-inch to 1/2-inch in thickness and is very small, lightweight and soft-covered.

According to Ms. Murphy, when Ms. DeAngelo first came to her class Ms. Murphy explained to her that she had certain children in the classroom who had

problems who were assigned to her class because she was trained in special education. Ms. Murphy noted that she wanted to make sure that Ms. DeAngelo would not get "too excited" if the children started to act up so she pointed out specific children to her.

Murphy commented that she asked Ms. DeAngelo to correct papers and that it took her quite some time to do so. This indicated to Ms. Murphy that Ms. DeAngelo would have problems and difficulties doing paper and pencil-type tasks and that it would be necessary to give her more time to work with the children.

The witness testified that in the course of her teaching career she did touch students on the head. She explained

> Yes, all the time because I do what is called friendly patting, friendly hugging, you know, rubbing, back rubbing, shoulder rubbing, heads things of that kind as an approval because these children need that. They are looking for that.
>
> They got to have the positive--I can't think of the term, but the positive feedback . . . yes, reinforcement, right, because these children are striving--they are looking for that constantly.
>
> If they don't get that from me as a teacher, they become upset.

She asserted that Mr. Falzone was aware of her habit of patting children on the head and that she had told him about this on a number of occasions. After Ms. DeAngelo's allegation became public she was told that she should not touch children on the head or shoulders, a decision with which she did not agree from an educational standpoint. She never received a direct reprimand from Mr. Falzone, but at the end of the year she went to him and asked him about the DYFS investigation and he said that he had heard nothing. He asked whether she had gotten a copy of his memo to her. When she told him that she had not, he said that he thought that he had given it to her. As a result he made a copy of it and gave it to her.

The witness diagramed her classroom prior to the hearing and presented the diagram as an exhibit. R-4. She noted that there was a bookcase approximately five feet high and five to six feet wide which ran parallel to the wall which contained the door. The desks were slanted away from the radiators because these could become quite hot. The reading table is placed quite a ways out from the radiator, probably 2 1/2 to 3 feet. The radiator ends near the third chair from the right at the reading table and the bookcase ends near the second chair. T.G. was at the first chair, facing across the table. There were three other children on the opposite side and no children sitting next to T.G. At the time of the incident involving this child, T.G.'s left shoulder was toward the blackboard and her left ear would have been on the opposite side from the radiator.

The witness denied that she ever picked up the student and threw her against the radiator. If she had fallen straight back she would not have hit the radiator. The radiators are very heavy and if one hits them it would make a noise.

Ms. Murphy denied that she ever told anybody on April 30, 1990 that she was taking medications. She saw a doctor the following morning. On April 30 she was not taking any medication for her throat or her larynx.

The witness described T.G.'s conduct on the morning of April 30. She had a problem with the child, who was very disruptive. At first she was able to settle T.G. down, but then T.G. began to act up again and finally got to the point where she had to be sent to the office because she was disturbing other children. A little while later she came back to the classroom and sat at her desk. She began to have a "real temper tantrum. . . screaming and carrying on." Ms. Hughes told her to be quite. She became even more agitated. In order to remove her from the area where Mrs. Hughes was working with a child, Mrs. Murphy directed T.G. to come up to the reading table. She did so, but would not calm down. There was a little boy seated across from T.G. on the other side of the reading table. He suddenly pushed his chair back and moved away from the table. At this point Murphy

> knew that she was kicking and with that I reached over and grabbed her shoulder and said to her "stop that."
>
> I reached down and pushed her legs around and away from him because I was afraid that she was going to kick him again and then also possibly kick me because her legs

> were swinging wildly under the table. . . . Then I went back to the correcting. She was sitting there kind of crying a little bit and is was just, you know, five or ten minutes, I'm not sure of the time, I glanced up at her grandmother. . . came in and with that I just glanced up and her grandmother motioned to her to come, and I said to her "go with grandma."

The witness explained that the reason she touched the child on her shoulders and her leg was to keep her leg from swinging and to get her attention. T.G. was screaming and "you have to get the children to look at you."

The witness recalled that when she was summoned to meet with Mr. Falzone he told her that Ms. Ali told him that she, Murphy, had hit T. Her response was to ask him where and when this had supposedly occurred and he was unclear in his responses. He told her that he was relieving her from duty and that she would have to go down to the central office. She never told him that she was taking medications. He knew that she had a doctor's appointment the following day because she was having trouble with her sinuses and throat. However, she denied telling him that she was so sick that she needed a medical leave of absence or that she was taking medication.

The witness examined exhibit P-1, which is Mr. Falzone's report to Dr. Larkin concerning the April 30 incident. She stated that it did not accurately describe what she had said on April 30. She denied that Mr. Falzone had come to her room and asked her to come to his office. In fact, a basic skills teacher had done so.

With regard to exhibit P-2, which is Mr. Farkas' report regarding the April 30 matter, she told Farkas that she was not on any kind of drugs, but that she had a doctor's appointment the next day and had a sore throat. She did advise Farkas that she had shaken the child and pushed her legs away because she was kicking and the child was out of control. She also told him that she had sent the child to the office earlier in the morning.

The witness noted that upon observations made of the child prior to the incident she had noted that she had a lump under her left ear and that there were keloid scars around the head, face, shoulder, back and the back part of the head.

She also saw them on the back of the shoulder and the top of the head, legs and arms and around the hairline in back of the head behind the ears.

Ms. Murphy went to the doctor on May 1 and he ran some gynecological tests because she was having a lot of bleeding. She was given no medications that day and was not placed on any stress medications subsequent to May 1, 1990. She had no psychological or psychiatric treatment.

Finally, the witness testified that in 1989 the school did not use any red textbooks for first graders because red is a color that had been found to be threatening to children. She denied any wrongful touching of any child in 1989 or 1990.

On cross-examination the witness was asked to review the colors of the textbooks that were used. She began her answer "red--excuse me, not red." She then listed blue, yellow, green, orange, tan, a light pink. To her knowledge there was no textbook that was colored red. She denied that there were any library books on the reading table or any reference materials. Ms. Murphy also denied that her head tapping procedure ever was performed with any reading books.

The witness was further questioned concerning her medical condition on April 30. She noted that she had had bleeding problems for about three weeks and that she had made an appointment with the doctor about a week before the incident. It was not normal for her to bleed like that and she was tired, run down and the situation was "very abnormal." She never before had such a problem. The doctor took tests and told her to wait a week and come back. When she did, she was placed on medication to stop the bleeding. She returned one week later and not again. She was also having a periodic problem with her larynx which recurred about three or four times during the year. She was having some difficulty talking and had a bad sore throat and was having difficulty swallowing.

DISCUSSION

The board of education charges Ms. Murphy with having engaged in conduct unbecoming a tenured teaching staff member in connection with two incidents of corporal punishment allegedly occurring in February 1989 and April

1990. In regard to the first incident, the only evidence presented by the board in support of its charge was the testimony of the then Rutgers College student Victoria DeAngelo, who is now a special education teacher employed outside the New Brunswick district. Ms. DeAngelo was present in Ms. Murphy's classroom as part of a pre-student teaching program. Although she only recalled being in Ms. Murphy's classroom on the one occasion when she purportedly observed Ms. Murphy hit the student on the head with a red book, Ms. Murphy recalled that she actually was in the classroom on several occasions.

The issue concerning the February 1989 incident appears to come down to one of perception and credibility. There is absolutely no evidence to suggest that Victoria DeAngelo had any reason to invent a tale concerning a teacher hitting a student on the head. Ms. DeAngelo was a college student who had no personal relationship of any sort with Ms. Murphy and had nothing to gain by alleging that Ms. Murphy had engaged in corporal punishment on a student. Thus, I **FIND** that Ms. DeAngelo actually did observe something occur in Ms. Murphy's classroom. The question that must be answered is whether what she actually observed is what she reported having seen or whether she merely misinterpreted what she saw and made something of a very innocent nature into something which has a more serious and negative connotation.

According to Ms. DeAngelo, the incident came to her attention when she was sitting in the back of the room taking notes and then heard Ms. Murphy yelling at a student. When she looked up she heard Ms. Murphy telling the class "that the child wasn't living with her mother" or something to that effect. Ms. Murphy then hit the child on the head with the book and the child cried. She had no doubt that the teacher that she observed performing this action was Ms. Murphy and not Ms. Lewis, whose class she went to after the bell rang ending the period.

Ms. Murphy's testimony regarding this incident simply amounted to a denial that she had hit a child on the head with a textbook. She did acknowledge that she often had physical contact with her students, engaging in "friendly" hugging, patting, rubbing of backs, head, etc., all in an attempt to give the children positive feedback and reinforcement. It was only after the DeAngelo allegation became public that she was told by school authorities not to engage in such

touching. According to the respondent, there were no red books in her classroom and thus Ms. DeAngelo's recollection of the color of the book is wrong.

Ultimately, the resolution of the question of whether Ms. Murphy did "hit" the pupil on the head with a book comes down to whether Ms. DeAngelo saw nothing, or she saw what she claimed, or possibly simply saw Ms. Murphy pat a child on the head and mistakenly thought that Ms. Murphy touched the child not only with her hand, but also with a book. Perhaps Ms. DeAngelo was confused and mistakenly thought that a pre-classroom discussion regarding the family status of this child had actually taken place just at the moment when the alleged touching took place. Or, perhaps, Ms. Murphy, if not telling the truth, either has purposely misstated what she did or has simply forgotten that on this occasion, if on no other, her "friendly" tapping was not simply a "pat" on the head with her hand, but was a more "threatening" and "dramatic" act, performed with a book.

Although it is certainly possible that Ms. DeAngelo confused the color of the book and perhaps misidentified a book which was orange, or pink, or some other color as red, on the whole, I am convinced that her version of the incident is accurate. As a pre-student teacher assigned to the classroom, Ms. DeAngelo had particular reason to take notice of what occurred in the classroom. She was there specifically to make observations and "learn" from the teacher whom she was observing. The incident as she described it, that is, a teacher yelling at a student, making a specific statement about the student's family situation and then hitting the child on the head with a book, is certainly the kind of incident which would be both dramatic enough in itself and significant enough to one observing the actions and procedures of the teacher to have imprinted itself upon Ms. DeAngelo's memory. While she acknowledged that she was hazy about exactly what she did after she left Ms. Murphy's class that morning and while she had some vague recollection that Ms. Murphy might have told her about this child before class, nevertheless, on a whole, I **FIND** that Ms. DeAngelo did observe an incident in which Ms. Murphy yelled at a student and touched her on the head with a book. Whether one would characterize the touching as a hit, a tap, or by some other designation is difficult to assess. While the student cried, it is not clear whether the touching was actually done in an attempt to cause the student some pain or was simply a "placing" of the book on the top of the student's head which, if done simply with the hand, might accurately be described as a pat. Ms. DeAngelo's recollections were

not so detailed as to lead to a conclusions as to the force with which the book was brought upon the child's head. That the child cried is not in and of itself any proof that the force was significant. Since the child did not testify and since it is impossible to make any judgments as to the emotional status of the child at the time or exactly why or how she reacted to what was done to her, I ultimately must simply find that Ms. Murphy touched the child on the head with a book and that the child reacted to this, or perhaps to other circumstances in conjunction with the touching, by crying.

Although Ms. Murphy denied that she engaged in this conduct, it is clear that she had a habit of touching her children. She did this for reasons for which she thought to be educationally and psychologically valid. Without passing judgment on whether her opinion has some educational validity, nevertheless, it is clear that this habit and custom of hers was one which she felt comfortable with. It would not be inordinately surprising to find that on occasion Ms. Murphy might touch a soft-cover book to the student rather than simply using her hand. Once again, such a touching would almost undoubtedly have occurred for the same reasons and with the same intent as the hands-only pat or touch. Ms. Murphy might well commit the act in such a manner that the touch would be light and non-threatening and it is even possible that under the right circumstances the student in question in this particular incident might not have reacted by crying, but might simply have accepted the touching as non-threatening.

Based on the evidence presented with regard to the February 1989 incident, I **CONCLUDE** that Ms. Murphy did touch her student on the head with a book. I decline, however, to draw any conclusions as to the strength of that touching and I **CONCLUDE** that Ms. Murphy had no malicious intent.

As regards the April 30, 1990 incident involving T.G., Ms. Murphy does not deny that she touched the child. She asserts that she was simply attempting to control a child who was acting out and was "out of control" in apparent consequence of attention deficit disorder hyperactivity. She claims that she did so when T.G. was kicking under the table, an action which caused the child sitting opposite her to pull back from the table. According to Murphy, her contact with T.G. involved initially grabbing her shoulder and then reaching down and pulling her legs around as they swung wildly under the table. She denied that it was possible for the child to have fallen back against the radiator in such a way as to strike behind

her left ear due to the position of the chair and the radiator which would have made such contact impossible. In addition, Murphy asserted that this particular child had been disruptive earlier that morning and as a result had been sent down to the main office after Ms. Murphy had written a referral as required by procedure.

In opposition to this version of the incident the board presented Ms. Ali's testimony, in which she characterized her observations through the door as having involved her hearing Murphy tell T.G. to be quiet, then yelling at her to stop crying and then slapping her on the thigh, then across the face, and then grabbing her, which resulted in the chair going backwards and the child striking her head against the radiator. T.'s own testimony was naturally limited in detail. She recalled that she was sitting in a chair by the radiator and that she hit her head on the radiator, because she thinks that Ms. Murphy pulled her. Other than that she did not recall anything else that happened.

Perhaps the most dramatic and significant testimony presented with regard to this incident is that of Messrs. Falzone, Farkas and Larkin. Each of these gentlemen testified that when they met with Ms. Murphy following the complaint from Ms. Ali, Ms. Murphy admitted having hit the child and also stated that she did not know why she had done so. Each of them characterized Murphy as emotional, upset, and distraught at the time of their initial meeetings with her. Of particular significance, Mr. Falzone presented his recitation of the events which occurred early on the morning of April 30, prior to the time that the incident with T.G. occurred. This testimony, that Falzone went to Murphy's classroom prior to 9:00 a.m. because he heard Murphy yelling and screaming and that when he asked her whether she needed a break she said that she would be all right, suggests that perhaps whatever was affecting Ms. Murphy that early in the morning may have played a role in her actions later in the morning regarding T. G. Indeed, if Ms. Murphy was upset, emotional and perhaps somewhat out of control prior to 9:00 a.m. it would not be shocking to learn that she continued to be so later on in the morning. In fact, the circumstances as described by Ms. Murphy, that is, a frustrating experience with an ADHD child who was acting out, might well be the type of circumstance which would trigger and/or exacerbate whatever underlying difficulties might have been affecting Ms. Murphy earlier in the morning and might have led her to having a reaction toward T.G.'s conduct which was unreasonable, out of proportion, and inappropriate.

The fact that Ms. Murphy did not immediately advise either Mr. Falzone or Mr. Farkas of the reasons why she had touched T.G., but instead told them that she did not know why she had hit the child, is significant. Having considered the testimony of these witnesses, I found them to be credible individuals. Neither had any reason to want to hurt Ms. Murphy. In fact, both would probably have been happy to see her finish out her career with the district. Although one can recognize the delicate situation of school administrators faced with an allegation by a parent and school employee that a teacher was striking children, there is no reason to believe that any one, or the group of administrators, attempted to falsify or shape the evidence in such a fashion so as to make Ms. Murphy look bad. Instead, I **FIND** that their testimony concerning Ms. Murphy's reaction to them was honest and as complete as their recollections permitted. I **FIND** that when Ms. Murphy was confronted by Mr. Falzone in his office Ms. Murphy did say that she had slapped the child in the face, but that she did not know what had happened to her. I **FIND** that she was taking medication, although it may have only been an over-the-counter remedy. I **FIND** that for whatever reason Ms. Murphy did strike the child on the face and did grab her by the shoulders, which apparently caused the chair to go backwards. Whether the bump behind the ear was or was not evidence of the child striking the radiator, whether it was a bump or a keloid scar, is not ultimately crucial to the decision. The issue is whether Ms. Murphy touched the child in a fashion which was inappropriate and which constituted unbecoming conduct on the part of a tenured school teacher.

I **FIND** that when Ms. Murphy met with Mr. Farkas in his office and he told her of the allegation against her, she did tell him that she struck the student, that she was on medication and that she might have been better off staying home. I **FIND** that at the time that she made these statements she was very upset.

Finally, I **FIND** that when Ms. Murphy appeared before Dr. Larkin she was highly agitated, that she told him that she was on medication and that she stated that she should have taken the day off. She also said that she did hit the student, but she denied that the student banged her head against the radiator. At this time she did advise Dr. Larkin that the child was screaming and out of control, but she also told him that, although she had to do something to quiet the child, she knew that what she had done was wrong.

Based on the evidence presented I **CONCLUDE** that on April 30, 1990 T.G. became disruptive, that Ms. Murphy reacted to this by attempting to calm her, but that she did so in a fashion which was inappropriate in its intensity and its severity. While there was evidence which would suggest that under certain conditions it would be appropriate for a teacher to physically touch and attempt to control an out-of-control, acting-out student, nevertheless there are limits on what a teacher may do to attempt to bring a child under control, particularly in the absence of any real indication that the child is an immediate threat to the physical safety of the teacher, the out-of-control child, or other students. While the student seated across from T.G. may have pushed back from the table because T.G. was kicking under the table, there is no evidence that any real physical threat existed to that student or any other. For Ms. Murphy to slap the child across the face and grab the child so forcefully that the child's chair fell backwards was simply an overreaction to the incident. Given the believable evidence that Ms. Murphy was having difficulty controlling herself earlier in the morning and that she was physically drained and spent due to her physical condition at the time, it is not surprising to find that even this otherwise good and devoted teacher acted toward T.G. in frustration and failed to control herself properly.

For the reasons expressed, I **CONCLUDE** that both in February 1989 and on April 30, 1990 Ms. Murphy did physically strike or touch students. The question that must now be considered is whether these physical contacts were inappropriate and whether they constituted conduct unbecoming a tenured school teacher.

N.J.S.A. 18A:6-1 provides

> 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; 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) . . .

> (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.

In interpreting the statutory provision in the context of actual cases, the Commissioner of Education has shown concern for the intent of the teacher in circumstances where an incident of possible corporal punishment has occurred. Where the teacher intended to inflict pain and suffering on a pupil with possible resulting physical harm the commissioner has viewed the matter severely. Where the circumstances indicate that the contact "was not of a punitive nature" then, depending upon all the circumstances, the commissioner has considered the matter to be less serious and to require a more measured response in terms of the penalty to be imposed. *In the Matter of the Tenure Hearing of Samuel Ivens, School District of Toms River Regional, Ocean County*, 1977 *S.L.D.* 960, 965; *In the Matter of the Tenure Hearing of Basil Fattell, School District of Paterson, Passaic County*, 1977 *S.L.D.* 941. In assessing the question of whether a teacher has acted improperly the commissioner has shown concern for the "significant differences in cases involving the specific circumstances surrounding the corporal punishment of pupils" *Fattell, supra*, at 950, considering

> The circumstances under which the episode occurred, its provocation, the nature of the incident, the age of the pupil, the teacher's record, his attitude and the prognosis for his continued effective performance and usefulness in the school system. . . In the commissioner's opinion each such matter must be judged in the light of all of the circumstances. The kind and degree of penalty will necessarily vary also according to the particular problem. *In the Matter of the Tenure Hearing of Frederick L. Ostergren, 1966 S.L.D. 185, 188.*

Keeping in mind the above, the findings with regard to the conduct of Ms. Murphy must be assessed to determine (1) whether the touchings involved

constituted incidents of corporal punishment and thus violated the statutory prohibition against such action and (2) if the matters did involve corporal punishment, what the proper penalty should be.

In regard to the first incident involving the unidentified student who Ms. Murphy touched on the head with a book, the testimony does not specifically identify a motivation for this conduct. According to Ms. DeAngelo's credible testimony the episode came to her attention when she noted that Ms. Murphy was yelling. It is not clear exactly what she was yelling about or what provoked this action. This yelling appears to have involved a statement concerning the child's current family condition. Why Ms. Murphy was mentioning this to the class is entirely unclear. The subsequent "hitting" of the child on the head with the book appears to lack any motive or provocation. In sum, it is impossible from the testimony to determine whether Ms. Murphy was acting as she did in reaction to something which the child had done, some internal provocation of an unexplained nature, some action on the part of some other students, whether she was in some way defending this child against some seemingly inappropriate conduct on the part of another student, and whether her placement of the book upon the head was done out of anger, as a means of attempting to control the child, or out of some well-intentioned, but misguided, attempt to "positively reinforce" the child. Based on the limited evidence concerning this incident it is really impossible to determine whether the intent was to inflict pain and suffering and possible injury on the student or whether there was some other motivation involved. It is unclear whether the action was of a "punitive nature" or whether the incident simply exhibits a "lack of self-control" and a lack of circumscription and control on the part of the teacher. The evidence is insufficient to support a conclusion that the intent was to "inflict pain and suffering," the kind of intent which the commissioner has considered to be intolerable. According to Dr. Larkin the board's response to this incident was to issue a written reprimand to Ms. Murphy which was placed in her file, which was to have been delivered to her (although it is not clear that this was initially done) and which was ultimately removed from the file in accordance with an agreement with the Union. Under the circumstances of the first case, and in the absence of evidence that may be contained in the DYFS report which is unavailable, it appears that this response was a properly measured reaction to an unfortunate, but unclear, episode involving an otherwise well-respected educator with long service in the district.

The evidence concerning the incident of April 30, 1990 is somewhat more clear and therefore it is somewhat easier to characterize the respondent's conduct. Based upon that evidence it appears that Ms. Murphy's conduct toward T.G. was motivated at least in part by this young child's inability to completely and satisfactorily control herself. This provocation apparently caused Ms. Murphy, who appears to have perhaps been under some stress as a result of her ongoing physical difficulties, to react out of frustration and perhaps out of anger and to have caused her to slap and shake the child. That Ms. Murphy did not intend to inflict injury on the child is, I think, evident. Her intention was to somehow obtain T.G.'s undivided attention and to get her to calm down. However, the manner in which Ms. Murphy undertook to do this, which might have been appropriate in an extreme instance of acting out with some real evidence of a threat to the physical safety of others, was, under the circumstances, inappropriate. Although the definition of corporal punishment contains a specific exclusion for actions of a reasonable and necessary nature undertaken in order to prevent the threat of physical injury to others and protect persons and property and specifically notes that those actions "shall not be construed to constitute corporal punishment" in the present instance the circumstances do not bespeak the level of disturbance and threat which would allow a teacher to slap and shake a child. This action constituted corporal punishment. While surely Ms. Murphy had the right and duty to take steps necessary to ensure that T.G. either calmed down or to remove her from the class so as to allow her to instruct other students without disturbance, this right did not permit her to physically assault the student in the absence of the kinds of threats and need for protection which constitute the exception to the definition of corporal punishment in *N.J.S.A.* 18A:6-1.

I **CONCLUDE** that the respondent's actions with regard to the unidentified student in February 1989 constituted corporal punishment. However, I **FIND** that within the context of the evidence which has been presented in this case the conduct which occurred was sufficiently limited in scope and its purpose and intent was sufficiently clouded such that the limited action taken by the board of education in response thereto, that is, the written reprimand, was an adequate and appropriate response. With regard to the incident of April 30, 1990, I **FIND** that that incident constituted corporal punishment. I **CONCLUDE** that although the respondent's actions were not motivated by an intent to cause pain and suffering or injury to the student they were nevertheless inexcusable.

PENALTY

The board seeks dismissal of Ms. Murphy from her position with the district. In its brief, it argues that this penalty is necessary because of the seriousness of Ms. Murphy's conduct, particularly when taking into account the fact that the incident of April 30 was the second incident of corporal punishment within just over a year's time. The board's concern for the safety of its students is obvious and understandable.

Perhaps the most difficult question that needs be addressed in connection with the penalty to be imposed is the question of whether Ms. Murphy's conduct manifests some inability on her part to control her actions and conduct. With regard to the first incident of February 1989, this opinion concludes that the motivation for the conduct cannot really be determined. The evidence is simply not detailed enough to allow a conclusion as to why Ms. Murphy acted as she did. As for the second incident, the evidence does suggest that in that particular occasion Ms. Murphy was certainly physically and probably emotionally stressed due to her physical ailments and that this may well have played a part in the nature of her response to T.G.'s disruptive activity.

Based upon all of the evidence, I **CONCLUDE** that the circumstances involved in these two incidents do not require that Ms. Murphy be removed from her position. With regard to the first incident, the board took appropriate action given the limited facts available to it and its obvious concern that Ms. Murphy not touch her students in a manner which, while perhaps well intentioned, could lead to difficulties. As for the second incident, the circumstances suggest that Ms. Murphy was not physically or emotionally in the best of health at the time that she was dealing with the student, who was unfortunately acting in a manner which might be difficult to deal with even had Ms. Murphy been feeling well physically and emotionally, and that Ms. Murphy did not willfully and deliberately act in a manner calculated or intended to inflict pain and suffering and injury to the child. While the conduct was inexcusable, it nevertheless appears to be an isolated manifestation in an otherwise highly commendable career. Undoubtedly the experience of this process has driven home to Ms. Murphy once and for all the fact that except in the most extreme and absolutely necessary circumstances touching her pupils is simply

unacceptable. Therefore, I **CONCLUDE** that the proper penalty to be imposed in this case is that Ms. Murphy be reinstated to her teaching position at the same annual salary that she was paid during her suspension, without benefit of any adjustment or increment which might otherwise pertain. *See Ivens, supra.* It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 16, 1992
Date

JEFF S. MASIN, ALJ

Receipt Acknowledged:

July 17, 1992
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 22 1992
Date

OFFICE OF ADMINISTRATIVE LAW

EVIDENCE LIST

JOINT EXHIBITS:

J-1	Yellow legal sheet with diagram

ON BEHALF OF PETITIONER:

P-1	Memorandum of April 30, 1990 from Lawrence D. Falzone to Dr. Ronald F. Larkin
P-2	Memo of April 30, 1990 from Steven Farkas to file
P-3	Memo of May 8, 1990 from Steven Farkas to Dr. Ronald F. Larkin
P-4(1)-(7)	(Not in evidence) Photographs of classroom

ON BEHALF OF RESPONDENT:

R-1	New Brunswick Public Schools Report of Accident dated April 30, 1990
R-2	(Not in evidence) Confidential memorandum of March 14, 1989
R-3	(Not in evidence) Memorandum
R-4	White notebook sheet with diagram of classroom 1989-90

IN THE MATTER OF THE TENURE	:	
HEARING OF PATRICIA JO MURPHY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
NEW BRUNSWICK, MIDDLESEX COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by both respondent and the Board of Education pursuant to the provisions of N.J.A.C. 1:1-18.4.

Respondent's exceptions aver that, with regard to the February 1989 incident discussed above, the ALJ disregarded a critical weakness in the Board's case: the Board, which bore the burden of proof in this matter, failed to bring forward student witnesses or seek a court order authorizing the DYFS investigator to testify; the Commissioner must therefore infer that such production would have been adverse to the Board's interest. Further, the ALJ erred in accepting the testimony of witness Victoria DiAngelio* without substantiating evidence such as the purported "red book" or notes of class observations, and without considering the

* Notwithstanding the spelling "DeAngelo" above, the witness' name appears throughout the record as given herein.

improbability of DiAngelio's witnessing a supposedly upsetting incident and then failing to report it to school administrators. In sum, the Board failed to prove that an incident of corporal punishment occurred and the resultant charge should be dismissed.

With regard to the April 1990 incident, respondent contends that the ALJ wrongly rejected her testimony and instead credited witness accounts that ignore the physical impossibility of a child receiving the type of injury alleged under the circumstances and the improbability that if such an incident had occurred it would not have been witnessed by the other adults present in the room and caused the young children in the room to become upset and report the incident to parents or other teachers. Rather, respondent avers, what the proofs show is that she was properly attempting to control an out-of-control child, just as the law permits and the superintendent testified he expected his teachers to do; therefore this charge must also be dismissed.

With regard to the penalty imposed, respondent cites a number of cases wherein physical contact was not found to constitute corporal punishment or where minimal incidents did not result in serious sanctions, contrasting these to cases where dismissal did result as a consequence of several incidents far more serious than the incidents alleged herein.

The Board, on the other hand, urges acceptance of the ALJ's findings regarding the incidents underlying the tenure charges, but seeks a heavier penalty than that imposed by the ALJ. The Board notes that a close examination of respondent's testimony and briefing position will indicate that she essentially denies much of

what the ALJ found to be true based on his assessment of witnesses whose credibility he had the opportunity to judge directly. Particular note is made of the fact that three witnesses testified that, immediately following the April 1990 incident, respondent admitted striking the child, stated that she was on medication and attributed her inexplicable conduct to her stressed physical condition, all of which respondent now denies. Moreover, the Board observes, although the ALJ found that the experience of litigating the within charges had demonstrated to respondent the unacceptability of her conduct so that a lesser penalty should suffice under the circumstances, respondent in her exceptions objects even to this penalty and disavows all responsibility for any improper actions. In view of this, the Board argues, the very least that is warranted is forfeiture of the 120 days' pay withheld during suspension, in addition to loss of an increment as recommended by the ALJ.

Upon careful review of this matter, including the transcripts of hearings before the ALJ, the Commissioner affirms the findings of the ALJ regarding the incidents underlying the tenure charges, but determines to impose a heavier penalty than that recommended in the initial decision.

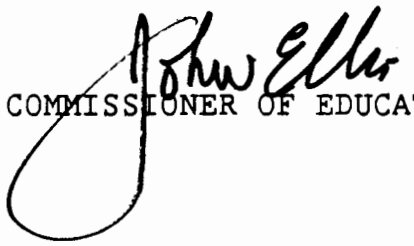
In so doing, the Commissioner rejects respondent's contentions that the Board failed to prove the charges at issue herein. That it elected not to pursue certain avenues of proof (such as compelling first-grade students, or a DYFS investigator by court order, to testify to events otherwise witnessed by adults within the school system) in no way detracts from the proofs and

testimony that were presented, which the Commissioner, like the ALJ, finds sufficiently convincing in their own right. Neither does the Commissioner find any basis in the hearing transcripts or elsewhere to question the credibility assessments made by the ALJ, particularly regarding the testimony of Ms. DiAngelio and the disparate accounts of the immediate aftermath of the April 1990 incident. To the contrary, the ALJ has taken great pains to carefully weigh and analyze the situations underlying the tenure charges, both as to what actually occurred and as to proper penalty in view thereof.

With regard to such penalty, however, while the Commissioner concurs with the ALJ that dismissal is not warranted in this matter, he disagrees with the ALJ's recommendation that withholding of increment is a sufficient consequence for respondent's behavior. Even though respondent's record is otherwise unblemished and it appears that there was no premeditation, cruelty or deliberate attempt to injure children in the actions underlying the charges against her, inappropriate touching and loss of control of the type demonstrated in this matter cannot be countenanced in public school teachers under any circumstances. Therefore, to impress upon respondent and others the seriousness of the conduct at issue herein, the Commissioner directs that in addition to the employment and adjustment increments recommended by the ALJ, respondent shall forfeit the 120 days' pay withheld from her during her suspension following certification of charges to the Commissioner. In the Matter of the Tenure Hearing of Anne Boyd, Matawan-Aberdeen Regional School District, Monmouth County, decided July 10, 1992

Accordingly, the initial decision of the Office of Administrative Law is affirmed for the reasons expressed therein in all respects except as to penalty imposed, where the determination of the ALJ is modified to include forfeiture of the 120 days' salary withheld during respondent's suspension upon certification of charges to the Commissioner.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

AUGUST 27, 1992

DATE OF MAILING - AUGUST 27, 1992

201-92

EDU #894-91
C #201-92
SB # 43-92

IN THE MATTER OF THE TENURE :
HEARING OF PATRICIA JO MURPHY, : STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION
NEW BRUNSWICK, MIDDLESEX COUNTY. :
:

Decided by the Commissioner of Education, August 27, 1992

For the Petitioner-Respondent, Ralph Stanzione, Esq.

For the Respondent-Appellant, Klausner, Hunter, Cige & Seid (Stephen E. Klausner, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. In affirming this determnation, we stress that Appellant's salary is to be set for the year following reinstatement at the level at which Appellant was compensated prior to her suspension.

January 6, 1993
Date of mailing JAN 08 1993

202-92

202-92

IN THE MATTER OF THE TENURE	:	
HEARING OF GERALD DE PASQUALE,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF HIGHLAND PARK, MIDDLESEX	:	
COUNTY.	:	

SYNOPSIS

Board certified tenure charges of conduct unbecoming a school employee against respondent, custodian since 1977, for theft of upholstered chair from faculty lounge.

Initial decision concluded respondent did engage in conduct unbecoming a school employee. ALJ found although value of chair was slight, there was an unlawful taking and a dishonest act by a public employee that violated public trust. Respondent was ordered removed from his tenured custodial position as of date of final decision.

Commissioner adopted findings and determination in initial decision.

AUGUST 31, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7744-91
AGENCY DKT. NO. 184-6/91

IN THE MATTER OF THE TENURE HEARING OF GERALD DEPASQUALE, SCHOOL DISTRICT OF HIGHLAND PARK.

James L. Plosia, Jr., Esq., and **Karen M. Sorrell**, Esq., for petitioner (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Stephen E. Klausner, Esq., for respondent (Klausner, Hunter & **Cige, attorneys)**

Record Closed: May 19, 1992 Decided: July 15, 1992

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

The Highland Park Board of Education, petitioner, certified to the Commissioner of Education tenure charges of conduct unbecoming a school employee against Gerald DePasquale, respondent, a tenured custodian in the Board's employ. The respondent filed an answer and the Department of Education transmitted the matter 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. After notice, a prehearing conference was held on September 27, 1991. The matter was set down for hearing and was heard on April 13, 1992, at the Highland Park Municipal Court.

THE CHARGES

The respondent was assigned to work the second shift at Highland Park High School in the 1990-91 school year. The Board alleges that on March 8, 1991, at approximately 5:30 p.m. the respondent removed a large upholstered chair from the faculty lounge at the school and took it from Board property. It is undisputed that the chair eventually reappeared in the faculty lounge. The issue to be determined is whether the respondent by his actions or by his responses to school administrators or both engaged in conduct unbecoming a school employee.

The burden of proof lies with the charging party.

RELEVANT EVIDENCE

Joseph Blaszczyk testified. He was a Highland Park High School janitor until June or July 1990. He left his position after an incident in which a child was slapped. No charges were preferred against Blaszczyk.

On March 8, 1991, he drove by the high school on North 5th Street. He saw the respondent struggling with a chair. He pulled into the parking lot. It was 5 or 6 p.m. on a Friday evening and there were a few other cars in the lot. The witness asked the respondent if the respondent needed help. He helped the respondent place the chair in the witness' car. They drove the car around the building to the front door. DePasquale told the witness the chair had to be repaired. He also said there was a practice going on in the auditorium and he could not make any noise in the area. The witness left as the respondent took the chair into the building.

Sandra Jean Krupinski, who has been a chemistry teacher in the school for six years testified. She returned to the high school on March 8, 1991, at approximately 4:30 p.m. She parked in the administrative parking area, entered the school, went up two flights to the science wing and got some materials from her room. She retraced her steps to the first floor and went to the school office, which she found locked. She observed the faculty room door being held open by Blaszczyk and another, rather large, man. She walked into the faculty room and observed the subject chair in the middle of the room. She asked Blaszczyk, "Where's Gerry?" She also stated she needed to get into the office. Blaszczyk pointed and the witness saw the respondent coming down the hallway pushing a handcart. She asked the

respondent to let her into the office and he did. She entered, got the materials she needed, noted the photocopy machine numbers, turned out the lights, locked the door and left. She went back to her room for a book and lesson plans. There was no one near the main office when she left.

Upon returning to the first floor, the witness saw DePasquale, Blaszczyk and a third man trying to get the chair through a door. They stopped to let her through. While going to her car, she noticed a brown station wagon with the tailgate down parked next to her vehicle. She saw no one else while she was in the building and she knew of no other activities going on in the building.

Younan Greiss, a custodian since 1988, testified. On March 8, 1991, he and three others were working the 3 p.m. - 11 p.m. shift. At about 4 p.m., the witness took boxes outside using the administrative parking lot exit. He saw the respondent and Blaszczyk with the chair on the stairway to the exit. The witness put his trash out and observed the men carrying the chair from the steps to the parking lot to the car. He then went back to work and observed nothing else.

A few days later, the witness heard that DePasquale had been questioned by the high school principal about the chair. No school official ever asked Greiss if he had helped move the chair. The witness did make a statement to school officials about what he had observed.

Joseph L. Hood, principal of the school for five years, testified. In 1990-91, three custodians worked 7 a.m. - 3 p.m. and four custodians worked 3 p.m. - 11 p.m. Custodians DePasquale, Greiss, Jones and Tofte worked the second shift.

On Monday, March 11, he spoke to Krupinski and she reported the chair missing from the faculty room. She told the principal she had seen the respondent removing the chair on the prior Friday. The principal checked the faculty room and observed that the chair, indeed, was not there. He asked the head custodian about it. The head custodian reported there was no reason for the chair to be gone.

The principal spoke to the respondent. He stated he didn't know about the chair being missing. He then suggested that the principal check with the drama coach, presumably because the coach could have used the chair as a stage prop. The principal advised DePasquale that the chair, "Needed to come back to the faculty lounge." DePasquale stated he removed the chair to clean the room and then

noticed it missing. The principal told DePasquale that he had been seen taking the chair from the building. DePasquale repeated that he took the chair out of the room to clean the room and when he was finished, the chair was missing. He stated he would look for the chair and again stated he did not know where the chair was. On the morning of March 12, the chair was back in place. The principal contacted the chair of the local education association and stated that he wanted to see DePasquale that afternoon and asked that a union representative arrange to be present. The meeting was held that afternoon.

The principal stated he was concerned about the removal of the chair from the school. DePasquale stated the chair was back and there was no need to worry now. The principal said he was still concerned that the chair was removed at all and that the matter should not have occurred. At some point, the respondent stated he did take the chair from the building and removed it to a storeroom by going around the building and entering through another entrance. This, of course, was different from his statement of the previous day. DePasquale asked several times who had told the principal that he took the chair from the building. The principal stated he would have to report the matter to the superintendent and advised the respondent to consult his union.

The storeroom in question is on the Montgomery Street side of the building, down a short flight of stairs. There were no activities going on in the building on the late afternoon of March 8, 1991, that the principal was aware of. Rug cleaning is usually done during the summer. If it were needed during the school year, it would be done on longer breaks such as the December vacation. During cleaning, furniture is stored in hallways. The witness also reported no change in the condition of the faculty room rug between March 8 and March 12.

Superintendent Peter J. Bastardo testified. He discussed the chair incident with Principal Hood. Hood reported he had checked into the matter of the chair disappearing and then reappearing. The superintendent received the principal's report and waited until he had a full report before taking any action. At some point later in March 1991 he sent a letter to the respondent directing that he come in with his attorney and have a meeting. The respondent declined to participate without a list of witnesses against him being supplied. He was given the list and the meeting was scheduled. DePasquale's attorney appeared, but DePasquale did not. Theft was denied and it was asserted that Greiss had helped DePasquale. After the meeting,

the superintendent checked with Greiss, who denied giving any assistance to the respondent.

The witness had no personal knowledge of DePasquale's employment history. DePasquale was suspended without pay and, 120 days later, the Board ordered him back to work when it resumed paying him, per statute. The respondent was assigned to a smaller school and has keys only for the areas in which he works.

The Board survived a motion to dismiss and the respondent put on his case.

Gerald DePasquale stated that he removed the chair from the faculty room on March 8, 1991 on a hand truck and took it to another area to repair it. He got locked out of the building and because the locks are old, his keys did not work. He took the chair from the parking lot to the front door with Blaszczyk's help. He then put the chair in a stockroom, resumed work and forgot about the chair.

On Monday, March 11, the principal asked the respondent where the chair was. The witness testified that Hood questioned him extensively. The witness stated, "All things like that he put against me."

The respondent stated Blaszczyk was never in the building. He came into the parking lot as the respondent was repairing the chair. Blaszczyk helped the respondent get the chair to the front door and from the front door to a storage room. The respondent then was called away to help Greiss.

DePasquale stated that Krupinski was wrong about three men being at the faculty room. He also stated he had no intention to take the chair, he intended to repair it outside the building because play practice was going on and the coach would brook no noise; that the chair was fixed before Blaszczyk drove by; and that the witness was struggling to "walk" to the front door and reenter the building. He also stated putting the chair in the stockroom was the fastest way to take care of the chair from the front door. He never got a chance to clean the faculty room and the chair stored in the stockroom left his mind. He did not want to leave the chair in the hallway while pupils were in the building. He could have put the chair in the school office, but did not. He took it upon himself to shampoo the faculty lounge rug but did not complete the job and did not remove any other furniture. He never told anyone he removed the chair to repair it, but fixed the chair "on my own."

The witness also testified that the principal told him if the chair were returned, the principal would forget about the incident. The chair was returned and then, about two weeks later, the respondent started to get letters from the principal. Eventually, tenure charges were filed. The witness identified his affidavit which he signed in his attorney's offices. He did not read the affidavit before he signed it. His own attorney did not let him see the affidavit. At hearing, the witness stated that the affidavit contained answers he did not agree to. He also testified that, contrary to paragraph five of the charges, he never stated that he removed the chair from the faculty room so that he could clean the carpet in the lounge. He agrees, however, that the principal asked about the chair.

The witness was questioned extensively about the charges and his answer and the parts of which he agreed with and those parts that he did not. The witness also signed the first set of answers to requests for admissions and interrogatories, but says he did not admit "to all these things."

The witness again testified about events of March 8, 1991. He now stated he asked Greiss to help him get the chair into the storeroom, but Greiss declined to be involved. The chair was in the front-door area at the time. He never saw Krupinski inside the building and denies she asked to be let into the office. The witness testified further, generally repeating his earlier testimony.

Donald Ralph, a guidance counselor since 1969, testified. He is president of the Highland Park Education Association and is a member of the New Jersey Bar. As a staff member, he was involved in decorating the faculty lounges. The furniture in the lounges was bought and donated by the faculty. The faculty made no complaints to the administration about missing furniture. The witness has dealt with the respondent, who apparently has reading comprehension difficulties. He has assisted the respondent with documents, sometimes successfully, sometimes not. As union representative, he attended some of the meetings with the respondent's attorney. There are some questions concerning the respondent's comprehension. His first response is always, "I understand." Then, on further questioning, he admits he does not comprehend.

The witness could not say that the chair was in disrepair in March 1991. He knew, after the fact, that Krupinski had told the principal of a problem. DePasquale's attorney took special care to elicit facts from him. The respondent

knew that theft was the gravamen of the charges against him. The witness also took special care to explain the situation to the respondent.

Younan Greiss, recalled, testified that the respondent did not ask him at any time on March 8, 1991, to help carry or move the chair. Neither did the respondent help Greiss move bleachers on that day.

DETERMINATION

Having heard and observed the witnesses as they testified and having reviewed all the documents in this case, I **FIND:**

1. On March 8, 1991, Gerald DePasquale removed a chair from the faculty lounge at Highland Park High School and took it from the building into a parking lot.
2. The chair was placed in a vehicle and removed from school premises.
3. The chair was not in place on Monday, March 11, 1991.
4. Upon being advised of the situation, the principal properly conducted an inquiry.
5. During the course of the inquiry, the principal advised the respondent that the chair should be in its place.
6. On the morning of March 12, 1991, the chair reappeared in the faculty lounge.
7. The respondent's version of the events is not credible.
8. The proofs presented by the Board are both credible and convincing.

In consideration of the foregoing, I **CONCLUDE** that the Highland Park Board of Education has shown that Gerald DePasquale, a tenured custodian in its employ, engaged in conduct unbecoming a school employee in the period March 8-12, 1991.

The value of the chair involved in the incident is likely very slight. A more important consideration, however, is that there was an unlawful taking, however brief. This cannot be condoned. A board of education has the right to presume the basic honesty of its employees. A dishonest act by a public employee violates the public trust.

I **ORDER** Gerald DePasquale removed from his tenured custodian position with the Highland Park Board of Education effective on the date of a final decision in this matter.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

15 JULY 1992
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

7/15/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 21 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

km

WITNESSES

Joseph Blaszczyk
Sandra Jean Krupinski
Younan Greiss
Joseph L. Hood
Peter J. Bastardo
Gerald DePasquale

EXHIBITS

P-9 Highland Park Public Schools District Calendar, 1990-1991

IN THE MATTER OF THE TENURE	:	
HEARING OF GERALD DE PASQUALE,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF HIGHLAND PARK, MIDDLESEX	:	
COUNTY.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by respondent pursuant to N.J.A.C. 1:1-18.4, as were replies thereto by the Board.

In his exceptions, respondent first contends that the ALJ improperly ignored the testimony of witness Blaszczyk to the effect that respondent only took the chair to repair it and was in the process of returning it to the building when observed by the witness. He further renews the arguments of his post-hearing submission to the effect that, even crediting the Board's version of the facts, no "theft" occurred because there was no extended deprivation as required by N.J.S.A. 2C:20-1a(2) and the property at issue was owned not by the Board but by the faculty association, which lodged no complaint against respondent. In reply, the Board observes that the ALJ did not "ignore" Blaszczyk's testimony, but rather credited the conflicting testimony given by other witnesses. The Board then notes that neither actual property ownership nor standards for criminal prosecution are applicable to a tenure matter where the basic issue is the Board's need to rely on the honesty of its employees.

Upon careful review of this matter, the Commissioner concurs with the ALJ that respondent must be dismissed from his tenured employment.

The initial decision's findings of fact were properly based on credibility determinations which the Commissioner finds no reason to challenge in either the record before the ALJ* or respondent's exceptions. Nor is the Commissioner persuaded by respondent's arguments that no "theft" occurred because the chair at issue was purchased by the faculty association and was promptly returned when its disappearance was brought to respondent's attention. As the Board properly notes, the chair was taken from district premises and respondent lied repeatedly to avoid the consequences of his actions. Such dishonesty is, as noted by the ALJ, inherently incompatible with public employment and cannot be countenanced by the Commissioner.

Accordingly, the initial decision of the Office of Administrative Law is affirmed for the reasons expressed therein and respondent's tenured employment is terminated as of the date of this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 31, 1992

DATE OF MAILING - SEPTEMBER 1, 1992

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* The Commissioner here notes that no transcripts were provided to him in this matter.

202-92

EDU #7744-91
C #202-92
SB #40-92

IN THE MATTER OF THE TENURE :
HEARING OF GERALD DE PASQUALE : STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH OF : DECISION
HIGHLAND PARK, MIDDLESEX COUNTY. :
:

Decided by the Commissioner of Education, August 31, 1992

For the Petitioner-Respondent, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (James L. Plosia, Jr., Esq. and Karen M. Sorrel, Esq., of Counsel)

For the Respondent-Appellant, Klausner, Hunter, Cige & Seid (Stephen E. Klausner, Esq., of Counsel)

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

S. David Brandt and Corrine M. Mullen opposed.

March 3, 1993

Date of mailing MAR - 5 1993

203-92

203-92

JACK BOURHIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, former Science Department Supervisor whose position was abolished, challenged appointment of nontenured individual to new position of Departmental Assistant having supervisory responsibilities for math, science and guidance. Board contended it needed to hire female so as not to cause disparate impact on basis of sex in violation of Title 7 of Civil Rights Act of 1964, as amended by Civil Rights Act of 1991.

ALJ found petitioner was entitled to supervisory position by virtue of tenure law. ALJ found mere disparity in numbers of male versus female administrators, which may or may not be related to impact of tenure entitlement laws, cannot serve as basis for denying employment claims of a staff member who is clearly entitled to a position by tenure right. Board was ordered to appoint petitioner to position of Departmental Assistant as of September 1, 1991.

Commissioner concurred with findings and determination in initial decision and directed petitioner's appointment with compensation and benefits retroactive to September 1, 1991.

SEPTEMBER 1, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8193-91
AGENCY DKT. NO. 271-7/91

JACK BOURHIS,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,
Respondent.

Robert M. Schwartz, Esq., for petitioner
(Lake and Schwartz, attorneys)

Robert T. Tessaro, Esq., for respondent

Record Closed: June 1, 1992 Decided: July 15, 1992

BEFORE **JOSEPH F. MARTONE**, ALJ.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter petitioner alleges that respondent violated his tenure rights by abolishing the position of Science Department Supervisor held by petitioner and by appointing a non-tenured supervisor as a Departmental Assistant having supervisory responsibilities for math, science and guidance. The matter was transmitted to the Office of Administrative Law (OAL) on August 6, 1991, for hearing 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 assigned to the undersigned administrative law judge (ALJ) on October 18, 1991, and was scheduled for a telephone prehearing conference, which was held on December 9, 1991. A prehearing order was entered on December 11, 1991, settling the procedures to be followed in this matter and scheduling a hearing for March 18, 1992.

Prior to the scheduled hearing date, the attorneys for the respective parties agreed to submit a joint stipulation of all relevant facts and further agreed that no hearing would be required. After the submission of a stipulation of facts and the receipt of the legal arguments from the attorneys for the respective parties, and after affording the ALJ an opportunity to review these submissions, the record closed on June 1, 1992.

FACTUAL DISCUSSION

A complete statement of all facts deemed to be relevant by the parties to these proceedings is set forth in the stipulation of facts (Exhibit J-1) and the exhibits annexed thereto (Exhibits J-2 through J-5). For purposes of this Initial Decision, I will outline and summarize the facts which I found to be relevant.

Petitioner was first employed by respondent in September, 1971, as a science and math teacher. He continued to teach science and math until June 30, 1976 Beginning in September, 1976, his teaching responsibilities were limited to science, which continued through December, 1980. In January, 1981, petitioner was appointed as Science Department Supervisor and was reassigned to the Fort Lee High School. He held that position continuously from January, 1981, until June, 1991.

Petitioner has a Teacher of Science Certificate and a Teacher of Mathematics Certificate, both issued in December, 1972. He also has a Principal and a Supervisor Certificate issued in March, 1981.

On April 30, 1991, the school district's annual budget for the 1991-1992 school year was rejected by the voters. On May 16, 1991, the Borough of Fort Lee, pursuant to *N.J.S.A.* 18A:22-37, certified an amount for the 1991-1992 school budget which

was $586,689 less than the original proposed current expense budget which had been rejected. This included a reduction of $33,896 in the account for supervisors' salaries.

By resolution dated May 23, 1991, respondent eliminated the title of Department Supervisor. On May 24, 1991, respondent advised petitioner that the position of Department Supervisor had been abolished and that petitioner would be reassigned to a classroom position.

By resolution dated June 3, 1991, (Exhibit J-4), respondent created the position of Departmental Assistant, and on June 4, 1991, respondent advertised for applicants to that position.

On June 12, 1991, respondent requested approval from the county superintendent's office for the creation of the title of Departmental Assistant (Exhibit J-2).

On June 13, 1991, petitioner applied for the position of Departmental Assistant. However, respondent decided not to employ petitioner in this position but instead employed a non-tenured Supervisor as Departmental Assistant having supervisory responsibilities for math, science and guidance.

On October 29, 1991, the Acting County Superintendent of Schools approved the title of Departmental Assistant indicating that the authorizing endorsement for the title was Supervisor, and the legal title of Departmental Assistant was also Supervisor (Exhibit J-3).

The qualifications for the title of Departmental Assistant require the holder to have a New Jersey Teacher's Certificate, Supervisor's Certificate, Masters Degree from an accredited college or university, and a minimum of three years teaching experience (Exhibit J-4). Petitioner received a Bachelor of Science Degree from Fairleigh Dickinson University in 1960, and a Master of Science Degree from New York University in 1965

The professional staff employed by respondent, exluding central office and building administation and supervisors, totals 254 employees of which 191, or 75.2 percent are female and 63, or 24.8 percent are male.

The total central office administration, building administration and supervisors employed by respondent are 19 employees of which five, or 26.3 percent are female, and 14, or 73.7 percent are male.

The number of male and female administrative/supervisory staff includes a female Departmental Assistant appointed by respondent, having supervisory responsibilities for math, science and guidance. This Departmental Assistant is not tenured and was appointed effective for the 1991-1992 school year.

The female appointed to the position of Departmental Assistant began her service as a Supervisor in September, 1991. She previously had served in a non-supervisory, teaching staff position since 1963.

Respondent asserts that if petitioner is appointed to the position held by the non-tenured female Departmental Assistant, it would result in increasing the percentage of male administrative/supervisory staff to 78.9 percent and decreasing the female administrative/supervisory staff to 21.1 percent. Respondent asserts that it is subject to the requirement of *N.J.A.C.* 6.4-1.6(a)(b) to create gender balance throughout the district, including approved goals for the appointment of females to administrative/supervisory positions.

LEGAL DISCUSSION AND ANALYSIS

Tenure is a legislative status, not acquired in any specific assignment, but in the "positions" enumerated in *N.J.S.A.*18A:28-5. This statute provides in relevant part that teaching staff members may acquire tenure in the positions enumerated in the statute and in such other positions which "require them to hold appropriate certificates issued by the board of examiners . . ."

In this case, petitioner has had a supervisor certificate since March, 1981. Thus, based on his years of service as Science Department Supervisor, petitioner has met the tenure requirement so as to have acquired tenure in the position of Supervisor.

Notwithstanding the fact that petitioner acquired tenure as a Supervisor, respondent appointed a non-tenured Supervisor as Departmental Assistant having supervisory responsibilities for math, science and guidance. Consequently, petitioner contends that as compared to the non-tenured individual currently in the position of Departmental Assistant for math, science and guidance, he has a greater entitlement to be appointed to that position. Petitioner relies upon *Capodilupo v. West Orange Board of Education*, 218 *N.J. Super.* 510 (App.Div. 1987); *Bednar v Westwood Board of Education*, 221 *N.J. Super.* 239 (App.Div. 1987), *Schienholz v. Ewing Township Board of Education*, 1989 S.L. D., June 19, 1989, affirmed in part and reversed in part, State Board of Education, February 2, 1990, affirmed by the Appellate Division (N.J. App.Div., A-2905-89T3, Nov. 19, 1990) (unreported); *Herbert v. Board of Education of the Township of Middletown,* 1989 S.L.D., July 25, 1989, affirmed, State Board of Education, August 1, 1990, affirmed, Appellate Division (N.J. App.Div., A-318-90T1, May 22, 1991) (unreported); *Dennery v. Passaic Valley High School*, 251 *N.J. Super.* 144 (App.Div. 1991).

In its Letter Brief, respondent through its attorney argues that respondent and now the Commissioner of Education through the OAL, is forced to choose between the somewhat diametrically opposed obligations imposed by different provisions of New Jersey Laws dealing with public education. Respondent points out that *N.J.S.A.* 18A:6-6 prohibits discrimination based on sex in the formulation of wages, compensation, appointment, assignment, promotion, transfer, resignation, dismissal or other matter pertaining to the employment of teachers in any school supported by public funds. Respondent argues that this obligation appears to be in conflict with the requirement of *N.J.S.A.* 18A:28-12 which grants teaching staff members such as petitioner seniority rights when tenured positions are abolished as a result of a reduction in force.

Respondent points out that no case appears to be directly on point in this jurisdiction. However, it argues that there is no question that respondent has been placed in the position of being accused of violating both *N.J.S.A.* 18A:6-6 as well as the Federal Civil Rights Act of 1991 if it appoints petitioner to the supervisory position of Departmental Assistant. It asserts that while the selection of petitioner could have been made without intentional, sexual discrimination by respondent, the disparate impact of such a decision in favor of tenure rights, given the wide disparity

in the ratio of total female employees to total female supervisors, could subject respondent to such a challenge.

Respondent asserts that the unequal number of male supervisors compared to the number of female professional staff employees can only continue if tenure rights are given preference over attempts to cure disparities which exist in the number of female supervisors compared to female employees. Respondent indicates that should petitioner's complaint be upheld, respondent will have no choice under current fiscal constraints but to reassign the non-tenured female employee back into the ranks of the teaching staff population, thereby perpetuating the inequality of the current situation.

In the present case, petitioner is a tenured supervisor who has been removed from a position as a result of a reorganization by the respondent. Respondent has filled the position of Departmental Assistant for science, math and guidance with a non-tenured supervisor despite the fact that petitioner has tenure. This is clearly a violation of the tenure law.

Respondent appears to argue that the tenure statute and respondent's use of tenure as an employment practice has caused a disparate impact on the basis of sex, in violation of Title 7 of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991. However, see 42 *U.S.C A.* § 2,000 e-2(k)(1)(A)(i) which provides that an unlawful employment practice based on disparate impact is established only if a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of sex, and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity. In order to prove disparate impact, a plaintiff must first identify the specific employment practice being challenged, and then show that the practice excluded the plaintiff, as a member of a protected group, from a job or promotion opportunity. *Waisome v. Port Authority of New York & New Jersey*, 948 *F.2d.* 1370, 1375 (2nd Cir. 1991). In this regard, statistical evidence of disparities may be probative if they are so great that they cannot be accounted for by chance. *Id.*

However, there has been no proof of disparate impact caused by the Teacher Tenure Law, and no complainant has come forward to claim that the Teacher Tenure

Law results in disparate impact on the basis of sex. Once violations of the Civil Rights Act are established, then respondent may be ordered to take appropriate action to remedy such violaions. However, the statistical evidence of disparities which may or may not be related to enforcement of the New Jersey Teacher Tenure Law may not be used as a basis for ignoring the provisions of the tenure law.

Petitioner is certified and has tenure in a supervisor's position and the non-tenured appointee does not. Accordingly, based upon the undisputed facts in this matter, I **FIND** that petitioner has tenure as as supervisor and is entitled to appointment to the position of Departmental Assistant having supervisory responsibilities for math, science and guidance.

DECISION AND ORDER

Based upon the foregoing it is hereby **ORDERED** that respondent shall forthwith appoint petitioner as Departmental Assistant having supervisory responsibilities for math, science, and guidance. It is further **ORDERED** that petitioner is entitled to back pay and emoluments effective as of September 1, 1991.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 15, 1992
Date

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

July 20, 1992
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 22 1992
Date

OFFICE OF ADMINISTRATIVE LAW

tw/dgi

APPENDIX

LIST OF EXHIBITS

C-1 Brief in Support of Petitioner
C-2 Letter Brief in Support of Respondent

J-1 Stipulation of Facts
J-2 Letter from Assistant Superintendent Harold S. France to County Superintendent of Schools dated June 12, 1991
J-3 Correspondence from Acting County Superintendent dated October 29, 1991
J-4 Resolution of Respondent Board of Education adopted June 3, 1991
J-5 Position specifications for High School Department Supervisor

OAL DKT. NO. EDU 8193-91

JACK BOURHIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner concurs with the ALJ that mere disparity in numbers of male versus female administrators, which may or may not be related to the impact of tenure entitlement laws, cannot serve as a basis for denying the employment claims of a staff member who is clearly entitled to a position by tenure right.

Accordingly, the initial decision of the Office of Administrative Law directing the Board to forthwith appoint petitioner, with back pay and emoluments from September 1, 1991, to the position of Departmental Assistant having supervisory responsibility for math, science and guidance, is affirmed for the reasons well expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 1, 1992

DATE OF MAILING - SEPTEMBER 1, 1992

204-92

204-92

JOSEPH LA ROSA, JR.,

PETITIONER,

V.

JOHN ELLIS, COMMISSIONER, ET AL., NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner challenged denial of English endorsement by Division of Teacher Preparation and Certification. Petitioner had been given outdated information from county office. A 1985 amendment to N.J.A.C. 6:11-5.1 had changed rule to require 30 semester-hour credits instead of 24.

ALJ concluded petitioner failed to prove by a preponderance of evidence that respondents must issue him an endorsement to teach English as he did not meet the current requirements for such issuance. Moreover, ALJ found petitioner was owed a coherent explanation of why his coursework was insufficient and directed an evaluation of petitioner's credentials by the Division of Teacher Preparation and Certification.

Commissioner concurred with ALJ that petitioner had not met requirements for the endorsement. Commissioner, however, modified initial decision's directive that the Division of Teacher Preparation and Certification provide petitioner a credentials evaluation as current regulations leave the decision as to what constitutes a "coherent sequence" in a subject area to the approved college of attendance.

SEPTEMBER 2, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1043-92
AGENCY DKT. NO. #427-12/91

JOSEPH LaROSA, JR.,

Petitioner,

v.

JOHN ELLIS, COMMISSIONER,
DR. MAUREEN KELLER, ACTING DIRECTOR,
BUREAU OF CONTROVERSIES AND DISPUTES,
ELLEN M. SCHECHTER, ACTING DIRECTOR,
DIVISION OF TEACHER PREPARATION
AND CERTIFICATION, AND
NEW JERSEY DEPARTMENT OF EDUCATION

Respondents.

Joseph LaRosa, Jr., petitioner, *pro se*

Arlene Goldfus Lutz, Deputy Attorney General, for respondents, (Robert J. DelTufo, Attorney Genera l of New Jersey, attorney)

Record Closed: June 9, 1992 Decided: July 17, 1992

BEFORE EDGAR R. HOLMES, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Joseph LaRosa, Jr., petitioner, graduated from Glassboro State College in 1976 with a Bachelor's Degree in Communications. He worked in the field of communications for more than ten years. First as a tourist representative for the Cape May County Department of Public Affairs and later, with Bally's Park Place

Casino. In 1989 he managed Farley State Marina for the Trump Castle Casino. At that time he determined to return to Glassboro State College and obtain certification as a social studies teacher.

During the time when petitioner returned as a student to Glassboro State College in order to be certified as a social studies teacher, he visited the Office of the Cape May County Superintendent of Schools in Cape May Court House, in order to obtain the information necessary to be accredited as an English Teacher too. However, he was given materials which were outdated.

The materials petitioner received explicitly stated that to receive an institutional certificate endorsed "Teacher of English" one was required to have, among numerous other requirements, "24 semester-hour credits in English ..." The paragraph went on to allocate the number of minimum hours required in the areas of Composition, Literature, Speech Arts or Dramatics and Communication Arts. The first three were required areas according to a footnote.

Unfortunately, a 1985 amendment to *N.J.A.C.* 6:11-5.1 the source for the requirements for certification, changed the rule to require 30 semester-hour credits instead of 24.

After petitioner obtained his certificate in social studies through Glassboro State College, he forwarded his application to be certified in English to the Office of Teacher Certification and Academic Credentials through the Cape May County Superintendent's Office. On February 13, 1991, he received a letter advising him that the regulation had been changed and now required "30 credits in a coherent sequence in the subject field."

Thereafter, a lengthy correspondence followed between petitioner and Department of Education officials culminating in the petitioner filing a demand to be certified in English. His demand is the petition filed herein on December 5, 1991 with the Bureau of Controversies and Disputes.

The matter was transmitted to the Office of Administrative Law (OAL) on February 7, 1992, pursuant to *N.J.S.A.* 52:14B-1 *et. seq.* and *N.J.S.A.* 14F-1*et. seq.* to be heard as a contested case. The matter was heard on June 9, 1992.

At the hearing petitioner relied upon the fact that the Cape May County Superintendent supplied him with an outdated summary of the certification requirement as the basis for his demand that he be certified.

Apparently, he relies upon unformed notions of detrimental reliance, estoppel, or specific performance. He argued that as a result of the Department of Education's failure to certify him he was unable to get a job as a school teacher, because persons certified only in social studies are "a dime a dozen." He asserts that had he also been certified in English he would have been more employable.

On cross examination petitioner acknowledged that he never discussed English certification with Glassboro State College officials or his advisor. He also admitted that it is a "bad job market" for teachers. He was working at the time of the hearing as a REACH Coordinator, employed by the Vineland Board of Education. He told us that funding for this position would shortly expire. Finally, the petitioner advised that he has satisfactorily passed the National Teacher Examination in English.

The Legislature has empowered the State Board of Examiners with the authority and responsibility to "issue appropriate certificates" to teachers. *N.J.S.A.* 18A:6-38. It is a heavy responsibility because the Constitution requires that our students receive both a "thorough and efficient education." *N.J. Constitution, article VIII, Section IV, para.1.*

This policy should not be thwarted by traditional notions of contract law or liability. Indeed, the State would be immune from tort liability for the action complained of here. *N.J.S.A.* 59:2-5.

To compel the Department to certify the petitioner would defeat the public policy expressed in the Constitution and the Statute. *See Summer Cottager's Ass'n of Cape May v. City of Cape May* 19 *N.J.* 493; *City of Hackensack v. Winner,* 82 *N.J.* 1, 30. Unqualified teachers, just as unqualified surgeons, should not be licensed to practice under any condition.

I therefore **CONCLUDE** that the petitioner has failed to prove by a preponderance of the evidence that the respondents must issue a certification to teach English.

Nevertheless, the petitioner is entitled to more than he received. The deputy apologized on behalf of the County Superintendent for the mistake in supplying him with an outdated regulation as has the County Superintendent herself. But the petitioner had not yet received a coherent explanation of why he was not eligible to be certified as an English teacher. He ought to have received at minimum a credentials evaluation which lists the courses he has completed and which the Department considers count towards the 30 hours required in English Certification. Only with such information can the petitioner intelligently plan for the future since it is the Division of Teacher Preparation and Certification which has the final say in matters of certification. Of course such an evaluation may be appealed to the Bureau of Controversies and Disputes.

I therefore **ORDER** that the Division of Teacher Preparation and Certification evaluate the petitioner's college transcripts and advise him in writing which courses and semester hours he has successfully completed and which it considers count toward the 30 hours in English required for certification.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 17, 1992
Date

Edgar R Holmes
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

July 22, 1992
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 27 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

PETITIONER:
JOSEPH LaROSA, JR.

RESPONDENTS:
JOHN ECKSTINE, PRIN . EXAM. NJ DEPT. OF ED.

DOCUMENTS IN EVIDENCE

PETITIONER:

P-1 PAGES 73 & 74 OF 1989 ENDORSEMENT: ENGLISH
P-2 LETTER , DATED 2/13/ 91 FROM KATHI DALTON, CERT. SEC. CAPE MAY COUNTY
P-3 EVALUATION OF CREDENTIALS FROM NJ DEPT OF EDUCATION DATED 2/6/91
P-4 LETTER, DATED 3/16/91 TO DR. PATRICIA HORTON FROM LaROSA
P-5 LETTER, DATED 4/4/91, FROM DIR. CELESTE RORRO TO DR. PATRICIA HORTON
P-6 LETTER, DATED 5/3/91, FROM LaROSA TO DR. CELESTE RORRO
P-7 LETTER, DATED 5/20/91, FROM DR. RORRO TO LaROSA
P-8 LETTER, DATED 6/3/91 FROM LaROSA TO DR. RORRO
P-9 LETTER, DATED 6/17/91 FROM DR. RORRO TO LaROSA
P-10 LETTER, DATED 7/13/91 FROM LaROSA TO COMM. ELLIS
P-11 LETTER, DATED 8/22/91 FROM COMM. ELLIS TO LaROSA
P-12 LETTER, DATED 8/30/91 FROM LaROSA TO COMM. ELLIS
P-13 LETTER, DATED 9/25/91 FROM COMM. ELLIS TO LaROSA
P-14 NTE EVALUATION ENGLISH LANG. & LITERATURE DATED 12/8/90
P-15 ACC TRANSCRIPT DATED 12/8/70, RE: LaROSA
P-16 THROUGH P-18 OFFICIAL COPY OF ACADEMIC RECORD OF LaROSA AT ACC 1971-1973

RESPONDENT:
NONE

JOSEPH LA ROSA, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JOHN ELLIS, COMMISSIONER, ET AL., NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENTS.	:	
	:	

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

Upon review, the Commissioner concurs with the ALJ that, while it is unfortunate that petitioner was given outdated information on certification requirements at the time of his initial inquiry, the State's interest in licensing only teachers who have fully met such requirements cannot be thwarted by circumstances such as those herein. Accordingly, the Commissioner affirms that portion of the initial decision dismissing the Petition of Appeal on this basis.

The Commissioner cannot, however, concur with the ALJ's directive that the Division of Teacher Preparation and Certification provide petitioner with a credentials evaluation listing the completed courses which the Department deems to count toward the 30-hour "coherent sequence" requirement so that petitioner can intelligently plan for the future. This is so because current

regulations, which were in effect at the time of petitioner's application, leave the decision as to what constitutes a "coherent sequence" to the approved college of attendance rather than to the Division of Teacher Preparation and Certification, which has no discretion to disagree with the determination of an approved college teacher preparation program in this regard. N.J.A.C. 6:11-5.1(a)2, 6:11-5.2(b), 6:11-7.1, 6:11-7.3(b) Therefore, there is nothing further that petitioner could learn from any review by the Division of Teacher Preparation and Certification. Petitioner's proper course of action would be to consult with approved college(s) of his choice, present his completed coursework and fulfill whatever obligations remain to meet his chosen college's coherent sequence standard. Such action would remove any impediment to petitioner's certification application resulting from failure to meet the 30-credit requirement.

Accordingly, the initial decision of the Office of Administrative Law is affirmed in its ultimate dismissal of the Petition of Appeal, but modified as set forth herein as to the ALJ's directive to the Division of Teacher Preparation and Certification.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 2, 1992

DATE OF MAILING - SEPTEMBER 2, 1992

205-92

205-92

BOARD OF EDUCATION OF MIDDLE TOWNSHIP, CAPE MAY COUNTY,

PETITIONER,

V.

K.K. AND P.K.,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board sought declaration that S.K., child of respondent parents who resided illegally year-round at a campsite violating rules and regulations of campground condominium association, did not qualify for free education pursuant to N.J.S.A. 18A:38-1 et seq. Respondents contended they were domiciled within Middle Township and thus S.K. was entitled to free education therein.

ALJ dismissed petition finding parents had "all-year-round dwelling place" in district even though residency was carried out in defiance of association's bylaws. (Orange Board of Education v. New Jersey State Department of Education) Thus, respondents should be deemed domiciled therein for school attendance purposes.

Commissioner adopted findings and determination in initial decision.

SEPTEMBER 8, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1159-92
AGENCY REF. NO. 394-11/91

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLE, CAPE MAY COUNTY,
Petitioner,
v.
K. K. and P. K.,
Respondents.

Louis C. Dwyer, Jr., Esquire, for petitioner (Corino & Dwyer, attorneys)
Richard I. Goldstein, Esquire, for respondents

Record Closed: June 29, 1992 Decided: July 20, 1992

BEFORE **JOSEPH E. KANE, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Middle Township Board of Education, petitioner, filed a petition with the Commissioner of Education (Commissioner) seeking a declaration that K.K and P. K., respondents, are not legally domiciled within Middle Township, New Jersey, and as a result, their child, S.K. does not qualify for a free education pursuant to N.J.S.A. 18A:38-1 et seq. Respondents contend that they are domiciled within Middle Township, New Jersey and as such, their child is entitled to a free education within the school district.

The Commissioner on February 13, 1992 transferred the matter to the Office of Administrative Law (OAL) to be heard 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 conferenced at the Atlantic City OAL, 1201 Bacharach Boulevard, Atlantic City, New Jersey on June 8, 1992 at which time, the parties agreed that the matter should be determined based

on the submission of stipulated facts and briefs. Briefs and a stipulation of facts was filed and the record closed on June 28, 1992. A decision was rendered on July 20, 1992.

ISSUE

WHETHER RESPONDENTS HAVE ESTABLISHED A DOMICILE SO AS TO ENTITLE THEIR CHILD TO A FREE EDUCATION PURSUANT TO N.J.S.A. 18A:38-1 ET SEQ. WHEN THEY HAVE BEEN LIVING IN A CAMPGROUND YEAR ROUND, THE OCCUPANCY OF WHICH VIOLATES STATE REGULATIONS, LOCAL ORDINANCE AND THE RULES AND REGULATIONS OF THE CAMPGROUND CONDOMINIUM ASSOCIATION.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The petitioner filed a petition with the Commissioner seeking an order declaring that the respondents are not domiciled within Middle Township, New Jersey and thus, their child is not entitled to a free education pursuant to N.J.S.A. 18A:38-1 et seq. Additionally, petitioner also requested that respondents be ordered to pay for their child's education commencing October 17, 1991. The respondents claim that they have been domiciled within Middle Township, New Jersey since 1985 and thus are entitled to a free education for their child. This matter involves an interpretation of the meaning of "domicile" within the Attendance at School Free of Charge, N.J.S.A. 18A:38-1 et seq.

The respondents and their two minor children, S.K. and A.K. have lived at Hideaway Beach Campground in the Township of Middle, County of Cape May since March of 1985. Seven year old S.K. was registered in the Middle Township Public School System in April of 1990, has attended school and travels on the school bus.

In 1981 the owner of the Hideaway Beach Campground filed a Master Deed converting the campground into a condominium of campsites. Thereafter, the owner sold off the individual campsites, one of which was purchased by the respondents.

The campground is operated by the Hideaway Beach Campground Association and is comprised of 344 individually owned campsites. Each owner has an undivided 1/344 interest in certain common areas set forth in the Master Deed.

Relevant to this instant matter, the condominium Master Deed sets forth at Article IX, Sec. W, language which closely tracts N.J.A.C. 8:22-1.15, that "a campsite owner shall not occupy a campsite for more than 21 days within any given 30 day period from November 1 to April 1." The Master Deed further provides that water to the individual sites of the campground was to be discontinued between November 1 and April 1 to facilitate the enforcement of the closing of the campground.

> W. The Declarant, the Association and the Administrator shall comply with all provisions of N.J.A.C. 8:22-1.1 et seq. relating to campgrounds. From November 1 to April 1, the occupancy of any one campsite shall be restricted to a period not to exceed 21 days during any 30-day period. Recreational vehicles when not in use may remain on the campsite. As a further means of ensuring seasonal use and minimizing condominium costs, the Association shall discontinue all water service to the campsites in the condominium during the period between November 1 and April 1, inclusive, each year. The Association shall, however, allow use of individual campsites consistent with the above-cited provisions of the New Jersey Administrative Code and may furnish limited bath house facilities during this period. This provision is a restrictive covenant binding upon all campsite owners. Provided, however, that if the laws of the State of New Jersey which are applicable to this provision shall be altered, changed, modified or amended or new laws or regulations be enacted then this provision shall be deemed to and shall be automatically amended to conform to such enactments. (Emphasis supplied.)

In 1988, the Middle Township Committee adopted ordinance 653-88 entitled "An Ordinance Requiring the Payment of All Delinquent Local Real Property Taxes Before the Issuance of Any permit Affecting Said Real Property." Section V of that Ordinance provides:

> Any license issued by the Township of Middle may be revoked or suspended by the township Committee upon submission of proof by its applicable enforcement officers that the taxes on the premises have remained unpaid for a period of three consecutive quarters.

This device ostensibly was a method embraced by Middle Township to seek the enforcement of the collection of taxes of the individual campsites and to transfer the enforcement responsibility and burden to the campground itself and the condominium association that runs the campground.

Consistent with that approach, Ordinance 694-89, enacted on September 21, 1989, dealt with the issue of year-round residency and occupancy of the campground and also attempted to place policing responsibilities on the

condominium association. Paragraphs A and C of the ordinance are instructive. Paragraph A states:

> No licensee shall permit any permanent structure to be affixed to any campsite in the licensed campground.

Paragraph B states:

> Only motor vehicles or motor-drawn vehicles in compliance with the State Campground Code or Law may be located on any campsite in any licensed campground. Said vehicles shall not be altered in any manner that would prevent ready removal thereof.

Paragraph C states:

> No licensee shall permit the occupancy of any motor vehicle or motor-drawn vehicle in the licensed campground in such a manner so as to facilitate the establishment of domicile or residency for the occupant thereof. No licensee shall permit any person or entity to occupy any vehicle or other structure situate on the licensed campground who does any of the following:
>
> (1) Registers to vote from the campground;
> (2) Registers a child in the Middle Township School System or any other school system from the campground;
> (3) Registers a motor vehicle from the campground.

Section 17 of Ordinance 694-89 states that any campground license found in violation of Section 14 shall be subject to the immediate revocation of the campground license.

A court challenge to the validity of the above cited regulations was instituted with the result that the restrictions upon year-round residency at the campground was held to be valid. See decision of the Superior Court, Docket No. L-238-91PW. As of the date of this hearing, the respondents are continuing to reside at the Hideaway Beach Campground and will presumably continue to do so until November 1. 1992. This opinion, however, will only address the issue of whether the respondents were domiciled within Middle Township up until the date of the hearing and will not address those rights to a free education which respondents may, on behalf of their child, assert after November 1, 1992.

The issue to be resolved at this proceeding is whether S.K. will be denied free public education based on an alleged lack of domicile within Middle Township, and

whether her parents will be responsible for the cost of her education during the 1991-92 school year.

N.J.S.A. 18A:38-1 provides (in pertinent part) that:

> Public Schools shall be free to the following persons over five and under 20 years of age:
>
> (a) Any person who is domiciled within the school district;
>
> (b) Any person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein, but any person who has had or shall have his all-year-round dwelling place within the district for one year or longer shall be deemed to be domiciled within the district for the purposes of this section. [N.J.S.A. 18A:38-1(a) & (d)].

Thus, Subchapter 38-1, supra, conditions access to a free public education on, inter alia, domicile within the school district, id. at (a) and (d), or, at least, temporary residence therein with a parent or guardian, id. at (d).

In general, domicile is the place of a person's abode where he has the present intention of remaining and to which, if absent, he intends to return. Mercadente v. City of Paterson, 111 N.J. Super. 35, 39 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971). A person may have multiple residences, but may have only one true domicile at one time. State v. Benny, 20 N.J. 238, 251 (1955). Thus, residence may coincide with domicile, but does not, alone, determine it. Id. Where there are several residences, domicile is that place which the subject regards as his true and permanent home. In re Jaffee, 74 N.J. 86, 90-91 (1977); See also, Citizens Bank & Trust Co. v. Glaser, 70 N.J. 72, 81 (1976). A domicile once established continues until it is superseded by a new one. In re Estate of Gillmore, 101 N.J. Super. 77, 87 (App. Div. 1968), cert. denied 52 N.J. 175 (1968).

In a recent case concerning free public education, Fort Lee Bd. of Ed. v. Kintos, 92 N.J.A.R. 2d (EDU) 96, 103, Comm'r decision (Dec. 24, 1991), the Commissioner of Education stressed that the determination of a family's domicile is a matter of intent. Where the family appeared to have lived between and among multiple dwellings, all having some indicia of residency attached, the Commissioner found it necessary to remand the matter to obtain further evidence on the issue of intent. Significantly, the Commissioner stated: "that [the family] may not have actually resided at [the

location] for much of the time in question may enure against a claim of domicile therein, but does not necessarily preclude one." Id. at 103.

In the present matter, the question under N.J.S.A. 18A:38-1(a) involves the domicile of a minor child. Here, the child lives with both her parents. Consequently, the domicile of the child will follow that of her parents since there are no complicating factors of divorce or separation or any assertions of separate domicile by the mother. See, e.g., V.R. on Behalf of A.R. v. Bd. of Ed. Boro. of Hamburg, 2 N.J.A.R. 283 (1980); C.J. on Behalf of her Minor Children, R.J. and D.J., Jr., v. Bd. of Ed. Boro. of Palmyra, OAL Dkt. No. EDU 1202-86, modified by the Comm'r of Ed. (May 14, 1986). Thus, it simply remains to determine the domicile of the parents.

Both parents and the child live in a campground condominium within Middle Township. They have lived there since March of 1985. The family's year-round occupancy of this site was and is in violation of the condominium association's by-laws which requires that the campground occupants vacate the campsites between the months of November and April of each year. A New Jersey Superior Court has held that the time restrictions set forth in the association's by-laws are valid and may be enforced by the campground association. Thus, it can be assumed for the purposes of this argument that respondent's family will only be permitted to reside in the campground full time between the months of April 1 and November 1.

In actuality, the parents have had only one residence for the past six years and that has been within the petitioning township. Physical presence is undisputed. Thus, if one finds that the parents had the requisite intent--i.e., they intended to make that place their permanent home, to which they would always return following any absence--their domicile (and, thus, the student's domicile) is in Middle Township.

I **FIND** that the requisite intent is easily established given the duration of the residency and the lack of any indication of an intent to retain a former domicile or to move to an interim one. The family's year-round residency carried out in defiance of the association's by-laws shows a resoluteness foreign of intention.

That the year-round occupancy violated the condominium association's by-laws will not upset the family's claim of domicile. In Orange Bd. of Ed. v. N.J. State Dept. of Ed., OAL Dkt. No. EDU 016-87, Comm'r decision (Nov. 13, 1987), the Commissioner's decision (which reversed the ALJ's determination for other reasons) noted that the fact that the father's residence may have been contrary to senior

citizen housing regulations was "of no moment in making a determination of residence for school funding purposes under N.J.S.A. 18A:7B-12 and N.J.A.C. 6:20-5.3." This decision also cites I.C. and M.C. on behalf of J.C. v. Bd. of Ed. of Paterson, 1983 S.L.D. 218, for the proposition that, "the possibility of one being an illegal resident in a municipality does not interfere with a child's right to free public schooling." A pivotal issue in the I.C. and M.C. case was whether N.J.S.A. 18A:38-1 might be so construed as to import into the phrase "domiciled" a necessary and sufficient exclusion therefrom for illegal resident aliens within the school district. The ALJ concluded (and the Commissioner concurred) that the 14 year old child of the illegal resident alien should be admitted to the public school. The illegality had not defeated the assertion of domicile.

The petitioner argues that the very nature of a campground is indicative of a temporary residence, one which does not establish a domicile.

It must be remembered that the concept of a "domicile" is to be given a much more liberal interpretation when considering whether a child is entitled to receive a free public school education. N.J.S.A. 18A:38-1(d) provides another avenue to a free public education.

It provides that a free public education shall be available to persons whose parent, even though not domiciled within the district, resides temporarily therein. It also provides that any person who has had or shall have had his "all-year-round dwelling place" in the district shall be deemed domiciled therein for purposes of a free public education.

Even given credence to petitioner's argument that the student's parents are residing temporarily in the campground, the student should be deemed domiciled in the district for the purposes of school registration.

CONCLUSION

I **FIND** that respondents have resided within the district continuously since March of 1985 and as a result, the child for the purposes of school registration, is to be deemed domiciled within that district. The by-laws and applicable state regulation and local ordinance have no effect on this determination. Accordingly, I herein **DISMISS** the petition filed by the petitioner.

I hereby file this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 29, 1993
Date

JOSEPH E. KANE, ALJ

Receipt Acknowledged:

7/24/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 29 1992
Date

OFFICE OF ADMINISTRATIVE LAW

psa

OAL DKT. NO. EDU 1159-92

BOARD OF EDUCATION OF MIDDLE TOWNSHIP, CAPE MAY COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
K.K. AND P.K.,	:	DECISION
RESPONDENTS.	:	
	:	

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

Upon such review, the Commissioner concurs with the ALJ that respondents were domiciled in Middle Township for school attendance purposes during the period at issue notwithstanding that their year-round occupation of a seasonal campsite was in violation of campground bylaws and local ordinances.

Accordingly, the initial decision of the Office of Administrative Law is affirmed for the reasons well expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 8, 1992
DATE OF MAILING - SEPTEMBER 8, 1992

208-92

208-92

IN THE MATTER OF THE TENURE :
HEARING OF MONICA MEADE-STEPHENS, :
STATE-OPERATED SCHOOL DISTRICT : COMMISSIONER OF EDUCATION
OF THE CITY OF JERSEY CITY, : DECISION
HUDSON COUNTY. :
:

SYNOPSIS

Board certified two sets of tenure charges of unbecoming conduct, incapacity, and chronic and excessive lateness and absenteeism against respondent, high school Spanish teacher.

Having considered testimony of witnesses and written reprimands and observation reports, ALJ found even after repeated warnings, withholding of her increment and the certification of first set of tenure charges, respondent showed little interest in improving her performance. ALJ concluded students' academic progress was affected. (Pellechio) Respondent was ordered dismissed from her tenured position.

Commissioner adopted findings and determination in initial decision as his own. Respondent was ordered dismissed as of date of this decision. Commissioner directed matter be forwarded to State Board of Examiners pursuant to N.J.A.C. 6:11-3.6 for appropriate action.

SEPTEMBER 9, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9950-90
AGENCY DKT. NO. 284-8/90
OAL DKT. NO. EDU 7455-91
AGENCY DKT. NO. 233-6/91
(CONSOLIDATED CASES)

IN THE MATTER OF THE TENURE HEARING OF MONICA MEADE-STEPHENS, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY

Cherie L. Maxwell, Esq., for petitioner, State-Operated School District of Jersey City (Murray, Murray & Corrigan, attorneys)

Philip Feintuch, Esq., for respondent, Monica Meade-Stephens (Feintuch, Feintuch & Porwich, attorneys)

Record Closed: June 15, 1992 Decided: July 23, 1992

BEFORE **EDITH KLINGER**, ALJ:

On August 7, 1990, the State-Operated School District of the City of Jersey City (District) certified tenure charges against Monica Meade-Stephens to the Commissioner of the Department of Education, alleging chronic and excessive lateness and absenteeism, incapacity, and conduct unbecoming a teacher. An answer was filed on behalf of Meade-Stephens on November 19, 1990, and the matter was transmitted to the Office of Administrative Law on December 4, 1990 for hearing 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 June 20, 1991, the District certified a second set of tenure charges against Meade-Stephens to the Commissioner, again alleging chronic and excessive absenteeism, incapacity, and conduct unbecoming a teacher. Meade-Stephens filed her answer with the Commissioner on July 30, 1991, and on August 13, 1991, the matter was transmitted to the Office of Administrative Law for hearing 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.*

An Order consolidating the two cases was issued by the undersigned on September 24, 1991.

At a prehearing conference held on February 25, 1991, it was determined that the following were the issues to be resolved at hearing:

1. Is respondent guilty of chronic and excessive absenteeism?
2. Is respondent guilty of unbecoming conduct?
3. Is respondent incapable of carrying out the duties of her position?
4. What sanctions, if any, are appropriate?

Although the prehearing was held prior to the transmittal of the second set of tenured charges, the issues were identical; hence, the consolidation of the two cases. The hearing took place on May 13, 1992, and the record was held open to permit the parties to submit briefs. When the last submission was received on June 15, the record was closed.

REVIEW OF EVIDENCE

Anne Butler has been an employee of the District for 22 years. She served as vice principal at Lincoln High School during the 1985-86 school year. She also served as principal of Dickinson High School and is presently principal of the Nicholas Copernicus School, P.S. 25, in the District.

Butler first met Meade-Stephens when she was vice principal of Lincoln High School, where Meade-Stephens was a teacher of Spanish. Her attendance was a problem, and Butler had numerous talks with her concerning her lateness and attendance.

Butler also supervised Meade-Stephens between 1987 and 1991 at Dickinson High School, where Meade-Stephens was transferred in 1987. Butler stated that she had regular

discussions with Meade-Stephens during this time regarding her latenesses and absenteeism. Butler told Meade-Stephens that she could not continue to perform her job in this manner because her students were suffering.

At the time, Meade-Stephens was teaching five Spanish classes a day to freshman, all of whom were American-born. By its very nature, the teaching of language is a cumulative learning experience, and Meade-Stephens knew that she had to be in class consistently to allow the students to build their knowledge of the language. Her classes were made up of the lowest-performing students who needed more, rather than less, instruction than other language students.

After her conversations with Butler, Meade-Stephens was generally agreeable and said that she would try to improve. However, she continued to be late or absent, and she would sometimes leave the building during the day. When she did this, there was no chance for the school to obtain a substitute teacher except by sending notes to other teachers requesting that they cover her classes during their preparation time or announcing over the loudspeaker that a teacher was needed to cover her classes. Rarely could these substitute teachers teach Spanish.

When Meade-Stephens was absent, the District, for the most part, was unable to find a substitute teacher in the subject-matter area. If she called in sick, the District tried to get a pool substitute who could teach Spanish. If not, they tried to get a substitute just to keep order in the class. If no substitute was available, another teacher had to be taken from his or her own preparation period and paid one-fifth more money for the day because of the addition of another class to his or her schedule.

Meade-Stephens was told by Butler and other administrators that her absences and latenesses were a problem. She told Butler that they were caused by her medical problems. Butler counseled her that she was involved in too many difficult tasks which were taxing her physical condition and causing her work to suffer. In addition to her teaching duties, Meade-Stephens was involved in running her own travel business and was taking courses toward her doctorate. Whenever Butler spoke to her about the problem, Meade-Stephens was pleasant and agreed to change but never did. When Meade-Stephens explained that she was late in the morning because her medication made her groggy and it was difficult for her to get ready for school on time, Butler suggested that she ask her doctor to change her medication schedule; she never did.

During the 1985-86 school year, Meade-Stephens was absent because of illness for a total of 37 days: Six days in October; two days in November; two days in December; five days in January; 10 days in February; two days in March; four days in April; one day in May; and five days in June. A full school year consists of 180 days.

By contract, a teacher loses one-half of a day's pay for each five days of lateness. Meade-Stephens lost two days pay, or $92.87, because she was late 16 times during the 1985-86 school year.

During the 1986-87 school year, Meade-Stephens was absent 12 days through the end of 1986 and then was not in school for the entire second half of the year because she stayed out on an unofficial sick leave following an injury.

During the 1987-88 school year, respondent was out sick 55 days and took an additional number of hours of sick time, adding up to two and one-half days. Butler wanted to recommend that Meade-Stephens's increment be withheld for the following year but did not do so, based upon Meade-Stephens's promises to improve her performance. Butler now considers that her leniency at the time was a mistake.

During the 1988-89 school year Meade-Stephens was absent 43 days and a number of sick hours, adding up to two and one half additional sick days. Because of her absences, her increment was withheld by the Board of Education (Board) for the 1989-90 school year. Her administrative appeal is still pending.

During the 1989-90 school year, Meade-Stephens was absent 14 days and a number of hours, totaling two and one-half days of sick time. She was also late in arriving at school in the morning 44 times that year. The first set of tenure charges against Meade-Stephens was certified to the Commissioner on August 7, 1990, because her attendance did not improve even after her increment was withheld.

There is no Board policy relating to absences and, therefore, there are no guidelines for withholding a teacher's increment for this reason. It is left to the discretion of the principal. This allows the principal to consider the circumstances surrounding the number of absences, such as major illness or death, in determining whether absenteeism was excessive. Butler explained that the Board does not authorize absences, but it may accept

the teacher's excuses and approve an absence in the sense that the teacher got paid for the days missed.

Butler believes that the Board must have accepted Meade-Stephens's excuses for her absences in the past, or her pay would have been docked at some point. The record shows that Meade-Stephens was formally granted leaves of absence for illness from January 11 through January 19, 1988, from April 11 through May 3, 1988, from September 26 to September 30, 1988, and from December 20, 1988 to January 10, 1989. There are no other approved leaves of absence in her record.

Butler explained that there is a Board policy related to lateness; that is, a teacher loses a half-day's pay for each five days of late arrival. This is an automatic deduction, and provision for it is included in the teacher's contract. Butler excused lateness in cases of bad weather or if it appeared the teacher was not at fault. The excessive latenesses with which Meade-Stephens is charged do not include this type. Butler chose not to implement another Board policy, which did not allow a teacher who arrived after 9:00 a m into the building. However, teachers were due in at 8:30 a.m., and any teacher arriving after that time had to sign an attendance notebook (late sheets).

Meade-Stephens's latenesses are documented in the late sheets for the 1990-91 school year. She was required to be at school at 8:30 in the morning because she had a homeroom period scheduled. The book shows that she was too often not there at the expected time.

Her latenesses were not restricted to her appearance in the morning. She was often late returning to school after lunch. Butler said that when she spoke to her, Meade-Stephens told her that she had to take care of her travel business at lunchtime. Butler explained to her she could not do that because her students were being left unattended after lunch. Meade-Stephens denied that she took care of her business at lunchtime. She stated that she went home for lunch, and her home happened to be in the same building where her business was located.

Barbato Russomagno, supervisor of the foreign language department in the District, was Meade-Stephens's immediate supervisor. On March 12, 1990, he wrote a letter to her reprimanding her for leaving her seventh-period class unattended for 15 minutes. She told him that she had gone to the main office on the first floor to duplicate a test for her class.

He found her reason unacceptable and her behavior "unprofessional, at the very least, and [that it] displays disregard for both student safety and school rules and regulations."

Russomagno explained at the hearing that respondent would have had the opportunity to duplicate the examinations at some other more appropriate time. Meade-Stephens testified that she would have been able to return to her classroom in time if she had been given the key to the copy room as she had requested. Instead, she had to go to the main office to make copies, which took longer.

On November 16, 1990, Meade-Stephens received a written reprimand from Margaret Oliver, a vice principal of Dickinson High School. Oliver wrote, "You were not on your hall patrol (period 9) on Friday, Nov. 16, toward the end of the period. Please arrive on time and remain on patrol until 3:00 p.m." Oliver again had occasion to reprimand Meade-Stephens for being late to her hall patrol assignment during period nine on December 3, 1990.

On April 9, 10, and 11, 1991, Meade-Stephens was assigned as an examiner for the High School Proficiency Test (HSPT) at Dickinson High School. Because of her lateness to school, she was not able to perform her duties on April 10 and 11. She was reprimanded for this failure on April 12, 1991, by Frances M. Brill, a vice principal of Dickinson High School. Brill reminded her that she had been late 35 mornings up until that time and that her latenesses impacted on her students and on other staff members.

On April 10, 1990, Meade-Stephens was observed by Russomagno teaching a Spanish 1B class. She was rated by him as unsatisfactory in all areas except her proficiency in the subject matter, which was good, and her ability to establish rapport with the pupils, staff, and/or parents and community, which he described as fair. Russomagno reported that respondent's assessments of the needs and evaluation of the progress of her pupils was unsatisfactory.

The class began with Meade-Stephens announcing a test covering Chapter 18 scheduled for the next day, and she began to review for it. Her lesson plan made no reference to the test either on an earlier or subsequent day. One-third of the students were absent and, of those present, only the same one or two students were able to respond. It was clear that the subject matter had been given insufficient coverage; according to Russomagno, the students' lack of understanding was obvious and should

have been addressed during a lesson. He suggested that given the level of understanding of the students, respondent should have withdrawn the announcement of the test.

Russomagno also criticized respondent's quizzes and tests as being hastily prepared, "primarily discreet--point (at recall level) rather than application-oriented, as required through departmental goals of communicative competence." He added, "Attention to deficiencies noted in uniform exam results is minimal."

Russomagno assessed Meade-Stephens's employment of effective organization and planning as unsatisfactory. He found her lessons plans "unnecessarily difficult to read/interpret." In his opinion, her planning revealed "unrealistically fast pacing of instruction and presents no evidence of long-range objectives" and believed that her treatment of the course content was superficial. She also showed no differential in her lesson plans based on the level of achievement among her four Spanish 1B classes or on the individual needs of students. He was also concerned about the lack of relationship between her lessons plans and her actual instruction, as evidenced by the class which he observed on April 10.

Russomagno rated Meade-Stephens's utilization of effective instructional techniques as unsatisfactory. As stated before, he found the class unprepared and uninvolved with the lesson.

> Yet there was no check for understanding by teacher nor did any re-teaching take place. Teacher must assess students' needs on an ongoing basis and adjust instruction accordingly. Teaching techniques must be varied in order to accommodate students' varied learning styles. Teaching is too hurried. Teaching tone is too loud and strident.

In preparing his evaluation of April 10, 1990, Russomagno checked Meade-Stephens's record of latenesses, which he obtained through the school records and which he discussed with the principal. There were 57 latenesses as of April 10, and respondent was six minutes late for class on the date of the observation. This happened in spite of his written reprimand to her of March 12, 1990 for arriving at her class late and leaving it unattended.

In her written comments in response to Russomagno's unsatisfactory ratings, Meade-Stephens explained that she was late on April 10 because the parking lot at Dickinson was

newly paved, there were no marked parking spaces, and the head security guard told her to go back and move her car as she was entering the building for her sixth-period class.

Meade-Stephens also stated that Russomagno was unfair in rating her unsatisfactory based upon her lesson plan. The lesson plan provided to him in her plan book was incorrect, and she had written a corrected one on the board and was following it at the time. She claimed to have pointed this out to him at the time, and she explained to him that she had revised her lesson plans because she was involved with the HSPT that week and had to make changes in her plans

Respondent explained her absences and latenesses generally by the fact that, "[I was] recovering from diverticulitis, I have a recurring ulcer, high blood pressure and this year endometriosis. I am supposed to be in the hospital for minor surgery this month (May)." She explained her latenesses by the fact that she was a certified doctoral student at Columbia University Teachers College and worked many late nights completing her doctoral dissertation. This, she said, happened because the school had denied her a sabbatical leave.

Meade-Stephens attributed the unsatisfactory evaluation, to a large extent, to Russomagno's personal animus towards her and prejudice against her, stating that his style was to "lead by fear!"

According to Russomagno, the last time Meade-Stephens was evaluated by someone in the foreign language department prior to April 1990 was in 1982, not including occasional observations, monitoring, or visiting. His attempts to evaluate her were always put off by her with claims of illness or other excuses.

Meade-Stephens was observed on February 24, 1991 by Frances Brill, who also rated her unsatisfactory in all areas except proficiency in subject matter and establishing rapport with pupils, staff, and/or parents and community. She was rated good in both of these areas.

Brill commented on Meade-Stephens's failure to present material on the blackboard clearly because the previous lesson was inadequately erased. Her record-keeping was sloppy and difficult to read, and there were obscenities in her record book. Her plan book lacked "student-centered objectives." There was no plan written for each day. Some days

had "teacher absent" written in instead of plans that should have been written in the week before. Teaching time was not used effectively. Students appeared "confused and did not know what was expected of them." Students were not encouraged to participate in the lesson. Transitions from one area of teaching to another were not smooth, and insufficient time was allowed for effective closure of the lesson. Brill reprimanded Meade-Stephens for being late 31 mornings as of the date of the observation.

> Your signed PIP indicates you plan to correct this problem. Your lateness is unfair to your homeroom students and places a burden on the clerk, teachers, and the administrative staff. Learn to manage time efficiently so that you arrive at school by 8:30 a.m.

Meade-Stephens responded to this evaluation in essentially the same manner as she responded to the evaluation by Russomagno the year before; she presented justification of her methods and an attack on her evaluator as "just trying to 'get me.'" Meade-Stephens apparently initiated a grievance procedure against Brill and demanded that she apologize both to her and her class "for the misunderstanding, to disregard this evaluation, and to evaluate another class."

Meade-Stephens claimed that all of her absences were approved by the Board, at least retroactively. She further claimed that no one ever suggested to her that she take an extended leave of absence without pay for illness. She believed that the only penalty that should have been imposed for lateness was the contractual agreement to dock her pay; once that was done, no further action could be taken by the District against her for this reason. She also testified that no one ever warned her that her absences and latenesses were a problem which might subject her to disciplinary action. She specifically denied that Butler ever discussed these subjects with her.

Meade-Stephens's absences had a significant effect on the ability of her students to master the subject. Her high rate of absences often left her students in the care of a teacher with no knowledge of the subject matter But even if the school were able to obtain a substitute with knowledge of Spanish, Meade-Stephens's lesson books contained no plan for the days on which she was absent, so that a substitute was unable to provide continuity to the class.

When she was present, respondent's lesson plans suffered because she attempted to rush through the subject matter to cover the course material in the available time This

failure rate of students in her class was higher than for Spanish teachers who were present in school on a more regular basis.

The uniform examinations given by the foreign language department required uniformity in preparation, administration, and evaluation of the results. This made it possible for Russomagno to make an across-the-board comparison of results for each teacher to see that the established objectives for each language were being reached. There were 11 different objectives. Russomagno could use the test results to compare the district average, school average, and teacher average for each objective for each language taught. He could then show the teachers how their students progressed from the year before.

By performing this analysis, Russomagno found that Meade-Stephens's absences definitely affected her students. She had more students fail the course in the years that she had the highest rates of absences than other teachers who taught the same subject in the same school in the same year. A 30-percent failure rate is the norm. In the 1987-88 school year, when Meade-Stephens was out sick 55 days, 70 percent of her class failed for the year.

From the evidence, I **FIND** that Meade-Stephens was absent an excessive number of times based upon the effect which it had upon her students' academic progress. I **FIND** that in spite of her testimony, she was warned repeatedly that her absences and latenesses were excessive. It is not clear why she did not consider repeated verbal and written warnings and reprimands, increment withholdings, or the first set of tenure charges adequate notice that her record was unacceptable to the District. I further **FIND** that even with repeated warnings, Meade-Stephens showed little interest in improving her performance; she even argued that she was improving because she had substituted latenesses for sick days.

DISCUSSION OF LAW AND CONCLUSIONS

There are no absolute standards as to when absence or lateness becomes chronic or excessive. However, the case law is clear that this boundary is crossed when the performance of students begins to suffer. *State-Operated School District of N.J. v. Pellecchio*, 92 *N.J.A.R.*2d (EDU) 267. This is true even where the absences are for legitimate medical or health reasons. *Id.* at 270.

I **CONCLUDE** that Meade-Stephens's absences were chronic and excessive based upon the appalling consequences to the students with whose instruction she was charged. I further **CONCLUDE** that in spite of repeated warnings, her poor performance continued; she herself testified that her latenesses were in lieu of former absences and that, in effect, she made a conscious choice to continue her prior course of conduct in a different form. Although her lateness was not the subject matter of the first set of tenure charges, in light of Meade-Stephens's testimony and the number of oral and written warnings and reprimands in the record, I **CONCLUDE** that there is no merit to her argument that she had no notice that her record of lateness, as well as her record of absence, was a problem. Consequently, I **CONCLUDE** that Meade-Stephens should be subject to disciplinary action for chronic and excessive lateness and absenteeism.

The record further reveals that Meade-Stephens did not prepare her classes in advance, with the result that if she were absent, a substitute Spanish teacher, if available, could not provide her students with the cumulative learning experience necessary for the teaching of the language. She herself had to rush through the curriculum in order to cover all of the required ground before the uniform tests were administered each year. It appears from the observations of her teaching that this made her coverage of the material superficial, with no regard for the level of achievement of her classes or the individual needs of her students. (It is hard to see how she would have knowledge of the level of achievement of her classes and of the individual needs of her students given her lack of attendance.) When this is added to her inability or unwillingness to be at her assigned place at the appropriate time, I **CONCLUDE** that her behavior constitutes a course of conduct unbecoming a teacher as alleged. Her students were clearly the least important of her priorities, and their needs were relegated to whatever time she had left over from her other activities.

I **CONCLUDE** that the District has not proven by a preponderance of the credible evidence that Meade-Stephens was incapable of performing her duties, only that she did not try to or could not fit them into the rest of her schedule.

Because of the ongoing nature of Meade-Stephens's conduct and her unwillingness to take any reasonable steps to alter it in spite of repeated warnings and disciplinary actions which she denies receiving, it is clear that the only adequate sanction that can be

applied is to remove her from her position. Her students cannot continue to bear the brunt of her unsatisfactory performance.

I **CONCLUDE** that there is no merit in Meade-Stephens's argument that she should not be subject to discipline because her poor performance was condoned by the Board in the past. For her to advance this argument, in the face of her negative impact upon her classes, shows a lack of professionalism which should not be allowed to affect succeeding generations of students placed in her care. The Board cannot be compelled, based upon its alleged prior inaction, to continue to tolerate her misconduct.

ORDER

It is hereby **ORDERED** that Monica Meade-Stephens be **REMOVED** from her position as a teacher of Spanish in the State-Operated School District of the City of Jersey City, Hudson County.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 23, 1992
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

Maureen K. Keller

DEPARTMENT OF EDUCATION

July 29, 1992

DATE

Mailed to Parties:

JUL 30 1992

DATE

Jaynee LaVecchia

OFFICE OF ADMINISTRATIVE LAW

md/e

APPENDIX

WITNESSES

For Petitioner:

M. Butler
Frances M. Brill
Barbato Russomagno

For Respondent:

Monica Meade-Stephens

EXHIBITS

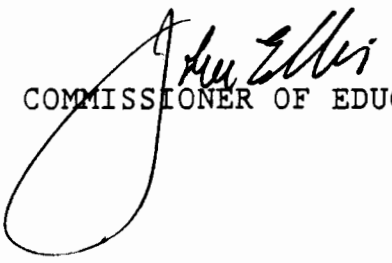
P-1	Teacher Attendance Record, 1985-86
P-2	Teacher Attendance Record, 1986-87
P-3	Teacher Attendance Record, 1987-88
P-4	Teacher Attendance Record, 1989-90
P-5	Teacher Attendance Record, 1990-91
P-6	Notice of increment withholding, August 2, 1989
P-7	Amended notice of increment withholding, August 18, 1990
P-8	Notification of Board action on increment, August 31, 1989
P-9	Teacher Attendance Record, 1988-89
P-10	Record of Board-granted leaves of absence
P-11	Record of Board-granted leaves of absence
P-12	Observation report, February 27, 1991
P-14	Written reprimand, November 16, 1990
P-15	Written reprimand, December 3, 1990
P-16	Written reprimand, April 12, 1991
P-17	Report from Russomagno to Butler, March 12, 1990
P-18	Observation Report, April 10, 1990

IN THE MATTER OF THE TENURE HEARING OF MONICA MEADE-STEPHENS, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Respondent's exceptions were untimely filed pursuant to N.J.A.C. 1:1-18.4. Because respondent's submission was untimely, the Board's reply exceptions as well as the exceptions are not considered in the adjudication of this matter.

Upon a careful and independent review of the record of this matter, which, it is noted, includes a transcript of the proceeding below, the Commissioner adopts those findings and conclusions of the ALJ finding that respondent is guilty of conduct unbecoming a teaching staff member as a result of chronic tardiness and excessive absenteeism during the subject years, which behaviors resulted in pronounced and inexcusable deficit in the education of the students with whom she was charged as a teacher of Spanish. The Commissioner's review of the record comports with the ALJ's conclusion that the ongoing nature of respondent's conduct and her unwillingness to take steps to alter it in spite of repeated warnings and disciplinary action warrant dismissal from her tenured employment with the State-operated school district of Jersey City. The Commissioner so finds.

Accordingly, for the reasons expressed in the initial decision, respondent is directed to be removed from her tenured employment with the State-operated school district of Jersey City as of the date of this decision. It is further directed that the matter be forwarded to the State Board of Examiners pursuant to N.J.A.C. 6:11-3.6 for further action as it deems appropriate.



COMMISSIONER OF EDUCATION

SEPTEMBER 9, 1992

DATE OF MAILING - SEPTEMBER 9, 1992

208-92

EDU #9950-90 and 7455-91 (consolidated)
C # 208-92
SB # 45-92

IN THE MATTER OF THE TENURE :
HEARING OF MONICA MEADE-STEPHENS, : STATE BOARD OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF : DECISION
THE CITY OF JERSEY CITY, HUDSON :
COUNTY. :
:

Decided by the Commissioner of Education, September 9, 1992

For the Petitioner-Respondent, Murray, Murray & Corrigan
(Cherie L. Maxwell, Esq., of Counsel)

For the Respondent-Appellant, Monica Meade-Stephens, pro se

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

January 6, 1993
Date of mailing JAN 08 1993

209-92

209-92

TALAYA YVETTE STODDARD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION ON REMAND
RESPONDENT.	:	

SEPTEMBER 9 , 1992

TALAYA YVETTE STODDARD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION ON REMAND
RESPONDENT.	:	

For the Petitioner, Talaya Yvette Stoddard, pro se

For the Respondent, Marlene Zuberman, Deputy Attorney General (Robert J. Del Tufo, Attorney General)

This matter is before the Commissioner of Education by directive of the State Board of Education, which, in a decision of September 2, 1992, rejected the Commissioner's holding, as expressed in a letter decision to petitioner dated May 15, 1992, that, as argued by the Attorney General representing respondent, the Commissioner did not have jurisdiction over denial of teaching certificate by the State Board of Examiners and that petitioner's appeal should be filed with the State Board of Education. The Board held instead that jurisdiction in this matter lay with the Commissioner of Education and directed him to consider the matter on its merits. Accordingly, as the Board of Examiners had not previously filed an answer on the merits, it was directed to do so; upon receipt of said answer, the record of this matter was deemed closed and the Commissioner determined to proceed to summary judgment.

Petitioner argues that the Board should not have denied her teaching certificate on the basis of a single incident of theft by deception (welfare fraud), as 1) her offense was a minor misdemeanor, she was not convicted of any crime and she was found qualified for school employment under the criminal history background check laws; 2) the underlying incident (failure to report a savings account when applying for benefits) was an isolated one arising out of a desperate personal situation, the fear that the savings earmarked for her college expenses would prevent her from receiving the public assistance she needed as a single parent to support herself and her newborn child while attending college in order to better herself and prepare for a worthwhile career; 3) while in college she worked diligently and distinguished herself in several areas including her chosen field of early childhood education as indicated by numerous honors and awards; 4) she has reported faithfully to her probation officer, who specifically recommended that she be granted her certificate, and is fully complying with the court's requirements for monetary restitution; and 5) she has grown through her education and experiences over the past five years to realize that she should not have done what she did, and she sincerely regrets her actions even apart from the consequences they have had for obtaining her certificate. In sum, petitioner asks that one mistake, committed at age 19, not be permitted to destroy everything she has worked for and deny her entry into a profession for which she has been fully trained and in which she has shown the capacity to excel.

In reply, the Board of Examiners argues that 1) petitioner's offense is a real one notwithstanding that it did

not rise to the level required for disqualification pursuant to N.J.S.A. 18A:6-7.1 or forfeiture of public employment pursuant to N.J.S.A. 2C:51-2; 2) that these statutes speak only to who may not serve in the public schools, and do not in any way limit the discretion of the Board of Examiners to determine who is entitled to a teaching certificate; 3) that N.J.A.C. 6:11-2.2 clearly provides for the Board to refuse to issue a certificate "where the applicant has been found by a court or administrative agency of competent jurisdiction, to have engaged in conduct which would have provided adequate grounds for the revocation of the certificate, if then held;" and 4) that petitioner's admitted act of theft by deception, which clearly constitutes conduct unbecoming a teacher, would be sufficient to sustain a revocation proceeding under "other just cause" pursuant to N.J.A.C. 6:11-3.4, so that the Board acted within the scope of its lawful discretion in denying petitioner her certificate.

Upon careful review of this matter, the Commissioner determines to reverse the decision of the Board of Examiners and direct that petitioner be awarded her teaching certificate.

In so determining, the Commissioner is persuaded that the Board, while properly recognizing the gravity of petitioner's conduct, particularly in view of the high standard required for public school teachers, gave insufficient consideration to the fact that 1) petitioner's offense is the sole blemish on an otherwise outstanding record and was committed five years ago (August 1987) at the age of 19 and prior to her becoming a teacher under circumstances which, while they do not exonerate petitioner, have a mitigating effect on the consequences she should be made to suffer

beyond those imposed by the court; 2) petitioner's probation officer (to whom she has reported, by judgment of December 1990, from January 1991 to the present) has found her to be of sufficiently responsible and mature character to warrant reporting once a month by telephone, and specifically urges that petitioner not be denied her teaching certificate; 3) petitioner has submitted ample evidence of both extraordinary effort and a very high degree of success in her educational endeavors, as well as of the regard in which she is held by people in a good position to judge her character and sincerity. In view of all this, the Commissioner finds that the Board's denial of petitioner's application for certificate was an unreasonable exercise of its discretionary authority.

Accordingly, the Commissioner rejects the determination of the State Board of Examiners to deny petitioner's certificate based on her offense of theft by deception and directs that, presuming she has otherwise met applicable requirements, petitioner be awarded her certificate forthwith.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 9, 1992

DATE OF MAILING - SEPTEMBER 10, 1992

211-92

211-92

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF WILLINGBORO, BURLINGTON	:	
COUNTY.	:	
_____	:	

SYNOPSIS

Petitioners, ten legally registered voters, sought inquiry into alleged acts of negligence and omission at annual school election (not checking signatures, improprieties in campaign literature and improper electioneering).

ALJ found petitioners did not prove that will of people was not expressed in election results so as to necessitate a new election. (In re Wene) Moreover, proper remedy for violations by individuals is pursuit in a court of appropriate jurisdiction. Petition was dismissed.

Commissioner concurred with ALJ that irregularities did not rise to level necessary for remedy of setting aside election results. Commissioner did, however, refer matter to County Prosecutor for action against individual candidates and/or officials as deemed appropriate.

SEPTEMBER 10, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3001-92
AGENCY DKT. NO. 129-4/92

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY.

James P. Granello, Esq., for petitioners

Record Closed: June 10, 1992 Decided: July 27, 1992

BEFORE **M. KATHLEEN DUNCAN**, ALJ;

Pursuant to a letter complaint filed by ten legally registered voters, Lloyd R. Davis, Ann Palmer, Sylvia Riddick, Ronald Snowden, Claire M. S. Grimes, Richard M. Tucker, Russel T. Brankley, Lillian W. Parykaza, Edward M. Ayer, and Robert L. Thorpe, Sr., the Commissioner of Education determined to conduct an inquiry into the annual school election held on April 7, 1992, in the school district of the Township of Willingboro, Burlington County.

On April 29, 1992, the matter was transmitted to the Office of Administrative Law pursuant to N.J.S.A. 52:14F-1 et seq. A hearing was conducted on June 1, 1992, at the Westhampton Township Municipal Building, Mt. Holly, New Jersey. Following the close of the hearing, the record remained open for the receipt of written

argument. A letter memorandum on behalf of petitioners was received on June 10, 1992, whereupon the record closed.

FINDINGS OF FACT

Most of the facts relevant to a determination of the within matter are not in dispute and I, therefore, **FIND** the following as uncontested facts.

An election was held on April 7, 1992, to fill three seats on the Board of Education of the Willingboro School District. The announced results were as follows:

CANDIDATE	AT POLLS	ABSENTEEISM	TOTAL
Linda Taylor	1,676	18	1,694
Victor Smith	1,498	15	1,513
Frank Phillips	1,405	15	1,420
Lloyd Davis	1,338	11	1,349
Ann Palmer	1,321	13	1,334
Sylvia Riddick	1,258	10	1,268
Alice C. McIntosh	1,036	2	1,038
Marcellus D. Smith	960	1	961
Martin Nock	849	2	851
Hosey Best	217	1	218
James Lewis	208	0	208

(P-24 in evidence)

Petitioners challenge the election of Linda Taylor, Victor Smith and Frank Phillips and assert that a new election is required as the result of the following alleged violations of the school election law.

> Failure to conform to N.J.S.A. 18A:14-97 which requires printed matter used in elections to show the source of payment and printer.

A number of pieces of campaign literature were identified by witnesses at the hearing as having been distributed during the election and on the day of the election failed to comply with the statutory requirement that they must show the source of payment and printer. Some items contained no reference to source (P-1 in evidence). Others such as P-5 in evidence, simply stated "ordered and paid for by the

candidates." P-28 in evidence appears to have been sent by a group or committee of supporters for the winning three candidates, Taylor, Smith and Phillips and it contains no name or address of association or group or the name of one person who was acting for such group. I **FIND** that petitioners have offered sufficient evidence to establish this violation.

> Use of Student Records for Campaign purposes contrary to N.J.S.A.18A:36-19 (the statute providing for confidentiality of pupil records and their accessibility to parents and adult students); N.J.A.C. 6:3-2.4 et seq. (limiting access to pupil records to only authorized organizations, agencies or persons as defined in the regulations and allowing access by school district personnel but only for specifically assigned school related tasks) and N.J.S.A. 18A:14-101 (the statute which prohibits impeding or interfering with a voter.)

Several witnesses testified that they had received written material addressed to "The parents of" followed by the student's name. In some instances the student had already graduated and was no longer enrolled in the Willingboro School System. Marcellus Smith testified that the envelope he received addressed "To the parent or guardian of" could only have come from within the school system since nobody knew he was the child's guardian except the school. By telephone, several callers used a parent's or guardian's unlisted telephone number, addressed the person by name and in some instances identified themselves as teachers or librarians and had a knowledge of the student's school related activities, i.e., wrestling team membership. Petitioners assert that these instances leave a clear inference that pupil records were unlawfully utilized by the winning candidates. They also assert that improper and illegal use of pupil records violates the provisions of N.J.S.A.18A:14-101 which states:

> No person shall by abduction, duress or any forcible or fraudulent device or contrivance whatever, impede, prevent or otherwise interfere with the free exercise of the elective franchise by any voter at any election; or compel, induce or prevail upon any voter either to vote or refrain from voting at any election, or to vote or refrain from voting for any particular person or persons at any election.

While it certainly appears that someone obtained access to and improperly used pupil records for the purposes of making mass mailings to "the parents of" Willingboro students and former students and placing telephone calls to unlisted numbers, and the facts do support an inference that at least some of those people were school district employees, and such actions violate the Family Educational Rights and Privacy Act and regulations, they certainly do not rise to the level of

duress or fraud or contrivance or force such as to impede a voter in the exercise of his franchise. I **FIND** no violation of N.J.S.A. 18A:14-101.

> Violation of prohibition against electioneering at or near the polling places contrary to N.J.S.A 18A:14-72 and N.J.S.A. 18A:14-81

Testimony presented by petitioners at the hearing clearly established violations of the following statutory provisions:

> N.J.S.A. 18A:14-72 Obstructing elections; electioneering near polling place prohibited
>
> If a person shall on any day fixed for any election tamper, deface or interfere with any polling booth or obstruct the entrance to any polling place, or obstruct or interfere with any voter, or loiter, or do any electioneering within any polling place or within 100 feet thereof, he shall be a disorderly person and shall be punished by a fine not exceeding $500.00 or by imprisonment not exceeding one year, or both
>
> N.J.S.A. 18A:14-81 Prohibits certain electioneering; penalty
>
> If a person shall distribute or display any circular or printed matter or offer any suggestion or solicit any support for any candidate, party or public question, to be voted upon at any election, within the polling place or room or within a distance of 100 feet of the outside entrance to such polling place or room, he shall be a disorderly person.

Mary Rodriguez testified that she had voted at the Garfield Park East location at around 3 p.m. and observed children running around handing out campaign literature for the Smith, Taylor and Phillips' slate within 25 feet of the entrance of the school. She acknowledged that she had not filed any complaint about the conduct. Robert Rodriguez also testified concerning the same activity at Garfield East Elementary School at 4 or 5 p.m. Lynn Sanford testified that she voted at Hawthorne School at approximately 2:30 and had observed people with signs and children handing out literature within 50 feet of the entrance of the building. She did not know what the signs said and she did not look at the literature the children were handing out. Pauline Snowden also testified concerning the electioneering which was taking place at Garfield East at around 5:30 p.m., although she too indicated that she did not look at the literature. Ann Palmer testified that when she voted at Garfield East Elementary School a little after 3 p.m. she observed children with signs inside the polling place and Linda Taylor, one of the ultimately successful candidates, was standing at the door passing out literature. When she complained to Ms. Allen, one of the poll workers, Ms. Allen said she had told them to leave. She

testified that the children were actually passing out business cards indicating the positions of the Smith, Taylor and Phillips slate on the voting machines to voters as they were standing on line waiting to vote. "She put them out on several occasions," she testified concerning Ms. Allen. Martin Nock testified that he voted at the Levitt Administration Building between 3 and 3:30 at which time he observed teachers within the 100-foot limit handing out literature for the Linda Taylor slate. He also observed children running up to the door and handing out flyers. Marcellus D. Smith, Jr., an unsuccessful candidate, testified that when he had voted at Twin Hills Elementary School between 7:30 and 8 he did not see any electioneering taking place. He testified that he had seen Victor Smith supervising children handing out campaign literature at Hawthorne School well within the 100-foot limit. He also testified that Victor Smith had been verbally and physically abusive to him and had actually pushed him. Robert Reynolds testified that he had voted at McGinley School at approximately 3 p.m. and that while he was waiting to vote he observed small children handing out political information for the Taylor, Phillips, Smith group to people waiting in line. He personally observed the children hand literature to 10 or 12 people. He testified that his wife had complained to the inspector who was standing next to the voting machine and who would also have been in a position to see the children. He testified that later on when he had taken his daughter to vote, a woman was supervising children who were passing out campaign literature near the front entrance. The woman kept calling the children back to outside the 100 feet, but they kept running back toward the building. He testified that he did not register a complaint the second time and also that he did not see any complaint forms available. Raymond Findley, Jr., also testified that he observed campaigning within the 100-foot mark at Levitt Administration Building at approximately 6 p.m. The literature and the signs supported the Taylor, Smith, Phillips slate. Margaret A. Reynolds testified that when she had spoken to the poll worker about the children passing out literature to the voters on line, the poll worker said that there was nothing she could do about it, that she was too busy and that she had been on her feet all day. She testified that the children were still there when she left 15 or 20 minutes later. I **FIND** petitioners have offered sufficient evidence to establish these violations.

> Violations of N.J.S.A 18A:14-101 by distributing literature containing intentionally false allegations within a few days of Election day.

Petitioners presented testimony concerning various statements and campaign literature distributed by the Smith, Taylor, Phillips slate the weekend before the

election. Specifically, the witnesses charged that statements which claim that both the "Reformers" and "Three M" groups were going to "close two more elementary schools" and implement "pay to play" requiring payment for participation in extracurricular activities were intentionally false. This they alleged to be a violation of the N.J.S.A. 18A:14-101 previously quoted hereinabove which prohibits impeding or interfering with a voter.

The nature of an inquiry such as this one conducted by the Office of Administrative Law for the Commissioner of Education is not conducive to fully and fairly determining issues such as alleged fraud or libel. At an inquiry witnesses frequently present only one side of the controversy and are not subject to cross-examination. Accordingly, no determination can be made concerning the truth or accuracy of the allegations in the campaign literature. This is an issue properly resolved in other forums, where those accused are represented and have an opportunity to be heard.

Failure of polling officials to perform their duties in violation of N.J.S.A. 18A:14-67, 18A:14-50 and 18A:14-51.

The materials handed out prior to the election by the Board Secretary to election officials directs that illegal electioneering should be reported to the police; petitioners' assert that despite the pervasive illegal electioneering in and around the various election polls on election day the police were not contacted, although there was no direct evidence that this was the case, other than the testimony from Margaret Reynolds that an unnamed inspector had stated that she was "too busy" to do anything about it. Robert Rodriguez, who was a challenger stationed at Twin Hills throughout the day, testified that he never saw a poll worker check the poll list signatures with the signature copy register as required by N.J.S.A. 18A:14-50 and 18A:14-51. He also testified that he had to go outside and chase the kids away. "We were woefully understaffed," he said , "very busy." Nevertheless, he did not register any formal complaints. Joseph Capelli, who voted at Twin Hills at about 5:25 p.m., witnessed at least 4 people on line ahead of him vote without having the poll worker check the registration book. He testified that one person claimed she was not registered and was still permitted to vote. Robert Reynolds, who checked the registered voter list for Willingboro against the signatures and addresses in the poll list, found 22 names on the poll list of persons who appeared not to be properly registered voters. Mr. Reynolds also noted that there was a three-vote difference between the announced total (not including absentee ballots) and the signature count. He also detected ten duplicate ballot number entries indicating that at least

two people voted with the same number on ten separate occasions. Eight signature lines had no number of the official ballot used and 114 ballots were not in the proper number sequence. At Hawthorne 83 ballot numbers were missing altogether. Mr. Reynolds also testified concerning cross outs in name or address which were not initialed or explained and markovers or strikeouts on 113 ballot numbers. Twenty-eight entries were missing address designations. Finally, Lee Muller, the Board Secretary, acknowledged that she had appointed two district employees to serve as poll workers, contrary to N.J.S.A. 18A:14-6, which requires appointments from qualified voters "who are not members or employees of the Board of Education." Based upon the testimony and the documentary evidence, I **FIND** there is sufficient evidence to **conclude** these violations occurred.

APPLICABLE LAW AND DISCUSSION

The legal standard to be used in analyzing the facts in an inquiry such as this one is articulated at N.J.S.A. 18A:14-63.12 as follows:

> Upon written request within 5 days of the announcement of the result of an election by any defeated candidate, or, in the case of a question, proposition or referendum, upon petition of 10 qualified voters at any school election, the Commissioner of Education or his authorized representative shall inquire into alleged violations of statutorily prescribed procedures for school elections, to determine if such violations occurred and if they affected the outcome of the election.

Case law has made it abundantly clear that any irregularities or violations established must be the producing cause of a result which otherwise would not have occurred.

> The rule in our State is firmly established that if any irregularity or any other deviation from the election law by the election officials is to be adjudged to have the effect of invalidating a vote or an election, where the statute does not so expressly provide, there must be a connection between such irregularity and the result of the election; that is, the irregularity must be the producing cause of illegal votes which would not have been cast or of defeating legal votes which would have been counted, had the irregularity not taken place, and to an extent to challenge or change the result of the election; or it must be show that the irregularity in some other way influenced the election so as to have repressed a full and free expression of the popular will... In re Wene, 26 N.J. Super 363, 383 (Law Div. 1953), aff'd sub nom. Wene v. Meyner, 13 N. J. 185 (1953)

The burden of establishing, with a reasonable degree of certainty, that violations have altered the election outcome which otherwise would have resulted is upon petitioners. In re Application of Moffat, 142 N.J. Super. 217, 224 (App. Div. 1976), certif. den. sub nom. Princeton Twp. v. Bleiman, 71 N.J. 527 (1976).

In the within matter, petitioners have established a number of irregularities; clearly election officials were derelict in performing their duties by failing to check the signatures from the poll list with the signature copy register, and by failing to fully enforce the prohibition on electioneering near the polling places. There is an important distinction between the binding effect of election laws upon officials entrusted with their administration in connection with their being subject to a punishment for a violation thereof, or the effect of such provisions if enforced as a challenge at the time of voting, on the one hand, and as to whether, on the other hand, an irregularity as to a particular provision due to no fault of the voter and not involving fraud or repression of the full and free expression of the popular will, should after the election have the effect of invalidating such votes. In re Wene, Supra, 26 N.J. Super. at 385, In re Smock, 5 N.J. Super. 495 (Law Div. 1949).

Not one of the witnesses who testified at the hearing herein in any way indicated that his or her vote was prevented or changed by the various illegal activities observed. The only evidence offered by petitioners which tended to establish that illegal votes may have been cast related to a 3-vote difference between at-the-polls total and poll list signatures and 22 voters who may not have been properly registered. The names and/or addresses of those voters are set forth in P-25 in evidence. Even if we assumed that all twenty-five voters were illegally permitted to vote and that all twenty-five voted for the winning candidates, the illegalities would be insufficient to change the election results since 71 votes separate the winning third-place candidate and the losing fourth-place candidate. Furthermore, no such assumption may be made concerning how anyone voted. Matter of Mallon, 232 N.J. Super. 249 (App. Div. 1989), the one case directly cited by petitioners in their post-hearing written submission, makes it clear that petitioners are required to prove whether illegal votes cast in the election were cast for the opposing candidates. Id., 268, 273. Faced with the total absence of proof directly related to illegal votes or any individuals who were illegally deprived of the right to vote, petitioners argue that the totality of irregularities present in this election constituted "malconduct" on the part of the election workers. The case cited by petitioner, Matter of Mallon, supra, does not support their proposition, however. Therein the court explained:

> ..."Malconduct" is the first of three words in section a used to characterize prohibited actions of election officials. It is juxtaposed with "fraud" and "corruption." Hence, "malconduct" should be read in pari materia with those words even though the disjunctive is used. Red Bank Reg. Ed., Ass'n v. Red Bank Bd. of Edu., 151 N.J. Super. 435, 438 (App. Div. 1977), aff'd 78 N.J. 122 (1978); State v. DeMarco, 174 N.J. Super. 411-415 (Law Div. 1980); Allstate v. Howard Savings Inst., 127 N.J. Super. 479-494 (Ch. Div. 1974); 1A Sutherland, Statutory Construction (4th ed. 1985), § 21.14. The term "malconduct" is defined as "bad conduct; especially dishonesty in managing public affairs." Wesbter's Third New International Dictionary (1971). Black's Law Dictionary, (5th ed. 1979), contains the definition:
>
> > Malconduct. Ill conduct, especially dishonest conduct, maladministration, or, as applied to officers, official misconduct.
>
> "Mal" is defined as "A prefix meaning bad, wrong, fraudulent; as maladministration, malpractice, malversation, etc." Ibid. Maladministration is defined in this same law dictionary as being used "interchangeably with misadministration, and both words mean 'wrong administration.'" The Latin derivation of mal is "evil" or "bad." The malconduct referred to in N.J.S.A. 19:29-1a must result from a degree of gross negligence or inattention to duty tantamount to purposeful conduct such as fraud or corruption. Isolated acts of negligence or omission do not rise to the level of official malconduct. Id. at 271-272.

The evidence in the within matter establishes isolated acts of negligence and omission by very busy election workers, not dishonesty or fraud. Undoubtedly signatures should have been checked against the signature copy register and local law enforcement authorities should have been called to cease the improper electioneering which was taking place at some of the polling places. The negligent conduct of poll workers who failed to comply with their obligations in this regard is reprehensible; there is not one iota of evidence, however, to establish that such conduct changed what otherwise would have been the election results. Furthermore, petitioners do not describe how any of the other irregularities cited affected the election outcome, and it is not apparent how any of them could have done so. Petitioners took no action to correct or arrest or redress the violations or violators at the time of occurrence. Their litany of complaints to the Commissioner after the fact may not be utilized to overturn the election simply because they do not like the results.

Petitioners are not without their remedies to address the alleged wrongful conduct of the winning candidates; forums exist in both the civil and criminal courts to hear their grievances. The purpose of ordering a new election is not to punish successful wrongdoers; only where it is reasonably certain that election results do not express the will of the people will a new election be ordered. Petitioners herein have not established the necessary prerequisites.*

> The right of suffrage in a government of and by a free people must always be regarded with jealous solicitude. To overthrow the expressed will of a large number of voters for no fault of their own and solely because of some harmless irregularity would in many cases defeat the paramount object of the election laws. Sharrock v. Keansburg, 15 N.J. Super. 11, 19 (App. Div. 1951)

Accordingly, for all the foregoing reasons, the relief which petitioners seek is **DENIED**, and the within matter is **DISMISSED WITH PREJUDICE**.

* In re Annual School Election, Borough of Chesilhurst, Camden County, EDU 4952-91, 102-5/19, January 28, 1992, also mentioned by petitioners, presented a vastly different set of facts. One vote each separated the second, third and fourth place candidates and three votes separated the first and second place winning candidates. Based upon evidence that numerous residents of R & M Guest Home, a supervised healthcare facility for individuals with mental deficiencies, had been instructed for whom to vote and had been improperly assisted inside the voting booths, the Commissioner declared the election void.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 27, 1992
Date

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

July 27, 1992
Date

Receipt Acknowledged:
Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 28 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

EXHIBITS IN EVIDENCE

P-1 Campaign Literature (Hi, my name is Margret Reynolds, these are my puppets...)

P-2 Campaign Literature (Vote to Restore the Pride)

P-3 Campaign Literature (Linda Taylor)

P-4 Campaign Literature (Victor Smith)

P-5 Campaign Literature (Restore the Pride)

P-6 Postcard (Elect the Reformers, Palmer, Davis, Riddick)

P-7 Postcard (Victor Smith, Linda Taylor, Frank Phillips)

P-8 Campaign Literature (Willingboro Education Association)

P-9 Copy of Newspaper Article, Thursday, March 5, 1992

P-10 Campaign Literature (School Board Election Tuesday April 7, 1992) (2 pages)

P-11 Envelope addressed, "To the parents of Michael Green," containing campaign literature

P-12 Envelope addressed, "To the parents of Angela Green," containing campaign literature

P-13 Envelope addressed, "To the parents of Angela Green," containing campaign literature

P-14 Envelope addressed, "To the parents of Mike Green," containing campaign literature

P-15 Business card (Voteminder - Coalition of Positive Forces)

P-16 Campaign Literature (Vote to Restore the Pride)

P-17 Campaign Literature (March 20, 1990 to Dear Friends:)

P-18 Poll Workers 1992 School Election Preliminary List a few days before election (2 pages)

P-19 Poll Workers 1992 School Election (actual) (2 pages)

P-20 Packet of materials given to Judges of Election and membership of Election Board (71 pages)

P-21 Memorandum from Linda Taylor to Lee Muller, Board Secretary, dated March 31, 1992 (2 pages)

P-22 Memorandum from Frank Phillips to Lee Muller, Board Secretary, dated March 31, 1992 (2 pages)

P-23 Memorandum from Victor Smith to Lee Muller, Board Secretary, dated March 31, 1992 (2 pages)

P-24 Election results

P-25 Summary Initial Review of Poll Lists, Willingboro School Board Election, April 7, 1992 (8 pages)

P-26a Willingboro Poll List Book District I

P-26b Willingboro Poll List Book District 2

P-26c Willingboro Poll List Book District 3

P-26d Willingboro Poll List Book District 4

P-26e Willingboro Poll List Book District 5

P-26f Willingboro Poll List Book District 6

P-26g Willingboro Poll List Book District 7

P-26h Willingboro Poll List Book District 8

P-26i Willingboro Poll List Book District 9

P-26j Willingboro Poll List Book District 10

P-27 Willingboro Registered Voter List

P-28 Campaign Literature, April 4, 1992, Dear Concerned Parents and Citizens (2 pages)

WITNESSES

For Petitioners:

Bernard Giuliana
Richard Tucker
Mary Rodriguez
Robert Rodriguez
Anita Green
Lynn Sanford
Monica Jean Welch
Pauline Snowden
Leonard Kunz
Joseph Capelli
Earl R. Reinhard, Jr.
Ann Palmer
James Lewis
Martin Nock
Marcellus D. Smith, Jr.
Lee C. Muller
Robert Reynolds
Lloyd Davis
Raymond Findley
Margaret A. Reynolds

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioners pursuant to N.J.A.C. 1:1-18.4.

In their exceptions, petitioners argue that 1) the ALJ erred in refusing to address violations of N.J.S.A. 18A:14-101 (coercion or impeding of voting), as petitioners' charges clearly arose under the education laws and were amenable to full adversarial proceedings before OAL, and it was abundantly clear that the winning candidates' "dirty tricks" had a deleterious effect on how voters perceived other candidates; 2) the ALJ erred in finding Mallon, supra, inapposite, as petitioners were not trying to change the numbers of votes in the election tally, which would have required them to show how people voted, but rather to demonstrate that the entire election process was so pervaded by irregularity that a full and free expression of the popular will cannot reasonably be found to have occurred regardless of tally; and 3) the violations shown in this case should be referred to the County Prosecutor for review as to possible criminal charges.

Upon careful review, the Commissioner concurs with the ALJ that while irregularities and violations of school election law were shown to have occurred in this matter, they did not rise to the level necessary for the extreme remedy of setting aside the results of the election.

As the ALJ properly observed in applying In re Wene, supra, at page 8 above.

> ***There is an important distinction between the binding effect of election laws upon officials entrusted with their administration in connection with their being subject to a punishment for a violation thereof, or the effect of such provisions if enforced as a challenge at the time of voting, on the one hand, and as to whether, on the other hand, an irregularity as to a particular provision due to no fault of the voter and not involving fraud or repression of the full and free expression of the popular will should after the election have the effect of invalidating such votes.***

Here, there was no evidence that any of the proven irregularities resulted in coercion or impeding of voting, and even granting every possible inference to petitioners' claims of illegal votes being cast, the number of such votes would not have been nearly sufficient to alter the outcome of the election. Therefore, whatever other remedy may be appropriately pursued in this matter, there is no basis to warrant the calling of a new election and the Commissioner accordingly declines to so order.

Neither is the Commissioner persuaded by petitioners' claim that the ALJ erred in declining to consider allegations of fraud and libel in the successful candidates' campaign literature. The Commissioner fully concurs with the ALJ that matters of fraud and libel are to be pursued in a court of competent jurisdiction, notwithstanding that they are rooted in school election campaign materials, and that dissemination of the materials referenced

herein, even if they were found fraudulent or libelous in court, did not constitute a violation of N.J.S.A. 18A:14-101 in that they neither coerced nor impeded individual voters in the casting of their ballots. In school elections as in any other, individual candidates are answerable for their campaign claims to their opponents, to civil and criminal courts, and to the voters they seek to persuade; the role of the Commissioner cannot be to referee the truth or appropriateness of such claims, or to judge the effect of such materials on voters' thinking.

Notwithstanding the above, however, the Commissioner notes the improper use of pupil records and the inappropriate use of pupils themselves evidenced in this matter and strongly cautions the instant Board and all other boards of education and their agents against committing or permitting violations of the letter and spirit of statute regarding the use of public school pupils for partisan election activities. N.J.S.A. 18A:42-4

Further, the Commissioner concurs with petitioners that the violations demonstrated herein fully merit consideration by the County Prosecutor for action against individual candidates and/or officials as deemed appropriate.

Accordingly, the initial decision of the Office of Administrative Law dismissing the request for a new election is affirmed for the reasons well expressed therein, and the instant matter referred to the Burlington County Prosecutor consistent with the discussion above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 10, 1992

212-92

Thomas J. Boles v. Board of Education of the Vocational Schools of the County of Bergen, Bergen County

Thomas J. Boles v. Board of Education of the Vocational School of the County of Bergen, Bergen County

Ralph Rossi v. Board of Education of the Vocational Schools of the County of Bergen, Bergen County

Anthony Polo v. Board of Education of the Vocational Schools of the County of Bergen, Bergen County

SYNOPSIS

Petitioners, three tenured carpentry teachers, brought seniority claims due to reduction of their positions from full to part time. These seniority claims involved a second round of litigation.

In ALJ's partial summary decision, Petitioner Boles' petition was dismissed as untimely. Petitioner Rossi's petition was dismissed by the Entire Controversy Doctrine (cannot litigate claim which was known to him at time of first hearing and was related to "the same transactional circumstances"). ALJ did relax 90-day rule for Petitioner Polo since relief requested was prospective starting with school year 1991-92. Petitioner Polo was granted day in court.

Commissioner adopted findings and conclusions of ALJ with clarification. Commissioner dismissed petitions of Boles and Rossi. Commissioner affirmed findings of ALJ regarding Polo's petition II citing Paul Gordon. Allegations of mere continuation of status quo from previous years will not establish a new cause of action. Petitioner Polo timely filed his petition within 90 days of learning of Board's intent to newly assign individuals to positions that they had not filled in the 1990-91 school year in the 1991-92 school year. Commissioner directed Petitioner Polo's petition II to proceed to a hearing on the merits.

SEPTEMBER 10, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

PARTIAL SUMMARY DECISION

OAL DKT. NO. EDU 3717-91

AGENCY DKT. NO. 46-2/91

THOMAS J. BOLES,

Petitioner,

v.

BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS OF THE COUNTY OF BERGEN,

Respondent.

OAL DKT. NO. EDU 5392-91

AGENCY DKT. NO. 98-5/91

THOMAS J. BOLES,

Petitioner,

v.

BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS OF THE COUNTY OF BERGEN,

Respondent.

OAL DKT. NO. EDU 5393-91
AGENCY DKT. NO. 115-5/91

RALPH ROSSI,
Petitioner,
v.

BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS OF THE COUNTY OF BERGEN,
Respondent.

OAL DKT. NO. EDU 8947-91
AGENCY DKT. NO. 286-7/91

ANTHONY POLO,

Petitioner,
v.
BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS OF THE COUNTY OF BERGEN,
Respondent.

Alfred F. Maurice, Esq., for petitioner Thomas J. Boles

Robert A. Fagella, Esq., for petitioner Anthony Polo
(Zazzali, Zazzali, Fagella & Nowak, attorneys)

Randi Donner, Esq., for petitioner Ralph Rossi
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Philip Scalo, Esq., for respondent

OAL DKT. NO. EDU 3717; EDU 5392;
EDU 5393 and EDU 8947-91

Record Closed: June 24, 1992 Decided: July 23, 1992

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is the second round of litigation involving competing seniority claims of three long-time carpentry teachers, each of whom has been a district employee for nearly two decades. Last year, in the matter entitled *Polo v. Bergen Cty. Vo-Tech Schs. (Polo I),* 92 *N.J. A.L.R 2d (EDU) 230.* (Comm'r Jan 30, 1992), the Commissioner of Education ("Commissioner") decided that both Anthony Polo ("Polo") and another teacher, Ralph Rossi ("Rossi"), have equal credit for seniority purposes and, therefore, that the district was entitled to reduce Polo from a full to a part-time position for the 1990-91 school year while retaining Rossi in a full-time position. Thomas Boles ("Boles"), the third contender, was served with adequate notice of the prior proceeding, but did not intervene to protect his interests.

Each of the four present cases were filed with the Commissioner after the date of filing of *Polo I,* which occurred on June 27, 1990. By common consent, the Office of Administrative Law ("OAL") has consolidated all of them for a single hearing, which began on June 24, 1992.[1] Respondent Board of Education of the Vocational Schools of the County of Bergen ("Bergen Vo-Tech") seeks to dismiss three of the four cases, *Boles I, Rossi* and *Polo II,* on the theory that the later filings are untimely and raise issues which ought to have been resolved in the first proceeding. Because each of the three cases implicate slightly different considerations of fairness, efficiency, and finality, they will be addressed on their individual merits.

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[1]Boles' first petition, designated OAL Dkt. No. EDU 3717-91, will be abbreviated as *Boles I* and his second petition, designated OAL Dkt. No. EDU 5392-91, will be abbreviated as *Boles II.* Polo's second petition, designated OAL Dkt. No. EDU 8947-91, will abbreviated as *Polo II* to distinguish it from last year's case, abbreviated as *Polo I.*

(1) Motion to Dismiss the *Boles I* Petition

All of the relevant facts are undisputed. As noted in *Polo I*, at 231, Polo's counsel sent written notice of the earlier litigation to Boles "[b]y certified mail, dated November 7, 1990." However, Boles did not apply to be heard and failed to attend the hearing held on April 23 and 29, 1991. In or about April 1990, Bergen Vo-Tech had decided to abolish one carpentry position by reducing two of its three positions from full to 3/7th time. Initially, it had awarded the full-time position to Boles and offered part-time positions to Polo and Rossi. After Polo had filed his first appeal, Bergen Vo-Tech belatedly acknowledged that both Polo and Rossi have greater seniority than Boles. Therefore, it reduced Boles from full-time to 3/7th time for the remainder of the 1990-91 school year. *Polo I*, at 232.

By letter dated August 20, 1990, Bergen Vo-Tech sent Boles a copy of its resolution, which reduced his employment from full to 3/7th time and lowered his salary by $32,600, effective November 1, 1990. Significantly, Boles acknowledges receipt of this letter and a copy of the board resolution. In the letter, the board secretary also informed Boles that, "If you have any questions regarding the above, do not hesitate to contact this office." Coincidentally, the effective date of Bole's reduction occurred at approximately the same time that Polo's attorney invited Boles to intervene in Polo's challenge to his own reduction for the 1990-91 school year.

Admittedly, Boles did not contact Bergen Vo-Tech's office for additional information and took no immediate steps to appeal its adverse action. According to his certification filed in opposition to the requested relief, Boles has no legal training or experience and erroneously believed that Bergen Vo-Tech's seniority determination "was the result of an adjudication to which [he] was bound." He waited some six months before consulting with his local bargaining unit representative "[i]n the middle of February 1991." Even then, he did not move to intervene in the pending *Polo I* proceeding about to go to hearing. Instead, he filed a separate appeal with the Commissioner on February 28, 1991, more than 190 days after he had notice of the reduction.

N.J.A.C. 6:24-1.2(c) prescribes that "[t]he petitioner shall file a petition no later than the 90th day from the date of receipt of a final order, ruling or other action by

the district board of education which is the subject of the requested contested hearing." Recently, the Appellate Division reaffirmed the validity of the 90-day rule and clarified that it applies to employee rights upon a reduction in a school's work force. *Kaprow v. Berkeley Twp. Bd. of Ed.*, 255 *N.J. Super.* 76 (App. Div. 1992). Prompt filing of actions before the Commissioner serves to preserve the immediacy of the record and to stabilize existing relations, thereby avoiding disruption of the educational process. *Newman v. Bd. of Ed.* , 1984 *S.L.D.* __ (Comm'r Jan. 19, 1984).

It is improbable that Boles, a professional educator, had difficulty understanding the clear and simple language of the board resolution which reduced his hours of employment and salary. And, in the unlikely event that he was genuinely confused about his right of appeal, that confusion should have been dispelled when he received the attorney letter that Polo was challenging his own seniority status. Assuming, however, that Boles did not fully appreciate his legal rights, that circumstance would be of no legal significance. Ignorance of the law does not toll the running of a limitations period, except where there has been concealment. *Reilly v. Brice*, 109 *N.J.* 555, 559 (1988).

Although Polo concedes that his appeal was filed beyond the required 90 days, he asks the Commissioner to exercise his authority under *N.J.A.C.* 6:24-1.15 to relax application of any rule "where strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice " Exceptions to the 90-day rule should be granted sparingly, and only where there exist compelling circumstances to justify enlargement or relaxation of the time limit. See *Riely v. Bd. of Ed. of Hunterdon Cent. H.S.*, 173 *N.J. Super.* 109 (App. Div. 1980); *Le Mee v. Ridgewood Bd. of Ed.*, 1990 *S.L.D.* __ (Comm'r May 3, 1990); *Weir v. Bd of Ed of N. Valley Reg. H. S. Dist.*, 1984 *S.L.D.* __ (Comm'r July 20, 1984), aff'd No A-3520-84T6 (N.J. App. Div. April 9, 1986); *Bogart v. East Orange Bd. of Ed.*, 1983 *S.L.D* __ (Comm'r March 14, 1983). Equitable considerations which might allow relaxation of the rule include good faith discussions between parties to resolve the dispute, *Polaha v. Buena Reg. Sch. Dist.*, 212 *N.J. Super* 628 (App. Div. 1986), delay attributable solely to the board of education, *Perrotti v. Newark Bd. of Ed.*, 1981 *S.L.D.* __ (Comm'r May 11, 1981), or cases presenting a substantial constitutional issue or matter of significant public interest, *Miller v. Morris Sch. Dist.*, 1980 *S.L.D.* __ (Comm'r Feb. 27, 1980).

No mitigating circumstances are present here. Boles should have appealed within 90 days of receipt of the board resolution in August 1990. At the very least, he should have moved to intervene in *Polo I* in order to assert his seniority claims. Certainly Boles, who slept on his rights, should not now be in a better position than Polo and Rossi, who took timely action. Nor would it be just and equitable to require Bergen Vo-Tech to relitigate essentially the same issue it has successfully defended in the past, exposing it to extra expense and the potential of inconsistent outcomes.

It is tempting to add that Boles is legally bound by the prior judgment in *Polo I*. On first glance, such a result would seem to comport with traditional notions of due process, inasmuch as Boles had adequate notice and an opportunity to be heard, if he had wished. *See, Mullane v. Cent. Hanover Bank & Trust Co.*, 339 *U.S.* 306 (1949). Nevertheless, the theoretical soundness of that approach is open to doubt. In an analogous situation, the United States Supreme Court recently held that a group of firefighters who had not been parties in prior civil rights litigation were not precluded from subsequently challenging the validity of a consent degree entered in the original litigation. *Martin v. Wilks*, 490 *U.S.* 755 (1989).

Rejecting the argument that their suit should be barred because the firefighters were aware that the underlying suit might affect them and chose to pass up an opportunity to intervene, the *Martin* Court declared that "[t]he law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger." *490 U.S.* at 763 "Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subject to the jurisdiction of the court and bound by a judgment or decree." 490 *U.S.* at 765. That legal doctrine is said to flow from our "deep-rooted historic tradition that everyone should have his own day in court." 490 *U.S.* at 761.

At this juncture, however, it is unnecessary to distinguish *Martin* in order to justify dismissal of Boles' late petition.[2] It is enough that Boles' petition was filed beyond the 90-day limit without good cause.

(2) Motion to Dismiss the *Rossi* Petition

Unlike Boles who remained on the sidelines, Rossi did move to intervene in *Polo I* and was granted the full status of a party in that case, including the right to offer evidence, to cross-examine adverse witnesses, and to make oral and written legal arguments. *N.J.A.C.* 1:1-16.1. Counsel represented Rossi at the evidentiary hearings which took place on April 29 and 30, 1991. Rossi himself took part and gave testimony. Meanwhile, the Board notified Rossi on January 9, 1991 that he too was being reduced from a full to a part-time teaching position, effective as of March 15, 1991. The upshot of all the maneuvering was that Bergen Vo-Tech ended 1990-91 having equally reduced all three carpentry teachers from full to part-time positions

Inexplicably, Rossi did not amend the pleadings in the pending *Polo I* matter to add a cross-claim against the Board Nor did he promptly file his own petition and move to consolidate the related issues pertaining to his teaching assignment for 1990-91. Rather, he waited until the hearing in *Polo I* was over before filing an additional appeal to the Commissioner on May 6, 1991. More than four months elapsed between Rossi's receipt of notice of the board action and his bringing of an appeal. Consequently, the Board has moved for summary decision dismissing Rossi's suit as untimely under the 90-day rule.

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[2]A close reading of *Martin* reveals that its rationale depends heavily on the mandatory joinder philosophy incorporated into the Federal Rules of Civil Procedure. By contrast, "[t]he requirement that civil suit litigants must join certain indispensable parties, present in the court rules, is not a common part of administrative practice." S. Lefelt, *Administrative Law & Practice,* 37 *N.J. Practice Series,* §309 (Supp. 1992). Morever, the majority in *Martin* recognizes special exceptions to the general rule where a remedial scheme expressly forecloses successive litigation, such as bankruptcy or probate proceedings. *490 U.S.* at 762. Arguably, a statutory scheme designed to resolve rival seniority claims in accordance with uniform state regulatory standards fits within this category. Also, it is unclear whether the *Martin* firefighters received the same *individualized* notice which Boles received in this particular instance.

Rossi concedes the accuracy of this sequence of events. Nevertheless, he contends that the 90 days did not start to run until some unspecified date when he allegedly first learned that the Board had retained less senior teachers in full-time positions. In his papers, Rossi does not supply any specific facts which might substantiate this mere assertion. Moreover, the parties had completed extensive discovery in connection with *Polo I* and seniority charts were readily available to Rossi and his attorney.

As a matter of law, it is true that a teaching staff member's cause of action arises on the date when he becomes aware of a subsequent preference given to a less senior employee, as distinguished from the date of his actual reduction. *See Kaplow*, 255 *N.J. Super.* at 89, holding that a school administrator's rights accrued when the local board notified him of the later appointment of others to disputed positions, not eight years earlier at that time of his termination. Accord, *Data-Samtak v. Scotch Plains - Fanwood Bd. of Ed.*, 1988 S.L.D. __ (Comm'r Jan. 27, 1988), aff'd (St. Bd. June 3, 1988), holding that a teacher did not acquire the requisite knowledge that she might have a claim until she learned that a nontenured teacher had been appointed to a position for which she herself might be qualified. Here, however, Rossi's rights were fixed as of January 9, 1991 when he received notice of the change in his hours of employment. Nothing on the record suggests that the Board made any subsequent appointments or personnel changes which might violate Rossi's priority rights. Rossi has not filed any opposing affidavits which raise genuine issues of fact. *See Robbins v. Jersey City*, 23 *N.J.* 229, 241 (1957); *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* 67, 75 (1954). Thus, Rossi's petition is barred by the 90-day rule

An alternate basis for dismissing Rossi's petition is the court-made principle known as the "entire controversy doctrine." Evolving case-by-case and ultimately incorporated into a formal court rule, the doctrine "embodies the principle that adjudication of a legal controversy should occur in one litigation in only one court." *Cogdell v. Hospital Center at Orange,* 116 *N.J.* 7, 15 (1989). *Pressler, Current N.J. Court Rules, Comments to R.* 4:30 (1992). At the very least, the doctrine mandates that all parties involved in a particular litigation must present "all of their claims and defenses that are related to the underlying controversy." Behind this stricture lies a philosophy of eliminating wasted time and effort, of avoiding "piecemeal decisions" and of "preventing [a] multiplicity of suits." Originally, the doctrine

encompassed "a mandatory rule for the joinder of virtually all causes, claims, and defenses relating to a controversy between the parties engaged in litigation." *Cogdell,* at 15-16. It has been gradually broadened to include not only defenses, but also affirmative claims that could, and should, be brought as counterclaims. *Ajamian v. Schlanger,* 14 *N.J.* 483, 488 (1954). Generally, the doctrine requires joinder of constitutent causes which arise during the course of pending litigation. *See Brown v. Brown,* 208 *N.J. Super.* 374 (1986). Recently, the doctrine has been extended to apply not only to related claims, but to parties with a material interest as well. *Cogdell,* at 26. *See also, Crispin v. Volkswagenwerk, A.G.,* 96 *N.J.* 336 (1984).

While techniques and procedures developed to handle the business of the judicial branch will not necessarily be "imported wholesale into administrative agencies," court-fashioned solutions to managing common problems of litigation "have some genuine utility and relevance in administrative proceedings." *City of Hackensack v. Winner,* 82 *N.J.* 1, 29 (1980). Judicial doctrines designed to promote general policy goals of any adjudicatory system, such as finality and repose, prevention of needless litigation, and the avoidance of duplication, "have an important place in the administrative field." *Winner,* at 32-33. In particular, the New Jersey Supreme Court recognizes that there is much to be gained "from the prudent and selective application in administrative proceedings of such doctrines as *res judicata,* collateral estoppel and the single controversy rule." *Winner,* at 31.

Considerations of administrative economy and efficiency make it highly desirable that seniority disputes among teachers be resolved as quickly and fairly as possible in a single proceeding. Everyone benefits from such an approach. Students deserve stability and continuity of instruction. Teachers are better off knowing exactly where they stand, rather than operating under a lingering cloud of uncertainty. Staff morale is bound to improve when professional colleagues are no longer battling each other for remaining job slots. Boards of education will avoid the unnecessary expense of defending against successive lawsuits and are spared the very real potential of inconsistent judgments. Thus, the entire controversy doctrine precludes Rossi from litigating a claim which was known to him at the time of the first hearing and was related to "the same transactional circumstances." *Brown,* at 377.

(3) Motion to Dismiss the *Polo II* Petition

Of course, it was Polo who initiated the prior litigation, and he had the advantage of framing the issues to be litigated. On the first day of hearing in *Polo I*, the OAL sustained Bergen Vo-Tech's objection to admission of evidence in support of a generalized claim that Polo was entitled to teach trades in which he does not hold any specific endorsements, such as plumbing or building mechanics, and his claim as an industrial arts teacher. The OAL ruled that such issues, raised for the first time at the hearing itself, went beyond the scope of the pleadings, which were "limited to the areas of carpentry, brick and stone masonry, and vocational skills/ science." *Polo I*, at 234, fn. 2. Otherwise, Bergen Vo-Tech would have suffered substantial prejudice and unfair surprise, since Polo wanted to present a different case than that against which the board was prepared to defend.

Thereafter, Polo filed a second petition with the Commissioner on July 30, 1991, raising the same theories which were excluded at the first hearing. Nothing had changed in the meantime, except that on June 15, 1991 Bergen Vo-Tech had continued Polo in a 3/7th position for the 1991-92 school year, the same position he had held the year before. Polo candidly acknowledges the instant litigation was filed "because of the [OAL's] refusal to permit petitioner to litigate those issues" in *Polo I*. Again, Bergen Vo-Tech moves to dismiss the second suit, as untimely under the 90-day rule and as violative of the entire controversy doctrine.

At first blush, it would appear that *Polo II* is merely a collateral attack on a prior evidentiary ruling. Polo's contention that continuation of his assignment to the same teaching position for 1991-92 gives rise to a new and different cause of action is legally unsupportable. Rather, the situation is analogous to the increment withholding in *North Plainfield Ed. Ass'n v. Bd. of Ed.*, 96 *N.J.* 587, 595 (1984), where the loss in future years was "not attributable to a new violation each year, but to the effect of an earlier employment decision."

Nonetheless, there are compelling circumstances why Polo should not be denied his day in court. First, Polo did not sleep on his rights. To the contrary, he vigorously attempted to assert these claims at the first hearing and was prevented from doing so only on procedural grounds. Hence, this is not a case where a party has neglected to apprise the court and his adversary of the existence of potential

claims for inclusion in the first proceeding. *Brown*, at 382. Second, there has been no final disposition of these particular claims "on the merits." A dismissal based on a court's procedural inability to consider a case will not preclude a subsequent action on the same claim. *Watkins v. Resorts Intern. Hotel & Casino*, 124 *N.J.* 398, 416 (1991). Third, Polo should not be punished because his counsel drafted such careful and precise pleadings in the first case, rather than making vague shotgun allegations. Usually such specificity advances the cause of justice and is to be encouraged. It would be truly ironic if Polo were to forfeit his right to assert a claim because his attorney was not sloppy. Fourth, Bergen Vo-Tech has not demonstrated any genuine prejudice at this stage of the proceedings. Surely it is too late in the game to cry surprise. Many of the same issues will be litigated anyway in the *Boles II* litigation, so there would be no substantial savings of money or energy even if Polo were prevented from adding his own claims. Finally, the relief requested in *Polo II* is prospective, starting with the 1991-92 year. Regardless of the outcome, the decision will not alter the prior ruling that pertains to 1990-91.

Taken in their totality, these considerations are sufficient to relax strict adherence to the 90-day rule, in the interest of justice and fairness. Likewise, the entire controversy doctrine will not be invoked to defeat the rights of a party who has sought diligently to preserve these claims.

Order

It is **ORDERED** that the motions by Bergen Vo-Tech to dismiss the petitions in *Boles I* and *Rossi* are granted.

And it is further **ORDERED** that the motion by Bergen Vo-Tech to dismiss the petition in *Polo II* is denied.

CAL DKT. NO. EDU 3717; EDU 5392;
EDU 5393 and EDU 8947-91

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 23, 1992
Date

Ken R. Spring
,ALJ

Receipt Acknowledged:

July 27, 1992
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 30 1992
Date

Jayree LaVecchia
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NOS. EDU 3717-91, EDU 5392-91, EDU 5393-91, EDU 8947-91
(CONSOLIDATED)

THOMAS J. BOLES, PETITIONER, V. BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS OF THE COUNTY OF BERGEN, BERGEN COUNTY, RESPONDENT.	:	
THOMAS J. BOLES, PETITIONER, V. BOARD OF EDUCATION OF THE VOCATIONAL SCHOOL OF THE COUNTY OF BERGEN, BERGEN COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION
RALPH ROSSI, PETITIONER, V. BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS OF THE COUNTY OF BERGEN, BERGEN COUNTY, RESPONDENT.	:	

ANTHONY POLO, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS OF THE COUNTY OF BERGEN, BERGEN COUNTY, :

RESPONDENT. :

The record and partial summary initial decision rendered by the Office of Administrative Law in this matter have been reviewed. The Board filed timely exceptions and Petitioner Polo filed a brief and appendix in opposition to respondent's exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Board also filed replies to Petitioner Polo's reply exceptions, which are not considered insofar as there is no provision providing for the submission of replies to replies.

The Board's exceptions address the ALJ's conclusions regarding the Polo II petition. It claims first that said petition filed on July 30, 1991 is untimely, as found by the ALJ, because the same theories were raised in the second petition as were excluded in the first hearing. The Board charges that no facts have changed since the first filing on July 30, 1991, except that respondent continued Mr. Polo in a 3/7th position for the 1991-92 school year, the same position he held in the preceding year.

The Board contends further, that the ALJ erred in relaxing the standards of N.J.A.C. 6:24-1.2(c) for Petitioner Polo while not having done so in the instance of Petitioner Boles' petition, because it is admitted in the record that "'nothing had changed in

the meantime' between Polo's first petition of 1990 and his second petition filed on July 30, 1991.***" (Exceptions, at p. 3, quoting Initial Decision at p. 10)

Second, the Board submits Polo failed to raise the issues of his entitlement to teach plumbing, building mechanics and industrial arts in his first petition, and thus should not be permitted to raise those issues in his second petition, noting the Board's accord with the ALJ's conclusion that "Polo's contention that continuation of his assignment to the same teaching position for 1991-92 gives rise to a new and different cause of action is legally unsupportable." (Exceptions, at pp. 3-4, quoting Initial Decision, at p. 10) Relying on North Plainfield Ed. Ass'n v. Bd. of Ed., 96 N.J. 587 (1984), the Board avers the Polo II petition should have been dismissed, noting that both the Commissioner and State Board have held that the issue of Polo's entitlement to teach such courses was properly denied on procedural grounds. The Board avers that the ALJ erred in allowing Polo to assert claims that should have been set forth in the first petition.

Third, the Board submits that the issue of claim preclusion under res judicata and collateral estoppel should have been considered in conjunction with the applicability of N.J.A.C. 6:24-1.2. Because Polo's first petition was silent on claims to teach positions in plumbing, building mechanics and industrial arts, the Board avers Polo slept on his right to assert or amend the petition to include additional areas of entitlement, and thus Polo is not entitled to a "second bite of the apple." The Board would distinguish Watkins v. Resorts International Hotel & Casino, 124 N.J. 398 (1991) from the one at bar, arguing that the ALJ's reliance

on Watkins for the proposition that "***procedural inability to consider a case will not preclude a subsequent action on the same claim" (Exceptions, at p. 5 quoting Initial Decision, at p. 11), because Watkins dealt with the issue of whether claims which were dismissed for procedural reasons in federal court should be precluded from being brought subsequently in state court under valid state statutes. In the case at bar, the Board alleges, petitioner is precluded from bringing claims for entitlement to positions in plumbing, building mechanics and industrial arts in Polo II because the same were not alleged in the original Polo I. Thus, the Board submits, Polo failed to timely file such claims under N.J.A.C. 6:24-1.2(c), and urges further that in Watkins there was no question that the state claims were brought within the appropriate statute of limitations.

The Board submits the ALJ erred in relaxing the application of N.J.A.C. 6:24-1.2 under N.J.A.C. 6:24-1.15 also because rather than exhibiting "careful and precise pleadings" (Exceptions, at p. 6, quoting Initial Decision, at p. 11) as the ALJ found, petitioner failed to raise all claims available to him within the timeframe prescribed in regulation. Thus, the Board argues against permitting petitioner to file a second petition solely on the basis of the denial of his right to bring the claims for the above teaching positions, as was found by the Commissioner and State Board in the earlier Polo matter.

Petitioner Polo's reply exceptions first contend that the ALJ's decision is an interlocutory order and should not be reviewed at this time. However, said reply exceptions filed by Polo on August 20, 1992 may only rebut arguments tendered by opponents, not

raise procedural arguments anew. Such arguments should have been submitted as primary exceptions pursuant to the dictates of N.J.A.C. 1:1-18.4 insofar as the Board's exceptions are silent on the issue of whether the matter represents an interlocutory determination or an initial decision. Hence, the Commissioner does not consider such argument at Point I of Polo's reply exceptions in deciding this matter.

In Point II, Polo submits that the Board does not deny that he filed his second petition within 90 days of his contested assignment for the 1991-92 school year. The current petition (Polo II), involves, he claims, the 1991-92 assignments of individuals appointed to, or holding, positions which he asserts are within his certification and more properly should be held by him. Admitting that many of those assignments are the same as those sought in Polo I, Polo notes several distinctions which he claims justify the ALJ's decision to allow the matters to proceed.

First, he notes his current claims are not retroactive to assignments from previous years, but rather seek to invalidate prospectively the 1991-92 assignments of nontenured or less senior persons in positions to which he claims entitlement by virtue of his skilled trades and industrial arts endorsements. Despite his claim of superior seniority, Polo contends in June 1991 the Board made appointments of other teachers to positions which he argues fall within the scope of his qualification. Polo also mentions that a completely new teacher, Mark Levy, was assigned to teach plumbing for 1991-92, which Polo asserts is within his skilled trades endorsement.

Regarding timeliness of his second petition, Polo avers he did not sleep on his rights, but rather promptly filed his most recent petition when such assignments, allegedly made in violation of his tenure and seniority rights, were made for 1991-92. Polo claims the Board's actions of June 1991 constitute separate conduct from those events contested in his first petition which arose once the Board renewed its action for 1991-92 assigning him to a 3/5th position. Thus, Petitioner Polo submits his rights were again violated and a new cause of action accrued. He cites Paul Gordon v. Board of Education of the Township of Passaic, Morris County, decided by the Commissioner, March 27, 1986 in support of such claim.

In the event that the Commissioner deems that the instant petition filed by Polo should have been raised earlier, Polo supports the ALJ's conclusion that relaxation of the 90-day rule is appropriate under the circumstances of this matter, for the reasons cited by the ALJ and made in reliance on Watkins, supra. Polo notes, however, that the issue of ultimate success on the merits is certainly analytically distinct from the question of whether the claims should be adjudicated on the merits, which he strongly urges should go forward for hearing.

Upon a careful and independent review of this matter, the Commissioner affirms the findings and conclusions of the ALJ below with the following clarification.

First, the Commissioner adopts as his own findings and conclusions of the ALJ below concerning Petitioners Boles' and Rossi's claims. Those petitions are, therefore, dismissed with prejudice.

Similarly, the Commissioner affirms the findings of the ALJ regarding the Polo II petition, but notes that the only time when a new cause of action arises, as was the case in Paul Gordon, supra, is when it can be established that the petition alleges the board has newly assigned to a position a staff member who did not hold that position in the preceding year for which position the petitioner believes himself or herself to be entitled. Allegations of the mere continuation of the status quo from previous years will not establish a new cause of action.

Petitioner Polo timely filed his petition within 90 days of learning that the Board allegedly intended to assign individuals to positions that they had not filled in the 1990-91 school year in the 1991-92 school year. Petitioner claims these individuals, including a new plumbing teacher named Mark Levy, enjoy less seniority or no tenure entitlement over him. Thus, the Commissioner concurs with the ALJ that the matter should proceed as a new cause of action to the Office of Administrative Law for adjudication on the merits of Petitioner Polo's claims. The Commissioner stresses that the review of Polo's claims for 1991-92 is limited solely to newly assigned individuals for the 1991-92 school year. See Paul Gordon, supra.

Accordingly, for the reasons expressed by the Office of Administrative Law as clarified herein, the initial decision is adopted. Petitioners Boles' and Rossi's petitions are accordingly dismissed and Petitioner Polo's Petition II will proceed to a hearing on the merits.

IT IS SO ORDERED.

SEPTEMBER 10, 1992

DATE OF MAILING - SEPTEMBER 10, 1992

COMMISSIONER OF EDUCATION

212-92

EDU #3717-91, 5392-91, 5393-91 and #8947-91 (consolidated)
C # 212-92
SB # 42-92

ANTHONY POLO,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE VOCATIONAL-TECHNICAL SCHOOLS OF THE COUNTY OF BERGEN, BERGEN COUNTY,	:	DECISION
RESPONDENT-CROSS/APPELLANT.	:	

Decided by the Commissioner of Education, September 10, 1992

For the Petitioner-Appellant, Zazzali, Zazzali, Fagella & Nowak (Robert A. Fagella, Esq., of Counsel)

For the Respondent-Cross/Appellant, Philip Scalo, Esq.

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

January 6, 1993

Date of mailing JAN 08 1993

212-92

EDU #8947-91
C # 212-92
C # 78-93
SB # 42-92
SB # 29-93

ANTHONY POLO,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS OF THE COUNTY OF BERGEN, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decision on motion by the Commissioner of Education, September 10, 1992

Decision on motion by the State Board of Education, January 6, 1993

Decided by the Commissioner of Education, May 3, 1993

For the Petitioner-Appellant, Zazzali, Zazzali, Fagella & Nowak (Robert A. Fagella, Esq., of Counsel)

For the Respondent-Respondent, Sokol, Behot & Fiorenzo (Philip Scalo, Esq., of Counsel)

In April 1990, Anthony Polo (hereinafter "petitioner"), a tenured teaching staff member, was notified by the Board of Education of the Vocational Schools of the County of Bergen (hereinafter "Board") that, as the result of a reduction in force, his full-time employment as a teacher of carpentry was being reduced to part-time.[1] Petitioner had been issued an emergency certificate in September 1971 as a teacher of skilled trades. He received a permanent instructional certificate with an endorsement

1 We note that the Board abolished one carpentry position by reducing two of its three carpentry positions from full-time to part-time.

Nov. 3 1993

in "skilled trades" in August 1972. He also held an endorsement as a "teacher of industrial arts," which was issued in 1978, and endorsements as a "teacher of carpentry," "teacher of vocational technical related subjects" and "teacher of brick and stone masonry," which were issued in 1982.

Petitioner filed a petition with the Commissioner of Education challenging the Board's action as violative of his tenure and seniority rights. The Commissioner dismissed that petition. We affirmed the Commissioner's ultimate determination to dismiss the petition, but rejected his analysis of petitioner's claim to seniority credit for services rendered to the district in August 1971. Polo v. Board of Education of the Vocational Schools of the County of Bergen, decided by the Commissioner, January 30, 1992, aff'd with modification by the State Board, August 5, 1992, appeal pending, (App. Div.). ("Polo I").

In June 1991, the Board notified petitioner that he would continue in a part-time position for the 1991-92 school year. Petitioner thereupon filed the instant petition, challenging his assignment for 1991-92. ("Polo II"). The Board filed a motion to dismiss petitioner's claim in Polo II as violative of the single controversy doctrine. On September 10, 1992, the Commissioner denied the motion, stressing that review of petitioner's claims in the instant action was limited solely to newly assigned individuals for the 1991-92 school year. We affirmed.

As found by the Commissioner and not disputed by the petitioner, only two teaching positions to which petitioner claimed entitlement by virtue of tenure and seniority had been newly

assigned to nontenured individuals in 1991-92: plumbing and custodial training. Those two positions form the basis of the instant appeal.

On March 19, 1993, an Administrative Law Judge ("ALJ") denied the relief sought, finding that petitioner lacked the appropriate certification to teach either of the controverted positions. The ALJ stressed that, under current regulations, the skilled trades endorsement is expressly restricted to the particular occupations in which the applicant demonstrates sufficient work experience, and is not a "blanket certificate" usable in all of the skilled trade areas. Observing that petitioner's skilled trades endorsement was issued by the Department of Education with approved occupational experience in "building construction," the ALJ concluded that "the 'building construction' category recognized in 1972 but now defunct," authorized petitioner "to expose students to a few of the basic principles of plumbing and electrical wiring as an adjunct to a survey course focused on the carpentry and masonry techniques of home-building," but did not signify that petitioner "has the necessary background to teach a course devoted entirely to plumbing, for which he must obtain the more specific skilled trades endorsement in 'plumbing and pipefitting.'" Initial Decision, slip op. at 9.

The ALJ also concluded that petitioner was not authorized to teach custodial training, finding that he possessed neither the "old skilled trades endorsement in custodial training nor the new PPSO [production, personal or service occupations] endorsement in building maintenance." Id. at 10. The ALJ also rejected petitioner's attempt to rely on his industrial arts endorsement,

finding that custodial training did not fit within the general subject areas covered under such certification.

On May 3, 1993, the Commissioner adopted the ALJ's findings and conclusions and denied the relief sought by petitioner.

Petitioner has filed the instant appeal, contending that the skilled trades endorsement he received in 1972 authorized him to teach plumbing and that his industrial arts endorsement should extend to the custodial training courses.

After a thorough review of the record, we affirm the ultimate determination of the Commissioner to dismiss the petition, but we modify her analysis in that there is no indication that her review of petitioner's authorization to teach plumbing included specific consideration of the language of the regulations in effect at the time petitioner received his skilled trades certification.

Petitioner's authorization to teach plumbing is necessarily dependent in this case upon the scope of the skilled trades endorsement he was issued in 1972. Petitioner contends that the endorsement he received, which was designated simply "Skilled Trades," exhibit P-1, in evidence, "must be deemed to extend to subject categories and trades which he actually taught pursuant to the 1972 endorsement, and in which he had actual work experience." Appeal brief, at 14.

In order to determine this matter, it is necessary to review the language of the certification regulations in effect at the time the endorsement was issued. In so doing, however, we note that the "regulations" relied upon by the parties in the record is reproduced from a certification handbook issued by the Department of Education and does not precisely reflect the substance of the

applicable regulations. Unlike the handbook, the certification regulations in effect in August 1972 did not expressly enumerate any trades under the skilled trades endorsement. They simply provided for an endorsement in "Skilled Trades (Experience background)." N.J.A.C. 6:11-5.5, now codified as amended in N.J.A.C. 6:11-6.2. The regulations, however, further provided:

> 18. Skilled trades. (Experience background). Applicants who present six years of approved full-time experience (which may include apprenticeship) in a skilled trade requiring a minimum learning period of two years on-the-job training before reaching the classification of skilled worker or journeyman, of any trade listed by the Federal Committee on Apprentice Training, may receive this endorsement without the requirements of a bachelor's degree...

N.J.A.C. 6:11-8.3(e)(18), now codified in N.J.A.C. 6:11-8.1. See also N.J.A.C. 6:11-8.2.[2]

Although the regulations in effect in August 1972 did not explicitly specify the scope of the authorization to teach under the skilled trades endorsement or delineate various trades thereunder, it is evident from the language of those regulations that they were not intended to authorize the holder of such certification to teach trades beyond those in which he or she had demonstrated the requisite experience. Issuance of the endorsement was based upon demonstration by the applicant of "six years of approved full-time experience...in "a skilled trade." Id.

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[2] We note that the certification regulations were amended in 1984 so as to expressly list 35 different trades under the skilled trades endorsement. See R.1984 d.369, effective October 15, 1984 (operative September 1, 1985). The regulations were subsequently amended again in 1990, eliminating the list of specific skilled trades, but providing that the holder of a skilled trades endorsement is authorized "to teach skilled trades courses in the area of his or her State-approved occupational experience..." See R.1990 d.510, effective October 15, 1990.

(Emphasis added.) The patent effect of such provision was to limit the scope of the authorization. In the face of such requirement, it is manifest that the endorsement was intended to authorize the teaching of a skilled trade or trades in which the individual had demonstrated the mandated six years of experience.

Thus, in determining whether the petitioner herein was authorized to teach plumbing under his skilled trades endorsement, the issue, based upon the regulations in effect in August 1972, is whether petitioner had six years of full-time experience in plumbing so as to have qualified for a skilled trades endorsement which included the authorization to teach that trade. Based upon the record before us, we agree with the finding of the ALJ as adopted by the Commissioner that petitioner has not established such a degree of experience in plumbing. Nor has petitioner demonstrated that his approved experience in "building construction," as reflected in the Department of Education's records, evinced the requisite experience in plumbing under the regulations or was intended to encompass that particular trade. Consequently, we conclude that petitioner has not established that he met the threshold qualification for service as a teacher of plumbing so as to have entitlement by virtue of tenure to such employment.

In addition, for the reasons expressed by the Commissioner, we also reject petitioner's claim to the position teaching custodial training. The mere fact, as argued by the petitioner, that the Board had previously employed two individuals to teach custodial training under industrial arts endorsements did not give petitioner entitlement to an assignment which, under the certification regulations, was within the purview of an endorsement he did not possess, "teacher of production, personal or service occupations."

Nor has petitioner demonstrated that the duties attending the particular assignment at issue herein were of such character as to require instructional certification in industrial arts.

Therefore, for the reasons expressed herein, we affirm the Commissioner's ultimate determination to deny the relief sought.

Attorney exceptions are noted.

November 3, 1993

Date of mailing 05 NOV 1993

213-92

213-92

CATHERINE A. BROWN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Peittioner, high school science teacher, challenged Board's withholding of her salary increment for the 1991-92 school year due to alleged poor performance. Petitioner contended she had severe medical problem (diabetes) which affected her performance and she also alleged procedural deficiencies in the Board's withholding action.

Following consideration of testimony of coordinator who conducted nine formal evaluations of petitioner demonstrating her inability to exercise proper supervision, control and instruction of her students, ALJ determined Board's withholding was proper exercise of its discretionary authority pursuant to N.J.S.A. 18A:29-14. Moreover, withholding had been approved by superintendent following discussion with personnel director and included by superintendent on Board's agenda for action. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

SEPTEMBER 10, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9960-91
AGENCY DKT. NO. 352-9/91

CATHERINE A. BROWN,
Petitioner,
v.
TOWNSHIP OF SOUTH BRUNSWICK BOARD OF EDUCATION,
Respondent.

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

David W. Carroll, Esq., for the respondent (Carroll & Weiss, attorneys)

Record Closed: June 12, 1992 Decided: July 27, 1992

BEFORE **AUGUST E. THOMAS,** ALJ t/a:

Petitioner is a tenured teacher employed by the Board of Education of the Township of South Brunswick (Board). On June 24, 1991, the Board voted to withhold her "increment in salary" for the coming school year. She filed an appeal of this determination with the Commissioner of Education on September 19, 1991. On October 25, 1991, the matter was transferred 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.

Hearings were conducted at the Office of Administrative Law (OAL), Trenton, on March 16, 1992, and May 5. 1992. Subsequently, the litigants filed post hearing briefs which set forth their proposed findings of fact and conclusions of law. Those relevant facts are incorporated below.

ISSUE

The sole issue in this matter is whether or not the Board had good cause to withhold petitioner's increment.

RELEVANT FACTS AND TESTIMONY

Petitioner is a tenured high school science teacher. Her immediate supervisors during the 1990-91 school year were the science coordinator, and the principal of South Brunswick High School. The testimony and documentary evidence presented at the hearing shows the following.

At the commencement of the 1990-91 school year, as part of the evaluation process, the coordinator met individually with each of the ten science teachers whom he supervised. In his meeting with petitioner, the coordinator shared several concerns about her classroom instruction and discussed professional improvement options. The coordinator had prior knowledge of petitioner's classroom style and management from having observed and visited her class during the previous school year, when he had served as science department chairperson. In addition, concerns had been raised by the guidance office (Student Personnel Services) because of the large number of calls received from parents whose children who wanted their children removed from petitioner's class. Petitioner acknowledged the many requests, however she told the coordinator that she felt there was some kind of conspiracy among the parents and that she was being viewed unfairly by them. The coordinator assured her that he would be observing her classroom during the year and would base his "assessment of her teaching on what he saw, not on what anyone in the community was speaking about."

The coordinator conducted nine formal, evaluative observations of petitioner over the course of the school year.* In some cases these observations were with advance notice to petitioner. On at least one occasion, petitioner herself selected the day for a formal observation (R-3). In other cases the visits were unannounced. In each case, the coordinator held a conference with petitioner after the observation and went over the objective of the lesson, the strengths and weaknesses shown, and his suggestions for improvement. He then prepared a draft written report on the observation. In accordance with standard procedure in the district, the draft report was given to petitioner to review and comment upon prior to its finalization. With respect to each written observation report, petitioner was also given an opportunity to submit a rebuttal or other written statements in response.

The coordinator testified that in addition to his formal observations, he also observed petitioner's classroom on at least a dozen other occasions during the course of the school year.

Petitioner was also formally evaluated on two occasions by the principal.** His observations identify many of the same types of deficiencies independently noted by the coordinator.

*The dates of those observations and the exhibit numbers of the written evaluations which resulted are as follows:

Exhibit	Observation Date(s)
R-2	November 29, 1990
R-3	March 13, 1991
R-4	April 17, 1991
R-5	April 19, 1991
R-7	April 24, 1991
R-8	April 10-24, 1991
R-9	May 1, 1991
R-10	May 8, 1991
R-11	May 14-15, 1991

**The dates of the principal's observations and the exhibit numbers of his written reports are set forth below:

Exhibit	Observation Date(s)
R-1	October 12, 1990
R-6a & b	April 23, 1991

The observation reports describe what petitioner's classes were like. She had difficulty throughout the year in getting the attention of her students at the beginning of the period. Students repeatedly came in late, and the teacher took no action against them. There were also many complaints from the attendance office because petitioner either did not complete, or improperly completed, notices of absences and tardiness for her first-period classes. This caused problems for other teachers, since the first-period attendance report was the official record used by the other teachers for the entire school day.

Petitioner also had a problem with control at the end of the class. Students would just leave when the bell rang, rather than wait to be dismissed by the teacher.

The record shows that petitioner often failed to hold the students' attention during the instructional period. An excerpt from the following observation of November 29, 1992, gives one example which respondent asserts is typical of petitioner's performance.

> Many of the students were not in class until minutes after the late bell. Catherine attempted to get the attention of the class, but was ignored by the majority of the students. Directions were given for the distribution of materials but all but two of the students had picked up their materials, already. During the first 10 minutes of class students were "playing" with the computers - typing on the keyboard, turning the adjustment knobs, and switching the connection cables. Many expressed frustration that they could not get the computers to work. Catherine worked with a group in an attempt to start their computer and then realized and explained to the class that the power switches had not been turned on. When the power was switched on, about half of the students began working on their labs.
>
> During the rest of the period, a number of inappropriate behaviors were observed. There was constant use of foul language by a number of students. This language was directed at each other, Catherine, the computers and the assignment. The computers continued to be misused. Keyboards were banged on, peripherals were connected and disconnected, settings were changed, and power plugs were kicked out as a prank. Water was brought [from] the sink to a computer table and spilled on the floor. Water was also dripped onto a key board by a student drinking from a plastic bag full of ice. Students also rummaged through the software cabinet and took disks to use instead of carrying out the assignment. This resulted in the use of software not related to the lesson. Several obscenities produced with a painting program that were shared with other students.

> Catherine worked with individual students during the period and seemed unaware of what was going on. There was an incident in which a student used inappropriate language near to her and she reprimanded the student. Catherine shared in our conference that she "misses much of what is happening" in the computer room and that she is not comfortable with the physical arrangement of the room [R-2, November 29, 1990, observation.]

The coordinator made many constructive suggestions for improvement. He also provided resources for petitioner to review on discipline strategies, and arranged technical assistance on the computer equipment to be provided to petitioner at her convenience. Petitioner did not avail herself of the latter opportunity. Observation reports from the end of the school year show recurrent problems in managing her class.

In the area of instruction, petitioner often used ineffective techniques, examples of which are shown below:

> The use of wait time is practically non-existent. Catherine consistently asks questions on top of question with no time in-between. When students do respond, the first response is accepted and repeated. There has been no improvement noted in the area of questioning. In addition to the problem with wait-time, almost all questions are simple recall of facts. A small percentage of students are involved in answering questions. There has been no indication of Catherine attempting to involve more students. [R-8]

> Effective questioning involves well-constructed, clear questions, adequate wait time, and addressing individual students as well as the class as a whole. Comments such as "Whose voices do I hear?", "Do you want to work alone?", and "What's happening here?" are not effective in addressing student behavior. [R-3]

> Although questions were asked often during the class, a total of eight students were asked questions or responded on their own. There were no steps taken to check the understanding of the entire class. [R-7]

> No effective uses of wait time were noted. There were 16 instances noted in which the instructor asked a question and immediately asked another question or answered the question herself. [R-7]

The coordinator testified that despite his suggestions there was no improvement shown in the following area:

> Catherine continues to do most of the talking in class - more than 95%. Her comments on every occurrence and question

> are so extensive and difficult to follow that students consistently "tune her out." There is a tremendous need for consistent improvement in this area. Catherine must limit her comments so that the important information is clearly and effectively communicated. She must discontinue verbalizing her train of thought - unless it specifically addresses the objective. She needs to make decisions about what she says and how she says it. By decreasing the amount of time she spends talking, she can increase the active participation of the students. Without this change, students will not pay attention. . . . [R-8]

The coordinator also prepared an annual evaluation, in which he recommended that petitioner's increment be withheld (R-12). The District's personnel director, received the evaluation and recommendation, discussed it with the evaluators and then sent it to the superintendent as a recommendation for withholding petitioner's salary increment. The personnel director testified that he also discussed the matter orally with the superintendent. The superintendent agreed with the recommendation and he in turn recommended it to the Board by including it as an action item in the consent agenda.

The Board, without discussion, approved the superintendent's recommendation by adopting the salary increment withholding resolution at its meeting of June 24, 1991 (R-15, Item 2.8). Petitioner was notified on June 25, 1992. The record shows that petitioner asserted a medical condition as the source of her problems, and that petitioner's supervisors were generally aware that she had been newly diagnosed as a diabetic. This awareness came informally from ordinary work environment conversations. Both the coordinator and the principal testified that they could not recall the particular way in which they learned of her illness.

At the hearing petitioner testified on her own behalf. She stated that she was first diagnosed as having a severe case of diabetes in the summer of 1990, and that her condition was not brought under control until October 1990. By the end of March 1991, the diabetes was running rampant. Her blood sugar levels were again very high and were not being controlled by medication. Petitioner testified that she developed leg ulcerations that did not heal in a timely fashion; a very painful urinary tract infection persisted; she had high ANA (antinuclear antibodies); titers were elevated causing painful joint swelling in her ankles, knees and fingers; and she experienced intermittent blurred vision, extreme fatigue and concentration difficulties. She further testified that although she worked, she was so physically and emotionally drained from the diabetes that she does not know how she functioned. She testified that it was during this medical crisis that her teaching

performance dropped and she received poor observations. Petitioner testified also that she apprised her supervisor and principal at various times about her poor health but both ignored her concerns. Neither made any suggestions to accommodate her physical handicap.

The local association grievance chairperson corroborated petitioner's testimony about her physical complaints and the supervisor being apprised of same and avoiding or ignoring petitioner's medical problems.

Petitioner's medical doctor testified in detail about her condition. The doctor testified that petitioner's uncontrolled diabetes was a very serious medical problem that clearly could cause her to be weak and tired, to have blurred vision, to suffer from non-responding infections and, in essence, to be ineffective as a teacher. Petitioner's medical records were introduced into evidence. (P-1)

Based on the above, petitioner seeks restoration of the withheld increment and expungement of her file of all references to the withholding.

DISCUSSION

Regarding petitioner's medical condition, her physician testified on her behalf and stated that most diabetics are capable of continuing to function well in their jobs and personal lives. She described petitioner's diabetes as "adequately controlled" for most of the year. She did not recommend that petitioner stop working nor did she suggest that petitioner take sick leave. Rather she prescribed weight loss, diet and exercise as appropriate activities. Accordingly, the record does not support a finding that petitioner was physically incapable of teaching.

For the most part, the petitioner did not refute her supervisors' factual observations contained in their many evaluations of her classroom performance. There were instances, however, when she disagreed with some of the specific comments incorporated in the evaluations. A review of these evaluations, together with the testimony of petitioner's supervisors, shows that petitioner was unable to have the control over her classes that is necessary if one is to be an effective teacher. The record shows that petitioner did not refute the written evaluations that led to the withholding of her increment; rather, she asserted that her medical condition was the cause of her classroom problems. However, the petitioner's own physician

did not find that petitioner was incapacitated or unable to perform her required duties.

The statutes provide sick leave for teachers who are unable to work because of illness. Teachers who are ill should not report to work. It must be emphasized that the only purpose for school is the instruction of pupils. If that goal cannot be met adequately, for any reason, the purpose of schooling fails.

In the present matter I **FIND** that the instructional goal for petitioner's pupils was not met, based on the reports of her supervisors; therefore, petitioner failed to provide the supervision and instruction required to be effective as a classroom teacher. The record shows that petitioner could not control and properly supervise her pupils. A teacher's knowledge of the subject matter and extensive preparation for the lesson cannot overcome an inability to exercise proper supervision, control and instruction.

Nothing in the record, except petitioner's allegations, demonstrates that her supervisors were out to get her. Rather, the record shows a lack of classroom supervision and numerous complaints from parents who wanted their children transferred out of petitioner's classes. There is no evidence of a conspiracy by parents, as petitioner contends. Accordingly, I **CONCLUDE** that there is adequate evidence in the record to support a recommendation by the supervisor that petitioner's increment be withheld for the 1991-92 school year.

Petitioner asserts that the Board's action in withholding her increment is flawed and must be set aside because the withholding was not made pursuant to a recommendation to the Board from the superintendent. The record does not support this assertion. The record shows that the supervisor recommended in writing that the increment be withheld, and that the director of personnel made this recommendation to the superintendent orally and in writing (P-5).

The superintendent included this recommendation in his consent agenda to the Board, and the Board on June 24, 1991, voted, without question, to withhold petitioner's increment. Neither the statutes nor the regulations (N.J.A.C. 6:8-4.2(a)6) require that a recommendation be made by the superintendent before a teacher's increment is withheld.

Nothing in this record shows any bias or untoward reason for the increment withholding. Rather, the supervisors' evaluations were made mindful of petitioner's classroom problems in the prior school year and the continuing calls from parents seeking transfers for their children. Regarding teacher evaluations, the court held in Kopera v. West Orange Bd. of Education, 60 N.J Super. 288, 296 (App. Div. 1960), that ". . . in 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 conclusions." Based on this record, I am convinced that the supervisors' evaluations and their conclusions were reasonable and required for the purpose of improving the instruction offered to pupils in petitioner's classes. "[T]he burden of proving unreasonableness is upon appellant [(petitioner)]." Kopera at 297. Petitioner has not met that burden. Although petitioner disagreed with some of the comments made by her evaluators, most of their criticisms were uncontradicted.

DISCRIMINATION

In his brief, counsel for the petitioner raised the defense of discrimination for the first time. There is no mention of discrimination in the pleadings nor was it mentioned or suggested on either of the two days of hearing. Nevertheless, counsel alleges that petitioner's illness is a handicap within the meaning of N.J.S.A. 10:5-4.1 and N.J.S.A. 10:5-5q, and that her "employer must make reasonable accommodation to the limitations of a handicapped employee." This argument is inappropriate at this time. Nevertheless, there is no showing that petitioner was treated differently from any of her colleagues. Nor is there any showing that any special accommodation was required. Petitioner was a regular, tenured classroom teacher who was treated the same as all teachers in the South Brunswick school district, absent any showing to the contrary. Accordingly, no consideration will be given to the allegation of discrimination.

CONCLUSION

Case law supports the discretionary power of a local board to withhold a teacher's increment. In this case the Board withheld petitioner's salary and adjustment increments. Although not stated specifically, the recommendation to

the superintendent on which the Board voted expressed the intention of "freezing" petitioner's salary at the 1990-91 level (R-15).

Based on all of the above, I **CONCLUDE** that the Board's withholding of petitioner's increment for the 1991-92 school year was an appropriate exercise of its discretionary authority pursuant to N.J.S.A. 18A:29-14.

The petition is **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties

27 July 92
Date

August E. Thomas
AUGUST E. THOMAS, ALJ t/a

Receipt Acknowledged:

29 July 92
Date

Maureen K. Kelber
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 3 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

km

WITNESS LIST

Fred Cereques, history teacher
Catherine Brown, petitioner
Paul Sears, science supervisor
Michael Lacey, director of personnel
Richard Kaye, principal
Lynda Compagnone, medical doctor

EXHIBITS

For the Petitioner:

P-1	Catherine Brown, Health Information ,1990-91
P-2	Catherine Brown, Health Information, 1991-92
P-3	Health Plan Evaluation Report
P-4	Board Minutes, June 24, 1991
P-5	Memorandum, Withholding of Increment
P-6	Questions and Responses to Interrogatories 14 and 15 (exerpted)
P-7	Question and Response to Interrogatory 24
P-8	Question and Response to Interrogatory 25

For the Respondent:

R-1	Conference Notes, October 12, 1990, observation
R-2	Observation, November 29, 1990
R-3	Observation, March 13, 1991
R-4	Observation, April 17, 1991
R-5	Observation, April 19, 1991
R-6a	Observation Report, Kaye to Brown, re: April 23 observations (handwritten)
R-6b	Observation Report, Kay to Brown, re: April 23 (typed)
R-7	Observation, April 24, 1991
R-8	Observation Summary, April 10th - 24, 1991
R-9	Observation, May 1, 1991
R-10	Observation, May 8, 1991
R-11	Observations, May 14 & 15, 1991

R-12	Annual Evaluation, June 4, 1991
R-13	Memo, Kaye to Brown, March 28, 1991, re Supervisory Evaluative Process
R-14a	Memo, Sears to brown, April 10, 1991, re Supervisory-Evaluative Process (typed)
R-14b	Memo, Paul (Sears) to Catherine (Brown), April 10, 1991 (handwritten)
R-15	Minutes of Board Meeting, June 24, 1991, with Lacey to Daggett memorandum attached
R-16	Letter, Lacey to Brown, dated June 25, 1991
R-17	Not submitted
R-18	Not submitted
R-19	Memo, Paul (Sears) to Catherine (Brown) December 14, 1990 (handwritten)
R-20	Memo, Sears to Biddle, December 19, 1990
R-21	Memo, Sears to Crownover, December 18, 1990
R-22	Article reprint, "Classroom Discipline" with notation "sent to CB, 1/22/91"
R-23	Not submitted
R-24	Packet of 13 Attendance Office memos from Biddle to Brown, November 5, 1990 through May 23, 1991
R-25a & b	South Brunswick Board of Education attendance records

CATHERINE A. BROWN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner, as were replies thereto by the Board, pursuant to N.J.A.C. 1:1-18.4.

In her exceptions, petitioner primarily takes issue with the ALJ's refusal to consider her discrimination claim, averring that the entire thrust and focus of her case was that she had a handicap (diabetes) which the Board made no attempt to accommodate. She further reiterates her argument on the alleged procedural defect in the Board's action due to the purported absence of a recommendation to withhold from the superintendent. In reply, the Board references the arguments of its post-hearing submission, which were essentially adopted by the ALJ and are fully reflected in his discussion.

Upon careful review, the Commissioner concurs with the ALJ that the Board's action in withholding petitioner's increment was a proper and reasonable exercise of its discretionary authority.

The Commissioner finds no merit in petitioner's contentions regarding the ALJ's handling of her discrimination claim, as the record of this matter (including a transcript of the March 16, 1992 hearing) clearly indicates that such claim was raised in neither the pleadings nor the prehearing order, and testimony on petitioner's illness, while voluminous, was presented and pursued at hearing solely by way of explaining away petitioner's essentially undisputed poor performance; indeed, there is not even a hint of reference to any clear request for specific accommodation (such as reduced or altered scheduling, or change in physical surroundings) made by petitioner, let alone of denial by the Board. To the extent that petitioner intends her claim to mean that poor evaluations or withholding an increment for poor teaching performance which may have been due to or exacerbated by illness constitutes lack of accommodation of handicap, the Commissioner fully concurs with the ALJ that the only purpose of schooling is the instruction of pupils and that this purpose fails if instruction takes place ineffectively, so that the proper remedy for teachers who cannot perform their duties due to illness is to avail themselves of the sick leave provided by statute for this purpose.

With regard to petitioner's claims that her withholding was procedurally defective because the Board's action was not taken on the superintendent's specific written or verbal recommendation, the Commissioner views petitioner's position as placing form over substance and finds that the superintendent's action of accepting the personnel director's written recommendation to withhold petitioner's increment and including it on his consent agenda for the June 24, 1992 Board meeting fully constituted a recommendation

for Board action within the intent of the Commissioner's directive, as expressed in Brescia v. Pemberton Twp. Bd. of Ed., decided April 1, 1991 and Rotondo v. Carlstadt-East Rutherford Regional High School District, decided May 8, 1992, that proposed personnel actions come before the Board through recommendation of the superintendent.

Accordingly, the initial decision of the Office of Administrative Law is affirmed for the reasons expressed therein and the instant Petition of Appeal dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 10, 1992

DATE OF MAILING - SEPTEMBER 11, 1992

EDU #5702-88
SB # 47-89

BOARD OF EDUCATION OF THE BOROUGH OF MERCHANTVILLE, CAMDEN COUNTY,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,

RESPONDENT-APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF HADDONFIELD, CAMDEN COUNTY,

CROSS/RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION ON MOTION

Decision on motion by the Commissioner of Education, July 10, 1989

For the Petitioner-Respondent, Kalac, Newman & Lavendar (Peter P. Kalac, Esq., of Counsel)

For the Respondent-Appellant, Maloney & McCafferty (Joseph J. Finley, Esq., of Counsel)

For the Cross/Respondent-Respondent, Kenney, Kenney, Gross & McDonough (Malachi J. Kenney, Esq., of Counsel)

The Board of Education of the Township of Pennsauken has applied for leave to appeal an interlocutory order of the Commissioner. In his determination, the Commissioner rejected that portion of a discovery order issued by the Administrative Law Judge that would have accorded Pennsauken the right to interview resident students of Haddonfield High School with respect to the racial and educational implications of termination of the sending-receiving relationship between Merchantville and Pennsauken and proposed relationship with Haddonfield. Termination of the relationship between Merchantville and Pennsauken and the establishment of a new relationship with Haddonfield is the subject of litigation now pending before the Office of Administrative Law.

Pennsauken's application for leave to appeal was not made within the time limit prescribed by N.J.A.C. 6:2-2.3. However, on the basis of the circumstances presented as certified by counsel and with the consent of all parties, we have relaxed the rule so as to permit the State Board of Education to consider the application, N.J.A.C. 6:2-1.19, and have granted Pennsauken's application so as to review the Commissioner's determination. After considering the arguments of counsel and carefully reviewing the express terms of N.J.S.A. 18A:38-13, we affirm the Commissioner's determination substantially for the reasons expressed therein.

S. David Brandt, John T. Klagholz and Dr. Deborah P. Wolfe opposed.

October 4, 1989

Date of mailing OCT 06 1989

(SB) 47-89
211-92

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
CN 500
TRENTON, N.J. 08625-0500

October 10, 1989

SAUL COOPERMAN COMMISSIONER

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Dear Counsel:

BOARD OF EDUCATION OF THE BOROUGH OF MERCHANTVILLE V. BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN V. BOARD OF EDUCATION OF THE BOROUGH OF HADDONFIELD, CAMDEN COUNTY, STATE BOARD DOCKET #47-89

Enclosed is a written dissent by John Klagholz in the above matter. Please attach this to the written decision rendered by the State Board on October 4, 1989.

Sincerely,

Roslynne Novack

Roslynne Novack
Counsel to the State Board of Education

RN/SF/ch:5/7042U

Enclosure

c: Donald E. Beinemen
Ann F. Murphy
Edwin N. Ragone
Ben Schoellkopf

John T. Klagholz, dissenting.

I recognize that this matter is before us as an interlocutory appeal challenging only that portion of an order issued by an Administrative Law Judge which prohibited the interviewing of resident students of the Haddonfield school district by Dr. Fine, a social psychologist engaged by the school district of Pennsauken. However, and having read the entire order, I cannot escape notice that the Commissioner's decision permits Dr. Fine to interview students who attend Haddonfield High School but are residents of the Borough of Merchantville.

My concern rests on the potential harm which may accrue to the children who will be interviewed as part of the discovery process and for the purposes of seeking information as to their beliefs and feelings on matters of race relations. Although Pennsauken argues that such interviews are necessary, presumably for the purpose of presenting a complete record, I cannot see the relevance of such data, even if discovered. Nor can I see any benefit to Pennsauken's cause sufficient to outweigh the risk of treading on the privacy rights of these children, i.e., the risk necessarily attending intrusion into the lives of these students by a social psychologist.

Indeed, it is not clear to me as to whether Pennsauken seeks to offer Dr. Fine as a fact witness or as an expert witness. In either case, the issues to be settled in this case do not, in my opinion, require such interviews. That is, if Pennsauken seeks to establish "symbolic loss," I believe that it may do so as a matter of law, see Brown V Board of Education, without intrusion. If they

seek to establish a factual negative impact on the racial composition of the student body of Pennsauken, the children's beliefs and social attitudes are irrelevant.

I also recognize that the order below conditions these interviews on Dr. Fine's securing parental consent. Notwithstanding such consent, we have consistently protected students from unnecessary or unwarranted intrusions with respect to all other potential interviews or testing. As my colleague Mr. Brandt noted, but for this litigation, such interviews as proposed by Pennsauken would not be permitted under existing statutory or regulatory provisions that insure the privacy of students and the confidentiality of student records.

Therefore, I would amend the order and prohibit any interviews of students for the purposes offered.

October 6, 1989

Date of mailing OCT 11 1989

214-92

214-92

Board of Education of the Borough of Merchantville v. Board of Education of the Township of Pennsauken v. Board of Education of the Borough of Haddonfield

SYNOPSIS

Merchantville Board of Education attempted to sever relationship with Pennsauken Board of Education. This was the district's second attempt to sever the sending-receiving relationship that began in the 1972-73 school year. The first attempt centered on question of the expiration of its contract - the Commissioner disagreed that contract expired and State Board affirmed. Present petition designates Haddonfield as new receiving district.

Following consideration of testimony of lay and expert witnesses, ALJ found if severance of sending-receiving relationship were granted, there would be no significant negative impact--educational, financial or racial. ALJ found that Merchantville had shown by preponderance of credible evidence in the record that, in accordance with the standards required by N.J.S.A. 18A:38-13, it should be permitted to end its sending-receiving relationship with Pennsauken. As to the cross petition that Haddonfield's private tuition policy was improper as it allegedly undermined attempts at racial integration, ALJ found effect of nonresident enrollments at Haddonfield High School was so remotely related to enrollment composition of Pennsauken High School that "an insufficient nexus" existed to permit the action Pennsauken sought. ALJ granted Haddonfield's Motion to Dismiss the Cross Petition. (Englewood/ Englewood Cliffs; Booker; Jenkins)

Commissioner affirmed in part/reversed in part the initial decision. Commissioner concurred with ALJ's findings and conclusions regarding absence of significant negative financial impact on either of the districts concerned if severance were granted. Similarly, Commissioner was persuaded that no significant educational impact would flow from severance. The Commissioner, however, rejected the ALJ's conclusion that no significant negative racial impact would exist. Such negative impact would befall Pennsauken High School. Citing Englewood/Englewood Cliffs and the statistics relative to racial balance developed by Merchantville's demographer, Commissioner found severance would result in advancing the deterioration in the balance of racial and national origin groupings represented in Pennsauken High School's community. Commissioner denied Merchantville's request for severance from Pennsauken relationship. Moreover, Commissioner denied Pennsauken's motion to enjoin Haddonfield's private tuition program.

SEPTEMBER 16, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5702-88
AND EDU 4063-89
AGENCY DKT. NO. 207-7/88
AND 105-4/89
CONSOLIDATED

BOARD OF EDUCATION OF THE BOROUGH OF MERCHANTVILLE,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN,
Respondent-Cross Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF HADDONFIELD,
Cross-Respondent.

Peter P. Kalac, Esq., for petitioner, Merchantville Board of Education (Kalac, Newman, Lavender and Campbell, attorneys)

Joseph F. Maloney, Esq., and **Joseph J. Finley,** Esq., for respondent-cross petitioner, Pennsauken Board of Education (Maloney & Finley, attorneys)

Malachi J. Kenney, Esq., for cross-respondent, Haddonfield Board of Education (Kenney, Gross & McDonough, attorneys)

Record Closed: March 16, 1992 Decided: May 1, 1992

New Jersey Is An Equal Opportunity Employer

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

Petition for an order of the Commissioner of Education to dissolve a sending-receiving relationship for secondary pupils between boards of education.

PROCEDURAL HISTORY

This is the Merchantville Board of Education's (Merchantville's) second attempt to sever its sending-receiving relationship for high school pupils with the Pennsauken Board of Education (Pennsauken). The sending-receiving relationship began in the 1972-73 school year. The parties entered a sending-receiving contract on December 14, 1971, the contract term being September 1, 1972-June 30, 1982. When the contract term had run, Merchantville asked the Commissioner of Education (Commissioner) to declare that the contract had expired by its own terms and that Merchantville was no longer obligated to send its secondary pupils to Pennsauken High School. The Commissioner disagreed and the State Board of Education affirmed. 1982 S.L.D. 753, 756. The matter was argued in the Appellate Division of Superior Court. On September 30, 1985 the court affirmed the decision of the State Board of Education. Merchantville Bd. of Ed. v. Pennsauken Bd. of Ed. (N.J. App. Div., Sept. 30, 1985, A-1655-82 T3) (unreported).

On July 6, 1988, Merchantville filed the present petition with the Commissioner. Pennsauken filed its answer on July 25, 1988. The matter was 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. on August 1, 1988. A prehearing conference was held on October 7, 1988 before the judge then assigned. Subsequently, the matter was assigned to me.

Pennsauken moved to cross-petition against the Haddonfield Board of Education (Haddonfield). Merchantville had designated Haddonfield as the district to which it would send its secondary pupils should its petition be granted. Haddonfield became a party respondent without objection on February 3, 1989 and filed its answer on May 17, 1989. An order of consolidation issued on July 26, 1989 and the cases proceeded simultaneously

The parties engaged in extensive discovery including depositions of lay and expert witnesses. Several prehearing rulings issued. Rulings concerned

acceptance by Haddonfield of Merchantville tuition students, Pennsauken's right to have its experts interview Haddonfield students and Merchantville's request for a ruling on the issue of burden of proof.

On the latter issue, after arguments by counsel, the judge ruled on October 25, 1989 that

> The petitioner must first consider the educational, financial and racial implications for itself and the receiving districts. The petitioner must show the Commissioner that no substantial negative impact will result from its proposed withdrawal. This is significantly more than "some" evidence that withdrawal will not significantly affect the receiving district. What this means in terms of how the hearing proceeds is that the petitioner must make its best case in its case in chief. Upon close of the petitioner's case in chief, the respondent may make any appropriate motions. Assuming the petitioner's case survives the motions, the respondent must make a case that rebuts or mitigates the petitioner's case. The parties may then rest or, as is more likely, take the opportunity to present parol and documentary rebuttal evidence. [at p. 3]

Merchantville attempted an interlocutory appeal to the Commissioner. On November 13, 1989, the Commissioner denied review. Merchantville moved to appeal the Commissioner's constructive affirmance of the administrative law judge to the State Board of Education (State Board) and on January 3, 1990, the State Board granted Merchantville's leave to appeal. The State Board issued a stay of proceedings while it considered the appeal.

On September 5, 1990, the State Board ruled on the burden of proof issue, stating, among other things,

> The allocation of the burden of production delineated above does not shift the ultimate burden of persuading the Commissioner that termination is mandated or warranted. That burden remains on the petitioning party. However, where a petitioner has met its initial burden of production in proceedings, under N.J.S.A. 18A:38-13, . . . the claim by the respondent that termination will have a substantial impact is in the nature of an affirmative defense. Thus, it is appropriate that the party asserting the claim bear the burden of showing that a negative impact outweighing any positive benefits of termination will result.

Upon the State Board's ruling, hearing commenced on November 8, 1990. Thirty witnesses were heard and 67 exhibits entered in evidence. See appendices

following the initial decision. After 22 days of taking testimony, hearing concluded on October 8, 1991. The matter was completely briefed and a further ruling on motion was made. In response to a Merchantville motion to exclude proffered documents, the judge heard oral argument by telephone on March 3, 1992. In the course of submitting its briefs, Pennsauken attached four documents that had not been offered at hearing. Merchantville filed the above-mentioned motion and Haddonfield concurred with Merchantville's arguments. Pennsauken argued that it believed it was permitted to submit documents it said came to light after the hearing concluded. Inasmuch as there is no rule permitting such submissions and the judge had received no motion or application for leave to submit, the judge ordered the documents excluded. The record closed on March 16, 1992.

THE PLEADINGS

In its petition, Merchantville alleged it had completed the comprehensive feasibility study required by N.J.S.A. 18A:38-13; it had filed same with the Commissioner; Haddonfield cooperated in providing data for the study and was both willing and wanted to accept Merchantville High School pupils, subject to Commissioner approval; that Merchantville by resolution adopted March 29, 1988 determined to ask the Commissioner's approval for termination of the sending-receiving relationship with Pennsauken and for the establishment of a new relationship with Haddonfield, and that several equitable considerations supported the requested termination:

(a) Pennsauken High School is overcrowded based on functional capacity studies completed by the Division of Facility Planning, State Department of Education;

(b) Haddonfield HIgh School is functioning at approximately 60% of capacity based on functional capacity studies completed by the Division of Facility Planning;

(c) Projected enrollments over the next five years reflect an increase of students at Pennsauken High School and a decrease of students at Haddonfield High School;

(d) Infusion of Merchantville pupils at Haddonfield High School would permit Haddonfield to continue its broad curriculum offerings;

(e) Haddonfield High School represents a more compatible secondary school experience than does Pennsauken High School for children coming from the type of educational program provided by Merchantville;

(f) Merchantville seeks a more academically oriented program for its pupils. Haddonfield provides 70% of its course offerings in basic academic areas. Pennsauken offers only 52% of its courses in basic academic areas;

(g) Class sizes generally are larger at Pennsauken than at Haddonfield, and

(h) The pupil-teacher ratio at Pennsauken is higher than at Haddonfield.

Merchantville also asserted the change in high school designation would have no substantial negative impact on the educational program, on the racial balance or the finances of the affected districts.

Pennsauken denied each allegation or stated it lacked sufficient information or knowledge to form a belief as to the truth of the allegation.

In its cross petition, Pennsauken alleged that Haddonfield's practice of soliciting and accepting pupils from Merchantville on a tuition basis has and will have an adverse educational, social, racial and financial impact on Pennsauken.

Haddonfield answered, admitting that it accepts pupils from other districts but denying that it solicits their enrollment and denying that its practice creates any adverse educational, social, racial or financial effect in the Pennsauken district.

PAROL AND DOCUMENTARY EVIDENCE

Merchantville's Case

Merchantville presented a six-year Board member who testified the district operates one school, grades kindergarten-eight (K-8). In October 1990, approximately 400 pupils were enrolled. Merchantville was a kindergarten-twelve (K-12) district through 1972. It received pupils from Cherry Hill Township and Pennsauken Township throughout most of this century.

In 1972, Merchantville and Pennsauken entered a ten-year sending-receiving contract. Some 12-18 months before the contract expired in 1982, Merchantville began looking at alternatives. See, first petition of appeal (P-1). Merchantville considered Haddonfield and Haddon Township. As the contract

expired, Merchantville approached Pennsauken. It was determined that the Boards could not amicably end the relationship. Merchantville filed a petition of appeal with the Commissioner of Education that ultimately was decided by the Appellate Division in 1985.

The Board then waited "a couple of years." The legislature was looking at the question. Committees of the Merchantville and Pennsauken Boards met in September 1987. Pennsauken refused voluntary severance. Merchantville then considered additional alternatives. Among other things, it listed potential receiving high schools. It narrowed the list and approached several. Committees of the Board visited two high schools that seemed hospitable and compatible. Haddonfield was one of these.

The Board Committee recommended that the Board continue to seek a sending-receiving relationship with Haddonfield. It hired Guidelines, Inc., a consulting firm, and directed it to perform a feasibility study as required by N.J.S.A. 18A:38-13. The study was directed by Dr. Robert F. Savitt. [See, Savitt's testimony, below.]

The Merchantville Board received a draft report in March 1988. It held a community meeting for the twin purposes of presenting Savitt's findings to the community and getting community input. On March 29, 1988, the Board resolved to pursue the present appeal (P-4). Thereafter, Merchantville filed the present petition (P-2).

The Board collected materials including State Department of Education Report Cards on Merchantville, Pennsauken and Haddonfield. Savitt's educational reasons squared with the statements on the report cards prepared for each district.

The Board did not do a formal parent-community survey concerning the change in 1988. It had done so in 1982. The Board got comments from community at board meetings.

Each year, Merchantville holds sessions for eighth grade pupils and parents. The parents are invited to Pennsauken High School. A few days later, pupils visit the school. Those interested may further explore the Pennsauken program. Pennsauken personnel make a presentation to eighth grade pupils. Haddonfield makes no such presentation.

There have been mathematics articulation meetings between Merchantville and Haddonfield teachers. The districts are using the same mathematics curriculum.

The Haddonfield Superintendent of Schools testified. He has been in the district for over 12 years, serving since 1981 as superintendent. In October 1990, the district enrolled 1,740 pupils. Secondary pupils are housed in a "multibuilding" complex and number approximately 550. The building is rated at a 1,250-pupil capacity, although the district would prefer fewer pupils to actually occupy the building.

In late 1987 and early 1988 the Board directed a study of the feasibility of a sending-receiving relationship with Merchantville (P-8). There was no agreement at the time to accept Merchantville pupils. Haddonfield was and is interested in grades 9-12 only. The study considers whether the high school program and building could accommodate Merchantville pupils. The focus is on the impact on Haddonfield.

The high school is evaluated by the Middle States Association of Colleges and Schools and is monitored by the State Department of Education. The most recent Middle States report is from October 1986 and is admitted in evidence as Exhibit P-10. The January 12, 1987 "T and E" monitoring report of January 12, 1987 is in evidence as Exhibit P-11.

If the sending-receiving relationship is approved, Haddonfield assumes a phase in over four years. After all Merchantville pupils, perhaps 60-100, are in Haddonfield, the effect should be positive. Haddonfield's enrollments at the secondary level are declining. The infusion of new pupils would help keep the curriculum broad and rich. The tuition moneys received would add resources to program development and staff development. There would be little or no need for additional staff.

After his study, the Haddonfield Board considered the question and on February 11, 1988 approved the concept (P-12).

Dr. Robert F. Savitt, a principal of Guidelines, Inc., testified. He has extensive experience in school consulting and has done superintendent searches,

school reorganization studies, administrative reorganization studies, regulation studies and sending-receiving studies. More than half of Guidelines, Inc.'s business is done in New Jersey. He twice before qualified to testify as an expert in Office of Administrative Law proceedings.

Savitt did a 57-page report and a supplemental report. On the day he testified, he was shown September 1990 enrollment figures. He reviewed them prior to testimony and stated his basic findings and conclusion were unchanged (P-13a, P-13b).

The witness developed the racial component of Exhibit P-13a. He has done similar work in four or five other New Jersey districts. The witness stated racial impact is measured on a purely quantitative basis.

The witness assessed programs at Pennsauken and Haddonfield high schools. He collected data from the districts, and the county superintendent. He made visits to each school. He had the opportunity to discuss collected data and to request additional data. He spoke to administrators and others in each school and he visited and observed certain classes and activities. He believes the data he collected allowed him to state the conclusion in P-13a and P-13b.

One aspect of his study was how pupils would fare K-12 in terms of the educational program offered. The focus was on Merchantville pupils in terms of a curriculum continuum. He met with the Merchantville Board while conducting his study. He provided periodic progress reports, the first approximately 6-8 weeks after retention. He sent some data ahead and met with the full board. Approximately a month later he sent more data and again met with the full board. The next meeting was a presentation of his preliminary report. Savitt submitted it in writing and again met with the full board. At the preliminary report meeting the goal was to find any errors. Some corrections, indeed, were made. There was a general discussion and a public meeting was planned for several weeks later.

The final report was submitted in February or March 1988. The public meeting was held at about the same time. Several experts contributed to the report, but Savitt wrote the report.

Savitt stated he visited Pennsauken high school on two days. He conferred with the building administration and the superintendent. He had

questions concerning many areas and generally was provided the data he needed as well as the observations he requested.

The witness testified at some length concerning his observations. He had good cooperation from the high school principal and saw a range of classes and activities. Teachers knew that Savitt and an associate would be in the building. The associate made his own observations. The observers spoke to some teachers between classes or during activities that occupied pupils. Savitt stated he always has a sign in conference and sign out conference. At the departure conference he met with an assistant principal-disciplinarian. The principal had collected some requested data and gave it to him at that time.

The witness observed that special education classes and science classes were cramped. The high school principal volunteered that the building was overcrowded. A period-by-period room review showed almost no space available. Savitt was shown architect-prepared plans he believes were never implemented. The plans he saw would have resolved one building need; it would have upgraded certain special facilities. However, it could create no significant increase in the building's functional capacity. The plans he saw may have had preliminary department of education approval. Savitt was not aware of any financing approval or any plans submitted to the state for final approval.

Savitt's associate observed and spoke approximately the same way to approximately the same number of pupils and teachers. The associate contributed several sections to the report (P-13a). He also contributed to the summary. Savitt observed Pennsauken High School before visiting Haddonfield High School. His associate also visited both schools. In addition, Savitt visited and made observations at the Merchantville elementary school.

Savitt and his associate did not visit Haddonfield High School at the same time. Savitt met with the superintendent to request additional information, to get the superintendent's sense of the district and program and to explore his interest in and reasons for a Merchantville sending-receiving relationship. Savitt also spoke to the business administrator/board secretary. He then went to the high school and met with the principal, other administrators, guidance personnel and the athletic director. He requested materials and asked questions concerning curriculum and space availability. He visited and observed seven or eight classes and toured the school. He and his associate both took some notes and conferred before producing

the report. Both approached their observations based on elements developed in a meeting before the observations were made. They looked for individualization of instruction, tone of the school, impressions of leadership and also how the facilities affected the instructional program. They did not use a facilities checklist. He developed and provided to his associate the criteria shown on page 15 of his report.

Haddonfield personnel believed Haddonfield would benefit if Merchantville pupils attended their high school. Almost all pointed to better staff utilization and the nonelimination of staff and programs. Some Haddonfield personnel feared low enrollment classes would be eliminated.

The consultants met no members of the Haddonfield Board. They spoke to pupils at Pennsauken, Haddonfield, and Merchantville, but spoke to no parents at any school. The consultants spoke to more pupils at Pennsauken than at Haddonfield. There were no preplanned questions of pupils, but both consultants agreed they needed to focus on facilities and how facilities affect programs. They inquired about this of teachers, pupils and administrators.

Savitt expressed opinions about a comprehensive high school and its ability to present a variety of courses, experiences and services to meet the needs of its whole student body. Haddonfield High School is comprehensive to meet the needs of its pupils who, overwhelmingly, are in college preparatory curriculums. The school would not meet all pupils' needs. In this regard, the witness stated comprehensive relates to the given student body.

The selection of classes observed was restricted only by what was available at the time the consultants were at a given school. Concerning class size, Savitt stated that very small classes can reduce the opportunity for social interaction and are often eliminated as resources become scarce. This typically reduces a school's ability to present advanced courses.

Savitt uses the term "compatibility" in his report (P-13a). As used, the term refers to an arrangement in which the program in one school district flows into and relates to the program in another. Articulation is how curriculum meets. Compatibility is a much broader term and includes elements such as the tone of the school. The witness made findings concerning articulation of curriculum and program between Merchantville and Pennsauken and made projections concerning articulation of curriculum and program concerning Merchantville and Haddonfield.

If Pennsauken could make the same commitments as Haddonfield, the witness might change his recommendations.

Community ties and relationships are considered within his report (p.36), but are not a separate study. His findings address educational compatibility, not social compatibility. In this study and in other studies he has done, the witness did not include socioeconomic ties. All reports speak to articulation, however.

Savitt used no standardized forms in his studies. However his observation included classroom atmosphere, teacher evaluation procedures and instruments, pupil interaction and pupil-teacher interaction. The consultants observed honors classes at Pennsauken and at Haddonfield. Both consultants observed classified classes at the two high schools. The consultants observed that special education facilities were vastly different. The Pennsauken facilities were inadequate and the Haddonfield facilities were "perfect." In both cases, however, teachers and program were judged good.

The Pennsauken curriculum serves its student population. Curriculum is driven by pupil needs. There is a relationship between standardized test results and pupils' goals after high school. There is no agreed upon reason for this relationship, but it is a universally observed relationship. College-bound pupils usually score better. In any event, Scholastic Aptitude Tests and standardized tests form one of many parts of an educational program.

The witness was questioned concerning his work in the Upper Freehold Regional-Washington Township case. He pointed out certain similarities between his work in that case and the present matter. He also pointed out that both case law and the statute, N.J.S.A. 18A:38-13, have changed since Upper Freehold was decided.

The witness also testified concerning the Middle States evaluation of Haddonfield, observations concerning school facilities in general and some negative comments in his report concerning atmosphere and program at Pennsauken. The feasibility study addresses the three areas required by statute.

The witness did not examine Merchantville's private tuition policy, if any; did not go into what districts Haddonfield might be negotiating with; did not break out which colleges Haddonfield pupils are attending; did not differentiate between

two-and four-year colleges and looked at diversity of facility and staff. In this regard, Savitt stated that diversity of faculty and staff is a good idea, but a more important criterion is the quality of faculty and staff.

Savitt concluded with testimony concerning extracurricular activities, college preparatory programs, guidance programs, pupil-teacher ratios, administrative staff concerns, libraries, special education and cocurricular activities. Generally, both Pennsauken and Haddonfield measure well in these areas. The witness believes Pennsauken administrative staff are overworked. Nevertheless, Pennsauken adequately prepares pupils for college with what they have. So far as the witness knows, no Merchantville pupil has been denied a particular class at Pennsauken High School. The cafeteria at Pennsauken is overcrowded. The two high schools have common elements, but unique atmospheres. There are differences in administrative style, teaching techniques, resources and philosophy. The witness and his associate both have experience as superintendents of schools. Savitt regards his associate as completely reliable. They "speak the same language" and work together well.

Merchantville also called a financial expert. Carole Deddy holds degrees in business administration and education. She also holds a Masters in Business Administration. She has taught high school business education and is a certified school business official. She served eight years in business official capacities and was a vice president of Swarthmore College in Pennsylvania. As a school business administrator, she performed all of the functions associated with that capacity including budget administration, preparation and administration and interpreting the budget to the public. She knows the relationship of property tax levies to school taxes. She is familiar with tuition calculations having worked in a receiving district. She holds principal, business official and assistant superintendent for finance certificates. She has previously testified in two sending-receiving cases and has done at least five feasibility studies in finance, budget preparation and budget influence on municipal tax levies. She was hired in late 1987 or early 1988 to study the financial implications of this sending-receiving case. Her report is part of P-13a and her update is in evidence as Exhibit P-13c In both her original and updated reports she collected financial data. Her assumptions are listed and carefully set forth in her portions of the report. She was shown Exhibit P-13d, a State Department of Education printout of financial statistics for Camden County school districts. Based on her review of that document, she would reaffirm her findings. She carefully considered all available data and concluded that there would be no negative

financial impact on Pennsauken if Merchantville pupils were withdrawn. The Pennsauken principal indicated enrollments were rising and would generate approximately one million dollars in additional aid. This would more than offset any loss of Merchantville pupils. It is noted that the principal made this statement before the Quality Education Act was enacted.

In sum, the Merchantville consultants conclude there would be no substantial educational, financial or racial impact on Pennsauken or Merchantville if severance were allowed.

Motion to Dismiss

On the fourth day of hearing, Merchantville rested. Pennsauken moved to dismiss; Merchantville and Haddonfield opposed. The judge ruled from the bench as follows:

> Gentlemen, I have reread my bench notes very carefully including the notes of the argument.
>
> In dealing with a motion to dismiss it is required that all favorable inferences be construed in favor of the party not the maker of the motion.
>
> Having heard your respective arguments of fact and law, and having considered them, I perceive that a prima facie case has been made by the parol and documentary evidence of record. And I would reach that conclusion whether under the standards set by the State Board decision of September 5th or whether by the former standard.
>
> A defense is required of the Pennsauken Board of Education and the motion to dismiss is denied, subject of course, to renewal at an appropriate time.
>
> This order may be reviewed by the Commissioner of the 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.

On the next day, November 21, 1990, Pennsauken began presentation of its case.

Pennsauken's Case

Pennsauken called the Merchantville guidance counselor. She has held that position since December 1, 1980. She stated that during course selection for

eighth graders entering Pennsauken High School, Pennsauken representitives come to Merchantville. They present to pupils the course selection procedure. The witness works with Merchantville pupils, does paperwork and forwards papers to Pennsauken. She has received good cooperation from Pennsauken guidance personnel throughout her experience. There appear to be no problems for pupils in transition. There are no parent complaints she is aware of concerning transition.

Last year, Merchantville received curriculum information from the Pennsauken High School language and mathematics departments in response to a Merchantville request. The witness had no specific recall of complaints from Merchantville pupils attending Pennsauken High School. Merchantville pupils usually do not consult her on high school course selection and most pupils do not express an opinion on what secondary school is best for them.

Articulation between Pennsauken and Merchantville consists, in the main, of one meeting per year and perhaps some telephone followup. At one time, when Merchantville operated a 9th grade, all pupils who would attend Pennsauken High School toured the school in the May before the September in which they would enter. This has not happened for several years. The witness' primary contact at Pennsauken is most cooperative.

The Merchantville supervisor of special services testified. He has a range of experience in education, particularly special education, and is a certified Learning Disabilities Teacher Consultant.

The witness stated articulation within the special education areas between Merchantville and Pennsauken has been accomplished cooperatively. The witness believes special education programs at Pennsauken meet the needs of Merchantville pupils at this time. The Pennsauken vocational coordinator has a special education background and this is particularly helpful for handicapped pupils who may be interested in vocational training. Proposals for expansion at Pennsauken High School include space for vocational education programs for special education pupils.

Pennsauken's primary expert witness testified. Dr. Lawrence Kaplan described how his report was compiled (RP-5, RP-6). The witness stated that his firm, University Consultants on Education, was first contacted in late 1988 by a Pennsauken assistant superintendent. The witness then met with a Pennsauken

group and discussed generally what Pennsauken would require in a report. Demographics and related questions were discussed as was Pennsauken's attorney's need for a report and testimony on the criteria established by statute.

The witness also looked at some of the work done by Dr. Michelle Fine (see, below) concerning symbolic loss and secondary loss. At deposition, the witness had stated these concepts were introduced to him and explained to him by Pennsauken's counsel.

No one associated with Pennsauken dictated to the consultants or suggested to them what the outcome should be. The consultants began with no preconceived notions.

The witness filed at least three reports with Pennsauken's counsel. Exhibit RP-5, a 36-page report, is the latest revision.

Exhibit P-14, a 43-page report, was the consultants' initial draft. The witness wrote pages 1, 4 and 21-43. This document was probably completed in late October 1989. He also wrote RP-6, "Neighborhoods and Communities, the Pennsauken-Merchantville Connection."

The witness consulted with Dr. Fine three times: when hired, in late spring 1989 and at the University of Pennsylvania some time later.

The initial draft was reviewed with counsel and another associated consultant. The latter did the comparative analysis of Pennsauken and Haddonfield. In the first draft, the consultant refers to counselor to pupil ratios at the two high schools. The ratio is one to 250 at Pennsauken and one to 200 at Haddonfield. The consultant reports guidance counselor contacts at least twice a year at Pennsauken although seniors may be seen as many as 12 times. Guidance services at Pennsauken appear to be organized to meet the needs of minorities, vocational pupils, Hispanic pupils and those for whom English is a second language.

The witness spent six or seven days, or parts thereof, in Pennsauken. He believes the school is not overcrowded. In his draft report he mentions a conference with eight Merchantville pupils and makes reference to uncomfortable size and atmosphere. These observations, however, do not lead to a conclusion that the

school is overcrowded. In any event, these references do not appear in the final report.

The witness had read some of Fine's work before he did his draft. Two sections of his report are devoted to symbolic and secondary loss. His study was done entirely at his discretion, but he was told that attention and treatment had to be given to demographics.

When deposed, Dr. Kaplan stated that the financial considerations were not substantial in this case. A small number of Merchantville pupils withdrawn from Pennsauken would not have a serious financial effect.

In his report, Kaplan states, "We are not dealing here with the best and worst of high schools but with two distinctly different sets of community educational needs" (RP-5, p. 2). Kaplan still believes that symbolic loss is an important issue in this matter notwithstanding the State Board decision language "Therefore, . . . we have neither relied upon nor considered the proofs developed from interviews with students attending DMHS and THS concerning their beliefs and social values, which were submitted into evidence to show that 'symbolic loss' would occur in this case." Englewood Cliffs Bd. of Ed. v. Englewood Bd. of Ed., 12 N.J.A.R. 566 (Apr. 18, 1988); mod. Comm'r of Ed., 12 N.J.A.R. 632 (July 11, 1988); mod. St. Bd. of Ed., 12 N.J.A.R. 663, 688-689 (Apr. 4, 1989).

After a meeting with counsel and an associate consultant, Kaplan edited the report. The whole team did not meet to compile and coordinate the final report. Kaplan gathered data and relied on certain source materials. He cites associate consultants and others. He also relied on his own experience.

On page 14, the witness sets out six areas to be discussed:

1. The historic and geographic relationship of Merchantville and Pennsauken;

2. The effect on Merchantville pupils of loss of contact with Pennsauken;

3. The symbolic loss to Pennsauken High School and community if Merchantville departs;

4. Secondary loss resulting from departure and the impact of symbolic loss;

5. The comparison between the Pennsauken school system and community and the New Brunswick system and using

historic and current data from New Brunswick and its parallel to Pennsauken; and

6. A summary.

After completing the exhibit, Kaplan wrote the supplement (RP-6). He was asked to expand on historic and geographic aspects. He did additional research in order to produce Exhibit RP-6. Among other things, he read publications of the Bicentennial Commission of Pennsauken and a 1964 Merchantville publication. He did not read Commissioner of Education decisions on the topic and has no recall of reading Commissioner of Education decisions in the New Brunswick-North Brunswick sending-receiving matter.

Kaplan noted that Merchantville and Pennsauken share a water supply, trash collection and Little League field use. He did not establish separate and local tax collection, separate and local inspectors, separate and local municipal courts, separate and local zoning and planning functions and the like. He reported no municipal library in Merchantville, but learned later that there is one. In his opinion, however, items he did not address as separate and distinct do not negate the "oneness" of the two municipalities.

The witness maintains that Merchantville is physically surrounded by Pennsauken as Morris Township surrounds Morristown. See, Jenkins v. T.P. of Morris School Dist. and Bd. of Ed., 58 N.J. 483 (1971). The witness also stated he knows Merchantville has some borders not contiguous with Pennsauken but considers Merchantville physically surrounded by Pennsauken. In Exhibit RP-5 he refers to Merchantville as surrounded; in RP-6 he refers to Merchantville as surrounded almost exclusively by Pennsauken.

The witness also stated that he made reference to Pennsauken's "urban classification," but was challenged at his deposition. In Exhibit RP-6, in a change from earlier reports, he refers to Pennsauken as "urban/suburban." All references are to New Jersey Department of Labor classifications.

The University Consultants' report concludes that Pennsauken High School delivers quality education. Removing the press of constant litigation, the district will focus more on enhancing delivery of services. The consultants also believe that continued attendance by Merchantville pupils at Pennsauken High School can benefit both groups of pupils and prepare Merchantville pupils "for a

productive and satisfying life encompassing more schooling or a successful work experience, and with a set of skills and experiences to live in a complex world populated by many different peoples" (RP-5 at 35).

Kaplan further stated that he compared curriculums, facilities, programs and community factors. He applied his own opinion as to which of the three statutory elements (educational program, financial impact and racial impact) was most important. He did not do the financial analysis. That was done by an associate consultant. His references to money express his opinion, but are not a part of his study. He was able to do the demographic work and decide what best supported Pennsauken. The educational effect of a Merchantville withdrawal was not a part of his study. His work was done completely independently; he was given broad guidelines at an initial meeting, some board employees helped him gather data, and he set the direction of his paper. He did not use certain information others gathered.

The witness expressed the opinion that although Merchantville and Pennsauken each have a municipal governmental structure, that is not particularly important. Merchantville is a "neighborhood in the community of Pennsauken."

On his visits to Pennsauken High School, Kaplan did not observe the school to be overcrowded. Because 1990 U.S. Census figures were not available, Kaplan relied on the 1987 updated figures (RP-5 at 22). The witness conceded a smaller number of white residents leaving Pennsauken if severance were granted than the number that left New Brunswick. However, the difference in numbers does not affect his loss concepts. Although some years are not reported in some charts in his report, this does not affect trends and patterns.

Kaplan started from the position that Pennsauken is better served if the sending-receiving relationship is continued. He then made his report. The witness also testified that the specifications of his report and services to Pennsauken were changed almost as soon as drawn.

Pennsauken presented its director of school facilities. He has served in the post for eight years. He was involved in the proposed expansion of Pennsauken High School. He developed educational specifications with input from school administrators and worked with the architect.

Approximately $18 million has been alloted to the project in five phases. The program was authorized in October 1988 by the Board. The Board also is committed to lease-purchase arrangements.

The functional capacity of Pennsauken High School is 1,426. After expansion, the functional capacity will be 1,786 based on program with a maximum rated capacity of 1,862 if the New Jersey Department of Education permits.

In the witness' opinion, Savitt's finding of overcrowding or overuse is not accurate. He believes the building is not overused.

The improvement plan will create additional classroom space to aid scheduling existing programs and to accommodate expanded programs. In the 1970's, when there were only three grades in the school, the capacity was similar to today's. There have been times when utilization was even higher than today. More space definitely provides more program flexibility. The witness concedes there is minimal flexibility at this time. Scheduling four separate pupil lunch periods gives some spatial relief but the witness was not in his present position when this began and he cannot be positive of the reason it was implemented. High school space as currently available gives administrators what they need for current program requirements. There are few unused classrooms at any time in the day. There is not enough space for an in-school suspension program covering every period of the school day.

The witness did a capacity study of the building with the Board's architect in late 1988 and derived the same number as did the New Jersey Department of Education.

The witness believes Savitt's language concerning Haddonfield High School is also applicable to Pennsauken High School. Pennsauken has ample space for current scheduling. It now has a diversified program. Underutilization and having pupils below the number of functional capacity are not the same thing. The witness, however, has minimal involvement with scheduling. He has no familiarity with Haddonfield High School.

Pennsauken's director of special services testified. He is responsible for special education, guidance, counseling, nursing, the child study team, attendance and other functions. He stated that Exhibit RP-6 covers offerings at Pennsauken.

Merchantville has 14 classified pupils in Pennsauken, eight of them at the high school. His office produced RP-15, a Pennsauken High School Special Education Report dated April 12, 1991. The witness stated there is much mainstreaming at Pennsauken High School and noted that computer literacy courses are available to perceptually impaired classified pupils.

The witness conceded there are three special education teachers in one room. However, not more than two use the room at one time. This does not violate any state guidelines. There is a total of 137 classified pupils at the high school. Of these, 31.3 percent are minority pupils. All Merchantville classified pupils are white.

Every special education parent is offered involvement in his/her child's program. Articulation with Merchantville special education personnel is excellent. At the high school, there are four self-contained classes for perceptually impaired pupils, one class for socially maladjusted pupils, these two accounting for approximately 40 pupils and the balance, some 95-100 pupils, are in resource room situations.

Time out rooms, a widely accepted concept for special education pupils, are used at the high school but, because of space limitations are within the classroom, not in separate rooms.

Pennsauken's supervisor of counseling testified. She coordinates guidance activities between Pennsauken and Merchantville. The witness disagrees with Pennsauken's expert's report (P-13 at 12) stating, "It was very disappointing to note that little if any articulation of curriculum is carried out with Pennsauken High School." The witness maintains articulation is addressed carefully. Incoming Merchantville pupils spend a day at Pennsauken High School with 9th grade pupils. Meetings are held at the Merchantville school with counselors in order to develop pupils' schedules. There is an 8th grade parents' meeting. In addition, there is a general awareness of Pennsauken's programs by way of older siblings who attend Pennsauken, sports programs, and other informal means.

The witness also disagreed with Merchantville's expert's statement (P-13 at 14), "Although community and parent involvement is extensive in relationship to Merchantville Elementary school, opportunities are very limited in relationship to Pennsauken High School. A limited orientation program for students and parents is provided." The witness' disagreement is based on the same reasons she expressed

concerning articulation and curriculum. Merchantville is advised of every activity concerning the Counseling Department such as college night and scheduling night. The witness also stated that she has no complaints regarding any facet of counseling activities from Merchantville parents.

Pennsauken has three general curriculums: college preparatory, business and technical. College preparatory pupils comprise about one-half of enrollment. Guidance is divided between college preparatory and noncollege preparatory. Much time is spent on college applications and, in their senior years, college-bound pupils are seen as many times as needed.

The witness recalls speaking to a consultant about guidance services once or perhaps twice. She does not recall speaking of the areas the consultant mentions, but concedes the consultant must have spoken to the principal (P-14 at 12). The witness also believes Merchantville's consultant's conclusions apply to Pennsauken as well as Haddonfield. She firmly believes the school has low class sizes allowing for individual differences and that transfers can be accommodated within present class sizes. A few classes are overenrolled (P-20, P-21, P-22). The courses rather than room sizes dictate the number of pupils that should be assigned. If the educational recommendation for a given class is 17 pupils but the room can accommodate 30, the school tries to keep enrollments at or near 17.

The Pennsauken supervisor of language arts and foreign languages testified. She has worked with Merchantville and, in March 1990, was invited to Merchantville Elementary School to meet for approximately two hours with professional staff. She, in turn, invited Merchantville teachers to an inservice program at Pennsauken.

Pennsauken requires 9th grade pupils to read two books over the summer prior to beginning of the 9th grade. For at least two years, the witness has taken this information to Merchantville. She has also been involved in the advanced placement of two Merchantville pupils in Spanish. The witness can recall no complaints from Merchantville regarding articulation.

The Pennsauken supervisor of mathematics and science also testified. He has met with Merchantville staff concerning mathematics curriculum, has spoken to Merchantville staff concerning algebra text books, has spoken at Merchantville in-service meetings about curriculum, has been involved in a joint meeting of

Merchantville and Pennsauken personnel concerning scope and sequence of mathematics curriculums and has been invited to meetings at Merchantville and has invited Merchantville staff to meetings at Pennsauken. He can recall no complaints concerning curriculum or articulation from Merchantville staff. Three of the four contacts with Merchantville staff that he recorded occurred after the present litigation began.

A Pennsauken assistant principal testified. He does master scheduling, supervises instruction and teaching, is responsible for programs of studies and is responsible for report card procedures. His most current master schedule at the time of hearing (RP-21) was admitted in evidence. The capacities mention number of pupils taking each course. All department chairs and supervisors are given data. The number of sections that each class should run are determined. The number does not equal the functional capacity of the space per the New Jersey Department of Education. For example, if 100 pupils select a course, five sections are established and a maximum enrollment of 20 is derived. The enrollment cap is for school purposes--to keep balance--and is not "official."

Pupils move in and out, especially in autumn. Pupils add and drop courses after the first marking period. The actual physical capacity of a teaching station or the school has never been exceeded. Rooms are available because of 8-period days.

The witness also testified to racial composition of the Pennsauken High School pupil population (RP-20). The witness added that no Merchantville pupil, parent, teacher or administrator ever complained to him about the lack of a course at Pennsauken. He has heard no articulation complaints. Space at Pennsauken High School is not impinged by schedule. Additions to the school will make a good situation better. The school has not had a space problem it could not resolve since July 1987. The 1988 functional capacity study showed the building at 108% utilization. The witness maintained, however, that there was no problem offering needed classes. The witness supervises people who talk to Merchantville personnel, but he does not communicate directly with Merchantville personnel. He believes articulation is adequate although he would have liked to see even more communication between the two schools. He had not been aware that Merchantville had initiated the mathematics curriculum meeting between the two schools.

The witness testified concerning staff utilization and, despite some situations that could be better, believes that all teaching stations are appropriate for the uses to which they are put. Self-imposed capacity limits and some state-imposed capacity limits have been exceeded (RP-21). The auditorium and cafeteria are not used for instructional purposes, but are used as study halls. More space, of course, would be a benefit. The planned addition would make good instruction better. Mere relocation, however, will not change instruction. Related classes will be held in the same general areas. The proposed expansion may allow a reduction in class size. The witness was unable to say at the time he testified that class size would certainly be reduced. He did state that no class has been not offered because of space limitation.

The Pennsauken High School principal testified. He discussed the Satellite Education Resources Consortium. It involves small, highly interactive groups. More than 30 other districts have sent personnel to observe the program, including Haddonfield.

The principal does not believe the building is presently overcrowded. Articulation with Merchantville seems not to be a problem. However, there is no input from Merchantville concerning curriculum and extracurricular activities. As to faculty recruitment, the witness stated the faculty should reflect pupil makeup. He can only act when there is a vacancy. However, when a vacancy occurs, broad searches are conducted for qualified minority candidates. At the time he testified, the witness recognized 13 black, 2 Asian and one native American teachers.

The witness denied telling Merchantville's consultant that the building was overcrowded. On one of the days Savitt visited the school, pupils were being held in the cafeteria because there was a suspicion of drug activity immediately outside the school.

The witness also described, as did witnesses before him, the proposed expansion. He noted renovation of some existing rooms plus new physical education, art and music facilities. Each subject area will be housed in a zone within the school.

The witness also generally disagreed with the Savitt study (P-13a, 13b, 13c, 13d). He stated four lunch periods, beginning at 10:09 a.m., are not a scheduling ploy to keep pupils out of classrooms. However, he has never analyzed

whether three lunch periods could be housed. When deposed in 1989, he stated that a 3-lunch period schedule would be difficult. There could be no in-school suspension program.

Although some room is available each period, the same room is not available all day. Many suspensions are of one day's duration. They last only until a parent conference is held, usually the next day. Some suspensions are out-of-school if the nature of the infraction dictates. When the witness was at the Middle School, he had a successful in-school suspension program because he had space in which to house it. The witness also testified to several space problems in the present building.

The witness becomes involved in articulation directly with Merchantville if Merchantville makes a specific response or if his superiors direct him to do so. Articulation requests usually are made through central offices. Department heads have implied articulation responsibilities. Persons are designated to serve articulation purposes as needs arise. The school has an ongoing curriculum review. Courses are added, dropped and changed each year. Much remains the same, but all courses are examined. The witness also stated that Merchantville parents and Board members have as much input as they want. He is unaware of any administration-to-administration communication, however. The witness did recall a letter from a Merchantville Board member. It was probably directed to the Pennsauken superintendent or Board. It was forwarded to him for disposition. The letter requested certain topics be discussed. The witness was unaware there had been a letter written concerning examination schedules.

A Pennsauken High School Spanish teacher testified briefly. The relevance of the testimony and the probative value were so slight that the judge merely mentions that the testimony was received.

The Pennsauken assistant superintendent of schools testified that he has been in the position since 1974. He has read Savitt's report (P-13) concerning articulation and curriculum and disagrees. He believes there is a long history of cooperation and articulation between Pennsauken and Merchantville. A weekly Pennsauken staff news letter is sent to Merchantville staff. Merchantville eighth grade pupils spend a full day at Pennsauken High School each spring. A school board member from Merchantville is often invited to attend board meetings in Pennsauken. In addition, there is an orientation night and a college night which includes much information on financial aid. Pennsauken Board agendas and

minutes are sent to Merchantville regularly. He has invited Merchantville staff and faculty to attend Pennsauken staff development meetings. Language arts, fine arts, and science-mathematics have been the subject of in-service training with Merchantville faculty particularly as to the High School Proficiency Test and the eighth grade "early warning" test.

Merchantville parents are active in the Pennsauken High School Parent-Teacher Association and in various booster clubs. There is a learn to swim program to which Merchantville residents are invited. A newsletter, Your Schools, is sent to Merchantville homes. Tickets for all Pennsauken activities are sent to Merchantville Board members and administrators. Merchantville senior citizens can get a Pennsauken "gold card" that entitles them to reduced fees for Pennsauken athletic events and other activities. Merchantville parents have membership in the Pennsauken library. No Merchantville administrator has ever expressed dissatisfaction with articulation to the witness. A few years ago, Merchantville had concern about algebra readiness. The districts worked out a response. At one point, parents and staff at Merchantville did not like the fact that Merchantville pupils moved from Merchantville Elementary School to Pennsauken Junior High School and, one year later, to Pennsauken High School. This, too, was addressed and changed.

Pennsauken High School has supervisors in special education, basic skills, science-mathematics, language arts-foreign languages and social studies. All supervisors have articulation responsibilities. However, the witness did not know if articulation responsibilities were part of the supervisors' job descriptions. His job embraces some articulation, but the principal is the ultimate articulator. The director of guidance and all other administrators also have some responsibilities. Articulation is not a thing that happens at whim. It goes on regularly. The same activities occur each year at specified times. The present system is more than adequate. To this witness, the fact that the science-mathematics supervisor had had no contact with Merchantville for approximately six years meant that there were no problems. This does not mean articulation occurs only when there are problems. Information exchanges and invitations to Merchantville are an ongoing process. If there are no complaints, the witness assumes everything is all right.

A year or two ago, the witness had some responsibility for gathering materials and information to answer interrogatories. He provided enrollment and attendance data from state reports. Over the last few years some Pennsauken

eighth grade pupils have chosen not to attend Pennsauken High School. The witness stated at hearing, as he had at deposition, that Pennsauken has never surveyed families whose eighth grade pupils did not go on to the high school. He knows of no efforts made to encourage those pupils to attend Pennsauken High School. The witness also testified about the process of curriculum review and change in the Pennsauken schools.

Pennsauken's financial expert testified. He is a Certified Public Accountant and a Registered Municipal Accountant. He has 20 years' experience with school districts. He also acts as a financial advisor. He cannot, by law, advise on investments, but can advise of tax rate effects and can advise when to sell bonds.

He did not help prepare the 1990-91 budget. His responsibility, after the budget was prepared, was to determine the tax rate impact. The 1990-91 budget called for a local tax levy of $18,333,692. It was defeated. The 1991-92 school budget was approved. It calls for a local tax levy of $18,767,142. The increase in local tax levy was 2.63%. The Quality Education Act set a cap on the amount raised by levy. For Pennsauken, the calculated cap was 8.2%. A cap worksheet was submitted to the county superintendent of schools. Capital outlay in the amount of $172,000 was proposed. The 1991-92 budget was within $66,000 of its cap.

In response to a series of questions, the witness assumed a loss in anticipated revenues. For the 1992-93 budget he saw several options. The local district might add certain revenues and offset by reduced expenditures, or state and federal categorical aid might be added. In addition, the 1991-92 budget had a projected surplus of over $1.5 million. As a rule of thumb, surplus should not exceed 5%. Pennsauken was well below that figure at the time the witness testified.

Concerning tuition anticipated, the witness used state figures and derived a cost per pupil of $8,803. Merchantville reported an anticipated 60 high school pupils in total, not by grade. Extrapolating from the April 1991 tuition billing, this represents only five new 9th grade pupils.

Using preliminary assessed evaluation from the Camden County Board of Taxation and estimated assessed evaluation using Merchantville's expert's numbers, the witness built from that a scale of lost revenues. Because the Pennsauken Board budgets on a calendar year as opposed to a school year, the first year impact would be 50% and thereafter 100%. In short, if there is a phasing out of pupils, tuition

income from Merchantville declines to zero over a four year period. If all Merchantville pupils were removed at once, the loss would be $528,180. Over an objection from Haddonfield's counsel, the witness' figures were admitted for comparative purposes, but not as accurate per se. Recognizing that several facts are estimated, the judge admitted the testimony on a limited basis.

The witness also expressed the opinion that the revenue loss in 1991-92 if there were a phase out would be less than $50,000. The 1991-92 budget exceeds $41,000,000. The loss represents less than one-tenth of one percent of revenue. The witness expressed the opinion that this is not a substantial negative impact on the total budget, particularly total revenues.

The loss in the second year, assuming 19 additional pupils withdrawn, would be approximately $167,257. Assuming the budget cap stays at or near 8.8%, the witness estimated the 1992-93 school budget to be somewhere in the area of $43,500,000, not counting Merchantville tuition loss because of pupil withdrawal.

For the hypothetical situation in 1992-93, the loss is less than one-half of one percent. This, in the witness' opinion, is not a substantial negative impact on the overall estimated 1992-93 budget in terms of percentage.

The accountant also stated that for the ensuing two years, percentage-wise, the tuition loss was not likely to exceed one percent of revenues. This is not a substantial impact on the overall budget. The amount of increase that loss of tuition would cause in the tax rate, using the current rate as a basis for calculation would mean, in the worse case, an increase from $7,522 to $7,622 assessment on a house valued at $100,000. As a percentage, this is not a significant increase.

When the witness did his calculations, he did not factor in any savings from withdrawal of Merchantville pupils. He could not derive a reasonable figure to represent the offsets and, therefore, they are not included in his calculations. Quality Education Act figures were of no assistance because, under the act's first year provision, moneys were paid directly to the municipality. The witness used an estimated tuition of $8,803. The prior year's actual figure had not been released by the New Jersey Department of Education when the witness testified. The 1988-89 actual, the last know actual figure, was $5,575. The history of tuition increases over the last seven years indicated an annual increase of between seven and one-half

percent and eight percent. Using this factor, the witness built his estimated tuition figure.

The witness identified a letter he wrote on May 15, 1991. In a paragraph mentioning budget caps, the witness indicated that caps included basic state aid but not categorical aid and certain other revenues. Formula aid reductions can be made up by local tax levy. If tuition money is reduced or nonexistent, local tax levy cannot be substituted if that would cause the district to exceed its budget cap unless the voters grant an approval. The identified letter also mentions a tax rate impact of 9.17¢. If, however, the revenue were lost and budget reductions in the same amount were effected, there would be no tax rate impact. If the Board got a tax waiver approval from voters, then and only then could they increase revenues.

The accountant stated he has been Pennsauken's accountant and auditor for 15 years and has done its annual audits and certified its actual surpluses for that period. The actual surplus for each of the seven years he has referred to has exceeded projected surpluses. His loss of revenue calculations in relationship to surplus would actually be lower on a percentage basis. However, the Board has been appropriating forward more of its surplus each year. The formula aid Pennsauken receives from the state is based on net operating budget which factors in numbers of pupils enrolled. The witness is aware of some Pennsauken enrollment decline. He is not aware, however, of any financial problems caused by the enrollment reductions.

He would never advise exhaustion or even serious diminution of surplus. The 1990-91 budget was the basis for his calculation of allowable surplus of approximately five percent. If all tuition moneys were removed, he could not recommend making up the entire amount from surplus. The witness stated he was not asked to and was not qualified to calculate savings realized by Merchantville's withdrawal.

The assistant superintendent was recalled and testified about the budget building process. It is not significantly different from that used in most New Jersey school districts. Approximately 81% of the budget is spent on personnel and fringe benefits. In the case of revenue losses, absent a cap waiver, his recommendations to the Board would include program reductions that would affect the least number of pupils. For 1991-92, the district delayed purchase of three school buses, did not offer minigrants to teachers, cut summer curriculum work for teachers by one-half, permitted no field trips and eliminated summer driver training courses. In addition,

the district took $700,000 from maintenance, new equipment, computer replacement and painting. Nearly every account but textbooks was reduced.

In the witness' opinion tuition losses would be about $44,000 in the first year and $167,000 in the second year with the third year exceeding that figure. The witness also stated a management team considered tuition loss and attempted to translate that into program reductions. The team has existed for many years and monitors all school operations including budgets, curriculum and personnel. The committee did meet for the express purpose of looking at program effects if Merchantville tuition were lost. Discussions began soon after Merchantville filed the present appeal. An options list was developed late in the 1989-90 school year; that is, early in calendar 1990. The group used an estimated loss of $500,000. The figure came from historic tuition line items. The matter was discussed four or five times before the team made recommendations to the Board. The team did not have the benefit of the auditor's May 15 letter. The witness did not know the exact projected loss for each year until the day he testified. He stated that if the first year loss were $44,015, he believes he could recommend no cuts in program. If the second year loss were $167,257 and there were a budget surplus of $1.5 million, he believes he might recommend no cuts but would have to take direction from the Board. He would have opinions and would make recommendations if tuition moneys were actually lost. To make recommendations and relate them to loss and tuition, he would have to put a dollar value on each recommendation.

There are now approximately 70 Merchantville pupils at Pennsauken High School. The witness believes that five years ago there were more, probably over 100. He believes 134 was the highest number of Merchantville pupils ever enrolled. Today's number is approximately one-half of what it was at its peak. As pupil numbers dropped so did tuition received. The witness recalls no program cuts resulting from the tuition loss. If Pennsauken lost five Merchantville pupils next year, it could and would offer a thorough and efficient education to its pupils. If Pennsauken lost all 70 Merchantville pupils next year, it could and would offer a thorough and efficient education to its pupils.

High school enrollments are now level after a period of decline. Elementary enrollments are up slightly. Some electives at the high school are losing "drawing power." Many pupils are in basic skills programs. The management team did not look at eliminating some of these courses and decided not to recommend reductions and attached no dollar amounts to them.

The Pennsauken teacher salary guide is among the top three or four in Camden County which contains 30 or more school districts. A three-year contract ends on June 30, 1992. The present contract calls for a 9% increase each year. The management team assumed that things would be much the same in the future, but there are a number of teachers nearing retirement. The team did discuss lesser raises in the future and does believe the rate of increase will slow down significantly because of general economic conditions in the state and nation.

Projected reductions have not been and could not have been tempered by early retirements of teachers at the high end of the salary scale and resulting lower salary costs. The Board can close any tuition gap in many ways and the Board has the ultimate decision making power. The reductions he listed in his testimony would be only recommendations.

Three Merchantville parents testified concerning their satisfaction with the Pennsauken High School and its program. The first stated she believes the pupil mix at Pennsauken High School is good. It would be imprudent to shelter children from children of other backgrounds. The witness could recall no opportunity for the public to speak at Merchantville Board meetings on the sending-receiving question. Later in her testimony, she stated there is a portion of each board meeting at which the public may speak. She did not speak, however, at the meeting she attended. Her children have friends who do not attend Pennsauken High School. Her children do not interact differently with the children who do not attend Pennsauken. Present attendance patters have stood for a long time. She sees an insult to Pennsauken if Merchantville pupils are removed.

A second testified that she has one child in Pennsauken High School. She is a realtor in the Pennsauken-Cherry Hill-Merchantville area. She knows of the request to sever the sending-receiving relationship. She thought it was a "personal slur." The witness testified to many community activities. She knows no Merchantville people who are "strong" to send their children to Haddonfield. She knows of no survey or referendum on the subject. However, the witness also stated she did not know the Merchantville Board's reasons for seeking severance. She did state that there could be educational reasons for the move. The witness also stated she was selected to testify. The Pennsauken High School principal had asked her daugnter to testify. The daughter was involved in activity at Rutgers University on the particular hearing day and the principal asked the mother to testify. Early in the

year she had expressed a desire to testify and contacted the principal. The witness repeated that she does not understand why Merchantville wants to withdraw from Pennsauken. The witness also stated she did not ask what the Merchantville's reasons were. She did ask Pennsauken Board members why severance was sought and what precipitated it. They replied that they were not sure.

The witness did not know Merchantville had had public hearings on the question. She has asked people she knows about the severance matter but has not asked any Merchantville staff or Board members.

The witness compared high schools when her child was in junior high school. She knows Haddonfield as a realtor and the schools are a strong selling point in that community. She knows a high percentage of Haddonfield pupils go on to higher education. She knows of state report cards on school districts but has not seen comparisons. She has read newspaper articles on the subject. The witness had a vague recall of comparisons of schools approximately two years ago. She could not recall attendance figures or any other statistics.

Another parent testified that she has been involved in parent-teacher activities and in a Pennsauken athletic association for some years. She is aware of the proposed severance and believes it a slap in the face to Pennsauken. The mere request to sever implies that the education in Pennsauken is somehow inferior. She believes her parent-teacher activities give her certain insights. She is satisfied with the Pennsauken education program and is satisfied with the diversity of pupils in Pennsauken.

The Pennsauken High School principal called her and asked her to testify in this matter. He did not mention who else he had contacted. The witness met with other witnesses on the hearing day. They met in the principal's office for a few minutes. The witnesses' opinions were solicited. The witness expressed her opinion; the principal expressed none.

The witness feels Pennsauken will be offended if Merchantville leaves on the basis that Pennsauken High School is "not good enough for them." Most of her information was gained by word of mouth and through parent-teacher organizations. Severance has come up only occasionally at parent-teacher organization meetings, however.

The Spanish teacher who previously testified was recalled. He believes Pennsauken High School is an outstanding comprehensive high school. He has served at Pennsauken High School since 1972. In the five years before that, he taught at Merchantville High School. When Maple Shade ceased sending pupils to Merchantville, Merchantville closed its high school and sent its pupils to Pennsauken High School. Inasmuch as the witness believes Pennsauken "took us with open arms," Pennsauken would feel hurt and betrayed if Merchantville pupils left. Severance would represent no gain for Merchantville pupils.

The witness did no survey of Merchantville pupils at Pennsauken High School. He does not know how many Merchantville pupils do not attend Pennsauken High School. He is offended that the Merchantville Board would choose to remove its pupils. He is not offended, however, when the parents of one child decide the child will attend a secondary school other Pennsauken High School. Two Merchantville pupils took a placement test prepared by the witness. As ninth grade pupils, they will be eligible to take Spanish II.

A day long visit by Merchantville pupils to Pennsauken was instituted after the present litigation began. The witness has not studied severances. The probable effects he sees are based on experience, conversations with others and his knowledge of the three communities. A pluralistic high school offers much to young people. However, parents have a right to choose the schools their children will attend. They may choose a school they perceive as academically superior as opposed to a culturally diverse school.

A 20-year Pennsauken High School teacher testified. He teaches pupils from Merchantville as well as from Pennsauken. He believes severance would label the Pennsauken faculty as not credible educators. The school has adjusted to changing populations. The witness is a co-sponsor of the After School Club. The Club has discussed what one pupil called "Merchantville flight." The witness reported pupils upset with movement away from them. Black pupils, who made up a majority of those attending the meeting, said the proposed severance is another reason not to be part of the "situation in America." The witness believes the United States is diverse and acceptance is needed. The schools are a good place to start.

The principal told the witness he would be testifying in this matter, but did not say what would be asked. The witness is not offended that some Merchantville pupils now choose not to attend Pennsauken High School. The

witness believes Pennsauken is an urban-suburban community. He believes the high school, which operated at 104% of capacity in 1989, is not crowded.

When pupils brought up the question of severance he offered that Pennsauken High School is diverse and that some segments do not want this. One could assume that by "segment" he meant Merchantville. He said to the pupil group, "Let's examine why Merchantville would ask the Commissioner to sever." The witness stated he knew documentation was not the issue. He dismissed out-of-hand whatever Merchantville offered. He did not know what Merchantville's stated reasons were and he didn't believe the pupils needed to know. He doesn't know if the Merchantville Board has ever expressed any reasons other than those in its petition. Better education in Haddonfield is a "disguise" the Merchantville Board chooses to use. All its papers are false. The petition is a charade. He has personal knowledge that the Merchantville Board's allegations are other than those expressed in its petition.

The witness considers himself a "human resource person for the Pennsauken community." His own children attended public schools, but not in Pennsauken. The Club probably discussed the severance question at two sessions. Both were probably held in November 1990. Approximately 20-25 pupils attended each time. The pupils would be from grades 9-12.

Three Pennsauken High School pupils testified. Each had been told approximately one month ago that he/she would be a witness. The principal saw approximately 20 pupils, roughly five at a time. The principal stated that Merchantville wanted to send it s pupils to Haddonfield. There was no discussion of the issue and the principal's mention was the first that the first witness knew of the situation. The principal advised each pupil that he/she would be notified if called upon to testify.

The first witness does not know the racial mix at Pennsauken High School. She believes even a small change in white registration would hurt. She does not know why Merchantville would seek to remove its pupils. She is proud of her school and believes it offers much opportunity. Each family, however, has a right to choose how its children will be educated. A "whole group" shouldn't be removed, however.

A second pupil testified that she is involved in several activities including field hockey and the Minority Club. She knows of the requested severance. In her opinion, Pennsauken High School is good enough for anyone. "We should be as one." It is disheartening to the witness for "them" to take white pupils out of Pennsauken High School. She does not believe the school is overcrowded. She does not believe Haddonfield offers better education. She does believe that the basis is racial.

The witness spoke to the high school principal alone sometime before she testified. She spoke only to the principal and the Board's counsel and her parents. She came to her opinions by herself. She did, however, discuss the matter some months ago with another pupil. Nothing could convince her this is not a racial issue.

The third pupil testified that she has friends of all colors and backgrounds in the school. Her opinion is that the withdrawal is embarrassing. It says something is wrong with her school. The witness believes "they" don't like minorities. She would continue to associate with the same persons even if severance were granted. Students and parents of Merchantville did not like the numbers of minorities at Pennsauken High School. The witness knows many Merchantville families. She knows Merchantville gave educational reasons to the Commissioner. The principal asked a few pupils to be witnesses. They went to his office. She believes she spoke with the principal alone. She did not discuss her testimony with any other witness.

This witness knows young people who live in Pennsauken but do not attend Pennsauken High School. Some left at the end of grammar school to attend Catholic high schools. That did not bother her. She enjoys Pennsauken High School and currently is fourth in academic rank in her class. Severance would not hurt her performance.

Dr. Michelle Fine testified on behalf of Pennsauken. She is a social psychologist. She teaches, supervises doctoral research, consults and publishes. She is involved in a three-year project to restructure the comprehensive high schools in Philadelphia. She seeks to understand how people in a context "make meaning" of their circumstances. She has done significant amounts of work in race relations.

Dr. Fine was hired by and produced a report for the Pennsauken Board of Education. The report deals with perceived motives of Merchantville and the anticipated effects on Pennsauken High School if Merchantville pupils were

withdrawn. Her task was to interview pupils, staff and community members to try to determine their views of the litigation and its impact. She used two sampling techniques. She interviewed one group of educationally active pupils and she interviewed a randomly selected group of pupils including some from Merchantville. Her idea was to "get a reading of the climate." She spoke to teachers and administrators in small groups and she spoke to parents and community members in small groups. All her work was intended to find out what these persons saw as the motivation for and the impact of severance. Dr. Fine conducted her interviews in the fall and spring of the 1988-89 school year. The group of pupils she interviewed first were identified by the school administration. Twenty pupils 18 years of age or over were interviewed throughout the year, all after the large group interviews had been conducted. The same was applied to Merchantville pupils: they were interviewed in fall and spring after large group interviews had taken place. Interviews of Merchantville pupils ran longer into the year. The witness had intended to interview a "substantial number" of Merchantville parents, but couldn't reach the numbers she wanted. She expanded the number of pupils, then, from ten to 20.

Three of 11 pupils in the group of identified pupils were from Merchantville. She believes some of the 20 pupils 18 or older were from Merchantville, but cannot say how many. This number is not stated in her report. In total, 51 pupils were interviewed, at least 23 from Merchantville.

Pennsauken resident enrollment at Pennsauken High School is much greater than one-half of the school's enrollment. More than one-half of the pupils interviewed, however, were from Merchantville. The emphasis on these pupils came from three perspectives. First, these pupils were active in school. It is a standard procedure to talk to these pupils to get a feeling for the climate of a school. Second, many Merchantville pupils simply fell into the random sample. Third, the witness wanted data from pupils "most at question in the litigation." These were the pupils who would be moved.

The witness was aware that Merchantville had asked for a phase out and that no pupils presently at the high school would be affected by separation. The witness stated, however, that all pupils would be affected because there is a "symbolic loss" attached to a state-granted severance. When the state takes a position on educational issues, it has consequences on how communities look at themselves. Whether pupils attend Haddonfield High School is irrelevant; the witness sees an effect on all pupils.

At least two levels are involved. First is the extent to which pupils look at state decisions as reflective of social policies. Second, everything she heard suggested an effect on how people look at themselves and their communities.

Twenty interviewed pupils were affected as citizens, family members, community members and how they looked at their participation in the multicultural community of Pennsauken. The witness could not say if any or all of those pupils were still in Pennsauken. She presumed that at least some were. Merchantville pupils who were seniors in 1988-89 would, as citizens of the community, be affected--not as to where they go to school, but about race relations.

Dr. Fine could not separate educational consequences for those who were seniors in 1988-89. As a social psychologist, Dr. Fine is concerned with the relationship of an individuals to their environments. She trained her team of interviewers in preparation for the interviews. The same four questions were asked in individual interviews. The questions are (1) what do you know of the case, (2) what do you perceive the motive to be, (3) what do you think the impact will be, and (4) how do you know what you know. If any subject gave an unclear answer, the interviewers used nonleading probes. A standard reporting format was developed. If the identified pupils did not know much about the case, it was reasonable to assume that the general population did not. Only two pupils of the sample knew nothing; most knew little. The matter had not been discussed in classes. Dr. Fine had asked the principal and vice principal to select a multiracial, geographically mixed group and said she wanted the administrators to say nothing to the pupils beforehand. She relied on the administrators' perceptions of educationally active pupils. Interviews were scheduled for 30 minutes. Some ran less because the pupil offered little and knew little. About 20% of the interviews ran for more than 30 minutes.

The witness identified transcriptions of her notes. These concern group interviews of pupils, administrators and teachers, and parents. She attended and participated in large student group interviews. She also attended and participated in three teacher interviews and three or four parent-community interviews. Follow up interviews of teachers were based on their apparent reluctance to talk in group situations. The witness knew the composition of Pennsauken High School faculty at the time. There were 10-12 black teachers and perhaps one Asian teacher. The witness could not recall the total number of faculty and could not recall the

percentage of minority faculty. Interviewed teachers were selected by the administration, not Dr. Fine. The group of teachers selected was not demographically reflective of the whole faculty. It did reflect diversity of faculty. The witness wanted a cross-section of organization and diversity of perspectives. She believes she got this.

Of pupils, Dr. Fine wanted "leaders" in the pupil culture, a random cross-section of pupils and the Merchantville perspective from Merchantville pupils. On these bases, Dr. Fine believes she got samples that reflect universal faculty perception and accurate readings of pupil perception.

Dr. Fine's report reflects formal interviews with the principal and vice principal. She selected them because she had to know how the principal and his first assistant perceived the situation. These persons can and often do set the tone for a school. Their views were critical to her understanding of the impact of litigation on the school. In addition, they were likely to know more about the case than other faculty members. They could make more informed judgments than others.

Concerning the randomly selected seniors, randomness is desirable because one objective was to get a reading from a random selection of pupils who had gone through the school. She did limit those selected to seniors 18 years of age or older because she wanted seniors with experience in the school and wanted those 18 or over to avoid parental consent problems. She believed she needed parental consent to interview pupils less than 18 years of age. Therefore, her sample of seniors was not truly random. For Merchantville pupils, the witness did try to get parental consents.

Social science now prefers multiple methods of gathering data. The theory is that this helps extract as much information as possible. Her group interviews were designed to find out how individuals feel, whether individuals can identify issues between and among pupils and to get an overview of the dynamics. Individual interviews were designed to solicit individual perspectives. There was followup on two black teachers because the witness wanted to be sure their statements in a group situation were truly held beliefs. In the followup interviews, the teachers could talk without peer pressure and could respond in a different way if they chose.

The parent-citizen group numbered 15 persons. Seven were black and eight were white. Twelve were from Pennsauken and three from Merchantville. School administrators selected the group on the basis of being involved with school activities and also because of racial diversity. The sample was gathered in the same way as educationally active pupils; that is, the administration selected the group. There is no mention of race or gender proportions of the group in Fine's report. In interviews with various groups and persons, the researchers referred to the Merchantville Board as a whole, not merely those who voted to address a petition to the Commissioner. No interviewee was ever asked if she/he had knowledge of or involvement with Merchantville Board members who voted to petition the Commissioner. Pupils, particularly, ranged from very informed to uninformed.

The witness does not know and did not try to ascertain actual Merchantville motives. The witness cannot assess the relation between the perception and reality. Her opinions do not in any way depend on actual Merchantville motivations. Her examination of perceived motivations is aimed at discovering how the culture of the school is affected by litigation. Some pupils were aware of race and class tensions, some were not. Fine did not read or find any work on attitudes and perceptions in the school before litigation. There was no benchmark. She believes the onset of litigation helped to shape pupils' perspectives of race and class considerations.

Fine had no benchmark concerning Pennsauken parents placing pupils in nonpublic schools. She cannot state cause and effect in that context. Some parents stated that "people were talking" about where to place their children, but this is not the same as cause and effect.

In three or four parent interviews all investigators were involved. Most parents had pupils in Pennsauken schools. No one was asked the degree of her/his activity in the Pennsauken schools. During a self-introduction, some parents revealed the nature of their relationships with the schools. Fine's notes do not contain actual recordation of the parents' levels of activism in the schools. She cannot assess from this the nature and level of their involvement. She asked administrators for persons who were actively involved in the schools and who would represent a diversity of opinion. She was satisfied on the basis of answered questions and how parents introduced themselves that they had many kinds of contacts with the school.

The investigators asked parents about effects if future Merchantville classes attended Haddonfield High School instead of Pennsauken High School. There were several comments concerning Haddonfield, but no assessment of what parents and pupils actually knew of the school. Fine collected no data on Haddonfield High School and considered only the racial composition of Haddonfield High School. She cannot say to what degree Pennsauken pupils' perceptions of Haddonfield were accurate.

Nothing in Fine's report address actual impact of change for Merchantville pupils to Haddonfield. Therefore, the report cannot demonstrate or support that change to Haddonfield would be detrimental educationally to Merchantville pupils. Her report deals mainly in perceptions. No specific statement says that a shift to Haddonfield High School would be detrimental to or would disadvantage Merchantville pupils. The report does identify "rich opportunity" at Pennsauken High School.

The witness believes there would be no actual impact on racial composition if Merchantville pupils were withdrawn. Her conclusion of the effect of severance is stated in her report at page 19:

> Put simply, adverse tensions have begun to fester across communities and schools. These tensions will only be exacerbated should severance be granted.
>
> . . . Given the evidence of a solid, integrated social education at Pennsauken High School, we conclude this report with a recommendation to retain the Merchantville students at Pennsauken High School (RP-27).

This, of course, does not mean that adverse tensions did not exist before litigation. There were, for example, some tensions reported to the investigator concerning high school principal selection.

The witness has not written about the effects of actual terminations nor can she identify any work on the subject. If Merchantville pupils attend Haddonfield High School, the community of Pennsauken will be unchanged. When she referred to exacerbation of tensions, this was suggested by literature of organizational psychology. She stated that when authority validates segregation where there are local, surrounding tensions, the tensions are exacerbated. Severance does not here equal segregation of Pennsauken High School. At the time of her study, Fine found

Pennsauken High School integrated. The small number of Merchantville pupils involved in severance would not make the school significantly less integrated.

Few children in New Jersey have exposure to "rich culture diversity." Her report does not contrast social education with academic education. There are probably many New Jersey schools with little or no minority population. The witness believes that the heterogeneity at Pennsauken High School is more important than test scores. Pennsauken High School appears to be a community in which pupils get along across group lines.

Fine was aware of no official pronouncements by Pennsauken concerning the withdrawal. If Pennsauken had said it welcomes the withdrawal because it will ease strain on facilities, pupils' perceptions of Pennsauken High School would likely be different. So would the perceptions of parents and citizens.

The investigators did not break out pupils' sources of knowledge about the severance because of poor response. There was no correlation between source of knowledge and positive or negative reaction to the severance.

Although the witness mentions newspaper articles in deposition, she could not recall them when she testified. She did not review "official" communications concerning the case before her work started. She could form no opinion of impact of those communications, if any existed.

The witness' methodology was designed to assure that opinions did reflect the opinions of a larger body. She adheres to stratified, random sampling combined with an ethnographic approach. She intended a sample that would represent a breadth of views, not necessarily in proportion to the universal group. Her interview study was designed to capture the culture of the community, which is not the same as polling. One cannot say that "active students" equal opinion leaders. The pupils interviewed were not representative of the student body as a whole. They were selected not because they represented all pupils but because they were expected to know the school climate. The investigators intended not to convey the idea they were looking for consensus. Team training was aimed at cutting off a phenomenon known as the stampede to consensus. Individual interviews were randomized. More of these pupils, as opposed to the selected interviewees, knew little of the case. Fine did not check against school records to see if the samples were

representative of the racial mix of student populations. The same is true concerning grade level and ages.

Fine believes she would find the same perspectives today although proportions might vary. Behavior and attitude are not the same thing. Some people will try to give answers they think the interviewer wants. In one group of 20, five pupils indicated the case involved racism (RP-27 at 7). Three or four of the 20 were nonwhite pupils. The investigators have no racial breakdown of the five who gave the answer. Interviewers did not probe for race. They did not probe for pupils who tended to give what they believed the interviewer wanted. A study is, after all, a gathering of opinions. Opinions are subject to change. Providing additional information may change opinions.

The investigators did no follow-up study at Pennsauken High School. Fine, however, believes pupils today would have roughly the same opinions because of confidence in her methods. If looking for predicability, she would consciously oversample some strata and would be confident of proportionality only with respect to the random sample. Adversity of an effect is not necessarily related to the degree to which a perspective is held. Hypothetically, even if 97% of all pupils believed "Let them go. Who needs them?", there would still be two adverse effects. The first would be on Merchantville pupils who lost the advantage of a multicultural setting and the second would be a perception of Pennsauken pupils that the state was legitimizing a segregative action. In testimony, Fine said the "let them go" attitude was linked to the notion of insult. This, however, does not appear in her report.

The witness undertook the study assuring the Board that she was not guaranteeing a particular outcome. She had no preconceived opinion in the Englewood matter, either. Fine made the same recommendation in each case, but based on different analyses. Hypothetically, if she showed the students who were interviewed the pleadings in the case, discussed the history of the matter and generally gave more information, their perceptions would likely change. The investigators' intent was to find out what pupils believed. Merchantville's motives were not significant to that study. Merchantville's motives were of interest to the investigators only as viewed by persons involved in the situation.

Fine believes that little or no chance of social education exists at Haddonfield High School. The quantitative loss is insignificant to Pennsauken if all Merchantville pupils are phased out. In her opinion, the symbolic issue was more

important than actual numbers. Her sampling was designed to capture the breadth of positions in the school community. She oversampled African-American pupils. Proportionality could not be projected, however.

Several questions to the witness were objected to and the objections sustained. The record preserves Pennsauken's exceptions in each instance.

Pennsauken's statistical expert, Dr. Craig Richards, testified. His report is more than an enrollment projection. It deals with socioeconomic factors as well. Although not a statistician, he uses statistical analysis. He has reported on various aspects of other sending-receiving cases. In a matter involving Madison, he did a report on program, finances and enrollment. He did not testify in that matter, however.

Dr. Richards prepared a report for the West Morris Regional High School District. That dealt with regionalization, but involved issues similar to those in a sending-receiving case. The matter did not go to hearing and the witness did not testify.

The witness did testify in a matter involving Boonton. The report in that matter covered programmatic, financial and racial effects that would have been associated with a severance. At hearing in that matter, he testified that some calculations concerning racial distribution were incorrect. The witness conceded certain conclusions in the report were based on computations he had done.

In the present case, he did a first draft that required certain computations concerning cohort survival and other computations. Pennsauken's counsel discovered a mistake in the calculations and in the cohort survival tables. The witness then redid most of the figures.

The report prepared for this litigation is broader in scope than statistical analysis in enrollment projections. It deals, as well, with socioeconomic profiles. There are some references to demographic study. The report addresses two main points. First, whether the withdrawal of Merchantville pupils will have a significant and negative impact on enrollment at Pennsauken High School and whether the withdrawal of Merchantville pupils will have a significant and negative impact on the racial-ethnic integration in the school

Richards concluded that the severance would not cause a negative effect on enrollments. His testimony was confined to significant and negative effect relating to what he describes as racial-ethnic integration at the school.

The witness did not personally collect data. He concluded that the withdrawal would have a significant and negative effect on the racial composition of the school because about 15% of all white pupils forecast to be in attendance in 1995 would be withdrawn. At deposition, there had been extensive exploration of the witness' definition of integration. Among other things, he stated that he could not establish integration [or not] purely on the number of white and minority attendants in a school district. The witness' definition is one that looks at a variety of indicators within a high school including apparent discrimination in the representation of children in special education classes, on sport teams, in music, science and mathematics and participation in the social and cultural affairs of the school. Counsel then asked, "Now Dr., you didn't study whether or not there was that type of integration between the races at Pennsauken." The witness answered no and counsel then asked, "So you can't address any question dealing with whether or not this high school is integrated or not according to your definition." The witness again answered no.

After reviewing the deposition testimony at hearing, Merchantville's counsel moved the tribunal to determine, pursuant to rule, that Dr. Richards did not qualify as an expert in this matter. Before ruling, the judge permitted Haddonfield's counsel to vior dire the witness. The witness testified to his experience using cohort survival methods. After extensive vior dire, the judge ruled that the witness might testify about numbers he examined, how he treated them and what he thinks they tell. No comment was made as to the weight that might ultimately attach to the testimony.

Richards stated he relied on several sources of information. He used the 1991 New Jersey Legislative District Data Book and the 1990 U.S. Census General Characteristics of the population. The witness then described how he treated the data in deriving certain tables. The witness also used the fall enrollment reports required by the State Department of Education. These carry racial breakdowns of pupils by grade level. The same data do not reveal the sending pupils separated by race. Based on the information the witness had, he tried to estimate racial effects of a severance. Unfortunately, Pennsauken could not supply certain supplemental information the witness desired. This information comprised certain historical

tabulations. Absent those data, "it was impossible to do a formal cohort survival analysis for the high school in terms of those sending students." T XX 75-76.

Pennsauken did tell the witness, however, that the number of minority students that actually came to Pennsauken from Merchantville was never more than three percent over the previous years that any one could recall. The witness, however, estimated at five percent. He stated he was attempting to be conservative in estimates because he wanted to allow for error in the verbal reports given him. He did not ever check directly with Merchantville personnel, however.

Richards' report also contains appendices giving information on resident births for Haddonfield, Merchantville and Pennsauken broken down as to white, black and other. These tables cover a ten-year period through 1988, the last year for which information was available.

The witness also reports change in birth rates by race ethnicity, resident births and kindergarten enrollments for each district and a series of tables on enrollment history, five-year enrollment forecasts, enrollment history and survival ratios, and enrollment projections by race. Another appendix is the cohort survival methodology the witness used. The witness once again reported a computational error because of difficulty reading data transmitted by telephone facsimile. The witness stated he overestimated Pennsauken High School pupil numbers by 100 in a year that he could not recall. The mistake was thereafter propagated throughout his draft. The data were never submitted as part of the report, however. The report was then moved into evidence (RP-28).

The witness recounted briefly how he was hired by and instructed by the Pennsauken Board of Education. He was aware there was a possibility he would be called as an expert witness. No member of the Board communicated directly with him. He was contacted by and dealt through Pennsauken's counsel at the outset of the relationship. Later, he met with the assistant superintendent and briefly with the superintendent. He was also provided a tour of the Pennsauken, Haddonfield and Merchantville communities. He used other reports the districts, particularly Pennsauken, were required to file. All materials he produced were based on enrollment reports for the 1990-91 school year as the latest year . The witness did not use any associate consultants in connection with this report. The product is his.

In reply to several questions concerning major conclusions on page 7, the witness stated they are essentially summaries as opposed to the conclusion at the end of the report, which is a substantive conclusion. There were several inquiries about methodology which, with few exceptions, shed little light on the record. The judge notes, however, that the witness had no birth information after 1988. The witness stated this injects a note of caution into the results. Because the witness did not have birth information for the latest three-year period, it might have, but not necessarily would have, a significant result on his conclusions. There is no reason to believe, however, that the trends of the missing three-year period would be greatly different from the trends in the two-five year periods immediately proceeding.

The witness answered a series of questions on specific calculations and sources of data for the calculations. Among other things, the witness stated he projected the number of Merchantville pupils enrolled in Pennsauken in September 1991 rather than calling one of the schools and finding out what the number was. That was a professional decision the witness made. His projected figure of 78, if different from the actual number enrolled, would make a difference in the number he projects for 1995. The witness candidly stated that he used projected enrollments for previous years to project the final years covered by his report. A ratio will be applied to the number (78) to determine how many of those pupils would survive into the following grade for 1992-93.

On table A-3, resident births and kindergarten enrollments in the three communities, there are no figures in the far right-hand column for Pennsauken. The witness stated it was simply an error that he did not catch. Some birth data are given in table A-2, but A-3 was intended to carry the data further. Figures on page 14 for Merchantville pupils were derived by cohort survival. If the information had been available, the witness would have begun with 1991-92 enrollment figures at Pennsauken rather than projecting the number.

Table 8 at page 18 projects 115 Merchantville pupils in Pennsauken in 1995. This is derived by beginning a projection for 1991-92 and carrying forward. If the actual number were 69 as opposed to the projected number of 78, the 1995 figure would have been less. Of the 115 pupils projected, the witness believed 109 would be white and six would be minority. This is based on Pennsauken administrators' opinion that not more than three-percent of Merchantville pupils are minority and it seems to be consistent with earlier birth data the witness examined. Although the witness used a five-percent minority figure, he believes it is

not arbitrary but, rather, an educated guess. The witness' explanation of how he came to use this increase, however, appeared inconsistent with common experience and logic. The witness had earlier commented that the numbers of minorities in Merchantville were so small that percentage variances could not be relied upon because one or two children either way could make a significant difference. Although he increased his estimate by two-thirds, that is, from three percent to five percent, he stated he would not have to find significant growth in the population figures to justify the increase. He also represented this as being conservative. In the text, the witness states, "However, based on the conversations with Administrators and Guidance Staff at Pennsauken and a review of elementary school racial patterns, the number has not exceeded three percent. Five percent was selected as an upper bound of the size of minority representation through 1995." T XX 120.

He did not review Merchantville's elementary school's racial patterns. He checked census data and birth data. He did not check consolidated enrollment reports. He did not have that information in his possession and deemed it insignificant in view of the numbers from Merchantville appearing at Pennsauken High School. The majority-minority makeup of the high school projected for 1995 is the essential finding of his study. He did not have breakdowns for Merchantville. One way to determine those numbers would be to build a projection of elementary minority percentages. He used the 1990 Merchantville report (P-25) that showed of approximately 400 pupils, 35, including special education, were minorities. Exhibit P-25 shows his opinion based on incorrect numbers. Thirty-five pupils equals 8.75% of pupils now in Merchantville. His cohort survival formula does not adjust the numbers accordingly.

In response to a series of hypothetical questions, the witness stated that if a new parochial high school were established, he could determine the effect on Pennsauken High School. If a new housing development were completed and occupied, he would take that fact into account. If he detected a significant trend of in migration of minorities, that should be reflected in cohort survival. If a trend is recent, for example the last three years of a five year period, the first two years' data would dilute the trend. Any in migration of whites or minorities he detected is reflected in year-to-year enrollments. Pupils in 9th-12th grade in 1995 are now in grades 5-7 at Merchantville. Richards' cohort analysis recognizes the "ebb and flow" of eighth grade figures to ninth grade figures. Although the witness could not break out Merchantville pupils at Pennsauken High School by numbers, he did

analyze the whole high school by race. His projections is based on anecdotal data. At the time he testified, Exhibit P-25 referred to pupils in grades 4-7.

Pennsauken data could be projected reliably. He used Merchantville Application for State School Aid (ASSA) aggregate figures to approximate minorities in Merchantville's population for the same period. There were 17 minority Merchantville pupils in grades 4-7 in 1990. When asked if there were any evidence of minority in migration to Merchantville in the last three years, the witness stated he looked at the question, but it does not appear in his report. His source information came from census figures. The witness concedes it is important to pick up recent trends. If doing the report again, he would get those data because they would aid his understanding. A review of figures in the witness' work and from other sources shows minority pupils in Merchantville increasing in the 1988-91 period from 16 to 21 to 35 to 45. The minority increases are statistically significant. Four years is a sufficient period to show a trend. Evidence of increases of minority pupils is there, but the witness could not attribute the increases to in migration exclusively. There could be other reasons. The witness could not estimate the number of Merchantville minority pupils going to Pennsauken High School in 1995 if his five percent figure were incorrect even with the identified trend and new data. He could do a new cohort survival projection for the elementary school by race, but could not do the same for the high school. Cohort survival based on the number of minorities who actually appear at Pennsauken High School would be the essential ingredient. Without that number, it would be impossible to do a meaningful cohort analysis for the high school.

The phase out of Merchantville pupils might be accomplished in 1996, rather than 1995. The witness' projections did not go to 1995-96.

Richards set out to analyze the racial breakdown of Pennsauken High School (1) if Merchantville continues to send pupils, or (2) if Merchantville withdraws. His Table 8 on page 18 shows his estimates for 1991 and 1995. The years 1992-94 are calculable from, but not shown on Table 7. His figures are subject to some adjustment. The witness' opinions are based on numbers. A change in the minority percentage at Pennsauken High School of .5% (one-half of one percent), is not a significant impact in terms of policy. If, after four years, the change were in the range of a little less than two percent, the witness would begin to look at the context. Referring to his Table 6 and Table B-8, he used two trends at different rates and got differing results. The witness emphasized he worked with numbers of

Merchantville pupils who actually appeared at Pennsauken High School, not necessarily numbers of pupils who completed elementary schooling in Merchantville.

The witness answered several other questions concerning methodology. He noted that birth data are not especially valid for projecting kindergarten enrollments. At one point he stated, "Birth data may be ignored."

Although the witness can break out several important figures, he cannot break out white-minority numbers by grade or by district of residence.

Merchantville's Rebuttal

The petitioner called Dr. Adam F. Scrupski. He is a professor at the Graduate School of Education at Rutgers University. He teaches theory and policy of administration. He was director of teacher education programs. He has done work on social and cultural foundations of education, schools as social systems and social class influence in schools. He also has experience as a middle school principal, has written on social forces in schooling, is a member of the New Jersey Civil Rights Advisory Committee and has testified as an expert for the New Jersey Legislature in the "moment of silence" case.

Scrupski was employed by the Merchantville Board to gather data for a report concerning students of both districts. His methodology is laid out at page 86 of his report (P-29). He did interviews of Pennsauken resident pupils and of Merchantville resident pupils attending Pennsauken High School. He interviewed parents of Merchantville pupils attending Pennsauken High School and parents of Merchantville pupils attending Camden Catholic High School and Haddonfield High School.

His conclusions state that severance will have no substantial negative impact of a racial nature on Pennsauken High School.

The witness has done two other studies of this magnitude and scope. In this study, he did observations at football games, spent parts of three or four days in Pennsauken High School and reviewed Pennsauken High School year books. His interviews were conducted in October and November 1989. He has not updated those data.

School officials provided him a list of Merchantville 8th grade pupils as well as pupils attending Camden Catholic and Haddonfield High Schools. He was also given a Haddonfield High School handbook.

Parent interviews were conducted in the school library. He got library book borrowing data from Haddonfield and Merchantville, but not from Pennsauken. However, these data were not used in his report.

The witness saw Merchantville's petition early in his relationship with the Board, but not prior to beginning his work and signing a contract. The witness is familiar with Dr. Savitt and reviewed his report at approximately the time the witness began his study. Scrupski also knows Dr. Fine and reviewed what he thought was not her final report. He did not interview any Board members, faculty members or administrators.

Since doing his report, if Merchantville minority pupil numbers grew, it would not change his ultimate recommendations. His report does not look at community effects but focuses on pupils only. Among the authorities he relied on are Parsons and Allport, particularly in the area of the nature of prejudice.

All of Scrupski's interviewees were selected at random. In interviews of minority pupils at Pennsauken High School, he told the pupils of the petition because some of them were unaware of its existence. He did not tell them of Pennsauken's answer to the petition. Interviewers had to be as neutral as possible to avoid bias; that is, the tendency of respondents to give answers they think interviewers want.

Significantly, no minority pupil "responded in terms of symbolic or physcosocial loss" (P-29 at 9).

Scrupski used an adolescent self-esteem scale (P-15) and this is discussed in the main section of his report. He tape recorded responses. He made no observations of and is aware of no studies saying that the presence of a tape recorder intimidates interviewees. To the contrary, he finds notetaking sometimes intimidates interviewers.

The witness addressed the "real world" issue to parents, not pupils, because he considered it a matter of parental responsibility. No pupil interviewees revealed so-called "real world" concerns.

Gender seemed to be a factor in Merchantville pupils' responses. There are five Merchantville 11th grade girls attending Pennsauken High School. Four were interviewed. All expressed relative satisfaction with the school and would not transfer to Haddonfield in mid-high school career. Three said they would not have elected Haddonfield if they had had the choice at the time they were entering 9th grade. Scrupski believes these respondents were avoiding cognitive dissonance. To conceive of the school one has attended and will most likely be constrained to attend as inadequate is psychologically uncomfortable and, thus, cognitively dissonant. The dissonance is removed by adjusting to the situation and justifying it as at least acceptable, if not preferable. This may also explain responses of the few Merchantville boys who said they were satisfied with Pennsauken High School. Another view of this is that there are only five girls in the 11th grade. It appears they are the ones who, in effect, have survived. A Merchantville parent couple, when asked about the ponderance of Merchantville girls attending private, Catholic or other schools said they believed parents are more likely to transfer girls out of Pennsauken then they are to transfer boys. In part, this is based on the perception that boys are "tougher" and better able to hold their own in a large, perhaps feral high school such as Pennsauken High School. Girls appear to be the primary candidates for transfer if they are easily intimidated, but are allowed to remain in the school if they are effectively coping.

In some cases, an already established familiarity with the school and some of its occupants, through older siblings and friends, considerably eases adjustment to a high school. Several pupils mentioned this. One female pupil saw the absence of a familiar social context at Haddonfield as a reason for not going there, but allowed that once "you started up" it would become comfortable in a couple of years.

The witness testified concerning several other interviews. A Merchantville male pupil, not college-bound, planned to enter the Marine Corps on graduation. He had two occupations planned for himself. Some spoke of cross-age grade interaction where younger youth are inducted into the more mature activities of high school youth. Merchantville pupils, however, appear to develop less quickly. This may be the result of a more prolonged childhood pattern experience in the smaller elementary school. Another cited the giddiness of Merchantville girls as a

sign of immaturity and a lack of the "coolness" valued at Pennsauken High School. Some pupils mentioned fights that frequently are the consequence of teasing. Other pupils do not step in to break up fights, but instead cheer the participants on. A black male Merchantville pupil who had attended Philadelphia elementary schools and, upon moving to Merchantville after 8th grade, had attended Camden Catholic High School for two years said he thought Pennsauken High School had a reputation for being "bad," that is, disorganized and rowdy. However, he said that when he got to Pennsauken High School he liked the teachers' approach to pupils. In contrast to lay teachers at Camden Catholic High School, Pennsauken teachers were more personal with pupils. "They treat you like grownups," he reported. Still another Merchantville boy reported all high schools were alike to him. More than one interviewee reported pupils who were always ready to fight at the slightest provocation. A few Merchantville pupils were genuinely negative about Pennsauken High School. Bullying, larger classes and stratification of pupils by curriculum were mentioned. Although pupils did not use the word, several made reference to what they considered egalitarianism at Merchantville.

Most pupils had secondhand knowledge of Haddonfield High School. None had direct experience. Scrupski did not ask any pupils for reasons underlying their opinions because he did not need to. The fact that they held a given perception was important; how they came to the perception was immaterial.

Scrupski interviewed Merchantville parents sending children to Camden Catholic High School. One parent mentioned religious reasons for sending her child there. All others mentioned that it was a small and more orderly school.

Merchantville parents of pupils in Haddonfield High School view preparation for life in the real world as a more profound and complex experience than do academic sociologists and government officials who believe that merely putting adolescents in a school with age peers of varying social class and ethnicity will prepare them effectively to deal with all kinds of people. The Merchantville parents see the roots of adaptation to the real world springing from what children learn in their families about dealing with others. As with pupil perceptions, the parents' beliefs are what they are. How they came to them is immaterial. The witness did note that extensive literature in sociology relates higher social status with acceptance of different others.

The witness made observations of a football game and made observations of cocurricular activities. At the football game, he saw three instances of interracial seating. Attendance at football and similar activities is on the wane.

Scrupski also looked at 7th and 8th grade suspension rates. He compared suspensions at this grade level because it represents a parity of sanction for all three districts; none has in-school suspension programs for these grades. Using New Jersey Department of Education suspension figures for 1987-88 (the last available), he derived suspension rates of two percent for Merchantville, three percent for Haddonfield and 20 percent for Pennsauken. For 1985-86 when the 11th grade interviewees were in 7th grade, the percentages were three percent, one percent and 19 percent, respectively. Based on 7th and 8th grade infractions, behavior among Merchantville youth is dramatically less deviant than behavior of Pennsauken youth and much more congruent with behavior patterns of Haddonfield youth. A comparison of suspension rates at Pennsauken and Haddonfield high schools reveals a similar differential.

The witness could not positively identify the source of the relatively high amount of deviance, indicated by suspensions, at Pennsauken. Pupils reported a good deal of fighting, even among girls. The sanction for fighting is almost always suspension from school. Estimates of the number of fights at the high school among those who offered estimates range from four-seven fights a month. One respondent reported that last spring there seemed to be a fight every other week. Whatever the source of the social conflicts at Pennsauken High School, the size of the school and a youthful population less familially and more youth culture oriented seem to be facts of social life.

The witness stated his conclusions. Pennsauken High School seems not to integrate effectively its multiethnic clientele. This is probably not the fault of the school's administration which works hard to facilitate integration, to control pupils and to insure order. It is paradoxical that when high schools are called upon to do more than they have been expected to do, they have suffered a declining significance as integrating institutions and as objects of loyalty. Merchantville youth are not a positive reference group for Pennsauken pupils, certainly not for black students, but not for white students either Almost all Pennsauken pupils interviewed were indifferent to the presence or absence of future cohorts of Merchantville pupils. Some Pennsauken pupils regarded Merchantville pupils as somewhat immature. Some Merchantville youth reported feelings of alienation.

Half of the Merchantville pupil respondents complained about the feral nature of the ungoverned informal social context at Pennsauken High School. Many experienced anxiety as a result of baiting and repeated challenges to fight by easily provoked Pennsauken youth.

Dr. Emanuel Averbach testified. He has been the managing principal of a consulting firm since 1972. He has concentrated in school work since approximately 1975. He advises on comprehensive planning, facilities planning and organizational planning. In Jenkins, et al. v. Tp. of Morris School Dist. and Bd. of Ed., 58 N.J.. 483 (1971), he supervised preparation of enrollment projections and worked on the community of the two municipalities involved. He testified as an expert in Office of Administrative Law cases concerning Boonton and Asbury Park. He testified as an expert in Superior Court in a matter involving Colts Neck and Freehold Regional High School District.

Averbach was retained by Merchantville and developed three reports dated January 2, 1990, May 2, 1991 and September 14, 1991. In the last report he relied on Pennsauken enrollment figures obtained from Dr. Richards' report. For Merchantville figures he used numbers from the consolidated enrollment reports for four years prior and used the enrollment number as of September 12, 1991 as reported by Merchantville. He developed a chart (P-32) that projected the white-minority mix at Pennsauken High School for the years 1992-95, with and without Merchantville pupils in attendance. Based on his reports, his expert opinion is that no significant racial difference or impact would accrue if severance occurs. At the end of four years, the withdrawal of Merchantville pupils produces a difference of 1.7% of white pupils. This is a change of less than one-half of one percent per year. This is a nonrecurring loss.

Looking at Pennsauken's enrollment history from 1984-90, in 1984, white pupils constituted 80% of enrollment. In 1990, they constituted 63.5% of enrollment. This is a decline of 16.5% in six years. It is an average decline of 2.75% per year. Richards' projection with Merchantville pupils included predicts a white enrollment for 1995 of 49.7%. This, of course, represents an additional decline from 1990 of approximately 2.75% per year. Over an 11-year period, five historic and six projected, the 2.75% white loss per year is assumed constant. Over that time, a nonrecurring loss of less than one-half of one percent per year would be de minimis.

With or without Merchantville pupils, by 1995, minority pupils will represent a slight majority of the enrollment at Pennsauken High School. Richards' projections were based on current enrollment patterns and on cohort survival ratios. Averbach's figures are similarly derived but incorporate the racial mix of Merchantville pupils. To assume no withdrawal one must also assume present and historical 8th to 9th grade survival patterns will continue.

The witness stated he had knowledge of the New Jersey sending-receiving statutes before doing the studies in which he was involved. He would reach basically the same conclusions today that he reached in his January 1990 report although numbers understandably would have changed somewhat in the interim. When he refers to out migration, he refers to school enrollments only. He did not measure the larger community and makes no statement on the larger community. Table A-2 shows in migration, out migration and net numbers. Merchantville cannot check the changes in pupil enrollment composition in the Pennsauken schools. There is no known comprehensive plan or strategy to address community racial-ethnic balance. The witness' historical reports and projections are entirely quantitative. He makes no qualitative claim for the data. Averbach was asked to look into the question of whether the two municipalities are one community. He examined master plans and observed certain key services shared and not shared. There were a great number of things that could have been shared that are not. There are, indeed, some indicia of community. For example, a local newspaper states it circulates in Pennsauken, Merchantville and Delair.* The witness observed that Pennsauken and Merchantville share Little League facilities. However, Merchantville and Cherry Hill share certain activities and facilities. Geographic barriers around neighborhoods tend to impede interaction in Pennsauken.

When Pennsauken High School agreed in 1972 to accept Merchantville pupils, it did so with reference to its own interests, not necessarily Merchantville's. There are undeniably some socioeconomic differences between the towns. However, if all Merchantville pupils were withdrawn from Pennsauken High School today, the enrollment would remain 65.1% white. The Camden County average is 63.5%. If the composition of Pennsauken Township is changing, there is virtually nothing the schools can do about it.

*Delair is not an incorporated municipality. Rather, it is a section of Pennsauken Township.

In his supplementary study dated May 2, 1991 (P-34) Dr. Averbach states:

> It was concluded that the withdrawal of Merchantville's high school students from Pennsauken High School would not significantly impact on the school's racial-ethnic integration since the present minority enrollment in the Pennsauken schools feeding the high school is growing at a rate so rapid that the racial-ethnic mix would be little affected in the long run by the presence or absence of Merchantville's declining relatively small, predominately white high school enrollment.

He reaches this conclusion because births are not necessarily as significant as in migration. He looked at births in Merchantville and saw very slow change. Births have changed in correlation with enrollment in Pennsauken, however and have done so rather quickly. On a percentage basis, the change appears large. The data strongly suggest a change taking place but are not sufficient to support conclusions as to the magnitude and rate of change.

Averbach's Table E shows that, in the absence of contravening evidence, it is reasonable to assume that Merchantville's elementary population will henceforth reflect the general increase in minority representation in the schools. If severance is granted, Pennsauken is not loosing an all white contingent. The witness also stated that some desirable data were not available, either to him or to Dr. Richards. However, only a slight advantage would have been realized even if these additional data were available.

In conclusion, Dr. Averbach stated that the Merchantville birth rate is not significant, but the growth of minority pupils within the Merchantville schools is. In the period 1988-1991, minority membership grew significantly. Based on that information, he projected the number of Merchantville minority pupils in 1995 and demonstrated a significant increase.

The Cross Petition

The Pennsauken cross-petition was argued on the papers and is addressed below.

FINDINGS OF FACT

Merchantville is a borough in the northern portion of Camden County. It is surrounded on three sides by Pennsauken Township. The westernmost reach of

Merchantville nearly cuts Pennsauken in two. Part of Merchantville's southerly boundary touches Cherry Hill Township. Merchantville and Haddonfield are not contiguous. Pennsauken and Merchantville have had various sending-receiving relationships for many years.

Pennsauken is geographically the largest. It is also the most racially diverse. Pennsauken is described by the New Jersey Department of Labor as urban/suburban; Merchantville and Haddonfield are classified suburban.

Pennsauken High School operates at or near its functional capacity as measured by the New Jersey Department of Education. Haddonfield High School operates at approximately 60% of its functional capacity.

N.J.S.A. 18A:38-13, as amended effective November 24, 1986, requires the district seeking severance to submit a feasibility study considering the educational and financial implications for the sending and receiving districts, the impact on the quality of education received by pupils in each of the districts, and the effect on the racial composition of the pupil population of each of the districts. It was found during the hearing, when Pennsauken moved to dismiss when Merchantville rested, that Merchantville made out a prima facie case. Under the September 5, 1990 State Board ruling, above, Pennsauken was required to demonstrate an affirmative defense to severance. The financial, educational and racial aspects of the case will be discussed seriatim.

The Financial Aspect

While this matter was pending, the Legislature enacted the Quality Education Act, N.J.S.A. 18A:7D-1 et seq., and its subsequent amendment, L. 1991, c. 62. Fortunately, the witnesses testifying about the financial aspects of the case were able to state that the act and subsequent amendment did not substantially affect their opinions.

Merchantville's financial expert was eminently well qualified. She considered enrollment projections in the event of a phase out, state aid entitlements, advertised annual budgets, Department of Education per pupil cost, Pennsauken pupil enrollment projections, election results, state school aid applications, reports of school taxes, Board secretary cash reports, report of rateables, report of tax levy, report of tax rate, and report of average ratio. The

witness carefully examined Pennsauken's property tax structure, school budgets and tax status. In addition, she addressed the school budget phase out of Merchantville pupils, forecast of tuition revenues, forecast of impact on taxpayers, future forecasts and other considerations.

As a result of her detailed examination, Merchantville's expert concluded the following:

1. A phased withdrawal beginning in school year 1989-90 of Merchantville pupils from Pennsauken High School will not have a substantial financial impact on the receiving district.

2. Tuition revenue has been declining as a percentage of the Current Expense portion of the Pennsauken school budget for the past seven years.

3. Property taxes have made a declining contribution to the Current Expense portion of the Pennsauken school budget for the past seven years.

4. Free balance makes up a rather large portion of the Pennsauken budget. Additional appropriations from free balance could be used to offset property tax increases.

5. Pennsauken will not absorb completely the loss of tuition revenue if Merchantville pupils withdraw, but increased student enrollments from within Pennsauken will expand state equalization aid and offset the loss of tuition revenue.

6. Both Haddonfield and Merchantville have indicated a willingness to negotiate tuition rates and it is anticipated that this will reduce any significant financial impact on Merchantville.

Merchantville's expert prepared an update of the financial data in preparation for her testimony. Although the figures changed somewhat, she reached the same conclusions.

After Merchantville's expert prepared her update, Pennsauken and Merchantville received preliminary figures from the New Jersey Department of Education on the amount of State aid they anticipate receiving for fiscal year 1992. Deddy set forth that information in Exhibit P-13D. In pertinent part, the exhibit indicates:

MERCHANTVILLE

Foundation Aid FY 92	Categ/Trans Aid FY 92	Transition Aid FY 92	Total New Aid FY 92	Change In Aid
$1,397	$ 333	$ 0	$1,730	$ 537

PENNSAUKEN

Foundation Aid FY 92	Categ/Trans Aid FY 92	Transition Aid FY 92	Total New Aid FY 92	Change In Aid
$19,700	$4,940	$ 0	$24,640	$5,854

(All figures in thousands)

All financial information in the feasibility study and the update, P-13a and P-13c, were accepted as Deddy's direct testimony. To this she added that she had had an opportunity to review Exhibit P-13d, the State estimates of financial aid to Pennsauken and Merchantville for 1992, and concluded:

> I would like to reaffirm the findings of my original study and my amended study to say that I see no financial impact--substantial financial impact--on any of the three districts involved in this matter based on the fact that this document, the Quality Education Act [figures] [show] that each of the three districts will receive substantial new unanticipated aid in 1990-92. T IV 11.

Pennsauken argues that Deddy failed to look specifically at the financial implications for the prospective sending district. Nor did she inquire into the status of the 1990 Pennsauken school budget. Most importantly, Deddy failed to take into account the effect of the Quality Education Act on the financial implications of the case. It is true that Deddy said she could not be certain of anything related to the Quality Education Act because "It's unclear and things seem to be changing by the week in Trenton." T IV 16. This was an accurate statement in the general sense and applied to any witness trying to deal with the shifting sands of State aid. Nevertheless, both financial experts were able to give reasoned and reasonable reflections based on the advent of the Quality Education Act and its first amendment.

Deddy's work carries the indicia of trustworthyness. Projections are based on known numbers wherever possible. Assumptions, where used, are clearly stated and, more importantly, seem reasonable. Her analyses lead the reader in a logical sequence and her results comport with common experience and common sense. There is no extraneous information offered.

Pennsauken's financial expert is a Certified Public Accountant who is registered as a municipal and public school accountant with the State of New Jersey. The tribunal qualified him as an expert in school finance. T XVI 74. Mr. Hoffmann had nearly 20 years' experience as a school accountant when he testified.

Pennsauken's expert stated he was employed and given the charge to criticize the report of Merchantville's financial expert. He prepared a two-page letter dated May 15, 1991 (RP-24) that was sent to Pennsauken's counsel. The following exchange appears in the record:

> Q. And, sir, would it be fair to say that your financial analysis consisted of dividing the 1991-92 Merchantville anticipated tuition of $528,180 by the estimated assessed valuation in Pennsauken for 1992 and coming up with a quotient which you identified as the amount of increase, $100, of assessed valuation in Pennsauken?
>
> A. That is correct dividing -- once we established by counter area, that's correct.
>
> Q. That's the sum total of your analysis, is that correct?
>
> A. That's correct. [T XVI 101.]

Hoffmann acknowledged he did no analysis of impact on Haddonfield or Merchantville in the event severance was granted. He conceded that if the phase out were to commence during the present school year (1991-92), in his opinion there would be a total loss of tuition to Pennsauken of approximately $44,000. This was the product of the tuition rate per student of $8,800 multiplied by the number of Merchantville pupils he estimated would be lost to Pennsauken, five. He stated the figure represented one-tenth of one percent loss in revenue to Pennsauken. In his opinion, that would not produce a substantial negative affect on the total budget.

Working through the net loss for each year of a phased withdrawal, the witness conceded that each loss of tuition, expressed in dollars and compared to the budget total, did not constitute a significant impact.

Hoffman did all that was asked of him. In reviewing pages 46-53 of Guidelines' report (P-13a) dealing with economic impact, he saw reference to a worst case scenario (Item 8) and pointed out that a recently authorized lease-purchase agreement could affect the scenario. He also suggested that Item 7 extracted the current expense portion of the Pennsauken budget from the advertised budget and that figure would include fully funded special projects.

The witness detected several minor errors in Guidelines' report. He then, as requested, supplied the following:

As you requested, I have reviewed the Pennsauken Township School District's 1990-91 budget, as adopted. My purpose was to determine the financial impact of losing the Merchantville Borough School District tuition as an item of revenue. My review indicated the following:

1990-91	Merchantville Tuition Anticipated	$497,000.00
1990	Assessed Valuations/Camden County Abstract of Rateables	$568,415,872.00
1991	Estimated Assessed Valuation based upon the past seven years average growth of .82%	$573,076,882.00

Tax rate impact in 1990--based upon 50% of Merchantville tuition since taxes in Pennsauken Township are raised on a calendar year	4.37 cents/ $100 of Assessed Value
Tax rate impact in 1991	8.67 cents/ $100 of Assessed Value

The above effect on the tax rate is based upon the assumption that all Merchantville students would leave the Pennsauken District prior to the 1990-91 school year. Since the withdrawal is proposed on a gradual basis, the impact would be less in the first three years; however, the ultimate impact would remain at a loss of $497,00,00. The impact if withdrawal were gradual is estimated to be as follows:

No. of Students	Year	Estimated Revenue Lost	Approximate Fiscal Year Tax Rate Impact*
16	1990-91	$112,024.00	$1.97 cents
10	1991-92	132,997.00	2.32
22	1992-93	154,020.00	2.66
14	1993-94	97,959.00	1.68

*Per $100 of Assessed Valuation.

(RP-24)

The work is internally impeccable. It does not consider any offsets.

There is no challenge to the quality or reliability of Hoffmann's work. The problem this judge sees is that the witness was not asked to do more.

In review of the record, including transcripts, there is considerable testimony and documentary evidence on the financial aspect. All of it, however, indicates there would be no significant financial effect on the Pennsauken public schools if Merchantville pupils were withdrawn whether by phase out or all at once. Obviously, a phased withdrawal would cushion and spread out whatever the effect would be. Although there is great difficulty dealing with figures that change almost daily, both experts were able to express opinions both as to dollars and impact.

I **FIND** that Merchantville has demonstrated there would be no significant adverse economic impact on Pennsauken or Merchantville if the present sending-receiving relationship is ended.

The Educational Aspect

Negative educational effects can flow from a severance in more than one way. The receiving district's loss of tuition dollars might be enough to affect

curriculum and overall program whether by restriction, reduction or elimination. A loss of students might result in abandonment of certain low enrollment courses in the receiving school. Courses usually affected are advanced placement or honors programs with low enrollments.

In a phased withdrawal, the last year would show the greatest effects. Pennsauken's accountant, however, concedes that the maximum impact on Pennsauken's overall budget would be about one percent. This figure does not include offsets that might be realized from rising enrollments from within the district or fiscal aid from the state.

The projected 1992-93 Pennsauken High School enrollment, by Pennsauken's expert's reckoning, is 1,363 pupils (RP-28). According to the same projections, 23 of those pupils would be from Merchantville. The loss of 23 pupils from a student body of over 1,360, without more, does not show educational impact. It is possible, but it has not been shown, that the 23 Merchantville pupils would all be snatched from courses operating at the minimum enrollment. Of course, there is nothing in the record to support that hypothesis.

During examination about enrollment the Pennsauken High School principal stated

> Q. That being the case, if you had a diminution of students as a result of Merchantville withdrawing, that would ease the problem as well; would it not?
>
> A. I don't accept that because less than 100 students sprinkled throughout the curriculum does not make a difference that's going to manifest itself in a scheduling change. And--and the reason I say that is that Merchantville young people -- and I did testify to this yesterday -- are spread about the entire curriculum.
>
> Q. Being spread about the entire curriculum then, sir, would mean that in the event these children are withdrawn, you wouldn't have to necessarily reduce the size of your staff.
>
> A. Are you asking me, Mr. Kalac, if I would reduce the staff if they left? Is that what you're asking me?
>
> Q. Yes.
>
> A. I would not, sir, no. [T XII 54-55.]

Both high schools offer accessible guidance programs. Haddonfield enjoys a somewhat better pupil-counselor ratio. Viewed as a whole, the record demonstrates at least adequate guidance services to pupils in both high schools. Understandably, Pennsauken's efforts are organized somewhat differently. Pennsauken's guidance services are organized to meet the needs of minority pupils, vocational pupils, Spanish speaking pupils and English as a Second Language (ESL) pupils. At least half of Pennsauken's efforts are directed at these four groups. Approximately half of Pennsauken's guidance services are directed toward college bound pupils. Guidance services at Haddonfield are directed predominately at the college-bound pupil.

Pennsauken's expert, Kaplan, testified that the purpose of his report was to support the educational philosophy of Pennsauken. The two main issues he saw were the symbolic loss of Merchantville pupils leaving Pennsauken High School as well as the secondary loss of pupils from Pennsauken High School if Merchantville pupils were permitted to leave. The secondary loss would flow from the symbolic loss. The initial symbolic loss occurs as a result of perceptions in the community brought about by the severance through media coverage, how real estate agents operate and how businesses react. Kaplan also testified that attendant publicity is only one of the elements of symbolic loss.

Kaplan drew a parallel between the present situation and that which occurred in New Brunswick and North Brunswick in the early 1970's. He urged that the situations are similar. Among the similarities the expert saw were sending districts repeatedly attempting to sever the relationship with the receiving district, suburban versus urban high schools and the demographic history of the two areas. This line of testimony appeared much more appropriate to questions of minority enrollments and will be addressed in that section, below.

Guidelines' educational program analyses (P-13a, pp. 16-45) are comprehensive. The report fairly points out strengths noted at Pennsauken High School. It also tends to show that with or without Merchantville pupils, Pennsauken High School will have a large and diversified pupil enrollment. The report suggests withdrawal of Merchantville pupils might alleviate overcrowding at Pennsauken. This must be leavened with the knowledge that Pennsauken enrollments are virtually sure to increase during the examined period. The report also states, "It is apparent that there is no concentration of courses selected [by Merchantville pupils] which would necessitate the elimination of any class if Merchantville students

withdrew." Id. at 44. The other side of that coin is that the addition of even a few Merchantville pupils could aid low enrollment classes at Haddonfield High School. Any increase in enrollment at Haddonfield would yield better use of the facility in a period of declining enrollment. Ibid.

The University Consultants' report prepared for Pennsauken (RP-5) contains the following concerning educational impact on Merchantville pupils if severance is granted:

> One might wonder about the symbolic and experiential loss suffered by Merchantville students should the sending/receiving relationship be severed. Not only might they lose the proximity benefits cited directly above, but there are major societal education experiences also lost.
>
> While never questioning the quality of educational services offered at the Haddonfield High School there would be real losses to be accounted for. Johnson and Fine both refer to the benefits of a heterogeneous setting for education. The diversity of the student body, its representativeness to the world outside of the home, the world of work, social intercourse, and communication as a basic need and right of all students, might well be severely limited should the two communities [sic] historic relationship be concluded.
>
> A most clear quote from a student is offered by Fine, "School is not just academics, its social development too. How we interact with other cultures can help each other."

That is the entire section. Unfortunately, the Johnson material referred to appeared in a draft, but not in the final document. The Fine material concentrates on loss concepts and is addressed in the section on racial aspects of the case.

Looking at all the evidence adduced on the educational impact aspect of the case, I **FIND** that even if all Merchantville pupils were removed at once, the effect on educational offerings at Pennsauken High School would be minimal.

The State Board of Education addressed the issue of educational impact in Cranbury Tp. Bd. of Ed. v. Lawrence Tp. Bd. of Ed., OAL DKT. EDU 8626-82 (Aug. 1, 1985); aff'd Comm'r of Ed. (Sept. 30, 1985); aff'd St. Bd. (Apr. 1, 1987). The State Board declared

> Specifically, we will not find negative impact based on speculation regarding the future of the receiving district's programs where the future direction of such program will be

> determined by decisions, both financial and educational, made by that district, and the continued ability to achieve its educational goals is within the control of the receiving district. [Slip opinion at 14.]

The proofs offered by Merchantville, buttressed by the Pennsauken High School principal's testimony, show no substantial negative impact on any affected district. Pennsauken's proofs, on the other hand, do not rebut or even significantly mitigate those offered by Merchantville. Accordingly, I **FIND** there would be no significant educational impact on any affected district should severance in this matter be granted.

The Racial Aspect

The Kaplan-Richards report (RP-5, RP-6) states withdrawal of Merchantville pupils from Pennsauken High School will have a substantial negative effect on racial balance of the school's enrollment. Kaplan's testimony centered on symbolic loss and secondary loss and on a parallel with the situation in New Brunswick in the early 1970's. In the State Board of Education decision in Englewood, above, the Board cites a statement of educational policy it issued on November 5, 1969:

> Educational considerations are primary in eliminating school segregation. The elimination of racial imbalance is not to be sought as an end in itself but because such imbalance stands as a deterent and handicap to the improvement of education for all.

The Board goes on to state

> Such educational considerations do not include the beliefs and social values of the individuals attending a particular school. Rather, as set forth above, resolution of the legal and policy questions with which we have been presented rests on fundamental educational principles applicable in all educational settings as those principles have been expressed in the decisions of the United States and New Jersey Supreme Courts. Therefore, in resolving these questions, we have neither relied upon nor considered the proofs developed from interviews with students attending DMHS and THS concerning their beliefs and social values, which were submitted into evidence to show that "symbolic loss" would occur in this case. Cf. In the Matter of the Board of Education of the Township of Hillside, supra, Commissioner's decision, at 22, State Board's decision, at 28a-29a, Appellate Division's decision, at 2-3. In this respect, we specifically find that whatever evidentiary value Dr. Fine's "report" might have does not justify intruding

> upon the privacy of students by interviewing them for purposes of this litigation concerning their beliefs and feelings on matters of race relations. See Board of Education of the Borough of Merchantville v. Board of Education of the Borough of Pennsauken v. Board of Education of the Board of Haddonfield, Decision on Motion by the State Board of Education, October 6, 1989 (John T. Klagholz, dissenting).

Englewood Cliffs Bd. of Ed. v. Englewood Bd. of Ed., 12 N.J.A.R. 566 (Apr. 18, 1988); mod. Comm'r of Ed., 12 N.J.A.R. 632 (July 11, 1988); mod. St. Bd. of Ed., 12 N.J.A.R. 663, 688-689 (Apr. 4, 1989).

Accordingly, the judge has not weighed the loss arguments. The better evidence is found in the figures, actual and projected, developed by persons trained in their use.

The treatments, assumptions and testimony associated with enrollments is discussed above. I **FIND** the more reliable treatment to be that of Averbach (P-32). Using the 1992-95 projected mix with Richards' Table B-8 and the 1992-95 projected Merchantville mix he developed (P-35 at 3), Averbach produced the following chart:

	NUMBERS		%	
Year	White	Minority	White	Minority
1992 total	757	547	58.0	41.9
Minus Merchantville	64	9		
Without Merchantville	693	538	56.3	43.7
1993 total	777	597	56.6	43.4
Minus Merchantville	71	14		
Without Merchantville	706	583	54.8	45.2
1994 total	770	686	52.9	47.1
Minus Merchantville	60	15		
Without Merchantville	710	671	51.4	48.6
1995 total	758	767	49.7	50.3
Minus Merchantville	70	23		
Without Merchantville	688	744	48.0	52.0

(P-32)

Averbach's figures show the picture clearly and succinctly. He concluded there would be no substantial negative impact on the racial composition at Pennsauken High School should severance be granted. Through his chart, Averbach demonstrated that the racial impact in the event of severance would be so slight that, in Richards' words, it would represent a "fluctuation that would occur in normal demographic variance from year to year." T XX 163. In his projection, Richards simply erred when he assumed all Merchantville's projected secondary pupils in 1995 would be white. To the contrary, the evidence suggests a growing nonwhite pupil population in Merchantville. In addition to the shortcomings discussed above, this, too, makes Averbach's calculations the more reliable and worthy of belief. Averbach used the latest Merchantville enrollment figures available. He made his projections based on actual numbers of minority pupils enrolled. He did not assume that all of Merchantville's secondary pupils in 1995 would be white.

Averbach's work demonstrates an average net change in the racial composition at Pennsauken High School, if severance were granted, of .425% per year for each of the phase out years. Averbach stated, "That's a smaller figure than we can normally measure in this field . . .." T XXII 21. This judge grants that small numbers, such as those dealt with here, may have significance in a policy sense. In a statistical sense, however, they do not. There is a trend in enrollments at Pennsauken High School that shows rising minority enrollments in proportion to the whole. Whether Merchantville pupils attend Pennsauken High School or not, that trend is little affected.

In supporting his conclusion, Averbach stated

> [I]f you look at the impact at the end of four years as you compare the impact at the end of four years of keeping Merchantville in and not keeping Merchantville in, you find that Merchantville produces a difference--1995 between with and without--by being there or not being there, a total of 1.7 percentage points of white enrollment, which really means we're talking about a change of .425% per year, less than a half of a percentage per year.
>
> And this non-recurring loss. It's a non-recurring loss.
>
> Now, to put this in context, . . . I think I have to--I've looked at the enrollment history from 1984-1990 and the percent white in 1984 was 80% white. The percent white in 1990 at Pennsauken High was 63.5% white. . . .

> So that's a decline of 16.5 percentage points in a period of six years. It comes to 2.75% per year.
>
> If you look at Dr. Richards' projection, you find that the projections with Merchantville in are projected to--let's see--the projected white enrollment at Pennsauken High is for 1995, is 49.7% white which is the figure which I have up there . . .
>
> So there's really little debate that over this 11-year period, six years of history and five years projected, that we're talking about a 30%--a drop of 30 percentage points and a pretty continuous rate of a loss of 2.75 % white per year.
>
> Now, in that context, the loss of 4.25% per year for four years in non-recurring loss is almost--it seems almost de minimis. T XXII 19-21.

The attempted Pennsauken-New Brunswick analogy is rejected. Insufficient foundation was laid. There are some similarities in the two situations. There are also significant differences in, among other things, the character of contiguous municipalities. Nothing was adduced concerning, for example, unemployment rates or the number of households receiving welfare benefits. Without more, this judge is unwilling to accept generalizations and projections as probative.

In consideration of the foregoing, and giving particular attention to the significant increases in minority enrollments in Merchantville, I **FIND** there would be no substantial negative racial impact if severance were granted. Pennsauken's expert, when using Averbach's more reliable figures, conceded on cross-examination that there would be no negative racial impact.

CONCLUSION

Whether viewed from an educational, financial, or racial viewpoint, Merchantville has adduced proofs showing that there would be no significant negative impact in any of those areas if it were allowed to terminate its sending-receiving relationship with Pennsauken. Pennsauken's case, in the nature of an affirmative defense, did little to rebut or mitigate the proofs Merchantville established. N.J.S.A. 18A:38-13 requires the board submitting an application to sever a sending-receiving relationship to prepare and submit a feasibility study considering the educational and financial implications for the sending and receiving districts, the impact on the quality of education received by pupils in each of the districts, and the effect on the racial composition of the pupil population of each of the districts. Merchantville has carried this burden. The statute next requires

consideration of all the circumstances, including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils and the effect on the racial composition of pupil population of the districts. A careful review of the whole record in this matter reveals no negative educational or financial implications for any of the affected districts. The effect on the racial composition of the pupil populations of the various districts is insignificant. With or without Merchantville pupils, Pennsauken eventually will become a "majority minority" school. The addition of approximately two dozen minority pupils from Merchantville to Haddonfield will make a greater difference in the proportion of minorities at Haddonfield than will the removal of the same number from Pennsauken.

Merchantville did its homework. It marshalled facts and produced credible interpretations of those facts.

I **CONCLUDE** that Merchantville has shown by a preponderance of the credible evidence in the record that, in accordance with the standards required by N.J.S.A. 18A:38-13, it should be permitted to end the sending-receiving relationship now in effect with Pennsauken.

It is so **ORDERED.**

THE CROSS PETITION

Pennsauken charges that Haddonfield is operating its high school as a private school in a public setting and that the Haddonfield private tuition policy runs afoul of controlling case law and undermines attempts at racial integration in the public schools of the state.

Pennsauken argues that the Haddonfield superintendent, who testified on November 30, 1990, confirmed what he stated in his deposition on October 23, 1989. Specifically, that Haddonfield first discussed accepting Merchantville pupils in 1981. Haddonfield was accepting less than 15 tuition students at all grade levels at that time, the majority being at Haddonfield High School. When the superintendent testified at hearing, Haddonfield was receiving 83 tuition students with 45 at the high school. Eleven of these were Merchantville residents attending the high school on a tuition basis and this represented the greatest number of pupils from another

district. There are also two Pennsauken pupils attending Haddonfield, one at the high school level.

The superintendent stated that Haddonfield has advertised for tuition pupils since 1982. Advertisements are in newspapers and a magazine. Haddonfield caused announcements of its visitation day to be made over television and radio stations in Philadelphia. The superintendent testified that Haddonfield's tuition policy is for pupils and parents seeking an alternative to private school. (RP-9). Pennsauken urges that the advertisements merely invite the reader to consider Haddonfield as an alternative to whatever school a particular child is attending, not simply an alternative to private schools.

The superintendent conceded that the Haddonfield Board of Education policy relative to its tuition program, adopted February 12, 1987, makes no mention of an alternative to private education (RP-11). The admission and tuition procedures (RP-12) make no reference to an alternative to private schools. Information packets sent to prospective candidates include much information on the school district, the community, programs of study and the like, but make no reference to being an alternative to private school education. Pennsauken maintains Haddonfield's tuition policy is intended for anyone able to pay the tuition. It is conducting its business as would a proprietary school.

The feasibility study prepared by Haddonfield concerning acceptance of Merchantville did not address racial impact on either district. Haddonfield High School has no black faculty members. It has, perhaps, one Hispanic faculty member.

The superintendent confirmed that Merchantville pupils are relatively close to Haddonfield pupils in Scholastic Aptitude Tests (SAT) scores. Pennsauken urges there is actually a 45-point spread between the verbal scores of Merchantville and Haddonfield pupils and a 17-point spread in the mathematics area. In 1989, Haddonfield High School had 814 pupils in a district-wide enrollment of over 2,000. Today, there are approximately 540 pupils at the high school and roughly 1,700 pupils in the district. The superintendent stated plainly that its tuition policy was a way of buttressing enrollment and revenues in a period of declining enrollment. Exhibit RP-19 represents Haddonfield enrollment trends and a projection chart from 1980-81 to 1995-96. Haddonfield has suffered a serious decline in enrollment.

Although Haddonfield argues that its tuition policy is lawful pursuant to N.J.S.A. 18A:38-3, the practice of operating a tuition program must be consistent with overriding public policy in New Jersey concerning integration in the public schools. The policy must not serve as a conduit for parents from other school districts to circumvent an existing sending-receiving relationship with an integrated school to resegregate their children in an all white atmosphere. A State Board of Education resolution dated November 5, 1969 states, "RESOLVED, that the Commissioner of Education under the policy of the State Board undertake such steps as he shall deem necessary to correct such conditions of racial imbalance as may be found." N.J.S.A. 18A:38-3 imposes no mandatory course of action on any local board. It grants discretion to boards in certain situations if a board is inclined to act. Pennsauken sees no conflict between the principles of Jenkins (the Morristown-Morris Township case) and the statute. Even if there were a conflict, the educational goals and objectives underlying Jenkins would have to be paramount.

In its opinion in Englewood, above, the State Board emphasized that N.J.S.A. 18A:38-3 was enacted to ensure that children of migrant laborers and other children temporarily residing in New Jersey would be entitled to an education while in the state. Of course, the statute does not preclude the district board of education from adopting admission policies aimed at alleviating declining enrollment. This is what Tenafly did in the Englewood case. But the State Board went on to say that the discretion given by the statute does not create an absolute right for district boards to admit nonresident students on a tuition basis or otherwise. Nor was there any other source in law that would confer such a right where the admittance of pupils by a given district has contributed significantly to deterioration in the balance among racial and national origin groupings represented in the pupil population of another district. 12 N.J.A.R. at 691.

At this point, Pennsauken urges that the testimony provided by Merchantville and Haddonfield show, at best, that both have been less than attentive to this mandate. While Haddonfield's tuition policy may be acceptable on its face pursuant to the statute, in the context of a sending-receiving controversy it must be abolished. The policy has the effect of robbing Peter to pay Paul when it accepts 11 Merchantville pupils who are otherwise subject to a sending-receiving relationship with Pennsauken High School. Similarly, the two Pennsauken residents attending Haddonfield High School are subject to attending public high school at Pennsauken. Moreover, Exhibit R-4 demonstrates that all 11 Merchantville residents attending Haddonfield High School are white. The State cannot sanction a private

tuition policy where the effect of the policy is to allow white parents to channel their children from a fully integrated school to one that is overwhelmingly white. Allowing such a practice would be counter to every tenet of constitutional policy. Haddonfield should be foreclosed from accepting into its all white atmosphere the disproportionately large percentage of Merchantville pupils who would and should remain at Pennsauken High School.

Haddonfield asserts that its nonresident tuition program operates in full compliance with all applicable statutes, regulations and policies. Public school tuition programs for nonresident pupils are authorized by N.J.S.A. 18A:38-3 and are entitled, therefore, to a general presumption of validity. Haddonfield did not and does not contend that the presumption is irrebuttable. Haddonfield did and does acknowledge that the rights provided under the statute are limited by strong public policy against segregation and discrimination. Where an nonresident tuition program adversely affects that policy, it may be enjoined. Haddonfield believes the party seeking to enjoin a tuition program bears the burden of showing that the program undermines fundamental policy. Pennsauken disagrees and contends that there are no limits on the Commissioner's or the State Board's discretionary authority to prohibit a local school district from enrolling nonresident pupils. Pennsauken also suggests that Haddonfield's argument is based on selective quotation of relevant cases.

First, the concept of unfettered discretion is alien to the entire American legal system, a system of laws, not men, that has as its basic purpose protection of citizens from the caprice of the powerful. Second, Pennsauken's argument constitutes a novel view of the separation of powers that would permit a duly enacted statute to be suspended at the whim of an administrative agency. The Commissioner and the State Board are empowered to administer the education laws, but not to revise those laws. Third, neither the Commissioner nor the State Board have ever presumed to take upon themselves the unfettered powers Pennsauken claims they possess. In both of the leading cases involving challenges to nonresident tuition programs, Asbury Park Bd. of Ed. v. Bd. of Ed. of Shore Regional High School Dist., 1971 S.L.D. 221 (Aug. 20, 1971) and Englewood, above, great pains were taken to delineate the specific reasons justifying injunctions against the tuition programs. In Shore Regional, the Commissioner held

> The law in the instant matter is clear. N.J.S.A. 18A:38-3 permits the enrollment of nonresident pupils by any board of education. The Commissioner would find repugnant, however, any deliberate act by a parent or an accommodating

board of education through spurious means to circumvent the positive attempts by the Commissioner and the courts to bring about meaningful racial integration in the public schools of this State in accordance with the law. 1971 S.L.D. 225, 226.

In Englewood the State Board characterized the law thus:

Although enacted to insure that the children of migrant laborers and other children temporarily residing in New Jersey would be entitled to an education while in our state, Statement accompanying S. 216, L. 1947, c. 138, the statute does not preclude a district board from adopting admission policies aimed at alleviating declining enrollment, as did Tenafly, or from admitting nonresident students under such policies.

However, the discretion afforded by N.J.S.A. 18A:38-3 does not create an absolute right for districts boards to admit nonresident students on a tuition basis or otherwise. Nor can we identify any other source in law which would confer such right where admittance of students by a given district pursuant to the statute has contributed significantly to deterioration in the balance among racial and national origin groupings represented in the pupil population of another district.

As the State Board of Education has long recognized:

> N.J.S.A. 18A:38-3 imposes no mandatory course of action on any local board. It allows discretionary action by such a board in certain situations if a board is so inclined to act. We see no conflict between the principles of Booker and Jenkins as here involved and the provisions of the cited statute and even if there were, the educational goal and objectives underlying Booker and Jenkins would have to be given pramacy.

Shore Regional, supra, at 229.

We repeat that, as established by Booker and Jenkins, our State's policy against discrimination and segregation in the public schools is of such vigor and import as to match its policy in favor of a thorough and efficient education. Accordingly, where a question involving the exercise of discretion by a district board is brought before this agency, the Commissioner and the State Board of Education have both the power and the responsibility to limit the exercise of that discretion, and, where reasonable and feasible, to direct such remedy as necessary to effectuate our State's policy. Jenkins, supra, at 505; Booker, supra, at 178.

Furthermore, there is no question that the Commissioner and the State Board have the responsibility to counter trends towards withdrawal from the school community by members of the white majority. Booker, supra, at 180. Consequently, we must have the accompanying power to limit the exercise of

discretion by district boards to the extent necessary to counter such withdrawal. 12 N.J.A.R. at 691-692.

The Commissioner and the State Board have only acted to restrict a district's operation of a nonresident student tuition program in those cases where the operation of that program adversely affected racial balance in another school district. It remains Pennsauken's burden to prove the existence of such adverse impact in this case

In its original and reply briefs, Pennsauken criticizes the Haddonfield nonresident tuition program for being promoted as a private school, for not being a private school, for advertising, and for being successful in attracting students. First, although each of these criticisms has some basis in the record, the criticisms are based on an extraordinarily willful reading of the record. Second, whatever the merit of the individual criticisms, they are irrelevant to this litigation. Pennsauken criticizes Haddonfield for holding itself out as offering an alternative to private school education. This simply criticizes Haddonfield for having earned a reputation for educational excellence. The validity of that reputation is self-evident. Pennsauken's own witness, Kaplan, testified that Haddonfield High School "should be given the highest possible academic grades" and that he would have liked his own children to have attended the school. T IX 3. It must be noted Kaplan testified that, although he performed a careful evaluation of the Haddonfield High School curriculum and educational program and that although one of his associate consultants evaluated the Pennsauken curriculum and academic program, he ultimately determined not to make such academic comparisons between the two schools. Id. at 3-6. Kaplan conceded that he was aware that the reported sending-receiving decisions gave significant weight to educational and academic factors, but he was less than forthcoming about his reasons for not addressing those issues in his report Id. at 6-12. Haddonfield urges that this otherwise inexplicable omission compels the inference that Kaplan did not make the academic comparison because it would be disadvantageous to Pennsauken.

Few public schools are so fortunately situated that they can compare themselves with private preparatory schools. Haddonfield is one of the fortunate few. It has achieved this status through the efforts of staff, students and, perhaps most importantly, the support of tax payers. Pennsauken's complaint that Haddonfield is not operating as a private school is far-fetched. It has never been suggested that Haddonfield is anything other than a public school operating under

the Educational Law of New Jersey. Haddonfield concedes that, for marketing purposes, it has advertised its tuition program as an alternative to private schools. It has never sought to restrict nonresident applicants to those previously enrolled in private schools. The distinction is without meaning. The available pool of candidates for nonresident tuition payers are those students of the proper grade levels within reasonable travel distance of Haddonfield. Haddonfield is correct in believing that the families of the students enrolled in other public schools are not likely to consider Haddonfield in isolation, but only as one of a number of alternatives to their existing educational situations. The Haddonfield option is only one of a number available to interested parents. Most of the others are private institutions. In this sense, the Haddonfield program does act as an alternative to private schools.

Haddonfield is also criticized for advertising its nonresident tuition program and for having been successful in doing so. It is neither reasonable nor relevant to criticize Haddonfield for having developed a creative response to an extremely difficult situation. Haddonfield has pursued tuition students because declining enrollment among local residents has made it more difficult to maintain a full roster of educational offerings. It has required additional students to have the critical mass necessary to function as a comprehensive school system. Nonresident tuition students provide the additional benefit of bringing additional financial resources to the community which had paid and continues to pay a high price for educational excellence. Haddonfield could not successfully market its product unless it had something extraordinary to offer.

The Commissioner and the State Board have articulated only one reason for enjoining the operation of a nonresident tuition program: The adverse impact of that program on State goals of racial integration and balance. Therefore, only evidence relating to the impact of the tuition program on racial balance in another district should be considered relevant here.

Pennsauken has failed to sustain its burden of proof that the Haddonfield program adversely affected integration and racial balance at Pennsauken High School. Haddonfield's enrollment figures are of record. Pennsauken advances only one substantial criticism of the figures. Pennsauken has correctly pointed out that the table on page four of Haddonfield's brief contains a typographical error in indicating that only seven Merchantville pupils attended Pennsauken High School in

1990-91. The correct number, as evidenced by a variety of exhibits offered by the parties, is 70.

It is not necessary to belabor the numbers again, but it must be pointed out that Pennsauken has at no point disputed the fact that the Haddonfield tuition program has had no significant impact on Pennsauken's racial balance, whether that balance is measured in terms of absolute numbers or relative levels of black, Hispanic and white enrollment. Nor has Pennsauken established that the negligible effect of the Haddonfield program on Pennsauken's racial balance should be considered as having some special significance in the overall context of the situation. Pennsauken concedes as much in its reply brief. At page 57 of the reply brief, Pennsauken contends:

> The problem with the position taken by Haddonfield, and Merchantville for that matter, is that their arguments have relied strictly on a quantitative and statistical analysis.

One may reasonably ask, however, what method other than statistical analysis can shed useful light on the question of impact of the program on a statistical construct such as racial balance.

Haddonfield contends that Pennsauken offers a somewhat unusual answer. Pennsauken states that the statistical impact is irrelevant given the context of the sending-receiving litigation. The argument is without merit. There is nothing in any of the reported cases which suggest the possibility that a nonresident tuition program must automatically be terminated if a district sponsoring such a program is involved in sending-receiving litigation.

Finally, Pennsauken relies on assertion rather than evidence. It contends

> the Haddonfield tuition program is acting as a conduit for Merchantville parents to pass over the legally designated high school which their children should attend and allows those children to attend a white academy while remaining in the public school system.

The phrase "white academy" raises the specter of a segregated system of private academies set up in much of the south in response to Supreme Court integration orders in the 1960's. Rhetoric is no substitute for evidence. The record simply contains nothing that shows the Haddonfield Board is, in either policy or practice,

operating in a discriminatory manner. Indeed, an analysis of the racial mix of nonresident students enrolled in Haddonfield shows the interesting fact that the tuition program increases the proportion of minorities enrolled in the district. The program attracts a substantial number of black pupils from Lawnside, a primarily black community. One of the two Pennsauken pupils enrolled in the program, a high school senior, is black.

There is simply no evidence in the record to support the assertion that parents from Merchantville or anywhere else are attracted to Haddonfield because it offers a "white" environment. Finally, the statistical evidence does not indicate that the Haddonfield program serves as a mechanism for white flight. On the contrary, exhibit R-4 clearly shows that the great bulk of nonresident students come from communities which either have negligible minority populations or are racially stable. Pennsauken's own evidence does not support the conclusion that Pennsauken is or has been the victim of white flight. Exhibit RP-20 provides a racial-ethnic analysis of Pennsauken High School enrollment from 1981-1990. That exhibit, based upon annual September 30 enrollment reports, shows that there has been a significant decline in enrollment at Pennsauken High School from a total enrollment of 1,624 in 1981 to 1,279 in 1990, a decline of 21 percent. It is also true that the enrollment of white students has declined in the same period from 1,243 to 816, a decline of 34 percent. But, it should be noted that Haddonfield, which Pennsauken has characterized as "all white" and "segregated" as also experienced dramatic enrollment declines. There is simply no evidence of record to support the conclusion that the proportionately greater decline of white enrollment, relative to minority enrollment, in Pennsauken reflects anything more than national demographic trends. Indeed, RP-20 demonstrates that, although black enrollment has increased from 19 percent to 25 percent of the overall Pennsauken High School population, the actual numerical increase from 1981-90 was 11 pupils, or 3.5 percent. That is, it appears that the black birth rate in Pennsauken is consistent with the national trends, with significant declines occurring a few years later than similar declines in the white birth rate. In fact, significant growth in Pennsauken High School enrollment is found neither among whites nor blacks. The Hispanic enrollment has increased from 44 in 1981 to 105 in 1990, an increase of 61 students or 139 percent. A similarly dramatic increase has occurred among the Asian or Pacific Islander category.

Pennsauken insists that this is a racial impact case. But, it has offered no evidence to support that claim. The evidence in the record as offered by Pennsauken

and the other parties establishes that statistically, race is irrelevant. Pennsauken's expert, Kaplan, however, made it clear why he and his client have emphasized the racial issue. As Kaplan conceded, although he was hired with a mandate to review all of the issues relevant to a sending-receiving dispute, he concluded in the course of his research that the only real issue in the case was racial impact. Yet, as argued at the outset of the case, Pennsauken has not focused on the racial issue because there exists evidence to support the position. Rather, it has focused on the racial issue because there is no evidence of adverse impact in any of the other areas made relevant by the applicable statutes and reported cases.

Haddonfield submits that its motion to dismiss Pennsauken's petition of appeal against the Haddonfield nonresident tuition program should be DISMISSED.

DECISION ON MOTION

Although the two cases decided today were heard together, the outcomes are independent. Should the decision to sever the Merchantville-Pennsauken sending-receiving relationship be adopted, the motion is mooted. If the decision is modified or reversed, the motion still must be addressed.

Initially, and following a thorough examination of the record, I **FIND** that Pennsauken has not adduced proofs sufficient to support its motion. As Haddonfield suggests, argument is not proof. However, given the nature of the question and the fact that it is policy sensitive, further examination is necessary.

As in Englewood, above, Haddonfield here used a tuition policy to alleviate the effects of its own declining enrollment. On its face, this is no abuse of *N.J.A.C.* 18A:38-3. Nevertheless, the State's policy with respect to segregation and imbalance in New Jersey's public schools is necessarily implicated. In Booker v. Bd. of Ed. of Plainfield, 45 *N.J.* 161 (1965) and Jenkins v. Tp. of Morris School Dist. and Bd. of Ed., 58 *N.J.* 483 (1971), the New Jersey Supreme Court found constitutionally-driven state policy against discrimination and segregation in the public schools. As did the ALJ in Englewood, I **FIND** that Haddonfield's intentions do not contravene the State's involvement.

Preliminarily, the numbers at work in Englewood, are not present in this case. Very few Merchantville pupils, in real numbers, and a minute percentage of Merchantville pupils attend Haddonfield High School on a tuition basis. Nor is the

shift in enrollment composition at the designated receiving high school of comparable magnitude. It is conceded that there were discussions between Haddonfield and Merchantville. Unlike the Englewood situation, however, there is no evidence of Merchantville pupils flocking to Haddonfield.

The State Board, sensitive to the numbers of pupils of various backgrounds involved, found in Englewood that by precluding high school pupils from Englewood Cliffs from withdrawing from their assigned high school while remaining within the public school system, it would forestall further deterioration in the balance of racial and national origin groupings represented in the public school population at Dwight Morrow High School, Englewood's High School. In the present case, although dealing with raw numbers of sending pupils greater than those in the Englewood case, the matrix in which those numbers are embedded is vastly different. Averbach's work , above, indicates a trend at Pennsauken High School that, in three to five years, will produce a "majority minority" high school. This trend appears irresistible with or without Merchantville pupils in Pennsauken High School. The removal of Merchantville pupils will not measurably accelerate change nor will the retention of Merchantville pupils measurably retard it.

Where an action cannot effectuate the State's policy, it makes no sense to take it. A court will not do, or require the doing of, a vain or useless thing; it will not use its powers to accomplish a useless purpose, nor will it grant a decree which does not confer a benefit, which is impractical as concerns enforcement, which is not enforceable, or which is ineffectual because compliance is impossible. The same maxim applies to administrative agencies.

I **FIND** that the effect of nonresident enrollments at Haddonfield High School is so remotely related to the enrollment composition of Pennsauken High School that an insufficient nexus exists to permit the action Pennsauken seeks. Accordingly, I **GRANT** Haddonfield's Motion to Dismiss the Cross Petition. It is so **ORDERED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

1 MAY 1992
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

May 4, 1992
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 08 1992
Date

OFFICE OF ADMINISTRATIVE LAW

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EXHIBIT LIST

** denotes marked for identification only*

Petitioner: Merchantville Board of Education:

P-1	Prior decision, Merchantville v. Pennsauken, N.J. App. Div., Sept. 30, 1985
P-2	Petition of Appeal
P-3	Merchantville Report Card
P-4	March 29, 1988 Resolution, Merchantville
P-5	Pennsauken Report Card
P-6	Haddonfield Report Card
P-7	Macaluso Functional Capacity Study, Haddonfield, March 22, 1988
P-8	Haddonfield Feasibility Study, February 11, 1988
P-9	Haddonfield HS Program of Studies
P-10	Haddonfield Middle States, October 1986
P-11	Haddonfield County Monitoring Report, January 1987
P-12	Haddonfield Minutes, February 11, 1988
P-13A	Feasibility Study (Savitt)
P-13B	Feasibility Study Update
P-13C	Deddy Update, September 7, 1989
P-13D	Estimated Program Aid 1991-92 and present 1990-91 from SDE (July 8, 1990)
P-14	Kaplan Report (43 pp.) *
P-15	December 9, 1988 letter, Kaplan to Maloney & Finley, *
P-16	Belmar Student Survey, Belmar v. Asbury Park, October 1987 *
P-17	Enrollment projections, Belmar v. Asbury Park, October 1987 *
P-18	Analysis of Racial Data, Belmar v. Asbury Park *
P-19	Macaluso Functional Capacity Study, Pennsauken HS, March 23, 1988 *
P-20	October 31, 1988 Printout, Master Timetable (pgs. 1-5)

P-21 October 31, 1988 Printout, Master Timetable (pgs . 6-11)

P-22 October 31, 1988 Printout, Master Timetable (pgs. 12-19)

P-23 November 21, 1989 letter, Murphy to Phifer

P-24 Richards report, Boonton Twp. v. Boonton Town, pgs. 13, 14, 3

P-25 Consolidated Enrollment Report, Merchantville, October 15, 1990

P-26 Consolidated Enrollment Report, Merchantville, September 29, 1989

P-27 Consolidated Enrollment Report, Merchantville, September 12, 1991

P-28 Consolidated Enrollment Report, Merchantville, September 30, 1988

P-29 Scrupski Report, June 1990

P-30 Scrupski Vitae

P-31 Averbach Vitae

P-32 Projected 1992-95 White/Minority Pennsauken HS Mix with and without Merchantville pupils

P-33 Averbach Report, January 2, 1990

P-34 Averbach Report, May 2, 1991

P-35 Averbach Report, September 14, 1991

Respondent Cross Petitioner: Pennsauken Board of Education

RP-1 Savitt testimony, Washington Twp. v. UFR , June 13, 1988 (pgs. 45-48 out)

RP-2 Pennsauken Middle States Report, October/November 1985

RP-3 Savitt Report, Asbury Park *

RP-4 March 29, 1988 minutes, Merchantville Bd. of Ed. (Selverian)

RP-5 Kaplan Report (36 pp.)

RP-6 Kaplan "Neighborhoods and Communities, the Pennsauken-Merchantville Connection"

RP-7 Haddonfield HS Tuition Students, October 22, 1990

RP-8 Community Calendar Announcement, October 14, 1988

RP-9 Haddonfield School Advertisements

RP-10 Haddonfield Magazine Advertisements (Focus Magazine)

RP-11 Haddonfield policy 3240 (Tuition)

RP-12	Haddonfield, Supt. to Administrative Council members "Admission and Tuition Procedures"
RP-13	Haddonfield 1985-89 College Selection (23 pp.)
RP-14	Architect plans for Pennsauken HS expansion, December 19, 1989
RP-15	Pennsauken HS Special Ed Report, April 12, 1991
RP-16	Pennsauken Special Services Dept. Brochure (4 p.)
RP-17a	Pennsauken HS, Class of 1984 rank
RP-17b	Pennsauken HS, Class of 1985 rank
RP-17c	Pennsauken HS, Class of 1986 rank
RP-17d	Pennsauken HS, Class of 1987 rank
RP-17e	Pennsauken HS, Class of 1988 rank
RP-17f	Pennsauken HS, Class of 1989, Profile of Merchantville students
RP-17g	Pennsauken HS, Class of 1990, Profile of Merchantville students
RP-17h	Pennsauken HS, Class of 1991, Profile of Merchantville students
RP-17i	Pennsauken HS, Class of 1992, Profile of Merchantville students
RP-18	Pennsauken Internal Monitoring Report: Employment Goals, June 1990
RP-19	Haddonfield Enrollment, trends and projection chart 1980-81 to 1995-96 (February 11, 1988)
RP-20	Pennsauken Grades 9-12, 1981-1990 Enrollment, Demographic Analysis
RP-21	Pennsauken HS Master Schedule (605 report), April 15, 1991
RP-22	Computer Report on space available, April 19, 1991
RP-23	1991-1992 Pennsauken Budget
RP-24	May 15, 1991 letter, Bowman to Maloney & Finley
RP-25	Klaus notes
RP-26	Michelle Fine vitae
RP-27	Michelle Fine Report
RP-28	Craig Richards report
RP-29	Craig Richards vitae
RP-30	Pennsauken High School Student Handbook, 1989-90

Cross Respondent: Haddonfield Board of Education:

R-1 Goldsmith notes (November 1988) attached to Finley letter of June 27, 1990 (15 pp.)

R-2 Fine notes of group interviews (41 pp.)

R-3 Consolidated Enrollment Report, Merchantville, 1985

R-4 1991-92 tuition list

WITNESS LIST

Dr. Bruce Wilson
Dr. Barry Ersek
Robert Savitt
Carol Deddy
Carol A. Vita
Christian R. Swanson
Dr. Lawrence Kaplan
Bruce Morgan
Dr. James P. Brown
Martin A. Slater
Frederick Keating
Dorothy K. Grobelmy
Anne Morris
Lewis Sobelman
William Clarke
John S. Ritchie
Thomas J. Roan
Kurt R. Klaus
Joseph F. Hoffmann
Susan Walker
Mildred Roatche
Monica Lee
Bruce Ransone
Jennifer Morales
Tara Pritchett
Elizabeth Wagner
Dr. Michelle Fine
Dr. Craig E. Richards
Dr. Adam F. Scrupski
Dr. Emanuel Averbach

TRANSCRIPT NUMBERS AND HEARING DATES

I	November 8, 1990
II	November 15, 1990
III	November 16, 1990
IV	November 20, 1990
V	November 21, 1990
VI	November 27, 1990
VII	November 29, 1990
VIII	November 30, 1990
IX	April 9, 1991
X	April 10, 1991
XI	april 15, 1991
XII	April 22, 1991
XIII	April 23, 1991
XIV	April 24, 1991
XV	May 17, 1991
XVI	May 22, 1991
XVII	June 10, 1991
XVIII	August 2, 1991
XIX	August 5, 1991
XX	September 25, 1991
XXI	September 26, 1991
XXII	October 8, 1991

OAL DKT NOS. EDU 5702-88 and EDU 4063-89 (CONSOLIDATED)

BOARD OF EDUCATION OF THE BOROUGH OF MERCHANTVILLE, PETITIONER, V. BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, RESPONDENT-CROSS PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF HADDONFIELD, CROSS-RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

The record and initial decision filed by the Office of Administrative Law have been reviewed. By extension, Respondent Pennsauken (Pennsauken) filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. Respondent Haddonfield (Haddonfield) and Petitioner Merchantville (Merchantville) filed timely reply exceptions.

Pennsauken's lengthy exceptions are grouped into six categories. Each will be addressed seriatim.

Exception #1 claims the procedural history set forth by the ALJ at pages 2-4 of the initial decision omits several crucial facts critical to understanding the present litigation. Harkening back to the earlier failed attempt made by Merchantville to sever its sending-receiving relationship with Pennsauken, Pennsauken argues that the reconstructed initial decision from that matter established

among other stipulations of fact, adopted by the Commissioner, that "[N]o inadequacy of building or program has been shown or even alleged." (emphasis in text) (Exceptions, at pp. 2-4, quoting Commissioner's decision 1982 S.L.D. 751, 755) Pennsauken queries whether everything has changed in just three years time, in that Merchantville alleged several inadequacies in the areas of facilities, curriculum and alleged overcrowded conditions.

In reply to Pennsauken's first exception, Merchantville charges that what Pennsauken demonstrates is not that the ALJ omitted crucial facts critical to understanding the present litigation, but that Pennsauken has no grasp of the legal theory advanced by Merchantville in the initial sending-receiving relationship controversy, and thus, cannot comprehend that which was written in those earlier decisions by the ALJ, Commissioner of Education and Appellate Division during the 1982 matter. Merchantville agrees with the ALJ that the earlier case, therefore, has no relevance here and was rightfully omitted by the ALJ. It claims that in the 1982 litigation, Merchantville alleged that the ten-year term of the sending-receiving contract with Pennsauken had expired, and thus, contractually, it had no further obligation to continue sending its students to Pennsauken. Merchantville concedes that the ALJ, Commissioner of Education and Appellate Division in that matter believed otherwise, however. It claims that in that case, the issue was one solely of contract and did not present arguments dealing with the negative impacts that might be visited upon Pennsauken if Merchantville were permitted to sever. Thus, Merchantville finds Pennsauken's exception in this regard to be without merit.

Exception #2 claims the ALJ erred in placing any reliance on the Merchantville feasibility study, because it and its primary author, Dr. Robert Savitt, lack any credibility and reliability and thus should be disregarded. Citing Dr. Savitt's deposition of October 5, 1989, Pennsauken avers Dr. Savitt admitted that he is not an expert in the component areas of the feasibility study, specifically in the areas of student evaluation, teacher evaluation and general educational facilities. Further, Pennsauken claims Dr. Savitt's feasibility study is strictly a numerical and quantitative analysis of the three schools at issue herein. Pennsauken argues there were no qualitative considerations in the report in any area he studied, and further that the report does not begin to approach the mandates of the sending-receiving statute, N.J.S.A. 18A:38-13, but instead merely counts courses, bodies, textbooks, etc.

Merchantville replies to Exception #2 by reciting Dr. Savitt's educational and professional experience, as well as the ALJ's conclusion finding him to be qualified as an expert, and claims that its expert is qualified pursuant to N.J.A.C. 1:1-15.9(b). Further, Merchantville rebuts Pennsauken's attack on Dr. Savitt's feasibility study. It claims the feasibility study met the Commissioner's scrutiny in that he transmitted the matter for hearing and addressed each of the statutory elements, educational, financial and racial impacts, and that it contained documentary data on each such element, as well as an opinion regarding same. Thus, Merchantville avers, the feasibility study and Dr. Savitt's findings therein are admissible and should receive the Commissioner's consideration.

Exception #3 avers the ALJ erred in placing any reliance on Dr. Savitt's testimony and the Merchantville study. Pennsauken avers it has established through its witnesses and evidence that the Merchantville withdrawal from Pennsauken High School would have a substantial negative impact educationally and racially. The thrust of this exception considers, inter alia, the evidence adduced from Pennsauken's witnesses regarding educational quality at Pennsauken High School and whether there is racial harmony at Pennsauken High School, which the Commissioner will not recite herein. Pennsauken notes that the Director of Guidance, Ms. Carol Vita, testified the articulation between Pennsauken and Merchantville consists of one meeting per year and perhaps some telephone follow-up. Pennsauken indicates that such testimony speaks only to her experience with articulation, and does not represent a description of the entire articulation between Pennsauken and Merchantville, which in Exception #2, Pennsauken suggests, is nearly nonexistent.

Objecting to the ALJ's reliance on a draft of the feasibility study of Pennsauken's primary expert, Dr. Lawrence Kaplan, instead of relying on his final report, both of which dealt with racial impact, for such matters as whether Pennsauken High School is overcrowded, Pennsauken stresses that specific language from the draft which the ALJ summarized, is absent from the final report and thus should not have been referred to by the ALJ.

In further rebuttal to the alleged space problem at Pennsauken, Pennsauken indicates in exceptions that its head of guidance testified that contrary to the ALJ's comment that there are no separate time-out rooms for disruptive special education students at Pennsauken High School, the concept of time-out space is used at

Pennsauken, but that such space is provided in the classroom itself instead of in a separate room.

Thereafter, Pennsauken's third exception addresses the ALJ's disregarding of the "qualitative" testimony (Exceptions, at p. 95) offered by its expert on symbolic and secondary loss, Dr. Michelle Fine, which evidence, Pennsauken claims, must exist if the State were to grant severance. Pennsauken objects to the ALJ's stating that Dr. Fine's report did not deal with actual impact, but rather deals "mainly in perceptions." (Initial Decision, at p. 39) Pennsauken notes its objection to the ALJ's conclusion in response to Pennsauken's argument that the position of Haddonfield and Merchantville was strictly a quantitative and statistical analysis (Initial Decision, at p. 76) Rather, Pennsauken would have the Commissioner consider and accept Dr. Fine's report on symbolic loss.

Pennsauken also excepts to the ALJ's criticisms of Dr. Craig Richards' reports. Dr. Richards was Pennsauken's statistics expert. Reiterating that the ALJ qualified Dr. Richards as an expert, Pennsauken suggests that the central conclusions reached by Dr. Richards were indisputable, which are recited in the exceptions taken from p. 16 of his study, (RP-28):

> 1. Haddonfield and Merchantville high school students are more than ninety five percent white.
>
> 2. From 1991-1995 minority representation at Pennsauken High School will increase approximately fifty four percent based on a five year enrollment forecast.
>
> 3. In 1991, minority students will represent about thirty nine percent of Pennsauken High School students; by 1995 about fifty percent. (This conclusion is also supported by Dr. [Emanuel] Averbach.)

4. The withdrawal of Merchantville students from Pennsauken High School will result in a withdrawal of about fourteen percent of the white students forecasted to attend in 1995.
(Exceptions, at p. 97)

Pennsauken claims in exceptions that both demographers, Drs. Richards and Averbach, have opined that in the near future, Pennsauken High School will become a minority school, and the loss of the predominately white Merchantville students will only serve to exacerbate this phenomenon. It further argues that Dr. Richards concluded at pp. 16 and 17 of RP-28 that the withdrawal of the Merchantville students would have a slightly negative impact on racial integration in Pennsauken High School since about 15% of all the white students forecasted to be attending Pennsauken High School in 1995 would be withdrawn. It relies on RP-20, the demographic analysis of Pennsauken High School enrollment from 1981-90 as reflecting the trend discussed in Dr. Richards' report. Pennsauken suggests that while the total enrollment at the high school has decreased during the time from 1981-90, the percentage of minorities has dramatically increased to the point of representing 36% of the student body for the 1990 school year.

In reply, Merchantville suggests that in light of the flaws the ALJ noted throughout the initial decision in Dr. Richards' studies, Richards' central conclusions cannot be disputed when the premises upon which those conclusions are based are invalid or faulty. As to Richards' four conclusions, Merchantville argues that

> The first three, which deal with minority enrollments, present and projected, cannot have a cause-effect relationship with the proposed severance inasmuch as the withdrawal, as has been established by Averbach, will result in a decline in Pennsauken High School minority population of "less than one-half of one percent per year," and "that's a smaller figure than we can normally measure in this field." [ID 53]
> (Reply Exceptions, at p. 28)

Regarding Richards' fourth conclusion, Merchantville contends it is premised on a flawed projection using as a starting point 78 Merchantville students attending Pennsauken in 1991-92. That starting point was incorrect, it claims, noting that the correct number is 69 Merchantville students, citing TR. XXII 10, P-35, Table D. (Reply Exceptions, at p. 29) Thus, Merchantville avers, there is a 12% error built into Richards' projections. Consequently, Merchantville submits

> when Pennsauken argues the withdrawal "would have a significant negative impact on racial integration of Pennsauken High School since about fifteen percent of all the white students forecasted to be attending Pennsauken High School in 1995 would be withdrawn" [PE* 100], it is wrong on two counts. The percentage of white students was erroneously calculated, having a built-in 12% error from the outset, and the total withdrawal in 1995 is not now realistic. (Reply Exceptions, at p. 29)

Exception #4 charges that the ALJ erred in placing any reliance on Merchantville's rebuttal, first by excepting to the ALJ's declaring Dr. Adam Scrupski, a social scientist from Rutgers University and a Merchantville witness, as an educational expert on sociology of education. Merchantville's reply exceptions capture the main objections Pennsauken cites on Dr. Scrupski's serving as an expert witness:

> ***Pennsauken claims Scrupski is without expertise, his testimony was superficial and he was not credible [PE 106]. He also, according to Pennsauken, made elitist statements [PE 109], was guilty of editorializing [PE 110], and was disingenuous [PE 113]. It is also claimed he is an outlandish speculator [PE 115], and perhaps worst of all, Scrupski was "guilty of injecting his own words while concurrently attributing

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*PE - Pennsauken Exceptions

phrases to Merchantville student respondents" [PE 116]. (Reply exceptions, at pp. 29-30)

Pennsauken asks that the Commissioner disregard Dr. Scrupski's testimony and report (Exhibit P-29).

Merchantville rebuts that Pennsauken's "unsubstantiated ramblings" warrant nothing by way of response. (Reply Exceptions, at p. 30)

Pennsauken also excepts to the testimony of Merchantville's demographer, Dr. Emanuel Averbach, as an expert because he made no qualitative estimate of the impact of Merchantville's withdrawal in terms of the educational climate at Pennsauken High School. Pennsauken finds his testimony not credible and superficial, that his report lacked depth and that his conclusions were "groundless and without foundation." (Exceptions, at p. 123)

Pennsauken claims Averbach made no qualitative estimate of the impact of Merchantville's withdrawal in terms of the educational climate at Pennsauken and also that he testified that the loss of Merchantville students from Pennsauken High School would be a non-recurring loss by Pennsauken. Yet, Pennsauken claims, Dr. Averbach admitted that the pool of students graduating from the Merchantville elementary school year after year would be lost by Pennsauken, which Pennsauken claims is a recurring loss, citing TR. XXII 24.

Pennsauken further argues that Dr. Averbach made no findings in his January 2, 1990 report or in his May 2, 1991 report relative to birth rates and minority trends in the Merchantville elementary schools, nor did he make any calculations relative to the net in-migration or out-migration relative to Merchantville's population. Further, Pennsauken states Dr. Averbach's only

calculations in such two reports relative to Merchantville was Table E of, P-34, setting forth the school population from 1985-90. (Exceptions, at p. 124) Pennsauken criticizes Averbach's conclusion of his May 2, 1991 report, therefore, that the withdrawal of Merchantville High School students from Pennsauken High School would not significantly impact on the school's racial/ethnic in-migration. Further, Pennsauken finds Averbach's September 14, 1991 report (P-35) shallow (Exceptions, at p. 126) because despite drawing the conclusion that substantial numbers of Merchantville pupils who could have been expected to attend Pennsauken High School in the past, are opting not to (id., quoting TR. XXII 61), Averbach could not provide any explanation for why or how this phenomenon has developed.

In reply, Merchantville cites Dr. Averbach's credentials and then cites the ALJ's conclusion regarding Dr. Averbach's Exhibit P-32, the chart found on page 66 of the initial decision, as dispositive of this exception. Merchantville claims the conclusion of the ALJ that there would be no substantial negative racial impact made in reliance on Averbach's chart is fully supported by the record.

Exception #5 avers the ALJ erred in reaching his findings of fact, in particular regarding his conclusions that Merchantville established a prima facie case in not applying the correct burden of proof standard and in not comprehending the New Jersey and U.S. Supreme Court precedents dealing with integration of public schools. Pennsauken cites its earlier exceptions for its contention that Merchantville has failed to establish a prima facie case.

Noting the State Board decision in this case dealing with the burden of proof, Pennsauken argues that Merchantville has failed to meet its burden of proof because it has failed to establish any of the following allegations:

1. Pennsauken High School is presently overcrowded;

2. Haddonfield High School represents a more compatible secondary school experience than does Pennsauken High School for children coming from the type of educational program provided by Merchantville Elementary School;

3. The Merchantville Board of Education seeks a more academic oriented program for its students.

4. Class sizes generally are larger at Pennsauken High School than they are at Haddonfield High School.

5. The pupil-teacher ratio at Pennsauken High School is higher than it is at Haddonfield High School.

   (See paragraph 9(a), (e), (f), (g) & (h) of Merchantville petition dated June 30, 1988 designated as trial exhibit P-2)

6. The change in high school designation will have no substantial negative impact on the educational program of the districts affected. (Paragraph 10 of P-2)

7. The change in high school designation will have no substantial negative impact on the racial balance of the affected districts. (Paragraph 11 of P-2) (Exceptions, at p. 128)

Rather, Pennsauken avers it has refuted each alleged reason for Merchantville's seeking to sever its sending-receiving relationship. Thus, Pennsauken says Merchantville's petition must be denied.

Assuming arguendo that Merchantville has met its initial burden of production pursuant to the State Board's interlocutory ruling of September 5, 1990, Pennsauken contends it established, at

a minimum, that there would exist "some" negative impact, which it claims the State Board has decided compels the Commissioner to determine whether the "positives" of termination are outweighed by the negatives based on an equitable determination of all the circumstances. (Exceptions, at p. 130, quoting State Board, at p. 5) It is Pennsauken's position that no credible relevant testimony in the entirety of the record can be found to establish any positives, and it claims the ALJ is silent on the issue. It cites those arguments already mentioned in its exceptions in support of this contention. It further claims it has established the substantial negative impact both educationally and racially that would result in the termination of its sending-receiving relationship with Merchantville, noting that it believes such negative impact will not be limited to Pennsauken High School and community but also will impact on the Merchantville students and community by preventing them from attending a richly diverse and comprehensive high school such as Pennsauken's.

In its fifth exception, Pennsauken also reasserts an argument raised in its earlier brief, that the ALJ has conducted a purely numerical and quantitative examination relative to impact, which alleges that the ALJ did not comprehend the holding of the Supreme Court of the United States and of New Jersey in Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) and Booker v. Board of Education of the City of Plainfield, 45 N.J. 161 (1965). Pennsauken restates its belief that such cases have defined education and educational impact in far more expansive and qualitative terms than the simplistic course-counting approach undertaken by Dr. Savitt and accepted by the ALJ. (Exceptions, at

p. 133) It claims that if the Commissioner were to accept Dr. Savitt's position, which the ALJ adopted, i.e., that severance would aid all concerned because Pennsauken's alleged overcrowding would be alleviated and would help Haddonfield's declining enrollment, such acceptance would undermine 40 years of progress in constitutional and public school integration law. Pennsauken adds that the ALJ's reliance on Cranbury Township Board of Education v. Lawrence Township Board of Education, decided by the Commissioner September 30, 1985, aff'd State Board April 1, 1987 is misplaced in this matter because that case did not have a racial component because both school districts were predominantly white. Pennsauken states the the ALJ's reliance on Cranbury runs afoul of the decisions of the Commissioner, State Board and Appellate Courts commanding that qualitative impact be addressed.

Relying on the State Board decision in Englewood/Englewood Cliffs, supra, Pennsauken posits that the State of New Jersey cannot sanction the disruption of the current sending-receiving relationship between it and Merchantville given the following:

A. The subject students have been educated together for over 75 years; and

B. The social fabric of the communities involved are, and have been throughout their history, substantially intertwined; and

C. The Pennsauken High School is now an institution undergoing a rapid transition wherein there is a significant minority population which will increase shortly to majority status; and

D. The number of white students sought to be withdrawn represents a substantial percentage of the white student population now attending Pennsauken High School; and

E. As the students and faculty who have testified, by stipulation, as representative of the entire student body and faculty population, there would be a substantial impact on the quality of the educational experience at Pennsauken High School should this withdrawal be permitted; and

F. As testified to by the credible expert witnesses involved, the resulting stigma attached to the high school, should the state sanction withdrawal, would have a substantial negative impact for the same reasons expressed at all levels of consideration in the matter of the Board of Education of Englewood Cliffs v. Board of Education of Englewood v. Board of Education of Tenafly wherein the State Board of Education in its decision dated April 4, 1990 upheld the decision of the administrative law judge and the Commissioner. It is important to note that the State Board of Education reached its decision based on its application of much of the case law recited here; however, both the administrative law judge and the Commissioner studiously considered the expert testimony and reports relative to the negative and symbolic impact on the students affected.

G. The Borough of Merchantville has advanced no educational benefit to be derived from the proposed withdrawal.

H. Though it is not necessary to resolve this matter in favor of the Respondent, we are left with the inescapeable (sic) conclusion that Merchantville's motivation is to resegregate its student population in an all white high school atmosphere.

(Exceptions, at pp. 147-8)

Merchantville's reply to Exception #5 claims its two post-hearing briefs exhaustively document that it has established a prima facie case. It incorporates such brief in its reply exceptions. As to the burden of proof argument raised by Pennsauken, Merchantville too relies on the State Board interlocutory decision in Merchantville, supra, for the proposition that a balancing test has been struck by the State Board in

sending-receiving cases. However, Merchantville suggests that Pennsauken has not met the State Board requirement of demonstrating "some" negative impact as it claimed in its exceptions, but rather has made only a de minimis showing of negative impact, and thus fails to meet the condition precedent required by the State Board's interlocutory decision before the balancing test is triggered. (State Board Decision, at p. 5)

Finally, in regard to this exception, Merchantville replies that Pennsauken loses sight of the issue before the ALJ, and contends Pennsauken was litigating the wrong issue. Merchantville suggests this is not a public school segregation case and thus does not address the racial issues of Brown, supra, Jenkins, supra, and Booker, supra, and cites the initial decision with accord as found at pages 77-78 as being dispositive of Pennsauken's Exception #5 in this regard.

Moreover, Merchantville suggests that because Pennsauken's exceptions make no reference to the ALJ's findings regarding financial impact, Pennsauken has conceded there will be no substantial financial negative impact should severance be granted. As to educational impact, the de minimis loss in tuition revenues will not, in Merchantville's opinion, be the cause for abolishing any educational programs at Pennsauken. Neither it contends, can the loss of the few Merchantville students, substantially or negatively, impact on the scheduling of students at Pennsauken High School or on the curriculum. Neither, it avers, will the loss result in reduction in staff or elimination of any program. Finally, Merchantville submits that despite arguing that this is a racial impact case, Pennsauken offered no evidence to support its

claim. In so stating, Merchantville notes Dr. Averbach's figure that the loss of white enrollment at Pennsauken High School will be .425% per year and the total reduction in the white enrollment over the entire phase-out will be 1.7%, which is not normally measurable and thus is de minimis. (See Reply Exceptions, at p. 36.) Accordingly, Merchantville seeks affirmance of the initial decision.

Pennsauken's sixth exception addresses the cross-petition it filed against Haddonfield and avers the ALJ erred in his decision to deny such cross-petition, alleging such determination is directly contrary to the State Board's ruling in Englewood and other controlling precedents for this matter. It relies on its post-hearing reply brief in support of this contention. Pennsauken also notes its disagreement with the ALJ's summation of the Pennsauken position regarding the discretionary authority afforded the Commissioner or State Board to prohibit a local school from enrolling non-resident pupils. Pennsauken contends it simply argued that it was unaware of any case law limiting the Commissioner's authority to enjoin private tuition programs to the specific and limited instances described by Haddonfield in its January 16, 1992 brief.

Further, Pennsauken notes that the State Board decision in Englewood/Englewood Cliffs suggests that when addressing impact, both racial and educational, statistics may not be relied upon solely. Pennsauken finds the ALJ's simplistic approach, whereby he merely counted textbooks, courses, dollars and cents, and white and black faces is "fallacious and farcical." (Exceptions, at p. 154) Pennsauken urges that the Commissioner cannot permit a predominantly

white sending district to leave a fully integrated high school and have its students attend an all white high school. Such a scenario, Pennsauken avers, would lead to the specter of resegregation by allowing more whites to be added to the all white Haddonfield High School at the expense of the fully integrated and diverse Pennsauken High School. The Commissioner is urged by Pennsauken in exceptions to reverse the initial decision and to disallow severance of its sending-receiving relationship with Merchantville.

Merchantville submitted no reply exceptions to Pennsauken's sixth exception, but urges the Commissioner to affirm the initial decision and permit the severance of the sending-receiving relationship between Pennsauken and Merchantville.

Haddonfield did submit reply exceptions to Pennsauken's Exception #6, noting its accord with the ALJ's determination that the Haddonfield private tuition policy does not violate N.J.S.A. 18A:38-3, and stating that such decision does not contravene the State's interest in preventing segregation and racial imbalance in New Jersey's public schools. Haddonfield contends the actual tuition enrollment figures at Haddonfield High School demonstrate that the tuition program does not adversely affect racial balance at Pennsauken High School. It finds that contrary to Pennsauken's position, the Englewood/Englewood Cliffs decision makes it clear that neither that decision nor any other holds that there is an absolute bar as a matter of law to the operation of a tuition program. Rather, Haddonfield claims the reported cases permit the enjoining of tuition programs only in those instances in which the facts demonstrate that the tuition program causes an adverse impact on racial balance in another district. It further claims that

injunctive relief, such as that sought by Pennsauken, must be justified on the facts, and that this case does not warrant such relief.

More specifically, Haddonfield charges that Pennsauken fails to grasp the distinction that this matter lacks the shift in enrollment composition of high-school-aged students which was the focus of the analysis in Englewood/Englewood Cliffs. It notes that in that case, the number of Englewood Cliffs students attending the private tuition program at Tenafly grew from 11 in 1982 to 76 in 1987-88. Haddonfield observes that the ALJ correctly noted that no such shift has occurred in this case.

Haddonfield claims the operation of the Haddonfield private tuition program has not experienced a growing number of Merchantville students electing to participate in it to the point where anywhere near a majority of Merchantville high-school-aged students attend Haddonfield rather than their designated high school, Pennsauken. Haddonfield thus claims that its tuition program does not in any but the most de minimis way impact upon the student population at Pennsauken High School.

Haddonfield claims too that Pennsauken has failed to uncover any cases in which the Commissioner has enjoined a private tuition program in the absence of adverse racial impact on another district because there are none. It also claims that Pennsauken has failed to show that the Haddonfield private tuition program operates "to the detriment of its neighboring public school districts." (Haddonfield Reply Exceptions, at p. 4, quoting Exceptions, at p. 152) To this, Haddonfield refers to the initial decision and agrees with the ALJ at p. 78 wherein he stated, "Pennsauken 'has

focused on the racial issue because there is no evidence of adverse impact in any of the other areas made relevant by the applicable statutes and reported cases.'"

Finally, Haddonfield submits there exists no legal basis for enjoining a private tuition program because of unarticulated "detriment" (Reply Exceptions, at p. 4, quoting Exceptions, at p. 152) to neighboring school districts. Nor does there exist a statutory scheme by which one public school district is entitled to all of the high-school-aged students within its geographic bounds, Haddonfield avers. It argues that inasmuch as parents have the final option to determine where their children attend high school on a tuition basis should they choose not to attend the public high school designated for their district, Pennsauken's claim that Haddonfield has "robbed" its neighboring school district of their pupils is misplaced and irrelevant to this instant litigation. (Reply Exceptions, at p. 4)

Accordingly, Haddonfield seeks affirmance of the ALJ's conclusion regarding the cross-petition on the tuition policy in Haddonfield.

COMMISSIONER'S DETERMINATION

Upon a careful and independent review of this matter and mindful of the allocation of proofs for a sending-receiving severance application as set forth in the State Board's Interlocutory Decision rendered on September 5, 1990, the Commissioner affirms in part and rejects in part the initial decision in this matter rendered by the Office of Administrative Law on May 1, 1992.

Toward the orderly disposition of the voluminous exceptions filed in this matter, procedural claims will be addressed first.

Regarding the feasibility study submitted by Dr. Savitt for Merchantville and his having been qualified as an expert, the Commissioner concurs with the ALJ's conclusion that the feasibility study meets and exceeds the requirements of N.J.S.A. 18A:38-13 and that Dr. Savitt is fully qualified to testify in this proceeding as an expert. There exists no obligation that he be qualified to respond in areas such as student or teacher evaluation. See, N.J.A.C. 1:1-15.9(b). Thus, for the reasons expressed by the ALJ at Tr. II 13-14 in his ruling regarding the qualifications of Dr. Savitt to testify as an expert for Merchantville, the Commissioner concurs that Pennsauken's motion be denied. As noted by the ALJ, however, the testimony rendered by Dr. Savitt is subject to weighing by the trier of fact, including Dr. Savitt's testimony of those observations made by and recorded in Merchantville's feasibility study made by his colleague Dr. McGuigan.

In conducting a review of Dr. Savitt's testimony, the Commissioner notes Pennsauken's strong objection to the conclusion of the ALJ, drawn from Dr. Savitt's feasibility study (P-13) and testimony that the racial impact component of this matter represents solely a quantitative, not qualitative, investigation. The Commissioner's review of the record comports with the ALJ's conclusion that in many aspects, particularly relating to racial and financial impact, "a statistical analysis can shed useful light on the question of impact of the program on a statistical construct such as racial balance." (Initial Decision, at p. 76) However, the Appellate Court in Englewood/ Englewood Cliffs, decided June 15,

1992, A-4912-89T5, A-6384-90T5, A-6385-90T5 (consolidated) grants credence to such quantitative elements of severance as symbolic loss (students' beliefs and feelings on matters of race relations) only to the extent that the State Board allowed that "educational considerations" take into account "fundamental educational principles applicable in all educational settings as those principles have been expressed in the decisions of the United States and New Jersey Supreme Courts." (State Board Decision, April 4, 1990, at p. 37) The State Board cited its own Statement of Educational Policy, November 5, 1969 in support of this proposition, emphasizing the policy's content, stressing that racial imbalance not symbolic loss stands as a "deterrent and handicap to the improvement of education for all." The policy statement suggested that racial imbalance serves as the basis for determining at what point racial impact becomes substantial and negative. The Commissioner in this matter thus looks to such guidance as provided by the Appellate Division and State Board as set forth in the 1969 Statement of Educational Policy in assessing the racial and educational impact in this matter, and thus only broadly incorporates the testimony and reports educed at hearing regarding such "qualitative" arguments as those suggested by Dr. Michelle Fine, Pennsauken's expert on symbolic loss, and Dr. Adam F. Scrupski, Merchantville's expert in sociology of education regarding symbolic loss. Instead, he relies on that language of the State Board policy statement of November 5, 1969 wherein it is stated:

> Educational considerations are primary in eliminating school segregation. The elimination of racial imbalance is not to be sought as an end in itself but because such imbalance stands as a

> deterrent and handicap to the improvement of education for all.
> (Englewood/Englewood Cliffs, supra, State Board, at pp. 36-37 quoting New Jersey State Board of Education, A Statement of Educational Policy, November 5, 1969)

Further, regarding Merchantville's citing the earlier Merchantville case, which sought severance from the Pennsauken-Merchantville relationship in 1982, the Commissioner finds and determines that the current case will be adjudged on the merits of the proofs submitted under the standard of review extant now in sending-receiving relationship severance cases, as set forth in N.J.S.A. 18A:38-13. The earlier matter, to which Pennsauken alludes by questioning whether circumstances at Pennsauken High School could have changed radically in the three years since that matter was decided by the Appellate Division, was not reviewed under the criteria of N.J.S.A. 18A:38-13. Rather, the Commissioner, State Board and Appellate Division in that case disallowed severance based on a contract claim made by Merchantville that once the term of its previous sending-receiving contact expired, the relationship ended. The review of that matter in no way touched upon the standards of review presently before the Commissioner in this matter, and thus finds those contentions raised by Pennsauken in its exceptions regarding the earlier case to be without merit.

Last, in regard to the procedural predicates to this matter, the Commissioner concurs with the finding and conclusion of the ALJ as stated at page 56 of the initial decision, at Tr. IV 42-43 and for the reasons proffered by Merchantville at Tr. IV 25-31 that Merchantville has established a prima facie case of why severance should be allowed in this matter.

With such procedural matters resolved, the Commissioner now advances to the merits of the matter at hand and the burden of proofs established in such cases as stated by the State Board, in its Interlocutory Decision of September 1990.

First, the Commissioner concurs with the ALJ's findings and conclusions regarding the absence of significant negative financial impact on either of the districts concerned in this matter for the reasons stated in the initial decision at pp. 56-61. See also Tr. IV 2-16. Pennsauken so much as concurs in this conclusion by addressing no exceptions on the question of significant negative financial impact. The Commissioner so finds.

Similarly, the Commissioner is persuaded that no significant negative educational impact would flow from severance of this sending-receiving relationship substantially for those reasons set forth in the initial decision. The Commissioner agrees that contrary to the position of Merchantville, overcrowding will not be a problem, if it did exist at all, at Pennsauken after September 1992 due to the two additions constructed in the high school. See Tr. IX 7-9, 11-14, Tr. XII 2-5, 14 and 80-81. From such testimony the Commissioner concludes that the two additions, including 13 standard classrooms, with associated laboratory facilities and storage areas, six small group instruction spaces, a multi-purpose room, four office areas in the first wing and in the second two large classrooms for automotive and construction technology programs, with associated lab facilities and an associated classroom for instruction will increase functional space capacity to 1,862 students (Tr. XI 8-12) thus negating Merchantville's arguments regarding overcrowding.

Further, the Commissioner is persuaded by the testimony of the principal, Mr. John Ritchie, that articulation of curriculum between the two districts has not manifested itself as a problem, with one exception voiced by a Board member of Merchantville, which was promptly addressed by the principal. (See Tr. XII 81-82.) Neither is it seriously argued that curriculum offerings would be adversely affected by the withdrawal of the Merchantville students. Accordingly, for the reasons expressed in the initial decision, as amplified here, the Commissioner finds and determines that no substantial negative impact will flow from severance of the Pennsauken-Merchantville sending-receiving relationship.

Thus, this matter reduces to a question of whether there would exist substantial negative racial impact, considering all of the circumstances of this case, were the Commissioner to grant severance. In this regard, the Commissioner rejects the ALJ's conclusion that no such negative impact will result, and finds, instead, that he cannot permit severance of the relationship under the circumstances of this case due to the substantial negative racial impact that would befall Pennsauken High School were such severance permitted.

As noted above, and in keeping with the Appellate Division's decision in Englewood/Englewood Cliffs, supra, the Commissioner's consideration of the racial aspects of this case is not strictly limited to a quantitative review, but looks also to such considerations as 1) what effect the reduction in white population at Pennsauken will have; 2) whether the concentration of minorities at Pennsauken would remain in the wake of severance; 3) the demographics of the communities' minorities populations, both

current and projected; and 4) whether the prospective new receiver, Haddonfield, attempts through its tuition policy to lure a disproportionate number of white students from Merchantville away from Pennsauken High School.

In conducting such an exhaustive review of the record developed in this aspect of the case, the Commissioner, like the ALJ, is persuaded that the statistics relative to racial balance developed by Dr. Averbach are altogether more reliable and indicative of the conditions extant in these communities and at Pennsauken High School now and through 1995, the timeline established for the phase out, than those presented by Pennsauken's demographer, Dr. Richards. P-32 is accepted as an accurate assessment of enrollment through 1995 at Pennsauken High School, both with Merchantville students attending, that is, if severance is denied, and without them, that is, if severance is granted. For clarity of discussion, said chart is duplicated herein:

	NUMBERS		%	
Year	White	Minority	White	Minority
1992 total	757	547	58.0	41.9
Minus Merchantville	64	9		
Without Merchantville	693	538	56.3	43.7
1993 total	777	597	56.6	43.4
Minus Merchantville	71	14		
Without Merchantville	706	583	54.8	45.2
1994 total	770	686	52.9	47.1
Minus Merchantville	60	15		
Without Merchantville	710	671	51.4	48.6
1995 total	758	767	49.7	50.3
Minus Merchantville	70	23		
Without Merchantville	688	744	48.0	52.0

As noted by the ALJ, Averbach's chart demonstrates that by 1995 Merchantville's 70 non-minority students will represent a 1.7% loss of white enrollment at Pennsauken High School, in a total population of 1,525 students with Merchantville students included, 1,432 without them.

Initially, the Commissioner recognizes that while 1.7% may not be statistically significant, it is significant from an educational standpoint. The Court in Booker, supra, at 170-174 has vested the Commissioner with the power to confront and eradicate racial segregation and discrimination in the public schools of New Jersey. It is the Commissioner's august duty to ensure that no school district in New Jersey's public domain permit the acceleration of racial imbalance thorough elimination of non-minority populations under any circumstances and certainly not in the guise of bettering another district's balance. Neither will he tolerate de facto segregation in any form for want of a "statistically significant" number ratio. Such action would represent an abdication of our "long standing" and "vigorous" state policy condemning segregation. (Booker, 45 N.J. at 173)

It is apparent from a careful review of the Averbach chart that Merchantville's non-minority population at Pennsauken High School in 1995, were severance denied, equals 9.23% of the total population. The Commissioner is compelled to find that in light of the State's repugnance of school segregation, to remove such 9.23% non-minority students in fact does represent a significant negative impact that would result in advancing the deterioration in the balance of racial and national origin groupings represented in this

high school community, in direct contravention to the admonition expressed in Englewood/Englewood Cliffs, supra, Brown, supra, Booker, supra, and Morean, supra. In this regard, the 1.7% loss of non-minority population from Pennsauken represents a greater percentage loss than the 1.6% non-minority loss at issue in the Englewood/Englewood Cliffs matter. It is the Commissioner's heartfelt conviction that he is obligated to forestall the erosion of cultural and educational mingling that such severance would discourage and to encourage "the angle of repose," that is, the racial stability, that exists in the relationship now. See Englewood/Englewood Cliffs, supra, Appellate Division, at p. 53, 61 and N.J.S.A. 18A:38-13. See also, Booker, supra, and Brown, supra, as quoted at page 40 of Englewood/Englewood Cliffs Appellate Division decision and Morean v. Montclair Bd. of Ed., 42 N.J. 237 (1964) as cited at page 62 of Englewood/Englewood Cliffs.

In so finding, the Commissioner rejects that argument posed by petitioner in this matter that permitting the severance would help balance Haddonfield's racial composition better and provide Haddonfield financial relief in the face of declining enrollment for the same reasons that the Englewood court rejected Cliffs' argument that the positive impacts it suggested to granting severance outweighed the negative impacts on Englewood and its Dwight Morrow High School. As noted by the court, the standards articulated in N.J.S.A. 18A:38-13 do not represent a balancing test. Where a single substantial negative impact is found among the three articulated, that is, racial, financial and educational, for any district involved, severance must be disallowed. Having now found that substantial negative impact would visit Pennsauken were the

severance allowed, no argument may be raised to ameliorate such finding by contrasting alleged positive impacts to Haddonfield or Merchantville. See Englewood/Englewood Cliffs, Appellate Divison, at pp. 57, 59, 62.

As noted above, neither will the Commissioner countenance withdrawal of a non-minority population couched as an attempt to ameliorate conditions in another district. By such contention is de facto segregation perpetuated.

COUNTER CLAIM

Pennsauken's Cross-Petition alleges Haddonfield's private tuition policy runs afoul of the law and undermines attempts at racial integration, which policy should be disallowed.

The statistics available from the record are these. In 1981 Haddonfield accepted fewer than 15 tuition students at all grade levels. In the 1991-92 school year, Haddonfield received 83 tuition students throughout its district, 45 of whom were at the high school. Of the 45, 11 hailed from Merchantville, which represented the largest single outside community population. Two were Pennsauken pupils, one of whom was at Haddonfield High School. Haddonfield currently has 550 students at its high school. The 11 students from Merchantville are all non-minority. The record does not include data on the pool of students residing in Merchantville who attend schools other than Pennsauken High School in the commuting area, including private, parochial and public. A similar pool of data was part of the record in Englewood/Englewood Cliffs. Neither did the feasibility study prepared by Haddonfield concerning acceptance of Merchantville students address racial impact on either district. Like the ALJ below, the Commissioner finds that

Pennsauken has not adduced proofs sufficient to support its motion to enjoin the Haddonfield Board of Education's private non-resident tuition program.

Once again, the Englewood/Englewood Cliffs matter addresses tuition programs at public schools in New Jersey made in reliance upon N.J.S.A. 18A:38-3, which provides:

> Any person not resident in a 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, and with or without payment of tuition, as the board may prescribe.

The State Board in Englewood/Englewood Cliffs stated at page 40 of its decision:

> ***the statute does not preclude a district board from adopting admission policies aimed at alleviating declining enrollment *** or from admitting nonresident students under such policies.

The Appellate Court in Englewood/Englewood Cliffs, in reviewing the injunction in place precluding all boards of education from accepting any Cliffs' students, regardless of race, noted that "the standard to be applied is a rational basis standard which requires only that there be some reasonable connection between a legitimate state interest and the action taken." (citations omitted) (Englewood/ Englewood Cliffs, at p. 68)

However, under the facts available in this matter, the Commissioner finds no basis at this juncture to prescribe Haddonfield's accepting tuition students, be they from Pennsauken, Merchantville or other communities. While the Haddonfield Board actively seeks tuition-paying students as an alternative to private schooling, the evidence in the record does not demonstrate the same trends in advancing white flight or limiting the broadest diversity

possible as was evident in the Englewood/Englewood Cliffs matter. Neither is there present herein the suggestion or any proofs whatsoever that Haddonfield enticed Merchantville's top student achievers from Pennsauken. Nor is it claimed that Merchantville encouraged and facilitated enrollment in Haddonfield as occurred in the Englewood/Englewood Cliffs matter. (See Englewood/Englewood Cliffs Appellate Division decision, at p. 74) Accordingly, the Commissioner finds no grounds for limiting Haddonfield's tuition policies at this juncture. It bears stating that should another district, including Pennsauken or Merchantville, believe in the future that it can demonstrate that white flight, racial imbalance, or de facto segregation exists as a result of Haddonfield's tuition program, under the standards articulated herein and in the Englewood/ Englewood Cliffs case, the Commissioner would certainly consider the motion anew.

Accordingly, for the reasons expressed herein, the Commissioner affirms in part and reverses in part the initial decision. He finds no substantial negative financial or educational impact but does find substantial negative racial impact and thus denies Merchantville's request for severance of its sending-receiving relationship with Pennsauken. In so concluding, however, he denies Pennsauken's motion to enjoin Haddonfield's private tuition program.

John C. Woodbury

ACTING COMMISSIONER OF EDUCATION

SEPTEMBER 16, 1992

DATE OF MAILING - SEPTEMBER 16, 1992

214-92

EDU #5702-88 and #4064-89 (consolidated)
SB # 47-89
SB # 78-89
C # 214-92
SB # 48-92

BOARD OF EDUCATION OF THE BOROUGH OF MERCHANTVILLE, CAMDEN COUNTY,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,

RESPONDENT-CROSS/PETITIONER-CROSS/APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF HADDONFIELD, CAMDEN COUNTY,

CROSS/RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decision on motion by the Commissioner of Education, July 10, 1989

Decision on motion by the Commissioner of Education, October 6, 1989

Decision on motion by the Commissioner of Education, November 13, 1989

Decision on motion by the State Board of Education, January 3, 1990

Decision on motion by the State Board of Education, September 5, 1990

Decision on motion by the State Board of Education, November 19, 1990

Decided by the Acting Commissioner of Education, September 16, 1992

1/8/97

For the Petitioner-Appellant, Kalac, Newman, Lavendar & Campbell (Peter B. Kalac, Esq., of Counsel)

For the Respondent-Cross/Petitioner-Cross/Appellant, Hill Wallack (Joseph J. Finley, Esq., of Counsel)

For the Cross/Respondent-Respondent, Kenney, Kenney, Gross & McDonough (Malachi J. Kenney, Esq., of Counsel)

This case was initiated on July 6, 1988, when the Merchantville Board of Education petitioned the Commissioner pursuant to N.J.S.A. 18A:38-13, seeking to terminate its sending receiving relationship with the Pennsauken Board of Education and to establish a new relationship with Haddonfield.

On July 25, 1988, Pennsauken filed its answer to this petition and the matter was transmitted to the Office of Administrative Law. Subsequent to the prehearing conference in October, Pennsauken filed a cross-petition against Haddonfield, seeking to enjoin it from accepting tuition students from Merchantville. On February 3, 1989, Haddonfield became a party respondent and filed its answer to Pennsauken's cross-petition on May 17, 1989. On July 26, 1989, the matters were consolidated.

The hearing in the matter commenced in November 1990, after extensive discovery, the issuance of several prehearing rulings, and an interlocutory appeal to the State Board of Education which was decided on September 5, 1990.[1] The hearing concluded in October 1991 after twenty two days of testimony. However, because of additional motions filed by the parties, the record before the Administrative Law Judge (ALJ) was not closed until March 16, 1992.

[1] In that decision, the State Board delineated the burden of production under N.J.S.A. 18A:28-13.

On May 1, 1992, the Administrative Law Judge issued his initial decision, finding that there would not be any significant negative impact on the quality of education or the racial composition of the pupil populations of the districts involved and that there were no financial or educational implications precluding severance of Merchantville's relationship with Pennsauken. The ALJ also found that the effect of Haddonfield's tuition policy was only remotely related to the enrollment at Pennsauken High School, and therefore granted Haddonfield's motion to dismiss Pennsauken's cross-petition against it.

On September 16, 1992, Acting Commissioner John Woodbury rendered his decision, rejecting that portion of the ALJ's decision which found that there would not be a significant negative impact on the racial composition of the pupil population at Pennsauken High if Merchantville were permitted to terminate its relationship with Pennsauken. Rather, the Acting Commissioner concluded that severance of the relationship would result in advancing the deterioration in the balance of racial and national origin groupings represented at Pennsauken High. He therefore denied Merchantville's request to terminate the relationship. However, the Acting Commissioner concurred with the ALJ's determination to deny Pennsauken's cross-motion to enjoin Haddonfield's tuition program.

Both Merchantville and Pennsauken appealed to the State Board from the Acting Commissioner's decision.

By letter of November 22, 1996, the Legal Committee of the State Board of Education notified the parties that, in the process of developing its report in the matter, it had concluded that it was necessary to update the record.

Although Haddonfield has not yet responded, both Pennsauken and Merchantville have responded positively to this notice, indicating that they are willing to provide the State Board with the necessary information.

Therefore, pursuant to N.J.A.C. 6:2-1.9, the State Board of Education directs that the record in this case be updated by supplementation with the following:

1. Current numerical data showing the composition by race and national origin of the student populations of Pennsauken, Merchantville and Haddonfield.

2. Current numerical data showing the composition by race and national origin of the total number of high school age students from Merchantville and of those who attend Pennsauken High.

3. Data from the 1990 census showing by race and national origin the composition of both the general populations and school age populations of Pennsauken, Merchantville and Haddonfield.

We direct that the parties, including Haddonfield, submit this information to our Legal Committee as expeditiously as possible without compromising the accuracy of the information.

Jean D. Alexander abstained.

January 8, 1997

Date of mailing JAN 10 1997

214-92

EDU #5702-88 and #4064-89 (consolidated)
SB # 47-89
SB # 78-89
C # 214-92
SB # 48-92

BOARD OF EDUCATION OF THE BOROUGH OF MERCHANTVILLE, CAMDEN COUNTY,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,

RESPONDENT-CROSS/PETITIONER-CROSS/APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF HADDONFIELD, CAMDEN COUNTY,

CROSS/RESPONDENT-RESPONDENT.

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Decided by the Acting Commissioner of Education, September 16, 1992

JAN. 7, 1998

Decision by the State Board of Education, January 8, 1997

For the Petitioner-Appellant, Kalac, Newman, Lavendar & Campbell (Peter B. Kalac, Esq., of Counsel)

For the Respondent-Cross/Petitioner-Cross/Appellant, Hill Wallack (Joseph J. Finley, Esq., of Counsel)

For the Cross/Respondent-Respondent, Kenney, Kenney, Gross & McDonough (Malachi J. Kenney, Esq., of Counsel)

This matter involves an appeal and a cross-appeal from a decision rendered by the Acting Commissioner of Education, which denied both the application made by the Board of Education of the Borough of Merchantville (hereinafter "Merchantville") pursuant to N.J.S.A. 18A:38-13 to terminate its sending-receiving relationship with the Board of Education of the Township of Pennsauken (hereinafter "Pennsauken") so as to establish a new relationship with the Board of Education of the Borough of Haddonfield (hereinafter "Haddonfield") and Pennsauken's cross-petition to enjoin Haddonfield from accepting students from Merchantville or Pennsauken on a tuition basis. The case calls upon us to determine whether this agency may approve such a change in designation pursuant to N.J.S.A. 18A:38-13 where the statistical change in the racial composition of the current receiver may not be statistically significant, but under circumstances in which the current receiver is integrated, the proposed receiver is almost exclusively white and the sending district is predominantly white. Such determination requires that we further explore the relationship between racial balance and educational quality and our obligations in this context to effectuate our State's policies.

I

The case was initiated on July 6, 1988, when the Merchantville Board of Education petitioned the Commissioner pursuant to N.J.S.A. 18A:38-13, seeking to terminate its sending-receiving relationship with the Pennsauken Board of Education and to establish a new relationship with Haddonfield. This represented Merchantville's second attempt to terminate the relationship it had entered in 1972-73 when it closed its own high school.

On July 25, 1988, Pennsauken filed its answer to this petition and the matter was transmitted to the Office of Administrative Law. Subsequent to the prehearing conference in October, Pennsauken filed a cross-petition against Haddonfield, seeking to enjoin it from accepting tuition students from Merchantville. On February 3, 1989, Haddonfield became a party respondent and filed its answer to Pennsauken's cross-petition on May 17, 1989. On July 26, 1989, the matters were consolidated.

The hearing in the matter commenced in November 1990 after extensive discovery, the issuance of several prehearing rulings, and an interlocutory appeal to the State Board of Education which was decided on September 5, 1990.[1] The hearing concluded in October 1991 after twenty-two days of testimony. However, because of additional motions filed by the parties, the record before the Administrative Law Judge was not closed until March 16, 1992.

On May 1, 1992, the Administrative Law Judge ("ALJ") issued his initial decision, finding that there would not be any significant negative impact on the quality of education or the racial composition of the pupil populations of the districts involved and

[1] In that decision, the State Board delineated the burden of production under N.J.S.A. 18A:28-13.

that there were no financial or educational implications precluding severance of Merchantville's relationship with Pennsauken. He therefore concluded that, under the terms of N.J.S.A. 18A:38-13, the Commissioner should approve severance of the relationship. The ALJ also found that the effect of Haddonfield's tuition policy was only remotely related to the enrollment at Pennsauken High School, and therefore granted Haddonfield's motion to dismiss Pennsauken's cross-petition against it.

On September 16, 1992, Acting Commissioner John Woodbury rendered his decision, rejecting that portion of the ALJ's decision which found that there would not be a significant negative impact on the racial composition of the pupil population at Pennsauken High if Merchantville were permitted to terminate its relationship with Pennsauken. Rather, the Acting Commissioner concluded that severance of the relationship would result in advancing the deterioration in the balance of racial and national origin groupings represented at Pennsauken High. He therefore denied Merchantville's request to terminate the relationship. However, the Acting Commissioner concurred with the ALJ's determination to deny Pennsauken's cross-motion to enjoin Haddonfield's tuition program.

Both Merchantville and Pennsauken appealed to the State Board from the Acting Commissioner's decision.

II

When Merchantville initiated this litigation, questions relating to racial balance did not appear to be central. In its petition, Merchantville asserted that it was seeking a change in designation because Pennsauken was overcrowded and Haddonfield's more

academically-oriented program represented a more compatible secondary school experience for its students than did Pennsauken's educational program. In conformance with N.J.S.A. 18A:38-13, Merchantville asserted that the change it sought would not have any substantial negative impact on the educational program, racial balance or finances of the affected districts.

At hearing, Pennsauken contested each of Merchantville's claims, including the assertion that Pennsauken was overcrowded. Moreover, as reflected by the record, the focus narrowed during the course of the proceedings before the ALJ and review of the matter by the Acting Commissioner.[2] As a result, the determinations challenged by the appeals before the State Board are those relating to racial balance.

The ALJ focused solely on the statistical impact of Merchantville's withdrawal on the racial composition of Pennsauken High School's student population when he assessed whether severance would have a substantial negative impact. From this perspective, he determined that there would not be any substantial negative impact on the racial composition because severance would result in only a 1.7% decrease in Pennsauken High School's white population.

Based on the same facts, and relying heavily on the State Board and Appellate Division decisions in Board of Educ. of Englewood Cliffs v. Board of Educ. of

[2] The only mention of racial balance in the original feasibility study prepared by Guidelines, Inc. was its report of the number of minority students at Pennsauken High School and the statistical change if Merchantville's students had been withdrawn in 1987-88. The study then stated without any discussion that a phased withdrawal in 1989-90 would not have a substantial impact on "the racial enrollment of the Pennsauken District." Exhibit P-13a, in evidence, at 54-55. Merchantville subsequently submitted a study dated January 2, 1990, prepared by Emanuel Averbach, Ph.D., on the "Dynamics of Current Racial/Ethnic Enrollment Changes in Pennsauken Schools that Bear on Deciding a Petition for the Withdrawal of Merchantville Students from Pennsauken High School." Exhibit P-33, in evidence. Together with two supplemental reports of similar title dated May 2, 1991 and September 14, 1991, exhibits P-34 and P-35, in evidence, these documents posit that major changes reducing the number of whites at Pennsauken High and increasing the number of minorities had been in progress since 1985 and that "the growing racial/ethnic imbalance is of significance now." Averbach report of January 2, 1990, at 7.

Englewood, decided by the State Board of Education, April 4, 1990, aff'd, 257 N.J. Super. 413 (App. Div. 1992), aff'd, 132 N.J. 327 (1993), cert. denied, 510 U.S. 991, 114 S.Ct. 547, 126 L.Ed.2d 449 (1993), the Acting Commissioner concluded that although the decrease in the white population at Pennsauken might not be statistically significant, withdrawal of the Merchantville students would "result in advancing the deterioration in the balance of racial and national origin groupings represented in Pennsauken High School's community." Commissioner's Decision, slip op. at 111. He therefore rejected the ALJ's determination and denied severance.

On appeal to the State Board, Merchantville stresses that it is in full agreement with New Jersey's policy against racial segregation in our public schools. However, it is Merchantville's current position that because Pennsauken High School was not already racially segregated during the period relevant to this litigation and would not be segregated if all of Merchantville's students were withdrawn from Pennsauken, race is not relevant to this case. See supra note 2.

In response to Merchantville's appeal, Pennsauken argues that the Acting Commissioner properly determined that withdrawal of the Merchantville students would result in a substantial negative racial impact on Pennsauken High, and that legal precedents such as Englewood mandate that Merchantville's petition be denied. Pennsauken, however, contends that the Acting Commissioner erred in adopting the ALJ's determination that there would not be any substantial negative educational impact from severance, arguing in this respect that educational impact is interwoven with racial impact.

In addition, by its cross-appeal, Pennsauken seeks reversal of the Acting Commissioner's determination to deny its cross-petition to enjoin Haddonfield's tuition policy. Pennsauken claims that Haddonfield's policy undermines racial integration in the public schools by siphoning off Merchantville students from Pennsauken, and that Haddonfield should therefore be enjoined from accepting any Merchantville or Pennsauken students on a tuition basis.

III

After exhaustive review, we reject Merchantville's view that questions relating to racial balance are not relevant to this matter. To the contrary, resolution of those questions are pivotal in assessing the educational implications of approving the change of designation which Merchantville is seeking.[3]

Initially, we, like the Acting Commissioner, reject the view that a statistical change in the racial composition of the current receiver is alone dispositive of whether a significant negative impact will result from severance. Englewood, supra. Rather, as mandated by the statute, it is imperative that the significance of the statistical change in a particular case be evaluated under "all of the circumstances." Id.

The statistical change in the proportion of white students attending Pennsauken High School in 1988 would have been almost identical to that which would have resulted in Englewood had severance been granted in that case. Further, Merchantville, like Englewood Cliffs, had a largely white student population, and, like

[3] See supra note 2.

Tenafly, Haddonfield was more focused on college preparation and was almost exclusively white.

Hence, it was appropriate for the Acting Commissioner to use the decisions in Englewood as his point of departure. However, closer examination of the factual circumstances in this case reveals that they are markedly different from those presented to the State Board in the Englewood matter. Most apparent is that, in contrast to Englewood's Dwight Morrow High School, Pennsauken High was only 25% minority at the time of hearing.[4] Accordingly, in contrast to Englewood, this case does not present us with a situation where there is already a concentration of minority students that is unacceptable from either a legal or policy perspective. Nor is there any indication of conduct by any of the districts involved in this case that is inconsistent with the legal relationship between Merchantville and Pennsauken. Finally, in stark contrast to Englewood, nothing indicates that there has already been a loss of Merchantville students to Haddonfield because of its tuition policy which has affected the racial balance at Pennsauken.

However, the differences between the circumstances in Englewood and those in this situation do not mandate the conclusion that severance of the sending-receiving relationship between Merchantville and Pennsauken is appropriate in this case. To the contrary, for the reasons that follow, it is our conclusion that severance should not be granted.

[4] In this decision, "minority" includes Hispanic and Asian, as well as African-American.

N.J.S.A. 18A:38-11 mandates that all school districts which, like Merchantville, lack high school facilities must designate a high school for the attendance of its pupils. N.J.S.A. 18A:38-13 then provides in pertinent part that:

> No such designation of a high school...shall be changed or withdrawn...except upon application made to and approved by the commissioner. Prior to submitting an application the district seeking to sever the relationship shall prepare and submit a feasibility study, considering the educational and financial implications for the sending and receiving districts, the impact on the quality of education received by the pupils in each of the districts, and the effect on the racial composition of the pupil population of each of the districts. The commissioner shall make equitable determinations based upon consideration of all the circumstances, including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population of the districts. The commissioner shall grant the requested change in designation...if no substantial negative impact will result therefrom.

The central question in this appeal is whether the change sought by Merchantville will result in a substantial negative impact on the districts involved. This inquiry requires that the Commissioner consider a series of factors which must be included in a feasibility study submitted by the district seeking the change, and, as embodied in the terms of the statute, further requires that the Commissioner evaluate the effect of a requested change in receiving districts on the children of each district concerned. Hence, while N.J.S.A. 18A:38-13 is not a traditional balancing statute, Englewood, supra, at 461-62, the determination in this case cannot be made solely by evaluating the impact of severance on Pennsauken without regard to the other districts involved.

When Merchantville initiated the present litigation, it specified that it was seeking to terminate its relationship with Pennsauken so as to enter a new relationship with Haddonfield. Accordingly, the feasibility study which it submitted in support of its petition centered on comparison of Haddonfield to Pennsauken. Exhibits P-13a and P-13b, in evidence. In point of fact, as the documentary evidence Merchantville submitted at hearing amply illustrates, its application for severance was predicated on establishing a new relationship with Haddonfield, exhibits P-1 through P-12, in evidence, and there is nothing in the record to suggest that it considered any other alternative during the course of the litigation.

Haddonfield, however, has indicated that it is no longer willing to commit itself to entering into a sending-receiving relationship with Merchantville without obtaining a new feasibility study.[5] Hence, at this point, Merchantville's application does not meet the statutory prerequisites for consideration and on these grounds alone we would dismiss the matter.

In this respect, we stress that a failure by the petitioning district to designate an alternative to its present receiving district makes it impossible to apply the statutory standard. Furthermore, as expressed by the State Board in our decision in Board of

[5] In correspondence dated April 11, 1997, Haddonfield advised us that it was reserving the right to conduct a new feasibility study before making a final decision on entering into a sending-receiving relationship with Merchantville and informed us that we should not assume that severance of Merchantville's relationship with Pennsauken would automatically result in the establishment of a relationship between Merchantville and Haddonfield. In reaction, Pennsauken filed a motion with the State Board seeking dismissal of Merchantville's petition or, in the alternative, adjournment of the matter until Haddonfield completed a new feasibility study and declared whether it would accept Merchantville's students. Merchantville then moved for bifurcation of the matter for the purpose of obtaining a decision from the State Board as to the impact that Merchantville's withdrawal from Pennsauken would have on the Merchantville and Pennsauken school districts.

Education of the City of Absecon v. Board of Education of the City of Pleasantville, decided by the State Board of Education, October 5, 1988:

> ....at minimum, it is the obligation of the State Board of Education to insure that the students of the sending district will have an educational alternative, and to permit withdrawal in the absence of a demonstrated alternative would contravene that responsibility. Accordingly, the State Board of Education will not direct termination without knowing where the senders' children are to be educated.

Absecon, supra, slip op. at 2.

Nonetheless, because the record in this matter is such as to permit us to decide the appeal and cross-appeal now before us on their merits, and in view of the significance of the questions involved, as well as the resources which all three parties have expended in litigating the matter, we have reviewed and decided the merits of the matter as well.

The starting point for any substantive discussion of issues such as those raised by Merchantville's appeal is our State's fundamental policy in favor of equal educational opportunity. Englewood, supra, at 452. Integrated schools are an essential part of such opportunity, and, for this reason, the New Jersey Supreme Court has repeatedly stressed the importance of eliminating segregation in our public schools. See, e.g., Jenkins v. Tp. of Morris School District and Bd. of Educ., 58 N.J. 483 (1971); Booker v. Bd. of Educ. of Plainfield, 45 N.J. 161 (1965).

As has been long recognized by the New Jersey Supreme Court, segregation, whether de jure or de facto in origin, has an undesirable effect upon attitudes related to successful learning. E.g., Booker, supra, at 178. As expressed by the New Jersey State Board of Education:

> Educational considerations are primary in eliminating school segregation. The elimination of racial imbalance is not to be sought as an end in itself but because such imbalance stands as a deterrent and handicap to the improvement of education for all.

New Jersey State Board of Education, A Statement of Educational Policy, November 5, 1969.

Therefore, given the interrelationship between racial balance and educational quality, the Commissioner has been vested with broad power to deal with the subject. As expressed by the New Jersey Supreme Court:

> In a society such as ours, it is not enough that the 3 R's are being taught properly for there are other vital considerations. The children must learn to respect and live with one another in multi-racial and multi-cultural communities and the earlier they do so the better. It is during their formative school years that firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs. Recognizing this, leading educators stress the democratic and educational advantages of heterogeneous student populations and point to the disadvantages of homogeneous student populations, particularly when they are composed of a racial minority whose separation generates feelings of inferiority....

Booker, supra, at 170-171.

It is axiomatic that our responsibility to insure equal educational opportunity is not limited to those situations where a significant racial imbalance has already developed.[6] To the contrary, given the substantial negative educational implications of

[6] We note that Merchantville continues to argue in its exceptions to our Legal Committee's report that this case does not involve any issues of "segregation." We also note that such position does not appear to be consistent with that embodied in the Averbach reports submitted by Merchantville during the litigation. See supra note 2. Those reports argue that "radical" changes in the racial/ethnic composition of Pennsauken's pupil population have been "in process" since 1985 leading to an "evolving, massive racial/ethnic imbalance." Averbach report, January 2, 1990. Hence, these reports argue for severance, not because racial balance is irrelevant to this case, but because Merchantville's predominantly white students would not be sufficient in number to "dilute a continuing influx" of minority pupils to Pennsauken. Id.

permitting our State's student populations to be separated by race and because of the difficulties involved in correcting such a situation once it has developed, it would be counterproductive to allow an existing sending-receiving relationship to be disturbed where the change may contribute to the development of racial imbalance.

Furthermore, as we stressed in our decision in Englewood, supra, the educational benefits of a heterogeneous student population accrue not only to minority students, but to all children who attend school in an integrated educational environment. See Deepening Segregation in American Public Schools, Harvard Project on School Desegregation (April 5, 1997).[7]

The record shows that Pennsauken High School offers an integrated educational environment. At hearing, it was projected that Pennsauken would remain integrated with or without severance, but that the white/minority ratio would decline from 58% white and 41.9% minority in 1992 without severance to 56.3% white and 43.4% minority if severance was approved. Exhibit P-32, in evidence.

By decision of January 8, 1996, the State Board directed supplementation of the record with: 1) Current numerical data showing the composition by race and national origin of the student populations of Pennsauken, Merchantville and Haddonfield, 2) Current numerical data showing the composition by race and national origin of the total number of high school age students from Merchantville and of those who attend Pennsauken High, 3) Data from the 1990 census showing by race and national origin

[7] We note that if existing trends continue, whites will become one of several minorities in the schools, as well as in society. Deepening Segregation in American Public Schools, ibid. As the American population changes, the skills that develop through exposure and interaction with other minorities will become even more critical.

the composition of both the general populations and school age populations of Pennsauken, Merchantville and Haddonfield.

The parties submitted the updated information requested by the State Board. The updated information shows that as of October 1996, Pennsauken High School enrolled a total of 1,548 students in grades 9-12, excluding classified special education students. Of these, 53.9% (835) were white, 30.36% (470) were African-American, 11.8% (183) were Hispanic, and 3.875% (60) were from other groups, including Asian. From the 1990 census data, Pennsauken's total school age population (6,397) was 66.5% white, 18.8% African-American, 7.97% Hispanic, and 6.7% other, including Asian. In contrast, Haddonfield's total school age population (1,907) was comprised of 96.3% white, 1.3% African-American, 0.9% Hispanic, and 1.45% other, including Asian. Merchantville's school age population (696) was 92.8% white, 2.2% African-American, 2.7% Hispanic, and 2.3% other, including Asian.

Although there is no one statistical balance which is ideal from an educational perspective, a truly integrated setting offers the best opportunity for meaningful exposure of different races in the educational context.[8] Again, Pennsauken High School offers such a setting.[9]

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[8] We note that there is a primary distinction between formal desegregation and actual integration. Desegregation refers to the removal of legal and social practices that separate whites and minorities and to the physical presence of both in the same schools, while integration occurs only if there develops joint participation and mutual acceptance in all activities normally associated with school attendance. See A Common Destiny: Blacks and American Society, National Research Council (National Academy Press, 1989).

[9] In this respect, we reject the characterization made in the Averbach reports that Pennsauken is a district which is significantly racially/ethnically imbalanced.

all the more important for us to sustain our efforts to effectuate our State's policy by taking such measures as are necessary to maintain diversity among our student populations in order to avoid segregation.

Again, this case does not require us to remedy racial imbalance, but asks that we maintain the existing level of diversity. While denying severance of Merchantville's sending-receiving relationship with Pennsauken cannot guarantee that racial imbalance will not develop in the future, it eliminates the possibility that racial imbalance in these school districts will be encouraged by any action we have taken.

In this respect, we recognize that it is difficult to establish the exact point at which the percentage of minority students at a given school is so sharply out of balance with the composition of the society in which those students must function so as to allow that school to be characterized as a minority school and to carry the stigma attached thereto. Englewood, supra, State Board's decision, slip op. at 36. See Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). We also recognize that such point may not be reached until the student body is more than 50% minority. Booker, supra, at 180. We stress, however, that it is generally reached well before the student body is 100% minority. Id.

As the record in this case shows, while the proportion of minority students at Pennsauken High has increased in recent years, its student population continues to be diverse. While severance would not change the diverse character of Pennsauken High School, it would result in a slight increase in the proportion of the minority population at Pennsauken High, which currently constitutes approximately 50% of the student population. In addition to the educational benefits which will accrue to Merchantville's

students, their continued presence will help maintain the stability of the sensitive racial balance of the pupil population at Pennsauken High, and thereby avoid the future necessity for undertaking the much more difficult task of correcting an imbalance after it has developed.

Therefore, for the reasons stated in this opinion, the State Board of Education denies Merchantville's petition to sever its sending-receiving relationship with Haddonfield. However, in that Pennsauken has not established that Haddonfield's tuition policy has in fact had a negative impact on the composition of its student population, we deny the relief sought by Pennsauken's cross-appeal.

Attorney exceptions are noted.

January 7, 1998

Date of mailing JAN 0-3 1998

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GERALD S. ROTONDA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SEASIDE PARK, OCEAN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

SEPTEMBER 16, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING EMERGENCY RELIEF
OAL DKT. NO. EDU 6754-92
AGENCY DKT. NO. 412-9/92

GERALD S. ROTONDA,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF SEASIDE PARK, OCEAN COUNTY,
Respondent.

Gerald S. Rotonda, petitioner, *pro se*

Dina R. Khajezadeh, Esq., on behalf of respondent (**Berry, Kagan** and Sahradnik, attorneys)

Record Closed: September 3, 1992 Decided: September 3, 1992

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter was transmitted to the Office of Administrative on September 2, 1992, on an emergent basis and heard on September 3, 1992. The attached tape recording contains the arguments of the parties as well as the basis for my ruling. It is **ORDERED** that petitioner's children be permitted to attend school within the respondent district commencing on Tuesday, September 8, 1992, consistent with the dual judgment of divorce entered before the Superior Court on July 24, 1992, in Rotonda v. Rotonda, Superior Court, Chancery Division Ocean County-Family Part, Dkt. No. FM-15-443-91. To the extent that issues remain, these are remanded to the Department of Education for settlement purposes.

This order may be reviewed by the **COMMISSIONER OF THE 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.

DATE 9/3/92

SOLOMON A. METZGER, ALJ

/cae

GERALD S. ROTONDA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SEASIDE PARK, OCEAN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

The record of this matter, including the tape recording of proceedings before the ALJ, and the initial order of the Office of Administrative Law granting emergent relief to petitioner on the grounds that his judgment of divorce specifically directs that his children, of whom he shares joint custody, will attend school in Seaside Park during 1992-93 notwithstanding that his ex-wife has primary custody of said children and is domiciled in Lavalette, have been reviewed. Timely exceptions were filed by respondent pursuant to the provisions of N.J.A.C. 1:1-18.4.

In its exceptions, the Board argues that under the terms of N.J.S.A. 18A:38-1, persons must be domiciled in the school district to be entitled to a free education there, and the Commissioner has previously held that a child of divorced parents is deemed to be domiciled with the custodial parent, C.K.F. and B.F. v. Board of Education of Upper Township, Cape May County, 1975 S.L.D. 723; and that the judgment of divorce on which the ALJ relied is not enforceable against the Board because 1) the court specifically

eschewed any position on the merits of the agreement; 2) the judgment represents a property settlement to which the Board was not a party; and 3) the judgment contravenes statute and case law as cited above. Therefore, the Board contends, the ALJ erred in concluding that he had no authority to overrule the judgment of divorce. The Board also notes that it has filed, concurrently with its exceptions, a motion before Superior Court to strike the pertinent clause in the divorce judgment for the reasons set forth above.

Upon review of this matter, the Commissioner finds that there is a legitimate question as to the Commissioner's authority to overrule a court judgment that is both clear and specific with regard to the children at issue herein yet appears to be contrary to, or at least inconsistent with, law providing that children shall be entitled to free education in the school district within which they are domiciled. (N.J.S.A. 18A:38-1) Therefore, while the Commissioner concurs with the ALJ that petitioner's children are to remain in the Seaside Park school district while the present dispute is pending, he cannot entirely abrogate his responsibility to hear this matter unless it is definitively determined, through fuller argument than is possible or appropriate in the context of an emergent relief proceeding, that he does in fact have no jurisdiction arising from his specialized educational expertise to decide the enforceability of the divorce decree provision (No. 4) dealing with the education of petitioner's children. Asbury Park Board of Education v. Murnick, 224 N.J. Super. 504, 513 (App. Div. 1988)

Accordingly, the initial decision of the Office of Administrative Law is affirmed insofar as it grants petitioner's request for emergent relief, but modified in its implication that the central issue in this matter has been resolved on the merits so that no further proceedings are necessary.* The matter, therefore, is to proceed to hearing in accordance with the parameters set forth above.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

SEPTEMBER 16, 1992

DATE OF MAILING - SEPTEMBER 16, 1992

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* The Commissioner notes that p. 2 of the initial order erroneously references procedures for interlocutory review rather than for review of emergent relief pursuant to N.J.A.C. 1:1-12.6. The ALJ's intentions in this matter are expressed in his directive that "[t]o the extent that issues remain, these are remanded to the Department of Education for settlement purposes" (Initial Decision, at p. 1) and in the tape recording of hearing on emergent relief wherein it is clear that he anticipates no further proceedings in this matter.

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GERALD S. ROTONDA,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF SEASIDE PARK, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

NOVEMBER 25, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 6754-92
AGENCY DKT. NO. 412-9/92

GERALD S. ROTONDA,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF SEASIDE PARK, OCEAN COUNTY ,
Respondent.

Gerald S. Rotonda, petitioner, *pro se*

Dina R. Khajezadeh, Esq., on behalf of respondent (Berry, Kagan and Sahradnik, attorneys)

Record Closed: October 2, 1992 Decided: October 20, 1992

BEFORE **SOLOMON A. METZGER,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on September 2, 1992, upon petitioner's request for emergency relief. A hearing was conducted on September 3, 1992, and an Order Granting Emergency Relief was issued that same day. The Commissioner of Education affirmed that decision by order of September 16, 1992, but also returned the matter to the OAL so that the legal arguments underpinning the decision could be more fully developed. On October 2, 1992, the OAL received correspondence from respondent's attorney indicating that respondent would no longer pursue this litigation and that the Rotonda children could attend Seaside Park Elementary School for the 1992-93 school year (attached).

Based on the foregoing, I **CONCLUDE** that this matter is no longer a contested case before the OAL and it is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10/20/92
Date

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

10/20/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 26 1992
Date

OFFICE OF ADMINISTRATIVE LAW

/cae

RECEIVED
Oct 5 9 39 AM '92
STATE OF NEW JERSEY
OFFICE OF ADMIN

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DINA R. KHAJEZADEH
CHRISTOPHER J. CARKHUFF

FRANKLIN H. BERRY 1941-1975
WILLIAM W. WHITSON 1941-1967
MAJA L. BERRY 1948-1961

September 30, 1992

Maureen Keller, Acting Director
Bureau Controversies & Dispute
Department of Education
225 West State Street
CN-500
Trenton, NJ 08625

Re: OAL Docket No. EDU 06754-92 S
Agency Ref. No.: 412-9/92
Transmitting Agency: Department of Education
Rotonda v. Board of Education of Seaside Park

Dear Ms. Keller:

In response to a Notice of Filing dated September 14, 1992 from the Office of Administrative Law with respect to a continuation of certain issues involved in the above captioned matter, I have spoken with the Board of Education and they have decided not to pursue the litigation and will abide by Judge Metzger's decision authorizing the two Rotonda children to attend Seaside Park Elementary School for the 1992-93 school year. It is expressly understood, of course, that the Judgment for Divorce which incorporated the Property Settlement Agreement limits the children's attendance in the Seaside Park Elementary School District to the 1992-93 school year. If the Board concludes that the children and the custodial parent are not domiciliaries of the Borough of Seaside Park for the school year commencing 1993-94 that in accordance with the appropriate Statute the Board of Education may not permit said children to attend the Seaside Park Elementary School.

Based on the aforementioned, I do not believe it is necessary to continue further submissions.

Thank you for your cooperation in this matter.

Sincerely yours,

SEYMOUR J. KAGAN

SJK:mk
cc: Office of Administrative Law
Margaret Mueller, President
Gerald S. Rotonda
Teri A. Rotonda

OAL DKT. NO. EDU 6754-92

GERALD S. ROTONDA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SEASIDE PARK, OCEAN 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.

The Commissioner agrees with and adopts as his own the recommendation of the ALJ to dismiss the instant matter. Such determination is reached in light of Mr. Seymour J. Kagan's letter of September 30, 1992 which indicates the desire of the Seaside Park Board of Education not to pursue the litigation and the fact that the Judgment of Divorce limits petitioner's children's attendance in the Seaside Park School District to the 1992-93 school year.

Accordingly, the Petition of Appeal is hereby dismissed.

NOVEMBER 25, 1992

COMMISSIONER OF EDUCATION

DATE OF MAILING - NOVEMBER 25, 1992

216-92

216-92

FRANK R. NOTARO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, former Department Chairperson of Driver Education Department whose position was abolished due to 1982 RIF resulting in his reassignment to position of Health Teacher, alleged his tenure and seniority rights were violated when four less senior individuals were appointed to positions of department chairpersons.

ALJ determined petitioner's tenure and seniority rights were not impaired by Board. ALJ found since petitioner never served in any of the supervisory positions he claimed entitlement to, he had no seniority in those positions which were filled by other tenured supervisors. ALJ found Capodilupo and Bednar did not apply. ALJ did cite Weinstein, N.J.A.C. 6:3-1.10(b) and 1.10(1)(12). Petition was dismissed.

Commissioner adopted findings and determination in initial decision with clarification that petitioner is entitled to be interviewed for positions such as those claimed herein if other applicants have no seniority in the positions at issue. (Schienholz)

SEPTEMBER 17, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2490-91
AGENCY DKT. NO. 25-2/91

FRANK R. NOTARO,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE,
Respondent.

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

Scott T. Smith, Esq., for respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: June 18, 1992 Decided: July 31, 1992

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

Frank R. Notaro, Jr., petitioner, claims the Old Bridge Board of Education, respondent, violated his tenure and seniority rights when it appointed, from a reduced in force list, four persons less senior than he to department chairmanships.

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for disposition 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 petitioner's counsel withdrew because of a potential conflict of interest. The petitioner's present counsel was timely substituted and, after notice, a prehearing conference was held by telephone on October 31, 1991. It was settled at the conference that the

issue to be resolved is whether the petitioner is entitled by reason of tenure and seniority to one of the chairperson positions the Board filled in October 1990. The matter was heard on June 2, 1992 at the Highland Park Municipal Court. Counsel timely filed posthearing submissions and the record closed on June 18, 1991.

PAROL AND DOCUMENTARY EVIDENCE

The assistant superintendent of the district was called by the respondent. He stated the petitioner began employment in April 1968 and held the position Physical Education or Driver Education teacher or both, until June 1974. The Board then employed the petitioner as chair of the Driver Education Department, a position for which Notaro held the appropriate certificate. In June 1982, the Board effected a reduction in force (RIF). This resulted in the abolition of the petitioner's position and his reassignment to the position of Health teacher.

The Board interviewed applicants for certain department chair positions in September 1990 and offered employment in those positions to the best qualified applicants.

The petitioner claims entitlement to one of those positions by reason of his seniority accumulated as chair of the Driver Education Department. In the course of discovery, the petitioner indicated he believes himself entitled to any of the following chairperson positions: Foreign Language chair at Cedar Ridge High School, Business chair at Cedar Ridge High School, Science chair at Madison Central High School and English as a Second Language chair at an unidentified school.

It is uncontroverted that the petitioner has no experience in any of the positions to which he claims entitlement.

Upon conclusion of this testimony, the Board moved for summary judgment. Following the direction of the Appellate Division in Castro v. Helmsley Spear, Inc., 150 N.J. Super. 160 (App. Div. 1977) this judge stopped the hearing to dispose of the application. Counsel were directed to file and timely filed papers on the motion.

ON THE MOTION

The Board argues that because the petitioner has no seniority in any of the particular chair positions he claims, he has no legitimate claim to those positions. Seniority is "determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as herein after provided." N.J.A.C. 6:3-1.10(b).

The petitioner seeks supervisor positions and "each approved supervisory title shall be a separate category." N.J.A.C. 6:3-1.10(l)12. Because the petitioner has not been employed by the Board in any of the positions to which he claims entitlement, he has no seniority in any of those positions and his petition is without merit. Weinstein v. Bd. of Ed. of Tp. of Old Bridge, 91 N.J.A.R. 2d 102; aff'd St. Bd. of Ed. 92 N.J.A.R. 2d 328. Weinstein obtained tenure in the supervisor position of Coordinator of the Board's Gifted and Talented Program. In 1990, the Board effected a RIF. As part of that RIF, the Board created the positions of Basic Skills supervisor and assistant director of Special Services. Weinstein was qualified for both. However, the Board hired another tenured teaching staff member as the Basic Skills supervisor and hired an untenured teaching staff member as the assistant director of Special Services. Weinstein claimed entitlement to both positions, asserting she possessed greater seniority than the tenured teaching staff member and that her tenure entitled her to displace the untenured teaching staff member.

The administrative law judge rejected Weinstein's claim as to the tenured teaching staff member because Weinstein had never served as a Basic Skills supervisor. The judge stated

> When considering two tenured supervisors, seniority is determined "in specific categories," N.J.A.C. 6:3-1.10(b), and each approved supervisory title is a separate category. N.J.A.C. 6:3-1.10(l)12. Therefore, contrary to Ms. Weinstein's argument, she cannot assert a seniority claim against Dr. Bettencourt for the Supervisor of Basic Skills position since she has no seniority as to that position. As between Dr. Bettencourt and Ms. Weinstein, two tenured supervisors, the board was free to select the candidate it believed most qualified.

Slip op. at 6.

Turning to the assistant director of Special Services position, the judge held that neither Weinstein nor the untenured teaching staff member hired for the position held tenure in the position. The judge stated

> Since the dispute is between two nontenured individuals for a principal's position, Ms. Weinstein's claim is not superior to Dr. Andrews'. DeCarlo v. South Plainfield Bd. of Ed., OAL DKT. EDU 6111-87 (June 20, 1988), adopted Comm'r of Ed. (Aug. 4, 1988). As between Dr. Andrews and Ms. Weinstein, the Board can select the candidate it determines to be most qualified for the position.

Slip op. at 6-7.

The Commissioner adopted the findings and conclusions rendered by the administrative law judge. The Commissioner agreed that the petitioner's tenure rights were not impaired by the Board's actions. Each supervisory title is a separate category under the seniority regulations. Both Bettencourt and Weinstein were tenured supervisors, but neither had seniority in the Supervisor of Basic Skills position because neither had served in that specific category pursuant to the regulations. Therefore, Weinstein had no superior seniority claim to the position. Inasmuch as the Board had tenured supervisors on a preferred seniority list because of the June 1990 RIF, it could not fill a supervisory position with a nontenured employee. Rather, it was compelled to fill the position with one of the RIFfed tenured supervisors, although which one it chose from among those on the preferred eligibility list was a Board prerogative. The Commissioner also agreed with the judge's conclusion that because the petitioner had not served in a position requiring a principal's certificate, she had not acquired tenure or seniority in that category. Therefore, the petitioner had no tenure claim to the position of assistant director of Special Services.

The State Board affirmed the Commissioner for the reasons set forth in his decision.

In the present case, petitioner Notaro has not served in any of the supervisor positions he claims. Therefore, he has no seniority with respect to any of those positions. He cannot possibly have a senior right to those positions over those hired by the Board. Therefore, summary judgment should be granted in the Board's favor and the petition should be dismissed.

The petitioner argues that he is duly certified as a supervisor, his position was abolished by RIF and he has five years of seniority as a supervisor.

The assistant superintendent testified at hearing that the petitioner was not offered either supervisory position and he was not even notified by the Board that the positions were open. The Board took the position that subject area certification was necessary and, therefore, no notice was required. When the petitioner discovered this, he requested one of the positions and when an appointment was not forthcoming, he filed the present appeal.

The Appellate Division has consistently held that a tenured employee can claim any position for which he is certified over a nontenured employee. See, e.g., Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987) certif. den., 110 N.J. 512 (1988); Capodilupo v. West Orange Bd. of Ed., 218 N.J. Super. 510 (App. Div. 1987), certif. den. 109 N.J. 514 (1987).

Because courts do not legislate but merely interpret and apply the law, the petitioner argues that these decisions reflect the law as it has always been and he therefore is entitled to one of the positions together with back pay from September 1990.

In addition and alternatively, the petitioner seeks an order compelling the Board to place him on a preferred eligibility list and to offer him any new supervisory position that may in the future become available.

DETERMINATION

Notaro relies, as did Weinstein, on Capodilupo, above. However, this judge can find no impairment of the petitioner's tenure and seniority rights because each supervisory title is a separate category under the seniority regulations. N.J.A.C. 6:3-1.10 et seq. He has no record of service in Foreign Languages, Business, Science or English as a Second Language. The petitioner may assert his tenure rights as against anyone appointed to the Director of Driver Education position if the Board should recreate that position.

Both Bednar and Capodilupo emphasize the importance and strength of tenure protections. The Appellate Division in Bednar gives clear instruction. In a footnote at p. 241, the court states

> In several recent unpublished opinions we have held that the more restrictive current seniority regulations, N.J.A.C. 6:3-1.10,

> lawfully apply to determine job rights in a current reduction in force (RIF), even though some of the seniority arose before September 1983. See, e.g. Hill v. Bd. of Ed., West Orange, 1985 S.L.D. _____ (January 16, 1985). aff'd by St. Bd. of Ed., 1985 S.L.D. _____ (May 1, 1985), aff'd App. Div. 1986 (A-4355-84T1), certif. den. 104 N.J. 443 (1986); Principe v. Bd. of Ed., Tp. of Woodbridge, October 31, 1986 (A-384-85T1). The essential difference between the old and new regulations is that seniority was formerly attained in every instructional field endorsed on the teacher's certificate. Now, it is obtained only by the accrual of actual experience in usually narrower specific instructional categories.

Tenure is created by statute. The statute should be liberally construed to further its beneficial purpose of affording security to teaching staff members who meet its terms. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 74 (1982). The tenure law does not limit the right of a school district to reduce staff. RIF is permitted and, pursuant to N.J.S.A. 18A:28-10, shall be made on the basis of seniority according to standards adopted by the state. N.J.S.A. 18A:28-12 gives preference in reemployment to staff who are dismissed in a RIF.

The court also states

> The tenure stature authorizes the creation of seniority regulations to rank the job rights of tenured teaching staff in a RIF. N.J.S.A. 18A:28-13. (citations omitted). The statute does not create or authorize the Commissioner to create competing rights for non-tenured teachers. Under current regulations, seniority is measured by years of employment in specific job categories which are normally narrower than the subject fields which are endorsed on teachers' certificates. (citations omitted).
>
> Seniority is a statutory concept . . . . It does not purport to create employment rights for non-tenured employees. This court has held that non-tenured teachers whose contracts are not renewed by reason of a RIF are not entitled to reemployment rights . . . .

221 N.J. Super. at 242.

Examination of the pertinent administrative code shows no revision since early 1989. N.J.A.C. 6:3-1.10(f) states

> Whenever a person shall hold employment 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 is or has been employed. For purposes of calculating seniority entitlement,

there shall be no distinction between academic years and calendar years. [Emphasis added.]

N.J.A.C. 6:3-1.10(h) provides

Whenever a person shall move from or revert to a category, all periods of employment shall be credited toward his or her seniority in any or all categories in which he/she previously held employment. [Emphasis added.]

N.J.A.C. 6:3-1.10(i), (j) and (k) provide

(i) Whenever any person's particular employment shall be abolished in a category, he or she shall be given that employment in the same category to which he or she is entitled by seniority. If he or she shall have insufficient seniority for employment in the same category, he or she shall revert to the category in which he or she held employment prior to his or her employment in the same category and shall be placed and remain upon the preferred eligible list of the category from which he or she reverted until a vacancy shall occur in such category to which his or her seniority entitles him or her.

(j) If he or she shall have insufficient seniority in the category to which he or she shall revert, he or she shall, in like manner, revert to the next category in which he or she held employment immediately prior to his or her employment in the category to which he or she shall have reverted, and shall be placed and remain upon the preferred eligible list of the next preceding category, and so forth, until he or she shall have been employed or placed upon all the preferred eligible lists of the categories in which he or she formerly held employment in the school district.

(k) In the event of his or her employment in some category to which he or she shall revert, he or she shall remain upon all the preferred eligible lists of the categories from which he or she shall have reverted, and shall be entitled to employment in any one or more such categories whenever a vacancy occurs to which his or her seniority entitles him or her.

N.J.A.C. 6:3-1.10(l) provides, in part

The following shall be deemed to be specific categories, not necessarily numbered in order of precedence.

. . .

12. Supervisors (each approved supervisory title shall be a separate category. District boards of education shall adopt job descriptions for each supervisory position which set forth the qualifications and specific endorsements required for such position);

. . . .

This is not a seniority case. When a position is abolished pursuant to RIF, the occupier of the abolished position has tenure rights to any newly created, substantially similar position. Christie v. East Orange Bd. of Ed., OAL DKT. NO. EDU 6535-84 (Jan. 18, 1985), aff'd Comm'r of Ed. (Mar. 11, 1985). The actual duties performed and not the job title alone will determine whether two positions are substantially similar. Boeshore v. North Bergen Bd. of Ed., 1974 S.L.D. 805. What the petitioner remains entitled to is not remotely related to the positions the Board filled. Consequently, the petitioner cannot assert any tenure rights to these positions.

Capodilupo and Bednar do not support the petitioner's argument. There are no nontenured persons involved here. When considering supervisors, entitlement is determined in specific categories, N.J.A.C. 6:3-1.10(b), and each approved supervisory title is a separate category, N.J.A.C. 6:3-1.10(l)(12). The petitioner cannot assert a claim against any person in a position in which he has no seniority. Weinstein, above.

For these reasons, I **FIND** and **CONCLUDE** that Mr. Notaro has never served in any of the positions to which he claims entitlement. He, therefore, has no seniority in respect of any of those positions or in any reasonably related position. If he has no seniority, he cannot exercise a senior right over those hired by the Board, who concededly are tenured.

I further **CONCLUDE** that the petitioner's tenure rights have not been impaired by the Old Bridge Board of Education and I **ORDER** his petition **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

31 JULY 1992
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

AUG. 4, 1992
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 7 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

km

WITNESS

Peter M. Delaney -

EXHIBITS

For the Petitioner:

P-1	Letter, Notaro to Korshalla, December 12, 1990
P-2a	Petitioner's Secondary School Teacher of Physical Education Certificate
P-2b	Petitioner's Teacher of Health and Physical Education Certificate
P-2c	Petitioner's Teacher of Driver Education Certificate
P-2d	Petitioner's Supervisor's Certificate
P-3	Old Bridge Township Public Schools Seniority List, January 1982

FRANK R. NOTARO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner pursuant to N.J.A.C. 1:1-18.4, which substantially rely on arguments made before the ALJ and need not be reiterated herein. No reply was filed by the Board.

Upon review, the Commissioner concurs with the ALJ that petitioner can make no seniority claim to positions in which he has never served and therefore has no seniority. This is true notwithstanding that he might have been entitled to one of the positions in question by tenure right upon his RIF in 1982, as the time for claiming such an entitlement based on subsequent court rulings in Capodilupo, supra, and Bednar, supra, is long since past by any reasonable reckoning.

The Commissioner observes, however, while petitioner had no seniority entitlement to the positions at issue, if the successful candidates for any of those positions likewise had no seniority entitlement thereto, as a riffed tenured supervisor, petitioner was

at least entitled to be interviewed for the position(s) notwithstanding the Board's contention that it also required subject area certification which petitioner did not possess. Nathan Schienholz et al. v. Board of Education of the Township of Ewing, Mercer County, decided by the State Board of Education February 7, 1990, affirmed Superior Court November 19, 1990, App. Div. #A-2905-89T3. Consequently, should any such situations arise in the future, the Board is directed to provide petitioner with an opportunity for interview in keeping with his tenured status. Of course, should there be no other tenured candidates for an available supervisory position, petitioner's rights are paramount as against nontenured applicants.

Accordingly, the initial decision of the Office of Administrative Law is affirmed for the reasons expressed therein as amplified above.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

SEPTEMBER 17, 1992

DATE OF MAILING - SEPTEMBER 17, 1992

217-92

Y.A.L.E. SCHOOL, INC. :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

NEW JERSEY STATE DEPARTMENT OF EDUCATION, : DECISION

RESPONDENT. :

:

SYNOPSIS

Petitioner, private school for the handicapped, challenged variety of expenditures that Department deemed to be non-allowable in calculating tuition reimbursement rate for public school handicapped students who are educated under N.J.S.A. 18A:46-14(g).

ALJ found maximum amount of $750 representing contributions, donations, awards and scholarships as allowable costs in calculation of certified actual cost per pupil. (N.J.A.C. 6:20-4.4(a)14) ALJ also allowed cost of conference in St. Thomas. Otherwise, petition was dismissed as ALJ concluded that gardening costs, window shading film, landscaping costs and certain salary allocations of executive director and assistant director were non-allowable for tuition rate purposes.

Commissioner adopted findings and determination in initial decision.

SEPTEMBER 17, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3912-90
AGENCY DKT. NO. 74-4/90

Y.A.L.E. SCHOOL INC.,
Petitioner,
v.
STATE OF NEW JERSEY,
DEPARTMENT OF EDUCATION,
Respondent.

Robert J. Forgash, Esq., for petitioner

Arlene Goldfus Lutz, Deputy Attorney General, for respondent (Robert J. Del Tufo, Attorney General of New Jersey, attorney)

Record Closed: June 18, 1992 Decided: July 31, 1992

BEFORE **STEVEN C. REBACK**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On April 5, 1990, Y.A.L.E. School, Inc. (Y.A.L.E.) filed a petition with the Commissioner of Education challenging the results of an audit conducted by the respondent. The audit, which covered the period July 1, 1987 through June 30, 1988, determined that certain expenses incurred by Y.A.L.E. were deemed non-allowable costs under N.J.A.C 6:20-4.1 et seq. and, thus, not included in computing the tuition rate of its students. Following a two-step interagency appeals process, Y.A.L.E. challenges in this forum some, but not all of the determinations that were arrived at by the respondent (the Department). Those findings which are challenged by Y.A.L.E. which it alleges should not be deemed non-allowable costs, are set forth in the petition and are incorporated by reference into this decision.

In addition, Y.A.L.E. also challenges the authority of the respondent to order reimbursement of various tuitions paid for the year preceding the audit, July 1,

1986 through June 30, 1987. The Commissioner of Education deemed Mr. Forgash's petition to be in the nature of a request for a contested case and he thereafter transmitted the matter to the Office of Administrative Law (OAL) on or about May 17, 1990, pursuant to N.J.S.A. 52:14F-1 et seq. and N.J.S.A. 52:14B-1 et seq.

Following a preliminary determination after the conference conducted in December 1990, in which Deputy Attorney General Lutz was going to challenge by motion the scope of the hearing, she advised by letter that because of a decision arrived at by the Commissioner of Education, she would no longer challenge that issue: the matter before the Office of Administrative Law would proceed de novo. Thereafter the prehearing conference, which was initiated on December 3, 1990, concluded on June 4, 1991, and a prehearing order was issued on June 12, 1991.

Following the issuance of the order and pursuant to a motion schedule which was agreed to but which was not entirely complied with, Deputy Attorney General Lutz submitted a motion for partial summary decision. The motion challenged some but not all of the 12 expenditures which Y.A.L.E. had contested. That motion sought summary decision in respect to 7 of the 12 contested expenditures. On October 22, 1991, I issued an 8-page ruling and order addressed to Ms. Lutz's motion granting portions of it and denying others. That ruling is incorporated into this decision by reference. To the best of my knowledge, interlocutory review of that ruling and order was taken by neither party. This opinion will address only those issues which were still viable following the ruling on Ms. Lutz's motion; as to those issues which were initially the subject of this appeal but which were mooted as a consequence of my granting Ms. Lutz's motion, no further discussion in respect to those shall ensue.

Hearings were conducted in this matter at the Office of Administrative Law, Mercerville, New Jersey, on November 18, November 25, November 26 and December 2, 1991. At the conclusion of the testimonial phase of the proceeding, it was agreed that Mr. Forgash would request a transcript of the hearing and that briefs would be submitted following a reasonable period after transcripts were received and reviewed. By letter of March 10, 1992, Deputy Attorney General Lutz confirmed her request to my office, which was granted, that the briefing schedule could be extended and that her submission would be due by April 10, 1992. In addition, by letter of April 16, 1992, Mr. Forgash confirmed that his request (both requests at issue here were not opposed by counsel) to extend his briefing schedule through to May 11, 1992 was also granted. On April 10, 1992, my office received

Ms. Lutz's letter brief, dated the previous day, and on May 8, 1992, my office received Mr. Forgash's written summation. Thereafter, on May 18, 1992, Ms. Lutz submitted a letter to me confirming a conversation which she had with my secretary in which she was granted an 11-day extension to submit a reply. On May 28, 1992, my office received Ms. Lutz's reply brief, dated May 27, 1992. On June 4, 1992, Mr. Forgash submitted an additional letter in the form of a sur-reply to Ms. Lutz's letter brief of May 27, 1992. Mr. Forgash's submission was received by my office on June 9, 1992. On June 8, 1992, I received a "facsimile" letter from Ms. Lutz objecting to the submission and receipt of Mr. Forgash's letter of June 4, 1992. On June 16, 1992, my office received a final submission by Ms. Lutz, dated June 15, 1992, addressing itself primarily to Mr. Forgash's final submission (dated June 4, 1992) and on June 18, 1992, my office received Mr. Forgash's final submission in this matter, a letter submitted in an effort to "set the record straight" in respect to the timing and number of post-hearing submissions made.

Accordingly, the record in these proceedings closed on the date upon which Mr. Forgash submitted his final word in these proceedings, June 18, 1992. There is no impropriety arising from counsels' submitting additional legal argument. Since there is no jury in this matter and since I am the fact-finder, no prejudice enures to either party by considering all post-hearing arguments as they relate to the evidential record.

ISSUES AND THE BURDEN OF PROOF

The petitioner in this matter, Y.A.L.E., is a private school for the handicapped that is authorized under N.J.S.A. 18A:46-14(g) to educate public school handicapped students. Y.A.L.E. is permitted to charge the public school district in which the handicapped child resides a tuition equal to costs which are deemed allowable pursuant to a certified audit. N.J.A.C. 6:20-4.1 et seq. In addition, there are certain specific items which pursuant to the foregoing regulatory scheme may not be included in computing the tuition rate of each student, and are deemed non-allowable costs. See, N.J.A.C. 6:20-4.4. As previously noted, Y.A.L.E. is challenging a variety of expenditures that the respondent deemed to be non-allowable in calculating the petitioner's tuition reimbursement rate. The following enumerates the particular expenditures at issue which were denied and which Y.A.L.E. argues should be allowable costs and thus included in computing its tuition rate:

1. Was respondent's decision, which determined that $295,195.75 in "merit pay" awarded to various teaching and non-teaching staff personnel of Y.A.L.E. during the 1986-87 and 1987-88 school years non-allowable, proper? The respondent's action was administratively posited on the application of N.J.A.C. 6:20-4.4(a)17 [as amended, currently N.J.A.C. 6:20-4.4(a)(21)]. At the hearing, the decision was also posited upon the assertion that the payment was a "bonus" in contravention of N.J.A.C. 6:20-4.4(a)(29) [currently N.J.A.C. 6:20-4.4(a)35].

2. Was respondent's decision to deny as an allowable cost restaurant expenses totaling $1,709.03 because they were not incurred as part of a school related activity, pursuant to N.J.A.C. 6:20-4.4(a)(13) [superseded by N.J.A.C. 6:20-4.4(a)(17)] ,proper?

3. Was the decision by the respondent which determined that $4,425.00 was not reimbursable but should have been capitalized and depreciated as an improvement to school facilities, pursuant to N.J.A.C. 6:20-4.3(a)(3) ,proper?

4. Was the decision by the respondent to deny as a reimbursable expense $4,825.00 for the installation of window shading film and concluding that the expenditure should have been capitalized and depreciated as an improvement of school facilities, pursuant to N.J.A.C. 6:20-4.3(a)(3), proper?

5. Was respondent's decision to disallow expenses incurred by Y.A.L.E. in the amount of $2,015.70 as an incident to a conference attended by Y.A.L.E. personnel in St. Thomas, Virgin Islands, because pursuant to N.J.A.C. 6:20-4.4(a)28 [currently N.J.A.C. 6:20-4.4(a)32] costs incurred for conferences and meetings in "countries not contiguous to the United States are disallowable," proper?

6. Was respondent's determination, which denied gardening expenses incurred by Y.A.L.E. in the amount of $725.27 because they were deemed non-school related, proper?

7. Was respondent's determination, which allocated the salaries paid by Y.A.L.E. to its executive director and assistant director, pursuant to the method prescribed at N.J.A.C. 6:20-4.1(c), rather than the allocation advanced by petitioner between its two campuses, proper?

8. Were various contributions made by Y.A.L.E. and deemed by respondent to be donations, awards and scholarships as defined at N.J.A.C. 6:20-4.4(a)14 such that a maximum of $750.00 is allowable in the calculation of the certified actual cost per pupil for each of Y.A.L.E.'s two campuses or is the $750.00 maximum attributable to only one campus?

In respect to each of the foregoing, the burden rests exclusively with the petitioner: Y.A.L.E. must establish by a preponderance of the relevant, credible evidence that the determinations arrived at by respondent from which this appeal has been taken were improper.

THE FACTS AND LEGAL ANALYSIS

The petitioner, Y.A.L.E., is a private school for the handicapped which is authorized to educate public school handicapped students, pursuant to N.J.S.A. 18A:46-14(g). Y.A.L.E.'s history dates back to 1977 when it served the needs of only three students and occupied space in a church in Woodbury, New Jersey. Mr. Louis Sarandoulias, is the individual primarily responsible for taking the institution from its tiny existence in the late 1970's and enlarging its base and operations. Mr. Sarandoulias is an educator with a long history of experience in teaching, vocational education, administration and an expertise in the area of special education. He has served as Y.A.L.E.'s director since 1979.

Following a period of growth and relocation, Y.A.L.E. today occupies two separate campuses. Its "Cherry Hill" campus is an elementary school which Y.A.L.E. has occupied since approximately 1985. The school in addition to its classrooms has a gym, an athletic field and a variety of facilities generally associated with typical public schools. The "Cherry Hill" campus serves primarily emotionally disturbed and neurologically impaired pupils whose ages range from 5 through 21. In 1981, Y.A.L.E. opened its second campus in Williamstown, Gloucester County, New Jersey, which caters primarily to emotionally disturbed high school pupils between the ages of 13 and 21. Also in 1981, Y.A.L.E. formed its vocational/career center and incorporated vocational programs into its campuses. These programs, as were described, include the teaching of various building trades, plumbing, and printing.

Today Y.A.L.E. serves between 56 and 60 "sending" school districts which encompass an area as far north as Mercer County and as far south as Salem County.

The "sending" districts refer students, most of whom are accepted, who are neurologically impaired and/or emotionally disturbed. Some of the pupils are rejected because their disabilities are too severe for ~~the limits of~~ Y.A.L.E. The "sending" school district generally provides transportation for the pupil who attends the various programs provided by Y.A.L.E. all of which are day programs. Mr. Sarandoulias estimated that at least for the period from 1985 through 1988 some 80% of the total of Y.A.L.E.'s student population was found at the "Cherry Hill" campus. It is clear that this percentage is not remote from the percentage existing today. It is also not unrelated to the distribution of Y.A.L.E.'s faculty between its two campuses.

Mr. Sarandoulias provided his understanding of the manner in which Y.A.L.E., as well as other private schools for the handicapped, are funded. Essentially, Y.A.L.E. receives tuition for the students it accepts from the "sending" school district. Based upon the prior school year's budget, the Department of Education calculates what Y.A.L.E.'s tuition rate for the following school year would be and notifies Y.A.L.E. of this determination in May or June. Essentially the tuition rate is arrived at by examining the previous year's average daily enrollment. Once that figure is arrived at (and presumably agreed to between the Department of Education and the private school) the "sending" school district is billed and pays that rate on a pro rata basis, usually submitting payments monthly, beginning in October of the following school year.

It is Y.A.L.E.'s assertion, and presumably there is no dispute, that tuition is the sole source of revenue for purposes of paying expenses and income to Y.A.L.E.'s teaching and non-teaching staff personnel. Mr. Sarandoulias emphasized the dilemma which presumably this process places on Y.A.L.E. as well as all other private schools for the handicapped. Since teacher contracts are signed and entered into in June of the year preceding the school year for which the contract applies, the private school enters into those contracts well before it can know with certainty that there will be sufficient students enrolled for the following year to generate tuitions necessary to meet its operating budget. As a consequence of this procedure, Y.A.L.E. has been compelled to obtain a line of credit on occasion (exceeding $400,000.00) to meet school expenditures from the beginning of the school year in September until sufficient tuition receipts are generated to meet the expenses already incurred.

The disputes engendered by this appeal center upon a variety of expenditures which the Department of Education has deemed to be non-allowable

costs for purposes of computing the tuition rate of each student which then may be utilized by Y.A.L.E. to seek reimbursement from the various "sending" school districts.

It is within the context of this educational and financial background of Y.A.L.E. that the particulars of the appeal shall now be addressed.

Disallowance of Merit Pay

In what is the largest claim which is the subject of dispute in this hearing, the Department of Education determined that $295,195.75 in what was described as "merit pay" was a non-allowable cost for purposes of computing Y.A.L.E.'s tuition rate of its students, pursuant to N.J.A.C. 6:20-4.4(a)17 [as amended, currently N.J.A.C. 6:20-4.4(a)(21)]. The Department found that the "merit pay" was distributed in a manner that was arbitrary, unreasonable, and capricious. Of the total sum, $31,287.40 was disallowed from funds distributed for the 1986-87 school year and the remaining $263,842.35 was disallowed from funds distributed for the 1987-88 school year.

The respondent during the proceedings at OAL also asserted that the basis for the disallowance of these funds was that they were deemed to be a bonus, pursuant to N.J.A.C. 6:20-4.4(a)(29) [currently N.J.A.C. 6:20-4.4(a)(35)]. The regulation prohibits as a non-allowable cost in the calculation of the certified actual cost per pupil "a payment or benefit to an employee in lieu of salary (bonus)."

The individual who was primarily responsible for the hands-on determination to craft a "merit pay" scheme is Mr. Edward Vonderschmidt, Y.A.L.E.'s current director of education and an employee of the institution since 1978. Mr. Vonderschmidt is an educator -- not a business administrator or an accountant. His background is in special education but his experience at Y.A.L.E. has also apparently made him "point man" in respect to the administrative and managerial relationship of Y.A.L.E. with its teachers and staff.

The motivation behind the "merit pay" idea, at least from the perspective of Y.A.L.E.'s witnesses, was simple: Y.A.L.E. experiences difficulties in attracting and keeping quality teachers because of the increased stress level at a private school for the handicapped and because private school teachers are traditionally paid less than public school teachers. Consequently, in an effort to provide teachers with a

compensation and benefit package which would attract them and induce them into remaining, Mr. Vonderschmidt, with Mr. Sarandoulias' acquiescence, created and implemented the merit pay program.

The program was first implemented in the 1986-87 school year. The faculty handbook/policy manual for that school year indicates:

> In keeping with this institution's policy of elevating the standards of our program, a pension/merit pay system has been established for our professional staff. Qualified personnel who have demonstrated outstanding performance may be entitled to this award, pending the availability of funds. Staff members who will be returning for the third (3rd) School year at Y.A.L.E. are eligible. These eligible candidates may receive from zero (0) to ten (10) percent of their current salary. Decisions regarding pension/merit pay will be made by the Executive Director and/or the Director of Education.

The corporate minutes for the 1986-87 year also authorized the merit pay program as well as an expenditure of funds not to exceed $30,000.00, but the implementation of the merit pay scheme for the 1986-87 school year was not undertaken until the spring of 1987 when Mr. Vonderschmidt alone (Mr. Sarandoulias had apparently suffered a heart attack and was not available to participate in this administrative decision) determined to implement the program. At that time, Mr. Vonderschmidt changed the criteria for making the merit payment available by increasing the class of persons who could receive it to staff members who had been at Y.A.L.E. for less than three years. Thirty-three persons were awarded merit pay for the 1986-87 school year, 25 of whom had 3 or more years of service and 8 of whom had less than 3 or more years of service. Twenty-eight people of these 33 received merit pay in the amount of $550.00 and the other 5 persons received payments ranging from $1,700.00 to $2,500.00. Mr. Vonderschmidt awarded himself merit pay in the amount of $6,000.00. Total for the merit pay for the 1986-87 school year was $29,600.00 plus a related employer payroll tax contribution of $1,687.40, making the actual total for the 1986-87 school year $31,287.40. The testimony indicated that it was not until December 1987 that merit payments were made to the recipients for the 1986-87 school year.

The merit pay program was continued for the 1987-88 school year but the standards for distribution were modified. The salary adjustment guidelines provided that the educators'/employees' base salary was calculated and based upon an average daily enrollment at Y.A.L.E. of 200 students. If at the conclusion of the 1987-

88 school year, the average daily enrollment exceeded 200 students, "Y.A.L.E. may, in its discretion, pay the educators'/employees' salary in excess of the base salary of original contract."

In addition the "salary" paid by Y.A.L.E., pursuant to the forgoing, was "in the discretion of the administration of Y.A.L.E. ..." As part of its exercise of discretion, Y.A.L.E. was to take into consideration the employees' years of service and the employees' individual staff responsibilities. Following various studies and formulae which Mr. Vonderschmidt employed, he devised five classes of employees who would qualify for merit pay based upon years of service: teachers with three years of service; teachers with one year of service; teachers with two years of service; teachers with four or more years of service; and clerical staff. He concluded, as well, that merit pay in the amount of $1,775.00 would be available for teachers with three years of service for each of those three years. A first-year teacher was to be awarded $1,492.00. A second-year teacher was to be given pay in the amount of $1,329.00 multiplied by the number of years of service and those teachers who were employed for four or more years were to be given $1,197.00 multiplied by four. Clerical staff were to be given an adjustment of $1,275.00 per-year of employment. Based upon the foregoing determinations for the 1987-88 school year, merit pay was made by Y.A.L.E. in the amount of $201,351.00. The total number of individuals receiving merit pay for the 1987-88 school year was 46, all of whom received payment under the "years-of-service" criterion.

In addition to the years of service criterion, Mr. Vonderschmidt determined that there was also to be the potential for merit pay based upon "responsibility". Of the 46 persons awarded merit pay increases based on their years of service, 11 received an additional amount based upon the degree of responsibility that they were perceived to have exercised. The amount paid under this criteria was $40,417.00.

In addition, Mr. Vonderschmidt established a "performance" criterion under which $2,990.00 was paid to 12 of the 46 people who also received merit pay based upon the years-of-service criteria. The aggregate awarded to staff for merit pay for the 1987-88 school year was $244,758.00 which, when aggregated with the related employer payroll tax contributions of $19, 084.35, resulted in a total merit pay award for 1987-88 which was disallowed by respondent of $263,842.35. The payment of the merit awards for the school year 1987-88 was made approximately in October of 1988, some four months after the 1987-88 school year was completed.

A further aspect of the 1987-88 merit pay program was set forth in the Policy Manual Faculty Handbook for Y.A.L.E., (R-1), as follows:

> .... Qualified personnel who have demonstrated outstanding performance may be entitled to this award, pending the availability of funds. Staff members who will be returning for the third (3rd) school year at Y.A.L.E. are eligible. These eligible candidates may receive from zero (0) to ten (10) percent of their current salary. Decisions regarding pension merit pay, will be made by the Executive Director and the Director of Education.
>
> Salary adjustment guidelines are as follows:
>
> 1. .... Y.A.L.E. may, in its discretion, pay the educator/employee salary in excess of the base salary of [the] original contract.
>
> 2. The additional salary outlined in paragraph 1 may be paid by Y.A.L.E. School to the educator/employee in the discretion of the administration of Y.A.L.E. School ....

Y.A.L.E. asserts that the first paragraph set forth above is in error in that it should not have been included. It would seem in view of the totality of the evidence and testimony provided by Y.A.L.E. concerning how the merit pay system operated for 1987-88 that the execution of the policy would have been inconsistent with that paragraph and thus for purposes of this proceeding I will not engage in an explicit finding that paragraph 1 is the policy for the merit pay plan for the school year 1987-88. The school, however, does not deny that the paragraph was in effect for the 1986-87 school year. In my view, however, the question of how if at all the overall merit pay scheme would be altered by the applicable paragraph in the policy manual would not be dispositive of the issue.

As noted, it is the Department's position that the merit pay plan as outlined above is a cost which is not allowable, pursuant to N.J.A.C. 6:20-4.4(a)(29) [currently N.J.A.C. 6:20-4.4(a)(35)], because the plan represents a bonus in the form of the receipt by an employee of a payment or a benefit in lieu of salary. Mr. Forgash, in his submissions, makes much of the fact that the only witness called on behalf of respondent in this matter, who addressed himself not only to the merit pay issue but to all others, was an auditor who was not offered as an expert. In my view while expertise may be implicated in certain aspects of this proceeding, there are questions to be addressed which do not require eliciting expert testimony for their resolution. Indeed in the current matter the question raised is a legal one more so than an accounting one. But even if the merit pay question implicates accounting

practices, a determination of whether under the foregoing regulation the merit pay scheme constitutes a bonus does not require such expertise.

In addition as will be recalled, the burden in this matter does not rest upon respondent to establish and uphold its disallowance; rather, the burden is on the petitioner to determine the impropriety of the determinations from which this appeal was taken.

In her brief, Ms. Lutz cites to various authorities construing the nature of a bonus. In Taylor v. Errion, 137 N.J. Eq. 221 (Chan. Div. 1945), a bonus was defined as something given "in addition to what is ordinarily earned by or strictly due to the recipient." "A bonus is something given or paid in addition to the usual or expected. It usually applies to money in excess of what is normally received or strictly due, given in consideration of superior achievement or as a share of the profits." In re Estate of Gregoriou, 142 N.J. Super. 457 (Cty. Ct. 1976).

In my judgment regardless of the appellation given to the payments made by Y.A.L.E. to its staff members in 1986-87 and 1987-88, those payments indeed constituted a bonus. The monies which were paid were not obligatory; that is, notwithstanding that a Y.A.L.E. official may have announced an intention to pay monies in the future, it was entirely discretionary. It need not have been given and even if it were, its distribution was dependent upon the exercise of the discretion of the school. Clearly, in addition, no employee had an entitlement to the receipt of the merit pay or was in possession of a legal contractual right to those monies should it have been withheld. That payment of the monies was actually made some six months after the school year in 1986-87 and some four months after the expiration of the school year in 1987-88 is wholly consistent with the conclusion that payment was contingent upon a variety of factors and was totally separate and wholly distinct from the contractual rights of staff and teaching personnel that defined their salaries during the applicable school years.

Much of Y.A.L.E.'s argument addressing itself to its efforts to overturning the disallowance of the merit pay sum as an allowable cost is, in my view, not material to the legal issue before me. Much testimony and evidence was elicited by Messrs. Vonderschmidt and Sarandoulias which go to the motivation behind Y.A.L.E.'s decision. They testified, and Mr. Forgash reinforced their testimony in his post-hearing submission, concerning the difficulties which Y.A.L.E. had (as presumably other private schools for the handicapped have as well) in maintaining

and attracting quality teachers. This difficulty was based in large part on the inability of private schools to meet the salaries of the public school sector. In addition, it resulted from what is acknowledged to be a highly stressful classroom environment. So it was clear that given the real factors underlying the problems that Y.A.L.E. began to experience -- particularly that it was losing quality teachers -- its administration in a perhaps good faith effort to be more competitive sought ways to keep those people on staff who were quality people and to attract others as well. The obvious way to encourage and maintain staff is, among others, giving them money. Mr. Vonderschmidt, admittedly a non-fiscally educated or oriented individual, did some private research and following a year or two of encouragement convinced Mr. Sarandoulias that the way to go was to employ a merit pay plan. Indeed there was some reference that the plan had even been discussed with an attorney and/or an accountant. So it is clear that the motivation behind the plan was ostensibly a salutary and reasonable one: maintain as fine a staff as possible.

In addition, the other prong of Y.A.L.E.'s apparent motivation concerns the school's inability, at least as set forth by Mr. Vonderschmidt, to raise the salary schedule for the staff. Mr. Vonderschmidt explained that in his view by the very nature of enrollment of pupils at Y.A.L.E. and by the very nature of funding which to a significant extent is based upon projections, Y.A.L.E. could not raise salaries in a manner which would be consistent with sound fiscal management. As Mr. Forgash notes at page 12 of his initial brief:

> So that when September comes and Y.A.L.E. starts its school year, it is obliged to pay substantial expenditures without knowing, without any guarantee, that there will sufficient students in order to generate cash flow to meet the operating budget. Tuition, and tuition alone, is the source of revenue to pay Y.A.L.E. staff and its other expenses. [Written Summation, Robert J. Forgash, Esq., May 8, 1992, at 12.]

Thus, Y.A.L.E. has reasonably and satisfactorily explained why it could not raise salaries, why it felt compelled to provide additional revenues to its staff, and why, therefore, it chose to utilize what has come to be described as a merit pay plan. The fundamental point that must be emphasized is that notwithstanding what might be described as the good faith intentions of Y.A.L.E. to reward its employees, Y.A.L.E.'s motivation cannot validate what is otherwise a patently invalid payment scheme under N.J.A.C. 6:20-4.4. I must infer that Y.A.L.E.'s predicament is not unlike the predicament in which many other private schools for the handicapped find themselves. The regulations, however, that have been promulgated by the

Department of Education and which detail those costs which are and are not allowable for purposes of calculating the certified actual cost-per-pupil were promulgated for and addressed to these very facilities. The arguments which I have outlined above cannot circumvent those regulations. Those are arguments that should be addressed to those persons charged with the responsibility of promulgating and amending applicable regulations. While I may personally sympathize with the fiscal plight of Y.A.L.E. and other schools for the handicapped, I have no more authority than do the representatives of Y.A.L.E. to disregard the regulations and to pass on to the various sending school districts those costs for reimbursement which the regulations explicitly proscribe. It is very easy to be generous with other people's money. It is also, on occasion, impermissible. This is one such occasion.

Mr. Forgash notes that the 1986-87 "merit pay program was a smash hit. It was a huge success. The teachers and staff were ecstatic." Id. at 18. He notes as well that the "merit pay/salary adjustment program for the school year 1987-1988 was again a smash hit. The recipients were thrilled." Id .at 22. While the consequence of the implementation of the merit plan was ostensibly successful -- morale was up, turnover was low -- the consequence of the program has no more significance on its validity than its motivation.

Similarly, any argument that Mr. Forgash raises concerning the fashion and manner in which the audit may have been conducted below cannot and should not obfuscate the facts as they were elicited at hearing. Those facts manifested in a de novo proceeding are the operative facts in these proceedings and serve as the exclusive basis under which an assessment of Y.A.L.E.'s arguments must be measured. By this determination I do not suggest or imply that the Department of Education was derelict in the fashion in which it conducted its audit. I make no finding in this regard since the disposition of this matter is determined exclusively by the proofs offered at hearing. As Ms. Lutz properly summarizes at page 17 of her April 9, 1992 letter brief:

> Thus, even if the school met its threshold requirement of 200 average daily enrollment, there was no commitment on the part of the school to distribute the excess funds. Moreover, if the school did in its discretion choose to distribute the funds, there was no guarantee that any individual would receive money, since the determination regarding how the funds would be distributed was also within the discretion of the administrators. Clearly then, this pay was not regular or expected compensation. Rather, it was something in addition to what was

> ordinarily earned... It was given or paid in addition to the usual or expected... It was a bonus and properly disallowed pursuant to regulation. Id. at 17-18. [Citations omitted.]

Based upon the foregoing, I **CONCLUDE** that Y.A.L.E. has failed to establish by a preponderance of the relevant, credible evidence that $295,195.75 in "merit pay" distributed to Y.A.L.E. employees paid for the 1986-87 school year and 1987-88 school year was not a non-allowable cost because it is deemed a bonus, pursuant to N.J.A.C. 6:20-4.4(a)(29) [currently N.J.A.C. 6:20-4.4(a)(35)].

Having concluded that the merit pay system was disallowable as a bonus under the foregoing regulation, it is superfluous to address any of the other arguments offered by the parties which seek to invalidate or validate the merit pay plan on other grounds. For purposes of a complete decision, however, and for purposes of providing the final decision maker with a comprehensive analysis of this issue in the event that the conclusion is reversed, I shall address the other argument raised by Ms. Lutz in support of the decision by respondent to disallow the merit pay plan.

The Department of Education concluded, separate and apart from the question of whether the merit pay plan was a bonus, that the funds earmarked as "merit pay" was non-allowable because it was distributed in a manner that was both arbitrary and capricious in contravention of N.J.A.C. 6:20-4.4(a)(17) [as amended, currently N.J.A.C. 6:20-4.4(a)(21)]. The regulation provides that the following is a cost which is non-allowable in the calculation of the certified actual cost-per-pupil:

> Fringe benefits -- when the benefits are determined in an arbitrary or capricious manner rather than on an existing uniform established policy based on an equitable standard of distribution, such as years of service or education.

In her April 9, 1992 post-hearing submission at page 20, Ms. Lutz sets forth the basis under which the Department of Education concluded that the merit pay plan contravened the foregoing regulation:

> The regulation clearly envisions that everyone eligible for the benefit as similarly situated people will receive it, as for example all who are employed for the fifth year or all employees with Master's degrees. It does not permit the school to determine who among the staff would be eligible for the fringe benefit. In a true fringe benefit equally distributed there is no discretion on the part of

> the school to determine who of the eligible people will receive it. Thus, the regulation precludes standards of distribution as "performance" or "degree of responsibility," because such standards permit the school to manipulate the distribution and predetermine who will receive the benefit. Plainly, an acceptable fringe benefit does not allow a school the discretion petitioner had in distributing its benefit. Petitioner's distribution of the unexpended funds was not a proper fringe benefit equitably distributed.

In his response to this argument, Mr. Forgash again addresses the manner in which the audit was conducted in the administrative context and strongly argues that because the auditor in Mr. Forgash's view was not fully apprised of the facts and circumstances giving rise to the merit pay plan that he was, thus, not in a position to assess the reasonableness or the lack of reasonableness in its implementation.

As was my view in respect to other arguments raised by Mr. Forgash in a different context, his focus on what may have occurred below is not significant in respect to the issue before me. Whether the auditor did or did not have before him all of the facts and all of the work-product that went into the creation and implementation of the merit pay program does not go to a determination here as to whether that plan does or does not comport with the requirements of then N.J.A.C. 6:20-4.4(a)(17). It is the factual and evidential record created in this de novo proceeding as measured against the law that will determine the propriety or impropriety of the merit pay issue and whether indeed it does or does not comprise an allowable cost under regulation.

There appears, however, to be no argument that the merit pay program can reasonably be designated as a "fringe benefit." Thus the only real issue for purposes of this aspect of the analysis is whether the merit pay plan was determined and implemented in an arbitrary or capricious manner.

Mr. Forgash spends much time in his post-hearing arguments in advancing the notion that indeed the merit pay plan was a reasoned, rational plan, created by Mr. Vonderschmidt's good faith attempts to meet the needs of his staff. Mr. Forgash, for example, underscores at page 25 of his initial submission that Mr. Vonderschmidt, admittedly having little to "go on," in respect to creating a merit pay plan "was using his best judgment and furtherance of a valid business goal. He was making a reasonable business decision." (Emphasis in original.)

Mr. Forgash then proceeds to cite authority construing what is meant by "arbitrary and capricious," essentially characterizing it as being "willful and unreasoned action, without consideration and in disregard of circumstances."

In my view, the difficulty with Mr. Forgash's argument is that while he is advancing a general notion of what is meant by reasonableness and its antithetical idea of arbitrary and capriciousness, N.J.A.C. 6:20-4.4(17) advances a specific notion of what constitutes arbitrary and capricious as a matter of regulatory language. The regulation explicitly sets forth that benefits are deemed to be determined in an arbitrary or capricious manner if they are not based upon "an existing written uniform policy based on an equitable standard of distribution, such as years of service or education..." Thus regardless of Mr. Vonderschmidt's good faith intention and regardless of whether he was doing the best he could under trying circumstances, in order for the fringe benefits (in this case merit pay) to be deemed an allowable cost it must be based upon an existing written uniform policy which is premised on an equitable standard of distribution, such as years of service or education.

Earlier in this opinion I detailed with great particularity the criteria which Mr. Vonderschmidt created as well as the manner in which he applied those criteria to both teaching and non-teaching staff personnel for the school years 1986-87 and 1987-88. It is beyond peradventure that the master plan under which merit pay was distributed and the manner of selection of individuals qualifying for merit pay as well as the amount to which each of those individuals would be entitled is clearly not based upon an existing uniform policy based on an equitable standard of distribution. Rather it is based upon Mr. Vonderschmidt's albeit perceived reasonable efforts to exercise his discretion in the distribution of different sums of money to different individuals employed by Y.A.L.E. for different reasons. While one could reasonably conclude in a generalized context that Mr. Vonderschmidt's judgment in the creation of this plan and its execution was not inherently arbitrary in that there are obvious ostensible correlations between years of service, performance, responsibilities and when and if an employee is deserving of a merit pay award, that is not the standard envisioned by the applicable "fringe benefit" regulation. Thus, whether Mr. Vonderschmidt was using his best judgments in furtherance of a business goal or not is simply in and of itself insufficient if not entirely immaterial to a determination of whether the plan meets the regulatory standard at N.J.A.C. 6:20-4.4(17). In the foreground of this conclusion also lurks the rather sloppy effort on behalf of Y.A.L.E. to articulate in writing its own established

policies. While Ms. Lutz attempts to demonstrate that once something was set down either in a policy manual or elsewhere it was etched in stone and thus any deviation from that policy resulted in an inherent arbitrary execution of the policy, I am more satisfied with the explanation by Y.A.L.E. that there were mistakes and on occasion inconsistencies between policies and board minutes. But these inconsistencies really do not establish anything but that the plan was not one that was clearly defined and articulated in a written policy which was uniform and it may very well have demonstrated as well that the school did, in fact, deviate from its policy. But even if it did not deviate from its policy, the policy itself in my view did not comport with the regulatory standard.

Based upon the foregoing, I **CONCLUDE** that the petitioner has failed to establish by a preponderance of the relevant credible evidence that the determination arrived at by the Department of Education that the sums designated as merit pay and distributed to various personnel for the school years 1986-87 and 1987-88 was a disallowable cost because it was a fringe benefit determined in an arbitrary and capricious manner in contravention of N.J.A.C. 6:20-4.4(17) [currently N.J.A.C. 6:20-4.4(21)]* was in error.

Restaurant Expenses

Y.A.L.E. is appealing a decision by the Department of Education which held as a non-allowable cost $1,709.03 in restaurant charges. The basis of the respondent's determination was the application of N.J.A.C. 6:20-4.4(a)(13) [superseded by N.J.A.C. 6:20-4.4(a)(17)], which provided that costs incurred for the entertainment of school offices or employees "for a non-school-related activity or any related activity item such as meals, lodging, rentals, transportation and gratuities" are non-allowable.

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* Although the numbers are insignificant in the context of the extent of the merit pay plan, since the plan is reasonably deemed an award, pursuant to N.J.A.C. 6:20-4.4(a)(10) [currently N.J.A.C. 6:20-4.4(a)(14)], such award is allowable up to but not exceeding $750.00 for each of the school's campuses. Since that amount has already been exceeded because each of the campuses has already used its allotted $750.00 for contributions, no aspect of the merit pay plan can be passed on to the sending districts pursuant to the formula utilized by the Department of Education in calculating the certified actual cost-per-pupil.

The basis under which the Department administratively denied the costs was that in its view there was no verification or documentation by way of receipts which would go to establishing that the various restaurant charges were incurred as an incident to school-related activities. Ms. Lutz argues at page 4 of her April 9, 1992 letter brief that while Y.A.L.E. did bring to the hearing a variety of receipts, they were never placed into the record and consequently they should not be reviewed by the administrative law judge in an effort to determine if the costs reflected in those receipts were allowable as school-related activities.

Mr. Forgash does not dispute that the various receipts were not evidential in the matter. He argues that during a break in the hearing, copies of the various receipts were shown to a representative of the respondent who chose not to assess them for purposes of reconsidering the latter's position in respect to restaurant charges. Mr. Forgash argues that the original determination of the respondent was based on findings supported only by monthly billing which presumably does not reflect the persons participating at the restaurant and/or the purpose of the dinner or meeting.

Based upon these arguments, it is clear the Ms. Lutz is correct: the testimonial and evidential record in these proceedings does not include within it, nor based on my recollection did Mr. Forgash move or attempt to move those documents into the record, the various receipts which reflected the restaurant costs incurred which are the subject of the appeal of this disallowance. The only other effort made by Y.A.L.E. to overturn the decision is a reference to the report which was prepared by James F. Leone, Y.A.L.E.'s accountant and financial advisor since 1976. Ms. Lutz argues that Mr. Leone's credibility is in issue (see footnote to page 5 of her April 9, 1992 submission). She notes that the most "troubling" aspect of his credibility is that he acknowledged performing the annual audits for Y.A.L.E. and that under then N.J.A.C. 6:20-4.8 such audit was required to be conducted by an independent certified public accountant. "Given that, by Leone's own testimony, he had been associated with the school as its financial advisor since 1976, one must call into question his judgment in certifying the annual audits he did as an 'independent' CPA."

As with any witness any interest or involvement that he or she has in a proceeding must be measured and assessed in determining credibility. This is not to suggest that because of Mr. Leone's involvement with Y.A.L.E. his credibility has

been impeached. His relationship with the school and with the audit does, however, speak for itself.

Mr. Forgash refers to page 3 of Mr. Leone's letter (P-2). In respect to restaurant charges, Mr. Leone indicates:

> Most impossibly all of the invoices and explanations were provided to the auditors. It appears that the auditors may have failed to look at the blue collar tickets and the reversed side of certain invoices. The restaurant charges were related to school employees, independent auditors, insurance agents, lawyers, contractors, school photographer and others providing services to the school. These expenses are clearly documented and should be allowable costs. [P-2 at 3-4.]

The statements offered by Mr. Leone in his letter of July 26, 1991, are entirely hearsay and conclusory in nature. Absent any direct documentary proof or more specific sworn testimony concerning the disallowance it is my view that Y.A.L.E. has not been able to meet its burden in overturning the decision by the Department concerning restaurant charges. I, therefore, **CONCLUDE** that Y.A.L.E. has failed to establish by a preponderance of the relevant, credible evidence that the respondent's determination to disallow $1,709.03 in restaurant charges because in its view those charges did not satisfactorily establish that under N.J.A.C. 6:20-4.4(a)(13) they were incurred for school-related activities, was improper.

Landscaping Expenses

The Department of Education denied as a non-allowable cost $4,425.00 which Y.A.L.E. paid to a landscaping company for landscaping at its Cherry Hill campus. Y.A.L.E. had charged this amount as an allowable cost, deeming it to be a teaching supply. While not concluding that the landscaping was done for non-school related matters, the respondent did determine that rather than construing the $4,425.00 to be a budgetary item which can be deemed an allowable cost, the amount should have been capitalized and depreciated as an improvement to school facilities.

In his post-hearing submission, Mr. Forgash makes reference exclusively to Mr. Leone's report (P-2) in support of Y.A.L.E.'s position that the determination by the respondent was improper.

The Department of Education arrived at its conclusion concerning the landscaping expenses by an application of N.J.A.C. 6:2-4.3. The regulation provides that a fixed asset expenditure of $1,000.00 or more shall be capitalized and depreciated using the straight-line method.* In addition, as Ms. Lutz properly notes in respect to this and other expenditures, landscaping costs were not entirely disallowed by the Department of Education; rather, its determination that it must be capitalized results in an inclusion in the tuition it passes on to sending districts over a period of years.

The nature of the actual landscaping, from the evidence, consists essentially and/or exclusively of the purchase and placing into the ground of a variety of plants which, pursuant to Mr. Leone's report, totaled 48. The invoice for those plants indicates that payment was for "redesigning and replanting" and that the plants were guaranteed for a period not to exceed one year. In his letter (P-2) Mr. Leone asserts that the $4,425.00 in expenditures "did not increase the value of property." He then refers to what appears to be a text of accounting principles which indicates that expenditures which "increase the capacity or operating efficiency of an asset, if they are substantial, should be capitalized. Minor expenditures are usually treated as period costs even though they have the characteristics of capital expenditures." (P-2 at 7-8).

Pursuant to N.J.A.C. 6:20-4.3(a)(1), generally accepted accounting principles apply to the accounting and bookkeeping systems for private schools for the handicapped. The same regulation provides as well that fixed asset expenditures of $1,000.00 or more shall be capitalized and depreciated using the straight-line method and a useful life consistent with current federal tax law. Pursuant to subdivision one of N.J.A.C. 6:20-4.3, where the regulations themselves modify accounting principles which might otherwise be defined by the American Institute of Certified Public Accountants, the rules and regulations take precedence. Thus, as Ms. Lutz properly argues, generally accepted accounting principles as they apply to the treatment of fixed asset expenditures of $1,000.00 or more are superseded by N.J.A.C. 6:20-4.3(3). Citing from a fundamental text on accounting Ms. Lutz, to my satisfaction, establishes that landscaping and planting clearly constitutes a fixed asset; indeed, it does not seem to be in dispute that Y.A.L.E.'s own accountant acknowledges that a fixed asset is one having a life of more than one year.

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* Subsequent to the applicable facts in these proceedings, the regulation was amended to create an exception in respect to realty.

Further, the argument that might be made that the landscaping, although aggregating $4,425.00, in reality constitutes 48 separate purchases of less than $100.00 is unacceptable. The reasonable perspective of landscaping is the one which the testimony of the representative of respondent set forth: In order to determine the cost of a fixed asset one must reasonably look to the cost of the entire project not to the cost of each separate unit within the project. Y.A.L.E. paid one invoice totaling $4,825.00 for a landscaping project which was comprised of 48 plants but which also included design and installation.

In addition, Mr. Leone's assertion at page 8 of his letter (P-2) that because there was the possibility that the plants as a consequence of heat, cold, rain or disease might not survive a period of one year does not change their characteristics as fixed assets. Rather the question is whether from a reasonable prospective view of an asset it is to be expected that the item will be useful for more than a current year. Certainly the planting of shrubs and plants is done with the reasonable expectation that they will survive a one-year period. One would not wait until after the one-year period expired to retrospectively examine the landscaping to determine whether it constitutes a fixed asset or not.

Finally, as Ms. Lutz also notes, the landscaper guaranteed the plants for a period of up to one year. Clearly the landscaping constitutes a fixed asset whose value exceeds the value of each individual plant. Accordingly, I **CONCLUDE** that the petitioner has failed to establish by a preponderance of relevant credible evidence that the determination of the Department of Education which held that $4,425.00 expended for landscaping was a non-allowable cost and concluded that the cost should have been capitalized and depreciated as an improvement to school facilities was improper.

Window Shading Film Expenses

The Department of Education, utilizing the same approach that it took in respect to the landscaping issue, denied as a non-allowable cost $4,825.00 which Y.A.L.E. expended for the installation of shading film on the windows of the school. Asserting that the window shading film is a fixed asset and adopting the same reasoning as was the case for landscaping, the Deputy Attorney General asks that the cost for installation be deemed a fixed asset and controlled by N.J.A.C. 6:20-4.3(a)(3).

Mr. Forgash relies on Mr. Leone's letter (P-2) in support of his assertion that the Department's decision should be overturned. Mr. Leone indicates that in respect to the $4,825.00 total it is representative of ten different invoices ranging from between $400.00 and $500.00 each. Each invoice, Mr. Leone 's letter indicates, covered between 40 and 50 windowpanes, the costs also including caulking, repairing, scraping, coding and cleaning the panes. He concludes: "It is very doubtful that an expenditure of this type would increase the value of such a large property." Id. at 8. Mr. Leone again refers to a text of generally accepted accounting practices in support of his conclusion that the window shade filming is a cost and should be considered as a current expense.

I adopt for purposes of the window shade expense analysis the same reasoning that was applied and the same regulatory criteria that was applicable to the discussion of the landscaping costs. It is clear that the aggregate cost for the window shading film exceeds the $1,000.00 limitation under N.J.A.C. 6:20-4.3(a)(3) and that the shading film itself is and should reasonably be deemed a fixed asset, the expense of which should be capitalized. Because the regulation explicitly addresses itself to this fixed asset, any discussion in respect to how generally accepted accounting principles would deal with the issue is superseded by the regulatory standard; Y.A.L.E.'s effort to divide the expense at issue by arguing that there were separate invoices for a variety of window shades is untenable. The window shading film arose from a single contract and the price was for the installation of the window shading film which included as well the variety of repairs, scraping and caulking that was referred to. As Ms. Lutz notes, these other steps were preparatory for the installation of the window shading film and the expense should be perceived as being paid for one contractual project which is clearly a fixed asset. The intention and reasonable expectation is that window shading film is expected to benefit more than one accounting cycle and to last for more than a period of one year. It should also be noted that the contract was performed at a single installation.

Based upon the foregoing, I **CONCLUDE** that the petitioner has failed to establish by a preponderance of the relevant credible evidence that the determination of respondent, that the $4,825.00 expended by Y.A.L.E. for window shading film must be capitalized because it represented an expenditure for a fixed asset, was improper.

Expenses Related to the Conference Held in St. Thomas, Virgin Islands

Apparently some $2,015.70 (the amount is referred to at page 9 of exhibit P-2) was submitted by the petitioner as an expense which was related to the attendance by one of the school's owners and a teacher at a conference in St. Thomas, Virgin Islands. The respondent denied this expenditure as a non-allowable cost under N.J.A.C. 6:20-4.4(a)28 [currently N.J.A.C. 6:20-4.4(a)32], which deems costs non-allowable when associated with a professional conference and/or meeting "held in countries not contiguous to the United States."

There seems no dispute between the litigants in this matter that the conference at issue was indeed one which was associated with the professional and educational responsibilities of Y.A.L.E.; rather, the denial is based exclusively upon the geographical issue of whether indeed St. Thomas, Virgin Islands, is a country not contiguous to the United States.

The matter was initially dealt with on the motion for partial summary decision brought by Ms. Lutz. In my ruling and order I concluded that there were genuine fact issues presented which could not be resolved on the papers in respect to whether the St. Thomas, Virgin Islands, is or is not a country and if it is whether it is contiguous or not to the United States. In that ruling I explicitly indicated that the view expressed by Y.A.L.E., which was the sole basis for its opposition of the motion, which is based exclusively upon its accountant's statement in his letter of July 26, 1991 (P-2) does not establish, to my satisfaction, the resolution of the issue. See, Ruling and Order, October 22, 1991, on Motion for Partial Summary Decision at 7-8.

In his post-hearing submission at page 35, Mr. Forgash does not expand upon his opposition to the Department's determination but rather refers precisely to the same assertion by his accountant which duplicates the argument which was raised on the motion. Mr. Leone in his letter brief cites to the Encyclopedia Americana (1987 Edition) noting that the western Virgin Islands are "an unincorporated territory of the United States." Volume 28, page 148. Since in the determination of Mr. Leone based upon the encyclopedic definition, the Virgin Islands is not a country, then it is clear that whether it is or is not contiguous to the United States is irrelevant. Ms. Lutz, relying on Black's Law Dictionary's definition of "country," adopts an overly broad view of that definition which includes within it a primary meaning which implicates the population, the nation, the state or the government having possession and dominion over a territory.

Neither party has in my view provided the kind of geographic evidential proofs which would establish for this proceeding a resolution to the issue. Therefore, I, as a layman, am left to make a reasoned judgment based upon the ordinary interpretation given to the relevant terms. Having said that, it is my judgment that as the word "country" as commonly used does not apply to the Virgin Islands, which is deemed by one generally accepted encyclopedic definition to be an unincorporated territory of the United States. While there admittedly may be various nuances distinguishing the term "country" from the foregoing description and which might on other occasions, as for example in a diplomatic setting, make the two synonymous, a reading of the regulation strongly suggests that the intention was to exclude as allowable those expenses incurred in what one would traditionally describe as a country separate and distinct from the United States. That notion is disparate from disallowing costs incurred in an incorporated territory of the United States.

Accordingly and based upon the foregoing, I **CONCLUDE** that the petitioner has established by a preponderance of the relevant, credible evidence that the expenditures of $2,015.70 associated with a professional conference conducted by several of its personnel in St. Thomas, Virgin Islands, is not a cost associated with a conference held in countries not contiguous to the United States. It is, therefore, **ORDERED** that the decision of the Department which disallowed this expenditure under N.J.A.C. 6:20-4.4(a)28 [currently N.J.A.C. 6:20-4.4(a)32] is **REVERSED**.

Gardening Costs

The respondent denied as a non-allowable cost $725.27 which Y.A.L.E. asserted was expended for the purchase of plants and supplies for the school "garden" club. The denial was based on the determination by the Department that the purchase was for non-school related expenses and that Y.A.L.E. was unable to establish satisfactory proof sufficient to contradict that conclusion.

The representative of respondent in his testimony indicated and confirmed that he was provided with a garden club proposal from the school (R-6) indicating that the proposed costs for the gardening activities and supplies was to be a one time $50.00 to$60.00 expense going to the planting of bulbs during a four or five week period in the fall of the year. The various invoices submitted by Y.A.L.E. to Green Lea, Inc. totaling the $725.27 not only far exceeds the garden club's proposal

but also reflects purchases for the spring of the year as well as a variety of gardening items which not only are inconsistent with R-6 but which reasonably raise questions which would compel Y.A.L.E. to come forward and explain why these items would not have been purchased for home use.

I do not find as fact that the purchases at issue were made for the private use of any of Y.A.L.E.'s representatives; rather, the only evidential record Y.A.L.E. has provided in support of its claim, R-6, is inapposite to the proofs provided by the Department. Consequently, the petitioner has been unable to meet its burden and establish that the Department's determination was improper. Accordingly, I **CONCLUDE** that the petitioner has failed to establish by a preponderance of the relevant credible evidence that the determination of respondent that the expenditure for gardening of $725.27 was a non-school related expense was improper.

Allocation of Expense of Salary of the Executive Director and the Assistant Director

In its accounting, Y.A.L.E. sought to allocate exclusively to its Cherry Hill campus the salaries which it paid to its executive director and its assistant director for the 1987-88 school years. Presumably, this allocation would be one which is more fiscally advantageous to Y.A.L.E.'s balance sheets than if some of the salary expenses were allocated to its Williamstown campus.

Respondent disallowed this accounting, concluding that the allocation did not adequately and properly represent and reflect the work performed by these officials for the Williamstown campus. Thereafter, following this administrative determination, Y.A.L.E. sought to allocate 98 percent of the salaries at issue to its Cherry Hill campus, the remaining 2 percent to be allocated to its Williamstown campus. Respondent's position at hearing is that this allocation must also be rejected because it too fails to properly and accurately reflect the services performed by these officials for the Williamstown campus. As a consequence, the Department concluded that since in its view Y.A.L.E. was unable to reasonably establish a justification for any allocation of the salaries for its executive director and assistant director, resort had to be made to the then applicable regulation, N.J.A.C. 6:20-4.1(c), which provided:

> Whenever it is not possible to charge the actual amount expended for a particular allowable cost item for each private school site.... The individual share of such expenditure for each site or program shall be determined

> on a pro rata basis in accordance with the following ratios or other acceptable method as approved by the Commissioner....
>
> 1. Administration: Ratio of number of teachers, aides and assistants at each site or in each program to the total number of teachers, aides and assistants.

Petitioner again relies on the report of Mr. Leone (P-2) as a primary basis for its position that it indeed is able to reasonably allocate the costs associated with the salaries such that the invocation of N.J.A.C. 6:21-4.1(c) and its formula may be dispensed with. Mr. Leone and Y.A.L.E. rely almost exclusively on their assertion that allocation of salaries for these officials of Y.A.L.E. should be based on where the executive director and assistant director spend their time. "If their time was expended performing work relating to the Cherry Hill campus, then it follows that their cost should be allocated to the Cherry Hill school. On the other hand, if their time was expended performing work relating to the Williamstown school, then the cost should be allocated to the Williamstown school." P-2 at 4.

Thereafter, Mr. Leone seeks to make various distinctions between the Williamstown and Cherry Hill campuses and to correlate what is obviously a significantly more diminished Williamstown campus to a diminished allocation of the officials' time and salaries as they may be devoted to the educational process at the latter institution. The emphasis is then placed upon where both officials, Mr. Sarandoulias and Mr. Vonderschmidt, spent most of their time. The testimony suggested that all but one hour per-week was spent at the Cherry Hill campus. Mr. Leone also asserts that the daily time sheets which he notes are mandated to be maintained by the respondent indicated that both the executive director and the assistant director reported to the Cherry Hill facility each and every day of the school year.

In my view, the mere fact that both the executive director and the assistant director may have spent most of their time at the Cherry Hill location does not provide cogent evidence to support the view that the time that was spent there was devoted almost exclusively to Cherry Hill campus activities. In addition as Ms. Lutz points out, the fact that the time sheets were presented that indicate that these individuals were working at the Cherry Hill facility and the duration of their work at that facility merely demonstrates their physical presence there but "does not prove that they were not doing work for Williamstown." Respondent's brief, April 9, 1992, at 13.

Even if the Williamstown campus was, by respondent's admission, significantly smaller, it is axiomatic that responsibilities concerning that campus -- educational, managerial, fiscal, and a variety of other obligations -- had to be done on its behalf and could reasonably have been done at the Cherry Hill campus. The further effort by Y.A.L.E. to prove that its 98 percent/2 percent allocation is proper which relied upon mileage records to determine the number of trips Mr. Sarandoulias and Mr. Vonderschmidt may have made to Williamstown is equally unconvincing. Apparently the records indicated that there were some 42 trips in one vehicle during the applicable time frame made to the Williamstown campus. I am not convinced that given the distance of that campus and the time necessary to make the trip that this record of travel establishes any aspect of Y.A.L.E.'s assertion.

The record is unclear as to how much time and energy was spent by the executive director and the assistant director in respect to effectuating their responsibilities for the Williamstown campus. I am satisfied, however, that the record provided by Y.A.L.E. is insufficient to sustain its assertion that Mr. Sarandoulias and Mr. Vonderschmidt spent no more than 2 percent of their time, energy and involvement in matters concerning the Williamstown campus. Since Y.A.L.E. has been unable to support this 98 percent/2percent allocation and since neither I nor presumably the Department of Education is in a position to assess any other acceptable method to determine the appropriate allocation, resort has to be made to the regulation then in existence, N.J.A.C. 6:20-4.1(c), which was promulgated to address this very condition.

Accordingly, I **CONCLUDE** that the petitioner has failed to establish by a preponderance of the relevant credible evidence that the determination by respondent that Y.A.L.E. has not satisfactorily established the appropriate allocation for the salaries of the executive director and assistant director in respect to each of its two campuses and, thus, allocation must be established pursuant to N.J.A.C. 6:20-4.1(c) was improper.

Allowance for Contributions, Donations and Awards

In the ruling and order issued on October 22, 1991, Ms. Lutz's motion was granted in respect to determining that a variety of expenditures made by Y.A.L.E. were donations, awards and scholarships as defined under N.J.A.C. 6:20-4.4(a)14. See, Ruling and Order on Motion for Partial Summary Decision, October 2, 1991, at 3-4. As a consequence of that determination once such expenditures were designated

as contributions, donations or awards, there was a maximum allowable in the calculation of the certified actual cost per pupil of $750.00. The only issue that was left to be addressed, following the issuance of the ruling and order, was whether the $750.00 maximum applies to both the Cherry Hill and Williamstown campus or whether each campus is entitled to a separate $750.00 maximum.

Mr. Forgash in his post-hearing submission argues that since the testimony demonstrated that regardless of whose figures were utilized the amounts expended in the form of contributions, donations and awards by each campus exceeded $750.00, each should be entitled to a separate $750.00 maximum allowance. Ms. Lutz does not address this issue in either her initial or post-hearing submission. Presumably, therefore, she does not oppose Mr. Forgash's argument. Absent any dispute in respect to the total sum expended by Y.A.L.E. under this category,* it is reasonable to conclude that given the separate nature of both the Cherry Hill and Williamstown campuses each is deserving of a separate $750.00 maximum allowable cost.

Accordingly, I **CONCLUDE** that the petitioner has established by a preponderance of the relevant, credible evidence that pursuant to N.J.A.C. 6:20-4.4(14) each of its campuses is entitled to a maximum $750.00 representing contributions, donations, awards and scholarships which can be computed as an allowable cost in the calculation of the certified actual cost per pupil.

Based upon the foregoing, but for the determination arrived at granting Y.A.L.E.'s appeal rights in respect to the costs incurred at the conference attended in St. Thomas, Virgin Islands, and but for the declaration that each campus is entitled to a separate maximum of $750.00 allowable costs under N.J.A.C. 7:20-4.4(14), it is **ORDERED** that all of the other determinations arrived at by respondent be and are hereby **SUSTAINED**.

At page 6 of my October 22, 1991 ruling, after granting Ms. Lutz's motion in part and ruling that the purchase of expensive custom pen and pencil sets and leather desk sets were limited by the $750.00 maximum at N.J.A.C. 6:20-4.4(a)14, I explicitly noted I would not deny the respondent the right at hearing "to seek to argue that even in this respect any 'expression of thanks' to the owners of the school can also be attacked as an invalid expenditure...." To the best of my knowledge, neither at hearing nor in a post-hearing argument has respondent sought to make this argument.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

7/31/92
Date

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

8/3/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 6 1992
Date

OFFICE OF ADMINISTRATIVE LAW

rmp

EXHIBITS

For petitioner:

P-1A	Salary guide 1980-1981
P-1B	Salary guide 1981-1982
P-1C	Salary guide 1982-1983
P-1D	Salary guide 1983-1984
P-1E	Salary guide 1984-1985
P-1F	Salary guide 1985-1986
P-1G	Salary guide 1986-1987
P-1H	Benefit Package Summary
P-2	Report of Mr. Leone, July 26, 1991 (19 pages)
P-3	Examination Report, July 1, 1987 through June 30, 1988 (page 25)

For respondent:

R-1	Y.A.L.E. Policy Manual 1987-88 (pages 1-2)
R-2	Examination Report (same as P-3 but in its entirety)
R-3	Letter of 2/22/90 from Mr. Kent to Louis Sarandoulias (12 pages)
R-4	Letter of 3/27/90 from Mr. Kaplan (7 pages with attachments)
R-5-a, b, c	Landscaping invoices
R-6	Garden Club Proposal
R-7	Contract Addendum of 1987-1988

WITNESSES

For petitioner:

Connie Spiegle

Louis Sarandoulias

Edward Vonderschmidt

James Leone

For respondent:

Frank Domin

OAL DKT. NO. EDU 3912-90

Y.A.L.E. SCHOOL, INC.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter, including transcripts of hearings, and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner, as were replies thereto by the Department, pursuant to the provisions of N.J.A.C. 1:1-18.4. Both essentially rely on the arguments of post-hearing submissions which are well summarized by the ALJ and need not be repeated at length herein.

In its exceptions, petitioner makes general contentions that the ALJ made inaccurate factual determinations, that he failed to recognize petitioner's thorough impeachment of the credibility of the Department's sole witness, and that he erred in failing to consider petitioner's allegations of deficiencies in the conduct of the audit that gave rise to this matter. With regard to specific disallowances, except for the ALJ's determination on the allowability of expenses related to a conference in the Virgin Islands, petitioner contests all of the ALJ's recommendations for the reasons argued in its post-hearing summation as briefly

reiterated in its exception letter, particularly the issues of bonuses and fringe benefits.

In turn, the Department argues that, with the exception of the issue of the Virgin Islands conference expenses, the ALJ's findings and conclusions are well supported by the record and should be affirmed. The Department further notes that the hearing in this matter was expressly conducted de novo, so that the ALJ was correct in regarding alleged errors in the conduct of the underlying audit as irrelevant, and that the petitioner bore the burden of proving that its expenditures were allowable.

Upon careful review, the Commissioner concurs with the decision of the ALJ for the reasons well expressed by him in his initial decision. The Commissioner finds the ALJ's findings and conclusions to be fully supported by the record and sees no basis on which to question the ALJ's credibility judgments, which in any event are not central to a matter which hinges on questions of law and interpretation of regulation rather than on true disputes of fact. Further, the Commissioner finds that the hearing was indeed conducted de novo, so that petitioner had every opportunity to demonstrate the allowability of its expenditures entirely independent of the manner in which the audit may have been carried out (an issue on which no judgment is expressed herein). Finally, the Commissioner fully endorses the ALJ's interpretation of the controlling regulations in this matter and reiterates the ALJ's observation that allegations of unreasonableness in these regulations are challenges to facial validity which must be pursued in a court of appropriate jurisdiction.

Accordingly, the initial decision of the Office of Administrative Law, dismissing the instant Petition of Appeal in all regards except as to conference expenses incurred in the Virgin Islands and the separate maximum allowable cost of $750 under N.J.A.C. 6:20-4.4(14), is affirmed for the reasons well expressed therein.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

SEPTEMBER 17, 1992

DATE OF MAILING - SEPTEMBER 17, 1992

217-92

EDU #3912-90
C # 217-92
SB # 41-92

Y.A.L.E. SCHOOL, INC.,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, September 17, 1992

For the Petitioner-Appellant, Robert J. Forgash, Esq.

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney General (Robert J. Del Tufo, Attorney General)

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

January 6, 1993

Date of mailing JAN 06 1993

218-92

218-92

RODNEY BOND,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

OCTOBER 7, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF AND
DISMISSING CERTAIN CHARGES
OAL DKT. NO. EDU 6610-92
AGENCY DKT. NO. 408-8/92

RODNEY BOND,
Petitioner,
v.
BOARD OF EDUCATION
OF THE CITY OF CAMDEN,
Respondent.

Lloyd D. Henderson, Esq., for petitioner

Karen A. Murray, Esq., for respondent (Murray, Murray and Corrigan, attorneys)

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

Action for an order of emergent relief.

Rodney Bond (petitioner) alleges changes in the assignment of certain classes in the Camden Public Schools to certain school buildings by the Camden Board of Education (Board or respondent) violates the Individuals with Disabilities Education Act, 20 U.S.C.A. §1401 et seq. and N.J.S.A. 18A 46-1 et seq., parents' rights and was done in violation of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq. The petitioner seeks an order barring the assignments "without adequate counselling and preparation," voiding the assignments because the Board failed to solicit public input and voiding the assignments because the Board violated the Open Public Meetings Act.

The matter was opened before the Commissioner of Education on August 28, 1992. The Department of Education transmitted the matter to the Office of

Administrative Law pursuant to N.J.S.A. 52:14F-1 et seq. Because of the application for emergent relief, the Department and this Office agreed that the matter would be heard promptly. The moving papers were received at the Office of Administrative Law on Monday, August 31, 1992. Oral argument on the motion for emergent relief was heard at 3:00 p.m. on Tuesday, September 1, 1992. The Board presented a copy of its answer to the petition at hearing.

The petition of appeal is stated in three counts. In Count One, the petitioner asserts he made inquiries about a rumored change of assignment of fifth grade classes from the McGraw Elementary School to East Camden Middle School and of eighth grades from East Camden Middle School to Woodrow Wilson High School. At a board meeting on June 29, 1992, the petitioner asked if this were the board's intent. He received no definitive reply. The petitioner states the Board avoided making any decisions at this meeting. In or about August 1992, the Board sent certain parents letters concerning placement changes for the school year. This, in the petitioner's view, violated the Open Public Meetings Act. For himself "and other similarly situated parents" the petitioner argues this would seriously affect them. The petitioner further charges he can find no public notice of the Board's actions creating the reassignments. He asks that the actions be voided and that the Board be enjoined from carrying out the reassignments.

In Count Two, the petitioner alleges that in making its reassignment decision, the Board violated the Education of Handicapped Children Act [now, the Individuals with Disabilities Education Act] as to handicapped pupils. He cites N.J.A.C. 6:28-2.2. This count also alleges that the civil rights of affected persons were violated. He asks relief against the Board for refusing to entertain public input concerning this decision and voiding of such actions as were taken. He would also have the reassignments enjoined.

In Count Three, the petitioner alleges the Board violated the Individual Educational Plans of affected handicapped children. By way of relief, he would have the reassignments enjoined until and unless adequate counselling and preparation of affected parents and their children can be accomplished. He also seeks relief against the Board for refusing to entertain public input concerning a critical decision.

At hearing, the petitioner's argument generally followed the petition. The petitioner says he received "abbreviated" minutes of the June 29, 1992 Camden

Board of Education Meeting. He concedes the minutes are designated "approved." He contends, however, that the minutes do not record any decision made on reassignment of classes. He also states the superintendent of schools misrepresented facts to him. He believes a decision was made, yet the Board denied it publicly.

The Board argues that the matter was first raised in the Superior Court, Law Division, but Judge Davies decided to take no action. The petitioner then filed before the Commissioner of Education. He did not provide the Board's counsel with moving papers until August 31.

The petitioner has no children affected by the reassignments of grades 5 and 8. Irrespective of the changes, his children's status is unchanged. Therefore, he has no standing. Nor can he argue for unnamed "similarly situated parents" that they would be seriously affected by the move.

None of the petitioner's children are classified. Even if the petitioner had one or more classified children, no special education pupils are affected by the move to which he objects. Thus, he has no standing to bring this Count.

The Board has been discussing space utilization since the end of the 1991-92 school year. There is a planning committee. The Board knew its lower grades enrollments were rising while secondary enrollments were stable or declining. The Board had to realign attendance boundaries to satisfy State requirements.

Letters to parents starting going out in May 1992. The Board received no complaints from parents, teachers, employee unions or anyone else until this petition was filed. There has been full discussion of the matter at board meetings since May. The petitioner's claim that action was taken only at the June 29 meeting is false. The Board took actions as far back as May. All that occurred on June 29 was that Mr. and Mrs. Bond asked several questions during the portion of the meeting devoted to questions from the public. These questions are reflected in the minutes as are the Board president's answers.

No statutory violation is alleged. The Open Public Meetings Act is raised, but without specification. There is no allegation that the Board can answer; the allegations are all general.

The petitioner urges that the complaint is of a decision that was not made in public. He acknowledges letters to parents in July and August concerning the changes. He concedes a board of education can reorganize [its attendance areas]. He merely wants compliance with the law and community involvement. The Board counters that an individual must be directly affected in order to raise the counts in the present petition. Official minutes show that the changes were discussed over a period and that virtually all parents already knew of the changes to come.

By consent, a letter dated July 14, 1992 from the East Camden Middle School principal to parents was admitted in evidence. The petitioner states he believes the letter was received by parents on July 15 or 16.

DETERMINATION AND ORDER

Having heard and weighed the arguments of counsel, I **DENIED** the request for emergency relief. The petitioner could make no showing of immediate harm, no showing of irreparable harm and his likelihood of prevailing on the merits was arguable at best. These being the long established criteria for temporary restraints in New Jersey, the request was denied. Further, balancing the relative hardships to the parties in granting or denying the relief, the decision must go to the respondent. Crowe v. DeGioia, 90 N.J. 126 (1982).

All special education questions were **DISMISSED** as being without basis in fact or law. The Individuals with Disabilities Education Act is remedial legislation and congressional intent that it be liberally construed is clear. However, one still must have standing and there still must be a justiciable issue. The petitioner has no standing and classified pupils are not affected by the reassignment he objects to.

The Open Public Meetings Act, popularly known as the Sunshine Law, established the right of the public to witness in full detail all phases of the deliberating, policy formation and decision making of public bodies. The statute generally requires that the public be given advance notice of and the right to attend meetings of public bodies and that all discussions and official actions, unless specifically exempted in the act, take place in public. Personnel matters, matters in litigation and the acquisition of real estate are generally accepted exemptions. There are nine statutory exceptions in all. The act covers virtually all political subdivisions of the State.

In 1979, the Appellate Division of Superior Court decided that the Commissioner of Education has jurisdiction to determine issues arising under the Open Public Meetings Act as they relate to controversies under the school laws. Stated another way, when an administrative agency has primary jurisdiction to determine the underlying controversy, it may also consider issues raised under the Open Public Meetings Act. Sukin v. Northfield Bd. of Ed. 171 N.J. Super 184 (App. Div. 1979). Thus, if the petition of appeal was timely under the Open Public Meetings Act, the Commissioner has jurisdiction to consider the question. Counsel have been directed to brief the issue. Their papers are due on September 15.

In sum, this order **DENIES** the request for emergent relief whether argued on a standing theory or on the traditional criteria for temporary restraints. This order **DISMISSES** all special education questions raised as without basis in fact or law. In addition, the petitioner has no standing. Finally, the viability of any Open Public Meetings Act issue is being argued, on the papers, by counsel. Their papers are due on September 15, 1992.

So **ORDERED** this second day of September 1992.

This order may be reviewed by the **COMMISSIONER OF THE 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.

Bruce R. Campbell

BRUCE R. CAMPBELL, ALJ

cad

OAL DKT. NO. EDU 6610-92

RODNEY BOND,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

This matter has come before the Commissioner of Education by way of petition and motion for emergent relief filed with the Commissioner on August 28, 1992. The matter was transmitted to the Office of Administrative Law, without answer, on Monday, August 31, 1992, and the oral argument on the motion was conducted on September 1, 1992. No exceptions were filed by the parties to the recommended initial decision denying emergent relief and dismissing certain charges rendered by the Office of Administrative Law on September 1, 1992.

The initial decision notes that the petition states three counts, charging first that the Board violated the Open Public Meetings Act (OPMA) by failing to apprise the public of a change of assignment of fifth grade classes from the McGraw Elementary School to East Camden Middle School and of the eighth grade classes from East Camden Middle School to Woodrow Wilson High School. Petitioner, a member of the public and parent of two children in the school system, asks that the actions of the Board regarding

placement changes for the school year be voided and that the Board be enjoined from carrying out the reassignments, contending adverse affect upon him and other parents "similarly situated." (See Initial Decision, at p. 2.)

Count Two of the petition alleges that in making its reassignment decision, the Board violated the Education for All Handicapped Children Act (now, the Individuals with Disabilities Education Act) as to handicapped pupils, citing N.J.A.C. 6:28-2.2, [6:28-1.1 et seq.] and claiming the civil rights of affected persons were violated. He seeks, in this count, relief against the Board for refusing to entertain public input concerning such decision regarding reassignment of pupils and the voiding and enjoining of such actions as are taken.

Petitioner's third count alleges the Board violated the Individualized Education Programs (IEP's) of affected handicapped children, seeking relief in the form of enjoining the reassignments until and unless adequate counseling and preparation of affected parents and their children can be accomplished. He also seeks relief against the Board for refusing to entertain public input concerning a critical decision.

Upon careful and independent review of the record of this matter, which includes a tape recording of the oral hearing below, the Commissioner adopts as his own the findings and conclusions of the ALJ that petitioner has failed to meet the standards articulated by the court for pendente lite restraints as articulated in Crowe v. DeGioia, 90 N.J. 126 (1982), for the reasons expressed in the initial decision and on the tape recording of the hearing. The Commissioner further concurs with the dismissal of those issues

raised concerning special education as being without basis in fact or law and because such matters are not appropriately filed pursuant to N.J.A.C. 6:24-1.1 et seq. He concurs also with the ALJ's finding that petitioner lacks standing to raise such special education issues insofar as he is not directly affected by the Board's actions in this regard because he has no classified children and because his children are not affected by the reassignments in question.

Finally, the Commissioner concurs with those conclusions of the ALJ that petitioner does enjoy standing to raise an OPMA challenge, and that the question of viability of any OPMA violation alleged should move forward for argument before the ALJ.

Accordingly, the request for emergent relief is denied, the special education questions are dismissed, and the timelines of the OPMA issue shall move forward to argument.

Accordingly, the initial decision is adopted for the reasons expressed by the Office of Administrative Law.

COMMISSIONER OF EDUCATION

OCTOBER 7, 1992

DATE OF MAILING - OCTOBER 7, 1992

221-92

THOMAS EWING AND VINCENT ANEPETE, PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN ET AL., OCEAN COUNTY, RESPONDENTS.	:	DECISION

SYNOPSIS

Petitioners, residents and taxpayers of Ocean Township school district, challenged Board's handling of pupil transportation. Petitioners wanted buses available for evacuation of pupils in times of disaster. Board had determined to sell its fleet of buses and contract for transportation services.

ALJ dismissed petition for failure to state cause of action upon which relief could be granted. Board can decide for itself how to provide mandated or discretionary pupil transportation.

Commissioner adopted findings and determination in initial decision.

SEPTEMBER 23, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4443-92
AGENCY DKT. NO. 269-6/92

THOMAS EWING AND
VINCENT ANEPETE,
Petitioner,
v.
OCEAN TOWNSHIP BOARD OF EDUCATION,
Respondent,

Thomas Ewing, pro se, on behalf of himself and **Vincent Anepete**

Paul Carr, Esq. for respondent

Record Closed: July 17, 1992 Decided: August 6, 1992

BEFORE **DANIEL B. McKEOWN,** ALJ:

This matter was originally opened before the Commissioner of Education by petitioners, residents and taxpayers of the Ocean Township School District, who filed a Petition of Appeal, together with an application for emergency relief, regarding a then pending board action regarding school bus transportation to be provided pupils in the Ocean Township District. After the matter was transferred June 16, 1992 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., oral argument on petitioner's motion for emergency relief was heard June 19, 1992. The application for emergency relief was denied on the record, and in writing by letter dated June 19, 1992. Moreover, the Board was granted leave to move to dismiss the entire petition of appeal, which it did, and which petitioner opposes by letter memorandum dated July 16, 1992.

For the reasons which follow, the conclusion is reached in this initial decision that the Petition of Appeal should be dismissed for failure to state a cause of action.

MOTION TO DISMISS

The Board seeks dismissal of the Petition of Appeal for failure to state a cause of action. The Petition, as is understood by this judge, alleges the following:

1. The Board determined on or about April 23, 1992 to provide school bus transportation for its district pupils through public bidding from outside school bus contractors rather than continue to provide transportation through district-owned school buses.

2. The Board, or some member or members of the Board, publicly stated a 10 year "comparison feasibility study, (costs only)" was performed, only to have Board member K. Dunster state that the asserted study was informal, rather than formal, and that no record or copies of the informal study exist. Petitioner assert that these comments are in "direct conflict" with the substance of a letter sent petitioner Ewing by the Commissioner of Education. It is noted that the Commissioner advised petitioner Ewing that the district superintendent

> *** informed us that a study which compared contacted transportation services to the district owned operation was conducted for the board of education. The results of the study indicated that approximately $125,000 could be saved by the board if they were to use contracted buses.

3. After having placed into issue the asserted feasibility study, petitioners next say that the Board abused its discretion by conducting its feasibility study without professional help "except for meeting and discussions with Mr. Murphy. Mr. Murphy is otherwise unidentified in this Petition, though later reference is made to a Murphy Bus Company. In the same paragraph, petitioners complain that the Board violated a

"Public Information Act" by failing to produce a copy of the feasibility study.

4. Petitioner say that the estimated cost savings of $125,000 referenced in the Commissioner's letter as the result of the change in method of providing school bus transportation is false and inflated.

5. Petitioners, in a conclusory manner, state that the Board abused its discretion "by attempting to [expedite] the sale of public and, or state property (namely buses) at a loss that could $100,000. " Without pleading any facts upon which that conclusion is reached, petitioners then allege that the Board is disposing of district owned buses, at the asserted loss, "at the insistence of Murphy Bus Company."

6. In this paragraph, petitioners complain that without district-owned school buses on district property during the school day, the Board cannot meet emergency evacuation plans, or early dismissal due to inclement weather, or as stated during the oral argument for emergency relief in the event of a nuclear disaster or forest fire. Petitioners contend that the Board is simply wrong when it states that 'emergency evacuation plans weren't the school boards responsibility'.

7. Petitioners claim in this paragraph that the Board acted unreasonably because it failed to provide adequate consideration to the future safety and lives of pupils because it failed to conduct any study or review any future evacuation procedures prior to the award of a school bus contract. Though not specifically pleaded, it may be inferred that a Murphy Bus Company was awarded a school bus transportation contract.

8. Here, petitioners complain that the Board acted improperly in failing to demand of the successful bidder that its school buses be maintained on a daily basis at the Board's Waretown elementary school for the entire school year.

Petitioners, on the basis of the preceding eight paragraphs contained within the Petitioner of Appeal, seek relief in the form of a temporary restraining order against the Board from entering into any contract until a decision on the merits is issued; that the Board be restrained from selling any of its district owned buses until a decision on the merits is reached; that if they prove the Board will not save $125,000 by contracting out its school bus transportation, that the Board be directed to continue its own school bus transportation with its own district-owned buses; that any school bus contract awarded to an outside contractor include a clause that the successful bidder must leave at least 10 or more school buses at a designated elementary school throughout the entire course of a school day throughout the entire school years; and, petitioners ask for "relief regarding the State and, or County Emergency Evacuation Plan as it now stands ***".

ANALYSIS

N.J.S.A. 18A:6-9 grants jurisdiction to the Commissioner to hear and determine all controversies and disputes under the school laws or under the rules of the State Board or of the Commissioner. N.J.S.A. 18A:39-1 imposes upon boards of education the obligation to provide transportation of its elementary pupils who live more than two miles and secondary pupils who live more than two and one-half miles from the public school of attendance. N.J.S.A. 18A:39-1.1 provides local boards of education with the authority to provide transportation to and from the school house to its pupils who live lesser distances from the school house. Finally, N.J.S.A. 18A:39-2 provides discretionary authority to boards of education to provide such pupil transportation by a bus or buses owned by it or may enter into contract for such transportation, approved by the county superintendent for a term not exceeding four years.

It is obvious, therefore, that a board of education providing school bus transportation to its school pupils may properly be the subject matter of a dispute which is brought to the Commissioner for resolution under N.J.S.A. 18A:6-9. The format of such petition is governed by administrative rule at N.J.A.C. 6:24-1.3 which states, in part, that the petition must include

> 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.

While the petition is verified by oath, it is absent 'a statement of the specific allegation(s) and essential facts supporting them which have given rise to a dispute under the school laws'. Paragraph one alleges simply that in petitioner's view the Board failed to meet the needs of the public by taking its controverted action on April 23, 1992. No facts are pleaded in this paragraph or any paragraph of the petition upon which petitioners conclude the Board failed to meet the needs of the public. Paragraph two says that the Board, or a member thereof, was to have conducted a ten year comparison feasibility study while one member was to have said the study was not a formal study which, in petitioners view, is to be in direct conflict to a letter from the Commissioner to petitioner Ewing. Paragraph three merely recites that the Board was unreasonable for conducting a feasibility study, formal or informal, without professional help except for 'meeting and discussions with Mr. Murphy'. Even if Mr. Murphy is the same Murphy from Murphy Bus Company, no facts are pleaded in this paragraph which gives rise to any cognizable dispute before the Commissioner.

Next, regardless whether the Board would realize a first year saving of $125,000 from contracting out its pupil transportation service rather than maintain in-house pupil transportation service is not a fact which gives rise to a dispute. The figure is an estimated figure only; it is not cast in concrete, nor should it be. That the Board elected to sell its school buses, without an allegation of unlawful impropriety, 'at a loss that could exceed $100,000', is not a basis whch gives rise to a cognizable dispute. There are no facts pleaded upon which petitioners conclude a loss was imminent, certain, unjustified, or, alternatively, that the Board was doing something unlawfully improper resulting in such a loss. The legal fact remains boards of education have authority to dispose of property no longer necessary for the operation of a thorough and efficient program of education. N.J.S.A. 18A:20-2.

Finally, petitioners complaint that a total evacuation plan of Ocean Township, not merely the school district, had contemplated the use of on-site school buses at the Waretown Elementary School and that the sale of district owned school buses in contravention of that township wide evacuation plan is insufficient, even if true, to prevent the Board from exercising its discretionary authority to change the method of school bus transportation it provides its pupils or to sell district-owned school buses.

In short, petitioners plead no facts which give rise to a cognizable dispute before the Commissioner of Education. While it is understood petitioners essential complaint is that school buses had traditionally remained on site at the Waretown Elementary School and, as such, had been targeted for use for the evacuation of either the Waretown public school pupils themselves or conjunction with the entire community in the event of a natural or unnatural disaster, the decision regarding how the Board is to provide mandated or discretionary pupil transportation remains exclusively in its hands. Absent facts upon which a cognizable dispute is presented for the Commissioner's determination, a difference of opinion regarding the most effective use of resources available to the Board in order for it to provide thorough and efficient program of education, including transportation, the intervention of the Commissioner, even to a limited degree of conducting a hearing on that difference of opinion, is highly inappropriate. Boards of education should not be exposed to the liability of defending its actions, otherwise considered proper and pursuant to law, of having to defend itself in a difference of opinion regarding how best to use limited resources.

For the foregoing reasons, I conclude petitioner have failed to state of cause of action in the petition of appeal upon which relief could or should be granted. Therefore, the Board's motion to dismiss is **GRANTED.** The Petition of Appeal is **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 6, 1992
Date

Daniel B. McKeown
DANIEL B. McKEOWN, ALJ

Receipt Acknowledged:

8/10/92
Date

Maureen L. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 13 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

tmp

THOMAS EWING AND VINCENT ANEPETE, PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN ET AL., OCEAN COUNTY, RESPONDENTS.	:	DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioners filed a timely submission pursuant to N.J.A.C. 1:1-18.4 indicating that they

> do not wish to cost the Ocean Township Board of Education several thousand dollars in legal fees to continue to defend their position; nor do [they] wish to cause any possible, further embarrassment which could be caused by court proceedings. Therefore, [they] will not appeal the recent decision made in this matter to deny [their] Petition.
> (Letter from Thomas Ewing, filed August 25, 1992)

However, said submission then goes on to ask for the Commissioner's "intervention" (Id.) regarding two areas of appeal, including keeping a minimum of ten buses on location at any time school is in session and to study, plan, rewrite and propose a new, updated emergency evacuation plan immediately, claiming that the lives of their children are knowingly being placed in jeopardy by failing to provide ten on-site buses while school is in session.

Upon careful and independent review of the record of this case, the Commissioner adopts as his own the findings and conclusions of the Office of Administrative Law dismissing the instant petition for failure to state a cause of action for which relief can be granted. As noted by the ALJ

> Absent facts upon which a cognizable dispute is presented for the Commissioner's determination, a difference of opinion regarding the most effective use of resources available to the Board in order for it to provide [a] thorough and efficient program of education, including transportation, the intervention of the Commissioner, even to a limited degree of conducting a hearing on that difference of opinion, is highly inappropriate.
>
> (Initial Decision, at p. 6)

Having uncovered no basis in the instant record to establish a cognizable dispute pursuant to the Commissioner's authority pursuant to N.J.S.A. 18A:6-9, the Commissioner adopts that conclusion of the Office of Administrative Law dismissing the instant Petition of Appeal by granting the Board's motion to dismiss.

John C Woodbury

ACTING COMMISSIONER OF EDUCATION

SEPTEMBER 23, 1992

DATE OF MAILING - SEPTEMBER 23, 1992

222-92

JANET MOORE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, former departmentalized 7th and 8th grade reading teacher, challenged her involuntary transfer to position as 3rd grade elementary teacher. Petitioner claimed she had more seniority then teachers retained.

ALJ concluded Board's transfer of petitioner was reasonable as petitioner was transferred within the scope of her K-8 elementary certification and petitioner was not singled out for transfer for improper reasons. ALJ found transfer was Board's managerial prerogative. Petitioner's employment was not terminated, she was merely transferred; thus, use of seniority list was not triggered.

Commissioner adopted findings and determination in initial decision. However, because petitioner raised possibility that teachers certified only in English were improperly teaching reading, Commissioner directed that County Superintendent ensure that all reading teachers in Cherry Hill school district are properly certificated for their positions.

SEPTEMBER 22, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8943-91
AGENCY DKT. NO. 328-8/91

JANET MOORE,
Petitioner,
v.
CHERRY HILL TOWNSHIP BOARD OF EDUCATION,
Respondent.

Justin T. Loughry, Esq., for petitioner (Tomar, Simonoff, Adourian & O'Brien, attorneys)

William C. Davis, Esq., for respondent (Davis, Reberkenny & Abramowitz, attorneys)

Record Closed: June 26, 1992 Decided: August 10, 1992

BEFORE **AUGUST E. THOMAS**, ALJ, t/a:

Petitioner is a tenured teacher employed by the Board of Education of the township of Cherry Hill (Board) who contests her involuntary transfer from a departmentalized 7th-and-8th-grade school where she taught reading to her new position as a 3rd grade elementary teacher. Petitioner asserts that the Board violated her tenure and seniority rights by its failure to transfer teachers with lesser seniority rather than her. The Board denies all of petitioner's allegations and states that she has been reassigned within the scope of her teaching certificate and that it owes petitioner no further duty. After filing her appeal, the Commissioner of Education, on September 20, 1991, transferred this matter to the Office of

Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A hearing was conducted on May 11, 1992, in the Office of Administrative Law, Trenton. The parties filed letter briefs, the record was closed on June 26, 1992, with the filing of petitioner's letter memorandum.

ISSUE

Where there is a reduction in force (RIF) with a resultant reassignment (transfer), is petitioner entitled to be returned to her position as a reading specialist because of her alleged seniority?

RELEVANT FACTS

Based on the testimony of the witnesses and the documentary evidence, I **FIND** the following facts.

1. The Cherry Hill Township Board of Education ("Respondent", or "Board"), maintains its grades 7 and 8 as "elementary schools" with departmentally-organized instruction.

2. At all relevant times, two Cherry Hill school buildings housed grades 7 and 8, the Beck School and the Carusi School, known prior to 1985 or 1986 as the Brainerd School. Events and staffing at Carusi (Brainerd) are at issue in this case.

3. In the early 1980s, the respondent allowed and encouraged teachers with K-to-8 elementary certification/endorsement to teach in departmentally organized grades 7 and 8 grade in the subject of "Developmental Reading."

4. Respondent has generally referred to the reading department and reading curriculum at the 7th-8th-grade level as "Developmental Reading" (P-22, curriculum guide).

5. Petitioner became a "reading" teacher at the 7th-grade level at the Brainerd/Carusi School in September 1982.

6. Petitioner is an elementary certified, K-8 teacher in respondent's employ. Petitioner holds no other certifications. As of June 1, 1991, petitioner accrued twenty-two years' total district seniority and had spent nine consecutive years teaching developmental reading at the junior school at the grade 7th-8th-grade level.

7. From September 1982 through September 1984, petitioner and other similarly certified teachers taught in

the reading department at Brainerd/Carusi Junior School under contracts describing the position as a "Reading" teacher (P-20).

8. In the fall of 1984, the Board changed the name of the position on petitioner's contract from "Reading" teacher to "Reading/English" teacher; and from in or about June of 1985 to June 1991, these contracts described the position as "English Teacher."

9. Until the end of the school year 1990-91, Board documents referred to a "Reading" department at the Carusi School separate and apart from other departments such as the language arts, math or science departments. During the 1991-92 school year, documents maintained by the superintendent eliminated mention of the "Reading" department in favor of an "English" department (P-9 and P-10).

10. Prior to the 1991-92 school year, respondent recognized a "Reading" department at the 7th-8th-grade level.

11. In May 1991, the Board decided that it was necessary to create five "English" positions at the Junior School level, to create positions for high school English teachers who would otherwise be "riffed." The five positions that were made open as of May 1991 were positions held at that time by teachers McFarland, Carter, Moore, LoVuolo and Bates. Each of these teachers held the K-8 certification and no secondary certification (P-11). McFarland, Carter, Moore and LoVuolo were teaching developmental reading, whereas Bates was assigned to teach "English."

12. In the summer of 1991, the Board determined that it was necessary to transfer one of the reading teachers at the Carusi School; petitioner was selected.

13. To identify the class of persons from whom involuntary transfers from Carusi's reading department would be drawn in May 1991, the Board determined that involuntary transfers would come solely from the ranks of teachers who held only the K-to-8 elementary certificate, exempting teachers who held subject matter endorsements in addition to the K-to-8 elementary certificate (P-5).

14. Within these parameters, the Board set forth three criteria for selecting those who would be involuntarily transferred first:

a. Seniority in the subject area since the Old Bridge* decision.

b. Number of years' experience at the 7th-8th-grade schools.

c. Total district seniority if there is a tie after a and b. [P-5]

15. As of May 1991, no teacher with a K-to-8 certification working in a departmentally organized subject grades 7 or 8 could legally have earned more than eight years' secondary seniority pursuant to the Old Bridge decision, supra.

16. As of the date of petitioner's involuntary transfer, in or about May 1991, the following teachers were teaching developmental reading at the 7th-8th grade level and with the following endorsements, experience, and related characteristics:

NAME	CERTIFICATION ENDORSEMENT	TOTAL DISTRICT SENIORITY (AS OF MAY 1991)	# YEARS ACTUALLY IN "READING" (gr. 7-8) SINCE SEPTEMBER 1, 1983	# OF YEARS TEACHING ENGLISH SINCE OLD BRIDGE	# OF YEARS TEACHING IN SOME CAPACITY IN JR. SCHOOL
McFarland	K-8	25	8	0	10
Carter	K-8	23	8	0	10
Moore	K-8	22	8	0	9
Wells	Fr., Eng., Sp.	25	3 teaching Reading, but under English certification	0	18
Chanowicz	Remedial Reading Spec., Russian, Library	21.2	3	0	?
LoVuolo	K-8	15	8	0	15

See P-6, 7, 8, 11, and 12.

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* In re Seniority Rights of Certain Teaching Staff Members Employed by the Old Bridge Township Board of Education, et al., 1984 S.L.D. 144 (August 6, 1984).

For the school year, 1991-92, these "reading teachers" remained the same except for petitioner, who was transferred to a 3rd grade teaching position. The Carusi Junior School lost one reading teacher position between 1990-91 and 1991-92.

Certain other teachers were assigned to teach "English" at Carusi in 1990-91 (as of May 1991):

NAME	CERTIFICATION/ ENDORSEMENT	TOTAL DISTRICT SENIORITY	# YEARS ACTUALLY IN "READING" SINCE SEPTEMBER 1, 1983	# OF YEARS TEACHING ENGLISH SINCE OLD BRIDGE	# OF YEARS TEACHING IN SOME CAPACITY IN JR. SCHOOL
Ellis	K-8	16.8	0	8	16.8
Bates	K-8	14.5	0	No more than 8	
Cutler	K-8 English	20	0	8	9

17. As indicated in the first chart above, Anne Wells taught developmental reading in 1990-91 and continued to teach developmental reading in 1991-92 under the "English" secondary certification (P-9).

18. As of May 1991, Anne Wells had three years' experience teaching developmental reading, taught under an English endorsement on her certificate. Petitioner had nine years teaching developmental reading under the K-8 elementary certificate. Wells remained at Carusi teaching developmental reading. Petitioner was transferred to an elementary position in the lower grades.

19. The superintendent and/or the Board created the above-described involuntary transfer system to save jobs; that is, they confined the involuntary transfers to K-through-8 certified teachers because such teachers may revert to available elementary contained classroom jobs within the district when transferred from their junior school positions.

20. Anne Wells did not have a K-to-8 certification; therefore, she could not take a primary grade (K-6) job.

21. Helen Chanowicz, also was not included in the class of persons from whom involuntary transfers were drawn. She had an endorsement on her certificate as a remedial reading specialist, an endorsement which allows her to teach small groups of persons in need of remedial reading as opposed to the regular developmental reading curriculum at the 7th-or-8th grade level. That reading specialist endorsement would empower her to teach at any level in the school system (P-7).

22. Helen Chanowicz taught developmental reading for three years as of May 1991, whereas petitioner had nine years experience in the subject (P-11See also P-17). Despite Chanowicz's lesser experience in grade 7-8 reading, she was not included in the group exposed to the possibility of involuntary transfer in May 1991.

23. As of May 1991, teacher Linda LoVuolo had one less year teaching developmental reading since the Old Bridge decision (September 1, 1983) than petitioner. Since September 1, 1983, LoVuolo had taught "English" one year and "Reading" for seven years (P-15). Under the articulated criteria of (P-5), petitioner would have had one more year teaching "reading" than LoVuolo since September 1, 1983. Linda LoVuolo's experience was thus "tied" with petitioner's when her "reading" and her "English" years were equated, and then added to each other. However, LoVuolo had 15 years teaching in the junior school as opposed to petitioner's eight (See item 14b above.)

24. As of May 1991, Gayle Cutler had eight years teaching "English", at the 7th-9th-grade level, nine years at the junior school level, and twenty years' district seniority. Similarly, petitioner had eight years in the subject (whether it is called reading or English), nine years at the junior school, and twenty-two years district seniority. However, Gayle Cutler was exempted from the involuntary transfer, because she holds a secondary "English" endorsement on her certificate. She also holds a K-8 certification.

CONCLUSIONS OF LAW

Petitioner relies on her seniority in the district as a "reading" teacher to assert her right to reinstatement in the junior school as a teacher of reading. However, in my judgment, the seniority regulations are not triggered based on the above facts, which with some modification, are reproduced entirely from petitioner's "Findings of Facts and Conclusions of Law."

The relevant statute is N.J.S.A. 18A:28-9 which reads as follows:

> 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. [Emphasis added].

Petitioner's employment was not terminated. She was merely transferred from one position (reading) to another (teacher of 3rd grade). She holds an appropriate K-8 certificate for both positions.

If there was a reduction in force in the district, it did not affect petitioner's employment. Perhaps the reduction was made from normal attrition, retirements, and non-reemployment of nontenured teachers. In any event there is no showing that the reduction triggered the utilization of a seniority list that would guarantee petitioner her former position.

The record shows that K-8 teachers are authorized to teach reading and that secondary certified English teachers may teach developmental reading. Teachers holding the reading specialist endorsement are also authorized to teach reading. However, English teachers are not authorized to teach pupils how to read.

In this context the Board, with the cooperation of the local education association personnel, established the criteria by which reassignment would be made. These are set forth by fact 14a, 14b and 14c above. An examination of the facts and the charts as set forth by petitioner discloses that petitioner was the least experienced "reading" teacher in the junior schools with the exception of those teachers holding secondary English or remedial reading endorsements. Teacher Bates does not have her junior school experience designated in the second chart above; nor is there any discussion of her junior school experience in petitioner's memorandum; nevertheless, P-11 indicates her district seniority at 14.5 years, therefore, absent any showing to the contrary, an inference may be drawn that her junior school experience is 14.5 years. Further, Bates is listed under language arts (p-110.

Based on the above analysis, each of the teachers compared by petitioner met the Board's criteria to remain in "reading" positions.

Petitioner developed several scenarios involving those persons teaching developmental reading with subject matter endorsements such as English and remedial reading, suggesting various transfers and reassignments the Board could have made rather than her transfer to third grade. Undoubtedly, the Board might have considered a different approach in this situation; however, the record shows that after considerable evaluation it decided that the most equitable approach was to transfer petitioner. There is no showing whatever that petitioner's transfer is arbitrary or without a reasonable or rational basis.

CONCLUSIONS OF LAW

In Guy Ciarcia v. Board of Education of the City of Trenton, OAL DKT. NO. EDU 7639-90 (July 15, 1991), (September 3, 1991), the petitioner alleged that the board of education violated his seniority rights when it reassigned him from secondary to elementary school, while retaining less senior teachers in secondary positions. Relevant quotes from the administrative law judge's (ALJ's) decision are reproduced below.

> The Board points out that whatever seniority claim petitioner may have the claim has not been triggered by his reassignment and cites Howley v. Ewing Township Board of Ed., 1982 S.L.D. 1328, 1340, aff'd State Board, June 1, 1983. Because neither petitioner nor any other art teacher lost their employment as the result of its reorganization which resulted in the movement of 9th grade students from junior high school to the high school, its reorganization did not result in the abolishment of any teaching positions as authorized under N.J.S.A. 18A:29-9. Simply put, the Board says that it transferred petitioner from one assignment for which he is properly certificated to another assignment for which he is properly certificated under the same instructional certificate, with the same endorsement . . . [Ciarcia, OAL DKT. NO. EDU 7539-90, at 4; emphasis added]

> The facts in this case show that petitioner neither lost his employment with the Board as a teacher of art, nor has he suffered a salary reduction, nor was he transferred to a position for which he is not properly certificated, and the facts show that the Board properly transferred him pursuant to law. Petitioner's claim to an enforceable

> senior right in those circumstances to a position solely at the secondary level is wholly without merit and no one of the cases petitioner cites in his letter memorandum lends any support to his argument. Each of the cases cited by petitioner addresses a situation where the complaining party lost their employment or were reassigned from a full time to a part time position. Such is not the case here. Nothing at all happened to petitioner other than he was reassigned from the secondary level to the elementary level. [Ibid.]
>
> Petitioner's attempt to liken his situation regarding his transfer from the secondary to the elementary level, under the very same instructional certificate and under the very same endorsement by which he has been employed consistently throughout his career with the Board, to an enforceable seniority claim in these circumstances is rejected. It is acknowledged that a teacher with tenure may not be transferred from one category of employment which requires a specific endorsement on a particular certificate to another position, or category, which requires either a separate certificate and endorsement or a new endorsement on the same certificate, is improper without the teacher's consent. However, that is not the case here. Quite simply, petitioner was simply transferred by the Board from one assignment to another assignment but in the same position of teacher of art. His attempt to distinguish "categories" in these circumstances is misplaced for categories apply only in the contest of seniority and whatever seniority claim he may have is not applicable here because his employment as a teacher has not been affected. [Id. at 5]

Affirming the decision, the Commissioner commented as follows:

> As the ALJ properly notes, petitioner suffered no loss of employment, no reduction in salary or any other action that could be deemed to violate his tenure or seniority rights; he was merely transferred within the scope of his certificate as it is well established that boards of education have the prerogative to do. Greenway v. Board of Education of the City of Camden, 129 N.J.L. 46, 28 A. 2d 99, affirmed 129 N.J.L. 461, 29 A. 2d 890 (1943); Ridgefield Park Education Association v. Ridgefield Park Board of Education, 78 N.J. 144 (1978); Shirley Vanderhoff v. Board of Education of the Scotch Plains-Fanwood Regional School District, Union County, Commissioner Decision April 15, 1987, affirmed State Board June 1, 1988, affirmed N.J. Superior Court Appellate Division May 8, 1989.

In Ridgefield Park, the Court discussed whether or not teacher transfers were negotiable under terms and conditions of employment. Although this matter is not a negotiations problem, the court's language is significant and pertinent to the matter herein.

> The selection of the school in which a teacher works or the grade and subjects which he teaches undoubtedly have an appreciable effect on his welfare. However, even assuming that this effect could be considered direct and intimate, we find that this aspect of the transfer decision is insignificant in comparison to its relationship to the Board's managerial duty to deploy personnel in the manner which it considers most likely to promote the overall goal of providing all students with a thorough and efficient education. Thus, we find that the issue of teacher transfers is one on which negotiated agreement would significantly interfere with a public employer's discharge of inherent managerial responsibilities. [Ridgefield Park, 78 N.J. at 156]

In the present matter, petitioner was transferred from a departmentalized 7th-and-8th-grade junior school to a K-6 elementary school, both within the scope of her K-8 elementary certification. This is clearly a managerial responsibility.

I **FIND** and **CONCLUDE** that the criteria established by the Board for the transfer of petitioner was reasonable, not arbitrary, capricious or unreasonable. The Board did utilize years of service at the 7th-and-8th-grade level to determine which teachers would be transferred and this criteria was applied fairly and consistently to all of its affected teachers.

Accordingly, the petition is **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10 August 92
Date

August E. Thomas
AUGUST E. THOMAS, ALJ t/a

Receipt Acknowledged:

10 Aug 1992
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 14 1992
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

km

DOCUMENTS

P-1 I.D.
P-2 I.D.
P-3 EVD Request for Information
P-4 EVD Answers to Requests
P-5 EVD Letter to MacFarland, May 28, 1991
P-6 EVD Personnel records of Wells
P-7 EVD Personnel records of Chanowicz
P-8 EVD Personnel records of Cutler
P-9 EVD Staffing Report, 1991-92
P-10 EVD Staffing Report, 1990-91
P-11 EVD Seniority List, English
P-12 EVD Certification Codes
P-13 EVD Board Policy re: RIF
P-14 EVD Memo re: k Known Vacancies for 1991-92 School Year
P-15 EVD Seniority Masterlist
P-16 EVD Preferred Eligibility List
P-17 EVD Letter to CHEA Grievance Committee, October 18, 1985
P-18 EVD Memo to MacFarland, December 19, 1984
P-19 EVD Budget/Staffing memo
P-20 EVD Moore Employment Contracts
P-21 EVD Seniority Register, Foreign Language, January 17, 1992
P-22 EVD English Developmental Reading, Junior Schools Course Outline
P-23 EVD 8th-grade textbook
P-24 EVD 7th-grade textbook
P-25 EVD English Text
P-26 EVD Grievance - Gayle Cutler
P-27 EVD Letter from Carolyn MacFarland, May 5, 1989

WITNESS LIST

Patricia Luca, Assistant Superintendent for Personnel
Carolyn Mac Farland - Teacher of Reading (Carusi)
Janet Moore - Petitioner

JANET MOORE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 1:1-18.4.

In her exceptions, petitioner renews her arguments that the Board's method for determining which teachers were transferred erroneously blurred "reading" and "English" with the result that an improperly certified teacher is now teaching reading; that the Board inappropriately placed higher value on subject certification as opposed to K-8; and that the Board's transfer system otherwise violated sound educational policy.

Upon careful review of this matter, the Commissioner concurs with the ALJ's fundamental analysis, as petitioner was transferred within the scope of her certificate, suffered no loss of salary or other reduction in employment, and was not singled out for transfer on constitutionally or statutorily prohibited bases. She therefore cannot claim under any circumstances that she has an

entitlement to be returned to her former position; at most she can point to specific violations of law in the system used by the Board to effectuate its staffing changes and seek a directive that such violations be remedied, which may or may not have an impact on her present assignment.

Petitioner has in fact alleged such a violation in her claim that improperly certified teachers may be teaching developmental reading. Contrary to the holding of the ALJ at p. 7 above, State Board regulation is clear that holders of English endorsements may teach reading only if they were doing so prior to February 1976 (N.J.A.C. 6:11-6.1(c)). While disposition of this issue is neither possible on the present record, nor necessary for resolution of petitioner's specific claim to her former position, to which she has no vested entitlement even if her allegation is true, the Commissioner cannot ignore the possibility that district staff are being placed in assignments for which they may be improperly certificated.

Accordingly, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal is affirmed substantially for the reasons expressed therein. However, in view of petitioner's unresolved allegations of improper certification, the Commissioner directs the Camden County Superintendent of Schools to ensure that all teachers of reading in the Cherry Hill school district are properly certificated for the positions they hold.

IT IS SO ORDERED.

SEPTEMBER 22, 1992

DATE OF MAILING - SEPTEMBER 23, 1992

John C Woodbury

ACTING COMMISSIONER OF EDUCATION

222-92

EDU #8943-91
C # 222-92
SB # 50-92

JANET MOORE,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATIoN

DECISION

Decided by the Commissioner of Education, September 22, 1992

For the Petitioner-Appellant, Tomar, Simonoff, Adourian & O'Brien (Justin T. Loughry, Esq., of Counsel)

For the Respondent-Respondent, Davis, Reberkenny & Abramowitz (William C. Davis, Esq., of Counsel)

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

S. David Brandt abstained.

February 2, 1993

Date of mailing FEB 04 1993

223-92

223-92

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
BOROUGH OF GLEN RIDGE, ESSEX : DECISION
COUNTY. :
:

SEPTEMBER 24, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NOS. EDU 3004-92 and
EDU 3005-92
AGENCY DKT. NOS. 128-4/92 and
127-4/92
(CONSOLIDATED)

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE BOROUGH OF GLEN RIDGE, ESSEX COUNTY

Ruby A. Siegel, petitioner, pro se

George P. Diamond, petitioner, pro se

Frank N. D'Ambra, Esq., for respondent, Glen Ridge Board of Education

Record Closed: August 3, 1992 Decided: August 11, 1992

BEFORE **STEPHEN G. WEISS**, ALJ:

This matter was transmitted by the Department of Education 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. on April 29, 1992, as the result of a filing by the petitioners, both of whom were defeated candidates at the April 7, 1992 Board election, alleging a variety of deficiencies in the electoral process. Since the two cases contained essentially the same set of circumstances, the matters were consolidated by me for purposes of hearing and decision

A plenary hearing commenced on May 7, 1992 and some testimony was taken. However, rather than continue with the proceeding, the parties met to discuss settlement and an amicable resolution of the consolidated matters then was reached.

Thereafter, a stipulation of settlement, signed by both petitioners, the Board president and the Board secretary was submitted to me for review. That stipulation is attached to this initial decision.

I have reviewed the record and the terms of the settlement, and **FIND**:

1. The parties voluntarily have agreed to the settlement as evidenced by the signatures appearing on the stipulation of settlement; and

2. The settlement is fair and reasonable and in accordance with law

I therefore **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 11, 1992
Date

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

8/13/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 18 1992
Date

OFFICE OF ADMINISTRATIVE LAW

amr

SILLS CUMMIS ZUCKERMAN RADIN
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Attorneys for
Glen Ridge Board of Education

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OFFICE OF ADMINISTRATIVE LAW

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

In the Matter of the Annual School Election, Borough of Glen Ridge	DOCKET NOS. EDU 3004-92 EDU 3005-92 STIPULATION OF SETTLEMENT

The parties have agreed to the terms as they appear on the attached Stipulation of Settlement in the above-captioned matter.

STIPULATION OF SETTLEMENT

IT IS HEREBY STIPULATED AND AGREED by and between the parties, GEORGE P. DIAMOND and RUBY A. SIEGEL, Petitioners, and the GLEN RIDGE BOARD OF EDUCATION, Respondent, that the above entitled action be and the same is hereby settled upon the following terms and conditions:

1. The GLEN RIDGE BOARD OF EDUCATION acknowledges that certain statutorily required procedures under Title 18A of the New Jersey Statutes Annotated concerning the counting and announcing of the vote, and concerning the rights of challengers, were not followed by the designated election officers at the Forest Avenue School in the April 7, 1992 Board of Education election;
2. GEORGE P. DIAMOND and RUBY A. SIEGEL acknowledge that the violation of procedures on April 7, 1992 was not a willful failure to perform or enforce the provisions of Title 18A and did not alter the results of the election;
3. In order to maintain public confidence in the integrity of the electoral process the GLEN RIDGE BOARD OF EDUCATION commits itself to conduct the training required under N.J.S.A. section 18A:14-6.1 prior to the next Board of Education election, and for each election thereafter, so that all election officers and employees are made aware of their statutory obligations and duties in the conduct of elections;
4. As a result of this settlement, GEORGE P. DIAMOND and RUBY A. SIEGEL agree to withdraw their Petitions which are docketed as

OAL No. EDU 3004-92 (Ruby A. Siegel) and EDU 3005-92 (George P. Diamond).

For Petitioners:

RUBY A. SIEGEL

GEORGE P. DIAMOND

Dated: 6/15/92

For Respondent:
GLEN RIDGE BOARD OF EDUCATION

Board President

Board Secretary

Dated: 7/13/92

OAL DKT. NOS. EDU 3004-92 AND EDU 3005-92

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE BOROUGH OF GLEN RIDGE, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

John C Woodbury

ACTING COMMISSIONER OF EDUCATION

SEPTEMBER 24, 1992

DATE OF MAILING - SEPTEMBER 24, 1992

224-92

224-92

IN THE MATTER OF THE TENURE	:	
HEARING OF JOSEPHINE ZAMOYSKI,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF JERSEY CITY,	:	
HUDSON COUNTY.	:	
	:	

SEPTEMBER 24, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10826-91
AGENCY DKT. NO. 363-10/91

IN THE MATTER OF THE TENURE HEARING OF JOSEPHINE ZAMOYSKI, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY.

Charlotte Kitler, Esq., for petitioner

Phillip Smith, Esq., for respondent
(Feintuch, Porwich & Feintuch, attorneys)

Record Closed: August 5, 1992 Decided: August 10, 1992

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

Josephine Zamoyski requested a hearing on charges by the State-Operated School District of the City of Jersey City, Hudson County. The matter was transmitted to the Office of Administrative Law on December 2, 1991 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.*

Prior to hearing, the parties agreed to settle the matter and submitted the attached Settlement Agreement Having reveiwed the record and the settlement terms, I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is further **ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/11/92
Date

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

8/12/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 13 1992
Date

OFFICE OF ADMINISTRATIVE LAW

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AUG 5 10 03 AM '92

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

CHARLOTTE KITLER
General Counsel
State-Operated School District
of Jersey City
346 Claremont Avenue
Jersey City, New Jersey 07305
(201) 915-6231

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
DOCKET NO. EDU-10826-91N

IN THE MATTER OF THE TENURE HEARING OF JOSEPHINE ZAMOYSKI, STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY.	:	SETTLEMENT AGREEMENT

The parties hereby agree as follows relative to the tenure charges filed against Josephine Zamoyski by the State-Operated School District of the City of Jersey City:

1. Ms. Zamoyski will immediately tender her resignation to be effective June 19, 1992.

2. Upon receipt of Ms. Zamoyski's written resignation, the State-Operated School District will withdraw the tenure charges filed on November 25, 1991 with the Commissioner of Education, Agency Ref. No. 363-10/91, and transmitted to the Office of Administrative Law under Docket No. EDU-10826-91N.

3. Ms. Zamoyski submits her resignation and enters into this Settlement Agreement voluntarily and without coercion.

FOR THE RESPONDENT

Josephine Zamoyski
JOSEPHINE ZAMOYSKI

Dated:

PHILIP FEINTUCH, ESQ.

Dated:

FOR THE STATE-OPERATED SCHOOL DISTRICT

Elena J. Scambio
DR. ELENA J. SCAMBIO
State District Superintendent

Dated:

Charlotte Kitler
CHARLOTTE KITLER, ESQ.

Dated: 5/11/92

OAL DKT. NO. EDU 10826-91

IN THE MATTER OF THE TENURE HEARING OF JOSEPHINE ZAMOYSKI, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standard for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983) The matter is hereby dismissed, subject to compliance with the terms of the settlement.

ACTING COMMISSIONER OF EDUCATION

SEPTEMBER 24, 1992

DATE OF MAILING - SEPTEMBER 24, 1992

225-92

225-92

THOMAS KNOWLES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SEPTEMBER 24, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 347-92
AGENCY DKT. 393-11/91

THOMAS KNOWLES,
Petitioner,
v.
OLD BRIDGE TOWNSHIP BOARD OF EDUCATION,
Respondent.

Arnold S. Cohen, Esq., for petitioner (Balk, Oxfeld, Mandell & Cohen, attorneys)

Harold G. Smith, Esq., for respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: August 6, 191992 Decided: August 11, 1992

BEFORE **STEVEN C. REBACK,** ALJ:

This matter was transmitted to the Office of Administrative Law on January 13, 1992 for a hearing pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/11/92
Date

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

8/13/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 19 1992
Date

OFFICE OF ADMINISTRATIVE LAW

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STATE OF N.J.
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AUG 6 2 58 PM '92

BALK, OXFELD, MANDELL AND COHEN, ESQS.,
50 COMMERCE STREET,
NEWARK, NEW JERSEY 07102
(201) 642-0161
ATTORNEYS FOR PETITIONER

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY

THOMAS KNOWLES, Petitioner, -vs- THE OLD BRIDGE TOWNSHIP BOARD OF EDUCATION, Respondent.	OAL DOCKET NO: EDU-00347-92 AGENCY REF. NO: 393-11/91 STIPULATION OF SETTLEMENT

The parties to the above-matter, Thomas Knowles, Petitioner, and the Old Bridge Township Board of Education, Respondent, having amicably settled their differences, it is agreed as follows:

1. Mr. Knowles' placement on the Board's salary guide will be adjusted, retroactive to September 1, 1991, by advancing him four steps on the salary guide;

2. Mr. Knowles' seniority status with the Board will be adjusted by granting him four additional years of seniority;

3. Mr. Knowles will receive back pay, retroactive to September 1, 1991, to correspond with his four step movement on the salary guide; and

4. This agreement fully resolves all issues in dispute presented in the Petition of Appeal.

BALK,OXFELD, MANDELL AND COHEN, ATTORNEYS FOR PETITIONER,

BY: _____
ARNOLD S. COHEN, ESQ.,

DATED: JULY 24, 1992

WILENTZ, GOLDMAN AND SPITZER, ESQS., ATTORNEYS FOR RESPONDENT,

BY: _____
HAROLD G. SMITH, ESQ.

DATED: AUGUST 4, 1992

THOMAS KNOWLES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law in the form of a joint stipulation of settlement have been reviewed. Upon examination of settlement terms, the Commissioner is unable to accept the settlement in its current form due to the fact that term No. 2 accords to petitioner four years of seniority credit without any information being provided to the record which allows the Commissioner to ascertain if the individual actually has a legal entitlement to said four years. Seniority is an employment protection which is controlled by statute and code and can be obtained only upon meeting the conditions of law. Moreover, seniority impacts not only on an individual teaching staff member's employment rights but also the employment rights of others.

Accordingly, the matter is remanded for modification of the settlement terms so as to address the infirmity cited above or for a plenary hearing on the merits.

IT IS SO ORDERED.

John C Woodbury

ACTING COMMISSIONER OF EDUCATION

SEPTEMBER 24, 1992

DATE OF MAILING - SEPTEMBER 24, 1992

225-92

23+-93
(225-92)

THOMAS KNOWLES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

FEBRUARY 16, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO.EDU 7803-92
AGENCY DKT. NO. 393-11/91
(OAL DKT. NO. EDU 0347-92 ON REMAND)

THOMAS KNOWLES,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,
Respondent.

Arnold S. Cohen, Esq., for petitioner (Balk, Oxfeld, Mandell & Cohen, attorneys)

Harold G. Smith , Esq., for respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: December 30, 1992 Decided: January 6, 1993

BEFORE **STEVEN C. REBACK**, ALJ:

STATEMENT OF CASE

This matter was transmitted to the Office of Administrative Law on remand on October 7, 1992 pursuant to a decision issued by the Commissioner of Education on September 24, 1992. The Commissioner found that the settlement which had been entered into and incorporated into an "initial decision settlement" on August 11, 1992 was unacceptable because the Commissioner was not provided with sufficient information to ascertain if the particulars engendered by term number two of the settlement was appropriate.

As a result the matter was remanded and on December 9, 1992 I convened a telephone conference call with counsel to discuss remediating the settlement. An amended stipulation of settlement was devised by counsel in an effort to satisfy the concerns expressed by the Commissioner and entered into on December 16, 1992. The settlement was received by my office on December 30, 1992.

I have reviewed the settlement and I **FIND**:

1. The amended settlement has been sufficiently modified so as to address the infirmities cited by the Commissioner in his decision of September 24, 1992.

2. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

3. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

11/6/93
Date

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

11/8/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 12 1993
Date

OFFICE OF ADMINISTRATIVE LAW

tmp

RECEIVED
STATE
OFFICE
DEC 30 7 42 AM '92

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
90 Woodbridge Center Drive
P.O. Box 10
Woodbridge, New Jersey 07059
(908) 855-6150

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY

THOMAS KNOWLES, Petitioner, -vs- THE OLD BRIDGE TOWNSHIP BOARD OF EDUCATION, Respondent.	OAL DOCKET NO. EDU-00347-92 AGENCY REF. NO.393-11/91 AMENDED STIPULATION OF SETTLEMENT

The parties to the above-matter, Thomas Knowles, Petitioner, and the Old Bridge Township Board of Education, Respondent, having amicably settled their differences, it is agreed as follows:

1. Mr. Knowles' placement on the Board's salary guide will be adjusted, retroactive to September 1, 1991, by advancing him four steps on the salary guide.

2. The question of Mr. Knowles' seniority status was referred to Robert F. Strauss, a Board consultant, to determine what seniority Mr. Knowles was legally entitled to. Mr. Strauss has prepared an updated seniority list for Seniority Industrial Arts Teachers dated 6/30/93 which indicates that Mr. Knowles is

legally entitled to fourteen (14) years of seniority as of that date. See copy of attached letter dated November 16, 1992, together with updated seniority list

3. Mr. Knowles will receive back pay, retroactive to September 1, 1991, to correspond with his four step movement on the salary guide.

4. This agreement fully resolves all issues in dispute presented in the Petition of Appeal.

BALK, OXFELD, MANDELL AND COHEN,
Attorneys for Petitioner

By: _____
ARNOLD S. COHEN, ESQUIRE

DATED: 12/18/92

WILENTZ, GOLDMAN & SPITZER
Attorneys for Respondent

By: _____
HAROLD G. SMITH, ESQUIRE

DATED: 12/16/92

CALIFON CONSULTANTS, INC.
Post Office Box 766 • Hanover, New Hampshire 03755 • (603) 643-1935 • FAX (603) 643-0676
Judith Esmay
Robert Strauss

RECEIVED
NOV 1992
RECEIVED
Asst. Supt.
For Sec. Ed.

16 November 1992

Old Bridge Board of Education
Administration Building, Route 516
Old Bridge, New Jersey 08857

Attention: Dr. Peter Delaney, Assistant Superintendent

Re: Seniority of Industrial Arts Teachers for 1992-93

Dear Dr. Delaney:

You have requested that I provide the current seniority entitlements of all Industrial Arts Teachers in the secondary grades of your district in conjunction with the Matter of Thomas Knowles v. Old Bridge Board of Education now pending before the Commissioner of Education.

The seniority list for the foregoing group of teachers as of 30 June 1993 is attached. I have based this list on full time employment for Mr. Knowles starting 9/1/92 and on information obtained this date regarding the status of Robert McClure who was hired as a 3/5 teacher on 9/1/92 and whose status, I understand, is to be changed to full time as of 11/11/92. I have not provided not updated list for the Elementary Industrial Arts Teachers as Mr. Knowles does not have entitlement in that category. I have also assumed that the status of Mr. Knowles as Teacher of the Handicapped is not affected by this matter.

If there is any further information you may require regarding this matter, please give me a call.

Best regards,
CALIFON ASSOCIATES

Robert F. Strauss

RFS:pc

c - 11/24/92 C. F. Kavanaugh
H. J. Smith

CATEGORY 1335 SECONDARY INDUSTRIAL ARTS TEACHER

Staff Member	Limitation	Other Sr. Categories	Starting Date	Years Employed	Time Out	Military Service	Total Service
Miller, John J			9/1/61	32.00	0.00	0.00	32.00
Jacobs, Lewis M		El Ind Art	9/1/64	29.00	0.00	2.00	31.00
Strodel, John H			9/1/66	27.00	0.00	3.58	30.58
Parks, Roland G		Supervisor	9/1/63	30.00	0.00	0.00	30.00
Santay, Thomas E			9/1/67	26.00	0.00	4.00	30.00
Joseph, James R			9/1/68	25.00	0.00	0.00	25.00
Jarocki, William N			9/1/69	24.00	0.00	0.00	24.00
Locke, Paul S			9/1/68	25.00	1.00	0.00	24.00
Braunsdorf, Douglas E			9/1/74	19.00	0.00	4.00	23.00
Falcichio, John E		El Ind Art	9/1/72	21.00	0.00	2.00	23.00
Grosse, Rudolf R		El Teacher	9/1/70	23.00	0.00	0.00	23.00
Healy, Emil		Ind. Ed.	9/1/70	23.00	0.00	0.00	23.00
Roberts, Michael W		El Ind Art	9/1/71	22.00	0.00	0.00	22.00
Weinfeldt, Edward R		Ind. Ed.	9/1/71	22.00	0.00	0.00	22.00
Nelson, Michael G		Skilled Tr Supervisor	9/1/74	19.00	0.00	2.98	21.98
Camp, William L			10/27/69	23.81	2.00	0.00	21.81
Berkin, Alvin D			9/1/74	19.00	0.00	2.00	21.00
Sulikowski, Matthew A			9/1/72	21.00	0.00	0.00	21.00
Demianiuk, Bogdan			9/1/74	19.00	0.00	1.20	20.20
Isbrecht, Alan		El Ind Art	9/1/73	20.00	0.00	0.00	20.00
Iorlano, Anthony		El Teacher El Ind Art	9/1/74	19.00	0.00	0.00	19.00
McClure, Robert G			9/1/78	15.00	0.00	0.19	14.81
Knowles, Thomas		Special Ed	9/1/79	14.00	0.00	0.00	14.00

OAL DKT. NO. EDU 7803-92 (EDU 0347-92 ON REMAND)

THOMAS KNOWLES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

FEBRUARY 16, 1993

DATE OF MAILING - FEBRUARY 16, 1993

226-92

226-92

STEPHANIE ANDRUS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SEPTEMBER 24, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7453-91
AGENCY DKT. NO. 272-7/91

STEPHANIE ANDRUS,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,
Respondent.

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

Martin R. Pachman, Esq., for respondent

Record Closed: July 23, 1992 Decided: August 12, 1992

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

Stephanie Andrus, a tenured teaching staff member employed by the Board of Education of the Borough of New Providence, Union County, was advised on May 16, 1991 that the Board had determined to withhold her employment and adjustment increments for the 1991-92 school year A statement of reasons was given. In a petition filed in the Bureau of Controversies and Disputes of the Department of Education on July 22, 1991, petitioner alleged Board action was arbitrary and in contravention of her rights under N.J.S.A. 18A 29-14. The Board's answer in general denial was filed with the Commissioner on July 29, 1991. The matter was transmitted to the Office of Administrative Law on August 1, 1991 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

Prior to the scheduled hearing dates, the parties entered into settlement discussions and advised the administrative law judge the matters at issue had been amicably resolved, subject to approval of the administrative law judge and the Commissioner of the Department of Education. Thereafter, a stipulation of settlement was submitted.

CONCLUSION

Based on the above, I **CONCLUDE** as follows:

1. The parties have voluntarily agreed to settlement as evidenced by the signatures on the stipulation of settlement;

2. Settlement fully disposes of all issues in controversy and is in the interest of parties and public.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 12, 1992
Date

James A. Ospenson
JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

8/14/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 19 1992
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

amr

LAW OFFICES
KLAUSNER, HUNTER & CIGE
63 E. High Street • P.O. Box 1012
Somerville, New Jersey 08876
(908) 685-1552
FAX: 908-526-8233
498

Stephen E. Klausner[1]
Stephen B. Hunter[2]
Brian M. Cige[3]

Lawrence J. Van Wess[2]

1 Member of N.Y. and N.J. Bar
2 Member of N.J. Bar
3 Member of N.J. and Pa. Bar

New York Offices
461 Park Avenue South
Suite 415
New York, N.Y. 10016
(212) 889-8151

RECEIVED
OFFICE OF ADMINISTRATIVE LAW
Jul 23 10 19 AM '92
FILE NO.

July 20, 1992

Honorable James A. Ospenson
Office of Administrative Law
185 Washington Street
Newark, N.J. 07102

RE: STEPHANIE ANDRUS vs. NEW PROVIDENCE BOARD OF EDUCATION
OAL DOCKET NO. EDU 7453-91
AGENCY REFERENCE NO. 272-7/91

Dear Judge Ospenson:

Enclosed please find a Stipulation of Settlement in the above captioned matter for your information and review which, in part, makes reference to the withdrawal of the Petition of Appeal in this matter.

Please contact the undersigned if you have any questions concerning the resolution of this matter.

Respectfully submitted,

Stephen B. Hunter/vjb.

Stephen B. Hunter

SBH/vjb
Enclosures
cc: Martin Pachman, Esq.
Stephanie Andrus
Ron Harvey

RECEIVED
OFF... STATE ... LAW
JUL 23 10 18 AM '92

STIPULATION OF SETTLEMENT
between
NEW PROVIDENCE BOARD OF EDUCATION
and
STEPHANIE ANDRUS
OAL DOCKET #EDU 7453-91

WHEREAS, the New Providence Board of Education and Stephanie Andrus are desirous of resolving all current and pending litigation by and between them under the docket number set foth above;

NOW, THEREFORE, IT IS AGREED AND STIPULATED AS FOLLOWS:

1. Ms. Andrus will withdraw her appeal of the increment withholding for the 1991-92 school year, docket #EDU 7453-91.

2. Effective September of 1992, Ms. Andrus will be restored by the Board to her proper place on the Guide for the 1992-93 school year, which is BA+60 (Masters Column, Step 12), so that the impact of the 1991-92 withholding will be limited to that one school year. It is understood by the parties that the New Providence Board of Education and the New Providence Education Association have not yet settled their Labor Agreement for the 1992-93 school year and that, therefore, the initial salary for the above noted Column and Step is $49,029, which will be adjusted in accordance with the final negotiated Agreement.

3. The parties hereby agree that there will be no public statements regarding the settlement of this matter other than the necessary Board Resolution authorizing Ms. Andrus to the Step and Column on the Guide referred to in paragraph #2 above.

Stephen B. Hunter

STEPHEN B. HUNTER, ESQUIRE
Attorney for Stephanie Andrus

Dated: 7/8/92

Martin R. Pachman

MARTIN R. PACHMAN, ESQUIRE
Attorney for New Providence
Board of Education

Dated: 7/6/92

OAL DKT. NO. EDU 7453-91

STEPHANIE ANDRUS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

ACTING COMMISSIONER OF EDUCATION

SEPTEMBER 24, 1992

DATE OF MAILING - SEPTEMBER 24, 1992

227-92

227-92

A.A., on behalf of his minor child, N.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HADDON HEIGHTS, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SEPTEMBER 24, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 935-92
OAL DKT. NO. 28-2/92

A. A., ON BEHALF OF HIS MINOR CHILD, N.A.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF HADDON HEIGHTS,
Respondent.

Kevin C. Watkins, Esq., on behalf of petitioner

Robert T. Becker, Jr., Esq., on behalf of respondent (Hannold, Marshall & Becker, attorneys)

Record Closed: August 10, 1992 Decided: August 12, 1992

BEFORE **STEVEN C. REBACK**, ALJ:

This is an appeal by the petitioner, A.A., in his capacity as guardian ad litem of N.A., a minor, from a determination arrived at by respondent (the Board) wherein the Board suspended N.A. from his participation in academic instruction and activities for a period of ten days at Haddon Heights High School, Haddon Heights, New Jersey. The matter was heard on an emergent basis on February 5, 1992 and on that date petitioner's motion for a stay was denied and the matter was scheduled for plenary hearing to be conducted on May 5, 7 and 8, 1992.

On May 5, 1992 the parties were able to structure a settlement of the appeal. The terms of settlement have been set forth by a proposed order prepared by Kevin C. Watkins, Esq. on behalf of the petitioner, which was received by my office on August 6, 1992. By letter dated August 10, 1992, Robert P. Becker, Jr., Esq., counsel to the Board advised that the proposed order is satisfactory and consequently sets forth the terms of settlement.

The terms of settlement are as follows:

It has been agreed that the petition of A.A. on behalf of N.A. shall be dismissed upon the following terms and conditions:

All records concerning this matter created, received and retained by the Haddon Heights Board of Education shall be destroyed by the respondent no later than the beginning of the 1992-1993 academic year of Haddon Heights High School:

All records related to the January 29, 1992 suspension of N.A. from Haddon Heights High School, include, but are not limited to:

a. The January 29, 1992 letter from George W. Reeves, then principal of Haddon Heights High School to A.A. formalizing the suspension of N.A, from said secondary school;

b. The January 24, 1992 letter/incident report of Mary Fallon, a teacher at Haddon Heights High School, detailing her complaints about the alleged in-school misconduct of N.A.;

c. Any inter-office letters or memoranda between Haddon Board of Education officials or employees or agents generated as a consequence of the January 29, 1992 suspension of N.A.;

d. All other documents, correspondence or memoranda otherwise existing and now in the custody and control of the Haddon Heights Board of Education relating to the investigation, suspension and discipline of N.A., as a consequence of alleged in-school misconduct on January 22, 19912, January 24, 1992, or otherwise arising from or related to conduct allegedly occurring on or about January 22, 1992 and January 24, 1992.

It is also been agreed that proof that the indicated records relating to the investigation and discipline of N.A., as a consequence of the alleged in-school

misconduct events have been destroyed pursuant to the terms of this order shall be supplied the petitioner no later than September 15, 1992, in the form of a letter from George W. Reeves, principal of Haddon Heights High School, or anyone acting in the capacity of principal of Haddon Heights High School at that time to Kevin C. Watkins, Esquire, attorney for petitioner, certifying that the indicated records have been duly destroyed; and

It is also been agreed that petitioner, A.A., and his attorney, Kevin C. Watkins, shall be allowed access to the permanent record of N.A., the minor, as maintained by the Haddon Heights Board of Education for the purpose of inspecting the complete contents of the same and that said inspection shall be allowed, on a reasonable time and basis, by the respondent and completed by the petitioner no later than thirty (30) days from the time of this order.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." - A copy of any exceptions must be sent to the judge and to the other parties.

8/12/92
Date

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

8/14/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 19 1992
Date

OFFICE OF ADMINISTRATIVE LAW

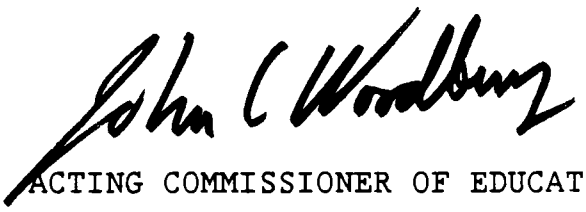
km

OAL DKT. NO. EDU 935-92

A.A., on behalf of his minor child, N.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HADDON HEIGHTS, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement. However, in so accepting the settlement, the Commissioner admonishes the ALJ and the attorneys in this matter that they are not to engage in any settlement which has terms that are effective prior to the Commissioner's review and approval or expiration of the forty-five days accorded him in law to render his final decision. (See page 3 of the initial decision.)



ACTING COMMISSIONER OF EDUCATION

SEPTEMBER 24, 1992

DATE OF MAILING - SEPTEMBER 24, 1992

228-92

228-92

R.W., GUARDIAN AD LITEM FOR R.W., AND R.W., INDIVIDUALLY,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, MERCER COUNTY,	:	
RESPONDENT.	:	
	:	

SEPTEMBER 25, 1992

R.W., GUARDIAN AD LITEM FOR R.W., AND R.W., INDIVIDUALLY,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, MERCER COUNTY,	:	
RESPONDENT.	:	
	:	

FOR PETITIONERS, Robert DeChellis, Esq.

FOR THE BOARD, James P. Granello, Esq.

This matter has come before the Commissioner of Education by way of Petition of Appeal and Motion for Emergent Relief filed by faxed transmission on September 24, 1992 seeking a stay of the Board's determination of September 21, 1992, imposing a ten-hour Saturday suspension on R.W., a senior at Hunterdon Central Regional High School, as a result of his alleged complicity in a streaking event during commencement ceremonies at respondent's high school last spring.

The matter was transmitted to the Office of Administrative Law for hearing on the application for emergent relief by faxed transmission on September 24, 1992, and the hearing was conducted on September 25, 1992.

Upon careful consideration of the arguments raised by the parties, which review includes consideration of the oral arguments of the parties at the hearing conducted by the Office of Administrative Law, as well as the ALJ's decision, the Commissioner DENIES the Motion for Emergent Relief, petitioners having failed to meet those standards articulated by the Court for pendente lite restraints as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982).

IT IS SO ORDERED.

John C Woodbury

ACTING COMMISSIONER OF EDUCATION

SEPTEMBER 25, 1992

DATE OF MAILING - SEPTEMBER 28, 1992

228-92

305+-92
(228-92)

R.W., on behalf of his minor child, R.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parents appealed Board's handling of disciplinary case. Parents contended their son R.W., who was charged with conspiracy to disrupt graduation (he drove car for four streakers at graduation), was denied due process prior to imposition of discipline.

ALJ found although R.W. was not involved in act of indecent exposure, his behavior was certainly disruptive within the meaning envisioned by district policy. Also, penalty of 10-day out-of-school suspension and 60-day suspension from extracurricular activities, which was modified to detention on 10 consecutive Saturdays beginning senior year, was the result of "multiple levels of meaningful review" by Board. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

DECEMBER 17, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7366-92
AGENCY DKT. NO. 450-9/92

R.W., ON BEHALF OF
HIS MINOR CHILD, R.W.,
Petitioner,
v.
BOARD OF EDUCATION OF
HUNTERDON CENTRAL REGIONAL
HIGH SCHOOL DISTRICT,
HUNTERDON COUNTY,
Respondent.

Robert DeChellis, Esq., on behalf of petitioner

James P. Granello, Esq., on behalf of respondent

Record Closed: October 14, 1992 Decided: October 30, 1992

BEFORE **SOLOMON A. METZGER**, ALJ:

This controversy arises under the education law, *N.J.S.A.* 18A:6-9, and regulations promulgated thereunder. A petition seeking emergent relief was filed with the Department of Education on September 24, 1992, and transmitted to the Office of Administrative Law for hearing the following day pursuant to *N.J.A.C.* 1:1-12.6. The motion was heard and denied on September 25, 1992, which decision was affirmed by the Commissioner. A hearing on the merits was convened on October 14, 1992, in Readington Township.

The primary basis for petitioner's appeal is that his son, R.W., now a senior in respondent's high school, was denied due process prior to the imposition of discipline, contrary to holdings in *Goss v. Lopez*, 419 *U.S.* 565, 95 *S. Ct.* 729, 42 *L. Ed.* 2d 725 (1975), and *Tibbs v. Bd. of Ed. of Franklin Township*, 59 *N.J.* 506 (1971), affirming the opinion of Judge Kolovsky in the Appellate Division at 114 *N.J. Super.* 287. Additionally, petitioner maintains that R.W.'s conduct was not an infraction of any of respondent's written disciplinary rules.

Paul Grimm, vice principal, testified on behalf of respondent. He is responsible for the day-to-day management of the school. On June 22, 1992, at approximately 6:00 p.m. four junior boys disrupted graduation by running naked in a field adjacent to the location of the ceremony. Dr. Grimm was present and observed the incident. He was informed by a guard that one boy had been arrested by Raritan Township Police, and he proceeded to police headquarters. There he spoke to Detective Glenn Tobasko, who informed him that R.W. had been taken into custody. Detective Tobasko told Dr. Grimm that a station wagon driven by R.W. had been stopped near the scene, and an officer observed numerous articles of clothing of varying sizes in the back seat. Dr. Grimm testified that Detective Tobasko then told him that once at the police station, R.W. admitted that he was the driver, and that he let the streakers out and was to pick them up one-half hour later. Dr. Grimm asked to speak with R.W. but was not permitted to do so because of the ongoing police investigation.

Dr. Grimm testified that June 22, 1992, was also the last day of school and he was involved in supervising the graduation party. He returned to the school and spoke with R.W.'s mother, who was a parent volunteer that day. He did not wish to create a scene and asked R.W.'s mother to see him in his office. Dr. Grimm relayed the information he had, and told her generally that the consequences were severe; he did not go into details about penalty at that time. A few days later he spoke to petitioner by telephone. Petitioner contended that R.W. had violated no school rule, since he was not among the streakers; he did not, however, deny that his son was driving. On June 26, 1992, Dr. Grimm wrote a letter to R.W.'s parents notifying them that he was imposing a ten-day out-of-school suspension and a sixty-day suspension from extracurricular activities, commencing at the start of the next school year. At or about the same time he also provided R.W.'s parents with a copy of his report of misconduct, which charged that R.W. "[c]onspired to help disrupt the graduation . . ." (J-2).

Dr. Grimm acknowledged that he did not speak to R.W. himself about the incident before reaching his conclusion. He also acknowledged that the student handbook contains no offense for conspiracy or aiding and abetting; it does contain an offense for disruptive behavior (J-1, p. 12). Dr. Grimm testified that he did not pursue an investigation beyond what he learned at the police station on the evening in question, because there was no factual dispute as to what occurred. Dr. Grimm did not believe that there was any meaningful distinction between R.W.'s conduct in driving and the other boys' conduct in streaking, and each of the boys involved received the same penalty.

Dr. Grimm testified that he received a police report from Raritan Township, some three weeks prior to the date of hearing in this matter. This was admitted to corroborate his testimony concerning his conversation with Detective Tobasko on the evening of the incident.[1]

Dr. David Myers, school principal, testified at the emergent relief hearing and the parties agreed to utilize that testimony here. Dr. Myers testified that the student handbook establishes a series of appeals from disciplinary actions, beginning with the teacher, when that is applicable, through to the school board (J-1, p. 15). The appropriate levels of review were provided in this case. Once an appeal of discipline is taken, the penalty is stayed until the school board takes final action.

Dr. Myers testified that petitioner appealed to him from Dr. Grimm's decision. He had discussed the matter with Dr. Grimm, who told him that R.W. had admitted his involvement to the police. Dr. Myers did not feel he had the authority to adjust penalties provided for in the student handbook, and he simply sustained Dr. Grimm's decision.

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[1] Petitioner objected to the entry of this document in evidence, first because it was not available to the decision makers when they evaluated the matter, and second because of an attachment to the report containing R.W.'s admission. Petitioner argued that this admission is the subject of a motion to suppress in an upcoming municipal court disorderly persons proceeding arising from this incident. The main function of this report was to corroborate the information that Dr. Grimm had on June 22, 1992, and no question was raised concerning its authenticity. Moreover, the mere fact that a motion to suppress has been filed elsewhere does not preclude entry of an admission here.

Dr. Myers testified that at no time during any of his conversations with R.W.'s parents, or with the parents of the other four boys involved, was any question raised about their culpability; mainly, the parents felt that the penalties imposed were overly severe.

Raymond P. Farley is the school superintendent. He met with R.W.'s parents and their attorney, Robert DeChellis, on August 6, 1992, to review the decisions of Drs. Grimm and Myers. Mr. Farley testified that R.W. did not speak on advice of counsel. R.W.'s parents did not deny his involvment in the incident; they felt that the penalty imposed had been harsh and Mr. Farley agreed. Mr. Farley eliminated the ten-day out-of-school suspension, and instead imposed detention on ten consecutive Saturdays, commencing at the beginning of the school year. Mr. Farley testified that participation in athletics is a privilege and he chose not to decrease the sixty-day exclusion from school activities.

Petitioner appealed to the School Board and was invited to the August 1992 meeting where the suspensions of the other four boys would be reviewed as well. Petitioner requested that he be permitted to attend instead the September Board meeting, because of a pending prosecution in municipal court. This request was granted. At the August meeting the Board again modified the penalty by eliminating the sixty-day exclusion from extracurricular activities. As this was done for the four boys present, the ruling was extended to R.W. as well.

Petitioner presented no witnesses. Counsel did enter a letter in evidence from petitioner to respondent, dated August 26, 1992, written in connection with his request that he be allowed to pursue his appeal at the September 1992 board meeting. In the letter petitioner wrote, "we do not believe [R.] is guilty of indecent exposure" (P-1). R.W. began serving his penalty on September 26, 1992.

This is the substance of the record.

Petitioner argues that the due process deprivation arises primarily from Dr. Grimm's handling of the case. His decision was based on the oral representation of Detective Tobasko on the evening in question; no further investigation was undertaken. Further, Dr. Grimm communicated exclusively with R.W.'s parents; at no time did he speak to R.W. Finally, the offense R.W. was charged with, essentially conspiracy to disrupt the graduation, is not listed in the manual of discipline. These arguments are without substance.

Initially, we should note that this is not a *de novo* proceeding to determine whether a preponderance of the credible evidence supports the contention that R.W. was involved in this incident; rather, we are here to review respondent's decision and the process provided, to determine whether it acted in an arbitrary or capricious manner. *Thomas v. Morris Tp. Bd. of Ed.*, 89 *N.J. Super.* 327 (App. Div.1965), *aff'd* 46 *N.J.* 581 (1966). The heavy burden of persuasion rests with petitioner.

Goss and *Tibbs* are inapposite. *Goss* involved the imposition of ten-day out-of-school suspensions without providing students an opportunity to tell their side of the story. Here, there was no preliminary suspension, first because under school policy an appeal normally stays a proposed action, and second, as a practical matter, summer vacation intervened. *Tibbs* raised a question of procedural fairness during the hearing process before a school board, where unsigned statements were accepted in lieu of testimony, because students feared physical reprisal. There is nothing in the case at bar that suggests this type of error.

It appears that this matter was handled properly. Dr. Grimm, who was fully credible, attempted to acquaint himself with the facts on the evening in question as best he could. He informed R.W.'s mother immediately and spoke to petitioner by telephone a few days later. Though petitioner in effect argued a legal point to Dr. Grimm, *i.e.*, that the conduct complained of was not an offense under school rules, there was no denial that R.W. was the driver. Thus, there was not much to investigate at that juncture. Additionally, because the penalty was stayed we need not focus narrowly on Dr. Grimm's role, but may look to the process afforded overall. Petitioner presented no transcript or minutes of the school board meetings in August and September, but there is not even an allegation that R.W. was deprived of the opportunity to confront his accusers or otherwise present a defense in these proceedings. To the contrary, it appears that there have been multiple levels of meaningful review, at which no denial has ever been made. The petitioner's declaration in his August 26, 1992, letter to the school board that "We do not believe [R.] is guilty of indecent exposure" hardly serves as a denial, in the face of the numerous opportunities petitioner was given to present his side of the story.

As to the question of notice, there is no doubt that R.W.'s parents were acting on behalf of their minor child, and that he was fully aware that he could make a rebuttal if he so chose.

As to the argument that R.W.'s conduct is not covered in the student handbook, it appears that although he was not himself involved in an act of indecent exposure, a specifically listed offense in the manual, his behavior was certainly disruptive, which the manual also lists as a separate offense. He was charged with conspiracy to disrupt the graduation, which it appears falls within the latter category. In any case, school boards are not required to establish an exhaustive shopping list of infractions with specified disciplines, *see, O.P. v. Board of Education of the City of Paterson*, 1976 *S.L.D.* 658, 660. R.W.'s conduct clearly violated the letter and spirit of school rules.

Based on the foregoing, it is my conclusion that petitioner has failed to establish that R.W. was deprived of due process, or that the offense charged is beyond the norms of behavior established by respondent. The action taken by respondent is **AFFIRMED** and this petition is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10/30/92
Date

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

11/4/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 6 1992
Date

OFFICE OF ADMINISTRATIVE LAW

/cae

LIST OF WITNESSES

On Behalf of Petitioner:

None

On Behalf of Respondent:

Dr. Paul Grimm, Vice Principal
Dr. David Myers, Principal
Raymond P. Farley, School Superintendent

LIST OF EXHIBITS

Joint Exhibits:

J-1 Student Handbook
J-2 Report of Misconduct
J-3 Pupil Grievance Procedure
J-4 Petition

On Behalf of Petitioner:

None

On Behalf of Respondent:

R-1 Letter from R.W. to Mrs. Sybrigje Herman, dated August 26, 1992
R-2 Letter from Sybrigje Herman to Mr. and Mrs. R.W., dated August 18, 1992
R-3 Suspension and Expulsion/Pupil Due Process
R-4 Police Report

OAL DKT. NO. EDU 7366-92

R.W., on behalf of his minor child, R.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review, the Commissioner concurs with the ALJ that petitioner was neither deprived of due process nor improperly charged with an offense not covered by the established behavioral norms of the district.

Accordingly, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

DECEMBER 17, 1992

DATE OF MAILING - DECEMBER 17, 1992

229-92

229-92

T.P. AND D.P., on behalf of their minor child, T.J.P.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF OAKLYN, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parents sought emergent relief alleging there was disparate treatment of their son, T.J.P., when he was required to repeat 7th grade after failing three subjects in 1990-91 school year. Parents contended Board had waived its policy of requiring retention after three subject failure for another student, D.B., at the end of the following school year, and thus sought promotion of T.J.P. to ninth grade.

Initial decision concluded petition was untimely filed and the matter was dismissed. Moreover, in the case of D.B., the Board had rescinded its decision to promote her but the ALJ reversed, recommending promotion on equitable principles and reliance. Petition as to T.J.P. was dismissed because Board's action was therefore consistent with its policy of requiring retention after three subject failure.

Commissioner adopted findings and determination in initial decision with modification. Commissioner concurred with ALJ that petitioners did not demonstrate disparate treatment of their son because Board acted consistently in enforcing its retention policy. Commissioner did reverse ALJ's finding that petition was untimely as petitioners filed after becoming aware of the D.B. matter.

SEPTEMBER 28, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
ORAL INITIAL DECISION
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DKT. NO. EDU 6755-92
AGENCY DKT. NO. 413-9/92

IN THE MATTER OF T.P. AND D.P.
ON BEHALF OF THEIR MINOR CHILD, T.J.P.,
Petitioners,
v.
THE BOARD OF EDUCATION OF THE BOROUGH OF OAKLYN, CAMDEN COUNTY,
Respondent.

D.P., petitioner, pro se

William D. Hogan, Esq., for the respondent

Record Closed: September 4, 1992 Decided: September 4, 1992

This is a transcript of the administrative law judge's oral initial decision rendered pursuant to N.J.A.C. 1:1-18.2.

BEFORE **LILLARD E. LAW**, ALJ:

Petitioner, D.P., alleges that there was improper disparate treatment of her son, T.J.P., by the Board of Education of the Borough of Oaklyn, hereinafter Board, when it required him to repeat the seventh grade for the 1991 school year after T.J.P. allegedly failed three subjects during the 1990-91 school year. The Board counters that there was no disparate treatment of T.J.P. and seeks dismissal of the instant matter. The Board also asserts that the petition for emergent relief was untimely filed pursuant to N.J.A.C. 6:24-1.2(c), commonly referred as the 90-day rule.

This matter was transmitted to the Office of Administrative Law, hereinafter OAL, on an emergent basis, on September 2, 1992, as a contested case pursuant to N.J.S.A. 52:14-B-1 et seq. and N.J.S.A. 52:14F-1 et seq. The hearing was held on September 4, 1992, at the Trenton, OAL, Mercerville, New Jersey. The hearing record was closed on September 4, 1992, and the decision was rendered on the record on the same day.

FINDINGS OF FACT

The relevant and material facts are not in dispute. During the 1990-91 school year, T.J.P. was a seventh grade pupil under the jurisdiction of the Board. During the course of the 1990-91 school year, T.J.P. failed three subjects; is that he was unsuccessful in passing social studies, mathematics and home economics.

The Board of Education has enacted a policy which states, in effect, that any pupil who fails three subjects must repeat the grade for the entire year. It is also part of the policy that the subjects may not be made up in summer school.

Subsequent to the close of the 1990-91 school year, T.J.P.'s parent, Mrs. D.P., appeared before the Board of Education to request that consideration be given for T.J.P. to take the subjects failed in summer school. The Board of Education denied D.P.'s request. T.J.P. therefore was assigned to the seventh grade to repeat that grade which he did during the course of the 1991-92 school year. T.J.P. has been assigned to the eighth grade commencing September 9, 1992.

At the close of the 1991 a school year, a matter was brought to the Board of Education involving the pupil, D.B., who had failed three subjects in the seventh grade. The three subjects failed were language arts, home economics and industrial arts. This matter is set forth in a initial decision rendered by the Honorable August E. Thomas, Administrative Law Judge, OAL DKT. NO. EDU 5669-92 and AGENCY DKT. NO. 302-7-9. I refer to some of the facts set forth therein:

In the D.B. matter, D.B.'s mother attended a Board of Education meeting on June 15, 1992 and requested that the Board of Education make an exception to the three subject failure rule. After some debate, in executive session and irrespective of the objections voiced by the Board's superintendent, the Board voted five to four to waive its retention policy "with the stipulation that D.B. pass English and summer

school." That was exhibit J-5 in the OAL DKT. NO. 5669-92 matter. D.B. was enrolled in summer school and successfully completed the summer school program. However, within a week of the Board's decision to rescind its policy, the herein petitioner, D.P., appeared before the Board of Education requesting that the Board of Education permit her son to attend summer school to take eighth grade courses and, therefore, waive the eighth grade and be assigned to the ninth grade commencing September 1992. Thereafter, on June 22, 1992, a special meeting of the Board of Education was called, where it went into executive session and subsequently rescinded the decision made in favor of D.B. It also denied the application by D.P., with respect to allowing to T.J.P. to attend summer school for the eighth grade. Those are the essential facts in this matter.

The facts also should indicate that T.J.P. has successfully completed the seventh grade for the second time; that T.J.P. has taken no eighth grade courses during the course of the summer school or the academic year and that he will be assigned to the eighth grade commencing in the 1992-93 school year beginning September 9, 1992.

Having reviewed all the testimony before me and the documents submitted with the pleadings and the one offered as J-1, I **CONCLUDE** that there was no disparate treatment of T.J.P. Inasmuch as the Board of Education rescinded its decision with respect to D.B., D.B. was granted the opportunity to go into the ninth grade on the basis of the decision rendered by the Honorable August Thomas, ALJ. I repeat part of Judge Thomas' conclusions. Judge Thomas states in part, at page five of his decision, that D.B. acquired no vested right with respect to the promotion. Judge Thomas recommended the promotion of D.B. on equitable principles and reliance. D.B. relied upon the Board of Education's actions on June 15, 1992, notwithstanding its rescission of that decision on June 22, 1992. In addition, Judge Thomas asserts that "this determination for D.B. does not extend to any other pupil. If a pupil was aggrieved in a prior year, actions should have been taken at that time."

I concur with Judge Thomas and **CONCLUDE** that this matter was filed out-of-time with respect to the 90-day rule. The 90-day rule provides, in part, that when an individual is aggrieved or has notice of an action, they must take the action within 90 days. No action was taken subsequent to T.J.P.'s failure at the close of the 1990-91 school year. On that basis alone, this matter is rendered **DISMISSED**.

The Board has reestablished its policy and is maintaining it with respect to the three-failure rule. T.J.P.'s record, notwithstanding repeating the seventh grade, was not one that would be considered to the outstanding. It appears that he does have some academic problems, which I understand the parents are willing to remedy. I don't believe however, it would be in his best interest or of the best interest of the Board of Education or the other pupils in the school to have T.J.P. skip the eighth grade and go to the ninth grade. For those reasons expressed, petitioner's motion for Emergent Relief is hereby **DENIED** and **DISMISSED**.

This recommended oral decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended oral decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended oral decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

END OF TRANSCRIPT

I, Janice Zuczek, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Law's oral decision rendered in the above matter on September 4, 1992.

DATED 4 September 1992 Janice Zuczek
JANICE ZUCZEK, Secretary

4 September 1992 Lillard E. Law
Date **LILLARD E. LAW**, ALJ

Receipt Acknowledged:

9/8/92 Maureen K. Keller
Date DEPARTMENT OF EDUCATION

Mailed to Parties:

Date OFFICE OF ADMINISTRATIVE LAW

jz

T.P. AND D.P., on behalf of their minor child, T.J.P.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF OAKLYN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and the transcript of the Initial Decision on Motion rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties pursuant to N.J.A.C. 1:1-18.4.

Upon a careful and independent review of the record of this matter, including the tape recording of the hearing on emergent relief heard on September 4, 1992, the Commissioner hereby determines that petitioner has failed to meet her burden of demonstrating those standards articulated by the court in Crowe v. DeGioia, 90 N.J. 126 (1982) for the grant of the extraordinary relief sought herein.

The record is absent altogether of any reference to the first prong of the standards extant for pendente lite restraints, that is, that were the stay of the Board action not granted, the moving party would suffer irreparable harm. Herein, T.J.P.'s mother has expressed only her belief that her son was disparately treated by the Board's determination, made in June of 1991 in accord with

district policy to retain T.J.P. in the seventh grade, he having failed three subjects. T.J.P. has now successfully repeated seventh grade, and has now been placed in the eighth grade. Thus, although petitioners contend that T.J.P.'s retention removed him from his peers, which was socially difficult for him, the Commissioner finds no irreparable harm visited T.J.P in the Board's decision compelling him to repeat the grade wherein the preceding year he had failed three academic subjects.

The second prong of the Crowe standards requires that for a stay to issue, there must be a showing of likelihood of success on the merits established. In this regard, the Commissioner concurs with the ALJ that petitioners have failed to meet such standard. Albeit that the Board attempted to rescind its policy regarding automatic retention where a student fails three subjects, in the case of another student, D.B., during June of 1992, such action was rescinded on June 22, 1992. Hence, petitioners are unable to demonstrate disparate treatment of her son because the Board has acted consistently, in the end, in enforcing its retention policy.

That an ALJ in an initial decision not yet the subject of a final decision by the Commissioner (D.B., supra) reversed this Board's recision action concerning D.B. on equitable principles, does not represent the law insofar as an initial decision is a recommendation by the Office of Administrative Law and does not become decisional law in the matter until the Commissioner has reviewed the matter or his 45-day period to review such recommended initial decision has been exhausted. N.J.A.C. 1:1-18.6. Hence, the ALJ's opinion in D.B. as yet has no force of law, and is not

properly referenced in this case. Consequently, the Commissioner finds that petitioners herein have failed not only to demonstrate a likelihood of success on the merits of their claim under the Crowe standards, but also have failed, upon full review of the merits of this matter, which the ALJ fully explicated in his thorough initial decision, to demonstrate that the Board acted in an arbitrary manner in retaining their son in 1991.

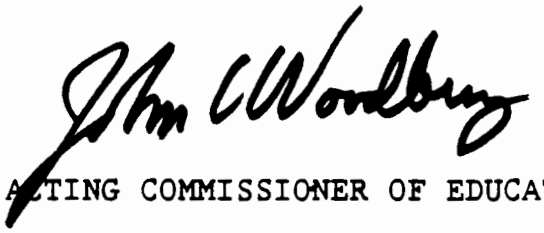
As to the third prong of the Crowe standards, the Commissioner determines that in the review of all of the circumstances of this case, the Board's concerns with providing a thorough and efficient education for the pupils in its care in a uniform and consistent manner outweigh petitioners' concern that their son ought to be promoted to the ninth grade, without having attended or completed grade eight based on their assertion of disparate treatment in 1991. The Commissioner would be loathe to substitute his judgment for that of a local board of education on a retention/promotion determination absent the most convincing evidence that T.J.P. had satisfied all the requirements for promotion from the preceding grade level. This record is devoid of any such suggestion. Accordingly, in reviewing the equities of this case, petitioners have likewise failed to meet their burden.

One last point requires attention in this case. The ALJ determined that this matter was filed out of time, again relying on the ALJ's initial decision in the D.B. matter. Not only because said case does not represent decision law, but also because the record of this matter makes plain that T.J.P.'s parents did not become aware -- and indeed, could not have been aware -- of a disparate treatment claim against the Board until the Board acted

in June 1992 to make an exception for D.B. of its retention policy, the Commissioner reverses that finding of the ALJ below that this petition is untimely.

Accordingly, for the reasons expressed herein, the Commissioner finds and determines that petitioners' request for emergent relief be and hereby is DENIED. Further, upon consideration of all of the merits of the case, the Commissioner dismisses the instant Petition of Appeal for the reasons expressed in this determination.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

SEPTEMBER 28, 1992

DATE OF MAILING - SEPTEMBER 28, 1992

230-92

230-92

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE GREENWICH SCHOOL : COMMISSIONER OF EDUCATION
DISTRICT, GLOUCESTER COUNTY. : DECISION
:

SEPTEMBER 28, 1992

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE GREENWICH SCHOOL : COMMISSIONER OF EDUCATION
DISTRICT, GLOUCESTER COUNTY. : DECISION
:

For Petitioner, Alan R. Schmoll, Esq. (Capehart & Scatchard)
For Respondent, Gary W. Stuhltrager, Esq.

This matter was opened before the Commissioner on May 5, 1992 through the Greenwich Board of Education's (Board) filing of an appeal of the cap waiver defeated by the voters of the Greenwich School District on April 7, 1992. On July 13, 1992 Gary W. Stuhltrager, Attorney for the Township of Greenwich, notified the Commissioner that the governing body had no objection to the cap waiver appeal.

On August 6, 1992, the Board submitted a position statement pursuant to the requirements of N.J.A.C. 6:24-7.8(a)2, thus it was on that date that the record in this matter closed.

It is the Board's contention that in addition to the current expense budget disapproved by the voters of the Greenwich School District on April 7, 1992 in the amount of $4,886,983 but sustained by the governing body by resolution on April 28, 1992,

there is a need for an additional $143,700 in current expense in order for the district to provide a thorough and efficient education to its students.

On March 6, 1992, Peter Contini, Gloucester County Superintendent of Schools, conditionally approved the Greenwich School District's budget subject to the cap waiver amount of $143,700 for tuition which was deemed necessary for a thorough and efficient education by him.

Therefore, the amount in dispute before the Commissioner is set forth below.

	Proposed tax levy adopted by Board of Education	Amount of tax levy certified by governing body
Current expense	$4,886,983	$4,886,983
Capital Outlay	NA	NA
Cap waiver:		
Current expense	$ 143,700	
Capital expense	NA	
Total	$5,030,683	$4,886,983

As indicated above, the $143,700 in cap waiver monies are deemed necessary for the provision of a thorough and efficient education to its students in order for the Board to meet its tuition obligations to the Paulsboro School District in order to provide for increases in tuition and back tuition adjustments, the particulars of which are set forth below:

CAP WAIVER PURPOSE: TUITION INCREASE, INCREASE IN PUPILS, AND BACK TUITION ADJUSTMENT FOR PAULSBORO SCHOOL DISTRICT.

BREAKDOWN FOR CAP WAIVER

TUITION AND PUPIL INCREASE	162 PUPILS X	$	7,495
	=	$1,214,190	
	+	$ 170,702*	
	=	$1,384,892**	

* BACK TUITION ADJUSTMENT
** TUITION EXPENSES FOR PAULSBORO 1992-1993

TUITION EXPENSES FOR PAULSBORO	$1,384,892
LINE ITEM 114 - TUITION ALLOTTED TO PAULSBORO	-1,241,192
REQUIRED CAP WAIVER =	$ 143,700

Upon review of the record of this matter, including the extensive documentation provided by the district in support of the necessity of the cap waiver funds, which is incorporated herein by reference, the Commissioner finds and determines that the requested relief shall and is hereby granted as the Board has borne its burden of demonstrating that these funds are necessary for the provision of a thorough and efficient education to the students of the Greenwich School District. East Brunswick Township Board of Education v. East Brunswick Township Council, 48 N.J. 94 (1966); Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305 (1989)

Accordingly, the Gloucester County Board of Taxation is hereby ordered to adjust the Greenwich School District's tax levy for the 1992-93 school year to reflect an increase of $143,700 for current expense which results in a total current expense tax levy of $5,030,683.

SEPTEMBER 28, 1992

DATE OF MAILING - SEPTEMBER 28, 1992

John C Woodbury

ACTING COMMISSIONER OF EDUCATION

231-92

231-92

BOARD OF EDUCATION OF THE BOROUGH OF BRIELLE, MONMOUTH COUNTY, PETITIONER,	
V.	COMMISSIONER OF EDUCATION
CALVIN JONES, ELAINE JONES AND PEARL FLEMING, RESPONDENTS.	DECISION

SEPTEMBER 28, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1946-92
AGENCY DKT. NO. #440-12/91

BOARD OF EDUCATION OF THE BOROUGH OF BRIELLE, MONMOUTH COUNTY,
Petitioner,
v.
CALVIN JONES, ELAINE JONES AND PEARL FLEMING,
Respondent.

Wayne Oppito, Esquire, for petitioner

Calvin Jones, Elaine Jones and Pearl Fleming, respondents, *pro se*

Record Closed: August 11, 1992 Decided: August 13, 1992

BEFORE LILLARD E. LAW, ALJ:

This matter was transmitted to the Office of Administrative Law on March 16, 1992, 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 agreed to a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

13 August 1992
Date

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

8/19/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 25 1992
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

WAYNE J. OPPITO, ESQUIRE
6 William Lane
Wayside, New Jersey 07712
(609) 771-8200 Fax (609) 771-9375

BOARD OF EDUCATION OF THE BOROUGH OF BRIELLE, MONMOUTH COUNTY,	:	BEFORE THE OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	OAL Docket No. EDU 01946-92 S Agency Ref. No. 440-12/91
v.	:	
CALVIN JONES, ELAINE JONES AND PEARL FLEMING,	:	STIPULATION OF SETTLEMENT
Respondents.	:	

The parties hereby agree to resolve the above matter as follows:

1. Mr. and Mrs. Jones agree to enroll their children for the 1992-93 school year and future years in the school district in which they reside, that presently being the Lakewood School District in Ocean County.

2. The board of education agrees to waive its claim for retroactive tuition payments.

Calvin Jones

Elaine Jones

Pearl Fleming

Charles T. Kavanagh, President
Brielle Board of Education

Sandra E. Capro, Board Secretary

Dated: August 7, 1992

OAL DKT. NO. EDU 1946-92

BOARD OF EDUCATION OF THE BOROUGH OF BRIELLE, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
CALVIN JONES, ELAINE JONES AND PEARL FLEMING,	:	DECISION
RESPONDENTS.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

ACTING COMMISSIONER OF EDUCATION

SEPTEMBER 28, 1992

DATE OF MAILING - SEPTEMBER 28, 1992

232-92

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN MADDEN, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF GLOUCESTER CITY,	:	DECISION
CAMDEN COUNTY.	:	
_____	:	

SEPTEMBER 28, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9222-90
AGENCY DKT. 339-9/90

IN THE MATTER OF THE TENURE HEARING OF JOHN MADDEN, SCHOOL DISTRICT OF GLOUCESTER CITY.

William D. Dilks, Esq., for petitioner

Kenneth A. Sandler, Esq., for respondent (Selikoff & Cohen, attorneys)

Record Closed: August 12, 1992 Decided: August 13, 1992

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

STATEMENT OF CASE

The Gloucester City school district filed tenure charges of incompetence against John Madden.

This matter was transmitted to the Office of Administrative Law on November 8, 1990 for a hearing 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 March 11, 1991. Among other things, the matter was set down for hearing in October 1991 and the parties indicated they were pursuing settlement.

The parties have agreed to settle this matter and have prepared the attached letter indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

3. The settlement is reasonable under the circumstances. The petitioner is not unjustly enriched and the charges are not of a type that the public interest would demand an adjudication or an action against the respondent's teaching certificates or both.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

13 AUGUST 1992
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

8/17/92
Date

Maureen L. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 20 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

km

Selikoff & Cohen, P.A.

Counselors at Law
Suite #314
307 Fellowship Road
Mount Laurel, New Jersey 08054-1233
(609) 778-6055
Telefax: 609-778-6056

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Joel S. Selikoff
Member of NJ and DC Bars
Steven R. Cohen
Member of NJ, PA and DC Bars

* Kenneth A. Sandler
* Judith A. O'Boyle
* Carol H. Sapakie
* William H. Donahue

* Members of NJ and PA Bars

August 6, 1992

HONORABLE BRUCE R. CAMPBELL, A.L.J.
Office of Administrative Law
Quakerbridge Plaza, Building # 9
Quakerbridge Road
Trenton, NJ 08625

RE: I/M/O TENURE HEARING OF JOHN MADDEN, SCHOOL DISTRICT OF GLOUCESTER CITY
OAL DKT NO. EDU 9222-90
AGENCY REF. NO. 339-9/90
Our File No. 2626-01

Dear Judge Campbell:

This is to advise that Respondent John J. Madden has been been granted a regular service pension by TPAF and that the settlement agreement entered into by the parties shall accordingly go into effect. I enclose for your reference the "Quotation of Retirement Benefits" statement issued by TPAF, which reflects that Mr. Madden has the requisite twenty-five (25) years of service.

If Your Honor believes any additional information is needed or a telephone conference needs to be scheduled, please let us know. In any event, thank you for your good efforts in assisting the parties in effecting this settlement.

Respectfully,
SELIKOFF & COHEN, P.A.

BY: Kenneth Sandler
KENNETH A. SANDLER

KAS:caa
Enclosure
cc: William D. Dilks, Esq. (w/enc.)
John J. Madden
James Geiger, NJEA Uniserv
Carolyn Trautwein, NJEA Pensions

SELIKOFF & COHEN, P.A.
307 Fellowship Road
Suite #314
Mt. Laurel, New Jersey 08054
(609) 778-6055
Counsel for John J. Madden and
Gloucester City Ed. Association

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GEN'L. LAW

In the Matter of the Tenure Hearing of **JOHN J. MADDEN**, School District of the City of Gloucester

OAL DKT. NO. EDU 09222-90S
AGENCY REF. NO. 339-9/90

In the Matter of **GLOUCESTER CITY BOARD OF EDUCATION**, Respondent

PUBLIC EMPLOYMENT RELATIONS COMMISSION

-and-

DOCKET NO. CO-H-91-172

GLOUCESTER CITY EDUCATION ASSOCIATION and JOHN J. MADDEN, Charging Party.

SETTLEMENT AGREEMENT

WHEREAS, on or about September 26, 1990, the GLOUCESTER CITY BOARD OF EDUCATION ("BOARD OF EDUCATION") certified tenure charges on grounds of incompetency against teaching staff member, JOHN J. MADDEN; filed said charges with the New Jersey Commissioner of Education; and suspended Mr. Madden's employment without pay;

WHEREAS, on or about October 24, 1990, JOHN J. MADDEN filed an answer to the aforesaid tenure charges denying his incompetency to serve as a teaching staff member with the Board of Education;

WHEREAS, pursuant to N.J.S.A. 52:14F-6, the Commissioner of Education on or about November 8, 1990 transferred the controverted matter of the Board's tenure charges to the Office of Administrative Law for hearing;

WHEREAS, on or about January 11, 1991, John J. Madden and the Gloucester City Education Association (Association) filed with the Public Employment Relations Commission an unfair practice charge against the Board of Education alleging that the Board's filing of tenure charges against and suspension of John J. Madden was in reprisal for and was wrongly motivated by Mr. Madden's July 18, 1990 appeal to arbitration of the Board's prior withholding of his employment and adjustment increments;

WHEREAS, on or about February 11, 1990, the Board of Education answered the aforesaid unfair practice charges and denied any wrongful motivation for its filing of tenure charges against and suspension of John J. Madden;

WHEREAS, on or about March 14, 1991, the Public Employment Relations Commission found that the allegations of the aforesaid unfair practice charge, if true, would constitute violations of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. and issued a complaint and notice of hearing at Docket No. CO-H-91-172;

WHEREAS, John J. Madden has been enrolled in the Teachers' Pension and Annuity Fund (TPAF) since the commencement of his employment with the Board on or about September, 1967;

WHEREAS, the TPAF provides for ordinary retirement after the accrual of service credit in the amount of twenty-five (25) school years;

WHEREAS, pursuant to N.J.S.A. 18A:6-14, the Board of Education is authorized upon certification of tenure charges to suspend the person against whom the charge is made either with **or** without pay;

WHEREAS, the matter of the tenure charges filed by the Board against John J. Madden is now set for hearing before Administrative Law Judge Bruce R. Campbell (in September, 1992);

WHEREAS, the parties hereto have now agreed to amicably resolve their respective actions against one another, it is hereby agreed as follows:

1. The Board shall amend its suspension of John J. Madden issued on September 26, 1990 concurrent with its certification of tenure charges so as to provide and to take all action necessary in order that said suspension be a suspension **with pay**. The Board shall further make any and all contributions to the TPAF on Mr. Madden's behalf for the entire period of his suspension and shall file any and all adjustment and/or other forms or documents required by TPAF.

2. John J. Madden shall retire from employment with the Board of Education effective June 30, 1992 provided that, at that time, the TPAF has determined that he has the service credit necessary for ordinary retirement.

3. Upon TPAF's acceptance and approval of John J. Madden's application for ordinary retirement according to the terms set

forth above, the parties will withdraw their respective actions as follows:

(a) The Board of Education shall withdraw with prejudice its tenure charges filed against John J. Madden and shall so advise the Commissioner of Education and/or the Administrative Law Judge assigned to hear the tenure charges.

(b) John J. Madden and the Association shall withdraw with prejudice their aforesaid unfair practice charges filed against the Board and will so advise the New Jersey Public Employment Relations Commission.

(c) John J. Madden and the Association shall withdraw with prejudice their appeal to arbitration of the April 27, 1990 action of the Board withholding John J. Madden's adjustment and employment increments.

WHEREFORE, the parties hereto set their hands and seals on the dates indicated below.

John J. Madden
JOHN J. MADDEN

Dated: April 14, 1992

GLOUCESTER CITY EDUCATION ASSOCIATION

By: Edward C. Hubbs, PRES. Carol Clarke, Pres.

Dated: April 14, 1992 May 6, 1992

GLOUCESTER CITY BOARD OF EDUCATION

By: Edward C. Hubbs

Dated: April 14, 1992

OAL DKT. NO. EDU 9222-90

IN THE MATTER OF THE TENURE HEARING OF JOHN MADDEN, SCHOOL DISTRICT OF GLOUCESTER CITY, CAMDEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standard for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983) The matter is hereby dismissed, subject to compliance with the terms of the settlement. In light of respondent's retirement (see Letter of August 6, 1992) and the nature of the tenure charges, i.e., incompetency, the Commissioner perceives no need for the matter to be transferred to the State Board of Examiners.

ACTING COMMISSIONER OF EDUCATION

SEPTEMBER 28, 1992

DATE OF MAILING - SEPTEMBER 28, 1992

233-92

233-92

ELLEN MORSE MILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning candidate appealed denial of Educational Services Certificate with Student Personnel Services endorsement. State Board of Examiners refused to issue certification based on lack of qualifications. Petitioner did not possess a standard New Jersey instructional, administrative or educational services certificate as required. Also, petitioner lacked one year of teaching experience.

ALJ found petitioners' ten years of counseling experience at various institutions of higher education in New York State could not be considered as meeting the teaching experience requirement as guidance functions in a public school with young pupils are different from guidance/counseling functions in an institution of higher education with adult students. ALJ further found that petitioner's objections to requirements themselves were inappropriately raised in the administrative forum. ALJ concluded State Board of Examiners acted properly in denying endorsement. (N.J.A.C. 6:11-11.11) Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

SEPTEMBER 28, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5119-91
AGENCY DKT. NO. 91-4/91

ELLEN MORSE MILLER,
Petitioner,
v.
NEW JERSEY STATE BOARD OF EXAMINERS,
Respondent.

Ellen Morse Miller, petitioner, pro se

Arlene Goldfus Lutz, Deputy Attorney General, for respondent (Robert J. Del Tufo, Attorney General of New Jersey, attorney)

Record Closed: July 10, 1992 Decided: August 12, 1992

BEFORE **DANIEL B. McKEOWN,** ALJ:

Ellen Morse Miller (petitioner) appeals a determination reached by the New Jersey State Board of Examiners (Board) by which it denied her application for the endorsement of Student Personnel Services to an Educational Services Certificate. After the matter was transferred May 20, 1992 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 finally conducted July 9, 1992, after two scheduled hearing dates were adjourned at petitioner's request, at the Office of Administrative Law, Mercerville. The record of the matter closed thereafter.

The conclusion is reached in this initial decision that petitioner failed to show that the decision of the Board regarding its refusal to issue her a Student Personnel Services endorsement based on the qualifications she presented was arbitrary, capricious or unreasonable.

FACTS

Neither the facts, nor the applicable governing regulations regarding the issuance of teacher certificates and endorsements thereon by the Board, are in dispute between the parties and they are as follows.

A student personnel services endorsement is required of any person who is assigned in a New Jersey public school to perform services such as study and assessment of individual pupils with respect to their status, abilities, interests and needs; counseling with teachers, students, and parents regarding personal, social, educational, and vocational plans and programs; and, developing cooperative relationships with community agencies in assisting children and families. N.J.A.C. 6:11-11.11.

The same administrative rule requires that in order for an applicant to be issued such an endorsement, the applicant must possess and present evidence of having completed a bachelor's or higher degree; a standard New Jersey teacher's certificate, or college transcripts indicating completion of the professional course work required for such a certificate; one year of successful teaching experience; and, either a graduate curriculum approved by the New Jersey State Department of Education as the basis of issuing the endorsement, or 30 semester-hour credits of post-baccalaureate work in five specific areas.

Petitioner does not possess a standard New Jersey instructional, administrative, or educational services certificate as is required. Neither does petitioner possess one year of successful teaching experience at any level.

Nevertheless, another administrative regulation, N.J.A.C. 6:11-3.24, authorizes

> (a) Any applicant lacking required preparation may provide the State Board of Examiners with evidence of alternative education and/or experience ***

The Board then considers the alternative education and/or experience as submitted by an applicant to determine whether the requirements for a particular endorsement are met.

After having been advised by the Board that the absence of a standard New Jersey certificate and one year of successful teaching experience did not qualify her for the student personnel service endorsement, petitioner, under authority of N.J.A.C. 6:11-3.24, submitted the following letter request with supporting documents to the Board on or about June 2, 1990.

> I am requesting an individual credentials review before the State Board of Examiners in order to obtain certification in the area of Student Personnel Services.
>
> It is my goal to be a high school guidance counselor, but in reviewing the requirements to become certified I believe I meet all of the requirements except the one year of successful teaching experience. I would like to present to the Board as a substitute for this experience, what I believe to be a substantial counseling background in both my educational and work experiences. It is my sincere hope that my request will be favorably considered based on the presentation of my background information.
>
> I am a graduate of the Bronx High School of Science, S.U.N.Y. at Albany and New York University. Extracurricular activities included being secretary of my high school senior class, treasurer of my college sorority, and a legislative intern to the New York State Assembly.
>
> I have been employed by Baruch College of the City of University of New York for over ten years in the Office of Curricular Guidance of the School Business and Public Administration. My responsibilities include advising students on: the courses they need to complete their degrees, the choice of a major, whether or not to go to graduate school, and a variety of other matters that may come up in the 45 minute counseling session.
>
> I am certified to teach English in New York City high schools, but I never pursued teaching as I have been employed by

> Baruch in a position that affords me the opportunity to counsel and advise students.
>
> Once again, I would appreciate it if you review all the materials that I have enclosed and consider my experience as a substitute for the teaching requirement. Thank you.
>
> (J-1)

Thereafter, petitioner was invited to address the Board at its meeting December 6, 1990 when it considered petitioner's application of alternative credentials. On January 17, 1991 the Board determined that because petitioner's experience is limited to counseling at the college level with no teaching experience at any level her alternative qualifications were not equivalent to the requirements for the issuance of a student personnel service endorsement. (R-1)

EVIDENCE AT HEARING

At hearing, Ms. Elizabeth Struther, a supervisor of examiners at the Bureau of teacher certification and who initially evaluated petitioner's application in 1989 for the student personnel service endorsement, advised petitioner of her need for specifically an instructional certificate and of the need for one year of full-time teaching experience. According to Ms. Struther, the difficulty with petitioner's application for the student personnel services endorsement is that petitioner has not been academically trained as a teacher and she has no experience as a teacher. Petitioner's academic training, it is noted, is in English, sociology, and counseling. While petitioner presently holds a license issued by the New York City Board of Education to serve as high school English teacher in the City schools, that license is not equivalent to a regular New Jersey instructional certificate because, according to Ms. Struther, the New Jersey Department of Education has no reciprocity agreement with the New York City Board of Education regarding certificates to teach in respective school districts.

Petitioner emphasized at hearing her desire to perform the duties authorized in New Jersey by the student personnel service endorsement, together with her over ten years of counseling experience at various institutions of higher education located in New York State. Petitioner cannot understand why with her counseling experience at the college level she is not being considered qualified to be issued the

endorsement in order to perform a similar function at a New Jersey Public School. Moreover, petitioner has no desire to be a classroom teacher for one year in order to meet the one year of full-time teaching experience requirement. When it was pointed out to petitioner during the hearing that the administrative regulations requiring the issuance of the endorsement in terms of an instructional certificate and one year full-time teaching experience appear on their face to be reasonable and whether petitioner had any evidence beyond that which was already submitted, petitioner suggested that this judge had already predetermined the case prior to hearing it. However, it was pointed out to petitioner that while I did not prejudge this dispute prior to the commencement of hearing, one of my functions is to be persuaded by the evidence heard at the time of hearing. Furthermore, it was pointed out to petitioner that if one presumes to perform the duties authorized by a student personnel service endorsement and as set forth above then it appears reasonable, absent evidence to the contrary, that eligibility and/or actual possession of an instructional certificate and teaching experience, are necessary. Guidance functions in a public school are different than guidance/counseling functions at an institution of higher education. The former requires work with pupils who have not reached adulthood; the latter requires work with adult students capable of reaching independent decisions.

CONCLUSION

The State Board of Examiners is authorized to issue appropriate certificates to teach or to direct or supervise the teaching, instruction, or educational guidance of pupils in public schools operated by boards of education under rules promulgated by the State Board of Education upon recommendation of the Commissioner. N.J.S.A. 18A:6-38; N.J.A.C. 6:11-2.2. In this case, the rules for the issuance of student personnel services endorsement are stated at N.J.A.C. 6:11-11.11. The rules are clear and, on their face, reasonably related to the goal of insuring individuals who carry out the functions authorized by the endorsement are properly trained and have demonstrated an acceptable capacity to be an elementary or secondary teacher. The rules are not overbroad, nor are they vague. In fact, the State Board of Education provided at N.J.A.C. 6:11-3.24 an alternative way for applicants to be issued the student personnel services endorsement by presenting alternative education and/or experience that would be substantially similar to what is contained within the authorizing rule.

In this case, petitioner is not in possession of a standard New Jersey certificate nor does she possess one year of successful teaching experience. While her desire to perform the duties as are authorized by the sought after endorsement is real, it remains that the State Board of Education, the Commissioner, as well as the State Board of Examiners must insure that only individuals who are properly qualified to perform specific functions and duties in our public schools do so.

One other matter remains. Ms. Struther testified at hearing that substitute teaching may not be used in the place of the required one year successful teaching experience. Petitioner asserted that the conclusion she would draw from that position is if the regular teacher assigned to her child's classroom is absent from school one day, then a substitute teacher is nothing more than a wasted school day for her child. Nothing could be further from the truth. A substitute teacher is to carry out the planned activities for a particular day when the regularly assigned teacher is absent. Those planned activities are easily ascertainable in the regular teacher's plan book or in emergency substitute plans.

Having found no evidence to show the State Board of Examiners acted in an arbitrary, capricious, or unreasonable manner or somehow in violation of rule or law, the Petition of Appeal is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 12, 1992
Date

Daniel B. McKeown
DANIEL B. McKEOWN, ALJ

Receipt Acknowledged:

8/14/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 19 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

tmp

DOCUMENTS IN EVIDENCE

J-1 Petitioner's letter, June 2, 1990, with attachments

R-1 State Board of Examiners decision

ELLEN MORSE MILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 1:1-18.4, as were replies thereto by the Board.

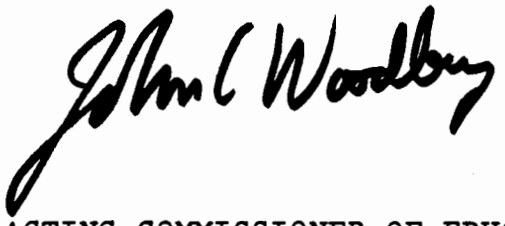
In her exceptions, petitioner objects to the manner in which the ALJ presented her testimony in his initial decision, alleging that certain statements are mischaracterized or taken out of context, while others are omitted. Specifically, she mentions arguments to the effect that, given the problems of today's students, teachers should be required to take counseling courses and that it is inherently unfair for there to be an alternative route for teachers but not for counselors. In reply, the Board notes that it acted fully in accord with State Board of Education regulations which reflect educational policy decisions on teacher training and are not subject to facial challenge in this forum.

Upon review of this matter, the Commissioner concurs with the ALJ that petitioner has not met requirements for certification

and that the Board of Examiners did not act arbitrarily or capriciously in denying her application. He further finds that petitioner's objections to the characterization of her testimony cannot be addressed in the absence of a hearing transcript and that, even if true, they would have no bearing on the outcome of this case. As properly observed by the Board above, petitioner's substantive objections reach to the efficacy of the controlling regulations themselves and not to the Board's application of them; petitioner must therefore abide by those regulations or seek their modification through action of the State Board of Education or challenge in a court of competent jurisdiction.

Accordingly, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal is affirmed for the reasons well expressed therein.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

SEPTEMBER 28, 1992

DATE OF MAILING - SEPTEMBER 28, 1992

233-92

EDU #5119-91
C # 233-92
SB # 51-92

ELLEN MORSE MILLER,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, September 28, 1992

For the Petitioner-Appellant, Ellen Morse Miller, pro se

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney General (Robert J. Del Tufo, Attorney General)

Ellen Morse Miller (hereinafter "Appellant) filed a notice of appeal to the State Board of Education on October 28, 1992 from a decision of the Commissioner of Education denying the issuance of an Educational Services Certificate with Student Personnel Services endorsement due to lack of qualifications and experience.

Appellant was informed by letter dated October 30, 1992 that pursuant to N.J.A.C. 1.6, her notice of appeal must be served upon the Commissioner of Education. In response, Appellant filed proof of service on November 12, 1992. Pursuant to N.J.A.C. 6:2-1.11(a), Appellant's appeal brief was due on November 17, 1992. Appellant, however, failed to file her brief by November 17. By letter dated November 18, she was notified of her failure to file a brief in support of her appeal, and advised that this matter was

JAN. 6, 1993

being referred to our Legal Committee for consideration of her failure to perfect the appeal. The Appellant has still failed to file an appeal brief. Nor has she at any time requested an extension of time for her filing or provided any explanation for the delay.

Thus, while we are mindful of Appellant's status as a pro se litigant, inasmuch as she has failed to file a brief in support of her appeal or to otherwise respond to the notice to her, nor has she provided a telephone number whereby we may contact her, the State Board of Education dismisses the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a).

January 6, 1993
Date of mailing JAN 08 1993

234-92

234-92

ROSLYN BRICKMAN GNATT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, former second grade teacher, appealed Board's action withholding her increment and salary adjustment for the 1991-92 school year. Petitioner alleged, among other things, that the Board's action to withhold was arbitrary, capricious and unreasonable. The Board contended, among other things, that its actions with regard to petitioner were proper and in accordance with the law.

Initial decision found that petitioner had been transferred to a higher grade (4) as a reading teacher allegedly because of difficulty relating to younger children, but thereafter experienced difficulty with classroom management. ALJ found that 15 classroom observations conducted of petitioner during 1990-91 school year showed some improvement but not enough to result in restoration of increment. Petition was dismissed.

Commissioner adopted findings and conclusions in initial decision noting his acceptance of the principal's testimony, as well as that of Ms. Schaeder (teacher advisor/teacher support person), but also finding that even without her testimony, observation reports provided sufficient basis for withholding.

SEPTEMBER 24, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8416-91
AGENCY DKT. NO. #306-8/91

ROSLYN BRICKMAN GNATT,

Petitioner,

v.

BOARD OF EDUCATION OF THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,

Respondent.

Lawrence Van Wess, Esq., for petitioner (Klausner, Hunter & Cige, attorneys)

Sanford D. Brown, Esq., for respondent (Cerrato, Dawes, Collins, Saker & Brown, attorneys)

Record Closed: June 25, 1992 Decided: August 7, 1992

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Roslyn Brickman Gnatt, appeals from an action by the Board of Education of the Manalapan-Englishtown Regional School District (Board) to withhold her increment and salary adjustment for the 1991-92 school year. Petitioner alleges, among other things, that the Board's action to withhold her 1991-

92 increment and salary adjustment was arbitrary, capricious and unreasonable. The Board contends, among other things, that its actions with regard to petitioner were proper and in accordance with the law. The Board request that the Petition of Appeal be dismissed.

The instant matter was transmitted to the Office of Administrative Law (OAL) on September 4, 1991, for determination as a contested case, pursuant to ***N.J.S.A.*** 52:14B-1 *et seq.* ; ***N.J.S.A.*** 52:14F-1 *et seq.* ; ***N.J.S.A.*** 18A:6-9 and ***N.J.S.A.*** 18A:29-14. A prehearing conference was held on January 6, 1992. The plenary hearing was held on June 23, 24 and 25, 1992, at the Monmouth Hall of Records, Freehold, New Jersey. The hearing record was closed on June 25, 1992.

BURDEN OF PROOF

Petitioner carries the burden to affirmatively demonstrate, by a preponderance of the credible evidence, that the Board's action to withhold her increment and salary adjustment for the 1991-92 school year was arbitrary, capricious and/or unreasonable.

BACKGROUND FACTS

Petitioner has been employed by the Board for 23 years. During the 1984-85 school year petitioner taught second grade under the supervision of Ruth Jackson, Principal of the Taylor Mills School.

In or about January 1985, petitioner's husband suddenly became critically ill. Petitioner's husband was hospitalized and, at some point in time, was transferred to the Sloan Kettering Institute for Cancer, New York City. Rather than take a leave of absence, petitioner used sick leave and personal leave days to attend to her husband. Petitioner visited her husband every day until his death on June 17, 1985. Petitioner was absent from school intermittently during the period of January through June, 1985.

Petitioner continued to teach at the Taylor Mills School for the subsequent years following her husband's death through the 1988-89 school year. At the conclusion of the 1988-89 school year Principal Jacobson recommended that petitioner be transferred from the second grade to a higher grade level because,

in Jacobson's considered opinion, among other things, petitioner was having difficulty relating to seven and eight year old children (R-1).

Petitioner was transferred to the Milford Brook School and assigned to teach the fourth grade beginning September 1989. Petitioner appeared for her assignment on the first day of school but did not appear thereafter. Subsequent to exhausting her sick leave petitioner applied for, and was granted, a health leave of absence. Although the Board and its agents were uncertain as to when petitioner would return for duty, she remained on the health leave of absence for the remainder of the 1989-90 school year.

Petitioner was under medical and psychiatric care beginning in the Summer of 1989 and continuing for four months thereafter. Petitioner was in counseling for grieving. As a consequence, petitioner did not believe she could effectively teach for the 1989-90 school year. She also felt the need to take care of unspecified personal matters during the 1989-90 school year.

During the Summer of 1990, petitioner contacted Harriet Bernstein, Assistant Superintendent of Personnel, to request that petitioner be assigned to a reading teacher position available at the Board's Pine Brook School for the 1990-91 school year. Petitioner was interviewed and accepted for the position as teacher of reading in the Board's Development Reading Program commencing September 1990.

This concludes a recital of the background facts which are hereby adopted, by reference as **FINDINGS OF FACT.**

TESTIMONIAL AND DOCUMENTARY EVIDENCE

Ruth Jacobson, Principal of the Taylor Mills School, testified, among other things, that she had supervised petitioner from the 1984-85 school year through the 1988-89 school year. Principal Jacobson asserted she recommended that petitioner be assigned from her then second grade to a higher grade level because petitioner was having difficulty relating to seven and eight year old children. Petitioner exhibited a lack of warmth toward the pupils in her second grade class and Jacobson was in receipt of negative feedback from parents whose children were assigned to petitioner's classroom. Parents requested of Jacobson that their children not be assigned to petitioner's classroom. Ms. Jacobson had to remove two pupils from petitioner's class due to conflicts between petitioner and the pupils. All of these

observations are a part of Jacobson's evaluation of petitioner; which were discussed with petitioner as a part of petitioner's Annual Performance Review (R-1).

In addition to Principal Jacobson's recommendation that petitioner be assigned to a higher grade level, Jacobson also recommended that petitioner be assigned a teacher advocate for the 1989-90 school year to aid and help petitioner get established on the new grade level and to assist petitioner in areas where she had demonstrated weaknesses; *i.e.*, motivation, communication, and continued development of teaching skills (R-1).

On cross examination, Jacobson testified that she noticed a decline in petitioner's performance during the 1986-87 school year following the death of petitioner's husband. Petitioner became lax with regard to classroom rules and demonstrated a lack of warmth toward pupils in her classroom. Ms. Jacobson had to remove two pupils from petitioner's classroom. One of the pupils Jacobson removed had become antagonistic towards petitioner. Subsequent to the removal of these two pupils, petitioner was able to maintain control over the class.

Principal Jacobson discussed petitioner's shortcomings with petitioner in an attempt to help petitioner improve her performance. Ms. Jacobson conducted a number of formal and informal observations of petitioner's classroom activities including the two annual required formal observations and evaluations. Ms. Jacobson conferred with petitioner following each of the observations in an attempt to help petitioner improve her performance. Jacobson also discussed with petitioner the Board's Employee Assistance Program where it provides psychological counseling to staff members upon request. Petitioner did not wish to discuss the Employee Assistance Program with Jacobson.

Harriet Bernstein, Assistant Superintendent of Personnel for the Board, testified that petitioner was transferred to teach the fourth grade at the Milford Brook School, commencing in September 1989. Ms. Bernstein asserted that petitioner arrived at the Milford Brook School for the first day of her assignment, however, petitioner did not appear thereafter. Subsequent to petitioner having exhausted her sick leave, petitioner applied for and was granted a health leave of absence. The Board was not certain when petitioner intended to return to her assigned duties. Petitioner did not return to duty for the entire 1989-90 school year.

During the Summer months of 1990, petitioner contacted Ms. Bernstein to request that petitioner be assigned to a reading teacher position for the 1990 school year. Petitioner interviewed for the reading teacher position and appeared to be enthusiastic about the assignment. Petitioner was the successful candidate for the position. Ms. Bernstein assigned Catherine Scheader, Supervisor of Reading, Language Arts, Library and Basic Skills, as petitioner's Teacher Advocate, commencing September 1990.

A Teacher Advocate is a program to aid and help teachers in transition from one teaching position to another involving a different assignment. The Teacher Advocate may conduct informal observation of the assigned teacher's classroom behavior and performance, assist with lesson plans, provide teaching materials for specific classroom projects, confer with the teacher about observed or perceived problems, goals and objectives; among other things. The Teacher Advocate's observations or assistance is not to be included in any formal evaluation of the teacher staff member observed and assisted by the Teacher Advocate.

Assistant Superintendent Bernstein became aware early in October 1990, that petitioner was having difficulty with classroom management in her new assignment. On or about October 17, 1990, Ms. Bernstein met with petitioner's Teacher Advocate and other school administrators to discuss petitioner's problems and methods to solve her classroom management problems. It was determined that petitioner should be removed from the Teacher Advocate Plan and placed on the Board's Teacher Support Plan; a more structured performance plan with specific written goals and objectives for teaching skills improvement. Ms. Bernstein assigned Ms. Scheader to work with petitioner under the Teacher Support Plan. Under the Teacher Support Plan, petitioner was subject to classroom observations and follow-up conferences by school administrators as well as Ms. Scheader.

Ms. Bernstein testified she did not ordinarily conduct classroom observations of teachers, however, she observed petitioner on December 4, 1990. Ms. Bernstein testified she observed that it took ten minutes for petitioner to distribute the teaching materials to begin the lesson; that most of the pupils were off-task; petitioner spent an inordinate amount of time dealing with discourteous and disruptive pupils; that there was a lack of mutual respect for teacher-pupil, pupil-teacher; and, that there was a lack of teacher motivation for learning.

Ms. Bernstein reviewed observations and evaluations of petitioner's performance conducted by other administrators and concluded that learning was

not taking place in petitioner's classrooms. Ms. Bernstein discussed petitioner's performance with the Superintendent and other school administrators and it was determined that tenure charges were to be brought against petitioner to the Board, pursuant to *N.J.S.A.* 18A:6-11, alleging inefficiency.

The Board considered the charge of petitioner's alleged inefficiency in executive session on January 8, 1991. Pursuant to *N.J.S.A.* 18A:6-11, petitioner was provided 90 days in which to correct and overcome the inefficiency. Petitioner was advised in advance of the Board's action of the specific charges against her. On January 9, 1991, the Board Secretary/Business Administrator provided petitioner with a copy of the written charges and the written statement of evidence in support of the charges together with the 90 day notice.

On January 17, 1991, Robert D. Hagler, Principal of Pine Brook School, submitted a 14 point Improvement of Performance Plan to petitioner. In addition, the principal transferred three additional pupils out of one of her classroom sections. The Improvement of Performance Plan provided, among other things, that petitioner's classroom to be observed weekly on an informal and formal basis to provide petitioner with feedback. Ms. Scheader was to continue with the Teacher Support Plan with petitioner.

Ms. Bernstein testified that on April 17, 1991, the Teacher Support Team of Mr. Hagler and Ms. Scheader submitted its interim evaluation of petitioner where the Support Team Members found that petitioner had achieved moderate success in meeting the established goals. Petitioner's handling of pupil discipline was still a major concern of the Support Team, notwithstanding that several disruptive pupils had been transferred out of petitioner's classrooms. It was determined to continue the Teacher Support Plan because petitioner was still not meeting the school district's standards for classroom management and pupil discipline.

Ms. Bernstein asserted that Principal Hagler submitted a memorandum to Superintendent Joseph Scozzari, dated May 6, 1991, wherein Hagler documented 15 classroom observations of petitioner together with an assessment of petitioner's performance with regard to the 14 point Improvement of Performance Plan dated January 17, 1991. Principal Hagler found some improvement in petitioner's performance. However, petitioner did not meet the school district's standards for classroom management, pupil motivation, and pupil-teacher relationships, among

other areas. Hagler recommended that petitioner be offered a 1991-92 contract because there was potential for improvement. However, Hagler aLso recommended that petitioner be denied her salary and adjustment increment for the 1991-92 school year due to her inability to deliver an acceptable program for the entire 1990-91 school year.

Subsequently, on May 14, 1991, the Board determined that it would not file tenure charges against petitioner but, rather, it took official action to permanently deny petitioner's increment for the 1991-92 school year when it unanimously adopted the following resolution:

> ....
> **WHEREAS,** the Board has reviewed the employment file of Roslyn Gnatt, a tenured teacher of the District; and
>
> **WHEREAS,** the Board has determined to permanently deny Roslyn Gnatt her increment for the 1991/92 school year for the following reasons:
>
> 1. Lack of consistent application of classroom management techniques.
> 2. Ineffective implementation of lesson plans.
> 3. Unable to effectively motivate and sustain students' interest.
> 4. Inability to develop an atmosphere where there isa display of positive regard and a sense of community which are conducive to learning.
>
> (R-14)

Melvin C. Reid, Assistant Principal of the Pine Brook School, testified, among other things, that he had observed petitioner's classroom performance during the 1990-91 school year and asserted that it was the worse pupil classroom behavior he had ever observed. Assistant Principal Reid was in charge of the Pinewood School pupil discipline and asserted that petitioner had made 45 pupil referrals to his office between the period of September to November 29, 1991. This was the highest incident of pupil referrals for discipline in the school. The next highest was 25 referrals by one teaching staff member, while the remainder of the referrals were in the single numbers.

Mr. Reid observed petitioner on October 9, 1990, November 27, 1990 and February 20, 1991. Reid asserted he had never observed pupils so unmotivated or a teacher so unprepared. Following the February 20, 1991 observation, Reid

conducted a conference with petitioner, however, petitioner could not recall the lesson Reid observed. Reid testified he was unable to engage petitioner in a dialog about his observation. Rather, Reid was only able to report to petitioner what he observed. Petitioner was passive and did not engage in any discussion of Reid's observation and evaluation.

Thomas William McNearney, Assistant Principal at Pine Brook School, testified, among other things, that he also observed petitioner during the 1990-91 school year and that petitioner did not perform up to the standards of excellence required by the Board. He asserted that quite a few of the pupils assigned to petitioner's classrooms expressed concerns about petitioner's discipline methods. In addition, between eight and ten parents telephoned McNearney to complain about petitioner's classroom performance and methods. Subsequent to the parent telephone calls to McNearney, McNearney spoke with petitioner about the complaints and arranged for petitioner to hold conferences with the parents. McNearney asserted that the parent complaints commenced in December 1990 and continued through January, February and March 1991.

Mr. McNearney testified that he participated in one of the parent-teacher conferences with petitioner. McNearney acted as a mediator between the parent and petitioner. At the conclusion of the meeting the parent insisted that his/her child be removed from petitioner's classroom. McNearney did not remove this pupil from petitioner's classroom. However, during the course of the school year, it was necessary for McNearney to removed between eight and ten pupils from petitioner's classes.

Assistant Principal McNearney asserted he first observed petitioner on October 21, 1990, with an informal observation on January 16, 1991 and a follow-up on January 30, 1991. He expressed his concerns about petitioner's deficiencies he observed in his first observation on October 21, 1990, and continued in January 1991. In a subsequent observation held on February 12, 1991, McNearney observed a more successful lesson performed by petitioner. However, he observed and noted that the classroom time was not well spent. He observed that petitioner spent an inordinate amount of time talking about the homework assignment and that she threaten to lower the pupil's grade if the homework was not presented on time. McNearney noted that petitioner was still deficient in classroom management and in her relationship with pupils.

Mr. McNearney asserted he met with petitioner after each classroom observation to discuss his observations and offer suggestions for petitioner's improvement. He asserted that petitioner offered excuses for her poor performance and objected to his criticism rather than accept responsibility for the conduct in her classroom.

Catherine Scheader, Supervisor of Reading, Language Arts, Library and Basic Skills, testified she observed petitioner on a regular basis during the 1990-91 school year as petitioner's teacher advocate and supervisor. Ms. Scheader continued to observed petitioner formally and informally after the Teacher Support Plan was initiated on or about October 17, 1990. The observed needs for petitioner's improvement included, among other things; lessen design, rapport with the pupils in her classrooms, effective use of time and planning, and the general conduct of the specific lessons.

Ms. Scheader testified she observed petitioner on October 17, 1990 where the classroom was completely out of order. Subsequently, on October 20, 1990, Ms. Scheader observed a lesson by petitioner where there was confusion among the pupils about petitioner's directions. It seems that petitioner devoted an inordinate amount of time explaining an assignment to the pupils which they had already completed. In the conference which followed these observations, Scheader recommended to petitioner that petitioner's lesson planning must be very specific. Ms. Scheader suggested to petitioner that petitioner write a script of her lesson plan and follow the script in teaching her classes.

Ms. Scheader observed petitioner during the months of January, February and March 1991, under the Teacher Support Plan. Ms. Scheader maintained a Teacher Support Log of her observation and conferences with petitioner (R-21). In addition, Ms. Scheader arrange for petitioner to observe three reading classes conducted by a fellow teaching staff member. These teacher observations were followed by a conference where petitioner and Ms. Scheader discussed what they each had observed and how those positive elements of the observed lessons could be adopted and incorporated into petitioner's program.

Ms. Scheader asserted she continued to observe deficiencies in petitioner's classroom performance. Those deficiencies involved petitioner's planning, motivation of the pupils and discipline. With regard to discipline in the classroom,

Scheader testified she observed 41 incidents of disciplinary behavior by pupils in one 48 minute class period.

Ms. Scheader provided petitioner with the publication, *Foundations of Reading*, known as the reading reachers "Bible," and a series of articles published in the *Journal of Reading* by noteworthy authors to aid petitioner in improving her teaching performance. In addition, Ms. Scheader conducted seven meetings for Reading Teachers during the 1990-91 school year where topics such as testing, teaching techniques and other timely subjects were discussed.

Ms. Scheader testified that petitioner had made some improvement in her teaching performance. However, pupil discipline problems continued to be a major deficiency and continued well into the Spring of 1991. Scheader had observed other reading teachers performance and had never witnessed such lack of control as she observed in petitioner's classrooms. Ms. Scheader testified that even in the months of April and May 1991, after several disruptive pupils had been removed, petitioner could not control the pupils in her classrooms. Ms. Scheader opined that petitioner's lack of pupil control was due to the lack of rapport between petitioner and the pupils in her classes.

Petitioner contends that when she was assigned as a Reading Teacher at the Pine Brook School commencing in September 1990, she was assigned to teach seventh and eighth grade pupils. When she arrived at Pine Brook prior to the opening of the school year, petitioner located the textbooks in the classroom, however, there were no information about the reading curriculum provided nor was there a class list of pupils assigned to her various classes. Petitioner was assigned five classes or five periods daily. Her largest class consisted of 23 pupils while her smallest class contained only six pupils.

Petitioner asserts that discipline at the Pine Brook School was a major problem as evidenced by the Disciplinary Survey conducted by the New Jersey Education Association (NJEA) (P-2). Petitioner also contends she had an inordinate number of classified pupils assigned to her classes by the Board's Child Study Team for the purpose of mainstreaming. Petitioner maintains that when she sent a pupil to the Principal or one of the Assistant Principals for disciplinary action, nothing was done to punish the pupil As a consequence, the pupil returned to petitioner's classroom gloating that nothing had happened to him or her.

Petitioner testified about a memorandum she received from Assistant Principal Reid subsequent to petitioner having referred two girls to Reid for disciplinary action. Petitioner asserted that the two pupils had left her classroom without permission and, therefore, she sent them to the principal's office. Petitioner opined that it was not unusual for eighth grade pupils to be defiant and insubordinate. However, Assistant Principal Reid followed this with a memorandum in which he asserted that the two girls alleged that petitioner had called them both "stupid." In a subsequent meeting, petitioner denied the allegations. Assistant Principal Reid followed up by interviewing 19 other pupils in petitioner's classrooms and quoted four of the other pupils as alleging that petitioner had, indeed, called them and others "stupid" (P-5).

As a consequence of these allegations, a letter of reprimand was placed in petitioner's personnel file. Subsequent to grievance filed by petitioner, the letter of reprimand was removed from petitioner's personnel file.

Petitioner invited the Pine Brook School Principal to her classroom to help her establish a pupil discipline program and show his support for petitioner. Petitioner testified that the principal visited her classroom on December 16 and 17, 1990. On the first day the principal observed petitioner's classroom performance but said nothing to the pupils. On the second day, the principal made no remarks to petitioner. However, the principal wrote an evaluation of his observation of petitioner where he cited petitioner's strengths and weaknesses. In his evaluation the principal stated it was the teacher's responsibility to establish discipline in the classroom.

Petitioner testified as to the change in roles of Ms. Scheader from Teacher Advocate to the Teacher Support Plan. It was petitioner's understanding that under the Teacher Advocate Program, Ms. Scheader's notes of observations were not to be used in evaluating petitioner's performance but, rather, such information was to be used to facilitate and aid petitioner to improve her performance. However, when Scheader's role changed from Teacher Advocate to Teacher Support in October 1990, petitioner testified that Scheader's past informal observations were used as a basis to criticized petitioner's past performance. As a consequence, petitioner filed and prevailed in a grievance to have Ms. Scheader's Teacher Advocate notes expunged from petitioner's formal observations and evaluations.

Petitioner admits that beginning in September 1990 and continuing throughout the 1990-91 school she was observed and evaluated by Principal Hagler, Assistant Principals McNearney and Reid, Supervisor Scheader and Assistant Superintendent Bernstein. Following each observation petitioner met with the observer to discuss differences in perception of the observation and evaluation of petitioner's performance. While there were some positive comments, petitioner concedes that the observations were generally negative in nature.

Petitioner also admits that the Superintendent received a variety of complaints from parents who did not want their children assigned to petitioner's classroom the subsequent school year. Petitioner was scheduled to teach the fourth grade commencing in September 1991 for the 1991-92 school year. In a meeting held in July 1991 with the Superintendent, a Teacher's Association representative and petitioner; the Superintendent had a file with 14 letters from parents who did not want their children assigned to petitioner's fourth grade classroom. The Superintendent also advised petitioner that parents had attended a meeting of the Board to express complaints about petitioner's performance. Petitioner testified that the letters from the concerned parents indicated that petitioner abused children, that she called her pupils stupid, that she would not allow pupils to go to the bathroom when necessary, among other things. Petitioner denied the allegations.

Petitioner conceded that it was the classroom teacher's responsibility to establish discipline and control over the pupils under her charge. She admitted that the school administrators removed certain pupils from her classroom during the 1990-91 school year in order to improve the classroom climate. Petitioner continued to assert she received no support from the school administration with respect to the disciplinary problems extant in her classroom.

It was at the meeting in July 1991, where the Superintendent encouraged petitioner to retire. Petitioner refused.

FINDINGS OF FACT

Having reviewed and considered the testimony and other evidence proffered at the hearing, and having assessed the demeanor and credibility of the witnesses, and having given fair weight thereto, I **FIND** the following **FACTS** in this matter:

1. Petitioner is a veteran teacher with 23 years experience.

2. Petitioner volunteered for and was assigned to a position of reading teacher for the 1990-91 school year upon her return from a voluntary health leave of absence for the 1989-90 school year.

3. Due to a change in assignment from the fourth grade to reading teacher, petitioner was assigned a teacher advocate to aid her in making the teaching transition beginning in September 1990.

4. The Teacher Advocate, Catherine Scheader, conducted informal observations of petitioner's teaching performance and counseled with petitioner concerning teaching methods and techniques. The Board's Teacher Advocate program is an aid to a teacher new to a grade level or instructional program, which is advisory and non-threatening in nature.

5. In early October 1990, Assistant Superintendent Harriet Bernstein became aware that petitioner was having difficulty with classroom management.

6. On October 17, 1990, the petitioner was removed from the Teacher Advocate program and placed on the Board's Teacher Support Plan. The Teacher Support Plan is more formal and structured with specific written goals and objectives to be met for petitioner's improvement in performance. Supervisor Scheader was assigned as petitioner's Teacher Support Plan consultant.

7. During the period October 17, 1990 through January 8, 1991, petitioner's classroom was observed by Ms. Bernstein, Assistant Principals Melvin Reid and Thomas McNearney, Principal Robert Hagler and Supervisor Scheader.

8. On January 8, 1991, the Board took action, pursuant to *N.J.S.A.* 18A:6-11, and charged petitioner with inefficiency. Such a charge requires a period of 90 days in which petitioner may correct the alleged inefficiencies prior to the Board certifying the charge to the Commissioner.

9. On April 17, 1991, an interim evaluation of petitioner by the Support Team members demonstrated that petitioner had achieved a moderate success in meeting the established goals, however, petitioner's classroom management and her handling of pupil discipline remained a major concern and a goal not met.

10. On or about May 6, 1991, Principal Hagler submitted a written memorandum to Superintendent Joseph Scozzari which reported 15 classroom observations of petitioner together with an assessment of her performance with regard to the 14 point Improvement Performance Plan dated January 17, 1991. Principal Hagler found some improvement. However, he also found petitioner did not meet the school district's standards for classroom management, pupil motivation or improvement in her pupil-teacher relationship, among other things.

11. On May 14, 1991, the Board determined it would not certify tenure charges to the Commissioner against petitioner.

12. On May 14, 1991, the Board took action, pursuant to *N.J.S.A.* 18A:29-14, to permanently deny and withhold petitioner's employment increment and/or adjustment increment for the 1991-92 school year.

DISCUSSION AND CONCLUSIONS

The controlling statute in this matter is found at *N.J.S.A.* 18A:29-14, which provides, in pertinent part, 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 member ship of the board of education.

The Appellate bench of our Superior Court established the standard of the Commissioner's review of a local board of education's action pursuant to statute in *Kopera v. West Orange Board of Education,* 60 *N.J. Super.* 288 (App. Div. 1960) where it said:

> "▪▪▪▪▪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 reasonable basis for their conclusions."

In *Kopera,* the Court held that there are only two determinations to be made when reviewing a board's determination to withhold a teaching staff member's employment increment; *i.e.,* (1) whether the underlying facts were as those who made the evaluations claimed, and (2) whether it was unreasonable for them to conclude as they did based upon those facts. The burden of proving unreasonableness lies with petitioner.

The facts in the instant matter clearly demonstrate that petitioner had, among other things, difficulty with classroom management which interfered with the teaching-learning process. The evidence shows that, even after the school's administration removed certain pupils from petitioner's classrooms, petitioner had a measure of difficulty in controlling pupil behavior. There was, as pointed out in her evaluations, a lack of mutual respect exhibited between pupil-teacher and teacher-pupil. The overall assessment of petitioner's performance for the 1990-91 school year demonstrates that petitioner did not meet the expectations or standards of excellence required by the Board in her assignment as reading teacher for the 1990-91 school year.

Our Supreme Court addressed the purpose of *N.J.S.A.* 18A:29-14, in the matter of *Bernards Township Board of Education v. Bernards Township Education Association.* 79 *N.J.* 311 (1979), where it stated, among other things, that:

> [t]he decision to withhold an increment ....is ...dependent upon an evaluation of the quality of the service in 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 manner of essential managerial prerogative which has been delegated by the Legislature to the board [of education] .... [citations omitted]. (at p. 321). (emphasis supplied)

I **CONCLUDE,** therefore, that a comprehensive review of the herein record demonstrates that the Board had a reasonable basis for its action to withhold petitioner's employment and/or adjustment increment for the 1991-92 school year.

I **CONCLUDE** that petitioner has failed to meet her burden of proof, by a preponderance of the credible evidence, that the Board's action was unreasonable, arbitrary and/or capricious. *Kopera, supra.* See also, *Melinda Shafran v. Board of Education of the Township of Middletown,* 1984, *S.L.D.* 969.

I **CONCLUDE** that under the facts and circumstances of this matter, the Board's action must be **SUSTAINED.** *Bernard's Township, supra.*

ORDER

Accordingly, it is **ORDERED** that the action by the Board of Education of the Manalapan-Englishtown Regional School District to permanently withhold the employment increment and/or adjustment increment of Roslyn Brickman Gnatt for the 1991-92 school year is hereby **AFFIRMED AND SUSTAINED.**

It is **FURTHER ORDERED** that the Petition of Appeal be and is hereby **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 7, 1992
Date

Lillard E. Law /jrr
LILLARD E. LAW, ALJ

Receipt Acknowledged:

8/10/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 14 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

PETITIONER:
ROSLYN BRICKMAN GNATT

RESPONDENT:
RUTH JACOBSON
HARRIET BERNSTEIN
MELVIN C. REID
THOMAS WILLIAM McNEARNEY
CATHERINE SCHEADER

DOCUMENTS IN EVIDENCE

JOINT EXHIBITS:

J-1 OBSERVATION & EVALUATION PLAN
J-2 SERIES OF ARTICLES:
DEVELOPING METACOGNATIVE AWARENESS
STRATEGY FAMILIAR FOR DISABLED READERS
CRITICAL THINKING
THE DIRECTED NOTETAKING ACTIVITY
ACTIVE RESPONDING IN CONTENT CLASSROOMS
DEVELOPING STRATEGIC LEARNERS

PETITIONER'S EXHIBITS

P-1 MEMO FACULTY MEETING OUTCOMES
P-2 1991- DISCIPLINARY SURVEY - MEEA
P-3 (I.D. ONLY)
P-4 STUDENT DISCIPLINE - PINEBROOK
BEHAVIOR IN CLASSROOM
SAMPLE DISCIPLINE PLAN FOR CLASSROOM USE
P-5 MEMO TO GNATT FROM REID, DATED JANUARY 8, 1991
P-6 MEMO FROM SUPERINTENDENT TO BOARD SECRETARY, DATED JANUARY 4, 1991 - WRITTEN CHARGES - INEFFICIENCY AGAINST GNATT
P-7 A. OBSERVATION - 2/12/91
B. OBSERVATION - 1/25/91
C. OBSERVATION - 1/16/91 - FOLLOWUP JANUARY 30, 1991
D. OBSERVATION - 1/30/91
E. OBSERVATION - 2/7/91
F. OBSERVATION - 3/27/91
P-8 MEMO FACULTY SUGGESTIONS, DECEMBER 17, 1990 FROM REID
P-9 (I.D. ONLY)

RESPONDENT'S EXHIBITS

R-1 ANNUAL PERFORMANCE REPORT - GNATT, JUNE 1989
R-2 MEMO TO GNATT FROM HAGLER RE: PARENT LETTER DECEMBER 1990 W/2 ATTACHMENTS
R-3 MEMO FEBRUARY 19, 1991 - SCHEADER TO GNATT
R-4 OBSERVATION REPORT - DECEMBER 4, 1990 BY BERNSTEIN
R-5 OBSERVATION REPORT - OCTOBER 21, 1990 BY McNEARNEY
R-6 OBSERVATION REPORT - NOVEMBER 27, 1990 BY REID
R-7 OBSERVATION REPORT - OCTOBER 9, 1990 BY REID
R-8 MEMO TO SUPERINTENDENT SCOZZARI FROM HAGLER, PRINCIPAL MAY 6, 1991
R-9 TEACHER SUPPORT PROGRAM
R-10 MEMO TO GNATT FROM HAGLER, OCTOBER 18, 1990
R-11 MEMO TO GNATT FROM HAGLER, JANUARY 17, 1991
R-12 LETTER FROM BERNSTEIN TO GNATT, JUNE 25, 1991

R-13 LETTER, JANUARY 9, 1991 TO GNATT FROM RIEHMAN
R-14 LETTER, MAY 28, 1991 TO GNATT FROM RIEHMAN
R-15 CONDUCT MANAGEMENT REPORT, MRS. GNATT, NOVEMBER 29, 1990
R-16 OBSERVATION REPORT, FEBRUARY 20, 1991,BY REID
R-17 MEMO TO GNATT FROM McNEARNEY, OCTOBER 18, 1990
R-18 LETTER, JANUARY 7, 1991 TO GNATT FROM BERNSTEIN
R-19 INFORMAL TEACHER OBSERVATION LOG, 11/7/90
R-20 INFORMAL TEACHER OBSERVATION LOG, 11/20/90
R-21 TEACHER SUPPORT PLAN LOG, MARCH 15, 1991
R--22 MEMO TO GNATT FROM HAGLER, FEBRUARY 6, 1991
R-23 MEMO TO GNATT FROM SCHEADER, FEBRUARY 12, 1991

ROSLYN BRICKMAN GNATT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

Petitioner's Exception No. One claims the ALJ allowed inadmissible testimony and documents to be entered into evidence, which tainted the record and prejudiced petitioner's case. She reasserts that argument raised at hearing that the evidence must be confined to the events that led to her alleged unsatisfactory performance for the year in which her increment was withheld, that is the 1990-91 school year, and that all other evidence should have been determined as being irrelevant to the controversy. Petitioner contends that the testimony and evidence related to her evaluation prepared by the principal, Ms. Ruth Jacobson, should not have been permitted because the witness' testimony was outside the scope of

the 1990-91 school year in question. She further argues such evidence presented by Ms. Jacobson as to years earlier than the 1990-91 school year prejudiced petitioner's case and the proper issues to be decided, that is, the events of the 1990-91 school year. She claims none of Ms. Jacobson's testimony concerned any of the specific incidents or charges alleged by the Board as reasons for its action against her. She would also have stricken from the record inclusion of R-1 in evidence, petitioner's 1988-89 Annual Performance Report (APR) alleging it is irrelevant to the instant withholding.

Petitioner contends that even if Ms. Jacobson's testimony were relevant, the consideration it received should have been greatly reduced, since her testimony related to events prior to the timeframe in question. She cites Trautwein v. Bound Brook Bd. of Ed., 1979 S.L.D. 876, rev'd on other grounds by Appellate Division 1980 S.L.D. 1539, cert. denied 84 N.J. 469 (1980). Petitioner further objects to Ms. Jacobson's testimony because she was not listed as a potential witness, and therefore her appearance at hearing constituted an unjust surprise because petitioner was unable to prepare a rebuttal to the testimony offered.

Exception No. Two avers the dual rule of Catherine Schaeder as both a teacher advocate and teacher support person created an unjustifiable conflict in her observation of petitioner's performance and, therefore, the testimonial and documentary evidence with regard to her observation of the petition should not have been admitted. Petitioner submits Ms. Schaeder's sharing first the role of advocate, which was solely for the benefit of petitioner, with her role after October 17, 1991 as a teacher support person, which

was adversarial in that Ms. Schaeder could share her thoughts with the administration concerning petitioner's alleged shortcomings, produced confusion and was improper. Petitioner argues that Ms. Schaeder's role as advocate negatively colored her perception of petitioner and information gathered during her tenure as petitioner's advocate was improperly used to bolster the Board's allegations against her.

Further, petitioner asserts that Ms. Schaeder offered no evidence that she has the proper credentials to evaluate her performance pursuant to N.J.A.C. 6:3-1.12(h) [N.J.A.C. 6:3-1.21(h)]. Petitioner contends Ms. Schaeder does not hold the proper certificate nor has she been designated by the Board to supervise instruction. She claims that the ALJ allowed Ms. Schaeder to testify about her teaching performance, and refers to her testimony in the initial decision. Petitioner finds such testimony improper and that Ms. Schaeder lacks the requisite credentials to offer such evaluations pursuant to N.J.A.C. 6:3-1.12(h) [N.J.A.C. 6:3-1.21(h)]. Petitioner would have such testimony disregarded.

In sum, petitioner submits that the ALJ committed reversible error by admitting tainted and improper evidence at the hearing. She seeks reversal of the initial decision and seeks an order directing a new hearing.

The Board's reply exceptions regarding the testimony of Ms. Jacobson note that the ALJ's ruling was absolutely correct insofar as petitioner herself, during her initial testimony, spoke of the history of her teaching and the impact that her husband's illness had on her teaching. The Board notes the ALJ's inclusion of such information at pages 2-3 of the initial decision, citing R-1 in evidence. Thus, the Board contends that petitioner herself provided

grounds to have Ms. Jacobson testify and provide background information, which, the Board avers, explained petitioner's historical problem and her alleged inability to perform.

The Board also contends that R-1 was pertinent and of no surprise at all to petitioner in that reference to and discussion of it was made a part of the documentation which was presented by the Board in its filing of charges of inefficiency on January 8, 1991. The Board claims such APR was attached to those charges, and was referred to in writing in the written charges. Thus, petitioner cannot argue surprise, the Board contends, in that she was well aware of and, in fact, received the APR as part of discovery well before the hearing began. However, even if petitioner had been unaware before hearing that Ms. Jacobson was going to testify, there was no prejudice because of petitioner's prior knowledge of the APR and due to her ability to cross-examine the witness and to present any other witnesses she chose. The Board notes that petitioner's only witness was herself.

The Board contends that petitioner's reliance on Trautwein, supra, is misplaced in that the State Board decision in that matter supports the Board's position that past history is acceptable in a matter such as this one. It cites a decision mentioned in Trautwein, In the Matter of Joseph A. Maratea, 1966 S.L.D. 77, aff'd State Board 106, aff'd Appellate Division 1967 S.L.D. 351 for the statement that "past conduct over a reasonably relevant period of time may properly be considered by a board of education in determining whether or not a teacher's increment should be withheld." (Trautwein, 1979 S.L.D. at 877) (Reply Exceptions, at

p. 3) The Board contends there can be no question of relevancy that petitioner's activity based on her own admission greatly changed at the time of her husband's sickness and that it continued thereafter. It further claims that the denial of increment occurred within a reasonably relevant time to the behavior changes noted. Thus, the Board submits, any testimony by the principal, including regarding the annual performance report, is proper and necessary for consideration.

As to the testimony of Ms. Schaeder, the Board avers she is a highly qualified reading supervisor, qualified by the ALJ, and strictly testified within her expertise. The Board contends Ms. Schaeder is the district's most academically qualified staff member in the area of reading, that she does hold appropriate certification as supervisor, and for 8 years has been preparing formal evaluations of teachers. Because petitioner was a reading teacher, the Board submits Ms. Schaeder's testimony is relevant in regard to her observations of petitioner during the 1990-91 school year. It cites the initial decision with accord at pages 9 and 10 in this regard.

As to Ms. Schaeder's purported change in roles, the Board contends petitioner was notified by Principal Robert D. Hagler of the change, which the Board supports by quoting petitioner's counsel's brief wherein it is stated "[o]n or about October 17, 1991, Ms. Schaeder's role changed from that of Teacher Advocate to that of Teacher Support Person." (Reply Exceptions, at p. 4) The Board also claims that petitioner's argument that no procedural guidelines were produced at the hearing also has no basis in fact and is contrary to the evidence. It avers that not only was this

issue discussed by Ms. Schaeder, but also by petitioner. It notes the procedural guidelines were marked into evidence as part of R-9. Thus, the Board submits, petitioner had full knowledge of Ms. Schaeder's role as a supervisor and the ALJ properly permitted the supervisor of reading to testify on those observations in conformance with guidelines.

The Board seeks affirmance of the initial decision.

Upon careful and independent review of the record of this matter, which it is noted does not include the transcript of the hearing below, the Commissioner adopts as his own the finding of the Office of Administrative Law that petitioner has failed to meet her burden of demonstrating that the Board's action in withholding her 1991-92 increments was unreasonable. See Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960).

The Commissioner's review of the record of this matter concurs with the ALJ's that petitioner had difficulty during the year in question with classroom management which interfered with the teaching-learning process. See R-4 through R-7. See also P-7 A, B, C, D, E and F. It bears noting that because tenure charges had been filed against petitioner during the same time, the district was obliged to provide extensive monitoring and support to petitioner during the 90-day period for correcting alleged inefficiencies it perceived in petitioner's performance. Such careful aid and reportage belie petitioner's concerns expressed in her response to observations conducted during the 1990-91 school year of lack of support from the administration in handling student discipline. Moreover, R-9, the exhibit setting forth the procedures of the teacher support program extant in the district lends further

credence to the Board's contention that it provided able assistance and support for petitioner toward improving the perceived inefficiencies and difficulties petitioner experienced.

As to petitioner's exceptions that Ms. Jacobson's testimony should be stricken for referring to petitioner's teaching history, the Commissioner deems such exception to be without merit. As noted by the Board in reply exceptions, petitioner herself "opened the door" to such testimony being admissible in referencing her husband's illness and how such circumstances affected her prior satisfactory teaching performance and perspective. Moreover, a teacher's performance history may be reviewed in evaluating whether to withhold an increment. See, for example, Dr. Joan Byorek v. Board of Education of the Scotch Plains-Fanwood School District, Union County, decided by the Commissioner August 14, 1992.

The record of this matter demonstrates clearly that the administration had been concerned with petitioner's performance since sometime before the 1988-89 school year, and that the Board was in the process during the 1990-91 school year of reviewing her teaching performance under the Tenure Employees Hearing Act, N.J.S.A. 18A:6-10 et seq. The evaluations conducted of petitioner during the 1990-91 school year make plain that the problems petitioner was experiencing as a reading teacher were of sufficient magnitude and duration to have warranted intervention by its teacher advocate and teacher support programs early on in the 1990-91 school year. The Commissioner deems that testimony adduced from the principal relating to petitioner's history of teaching performance, as well as the APR of 1988-89 (R-1), are thus relevant and admissible in his hearing.

However, even were such testimony and exhibit not considered in the Commissioner's review of this matter, the formal evaluations conducted by various other members of the staff as embodied in Exhibits R-4 through R-7 and P-7 provide sufficient basis for upholding the Board's determination to deny petitioner her increment for the 1991-92 school year. In so deciding, the Commissioner thus rejects petitioner's contention that Ms. Schaeder's role as both advocate and support person created a conflict that should have foreclosed her testimony from entering the record, and also because she allegedly lacked a supervisor's certificate. Although the Board's reply exceptions rebut the suggestion that Ms. Schaeder lacked a supervisor's certificate, the record is devoid of information pertaining to such argument. As noted earlier, the record of this matter does not include transcripts of the hearing below, and thus the Commissioner is without the ability to review whether this argument was raised before the ALJ and therefore ruled upon in his determination to permit Ms. Schaeder to testify. See In re Morrison, 216 N.J. Super. 143, 158 (App. Div. 1987). Thus, such contention is not considered in the Commissioner's consideration of this matter not only for failure to cite transcript references in presenting this exception, but also because even were Ms. Schaeder's testimony and evaluations stricken from the record, the other exhibits made a part of this record, as well as the testimony of the other witnesses, lead the Commissioner to the conclusion that petitioner has failed to demonstrate that the facts averred were not true as claimed and that the Board was unreasonable in withholding her increments. See Kopera, supra.

Accordingly, for the reasons expressed in the initial decision, as clarified herein, the recommended initial decision is adopted as the Commissioner's own. The Petition of Appeal is therefore, dismissed, with prejudice.

CTING COMMISSIONER OF EDUCATION

SEPTEMBER 24, 1992

DATE OF MAILING - SEPTEMBER 28, 1992

235-92

235-92

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE NORTHFIELD SCHOOL : COMMISSIONER OF EDUCATION
DISTRICT, ATLANTIC COUNTY. : DECISION
:

SEPTEMBER 28, 1992

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE NORTHFIELD SCHOOL : COMMISSIONER OF EDUCATION
DISTRICT, ATLANTIC COUNTY. : DECISION
:

For Respondent, James E. Franklin, II, Esq. (Megargee, Youngblood, Franklin & Corcoran)

This matter was opened before the Commissioner on June 10, 1992 through the Northfield Board of Education's (Board) filing of an appeal of the cap waiver defeated by the voters of the Northfield School District on April 7, 1992. On June 24, 1992, James E. Franklin, II, Attorney for the City of Northfield, notified the Commissioner that the governing body would not participate in the appeal so long as the Board did not reverse its determination to reduce the budget by $100,000.

On August 14, 1992, the time expired for the Board to submit a position statement pursuant to the requirements of N.J.A.C. 6:24-7.8(a)2, thus it was on that date that the record in this matter closed.

It is the Board's contention that in addition to the current expense budget certified by the governing body of the Northfield School District on April 21, 1992 in the amount of $3,947,535, there is a need for an additional $431,154 in current expense in order for the district to provide a thorough and efficient education to its students.

On March 11, 1992, Sandra Lowe, Acting Atlantic County Superintendent of Schools, conditionally approved the Northfield School District's budget subject to the cap waiver amounts set forth below which were deemed necessary for a thorough and efficient education by her.

03-213	Grades 6-8, Salaries-Teachers	$322,150.00
00-640	Utilities	23,000.00
00-820	Insurance & Judgments	4,000.00
00-870	Rentals Other than Lease Purchase	81,996.00
	Additional Current Expense Appropriations	$431,154.00

On July 2, 1992, Martin Ney, Atlantic County Superintendent of Schools, approved the $100,000 reduction to the Board's proposed budget due to unanticipated monies being available to the district for health insurance. The monies in contention in this matter are, therefore, as set forth below.

	Proposed tax levy adopted by Board of Education	Amount of tax levy certified by governing body
Current expense	$4,047,535	$3,947,535
Capital Outlay	NA	NA
Cap waiver:		
Current expense	$ 431,154	
Capital expense	NA	
Total	$4,478,689	$3,947,535
Amount in Dispute before Commissioner:		
Cap waiver:		
Current expense		$ 431,154

The $431,154 in cap waiver monies set forth above are necessary for the provision of a thorough and efficient education to the Board's students in order for the Board to reopen an elementary school which it closed 10 years ago. The information set forth below summarizes the necessity for the cap waiver monies:

The Northfield Schools consist of three elementary schools and one middle school. One of the elementary schools, The James E. Locuson School is currently rented to the Atlantic County Special Services District for $252,000.00. The Northfield Schools currently have a total of six portable trailers on site, four at the Charles M. Kresge School, two for use as a library, one for a Multiple Handicapped classroom and one is shared for Basic Skills Instruction and a Learning Resource Room, and two at the Mount Vernon Avenue School, one for Basic Skills Instruction and one for a Learning Resource Room. These trailers will be removed at the end of the 1991/92 school year. Due to increasing enrollment, the James E. Locuson School will be reclaimed for the 1992-93 school year and we will be able to remove the six substandard trailers. The Special Services District has added ten Modular self-contained classrooms on the Locuson site which the Northfield Board of Education intends to utilize for its programs.

***

The major increases in our budget are directly related with the recapture of the Locuson School. The loss of $252,000.00 in rental income, the modular classrooms at Locuson will cost $81,996.00, the school is all electric and we estimate an annual cost of $20,000.00. When we closed the school ten years ago, we sold most of the furnishings, we plan on sending various items from our other three schools, however we will need to stock a library, an office, a nurses office as well as three classrooms. We will also have to hire a secretary, custodian and part time nurse in addition to a principal. In addition to these costs we will be hiring three new classroom teachers due to increased enrollment and an additional MH teacher due to grade level changes from our current levels. We have always tried to be conservative with our budgets in the past and this year is no exception. All of our negotiable contracts are up for renewal this year and we have kept as many line items as possible to very modest increases.

(Budget and Cap Waiver Appeal, Section 3)

Upon review of the record of this matter, including the extensive documentation provided by the district in support of the necessity of the cap waiver funds, which is incorporated herein by reference, the Commissioner finds and determines that the requested

relief shall and is hereby granted as the Board has borne its burden of demonstrating that these funds are necessary for the provision of a thorough and efficient education to the students of the Northfield School District. East Brunswick Township Board of Education v. East Brunswick Township Council, 48 N.J. 94 (1966); Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305 (1989)

Accordingly, the Atlantic County Board of Taxation is hereby ordered to adjust the Northfield School District's tax levy for the 1992-93 school year to reflect an increase of $431,154 for current expense which results in a total current expense tax levy of $4,378,689.

COMMISSIONER OF EDUCATION

SEPTEMBER 28, 1992

DATE OF MAILING - SEPTEMBER 29, 1992

236-92

IN THE MATTER OF THE CAP WAIVER	:	
APPEAL OF THE KINGWOOD SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT, HUNTERDON COUNTY.	:	DECISION
	:	

SEPTEMBER 28, 1992

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE KINGWOOD SCHOOL : COMMISSIONER OF EDUCATION
DISTRICT, HUNTERDON COUNTY. : DECISION
:

Gaetano M. DeSapio, Esq., for Petitioner

This matter was opened before the Commissioner on May 5, 1992 through the Kingwood Board of Education's (Board) filing of an appeal of the cap waiver defeated by the voters of the Kingwood School District on April 7, 1992. On June 25, 1992, Mary E. MacConnell, Clerk of the Township of Kingwood, notified the Commissioner that the governing body had no objection to the cap waiver appeal.

On August 17, 1992, the Board submitted a position statement pursuant to the requirements of N.J.A.C. 6:24-7.8(a)2, thus it was on that date that the record in this matter closed.

It is the Board's contention that in addition to the current expense budget certified by the governing body of the Kingwood School District on April 28, 1992 in the amount of $1,912,652, there is a need for an additional $99,249 in current expense in order for the district to provide a thorough and efficient education to its students.

On March 19, 1992, Robert Sopko, Hunterdon County Superintendent of Schools, conditionally approved the Kingwood

School District's budget subject to the cap waiver amounts set forth below which were deemed necessary for a thorough and efficient education by him.

Required for Thorough and Efficient Education			$99,249.
Line 54	213	Pre School/Kindergarten Salaries	$35,000.
Line 56	213	6-8 Salaries	35,006.
Line 60	214	Other Instructional Staff	5,000.
Line 63	220	Textbooks	5,000.
Line 64	230	Library & Audio Visual Materials	4,000.
Line 65	240	Teaching Supplies	5,000.
Line 99	730	Purchase New Equipment	5,000.
Line 106	820	Insurance/Judgments	5,243.
TOTAL AMOUNT REQUESTED:			$99,249.

On April 28, 1992, the governing body acted to reduce the proposed budget by $100,000, an action approved by the Hunterdon County Superintendent of Schools given factors that were not present upon initial review of the budget. (See memorandum of May 18, 1992 to Commissioner Ellis.)

Therefore, the amount in dispute before the Commissioner is set forth below:

	Proposed tax levy adopted by Board of Education	Amount of tax levy certified by governing body
Current expense	$1,995,454	$1,912,652
Capital Outlay	$ 20,821	3,623
Cap waiver:		
Current expense	$ 99,249	
Capital expense	NA	
Total	$2,115,524	$1,916,275

Upon review of the record of this matter, including the documentation provided by the district in support of the necessity of the cap waiver funds, which is incorporated herein by reference, the Commissioner finds and determines that the requested relief

shall and is hereby granted in that the governing body has no objection to the cap waiver appeal and the Board has demonstrated that these funds are necessary for the provision of a thorough and efficient education to the students of the Kingwood School District. East Brunswick Township Board of Education v. East Brunswick Township Council, 48 N.J. 94 (1966); Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305 (1989)

Accordingly, the Hunterdon County Board of Taxation is hereby ordered to adjust the Kingwood School District's tax levy for the 1992-93 school year to reflect an increase of $99,249 for current expense which results in a total current expense tax levy of $2,011,901.

COMMISSIONER OF EDUCATION

SEPTEMBER 28, 1992

DATE OF MAILING - SEPTEMBER 28, 1992

237-92

237-92

W.C., parent, on behalf of C.C., a minor,

PETITIONER,

V.

WILLIAM J. FOLEY, SUPERINTENDENT, NANCY LETNEY SILVER, PRINCIPAL OF ASHER HOLMES ELEMENTARY SCHOOL AND BOARD OF EDUCATION OF THE TOWNSHIP OF MARLBORO, MONMOUTH COUNTY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SEPTEMBER 29, 1992

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

September 4, 1992
Date

STEVEN L. CARNES, ALJ

Receipt Acknowledged:

8/9/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 11 1992
Date

OFFICE OF ADMINISTRATIVE LAW

cad

DOCUMENTS IN EVIDENCE

For the Petitioner:

P-1	Primary school overview from Ranney School
P-2FID	Not in evidence
P-3	C.C.'s kindergarten report card, 1990
P-4	C.C.'s beginners report card, 1991
P-5	C.C.'s first grade report card, 1992

For the Respondents:

R-1	California Achievement Test, 1991
R-2	Marlboro Township Board of Education admission policy
R-3	Letter from superintendent Foley, dated August 31, 1992

WITNESSES

For the Petitioner:

None

For the Respondents:

Nancy Letney Silver, principal Asher Holmes Elementary School, respondent
Dr. William J. Foley, superintendent, Marlboro Township Public Schools, respondent

6. This agreement will only become effective when it is approved by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** Any disapproval by the Commissioner shall not interfere with the rights of either party to pursue the matter further.

9/4/92
DATE

Wayne Citron, petitioner

9/4/92
DATE

Vincent DeMaio, Esq., for the respondent
(DeMaio & DeMaio, attorneys)

9/4/92
DATE

William J. Foley, superintendent

CERTIFICATION

I, Wayne Citron, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that the Administrative Law Judge questioned my understanding and my acceptance of the terms of this Agreement. I enter into this agreement voluntarily.

It is also my understanding that if the Settlement Agreement is approved by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, my claim will terminate against the State of New Jersey.

9/4/92
DATE

PETITIONER

cad

OAL DKT. NO. EDU 6628-92

W.C., parent, on behalf of C.C., a minor,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
WILLIAM J. FOLEY, SUPERINTENDENT, NANCY LETNEY SILVER, PRINCIPAL OF ASHER HOLMES ELEMENTARY SCHOOL AND BOARD OF EDUCATION OF THE TOWNSHIP OF MARLBORO, MONMOUTH COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

SEPTEMBER 29, 1992

DATE OF MAILING - SEPTEMBER 29, 1992

238-92

238-92

J.B. parent, on behalf of J.T.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SEPTEMBER 29, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1049-92
AGENCY DKT. NO. 9-1/92

J.B., PARENT, ON BEHALF OF J.T.B.,
Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY,
Respondent.

J.B., *pro se*

George J. Sokalski, Esq., for respondent

Record Closed: August 4, 1992 Decided: August 19, 1992

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

On January 15, 1992, petitioner, J.B., filed a petition of appeal with the Commissioner of Education requesting a determination that his son's suspension for one day was improper and unjustly imposed. Respondent filed an answer on January 31, 1992, denying petitioner's allegations and requesting that the Commissioner dismiss the petition.

AN EQUAL OPPORTUNITY EMPLOYER

On February 7, 1992, the matter was transmitted by the Department of Education, Bureau of Controversies and Disputes, to the Office of Administrative Law for hearing 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 telephone prehearing conference was held on April 13, 1992. At that time, the issues were isolated and a hearing was scheduled for August 4 and 5, 1992, at the Office of Administrative Law.

As a result of settlement conferences held between the parties on August 4, 1992, a settlement was reached; the parties have prepared the attached Stipulation of Settlement indicating the terms thereof.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 19, 1992
Date

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

8/21/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 25 1992
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

jrp/e

STIPULATION OF SETTLEMENT
OAL DKT. NO. EDU 1049-91
AGENCY DKT. NO. 9-1/92

J. B., Parent, on behalf of J. T. B.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY,

Respondent.

The parties have amicably agreed to settle this matter on the following terms and conditions:

1. Respondent will expunge from J.T. B.'s student record all references to the suspension of November 4, 1991. There is no suspension as a result of the incident of November 4, 1991.

2. In regard to J.T B 's absence from school November 5 and 6,1991, his student absentee record will reflect that he was absent from school based on his parents' determination, and not that of the Board of Education, that it was unsafe for J.T.B to attend school on those dates.

3. Petitioner withdraws his appeal pending before the Office of Administrative Law.

4. This settlement is subject to approval of the Commissioner of Education.

1-4-92
Date

John Brodie, Parent of J.T.B., Petitioner

George Sokalski, Esq. for Respondent

OAL DKT. NO. EDU 1049-92

J.B. parent, on behalf of J.T.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

SEPTEMBER 29, 1992

DATE OF MAILING - SEPTEMBER 29, 1992

239-92

239-92

CAROLYN VALENTINO,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	COMMISSIONER OF EDUCATION
		DECISION
RESPONDENT,	:	
AND	:	
JANICE MATTHEWS,	:	
INTERVENOR-RESPONDENT.	:	

SYNOPSIS

Petitioner, tenured elementary teacher, alleged Board improperly riffed her in June 1991. Petitioner contended she had more seniority than intervenor.

ALJ concluded petitioner did have more seniority than intervenor and was entitled to back pay for that portion of 1991-92 in which she did not work and seniority credit for the period in dispute. ALJ concluded that although petitioner had been paid during the opening weeks of September-October 1979 as a per diem substitute, her service during this time was in all respects that of a regular teacher (a title to which she was duly appointed in mid-October 1979) and she was not hired to replace another person as contemplated within the meaning of law defining substitute service. Therefore, petitioner was entitled to seniority credit for the period at issue and back pay for the portion of 1991-92 during which she was riffed. No pre-judgment interest was allowed.

Commissioner adopted findings and determination in initial decision.

SEPTEMBER 29, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
ORAL INITIAL DECISION
OAL DKT. NO. EDU 10531 91
AGENCY DKT. NO 375-10/91

CAROLYN VALENTINO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,
Respondent,
and
JANICE MATTHEWS,
Intervenor-Respondent.

Gregory T. Syrek, Esq., for petitioner
(Bucceri and Pincus, attorneys)

Derlys Gutierrez-Congett, Esq , for respondent
(Murray, Murray & Corrigan, attorneys)

Paul L. Kleinbaum, Esq , for intervenor
(Zazzali, Zazzali, Fagella & Nowak, attorneys)

Record Closed: July 22, 1992 Decided: August 4, 1992

This is a transcript of the administrative law judge's oral [illegible] decision rendered pursuant to N.J.A.C. 1:1-18.2.

BEFORE **STEPHEN G. WEISS**, ALJ:

The following constitutes my oral decision with respect to the instant matter.

PROCEDURAL HISTORY

This is a seniority case which was transmitted by the Department of Education to the Office of Administrative Law pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14B-1 et seq. The individual whom the Board had hired rather than Valentino, Ms. Janice Matthews, had been granted permission to intervene as a respondent, and an order had been entered to that effect, I believe in March, prior to the prehearing conference. It was agreed at that telephone conference that the following issue was to be determined by me: "Were petitioner's seniority rights violated by the respondent Board as alleged and, if so, to what relief is petitioner entitled?"

A plenary hearing was conducted on June 11, 1992, posthearing briefs were filed in accordance with an agreed schedule and the record closed on July 22, 1992, for purposes of the commencement of the running of the 45-day period for issuance of an initial decision pursuant to N.J.S.A. 52:14B-10(c).

The matter is presently now the subject of an oral decision in accordance within OAL rules within the 45-day time period.

STIPULATION OF FACTS AND TESTIMONY

At the outset of the plenary hearing in June counsel submitted a joint stipulation of facts, which was marked Exhibit C-1. That document consisted of 12 stipulation paragraphs covering four pages, together with 15 attached exhibits designated as J-1 through J-15. The stipulated facts are as follows: If I were going to render a written decision, I would here lay out the joint stipulation. I would dictate it verbatim and it would be printed out. What I will do at this juncture, rather than read it to make it part of my decision, I will say the joint stipulation set forth the following undisputed facts. I can read them now, but rather than do that I'll just indicate that I will incorporate by reference at this juncture the paragraphs

beginning with paragraph 1 through the last paragraph, paragraph 13, rather than have to read them. We all have them and just to extend an oral decision by reading them doesn't seem to make any sense to me. But certainly the joint stipulation is part of the record in this case both as an exhibit and as part of my oral decision.

JOINT STIPULATION

1. Petitioner, Carolyn Valentino ("Valentino"), has been employed by the respondent Board of Education of the City of Hoboken ("Board") as an Elementary Teacher as follows:

1979-80 - The Board's hiring resolution makes Valentino's appointment effective October 16, 1979. (J-1) (J-1A) Valentino's service in the school district from September 1, 1979 to October 15, 1979 is the focus of the present legal proceedings.

1980-81
1981-82 (J-2)
1982-83 - Valentino's position was abolished pursuant to a reduction in force in April, 1982. (J-3) She was reemployed pursuant to a resolution adopted in October, 1982, effective October 18, 1982. (J-4) (J-5) Valentino's service in the school district from September 1, 1982 to October 17, 1982 is part of the focus of the present legal proceedings.

1983-84
1984-85
1985-86
1986-87
1987-88
1988-89
1989-90
1990-91

A copy of Valentino's employee record card is attached hereto as Exhibit J-6.

2. Valentino possesses an Instructional Certificate with the following endorsements:

   Early Childhood
   Elementary

3. As the result of her employment in the Board's school district and possession of the certification and endorsements required for such employment, Valentino gained tenure pursuant to N.J.S.A. 18A:28-5.

4. On May 21, 1991, the Board adopted a resolution terminating Valentino's employment effective June 30, 1991, as part of a reduction in force. (J-7)

5. On November 19, 1991, the Board adopted a resolution reemploying Valentino as a teaching staff member, effective December 2, 1991. (J-8)

6. Valentino's salary for the 1991-92 school year is $32,825 per year, prorated to the time of her reappointment. The salary is based upon placement on Step 13 of the B.A. column of the salary guide.

7. The intervenor, Janice Matthews ("Matthews"), has been employed by the Board as an Elementary Teacher as follows:

   1979-80 (J-9)
   1989-81
   1981-82 - Matthews' position of employment was abolished effective June 30, 1982. (J-10) She was reappointed pursuant to a resolution of the Board, effective November 16, 1982. (J-11) (J-12)

   November 16, 1982 - June 30, 1983
   1983-84
   1984-85
   1985-86
   1986-87
   1987-88
   1988-89

1989-90
1990-91

A copy of Matthews' employee record card is attached hereto as Exhibit J-13.

8. Matthews possesses an Instructional Certificate with the following endorsement:

Elementary

9. As the result of her employment in the Board's school district and possession of the certification and endorsement required for such employment, Matthews gained tenure pursuant to N.J.S.A. 18A:28-5.

10. Matthews was reappointed by the Board as a teaching staff member for the 1991-92 school year.

[11. Paragraph 11 not included in the Joint Stipulation.]

12. The following additional exhibits are attached hereto:

Exhibit J-14 - Principal's Monthly Report of the Time and Attendance of Teachers (September 10-17, 1979; September 18 - October 3, 1979).

Exhibit J-15 - Composition Book of Per Diem Substitutes, covering the following periods of time: September 10, 1979 to January 4, 1980 and September 9, 1982 to January 10, 1983.

13. The maiden name of Carolyn Valentino is Carolyn Branda. The maiden name of Janice Matthews is Janice Stole. This information is provided solely to assist in the examination of certain exhibits attached hereto.

In addition to the joint stipulation of facts (Exhibit C-1), testimony was offered at the hearing by Valentino on her own behalf. She explained that she was hired by the Board and began working in September 1979 having applied for an elementary

teacher position in July or August of that year. Valentino insisted that she did not apply for, nor did she seek, a position as a "substitute." She maintained that she was interested solely in a regular position, made that known, and was ultimately so hired. At some point at the beginning of the 1979-80 school year, and it's not clear to me exactly when that was. It may have been before the first day of day of classes, it may not have been. It's not clear. In any event, at the beginning of that school year, Valentino received a telephone call, perhaps from the Board secretary (she did not exactly remember) telling her to report for an assignment. She then came to work during the first or second week of September (this is her testimony) and was assigned to a sixth grade class at School No. 4. Let me note here that there is no indication in the record as to what day in September 1979 was the first day of classes. Labor Day that year fell on September 3, and one of the exhibits reflects that Valentino's pay began as of September 10, which would have been the next Monday. There is no indication whether school started on the 4th, the 5th, the 6th or the 10th. It would appear that she did not come to work on the first day of school, at least. Maybe she didn't come until the beginning of the second week, and that's why I said she reported for work during the first or second week of September. She testified, by the way, that she thought it might have been during the first week, but it's really not clear. Nevertheless, she maintained, in any event, there was no teacher for the class that she took over prior to its being assigned to her.

Thereafter, during the entire course of the 1979-80 school year Valentino was the regular teacher for that class and testified that all of her activities were undertaken without any differentiation from any other regular full-time teacher and she assumed that she fell into that category as well. For example, she prepared lesson plans for herself, not for anyone else, and followed them, she attended staff meetings, etc. Also, she testified that both the principal of that school and the superintendent told her that she was not replacing anyone and that she would be receiving a formal appointment. However, she was paid the substitute's salary for the days she worked in September and for the first half of October.

With respect to the absence in Board minutes for August or September 1979 of any reference to her appointment as a regular teacher, Valentino recalled that although she expected that a resolution would be offered including her, the Board meeting where that was to take place was cut short as a result, according to my

notes, of some sort of an altercation. Essentially that was her testimony in addition to the stipulation of facts.

One witness was called on the Board's behalf. That was Grace Corrigan, who's been the payroll clerk in Hoboken since 1978. Corrigan testified that she reviewed all of the Board's business records and found no indication of any retroactive payment or salary adjustment to compensate Valentino for the difference between the substitute pay she received during September and half of October 1979 and regular pay for the remainder of the school year. Valentino had testified that she did receive some sort of an adjustment of a couple of hundred dollars in October. However, that was not the amount which would have represented the difference between the sub-pay and the regular pay. I don't think there's any dispute over that. It may be that Valentino didn't recall how much it was. There was some confusion over that. In any event, it was Corrigan's testimony that from the Board's business records, there is nothing to indicate that any official action was taken to reimburse or to bring Valentino up to speed as it were with regard to what regular teachers were receiving during September and October.

The last witness was Ms. Matthews, the intervenor, who simply testified that she began working in September 1979 as a regular teacher and that she had been hired by a Board resolution in a regular meeting at the end of August 1979, and of course that testimony was corroborated by Exhibit C-7, which are the official minutes of the Board meeting of that night and include Matthews as one of 11 teachers hired for that school year. She is referred to as Janice Stolte, which was her maiden name.

As the result of references made to Board action or inaction in 1979, I directed counsel for the Board to provide copies of the Board minutes for August and September of that year, and as a result both the agendas and minutes for the meetings of August 14, August 29 and September 11 were submitted, together with the minutes of the September 27, 1979 Board meeting. No agenda, as such, could be located for that last meeting presumably, according to Board counsel, because it was devoted strictly to the topic of construction bids. Certainly, the agenda for that meeting has no reference to the hiring of teachers. As I have previously indicated, for purposes of the record I have marked the agenda and the minutes as Exhibits C-2

through C-9 respectively, and I have already designated for the record which exhibits relate to what dates.

The posthearing briefs filed by the parties appropriately focus attention on the primary legal issue involved in the matter; namely, whether the period of Valentino's service beginning in September 1979 through mid-October 1979 when she was designated by formal Board resolution as a regular teacher should count toward her "seniority." If it does, then according to the stipulated facts she would have had a superior claim to employment at the beginning of the 1991-92 school year over Janice Matthews. As it turned out, she was not hired at the beginning of that school year, but was recalled from her reduction in force a few months later. So at issue in the case is whether or not she is entitled to back pay for that period of time. But in addition to that, of course, the parties would like a determination by me of her seniority in the future. In ascertaining whether or not the period of service in question counts towards Valentino's seniority, the essential question is whether or not she was performing during the six or so weeks in question as a "substitute." If she was, then pursuant to the provisions of N.J.S.A. 18A:16-1.1, she could not acquire tenure credit based upon that service and, therefore, no seniority credit would attach either.

The leading case in the area with respect to substitute service vis-a-vis that statute as it pertains to this case is the decision of the Appellate Division in Sayreville Education Association v. Board of Ed. of Sayreville, 193 N.J. Super. 424 (App. Div. 1984). In that case the court held that the statute which I have just mentioned, 18A:16-1.1, is applicable in those situations where the services of the teacher are required because of the temporary absence, even if protracted, of a regularly employed teacher whose return to duty is contemplated. However, the court indicated that the statute is not to be construed to authorize the use of a "substitute" to fill what more accurately would be described as a vacancy on a long-term basis. Where, for example, a relatively substantial balance of the school year remains when a vacancy occurs and the Board is prepared to fill that vacancy until the end of the school year, it may not resort to a long-term substitute technique to accomplish that purpose. See the Sayreville decision at page 434. Accordingly, employees hired to fill such long-term vacancies are entitled to teaching staff membership and all the emoluments thereof, including tenure credit and, where appropriate, seniority as well.

Thus, in the Sayreville case the petitioners were granted teaching staff membership, notwithstanding they were labeled "long-term substitutes" and not withstanding they received a contractually established per diem rate of pay for substitute teachers. In other words, the court in Sayreville made plain that the applicability of N.J.S.A. 18A:16-1.1 does not turn on what rate of compensation is paid to the individuals involved. I would also refer counsel to the decision in Gruber v. Board of Education of Fair Lawn, OAL DKT. NO. EDU 6001-80, decided April 1, 1989, adopted by the Commissioner on May 22, 1981, finding substitute service ineligible for seniority credit notwithstanding there was credit on the salary guide to that for regular teachers, which I guess is the flip side of what the court in Sayreville said. So if you don't get regular pay and you're paid as a substitute, that doesn't necessarily mean you're a substitute, and if you do get the regular pay, that doesn't mean you're not a substitute.

Do the facts in this case demonstrate that Valentino was a substitute and therefore not entitled to claim seniority credit for the period in question? Both the Board and the intervenor argue, and correctly so, I believe, that as the petitioner, it was Valentino's burden of proof in respect to that critical inquiry. My analysis of her proofs in light of that obligation leads me to conclude, for the reasons I will get into shortly, contrary to the assertions of both the Board and Matthews, that during the period in question Valentino was not a substitute, and therefore her service should have been credited toward her seniority.

The evidence surrounding the precise events which took place at the time of her hire is somewhat sparse, consisting almost exclusively of Valentino's own testimony. She began her employment as the result of her submission of an application for a position as an elementary teacher and was told to report as the result of the telephone call she received, she believed, from the Board secretary. She immediately was assigned as a classroom teacher for a sixth grade class. There is no evidence that at any time did she seek substitute employment as such, nor is there any evidence to contradict her credible testimony or to reject her assertion that she was never advised that she was only being hired temporarily, or filling some vacancy until some other teacher returned. In short, I find nothing in the record to contradict Valentino's claim, which I believe, that she was not hired to replace another employee whose return to reclaim the position was contemplated. In that regard,

the fact pattern in this case is totally distinguishable from the facts in the case of Ward v. Westfield, cited by the Board, a 1988 School Law decision, wherein Ward was just replacing a named individual. That is not the case here at all. The fact that Valentino may have been called a substitute and referred to as a substitute in payroll records, is not, in my judgment, dispositive in light of the language of the court in the Sayreville case. We have to look at what she did and when she did it, and not what she was called and what she was paid and the precise context of her hire. Valentino testified credibly that she functioned in every respect as a regular elementary school teacher. She prepared, for example, her own lesson plans without reference to anyone else's or without having to prepare for the return of anyone else.

My scrutiny of the agendas and the minutes of the various Board meetings does not militate against the result which I have reached here. Although there is no Board resolution mentioning, no less hiring, Valentino in August or September 1979, there is not, on the other hand, any reference in those minutes or agenda items to her employment as a substitute within the meaning of N.J.S.A. 18A:16-1.1. Although Valentino refers to that portion of the minutes of the August 29, 1979 Board meeting (Exhibit C-7), wherein the superintendent requested that 12 teachers be hired and only 11 actually were, it is unclear what conclusions can be drawn from that difference. Counsel for Valentino argued that they really meant to hire 12, and something happened, and they only got around to 11. The Board, on the other hand, said that's a typo error, she was never intended to be hired, and wasn't. My judgment on those minutes and the agenda items is that the testimony it represents is neutral, and it would be pure speculation for me to decide either that she was omitted by accident or that something else occurred to prevent the Board from hiring her or that there was a typographical error. We just don't know. In fact, as I indicated, not only is there a reference to 12 recommended and only 11 hired, the agenda item for that meeting anticipated a recommendation by the superintendent for 10 people. I could speculate and say that it was a little bit of a fluid situation, the Board wasn't really sure, nor was the superintendent, how many sixth grade teachers they were going to need. It turned out that there were too many kids and they just needed another sixth grade teacher, and they called Valentino in. We just don't know. And then she was paid as a substitute waiting to see how things shook out. As it turned out, they needed her for the rest of the school year and the next 11 years as well. It's all speculation. The minutes really don't decide in that regard.

Nevertheless, I reject the proposition that since the Board appointed 11 regular teachers by formal resolution on August 29, 1979, not including Valentino, that her later hiring was strictly intended as, and must be construed to be, that of a substitute. The undisputed facts, not speculation, the undisputed facts are that she began work during either the first or the beginning of the second week of the 1979-80 school year in a classroom situation identical to that of all regular teachers. No evidence exists to support the notion that her service prior to October 16, 1979 was, in the words of the Appellate Division in Sayreville, "required because of the temporary absence, even if protracted, of a regular teacher whose return to duty is contemplated." That definition of what a substitute is for purposes of the statute does not fit what Valentino did in this case.

In essence, then, the absence of any specific reference to the appointment of Valentino as a regular teacher in the August or September 1979 Board minutes is not dispositive. As I indicated, what is important are the factors which the Sayreville court mentioned with respect to the statute. In that light, absent testimony and/or documentary evidence to rebut Valentino's credible testimony, I **CONCLUDE** that her service during the month of September 1979 and the first half of October 1979 should be credited for seniority purposes. Therefore, in light of the contents of the joint stipulation of facts, Valentino's seniority is superior to that of the intervenor, Janice Matthews, and she therefore, that is to say petitioner therefore, is entitled to appropriate relief, including back pay for the portion of the 1991-92 school year that she did not work, subject to normal deductions that would be taken from that salary and any mitigation if it applies, although there was no evidence of that in this case. Also, of course, she should be credited for seniority purposes for her entire period of employment in 1979-80. No prejudgment interest is to be allowed. I don't believe that the facts of this case warrant any prejudgment interest.

I will therefore, in accordance with OAL rules, have this oral decision transcribed and it will be filed as an initial decision with the Commissioner of Education for consideration, and counsel will receive a copy of the typed transcript of the decision, and it will processed by the Commissioner in normal fashion. That is to say, he will have the 45 days within which to accept, modify or reject. And, of course, counsel will have 13 days from the date they receive the typed version of this oral decision to file written exceptions with the Commissioner of Education.

Finally, just let me note for the record, which I would do in a written initial decision, the witness list was Carolyn Valentino, Grace Corrigan and Janice Matthews. Exhibit C-1 was the joint stipulation of facts and C-2 through C-9, were the agenda and actual formal minutes of the Hoboken Board of Education.

END OF TRANSCRIPT

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

I, Angela M. Robinson, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Weiss' oral decision rendered in the above matter on August 4, 1992.

August 14, 1992
Date

Angela M. Robinson
Angela M. Robinson

Receipt Acknowledged:

8/18/92
Date

Maureen C. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 19 1992
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

amr

CAROLYN VALENTINO,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	COMMISSIONER OF EDUCATION
		DECISION
RESPONDENT,	:	
AND	:	
JANICE MATTHEWS,	:	
INTERVENOR-RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by the Board and Intervenor Matthews pursuant to N.J.A.C. 1:1-18.4, as were replies thereto by petitioner.

In its exceptions, the Board renews its post-hearing arguments that petitioner's testimony was not credible and that she failed to carry her burden of proof with competent evidence. From a policy perspective, the Board further contends that it must have the flexibility to hire substitutes without being penalized if they are later appointed as regular teachers. Intervenor raises similar arguments and adds a discussion of how petitioner was not appointed to fill a vacancy so as to qualify for regular teacher status under Sayreville, supra. In reply, petitioner reiterates that she was not employed to take the place of another teacher and therefore was not

a substitute within the meaning of N.J.S.A. 18A:16-1.1. Petitioner further avers that the statements of Board agents on which she relied in believing that she was not being hired as a substitute constitute admissible evidence under Evidence Rule 63(9) on vicarious admissions.

Upon careful review, the Commissioner concurs with the ALJ that notwithstanding petitioner's having been paid as a per diem substitute during the early weeks of the 1979-80 school year, there is no evidence to contradict petitioner's credible testimony that she functioned in all respects as a regular teaching staff member and from the beginning filled a regular classroom position rather than temporarily replacing another teacher; indeed, nothing whatsoever about either petitioner's service or the nature of the position she was filling changed when the Board took formal action to hire her in mid-October. Under such circumstances, the Board and intervenor cannot rely on petitioner's payment status during the period at issue or the Board's delay in hiring her as a regular staff member to claim that the benefits of fully creditable work should be lost to petitioner.

Nor is the Commissioner persuaded by respondents' claims of insufficient evidence, as he finds no basis in this record (which does not include a transcript of hearings) to challenge the ALJ's determination that petitioner's testimony was both credible and uncontradicted. Finally, the Commissioner does not agree that crediting persons who perform duties under circumstances such as those present herein will in any way hinder boards of education in their legitimate use of substitutes within the meaning of that term set forth in controlling statute and case law.

Accordingly, the initial decision of the Office of Administrative Law, affording petitioner seniority credit for the period at issue, awarding her back pay less applicable mitigation and deductions for that portion of the 1991-92 school year in which she did not work due to the improperly effectuated RIF, and denying pre-judgment interest as unwarranted under N.J.A.C. 6:24-1.16(c)1, is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 29, 1992

DATE OF MAILING - SEPTEMEBR 29, 1992

239-92

EDU #10531-91
C # 239-92
SB # 49-92

CAROLYN VALENTINO,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT-APPELLANT,	:	
AND	:	
JANICE MATTHEWS,	:	
INTERVENOR-APPELLANT.	:	

Decided by the Commissioner of Education, September 29, 1992

For the Petitioner-Respondent, Bucceri & Pincus (Gregory T. Syrek, Esq., of Counsel)

For the Respondent-Appellant, Murray, Murray & Corrigan (Derlys Gutierrez-Congett, Esq., of Counsel)

For the Intervenor-Appellant, Zazzali, Zazzali, Fagella & Nowak (Paul L. Kleinbaum, Esq., of Counsel)

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

February 2, 1993

Date of mailing FEB 04 1993

240-92

240-92

IN THE MATTER OF THE TENURE	:	
HEARING OF LAWRENCE BEATTY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF NEWTON, SUSSEX	:	DECISION
COUNTY.	:	
	:	

SEPTEMBER 28, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8754-91
AGENCY DKT. NO. 180-6/91

BOARD OF EDUCATION OF THE TOWN OF NEWTON, SUSSEX COUNTY,
Petitioner,
v.
LAWRENCE BEATTY,
Respondent.

Robert M. Tosti, Esq., for petitioner
(Rand, Algeier, Tosti & Woodruff, attorneys)

Gary A. Kraemer, Esq., for respondent
(Daggett & Kraemer, attorneys)

Record Closed: July 22, 1992 Decided: August 10, 1992

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

The Board of Education of the Town of Newton, Sussex County, filed and certified to the Commissioner of the Department of Education on June 5, 1991, 15 charges of unbecoming teacher conduct against Lawrence Beatty, a tenured teaching staff member. The Board determined there was probable cause to credit the truth of the charges and that, if sustained, they warranted respondent's dismissal or reduction in salary, in accordance with N.J.S.A. 18A:6-10 et seq. Respondent's answer in general denial thereof was filed on June 14, 1991. The Commissioner transmitted the matter to the Office of Administrative Law on September 16, 1991, for hearing and determination as a contested case in

An Equal Opportunity Employer

accordance with N.J.S.A. 52:14F-1 et seq. Respondent alleged no procedural irregularities under N.J.A.C. 6:24-5.1.

On the first two days of hearing the parties entered into settlement discussions and advised the administrative law judge the matters at issue had been amicably resolved, subject to approval of the administrative law judge and the Commissioner of the Department of Education.

CONCLUSION

Based on the above, I **CONCLUDE** as follows:

1. The parties have voluntarily agreed to settlement as evidenced by their signatures or their representatives' signatures on the agreement;

2. Settlement fully disposes of all issues in controversy, is in the interest of parties and public and comports with Cardonick v. Bd of Ed. Bor. of Brooklawn, 1983 S.L.D. -- (slip op. at 2); and

3. The board's filing and certification of tenure charges are hereby **DISMISSED**, being in accordance with settlement pursuant to N.J.A.C. 1:1-19.1, subject to effectuation of its terms.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 10, 1992
Date

James A. Ospenson
JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

Maureen K. Keller

8/12/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 13 1992
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

amr

RECEIVED
OFFICE OF ADMINISTRATIVE LAW
JUL 22 10 12 AM '92

RAND, ALGEIER, TOSTI & WOODRUFF
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July 15, 1992

Honorable James A. Ospenson, ALJ
Office of Administrative Law
185 Washington Street
Newark, NJ 07102

RE: In The Matter of The Tenure Hearing of
Lawrence Beatty, Newton Board of Education
OAL Docket No. EDU-08754-91N

Dear Judge Ospenson:

Please be advised that after several negotiations and with Your Honor's assistance, a settlement of the above matter has been reached between the Newton Board of Education and Lawrence Beatty.

Both parties have tentatively approved the settlement pending its acceptance by the Commissioner of Education. In doing so, the Board has fully considered this matter by voting in an executive session to authorize counsel to enter into the attached Settlement Agreement. The Settlement Agreement, as well as the Releases, have been executed by both parties and are being held in escrow in the usual manner pending approval by the Commissioner of Education.

Robert M. Tosti
Attorney for Newton Board
of Education

Gary Kraemer, Esq.
Attorney for Lawrence Beatty

RAND, ALGEIER, TOSTI & WOODRUFF
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June 24, 1992

7/1/92 JRM to Mora-
- need sig. no BE
resol OK'd by Bd
- Stip. of Settlement has been issued & no appeal has been filed - it is in essence to BE final family appeal ALJ

James A. Ospenson, Esq.
Office of Administrative Law
185 Washington Street
Newark, NJ 07102

RE: In The Matter of The Tenure Hearing of Lawrence Beatty, Board of Education of The Town of Newton, Sussex County

Dear Judge Ospenson:

Enclosed please find a signed Stipulation of Settlement for Your Honor's approval.

If you should have any questions, of course, please do not hesitate to contact me.

Respectfully submitted,

JOSEPH R. MORANO

JRM:mr
Enclosure

cc: Gary Kraemer, Esq.

JUN 26 4 55 PM '92
OFFICE OF ADMINISTRATIVE LAW

RAND, ALGEIER, TOSTI & WOODRUFF, P.C.
Courthouse Plaza
60 Washington Street
Morristown, New Jersey 07960
Attorneys for Newton Board of Education

IN THE MATTER OF THE TENURE HEARING OF LAWRENCE BEATTY, BOARD OF EDUCATION OF THE TOWN OF NEWTON, SUSSEX COUNTY	:	BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY OAL DOCKET NO. EDU-08754-91N AGENCY DOCKET NO. 180-6/91

STIPULATION OF SETTLEMENT

This matter having been brought before the Office of Administrative Law (Honorable James A. Ospenson presiding) upon the joint application of counsel for the parties to the action, Robert M. Tosti, Esq., attorney for the Town of Newton Board of Education ("Board") and Gary A. Kraemer, Esq., attorney for Lawrence Beatty ("Mr. Beatty") appearing, and the Court having been informed at the hearing conducted on May 21, 1991, that the Board and Mr. Beatty wished to present a comprehensive settlement to the Administrative Law Judge and Commissioner of Education for their consideration and approval in connection with this dispute, and the parties having further advised the Administrative Law Judge that their desire to reduce to their agreement of settlement to writing for the consideration of the Administrative Law Judge and the Commissioner of Education;

WHEREAS, the Certification of the above charges by the Board was originally predicated on the Board's belief that the charges of unbecoming conduct and the evidence in support of those charges would be sufficient to warrant a dismissal pursuant to N.J.S.A. 18A:6-11; and

WHEREAS, the charges have been substantially based upon criminal allegations in the matter State v. Beatty, Superior Court, Sussex County Docket No. 89-06-0112 even though Mr. Beatty was acquitted in that case; and

WHEREAS, because much of the evidence upon which the Board seeks to rely relates to matters in the district's past, and the Board has therefore encountered the unavailability and unwillingness of witnesses to testify, as well as the recantation of witness testimony, the Board believes that using the settlement process to achieve the prescribed result of removal is prudent; and

WHEREAS, Mr. Beatty is also willing to withdraw his petition for back pay against the Board which is now on appeal before the State Board of Education in the matter Larry Beatty v. Board of Education of the Town of Newton, Agency Ref. No. 35-2/91; and

WHEREAS, the Board believes that the return of Mr. Beatty to a teaching position where he would be in contact with students would not be in the parties' best interests; and

WHEREAS, Mr. Beatty has indicated an intention to resign from all employment from the Board upon the terms and conditions set forth herein;

NOW, THEREFORE, in consideration of the mutual promises of the parties contained herein, and in exchange for the consideration more particularly noted below, as well as the delivery of documents as required hereby, it is mutually agreed as follows;

1. Mr. Beatty has submitted a resignation from all employment with the Board. The Board, by separate resolution will publicly accept Mr. Beatty's resignation at a public meeting conducted on _____.

2. It is recognized that the parties have claims against each other arising from Mr. Beatty's employment with the Board. The parties wish to settle all claims in connection therewith in consideration with the Boards agreeing to make the payments as set forth in this agreement, and in return for Mr. Beatty's relinquishment of employment as a teaching staff member and claims regarding back pay, the Board agrees to pay $155,000 to Mr. Beatty. No other payments will be made.

3. Mr. Beatty agrees to release and waive any claim which he may have for sick days, vacation days or any other emoluments of employment, except health benefits. Additionally, and more particularly, Mr. Beatty also agrees to withdraw his petition for back pay against the Board in the matter of Larry

Beatty v. Board of Education of the Town of Newton, Agency Docket No. 35-2/91. This shall be accompanied by the withdrawal of the Board's appeal. Moreover, Mr. Beatty also waives any claim for reimbursement or repayment of salary withheld for the 120 day period as specified by N.J.S.A. 18A:6-14.

4. This agreement and any actions require hereby, shall not be binding upon the parties until (a) Mr. Beatty has delivered the letter of resignation as required by this agreement; (b) the Board adopts a resolution at a public meeting authorizing the execution of this agreement together with the acceptance of Mr. Beatty's resignation as set forth therein; and (c) Mr. Beatty delivers an executed and duly acknowledged general Release to Board counsel.

5. Mr. Beatty shall supply the Board with a release which shall discharge the Board and all its current and past members, employees, agents and representatives for any possible civil liability for damages, attorneys' fees or otherwise which Mr. Beatty might assert arising from the investigation or prosecution of the tenure charges or claims of back pay which are to be settled in this stipulation.

6. The parties recognize that the effectiveness of this agreement shall be subject to the approval of the Administrative Law Judge assigned to hear this matter and the Commissioner of Education. In the event this agreement is rejected, the parties shall revert to their respective positions as of May 21, 1991.

7. Further it is acknowledged by the parties that each reserves unto itself the right to file separate memoranda with the Administrative Law Judge and the Commissioner of Education to support a rationale for approval of this settlement by the Commissioner.

8. ALL THE TERMS OF THIS SEPARATION AGREEMENT AND RELEASE ARE DEEMED MATERIAL. THIS DOCUMENT CONSTITUTES THE ENTIRE UNDERSTANDING OF THE PARTIES AND MAY NOT BE ALTERED, AMENDED, MODIFIED OR REVOKED EXCEPT BY AN INSTRUMENT IN WRITING EXECUTED BY THE PARTIES. Further, this separation agreement incorporates the complete financial obligation of the Board with regard to its employment relationship with Mr. Beatty and its separation of employment as a teaching staff member. This agreement incorporates and settles all claims and disputes which were exhibited between Mr. Beatty and the Board arising from his employment and otherwise.

9. Further, this agreement incorporates the complete financial obligation of the Board with regard to its employment relationship with Mr. Beatty and his separation of employment. The Board will be obligated to make to no further payments to Mr. Beatty except as specifically stipulated herein.

IN WITNESS WHEREOF, the parties have set their hands and seals of the first date mentioned above.

Robert M. Tosti, Esq.
Attorney for Town of Newton
Board of Education.

Gary Kraemer, Esq.
Attorney for Lawrence Beatty

IN THE MATTER OF THE TENURE	:	
HEARING OF LAWRENCE BEATTY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF NEWTON, SUSSEX	:	DECISION
COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law in the form of a joint stipulation of settlement have been reviewed. Upon examination of the decision, however, the Commissioner is unable to approve the settlement for the reasons expressed below.

While the ALJ states in the initial decision that the terms of the settlement comport with the standards for the acceptance of settlements of tenure charges set forth in In re Cardonick, supra, there is no explanation as to how the sum of $155,000, a large amount of money by any standard, specifically comports with Cardonick. Nor is there any settlement term which sets forth that in accepting the settlement, respondent understands that the matter will be referred to the State Board of Examiners for its review and possible action. See In the Matter of the Tenure Hearing of Robert B. Olek, School District of the City of Garfield, Bergen County, decided September 5, 1990.

Accordingly, the matter is remanded for further clarification as to how the sum of $155,000 meets the Cardonick standard and for incorporation of an acknowledgement by respondent that he understands that even if the Commissioner accepts the settlement, the matter will be forwarded to the State Board of Examiners.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

SEPTEMBER 28, 1992

DATE OF MAILING - SEPTEMBER 28, 1992

240-92

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(240-92)

IN THE MATTER OF THE TENURE	:	
HEARING OF LAWRENCE BEATTY,	:	COMMISSIONER OF EDUCATION
NEWTON SCHOOL DISTRICT,	:	DECISION ON REMAND
SUSSEX COUNTY.	:	
	:	

MARCH 29, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7838-92
(OAL DKT. NO. EDU 8754-91 ON REMAND)
AGENCY DKT. NO. 180-6/91

BOARD OF EDUCATION OF THE TOWN OF NEWTON, SUSSEX COUNTY,
Petitioner,
v.
LAWRENCE BEATTY,
Respondent.

Joseph R. Morano, Esq., for petitioner
(Rand, Algeier, Tosti & Woodruff, attorneys)

Gary A. Kraemer, Esq., for respondent
(Daggett & Kraemer, attorneys)

Record Closed: February 2, 1993 Decided: February 10, 1993

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

This matter is on remand of settlement of a tenure charge matter under OAL Dkt. No. EDU 8754-91. The Commissioner of the Department of Education in reviewing the record and initial decision of the administrative law judge on August 10, 1992, remanded, saying:

> . . . There is no explanation as to how [illegible] $155,000, a large amount of money by any stan[illegible]y comports with [*In Re Cardonick*, 1983 S.L.D. [illegible] 2]. Nor is there any settlement term which se[illegible] accepting the settlement, respondent understa[illegible] will

> be referred to the State Board of Examiners for its review and possible action . . . [citation omitted].

PROCEEDINGS *POST* REMAND

The parties reviewed and jointly reaffirmed their settlement. In written acknowledgment on January 20, 1993 (J-2), respondent said:

> Despite the settlement of tenure charges brought by the Town of Newton Board of Education without any determination by the Office of Administrative Law or admission by me that any of the charges have been sustained, I am aware the record in this matter may be referred to the State Board of Examiners for its review and possible action against my teaching certificate [pursuant to *N.J.A.C.* 6:11-3.5, 3.6(a)]. With this understanding, I am willing to be bound by the terms and conditions of the settlement of the tenure charges with the Newton Board of Education as expressed in the settlement documents.

In joint submission (J-1) of January 28, 1993, the parties noted:

> The agreement itself calls for the sum of $155,000 to be paid to respondent, such that his final salary payment will be received in January 1995. While this is indeed a substantial sum, it is in settlement of two administrative matters arising out of respondent's alleged misconduct. Specifically, *In the Matter of Larry Beatty v. Board of Education, Town of Newton*, Agency Ref. No. 35-2/91, the respondent successfully claimed before the Commissioner that he was due back wages from the Board's suspension without pay. As a result, the respondent may be due an excess of $75,000, pending a ruling on appeal by the State Board of Education. . . Further, as outlined in the agreement, it is also clear that the time and expense involved in processing the tenure charges at this point is also a factor strongly supportive of settlement. . . Ultimately, given respondent's successful claim for substantial back wages before the Commissioner, and the relinquishment of his tenure rights under the circumstances of his acquittal, it is clear that the payment of $155,000 for settlement would certainly be in the public interest.

In *Cardonick*, the State Board noted that tenure charge settlements presented to the administrative law judge and Commissioner should be accompanied by (1) supporting documentation as to nature of the charges, (2) circumstances justifying the consent or authorization of the Board of Education and the teacher to

the proposed settlement, and (3) the administrative law judge's conclusion that the teacher entered into the agreement with full understanding of his rights and that the agreement is consistent with the public interest. *Id.*, slip opinion at 5-6. It continues to be my view that documentation supporting the settlement agreement comports with requirements of the State Board of Education and readily supports my affirmation of conclusions earlier made under OAL Dkt. EDU 8754-91. Specifically, based on all submissions then and now, I **CONCLUDE** as follows:

1. The parties have voluntarily agreed to settlement as evidenced by their signatures or their representatives' signatures on the agreement;

2. Settlement fully disposes of all issues in controversy, is in the interest of parties and public and comports with *Cardonick v. Bd. of Ed. Bor. of Brooklawn*, 1983 *S.L.D.* -- (slip op. at 2); and

3. The Board's filing and certification of tenure charges are hereby **DISMISSED**, being in accordance with settlement pursuant to *N.J.A.C.* 1:1-19.1, subject to effectuation of its terms.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 10, 1993
Date

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

2/19/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 19 1993
Date

OFFICE OF ADMINISTRATIVE LAW

amr

EXHIBIT LIST

J-1 Joint letter of counsel for parties to administrative law judge, dated January 28, 1993, detailing basis for financial consideration of settlement agreement

J-2 Acknowledgement by respondent of right of State Board of Examiners to review record of tenure charges, pursuant to *N.J.A.C.* 6:11-3.5, 3.6(a)

IN THE MATTER OF THE TENURE	:	
HEARING OF LAWRENCE BEATTY,	:	COMMISSIONER OF EDUCATION
NEWTON SCHOOL DISTRICT,	:	DECISION ON REMAND
SUSSEX COUNTY.	:	
	:	

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

Upon review of the supplemental information brought to the record upon remand of the previously rejected settlement, the Commissioner approves the terms of the settlement as they comport with the standard of review for tenure matters set forth in In re Cardonick, 1990 S.L.D. 842, aff'd State Board 846. Such supplemental information documents respondent's understanding of the fact that even with acceptance of the settlement, the matter will be transmitted to the State Board of Examiners for its review and consideration. Also, the record now reflects that at least $75,000 of the $155,000 stipulated in this settlement is monies owing to respondent as a result of his successful claim against the Board for back wages as decided by the Commissioner in the matter entitled Lawrence Beatty v. Board of Education of Newton, 1991 S.L.D. 1001,

which currently is pending on appeal before the State Board.* Thus, the sum of $155,000 is in actuality for disposition of not one but two litigated matters involving the parties herein.

Accordingly, the Commissioner accepts the recommended decision of the Administrative Law Judge approving the settlement as set forth in his August 10, 1992 initial decision and as elaborated upon with the supplemental information that has been brought to the record as explicated herein. The determination to approve the settlement is based heavily upon the representation of the Board that the tenure charges are substantially based on the criminal allegations of which respondent was found not guilty and that much of the evidence upon which it sought to rely for the tenure charge matter is now not within its reach due to the unavailability and unwillingness of witnesses to testify, as well as the recantation of witness testimony. See terms of rejected settlement at page 2.

Therefore, the matter is dismissed, subject to compliance with the settlement terms by the parties. It shall forthwith be forwarded to the State Board of Examiners for its review and consideration.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 29, 1993

DATE OF MAILING - MARCH 29, 1993

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* Since no stay has been granted in the 1991 matter, the decision awarding back pay to respondent is deemed final and binding at this time pursuant to the statutory provision of N.J.S.A. 18A:6-25.

241-92

241-92

JACK KATINSKY, PRESIDENT, EVERYTHING ELECTRONIC,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY, AND BITS 'N' BYTES,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning company president alleged Board improperly awarded contract for computer equipment to Bits 'N' Bytes. Petitioner contended said bidder did not conform to specifications.

ALJ dismissed petition. ALJ found no specific brand name of computer was specified so bid from Bits 'N' Bytes did comply with specifications that computer be "IBM compatible."

Commissioner adopted findings and determination in initial decision.

OCTOBER 1, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5708-92
AGENCY DKT. NO. 309-7/92

JACK KATINSKY, PRESIDENT,
EVERYTHING ELECTRONIC,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF PENNSAUKEN,
CAMDEN COUNTY, AND BITS 'N' BYTES,
Respondents.

Jack Katinsky, for petitioner, pursuant to *N.J.A.C.* 1:1-5.4

James F. Maloney, Esq., for respondent Board of Education of the Township of Pennsauken (Maloney & Finley, attorneys)

M. Ramachandran, trading as Bits 'N' Bytes, respondent, *pro se*

Record Closed: August 11, 1992 Decided: August 19, 1992

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

This matter was commenced by Jack Katinsky, President, Everything Electronic, on July 21, 1992, with the filing of a petition of appeal and an application for temporary emergent relief. The petition alleged that the respondent Board of Education had improperly awarded the contract for computer equipment to Bits 'N' Bytes, a bidder whose bid did not conform to the specifications furnished by the Board. An answer was filed on behalf of the Pennsauken Board of Education and on July 29, 1992, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

Oral argument on petitioner's motion for temporary emergent relief was scheduled for August 5, 1992, at the Trenton office of the Office of Administrative Law. On that date all parties appeared and agreed to maintain the *status quo* pending the plenary hearing which was scheduled for August 11, 1992. The hearing took place as scheduled on August 11, 1992 at the Trenton office of the Office of Administrative Law. Following the close of testimony an additional exhibit was forwarded to the undersigned by Bit 'N' Bytes via facsimile machine. It was marked into evidence with the consent of all parties, whereupon the record closed. By letter order dated August 13, 1992, copy attached hereto, the undersigned advised the parties that no temporary restraints would be issued pending the final decision.

FINDINGS OF FACT

Most of the facts relevant to a determination of this matter are not in dispute and I therefore **FIND** the following as uncontested facts.

The Pennsauken Board of Education advertised for bids for computers and associated products for the district's elementary, middle and high schools. The specifications with respect to computers called for "IBM compatible;" brand names were designated for printers only. The bids were opened on June 12, 1992, by Barbara Heubel, Purchasing Assistant to Edwin N. Ragone, the Board Secretary and Business Administrator. After the bids were opened either Ms. Heubel or Mr Ragone had telephone conversations with each of the four lowest bidders to advise that the Board would be requiring a performance bond pursuant to paragraph 19 of the instructions and directions to bidders. That paragraph had provided:

> A CERTIFIED CHECK OR A BID BOND DRAWN TO THE ORDER OF THE PENNSAUKEN BOARD OF EDUCATION IN THE AMOUNT OF FIVE PERCENT (5%) OF THE TOTAL AMOUNT OF THE BID MUST ACCOMPANY EACH BID. THE CERTIFIED CHECK OF THE SUCCESSFUL BIDDER WILL BE RETAINED BY THE BOARD UNTIL COMPLETION OF THE CONTRACT. THE BOARD MAY REQUIRE A PERFORMANCE BOND IN THE AMOUNT OF THE CONTRACT.
>
> PLEASE NOTE: IN THE EVENT OF THE BIDDER'S TOTAL AMOUNT BID IS $1000.00 OR LESS, A BID BOND OR CERTIFIED CHECK WILL NOT BE REQUIRED. THIS DOES NOT APPLY TO BIDS FOR SERVICES OR CONTRACTS. (Emphasis added. P-4 in evidence)

Jack Katinsky, president of Everything Electronic and the second lowest bidder, wrote to Ms. Heubel by letter received on June 22, 1992, objecting to the telephone inquiry as follows:

> Please be advised that we consider your telephone inquiry regarding Performance Bonds to be inappropriate.
>
> The bidding procedure for your computer procurement was by sealed bid and all qualified bidders were required to supply bid bonds.
>
> Award of such contracts is to be made on the basis of clearly defined criteria including price and ability to perform. If a Performance Bond is required it should be part of the award package and the award should not be subject to prior conversations with individual bidders regarding this subject. (P-14 in evidence)

A number of the other bidders also complained that the Board was requiring a performance bond after the bids had already been opened, thus requiring the bidder to pay for the bond outside the cost as bid.

M. Ramachandran, the owner of Bit 'N' Bytes, who had submitted the lowest bid also had a telephone conference call after the bids were opened with several members of the Board. Discussed during that call were such things as whether the equipment to be supplied by Bits 'N' Bytes would meet the specifications and Bits 'N' Bytes' experience in the industry. On June 25, 1992, the Board of Education awarded the contract for all computer equipment to Bits 'N' Bytes. The award was recorded in the minutes of the special business meeting as follows:

> WHEREAS, advertised proposals were received, opened and read on June 12, 1992, for the purpose of purchasing COMPUTER EQUIPMENT for the Senior High School, Howard M. Phifer Middle School and Elementary Schools of Pennsauken Township: and
>
> WHEREAS, the following responsible bidder submitted the lowest price in conformance with the specifications:
>
> RESOLUTION: Purchase of Computer Equipment (cont'd)
>
> | | |
> |---|---|
> | BITS 'N' BYTES, Highland, NJ | $241,000.00 |
> | Elementary School | 151,932.00 |
> | Howard M. Phifer Middle School | 30,186.00 |
> | Senior High School | 57,734.00 |
>
> THEREFORE, BE IT RESOLVED by the Board of Education of the Township of Pennsauken that purchase orders be issued to the bidder named, in the amount shown, payable from the 1991-1992 Budget. (Year-end spending) Acct. #730 D)

> Other bidders were: Micro Tree Corp., Everything Electronic, Smart Computer Co., United Resources, P C & T, Judge Computer, IBM Corp. (P-3 in evidence)

Mr. Katinsky, on behalf of Everything Electronic, immediately complained about the award of the contract; he confirmed his complaints in writing by letter dated June 30, 1992, sent to Mr. Ragone and to the Board attorney. That letter provided:

> This will confirm our conversation of Thursday, June 25, 1992, during which I advised you that our company considers the contract award for the procurement of computer equipment to Bits and Bytes to be improper.
>
> I noted at the bid opening, and advised your purchasing agent, that the bid from the above referenced firm did not meet the requirements of item #7 of your bidding instructions since the manufacturer of the computer equipment to be supplied was omitted from the bid. Item #7 clearly states "When quoting substitutes or equal, please specify manufacturer, brand and catalog number.
>
> I was later advised that your purchasing agent called this vendor to inquire as to what brand they intended to supply, received an answer, and the vendor subsequently called back to change the brand of equipment and the equipment specifications. All of this took place after the bid opening and before the award.
>
> I hereby request that all of the documents relating to this bid, including the original bids, notes of telephone conversations between your purchasing agent and any bidder, and notes taken during any meeting relating to this bid, be submitted to your Board attorney for a determination as to the validity of this award. (P-5 in evidence)

By another letter dated the same day, Mr. Katinsky complained to Mr. Ragone and the Board attorney that he had been denied access by Barbara Heubel to a copy of the purchase orders issued to Bit 'N' Bytes for their computer procurement. He subsequently received copies of those documents under cover letter from Mr. Ragone, dated July 6, 1992, which provided as follows:

> Pursuant to your letter of June 30th, 1992 as to the validity of the Computer Bid award, we have had the Board Solicitor review the documents and upon his findings we are informing you that the award made on June 25th, 1992 will stand.
>
> You already have a copy of the bid documents and the copies of the purchase orders that you requested are attached.
>
> If you have any other questions, please feel free to call me at 609-8500, ext. 209 (sic). (P-12 in evidence)

By letter dated June 30, 1992, Ms. Heubel returned to Mr. Katinsky the certified check which was submitted with his bid for computer equipment. The envelope containing the check was mailed from the Pennsauken post office on July 1, 1992.

Another purchase order dated July 14, 1992, was issued to Bits 'N' Bytes for one "NEW 386 DX with 3 1/2 drive as per your specifications on bid." The purchase order also stated "This machine is to (be) installed first for use by Personnel to see what your machines will be like." That unit was shipped and received in Mr. Ragone's office on July 27, 1992. The performance bond required by the Board of Education was issued by Amwest Surety Insurance Company on July 13, 1992 and was submitted by Bits 'N' Bytes to the Board on July 14, 1992. This concludes the recitation of the uncontested facts.

Mr. Ramachandran testified that his bid had not mentioned a brand name of computer because the specifications issued by the Board had requested only "IBM compatible." He testified that the computers he will be providing will meet or exceed the bid specifications. He indicated that he had not regarded paragraph 7 of the Instructions and Directions for Submitting Bid Proposals, which states, "When quoting substitutes or equal, please specify manufacturer, brand name and catalog number," to be relevant to his bid because he had bid as specified without substituting or offering an equal. He denied that he had ever guaranteed any specific brand name computer to the Board members or to Ms. Heubel in any conversation which had taken place after the bid opening. He acknowledged that a conversation concerning what kind of computer he would be supplying had occurred and during that conversation he had mentioned Fountain as a possibility. When he had discovered that Fountain computers would not be available to him to fill the contract he subsequently advised the Board that Bits 'N' Bytes would assemble its own computer using a Chicony motherboard. The sample unit supplied to the Board after Bits 'N' Bytes was awarded the contract was this kind of computer, he testified. Mr. Ramachandran also testified that it is fairly common for Boards of Education to issue contract specifications without requesting a particular band name computer. One reason for this practice, he suggested, was that the computer industry is very fast paced and any particular manufacturer's model availability can change very quickly.

Edwin N. Ragone, Board Secretary and Business Administrator for Pennsauken Board of Education, testified that the specifications for computer equipment had been prepared by a committee of school district employees with expertise in computers. With the exception of Everything Electronic and perhaps IBM, none of the bidders had specified a brand name for the computers to be supplied and none had been required, Mr. Ragone testified. Mr. Ragone testified that it was his understanding from a conversation with Ms. Heubel that Mr. Katinsky had refused to provide the performance bond requested by the Board after the opening of bids unless the bond was paid for by the Board of Education. Accordingly, Mr. Ragone thought that Mr. Katinsky was not a qualified bidder eligible to receive an award of the contract in any event. He further testified that the evaluation model provided to the Board by Bits 'N' Bytes had not been requested or received prior to the award of the contract; he indicated that the purpose for ordering this sample had been two fold, one to provide a needed computer to a member of his staff and two, to evaluate whether the unit would meet the specifications. To date, however, he indicated the computer has not been used because programs from the existing computer have not been transferred to the new model nor has the new model been evaluated yet. Finally, he indicated that it had been important to award the contract and issue the purchase orders for the computer equipment before July 1, 1992, because the monies budgeted had been for the 1991-92 fiscal year ending June 30, 1992.

Jack Katinsky testified that Barbara Heubel had advised him during a conversation after the bid award that Mr. Ramachandran had originally said he would be supplying Fountain computers and called back a day or two later to say that he could not get Fountain and would be supplying his own brand. He explained that Fountain had an agreement with Everything Electronic to supply the computers called for in the specifications and therefore would not sell them to Bits 'N' Bytes. He stated that all computers with the same specifications are not the same and, therefore, it was his opinion that paragraph 7 of the Instructions and Directions for Submitting Bid Proposals required the supplying of a brand name so the Board would know what it was getting. He stated that if the specifications did not require the supplying of a brand name that they were deficient as being too vague.

With respect to the contested facts, I **FIND** that the specifications did not require the providing of a sample unit and that the evaluation model provided by Bits 'N' Bytes to the Board was provided after the awarding of the contract and played no part in the award process. I further **FIND** that no specific brand or manufacturer's model was promised by Bits 'N' Bytes to the Board and that the

award of the contract was not premised upon expected receipt of any particular brand of computer as long as the computer was IBM compatible and otherwise met the specifications. The testimony of Mr. Ramachandran and Mr. Ragone in this regard was straightforward and sincere and Mr. Katinsky had no competent evidence to the contrary.

APPLICABLE LAW AND DISCUSSION

It is clear that petitioner, as an unsuccessful bidder, may not not challenge the legality or sufficiency of the specifications pursuant to which respondent school board awarded the contract to respondent Bits 'N' Bytes, the low bidder. *Camden Plaza Parking, v. City of Camden,* 16 *N.J.* 150 (1954); *Waszen v. City of Atlantic City*, 1 *N.J.* 272 (1940); *Albert F. Ruehl Co. v. Bd. of Trustees, Industrial Ed.* 85 *N.J. Super.* 4 (Law. Div. 1964) The rationale of these holdings is "that one cannot endeavor to take advantage of a contract to be awarded under illegal specifications and then, when unsuccessful, seek to have the contract set aside." *Waszen, Supra* at 276. If petitioner had a problem with the clarity of the specifications, the time to raise that issue was before the bids were opened, not after.

Petitioner's alternate position is that the specifications clearly require the providing of a brand name for computers proposed to be supplied. The evidence on this issue is to the contrary, however. The specifications simply call for "IBM compatible" and accordingly, any computer which is IBM compatible and otherwise meets the specifications listed may be supplied. Paragraph 7 of Instructions and Directions for Submitting Bids Proposals, which states, "When quoting substitutes or equal please specify manufacturer, brand name and catalog number," obviously applies only where a brand name or specific manufacturer has been requested, as with the printers required under the specifications in this matter. Further, as pointed out by respondent Bits 'N' Bytes, there is no place on the specification form for indicating brand name of computers and with the exception of petitioner and possibly IBM none of the other bidders supplied a brand name. Since the specifications did not call for a brand name and no bidder was required to supply any, no bidder could obtain any unfair advantage by omitting that information. Accordingly, I **CONCLUDE** that petitioner has failed to establish that the bid submitted by Bits 'N' Bytes did not comply with the specifications.

Belousofsky v. Bd. of Education of City of Linden, 54 *N.J. Super.* 219 (App. Div. 1959), cited by petitioner is not applicable to the within matter. In that case the court held that when essential information is missing from a bid when it is opened, it may not be supplied then or thereafter by the private understanding of the bidder and the board, nor otherwise. The facts in this matter reveal that the Board did not require a brand name to be specified with respect to the computers to be supplied. Although there apparently was some conversation between Mr. Ramachandran and the Board concerning the type of computers he anticipated supplying, that conversation was only incidental to the purpose of the call which was to advise that a performance bond would be required. Mr. Ramachandran testified convincingly that he had promised the Board nothing other than that the computers would meet the specifications and that the brand names mentioned were only possibilities. Such conversations should be discouraged as contrary to the paramount aims of the bidding statutes that all bidders bid upon the same thing and that the public know clearly what the bidder must give and the Board must receive for a consideration plainly stated. The bid submitted by Bits "N" Bytes conformed to the specifications furnished, however, and no information supplied during the conversations either altered or supplemented the proposal or induced the Board to award the contract to other than the lowest bidder, and as previously noted whether the Board should have specified a name brand or equivalent is an issue petitioner has no standing to raise.

Petitioner's other contentions are likewise without merit. In the absence of an order from the Commissioner or a court of competent jurisdiction restraining the Board from issuing a purchase order to Bits "N" Bytes, there was nothing improper about the Board's determination to proceed with the contract as awarded. Petitioner had his remedy in the within forum when the parties agreed not to implement the contract before a full hearing on the merits before the undersigned. Petitioner's allegation that the Board's purchasing assistant acted improperly in not returning checks to the unsuccessful bidders immediately after the award was made is not supported by the facts or applicable law. *N.J.S.A.* 18A:18A-36 provides in pertinent part:

> . . .Within 3 days after the awarding of the contract and the approval of the contractor's performance bond the bid security of the remaining unsuccessful bidders shall be returned to them forthwith, Sundays and holidays excepted.

The performance bond provided by Bits "N" Bytes was not received by the Board until July 14, 1992, and petitioner's bid security was returned to him by first class mail on July 1, 1992, even before it was required to be. Petitioner also complains that

public documents he requested were not supplied to him promptly; the facts reveal that the purchase orders he requested on June 30, 1992 were supplied to him on July 6, 1992. *N.J.S.A.* 47:1A-2, the Right to Know Law, requires that every citizen shall have the right to inspect and hand copy certain public records during the regular business hours maintained by the custodian of the records. The custodian of the records is required to make copies available upon payment of the fees established in the statute. Mr. Katinsky could not hand copy the purchase orders in question himself on July 30, 1992, because at the time he was present at the Board office the purchase orders had not yet been prepared. After they were prepared later that same day, copies were made available to him less than one week later. The statute is silent concerning the length of time permitted between a request for copies of the records and their provision by the custodian and therefore a reasonable time must be presumed. Less than one week was not an unreasonable period of time, and petitioner suffered no prejudice from the brief delay.

For all the foregoing reasons, I **CONCLUDE** that petitioner has failed to establish by a preponderance of the competent and credible evidence that he is entitled to the relief which he seeks, and accordingly the within matter is **DISMISSED WITH PREJUDICE.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 19, 1992
Date

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

August 20, 1992
Date

Maureen K. Kelley
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 25 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

am

EXHIBITS IN EVIDENCE

P-1 Proposal for supplying computer equipment from Bits 'N' Bytes (14 pages)

P-2 Form Proposal for Supplying Computer Equipment from Pennsauken Board of Education (15 pages)

P-3 Portions of Board minutes from special business meeting 6-25-92 (2 pages)

P-4 Page 3, Instructions and Directions to Bidders

P-5 Fax cover sheet to James J. Maloney with June 30, 1992 letter from Jack Katinsky to Edward Ragone attached (2 pages)

P-6 Fax cover sheet to Ed Ragone with June 30, 1992 letter from Jack Katinsky to Edward Ragone attached (2 pages)

P-7 Letter from Jack Katinsky to Edward Ragone, dated June 30, 1992 with copy of certified mail return receipt

P-8 Fax cover sheet to James J. Maloney with letter from Jack Katinsky to James J. Maloney, dated June 30, 1992, attached (2 pages)

P-9 Fax cover sheet to Ed Ragone with letter from Jack Katinsky to James J. Maloney, dated June 30, 1992, attached (2 pages)

P-10 Photocopies of certified check and envelope showing July 1, 1992 postmark

P-11 Pennsauken Board of Education purchase orders (4 pages)

P-12 Letter from Edwin N. Ragone to Jack Katinsky, dated July 6, 1992

P-13 Handwritten note from Datapros to Dear Jack with Grant of Equipment Authorization attached (2 pages)

P-14 Letter from Jack Katinsky to Barbara Heubel, stamped received June 22, 1992

RB-1 Letter from Jack Katinsky to Joseph J. Finley, dated August 8, 1992, with attachment (2 pages)

RB-2 June 13, 1992 computer printout showing awarded vendors by name (2 pages)

RB-3 Emerson Board of Education Notice to Bidders (4 pages)

RB-4 Pennsauken Board of Education purchase order for one new 386DX with packing slip attached showing shipment 7-27-92 (2 pages)

RP-1 Proposal for Supplying Computer Equipment from Everything Electronic (8 pages)

RP-2 Spread sheets showing all bids (4 pages)

RP-3 Performance bond for Bits 'N' Bytes (3 pages)

RP-4 New Jersey Treasury list of State Contracted Vendors (72 pages)

WITNESSES

For petitioner: M. Ramachandran
Jack Katinsky

For respondent: Edwin N. Ragone
M. Ramachandran

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
CN 049
QUAKERBRIDGE PLAZA, BLDG. #9
TRENTON, NEW JERSEY 08625
(609) 588-6633

M. Kathleen Duncan
ADMINISTRATIVE LAW JUDGE

August 13, 1992

LETTER ORDER

Jack Katinsky, President
Everything Electronic
Ellisburg Shoping Center
Cherry Hill, NJ 08002

James F. Maloney, Esq.
Maloney & Finney
South Maple Avenue
Maralton, NJ 0805357

M. Ramachandran
Bits "N" Bytes
200 Portland Road
E 21
Highlands, NJ 07732

Re: Everything Electronic v. Bd. Of Ed . of Pennsauken and Bits "N" Bytes
OAL DKT. NO. EDU 5708-92

Dear Mr. Katinsky, Mr. Maloney & Mr. Ramachandran:

I have reviewed the entire record in this matter and the relevant statutes and case law. As I indicated at the hearing on Tuesday, it is clear that petitioner as an unsuccessful bidder has no standing to challenge the adequacy of the specifications. Further, it appears that Mr. Ramachandran's bid conformed to the specifications furnished. I see no other circumstances which would warrant vacating the award of the contract or requiring the contract to be rebid. Accordingly, no temporary restraints will be issued pending the issuance of a final decision in this matter. My initial decision has been delayed briefly because of an injury to my right shoulder, but I expect to issue it tomorrow.

This order may be reviewed by the **COMMISSIONER OF THE 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.

August 13, 1992
DATE

M. Kathleen Duncan am
M. KATHLEEN DUNCAN, ALJ

FAXED TO ALL PARTIES ON AUGUST 13, 1992. NO HARD COPY TO FOLLOW.

JACK KATINSKY, PRESIDENT, EVERYTHING ELECTRONIC,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY, AND BITS 'N' BYTES,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. A letter of exception, without proof of service, was filed by petitioner pursuant to the provisions of N.J.A.C. 1:1-18.4. This letter essentially reiterates arguments already raised before the ALJ and need not be set forth at length herein.

Upon careful review, the Commissioner concurs with the ALJ that the specifications promulgated by the Board of Education did not require bidders to provide a specific brand name for the computers offered; it required only that they be IBM compatible. Therefore, the successful bidder was not offering a substitute or equivalent such as to have invoked the requirements of Item No. 7 in the bidding instructions, and his bid fully conformed to the published specifications. Petitioner's objections to the Board's having elected to draft its specifications in this manner, including his concern about the possible educational problems which may arise

from a bidder supplying multiple brands, reach to the adequacy of the specifications themselves and are, therefore, outside his ability to raise in this context as noted by the ALJ.

Accordingly, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal is affirmed for the reasons well stated therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 1, 1992

DATE OF MAILING - OCTOBER 1, 1992

242-92

D.E.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF LOWER TOWNSHIP, CAPE MAY COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

OCTOBER 5, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
OAL DKT. NO. EDU 6869-92
AGENCY DKT. NO. 422-9/92

D. E.S.,
Petitioner,
v.
BOARD OF EDUCATION OF LOWER TOWNSHIP,
Respondent.

D.E.S., petitioner, pro se

Jeffrey K. Israelow, Esq., for petitioner

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

D.E.S. (petitioner) seeks an order of the Commissioner of Education that the Lower Township Board of Education's (respondent) kindergarten admission policy is arbitrary, capricious and an abuse of discretionary authority. The petitioner seeks (1) to amend the policy, (2) testing of her daughter for eligibility to attend kindergarten this year and (3) admission to kindergarten this year if her daughter's test results so indicate.

The matter was transmitted to the Office of Administrative Law pursuant to N.J.S.A. 52:14F-1 through-13 for a hearing on application for emergent relief. Oral argument was heard at the Office of Administrative Law, Mercerville, on September 14, 1992 and the judge rendered a bench decision on the same day. For the reasons expressed on the enclosed tape recording of the record, the application was **DENIED.**

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

14 SEPTEMBER 1992
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

km

D.E.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF LOWER TOWNSHIP, CAPE MAY COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

This matter has come before the Commissioner of Education by way of Petition of Appeal and Motion for Emergent Relief filed in the Bureau of Controversies and Disputes on September 8, 1992 following dismissal of the same matter without prejudice to file before the Commissioner of Education for exhaustion of the administrative remedy by Superior Court of New Jersey, Chancery Division, Cape May County; and

Whereas, the matter was transmitted to the Office of Administrative Law for a hearing on the application for emergent relief on September 10, 1992 and was heard on September 14, 1992; now therefore,

Upon careful consideration of the arguments raised by the parties, which review includes consideration of the oral arguments of the parties at the hearing by the Office of Administrative Law, as well as the ALJ's oral decision as contained in the tape recording of the hearing of September 14, 1992, the Commissioner

hereby DENIES the Motion for Emergent Relief, petitioner having failed to meet those standards articulated by the Court for pendent lite restraints as set forth in Crowe v. DeGioia, 90 N.J. 126 (1992). In so finding, it is noted that no exceptions were filed by the parties pursuant to N.J.A.C. 1:1-18.4.

COMMISSIONER OF EDUCATION

OCTOBER 5, 1992

DATE OF MAILING - OCTOBER 5. 1992

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(242-92)

D.E.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF LOWER TOWNSHIP, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JANUARY 5, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSING PETITION
OAL DKT. NO. EDU 6869-92
AGENCY DKT. NO. 422-9/92

D. E. S.,
Petitioner,
v.
BOARD OF EDUCATION OF LOWER TOWNSHIP,
Respondent.

D.E.S., petitioner, pro se

Jeffrey K. Israelow, Esq., for petitioner

Record Closed: November 30, 1992 Decided: December 1, 1992

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

D. E. S. (petitioner) sought an order of the Commissioner of Education that the Lower Township Board of Education's (respondent) kindergarten admission policy is arbitrary, capricious and an abuse of discretionary authority. The petitioner sought (1) to amend the policy, (2) testing of her daughter for eligibility to attend kindergarten this year and (3) admission to kindergarten this year if her daughter's test results so indicate.

The matter was transmitted to the Office of Administrative Law pursuant to N.J.S.A. 52:14F-1 through -13 for a hearing on application for emergent relief. Oral argument was heard at the Office of Administrative Law, Mercerville, on September 14, 1992 and the judge rendered a bench decision on the same day. For the reasons expressed on the record, the application was **DENIED.**

On October 5, 1992, the Commissioner affirmed the judge's decision. No appeal was taken. On November 10, 1992, the judge wrote to the petitioner, stating

> Dear Mrs. [S.]:
>
> On September 14, 1992, this tribunal denied your application for emergent relief in this matter. On October 5, 1992, the Commissioner of Education affirmed the decision.
>
> If I hear nothing from you by November 24, 1992, I shall consider the matter closed. If you believe any arguable issue remains, please advise me of it by November 24, 1992.

The established time having expired and having heard nothing from the petitioner, I **FIND** and **CONCLUDE** that prosecution of the appeal has been abandoned.

Accordingly, I **ORDER** the petition of appeal **DISMISSED** herewith.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

1 DECEMBER 1992
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

12/2/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 7 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

km

OAL DKT. NO. EDU 6869-92

D.E.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF LOWER TOWNSHIP, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon review, the Commissioner concurs with the ALJ that petitioner no longer wishes to pursue this matter.

Accordingly, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 5, 1993

DATE OF MAILING - JANUARY 5, 1993

243-92

243-92

IN THE MATTER OF THE TENURE	:	
HEARING OF JILL CASTRO, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF	:	DECISION
ELIZABETH, UNION COUNTY.	:	
	:	

OCTOBER 2, 1992

IN THE MATTER OF THE TENURE	:	
HEARING OF JILL CASTRO, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF	:	DECISION
ELIZABETH, UNION COUNTY.	:	
	:	

For the Board, Vito Gagliardi, Jr. (Riker, Danzig, Scherer, Hyland & Perretti)

This matter having been opened before the Commissioner of Education on July 9, 1992 through certification of tenure charges of unbecoming conduct and other just cause against respondent, a tenured teacher in the Board's employ, on grounds of abandonment of position and absence without leave beginning September 3, 1991 and continuing to the time of filing; and

Whereas, the Commissioner directed respondent by two notices to file an Answer to the charges against her; and

Whereas, respondent filed no answer as of this date and the second of the Commissioner's notices, which was sent return receipt requested, certified mail to two separate last-known addresses, was returned marked "Returned to sender -- forwarding order expired" and "Returned to sender -- unclaimed"; now therefore

IT IS ORDERED this 2nd day of October 1992 that the Board's charges against respondent are deemed to be admitted, so that summary judgment shall be granted to the Board. Respondent is accordingly dismissed from tenured employment as of the date of this decision and the instant matter is referred to the State Board of Examiners pursuant to N.J.A.C. 6:11-3.6(a) for further action as it deems appropriate.

John Ellis
COMMISSIONER OF EDUCATION

OCTOBER 2, 1992

DATE OF MAILING - OCTOBER 5, 1992

244-92

244-92

THOMAS J. BOLES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL SCHOOLS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

OCTOBER 5, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5392-91
AGENCY DKT. NO. 98-5/91

THOMAS J. BOLES,
Petitioner,
v.
BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS OF THE COUNTY OF BERGEN,
Respondent.

Alfred F. Maurice, for petitioner

Philip Scalo, Esq., for respondent

Record Closed: August 24, 1992 Decided: August 24, 1992

BEFORE **KEN R. SPRINGER,** ALJ:

This matter was transmitted to the Office of Administrative Law on May 30, 1991 for a hearing pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.*

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Aug. 24, 1992
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

8/26/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 27 1992
Date

OFFICE OF ADMINISTRATIVE LAW

al

OFF
AUG 24 11 [illegible] '92

PHILIP SCALO
COUNSELLOR AT LAW
One Executive Drive
Fort Lee, New Jersey 07024
(201) 947-9473
Attorney for Respondent

THOMAS J. BOLES, Petitioner, v. BOARD OF VOCATIONAL EDUCATION IN THE COUNTY OF BERGEN Respondent	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY **OAL DOCKET NO. EDU 5392-91** **STIPULATION OF SETTLEMENT**

Petitioner Thomas J. Boles ("Boles") and respondent, the Board of Education of the Vocational Schools of the County of Bergen ("the Board") hereby stipulate to the following terms and conditions of settlement, the same terms which were placed on the record before the Honorable Ken R. Springer, A.L.J. on July [illegible], 1992:

1. The Board shall by resolution reinstate Boles for the 1992-1993 school year at full salary based on his appropriate step and level of the teacher's salary guide and Boles shall receive all benefits normally due to a teaching staff member. Said salary shall be subject to all normal payroll deductions, including but not limited to, pension deductions. The payment by the Board to Boles will be subject to the approval of the within settlement by the Commissioner of Education. Boles' teaching assignment for the 1992-1993 school year shall be as designated by the Board.

2. The Board shall restore Boles' salary for the salary year 1990-1991 by paying Boles the sum of $25,943.20. That amount represents the full-time contract amount minus the actual payment made to Boles previously by the Board for the 1990-1991 school year. That amount also includes the appropriate TPAF pension contribution to be credited to Boles' TPAF account for the 1990-1991 school year.

3. Boles' reinstatement for the 1992-1993 school year shall become effective on September 1, 1992. On or before September 1, 1992, Boles shall sign and submit to the Board an irrevocable letter of resignation from all employment with the Board, to be effective at the close of business on September 30, 1992.

4. Boles shall waive any seniority claims arising out of his employment with the Board for the 1990-1991 school year and for the period of September 1, 1992 through October 1, 1992. Counsel for Boles has provided a letter opinion to counsel for the Board regarding the legal issues addressed by this settlement, specifically the legal and binding effect of (1) a waiver of seniority; (2) an irrevocable resignation; and (3) reinstatement of employment without prejudice to the position of the Board regarding the seniority and tenure rights of Boles as asserted in the above-captioned litigation. Counsel for Boles has rendered the opinion that the above waiver by Boles is effective and legally enforceable.

5. The settlement and resignation of Boles as outlined above are contingent upon the approval by the Board of the terms outlined in paragraphs 1 and 2 herein.

6. The parties further agree and acknowledge that the settlement agreement is contingent upon the review and approval by the Commissioner of Education of its terms as outlined herein.

7. This settlement is not contingent upon the favorable action of the Division of Pensions with regard to the pension application of Boles and Boles enters into this agreement knowing that the Division of Pensions' grant or denial of his pension application is not a factor or term of this settlement agreement.

8. Boles shall execute a general release in favor of the Board in the form accompanying this Agreement. However, nothing in this agreement, or the general release given by Boles shall preclude either party from bringing an action to enforce performance of any term of this Agreement should there be a default in performance. Said release shall be held in escrow by the Board attorney until September 30, 1992 and shall not be released from escrow unless the Board has fully complied with this Agreement on or before that date.

9. Boles shall withdraw and dismiss with prejudice the litigation known as Boles v. Bergen County Vocational Schools of the County of Bergen, Docket No. EDU 5392-91, now pending before the Office of Administrative Law.

10. The parties recognize that each has been represented by legal counsel of his or its own choosing and that they sign this Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

11. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Stipulation of Settlement and bind the Board to its terms. Boles, hereby acknowledges that he has consulted with counsel prior to entering into the within agreement and agrees to be bound by the terms as set forth herein.

President, Board of Education
Dated: August 19, 1992

Philip Scalo, Esq.
Attorney for Respondent

Thomas J. Boles
Dated:

Alfred F. Maurice, Esq.
Attorney for Petitioner

Rick A. Beye, Esq.
Private Counsel for
Thomas J. Boles

OAL DKT. NO. EDU 5392-92

THOMAS J. BOLES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL SCHOOLS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

OCTOBER 5, 1992

DATE OF MAILING - OCTOBER 5, 1992

245-92

245-92

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF JACKSON TOWN- : DECISION
SHIP, OCEAN COUNTY. :

SYNOPSIS

Petitioners, two unsuccessful candidates for election to Board, sought inquiry into alleged violations of election law (improper electioneering).

Initial decision determined petitioner failed to produce sufficient evidence to establish truth of any complaint of improper conduct by Board member. ALJ found Board member's persuading store to take down campaign sign was not a violation of election law. Request for inquiry was dismissed.

Commissioner adopted findings and determination in initial decision, affirming results of election as originally announced.

OCTOBER 5, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2999-92
AGENCY DKT. NO. 105-4/92

IN THE MATTER ANNUAL SCHOOL ELECTION HELD IN THE JACKSON TOWNSHIP SCHOOL DISTRICT, OCEAN COUNTY,

---

Curtis M. Briggs and **Joshua J. Reilly**, petitioners, pro se
Vickie Rickabaugh, pro se
Russell Weiss, Jr., Esq., on behalf of the Jackson Township Board of Education

Record Closed: August 20, 1992 Decided: August 21, 1992

BEFORE **DANIEL B. McKEOWN**, ALJ:

Curtis M. Briggs and Joshua J. Reilly (petitioners) were unsuccessful candidates for election to the Jackson Township Board of Education at the annual school election held April 7, 1992. On the very date of the election, petitioners filed a letter complaint with the Ocean County Superintendent of Schools who forwarded the letter to the Commissioner of Education. The Commissioner's office treated the letter complaint as a request for an inquiry and transferred the matter April 29, 1992 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 August 19, 1992 at the Jackson Township Municipal Building, Jackson Township.

Findings are reached in this initial decision that petitioners failed to produce sufficient evidence to establish the truth of any complaint of improper conduct by Board Member Vickie Rickabaugh. Therefore, the conclusion is reached that the entire matter should be dismissed and the announced election results affirmed.

FACTS

Petitioners' letter complaint is reproduced here in full:

We have been informed that a member of the Jackson Board of education may have engaged in improper electioneering. As candidates in the Jackson Board of Education election we have been posting our campaign literature in various store-fronts - with the permission of the store-owners and managers - of course.

Not long ago, it was reported to us that a certain Jackson Board of Education member, the name given to us was Mrs. Vickie Rickabaugh, had attempted to have our literature removed by intimidating and harassing store employees, and in some instances she may have vandalized or defaced our signs. In accordance with State ethics code, and is common practice in Board of Education elections, we as candidates and citizens request that an inquiry or investigation into these matters be undertaken by Board of Elections, and/or the County Superintendent's office.

While we do not know conclusively whether or not these statements are fact, we believe that an investigation is appropriate and should be conducted to determine their validity.

Please make note: we request this letter be filed as a formal complaint. We would appreciate if prompt attention be given this matter.

Three three year vacancies were filled at the annual school election. The total vote received by each of six announced candidates is as follows:

Name	Total Votes
Michael W. Gilbertson	968
Twila M. Rust	740
Earl Crawford	895
Curtis M. Briggs	397
Frank R. Reilly	405
Joshua J. Reilly	283

Candidates Gilbertson, Rust, and Crawford were declared successful candidates for membership to the Board.

The essence of petitioners' complaint is set forth in an affidavit of Faye Powell which is reproduced here, not for the truth of its contents because the affidavit is not in evidence, but simply to provide a background for the complaint.

1. I [Faye Powell] am employed by the WaWa Corporation, at their store on the corner of 528, and Bennetts Mills Rd. Jackson, N.J.

2. My responsibilities include waiting on customers and acting as Cashier, as well as Shift Manager.

3. Prior to the incident in question, which occurred about the second week of March 1992, the exact date escapes me. Joshua Reilly, a candidate for the Board of Education brought into my WaWa store several signs. They stated "Briggs & Reilly for Board of Education" as well as "Vote Yes for Education". Joshua asked if I would place them in the outer window(s). Seeing no problem with the request, I placed the signs in the window(s) immediately.

   I feel it is important to mention that no other candidates for the Board of Education asked to have their election materials displayed either before or after the Briggs and Reilly posters were in place.

4. Several days after the Briggs & Reilly signs had been posted Mrs. Vicki Rickabaugh came into the store and made a loud announcement. Mrs. Rickabaugh said "I didn't think that WaWa participated in politics."

5. Mrs. Rickabaugh then made such a ruckus, and was so insistent that the Briggs & Reilly signs be removed that Barbara Cuddy, the district supervisor, feeling so intimidated by Mrs. Rickabaugh, and fearing that she would lose customers, due to the outburst reluctantly took down all posters pertaining to

the Board of Ed. election; namely those mentioned previously ("Briggs & Reilly" and "Vote Yes for Education")

6. After hearing Mrs. Rickabaugh's complaint from the back room, I came out to the main register area of the store were [sic] I was also confronted by Mrs. Rickabaugh.

7. I asked Mrs. Rickabaugh, "What is the trouble?" and I asked, "Why [sic] the posters were removed?"

8. Mrs. Rickabaugh replied, in an extremely rude and intimidating fashion, "Why would I vote for an eighteen year old?"

9. I now know that she was derrogatoraly [sic] referring to Curtis Briggs, however, at the time thinking she was referring to Joshua Reilly I said, "He is not 18."

10. Vicki then asked "Do you want your taxes to go up?" I replied by saying that taxes go up anyway no matter who is on the Board.

11. I additionally said, "I think is it s a good thing to have youth on the Board of Ed. especially someone who went to the Jackson school system and is now attending college. I think he knows what the school systems needs. Josh comes from a fine family and in my opinion is qualified for the position on the School Board."

12. Then, I walked away to assist a customer.

13. Vicki continued on being negative towards Curtis Briggs and Joshua Reilly for some while longer, until the signs were all down and she eventually left.

14. I do not recall how many patrons were in the store during Mrs. Rickabaugh's tyrade [sic], but I hope that statements she made

did not hinder Joshua Reilly or Curtis Briggs in the School Board election, as that was clearly her aim.

15. I told Joshua Reilly what Mrs. Rickabaugh had done a day or two after the incident.

Personally, I feel Mrs. Rickabaugh's actions the day of the incident were completely improper. She has a great deal of influence in Jackson, as a Board of Ed. member, and as a member of other civic groups. I believe that her attack on Joshua Reilly and Curtis Briggs - two young people trying to make a difference in their community - was completely unfounded and just plain wrong.

Petitioner called as a witness Barbara Cuddy, the WaWa district supervisor to whom reference is made in the foregoing background affidavit. Ms. Cuddy says that WaWa does not make political statements nor does it allow its stores to be used for political purposes. However, because she has 13 stores to supervise she relies upon the judgment of individual managers whether to accept election materials, such as here, for posting in the individual store's window. In this case, Ms. Cuddy testified that she recalls seeing Ms. Rickabaugh and another women whom she did not identify in the WaWa store in Jackson and the subject of the posters for petitioners being in the windows was brought up. When the topic was brought up, Ms. Cuddy testified she went to the window area, removed the posters, and that was the end of that. According to Ms. Cuddy, Ms. Rickabaugh did not at any time intimidate her nor did Ms. Rickabaugh harass her in any form. Ms. Cuddy did claim that the woman who was with Ms. Rickabaugh was more vocal than Ms. Rickabaugh but that even that women did not intimidate nor harass her.

Ms. Cuddy acknowledge that WaWa Corporation is a private employer; that if her supervisor instructed her to allow petitioners' posters to remain in the windows, they would have remained; Ms. Cuddy was emphatic that she did not remove the posters because of any "order" from Ms. Rickabaugh nor because of Ms. Rickabaugh's membership on the Board; and, that the posters were removed simply because WaWa does not make political statements.

Petitioner Briggs testified that in addition to the foregoing WaWa incident, which this judge assesses to be the pivotal incident in this matter, he was in a strip shopping mall about one or two weeks before the April 7 election handing out

literature. He testified that he observed Ms. Rickabaugh tearing down election signs he had placed on unoccupied store fronts. The signs were to be advocating his and Reilly's election. This incident was to have occurred before the WaWa incident. Sometime before April 6, petitioners wrote a joint letter to the Board in which they complained of reports being made to them that Ms. Rickabaugh was attempting to have their signs and literature removed from stores in which they had already been placed. They also complained to the Board that Ms. Rickabaugh was harassing and intimidating owners and employees and that she may have vandalized or defaced their signs. No mention is made in this letter (B-1) of Mr. Briggs' personal observation he says he made of Ms. Rickabaugh tearing down signs he placed on unoccupied store fronts. However, he says that this letter was written prior to that observation. However, if that be so there is no explanation in this record why the letter was received in the superintendent of schools' office on April 6, 1992.

Moreover, no mention is made of this personal observation in the letter complaint filed with the Ocean County Superintendent of Schools which letter forms the basis for this inquiry and as that letter is reproduced above. Finally, petitioner-Briggs wrote a letter (B-3) on April 7, 1992 to the Board Secretary complaining of Ms. Rickabaugh's conduct but nowhere in that letter is his asserted personal observation reported.

In each of the three letters discussed (B-1, B-2, B-3), petitioners complain of the conduct of Ms. Rickabaugh and predicate those complaints upon other unidentified people reporting to them. Petitioner Briggs explained at hearing that he was reluctant to report his observation in order not to become the target of a defamation suit and he was uncertain whether the other individuals who were complaining to him of Ms. Rickabaugh's conduct would testify at hearing. Petitioner Briggs also testified that a local pharmacy removed their signs from the windows because of a complaint received from a female who was described in a manner that leads Briggs to believe it was Ms. Rickabaugh. Finally, Briggs testified that both he and petitioner Reilly found signs torn down from various locations throughout towns and that the signs were defaced but that he does not know if Ms. Rickabaugh is responsible.

Ms. Rickabaugh testified under oath that at no time did she remove, tear down, deface, or mutilate any signs which had been posted by either petitioner Briggs or petitioner Reilly. Ms. Rickabaugh further testified with respect to the

WaWa incident, she was not rude, intimidating, angry, boisterous, and she denies engaging in any conduct which could in anyway be considered inappropriate.

ANALYSIS

The pivotal WaWa incident occurred on essentially private property, though that property is used as a public accommodation, and consisted of discourse regarding an election. While it is true that school elections are to be nonpartisan, the election process in school election certainly engenders discourse on opposing views. Even if everything asserted in the affidavit of Faye Powell as reproduced above is true, none of what is asserted is contrary to any school election law in *N.J.S.A.* 18A:14-1, *et seq.* What is asserted constitutes discourse in the election process and as such is a highly protected form of speech both by the United States and New Jersey Constitutions. No reasonable person could read the representations made by Faye Powell and conclude that Ms. Rickabaugh improperly used her office as a Board member. If the WaWa Corporation, through Ms Cuddy or her supervisor or someone else in authority, elected to allow the signs of petitioners to remain in their windows, they would have so remained. True, the WaWa Corporation is concerned about community relations and maintaining a solid customer clientele and would, it so appears, not engage in conduct which displeases its customers However, those kinds of economic concerns do not eliminate the basic rule that Ms Rickabaugh engaged solely in election discourse. That WaWa removed the signs following the visit of Ms. Rickabaugh is either happenstance or a direct cause of the visit. In either case, nevertheless, the conduct of Ms. Rickabaugh is not contrary to any school election law.

Petitioner Briggs' argument that Ms. Rickabaugh's conduct contravenes N.J.S.A. 18A:14-101 is simply without merit. That statue provides in full as follows:

> No person shall by abduction, duress or any forceable or fraudulent device or contrivance whatever, impede, prevent or otherwise interfere with the free exercise of the elective franchise by any voter at any election; or compel, induce or prevail upon any voter either to vote or refrain from voting at any election, or to vote or refrain from voting for any particular person or persons at any election.

Ms. Rickabaugh's conduct as is represented by the background affidavit above cannot be considered interference with the free exercise of the elective franchise by

any voter at any election nor may it be seen as the compulsion, inducement, or the prevailing upon any voter to vote or to refrain from voting at any election or to vote or refrain from voting for any particular person at any election. In short, the WaWa incident is a private matter as between WaWa and petitioners, and, if not solely a private matter, then it is a matter over which the Commissioner of Education has no jurisdiction.

In regard to petitioner's Briggs' testimony that he observed Ms. Rickabaugh tear down signs he placed on the store fronts of unoccupied buildings at a strip shopping mall, I do not find such testimony persuasive in light of the absence of any comment Briggs easily could have made in any one of the three letters referenced earlier (B-1, B-2, B-3) and in light of Ms. Rickabaugh's denial of having engaged in such conduct. Neither petitioner offered any evidence suggesting Ms. Rickabaugh had any role in the tearing down of any signs throughout the community which were subsequently, to use the words of petitioner Briggs, defaced.

In short, I find that evidence presented by petitioners in support of their complaint wholly insufficient to establish as fact that Ms. Rickabaugh, as a sitting member of the Jackson Township Board of Education, engaged in any conduct with respect to the 1992 annual school election which in any way could be considered a violation of any election law. Therefore, the complaint is **DISMISSED.** The results of the election earlier announced and as set forth above are **AFFIRMED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 21, 1992
Date

DANIEL B. McKEOWN, ALJ

Receipt Acknowledged:

8/25/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 27 1992
Date

OFFICE OF ADMINISTRATIVE LAW

tmp

DOCUMENTS IN EVIDENCE

B-1 Letter, undated, stamped received April 6, 1992

B-2 Written formal complaint

B-3 April 7, 1992

B-4 Combined statement of results

B-5 Tally sheet

OAL DKT. NO. EDU 2999-92

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF JACKSON TOWNSHIP, OCEAN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

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

Upon review, the Commissioner concurs with the ALJ that no violations of election law were shown to have occurred herein even if the affidavit of Ms. Powell were accepted arguendo as true in its entirety, as the actions complained of in that affidavit do not constitute violations of election law and petitioners' other allegations were insufficiently supported by competent evidence.

Accordingly, the initial decision of the Office of Administrative Law dismissing petitioners' request for inquiry and affirming the results of the election as originally announced is adopted as the final decision in this matter for the reasons expressed therein.

IT IS SO ORDERED.

OCTOBER 5, 1992

COMMISSIONER OF EDUCATION

DATE OF MAILING - OCTOBER 5, 1992

* The Board of Education submitted a letter noting a factual error in the initial decision at pp. 2-3: At the election in question, there were only two open seats (rather than three as indicated by the ALJ), which were duly obtained by Candidates Gilbertson and Crawford.

246-92

246-92

IN THE MATTER OF THE TENURE HEARING OF MICHAEL BUTYNES, SCHOOL DISTRICT OF BERLIN TOWNSHIP, CAMDEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

OCTOBER 5, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU **8623-91**
AGENCY DKT. NO. **260-7/91**

BERLIN TOWNSHIP BOARD OF EDUCATION,
Petitioner,
v.
MICHAEL BUTYNES,
Respondent.

Joseph F. Betley, Esq., for the petitioner (Capehart & Scatchard, attorneys)

Steven R. Cohen, Esq., for the respondent (Selikoff & Cohen, attorneys)

Record Closed: August 19, 1992 Decided: August 20, 1992

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

This matter concerns the tenure charges filed against the respondent, Michael Butynes, by the petitioner, the Berlin Township Board of Education. The respondent requested a hearing and the matter was transmitted to the Office of Administrative Law on September 11, 1991, for a hearing pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

There was a prehearing conference on December 11, 1991, before Administrative Law Judge Richard J. Murphy, and at that time it was decided that the hearing would start on June 8, 1992.

Thereafter, the matter was reassigned to me and I adjourned the hearing dates since the parties were discussing a settlement. Prior to the rescheduled hearing, the

parties agreed to a settlement. This settlement is contained in the attached signed stipulation which is incorporated herein.

I have reviewed the record and the settlement terms, and I **FIND**:

1. The parties have voluntarily reached a settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1, and that the settlement should be approved. I further **CONCLUDE** that this matter is no longer a contested case. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 20, 1992
Date

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

8/24/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 27 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

None

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

STIPULATION OF SETTLEMENT
OF TENURE CHARGES

This Stipulation of Settlement of Tenure Charges ("Stipulation of Settlement") is entered into by and between the Berlin Township Board of Education ("Board") and Michael Butynes ("Butynes").

WHEREAS, Butynes was a tenured elementary school physical education teacher employed by the Board; and

WHEREAS, in April, 1991 the Board eliminated the elementary physical education program due to budgetary constraints, thus eliminating Butynes' teaching position; and

WHEREAS, the legality of said reduction in force has not been challenged; and

WHEREAS, on or about June 10, 1991 tenure charges were filed against Butynes pursuant to N.J.S.A. 18A:6-11; and

WHEREAS, on June 27, 1991 the Board adopted a resolution certifying tenure charges against Butynes for conduct unbecoming a teacher; and

WHEREAS, said tenure charges were filed with the Commission of Education ("Commissioner") on or about July 15, 1991; and

WHEREAS, Butynes has denied the allegations set forth in the tenure charges and has challenged said charges before the Commissioner pursuant to N.J.S.A. 18A:6-16 and administrative regulations promulgated thereunder; and

WHEREAS, to avoid the burden, expense, delay and uncertainty of future litigation, and in view of the unique circumstances in which the tenured position at issue has been eliminated due to a

reduction in force, and considering that the tenure charges do not involve criminal or immoral conduct, the Board and Butynes desire to amicably settle and resolve this matter and to bring these tenure charges to a final resolution; and

WHEREAS, Butynes and the Board agree that the settlement of the pending tenure charges as set forth herein is consistent with the criteria set forth in In re Cardonick and is otherwise in the public interest; and

WHEREAS, the Board has expressly authorized the entering into of this Stipulation of Settlement as per the resolution of the Board attached hereto and incorporated by reference as if full set forth; and

WHEREAS, Butynes has had the benefit of advice from his own legal counsel in connection with the terms of the Stipulation of Settlement;

NOW THEREFORE, Butynes and the Board agree to the following stipulations supporting a settlement of the within tenure charges:

1. The Board shall provide Butynes and all prospective employers with a neutral employment letter from the Superintendent of Schools, a copy of which is attached hereto and incorporated herewith, which recites Butynes' dates of employment, job responsibilities and other school activities in which Butynes participated while employed by the Board.

2. Butynes shall submit his unconditional letter of resignation to the Board immediately, effective July 1, 1991, and

the Board shall accept said resignation. Butynes understands and agrees that his resignation cannot be later revoked or rescinded.

3. Butynes understands and agrees that his resignation and the entering into of this Stipulation of Settlement extinguishes, terminates, waives and/or revokes any and all tenure, employment and reemployment rights he may have as a teaching staff member with the Board. Butynes further understands and agrees that his employment relationship with the Board and tenure rights are permanently and irrevocably severed, that he will not seek reemployment with the Board, and that the Board has no obligation, contractual, statutory or otherwise, to rehire, re-employ, recall or place him on any tenure eligibility list.

4. The Board shall forthwith withdraw the tenure charges pending before the Commissioner.

5. The Board and Butynes hereby release, remise and forever discharge each other from any and all claims, demands, rights, actions, damages, or liabilities of any description arising out of or related to Butynes employment with the Board, including but not limited to the aforementioned tenure charges, claims for additional compensation, or wrongful termination of employment.

6. This Stipulation of Settlement is not, and shall not be construed to be an admission of liability or wrongdoing by either party. Rather, the parties have entered into this Stipulation of Settlement for the sole purpose of resolving the aforementioned tenure charges and all other issues arising from Butynes'

employment without the burden, expense, delay and uncertainties of litigation.

7. This Stipulation of Settlement shall be binding upon and run in favor of each parties' heirs, assignees, agents, servants, employees, officers, board members, and successors in interest.

8. The tenure charges filed by the Board do not involve immoral, abusive or criminal conduct. Rather, the essence of the charges stem from discord between the parties that developed after notice of the elimination of the physical education program and concomitant reduction in force. For those reasons, as well as the monetary risks involved, potential legal fees, delay, the uncertainty of the outcome of tenure hearings, and the desire of both parties to bring these tenure charges to a final and amicable resolution, Butynes and the Board agree that this settlement is in the public interest.

9. It is expressly agreed that this Stipulation of Settlement is contingent upon the Commissioner's approval of the parties' agreement to withdraw the tenure charges. Should the Commissioner fail to approve the parties' application for withdrawal of the tenure charges, this Stipulation of Settlement shall be null and void, and the parties shall attempt to restructure the settlement to obtain the Commissioner's approval. If the parties are unable to obtain Commissioner approval, this Stipulation of Settlement shall not be used as evidence in any subsequent tenure hearing.

10. This Stipulation of Settlement is freely and voluntarily executed by each party hereto. Butynes acknowledges that he has had the terms of this Stipulation of Settlement fully explained to him by his own legal counsel and that he understands such terms and the legal implications arising therefrom.

IN WITNESS WHEREOF, the parties hereto set their hands and seals on this 12 day of August, 1992.

Berlin Township Board of Education

Michael Butynes

Thomas Foster, Board President

SELIKOFF & COHEN
Attorneys for Michael Butynes

BY Steven Cohen
Steven Cohen

Ralph Jedlicka, Board Secretary

CAPEHART & SCATCHARD, P.A.
Attorneys for Berlin Township
Board of Education

BY Joseph F. Betley
Joseph F. Betley

OAL DKT. NO. EDU 8623-91

IN THE MATTER OF THE TENURE HEARING OF MICHAEL BUTYNES, SCHOOL DISTRICT OF BERLIN TOWNSHIP, CAMDEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standard for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983) The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

OCTOBER 5, 1992

DATE OF MAILING - OCTOBER 5, 1992

247-92

247-92

DEWAYNE DAVENPORT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, riffed high school industrial arts teacher, sought restoration of pay and benefits when he was not recalled from preferred eligibility list for position in new high school program, Students Exhibiting the Need for a Structured Environment (S.E.N.S.E.).

ALJ found petition was filed untimely as petitioner filed more than 90 days after September 21, 1990, date of meeting at which he became aware that the S.E.N.S.E. position had already been filed. ALJ determined relaxation of 90-day rule was not warranted. (N.J.A.C. 6:24-1.2(c) and N.J.A.C. 6:24-1.15)

Commissioner adopted findings and determination in initial decision. Petition was dismissed.

OCTOBER 5, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6995-91
AGENCY DKT. NO. 217-6/91

DEWAYNE DAVENPORT,
Petitioner,
v.
BUTLER BOARD OF EDUCATION,
Respondent.

William F. Koy, Esq., for petitioner
(Ullman, Furhman, Platt & Koy, attorneys)

Kathleen M. Noonan, Esq., for respondent
(Ribis, Graham & Curtin, attorneys)

Record Closed: August 18, 1992 Decided: August 20, 1992

BEFORE **DIANA C. SUKOVICH,** ALJ:

NATURE OF THE CASE AND PROCEDURAL HISTORY

Dewayne Davenport (petitioner) filed a petition with the State Department of Education (DOE) on June 18, 1991 seeking restoration of pay and benefits and other relief from the Butler Board of Education (respondent). Respondent filed an answer on July 12, 1991, in which it raised the alleged untimeliness of the filing of the petition as an affirmative defense. The DOE subsequently transmitted the matter to

the Office of Administrative Law on July 18, 1991 for determination as a contested case pursuant to *N.J.S.A.* 52:14-1 *et seq.*

An initial telephone conference was conducted on April 27, 1992. Subsequent conferences were held, and a hearing was scheduled for August 19, 1992.

The parties filed prehearing memoranda in July 1992. On July 23, 1992, respondent filed a formal motion for summary decision, arguing that the petition had been untimely filed with the DOE. Petitioner filed a brief in opposition to the motion on August 10, 1992, and respondent filed a reply thereto on August 13, 1992. At this judge's request, petitioner filed citations of unreported cases relied on by him on August 14, 1992.

A telephone conference was held on August 17, 1992, at which time the parties were advised that the motion for summary decision would be granted and that an oral initial decision would be rendered on August 19, 1992, unless the parties preferred not to appear on that date. Telephone communications on August 18, 1992 confirmed that the parties would not appear on the scheduled date and would await the issuance of an initial decision. The record was closed on August 18, 1992.

FINDINGS OF FACT

A motion for summary decision may be granted if the papers and discovery that have been filed, in addition to any affidavits, demonstrate that there is no genuine issue regarding any material fact challenged and that the moving party is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5. I am persuaded that the material facts relating to respondent's motion for summary decision are not in dispute.

I **FIND** the following to be **FACTS**:

1. As of April 27, 1989, petitioner was a tenured teacher with 17 years of seniority as a high school Industrial Arts teacher employed by respondent.

2. On April 27, 1989, respondent undertook a reduction in force (RIF) in which petitioner's position was abolished effective June 30, 1989. The RIF

was implemented because of declining enrollment and defeat of a school budget. At the time of the RIF, petitioner was placed on a preferred eligibility list, on which he still remains.

3. In 1990, prior to the start of the 1990/1991 school year, respondent implemented a new program in its high school, referred to as S.E.N.S.E. -- Students Exhibiting the Need for a Structured Environment.

4. On July 30, 1990, respondent appointed Bernard Stiroh (Stiroh) to the position of S.E.N.S.E. teacher.

5. By letter dated September 6, 1990 to Frank Stranzle (Stranzle), respondent's Superintendent of Schools, petitioner noted his understanding that a new position, known as a S.E.N.S.E. teacher, would be started at the high school in September 1990. Petitioner stated that he was qualified and "in line" for the position, and he requested a response by September 21, 1990.

6. Stranzle responded to petitioner by letter dated September 11, 1990, scheduling a meeting for September 21, 1990.

7. A meeting between petitioner and Stranzle was held on September 21, 1990. Petitioner was accompanied by Allan T. Fox (Fox), a New Jersey Education Association (N.J.E.A.) field representative. At this meeting, Stranzle advised petitioner that the S.E.N.S.E. teacher position had already been filled for the 1990/1991 school year by Stiroh; Stranzle also stated that Stiroh had taught English at the high school and had substantially more seniority than petitioner (26 years of seniority as of that time).

8. Petitioner was not recalled from the preferred eligibility list to fill the S.E.N.S.E. position or any position.

9. By letter dated November 28, 1990, Fox communicated with Stranzle regarding petitioner's claim to the S.E.N.S.E. position. By letter dated February 13, 1991, Jim Kelly, president of the Butler Education

Association, requested that Stranzle forward a copy of the seniority list. By letter dated March 5, 1991, Zella Felzenberg, an N.J.E.A. field representative, advised Stranzle that a seniority list still had not been received.

10. Petitioner and/or a union representative received a seniority list from respondent pertaining to petitioner sometime in March 1991.* The reasons for any delay in providing the seniority list are not apparent.

11. Davenport filed a peittion with the DOE on June 18, 1991 alleging that his seniority/reemployment rights had been violated in relation to the S.E.N.S.E. position.

CONCLUSIONS AND ORDERS

Local boards of education have the authority to undertake RIFs. *N.J.S.A.* 18A:28-9. A teacher dismissed as a result of a RIF is to be maintained on a preferred eligibility list based on seniority pertaining to any vacancies in positions for which he is qualified for purposes of reappointment. *Id.* §12. Local school boards are required to notify staff members of their seniority status. *N.J.S.A.* 18:28-11.

The Commissioner of the DOE has general jurisdiction to hear and determine controversies and disputes arising under the school laws. *Id.* §9. The DOE has promulgated regulations regarding the prosecution and hearing of such cases, *N.J.A.C.* 1:24-1.1 *et seq.* The regulations incorporate a 90-day time limit on the filing of petitions. A petition must be filed no later than the 90th day from the date of receipt of notice of an official order, ruling, or other action by a board of education, individual party, or agency which is the subject of the requested case hearing. *Id.* §1.2(c). The rules pertaining to consideration of controversies and disputes may be relaxed, in the Commissioner's discretion, where strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice. *Id.* §1.15.

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* There is a disagreement between the parties, as evidenced by the documents filed, regarding the date on which the list was received. Respondent avers that it was faxed to a union representative on March 7, 1991; petitioner states that it was received in late March 1991. The resolution of this question is not determinative.

Petitioner argues that the 90 days began to run from the date of receipt of the seniority list. Respondent argues that the 90 days began to run on September 21, 1990. I am persuaded by respondent's arguments.

The statute of limitations reflected in *N.J.A.C.* 6:24-1.2 applies to claims alleging a violation of tenure or seniority rights. *Kaprow v. Bd. of Educ. of Berkeley Township*, 255 *N.J. Super.* 76 (App. Div. 1992) *(Kaprow)*; *Gordon v. Passaic Township Bd. of Educ.*, 1985 *S.L.D.* 1929, aff'd (N.J. App Div., May 27, 1986, A-3294-84T7) (unreported), certif. den. 105 *N.J.* 534 (1986) *(Gordon)*. The 90-day rule is to be strictly applied. *Gordon, supra. Dennis Moreland v. Passaic Board of Education,* 3 *N.J.A.R.* 276 (1980).

Kaprow and *Gordon* are factually analogous to the instant matter. Both involved claims of alleged violations of the right to reemployment. In each case, the petition of appeal was dismissed as having been untimely filed under *N.J.A.C.* 6:24-1.2. In *Kaprow*, the court concurred with a ruling of the State Board of Education that the applicable 90-day period commenced on the date on which the petitioner was advised by the local board secretary of appointments to positions to which the petitioner later laid claim. In *Gordon*, the State Board of Education ruled that petitioner's cause of action, and his obligation to file a petition of appeal, arose at the time he first became aware of a newly-created position and the appointment of someone else thereto.

In *Kaprow,* the court upheld dismissal of the petition although the local board had "stonewalled" Kaprow by not answering his letters in a timely fashion and had failed to comply with the statutory requirement of creating a preferred list.

> While we find it difficult to understand the Local Board's failure to comply with the statutory requirement of creating a preferred list and of notifying Kaprow of the openings, followed by their unexplained failure to promptly respond to his letters, we cannot disagree with the State Board's conclusion that Kaprow deliberately slept on his rights by his failure to file his petition within 90 days. *Kaprow* at 91.

Davenport's petition alleges that respondent failed to reemploy him for the subsequently-created S.E.N.S.E. position, in violation of his tenure and seniority rights. At least as of September 21, 1990, petitioner had actual knowledge of the

existence of the newly-created S.E.N.S.E. position, of respondent's appointment of another member of the teaching staff to that position, and of respondent's stand on petitioner's seniority claim. The applicable 90-day period for the filing of his petition expired on December 20, 1990. Although respondent's failure to provide a seniority list until March 1991 is not condoned, it is not determinative.

I am also persuaded that relaxation of the 90-day rule is not warranted. As noted hereinabove, the applicable statute of limitations is strictly applied. It was not relaxed in *Kaprow*, notwithstanding the fact that the local board had failed to create a preferred eligibility list and to promptly respond to petitioner's claims of entitlement. In *Gordon*, a claim for relaxation based on petitioner's pursuit of an amicable resolution of his claim, prior to the filing of a petition of appeal, was rejected. The situation in this case does not call for relaxation of the 90-day rule.

Based on the foregoing, I **CONCLUDE** that Davenport's petition was not timely filed with the Commissioner of the DOE pursuant to *N.J.A.C.* 6:24-1.2(c); that the 90-day statute of limitations reflected in that regulation should not be relaxed pursuant to *N.J.A.C.* 6:24-1.15; and that respondent's motion for summary decision should be granted.

It is hereby **ORDERED** that respondent's motion for summary decision be and is hereby **GRANTED**. It is also **ORDERED** that Davenport's petition be and is hereby **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 24, 1992
Date

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

8/24/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 25 1992
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

le/e

OAL DKT. NO. EDU 6995-91

DEWAYNE DAVENPORT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, 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 careful and independent review of the record of this matter, the Commissioner adopts as his own the findings of the Office of Administrative Law concluding that the instant Petition of Appeal is untimely filed pursuant to N.J.A.C. 6:24-1.2(c) and that no basis has been demonstrated for relaxation of the 90-day rule pursuant to N.J.A.C. 6:24-1.15.

Accordingly, for the reasons expressed by the Office of Administrative Law, the Commissioner dismisses this matter with prejudice.

COMMISSIONER OF EDUCATION

OCTOBER 5, 1992

DATE OF MAILING - OCTOBER 5, 1992

248-92

HOWARD ACKERMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, tenured industrial arts teacher at secondary level, alleged Board improperly riffed him while retaining less senior individual, Intervenor Jeffrey Faherty.

ALJ dismissed petition finding that petitioner did not have the required certificate to teach the vocational courses in printing and graphic arts taught by intervenor who did possess a vocational graphic arts certificate.

Commissioner adopted findings and determination in initial decision.

OCTOBER 5, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8920-90
AGENCY DKT. NO. 249-7/90

HOWARD ACKERMAN,
Petitioner,
v.
BOARD OF EDUCATION OF CITY OF HACKENSACK, BERGEN COUNTY,
Respondent.

Louis P. Bucceri, Esq., for petitioner (Bucceri and Pincus, attorneys)

Frank N. D'Ambra, Esq., for respondent (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Alfred F. Maurice, Esq., for Intervenor Jeffrey Faherty (Springstead & Maurice, attorneys)

Record Closed: July 10, 1992 Decided: August 17, 1992

BEFORE **EDITH KLINGER**, ALJ:

On July 19, 1990, Howard Ackerman, petitioner, filed a petition with the Commissioner of the Department of Education alleging that he was subject to a reduction in force (RIF) for the 1990-91 school year while the Board of Education of City of Hackensack (Board), respondent, continued to employ intervenor, Jeffrey Faherty, an individual with less seniority, in a full-time position within the scope of petitioner's tenure and seniority.

The Board filed its answer on August 20, 1990 denying the allegations of the petition. On October 29, 1990, the Commissioner transmitted this matter to the Office of Administrative Law for hearing 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 receiving notice of the proceeding, Faherty, the present incumbent of the disputed position, was granted leave to intervene.

In a series of conferences with the undersigned, it was determined that the parties would develop a joint stipulation of the facts in this matter and, in lieu of testimony, obtain a written response from the appropriate official of the State Department of Education to jointly submitted questions as to the nature of intervenor's certification and endorsements and the certification and endorsements required to teach the disputed position.

Hearing dates were scheduled for June 4 and 5, 1992. At the time of hearing, testimony was taken only as to the curriculum and content of the disputed courses. The record was held open until July 10, 1992, when the final submission was received.

STIPULATION OF FACTS

I **FIND** these **FACTS** to be as set forth in the following stipulation by the parties

1. Ackerman was continuously employed by respondent as an Industrial Arts teacher at the secondary level from February 5, 1973 through June 30, 1990

2. Ackerman has never taught Offset Printing I or II or Graphic Arts.

3. Faherty was employed by respondent in September 1973. For 1984-85, he took a personal leave of absence without pay. From 1985-86 through the present he has again taught Offset Printing I and II. In addition, in 1987-88, he also taught Graphic Arts. He has always taught at the secondary level.

4. Ackerman received a regular instructional certificate endorsed for Industrial Arts in January 1972. He holds no other certificates or endorsements.

5. Faherty had an emergency Industrial Arts certificate from October 1973 through July 1976. He was issued a regular instructional certificate in May 1977, endorsed for Graphic Arts. He holds no other certificates or endorsements.

6. By letter of April 24, 1992, Ackerman was advised that he would not be reemployed full-time by respondent for 1990-91.

7. Faherty was employed full-time by respondent for 1990-91. His schedule consisted of: Two periods per day of Offset Printing I, one period per day of Offset Printing II, one lunchroom supervision duty period per day, and two periods during which Faherty did printing jobs for the school district.

8. Faherty is employed full-time by respondent for the 1991-92 school year. His schedule for that year is the same as that for the 1990-91 school year.

9. If Ackerman had been employed by respondent for 1990-91, his salary would have been $58,555 (MA + 30, Step 14).

10. By letter of April 18, 1988, respondent's Superintendent of Schools requested an advisory seniority opinion from the Commissioner of Education.

11. An advisory opinion was issued by the Department of Education's Advisory Panel and signed by the Commissioner on July 13, 1988.

12. By letter of April 7, 1988, Faherty wrote for an opinion from the Bergen County Superintendent of Schools.

13. By letter of April 11, 1988, the Superintendent responded.

14. By agreement between the parties and the administrative law judge, a letter was transmitted to the Director of State Teacher Certification for an opinion.

15. At the request of the Director of Teacher Certification, the parties' request for an opinion with attachments was redirected to Thomas A. Henry, Assistant Commissioner of the Division of Vocational Education.

16. By letter of July 23, 1991, Dr. Henry responded. He attached the 1990-91 Fall Report, Manual for Coding Certificated Staff Status Report, and a copy of *N.J.A.C.* 6:43-3.3 to his response.

REVIEW OF EVIDENCE

The course outline for Offset Printing I begins with an "introduction to printing" and "methods of printing" and proceeds through an "introduction to shop equipment," "construction of layouts," "arrangement of copy prints," "shooting the negative," "stripping the negative," "processing the plate," "preparing the Chief 15 and AB Dick 350 presses for printing," "operation of the presses," "maintenance of the presses," "preparation of the printed job," "basic operation of other printing equipment," and concludes with "careers in graphics."

The course outline for Offset Printing II starts with a review of the work and operations learned in Printing I, a "study of common job sizes," "advanced darkroom procedures," "advanced plate procedures," "studies of parts and functions of the presses," operation of another press (the Chief 17), maintenance of all three presses, a further discussion of "careers in graphics," and ends with "silk screening." The Graphic Arts I course requires as prerequisites Art I, Photography I, Mechanical Drawing I, or Offset Printing I, and an interview with the printing and art instructor. The course is designed to

> develop the student's understanding of the fundamentals of design and composition through various graphic art processes. Specific emphasis will be placed on the use of student's original art and layout production. Various graphic techniques will be explored. . . .

The performance objectives of the course include the ability to "operate the present printshop equipment in a safe manner," the ability to "utilize various art media and art techniques to meet commercial needs," the ability to "complete basic paste-up and mechanical skills necessary for various graphic procedures," and the exploration of "employment opportunities in Graphic Arts and Design." Students are taught to operate the Compugraphic Edit Writer 7500, the Kenro 187 Camera, and the AB Dick 360 Offset Press and, generally, "to develop an understanding of the use of Graphic Arts for commercial application."

According to Faherty, not only are the course materials designed to give the students a working knowledge of the printing trades, the more advanced students actually run the print shop which produces the printed materials for the school district. They learn all aspects of printing from the assessment of the job, including ordering the materials needed, operating and maintaining the presses, binding the product, packaging it, and delivering it. The operation is run like a business to expose the students to the way a print shop should run. Students learn how to estimate the cost of jobs. When his students complete the course, they are ready for an entry-level job in the printing field.

Faherty uses all hands-on methods, and there is no textbook for the course. In September 1992, his program received special recognition from the National Association of Printers and Lithographers, who picked it for their new pilot program called "Workplace." This is a program designed to develop more advanced printing skills at the high school level.

The Printing I students are not at job entry level when they finish. Little more than half of the Printing I students go on to Printing II and can and do secure positions in the printing trade upon leaving school. Faherty also teaches a course called Exploratory, half of which is devoted to mechanical drawing and the other half to printing. Another teacher teaches the mechanical-drawing component of the course; Faherty teaches only printing.

Ackerman has never taught printing or graphic arts. His experience is in teaching auto-body repair. His only practical knowledge of printing is nine months of employment in commercial printing in 1968 and 1969. He also took a course in printing as a requirement for his Industrial Arts certificate at Montclair State College in about 1975 or 1976. He has no knowledge of the area subsequent to that time and is unfamiliar with modern printing techniques and machinery.

Anthony Marseglia, the Superintendent of Schools in Hackensack, testified that Faherty provides a valuable service to the district. If Faherty did not do the printing for the district while teaching the students how to run a print shop, the work would have to be contracted out by the district at a much greater expense. It is the opinion of the district that if Ackerman replaces Faherty in the position, Ackerman would be unable to run the print shop and, therefore, the course may have to be abolished because of the expense involved. Faherty's experience allows the course to support itself in large measure

Marseglia stated that the course was never intended by the district to be anything but the vocational education program which it has always been. The courses taught by Faherty are vocational, but the district concedes that they are not embedded in a vocational education program as described in *N.J.A.C.* 6:43-3.3 and do not satisfy the minimum number of minutes per week for a "program" as set forth in the regulation.

In 1988, it was decided that, for budgetary reasons, the district would have to reduce its staff. In order to receive guidance as to whether Ackerman (Teacher A) or Faherty (Teacher F) should be subjected to a RIF, the district decided to seek an advisory opinion from the New Jersey Department of Education pursuant to *N.J.S.A.* 18A:28-11.

In a letter dated April 18, 1988, Dr. Seymour Weiss, director of the Bureau of Controversies and Disputes, was asked the following questions:

> Teacher F
>
> Employed since 9/73 on an emergency Industrial Arts certificate. Received Teacher of Graphic Arts certificate 5/77. Teaches Printing I and Printing II exclusively, and has done so since 9/73.
>
> Teacher A
>
> Employed since 2/73. Has Teacher of Industrial Arts certificate dated 1/72. Has taught a variety of Industrial Arts courses but has never taught Printing.
>
> Question
>
> 1) Does the Teacher of Industrial Arts certificate entitle Teacher A to teach Printing as an endorsement right since Printing is listed under the Skilled Trades endorsement? Graphic Arts is, however, listed under the Industrial Arts endorsement.
>
> 2) Teacher A is not qualified to teach Printing nor is anyone else in the department. Given the fact that Teacher F has taught Printing under a Graphic Arts endorsement, does he have a seniority right to the position?

An advisory opinion written by an advisory panel on June 30, 1988 was reviewed and approved by the Commissioner of Education and transmitted to the district on July 13, 1988. The advisory panel concluded:

> A review of the authorization relative to the Teacher of Industrial Arts endorsement indicates that the holder is authorized to ". . . teach industrial arts . . ." which ". . . normally includes: graphic arts, drafting, woodworking, metal working arts and power mechanics." Based upon the aforesaid, therefore, the industrial arts endorsement does not grant entitlement to teach printing.
>
> In response to your second question, consultation with representatives of the Bureau of Teacher Preparation and Certification indicates that the endorsement of Teacher of Graphic Arts, which is no longer issued, did at the time of its issuance include within its authorization the right to teach Printing.
>
> Consequently, based upon the aforesaid, the holder of the Graphic Arts endorsement is authorized to assert a seniority claim to a teaching schedule which includes Printing.

Based upon the advisory opinion, Ackerman was RIFed by the Board.

Under *N.J.S.A.* 18A:27-11, the determination of the advisory panel is not binding upon the Board, any other party in interest, the Commissioner, or the State Board of Education in the event that a dispute arises with respect to the subject of the opinion.

On April 7, 1988, Faherty wrote to A. Castellano in the Bergen County Superintendent's office to verify whether or not he was teaching courses with the correct certification.

> As per our phone conversation, I am enclosing a copy of my "Teacher of Graphic Arts" certification and the course outline, Offset Printing 1 and Offset Printing 2, which I have taught at Hackensack High School the last fourteen (14) years.
>
> I would like to know:
>
> 1. Is my certification a Vocational Certification?
> 2. Does my "Teacher of Graphic Arts" certification certify me to teach Printing as I have been doing, or is another type of certification necessary.

On April 11, 1988, M. Ray Kelly, county Superintendent, responded as follows:

> 1) your certificate, "Teacher of Graphic Arts" (5/77) was issued under the 2600 category and is a Vocational Certificate;

2) although the skilled trades category has been revised several times since then, your certificate did (and still does) authorize you to teach Printing.

In the course of the present appeal, the parties determined to write a letter to Celeste M. Rorro, the director of Teacher Certification of the Department of Education, seeking clarification of the department's position rather than calling a witness from the department to testify at the hearing. They presented Rorro with the following information and list of questions:

> Petitioner has an Industrial Arts endorsement issued in 1972. The intervenor has a Graphic Arts endorsement issued in 1977. Petitioner has not taught printing. The intervenor taught printing for several years under an emergency Industrial Arts certificate and has taught it since 1977 under the Graphic Arts endorsement. Neither party has any other endorsement. The local district's course descriptions for Offset Printing I, Offset Printing II, and Graphic Arts are enclosed.
>
> Petitioner's essential inquiry is as to the meaning of the words "graphic arts" as they are used in the definition of the scope of the Industrial Arts endorsement. *N.J.A.C.* 6:11-6.2(a)(13). Petitioner asks why he cannot teach printing as one of the "graphic arts" his endorsement includes.
>
> The intervenor contends his Graphic Arts endorsement is a vocational endorsement and that this distinction is relevant and gives him the sole right to teach the courses attached.
>
> Finally, since it appears that the Graphic Arts endorsement is no longer issued, the parties wish to know when its issuance stopped and what currently issued endorsements would authorize instruction of the enclosed courses.
>
> Succinctly put, the questions for you are as follows:
>
> 1. Are any of the enclosed courses within the scope of an Industrial Arts endorsement under the definition of "graphic arts" as referred to in *N.J.A.C.* 6:11-6.2(a)(13)?
>
>   (a) If so, which courses are included?
>
>   (b) If any course are not included within that endorsement, please explain why they are not.
>
>   (c) Would the answer have been different in 1977?
>
>   i. If so, in what way.
>
> 2. Are any of the enclosed courses within the scope of a Graphic Arts endorsement?
>
>   (a) If so, which such courses are included?

(b) If any such courses are not included within that endorsement, please explain why they are not.

(c) Would the answer have been different in 1977?

i. If so, in what way.

3. What currently issued endorsements would authorize the teaching of the attached courses?

4. When did the State stop issuing the Graphic Arts endorsement?

Rorro referred the matter to Thomas A. Henry, Ed.D., assistant commissioner of the Division of Vocational Education. On July 23, 1991, he provided the following responses (a repetition of the questions has been deleted):

1. Yes. The enclosed course outlines appear to be within the scope of the Industrial Arts endorsement. . . . (1990-91 Fall Report, Manual for Coding Certificated Staff Status Report. Pages eight and nine, codes 1872 and 1876.)

1a) Offset Printing I
Offset Printing II
Graphic Arts I

1b) Not applicable.

1c) No.

2. No. The enclosed course outlines do not appear to meet the requirements of *N.J.A.C.* 6:43-3.3(c). Advanced, Skilled Vocational and Technical Education.

2a) None.

2b) The course outline does not seem to prepare individuals in a specific occupational area. . . . To be within the scope of a Graphic Arts endorsement, the courses must be developed to prepare individuals for entry level employment in the occupational areas.

2c) No.

3. If the attached courses are developed to prepare individuals for employment in a specific occupation and they meet the requirements for an approved secondary Trade and Industrial Education Program . . . , a person with a vocational Graphic Arts endorsement would be qualified to teach those courses. However, if the attached courses do not meet the requirements of an approved secondary Trade and Industrial Education Program, are designed to be exploratory programs which expose students

to a variety of careers, then the person possessing the Industrial Arts endorsement would be qualified to teach those courses.

4. The exact data that the State discontinued issuing endorsements for Graphic Arts is [*sic*] unknown. The records are no longer active and are in storage. Endorsements for Graphic Arts are lifelong and do not have to be periodically renewed. Although the Graphic Arts endorsements are no longer issued, the holders of such endorsements are eligible to teach those programs which originally fell under the auspices of the original endorsement.

It now appeared that the Bergen County Superintendent and the advisory panel for the Department of Education were of the opinion that Faherty had the appropriate certification to teach the disputed courses. In Henry's opinion, based upon the information provided to him, the appropriate teacher would be Ackerman.

A review of the seemingly divergent opinions of the advisory panel, the county Superintendent, and Henry makes it clear that the difference in opinions is based upon the difference in the perception of the curriculum and content of the courses in question. Therefore, a hearing was held solely as to this issue.

N.J.A.C. 6:43 contains the regulations governing vocational instruction. *N.J.A.C.* 6:43-3.3(a) states:

> Vocational instruction shall be primarily designed to prepare individuals for employment in a specific occupation. It may also prepare individuals for enrollment in advanced or highly skilled postsecondary vocational and/or technical education programs.

A vocational "course" is defined in *N.J.A.C.* 6:43-1.2 as

> an organization of subject matter and related learning experiences designed to meet a vocational objective provided for the instruction of pupils on a systematic basis, usually for a predetermined period of time.

Based upon the testimony of the witnesses, I **FIND** that Offset Printing I, Offset Printing II, and Graphic Arts I are primarily designed as a sequence to prepare students for employment in a specific occupation -- that is, the printing trade -- and the students are, in fact, equipped to fill an entry-level position in that trade upon graduation. I further **FIND** that it is the intent of the district that these courses be taught in this manner for this

purpose: the advanced students in the program provide the district with its printing services.

These are vocational courses as defined by *N.J.A.C.* 6:43-1.2 which are not embedded in a vocational and technical education program as defined by *N.J.A.C.* 6:43, subchapter 2. The Bergen County Superintendent and the Commissioner's advisory panel recognized the program as vocational.

Henry opined that it was not vocational because he was given only the course outline, which he said "does not seem to prepare individuals in the specific occupational area" and was not "developed to prepare individuals for entry level employment in the occupational areas." Henry was never provided with the information that the courses were taught within the limits of the course outlines in a hands-on fashion without text in a fully functioning modern print shop run by the advanced students in the courses, and he was not told that the students go directly from high school into entry-level positions in the printing field.

For this reason, I **FIND** that Henry's opinion as to the appropriate certification for teaching these courses is not inconsistent with that of the advisory panel or the county Superintendent since it appears that, based upon his response to the questions, had he been given all of the missing information, it would have been his opinion that these were vocational courses to be taught by a teacher with a vocational certificate. It may be that Ackerman, with his instructional Industrial Arts certificate, could teach printing. However, the courses which he would be able to teach would be those described by Henry as "exploratory programs which expose students to a variety of careers" -- an overview of printing and graphic arts.

Based upon the above, I **CONCLUDE** that it is Faherty, with his vocational Graphic Arts certificate, who is entitled to teach the vocational courses (Offset Printing I, Offset Printing II, and Graphic Arts I) and not Ackerman with his instructional Industrial Arts certificate.

The question of whether vocational courses can be taught separate and apart from a vocational program as defined by the regulations was not addressed by the parties to this appeal. It appears that the Commissioner of Education, the advisory panel, and the county Superintendent had no problem with the setting in which the courses, which they acknowledged to be vocational, were given.

Accordingly, I **CONCLUDE** that the intervenor, Jeffrey Faherty, was appropriately certified to teach the program containing the courses in question and is therefore entitled by seniority to retain the position against the claims of Ackerman, who does not possess the required certification. I therefore **CONCLUDE** that Howard Ackerman is entitled to no relief in this matter.

ORDER

It is therefore **ORDERED** that the petition of Howard Ackerman be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 17, 1992
DATE

Edith Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

8/19/92
DATE

Maureen K. Kelly
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 21 1992

DATE

OFFICE OF ADMINISTRATIVE LAW

md/e

APPENDIX

WITNESSES

For respondent:

Jeffrey Faherty
Anthony Marseglia

For Petitioner:

Howard Ackerman

EXHIBITS

Stipulation of Facts with the following attached exhibits:

J-1	Certificate of Howard Ackerman
J-2	Assignment record (Faherty)
J-3	Certification (Faherty)
J-4	Letter, Marseglia to Ackerman, April 24, 1990
J-5	Staff Schedule 1990-91 (Faherty)
J-5a	Teaching Schedule 1991-92 (Faherty)
J-6	Course Outline, Offset Printing I
J-7	Course Outline, Offset Printing II
J-8	Course description, Graphic Arts I
J-9	Letter, Judge Klinger to Assistant Commissioner Henry, June 28, 1991
J-10	Letter, Marseglia to Dr. Weiss, April 18, 1988
J-11	Covering letter for advisory opinion, Dr. Weiss to Marseglia, July 13, 1988
J-11a	Advisory Opinion, June 30, 1988
J-12	Letter, Faherty to County Superintendent, April 7, 1988
J-13	Letter, County Superintendent to Faherty, April 11, 1988
J-14	Letter, parties to Ms. Rorro
J--15	Letter, Assistant Commissioner Henry to Judge Klinger, July 23, 1991
J-15a	1990-91 Fall Report, Manual for Coding Certficated Staff Status Report
J-15b	Copy of *N.J.A.C.* 6:43-3.3

OAL DKT. NO. EDU 8920-90

HOWARD ACKERMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions and the Board filed timely reply exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. Such submissions, as well as the post-hearing briefs of the parties, are duly noted in the Commissioner's review of this matter.

Upon careful and independent review of the record of this matter, the Commissioner adopts as his own those findings and conclusions of the Office of Administrative Law that Intervenor Jeffrey Faherty was appropriately certified to teach the programs in printing and graphic arts at issue in this matter and therefore is entitled by seniority to retain his position against petitioner, who does not possess the appropriate certification to teach the courses under consideration herein.

Accordingly, for the reasons expressed by the Office of Administrative Law, the Commissioner adopts as his own the initial decision and dismisses the instant Petition of Appeal with prejudice.

OCTOBER 5, 1992

COMMISSIONER OF EDUCATION

DATE OF MAILING - OCTOBER 5, 1992

248-92

EDU #8920-90
C # 248-92
SB # 54-92

HOWARD ACKERMAN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, October 5, 1992

For the Petitioner-Appellant, Bucceri & Pincus (Louis P. Bucceri, Esq., of Counsel)

For the Respondent-Respondent, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Frank N. D'Ambra, Esq., of Counsel)

For the Intervenor, Springstead & Maurice (Alfred F. Maurice, Esq., of Counsel)

The basic facts herein were stipulated by the parties. Howard Ackerman (hereinafter "petitioner"), a tenured teaching staff member who possessed certification in industrial arts, had been employed by the Board of Education of the City of Hackensack (hereinafter "Board") as a teacher of industrial arts at the secondary level since February 1973. The intervenor, Jeffrey Faherty, held an endorsement in graphic arts and had been employed by the Board since September 1973 teaching Offset Printing I and II and Graphic Arts at the secondary level. Petitioner had never taught Offset Printing I or II or Graphic Arts.

MARCH 1, 1995

In April 1988, the Board requested an advisory opinion from the Commissioner of Education in order to determine the relative seniority rights of petitioner and intervenor in a reduction in force ("RIF").[1] On July 13, 1988, the Commissioner issued an advisory opinion prepared by an advisory panel which concluded that an industrial arts endorsement did not grant entitlement to teach printing, but that an endorsement in graphic arts, which was no longer issued, did at the time of its issuance authorize the teaching of printing. Consequently, the opinion concluded, under the information presented, the holder of the graphic arts endorsement, who had taught Printing I and II, could assert a seniority claim to a teaching schedule which included printing.

In April 1988, the intervenor requested a determination from the County Superintendent as to whether his graphic arts endorsement was a vocational certification and whether it authorized him to teach printing. The County Superintendent responded that intervenor's endorsement was vocational and that it did authorize him to teach printing.

By letter dated April 24, 1990, the Board notified petitioner that he would not be reemployed in 1990-91. The Board retained intervenor on a full-time basis in 1990-91, teaching Offset Printing I and II and doing printing jobs for the district. He was

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[1] N.J.S.A. 18A:28-11 provides that district boards may request an advisory opinion from the Commissioner with respect to the applicability of seniority standards to particular situations. No such determination, however, "shall be binding upon the board of education or any other party in interest or upon the commissioner or the state board if any controversy or dispute arises as a result of such determination and an appeal is taken therefrom pursuant to the provisions of this title."

also employed full-time in 1991-92. Petitioner filed a petition with the Commissioner, alleging that the Board, in continuing to employ a staff member with less seniority than he, had violated his tenure and seniority rights.

While this matter was pending in the Office of Administrative Law, the parties requested information pertinent to this case from the director of the Office of Teacher Certification in the Department of Education. On July 23, 1991, the Assistant Commissioner of the Division of Vocational Education responded that the course outlines for Offset Printing I and II and Graphic Arts I appeared to be within the scope of the industrial arts endorsement, and not the graphic arts endorsement, stressing that the course outlines did not appear to meet the requirements established in N.J.A.C. 6:43-3.3(c) for vocational programs. He explained that if the courses were developed to prepare individuals for employment in a specific occupation and they met the requirements for an approved secondary trade and industrial education program, then a person with a vocational graphic arts endorsement would be qualified to teach those courses. But, he added, if the courses did not meet such requirements and were designed simply to be exploratory programs which exposed students to a variety of careers, then the individual possessing the industrial arts endorsement would be qualified to teach them. The Assistant Commissioner noted that the course outlines in this particular case did not seem designed to prepare students for employment in a specific occupational area.

On August 17, 1992, the Administrative Law Judge ("ALJ") recommended dismissing the petition, concluding that the intervenor was appropriately certified to teach the program containing the

courses at issue and was therefore entitled by seniority to retain the position as against petitioner, who did not possess the required certification. The ALJ found that the seemingly divergent opinions received in this matter were based upon a difference in the perception of the curriculum and content of the courses in question.

Based upon the hearing held in this matter, the ALJ found that the courses were designed primarily as a sequence to prepare students for employment in a specific occupation and that it was the district's intent to teach the courses in this manner so that advanced students could provide the district with its printing services. Accordingly, she determined that the courses constituted a vocational program, as defined by N.J.A.C. 6:43-1.2, which were not embedded in a vocational and technical education program as defined by N.J.A.C. 6:43, subchapter 2. The ALJ therefore concluded that intervenor, by virtue of his vocational graphic arts endorsement, was entitled to teach the controverted courses, and not petitioner, who held only an instructional industrial arts endorsement.

On October 5, 1992, the Commissioner adopted the findings and conclusions of the ALJ and dismissed the petition.

Petitioner filed the instant appeal to the State Board of Education, maintaining that his industrial arts endorsement encompassed the courses at issue and that, as a result, he had superior seniority rights thereto as against the intervenor. He argues that the courses did not meet any definition of "vocational" which would mandate possession of a vocational endorsement in order to teach them.

After a thorough review of the record, we reverse the decision of the Commissioner.

Teaching staff members holding industrial arts endorsements are expressly authorized by the certification regulations to teach graphic arts. N.J.A.C. 6:11-6.2(a)(13).[2] Consequently, in order to conclude that petitioner, who held an industrial arts endorsement, was not authorized to teach the courses at issue herein, it would be necessary to find that the assignment was of such nature as to require possession of a "vocational" endorsement in order to fulfill the responsibilities thereof. The record before us does not support such a conclusion.

"Vocational education" is defined, in pertinent part, as:

> organized educational programs offering a sequence of courses which are directly related to the preparation of individuals for paid or unpaid employment in...trade and industrial occupations....Vocational education programs include competency-based applied learning which contributes to a pupil's academic knowledge, higher-order reasoning and problem-solving skills, work attitudes, general employability skills, and the occupationally-specific skills necessary for economic independence as a productive and contributing member of society. Vocational student organization activities are an integral part of the programs.

N.J.A.C. 6:43-1.2.

There is no indication in the record that the courses herein were designed or structured by the Board as part of an organized secondary trade and industrial education program or,

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2 N.J.A.C. 6:11-6.2(a)(13) provides:

> Industrial arts: This endorsement authorizes the holder to teach industrial arts in all public schools. Industrial arts normally includes: graphic arts, drafting, woodworking, metal working, arts and power mechanics.

indeed, that they met the explicit requirements established by the State Board for such programs. N.J.A.C. 6:43-3.3 expressly provides that:

> (a) Vocational instruction shall be primarily designed to prepare individuals for employment in a specific occupation....
>
> ....
>
> (c) An approved secondary trade and industrial education program is conducted a minimum of 600 minutes per week for three consecutive instructional periods per day and includes:
>
> 1. A minimum of 200 minutes of trade and industrial related instruction, including scientific principles and practices applicable to the occupation; and
>
> 2. 400 minutes of competency-based applied occupational training.

The contention that the courses may have been taught in a certain manner and that some students moved on to entry level positions in the printing field does not render courses "vocational" which were not designed or structured as such or intended to be part of an approved educational program. We agree with the then Assistant Commissioner of Vocational Education that the course outlines do not appear designed to prepare students for employment in a specific occupational area, and we find nothing in the record that demonstrates otherwise. Nor does the record indicate that the courses satisfy the minimum standards required for an approved secondary trade and industrial education program pursuant to N.J.A.C. 6:43-3.3(c).

Accordingly, we conclude that petitioner was qualified by virtue of his industrial arts endorsement, which expressly includes the authorization to teach graphic arts, to teach the courses at issue herein. Consequently, the Board violated his seniority rights in terminating his employment. Seniority accrues within the secondary category of the instructional certificate in the subject

area endorsement under which the individual has actually served, N.J.A.C. 6:3-5.1(1)(17)(i), and it is undisputed herein that petitioner had been continuously employed under his industrial arts endorsement since February 1973. As a result, although he had never taught printing or graphic arts, petitioner had entitlement by virtue of seniority to the controverted assignment as against the intervenor, who did not commence employment in the district until September 1973.

We therefore reverse the decision of the Commissioner and direct the Board to reinstate petitioner with back pay and other emoluments, less mitigation.

Attorney exceptions are noted.

March 1, 1995

Date of mailing MAR 03 1995

249-92

249-92

G.M., W.M., AND J.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, DR. DENNIS G. KELLY, SUPERINTENDENT OF SCHOOLS, WAYNE FULLER, EWING HIGH SCHOOL PRINCIPAL, JAMES POCETTI, SCHOOL GUIDANCE COUNSELOR, AND M. QUENTIN HAUSSER, EWING HIGH SCHOOL TEACHER,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning parents alleged Board engaged in racial discrimination in assigning failing grade to their high school son, G.M., for his Marketing Education II class. Petitioners contended 1) denial of opportunity to graduate in 1990-91 because of disparate and discriminating treatment in connection with failing grade and 2) Ewing school system had de facto two-tier system of education in violation of Constitution and N.J.S.A. 18A:36-20.

ALJ dismissed petition. ALJ found petitioners failed to carry their burden of proof on the alleged impropriety of the educational system and that G.M.'s failure to graduate was due to any discipline imposed on him or discrimination. Rather, the ALJ found G.M. did not have sufficient credits to graduate.

Commissioner adopted findings and determination in initial decision.

OCTOBER 6, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7076-91
AGENCY DKT. NO. 221-6/91

G.M., W.M. and J.M.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, DR. DENNIS G. KELLY, SUPERINTENDENT OF SCHOOLS, WAYNE FULLER, EWING HIGH SCHOOL PRINCIPAL, JAMES POCETTI, SCHOOL GUIDANCE COUNSELOR AND M. QUENTIN HAUSSER, EWING HIGH SCHOOL TEACHER,
Respondents.

G.M., *pro se*

W.M., *pro se*

J.M., *pro se*

David W. Carroll, Esq., for respondents (Carroll and Weiss, attorneys)

Record Closed: July 16, 1992 Decided: August 24, 1992

BEFORE **JAYNEE LaVECCHIA**, CHIEF ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, Mr. W.M., his wife Mrs. J.M. and their son, G.M. brought this action alleging that respondents engaged in racial discrimination in connection with

the assignment of a failing grade to G.M. for his Marketing Education II class which resulted in his failure to achieve a sufficient number of credits to graduate with his high school class at the conclusion of the 1990-91 school year. Petitioners also alleged that respondents have violated Article I, paragraph five of the New Jersey Constitution and *N.J.S.A.* 18A:36-20 in the context of the education provided to G.M. Petitioners also seek the initiation of tenure charges against Mr. Quentin Hausser. Respondent Ewing Board of Education and the individually named respondents, Dr. Dennis G. Kelly, Superintendent of Schools, Wayne Fuller, Ewing High School Principal, James Pocetti, Ewing High School Guidance Counselor and M. Quentin Hausser, Ewing High School teacher, deny the allegations and seek dismissal of the complaint.

A prehearing conference was conducted on January 6, 1992 and in accordance with agreed upon procedures in that Order, the Board moved to strike the third paragraph of petitioners' Prayer for Relief seeking an order from the Commissioner relieving Mr. Hausser of his tenure. The Letter Order issued by the undersigned dated May 5, 1992 struck paragraph three of petitioners' Prayer for Relief. No interlocutory appeal was taken from this Order.

An evidential hearing was conducted in this matter on June 17, 1992, July 8, 1992 and July 16, 1992. At the conclusion of the proceeding on July 16, 1992, the record was closed.

FACTUAL DISCUSSION

Petitioners' case consisted of essentially a two-part presentation. One part related to petitioners' allegations that G.M. was denied the opportunity to graduate with his class at the conclusion of the 1990-91 school year because of the disparate and discriminatory treatment he received in connection with his failing grade for the Marketing Education II class taught by Mr. M. Quentin Hausser. The second part of petitioners' presentation consisted of testimony and documents in support of petitioners' allegation that a de facto two-tier system of education existed in the Ewing school system in the context of the education provided to G.M. in violation of the New Jersey Constitution and *N.J.S.A.* 18A:36-20. These two parts to petitioners' case will be addressed separately in the discussion below.

Failing Grade

It is undisputed between the parties that G.M. was told that he would receive a failing grade in his Marketing Education II class in 1990-91 due to having received an "F" for the first three marking periods, and, that upon receiving this information, G.M. transferred to Trenton High School. The Marketing Education II class would have provided G.M. with 15 credits toward the 113 needed to graduate from Ewing High School. Trenton High School required only 100 credits to graduate. To date, G.M. has not earned his high school diploma.

The Marketing Education II program consists of two components, and did for purposes of considering the 1990-91 school year when G.M. took the class. Fifteen credits are awarded for successful completion, with five credits being generated by classroom work and ten credits being generated by the required work experience component. These credits may not be awarded separately. One grade is issued for both parts of the program. Marketing Education II is part of the high school's cooperative education program. As testified to be Mr. Hausser, if a student cannot secure or maintain employment to meet the work experience portion of the program, alternate experience may be substituted. This may include class projects simulating work-setting issues, such as a simulated entrepreneurial experience utilizing a workbook and class projects or, for example, participation in interscholastic athletics where the team coach would be called upon to assess the student's initiative, attitude, effort, commitment, dependability and like judgments, as any employer would be required to evaluate a student employee. This description of the program is accepted as fact.

G.M. and his parents contend that in repeated conferences with Mr. Hausser, the school principals - Dr. Miller and later Dr. Fuller, and G.M.'s guidance counselor, Mr. Pocetti, they were told that if G.M. would do his work in class, he would graduate. They variously recalled being told that G.M. needed to turn in weekly his time clock punch card. Students were required to time punch-in and punch-out for their work in the school store during classroom activities. As his reason for failing to do this, G.M. stated that he lost his punch card. Neither Mr. M. or Mrs. M. recalled being told anything more specific that G.M. should do in the classroom.

Moreover, Mr. and Mrs. M. voiced concern that G.M. received a failing grade because he did not remain employed throughout the school year. This was denied through the testimony of Mr. Hausser and Mr. Pocetti and the alternatives to work experiences were elaborated upon as set forth above. As explained by Mr. Hausser, if employed, it is the student's responsibility to provide the employer with an evaluation form and stamped, school addressed envelope which the school prepares for the student to deliver to the employer. No such form was provided by G.M.'s employer as of the close of the third marking period. When Mr. Hausser talked with G.M.'s employer, he was told that G.M. never presented such a form. Moreover, G.M. did not turn in pay stubs for his weeks worked. This resulted in G.M. being initially given an "Incomplete" for the third marking period, although Mr. Hausser testified that he held the marking period grade open for ten additional days so G.M. could bring in these documents. After the ten days elapsed, the Incomplete automatically converted to an "F" per the school district's computerized records on student grades. This occurred for G.M.

Finally, in support of the claim of disparate treatment regarding the failing grade in Marketing Education II, petitioners contended that G.M. was not permitted to participate in the Distributive Educational Clubs of America (DECA) competitions that annually take place on a regional, state and national level. At the regional conference in which any Marketing Education II student could theoretically compete, students role play and are evaluated on the basis of their performance. A written test is also administered. Winning students are eligible to compete in the statewide competition and, if successful, move on to the national competition.

G.M. testified that his Marketing Education II teacher, Mr. Quentin Hausser, would not let him compete at the regional level. He testified that he did not understand Mr. Hausser's position because he did not owe any tab at the school store which the Marketing Education II students ran as part of their classroom curriculum - a reason he understood Mr. Hausser to give to other students when denying them an opportunity to go to the DECA regionals.

This last contention was denied by Mr. Hausser who categorically stated that no student was told he or she could not participate in DECA competitions due to running a tab at the school store.

Mr. Hausser testified that during the 1990-91 school year, the regional DECA conference was scheduled to take place on January 8, 1991. On the day before Thanksgiving vacation, he provided each student in his Marketing Education II class with a packet containing information on past workshops run at the regional level, sample of tests given at the regional, along with answers for them to study to help them prepare to do well. The past test that was included in the packet on that date turned out to be the test that was ultimately given on the date of the regional conference on January 8, 1991. Therefore, the students had an opportunity to review the answers and an opportunity to do well at the January conference. Although G.M. attended school on January 8, 1991, he did not participate in the DECA regional competition. In order to permit G.M. to earn the 100 points which were available as a score on this test, Mr. Hausser gave G.M. the test that was given at the regional conference as part of a makeup exam. Out of a possible score of 100 points, G.M. received only 16 or 18. Furthermore, G.M. did not want to do the role play portion of the testing experience.

Mr. Hausser's testimony explained the grading system used for the Marketing Education II class. Everything is done on a point basis. All activities that a student performs in class is assigned a point average. For example, handing in the time card is assigned a point value. Errors on the time card result in deductions from the amount of points a properly executed time card would receive. Submission of wage forms and weekly pay stubs from employers, DECA activities, individual classroom assignments are all assigned point valuations. Extra credit points are given for word searches for business vocabulary which the students may look up and report on. Marking period quarters may differ in the amount of total points available. For the first quarter of 1990-91 school year, 460 points were available, with more points being possible to be earned through the use of extra credit. The grade average is computed by taking the total points actually earned by the student and dividing it by 460. That percentage is assigned a grade. A percentage of 90 to 100 is a grade of an "A". A "B" is a percentage of 80 to 89; a "C" is an average of 70 to 79; a "D" is an average of 60 to 69 and an "F" grade is given to anyone who achieves 60 percent or less. In the first quarter G.M. earned 170 points of a possible 460. This computed to a 36.9 percent or, rounded up, 37 percent grade which was the equivalent of an F. In the second quarter out of a possible 697 points which a student could earn, G.M. earned 117 points. This computed to a 16.7 percent score, or an "F" grade. In the third quarter, 485 points were available to be earned by the

students. G.M. earned 119 points or 24.5 percent. This was the equivalent of a grade of "F".

Mr. Hausser elaborated on G.M.'s employment during the school year. When he entered the program shortly after the first week of the school year, he was working for Pizza Hut. Mr. Hausser asked G.M. if wanted to continue working at Pizza Hut and G.M. responded that he did. Thereafter, G.M. was terminated from Pizza Hut for a failure to follow a company policy. This information was not relayed to Mr. Hausser by G.M. He learned this when he went to see the manager and was told that G.M. was no longer working there. Mr. Hausser testified that he waited two to three weeks to see if G.M. would tell him that he had been terminated, but G.M. did not come forward to provide Mr. Hausser with this information. When Mr. Hausser finally confronted him with this information, G.M. acknowledged that it was true. During his second marking period, G.M. found another job at the Lawrenceville Car Care Center. During this quarter, the employer assigned G.M. a grade of "B" for the work portion. As Mr. Hausser explained, the employer is allowed to assign the grade for the work portion of the student's activities. In connection with this work experience, Mr. Hausser testified that through the school year that G.M. attended Ewing High School and the Marketing Education II class, he recorded only one pay stub for the entire year. As noted above, submission of the pay stub counts toward the accumulation of points for purpose of calculating the classroom grade and, therefore, has a direct relationship on the grade that the student achieves.

Mr. Hausser summarized the class as one that required little homework; most work was done in class. There are few major tests, but some pop quizzes and a midterm and final exam which were added into the point average that the students would be assigned. G.M. tended to sleep through class, a phenomenon which worried Mr. Hausser. Mr. Hausser indicated he questioned G.M. about this because he was concerned that G.M. might be working at night and be tired during the day in class. G.M. informed him that this was not true. This combination of not submitting any wage forms, no punching in and turning in his time card at the end of the week and not doing classroom assignments, contributed substantially to the low grade point average and the failing grade which was assigned to G.M.

No homework activities were involved that impacted upon this grade. G.M.'s lack of effort and interest in performing in class were duly noted to him and his parents in mid-quarter progress reports in each of the three marking periods while he attended Ewing High school. Each informed G.M. and his parents of the possibility of failure for the pertinent quarter. Progress reports evincing similar concerns about G.M.'s class performance were sent home in classes for Ceramics (first and second quarter) Art II (second quarter) and Physical Education (first quarter).

Mr. Pocetti, G.M.'s guidance counselor, testified that he had numerous conversations with G.M. which he referred to as "counselings". These sessions appeared to be largely informal conversations between Mr. Pocetti and G.M. but did result in Mr. Pocetti maintaining frequent contact with G.M. in an effort to spark more interest and activity by G.M. in his school work. Mr. Pocetti told G.M. that he would stop into his class to see if there was a problem between Mr. Hausser and G.M. as G.M. had alleged that Mr. Hausser "did not like him." On one day that he stopped in, he observed G.M. with his head down on his desk sleeping in class. He awakened G.M. and told him that he would come back the next day. On the next day, Mr. Pocetti observed the class and it was one in which the students were expected to deliver a speech to the other students in the class. When G.M. was called to deliver his speech, Mr. Pocetti observed him get up from his desk and as he approached the front of the room, take a speech off of another student's desk and deliver that speech as if it was his own. Mr. Hausser did not permit G.M. to do this and, accordingly, G.M. received no credit for this classroom project.

Mr. Pocetti's recounting of meetings that he attended with G.M. and with G.M.'s parents were helpful in providing an accounting of the information that was being exchanged between Mr. Hausser and Mr. and Mrs. M. It seemed apparent to the undersigned in observing the witnesses and hearing their testimony that up until the end of the third marking period, Mr. Hausser and Mr. Pocetti had been telling G.M. and Mr. and Mrs. M. that it was still possible for G.M. to graduate if G.M. would take more of an active role in his classroom activities and perform the required activities which contributed to the point valuation for his class grade. I am convinced, having heard this testimony and observed these witnesses, that it there was not nor could there have been an unconditional guarantee that G.M. would be permitted to graduate.

Indeed, Mr. Pocetti recalled specific conferences in February 1991 where Mr. Pocetti and Mr. Hausser told G.M. specific things that he needed to do to improve his grade in the Marketing Education II class. These were simple tasks that he could do in class, and that would improve his performance and secure higher than a failing grade in the third marking period, thus avoiding a certain failure for the year's grade which determined credits earned for graduation. Less than two weeks later, at another progress meeting between the same three people, G.M. was told he was not doing the five specific things that Mr. Hausser had told him he should do. At this meeting, Mr. Pocetti testified that G.M. admitted that he was not doing these things. He stated he was working at the Lawrence Car Wash and that the work was "good." It should be noted that midway in his senior year, G.M. attained 18 years of age and he informed the school district of his desire to be treated as an adult pupil. Despite this status, not long after that meeting in late February, early March, a meeting took place between Mr. and Mrs. M., the principal and Mr. Pocetti regarding G.M., in which Mr. Pocetti related to Mr. and Mrs. M. the five things that G.M. had been told he needed to do in class. Mr. Hausser was then called into the meeting and he repeated almost verbatim what Mr. Pocetti had said. Those five things were described as follows:

1. Bring in wage forms from G.M.'s employer.

2. Punch the time clock and be sure to sign it and turn it in at the end of each week.

3. Try to increase the number of hours at work. 540 hours is what all other students were doing and Mr. Hausser wanted G.M. to try and approach this number. Although he need not reach this number to get credit, Mr. Hausser encouraged G.M. to increase his number of hours.

4. Pay attention in class.

5. Do daily classroom assignments.

By way of example of some of the classroom projects, Mr. Pocetti recalled G.M. being asked by Mr. Hausser to do a poster for Valentine's Day, complete an old application for employment for Korvettes and complete a wage card.

In his closing argument, respondent has described this case as one in which the student failed himself. This description is apt. While it was alleged that petitioner failed because of his work portion of the Marketing Education II course, there is simply no evidence in the record to substantiate this charge. Furthermore, for purposes of calculating his point average for his third marking period grade, G.M. was given additional time beyond the close of the third marking period to provide his employer evaluation form and pay stubs which may have avoided his failing grade in the third marking period. The record was replete in this matter with competent evidence that this student, G.M., did not do his class work, no matter how minimal the demands were in the Marketing Education II program. The description by Mr. Hausser and Mr. Pocetti of G.M. in class with his head down on his desk were never denied by petitioners. Nor was any competent evidence brought forward by petitioner to suggest that the grading assigned to G.M. was any different than the grading would have been assigned to any other student who did as little work in connection with a course as G.M. has done for this course. Indeed, G.M. admitted taking the other student's speech and not doing things in class that Mr. Hausser had urged him to do to improve his grades. These admissions against interest are competent evidence for purpose of this hearing and I note that no rebuttal evidence was provided by petitioners to contradict to these statements.

Having heard the objective assessment used to assign grades in this particular course, I find no basis to rule that G.M. was subjected to any disparate treatment in the assignment of his failing grade. Moreover, I do not **FIND** that G.M. was ever promised that he would graduate, he was just told that if he did do certain things, he could graduate. Unfortunately, G.M. never performed even close to a level to have avoided a failing grade in any of the three marking periods that he attended Marketing Education II at Ewing High School.

Finally, with regard to the allegations regarding the DECA conference, I simply found the testimony of G.M. to be not reliable. Mr. Hausser had specifically denied ever preventing any student from participating in the DECA conference because of a school tab. This approach was consistent with his treatment of other students in previous years. To the extent that G.M. made this statement, I note that G.M. was less than candid in his relating of information in this case.

Specifically, G.M. was asked by the undersigned whether he graduated from Trenton High School. G.M.'s response was not forthcoming, and only a half answer. His response was he was "partially successful". Only through further probing did G.M. reluctantly admit that he did not graduate because he did not pass "Gym" and had to go to summer school. Further probing was required in order to get an answer to the question of whether or not he graduated. Ultimately, G.M. stated that he brought in a doctor's note to be excused from Gym in summer school. Further questioning was required to learn that this was not accepted. He also had to take summer school for English. Ultimately, he did not graduate even after summer school because he did not pass Gym. This exchange was insightful as to the character and credibility of G.M. and has made the undersigned reluctant to credit the testimony of G.M. on his rather incredible statement that he was prevented by Mr. Hausser from participating in the DECA Conference.

G.M. sought to bolster his statement through the testimony of T.K., another student in his Marketing Education II class. T.K. testified that Mr. Hausser read a list of names of people who owed a tab at the school store and he further stated that these students were told that they may could not participate in the DECA regionals. He stated that he was not on this list but that he did not participate in the DECA conference because his participation in interscholastic football caused a conflict the weekend of the regionals. T.K.'s testimony was successfully rebutted by the Board when it proved the regionals occurred in January 1991, long after the conclusion of the football season.

Moreover, T.K. admitted to a hostile exchange between himself and Mr. Hausser on the last school day in which he was denying the owing of tab to the school store. This exchange resulted in him cursing Mr. Hausser and calling him a "racist pig". According to T.K., Mr. Hausser told him that he must stop this confrontation or Mr. Hausser would ask him to leave the classroom. T.K.'s response was to say to Mr. Hausser that he would not make him leave the classroom, that T.K. would leave on his own and he walked out of school. Later conversation between T.K.'s mother and Mr. Hausser resulted in her payment of the fine and her telling Mr. Hausser that T.K. would come in to apologize. T.K. never did apologize.

T.K. appeared to be a biased witness presumably caused by the hostility of this event between himself and Mr. Hausser on the last day of class in 1990-91. This

bias and hostility toward Mr. Hausser coupled with the obviously erroneous testimony offered with regard to his reason for not participating in the DECA Conference renders his testimony suspect. Accordingly, for the reasons set forth above, I **FIND** petitioners' allegation that G.M. was denied an opportunity to participate in the DECA Regional Conference by Mr. Hausser, to be unsubstantiated on this record.

Two-Tier System of Education

Petitioners have alleged that a two-tier system of education is at work in Ewing High School. This two-tier system was alternatively presented as 1) a faculty composition that fails to reflect the racial mix of the community and student population, 2) disparate disciplinary treatment of minority students, 3) segregation of minority pupils in Mr. Hausser's classroom, and 4) different and better treatment of the "elite" student population identified as those students operating at an "A" or "B" level compared to students operating at a "C" level or lower.

Taking the last contention first, petitioners submitted no proofs to support this sweeping statement. To the extent that they have alleged that Mr. Hausser "cared more" and showed more of an interest in students who did better in class than G.M., these allegations were rebutted by the testimony of Mr. Hausser and Mr. Pocetti as well as the testimony of past pupils from the Marketing Education II class, S.W. (a "B" or "C" student) and J.D. These general allegations are belied by the extensive amount of attention G.M. received from Mr. Hausser in an effort to secure from G.M. a modicum of interest in his classroom work. Mr. Hausser sought out reasons for G.M. sleeping through class; Mr. Hausser sought out G.M's employer at Pizza Hut and then waited, patiently, two to three weeks for G.M. to come and tell him of his difficulty with his employer so that G.M. could be on record as the initiator of resolving this loss of employment; it was Mr. Hausser who gave G.M. a make-up midterm, for which G.M. never showed up for the second part; and it was Mr. Hausser who sought out G.M.'s employer in the third marking period to determine why G.M.'s employer evaluation had not been submitted and who kept the marking period open an additional ten days so G.M. could have another chance to submit his employer evaluation and pay stubs. G.M. received a considerable amount of time and attention by both Mr. Hausser and Mr. Pocetti all in an effort to assist him to achieve a passing grade and get the credits he so needed to graduate. No other

proofs having been offered by petitioners on this issue, I decline to credit their allegations that an actionable two-tier system was in place for "elite" students and that this worked to the detriment of G.M.

Second, petitioners claim segregation existed in the seating arrangements in Mr. Hausser's classroom. They contend that on one side of the classroom virtually all desks seated minority students, whereas on the other side, separated by a walking aisle, all non-minority students were seated. This allegation borders on the frivolous.

Mr. Hausser testified that students selected their choice of seats at the outset of the course and after a few days were told that they must keep their chosen seats for purposes of a seating chart required for administrative purposes related to the sometime need for a substitute teacher to handle the class. Mr. Hausser credibly explained that he has found the classroom more conducive to a pleasant learning environment to allow students to sit with friends, and therefore, he lets the pupils self-select their seating. This was corroborated by the testimony of T.K. through cross-examination. There is nothing discriminatory in allowing students to select their seating arrangement. The claim of a discriminatory practice in this arrangement was unproven.

Petitioners point to portions of a State monitoring report (P-1) as support for their claim that a district-wide two-tier system permeates the Ewing School System because its faculty racial composition fails to reflect its pupil composition. This report, on careful examination does not support the petitioners' claim. The cover letter refers to an unacceptable rating for element 8, indicator 8.2, which relates to the third and sixth grade levels of basic skills testing failing to meet State minimum standards for proficiency. It is irrelevant to petitioners' claim. Attached to this cover sheet, petitioners affixed the Level I work sheet for element 9, indictor 9.1, which concerns the following:

> Where applicable, the district shall implement a desegregation plan approved by the Commissioner of Education. *N.J.A.C.* 6:8-4.3(a)9i

The district was assigned an "acceptable" rating for this indicator based on the following finding:

> Documentation on the district's progress in implementing the State approved desegregation plan indicates that

> programs and activities to address correction of identified deficiencies are acceptable. Based on a letter dated September 28, 1990 from the Office of Equal Educational Opportunity (OEEO) the district's desegregation status is conditionally approved through June 30, 1991. According to OEEO's report full approval requires each phase of the district's plan to be implemented in an efficient and timely manner.

Second, the petitioners affixed the portion of the State monitoring report for element 9, indicator 9.2 which provides:

> Annually, the district shall review progress toward the objectives of the Sate approved affirmative action plans for classroom and employment practices of the district. *N.J.A.C.* 6:8-4.3(a)9ii

Again, the district was assigned an "acceptable" rating for this indicator, based on the following finding:

> The district has reviewed progress toward the objectives of State approved Affirmative Action plans for both classroom and employment practices. Affirmative Action objectives have been revised for 1990-91. The Annual Review of Progress for 1989-90 was acceptable as indicated by the Office of equal Educational Opportunity in a letter dated September 28, 1990. There is evidence that the Internal Monitoring Guide was used by each building principal and the district to assess compliance activities pursuant to law and code.

Lastly, the petitioners affixed the monitoring report portion concerning element 9, indicator 9.1 which concerns the following:

> Annually, the district shall implement the affirmative action plans, including in-service training. *N.J.A.C.* 6:8-4.3(a)9iii

Again, the district was assigned an acceptable rating for this indicator, based on the following finding:

> Documentation shows that the district is implementing the affirmative action plans on an annual basis. In-service training has been provided to all staff as follows:
> November 7, 1989 "Strategies for Teaching and Learning"
> March 22, 1990 Affirmative Action topics
> July 9-13, 1990 "Teaching and Learning Styles"

August 9, 1990 "Teacher Expectations, Student Achievement and Self Esteem"

None of the above supports petitioners' claims of a racially discriminatory two-tier system of education contrary to New Jersey Constitution Article I, paragraph 5, or *N.J.S.A.* 18A:36-20

Dr. Kelly, Superintendent of schools for Ewing School District testified in a most forthright way concerning the school district's assessment via the monitoring system. He stated that the district met all indicators except 5.2, relating to facilities and the failure to meet certain life/safety standards due to the use of some portable facilities instead of permanent structures. This indicator is in the process of being met through implementation of a facilities plan.

Dr. Kelly further testified that the district is under a desegregation order because one of its six elementary schools is not within the minimum-maximum range for its minority-majority pupil ratios. The district-wide minority population is approximately 31-32 percent; the high school minority population is 36 percent. The elementary school which does not meet the applicable district range for minority population is being addressed in the context of the district's facilities plan, mentioned above, which will involve the elimination of one elementary school and the reassignment of pupils among the remaining schools.

Further, Dr. Kelly addressed petitioners' claim that the faculty minority population, specifically administrative staff, do not reflect the pupil composition See P-4. As of Spring 1992, of 316 teachers, 282 are white, 28 are black, one is asian and one is hispanic. Only three administrators are black as testified by Dr. Kelly.

Dr. Kelly explained that as the staff of the school district has aged, the district has aggressively recruited minority candidates as replacements and has commenced required in-service training to make existing staff more sensitive in dealing with children of today, be they black or white, male or female. Dr. Kelly's testimony was credible, forthright and reliable. It is accepted as fact. Based on the district's favorable monitoring reports on all indicators involving affirmative action and equal educational opportunity as assessed through classroom and employment practices, coupled with Dr. Kelly's elaboration of the district's further efforts in these areas, I find petitioners have failed to carry their burden of proving, by a preponderance of the credible evidence that a discriminatory two-tier system of

education as it pertains to G.M. is provided in Ewing School District by virtue of the faculty racial composition.

Lastly, petitioners claim proof of a two-tier system on the basis of statistical data relating to Ewing High School discipline (P-8). This data shows in 1990-91, the year pertinent to G.M., a greater number of minorities versus white students sent to the vice principal's office (260 v. 209), given an out-of-school suspension (144 v. 50), and given an in-school suspension (289 v. 224). No other evidence on this issue was offered by petitioners.

Respondents, through Dr. Kelly has offered the following explanation relating to these statistics. This review of high school discipline was done at his request after the issue was initiated by a member of the Board of Education. The report generated a review of the student handbook by a parent committee, who met afterward with administrators to discuss the revisions and to emphasize the need for consistency in interpretation of the revised policies. The significant changes to the discipline policy were:

1.) The committee wanted extraordinary efforts made to contact parents before sending a student home as part of a suspension. A confirming letter was also requested; and

2.) Changes were made in the acceptance standards for excusal notes submitted by parents.

Dr. Kelly's testimony also revealed that it is a vice principal in each school who administers discipline, and in the high school the vice principal who performs this task is black. This testimony is found as fact.

LEGAL ANALYSIS

Petitioners have raised serious allegations of discrimination within the educational opportunities offered by the Ewing School System, citing Article I, paragraph 5 of our New Jersey Constitution (1947), which prohibits "...[being] discriminated against in the exercise of any civil...right,... [or being] segregated...in the the public schools, because of religious principles, race, color, ancestry or national origin."; and *N.J.S.A.* 18A:36-20 which provides:

> No pupil in a public school in this State shall be discriminated against in admission to, or in obtaining any advantages, privileges or courses of study of the school by reason of race, color, creed, sex or national origin.

While not cited by petitioners directly, it is well recognized that schools are places of public accommodation, as that term is understood within the Law Against Discrimination, and as such may not invidiously discriminate in the offering of its "advantages" and "privileges" of which curriculum program, and course of study are a core. *N.J.S.A.* 10:5-4. *See Hinfey v. Matawan Regional Board of Education*, 77 *N.J.* 514, 523 (1978). Issues of this type are peculiarly within the province of the Commissioner of Education to decide. *Id.* at 534.

The Commissioner's authority to prescribe minimum courses of study, to require local boards to submit course of study for approval, and to supervise curriculum generally is a matter of legislative delegation. *See N.J.S.A.* 18A:4-23,-25 and -34. Implementation of the course of study devolves upon the various local boards of education.

In this instance petitioners have challenged the privileges provided to G.M. in connection with his Marketing Education II class at Ewing High school. As petitioners, the burden of proof falls to them to prove by a preponderance of the credible evidence that G.M. was treated in a disparate way regarding his course work. For the reasons expressed earlier, I **FIND** that petitioners have not carried this burden regarding the failing grade assigned G.M. for the year's work in Marketing Education II.

With regard to the various allegations relating to a two-tier system of education, petitioners also have failed to carry their burden of proof. In three of four of petitioners' allegations regarding this part of their case, petitioners' proofs were utterly lacking in substance as set forth in the factual discussion earlier.

As to the statistical data regarding suspensions, case law has established that the presentation of statistical data may shift the burden of persuasion from the complainant to the respondent in a racial discrimination claim, requiring the respondent to come forward with an explanation for the data. *See Watson v. Fort Worth Bank and Trust*, 487 *U.S.* 977, 101 *L. Ed. 2d* 817 (1988). However, the burden

of proof remains on the complainant. *Id.* at 994; 101 *L. Ed. 2d* at 845. Further, the complainant must show the specific practice which caused the impact on the protected group even in a disparate impact analysis.

Here there is no evidence that the black vice principal administering discipline in the high school is doing so in a way that treats like offenses as between a white and black student more harshly for the black student. Imposition of pupil discipline involves an inherently subjective analysis, that is dependent upon the unique factual circumstances of each incident. Petitioners never identified nor presented proofs on a specific aspect of the discipline process to establish the causation of any discriminatory disproportionate impact on minority students. Furthermore, no such criticism of the existing system was found by the parent review committee. The elaboration by Dr. Kelly regarding discipline of students militates against any finding of discrimination. Petitioners simply have not carried their burden of proof. Moreover, I note that this case does not involve any issue of discipline imposed on G.M. It is undisputed on this record that G.M.'s failure to graduate was not due to any discipline imposed on him. A pupil's discipline record is irrelevant to the computation of credits earned to qualify for graduation.

Accordingly, for all of the reasons set forth herein, I **FIND** that petitioners have failed to carry their burden of proof on their various allegations of discrimination in their petition of appeal. I **ORDER** that the petition of appeal be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 24, 1992
Date

Jaynee LaVecchia
JAYNEE LaVECCHIA, CHIEF ALJ

Receipt Acknowledged:

8/26/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 31 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

EXHIBITS IN EVIDENCE

FOR THE PETITIONER:

P-1	Portions of Level I Monitoring Report for Ewing School District
P-2	Marketing Education II - Curriculum Guide, Grade 12 - Summer 1990
P-3	Excerpts from the Ewing Township Secondary Schools Curriculum 1990-91
P-4	Answers to Petitioners' Discovery Request dated February 25, 1992
P-4a	Petitioners' Discovery Request, dated February 25, 1992
P-5	Letter dated October 23, 1990 from Berkeley College of Business to G.M.
P-6	10 page Ewing Township School District Internal Monitoring Guide, Equality in Educational Progress
P-7	1990-91 Ewing Township Student Enrollment Report
P-8	Ewing High School discipline statistics (3 years)
P-9	February 9, 1992 - Cooperative Education Program - Employer Evaluation of Cooperative Student

FOR THE RESPONDENT:

R-1	Mid-Quarter Progress Report Marketing Education II, Quarter 1
R-2	Mid-Quarter Progress Report Marketing Education II, Quarter 2
R-3	Mid-Quarter Progress Report Marketing Education II, Quarter 3
R-4	Letter, dated April 9, 1991, from Dr. Kelly to Mr. & Mrs. M.
R-6	Ewing High School report card for G.M., 1990-91, (through April 12, 1991)
R-8a	Mid-Quarter Progress Report, Ceramics - Quarter 1
R-8b	Mid-Quarter Progress Report, Physical Ed - Quarter 1
R-8c	Mid-Quarter Progress Report, Ceramics - Quarter 2
R-8d	Mid-Quarter Progress Report, Art II - Quarter 2
R-9	Discipline Record for G.M. - 1990-91
R-10	Clearance Form for G.M., dated April 11, 1991
R-11	Letter, dated May 12, 1992 from David Carroll, Esq., to Mr. & Mrs. M.

OAL DKT. NO. EDU 7076-91

G.M., W.M., AND J.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, DR. DENNIS G. KELLY, SUPERINTENDENT OF SCHOOLS, WAYNE FULLER, EWING HIGH SCHOOL PRINCIPAL, JAMES POCETTI, SCHOOL GUIDANCE COUNSELOR, AND M. QUENTIN HAUSSER, EWING HIGH SCHOOL TEACHER,	:	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 careful and independent review of the record of this matter, the Commissioner adopts as his own the findings and conclusions of the Office of Administrative Law that petitioners have failed to carry their burden of proof on the allegations of discrimination and arbitrary action on the Board's part as set forth in the matter herein. Accordingly for the reasons expressed in the initial decision, the Commissioner directs that the instant Petition of Appeal be dismissed, with prejudice.

COMMISSIONER OF EDUCATION

OCTOBER 6, 1992

DATE OF MAILING - OCTOBER 6, 1992

250-92

250-92

D.B., BY HER PARENTS, E.B. AND D.B.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF OAKLYN, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parents of D.B., 7th grade student, appealed Board's determination to deny her promotion to 8th grade after she successfully attended summer school for the courses she failed Board had voted to waive its policy (failure in three or more subjects meant grade must be repeated) if D.B. passed English Later the same month, Board rescinded its action and required D.B. to repeat 7th grade.

ALJ granted promotion based on equitable principles. Board had not followed its own policy and D.B. had relied on Board's determination to waive policy, despite Board's later rescission. ALJ granted petitioners' prayer for relief and D.B. was to be promoted to 8th grade. Request for counsel fees was denied.

Commissioner adopted findings and determination in initial decision, stressing this matter was strictly limited to facts pertaining solely to D.B.

OCTOBER 7, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5669-92
AGENCY DKT. NO. 302-7/92

D.B. BY HER PARENTS
E.B. AND D.B.
Petitioners,
v.
BOARD OF EDUCATION OF THE
BOROUGH OF OAKLYN,
CAMDEN COUNTY,
Respondent.

Jamie Epstein, Esq., for the petitioner

Howard Mendelson, Esq., for the respondent (Davis, Reberkenny & Abramowitz, attorneys)

Record Closed: August 25, 1992 Decided: August 27, 1992

BEFORE **AUGUST E. THOMAS**, ALJ, t/a:

Petitioner is a seventh grade pupil who appeals the determination of the Board of Education of Oaklyn (Board) which denied her an opportunity to be promoted to eighth grade despite repeating in summer school the courses she failed in the regular school year.

The matter was filed in the office of the Commissioner of Education on July 8, 1992 and transferred to the Office of Administrative Law as a contested case on July 28, 1992 pursuant to N.J.S.A. 52:14F-1 et seq. A hearing was conducted in the Office of Administrative Law, Trenton, on August 25, 1992. Sixteen documents were submitted in evidence and testimony was educed from the pupil's mother and the school superintendent. The record was closed after oral summation by counsel.

FACTS

The salient facts are not in dispute and are listed as follows:

1. D.B. is a seventh grade girl who failed three subjects in the 1991-92 school year (Language Arts, Home Economics and Industrial Arts).

2. Between September 27, 1991 and May 7, 1992, D.B.'s parents were notified by fifteen interim reports from her teachers concerning D.B.'s poor performance in her classes (J-4).

3. The parents do not contest any of the grades received by their daughter.

4. The Board has a policy which provides that "Failure in three or more subjects means the grade must be repeated." (J-12)

5. Failure in one or two subjects can lead to promotion if those subjects are passed in summer school.

6. D.B.'s mother attended a Board meeting on June 15, 1992 in an attempt to have the policy changed where non-academic subjects are involved (home economics and industrial arts) so that D.B. could be promoted. (J-5, J-7).

7. After some debate in executive session, and irrespective of the objections voiced by the superintendent, the board voted 5 to 4 to waive its retention policy "with the stipulation that [D.B.] passes English in summer school." (J-5)

8. The day after its June 15, 1992 meeting, another mother (P) called the superintendent about concerning son. She had been in attendance at the meeting the prior evening where the waiver was voted upon.

9. Thereafter, a special meeting of the Board was called on June 22, 1992. The Board went into executive session to entertain the concerns of (P) about her son who failed three subjects one year earlier and at that time the Board denied her request to promote him. One subject he

failed was home economics and P believed this subject should not be counted. P. allegedly spoke to a "legal examiner" at the state department who advised her to confront the Board about her situation. (J-11)

10. After discussion with its attorney and debate among its members, the Board voted 6 to 1 to rescind its action respecting D.B. on June 15, 1992 "on the grounds that such action is a violation of administrative policy and to require student D.B. in accordance with the policy to repeat 7th grade." (J-11)

11. The superintendent testified that the promotion policy had never been waived except for D.B.; that there is no distinction in the policy between academic and non-academic subjects; that there was no discussion of D.B. in the executive session attended by P; and that the promotion and retention policy submitted by petitioners (P-1) applied only to elementary school pupils in grades K-6. D.B. is a pupil in the 7 through 9 junior high school.

I accept the superintendent's testimony as fact.

DISCUSSION

This is a classic case of a board of education creating a problem for itself by its failure to abide by its own policy and its failure to adhere to the advice of its superintendent. The superintendent understands that policy is designed to keep the institution on the straight and narrow path and that deviations from policy are fraught with danger.

D.B.'s mother testified that she and her daughter were called to the superintendent's office on June 23, 1992, the day after the meeting in which the promotion policy waiver was rescinded. They were very upset and cried when they heard the news. Nevertheless, D.B. began her non-academic subjects on June 16, 1992 and had paid the tuition at Collingswood for her summer English class which would begin on July 1. This suit followed.

Now that she has passed English with a grade of "B" and made up home economics and industrial arts requirements with passing grades to the satisfaction of the school district, D.B. seeks promotion as a regular eighth grade pupil beginning in September 1992.

The Board argues that D.B. has acquired no vested right since she was notified before she began her English course in Collingswood and that she would be

reimbursed for any tuition paid for that subject. (The other two courses were offered in the local district at no charge to the pupils). Therefore, D.B. should be required to repeat seventh grade pursuant to its retention policy.

in McDowell v. Board of Education of Island Heights, 1974 S.L.D. 1316, that board of education rescinded its resolution permitting entrance to school for an under age kindergarten pupil. The Island Heights board cited its statutory and discretionary authority to make, amend and repeal rules pursuant to N.J.S.A. 18A:11-1. Relevant portions of that decision are quoted below:

> The Board asserts . . . that when a board of education acts within its discretionary authority, the Commissioner should not interfere or substitute his judgment for that of the local board. Kopera v. Board of Education of West Orange, 60 N.J. Super. 288 (1960) . . .
>
> The Board argues, finally, that the infant acquired no vested right since he had not been enrolled, nor did he attend any classes; therefore, his right to a free public school education has only been postponed for a year.
>
> In previous decisions by the Commissioner, it has been held that ***an acquired right through the adoption of a resolution by a board of education cannot be invalidated by a rescinding of the resolution at a subsequent meeting." Marion S. Harris v. Board of Education of Pemberton Township, Burlington County, 1939-49 S.L.D. 164 (1938) (at pp. 165-166) See also Samuel Hirsch v. Board of Education of the City of Trenton, Mercer County, 1961 S.L.D. 189; Anthony Amorosa v. Board of Education of the City of Jersey City, Hudson County, 1964 S.L.D. 105; Leon Gager v. Board of Education of the Lower Camden County Regional High School District No. 1, Camden County, 1964 S.L.D. 81; James Docherty v. Board of Education of West Paterson, Passaic County, 1967 S.L.D. 297; Leonard V. Moore v. Board of Education of the Borough of Roselle, Union County, 1973 S.L.D. 526.
>
> The Board avers that this matter is distinguishable from the cases cited, ante, in that the persons represented therein had signed contracts with their boards giving them vested rights.
>
> In the hearing examiner's judgment, pupils also have rights. They have a right to be treated equitably and a right to expect that those persons charged with the responsibility of charting the educational future of children will do so in their best interest. The hearing examiner finds in the instant matter that the infant acquired a right to attend kindergarten in the Borough of Island Heights because of the several actions of the Board . . . (at pp. 1319-1320).

The Commissioner adopted the report of the hearing examiner as his own and directed the Board to admit the kindergarten pupil holding also that no new underage applicants need be considered for entrance.

I **FIND** and **CONCLUDE**:

The matter herein is similar. D.B. had a right to rely on the determination of the Board to waive its promotion policy thus making it possible for her to be promoted on the successful completion of summer school. The fact that D.B. acquired no vested right is not germane to the fact pattern here. D.B. must be promoted according to equitable principles. Black's Law Dictionary defines equitable as --

> Just; conformable to the principles of justice and right.
>
> Just, fair, and right in consideration of the facts and circumstances of the individual case.

Now that D.B. has satisfied the requirements to be promoted to eighth grade no educational or rational purpose can be served by forcing her to repeat seventh grade.

This determination for D.B. does not extend to any other pupil. If a pupil was aggrieved in a prior year, action should have been taken at that time.

The Board's promotion policy is not questioned. It appears fair and designed by its professional staff in the best interest of the school pupils. This problem arose only because the Board did not follow its own policy.

In his closing argument counsel for petitioner sought to amend his complaint on the ground that there was a discussion of D.B. with another parent at the executive session of the Board on June 22, 1992, in violation of the rules concerning confidentiality of pupil records. It appears that D. B. was mentioned at this meeting (J-11); however, the superintendent testified that there was no such discussion while P was in attendance.

I am convinced from the record as a whole that any mention of D.B., if it occurred at all, was only in the context that a waiver had been authorized for her and not for P's son who had a similar problem in an earlier year. Accordingly, the motion to amend the complaint is **DENIED.**

The Commissioner has no authority to award counsel fees. As stated in Balsley v. North Hunterdon Board of Education, 117 N.J. 434 (1990) " . . . the absence of express statutory authority is fatal to the claim for counsel fees." (at 443) Accordingly, petitioner's request for counsel fees is **DENIED.**

Based on all of the above, petitioner's prayer for relief is **GRANTED** She will begin in grade 8 in September 1992.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

27 August 92
Date

August E. Thomas Jr.
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

August 31, 1992
Date

Maureen E. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 1 1992
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

km

EXHIBITS

P-1	Promotion and Retention
J-1	Promotion Policy
J-2	Principal's letter
J-3	D.B. - Pupil Progress Report, November 15, 1991
J-4	D.B. - Interim Report
J-5	Board Minutes
J-6	BO and TP - Pupil Progress Reports, June 15, 1992
J-7	D.B.'s mother's statement
J-8	Principal's letter, June 12, 1992
J-9	Principal's letter, June 29, 1992
J-10	Principal's letter with attachments, February 6, 1992 and April 16, 1992
J-11	Board Minutes, June 22, 1992
J-12	Principal's letter, June 29, 1992
J-13	Superintendent's letter, July 31, 1992
J-14	D.B.'s Final Report, August 12, 1992
J-15	Principal's letter, August 24, 1992

WITNESSES

D.B.'s mother
Henry Lindner, Superintendent

D.B., BY HER PARENTS, E.B. AND D.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF OAKLYN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioners' exceptions were untimely filed pursuant to the prescriptions of N.J.A.C. 1:1-18.4, and thus are not considered in the Commissioner's disposition of this matter.

Upon careful and independent review of the record of this matter, the Commissioner adopts as his own those findings and conclusions of the Office of Administrative Law that for the equitable reasons as expressed in the initial decision, and because D.B. has satisfied the requirements to be promoted to eighth grade, petitioners' prayer for relief seeking D.B.'s promotion to grade 8 in September 1992 be granted. In so determining, the Commissioner stresses, as did the ALJ below, that this matter is strictly limited to the facts pertaining solely to D.B., and does not extend to any other pupil.

Accordingly, the initial decision is affirmed for the reasons expressed therein.

COMMISSIONER OF EDUCATION

OCTOBER 7, 1992

DATE OF MAILING - OCTOBER 7, 1992

251-92

PARENTS FOR A BETTER SOLUTION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE EAST WINDSOR REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

OCTOBER 14, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3624-92
AGENCY DKT. NO. 81-4/92

PARENTS FOR A BETTER SOLUTION,
Petitioner,
v.
BOARD OF EDUCATION OF THE EAST WINDSOR REGIONAL SCHOOL DISTRICT,
Respondent.

Appearances:

William C. Baggitt, Esq., for petitioner

David H. Coates, Esq., for respondent (Turp, Coates, Essl and Driggers, attorneys)

Record Closed: August 27, 1992 Decided: August 28, 1992

BEFORE **JAYNEE LaVECCHIA,** CHIEF ALJ:

On April 2, 1992, Parents for a Better Solution filed a petition with the Commissioner of Education seeking relief from a proposed school district reorganization, which it alleged was based on erroneous and incomplete cost information and without educational justification. On April 21, 1992, respondent, Board of Education of the East Windsor Regional School District, filed its answer denying the allegations of the petition and seeking dismissal of the petition with the Commissioner of Education. On May 15, 1992, the Commissioner of Education transmitted the matter to the Office of Administrative Law for hearing under the provisions of *N.J.S.A.* 52:14F-1 *et seq.*

A telephone prehearing conference was conducted by the undersigned on July 20, 1992, during which petitioner's attorney advised that petitioner had determined not to pursue the matter, and respondent's attorney advised he would file a motion to dismiss. Thereafter, on August 8, 1992, respondent's motion to dismiss was filed with the undersigned. The motion seeks dismissal on the basis of (1) petitioner's representation at the prehearing that it was abandoning its intention to affirmatively prove at a plenary hearing the factual basis for its allegations that the board's decision regarding the reorganization plan was arbitrary, capricious and unreasonable; (2) no Open Public Meetings Act violation occurred; and (3) the board's action is not *ultra vires* merely because the completion of the reorganization plan will continue into the term of a subsequent board.

On August 27, 1992, a letter submitted on behalf of petitioner was received indicating that petitioner joins in the motion to dismiss, stating that to prolong the process would be counterproductive.

Therefore, based upon the lack of opposition to the motion filed on behalf of respondent, and petitioner joining in the motion to dismiss, I direct that this matter be **DISMISSED** with prejudice.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 28, 1992
Date

Jaynee LaVecchia
JAYNEE LaVECCHIA, CHIEF ALJ

Receipt Acknowledged:

Sept. 2, 1992
Date

Maureen K. Kelly
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 4 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 3624-92

PARENTS FOR A BETTER SOLUTION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE EAST WINDSOR REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner concurs that petitioner no longer wishes to pursue this matter as evidenced by its joining in the Board's motion to dismiss the matter as a controversy before him.

Accordingly, the initial decision of the ALJ dismissing the Petition of Appeal is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 14, 1992

DATE OF MAILING - OCTOBER 14, 1992

252-92

IN THE MATTER OF THE CAP WAIVER	:	
APPEAL OF THE NEWFIELD BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, GLOUCESTER COUNTY.	:	DECISION

OCTOBER 15, 1992

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE NEWFIELD BOARD OF : COMMISSIONER OF EDUCATION
EDUCATION, GLOUCESTER COUNTY. : DECISION

For the Petitioner, Carl W. Cavagnaro, Esq. (Reuss & Cavagnaro)

For the Respondent, Colleen A. Maier, Esq.

This matter was opened before the Commissioner by way of a Petition of Appeal filed by the Newfield Board of Education (Board) on May 27, 1992 appealing the cap waiver defeated by the voters of the school district on April 7, 1992. On June 19, 1992 the Borough Council of Newfield (Borough) submitted its Answer to the Petition raising the following separate defenses:

1. That the Board appealed the defeat of the cap waiver in the amount of $183,258 without having provided the Borough with the opportunity to identify and provide reasons for specific line item reductions in the cap waiver requests. It is contended by the Borough that the Board in its meeting on April 23, 1992, as required by N.J.S.A. 18A:22-37, did not address itself to the cap waiver items nor provide reasons for their restoration.

2. That the Board's decision to accept reductions of $12,000* from its basic school budget is inconsistent with its request to the Commissioner for approval of a cap waiver.

* The Board accepted the $12,000 budget reduction effectuated by the Borough which the Gloucester County Superintendent agreed could be sustained due to respondent's willingness to do grounds care and trash removal and anticipated savings for utilities.

On June 24, 1992 the Borough adopted Resolution #71-92 in which it amended its tax levy by increasing such levy by $34,063 and setting forth its position by specific line item as to why the remaining requested cap waiver of $149,195 should not be granted by the Commissioner. Subsequent to the receipt of the Borough's Statement of Reasons, the Board submitted its Response to the Borough's position. No additional documents were filed by either party thereby closing the record.

It is noted by the Commissioner that the Gloucester County Superintendent of Schools conditionally approved the 1992-93 Newfield School District budget on March 3, 1992 upon its advertisement of the following cap waiver proposal:

Account Title	Account No.	Amount
Preschool/Kindergarten, Salaries-Teachers	01-213	$ 7,535
Grades 1-5, Salaries-Teachers	02-213	37,670
Grades 6-8, Salaries-Teachers	03-213	7,535
Salaries-Other Instructional Staff	05-214	31,644
Other Salaries for Instruction	05-216	5,220
Textbooks	05-220	1,222
School Library and Audio/Visual Materials	05-230	2,304
Teaching Supplies	05-240	3,078
Other Expenses	05-250	1,000
Purchased Professional Educational Services	05-260a	11,500
Salaries-Health	00-410	17,190
Trips Other Than To and From School	00-520c	3,200
Contracted Services	00-720	41,000
Insurance and Judgments	00-820	3,632
Student Body Activities-Other Expenses	00-1020	1,100
Special Education, Resource Room-Salaries	18-210	6,728
Special Education, Resource Room-Other Expenses	18-290	1,200
Basic Skills/Remedial-Other Expenses	24-290	500
Additional Current Expense Appropriations		$183,258

Subsequently, upon defeat of the proposed budget and cap waiver, the Board met with the governing body on April 23, 1992 as required pursuant to N.J.S.A. 18A:22-37 at which time the Borough reduced the proposed budget and tax levy by $12,000, said reduction

being accepted by the Board. The Board's Petition of Appeal requesting approval by the Commissioner of the cap waiver constitutes the matter controverted herein.

The amounts in contention in this appeal are set forth below:

Proposed Tax Levy Adopted by Board		Amount of Tax Levy Certified by Borough
Current Expense		Current Expense
$686,191		$674,191*
183,258	(Cap Waiver)	
$869,449		
Capital Outlay		Capital Outlay
-0-		-0-
Total $869,449		$674,191

Amount of Cap Waiver in Dispute before Commissioner

$183,258

BOARD'S POSITION

Line Item		Amount
01-213	Preschool/Kindergarten, Salaries-Teachers	$ 7,535
02-213	Grades 1-5, Salaries-Teachers	$37,670
03-213	Grade 6-8, Salaries-Teachers	$ 7,535

The above line items represent teacher salaries for the district's art, music and physical education programs which are provided by specialists three days per week, three days per week and two days per week, respectively, by certificated specialists in those areas. Should the cap waiver request be denied, the programs

---

* On June 24, 1992 the governing body resolved to amend the tax levy for current expense to add $34,063 for cap waiver purposes but certification to the Gloucester Board of Taxation was not accomplished because no statutory authority exists for a governing body to tax above cap.

would be eliminated and responsibility for art, music and physical education would be placed upon classroom teachers.

05-214 Salaries - Other Instructional Staff $31,644

The amounts in this account represent the salaries for a three day per week librarian and the salary for the school nurse who acts as coordinator of the child study team two days per week. Elimination of the librarian's salary would require classroom teachers to assume the responsibility of teaching library skills and providing enrichment. Since the child study team consists of part-time persons providing per diem and per case services, the Board contends that elimination of this coordination function would inhibit required communication between teaching staff members and parents.

05-216 Other Salaries for Instruction $ 5,220

The salary in this account is for a basic skills coordinator who completes the Chapter I applications for federal aid, determines the extent of the program, completes the state-required evaluation and schedules meetings with parents. The employment in this area is for 30 days per year and its elimination would place the burden for these activities on the existing staff to the detriment of their other duties.

05-220 Textbooks $ 1,222

This line item is for replacement of textbooks for social studies which is a district adopted T&E objective.

05-230 School Library and A/V Materials $ 2,304

The district contends that materials in this line item were eliminated in the 1991-92 budget and their elimination in this budget would mean that no new materials would be purchased for two consecutive years.

05-240 Teaching Supplies $ 3,078

This line item is primarily for the art program and represents paper and other supplies.

05-250 Other Expenses $ 1,000

This line item is for the purchase of new software for existing computers. The Board contends these funds are necessary in order to update computer systems which are an integral part of the curriculum of Computer Assisted Instruction.

05-260A Purchased Professional Educational Services $11,500

The Board points out that the amounts in this account are for child study team services which are mandated by law.

00-410 Salaries - Health $17,190

This line item represents 60% of the full-time school nurse's salary, the other portion being paid out of Account 05-214. Nursing services are mandated by state law and therefore cannot be eliminated.

00-520c Trips Other Than To and From School $ 3,200

This amount is provided in order to permit one field trip per class per year. These monies are to meet the expenses for such trips, particularly to meet the mandate to provide funds for students whose parents cannot afford to contribute toward such trips. Elimination of these funds would eliminate all field trips for pupils.

00-720 Contracted Services $41,000

The services for which the Board contends it must contract are as follows:

1. $30,000 for repair to corridor doors which was required by the Borough's Fire Code.

2. $6,000 to improve ventilation in the nurse's room.

3. $5,000 for general repairs included as part of the district's five-year facility plan.

00-820 Insurance and Judgments $ 3,632

Of the above amount, $1,132 is required for purposes of providing insurance coverage for the music, art and physical education teachers while $2,500 is required for the cost of undertaking a total fixed asset appraisal as recommended by the auditor in the 1991-92 school budget audit.

00-1020 Student Body Activities - Other Expenses $ 1,100

The funds in this account are for purchase of graduation and attendance certificates. The Board, however, acknowledges that a surplus of $775 in the 1991-92 school year permits them to accept a 50% reduction in the amount requested to $550.

18-210 Special Education, Resource Room - Salaries $ 6,728

The amount required in this line item is for the payment of the salary of a supplemental Resource Room teacher for one day per week. The Board argues that it must finance one day per week in order to receive a matching federal grant for an additional day per week.

The Board contends without the salary in this account students will be denied supplemental instruction as well as reinforcement on the computer.

18-290 Special Education, Resource Room - Other Expenses $1,200

This line item provides materials for 15 children in the Resource Room which the Board maintains are necessary to meet the requirements of the IEP's of these pupils.

24-290 Basic Skills/Remedial - Other Expenses $500

The Board contends the amount in this account represents the minimum required to provide supplies for special education, as well as computer supplies and software for this remedial program.

BOROUGH'S POSITION

The Borough's position in each of the foregoing accounts is set forth in its Resolution #71-92 as follows:

> LINE ITEMS - 01-213, 02-213, 03-213
>
> The proposed cap waiver presented to the public included an art program that is only four years old and could be reincorporated into the regular classroom curriculum as it was prior to its institution with no adverse effect on the regular education of the children. The Physical Education Program could also be incorporated as part of the normal days work of the regular classroom teachers, who normally provide recess and physical activity for the students, anyway. The music program should be continued with the [bare] minimum of time that the program would need to be effective one and one half days per week. This program provides the students a special interest outside of the classroom. ($43,095.00 reduction)
>
> LINE ITEM - 05-214
>
> We believe that the librarian could be cut to one day per week and that the CST coordinators position and responsibilities should be done by the administration, which would eliminate $24,916.00 from this line item.
>
> LINE ITEM -05-216
>
> We have seen no adverse affect to the education of the children by the existing employees performing the work in this line item, and that was an alternative presented by the School Board. ($5,220.00 reduction)
>
> LINE ITEM - 05-220
>
> With the possible regionalization of the school district, we feel that the purchase of the text books should be held off until that is decided. ($1,222.00 reduction)

LINE ITEM - 05-230

With the total or partial elimination of the library staff, the need for this expense should be removed. ($2,304.00 reduction)

LINE ITEM - 05-240

We are recommending that the art program be removed, therefore, the need for these items is no longer needed. ($3,078.00 reduction)

LINE ITEM - 05-250

We must realize that at times we need to hire within our means. With the possibility of regionalization, we should keep this cost out of the budget. ($1,000.00 reduction)

LINE ITEM - 260A

If state law does not require that we have our own CST, then we see no need to include this item. We feel that the support staff of the district should be able to handle these duties. ($11,500.00 reduction)

LINE ITEM - 00-[410]

School Nurse - If allowed to remain, the nurse should be given some of the support duties that we have eliminated in other line items. We need to consolidate the staff in order to make the staff more efficient.

LINE ITEM - 520C

There are other ways of providing the needed money for field trips. This should be privately funded *** and not be included in the budget. ($3,200.00 reduction)

LINE ITEM - 00-720

These repairs should be held up until we know whether there will be a regionalization of the district. ($41,000.00 reduction)

LINE ITEM - 00-820

As the admission of the statement, this line item can be eliminated and the fixed asset recommendation certainly does not [affect] the education of the children. ($3,632.00 reduction)

LINE ITEM - 00-1020

We would hope that the parent organization would be able to fund this program. It seems logical that this type of activity certainly does not [affect] the education of our children. ($1,100.00 reduction)

LINE ITEM - 18-210

The elimination of this program would keep the children in the classroom and the needed help should then come from the staff already in place. (classroom teachers) ($6,728.00 reduction)

LINE ITEM - 18-290

If the Line Item 18-210 was eliminated, the items in this line item would no longer be necessary. The supplies could come from the normal classroom equipment. ($1,200.00 reduction)

LINE ITEM - 24-290

We agree that if there is a minimum needed to support this program, we should allow the on staff people the equipment to effect this program to the students.

COMMISSIONER'S DETERMINATION

The Commissioner has carefully reviewed the arguments presented by the parties, as well as the record of the concessions made by them towards each other's position. In so doing, the Commissioner notes that, apart from the $12,000 concession by the Board in the basic budget which was formally approved by the Gloucester County Superintendent, neither party to this dispute had the authority to grant such concessions.

The Commissioner finds that the Borough's action in conceding certain programs within the cap waiver request by its additional appropriation of $34,063 is entirely outside that body's authority. When a cap waiver request is presented to the voters upon the authorization of the Commissioner and then defeated by the

voters, only the Commissioner himself has the legal authority to determine whether any or all parts of that cap waiver request are necessary in order to assure the provision of a thorough and efficient system of education. The governing body has no authority to authorize a tax levy funding all or part of the cap waiver request.

The Commissioner further notes that the Board in conceding to the reduction of its music program and agreeing to provide coordination of its child study team by other administrative personnel, rather than by the means originally contemplated in its cap waiver request, has likewise exceeded its authority. In so concluding, the Commissioner notes that the budget when presented to the County Superintendent for permission to advertise was approved as providing a thorough and efficient system of education conditioned upon the presentation of a cap waiver to the voters of the community. Consequently, that conditional approval status cannot be abrogated by the Board through specific line item concessions without the specific approval of such concessions by the County Superintendent. In the matter before the Commissioner, no such approval of concessions was sought or approved.

The following represents a line item by line item determination by the Commissioner in each area of specific reduction put forth by the Borough in its position statement.

Line Items 01-213, 02-213, 03-213

In regard to the art and music programs, the Commissioner finds such programs to be a significant contribution to the totality of a thorough and efficient education. To require such programs

currently in existence and taught by specialist to be taught by regular classroom teachers would represent a significant retrogression. Therefore, the Commissioner concludes that the Board has demonstrated the necessity for this portion of the cap waiver and directs that $52,740 in these three accounts be added to the 1992-93 tax levy.

Line Item 05-214

The Commissioner agrees with the Board that there is the necessity for continuing the services of a school librarian at the existing rate of 3 days per week. The Commissioner finds the Borough's argument of reducing the librarian to one day of service per week to be untenable. Further, as indicated above, the Board's concession to have the administration assume the child study team coordination role cannot be sustained.

Consequently, the Commissioner determines that the $31,644 in cap waiver in this line item is necessary.

Line Item 05-216

The Commissioner finds the Board's request for a part-time coordinator of its Basic Skills program to be necessary for meeting its responsibility to prepare applications, conduct evaluations and schedule meetings with parents. He therefore approves the inclusion of the $5,220 in the Board's cap waiver request.

Line Item 05-220

Approval of the cap waiver request for purchase of social studies textbooks in the amount of $1,222 is granted. The Board has established this as one of its district T&E objectives and the Commissioner finds the Borough's argument relative to possible regionalization to be irrelevant. Regionalization and/or a sending-

receiving relationship is speculative at this time and may not serve to hold the district's present needs hostage.

Line Item 05-230

The Commissioner finds persuasive the Board's argument that a reduction in this area, after a total elimination of expenditures in this account in 1991-92, would seriously hamper it in providing a thorough and efficient education. The $2,304 cap waiver requested in this account is granted.

Line Item 05-240

Having granted the Board's request for a cap waiver to employ an art specialist, the $3,078 for classroom art supplies is hereby approved.

Line 05-250

The Board's request in the amount of $1,000 for purchase of computer software is granted. The Commissioner finds the arguments presented by the Borough to be unresponsive.

Line Item 05-260a

The amount of $11,500 for purchase of child study team services is granted. These services are mandated by law and therefore must be provided.

Line Item 00-410

Nursing services are likewise mandated by law and cannot be eliminated. The Commissioner notes that the Borough concedes the continuance of these services by virtue of its additional appropriation of $34,063 contained within Resolution #71-92, therefore the $17,190 cap waiver for this line item is granted.

Line Item 00-520c

Opportunity for field trips is an integral and necessary component of a thorough and efficient education. While the current status of the law permits parents to contribute to such trips, children unable to pay must be permitted to attend at public expense. Therefore, a $3,200 expenditure for one field trip per year per class is a reasonable amount and such amount is to be added to the district's cap waiver request.

Line Item 00-720

The projects contemplated by the Board are reasonable and necessary. The $41,000 cap waiver requested by the Board is granted. Necessary repairs cannot be delayed pending the speculative possibility of regionalization.

Line Item 00-820

The Commissioner concludes that the Board's request for fixed asset appraisal is reasonable and necessary, therefore the cap waiver of $3,632 is granted for this line item.

Line Item 00-1020

The Commissioner grants the $1,100 for award certificates and assemblies requested by the Board.

Line Item 18-210

The $6,728 in cap waiver monies for purposes of providing a part-time supplemental teacher is granted. The Borough's argument that such services be provided by regular classroom staff is inconsistent with law.

Line Item 18-290

The Board's request in the amount of $1,200 is granted. The necessity for providing supplies and instructional materials to

Resource Room pupils cannot reasonably be argued. The Borough's position that the supplies are in some way related to the hiring of the part-time supplemental teacher is without foundation.

Line Item 24-290

The Borough in its Resolution #71-92 has conceded the $500 in this account and has already included it as part of its $34,063 supplemental appropriation. Therefore, the Commissioner sustains this cap waiver amount.

Accordingly, the Commissioner finds and determines that an additional amount by way of cap waiver of $183,258 is required by the Newfield Board of Education in order to provide a thorough and efficient system of education to its students. East Brunswick Township Board of Education v. East Brunswick Township Council, 48 N.J. 94 (1966); Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305 (1989)

The Commissioner hereby directs the Gloucester County Board of Taxation to adjust the Newfield School District's tax levy to reflect the aforesaid $183,258 for current expense which shall result in a total current expense tax levy of $857,449 for the 1992-93 school year.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 15, 1992

DATE OF MAILING - OCTOBER 15, 1992

252-92

6+-93
(252-92)

IN THE MATTER OF THE CAP WAIVER	:	
APPEAL OF THE NEWFIELD BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, GLOUCESTER COUNTY.	:	DECISION ON MOTION
	:	

JANUARY 15, 1993

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE NEWFIELD BOARD OF : COMMISSIONER OF EDUCATION
EDUCATION, GLOUCESTER COUNTY. : DECISION ON MOTION
:

For the Petitioner, Colleen A. Maier, Esq.
For the Board, Carl W. Cavagnaro, Esq.

This matter has come before the Commissioner of Education by way of Motion for Stay with accompanying affidavit from the Mayor of the Borough of Newfield seeking a stay of the decision of the Commissioner dated October 15, 1992. An extension was granted until December 14, 1992 for counsel for the Borough of Newfield to file a brief in support of the motion, which by letter dated December 2, 1992, counsel determined would not be submitted. No responsive papers were filed by the Board, although it was properly served with the motion and affidavit.

The affidavit accompanying the Motion for Stay filed by the Mayor of Newfield would have the Commissioner grant a stay of the cap waiver appeal rendered on October 15, 1992, observing that discussions are underway between the Newfield Board of Education and the Buena Board of Education with regard to a sending/receiving relationship, which, if formalized, would substantially change the demand for the programs and expenditures as requested in the cap waiver. The mayor's affidavit further contends that insofar as it

is halfway through the school year, the immediate implementation of new programs and expenditures will cause disruption and will result in the unnecessary use of taxpayers' money should the appeal of the Borough of Newfield be successful. Finally, the mayor argues that in the event the Borough of Newfield is successful in the pending appeal of the cap waiver before the State Board of Education, there will be a detrimental impact upon the School Board, the teachers and students, should the Board be forced to lay off teachers hired, and cut back programs implemented pursuant to the cap waiver.

Upon a careful and independent review of the record of this matter, the Commissioner denies the request for stay insofar as the Borough has failed to meet those standards articulated by the Court for the grant of the extraordinary relief sought herein as stated in Crowe v. DeGioia, 90 N.J. 126 (1982). Those contentions raised in the affidavit tendered by the Mayor of Newfield constitute mere speculation and therefore are not persuasive as to either irreparable harm, likelihood of success on the merits of the underlying claim of the matter or that the balancing of equities enures in favor of the Borough of Newfield.

Accordingly, IT IS hereby ORDERED on this 15TH day of January 1993 that the instant Motion for Stay be and hereby is DENIED.

IT IS SO ORDERED.

Marlene Fitzgerald

COMMISSIONER OF EDUCATION

JANUARY 15, 1993

DATE OF MAILING - JANUARY 15, 1993

254-92

254-92

C.C., on behalf of her minor child, T.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HARRISON, GLOUCESTER COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

OCTOBER 15, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4710-92
AGENCY DKT. NO. 359-10/91
(ON REMAND
AND CONSOLIDATED):
OAL DKT. NOS. EDU 9287-91
AND EDU 1167-92
AGENCY DKT. NOS. 359-10/91
AND 359-10/91

C.C. ON BEHALF OF HER MINOR CHILD T.C.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HARRISON, GLOUCESTER COUNTY,
Respondent.

J.R. Powell, Esq., on behalf of petitioner

Russell E. Paul, Esq., on behalf of respondent

Record Closed: August 13, 1992 Decided: August 31, 1992

BEFORE **NAOMI DOWER-LABASTILLE**, ALJ:

This matter was transmitted on June 25, 1992, as a remand of OAL Dkt. Nos. EDU 9287-91 and EDU 1167-92 (consolidated), by the Commissioner of Education who disapproved the consent order filed in those dockets. The parties have revised their stipulation in hopes that it will be consistend with the Commmissioner's directives.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

1. I have reviewed the record and the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Aug 31, 1992
Date

Naomi Dower-La Bastille
NAOMI DOWER-LABASTILLE, ALJ

Receipt Acknowledged:

Sept. 2, 1992
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 4 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

/cae

C.C., on behalf of her minor child, T.C.

PETITIONER,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HARRISON, GLOUCESTER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

STIPULATION OF SETTLEMENT

For Petitioner, J. R. Powell, Esq.
For Respondent, Russell E. Paul, Esq.

On September 16, 1991 the respondent, Board of Education of the Township of Harrison, took Board action to rescind its existing busing policy. On October 3, 1991 the Petitioner, C.C. on behalf of her minor child, T.C., brought a Petition of Appeal with Motion for Emergent Relief before the Office of Administrative Law acting on behalf of the Commissioner of Education. Petitioner sought a stay of the Board decision of September 16, 1991 rescinding its existing busing policy.

On October 3, 1991 the Commissioner of Education issued a Decision on Motion which granted a preliminary injunction to the petitioner during the pendency of the transmittal of this matter to the Office of Administrative Law for a hearing to determine whether, under the facts of this case, the respondent, Board of Education, failed to give adequate notice and whether the Board's action in ceasing its discretionary practice was arbitrary, capricious or unreasonable due to insufficient notice, and if so, what remedy would be appropriate under the circumstances.

Subsequent, thereto, on October 11, 1991 the petitioner filed a Motion for Interlocutory Appeal, with Brief, to the State Board of Education (Docket No. 51-91). Petitioner contended that the Commissioner of Education had failed to hear and decide certain alleged Constitutional issues. The respondent contended that the matter was moot in that the Commissioner of Education had heard and decided the case except as to adequate notice.

On February 5, 1992 the State Board of Education issued a decision in the above captioned matter (Docket No. 51-91) and remanded the entire matter back to the Commissioner of Education through the Office of Administrative Law for a full hearing on the merits of the substantive claims raised by the petitioner subject to any jurisdictional limitations as to constitutional matters , and also a hearing as to the question of adequate notice. Said hearing before the Office of Administrative Law was scheduled for April 14, 1992. Pending the recommendation of the Administrative Law Judge to the Commissioner of Education and the Commissioner's of Education Decision, the status quo is to be maintained and the Board of Education is not permitted to amend its existing busing policy.

Prior to the aforementioned hearing then scheduled for April 14, 1992, the respective parties have held settlement conferences in an effort to resolve the instant matter to the satisfaction to all parties without the necessity of further proceedings. The Petitioner and Respondent recommend to the Commissioner of Education and the State Board of Education that they adopt a rule embodying the procedure set forth below for all school districts in the State of New Jersey which seek to change existing busing policy. The Petitioner and Respondent acknowledge that same is a "recommendation" and that the Commissioner of Education and the State Board of Education are not bound to accept same.

Based on the above, for purposes of judicial efficiency, for deciding this matter pursuant to the entire controversies doctrine, and for good cause shown

THE PETITIONER AND RESPONDENT BY WAY OF STIPULATION OF SETTLEMENT do hereby on this 10th day of August, 1992 AGREE AND STIPULATE as follows:

1. The Petitioner and Respondent mutually request that the Commissioner of Education rescind its injunction restraining the Respondent, Board of Education of the Township of Harrison, from amending its existing busing policy for the purpose of permitting said Respondent to adopt a proposed amendment to its busing policy as attached hereto and as set forth on Schedule "A" being Transortation Policy 7:9 and Transportation Policy 7:10.

2. The Petitioner and Respondent mutually agree that the following proposed amendment to the busing policy as set forth on Schedule "A" shall be adopted in accordance with the following procedures which shall be deemed to be mandatory in the future for adoption of the particular changes to the existing busing policy as set forth on Schedule "A".

Respondent shall be required prior to any change in any busing policy to adopt any proposed change to any busing policy at a regularly scheduled school board meeting on **first reading**, and prior to any final adoption a **second reading** must be held at a regularly scheduled school board meeting, which second meeting shall be no less than 20 days or no more than 40 days after the first reading, and a **third and final reading** of said proposed change to any busing policy shall be held at a regularly scheduled meeting of the board of education which shall be no less than 50 days and no more than 70 days after the first reading of same, and that any actions taken at the aforesaid three regularly scheduled meetings shall be in accordance with the Open Public Meetings Act of New Jersey (N.J.S.A. 10:4 et seq), and notice of the aforesaid change in any busing policy must be publicly placed at the place adopted by the board of education for public notices immediately following the first reading.

3. The Petitioner and Resondent agree that upon the Respondent carrying out the procedures as above set forth for a proposed change in its existing busing policy as set forth in Schedule "A" attached hereto, the within captioned action shall be dismissed with prejudice.

DATED: Aug 10, , 1992.

The attorneys for the Petitioner and the Respondent having read the above proposed Consent Order do hereby consent to same as to form and content.

J. R. Powell, Esq., Attorney for Petitioner, C.C. on behalf of her minor child, T.C.

Russell E. Paul, Esq., Attorney for Respondent, Board of Education of the Township of Harrison, Gloucester County.

C.C., on behalf of her minor child, T.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HARRISON, GLOUCESTER COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record of this remanded matter and the initial decision of the Office of Administrative Law in the form of a joint stipulation of settlement have been reviewed.

Upon review, the Commissioner notes that two of the three concerns raised in his previous decision remanding this matter for revision of settlement terms have been adequately addressed, namely the inappropriate drafting of the settlement document as a consent order and clarification of the nonbinding nature of the parties' request that the Commissioner adopt statewide directives on local board transportation decisions patterned after the procedures agreed to by the parties in this matter.

The third and most important concern, however, remains unaddressed in the revised stipulation, which, like its predecessor, appears on its face to improperly bind future boards as to what procedures shall be used to revise district policy. Nonetheless, in the interest of judicial economy, rather than rejecting the revised

settlement and remanding this matter yet again, the Commissioner determines instead to accept the settlement with the express understanding that language deeming agreed-upon procedures for adoption of changes to busing policy to be "mandatory in the future" shall apply only during the life of the present Board, that is, until organization of the new Board following the annual school election in April 1993. Should any new Board in the future desire to examine and/or alter the procedures set forth in the settlement agreement, it is not bound by the terms of same.

Accordingly, subject to the above-stated limitation as to the effective term of the agreement, the Commissioner accepts the initial decision and settlement as the final disposition of this matter subject to compliance by the parties with the terms of the agreement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 15, 1992

DATE OF MAILING - OCTOBER 15, 1992

255-92

HUDSON COUNTY TRANSPORT, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning transport company sought money damages when State-operated district rescinded contract awarded by prior Board of Education.

ALJ found initial award of contract to petitioner violated rules and regulations as petitioner was not lowest bidder and did not meet specifications of 36-passenger buses. (N.J.A.C. 6:21-16.5(d) and (e) and N.J.S.A. 18A:18A-37) ALJ further found that Board's action was ultra vires as it was in violation of State order to suspend awarding of contracts. Therefore, rescission was proper and petition was dismissed.

Commissioner adopted findings and determination in initial decision.

OCTOBER 16, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7544-90
AGENCY DKT. NO. 295-8/90

HUDSON COUNTY TRANSPORT, INC.,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Dennis McGill, Esq., for petitioner

David F. Corrigan, Esq., for respondent (Murray, Murray & Corrigan, attorneys)

Record Closed: July 24, 1992 Decided: August 31, 1992

BEFORE **EDITH KLINGER**, ALJ:

On December 13, 1989, Hudson County Transport, Inc. filed a complaint with the Superior Court of New Jersey, Law Division, Hudson County, Docket No W-03100689, seeking a judgment against the State-Operated School District of the City of Jersey City (District) for damages allegedly sustained when the District rescinded its contract with Hudson County Transport for the transportation of pupils.

The suit sought damages from the District in the amount of $275,040 in net profits lost as a result of the alleged breach of contract, punitive damages, cost of suit, attorney's fees, and such other relief as the court deemed appropriate. The District filed its answer on March 14, 1989. On April 27, 1990, Maurice J. Gallipoli, J.S.C., entered an order dismissing the complaint and/or transferring the matter to the Commissioner of Education pursuant to the doctrine of primary jurisdiction.

The Commissioner transmitted the matter to the Office of Administrative Law (OAL) on September 19, 1990 for hearing 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 a number of adjournments, hearings were held on June 12 and 13, 1992. The record was held open to allow the parties to submit briefs, and it was closed on July 24, 1992.

At a prehearing conference held on January 15, 1991 before Marylouise Lucchi-McCloud, ALJ, it was decided that the following were the issues to be resolved at hearing:

1. Does the Commissioner of Education have jurisdiction over an action alleging breach of contract and the power to award damages for the breach?

2. Did the District violate *N.J.S.A.* Title 18A when it rescinded petitioner's contract or reject petitioner's bid?

   a) Did the Jersey City Board of Education (Board) have the power/authority pursuant to the Order for Emergent Relief of the Commissioner of Education dated August 9, 1988 in the matter entitled *Walter J. McCarroll v. Bd of Ed. of City of Jersey City* to approve the award of a contract for transportation by its Resolution 5.20 on September 20, 1989?

3. To what relief, if any, is petitioner entitled?

JURISDICTION OF THE COMMISSIONER

The education statute, *N.J.S.A.* Title 18A, specifically *N.J.S.A.* 18A:6-9, grants the Commissioner jurisdiction to hear and determine controversies and disputes arising under school law or under the rules of the State Board of Education or the Commissioner of Education. Accordingly, the Commissioner and, therefore, the OAL have jurisdiction over school transportation contract disputes which fall under Chapter 39 of the education statute.

This jurisdiction over school bus contracts was affirmed by the New Jersey Supreme Court in *Rankin v. Bd. of Ed. of Egg Harbor Tp.* 134 *N.J L.* 342 (Sup. Ct. 1946), *aff'd* 135 *N.J.L.* 299 (E. & A. 1947). I therefore **CONCLUDE** that the Commissioner of Education has the

jurisdiction to hear the present dispute concerning the awarding of school bus transportation contracts.

However, purely contractual disputes do not fall under the school laws. The Superior Court has jurisdiction to hear breach-of-contract cases involving the transportation of pupils where money damages are sought. *Fair Lawn Bd. of Ed. v. Fair Lawn Plaza Taxi, Inc.*, 55 *N.J. Super.* 357 (App. Div. 1959). Accordingly, I **CONCLUDE** that the Commissioner of Education does not have jurisdiction to award money damages in the event that Hudson County Transport had a valid contract for transportation of pupils which was breached by the District.

BACKGROUND INFORMATION

On May 23, 1988, Walter J. McCarroll, assistant commissioner, Division of County and Regional Services, Department of Education, brought an Order to Show Cause before the Commissioner of Education why the Commissioner should not recommend to the State Board of Education the issuance of an administrative order establishing a State-operated school district in Jersey City pursuant to *N.J.S.A.* 18A:7A-14 and 15. The order was accompanied by a Verified Petition and a Motion for Emergent Relief.

The Commissioner issued an Order of Emergent Relief on August 9, 1988 affirming the order of Ken R. Springer, ALJ, of July 25, 1988 resulting from the Motion for Emergent Relief.

Under the terms of the order, the Board was obligated to provide the "assistant commissioner for county and regional services with prior notice of its intended action with only four days' notice" relating to any of its personnel and fiscal affairs.

In order to be sure that the Board complied with the order, it was directed by the Commissioner to submit agendas of its meetings and copies of proposed resolutions to Dr. Elena Scambio, now superintendent of the District, for review. After review, she could either enjoin the Board from taking any action on a resolution or permit it to consider the resolution and take whatever action it deemed appropriate; the Board was forbidden from taking any action on a resolution without prior permission from Scambio.

Two State Board members, Laura Mays and Judi Granick, were assigned to monitor every Board meeting to observe and report to Scambio. The Board agendas and proposed resolutions were to be submitted to Scambio for review through the monitors.

REVIEW OF EVIDENCE

Since it came into existence in 1976, Hudson County Transport has been in the business of providing buses for pupil transportation to the Jersey City school system.

The Jersey City Board of Education (Board) provides transportation for special education pupils. Each year, it prepares specifications and invites bids on 154 different bus routes. William Massa, the chief attorney to the Board in 1989, testified that the bid specifications for the 1989-90 school year were prepared by James Seaman, an assistant attorney to the Board.

Massa was chief attorney to the Board between September 1960 and October 4, 1989, except for a brief period in 1984 and 1985. He resumed the position in July 1985. Seaman had primary responsibility for reviewing bidding specifications and bus contracts for the Board. He operated as assistant to Massa, who had the overall responsibility.

On May 17, 1989, the Board approved the special education transportation specifications prepared by Seaman for the school year 1989-90

Potential bidders were provided with a packet containing the specifications and "route sheets" designating each numbered route individually by means of a list of the addresses of the students along the route and the type of vehicle which would be required to pick up the students at the listed addresses and take them to and from the A. Harry Moore School in Jersey City. An "inter-office memo" from the Transportation Department dated July 20, 1989 was sent to the bus transportation vendors from Robert J. Roggenstein, the principal in charge of transportation and food services in the central office, informing them that they would be required to provide the type of vehicle specified on the route sheets.

On the basis of the bids submitted, Hudson County Transport was awarded the contracts for Routes 433, 445, 475, 477, 478, 479, 482, and 516. The specifications for all of these routes called for a 36-passenger bus.

A 36-passenger bus is a bus designed to carry 36 passengers. A 54-passenger bus is a bus designed to carry 54 passengers. The terms have specific meanings in the industry and designate two different types of vehicles. A 36-passenger vehicle is approximately 8 to 10 feet shorter in body length than a 54-passenger vehicle. Its wheelbase is between 149 and 170 inches. A 54-passenger bus has a wheelbase between 224 and 260 inches. The 36-passenger buses were required on routes traveling through certain streets in Jersey City because many of the streets are narrow and have cars illegally double-parked along the side. The 54-passenger bus, with its longer wheelbase, could not always make the turn into the street.

The students served by the buses are children with special needs. The buses have an aide provided by the vendor who rides along with the driver and helps to pick up and drop off the children and generally maintain order. The students are picked up from their homes in the morning, taken to school, and dropped off at their homes in the afternoon. If a bus is unable to turn into the street to leave a child at his or her house, the aide must accompany the child from the bus and deliver the child safely to the door. This means that the driver is left alone on the bus with the remaining children while the aide is gone. The driver does not always take care of the remaining children, creating a potentially unsafe situation. If the buses were able to leave the child at the child's door, the aide could deliver the child and return to the bus almost immediately. A second aide on the buses would increase the cost of transportation significantly.

Janet Gaita, superintendent of transportation in the District since April 1990, testified that when the District receives complaints about transportation from parents, they are filed and used to make changes in subsequent years. Parents called the District to complain that the buses were not taking the children directly to their doors. It also takes longer to cover a bus route when the bus has to wait for an aide to walk a child down the street and return to the bus. When the District called the bus company to complain about the situation, it was told that the buses on the routes were too big to get around cars double parked at the street corner and that the streets themselves were too narrow.

Gaita also explained that 90 percent of the students transported are neurologically or psychologically impaired; by the end of the day, they become hyperactive on a large bus because there is more room for them to run around and get into trouble. They are more safely confined on the smaller buses and much better control can be maintained.

The bids for bus transportation for the 1989-90 school year were opened on August 3 1989 by the Board's business office. At the meeting of the Board on August 23, Resolution 5.102 was adopted awarding transportation contracts to various vendors, including those to Hudson County Transport for the routes mentioned above. The contracts were awarded even though Hudson County Transport did not specify in its proposal the type of equipment it would provide. New Bergen Livery, the next lowest bidder for these routes, was able to provide 36-passenger buses.

Between August 23 and September 7, 1989, the District attempted to inspect the vehicles to be provided by Hudson County Transport to comply with the specifications under the transportation contract. This inspection was authorized by Paragraph 49 of the Outline of Services required in the bid proposal, "to insure that proper vehicles and proper number of back-up vehicles are on hand to fulfill all obligations to be met to comply with all specifications as set forth."

When Christopher Genes, bus inspector, went to Hudson County Transport to inspect the required 36-passenger buses, he was told that they were not available.

Gaita requested legal advice from Seaman on September 6, 1989. She also spoke to Judi Granick, who became the State executive assistant to the State District superintendent on October 4, 1989. Seaman responded to Gaita's inquiry on September 6, 1989 that he had been directed by Granick not to award the contracts to Hudson County Transport. The routes in question were to be rebid.

On September 6, 1989, Gaita wrote a letter to Allan Manzo, president of Hudson County Transport, canceling the contracts for Routes 433, 445, 475, 477, 478, 479, 482, and 516 because Hudson County Transport did not have the necessary 36-passenger buses to operate these routes and did not meet the required specifications. The Board adopted Resolution 5.102 ratifying the action of the director of transportation, canceling the routes awarded to Hudson County Transport, and awarding them to New Bergen Livery, the next lowest bidder. The routes were to be serviced by this vendor for 30 days on an emergency basis until the contracts could be resubmitted for bids.

A hearing was held on Wednesday, September 13, 1989, between the Board and Hudson County Transport. Manzo appeared and was represented by counsel. Manzo's attorney argued that in all prior years, vendors were allowed to substitute a 54-passenger

bus for a 36-passenger bus. Gaita stated that even though this was true, the Transportation Department had changed its policy. Nevertheless, the pupil transportation contract which was signed by Hudson County Transport on August 23, 1989 was signed by the president of the Board on September 14, 1989.

On September 18, 1989, Massa issued a memorandum to the members of the Board expressing the opinion of counsel that

> it was the opinion of the Board's Transportation Committee and the Attorney that the original award of the contract was proper and legal. The rationale being that the specifications herein were too restrictive and did not promote competitive bidding as evidenced by only one vendor's ability to comply. Support for this conclusion may be found in *N.J.A.C.* 6:21-15 92)(c) [*sic*] in part:
>
> > " . . . To accomplish this purpose, the specifications must be definite and precise. Common standards must be set up. In order that all bidders shall be on an equal basis, the same information must be furnished to all Numerous bidders create competition. Therefore, the specifications must not restrict healthy bidding and make competitive bidding difficult."
>
> While the same information was furnished to all bidders, it should be noted that the said specifications were heretofore not rigidly enforced and that prior practice was to award contracts for buses whose capacity was greater than 36 passengers.

He recommended that the Board reinstate the transportation contract of Hudson County Transport.

Granick was provided with an agenda for the meeting of the Board scheduled for September 20, 1989. There was no mention of the Hudson County Transport contract in the materials submitted to Granick prior to the Board meeting During the course of the meeting, the Board went into closed caucus. According to the transcript of the caucus, it discussed the Hudson County Transport contract and decided that, pending an actual State takeover of the District, it had the authority and the responsibility to reaward the routes to Hudson County Transport.

Having apparently resolved to do this, the Board then called in Granick to ascertain what action the State would most likely take if they were to carry out their intent. The Board members explained to Granick that based on the findings of Massa following the

hearing of September 13, 1989, it was their opinion that the vendors had always supplied 54-passenger buses on routes for which 36-passenger buses were specified and that it would be unfair to deprive long-standing vendors of their opportunity to receive contracts from the Board, particularly where Hudson County Transport's proposal was $21,000 lower than the next lowest, and only other, bidder for the routes in question.

At this point, Granick requested that the meeting go off the record. During the off-the-record discussion, she pointed out to the Board that the State would almost certainly take over the District in the near future and that if the Board pursued its course of reinstating the Hudson County Transport contract, it would expose itself to litigation because the Commissioner would not approve the reinstatement.

Shortly after this, Granick left the caucus and hurried to the telephone to inform Scambio of this development in accord with her instructions to report anything which caused her concern.

Before Granick could return to the meeting room, the Board had left its caucus, returned to the public part of the meeting, and adopted revised Resolution 5.20 reinstating the transportation contract with Hudson County Transport effective at the end of the 30-day period during which the emergency contract had been awarded.

In October 1989, the State of New Jersey took over the school district, replacing it with the State-Operated School District of Jersey City. The new District rescinded revised Resolution 5.20 and authorized the director of transportation to rebid the special education routes served by Hudson County Transport as soon as possible. Massa was removed as chief attorney to the Board on October 4, 1989.

By letter dated November 16, 1989, Manzo was informed by Melindo A. Persi, interim school business administrator, that the State District had decided to rebid the routes, and she sent him a copy of the resolution of November 3, 1989 authorizing the rescission and resubmission for bids.

1. I **FIND** that the Board's specification for 36-passenger buses on certain of its routes was reasonable and designed to promote the safety of the special education students to be transported.

2. I **FIND** that the requirement of 36-passenger buses was a substantial condition imposed upon bidders since it directly affected the safety of the pupils transported.

3. I **FIND** that the Board awarded the transportation contract to Hudson County Transport knowing that the vendor could not fill the specifications and supply 36-passenger buses for the specified routes; the contract for transportation was signed by the Board on September 14, 1989 with full knowledge that Hudson County Transport was unable to comply with the specifications which the Board approved on May 17, 1989.

4. I **FIND** that the Board reinstated the transportation contract at its meeting of September 20, 1989 in a procedure which violated the Order for Emergent Relief dated August 9, 1988, in that the resolution by which this was accomplished was not submitted to Scambio for review prior to the meeting.

DISCUSSION OF LAW AND CONCLUSIONS

Every contract or agreement for the performance of any work for which the contract price is to be paid with school funds must be awarded only by a board of education after public advertising for bids and public bidding rules unless specifically exempted from this procedure by law. *N.J.S.A.* 18A:18A-4. The contracts must be awarded to the lowest responsible bidder. *N.J.S.A.* 18A:18A-37.

The regulations at *N.J.A.C.* 6:21-15.1 governing the responsibility of district boards of education to annually bid transportation contracts provide in pertinent part:

> (b) The district board of education shall reserve the right to reject any or all bids.
>
> * * *
>
> (d) All bidding shall be designed to prevent fraud, favoritism and extravagance, to safeguard the taxpayers and protect the lowest responsible bidder.
>
> (e) The specifications must be definite, precise and impose common standards.

> (f) These specifications and any revisions to these specifications shall be furnished to all prospective bidders and shall not restrict competitive bidding.
>
> (g) Variations from the specifications prescribed by the State Board must be reasonable and are subject to review by the Commissioner and the State Board.

N.J.A.C. 6:21-16.5 further requires that:

> (c) Contracts for the transportation of handicapped children to and from any other school district shall be awarded by formal action of the district board of education in a public meeting to the lowest responsible bidder and whose bid the board has determined is the least costly method. . . .
>
> (d) Any award of a contract made by a district board of education after advertisement must be according to the terms advertised to prospective bidders. Each bidder shall be compelled to conform to every substantial condition imposed upon other bidders.
>
> (e) After a contract has been awarded, a bidder cannot be relieved from conforming to the conditions imposed upon him or her in the specifications and cannot substitute something which does not conform to the specifications.
>
> *See N.J.S.A.* 18A:18A-22 of the Public Schools Contracts Law.

The practice of competitive bidding for public contracts is "rooted deep in sound principles of public policy " *Hillside Township v. Sternin,* 25 *N.J.* 317 (1957).

> The purpose is to secure competition and to guard against favoritism, improvidence, extravagence, and corruption. Statutes directed toward these ends are for the benefit of the taxpayers and not the bidders; they should be construed with sole reference to the public good; and they should be rigidly adhered to by the courts.
>
> *Id.* at 322. *See also Belousofsky v. Bd. of Ed. of City of Linden,* 54 *N.J. Super.* 219, 223 (App. Div. 1959).

The aim of competitive bidding is to put all actual or potential bidders on the same footing. *Carbro Construction v. Utilities Authority,* 233 *N.J. Super.* 116, 122 (App. Div. 1989). These statutory aims would be defeated "if a bidder were permitted to supplement his bid in essential details by private understandings or otherwise" and can only be achieved by

"curtailing local discretion and requiring strict compliance with bidding guidelines." *Belousofsky* at 223; *Carbro* at 123.

> So it follows that all bids must comply with the terms imposed, and any material departure therefrom invalidates a nonconforming bid as well as any contract based upon it. If this were not the rule, the mandate for equality among bidders would be illusory and the advantages of competition would be lost.
>
> *Hillside* at 323, 324. *See also In re Award Contract Construction of Bayonne Park,* 168 *N.J. Super.* 33, 38 (App. Div. 1979).

A bidder not in compliance with specifications may not qualify to win the contract, or acceptance of his bid may be reversed. *See Lowenstein, supra*; *Hillside* at 328 (defendant's nonconforming bid was not subject to acceptance by the township); *Belousofsky* at 222 (bid held too uncertain to be validly in conformance with specifications); *In re Award Contract Construction of Bayonne Park* at 45 (award of contract reversed and matter remanded to Commissioner where low bidder failed to fulfill post-award requirement of submission of contract and performance bond). As was held in *Hillside,*

> the significance of the expression "lowest bidder" is not restricted to the amount of the bid; it means also that the bid conforms with the specifications. . . . [Citations omitted.] [A]ny material departure stands in the way of a valid contract, and the defaulting person cannot be classed as a bidder at all.
>
> *Id.* at 324.

It appears from *Hillside, supra*, and I **CONCLUDE**, that Hudson County Transport was not the "lowest bidder" for the pupil transportation contracts because it could not conform to the specifications. I therefore **CONCLUDE** that pursuant to *N.J.S.A.* 18A:18A-37, the Board could not legally award it the contracts. A bidder is required by this statute to be "responsible" as well as to offer the lowest cost.

I **CONCLUDE** that the award of the contracts violated *N.J.A.C.* 6:21-16.5(d) in that the award was not made in accord with the terms advertised to prospective bidders. I **CONCLUDE** that it further violated *N.J.A.C.* 6:21-16.5(d) in that Hudson County Transport was not compelled to conform to a substantial condition (the provision of 36-passenger buses) imposed upon the other bidder, New Bergen Livery.

I **CONCLUDE** that the award of the contracts violated *N.J.A.C.* 6:21-16.5(e) in that Hudson County Transport was relieved from conforming to the specifications and allowed to substitute vehicles which did not conform to specifications.

Based on the above, I **CONCLUDE** that the award of the transportation contracts to Hudson County Transport was in violation of the laws and regulations governing public school contracts and was therefore an *ultra vires* act by the Board. Consequently, I **CONCLUDE** that the award of the contracts could and should be reversed since the Board could not have accepted the bids; there was no need to rescind the contracts.

I further **CONCLUDE** that the Board could not reinstate the contracts with Hudson County Transport because it could not have awarded them initially. I **CONCLUDE** that, in addition, the Board had been deprived of the power to enter into contracts without the review of the state monitors pursuant to the Order of Emergent Relief dated August 9, 1988.

I **CONCLUDE** that there is no merit in petitioner's argument that it was entitled to the award of an illegal contract because such contracts had been awarded illegally in the past. It even appears that Hudson County Transport, along with the other bidders, was given specific notice of the Board's intent to require conformity with the specifications for the 1989-90 school year as part of the packet sent to potential bidders, although Manzo could not recall whether or not he saw the memorandum by Roggenstein prior to submitting his bid.

I **CONCLUDE** that there is no merit in petitioner's argument that the requirement of 36-passenger buses is too restrictive and discourages competitive bidding because most vendors do not have this equipment. The specifications are definite, precise, and impose a common standard as required by *N.J.A.C.* 6:21-16.5(e). The specifications were properly developed to address the special needs of the student population to be served, not the vested interests of prospective bidders. A bidder willing to obtain the equipment will presumably plan for it and account for the cost in the bid submitted. Bidders with no interest in obtaining the required equipment need not bid. There is no restriction here on competitive bidding, only on noncompetitive bidders.

Accordingly, I **CONCLUDE** that the petitioner is entitled to no relief in this matter.

ORDER

It is hereby **ORDERED** that Hudson County Transport's petition be **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 31, 1992
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

Sept. 2, 1992
DATE

Maureen K. Kelley
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 4 1992
DATE

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

md/e

APPENDIX

WITNESSES

For petitioner:

William Massa, Esq.
Allen Manzo

For respondent:

Linda Wells, Manager,
Bureau of Transportation,
NJ Dep't of Education
Robert Roggenstein
Janet Gaita
Judi Granick

EXHIBITS

P-1	Transcript, Board Proceedings, June 5, 1985
P-2	Commissioner's Order for Emergent Relief, August 9, 1988
P-3	Board Inter-Office Memorandum, July 20, 1989
P-4	Board Route Sheets
P-5	Board Resolution 5.102, August 23, 1989
P-6	Board Letter to Manzo, September 6, 1989
P-7	Board Letter to Gaita, September 6, 1989
P-8	Board Letter to Seaman, September 6, 1989
P-9	Board Hearing Transcript, September 6, 1989
P-10	Board letter to Roggenstein, September 11, 1989
P-11	Board Hearing Minutes, September 13, 1989
P-12	Board Letter to Board members, September 18, 1989
P-13	Board Resolution 5.20, September 20, 1989
P-14	Board Resolution, October 1989
P-15	Board Letter to Schiller, October 20, 1989
P-16	Board Letter to Manzo, November 16, 1989
P-17	NJSC App. Div. Opinion in *Murphy v. J. City Bd. of Ed.*
P-18	Bid calculations for each route

R-1	Hudson County Transport Proposal and Specifications
R-2	Pupil Transportation Contract
R-3	Complaint
R-3a	Answer
R-4	Order Transferring Matter to Commissioner of Education
R-5	Resolution, May 17, 1989
R-5a	Memorandum, Kaminski to Massa, May 9, 1989
R-6	Order Disqualifying Plaintiff's Counsel
R-7	Transcript, September 20, 1989
R-8	Proposed Resolution, September 20, 1989
R-17	Memorandum, Wells to Scambio, October 19, 1989

OAL DKT. NO. EDU 7544-90

HUDSON COUNTY TRANSPORT, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner concurs with the ALJ that because petitioner could not conform to material and properly drafted specifications, the Board's initial contract award to it was in violation of law and ultra vires, as was its attempt to reinstate such contract following rescission. Moreover, the Board's actions in reinstating the contract were in direct violation of the State order limiting its ability to award contracts in view of impending establishment of a State-operated school district.

Accordingly, the initial decision of the Office of Administrative Law, finding that petitioner has no entitlement to relief and dismissing the Petition of Appeal, is affirmed for the reasons well stated therein.

IT IS SO ORDERED.

OCTOBER 16, 1992

DATE OF MAILING - OCTOBER 16, 1992

John Ellis
COMMISSIONER OF EDUCATION

256-92

256-92

J.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION ON MOTION
RESPONDENT.	:	

SYNOPSIS

Petitioning 18-year-old pupil classified as neurologically impaired since 1989 appealed denial by NJSIAA's Eligibility Appeals Committee to waive Article V, Section 4J of the NJSIAA Bylaws (eight semester rule). Petitioner contended he should be allowed to participate in interscholastic sports because of his classification and the fact that he has participated in interscholastic sports for, at most, only three semesters.

After careful review of record, Commissioner found no reason to reverse NJSIAA's decision. Commissioner found petitioner failed to demonstrate emergent relief was warranted in that participation in interscholastic sports has been adjudged by Courts of this State as a privilege not a right. Further, petitioner failed to demonstrate application of rule worked hardship upon him that outweighed harm to Association and other student-athletes conforming to law. Association properly applied its eligibility rules. Petition was dismissed.

OCTOBER 19, 1992

J.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION ON MOTION
RESPONDENT.	:	

For Petitioner, Bernard E. Malin, Esq.

For NJSIAA, Picco, Mack, Herbert, Kennedy, Jaffe, and Yoskin (Michael J. Herbert, Esq., of Counsel)

This matter was opened by way of petition to the Commissioner pursuant to N.J.S.A. 18A:11-3, which authorizes the Commissioner to hear and decide appeals from decisions of the New Jersey State Interscholastic Athletic Association (NJSIAA).

J.F., hereinafter petitioner, is an 18-year-old pupil classified as neurologically impaired since 1989 whose request with regard to football and wrestling for a waiver of Article V, Section 4J of the NJSIAA Bylaws was denied by the Eligibility Appeals Committee of NJSIAA on September 11, 1992. Said article of the Association's Bylaws provides that no student shall be eligible for high school athletics after the expiration of eight consecutive semesters following his/her entrance into the ninth grade. Petitioner avers he has participated in sports for only two semesters, although he concedes that when he originally entered ninth grade, which he later repeated, he did participate for eight

or nine days of practice, thus amounting, at most, to participation in interscholastic football for only three semesters. He claims he did not engage in athletics during school years 1988-89 and 1989-90 except as to practice days because he believed himself ineligible to participate and because he was having intensive therapy and emotional problems at the time.

Petitioner claims his situation is not a "red shirting" situation and relies on the transcript of the hearing before the NJSIAA Eligibility Appeals Committee to establish that although he would be a starting player were the waiver granted, he is not someone whom the coaches tried to hold back to develop until he became bigger as a fifth-year player because he is not a large player by any means. Moreover, petitioner avers that during his first and second freshman years, his situation as a neurologically impaired student, "unmanageable and uncontrollable, frustrated and confrontational" (Brief in Support of Petition on Emergent Relief, at Point Three), was beyond his control. He submits that if the situation were beyond his control, then he should not be responsible for the fact that he did not participate. Combining this fact with the fact that the child study team in his district indicates that sports participation has been extremely important to his morale, petitioner advances the position that the philosophy of the NJSIAA would be best served by the grant of an exception to the eight semester rule.

Finally, by certification from petitioner's mother, attached to the petition and brief, it is asserted that petitioner will suffer irreparable harm if he is denied a waiver of the eight

semester rule in that "[h]e does not participate in any other scholastic sports and does love football." (Certification dated October 1, 1992)

Respondent NJSIAA argues the Commissioner should affirm the decision of the NJSIAA denying eligibility on the basis of the eight semester rule and for failure to meet the standards for pendente lite restraints as set forth by the Court in Crowe v. DeGioia, 90 N.J. 126 (1982).

Citing Burnside v. NJSIAA (unpublished decision of the Appellate Division, Docket No. A-625-84T7, decided November 15, 1984; cert den. 101 N.J. 236 (1985)), at page 5 of NJSIAA's Letter Brief for the dual propositions that students do not have a right to participate in interscholastic athletics, NJSIAA contends neither the Commissioner nor the courts have ever viewed the denial of athletic eligibility as constituting irreparable injury warranting the extraordinary relief sought herein.

Further, NJSIAA argues that participation in interscholastic sports is subject to eligibility requirements as established by NJSIAA, subject to review and approval by the Commissioner of Education, and more particularly in this case, to Article V, Section 4J of the NJSIAA Bylaws, and NJSIAA Interpretive Guidelines for Student-Athlete Eligibililty, Handbook, at p. 66, wherein it is stated that "'participation' in any sports season will begin on the very first day that a student-athlete participates in or attends practice in a particular sport." (Reply Brief, at pp. 8-9) It contends that petitioner participated as a member of the football team in 1988, 1990 and 1991 and could have participated in his second year, since his academic deficiencies were waived by virtue of Article V, Section 4H of the Bylaws.

The Association argues further that although petitioner repeated a grade after becoming a classified student in the Spring of 1989, he never interrupted his schooling, he remained eligible to participate through all four years of high school, he never transferred, missed a year of schooling nor interrupted his high school years due to hospitalization or illness. Noting that the eight semester rule does not guarantee a student eight semesters of competition, but instead speaks to eligibility for interscholastic sports participation based on eight semesters of attendance at a secondary school, the Association submits petitioner has had an opportunity to participate in four years of athletic competition. It claims there are thus no circumstances beyond the student's control which justify granting him an extra year of eligibility in this case.

In support of the application of the eight-semester rule, the Association cites such cases as R.A.S. v. NJSIAA, 1987 S.L.D. 1698; D.S. v. NJSIAA, 1987 S.L.D. 211; R.S.R. et al. v. NJSIAA, decided by the Commissioner November 13, 1986; T.S., Jr. et al v. NJSIAA, decided by the Commissioner November 7, 1983; S.S., on behalf of his son, M.S. v. NJSIAA, 1986 S.L.D. 2314; and Kirk Snyder v. NJSIAA, 1983 S.L.D. 1076. Based on such precedents and the arguments mentioned above, respondent argues that the Eligibility Appeals Committee's decision was grounded on the rules and regulations of the Association, and thus, petitioner has no substantial likelihood that the decision will be overturned on appeal. Thus, the Association advances the position that petitioner has failed to meet the second prong of the Crowe, supra, standards.

Finally, NJSIAA submits that petitioner will suffer no undue hardship pursuant to the third prong of the Crowe, supra, standards insofar as he has had four years of eligibility, and participated in football for three of those years. On the contrary, the Association contends that as a starting player on the football and wrestling teams, petitioner would displace a student who has met all of the eligibility requirements of the Association and who has not been awarded an extra year of eligibility. If the stay is granted, this situation would cause hardship both to the Association, which maintains an interest in seeing that its eligibility rules are properly enforced, and especially to those displaced students.

The Commissioner, upon a careful review of the record, including the transcript of the hearing before the NJSIAA Eligibility Appeals Committee, the arguments submitted by the parties and the exhibits petitioner presented to the Eligibility Appeals Committee, finds that petitioner has advanced no compelling reason to reverse the decision reached by NJSIAA denying him a waiver of the eight semester rule, Article V, Section 4J. See Dam Jin Koh and Hong Jun Kim v. NJSIAA, 1987 S.L.D. 259 (If due process has been granted and there is an adequate basis for the decision being reached by the NJSIAA committees, the Commissioner will not substitute his judgment for that of the Association, even when he would decide otherwise in a de novo review).

While perhaps unfortunate that petitioner herein mistakenly believed himself ineligible to participate in interscholastic sports during the 1989-90 school year, the fact remains that he was in attendance at school continuously from the start of the 1988-89

school to date. The record is devoid of any evidence to suggest, moreover, that his therapy sessions encroached in any way on his regular attendance during the school year or rendered him incapable of attending practices or games had he participated. Thus, a waiver of the eight semester rule under these circumstances is not warranted because petitioner has set forth no evidence that his participation in sports during the years in question, including his participation during the 1988-89 school year when he attended 8 or 9 days of practice, was prevented because of circumstances beyond his control. (Article V, Section 4J, and NJSIAA Interpretive Guidelines for Student-Athlete Eligibility, Section 3a and c) See, for example, S.S., supra. See also, R.A.S., supra.

Moreover, in the Commissioner's judgment, petitioner has failed to meet his burden of demonstrating emergent relief is warranted in this matter because participation in interscholastic sports has been adjudged by the Courts of this State as a privilege not a right (see, Board of Education of the City of Camden, Camden County v. NJSIAA, decided by the Commissioner February 7, 1991, aff'd New Jersey Superior Court Appellate Division February 14, 1992, aff'd New Jersey Supreme Court February 21, 1992), because he has failed to advance persuasive arguments on the merits of his claim for the reasons expressed above, and because he has failed to demonstrate that the application of the rule at issue herein has worked a hardship upon him that outweighs the harm to the Association and student-athletes who have conformed with the law as set forth in the NJSIAA Bylaws, Rules and Regulations as embodied in its Handbook.

Accordingly, for failure to meet those standards articulated by the Court in Crowe v. DeGioia, supra, for the grant of the extraordinary relief sought herein, and because the Commissioner finds no support in the record before him to find that the actions of the NJSIAA in applying its eligibility rules to the facts in this matter were clearly and demonstrably arbitrary and capricious as required by Burnside, supra, the Commissioner hereby DENIES petitioner's request for emergent relief and dismisses the instant Petition of Appeal, with prejudice.

COMMISSIONER OF EDUCATION

OCTOBER 19, 1992

DATE OF MAILING - OCTOBER 19, 1992

257-92

257-92

TRENTON EDUCATION ASSOCIATION, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, RESPONDENT.	:	DECISION

SYNOPSIS

Petitioning Education Association representing five teachers at Adult Learning Center claimed tenure and other emoluments for said teachers who worked hourly without a contract.

Citing Spiewak and Rabolli, ALJ found petitioners met requirements of N.J.S.A. 18A:28-5 and were tenured. ALJ also determined petitioners were entitled to all salary and emoluments granted other teachers in district and ordered prospective compensation from August 2, 1991, date of petition.

Commissioner concurred with ALJ's determination that teachers were tenured. However, Commissioner remanded matter for factfinding and recommendation on whether or not the affected teachers meet requirements of specific statutes and regulations controlling benefits they seek. Commissioner did concur that any relief would be awarded prospectively from August 2, 1991.

OCTOBER 19, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8945-91
AGENCY DKT. NO. 289-8/91

TRENTON EDUCATION ASSOCIATION,
Petitioner,
v.
CITY OF TRENTON BOARD OF EDUCATION,
Respondent.

Michael T. Barrett, Esq., for the petitioner (Bergman & Barrett, attorneys)

Thomas W. Sumners, Jr., Esq., for the respondent (Sumners, Council & Inniss, attorneys)

Record Closed: July 14, 1992 Decided: August 5, 1992

BEFORE **AUGUST E. THOMAS**, ALJ, T/A:

Petitioner, the Trenton Education Association, represents five teachers employed by the Board of Education of the City of Trenton (Board) as part of its Community Education (Trenton Adult Learning Center) program. The teachers claim tenure and/or other emoluments offered by the Board to its other teachers.

This matter was filed in the office of the Commissioner of Education on August 2, 1991, and transferred as a contested case to the Office of Administrative Law on September 20, 1991. After a pre-hearing conference, the matter was scheduled for hearing on March 3 and 4, 1992, however counsel later agreed to its submission on a joint stipulation of facts and their letter briefs. The record was closed on July 14, 1992, after receipt of a fax from petitioner which included a copy of a June 7, 1992, letter providing information I had requested. However, the original letter of June 7, 1992, was never received. Although no joint stipulation was submitted, petitioner's stipulation was accepted in its entirety by respondent.

STIPULATION OF FACTS

The individual complainants, Ann Brooks, Sonia Foderaro, Steve Krimstock, Mary Catherine Paci and George M. Zofchak, are all teachers at the Trenton Adult Learning Center.

ANN BROOKS is a graduate of Pennsylvania State University and has taken post-graduate courses in psychology and remedial education. She is a teacher certified by the State of New Jersey and was hired to teach at the Trenton Adult Learning Center in October 1969 and has been employed at the Center since that time. She presently teaches and acts as a student advisor. Ms. Brooks is a member of the National Education Association and the New Jersey Education Association and other various professional organizations.

SONIA FODERARO received a bachelor of science degree in 1961 and a masters degree in education in 1963 from Bloomsburg State University. Ms. Foderaro has six (6) additional post-graduate credits in English as a second language (ESL) from Trenton State College. She is a teacher certified by the State of New Jersey. She has taught in elementary schools in Hazelton, Pennsylvania (4 years) and Bristol, Pennsylvania (1 year) and was hired at the Trenton Adult Learning Center in January 1977. Ms. Foderaro is also a member of several professional organizations.

STEVE KRIMSTOCK received a bachelor of arts degree from Pennsylvania State University in 1977 and has taken post-graduate courses at Trenton State College. He is certified by the State of New Jersey and, before being hired at the Trenton Adult Learning Center in March 1986, he substituted in both Hamilton Township and

Lawrence Township schools. Mr. Krimstock teaches adult basic education and English as a second language.

MARY CATHERINE PACI has a bachelor of arts degree in English from St. Xavier College in Chicago, Illinois, and taught in both the Chicago and Boston school systems before becoming certified by the State of New Jersey in 1979. She has taught at the Villa Victoria Academy (1983-1984) and has been a substitute teacher in both Ewing Township and Trenton schools. She has taught at the Trenton Adult Learning Center since 1990. Ms. Paci teaches adult basic education and general equivalency diploma (G.E.D.) classes.

GEORGE M. ZOFCHAK is a 1960 graduate of Rider College with a bachelor of science degree in business machines and has taken post-graduate courses at Trenton State College. He was certified by the State of New Jersey in 1970 and taught at Cathedral High School, at Trenton State Prison and in the Trenton public school district before being hired at the Trenton Adult Learning Center in March 1989, where he teaches adult basic education and G.E.D. classes.

All of the above teachers work five (5) days per week from 9:00 a.m. to 4:00 p.m. each day.

Each teacher now makes $16.00 per hour effective September 1991. For the three-year period prior to that, each teacher made $12.00 per hour.

No teacher has a contract. They receive no paid sick days, no paid vacation days, and no health benefits, although they can co-pay into the Trenton school district health benefits plan. No pension contributions are made on their behalf. All teachers have been paid on an hourly basis.

ISSUE

At issue is whether or not these certified teachers are tenured or eligible for tenure and all other benefits offered by the school district.

DISCUSSION

Petitioner argues that these five teachers are entitled to tenure in their positions pursuant to Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982),

where the Court held remedial and supplemental teachers eligible for tenure where they met the statutory requirements of N.J.S.A. 18A:28-5. Respondent argues that the matter is controlled by Capella v. Board of Education of Camden County Vocational & Technical School, 145 N.J.Super. 209 (App. Div. 1976), in which the Appellate Division affirmed the Commissioner's and State Board's decisions that adult evening high school guidance counselors could not become tenured in those positions.

N.J.S.A. 18A:1-1 provides:

> "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 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:28-5 further provides:

> The services of all teaching staff members including all teachers...and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners...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.

These requirements were discussed in the context of the tenure status of non-contract teachers in Spiewak, supra, relied upon by petitioner as decisive in this matter. In Spiewak, petitioners were remedial and supplemental teachers, not under contract, who were paid hourly, without sick leave, personal days, health insurance, holiday pay, vacation or pensions benefits. Each held a state-issued

teaching certificate appropriate to her position. Each had been employed with the school district for over three years. Spiewak, 90 N.J. at 67-68.

The Court examined the roots of the Tenure Act, N.J.S.A. 18A:28-1 et seq., which "specifically defines the conditions under which teachers are entitled to the security of tenure. The statute makes tenure a mandatory term and condition of employment. It therefore supersedes contractual terms." Spiewak, 90 N.J. at 72. The Court then examined the literal terms of N.J.S.A. 18A:1-1, defining teaching staff members, and N.J.S.A. 18A:28-5, setting forth the requirements for the entitlement to tenure. Id. at 73-74. Since the teachers fell within the express terms of the statute, the Court found they were presumptively eligible for tenure unless a statutory exception applied. Finding no relevant exception, the Court found "no evidence of legislative intent to exclude remedial and supplemental teachers from the express language of N.J.S.A. 18A:28-5," and concluded that they were eligible for tenure. Id. at 75. In so doing, the Court reversed Point Pleasant Beach v. Callam, 173 N.J. Super. 11, certif. den., 84 N.J. 469 (1980), which had upheld a board of education's refusal to grant tenure to noncontractual, temporary teachers who staffed the district's remedial reading program on the ground that they were not "teaching staff members" within the meaning of N.J.S.A. 18A:1-1:

> The decision in Point Pleasant relies on the wrong legal principles. By focusing on the contractual relations between the parties and not the statutory criteria for tenure, the court in Point Pleasant overlooked the authority which holds that tenure is a legal right governed by statute rather than contract. [Spiewak, 90 N.J. at 76]

The Court also decided in two companion cases that no exception existed to deny tenure to Title I teachers whose jobs are funded by federal rather than state money. Id. at 82.

Respondent relies on Capella, supra. In Capella, the Appellate Division upheld decisions of the Commissioner and the State Board that part-time guidance counselors, employed for more than three academic years in an adult evening high school, were not entitled to tenure in those positions under N.J.S.A. 18A:28-5. The court expressed its agreement with the Commissioner that "the 'over-protection petitioners seek would be a disservice to the schools... and is not intended by the school laws.'" Capella, 145 N.J. Super. at 211. Relying on Schulz v. State Bd. of Ed., 132 N.J.L. 345 (E. & A. 1944), the court further held that although petitioners came within the the literal terms of the statute as possessors of the necessary certificates

who had been employed for the requisite period of time, as part-time employees petitioners were not intended to be considered "teaching staff members" within the meaning of the Tenure Act. Id. at 211-213. Further, "[a]n analysis of the school laws indicate[s] that tenure was to attach only in those school programs which are *required* to be provided by a school system, and not to such optional programs as an adult evening high school which a board of education 'may' maintain." Id. at 214.

However, Spiewak distinguished the holding of Capella and dismissed its reliance on Schulz as "incorrect," stating:

> To the extent those decisions imply that the right to tenure derives from contract rather than statute, they are wrong. To the extent they suggest that courts may create exceptions to the clear language of N.J.S.A. 18A:28-5 based on policy considerations, they are disapproved. [Spiewak, 90 N.J. at 80]

Respondent contends that Spiewak merely limited the Capella holding to the extent that the source or manner of funding is irrelevant to determine a teacher's tenure status, but did not overturn the specific holding. Therefore, as the Learning Center program is not mandated by New Jersey Title 18A educational requirements, it is an optional program for which teachers are not afforded entitlement to tenure under the law.

Although Spiewak did not expressly reverse Capella, subsequent cases have followed Spiewak, considering Capella overruled. See Rabolli v. Board of Education of the Bergen County Vocational Technical Schools, Bergen County, 1983 S.L.D. 196 At 1983 S.L.D. 210, the Commissioner upheld the administrative law judge (ALJ) in Rabolli, who dismissed the Board of Education's reliance upon Capella and Perth Amboy Federation of Teachers, Local 857 v. Board of Education of the City of Perth Amboy, 1981 S.L.D. ____ (December 24, 1981) (denying tenure to teaching staff members and secretarial/clerical staff in a daytime adult school program based in part upon reliance on Point Pleasant and Capella). The ALJ concluded:

> I find the holdings in Perth Amboy and Capella to have been determined by policy conclusions of the Commissioner and the court, and not those of the Legislature. I further find those holdings overruled by the Supreme Court in Spiewak, which is dispositive of the instant matter. [Rabolli, 1983 S.L.D. at 208]

See also Ruby v. Board of Education of the Hudson County Area Vocational-Technical Schools, Hudson County, 1983 S.L.D. 941, in which it was held that the

Commissioner's holding in Rabolli that employees of an adult school can become tenured is "authoritative," and Milwit v. Board of Education of the City of Jersey City, OAL DKT EDU 465-87 (November 24, 1987), aff'd, Commissioner of Education (January 8, 1988), in which it was held that the full-time adult basic skills teacher achieved tenure pursuant to N.J.S.A. 18A:28-5 and Spiewak.

Further, the Spiewak rationale has been extended to eliminate the Capella distinction between "mandatory" and "optional" educational programs. Bergen County Vocational-Technical Schools Education Association Inc. v. Board of Education of the Bergen County Vocational School District, OAL DKT. EDU 5971-82 (August 15, 1983), aff'd, Commissioner of Education (October 3, 1983) ("Bergen Vo-Tech"). Bergen Vo-Tech addressed the significance of the Spiewak "mandate" upon the statutory framework of tenure entitlement:

> Until Spiewak was decided by the Supreme Court, a growing line of cases grafted various exceptions onto the statutory right of teachers to attain tenure in their employment, as defined in N.J.S.A. 18A:28-5. Some of these exceptions to the attainment of tenure related to teachers whose employment depended upon federal funding, teachers designated as supplemental instructors, teachers involved in remedial programs, teachers engaged in compensatory education programs, and those whose initial positions depended upon a contractual offer and acceptance of temporary employment. [Citations omitted.]
>
> In Spiewak, the Supreme Court eliminated the non-statutory exceptions to tenure eligibility...[and] rejected the holding by the Appellate Division in Capella, supra, that teachers in an adult evening school program were ineligible for tenure. [at 9; emphasis added]

The decision emphasized Spiewak's intent to overrule Capella, saying that while the Court

> approv[ed] of the method used by the Capella court in examining the statute in order to reach its determination, it is obvious that the Supreme Court, in Spiewak, determined that the result of that examination was nevertheless incorrect. [Ibid.]

CONCLUSION:

Based on the above and particularly under Spiewak and Rabolli, if the five individuals petitioner represents are able to meet the statutory criteria of N.J.S.A.

18A:1-1 and N.J.S.A.18A:28-5, they are entitled to tenure in their positions as teachers at the Trenton Adult Learning Center.

Having determined that all of those teachers who meet the requirements of N.J.S.A. 18A:28-5 are tenured, there remains the question of the appropriate relief, considering the employment history of each of these five individuals.

Each named individual is entitled to an ordinary teacher's salary at the appropriate step on the salary guide with full consideration for each teacher's total number years of experience. Each is entitled also to all the emoluments granted the other teachers in the district. However, this relief must be prospective. The record shows that the teachers and the Board had a clear understanding concerning their contractual relationship until this appeal was filed on August 2, 1991, pursuant to N.J.A.C. 6:24-1.2. This provision allows aggrieved persons 90 days to appeal to the Commissioner from a condition or known cause of action. Consequently, I **CONCLUDE** that a fair date for the beginning of their proper compensation would be August 2, 1991, the date this appeal was filed.

The decision to award relief prospectively is based on Lavin v. Hackensack Bd. of Ed., 90 N.J. 145 where the Court denied appellant retroactive benefits based on the doctrine of laches. In my judgment, the situation here is analogous to that in Lavin; therefore, the result should be the same.

So **ORDERED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

5 August 92
Date

August E. Thomas
AUGUST E. THOMAS, ALJ, T/A

Receipt Acknowledged:

8/7/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 12 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

km

EXHIBITS IN EVIDENCE

Community Education Program attached to respondent's brief

WITNESSES

None

TRENTON EDUCATION ASSOCIATION, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, RESPONDENT.	:	DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by the Board pursuant to N.J.A.C. 1:1-18.4. No reply was filed by petitioner. It is noted that the time for rendering of the Commissioner's decision in this matter was extended to October 31, 1992 pursuant to N.J.A.C. 1:1-18.8.

In its exceptions, the Board reiterates the arguments of its primary brief and urges the Commissioner to reject the interpretation of Spiewak, supra, embodied in the line of cases relied upon by the ALJ, instead revisiting the issue and ruling in line with Capella, supra.

Upon review, the Commissioner rejects the Board's position and affirms the ALJ's determination of the affected teachers' tenure status for the reasons stated by him in his initial decision, further noting that Milwit, 1988 S.L.D. 11, was affirmed by the State Board (June 1, 1988) and the Appellate Division of the Superior Court (May 8, 1989).

However, the Commissioner cannot concur with the ALJ's conclusions regarding entitlements flowing from the instant teachers' tenure status:

> Having determined that all of those teachers who meet the requirements of N.J.S.A. 18A:28-5 are tenured, there remains the question of the appropriate relief, considering the employment history of each of these five individuals.
>
> Each named individual is entitled to an ordinary teacher's salary at the appropriate step on the salary guide with full consideration for each teacher's total number years of experience. Each is entitled also to all the emoluments granted the other teachers in the district.***
>
> (Initial Decision, at p. 8)

Nothing in the tenure statutes entitles teachers to employment benefits as a corollary of tenure; rather, such benefits are controlled by the terms of the specific statutes conferring them or negotiated agreement between the parties. Moreover, a school district is not prevented from utilizing different salary schedules and levels of benefits for different classes of teaching staff members, so long as applicable statutory minimums are met. Therefore, in order to ascertain the salary and benefit entitlements of the teachers herein, it is necessary to remand this matter for factfinding and recommendation on whether or not the affected teachers meet the requirements of the specific statutes and regulations controlling the benefits they seek, including but not limited to the question of whether they are full-time employees for purposes of eligibility for the statutory minimum teachers' salary and whether or not the Board's collectively negotiated agreement with other teaching staff members constitutes an employment policy binding on the Board with respect to the teachers herein for benefits over and above those provided in statute. Frances W. Hyman

et al. v. Board of Education of the Township of Teaneck, State Board Decision 1985 S.L.D. 1940, affirmed Superior Court Appellate Division February 26, 1986, cert. den. 104 N.J. 469 (1986); Middlesex County Educational Services Commission Education Association v. Board of Directors of the Middlesex County Educational Services Commission, Middlesex County, State Board Decision 1987 S.L.D. 2642; Scotch Plains-Fanwood Education Association et al. v. Board of Education of Scotch Plains-Fanwood, State Board Decision 1987 S.L.D. 2690. The Commissioner concurs, however, that whatever relief the teachers herein may be granted is to be awarded prospectively from August 2, 1991, the date of filing of the petition in this matter, so that no further proceedings on the question of retroactivity are necessary.

Accordingly, the initial decision of the Office of Administrative Law is affirmed in its determination that the affected teachers are entitled to tenure status, but rejected in its findings regarding salary and other emoluments of employment and remanded for further proceedings as set forth above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 19, 1992

DATE OF MAILING - OCTOBER 19, 1992

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(257-92)

TRENTON EDUCATION ASSOCIATION, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, RESPONDENT.	:	DECISION ON REMAND

SYNOPSIS

Petitioning Education Association representing five teachers at Adult Learning Center claimed tenure and other emoluments for said teachers who worked hourly without a contract. In decision of October 19, 1992, Commissioner concurred with ALJ's determination that teachers were tenured but Commissioner remanded matter for fact-finding and recommendation on whether or not the affected teachers met requirements of specific statutes and regulations controlling benefits they sought.

On remand, ALJ found (1) petitioners were full-time tenured teachers; (2) petitioners were due back pay from August 2, 1991 (date of petition) based on his/her appropriate step on salary guide in each relevant year; (3) petitioners were to be credited with accumulated sick leave; (4) petitioners were eligible for all other emoluments set forth in current collectively negotiated agreement, absent any agreement to the contrary; and (5) pension claims were to be directed to Teachers Pension and Annuity Fund by Board. (Scotch Plains)

Commissioner adopted findings and determination in initial decision with modification. ALJ determined that the August 2, 1991 date of retroactivity should not apply to petitioners' accumulated sick leave. Commissioner determined to limit petitioners' crediting of accumulated unused sick leave to six years prior to filing of petition of appeal on August 2, 1991. Commissioner further directed that for purposes of current salary guide placement, petitioners should be credited with employment from six years prior to August 2, 1991. (Rutherford, Middlesex County).

SEPTEMBER 23, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 576-93
AGENCY DKT. NO. 289-8/92
(ON REMAND EDU 8945-91)

TRENTON EDUCATION ASSOCIATION,
Petitioner,
v.
CITY OF TRENTON BOARD OF EDUCATION,
Respondent.

Michael T. Barrett, Esq., for the petitioner (Bergman & Barrett, attorneys)

Thomas W. Sumners, Jr., Esq., for the respondent (Sumners, Council & Inniss, attorneys)

Record Closed: June 30, 1993 Decided: August 12, 1993

BEFORE **AUGUST E. THOMAS,** ALJ, T/A:

An initial decision was rendered in this matter on August 5, 1992 (OAL DKT. NO. EDU 8945-91; AGENCY DKT. NO. 289-8/91). After his review of the initial decision of the administrative law judge (ALJ), the Commissioner of Education rendered his decision on October 19, 1992, affirming "the ALJ's determination of the affected teachers' tenure status for the reasons stated by him in his initial decision," and remanding the matter to the Office of Administrative Law for further fact-finding on the teachers' entitlement to salary and the other benefits they seek. The matter was transferred to the OAL pursuant to N.J.S.A. 52:14B-10(c) and N.J.A.C. 1:1-18.7 on January 25, 1993, and reassigned to me on February 5, 1993.

Following several telephone conferences with counsel, they agreed that the relevant facts would be stipulated and that the matter could be decided after the

submission of letter briefs. The final letter brief was filed on June 30, 1993, closing the record.

The initial decision of the Office of Administrative Law (OAL DKT. NO. 8945-91) dated August 5, 1992, and the decision of the Commissioner dated October 19, 1992, are incorporated herein by reference, in their entireties.

Stipulation of Facts

There are five (5) individual complainants; Ann Brooks, Sonia Foderaro, Steve Krimstock, Mary Catherine Paci and George M. Zofchak. Each of the complainants teaches from 9:00 a.m. to 4:00 p.m. five days per week, twelve months per year.

1) Ann Brooks holds a bachelor of arts degree in education from Pennsylvania State University. She has post-graduate credits, but no master's degree, in psychology and remedial education. She is certified by the State of New Jersey. She has been employed as a teacher at the Trenton Adult Learning Center since October 1969.

2) Sonia Foderaro holds a bachelor of science degree and a master's degree in education (1963) from Bloomsburg State University. She holds (6) post-graduate credits in English as a second language from Trenton State College. She is a teacher certified by the State of New Jersey. She has elementary school teaching experience in Hazelton, Pennsylvania, (4 years) and Bristol, Pennsylvania (1 year). She was hired to teach at the Trenton Adult Learning Center in January 1977.

3) Steve Krimstock holds a bachelor of arts degree from Pennsylvania State University, which he received in 1977. He has taken post-graduate courses, but holds no master's degree. He is certified to teach by the State of New Jersey. He has been teaching at the Trenton Adult Learning Center since March 1986, prior to which he substituted in Hamilton and Lawrence Townships.

4) Mary Catherine Paci holds a bachelor of arts degree in English from St. Xavier College in Chicago, Illinois. She has been certified by the State of New Jersey since 1979. She taught at the Villa Victoria Academy in 1983-84 and substituted in both Ewing Township and Trenton in the interim.

5) George M. Zofchak holds a bachelor of science degree from Rider College (1960). He has been certified by the State of New Jersey since 1970. He was hired at the Trenton Adult Learning Center in March 1989 and previously taught at Cathedral High School, Trenton High School and the Trenton State Prison.

It is the position of the Trenton Board of Education (Board) that all individual complainants be placed on the Salary Guide as though they were hired August 2, 1991, the date of the filing of the Verified Petition.

It is the position of the Trenton Education Association (Association) that all individual complainants be placed on the Salary Guide from the date they commenced continuous employment in the district at the Trenton Adult Learning Center.

With their memoranda, the Board and the Association submitted their calculations both for salary and retroactive pay based upon their divergent theories as set forth above.

Counsel for the Board and the Association have revised the calculations under both theories and while both agree that the calculations are mathematically correct, both seek to advance their theories of setting present and future salary and retroactive pay.

The calculations were submitted as part of the separately submitted legal memoranda.

Issue

The issue in the original petition was whether or not the affected teachers were entitled to tenure and other benefits offered by the school district. The Commissioner affirmed the ALJ's determination that the affected teachers had acquired tenure in the district; however, he remanded the matter for "factfinding and recommendation on whether or not the affected teachers meet the requirements of the specific statutes and regulations controlling the benefits they seek, including but not limited to the question of whether they are full-time employees for purposes of eligibility for the statutory minimum teachers' salary and

whether or not the Board's collectively negotiated agreement with other teaching staff members constitutes an employment policy binding on the Board with respect to the teachers herein for benefits over and above those provided in statute."

Full-Time Employees

The Commissioner determined that each of the five petitioners is tenured (N.J.S.A. 18A:28-5). The litigants disagree as to whether or not the petitioners are full-time employees. In that regard, full-time is defined as the "number of days of employment in each week and the period of time in each day required by regulations of the State Board" (N.J.S.A. 18A:29-5). State regulations set forth that "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 full salary designated for their step on the district board of education's salary scale." N.J.A.C. 6:20-5.6(b). In the Trenton school district, the collective negotiating agreement between the Board and the petitioners governs the number of hours in a day and the number of days in a week a teaching staff member must work to be regarded as full-time and to receive full salary as set forth in the collective negotiating agreement salary scale. Article XII (A) (2) provides in pertinent part that:

> The regular school day for assigned teacher, planning and consultation functions including arrival and departure shall consist of no more than six and one half hours (6.5) which shall include a lunch period.
>
> [Board's letter brief, Attachment (A)]

Notwithstanding the Board's certification submitted by its director of State and Federal Funded Programs/Adult Education, the record discloses that each of the petitioners is a full-time employee. Each works from 9:00 a.m. to 4:00 p.m. (six and one-half or seven hours) each day during a twelve-month work year. Each teacher takes a lunch period, lasting for one-half hour or one hour, without compensation, according to the director's certification.

In Scotch Plains-Fanwood Educ. Ass'n et al., Petitioners-Respondents v. Board of Educ. of Scotch Plains-Fanwood, Respondent - Appellant, 1987 S.L.D. 2690, 2694, the State Board of Education reacted to the argument that an unpaid lunch hour did not count in a teacher's working day as follows: ". . . the one hour each day allocated to Petitioners' lunch must be considered part of their work day." It concluded that

this lunch hour, when considered with their remaining work hours, was sufficient to make them full-time employees.

District boards of education have been given the authority to define full-time employment so long as the number of hours required each day is more than four hours. N.J.A.C. 6:3-1.13. In the instant matter, the collective negotiating agreement provides that the regular school day for teachers is six and one-half (6.5) hours, which includes a lunch period. Article XII (A) (2). The record shows that petitioners work six and one-half to seven (6.5 to 7) hours each day; therefore, each qualifies as a full-time teaching staff member (N.J.A.C. 6:20-5.6 (b)).

Based on the Stipulations of Fact and other evidence in the record concerning petitioners' working arrangements, I **FIND** as **FACT** and **CONCLUDE** that all petitioners are full-time teaching staff members as defined in N.J.S.A. 18A:1-1 and N.J.S.A. 18A:28-5. This latter statute was interpreted clearly in Spiewak v. Rutherford Bd. of Educ., 90 N.J. 83 (1982), which put aside several previous limitations and exceptions used to judge so-called 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, supra, 90 N.J. at 81]

Salary Eligibility

Having determined that each of the petitioners is a full-time employee pursuant to regulation, it must now be determined to what salary, sick leave, pension, and other benefits each is entitled. Specifically, are petitioners entitled to all other benefits delineated in the current negotiated agreement between the Trenton Education Association and the Trenton Board of Education?

In Hyman et al., Petitioners - Respondents v. Board of Educ. of the Township of Teaneck, Bergen County, Respondent-Appellant, 1985 S.L.D. 1940, 1941, aff'd, No. A-3508-84T7 (App. Div. February 26, 1986), the State Board quoted the Commissioner,

who stated in Spiewak that a board of education "may negotiate differences in salary compensation between supplemental teachers and full-time classroom teachers." The Commissioner went on to conclude that the teachers in Spiewak were entitled to placement on the full-time teachers' salary guide because there was no separately negotiated agreement for auxiliary teachers (Ibid.). The State Board went on to say: "Thus, we conclude that the decision in Spiewak does not grant to supplemental teachers any statutory entitlement to benefits beyond that which may be conferred on them by existing statutes" (Id. at 1943). It stated further,

> In sum, we conclude that the decision in Spiewak does not mandate the placement of supplemental teachers on the salary guide for regular teaching staff members and that such right is contained in neither the tenure statutes nor those governing compensation. Because supplemental teachers are not entitled to guide placement as a matter of law, we hold that separate guides covering supplemental teachers are permissible so long as such guides conform to the requirements established by the school laws. However, we emphasize that where a board has adopted a salary schedule for any group of full-time teaching staff members, all full-time members must be covered by a schedule. Finally, we reiterate that under the New Jersey Employer-Employee Relations Act, boards and teachers are free to negotiate terms of compensation within the statutory framework of the school laws.
>
> [Id. at 1949; emphasis added]

In regard to salaries, the Board contends that any retroactive salary due petitioners must be limited because they are paid with grant monies based on a sixteen-dollar-per-hour scale. This argument is without merit. It is well settled that the source of funding for teachers does not matter in determining tenure eligibility so long as legal conditions are met. Spiewak, supra, 90 N.J. at 81-82. In my judgment, it follows also that a teacher's salary may not be controlled because of federal grant monies for special programs.

In the present matter, it is stipulated that there is only one salary guide for full-time teachers. Absent a separately negotiated salary guide for teachers in the Adult Learning Center, each must be compensated according to the only salary guide which exists, beginning August 2, 1991. This retroactive date was established by the Commissioner in the earlier decision (OAL DKT. NO. EDU 8945-91).

In limiting a board's liability for retroactive salary payments, the Supreme Court set forth guidelines in Rutherford Educ. Ass'n v. Board of Educ. of the Borough of Rutherford, 99 N.J. 8 (1985), as follows:

> There is no question that in this case the school boards acted properly and in good faith in relying on prior law. Further, it is unquestioned that applying Spiewak retroactively would have a substantial impact on the finances of many communities. "Municipal financing is predicated on a pay-as-you-go principle." Lavin v. Hackensack Bd. of Educ., 90 N.J. 145, 154 (1982). Boards of education prepare budgets on a cash basis. Presumably, they did not budget for expenses that would arise from a retroactive application of Spiewak. Therefore, providing tenure and its emoluments retroactively would not only have a serious adverse financial effect on the boards of education, but also may have serious consequences on the tax structure of many communities and other community services.

In Elma Milwit v. Board of Educ. of Jersey City, Hudson County; Jersey City Learning Center; and William A. Beebe, Director, 1988 S.L.D. 11; aff'd, Comm'r of Educ., 1988 S.L.D. 28; aff'd, State Board of Education, 1988 S.L.D. 30; aff'd, No. A-5965-87T1 (App. Div. June 8, 1989), the Commissioner accepted the determination of the ALJ restoring Milwit to her full-time position teaching adult basic skills in the Jersey City Learning Center. Notwithstanding the earlier decisions of the Commissioner and the courts, particularly the guidelines in Hyman, supra, Milwit, a full-time adult basic skills teacher, was awarded back pay only 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. . . ." Milwit, supra, 1988 S.L.D. at 26.

Nevertheless, a review of the facts as stipulated in this matter indicates that each of the five teachers is a full-time employee, each teaching thirty-five hours per week, twelve months per year.

In Hyman, supra, the State Board made it clear that each teacher's salary must be determined by a salary guide. The only salary guide which exists in the district for teachers is the guide that is subsumed within the current collective negotiating agreement between the parties.

Since there is but one collective negotiations agreement with one salary guide for teachers and since these teachers possess all of the qualifications necessary to fit within that agreement and under that guide, this Board is bound by the collectively negotiated agreement with other teachers as the salary and benefits relate to the teachers herein. See, Scotch Plains-Fanwood, supra, 1987 S.L.D. 2690; Hyman, 1985 S.L.D. 1940.

Based on the above, I **CONCLUDE** that petitioners are due retroactive pay for their appropriate step on the guide for the academic year beginning August 2, 1991, and the 1992-93 academic year.

Sick Leave, Pension and Other Benefits

Sick leave is a statutory entitlement for all eligible teachers (N.J.S.A. 18A:30-1 to 30-8) and sick leave accumulates (N.J.S.A. 18A:30-3). Accordingly, the Board is **ORDERED** to calculate and credit the number of sick days due each petitioner beginning with the date of their first employment less any days they may have called in ill during their employment. The date of retroactivity should not apply to sick leave because this is not an immediate monetary benefit which would burden the Board and ultimately the taxpayers (Rutherford, supra, 99 N.J. at 28-30).

Regarding pensions, in Scotch Plains-Fanwood, supra, 1987 S.L.D. at 2691, the State Board commented as follows:

> Although observing that the Commissioner had refused to assert jurisdiction over disputes involving enrollment in the Teacher Pension Annuity Fund (TPAF), the ALJ found that the Commissioner did have the authority to direct the Board to inform TPAF of the pertinent details regarding the employment of individual Petitioners, and directed that the Board do so. He found that Petitioners were eligible for all statutory benefits accorded regular teaching staff members similarly situated, including accumulated sick leave, and, although the collective negotiations agreement was not part of the record, to carry-over benefits conferred on other teaching staff members covered by that agreement. The Commissioner adopted the ALJ's determination in the matter with the modification that petitioners were entitled to full retroactive relief.

In my judgment, and absent any agreement to the contrary, petitioners are also entitled to the remainder of benefits afforded all teachers in the current collectively negotiated agreement. That agreement is binding on the Board for benefits over and above those provided by statute. And relying on the language of the State Board in Scotch Plains-Fanwood, supra, the Commissioner has the authority to direct the Board to inform the Teachers Pension and Annuity Fund of the pertinent details regarding the employment of the individual teachers.

SO ORDERED.

SUMMARY

Based on all of the above, I **FIND** and **CONCLUDE** that:

1. Each petitioner is a full-time teaching staff member and each has acquired a tenured status with the Board.

2. Each petitioner is due back pay from August 2, 1991, based on his/her appropriate step on the teachers' salary guide in each relevant year.

3. Each petitioner is to be credited with accumulated sick leave.

4. Petitioners are eligible for all other emoluments set forth in the current collectively negotiated agreement, absent any agreement to the contrary.

5. Pension claims must be directed to the TPAF by the Board.

SO ORDERED.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor West, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 12, 1993
Date

August E. Thomas
AUGUST E. THOMAS, ALJ T/A

Receipt Acknowledged:

Aug. 13, 1993
Date

Maureen K. Kelly
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 18 1993
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

TRENTON EDUCATION ASSOCIATION, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, RESPONDENT.	:	DECISION ON REMAND

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by the Board of Education pursuant to the provisions of N.J.A.C. 1:1-18.4. Petitioner's reply was untimely filed, having been mailed on September 14, 1993 and received on September 16, 1993, following August 31, 1993 service of the Board's exceptions by both facsimile and regular mail.

In its exceptions, the Board renews its arguments that petitioning Association members are not full-time employees, and therefore are not entitled to regular guide placement or sick leave, or alternatively, if they are found to be full-time, that their sick leave entitlement not be reckoned from the date of their first employment as such reckoning would impose an unacceptable burden on the Board and taxpayers.

Specifically, with respect to calculations of petitioners' hours of work, the Board urges rejection of the State Board's decision in Scotch Plains-Fanwood, supra, granting credit for unpaid lunch periods, averring that application of this decision in the

present instance amounts to conferring a benefit not negotiated with petitioning teachers. (Board's Exceptions, at pp. 2-4) With respect to sick leave, the Board argues that there was no basis in the record on which the ALJ could conclude that retroactive crediting of sick days would not result in immediate monetary benefit to teachers or create monetary difficulties for the Board, and that, to the contrary, substitutes must be paid for absent teachers and contractual monies are payable for unused sick days upon retirement, death or disability; moreover, the length of Petitioner Brooks' employment alone could result in a windfall sick payment of up to 144 days, at severe financial hardship to the Board and taxpayers. (Board's Exceptions, at p. 4) Finally, with respect to the salary guide placement of the affected teachers, the Board initially notes that the ALJ appears to have left this issue unresolved, then argues that these teachers' years of service should not include periods prior to the time of filing of the Petition of Appeal, that is, August 2, 1991, so as to limit damages and not create a serious adverse financial impact on the district. (Board's Exceptions, at pp. 5-6)

Upon review and consideration of the issues on remand, the Commissioner affirms the initial decision with modification and clarification as noted below.

With respect to petitioners' employment status, the Commissioner concurs with the ALJ that Scotch Plains, supra, controls in this matter and that petitioners are, under that decision and other applicable law, clearly full-time employees. The Commissioner further concurs that petitioners are to be placed on the district's negotiated teacher salary guide, as no separate

agreement exists for Adult Learning Center or other discrete categories of teachers, that petitioners are due all benefits and emoluments of the negotiated contract, and that the Board has an obligation to direct pertinent information regarding petitioners' employment to the Teachers' Pension and Annuity Fund (TPAF).

The Commissioner modifies, however, the ALJ's determination that the August 2, 1991 date of retroactivity should not apply to petitioners' accumulated sick leave. Although crediting of such leave would not necessarily result in a direct and immediate adverse fiscal impact on the district, the length of petitioners' respective employment histories is such that their accumulated entitlements could, as noted by the Board, result in significant outlays for retirement, substitution or other related costs; the rights of petitioners must, therefore, be balanced against the rights of the public to have damages limited in these circumstances. Accordingly, consistent with the principles of Rutherford, supra, and the decision of the State Board of Education in Middlesex County Educational Services Commission Education Association v. Board of Directors of the Middlesex County Educational Services Commission, Middlesex County, 1987 S.L.D. 2642, the Commissioner determines to limit petitioners' crediting of accumulated unused sick leave to a maximum of six years prior to the filing of the Petition of Appeal on August 2, 1991, depending on length of employment.

Similarly, with respect to petitioners' placement on the district salary guide, the Commissioner clarifies and modifies the ALJ's determination by holding that, in order to balance the rights of petitioners with those of the public, such placement should reflect crdit for service rendered in the district subsequent to

August 2, 1991 and for up to six years previously, depending on length of employment. Rutherford, supra; Middlesex County Education Association, supra

Accordingly, the initial decision on remand of the Office of Administrative Law is modified and clarified as set forth above, and otherwise affirmed for the reasons expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 23, 1993

DATE OF MAILING - SEPTEMBER 23, 1993

257-92

EDU #8945-91
C # 257-92
EDU # 576-93
C #224+-93
SB # 59-93

TRENTON EDUCATION ASSOCIATION, PETITIONER-CROSS/APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, RESPONDENT-APPELLANT.	:	DECISION

Remanded by the Commissioner of Education, October 19, 1992

Decision on remand by the Commissioner of Education, September 23, 1993

For the Petitioner-Cross/Appellant, Bergman & Barrett (Michael T. Barrett, Esq., of Counsel)

For the Respondent-Appellant, Sumners, Council, George & Dortch (Thomas W. Sumners, Jr., Esq., of Counsel)

By Petition of Appeal filed with the Commissioner of Education on August 2, 1991, the Trenton Education Association (hereinafter "Association") claimed that five individual teachers employed by the Board of Education of the City of Trenton (hereinafter "Board") at the Trenton Adult Learning Center were tenure eligible teaching staff members and entitled to the benefits of such status.

On the basis of a stipulation submitted by the Association and accepted by the Board, the Administrative Law Judge (ALJ) issued his Initial Decision on August 12, 1992, finding that, pursuant to Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982), the teachers involved in this case were entitled to tenure if they met

May 4, 1994

the statutory criteria of N.J.S.A. 18A:28-1 and N.J.S.A. 18A:28-5. The ALJ also found that each teacher was entitled to the salary and benefits granted to the other teachers in the district, but, based on Lavin v. Hackensack Bd. of Ed., 90 N.J. 145 (1982),[1] he recommended to the Commissioner that any award of salary and benefits should be prospective from the date on which the Petition of Appeal in this case was filed.

In a decision issued on October 19, 1992, the Commissioner concurred with the ALJ that the teachers involved in the case were tenure eligible. The Commissioner also adopted the ALJ's determination that any relief should be prospective from the date on which the petition was filed. The Commissioner, however, remanded the matter for factfinding as to whether the affected teachers met the requirements of the specific statutes and regulations controlling the benefits which they sought. Neither party appealed from that decision.

On remand, the ALJ found that the teachers in this case were employed full-time. He concluded that, therefore, each was entitled to the benefits provided by the District to its full-time teaching staff members. In accord with the Commissioner's decision of October 19, 1992, the ALJ recommended awarding salary benefits from August 2, 1991, when the Petition of Appeal was filed. However, contrary to the Commissioner's decision of October 19, 1992, the ALJ

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[1] In Lavin, the New Jersey Supreme Court held that a time limit for filing claims did not apply to a claim for military service credit because that benefit was a statutory benefit unrelated to service as a teacher. The Court further held, however, that the equitable doctrine of laches may apply so as to bar retroactive relief where there is a delay in making such a claim.

determined that the accumulated sick days due each of the teachers should be calculated from the date of their first employment because sick leave was a statutory benefit.

The Commissioner concurred with the substance of the ALJ's decision. However, in contrast to the Commissioner's earlier determination, the Commissioner relied on the New Jersey Supreme Court's decision in Rutherford Ed. Ass'n v. Bd. of Ed. of Rutherford, 99 N.J. 8 (1985) to conclude that both sick leave and salary credit should be awarded retroactively to the teachers involved here for the period commencing six years prior to the filing of their Petition of Appeal.

The Board appealed the substance of the Commissioner's decision, maintaining that the teachers involved are not full-time teaching staff members. The Association cross-appealed, challenging the six year limit the Commissioner placed on retroactive relief due to them.

Initially, we reject as entirely without merit the Board's claim that the five teachers in this case did not work the requisite number of hours to warrant considering them as full-time teaching staff members. As detailed in the ALJ's decision of August 12, 1993, the collective negotiations agreement between the Association and the Board establishes the maximum number of hours, including a lunch period, that full-time teachers staff members may be required to work. As the ALJ found, the hours that the five teachers here were required to work conformed to or exceeded that maximum, although they were not compensated for their lunch period. Under the circumstances presented in the record of this case, we find that, as the ALJ concluded, these teachers must be considered as

full-time teaching staff members. See Middlesex County Educational Services Commission Education Association v. Board of Directors of the Middlesex County Educational Services Commission, 1987 S.L.D. 2690. In this respect, we emphasize that the Board can not avoid its statutorily imposed obligations to any category of its teaching staff members based on the fact that it may not pay them for their lunch period. See id.

However, for the reasons that follow, we find that, as decided by the Commissioner on October 19, 1992,[2] the relief to be afforded the individuals involved in this case should be prospective from August 2, 1991, the date on which the Petition of Appeal was filed.

First, we recognize that questions of retroactivity are not simple ones. Rutherford, supra at 20-21 (1985). Generally, the overruling of a judicial decision is retrospective in nature. E.g., Rutherford, supra; Darrow v. Hanover Twp., 58 N.J. 410 (1971). However, because "the basis for the doctrine of retrospective application is pragmatic rather than theoretical," Rutherford, supra at 21, the presumption in favor of retroactivity may be overcome when there is "a clear demonstration in a particular case that there are policy reasons for according a judicial decision prospective application only." Id., citing Cogliati v. Ecco High Frequency Corp., 181 N.J. Super. 579, 583 (App. Div. 1981), aff'd, 92 N.J. 402 (1983). Such reasons may be present when a new rule of law has been

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2 We note that although the Commissioner decided the question of retroactivity in that decision, Commissioner's decision, at 13, neither party questioned the ALJ's subsequent consideration of the issue or sought to bar consideration of the issue in this appeal.

announced representing a clear break in the law. See, e.g., Rutherford, supra at 21.

The New Jersey Supreme Court's decision in Spiewak, supra, upon which the relief in this case is predicated, represented such a break in the law. Accordingly, while it found that the teachers involved in the Spiewak litigation were entitled to the reward of their efforts, the Court concluded that, contrary to the general rule, the Spiewak decision should apply only prospectively to those parties not before the Court. Id. at 83.

In Rutherford, supra, the Court settled that those remedial and supplemental teachers who had filed Petitions of Appeal to the Commissioner of Education prior to June 23, 1982, when the Court had decided Spiewak, were among those entitled to retroactive application of Spiewak. However, the Court limited retroactive relief to this category of teachers in two ways. First, only those who were still employed on the date of the Spiewak decision were entitled to relief. Second, because of its concern with the financial impact of unlimited retroactivity, the Court held that calculation of benefits under Spiewak for this category of petitioners was to be limited to six years prior to its decision in Rutherford. Rutherford, supra at 30-31.

It has been over a decade since the New Jersey Supreme Court decided Spiewak. Thus, the teachers in this case were obviously not "before the court" in the Spiewak litigation. Consequently, contrary to the Commissioner's determination, Rutherford neither controls nor limits the award of retroactive relief to the teachers in this case.

Our inquiry, however, does not stop here. Lavin, supra. Despite the fact that the claims involved arose as early as 1969,[3] the petition in this case was not filed until August 2, 1991. There is no indication in the record that Petitioner provided any explanation for this delay at any point during the proceedings.[4] We do not suggest that the underlying claim to tenure eligibility should be time-barred. See Spiewak, supra at 83 n. 2. However, in the absence of any explanation which would excuse the delay in the filing of this petition, we conclude, as did the Commissioner's prior decision in this case,[5] that calculation of the salary and sick leave benefits to which these teachers are entitled should date from August 2, 1991, when they filed their petition to the Commissioner claiming to be tenure eligible. Lavin, supra at 151-155.

May 4, 1994

Date of mailing MAY 06 1994

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[3] We note that one of the claims here involves a teacher who was first employed by the Adult Learning Center in 1969. The others were initially employed in 1977, 1986 and 1989.

[4] We note that Petitioner did not even file any exceptions to our Legal Committee's Report in this case.

[5] In his decision of October 19, 1992, remanding the matter, the Commissioner adopted the ALJ's determination that relief should be awarded from the date on which the petition was filed.

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258-92

IN THE MATTER OF THE TENURE HEARING OF PETER LORIA, SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

OCTOBER 21, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

PARTIAL INITIAL DECISION
DISMISSING INEFFICIENCY CHARGE AND DENYING DISMISSAL OF UNBECOMING CONDUCT CHARGE
OAL DKT. NO. EDU 1364-92
AGENCY DKT. NO. 32-2/92

IN THE MATTER OF THE TENURE HEARING OF PETER LORIA, SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.

Carolyn Ryan Reed, Associate Counsel, for petitioner
(Marvin L. Comick, General Counsel)

Gregory T. Syrek, Esq., for respondent
(Bucceri and Pincus, attorneys)

Record Closed: August 6, 1992 Decided: September 21, 1992

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter involves a hearing under the Tenure Employees Hearing Act, seeking the removal of respondent, a teaching staff member, on charges of inefficiency and unbecoming conduct.

This matter was transmitted to the Office of Administrative Law (OAL) on February 24, 1992, for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to

15 and *N.J.S.A.* 52:14F-1 to -13. A telephone prehearing conference was held on May 13, 1992, and a prehearing order was entered on June 1, 1992. The prehearing order provided a schedule for submission of motions with respect to the legal issues dealt with herein, and, in accordance with the schedule as amended, respondent filed a motion to dismiss on July 17, 1992, and petitioner responded thereto on August 5, 1992. The record closed with regard to submissions on August 6, 1992.

BASES FOR MOTION AND APPLICABLE STANDARD

There are two bases for respondent's Motion to Dismiss. First, respondent seeks dismissal of the tenure charge of inefficiency against respondent because of petitioner's alleged failure to comply with *N.J.A.C.* 6:24-5.1(c)(4). Second, respondent seeks dismissal of the tenure charge of unbecoming conduct because of petitioner's alleged failure to comply with the requirements of *N.J.A.C.* 6:24-5.1(b)(4), (b)(5), (b)(6) and/or *N.J.S.A.* 18A:6-13.

The Uniform Administrative Procedure Rules, found at *N.J.A.C.* 1:1-1.1 to -21.6, do not deal directly with motions to dismiss such as has been submitted by respondent. However, a summary decision

> . . . may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. [*N.J.A.C.* 1:1-12.5(b)]

Accordingly, I shall deal with respondent's motion as a motion for summary decision.

ALLEGED FAILURE TO COMPLY WITH *N.J.A.C.* 6:24-5.1(c)(4)

N.J.A.C. 6:24-5.1(c)(4) states:

> Concurrent with notifying the employee of such charges of inefficiency, the district board of education shall direct that there be a modification of the individual professional improvement plan mandated by *N.J.A.C.* 6:3-1.21(f) to assure that such plan addresses the specific charges of inefficiency and comports with the timelines established for correction.

It is not disputed that on August 27, 1991, petitioner adopted a resolution which recited that on August 1, 1991, tenure charges were filed against respondent alleging inefficiency, that the board reviewed the charge and evidence and was of the opinion that there is probable cause to credit the evidence in support of the charge. The board resolved that respondent be allowed 90 days in which to correct and overcome the inefficiency alleged in the charges, that respondent be served with a copy of the resolution along with a "90-day notice," that respondent be evaluated during the 90-day correction period and that at the expiration of the 90-day notice the board be apprised of respondent's correction efforts (Exhibit C-2).

Petitioner board does not assert and has produced no affidavit, certification or other documentation to establish that it directed that there be a modification of the respondent's individual professional improvement plan to assure that such plan addresses the specific charges of inefficiency and comports with the timelines established for correction (Exhibit C-4). Rather, it asserts that the professional improvement plan for respondent dated June 19, 1991, was based on the specific charges of inefficiency. Petitioner asserts without contradiction that respondent was evaluated during school year 1990-1991, and that in the evaluation report certain inefficiencies and recommendations for improvement were brought to his attention. It asserts that the June, 1991, professional improvement plan was based upon these inefficiencies and that it made recommendations for improvement. It alleges that the charges of inefficiency were based upon the inefficiencies cited in the June, 1991, professional improvement plan and teacher evaluation reports and that the inefficiency charges were filed in July, 1991. It takes the position that since the school year and respondent's 90-day period for improvement did not begin until September, 1991, there was no need to direct that the professional improvement plan be modified since the plan already complied with the requirements to address the specific charges and inefficiencies. Thus, petitioner takes the position that the existing professional improvement plan addressed the inefficiencies and that there was no need to modify the professional improvement plan (Exhibits C-4 and C-5).

Respondent asserts without contradiction that the resolution adopted by petitioner does not contain any language directing the modification of respondent's professional improvement plan. In addition, respondent certifies that he was never advised of the existence of a modified plan (Exhibit C-2), and none of the documents provided by the parties in this matter show the existence of such a document. Thus,

respondent asserts that the charges of inefficiency are fatally defective for failure to comply with the specific requirements of *N.J.A.C.* 6:24-5.1(c)(4).

Respondent relies upon the Commissioner's decision in a case entitled *In the Matter of the Tenure Hearing of Julio Triana*, OAL DKT. EDU 2537-87 (June 25, 1987), *modified and adopted*, Commissioner of Education (July 23, 1987). In that matter, the Commissioner held that the failure of the board to develop a professional improvement plan for respondent at the time of notifying him of the charge of inefficiency was sufficient grounds to dismiss the tenure charges based upon the violation of *N.J.A.C.* 6:4-5.1(c)(4), but without prejudice to the right of the board to recertify properly in a manner totally consistent with the statute and regulations. The Commissioner emphasized that the intent of the regulation is to promote correction of the inefficiencies through carefully supervised specific guidelines established at the time the teacher in question has been formally apprised of the nature of the inefficiencies. The Commissioner went on to point out that the language relative to modification of the plan was added to the regulations at the express direction of the State Board of Education to emphasize the importance that it placed upon the exact procedure required of local boards prior to certifying a tenure charge of inefficiency. See also, *Rowley v. Bd. of Ed. of Manalapan-Englishtown*, 205 *N.J. Super.* 65, 71-72 (App. Div. 1985).

Based upon the clear mandate of the regulation, and based upon petitioner's failure to comply with this clear mandate, I **FIND** that the tenure charge of inefficiency filed by petitioner against respondent should be dismissed for failure of the petitioner to comply with the requirements of *N.J.A.C.* 6:24-5.1(c)(4).

ALLEGED FAILURE TO COMPLY WITH *N.J.S.A.* 18A:6-13 AND *N.J.A.C.* 6:24-5.4(b)

Respondent argues that the tenure charge of unbecoming conduct should be dismissed based upon petitioner's failure to comply with *N.J.S.A.* 18A:6-13 and *N.J.A.C.* 6:24-5.4(b).

It is undisputed that the charge of unbecoming conduct was filed on August 1, 1991, and a letter transmitting the charge and statement of evidence was provided to respondent. After respondent was provided an opportunity to submit a reply, the petitioner had 45 days in which to determine by a majority vote of its full

membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary. Respondent argues that a resolution adopted by the board on August 26, 1991, indicates that the only probable caused determination related to evidence expressly pertaining to the charge of inefficiency.

It is noted that the board did not file the August, 1991,charge of unbecoming conduct with the Commissioner, but instead, on January 28, 1992, the board adopted another resolution indicating that on December 16, 1991, the tenure charges against respondent were refiled and on that same date respondent was notified. The resolution goes on to indicate that the board has reviewed and examined the charges against respondent, the statements of evidence in support thereof, supplemental statements of evidence and other documents, and is of the opinion that there is probable cause to credit the evidence in support of the charges and is of the opinion that the charges, if credited, warrant dismissal or reduction in salary as said charges constitute inefficiency and unbecoming conduct.

I have reviewed the resolution adopted by petitioner on January 28, 1992, and I **FIND** that petitioner has substantially complied with the requirements of *N.J.S.A.* 18A:6-13 and *N.J.A.C.* 6:24-5.4(b). I **FIND** that the charges and supporting evidence make it clear, and provide respondent with sufficient notice, that he is charged with unbecoming conduct. I **FIND** that the resolution adopted by petitioner makes it clear that petitioner board has reviewed the charges as well as the documentary evidence supporting the charges and finds probable cause supporting the charge of unbecoming conduct. Therefore, I **CONCLUDE** that respondent's Motion to Dismiss the charge of unbecoming conduct based on petitioner's alleged failure to comply with *N.J.S.A.* 18A:6-13 and *N.J.A.C.* 6:24-5.4(b) should be **DENIED**.

PROVISION FOR IMMEDIATE REVIEW

This matter is scheduled for hearing by the OAL on October 22 and 27, November 6, 12, and 17, 1992. Under the provisions of *N.J.A.C.* 1:1-12.5(e), the ALJ may submit a partial summary decision order to the agency head for immediate review as an initial decision, pursuant to *N.J.A.C.* 1:1-18.3(c)12, for the purpose of avoiding unnecessary litigation or expense by the parties. I **FIND** that delaying review of that portion of this order dismissing the charge of inefficiency until the

end of the contested case may result in unnecessary litigation and expense, in the event this decision is reversed or modified. Accordingly, I have rendered this as a partial initial decision pursuant to *N.J.A.C.* 1:1-12.5(e) in order to afford to the Commissioner of Education the opportunity to consider whether his immediate review of this decision would be appropriate.

The use of this procedure shall not delay the scheduled hearing on the remaining tenure charge of unbecoming conduct. *N.J.A.C.* 1:1-12.5(f)

DECISION AND ORDER

Based upon the foregoing, it is hereby **ORDERED** that the tenure charge of inefficiency be is the same is hereby **DISMISSED** without prejudice. It is further **ORDERED** that the Motion to Dismiss the tenure charge of unbecoming conduct be and the same is hereby **DENIED**.

This order for partial summary decision dismissing the charge of inefficiency and denying the dismissal of the charge of unbecoming conduct is being submitted under *N.J.A.C.* 1:1-12.5(e) for immediate review. This recommended order may be adopted, modified or rejected by the Commissioner of Education who by law is empowered to make the final decision in this matter. However, if the Commissioner of Education 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.

September 21, 1992 — Joseph F. Martone

Date — **JOSEPH F. MARTONE**, ALJ

dgi

APPENDIX

LIST OF EXHIBITS

C-1 Respondent's Notice of Motion to Dismiss filed July 17, 1992
C-2 Respondent's Certification dated July 16, 1992
C-3 Brief for Respondent In Support of Motion to Dismiss
C-4 Certification of Mae Rivers dated August 4, 1992
C-5 Brief for Petitioner in Opposition to Motion to Dismiss

IN THE MATTER OF THE TENURE	:	
HEARING OF PETER LORIA, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF NEWARK,	:	DECISION
ESSEX COUNTY.	:	
	:	

The record of this matter and the partial initial decision of the Office of Administrative Law, submitted to the Commissioner for immediate review pursuant to N.J.A.C. 1:1-12.5(e) and by concurrent request of respondent for interlocutory review of the ALJ's ruling on charges of unbecoming conduct, have been reviewed. Exceptions to the ALJ's dismissal of charges of inefficiency were filed by the Board pursuant to N.J.A.C. 1:1-18.4, as were replies thereto by respondent. Briefs on the issue of the ALJ's denial of respondent's motion to dismiss charges of unbecoming conduct were filed by both parties pursuant to N.J.A.C. 1:1-14.10.*

In its filing, the Board takes exception to the ALJ's procedural dismissal of its charges of inefficiency, reiterating its argument that respondent's PIP was not modified at the time of the Board's consideration of tenure charges because it already reflected the areas of inefficiency that were of concern to the Board. The

* It is noted that the Board's exceptions and brief were incorporated into a single document.

Board, therefore, substantially complied with the controlling statutes and regulations, and its technical oversight did not prejudice respondent; to dismiss its charges on procedural grounds, as the ALJ did, is to place form over substance. Respondent replies that compliance with N.J.A.C. 6:24-5.1(c)4 is a fundamental obligation of the Board, and that its oversight in this case left respondent with a PIP giving him a year to correct deficiencies while the Board filed charges against him for not correcting them within 90 days.

In his filing on the question of unbecoming conduct, respondent renews his argument that the Board's actions in this area were also fatally flawed because its implementing resolution fails to state a probable cause determination regarding unbecoming conduct as opposed to inefficiency. Charges of unbecoming conduct were filed on August 1, 1991, yet the Board's August 27, 1991 resolution refers to and directs action on only charges of inefficiency. The Board's January 28, 1992 resolution likewise lacks a statement of probable cause determination, but if this failing is overlooked and the certification accepted, then the Board's determination came well beyond 45 days after respondent's response period expired following filing of charges on August 1 and the Board's refiling of charges on December 16, 1991 cannot cure this defect. In reply, the Board reasserts that its actions and intentions are clear from its filings as a totality and that it fully complied with all requirements for probable cause determination.

Upon consideration of the record, the partial initial decision and the arguments of the parties, the Commissioner determines to affirm the decision of the ALJ in its entirety. On

the charges of inefficiency, the Commissioner fully concurs that the language and intent of controlling regulation are clear and that the Board's failure to abide by regulation, however lacking in malice, cannot be excused so as to allow the charges to go forward at this time; however, as noted by the ALJ, there is nothing to prevent the Board from recertifying charges in a manner consistent with regulation. On the charges of unbecoming conduct, the Commissioner concurs that, notwithstanding respondent's arguments on the deficiencies of the Board's August 27, 1991 resolution, the refiling of charges on December 19, 1991 opened the matter anew, and the Board's subsequent actions, including its resolution of January 28, 1992, were clear, procedurally proper and fully in accord with applicable law; therefore, there is no basis for dismissal of charges on the grounds pled by respondent.

Accordingly, the partial initial decision of the Office of Administrative Law is affirmed for the reasons expressed therein, so that this matter is to move forward to further proceedings as scheduled on the charges of unbecoming conduct.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 21, 1992

DATE OF MAILING - OCTOBER 21, 1992

258-92

EDU #1364-92
C # 258-92
SB # 53-92

IN THE MATTER OF THE TENURE :
HEARING OF PETER LORIA, SCHOOL : STATE BOARD OF EDUCATION
DISTRICT OF THE CITY OF NEWARK, : DECISION
ESSEX COUNTY. :
:

Decided by the Commissioner of Education, October 21, 1992

For the Petitioner-Appellant, Carolyn Ryan Reed, Esq.

For the Respondent-Respondent, Bucceri & Pincus
(Gregory T. Syrek, Esq., of Counsel)

In August, 1991, the Board of Education of the City of Newark (hereinafter "Board") certified tenure charges of inefficiency and conduct unbecoming a teaching staff member against Respondent. Acting on motion by Respondent, the Administrative Law Judge (ALJ) issued a partial initial decision in September, 1992, granting dismissal of the charges of inefficiency but denying Respondent's motion to dismiss the charges of unbecoming conduct. The Commissioner adopted the ALJ's decision and directed that the matter proceed as scheduled on the charges of unbecoming conduct.

Characterizing the Commissioner's decision as interlocutory, the Board then moved before the State Board of Education pursuant to N.J.A.C. 6:2-2.3 for leave to appeal the Commissioner's dismissal of the inefficiency charges. Respondent opposed the motion.

Initially, we find that, despite the Board's characterization, the Commissioner's determination to dismiss the

FEB. 2, 1993

charges of inefficiency represents his final decision on the matter. As such, our leave is not a prerequisite for hearing the Board's appeal of that determination. N.J.A.C. 6:2-1.1(a)(1).

Accordingly, we have reviewed the substantive arguments of counsel with respect to the Commissioner's dismissal of the inefficiency charges, and for the reasons expressed in the decisions below, we affirm that determination. In so doing, we note that our decision has no impact upon the charges of unbecoming conduct which are proceeding to hearing before an ALJ.

February 2, 1993

Date of mailing FEB 04 1993

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259-92

K.L.L. AND S.L.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, AND ROBERT GRADY, PRINCIPAL, LIVINGSTON HIGH SCHOOL, ESSEX COUNTY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning mother and high school student (S.L.) alleged Board unlawfully denied admission of S.L. into advanced placement English class for junior year.

ALJ found Board had reasonable basis to deny admission. S.L. had equal opportunity relative to admission to class. ALJ found he lacked recommendation of his sophomore English teacher, which recommendation was deemed essential for admission to the class. ALJ also found that even without such required recommendation, Board's decision was not unreasonable based on S.L.'s academic record. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

OCTOBER 21, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6003-92
AGENCY DKT. NO. 370-7/92

K.L.L. and S.L.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY AND ROBERT GRADY, PRINCIPAL, LIVINGSTON HIGH SCHOOL,
Respondents.

Robert Glickman, Esq., for petitioners (Glickman and Bassetti, attorneys)

James Rothschild, Esq., for respondents (Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Record Closed: September 3, 1992 Decided: September 4, 1992

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

The petitioners, S.L., a student in the respondent Board of Education's ("Board's") Livingston High School ("LHS"), and K.L.L., his mother, contend that the Board and Principal Robert Grady unlawfully denied S.L. admission into the LHS advanced placement English class for junior year ("AP English III") and they demand an order directing that S.L. be admitted to the class.

The respondents deny any wrongdoing and allege that the denial was consistent with reasonable standards already in place and resulted from a competent and good faith professional judgment.

PROCEDURAL HISTORY

On July 30, 1992, the petitioners' petition and supporting papers were filed with the Commissioner of Education. See N.J.S.A. 18A:6-9. The matter was transmitted to the Office of Administrative Law ("OAL") where, on August 4, 1992, it was received and filed as a contested case. See N.J.S.A. 52:14B-1 et seq., N.J.S.A. 52:14F-1 et seq. and N.J.A.C. 1:1-3.1. On August 11, 1992, the Board's letter brief and supporting papers in opposition to the petition were filed in the OAL. Also on August 11, 1992, Administrative Law Judge ("ALJ") Stephen Weiss heard argument; denied the petitioner's application for emergency relief; and scheduled the case for a plenary hearing on August 26, 1992. On August 17, 1992, the petitioner's attorney entered his appearance. On August 26 and August 31, 1992, the case was heard in the OAL's Newark office. On September 2 and 3, 1992, the parties' post-trial briefs were received.

FINDINGS OF FACT

The LHS AP Program, the LHS English Department and the Requirements for Admission to AP English

LHS, which is an excellent school, offers the following types of classes: "Advanced Placement" ("AP"), "Honors," "Standard," "Fundamental" and "Basic."

Class rank, which is a factor used by undergraduate schools in deciding upon admission, is determined by use of a weighted grade point average ("GPA"), and, relative to class rank, LHS's "Student Handbook" provides the following:

> Rank is determined by a weighted grade point average which is calculated by multiplying the grade equivalent, (A = 4.0, B = 3.0, C = 2.0, D = 1.0, E = 0.0), times the following course weighted quality point system:
>
> | | |
> |---|---|
> | Advanced Placement | 8 |
> | Honors | 7 |
> | Standard | 6 |
> | Fundamental | 5 |
> | Basic | 4 |

> The sum of all quality points earned is then divided by the number of marking periods plus one for the final grades earned in full-year courses and the number of marking periods plus .5 for the final grades earned in semester courses to determine a quality point average. Divide the quality point average by 6 to obtain the weighted grade point average. [P-1]

During relevant times, relative to admission into AP English III, the "LHS Course Guide" provided the following:

> ENGLISH 3 - ADVANCED PLACEMENT (131) — 5 Credits (8)
> Prerequisite: English 2, writing sample, teacher recommendation or demonstration of comparable proficiencies. — Full Year, Grade 11
>
> This course is open to students selected on the basis of ninth and tenth grade work of superior quality. A writing sample and a recommendation from the sophomore English teacher are necessary for admission. The main emphases of the course are techniques of research, writing skills, and an intensive study of the works of American authors. [P-2]

Given the above, compared to an LHS student who attains an "A" in the other English classes, an LHS student who gains admission to and attains an "A" in the very rigorous AP English class gains more weight for his GPA. However, many LHS graduates who were in the standard classes have gained admission to many of the finest undergraduate schools in the United States. Also, a junior who has taken the standard English class and who meets the requirements therefor, may be admitted to the advanced placement class for senior year (and this has occurred numerous times).

During the 1991-1992 school year, petitioner S.L. was a sophomore in LHS and he was in Roberta Bramhall's English class.

In 1958, Mrs. Bramhall received a B.A. and, in 1968, she received an M.A., from Montclair State College. She is certified to teach high school English; since 1958, she has taught English; and, since 1963, she has taught English at LHS. See N.J.S.A. 18A:6-34 et seq. and N.J.A.C. 6:11-6.2.

Since at least 1963, when Mrs. Bramhall began there, LHS has offered AP English classes and, as a teacher of standard English classes, she has been requested to consider whether her students should be recommended for admission to AP English classes. Further, Mrs. Bramhall has taught AP English classes. Therefore, she

is fully familiar with the AP English program's purposes and selection process, as well as the performance of students in the AP English program.

During the 1991-1992 school year, Steffi Poss was the supervisor of the LHS English Department.

In 1964, Mrs. Poss received her B.A. in English and English education; in 1975, she received an M.A. in English; and, in 1987, she received an Ed.S. in English education, all from Rutgers University. Mrs. Poss, who is certified as a teacher of English and as a supervisor, has taught English since 1972 and, in 1990, she began as supervisor of LHS's English Department.

As demonstrated by LHS's students' scores on standardized tests, by admission of LHS's students to the finest undergraduate schools and by LHS's students' performance in the finest undergraduate schools, LHS's English Department is excellent.

Before the distribution of applications for admission to AP English III for the 1992-1993 school year, Mrs. Poss conferred with the four LHS sophomore English teachers and she expounded upon the requirements for admission to the class, which, in her view, included the following: 1. teacher recommendation based on experience with that student in class, 2. grades in English courses, 3. counselor recommendation, 4. student application, 5. writing samples submitted with the application, and 6. standardized test scores if necessary for verification. See R-1.

Insightful interpretation and appealing expression in English are often the product of a person's artistic sensibility. However, artistic sensibility is often not quantifiable, e.g., by grades or standardized test results, although it may be intuitively perceived. Since they all believed that superior artistic sensibility was necessary for AP English III and since (of course) they all believed themselves to be sufficiently sensitive to detect that artistic quality, consistent with the Course Guide, Mrs. Poss and the English teachers all felt that a teacher's recommendation was essential for admission to the class.

The Petitioner's Record, His Application to the AP English III and the Rejection of His Application

The petitioner has indicated that his "intended college major" is "biological sciences" and that his "intended career choice" is "health and medical professions."

He is a diligent student and has completed several honors classes at LHS. See P-4. He has also worked on the LHS school newspaper and been a member of the golf team. He has an interest in literature and has read a substantial number of quality books. See P-4, P-5 and R-3.

During the 1991-1992 school year, the petitioner was a sophmore in Mrs. Bramhall's English class and her opinion relative to the petitioner, which I accept as **FACT**, includes the following: The petitioner's comments have shown little insight into literature, his classroom contributions have not been significant, his essay writing has shown neither creativity nor individual skill, he has difficulty and usually does not write well in his first or second drafts, and he generally writes well only after receiving a great deal of input from his teacher. After comments, advice, etc. from Mrs. Bramhall, the petitioner's final essays received the following grades: five "As", three "Bs", one "C" and one "E". See P-8, P-9, P-10, P-12, P-13, P-14, P-15, R-7a, R-8, R-9 R-10 and R-11. The petitioner, received the following report card grades from Mrs. Bramhall: a "B" for his first marking period, a "B" for his second marking period, a "B" for his mid-term examination, an "A" for his third marking period, an "A" for his fourth marking period, a "B" for his final examination and a "B" for his final grade. (At the petitioner's request, Mrs. Bramhall changed a "B + " to an "A-," which was then recorded as one of the two "As".) See P-5.

On or about February 10, 1992, Mrs. Bramhall announced to petitioner's class that applications could be made for admission to the "English III AP" class; Mrs. Bramhall announced when applications should be submitted; and the petitioner asked for and received an application.

The petitioner has testified that he left his completed application in Mrs. Poss' mailbox in the LHS English Department and that, thereafter, when he met with his guidance counselor to compose his junior year class schedule, he saw that he was not listed among those who had been admitted to the two AP English III classes then constituted (each of which had about 16 students).

On or about February 25, 1992, the petitioner met with Mrs. Poss, who told him she would review his application. In the days thereafter, the petitioner and his parents met with Mrs. Poss and Mr. Grady, at which time Mrs. Poss stated that she did not have an application from the petitioner; that the petitioner should complete and submit another application; and that his application would be reviewed relative for admission to AP English III.

and submit another application; and that his application would be reviewed relative for admission to AP English III.

On or about March 2, 1992, the petitioner submitted a completed application to Mrs. Poss. Mrs. Bramhall and Mrs. Poss then carefully read the application and they both determined that the petitioner's work was not of superior quality. For example, the petitioner certainly had not demonstrated that he would make insightful classroom contributions, which is essential for a successful AP English class. Further, Mrs. Bramhall felt that the petitioner's work was not close in quality to that of the students she did recommend; he was better suited for standard English; and she could not recommend the petitioner for AP English III.

After March 2, 1992, with Mr. Grady's approval, a third and final AP English III class was selected, so that a total of 48 students were admitted and 30 were rejected. Also, among the 30 rejected, were students whose work was superior to the petitioner's, but whom the sophomore English teachers did not recommend for AP English III. That is to say, the petitioner is not the "49th" student who might well have been admitted to the class.

All of the students admitted had the recommendations of their sophmore English teachers. Among the more quantifiable pre-grade 10 data relative to the students admitted, the following appears: (1) Relative to "Reading Comprehension" standardized test results: 37 were higher than the petitioner and 7 were lower. (2) Relative to "Language" standardized tests results: 34 were higher than the petitioner and 10 were lower. (3) Relative to (another) "Language" standardized test results: 32 were higher than the petitioner, 4 were equal and 9 were lower. Among the more quantifiable "Grade 10" data relative to the students admitted, the following appears: (1) Relative to "Reading Comprehension" standardized test results: 14 were higher than the petitioner, 7 were equal and 27 were lower, (2) Relative to "Language" standardized test results: 26 were higher than the petitioner, 4 were equal and 18 were lower. (3) Relative to (another) "Language" standardized test results: 46 were higher, one was equal and one was lower. (4) Relative to final English grades, 41 were higher and 7 were equal. (5) Relative to GPA, 37 were higher and 11 were lower. (6) Relative to rank in class, 38 were higher and 10 were lower. Therefore, in 8 of the 9 quantifiable categories, the petitioner's data was clearly inferior to that of the majority.

LEGAL CONCLUSIONS

The State of New Jersey must provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of children, such as the petitioner, and local boards of education, such as the respondent Board, are charged with operation of those schools. See N.J. Const. (1947), Art. VIII § IV, par. 1 and N.J.S.A. 18A:10-1 et seq. Further, no state may enforce any law which shall abridge a privilege of a citizen, such as the petitioner; no state may deprive any person of life, liberty or property, without due process of law; and no state may deny any person within its jurisdiction the equal protection of the law. See U.S. Const., Am. XIV § 1. That is to say, the State, its subdivisions and local public entities may discriminate (make choices) in making their limited resources available in response to the public's expanding demands, so long as such discrimination (choice) is not invidious or otherwise unlawful.

As a governmental entity, the respondent Board must be presumed to have acted lawfully and in good faith. See Fitzpatrick v. Civil Service Co., 91 N.J. Super. 535, 539 (App. Div. 1966). Therefore, the petitioner bears the burden of proof by a preponderance (the greater weight) of the credible evidence that there was no reasonable basis for the denial of his application. That is to say, he must prove that the denial was arbitrary, capricious and unreasonable. There is no authority for the reviewing entity to substitute its judgment for that of the respondents and it is not enough for the petitioner to prove merely that his admission would have been reasonable. See Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 297 (App. Div. 1960), and N.J.S.A. 18A:6-9.

I **CONCLUDE** as follows: At the excellent LHS, the respondents have satisfied their duty to provide a thorough and efficient system of education, including that related to English. The petitioner has been provided with an opportunity equal to that of other LHS sophomores relative to admission to AP English III. The Course Guide's requirements for admission are unchallenged and, in any event, they are reasonable and lawful. The requirements include "a recommendation from the [applicant's] sophomore English teacher for admission," which is necessary given the nature of English and the AP English III class (P-2). The petitioner's teacher reasonably declined to give the petitioner such a recommendation and, therefore, the petitioner cannot prove that the respondents lacked a reasonable basis for their action. (Further, given the petitioner's record in English, the petitioner cannot

prove that the respondents unreasonably determined that he lacked "Grade 11 comparable proficiencies.")

ORDER

I **DISMISS** the petition **WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9/4/92
Date

John R. Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

9/9/92
Date

Maureen K. Kibbe
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 11 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

jz

EXHIBITS

Joint Exhibit:

J-1 "A.P. English application form," completed by the petitioner (and received by the respondents on March 1, 1992, or thereafter)

Petitioner's Exhibits:

P-1 LHS 1991-92 Student Handbook (page 10)

P-2 LHS 1992-93 Course Guide (page 25)

P-3 Letter from Weaver, dated July 29, 1992

P-4 PSAT Report of Student Answers

P-5 Student Report Card

P-6 (No exhibit)

P-7 "Books Recently Read" by the petitioner

P-8 "The Flight of Pepe" (draft and final essay) and questions and answers

P-9 "The Most Wicked Witches of Them All" (draft and final essay)

P-10 "Why Where (sic) There Witches" (draft and final essay)

P-11 (No exhibit)

P-12 "Macbeth's Insanity" (draft and final paper)

P-13 '"Courage" (essay)

P-14 "Manolin's Tears" (essay)

P-15 "A New Lease on Life" (essay)

Respondent's Exhibits:

R-1 "Memorandum: Criteria for Selection to English Advanced Placement Courses"

R-2 "Students Admitted to English 3 AP 1992-1993 Academic Year"

R-3 "Representative List of Students Not Admitted to English 3 AP for 1992-1993 Academic Year"

R-3a "List of Students Not Admitted to English 3 AP, for 1992-93 Academic Year" (retracted)

R-4 Certification of Gerald Walker

R-5 Certification of Steffi Poss

P-6 Certification of Roberta Bramhall

R-7 Letter from Attorney Rothschild, dated August 17, 1992

R-7a "Zeena and The (sic) Cat" (draft and final essay)

R-8 "Dear Art" (letter)

R-9 "The Victim's Revenge" (draft and final essay)

R-10 "The Wiser Man" (draft and final essay)

R-11 "Outdated Traditions" (draft and final essay)

R-12 Certification of Arlene E. Zielinski (not accepted into evidence.)

K.L.L. AND S.L.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, AND ROBERT GRADY, PRINCIPAL, LIVINGSTON HIGH SCHOOL, ESSEX COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioners' exceptions were untimely filed pursuant to the prescriptions of N.J.A.C. 1:1-18.4, having reached the Commissioner's office one day beyond the period provided for by regulation, with the envelope marked "Postage Due 23¢." Accordingly, such exceptions are not considered in the Commissioner's review of this matter nor is the Board's reply to such exceptions. The Board's primary exceptions were timely received, however. It is noted that petitioners' counsel submitted a reply to the Board's reply exceptions, but because petitioners' exceptions are untimely and also because there is no provision in law for the consideration of replies to reply exceptions, such arguments as are made therein are also not made a part of this determination.

The Board's exceptions fully support the ALJ's determination to dismiss the instant matter, but it takes exception to three portions of the opinion of the ALJ, all of which relate to the list of respondents' exhibits compiled at page 11 of the initial decision. Such exceptions are recited herein verbatim:

> 1. The list should include Exhibit R-2a, a redacted version of R-2, which differed from R-2 only in that the full names were changed to initials and a number was affixed in front of each name.
>
> 2. Exhibit R-7 was a letter from respondent's attorney that was marked for identification but not admitted into evidence, as Judge Tassini held it was subject to the attorney-client privilege. It should be omitted.
>
> 3. Exhibit R-12, a certification from Dr. Arlene E. Zielinski, should have been admitted, as it set out the history of a phrase in P-2 that Petitioners believed was of great importance. (The phrase, "or demonstration of comparable proficiencies," was at the end of the list of prerequisites for all course requiring prerequisites.) Dr. Zielinski noted that the phrase was inserted in the list of prerequisites for all courses requiring prerequisites at the "direction of representatives of the New Jersey State Department of Education several years ago," "During the monitoring process," to accommodate transfer students, "Plan B" students, and special need students. The Department of Education should take into account its own directives, if it deems that phrase to be important. Judge Tassini correctly held the phrase to be irrelevant, and held, in any event, that petitioners did not meet it. (page 8) We make this Exception only in an excess of caution since Judge Tassini's Opinion is obviously correct whether or not one misreads P-2, as do petitioners, who read P-2 to not require a teacher recommendation, despite the language in P-2 that "a recommendation from the sophomore English teacher [is] necessary for admission."
>
> (Exceptions, at pp. 2-3)

Upon careful and independent review of the record of this case, the Commissioner adopts as his own those findings and conclusions of the Office of Administrative Law that petitioners have failed to meet their burden of demonstrating that respondents unreasonably determined that S.L. lacked the proficiencies necessary for acceptance into the Grade 11 Advanced Placement English program at Livingston High School. In so finding, the Commissioner notes the Board's exceptions but finds they do not alter the disposition of this matter.

Accordingly, for the reasons expressed in the initial decision, the Commissioner dismisses this matter with prejudice.

COMMISSIONER OF EDUCATION

OCTOBER 21, 1992

DATE OF MAILING - OCTOBER 22, 1992

259-92

EDU #6003-92
C # 259-92
SB # 55-92

K.L.L. AND S.L.,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, AND ROBERT GRADY, PRINCIPAL, LIVINGSTON HIGH SCHOOL, ESSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, October 21, 1992

For the Petitioner-Appellant, Glickman & Bassetti
(Robert P. Glickman, Esq., of Counsel)

For the Respondent-Respondent, Riker, Danzig, Scherer, Hyland & Perretti (James Rothschild, Esq., of Counsel)

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

February 2, 1993

Date of mailing FEB 04 1993

260-92

260-92

H.A.B., as guardian ad litem for S.T.B.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent, whose son was denied admission to first grade on basis of age, alleged Board's transfer admission policy discriminated against pupils who resided within district and attended nonpublic schools or out-of-district schools on a tuition basis, as opposed to those who transferred into first grade from outside the district. Petitioner contended admission policies for kindergarten and first grade were void on constitutional grounds.

ALJ concluded Board acted properly when it applied age-entrance policy in denying first-grade admission to petitioner's child, as the policy was rational, nondiscriminatory and fairly applied. ALJ found matter wholly within discretionary authority of Board. (Thomas v. Morris) Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

OCTOBER 21, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 4576-92
AGENCY REF. NO. 223-5/92

H.A.B. AS GUARDIAN AD LITEM FOR S.T.B.
Petitioner,

v.

MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,
Respondent.

H.A.B., Esquire, pro se
Sanford D. Brown, Esquire, for respondent (Cerrato, Dawes, Collins, Saker & Brown, attorneys)

Record Closed: August 31, 1992 Decided: September 8, 1992

BEFORE **LILLARD E. LAW, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner alleges that the admission policy of the Board of Education of the Manalapan-Englishtown Regional School District (Board) discriminates against pupils who reside within the school district as opposed to those pupils who transfer into the Board's first grade from outside public schools.

This matter was transmitted from the Commissioner of Education (Commissioner) to the Office of Administrative Law (OAL), on June 10, 1992, 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 or about July 16, 1992, petitioner propounded and served a Motion for Summary Judgment upon respondent and this tribunal. Due to the Board's attorney, Sanford D. Brown's scheduled vacation, the Board was granted leave to submit its response and cross-motion for Summary Decision later than the time required by N.J.A.C. 1:1-12.2 (c). The Board's Notice of Cross-Motion, Affidavit, Brief and Proposed Order were received on August 5, 1992. Oral argument was heard on August 17, 1992, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey. The record was considered closed on August 17, 1992.

MOTION FOR EMERGENT RELIEF

Subsequently, on or about August 21, 1992, petitioner propounded a Motion for Emergent Relief before the Commissioner. Because the matter was at that time before the OAL, the Commissioner declined to entertain petitioner's Motion. Rather, on August 25, 1992, the matter was transmitted to the OAL for determination. The respondent Board, by way of letter dated August 25, 1992, did not oppose petitioner's motion. It asserts, however, that its policy with respect to the placement of S.T.B. in its kindergarten rather than its first grade, is valid and in full compliance with state and federal statutes as well as case law.

Oral argument on the Motion was held on August 31, 1992, at which petitioner was able to set forth, on the record, his position with respect to the application for emergency relief.

This tribunal, having heard the arguments of the parties determined that there was no issue which was separate and apart from petitioner's case-in-chief. Therefore, petitioner's application was denied.

MOTION AND CROSS MOTION FOR SUMMARY DECISION

This matter comes before this administrative tribunal on Motion and Cross Motion for Summary Decision, pursuant to N.J.A.C. 1:1-12.5. Having carefully considered the criteria for summary judgment, as established by our Supreme Court in Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954) and, having carefully considered the entire record before me; I **CONCLUDE** that the instant matter is ripe for summary decision.

ISSUE

The sole issue to be resolved by this administrative tribunal is whether the Board has the authority and/or discretion to establish educational policy as to the chronological age children may enter and enroll in its schools?

STATEMENT OF FACTS

The relevant and material facts giving rise to this controversy are not in dispute and are set forth as follows:

The Board has adopted a pupil placement policy pursuant to N.J.S.A. 18A:11-1. Thereunder, children reaching the age of five on or before October 1 of any year will be eligible for entrance into kindergarten at the beginning of that school year. Children reaching the age of six on or before October 1 of any year will be eligible for entrance into first grade at the beginning of that school year. In the case of children who transfer into the Board's District from another district and who have completed a public school kindergarten program, the Board will consider placement into the first grade based on certain considerations.

S.T.B was born on October 31, 1986 and presently resides within the Board's jurisdiction for school attendance purposes. S.T.B. completed a preschool program (kindergarten) in June 1992 at Temple Shaari Emeth, a private institution licensed by the New Jersey Division of Youth and Family Services (DYFS).

The Board's admission policy provides, in pertinent part, as follows:

> Policy 5111 ADMISSION
>
> Entrance Age
>
> C. First grade
>
> Children reaching the age of six on or before October 1 of any year will be eligible for entrance into first grade at the beginning of the school year. Children reaching the age of six on or after October 1 will not enter first grade until the beginning of the following year. (A year's attendance in kindergarten is not necessary.)
>
> D. Transfers from public schools
>
> . . . .

> Grades kindergarten to one:
>
> In order to assure assignment to the grade best suited to a pupil's needs and readiness, placement is left to the discretion of the school principal working in cooperation with the pupil's parents/guardian. Such placements are governed by the following considerations: (1) age, health and maturity of the pupils; (2) quality and extent of his/her reading skills and needs; (3) record in writing from his/her previous school; and (4) results of standard district tests that the principal will administer after pupil is in attendance.
>
> . . . .
>
> E. Transfers from private schools
>
> Children who apply for admission from private or parochial school to grades two through eight on the basis of schooling outside the district shall be placed under the requirements described above. Applicants for grades kindergarten and first are eligible, if the child is five or six years old on or before October 1. (emphasis in the original).

ARGUMENTS OF THE PARTIES

PETITIONER'S POSITION

I

S.T.B. has a Constitutional Right to a Free Education

Petitioner observes that the New Jersey Constitution of 1947, Article VIII, Section IV, paragraph 1., provides as follows:

> The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the state between the ages of five and eighteen years.

The court held in West Morris Reg. Bd. of Ed. vs. Sills, 110 N.J. Super. 236 (Ch.Div. 1970), a school busing case, that "education in our state is essentially a state supervised function, and this includes private schools as well as public, religious as well as secular." West Morris at 243. Our state statutes require that public schools be free to persons over the age of five and under the age of twenty if they are domiciled within the school district. N.J.S.A. 18A:38-1(a).

It is clear that the State's duty to educate its children is a matter of constitutional demand. The Supreme Court in State vs. Vaughn, 44 N.J. 142, 145 (1965), stated that the State of New Jersey holds the education of children to be of supreme importance. The point was reiterated in Pingry Corp. vs. Hillside Tp., 46 N.J. 457, 460-461 (1966) wherein the court held that the constitutional right that the children of New Jersey have is the fundamental right to a thorough and efficient system of education. The court must "afford an appropriate remedy to redress a violation of those rights. To find otherwise would be to say that our constitution embodies rights in a vacuum, existing only on paper." Robinson vs. Cahill, 66 N.J. 133, 147, (1975) citing Cooper vs. Nutley Son Printing Co., Inc., 36 N.J. 189, 197 (1961).

The essential purpose of the Constitution's free education clause is to maximize public education so that our children will be prepared to function politically, economically and socially in a democratic society. N.J.S.A. 18A:7A-4; Levine vs. Institutions & Agencies Dept. of N.J., 84 N.J. 234, 249 (1980). State laws have provided guidelines for the achievement of this legislative goal and implementation of a thorough and efficient system of free public schools in N.J.S.A. 18A:7A-5. State educational goals and standards are set forth in N.J.A.C. 6:8-2.1(b)(c). The respondent implements these guidelines on behalf of public school transfers. The respondent refuses to implement these guidelines for private school transfers.

There can be no dispute by the respondent that petitioner has a Constitutional right to a free education.

II

There Shall be No Discrimination in the
Implementation of the Constitutionally
Mandated Guarantee to a Free Public Education

The respondent is required to provide a free education to all children in the state equally. Admission standards cannot be applied with distinctions. N.J.S.A. 18A:36-20 states "no pupil in a public school in this state shall be discriminated against in admission to or in obtaining any advantages, privileges, or courses of study of the school by reason of race, color, creed, sex or national origin.' N.J.A.C. 6:4-1.5(a) states "no student shall be denied access to or benefit from any educational program or activity solely on the basis of race, color, creed, religion, sex, ancestry, national origin or social or economic status."

It is a parent's sole right to determine whether a child should be enrolled in a free educational system or a private educational system. Since Pierce vs. Society of Sisters, etc., 268 U.S. 510 (1925) the courts have given parents the constitutional right to select the type and character of education they feel is best suited for their children, whether that be secular or sectarian. West Morris Reg. Bd. of Ed., Supra at 236; N.J.S.A. 18A:38-25.

There is no requirement for a Board of Education to accept, by transfer, a child not eligible by reason of age for admission on October 1. However, the board may, in its discretion, admit any such pupil if the entrance requirements established through the rules and regulations of the board are met. The respondent has chosen to accept children who have not met the October 1 deadline pursuant to N.J.S.A. 18A:38-5. N.J.S.A. 18A:38-5 states in part:

> No board of education shall be required to accept by transfer from public or private school any pupil who is 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 rule or regulation of the board." (emphasis added)

Respondent's policy, with regard to the admission into first grade provides that a pupil transferring from a public school and enrolling in grade one will be placed pursuant to the discretion of the school principal working in cooperation with the pupil's parents/guardian, subject to four conditions. However, a pupil transferring from private school will automatically be placed in kindergarten if the child has not yet reached the age of six on or before October 1 of that year. The respondent's policy distinguishes between transfers from public schools and private schools. No such distinction is made or permitted pursuant to N.J.S.A. 18A:38-5. There is no basis to distinguish between state accredited schools (public versus private). It is this arbitrary distinction which violates the constitutional rights of the petitioner pursuant to the Fourteenth Amendment of the United States Constitution and Article I, Paragraph 5 of the New Jersey Constitution and is discriminatory. The respondent is required to treat the transfer from public and private identically. In this matter both types or transfers require an individual evaluation.

The distinction between admissions from private or public schools is extinguished when applications are made to transfer into grades two through eight. There can be no rational basis for the policy modification. The respondent's policy, in creating the distinction between private and public school transfers for kindergarten and first grade, in conjunction with the modification for transfers into

grades two through eight, furthers the violation of petitioner's constitutional right and intrusion on petitioner's fundamental right to a free education.

III

Respondent's Admission Policy into First Grade is Unconstitutional. The Policy Fails to Pass either the New Jersey Balancing Test or the Federal Three Ties Approach Test.

It has long been recognized that Article I, Paragraph 1 of the New Jersey Constitution requires, just as the Fourteenth Amendment to the United States Constitution, equal protection. Article I, Paragraph 1 of the New Jersey Constitution states:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

Equal protection claims under the Fourteenth Amendment are analyzed under a three tier approach. In the First Tier statutes which regulate either a "fundamental right" or a "suspect class" are subject to "strict scrutiny". A suspect class is one "saddled with such disabilities, subjected to such a history of purposeful unequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process" San Antonio Indep. School Dist. vs. Rodriquez, 411 U.S. 1, 28 (1973). Fundamental rights are those which are "explicitly or implicitly guaranteed by the constitution" San Antonio at 33. There can be no dispute that the right to an education is a fundamental right guaranteed by the Constitution. State vs. Vaughn, 44 N.J. 142 (1965); Pingry Corp vs. Hillside Tp. 46 N.J. 457 (1969); Robinson vs. Cahill, 66 N.J.133 (1975) In addition, the respondent's distinction between private school children and public school children creates a suspect class as private school children are most often coming from religious schools. In order to withstand strict scrutiny the regulation or statute must further a compelling state interest and there must be no less restrictive means of accomplishing that objective. Graham vs. Richardson, 403 U.S. 365 (1971); Brown vs. City of Newark, 113 N.J. 565, 573 (1989).

The Second Tier is for regulations of a "semi-suspect" class or one that substantially affects a fundamental right in an indirect manner. This level is tested under intermediate scrutiny. To withstand intermediate scrutiny the classification must be substantially related to the achievement of an important governmental objective Craig vs. Boren 429 U.S. 190 (1976); Brown vs. City of Newark at 573.

Finally, if neither strict nor intermediate scrutiny applies the classification will be subjected to a "rational basis". To withstand this level of review the classification need be only rationally related to a legitimate state interest, Dandridge vs. Williams, 397 U.S. 471 (1970); Brown vs. City of Newark at 573.

New Jersey has rejected the multi-tiered analysis of the Federal Constitution that has employed a balancing test. Brown vs. City of Newark, at 573; Barone vs. Department of Human Services 107 N.J. 355, 368 (1987); Greenberg vs. Kimmelman, 99 N.J. 552, 567 (1985) Although the analysis is different under the New Jersey Constitution and the Federal Constitution, the result may be the same. Brown vs. City of Newark at 574. Under the New Jersey Balancing Test the court, in striking the balance, considers "the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." Brown vs. City of Newark at 574, Greenberg vs. Kimmelman at 567.

In applying the New Jersey Balancing Test to the instant matter, the nature of the affected right is a fundamental right, the right to an education (see prior citations). The respondent's intrusion on that right is significant. Pupils who have gone to private school and are attempting to transfer into the district's first grade are required to repeat kindergarten if born after October 1 of the school year. The extent to which the restriction intrudes upon the fundamental right to an education is to deny admission unilaterally although transfers from public schools are admitted pursuant to the discretion of the principal and subject to four conditions. There is no basis for the restriction upon transfers from private schools in contrast to transfers from public schools. Such a distinction is impermissible N.J.S.A. 18A:38-5. There is no public need for such a distinction. Accordingly, it is respectfully submitted that under the New Jersey Balancing Test the respondent's policy of entrance into first grade must be stricken as violative of the due process rights of petitioner.

Under the federal test it is submitted that the strict scrutiny test must be applied as clearly a fundamental right is involved. Arguably, a suspect class is involved. There is no compelling state interest in distinguishing between transfers from private and public schools. Such a distinction is impermissible N.J.S.A. 18A:38-5. There is obviously a less restrictive means of determining if pupils are qualified transferring from private schools. Private school transfers should receive the identical admission standards as public school transfers, admission pursuant to the

discretion of the school principal and parent/guardian, subject to the four conditions.

While it is petitioner's belief that the strict scrutiny test would be applied, the respondent's policy is unconstitutional under the intermediate scrutiny test and the rational basis test as well. Under the intermediate scrutiny test, again, there is no important governmental objective achieved distinguishing between private and public school transfers. Under the rational basis test, once again, the distinction between private and public school transfers is not rationally related to any legitimate state interest.

Petitioner submits that the distinction between private school transfers and public school transfers is arbitrary and capricious. The right effected is a fundamental one. There is no compelling state interest, or important governmental objective in making such a distinction.

With regard to the respondent's policy of admission into grades two through eight, as compared to grades kindergarten through one, the same analysis, concerning the admission policy into first grade would be applied. Accordingly, it is respectfully submitted that the modification of the policy beginning in grade two is arbitrary and capricious. The modification does not further any compelling state interest nor does it further an important governmental objective. What justification can there be to permit identical treatment beginning in grade two and not in kindergarten. A child's fundamental right to an education begins at age five N.J.S.A. 18A:38-1(a).

Under the balancing test of New Jersey again the fundamental right to an education is affected. The modification would require a private school student to obtain further private school education, both kindergarten and first grade, to qualify for transfer and admission into second grade. The policy, in effect, removes from the parent the ability to choose the type of education their child should obtain (private or public) and places it in the hands of the respondent.

IV

Conclusion

As the respondent's policy presently stands a pupil who has gone to a private school kindergarten, and was born after October 1, is faced with a dilemma. If the

parent exercises the parent's constitutional right and decides that it would be best for his child to enroll in a public school and receive his free education, then the child is punished and must repeat kindergarten. If the parent cannot afford to continue a private education the child is punished and must repeat kindergarten. If the parent does not wish the pupil to repeat kindergarten, the parent must pay for a private education, and subsequently seek a transfer into second grade. The respondent's policy creates an unconstitutional dilemma for both the parent and child at the parent's expense. It is only a parent who should and must decide what type of education his child should have, secular or sectarian. Pierce vs. Society of Sisters; West Morris Reg. Bd. of Ed. vs. Sills, N.J.S.A. 18A:38-25. In applying respondent's policy, such a choice is taken from a parent. Petitioner seeks the court to remedy the respondent's violation if his Constitutional rights. Robinson vs. Cahill, 66 N.J. 133 (1975).

It is the respondent which has chosen to admit students who have not met the age requirements pursuant to N.J.S.A. 18A:38-5. Having done that, the respondent is not permitted to discriminate against private school transfers pursuant to N.J.S.A. 18A:36-20 and N.J.A.C. 6:4-1.5(a). The respondent's policy allows greater rights to public school transfers than private school transfers. The respondent's unconstitutional policy infringes upon an unalienable fundamental right, a child's right to receive a free education from the state. State vs. Vaughn, 44 N.J. 142 (1965).

For all the foregoing reasons it is respectfully requested that the respondent's policy for transfers into kindergarten and grade one be stricken as unconstitutional as it violates equal protection clauses of both the New Jersey Constitution and the United States Constitution. For all the foregoing reasons it is respectfully requested that the respondent's policy distinguishing between transfers into kindergarten and first grade are discriminatory and violative of the protection clauses of the New Jersey Constitution and the United States Constitution.

THE BOARD'S POSITION

I

The Board Policy as Written and Applied is Valid and Should be Upheld.

N.J.S.A. 18A:38-5 reads in pertinent part:

> . . . 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. (emphasis supplied.)

N.J.S.A. 18A:11-1 reads in pertinent part:

> The board shall . . . make, amend and repeal rules, not inconsistent with this title or with the rules of the board , for . . . the government and management of the public schools. . . .

The granting of authority to local school boards by the New Jersey Legislature as cited above is clear indication of its intent not to substitute its judgment for local boards relative to pupil placement. Turtz v. Bd. of Ed. of Tp. of Randolph, 1979 S.L.D. 499, 501. A.H.A. and I.J.A. v. Bd. of Ed. of Boro of Glen Rock, OAL Dkt. No. EDU 6175-87 at 6.

The rules for the promotion of pupils within local school districts are established without the discretion of the Commissioner of Education and at the discretion of the local board of education. Shenkler v. Bd. of Ed. of the Bor. of Ho-Ho-Kus, Bergen County, 1974 S.L.D. 772.

A local board of education may promote or place pupils enrolled into public schools for its district according to the prescription of its own rules. Boulogne v. Bd. of Ed. of the City of Jamesburg, Middlesex County, 1964, S.L.D. 107; Wilcox v. Bd. of Ed. of the Borough of Oceanport, Monmouth County, 1954-55 S.L.D. 75; Staats v. Bd. of Ed. of Montgomery Twp., Somerset County, 1938 S.L.D. 669. Shenkler, supra, at 777.

The Commissioner of Education in the Shenkler case analyzed the authority of local boards based on cases decided prior to that time. There, the Commissioner noted at pages 777-778 that:

> In Boulogne, supra, the Commissioner was concerned with a policy of local board of education which required that pupils be six years of age on or before December 31 in order to qualify for entrance to first grade. Such policy was consistent with another Board policy with respect to qualifications for entry to kindergarten. The Commissioner said:
>
> It has long been held that it is the right and responsibility of the local board of education to establish rules for the promotion of pupils from grade to grade. In 1914, the State Board of Education in reversing the decision of the Commissioner in Staats v. Board of Education of Montgomery Township, 1938 S.L.D. 669, 671, said:

> The State Board of Education holds that a local board of education has authority to prescribe its own rules for promotion. It is given that express right by statute.

More recently, in the case of Wilcox v. Board of Education of Oceanport, 1954-55 S.L.D. 75, the Commissioner directed the admission of a child on transfer from a private kindergarten, concluding, at page 77, with the statement:

> The Board of Education of the Borough of Oceanport, Monmouth County, will determine in its discretion the grade in which the child shall be placed. (See R.S. 18:11-1.) [Now, N.J.S.A. 18A:33-1]

That a board of education may give consideration to age as a factor in determining promotion policies is set forth in the statutes. R.S. 18:11-1 requires boards of education not provide suitable school facilities and accommodations for the education of the children who reside in the district. Such facilities

> . . .shall include . . . courses of study suited to the ages and attainments of all pupils between the ages of five and twenty years.

In fulfillment of its duty to provide suitable school facilities, the board has no obligation under the law to employ formal testing procedures to determine a child's fitness to enter a particular grade. The statutes specifically reserve to the local school district the right to prescribe its own rules for promotion. R.S. 18:3-16 [now N.J.S.A. 18A:4-24] empowers the Commissioner to 'ascertain the thoroughness and efficiency of any or all public schools and any or all grades therein, by such means, tests, and examinations as seem proper to the Commissioner,' but after giving such power, the statute concludes:

> Nothing contained in this section shall impair the right of each district to prescribe its own rules for promotion.

While the board may use tests for grade placement purposes, it is not required to do so. In the case of Gutch and Fugger v. Board of Education of Demarest, Bergen County, decided by the Commissioner March 13, 1963 [1963 S.L.D. 85], affirmed State Board of Education May 1, 1963 [1963 S.L.D. 89], one of the questions was whether a board of education could make psychological testing a prerequisite to early admission to kindergarten. On this question the Commissioner said:

> . . .respondent is under no obligation to obtain the results of psychological testing as evidence of readiness for schooling of a child under the age of five years. If, on the other hand, respondent

> desires such guidance in the exercise of its discretion given it by R.S. 18:15-1, supra, the Commissioner is convinced that there is implied power for respondent to employ such professional assistance or advice as it may reasonably require.
>
> In the instant matter, respondent could have directed that petitioner's child be tested to determine qualifications for admission to first grade. that it did not so direct does not constitute a denial of any right. Petitioner admits that her daughter did not qualify for admission to first grade on the basis of age under respondent's policy.
>
> The Commissioner finds no evidence of arbitrary or discriminatory action in the board's modification of its policy to make children born on or before December 31, 1957, eligible for admission to first grade if they had satisfactorily completed the kindergarten program in its own or a suitable private kindergarten. Such a modification was obviously necessary to avoid inconsistence with its own rules. Petitioner lost no rights thereby which she had previously enjoyed. (1964 S.L.D., at pp. 108-109) (emphasis supplied.)

Thus, the Commissioner of Education and the State Board of Education have had occasion to interpret the pertinent statutes and policies, recited above, on prior occasions. While such interpretations are not binding on the Commissioner and or the Courts, they may not with impunity be set aside. The uniform administrative interpretation of a statute over a considerable length of time will be afforded respect. Safeway Trails, Inc. v. Furman, 76 N.J. Super. 90 (Law Div. 1962); Hudson County National Bank v. Provident Institution for Savings in Jersey City, 80 N.J Super 339 (Chan. Div. 1963).

Petitioner herein, as others in the past, has attempted to argue that the Board admission policies for kindergarten and first grade are void on constitutional grounds. The case herein is similar to the aforementioned Shenkler case where a father of a child five years of age claimed that the local board decision to deny the child admission to the first grade class was unconstitutional and arbitrary, unreasonable and unlawful. The Commissioner upheld the board policy which required children admitted to the first grade to be six years of age before October 1 of the school year. Citing to the past decisions upholding discretionary admission policies, the Commissioner found that these interpretations were,

> . . .not overturned by petitioner's constitutional argument that his son is being denied equal protection of the law. While the age criterion which the Board has utilized is not that which petitioner deems appropriate, there is no allegation nor

> evidence that such criterion was not uniformly applied by the Board with respect to petitioner's son and all other similarly situated pupils.
>
> The findings in the matter, sub judice, are similar to those of Boulogne, supra. the Commissioner finds no arbitrary nor discriminatory action on the part of the Board. The Board has done nothing it was not empowered to do. It is well established that absent a clear showing of unlawful action or abuse of discretion, the Commissioner will not interfere in a matter lying wholly within the discretionary authority of a local board of education. Thomas v. Morris Township Board of Education, 89 N.J. Super. 327 (App. Div. 1965); Boult and Harris v. Passaic Township Board of Education, 1939-49 S.L.D. 7, 13, affirmed State Board of Education 15, affirmed 135 N.J.L. 329 (Sup. Ct. 1947), affirmed 136 N.J.L. 521 (E.&A. 1947); Pepe v. Livingston Board of Education, Essex County, 1969 S.L.D. 47. (1974 S.L.D. at 778-779)

Here, as in Shenkler, there is no allegation that the Board has allowed in other private school students in violation of the Board policy.

This case is also similar to the case of Kelleher v. Bd. of Ed. of the Boro. of Northvale, Bergen County 1971 S.L.D. 546 there, the petitioner sought entrance to kindergarten and argued the board policy was unconstitutional and discriminatory against private and kindergarten students. The board there had adopted a cut off date of October 1 of the school year but also provided an exception for admission to kindergarten of children moving into the local district, "who had been enrolled in approved public school kindergartens in other school districts, even though under age with respect to [the local district's] policy for children in its own community." Kelleher, supra, at p. 546.

The Northvale policy also had language similar to the Manalapan-Englishtown's relative to admission into first grade:

> (3) Except as noted in Item No. 4, a child will be accepted for first grade only if his sixth birthday falls on or before October 1 of the school year for which entrance is requested, or if he had successfully completed an approved kindergarten program and if his birthday is no later than December 31 of the school year. the district reserves the right to screen entrants to provide for their appropriate placement into kindergarten or first grade.
>
> The petitioner in Keller alleged that the:
>
> Board's policy discriminates against private and parochial kindergarten pupils because the only exception to the cited cut off date pertains to children who have been previously enrolled in public school kindergartens. (Emphasis supplied).

In finding that the case was res judicata, the Commissioner in Kelleher upheld the board policy on all grounds:

> The most recent decision on kindergarten entrance age was Davidson v. Board of Education of the Borough of Glen Rock, [1970 S.L.D. 296] decided by the Commissioner etc. which reads in part as follows:
>
> The Commissioner determines that the statutes are clear and that petitioners unfortunately have no claim for early admission that can be supported by law. N.J.S.A. 18A:38-5 reads in part as follows:
>
> > 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. . . but the board may in its discretion admit any such pupil. . . (emphasis supplied.)
>
> The legislative intent here of the words 'shall' and 'may' is definitive. This provision makes early kindergarten entrance permissive, and the Commissioner cannot construe the statute, supra, otherwise.
>
> There is no issue of constitutionality in this matter applicable to petitioner's appeal. Petitioner's son does not meet the minimum statutory age requirement under N.J.S.A. 18A:38-5, supra, nor is there a showing that any of the other provisions of the Board's admission policy apply to petitioner.

Kelleher, supra at 548.

This case is also similar to the challenge to the admission policy in Turtz v. Bd. of Ed. of the Tp. of Randolph, supra, 1979 S.L.D. 499. There, the petitioner alleged his son was automatically entitled to admission to the first grade. The policy was agreed to permit admission to the first grade if the child either was six years of age before October 1st or had a year of approved kindergarten experience or was classified by the Child Study Team as qualified. Id. at 500. The petitioner contended that the Board had to admit his son automatically into the first grade as was his "statutory entitlement", and that failure to do so would deny the child his "constitutional rights as an individual and result in the claim and determination that the Board's policy itself is arbitrary, capricious and unreasonable." Id. at 501.

The Administrative Law Judge in his initial decision noted that residents should not be able to circumvent Board policy and sneak children into classes ahead of others based on economic advantage:

> The Board's policy in each sub-title includes the word "must" and therefore must be applied in pari materia. To do otherwise would make it possible for residents with sufficient economic resources to enroll a child in private kindergarten who did not meet the Board's kindergarten age requirement, and then transfer the child to the public school in grade one (1) and circumvent the kindergarten admission policy. Id. at 501

The Commissioner based on stipulations of facts as to the board policy upheld completely the board's policy and ordered that the child be enrolled in kindergarten and observed per board policy. Id. at 504.

The Commissioner has recently and consistently reaffirmed the right of local school boards to pass and enforce varied discretionary policies involving student placement into kindergarten and/or first grade. A.H.A. and I.J.A. v. Bd. of Ed. of Glen Rock, supra; L.B. v. Bd. of Ed. of Hillsborough, OAL Dkt. No. EDU 8323-89 (Comm. of Ed. 102-90, 5/1/90); Supuran v. Mount Laurel Tp. Bd. of Ed., OAL Dkt. No. EDU 7366-88 (Comm. of Ed. 304-88, 12/1/88).

Of greatest relevance is the Commissioner's decision in Supuran, supra, where an admission policy very similar to Manalapan-Englishtown's was upheld. The policy denied admission into kindergarten to any child not five years of age by October 1 except for certain qualifying pupils transferring from other public school districts. The policy read in pertinent part:

> 2. A child transferred into the Mount Laurel School District from a public school may be accepted although the child may not meet the age requirements stipulated in paragraph A1. In order to determine whether to accept an underage student transferring into the district, the child will be tested to determine whether he or she meets the standards for grade level placement.
>
> 3. A child transferred into the Mount Laurel School District from a private school who does not meet the age requirement will not be accepted.

The parents who were new residents of the district became aware of the policy and removed their child to their former district in New York where he attended kindergarten for six days. The child's fifth birthday was not until November. Even though the child performed well on a pre-registration test, the child was denied admission to the new district. The Commissioner found no flaw in the policy or its application and in so doing analyzed the intent and principle of the policy as stated by the board superintendent:

> Policies, like rules and statutes, are defined by their language. The words used are to be given their ordinary and well understood meanings in the absence of any explicit indication to the contrary. Only if an ambiguity exists is it necessary to go beyond the test itself. Ruehl Co. v. Bd. of Trustees for Education, 85 N.J. Super. 4 (Law Div. 1964). One of this tribunal's goals is to carry out legislative and administrative purposes and plans. The history of a policy, as testified to here by the superintendent, may be referred to as indicative of purpose and plan. See, Schinek v. Gibb Truck Rental Agency, 69 N.J. Super 590 (App. Div. 1961). In determining the intent of a policy, just as in determining the legislative intent in a statute, the intent of the entire piece is controlling, and all sections must be read together in light of general intent so that the auxiliary effect of each individual part is made consistent with the whole. Febbi v. Bd. of Review, Div. of Employment Security, 35 N.J. 601 (1961).
>
> Viewing the pertinent part of policy No. 502 in its entirety, it is clear that the Board and administration of Mount Laurel Public Schools have carefully considered the age of entrance question. N.J.S.A. 18A:38-5 is clear.
>
> Nothing in the portion of policy cited above is inconsistent with the statute. I FIND policy No. 502 to be consistent with N.J.S.A. 18A:38-5 and well within the compass of general powers delegated by the Legislature to boards of education by N.J.S.A. 18A:11-1. I also FIND that subparagraph A.2, if read strictly, would seem only to require that an underage student attempting to transfer into the district test at an acceptable level. And, indeed, that has happened in the present case.

A review of the superintendent's testimony in Supuran, supra, shows great similarity to the expressed purpose for the Manalapan-Englishtown Board policy as expressed by it's superintendent:

> The superintendent of schools testified that policy No. 502 was revised in 1983 at his request. Under the former policy, parents were appealing in cases wherein their children had attended other, usually private, schools. He believed the district should set an age criterion irrespective of attendance in other schools. He also asked the Board for some administrative leeway. The superintendent stated that the wording of the present policy is intended to provide for administrative discretion.
>
> The district's primary concern is the social and emotional readiness of children. Based on local informal studies as well as nationally recognized research, the district believes that chronological age is the most important factor in determining whether a child, particularly a male child, will do well not only in his first year of school but throughout his school career.
>
> The superintendent stated that he determined to deny N.S.'s admission on the basis of age. The superintendent had no

> background of previous success in a kindergarten to review. The six days' attendance in the Long Island school district were insufficient to base any judgment upon. The superintendent believes, based on age, that N.S. should not be admitted to the Mount Laurel Schools. There is no other child N.S.'s age in kindergarten in the Mount Laurel school district at this time.

Similar to the case in Supuran, supra, the Manalapan-Englishtown Superintendent's declarations of policy per his affidavit herein and in support of the Board's decision, convincingly shows that the intent of the Board policy read together is clear, carefully considered and is consistent with and in conformance with N.J.S.A. 18A:38-5.

> 2. The Board has determined that children must turn five years of age by October 1 of the school year in order to be admitted to Kindergarten. Likewise, children must turn six years of age by October 1 of the school year for admission into first grade.
>
> 3. The Board has made a determination that it does not wish parents in the district to try to jump ahead of others the same age by enrolling their children into a private child care facility which purports t provide an early Kindergarten program. Thus, the Board does not want to encourage early admission for five year olds. It is the general philosophy of the Board and its Administration that such is not advantageous.
>
> 4. The Board has further determined that it does not wish to penalize the few families who move into the District and who have relied on their former board's policies which called for entrance into Kindergarten at an age prior to the age which Manalapan-Englishtown determined to be proper. Even in those few instances, while credence is given to the former district's policies, the ultimate placement is determined based on certain considerations.
>
> Under Section D. of the Board policy, there are four factors listed which would determine ultimate placement of public school transferees for grades Kindergarten through eight. While the factors are listed for general purposes for all grades in the District, in actuality the fourth consideration, which is post admission testing, is not utilized for five year old children such as the petitioner's son. There are no tests available in the District for kindergarten age students. In the past, the Board had in fact used Gesell tests for consideration, but it was determined that there were problems with the testing and they were discontinued. The Board has found no substitute testing to adequately monitor the developmental level of children the age of petitioner's son.
>
> There are other rational distinctions between granting credence to another public school discretionary policy and not to private day care centers and/or schools.

> Private school teachers do not have to be state certified while public school teachers must be state certified. (See N.J.A.C. 6:10-122-1 et seq. vs. N.J.S.A. 18A:6-38 et seq.
>
> The State Department of Education has no jurisdiction over early childhood private schools (having six or more students under the age of 6.)
>
> They are considered child care institutions and are overseen by the Department of Human Services. N.J.A.C. 10:122-1.1
>
> Public school programs are overseen by the Department of Education. N.J.S.A. 18A:4-23.
>
> There are no attendance requirements for private schools while local districts establish attendance policies for public schools. (See N.J.A.C. 6:10-122-1 et seq. vs. N.J.A.C. 6:20-1.3).

(See Affidavit of J. Scozzari, 7/31/92, p.2).

Also of relevance is the recent decision in L.B., supra, where the Commissioner upheld the local board's decision to maintain a child in kindergarten even though the child had completed a full year in a public accredited kindergarten program in an adjacent municipality where she had been promoted to the first grade. As the Commissioner noted, "the Board's action in returning S.B. to kindergarten, under the circumstances of the instant matter, was an appropriate, reasonable extension of the Board's discretionary authority." Id. at 10.

Thus, in summary, the present Board has determined in its discretion and as permitted by statute to set initial admission into its school based on an October 1 cut off date of the school year. N.J.S.A. 18A:38-5; 18A:11-1. The only exception for admission is for students who have moved from out of district and had relied on that other district's discretionary decision to start children in kindergarten at an earlier age. The Board policy does not permit parents who reside within the District to take economic advantage over those around to jump ahead of their immediate neighbors by enrolling their children in what they perceive to be an early kindergarten program. And while the Board will give credence to another public district's decision to start kindergarten at a prior cut off date per statute, the Board also double checks the advancement of these children before considering advancement.

Petitioner's allegation that there is a suspect class created because private school children "are most often coming from religious schools" is irrelevant and in the very most has already been decided by the Commissioner to not create a violation of pupil placement policies. Kelleher, supra, Boards can pass policies which

distinguish between completion of public programs and private programs. Supuran, supra.

The board has done nothing it was not empowered to do. Petitioner cannot come close to meeting his specific burden which is to clearly show an unlawful action or abuse of discretion. Therefore, the Commissioner should not and cannot interfere with a matter lying wholly within the discretionary authority of the respondent Board. Thomas v. Morris Twp. Bd. of Ed., supra at 332; Shenkler, supra at 779.

DISCUSSION AND CONCLUSIONS

Petitioner properly observes that the New Jersey Construction (1947), Art. VIII, Sec. IV. par. 1 holds that it is the State's duty to educate our children and that such education is of supreme importance, State v. Vaughn, supra.; Pingry Corp. v. Hillside Tp., supra. The Legislature has undertaken the duty to satisfy this constitutional goal by providing for the public education of every child and youth within this State. Title 18A, Education Law. In so doing, the Legislature has granted the State Board of Education, the Commissioner and local boards of education certain powers and duties to satisfy the constitutional mandate to ". . . . provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. Const. Art. VIII, Sec. IV., par. 1. The Legislature has enumerated general mandatory powers and duties of local boards of education through enactment of N.J.S.A. 18A:11-1, which provides as follows:

> The board shall ---
> a. Adopt an official seal;
>
> b. Enforce the rules of the state board;
>
> c. Make, amend and repeal rules, not inconsistent 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[A], Civil Service, of the [---] 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 proper conduct, equipment and maintenance of the public schools of the district.

In addition, the Legislature has enacted a series of statutes concerned with attendance at the State's public schools. N.J.S.A. 18A:38-1 et. seq. Among those statutory provisions for school attendance is N.J.S.A. 18A:38-5, which provides that:

> 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 Legislature, in its wisdom, provided local boards of education with wide discretion to admit or not to admit a child into its schools who was not eligible to be admitted by reason of not having attained the age for admission on or before October 1 of the school year. The herein Board has, through N.J.S.A. 18A:11-1, adopted a rule, which is not inconsistent with any provision of Title 18A, not to accept children into its kindergarten who have not attained the age of five years on or before October 1, of the school year. The Board has extended its rule to exclude those children within its jurisdiction who seek to transfer into its first grade from a private kindergarten or day school program who have not attained the age of six years on or before October 1 of the school year. Within its discretionary authority under N.J.S.A. 18A:38-5, the Board has made an exception for those children who do not meet the age requirement for admission into its first grade and who moved into its school district after attending a public supported kindergarten. Petitioner claims, among other things, that the Board's application of this statutory discretion is discriminatory and violates his constitutional rights of equal protection under the Fourteenth Amendment of the United States Constitution and an intrusion on his fundamental right to a free public education under the New Jersey Constitution.

Petitioner asserts, without proof, that "private school children are most often coming from religious schools" and, thereby, attempts to create an unconstitutional classification of pupils for equal protection analysis. After an extended discussion of multi-tiered analysis of the Federal Constitution imposed by Federal Courts, petitioner concedes that New Jersey has rejected such analysis in favor of a balancing test. Borough of Collingswood v. Ringgold, 66 N.J. 350, 370, (1975), appl. dism., 426 U.S. 901, 96 S. Ct. 2220, L. Ed. 2d. 826 (1976). In the final analysis, moreover, petitioner has failed to demonstrate that private school pupils constitute a suspect classification in New Jersey. See, Barone v. Department of Human Services, 107 N.J.

335, (1987), where the Court held at 369 that, "Neither poverty nor disability is a suspect classification in New Jersey." (citations omitted).

The Commissioner has had occasion to determine constitutional equal protection claims as to age-entrance requirements enacted by local boards of education. The Commissioner has, universally, rejected such claims. Shenkler, supra. ; Kelleher, supra. Rather, the Commissioner has construed the legislative authority conferred upon a local board of education to make and enforce rules for its own governance under N.J.S.A. 18A:11-1, to include policies adopted by it consistent with N.J.S.A. 18A:38-5. The herein Board has done just that. It has determined to use its discretion in admitting children to its first grade who are new to the school district who have completed a public school kindergarten program and who would otherwise not be eligible for such admission, while rejecting admission to children who live within the school district and have completed a nonpublic school kindergarten program. As Mr. Justice Stewart said, speaking for the Court in Rinaldi v. Yeager, 384, U.S. 305, 86 S. Ct. 1497, 16 L. Ed. 2d 577 (1966):

> To be sure, the constitutional demand is not a demand that a statute necessarily apply equally to all persons. The Constitution does not require things which are different in fact . . . . to be treated in law as though they were the same (citations omitted). at U.S. 308-309.

I **CONCLUDE,** therefore, that the Board has not acted in an arbitrary or discriminating fashion when applied its age-entrance policy to determine that petitioner's son is not eligible for admission to its first grade.

I **CONCLUDE** that the Board has done nothing it is not empowered to do.

I **FURTHER CONCLUDE** that neither this tribunal nor the Commissioner shall interfere in a matter lying wholly within the discretionary authority of the Board Thomas v. Morris Twp. Bd. of Ed., 89 N.J. Super 327 (App. Div. 1965).

Accordingly, **Summary Decision** is hereby **ENTERED** on behalf of the Board of Education of the Manalapan-Englishtown Regional School District and petitioner's Motion for Summary Decision is **DENIED AND DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8 September 1992
Date

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

9/9/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 11 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

OAL DKT. NO. EDU 4576-92

H.A.B., as guardian ad litem for S.T.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful review of the arguments and facts herein, the Commissioner concurs with the ALJ that the Board was neither arbitrary nor discriminatory in denying first-grade admission to petitioner's child on the basis of age. Therefore, as found by the ALJ, the Board's actions were within its lawful discretion and are not subject to interference by this tribunal.

Accordingly, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

OCTOBER 21, 1992

DATE OF MAILING - OCTOBER 22, 1992

John Ellis

COMMISSIONER OF EDUCATION

261-92

261-92

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE TOWNSHIP OF MULLICA, ATLANTIC COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

OCTOBER 22, 1992

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE TOWNSHIP OF MULLICA, ATLANTIC COUNTY.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for one member of the Board of Education for an unexpired three-year term at a special school election held in the school district of Mullica Township, Atlantic County, on September 15, 1992, were as follows:

Candidates	At Polls	Absentee	Total
Anthony J. Butterhof	164	8	172
Maryann T. Agnew	170	4	174
Butterhoe (Write-in)	1	0	1
Nobody (Write-in)	1	0	1

Pursuant to a written request from candidate Anthony Butterhof, filed September 21, 1992, an authorized representative of the Commissioner of Education from the Office of the Atlantic County Superintendent of Schools was directed to conduct a recount of the machine ballots cast. The recount was conducted on October 6, 1992, at the Atlantic County Voting Machine Warehouse by the Atlantic County Superintendent of Schools.

At the conclusion of the recount, the tally stood as follows:

Candidates	At Polls	Absentee	Total
Anthony J. Butterhof	164	8	172
Maryann T. Agnew	170	4	174
Nobody (Write-in)	1	0	1

There was one write-in vote (for "Butterhoe") invalidated during the recount because it was "machine cancelled." The absentee tally given above reflects the results as originally announced, since no request was made to Superior Court for a recount of absentee ballots.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts it as his own.

Accordingly, the Commissioner finds and determines that at the special election held on September 15, 1992, Maryann T. Agnew was elected to the unexpired three-year term ending in April 1995 on the Mullica Township Board of Education.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 22, 1992

DATE OF MAILING - OCTOBER 22, 1992

262-92

262-92

HARRIET PRESCHEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ORADELL, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

OCTOBER 22, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 0704-92
AGENCY DKT. NO. 1-1/92

HARRIET PRESCHEL,
Petitioner,
v.
ORADELL BOARD OF EDUCATION,
Respondent.

Harriet Preschel, *pro se*

James L. Plosia, Jr., Esq., for respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Lisa Glick Zuker, Esq., appearing for the participant American Civil Liberties of New Jersey, pursuant to *N.J.A.C.* 1:1-16.6

Record Closed: September 11, 1992 Decided: September 16, 1992

BEFORE **KEN R. SPRINGER,** ALJ

This matter was transmitted to the Office of Administrative Law on January 27, 1992 for a hearing pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.*

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Sept. 16, 1992
Date

Ken R Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

Sept. 17, 1992
Date

Maureen K. Kelly
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 21 1992
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

al

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STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
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SILLS CUMMIS ZUCKERMAN RADIN
TISCHMAN EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(201) 643-7000
Attorneys for Respondent
Oradell Board of Education

HARRIET PRESCHEL, Petitioner, -v- ORADELL BOARD OF EDUCATION, Defendant.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW DOCKET NO. EDU- 0704-92 Civil Action STIPULATION OF DISMISSAL

The parties in the above-captioned matter have agreed to amicably resolve the above-captioned matter upon the following terms:

1. Petitioner hereby agrees to withdraw her Petition of Appeal with prejudice.

2. Respondent agrees that it will act consistent with its recently adopted policy on holiday displays.

3. No costs or damages are assessed against any party.

HARRIET PRESCHEL
Pro Se Petitioner

JAMES L. PLOSIA JR.
Attorney for Defendant
Oradell Board of Education

OAL DKT. NO. EDU 0704-92

HARRIET PRESCHEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ORADELL, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

OCTOBER 22, 1992

DATE OF MAILING - OCTOBER 22, 1992

263-92

263-92

BOARD OF EDUCATION OF THE CITY OF BEVERLY, PETITIONER, V. BOARD OF SCHOOL ESTIMATE OF THE CITY OF BEVERLY AND COMMON COUNCIL OF THE CITY OF BEVERLY, BURLINGTON COUNTY, RESPONDENTS.	:	COMMISSIONER OF EDUCATION DECISION

OCTOBER 26, 1992

BOARD OF EDUCATION OF THE CITY OF BEVERLY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF SCHOOL ESTIMATE OF THE CITY OF BEVERLY AND COMMON COUNCIL OF THE CITY OF BEVERLY, BURLINGTON COUNTY,	:	DECISION
RESPONDENTS.	:	

For Petitioner, Stephen J. Mushinski, Esq.

For Respondents, Denis C. Germano, Esq. (Hulse & Germano)

This matter was opened before the Commissioner by way of a Petition of Appeal filed on April 16, 1992 by the Board of Education of the City of Beverly (Board) appealing the budget set by the Beverly Board of School Estimate and the local tax levy certified by the Common Council of the City of Beverly (Council) and seeking restoration, on the grounds of necessity for a thorough and efficient education, of the reduction in the current expense tax levy for the 1992-93 school year. These reductions were made pursuant to N.J.S.A. 18A:22-14 and N.J.A.C. 6:24-7.2(a)1.

The total proposed and certified budgets, as well as the amounts in dispute in this matter, are set forth below:

Proposed Tax Levy Adopted by Board		Amount of Tax Levy Certified by Council	
Current Expense	$978,310	Current Expense	$938,310
Capital Outlay	2,825	Capital Outlay	2,825
Amount of Reduction by Council		**Amount of Reduction in Dispute before the Commissioner**	
Current Expense	$ 40,000	Current Expense	$ 40,000
Capital Outlay	-0-	Capital Outlay	-0-

The reductions at issue were effectuated by the Board of School Estimate after a public hearing on March 16, 1992 and certified by the Council by resolution on March 24, 1992. The reductions to specific current expense line items determined by respondents and being appealed by the Board are as follows:

Line Item 50 - Account 120b - Legal Fees $ 7,000

Based on past average expenditures

Line Item 52 - Account 130 - Other Administrative Expenses $ 4,000

Defer purchase of computer

Line Items 65/66 - Accounts 240/250 - Teaching Supplies and Other Expenses $ 5,000

Based on past average expenditures

Line Item 90 - Account 630 - Heat $ 4,000

Based on past average expenditures

Line Item 91* - Account 640 - Utilities $ 8,000

Based on past average expenditures

Line Item 102 - Account 700 series - Maintenance $12,000

Based on past average expenditures

*Respondents' Answer incorrectly identified this line item as 90, but clearly referred to Utilities, which is Line Item 91.

On May 4, 1992, respondents filed an Answer to the Petition of Appeal, admitting the amounts set forth above, but denying allegations by the Board that the reductions were arbitrary,

capricious and unreasonable and would result in insufficient funds to conduct a thorough and efficient system of schools. On June 1, 1992, a position paper was filed by the Board pursuant to N.J.A.C. 6:24-7.8 and, additionally, on July 22, 1992, a summation was filed by the Board pursuant to N.J.A.C. 6:24-7.8.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Mindful, then, of the balance to be applied in his standard of review, the Commissioner makes the following determinations with respect to the specific line items reduced by respondents.

Line Item 50 - Account 120b - Legal Fees $7,000

Respondents' reduction was based on a review of expenditures over the past three years and the determination that $6,000 was budgeted for legal fees in 1991-92 and $17,200 was budgeted in 1992-93. Based on this review, respondents reduced this account by $7,000. The Board responds that the budgeted amount of $17,200 includes expenditures for auditing and automated payroll services as well as legal fees. It must be noted that the budgeting for these other professional/technical services should not have been included in Account 120b which is solely for legal fees. The other expenditures should have been budgeted in Account 120d which is specifically for "Purchased Other Professional/Technical Services." All parties agree that the Board is currently involved in pending litigation. Since the amount budgeted for legal fees is significantly less than that thought necessary by respondents and is, in fact, less than the amount respondents had determined to allow for legal fees, the $7,000 reduced from this account is restored. The Board, however, is directed to correct the budgeted appropriations for Accounts 120b and 120d as noted above.

Line Item 52 - Account 130 - Other Administrative Expenses $4,000

Respondents' reduction was based on a review of expenditures over the past three years and the determination that the purchase of a computer be deferred. The Board responds that the increase in this account is primarily for publication of a quarterly newsletter, begun in the spring of 1992 and sent to every home in the City of Beverly. As the Commissioner deems the development of programs and operations responsive to changing technological demands is necessary and consistent with the goals of a thorough and

efficient education, and that parental and community awareness and involvement are essential to a thorough and efficient education, the $4,000 reduced from this account is restored.

Line Items 65-66 Accounts 240/250 - Teaching Supplies and Other Expenses $5,000

Respondents' reduction was based on a review of expenditures over the past three years and anticipated for 1991-92. The Board responds that the increase in these two accounts is due to costs for new instructional programs initiated in 1991-92 and increasing enrollment. It is determined that teaching supplies and other instructional materials are essential to provide a thorough and efficient education and that reducing appropriations for these materials would negatively impact the development of educational programs initiated this past year. The reduction in these accounts is deemed to be arbitrary and the amount of $5,000 is therefore restored.

Line Item 90 - Account 630 - Heat $4,000

Respondents' reduction was based on a review of expenditures over the past three years. The Board stated that there was no increase in this line item for 1992-93. They further note that the current school year had a particularly mild winter season and that they must plan and budget sufficiently to heat the buildings appropriately. The Commissioner determines that since this line item has no increase over the prior year and it is proper and prudent to budget for necessary heating levels, the amount of $4,000 is restored.

Line Item 91 - Account 640 - Utilities $8,000

Respondents' reduction was based on a review of expenditures for the past three years and anticipated for 1991-92.

The Board responded that there was no increase in this line item for 1992-93. It further notes that it anticipates increased costs in this account for 1992-93 because it has added a gas-heated hot water system, additional telephone services and fax machines.

The documentation submitted by the Board indicates that this account will have a surplus at the end of 1991-92. It is determined that the Board has valid reason because of the increased utilities to anticipate increased expenditures for 1992-93. However, it is further determined that the Board has offered no compelling reason for the restoration of the entire amount of the reduction. Therefore, $4,000 of the reduction is sustained and $4,000 is restored for the increased services in utilities.

Line Item 102 - Account 700 Series - Maintenance $12,000

Respondents' reduction was based on a review of expenditures for the past three years and anticipated for 1991-92. The Board responded that the 1992-93 budget included funds for the removal of a 7,000 gallon oil tank. The amount included was based on estimates it received from its consultant. It is determined that the removal of oil tanks and correction of any related hazardous conditions are essential to comply with statutory mandates. The amount of $12,000 is therefore restored.

SUMMARY

ACCOUNT	REDUCTION	SUSTAINED	RESTORED
120b	$ 7,000	$ -0-	$ 7,000
130	4,000	-0-	4,000
240/250	5,000	-0-	5,000
630	4,000	-0-	4,000
640	8,000	4,000	4,000
700	12,000	-0-	12,000
	$40,000	$4,000	$36,000

Accordingly, the Burlington County Board of Taxation is directed to make the necessary adjustment as set forth below to reflect a total of $974,310 to be raised in tax levy for current expense purposes by the Board for the 1992-93 school year.

	Amount Certified By Respondents	Amount Restored	Tax Levy After Restoration
Current Expense	$938,310	$36,000	$974,310

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 26, 1992

DATE OF MAILING - OCTOBER 26, 1992

264-92

BOARD OF EDUCATION OF THE BOROUGH OF FAIRVIEW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND COUNCIL OF THE BOROUGH OF FAIRVIEW, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

OCTOBER 26, 1992

BOARD OF EDUCATION OF THE BOROUGH OF FAIRVIEW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND COUNCIL OF THE BOROUGH OF FAIRVIEW, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

For Petitioner, Dennis J. Oury, Esq. (Oury, Mizdol & Brovarone)

For Respondent, James J. Deer, Esq.

This matter was opened before the Commissioner by way of a Petition of Appeal filed on May 29, 1992 by the Borough of Fairview Board of Education (Board) seeking restoration, on the grounds of necessity for a thorough and efficient education, of the reduction by the Mayor and Council (Council) in the capital outlay tax levy for the 1992-93 school year. A copy of the Board's notice of said appeal to the governing body was received by the Commissioner on May 13, 1992. These reductions were made pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2 following voter rejection of the Board's proposed budget on April 7, 1992 and after consultation with the Board as required by law. The total proposed and certified budgets, as well as the amounts in dispute in this matter, are set forth below:

Proposed Tax Levy Adopted By Board		Amount of Tax Levy Approved By Voters (Current Expense) and Certified By Governing Body (Capital Outlay)
Current Expense	$6,755,139	$6,755,139
Capital Outlay	$ 80,000	-0-
Amount of Reduction By Governing Body		**Amount of Reduction in Dispute Before the Commissioner**
Current Expense	-0-	-0-
Capital Outlay	$ 80,000	$ 80,000

The reduction at issue was effectuated by Council in a resolution dated April 28, 1992 to reduce the capital outlay tax levy as follows:

> [T]he Board of Education of the Borough of Fairview has adequate surplus monies to pay for the necessary Capital Outlay Proposition. (R-92-89)

On July 27, 1992, the Council filed its Answer to the Petition of Appeal pursuant to the provisions of N.J.A.C. 6:24-7.6 admitting to the amount set forth above, but leaving the Board to its proof in all other respects. In its Answer, the Council also listed six items of defense as follows:

> 1. The Petition does not comply with the format required by N.J.A.C. 6:24-1.3.
>
> 2. The Petition does not attach the information regarding the matter complained of required by N.J.A.C. 6:24-7.5.
>
> 3. The amount of the proposed capital outlay does not correlate with the repairs and improvements purportedly required for the school.
>
> 4. The capital outlay funds demanded by Petitioner are not necessary to comply with the constitutional mandate of providing a thorough and efficient education.
>
> 5. The Petition was untimely filed.

6. The Board of Education failed to provide proper notice of its intention to appeal the reduction.

On August 19, 1992, a position paper was filed by the Council pursuant to N.J.A.C. 6:24-7.8. On September 4, 1992, a position paper was filed by the Board pursuant to N.J.A.C. 6:24-7.8.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Mindful, then, of the balance to be applied in his standard of review, the Commissioner makes the following determination with

respect to the reduction in the capital outlay tax levy effectuated by the Council.

Reduction to Capital Outlay $80,000

The Board's Petition of Appeal stated that the proposed tax levy to replace the stairwell fire doors at two schools was necessary because a State monitoring report cited the existing fire doors as not meeting the requirements of the Fire Code. The Council's position stated in the resolution reducing the tax levy and in the position statement filed with the Commissioner is that the amount requested had not been verified by specific bids and that the Board has surplus funds which are greater than the amount requested for the project. The Council also states in the position paper that the monitoring report does not find the asserted deficiency so significant as to affect the students' education or the integrity of the school buildings, and that the Board had not provided to correct this condition in two budgets following the State report of December 1990. It should be noted that the Board did not provide for these repairs in the 1991-92 budget, but did attempt to provide in the 1992-93 budget which is here in dispute. In its Answer, the Council also listed six items, identified earlier in this report, challenging not only the amount of dollars and necessity of the project as noted above, but also the format, attachments, timelines and procedures followed for the Petition of Appeal.

In the instant matter the petition was filed on May 29, 1992, one day beyond the 90 day filing requirement of N.J.A.C. 6:24-1.2(c). However, it must be noted that, although N.J.A.C. 6:24 details the procedures and rules for controversies and disputes,

N.J.A.C. 6:24-1.15 allows a relaxing of the rules by the Commissioner in any case where a strict adherence may be deemed inappropriate or unnecessary or may result in injustice. The overriding priority of any review and decision must address the legislative mandate for a thorough and efficient system of education. Therefore, it is found and determined that the circumstances of this matter warrant relaxation of the filing requirement, given the Commissioner's obligation to assess if there are sufficient monies available for the provision of a thorough and efficient education in the Fairview School District. Further, it is determined that the remaining claims of procedural flaws do not warrant dismissal of the petition.

The Commissioner must note that the Board definitely had a responsibility to correct the code deficiencies in the stairwell fire doors, and the Council's position reducing the necessity and importance of this work is certainly arbitrary. The requirements of the Fire Code are written to ensure the health and safety of occupants of a building in the event of a fire. These requirements should not and may not be ignored. Although the Board should have made provisions in the 1991-92 budget to correct the doors, tardiness in action should not result in additional deferral or elimination of action. While the Commissioner affirms that there should be valid estimates by appropriate professionals of the costs for major projects, he likewise agrees with the Board's assertion that seeking bids prior to confirmation of funding is not an acceptable school business procedure.

The Board in its position paper states that the corrections required for the stairwell fire doors have already been completed

and were funded with money from the surplus account. A review of the Board's revised budget indicates a projected free balance for June 30, 1993 of only $170,137 which represents only 2% of its Total Net Budget which brings the surplus to only 2%. Therefore, the Commissioner finds and determines that $80,000 must be restored to the Fairview 1992-93 budget to ensure the provision of a thorough and efficient education to the pupils of the Fairview School District.

Accordingly, the Bergen County Board of Taxation is directed to adjust the Borough of Fairview tax levy for the 1992-93 school year to total $6,835,139, $80,000 of which is for capital outlay and $6,755,139 for current expense.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 26, 1992

DATE OF MAILING - OCTOBER 26, 1992

264-92

C #264-92
SB # 61-92

BOARD OF EDUCATION OF THE BOROUGH OF FAIRVIEW,

PETITIONER-RESPONDENT,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF FAIRVIEW, BERGEN COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, October 26, 1992

For the Petitioner-Respondent, Oury, Mizdol & Brovarone (Dennis J. Oury, Esq., of Counsel)

For the Respondent-Appellant, James J. Deer, Esq.

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

March 3, 1993

Date of mailing MAR - 3 1993

265-92

265-92

ELLEN STURN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, high school English teacher, alleged improper withholding of her increment for deficiencies in areas of instruction, planning and preparation, and classroom control as shown in year-end evaluation.

In light of Board policies and evaluations, ALJ concluded petitioner failed to establish by a preponderance of credible evidence that Board's action was arbitrary, capricious and unreasonable. Petitioner failed to prove that denial of increment was procedurally defective. Increment withholding was upheld.

Citing Kopera, Commissioner adopted findings and determination in initial decision. Petition was dismissed.

OCTOBER 27, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6869-90
AGENCY DKT. NO. 237-7/90

ELLEN STURN,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,
Respondent.

Richard A. Friedman, Esq., on behalf of petitioner (Zazzali, **Zazzali, Fagella** & Nowak, attorneys)

Robert J. Cirafesi, Esq., on behalf of respondent (Wilentz, **Goldman & Spitzer**, attorneys)

Record Closed: July 28, 1992 Decided: September 10, 1992

BEFORE **STEVEN C. REBACK**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner, Ellen Sturn, a tenured teaching staff member employed by respondent, Board of Education of the Borough of South Plainfield, Middlesex County (the Board) is appealing a determination withholding her adjustment increment for the 1989-90 school year. Ms. Sturn argues that pursuant to *N.J.S.A.* 18A:29-14, withholding of the increment was arbitrary, capricious and lacking in substantiation or justification. She also contends that the Board's decision to withhold her increment contravened various procedural safeguards and policies, notably those set forth at *N.J.A.C.* 6:3-1.21 in respect to classroom observations.

The Board asserts that its action in denying Ms. Sturn's increment was proper and justified both substantively and procedurally.

The matter was initiated by the filing of a Petition of Appeal with the Commissioner of Education on July 11, 1990. The Board's Answer was filed on August 22, 1990, after receiving an extension of the time within which it should have been forthcoming. Thereafter, on or about August 29, 1990, the Commissioner of Education transmitted the appeal 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.* A prehearing conference was conducted in the matter on November 8, 1990, before the late Administrative Law Judge David J. Monyek. The matter was then scheduled to proceed to plenary hearing in May 1991, but was adjourned and shortly thereafter the case was reassigned to my office. By letter dated July 31, 1991, Richard A. Friedman, Esq., counsel to Ms. Sturn sought with Mr. Cirafesi's consent to amend the Petition of Appeal by asserting that in addition to the increment being improperly withheld for the reasons already alleged, the withholding was "substantively arbitrary and unreasonable, because it was neither supported by the facts nor warranted by the alleged deficiency." Letter July 31, 1991 to Administrative Law Judge. In addition, as an incident to Mr. Cirafesi's acquiescence to this amendment he noted that the Board would reserve the right to claim that this portion of the petitioner's claim is timebarred because not asserted within the 90 days of the withholding of the increment. Thereafter the matter proceeded as scheduled to hearing and was heard on January 22, and January 23, 1992, at the Office of Administrative Law, Mercerville, New Jersey.

At the conclusion of the testimonial phase of the proceeding, counsel requested the opportunity to obtain a transcript of the proceedings and to submit briefs following their receipt of those transcripts and the opportunity to review them.

By letter of October 30, 1991, Mr. Friedman submitted the petition as amended setting forth in detail the summary which was provided by him in his letter to my office of July 31, 1991. Thereafter on November 21, 1991, my office received a letter from Mr. Cirafesi enclosing the Board's Answer to the Amended Petition of Appeal. Following receipt by the attorneys of the transcripts of the proceedings on May 18,

1992, my office received Mr. Friedman's post-hearing brief dated May 18, 1992.* On June 23, 1992, my office received Mr. Cirafesi's post-trial memorandum, dated June 19, 1992. On receipt of the latter submission, my office contacted Mr. Friedman and he advised by telephone that he intended to submit a responsive brief.' Thereafter, and after waiting for a reasonable period of time and not yet having received any further submission from Mr. Friedman, my secretary at my direction, contacted his office once again to inquire as to the status of that submission. She was advised that Mr. Friedman had reconsidered and that he intended to submit no further argument in the matter. At my request he was directed to submit a letter to that effect. On July 28, 1992, my office received a letter from Mr. Friedman, dated July 20, 1992, advising that the petitioner would rely upon the brief previously submitted and would submit no reply brief. Accordingly, the record in these proceedings closed on the date upon which Mr. Friedman's letter indicating that he would submit no further argument was received, July 28, 1992.

ISSUE AND BURDEN OF PROOF

N.J.S.A. 18:29-14 provides in pertinent part 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 role called majority vote of the full membership of the board of education.

The standard of review of a local board's action pursuant to the statute is set forth in *Kopera v. West Orange Board of Education,* 60 N.J. Super. 288, 296 (App. Div. 1960), where the court stated that: "[T]he 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 conclusions." The Commissioner, therefore, cannot properly redetermine for himself whether the petitioner had in fact been unsatisfactory as a teacher. Id. at 295; *see also, Littman v. Bd. of Ed. Cranford Tp.,* OAL DKT. NO. EDU 5026-80 (July 14, 1981), adopted, Comm'r of Ed. (Aug. 25, 1981).

* By letter of May 8, 1992, Mr. Friedman confirmed that at both counsel's consent the briefing schedule was extended.

Since the challenged action is a discretionary power of the local board of education, the administrative law judge must accordingly confine his review to determine whether the Board had a reasonable basis for its conclusion. Accordingly, and pursuant to this standard, the only two issues to be resolved by the Commissioner of Education and, derivatively, by the Office of Administrative Law when reviewing the determination of the local board of education to withhold the Ms. Sturn's increment are the following:

1. Were the underlying facts as those who made the evaluations purport them to be? and

2. Was it unreasonable, arbitrary, or capricious for the Board to conclude as it did based upon those facts?

The burden in respect to seeking to establish that the facts are other than they were set out to be before the Board and that the local Board's determination based upon an evaluation and analysis of those facts was unreasonable, arbitrary , and capricious rests with the petitioner.

FACT AND ANALYSIS

The petitioner, Ellen Sturn, is a tenured teacher of English employed at South Plainfield High School since 1970. She holds a Bachelor of Arts degree in English and a Masters Degree in educational media. Ms. Sturn obtained her New Jersey teaching certificate as a media specialist. But for the denial of the increment at issue, for the 1989-90 school year, the petitioner has received salary increments for every year of her employment with respondent South Plainfield Board of Education (the Board).

Year-end evaluations of teaching personnel employed the Board is based upon a rating system with a range of one (1) through three (3). That system is defined in the Annual Performance/Professional Improvement Program utilized for both tenured and non-tenured teaching personnel at the Board. It defines the ratings as follows:

1. One who is contributing in a successful manner. There are no major concerns about his/her effectiveness.

2. One who is meeting the job responsibilities but might enhance total effectiveness by responding to the suggestions itemized on the attached evaluation sheet.

3. One is is not meeting job responsibilities in an effective manner and needs to correct the specific deficiencies itemized on the attached evaluation form. [Exhibit J-9]

For the past ten years, excluding the 1989-90 school year, Ms. Sturn has received a year-end evaluation of 1, the highest rating under the guidelines.

For the school year 1989-90, the petitioner was given a total performance evaluation of 3 [J-9]. The Board concluded that of those major areas of teacher responsibility and performance, Ms. Sturn was not meeting her job responsibilities in an effective manner and was required to correct specific deficiencies in the areas of instruction, planning and preparation, and classroom control. She was given a rating of three in each of these areas. While she was also given ratings of 1 and 2 in each of the other 8 overall areas of performance, i.e., teacher/pupil relationship, personal qualities, curriculum development, the Board concluded that based upon the evaluation of 3 in the areas mentioned above Ms. Sturn's overall rating for the 1989-90 school year was a 3. As a consequence the total Performance Evaluation/Professional Improvement Plan for the 1989-90 school year, which was provided to Ms. Sturn on April 6, 1990, while recommending her reappointment, recommended the denial of her salary increment.

Counsel for the petitioner seeks to set aside as invalid the decision of the Board denying Ms. Sturn's increment based upon two fundamental arguments. The petitioner asserts that the Board's action was arbitrary and capricious in that its conclusions that Ms. Sturn was not meeting her job responsibilities in an effective manner in respect to instruction, planning and preparation and classroom control, resulting in an evaluation of 3, as well as the conclusion that based upon the foregoing an overall assessment for the year merited an evaluation of 3, was arbitrary and capricious and without a reasonable basis.

Secondly, petitioner argues that even if the record in this matter would support the determination that the underlying facts justified the evaluation given and the concomitant increment denial. The process and procedures utilized by the Board in assessing Ms. Sturn's performance and arriving at its decision to deny the increment contravened its own policies and regulations such that the denial must be set aside.

I shall address first the argument raised by Ms. Sturn that from a substantive perspective the denial of her salary increment cannot be supported by the factual record.

The person primarily responsible for recommending to the Board that Ms. Sturn be denied the increment at issue is the principal of South Plainfield High School, Dr. Leroy E. Seitz, who has been principal of the high school since 1986. Dr. Seitz testified at the hearing and identified five specific areas of Ms. Sturn's performance which he deemed deficient and upon which he based his increment denial recommendation. Dr. Seitz noted that he was the individual who observed Ms. Sturn's class on March 29, 1990, which was the last of three classroom observations for the year. He also indicated that he prepared the performance evaluation document recommending the increment denial [J-9]. (T II:104*) In arriving at the overall decision to recommend the increment denial, Dr. Seitz noted that the decision was culled from evidence that he received and obtained throughout the entire school year and was not based on the two or three classroom observations alone. He took into consideration contacts which he had both with Ms. Sturn as well as those which he had with parents, students and other staff members including the coordinator of discipline, guidance counselors and the director of guidance and counseling (T II at 106:16-25).

Dr. Seitz noted as well that since his tenure as principal of the high school began in 1986, he had made it clear to his entire teaching staff through verbal directives as well as through promulgation in the *Teachers' Handbook* (J-25)that of critical significance to him was that teacher's enhance the student's ability to learn and that one of the ways in which this objective could be accomplished was by commencing each class lesson by articulating the objectives of that lesson on the blackboard. In Dr. Seitz's view one of the failure's of Ms. Sturn directly relating to the decision to rate her 3 in classroom instruction was her systemic non-compliance with what he described as a long-standing policy to state the objective of the class on the blackboard. Dr. Seitz noted that in the first observation in the classroom of Ms. Sturn's performance for the 1989-90 school year, supervised by Ms. Erickson (J-3), Ms. Sturn failed to write the objectives of the lesson on the chalk board. Very specifically Ms. Erickson specifically states, "In the future, please be certain that objectives are clearly displayed throughout the class period." (J-3 at 2). In the second

* "T I" refers to transcript of the OAL proceedings conducted on January 22, 1992 and "T II" refers to the transcript of the proceedings conducted on January 23, 1992. Further references after the transcript refer either to the page alone or to the line or lines on that page to which reference is made.

class visitation for the school year, conducted by Mrs. De Simon in February 1990, Ms. Sturn apparently continued to fail to comply with this simple yet effective pedagogical tool. In the final teacher observation for the school year, conducted on March 29, 1990, the same deficiency is explicitly identified. The observer notes: "In the lesson observed, Mr. Sturn did not present an introduction to the lesson. There was no clearly stated objective stated on the blackboard or presented to the students." (J-5 at 2) Although the teacher observation indicates that the March 29, 1990 lesson was supervised by Mrs. De Simon, in his testimony Dr. Seitz notes that it was he who observed the class. [T II at 104] The March 29, 1990 teacher observation resulted in an evaluation of Mr. Sturn's performance of 3.

A second area of deficiency identified by Dr. Seitz in respect to Ms. Sturn's purported inability to meet her responsibilities in an effective manner both in respect to instruction and planning and preparation was Mr. Sturn's failure to provide for "closure" at the conclusion of each classroom period. Closure in Dr. Seitz's perception involves the articulation by students at the end of a class lesson of a summary of what they had learned. It seeks to ensure that the learning process is successful and effective. Merely asking the student at the conclusion of a lesson whether he understood it is, in Dr. Seitz's judgment, just insufficient. He noted that since September 1986, he had directed his teachers to provide "some type of closure, some type of lesson summary and that direction was given verbally. . . at faculty meetings and it was also placed in the record so far as the *Teacher Handbook* from 1986 on." (TII 107-08) Dr. Seitz's review of Ms. Sturn's performance as set forth in the October 26, 1989 teacher observation as well as the February 21, 1990 observation confirmed his own observation that Ms. Sturn failed to engage in closure or to summarize for her students the objective of that day's lesson.

Dr. Seitz also indicated that in respect to Ms. Sturn's purported deficiency in the area of instruction and preparation she either was untimely in the submission of lesson plans or failed completely to submit them. (T II at 188-89) Dr. Seitz noted that teachers are required to submit lesson plans to their immediate supervisor on a weekly basis. He noted that he received "direct input" from Ms. Sturn's supervisor that the petitioner was "constantly late in submitting these lesson plans and that [her supervisor] had spoken to Ms. Sturn about the lateness in submitting these lesson plans. (T II at 119: 1-11) The principal further noted that another of Ms. Sturn's supervisors sent a memo to her in February 1990 when it was discovered that she was absent on a particular day and, when a lesson plan was sought out to

provide to the substitute teacher, none was available. "This resulted in a day of instruction being wasted." (T II at 119) See also exhibit R-2.

Dr. Seitz, in support of his determination that Ms. Sturn's performance in the areas of instruction and planning and preparation were deficient, specifically voiced his concern that procedures and techniques which she employed in respect to grading of tests were unacceptable and also resulted in parental complaints. Dr. Seitz related in his testimony an incident involving a parent coming to him in the 1989-90 school year and presenting to him copies of tests which were taken by both of her children who attended Ms. Sturn's classes. In comparing the answers the parent had identified specific areas where either the answers were marked differently or where different answers were marked the same. Dr. Seitz had a conference with Ms. Sturn following some investigation and it was concluded that Ms. Sturn had made a number of mistakes in grading of those tests and quizzes. As a result he placed into Ms. Sturn's record the deficiency alluded to. Dr. Seitz continued by noting that throughout the year questions were raised concerning Mr. Sturn's practice of allowing students to grade tests of other students in the class. He noted that the practice had also been discussed with the petitioner and she had been verbally directed by the principal to cease the practice. Dr. Seitz also sent a memo to Ms. Sturn because he noted that the practice, notwithstanding his verbal admonition to the contrary, continued and directed her specifically that it was not to be done except in very specific situations where the exchange of papers was appropriate. (T II at 123). Ms. Sturn in her testimony acknowledged discussing the practice of allowing students to grade their own quizzes and tests with Dr. Seitz and also acknowledged receiving parental complaints about the practice.

The final area which was identified by Dr. Seitz as one which demonstrated Ms. Sturn's failure to meet her responsibilities went to classroom control for which Ms. Sturn received a 3 rating. Dr. Seitz essentially concluded that Ms. Sturn failed to demonstrate reasonable and sufficient classroom control based upon what he deemed to be an excessive number of disciplinary referrals. Dr. Seitz reviewed a the record of the disciplinary problems experienced by Ms. Sturn in her classroom for the school year which was prepared by Mr. Steven Novak, Jr. Mr. Novak has been employed by the South Plainfield Board of Education for some 24 years and has served as the Coordinator of Discipline for the South Plainfield High School for the school year 1989-90. The memorandum chronicles what may reasonably be described as a significant number of disciplinary referrals undertaken by Ms. Sturn during the school year at issue. Mr. Novak notes that there were some 63

disciplinary forms written concerning some 21 students for which various actions were required to be taken. In addition many other requests were made by Ms. Sturn in writing for which no action was taken by his office. He notes as well that on many occasions, citing specifically some 4 to 5 per week, students were sent out of Ms. Sturn's class at her behest and required to sit in his office. Mr. Novak in his testimony and in his memorandum noted that he met with Ms. Sturn some 8 to 9 times to discuss the problem and he also met with Ms. Sturn's supervisor on 2 or 3 occasions to discuss the problem as well. The memorandum, which was dated March 27, 1990, indicates that during the last three weeks matters "have been worse than usual." (R-1 at 9) Attached to the memorandum is a photocopy of a computer printout which catalogs the students in Ms. Sturn's classroom who on various occasions were required to be sent out of her room for disciplinary reasons. In addition Dr. Seitz testified that he had received parental complaints concerning problems with discipline in Ms. Sturn's classroom as well. Based upon those complaints and based especially upon Dr. Seitz's review of the record of disciplinary problems in Ms. Sturn's classroom prepared by Mr. Novak, Dr. Seitz concluded that Ms. Sturn was not reasonably taking proper action to control her class. He notes in his testimony that he found the number of disciplinary referrals to be excessive and unsettling. The assessment indicated to him that Ms. Sturn:

> had never clearly established control of that class. Discipline is an ongoing process. Its not simply a matter of setting up rules and regulations and then sending the kids to the coordinator of discipline when they violate those rules and regulations. There's a need to establish a rapport with the students. A need to establish a relationship with the students where you demonstrate respect for them and they demonstrate respect for you. In reviewing the report from Mr. Novak, R-1, it was clear to me that Ms. Sturn had not done that. She had not established effective procedures, routines for dealing with the students. In addition, just the sheer number from her classes were very unsettling. (T II at 125:8-4)

While Dr. Seitz did not specifically observe disciplinary problems in her classroom during the March 29, 1990 observation, he did testify to an incident that he observed which supported his overall assessment of Ms. Sturn's failure to take appropriate control. During the class Ms. Sturn had indicated to the students that the lesson was going to address itself to a variety of questions which had not been addressed during an earlier lesson. Dr. Seitz testified:

> At that point the students started to call out and say that they had not covered 4 questions the day before. So after a brief exchange, Ms. Sturn decided to go back over the four questions again. At the time I didn't know whether or not she

> had covered them. If found out yesterday that she indeed had covered them. So rather than establish that she was in control of the class and not proceed to repeat the four questions and waste instructional time, she gave into the students and repeated the 4 questions. I found that unacceptable. [T II 126 at 17-127-4]

In independently assessing the records set forth in R-1, Mr. Novak indicates that Ms. Sturn had 63 formal referrals plus an additional unreported 14 referrals within two days after she had acknowledged that she was unable to control a study hall after her request to be relieved of that duty had been denied. Mr. Novak's testimony also indicated that in March 1990, six months after the school year had begun, things had gotten worse and Ms. Sturn was sending students to him at the rate of 3 to 4 times weekly. In addition, some 4 or 5 students whom she had characterized as being particularly difficult were no longer being referred for discipline by other teachers. Mr. Novak also testified that during the school year he had conversations with a number of students and they informed him that in their judgment Ms. Sturn was overreacting to circumstances in the classroom. Some of these students also informed Mr. Novak that "they were not in trouble in other classes, only in this particular class. Those were the contents of a lot of the conversation. That the teacher had lost control of those classes." (T I at 186.)

Dr. Seitz reaffirms the assessment that was made in his testimony and in the various exhibits in support of that testimony when he memorialized his concerns in the Total Performance Evaluation/Professional Improvement Plan provided to Ms. Sturn on April 6, 1990 (J-9). In addition to identifying those areas that have been discussed in which Dr. Seitz concluded that Ms. Sturn was not meeting her responsibilities, i.e., instruction, planning and preparation, and classroom control, the principal also indicated that Ms. Sturn needed improvement in the areas of contribution to the total school effort, professional growth and personal qualities. these latter three areas of performance along with classroom management resulted in Ms. Sturn's being rated as 2. As will be recalled a rating of 2 in these areas indicates that a teacher is meeting the job responsibilities but might enhance her effectiveness by suggestion. In respect to instruction, Dr. Seitz specifically suggests as a means of improvement that Ms. Sturn:

> Provide opportunity for students to identify and to summarize in their own words at the close of each class period. This recommendation for instructional improvement had been made in 1988 and 1989 with no apparent improvement in the current school year. [J-9 at 3]

Clearly the foregoing refers to the issue of closure.

Dr. Seitz at page 4 of exhibit J-9 specifically addresses himself to his perception that Ms. Sturn's grading of tests and quizzes employed unacceptable procedures and techniques. The principal notes:

> Administers tests to evaluate student achievement in knowledge and skills - A review of tests administered by Ms. Sturn reveals gross inaccuracies in the grading practices. As a result, student achievement in knowledge and skills is not accurately evaluated. Ms. Sturn must personally grade each test and quiz and insure that each item is evaluated consistently from student to student, from class to class.

Dr. Seitz also addresses Ms. Sturn specifically in respect to his perception that her submission and preparation of lesson plans was wanting. He notes that she should:

> Plan[s] on daily and/or long term basis - weekly plans for classroom instruction should be submitted more punctually. [J-9 at 4]

The issue of classroom control is addressed specifically and at length. Dr. Seitz notes that Ms. Sturn should establish:

> [S]ystematic and effective procedural class routines. A review of referrals made by Ms. Sturn to the coordinator of discipline's office indicates that she has not established effective procedural class routines. In a two-day period in March Ms. Sturn sent 14 students to the coordinator of discipline's office. This type of effectiveness is unacceptable. [J-9 at 4]

Dr. Seitz then proceeds to set forth the protocol of action which he recommends Ms. Sturn take which is designed increase classroom control.

It should also be noted that in J-9 Dr. Seitz acknowledges and notes the strengths that he perceives in Ms. Sturn as a teacher. He perceives that she demonstrates a knowledge and comprehension of her subject matter; that her lessons evidence "preparation and organization," and that she provides reinforcement of learning and immediate feedback to her students. He also observes a variety of other characteristics which warrant more than satisfactory performance. Thus, while the decision by Dr. Seitz to recommend an increment denial certainly was convincing to him and did not require any undue deliberation, Dr. Seitz was not unmindful that Ms. Sturn does possess qualifications of a teacher

that are positive and proving. Indeed this should be the case given that Ms. Sturn has been a faculty member for some 20 years having been given tenure and having been awarded increments for at least the last 10 of those years. Thus while Dr. Seitz clearly viewed Ms. Sturn's performance with skepticism in respect to its quality, in my view he also viewed her work in its entirety in areas which were also positive. In my judgment this reinforces the credibility of the observations, perceptions and conclusions arrived at by Dr. Seitz in respect to the recommendations which he made to respondent that the increment be denied.

The challenge by the petitioner to the substantive basis under which the decision to recommend the increment denial was made shall now be addressed. It bears reemphasis, however, that this challenge must be viewed within the limited scope of the Commissioner's review as set forth and articulated previously in this decision. Neither I nor the Commissioner can properly redetermine for himself whether the petitioner had in fact been unsatisfactory as a teacher. Rather the scope of review is for the Commissioner 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. Accordingly, and pursuant to that standard in respect to the substantive basis under which the respondent Board denied Ms. Sturn's increment, the petitioner's challenge to that decision can only be viewed based upon the following:

1. Where the underlying facts as those who made the evaluations purport them to be?

2. Was it unreasonable, arbitrary or capricious for the Board to conclude as it did based upon those facts?

The burden in respect to seeking to establish that the facts are other than they were set out to be before the Board and that the local Board's determination based upon an evaluation and analysis of those facts was unreasonable, arbitrary and capricious rests upon Ms. Sturn. In my view and giving the petitioner's arguments every favorable interpretation she has not been able to meet her burden of proof in respect to establishing that from a substantive perspective either the underlying facts were other than they were purported to be or that the decision of the Board to conclude that the increment denial was justified based upon those facts was arbitrary, unreasonable or capricious.

In respect to the issue of "closure," Mr. Friedman in his post-hearing submission argues that the obligation of a teacher to utilize this technique applies only to the conclusion of a "lesson" rather than to the conclusion of a class "period." While it is correct that the *Teacher's Handbook* in defining the parameters of the instructional program notes that at the end of "the lesson" students should be able to identify the learning in their own words, I am satisfied that from Dr. Seitz's testimony and his expertise as an educator that the notion of closure encompasses matters beyond the niceties of a distinction of what is a lesson and what is a class period. Dr. Seitz in his testimony noted specifically as well that the issue of closure was discussed personally with Ms. Sturn not only during the school year 1989 but also in the school year 1988. He also noted that it was mentioned as an incident to the observations conducted of Ms. Sturn on February 21, by Ms. De Simon. (T II 110) The argument offered by Mr. Friedman that in order for an increment withholding to be sustained, it must be demonstrated that the staff member's superiors notified him or her of a deficiency during the school year upon which the increment withholding was based does not apply to the facts relative to closure as Dr. Seitz's testimony demonstrated that Ms. Sturn had been specifically advised on several occasions in respect to a failure to properly close during the school year in which her increment was indeed denied.

In respect to the deficiency perceived by respondent concerning Ms. Sturn's practices of grading tests and quizzes, Mr. Friedman offers no substantive argument in opposition to the Board's findings; rather he relies exclusively on a procedural argument that will be addressed subsequently in this opinion the gravamen of which is that the petitioner was never placed on proper notice that her methods of grading were deficient.

In respect to the assessment of Ms. Sturn as being unable to properly and reasonably control or discipline her class, Mr. Friedman initially asserts that the proofs of respondent were based solely on hearsay with no competent evidence to support it. While Mr. Friedman may be correct in citing the proposition that an increment withholding must be supported by a residuum of competent evidence, *see E. G. Colavita v. Hillsboro Board of Education*, 1985 *S.L.D.* 1882 (app. div.), that proposition does not address itself to the narrower question of whether the underlying facts were those that the evaluators purported them to be. In respect to the issue of discipline, the evidence went beyond mere hearsay and included a variety of information available to respondent including Ms. Sturn's classroom discipline record (R-1), the parental complaints that were made directly to Dr. Seitz and Ms. Sturn's own acknowledgment that she made "far greater referrals" for

discipline than in "any ordinary year." (T I at 60) In addition, as will be recalled, the testimony of Mr. Novak, the coordinator of discipline, also furnished support to respondent's determination that a disciplinary problem did exist from the facts presented. While one can, of course, never conclude that the mere numbers alone of disciplinary referrals justifies a determination that it is the teacher who is responsible for the referrals rather than the students themselves, the numbers presented by respondent were by comparison excessive and when combined with the other evidence adduced, i.e., Ms. Sturn's acknowledged inability to control the study hall and her request to be relieved of this duty, it cannot be said that the decision that the Board made which relied upon Ms. Sturn's inability to discipline her classroom was unreasonable, arbitrary or capricious. I say this without being unmindful of the other plausible explanations that may be elicited in respect to the disciplinary issue given that there were students who also experienced problems with other teachers. The record, however, is sufficient and its scope of review concomitantly narrow that the decision arrived at in this regard should not be overturned.

It should also be noted that to the best of my knowledge the petitioner did not seek to overturn as substantively improper respondent's justification for the increment denial which rested upon Ms. Sturn's failure to set forth the objectives of the class on the blackboard and her failure to timely and consistently provide lesson plans to her supervisors.*

Accordingly and based upon the foregoing, I **CONCLUDE** that the petitioner has failed to establish by a preponderance of the relevant credible evidence that the action of the Board in denying the petitioner her increment was arbitrary, capricious and without a reasonable substantive basis.

The other prong of Ms. Sturn's appeal addresses itself to the position that the Board decision which denied her increment was inconsistent with its own policies and regulations. The language used in these policies while providing some general

* While there was some reference raised by the petitioner at hearing in respect to absenteeism as serving as a basis for increment denial, and while petitioner also discusses the issue in his post-hearing submission, see petitioner's post-hearing brief at 22-23, it was clear by the representation made by counsel and by the absence of any evidence presented by Mr. Cirafesi in this regard, that absenteeism played no role in the increment denial.

assurances, in my view allows for flexibility in making increment - withholding decisions. There is no indication that the policy statements were all inclusive or were intended to be so. Specifically the petitioner argues that the Board's decision was inconsistent with a provision of its Staff, Evaluation, Purposes and Procedures (J-6) as well as inconsistent with its Personnel Regulations No. 4016 "Withholding an Increment" (J-7). The Board argues that its actions were not inconsistent with its stated policies and were in all respects reasonably based.

The proper approach to considering increment denial cases is well established and should apply to arguments addressed to any purported procedural irregularity as well. The withholding of an adjustment and/or an employment increment is generally an exercise of "essential managerial prerogative" authorized by *N.J.S.A.* 18A:29-14, which provides that a board of education may withhold for inefficiency or other good cause, the employment and/or adjustment increment of any teaching staff member in any year. *See, e.g., Probst v. Haddonfield BOE*, 127 *N.J.* 518, 527 (1992). In the *Probst* decision, the New Jersey Supreme Court reminds that (quoting *Board of Education v. Bernards Township Education Ass'n*, 79 *N.J.* 311, 321 (1979)) "The purpose of [Section 14] is thus to reward only those who have contributed to the educational process thereby encouraging high standards of performance." The Court also reinforces its earlier recognition in *North Plainfield Education Ass'n v. Board of Education*, 96 *N.J.* 587 (1984), that salary increments are a "reward for meritorious service." Id.

As noted, the above-mentioned guideposts for traversing the typical increment denial cases are firmly in place. In the instant matter, however, the local board has erected a few additional "signs" (in the form of certain policies) which must also be considered. Indeed, a definitive interpretation of the following policies is central to resolving this dispute.

A. Staff Evaluation Purposes and Procedures (Exh. J-6)

The South Plainfield Public Schools', "Staff Evaluation Purposes" document, dated September 1989 (and undisputedly in effect at all relevant times in the instant matter), at paragraph numbered 11 states, in pertinent part:

> . . . . Any tenured staff member who has an overall evaluation of three (3) on two (2) consecutive evaluations will be subject to having his increment withheld. Each administrator will be responsible for documenting and recommending those staff members whose lack

> of performance warrants withholding of increments. (J-6, Staff Eval. Purposes and Procedures, Para. 11, page 3).

B. Personnel Regulation No. 4016 (J-7)

The Board's Personnel Regulation No. 4016, entitled "Withholding an Increment," states, in pertinent part:

> . . . . As a general policy, the Board will not withhold a salary increment on the basis of a single poor evaluation or a single incident except in flagrant cases. A staff member will generally be given a minimum of 90 days to demonstrate the effectiveness of the recommended remedial action before punitive action is taken. (J-7).

Local school boards are charged by *N.J.S.A.* 18A:11-1(c) with making, amending, and repealing rules for the employment, regulation of conduct and discharge of their employees. The "policies" here at issue are rules which fall comfortably within this mandatory power. But, once a board has established such rules, logic and case law suggest those policies are then binding on the board. See, *Matawan Teachers Ass'n v. Matawan-Aberdeen Reg. Sch. Dist.*, 223 *N.J. Super.* 504 (App. Div. 1988) ("[i]n the absence of any statute to the contrary, the board's bylaw . . . is binding"); *Bergen County Vo-Tech Educ. Ass'n v. Bergen County Vo-Tech BOE*, OAL Dkt. No. EDU 1428-87 (May 27, 1987), *rev'd*, Comm'r dec. on remand from app. div. (July 8, 1987) (the Commissioner, while acknowledging that a board is not absolutely bound by its own policies when no vested rights are involved, overturned the board's action since it failed to follow its own properly adopted policy which had created an additional procedural right.) Thus, it seems clear that if the board's decision to withhold Ms. Sturn's increment is found to be inconsistent with the policies, the failure to follow its own policies should be viewed as arbitrary and unreasonable.

Preliminarily, it should be noted that since both policies deal with the same subject--the withholding of increments -- and taken alone are not unambiguous, it will be appropriate to construe them together (as with statutes in *para materia*). Still, it is helpful to first examine them on their own terms.

A. Staff Evaluation Policies and Procedures (J-6)

Petitioner first challenges the consistency of the Board's decision with paragraph 11 of the S.E.P.P. document. Since the Petitioner received only one overall evaluation rating of three (in 1989-1990), with ratings of one on her previous

nine years' overall evaluations, petitioner correctly notes that the Board's decision could not possibly have been based on two consecutive overall evaluations of three. Petitioner then reads paragraph 11 as requiring two consecutive overall evaluations of three before a teacher's increment is subject to withholding. Petitioner cites no case law nor principles of construction to support this reading, apparently relying upon the plain meaning of the statement.

The Board, on the other hand, posits that the statement was not intended to be all-inclusive, or intended to place a limitation on the circumstances in which an increment can be withheld. The Board argues that specifying that two consecutive overall evaluations of three will subject a teacher to increment withholding does not preclude withholding under such circumstances as are present in the instant matter.

There is no reported case involving this particular policy or involving any similar policies concerning the use of a certain number of evaluations in increment withholding decisions. The Board is correct in noting that there are a variety of decisions in which increment denials have been upheld for reasons both inside and outside the formal evaluation process. Respondent's brief at 2. Indeed, in one case based on evaluations, the Commissioner of Education noted, as did the ALJ, that "even a satisfactory summary year-end evaluation does not necessarily preclude a Board from acting to withhold an increment related to activities which took place during that school year.* *Darden v. Butler BOE*, OAL Dkt No. 4386-85 (Jan. 17, 1986), *adopted* by Comm'r (Mar. 7, 1986). Such increment cases, however, merely tell us that in the absence of such a policy (as paragraph 11 of the S.E.P.P. document), there has been no requirement for the withholding to be based on any specific number of evaluations. Thus, the question remains whether the policy as stated creates such a requirement.

There is only a vague indication of the Board's prior practice in interpreting the policies. In his direct testimony, Dr. Seitz stated that "there have been precedents in the school district where teachers who have received an overall rating of two on

* In *Darden*, the Commissioner also noted that failure to maintain discipline is in itself good cause to withhold an increment.

their evaluations have received denial of increments and that had [sic] been upheld." T II at 130; *See also*, T II at 173. No examples of these precedents were provided, however. As for matters involving one-year of a three rating, there is no indication that an increment had been withheld in the past. Dr. Seitz explained only that his understanding of the policy is that it allows for withholding when there is one year of an overall three rating. See, T II at 170 (basing his understanding on the last sentence of paragraph 11). His direct testimony states as follows:

> My understanding is that item 11 speaks to the minimum. That if this teacher . . . does get two overall evaluations of three, [then] you must deny the increment. It does not say you can't deny [an] increment for an overall rating of two or one year of three. (emphasis added). T II at 135.

So, what is properly the first resort appears to be the only resort--the policy's language. The language used in the statement--"[a]ny tenured staff member who has an overall evaluation of three (3) on two (2) consecutive evaluations will be subject to having his increment withheld"-- leaves no doubt as to the situations it addresses. The statement clearly applies when there are two "threes". However, the statement does not address, and, consequently, it is unclear what should happen in other situations (e.g., one "three"). Thus, the question of interpretation simply stated is whether the statement is all-inclusive or not.

In my view, the interpretation offered by the Board--that the statement was not meant to be all-inclusive --- is more persuasive. The statement establishes a criterion -- two "threes"-- which will trigger close scrutiny of the teacher's performance record and "subject [her] to" having her increment withheld. The triggering of such scrutiny is definitive, but the withholding is not. There is still a discretion/flexibility afforded by the words "subject to". It seems appropriate to view the statement as a trigger for "catching" those cases which have progessed to the point of two years of "overall threes" (a "worst case scenario"), without limiting the Board from withholding in other circumstances. Paragraph 11 (or for that matter, the entire S.E.P.P. document) does not specifically provide assurances that unless a teacher has two "overall threes" that teacher is somehow protected from being denied an increment regardless of the factors. Nevertheless, there is merit in the argument that by stating one criterion all other circumstances not meeting the one criterion are by implication ruled out. In the end, my agreement with the Board's interpretation is (given the two opposing yet both plausible readings of the S.E.P.P. document) most influenced by reading the statement in conjunction with the other increment-withholding policy -- Regulation No. 4016. That policy's

language, as will be discussed below, indicates that a fairly flexible approach is afforded the Board in deciding to withhold increments.

B. Personnel Regulation No. 4016 (J-7)

Petitioner also argues that the Board failed to comply in two respects with the policies contained in Regulation No. 4016. The first perceived inconsistency involves the Regulation's provision that "[a]s a general policy, the Board will not withhold a salary increment on the basis of a single poor evaluation or a single incident except in flagrant cases." Petitioner contends that the withholding in her case was made on the basis of a single poor evaluation. This, the Petitioner asserts, clearly violates the terms of the policy.

In response to this first challenge under Regulation No. 4016, the Board argues that Petitioner is similarly misreading this policy "as an absolute, all-inclusive prohibition to withholding increments absent more than one 'poor evaluation'." Respondent's brief at 5. The Board focuses on the use of the phrase "as a general policy" which, in its opinion, "purposefully allows for increment withholdings in other cases." Id. at 4. The Board's position is that the policy was written to allow for some flexibility.

The Board's interpretation is the more persuasive. The use of the introductory clause "as a general policy" does indicate that the Board retains discretion to withhold even in cases where there is only a single poor evaluation. While the phrase "except in flagrant cases" would seem to confine the Board's discretion, this phrase should be read as modifying "a single incident"-- which is not the basis in this case.

On the whole, the provisions of Regulation No. 4016 seem to provide a teacher with assurances that a single poor evaluation will usually not lead to increment withholding--that is, the policy contains some assurances but these are not absolute. Indeed, the policy explicitly states in its opening paragraph that increments "shall not be considered automatic." Since a general policy by definition allows for exceptions, even when an action does not follow the general rule of the policy it cannot be said to be inconsistent with the policy. That is, of course, unless the policy specifically limits the class of exceptions to exclude that type of exception. Here the Board's decision to withhold petitioner's increment, even where petitioner received

only one poor evaluation, can be viewed, if otherwise reasonably based, as an allowable exception to the general policy.

Petitioner additionally contends that the Board failed to follow another another of Regulation No. 4016's provisions--the statement which reads "[a] staff member will generally be given a minimum of 90 days to demonstrate the effectiveness of the recommended remedial action before punitive action is taken." Ms. Sturn argues that even where there is no policy or procedure, a board must give notice to the teacher of the specific deficiencies, and must provide instruction or assistance in overcoming those deficiencies before the increment can be withheld. Petitioner's brief at 10. Moreover, since this Board adopted the policy contained in Regulation No. 4016 (which according to petitioner "tracks the Tenure Act") petitioner suggests that the notice requirement is even more specific -- requiring at least ninety days notice of the deficiency and establishment of a remedial plan to correct it. Id. Petitioner claims that she received no notice that her responsibilities were not being effectively met or that withholding loomed, during the appropriate period -- i.e., within the 1989-90 school year but prior to the 90-days immediately preceding the withholding decision. Petitioner's brief at 11.

The Board counters petitioner's lack of notice contentions by arguing that the ninety day provision in Regulation No. 4016 is "merely a general directive that teachers be given ninety (90) days to demonstrate effective remedial action, not a directive to give ninety (90) days notice of an intention to withhold an increment." Respondent's brief at 13. The Board maintains it fully complied with this policy since petitioner was "given sufficient time and opportunity to improve her performance" in each of the five areas cited by Dr. Seitz. Id.

Petitioner's lack of notice argument is not persuasive. The excessive absenteeism cases which petitioner references have little impact on the notice question here. In those cases, the particular notice that was required is specific to that type of denial -- an absenteeism-based denial. *See, Vonita Smith v. Trenton BOE*, OAL Dkt. No. EDU 5255-88 (March 6, 1989) *adopted* by Comm'r (April 18, 1989); *Kochman v. Keansburg BOE*, OAL Dkt. No. EDU 9682-90 (on remand April 29, 1991), *adopted* on remand by Comm'r (June 12, 1991). The absenteeism/withholding case law specifies that a concern for the continuity of instruction must be conveyed to the staff member by his or her supervisors in a manner that is not merely pro forma or mechanistic. *See, e.g., Kochman, supra.* Increment withholding case law involving

unsatisfactory performance and evaluations provides a better indication of what notice is required in the instant matter.

The State Board, in *Yorke v. Piscataway BOE*, OAL Dkt. No. EDU 9267-88 (Aug. 10, 1989), *rev'd* Comm'r (Sept. 18, 1989), *rev'd* State Board (July 5, 1990), rejected the petitioner's argument that the board's action was unreasonable in that she had received no advance notice that her performance was viewed as being so deficient as to result in the withholding of her increments. In so deciding, the State Board noted that the "underlying purpose behind the evaluation procedure is to ensure that a teacher receives adequate notice of any unsatisfactory performance and of ways to improve performance." Id. Since concerns about her teaching performance were brought to the teacher's attention during various observations that year and the evaluations noted deficiencies, adequate notice was given. Indeed, the State Board remarked, ". . . while Petitioner may not have known with certainty that a recommendaton would be made to withhold her increments, an unfavorable evaluation should not have surprised her." Id.

In *Loewengart v. Randolph BOE*, OAL Dkt. No. EDU 5721-87 (June 20, 1988), *adopted* by Comm'r (July 29, 1988), the Commissioner concluded that it could not be said that "no notice or insufficient notice was provided or that the withholding came as a surprise." The petitioner "knew or should have known" early in the year that the principal who evaluates her performance was concerned about various aspects of it. The petitioner also was given, early on, a variety of suggestions as aids for improvement. The Commissioner noted that *N.J.S.A.* 18A:29-14 has no requirement for advance written notice of the intent to withhold. Rather, it requires that within 10 days following its action a board must notify the employee of the reasons why the increment is being withheld.

The Commissioner, in *Rosania v. Middlesex BOE*, OAL Dkt. No. EDU 5723-87, EDU 5303-86, Remanded (Dec. 14, 1987), *adopted with modification* on remand by Comm'r (Jan. 22, 1988), noted that case law has established the requirement of some notice and opportunity to correct defects in a withholding case; however, the Commissioner also emphasized that this requirement of notice and opportunity to correct defects in a withholding matter "certainly do[es] not rise to that required in a tenure matter." Id.

A case in which notice was found to be lacking is *Carney v. Freehold Reg'l High School BOE*, OAL Dkt. No. EDU 6356-83 (June 12, 1984), *adopted* Comm'r (July 20, 1984), *aff'd* St. Bd. (Feb. 1, 1985). The Commissioner adopted the ALJ's holding that:

> In order for an increment to be withheld and the withholding to be sustained on review, the withholding must not come as a surprise to the teaching staff member, as I am convinced it did here. The teaching staff member shall have plenty of advance notice of the alleged deficiencies and there should be a reasonable length of time between evaluations to allow for improvement.

In the instant matter, the 90-day provision of Regulation No. 4016, aside from placing a specific timeframe for the notice, does not add significantly to those general notice principles expressed in the increment withholding cases above. Again, the use of the term "generally" provides some flexibility (perhaps, as to the timeframe, but certainly does not give the flexibility to contravene the notice principles established by case law). The opportunity "to demonstrate the effectiveness of the recommended remedial action" before the withholding takes place can be read as reflecting "the opportunity to correct defects" recognized by case law. "[R]ecommended remedial action" can fairly be likened to "suggestions for improvement" as discussed in case law, and, it seems, should not be read to necessarily require formalized plans which go beyond suggestions.

In my view, Ms. Sturn knew or should have known during the course of the 1989-90 school year of the areas of concern expressed by the administration regarding her performance. Petitioner had specific and timely (especially considering the flexibility afforded by the term "generally") identification of certain deficiencies. The October 26, 1989 observation clearly indicates that the area of "Instruction" needs improvement. See, J-3. It further provides specific suggestions for improving her "statement of objectives" problem as well as her "closure" problem. Petitioner was made aware of these concerns in prior years' observations. The two later observations, Feb. 21, 1990 (J-4) and Nov. 29, 1990 (J-5) provide more specific suggestions and note that improvement is still needed in the area of instruction and also in the areas of planning and preparation and classrooom control. It is unreasonable for petitioner to contend that she was surprised, without help in remediating her deficiency, or without sufficient opportunity to remediate the noted inefficiencies or deficiencies cited by her supervisors.

Accordingly, I **CONCLUDE** the petitioner has been unable to establish by a preponderance of the relevant evidence the respondent's decision to deny her increment was procedurally defective.

It is therefore **ORDERED** that the determination of respondent Board of Education which denied the petitioner's salary increment for the 1990-91 school year be and is hereby **SUSTAINED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9/10/92
Date

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

9/15/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 17 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

am/jz

EXHIBITS IN EVIDENCE

Jointly submitted:

J-3	Teacher Observation Report 10/26/89
J-4	Teacher Observation Report 10/21/90
J-5	Teacher Observation Report 3/29/90
J-6	Staff Evaluation Purposes & Procedures
J-7	Administration Regulation 4016
J-8	Memo dated 3/26/90
J-9	Total Performance Evaluation/Professional Improvement Plan
J-10	Letter of 4/18/90
J-11	Typed Document, dated 4/21/91
J-12	Typed Document, dated 4/25/90
J-13	Letter of 4/13/90
J-15	Total Performance Evaluation/Professional Improvement Plan 3/14/80
J-16	Total Performance Evaluation/Professional Improvement Plan 3/81
J-17	Total Performance Evaluation/Professional Improvement Plan 3/82
J-18	Total Performance Evaluation/Professional Improvement Plan 3/83
J-19	Total Performance Evaluation/Professional Improvement Plan 3/84
J-20	Total Performance Evaluation/Professional Improvement Plan 3/85

J-21 Total Performance Evaluation/Professional Improvement Plan 3/86

J-22 Total Performance Evaluation/Professional Improvement Plan 3/87

J-23 Total Performance Evaluation/Professional Improvement Plan 3/88

J-24 Total Performance Evaluation/Professional Improvement Plan 3/89

J-25 Portions of Teacher Handbook

On behalf of petitioner:

P-1 Answers to Interrogatories #13

P-2 Addendum to J-1

P-3 Disciplinary Referral

P-4 Disciplinary Referral

P-5 Disciplinary Referral

P-6 Disciplinary Referral

P-7 Disciplinary Referral

P-8 Memo

P-9 Document

P-10 Disciplinary Referral

P-11 Document

On behalf of respondent:

R-1 Memo of 3/27/90

R-2 Document

WITNESSES

On behalf of petitioner: Ellen Sturn

On behalf of respondent: Steven Novak
Dr. Leroy E. Seitz

ELLEN STURN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Petitioner's exceptions reiterate those arguments presented at hearing, challenging that portion of the ALJ's decision relating to procedural irregularities, which found that the Board did not violate its own policies and regulations by denying petitioner's increment for the 1989-90 school year and finding that she was granted sufficient notice and an opportunity to remediate her deficiencies.

More specifically, petitioner claims in Exception I that the ALJ erred in concluding that the Board did not violate its own policies by relying on only one evaluation of three in denying her increment for 1990. She relies on a reading of the Board's Staff Evaluation Purposes and Procedures (hereinafter SEPP) (Exhibit J-6), and the Board's Personnel Regulation No. 4016 (Exhibit J-7) for the

proposition that because the Board based its decision to withhold Ms. Sturn's increment on one poor evaluation, the March 1990 summary evaluation, and because it is undisputed that the circumstances underlying the denial of her increment were not flagrant, the ALJ erred in finding that the Board did not violate these policies by relying on that one poor evaluation to deny her increment.

At Exception II, petitioner avers the ALJ erred in concluding that the Board did not violate the 90-day notice provision in Regulation No. 4016, and that the Board gave her sufficient notice and an opportunity to correct her deficiencies. Citing the case law discussed in the initial decision, petitioner reasserts her claim that her right to at least 90 days' notice and an opportunity to correct her deficiencies was violated pursuant to Board's Regulation No. 4016.

Further, petitioner contends the ALJ disregarded the notice and remediation principles required by Regulation No. 4016 by relying on the February 21, 1990 (J-4) and March 29, 1990 (J-5) observations as a basis for upholding the Board's decision to withhold her increment. She contends she improved her performance in the area of objectives, and that contrary to the ALJ's opinion, the areas of classroom control, test practices and lesson plans were not targeted until February 21, 1990, thus granting her insufficient opportunity to improve prior to the summary evaluation of March 1990. Finally, she argues that as to the issue of closure to lessons, the principal's findings in the March 29, 1990 observation are significantly compromised by the fact that he did not observe the entire class. Thus, petitioner submits, the Board violated its own policies and her procedural rights established in school law by

failing to notify her of her deficiencies in sufficient time to allow her to improve her performance.

At Exception III, petitioner claims the ALJ erred in relying on the March 29, 1990 observation as a basis for his decision and completely disregarded the Board's policies. She suggests that the ALJ did not address the two deficiencies in this report, thus requiring that his decision be reversed. In support of this contention petitioner cites SEPP (J-6) at paragraph 2, that observations for evaluation purposes "will be conducted for a minimum of one class period for secondary teachers" and, in addition, that the same paragraph further requires that observations be spaced apart.

For these reasons, petitioner submits that the ALJ's determination should be reversed and the Board should be ordered to restore her increment.

Upon careful and independent review of the record of this matter, the Commissioner adopts as his own the conclusions of the Office of Administrative Law that petitioner has failed to establish by a preponderance of the relevant evidence that the Board's decision to deny her increment for the school year in question was procedurally defective. It is noted that neither at hearing nor in her exceptions did petitioner contest the underlying substantive bases for the withholding in question, per se, instead arguing that consideration of such aspects of her performance that were allegedly found to be wanting could not be considered because of procedural flaws in the evaluation process based on the Board's policies. Hence, the Commissioner finds, as did the ALJ, that petitioner has failed to meet her burden of meeting the first prong of the standard

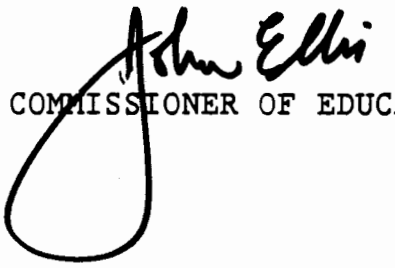
of review extant in withholding cases as set forth in Kopera v. West Orange Board of Education, 60 N.J. Super. 288, 296 (App. Div. 1960), regarding whether the underlying facts were as those who made the evaluations purport them to be.

In looking to the second prong of Kopera, supra, that is, to decide whether it was unreasonable, arbitrary, or capricious for the Board, based upon those facts, to deny the increment in question, the Commissioner is persuaded that the ALJ's thorough and cogent review of this matter carefully considered those arguments raised by petitioner at hearing and in exceptions and, further, that the conclusions of law drawn therefrom dispose of those arguments tendered by petitioner. In so finding, it bears emphasizing that the matter herein is not a tenure dismissal case; therefore, the notice requirements do not rise to those expressed in statute regarding tenure charges of inefficiency pursuant to N.J.S.A. 18A:6-10 et seq. and N.J.A.C. 6:24-1 et seq. Neither may it be argued in this matter that notice by the Board that absences negatively impact upon the continuity of instruction was lacking, as discussed in such case law as Vonita Smith v. Board of Education of the City of Trenton, 1989 S.L.D. 1495, because such concern is not at issue in this case. See initial decision at pp. 20-21.

Finally, regarding the lesson closure argument petitioner raises in exceptions, it is noted that J-9, Total Performance Evaluation/Professional Improvement Plan, which addresses closure, is a final annual evaluation, the synthesis of the entire year's performance and observations. Review of J-5, the March observation conducted by the principal, indicates that he was present in the classroom sufficient time to note the absence of closure for the

lesson on Thoreau. The Commissioner thus deems the comments contained in J-5 and J-9 regarding petitioner's lack of closure to have been sufficiently documented, and therefore not an arbitrary or unreasonable basis for withholding petitioner's increment.

Accordingly, for the reasons expressed in the initial decision as amplified herein, the instant Petition of Appeal is dismissed, with prejudice.



COMMISSIONER OF EDUCATION

OCTOBER 27, 1992

DATE OF MAILING - OCTOBER 27, 1992

266-92

ROBERT B. HUGHES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

OCTOBER 27, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4705-92
AGENCY DKT. NO. 176-5/92

ROBERT B. HUGHES,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,
Respondent.

Richard A. Friedman, Esq., on behalf of petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Jack L. Kolpen, Esq., on behalf of respondent (Martinez and Jennings, attorneys)

Record Closed: September 11, 1992 Decided: September 22, 1992

BEFORE **NAOMI DOWER-LABASTILLE**, ALJ:

Petitioner claimed tenure entitlement as a teacher of Health, and alleged that the Board assigned a non-tenured or less senior teacher than he to fill a position.

This matter was transmitted to the Office of Administrative Law on June 25, 1992, for a hearing pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.*

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have review the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of ***N.J.A.C.*** 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings by concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Sept 23, 1992
Date

Naomi Dower LaBastille
NAOMI DOWER-LABASTILLE, ALJ

Receipt Acknowledged:

9/24/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 28 1992
Date

OFFICE OF ADMINISTRATIVE LAW

/cae

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ZAZZALI, ZAZZALI, FAGELLA & NOWAK
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioner

ROBERT B. HUGHES, Petitioner, v. BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY, Respondent.	BEFORE THE OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. EDU 04705-92 S STIPULATION OF SETTLEMENT - DISMISSAL

The parties to this matter, through their respective counsel, hereby agree that this matter shall be deemed settled and resolved on the following terms:

1. The parties recognize that the Petition of Appeal alleges that Petitioner should have been assigned to a position as teacher of Health, under his Instructional certificate-Health endorsement, effective March 18, 1992.

2. Prior to March 18, 1992, the position in dispute required Instructional certification with endorsements as a teacher of Health and Physical Education, but Petitioner only holds an endorsement as a teacher of Health.

3. On March 18, 1992, the position was altered so that only

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FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
GATEWAY I
NEWARK, N.J. 07102

the endorsement as a teacher of Health was required.

4. On April 6, 1992, Respondent recalled Petitioner to the disputed position, as a teacher of Health.

5. The parties agree that Petitioner should have been recalled to the position effective March 18, 1992.

6. In settlement of all claims, the parties agree that Mr. Hughes will be fully compensated by the Respondent, for the period of March 18, 1992, through April 6, 1992, as if assigned to the position.

7. Respondent's obligation as such will be to provide Mr. Hughes with the salary he would have received if assigned to the position, from March 18, 1992, together with all benefits and emoluments, including but not limited to fringe benefits, sick leave, pension credit, and seniority credit, that he would have accrued or been provided with if in the position as of March 18, 1992.

8. The payment of such salary and provision of such benefits and emoluments will be without prejudice to Petitioner's entitlement to appropriate compensation, benefits, and emoluments for employment on and after April 6, 1992.

9. The payment of such salary shall be made within thirty (30) days of the Commissioner's approval of this agreement.

10. Both counsel, by signing this agreement, represent to the Court that they are authorized to enter into this agreement on behalf of their respective clients.

11. This agreement is subject to approval by the

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NEWARK, N.J. 07102

Administrative Law Judge and Commissioner of Education. If the Administrative Law Judge and the Commissioner of Education, or Commissioner of Education reject any term of this agreement, this matter will be returned to the Office of Administrative Law for further proceedings, without prejudice to the parties' right to attempt to settle this matter in such event.

12. In consideration to the above terms, the matter shall be deemed amicably resolved, settled, and shall be deemed withdrawn.

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
Attorneys for Petitioner

Dated: 7/22/92

By: _____
Richard A. Friedman, Esq.

MARTINEZ & JENNINGS
Attorneys for Respondent

Dated: 7/25/92

By: _____
Jack L. Kolpen, Esq.

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FAGELLA & NOWAK
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GATEWAY I
NEWARK, N.J. 07102

OAL DKT. NO EDU 4705-92

ROBERT B. HUGHES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

OCTOBER 27, 1992

DATE OF MAILING - OCTOBER 27, 1992

267-92

267-92

BARBARA HOLDER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY	:	DECISION
RESPONDENT.	:	

OCTOBER 27, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 384-91
AGENCY DKT. NO.247-7/90

BARBARA HOLDER,
Petitioner,
v.
BOARD OF EDUCATION
OF THE TOWNSHIP OF PISCATAWAY,
Respondent.

Nancy I. Oxfeld, Esq., for petitioner (Balk, Oxfeld, Mandell & Cohen, attorneys)

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

Record Closed: September 14, 1992 Decided: September 18, 1992

BEFORE **DANIEL B. McKEOWN**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 10, 1991, 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 agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 15, 1992
Date

DANIEL B. McKEOWN, ALJ, t/a

Receipt Acknowledged:

9/22/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 25 1992
Date

OFFICE OF ADMINISTRATIVE LAW

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OFFICE OF LAW
SEP 11 10 45 AM '92

BALK, OXFELD, MANDELL & COHEN
50 Commerce Street
Newark, New Jersey 07102
(201) 642-0161
Attorneys for the Petitioner

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY

Agency Ref. No. 247-7/90
OAL DKT. NO. EDU 00384-91S

BARBARA HOLDER,	:	
Petitioner,	:	SETTLEMENT AGREEMENT
-vs-	:	
PISCATAWAY BOARD OF EDUCATION,	:	
Respondent.	:	

The above matter having been amicably resolved between the parties, it is hereby agreed as follows:

1. The personnel records of the Respondent will be adjusted to reflect that the Petitioner voluntarily resigned her employment with the Respondent effective June 30, 1990.

2. Consistent with paragraph number 1, the following changes will be made to the contents of the Petitioner's personnel file:

(a) The March 15, 1990 summary evaluation of the Petitioner by Jerry Papariello shall be revised in that the recommendations for re-employment and for increment shall be changed from "no" to "resigned, no recommendation." The ratings of "U" shall remain unchanged and all written commentary both the written commentary of Papariello and the written response of the Petitioner, shall be deleted from that summary evaluation;

(b) The April 26, 1990 letter to the Petitioner from Gordon H. Moore shall be deleted from the file;

(c) The May 1, 1990 letter to Gordon H. Moore from the Petitioner shall be deleted from the file;

(d) The May 8, 190 letter to the Petitioner from Gordon H. Moore shall be deleted from the file;

(e) The handwritten words "not recommended" shall be removed from the Petitioner's Employee Record Folder.

3. The Respondent will respond to future inquiries concerning the status of the Petitioner's employment with the Respondent by stating only the dates on which the Petitioner was employed, the positions held by the Petitioner and the date on which she resigned.

4. In return for the Respondent taking the actions set forth in Paragraphs 1-4 of this agreement, the Petitioner agrees to withdraw her Petition of Appeal to the Commissioner of Education in this matter and to execute a release concerning any and all claims which she may have against the Respondent through the present date.

BARBARA HOLDER

Dated: 6/8/92

BALK, OXFELD, MANDELL & COHEN
Attorneys for the Petitioner
By:

NANCY I. OXFELD

Dated: 6/11/92

PISCATAWAY BOARD OF EDUCATION
Respondent
By:

Dr. Philip E. Geiger

Dated: 7/23/92

RUBIN, RUBIN, MALGRAN & KUHN
Attorneys for Respondent
By:

DAVID B. RUBIN

Dated:

BARBARA HOLDER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law in the form of a joint stipulation of settlement have been reviewed.

Upon review, the Commissioner finds that he cannot accept the proposed settlement in its present form, as it contains terms which would prevent the Board and its agents from making a full and forthright disclosure of the circumstances of a teaching staff member's resignation and its assessment of her performance, a matter of particular concern to the Commissioner where the teacher has received an unsatisfactory evaluation and may well seek employment in another public school district. In view of his duty toward public school districts statewide, the Commissioner cannot hold such a result consistent with sound educational policy and the best interests of students.

Neither can he condone, as an acceptable condition of settlement, alteration of a teaching staff member's evaluation documents in a way that misrepresents the district's true assessment

of his or her performance, such as would occur herein by changing the evaluator's assessment from "not recommended" for reemployment and increment to "resigned, no recommendation." Once again, while such a result may serve the immediate needs of the parties to a proposed settlement, it does not serve the greater interests of the public school system statewide and therefore cannot be permitted by the Commissioner in the context of an agreement submitted for his approval and endorsement.

Accordingly, the initial decision of the Office of Administrative Law is reversed and the instant matter remanded for revision of the settlement document consistent with the principles set forth herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 27, 1992

DATE OF MAILING - OCTOBER 27, 1992

267-92

EDU #384-91
C #267-92
SB # 60-92

BARBARA HOLDER,	:	
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, October 27, 1992

For the Petitioner-Appellant, Balk, Oxfeld, Mandell & Cohen
(Randi Doner, Esq., of Counsel)

For the Respondent-Respondent, Rubin, Rubin, Mandell & Cohen
(David B. Rubin, Esq., of Counsel)

Upon review of the record in this matter and the terms of the settlement proposed by the parties, we find, as did the Administrative Law Judge, that the proposed settlement is consistent with law and meets the requirements of N.J.A.C. 1:1-19.1. In that we further find that the terms of the settlement adequately protect the public interest and in no way jeopardize the interests of New Jersey's public school districts, we reverse the decision of the Commissioner and direct that she accept the settlement in this matter. In so doing, however, we remind the district Board of its ongoing obligation to assure that its personnel do not engage in discriminatory conduct.

S. David Brandt opposed.

April 7, 1993

Date of mailing 12 APR 1993

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BARBARA HOLDER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

JULY 15, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION APPROVING SETTLEMENT
OAL DKT. NO. EDU 8926-92
(ON REMAND EDU 384-91)
AGENCY DKT. NO. 247-7/90

BARBARA HOLDER,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,
Respondent.

Nancy I. Oxfeld, Esq.,for petitioner (Balk, Oxfeld, Mandell & Cohen, attorneys)

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

Record Closed: April 23, 1993 Decided: June 4, 1993

BEFORE **DANIEL B. McKEOWN**, ALJ, t/a:

STATEMENT OF CASE

This matter was transmitted to the Office of Administrative Law on , for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The parties settled the matter but the settlement was rejected by the Commissioner. On appeal, however, the State Board of Education reversed the Commissioner, and directed that the Commissioner accept the settlement as a final disposition of the matter.

It is so **ORDERED**.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

Since the agency head has consented to the settlement terms, this decision is deemed the final decision. N.J.A.C. 1:1-19.1(b)2.

June 4, 1993
DATE

Daniel B. McKeown, ALJ, t/a (NR)
DANIEL B. Mc KEOWN, ALJ, t/a

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BALK, OXFELD, MANDELL & COHEN
50 Commerce Street
Newark, New Jersey 07102
(201) 642-0161
Attorneys for the Petitioner

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY

Agency Ref. No. 247-7/90
OAL DKT. NO. EDU 00384-91S

BARBARA HOLDER,	:	
Petitioner,	:	SETTLEMENT AGREEMENT
-vs-	:	
PISCATAWAY BOARD OF EDUCATION,	:	
Respondent.	:	

The above matter having been amicably resolved between the parties, it is hereby agreed as follows:

1. The personnel records of the Respondent will be adjusted to reflect that the Petitioner voluntarily resigned her employment with the Respondent effective June 30, 1990.

2. Consistent with paragraph number 1, the following changes will be made to the contents of the Petitioner's personnel file:

(a) The March 15, 1990 summary evaluation of the Petitioner by Jerry Papariello shall be revised in that the recommendations for re-employment and for increment shall be changed from "no" to "resigned, no recommendation." The ratings of "U" shall remain unchanged and all written commentary both the written commentary of Papariello and the written response of the Petitioner, shall be deleted from that summary evaluation;

(b) The April 26, 1990 letter to the Petitioner from Gordon H. Moore shall be deleted from the file;

(c) The May 1, 1990 letter to Gordon H. Moore from the Petitioner shall be deleted from the file;

(d) The May 8, 190 letter to the Petitioner from Gordon H. Moore shall be deleted from the file;

(e) The handwritten words "not recommended" shall be removed from the Petitioner's Employee Record Folder.

3. The Respondent will respond to future inquiries concerning the status of the Petitioner's employment with the Respondent by stating only the dates on which the Petitioner was employed, the positions held by the Petitioner and the date on which she resigned.

4. In return for the Respondent taking the actions set forth in Paragraphs 1-4 of this agreement, the Petitioner agrees to withdraw her Petition of Appeal to the Commissioner of Education in this matter and to execute a release concerning any and all claims which she may have against the Respondent through the present date.

BARBARA HOLDER

Dated: 6/8/92

BALK, OXFELD, MANDELL & COHEN
Attorneys for the Petitioner
By:

NANCY I. OXFELD

Dated: 6/11/92

PISCATAWAY BOARD OF EDUCATION
Respondent
By:

Dr. Philip E. Geiger

Dated: 7/23/92

RUBIN, RUBIN, MALGRAN & KUHN
Attorneys for Respondent
By:

DAVID B. RUBIN

Dated:

OAL DKT. NO. EDU 8926-92 (EDU 384-91 ON REMAND)

BARBARA HOLDER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

Maryellen FitzGerald
COMMISSIONER OF EDUCATION

JULY 15, 1993

DATE OF MAILING - JULY 15, 1993

HARRIET WALLEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RANCOCAS VALLEY REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, librarian/media specialist riffed from her position, alleged Board violated her tenure rights by assigning nontenured staff to English position for which she was certified. Petitioner sought summary decision as to whether she was entitled, by virtue of her instructional certificate in English and her certification and employment within the district as media specialist, to claim position as English teacher held by nontenured staff member.

Commissioner determined petitioner was not entitled to relief she sought. Commissioner found petitioner had achieved tenure within the position of "educational services" but not within the separately enumerated position of "teacher." (Kish; Ellicott) Thus, she could not claim entitlement to latter position by tenure right. Petition was dismissed.

OCTOBER 27, 1992

HARRIET WALLEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RANCOCAS VALLEY REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

For Petitioner, Harriet Wallen, Pro Se*

For Respondent, Ernest A. Spinello, Jr., Esq. (Parker, McCay & Criscuolo, P.C.)

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed on May 16, 1991, wherein petitioner alleged that her tenure rights were violated, following her reduction in force (RIF) from the position of media specialist, by the Board's assignment of nontenured staff to English positions for which she was properly certificated. Upon receipt of the Board's Answer admitting petitioner's factual assertions but denying her conclusions of law, the matter was transmitted to the Office of Administrative Law (OAL) for further proceedings.

---

* Petitioner appointed William Wallen, Esq. (Sacks, Basch, Weston & Sacks) as her representative in this matter at the time of submission of her primary brief, which was prepared by Wallen, as was petitioner's reply to the Board's brief. All subsequent filings, however, were submitted pro se, as were all filings prior to the primary brief.

On July 3, 1991, petitioner requested that, as no facts were in dispute between the parties, the Commissioner decide this matter directly on a summary basis pursuant to N.J.A.C. 6:24-1.13. Following the Board's indication that it would join in seeking summary disposition, on July 19, 1991 the Commissioner requested return of the file from OAL, which return was duly effectuated on September 18, 1991. In accordance with an established schedule, primary briefs were filed by the parties during November 1991.

However, in a December 3, 1991 reply to the Board's brief, petitioner indicated that she would be filing under separate cover a motion to strike the Board's brief and reschedule the matter for hearing at OAL because the Board's submission included an affidavit from the district superintendent which raised new factual issues in contravention of the Board's prior agreement to have the case summarily decided on the facts set forth in the Petition of Appeal. In anticipation of such motion, the Board replied on December 10, 1991 that the disputed affidavit dealt with areas that were a matter of public record (e.g. pertinent job descriptions) and had been included to "clarify" the stipulated facts, and that the contents of the affidavit were in any event unnecessary for resolution of the instant controversy, so that no factual hearing was necessary. When petitioner filed the promised motion on January 17, 1992, she also included an affidavit from her supervisor in opposition to the affidavit of the superintendent. However, the Board was not served with the motion and affidavit until late March, and duly responded on April 3, 1992 with arguments similar to those in its prior submission; adding, however, that in the event that the Commissioner

deemed the superintendent's affidavit to inappropriately contain new facts, the Board would withdraw the affidavit and rely solely on its Answer and brief.

Upon review of the entire record and consideration of the parties' arguments on the question of need for further factfinding and conduct of a plenary hearing at OAL, the Commissioner determines that this matter remains amenable to summary decision and herein renders his ruling on the merits of the appeal.

STATEMENT OF THE ISSUE AND FINDINGS OF FACT

The issue in this matter is whether petitioner is entitled, by virtue of her instructional certification in English and her certification and employment within the district as a media specialist, to claim a position as English teacher held by a nontenured staff member.

The material facts of the matter are as follows:

1. Petitioner holds an instructional certificate with an English endorsement and an educational services certificate with a school media specialist endorsement, both dated April 1984 and in full force and effect throughout all times pertinent herein.

2. Petitioner was hired by the Board as a librarian/media specialist on September 1, 1985, and was subsequently rehired in this same position for the 1986-87, 1987-88, 1988-89, 1989-90 and 1990-91 school years, thus obtaining tenure pursuant to N.J.S.A. 18A:28-5.

3. On April 27, 1991, by majority vote of its full membership, the Board eliminated petitioner's position of school media specialist, effective July 1, 1991.

4. By letter dated April 29, 1991, petitioner claimed entitlement to a position as teacher of English held by a nontenured person

pursuant to Capodilupo v. West Orange Bd. of Ed. infra, and Bednar v. Westwood Bd. of Ed., infra.

5. On May 15. 1991, the Board, through its superintendent, informed petitioner that she would not be offered a position as English teacher notwithstanding that two such positions were held by nontenured staff. On May 16, 1991, petitioner filed the within appeal.

The Board's duly adopted job description for the position of librarian/media specialist is as follows:

I. POSITION: Librarian

II. QUALIFICATIONS: Bachelor's degree with education credits. Master's degree in Library Science. Library internship and two years school library experience.

III. RESPONSIBILITY: Directly responsible to Coordinator of Library/Media Center and through him/her to the Principal

IV. FUNCTION:

V. PERFORMANCE RESPONSIBILITIES:

A. Administrative Duties

1. Scheduling and programming for student and teacher use.

2. Scheduling and supervising student assistants and/or clerical help.

3. Organizing circulation work including checking lost books and overdues.

4. Planning publicity and public relations.

5. Supervising library suite.

6. Checking on operation of security system.

7. Checking on and making final filing decisions.

8. Being responsible for the general physical condition, order, cleanliness, etc. of the areas of the library suite, the shelves, the catalog, etc.

B. Technical Duties

1. Evaluating materials:

   a. Print materials
   b. Non-print materials
   c. Equipment

2. Selecting materials:

   a. Print
   b. Non-print materials
   c. Equipment

3. Classifying materials

4. Cataloging materials

5. Organizing and maintaining:

   a. File of vocational materials, including college materials
   b. Back files of magazines

6. Arranging for rebinding of books

C. Educational Duties

1. Reading guidance, book talks, book clubs, book programs, bulletin boards, TV and radio programming, book reviews.

2. Reference work

3. Library instruction

4. Assisting teachers in curriculum enrichment

5. Assisting teachers and parents in reading guidance of students

6. Studying school curricula

7. Attending faculty meetings and professional conferences

8. Maintaining library atmosphere of reading and study

9. Visiting classes

10. Training student assistants

11. Informing teachers and students of new library material

12. Initiating and/or cooperating in inservice programs

13. Speaking before school and community

VI. EVALUATION: Performance of this job will be evaluated annually in accordance with provisions of the Board's policy and procedures on Evaluation of Professional Staff.

VII. AUTHORIZATION AND DATE: Approved by Rancocas Valley Regional High School Board of Education September 19, 1979.

The Board's duly adopted job description for the position of high school teacher is as follows:

I. POSITION: High School Teacher, both non-tenured and tenured

II. QUALIFICATIONS: Appropriate New Jersey State Certification

III. RESPONSIBILITY: All teachers are directly responsible to their Department Supervisor and through him/her to the Principal

IV. FUNCTION: To participate as a professional member of an instructional team or department in directing and/or supervising the learning activities of students in attainment of established curricular objectives and "T & E" Outcome Goals.

V. PERFORMANCE RESPONSIBILITIES:

A. Classroom Management:

1. Follow prescribed course of study and/or establish instructional objectives that will meet the

individual needs, interests and abilities of that particular class.

2. Teach each student under his/her supervision in a manner that will contribute to that individual's intellectual, social and cultural growth.

3. Establish a positive instructional learning environment which will facilitate and encourage student learning and provide proper instruction in the area of safety matters as prescribed by his/her assigned curriculum.

4. Maintain an approved (by department supervisor) weekly lesson planbook, emergency plans, a class roll book, and a record of student achievement and classroom accomplishments.

5. Maintain proper attendance accounting.

6. Regularly evaluates student achievement and promptly reports said achievement at the conclusion of each marking period.

7. Keep parents informed of student progress via "Interim Reports," letters, telephone calls or conferences.

8. Attempt to identify the learning disabilities of students on a regular basis and seek assistance of district specialists, as needed.

9. Periodically re-evaluates curriculum content, personal teaching methods and materials, educational goals and other topics related to curriculum.

10. Assist in the development of curriculum guides, selection of textbooks, equipment, supplies and any other material delegated by the department supervisor.

B. Intra-School Management:

1. Teachers shall be responsible for proper and adequate conduct and control of students. Teachers shall enforce the rules and regulations of the school and shall give support to their principal in maintaining district policy.

2. Certified personnel assigned instructional, extra-curricular or supervisory duties are responsible for the safety of all students assigned to them during times they are under their jurisdiction.

3. Attends staff and department meetings and serves on staff committees.

4. Maintain and/or improve professional competency in subject matter area and strive to broaden educational background through professional readings, visiting other schools, attending meetings, conferences or workshops.

5. Demonstrates relationships with members of the school staff which promote cooperation at all levels of organization and contributes to the effective operation and administration of the school system.

6. Assumes, as part of his/her regular employment, "sponsorship" of certain extra-curricular activities such as clubs, athletics, class projects or other major duty. Teachers may volunteer for such duty or may be assigned by the building principal.

7. Accepts and carries out all administratively assigned duties (teaching/non-teaching) within the scope of his/her contractual obligations.

VI. PERFORMANCE RESPONSIBILITIES (SPECIFIC): As per any individually approved Departmental Job Description.

VII. EVALUATION: Performance of this job will be evaluated annually in accordance with provisions of the Board's policy and procedures on Evaluation of Professional Staff.

VIII. AUTHORIZATION AND DATE: Adopted: June 20, 1979

PETITIONER'S ARGUMENT

Petitioner submits that because she held a valid certificate to teach English at the time of her RIF, the Board could not retain nontenured English teachers while eliminating her employment. In denying her an English position, petitioner avers, the Board wrongly relies on the seniority-related notion of experience, which was flatly rejected by the courts in determining the rights of tenured teachers versus nontenured, as against tenured teachers inter sese. Capodilupo v. West Orange Township Board of Education, 218 N.J. Super. 510 (App. Div. 1987), cert. denied 109 N.J. 514 (1987); Bednar v. Westwood Regional Board of Education, 221 N.J. Super. 239, cert. denied 110 N.J. 512 (1988) Instead, these cases stand for the proposition that in a RIF situation, a school district may not retain nontenured teachers in positions for which riffed tenured staff hold valid certificates; actual teaching experience in the position claimed or under the qualifying endorsement is not required, and its lack cannot serve to defeat a claimant's statutory tenure rights. Joseph Grosso v. Board of Education of the Borough of New Providence, Union County v. Leslie et al., State Board decision, 1990 S.L.D. 1750; Anna Lynch v. Board

of Education of the West Morris Regional High School District, Morris County, 1990 S.L.D. 453; Pamela Bosco v. Board of Education of the Northern Highlands Regional School District, Bergen County, 1990 S.L.D. 1156; Catherine Lammers v. Board of Education of the Borough of Point Pleasant, Ocean County, 1990 S.L.D. 1500

These cases also, petitioner claims, defeat the notion relied upon by the Board that because petitioner's service was under one type of certificate (educational services) and the position she claims is under another (instructional), she has no entitlement to the claimed position. Indeed, the notion of "separately tenurable" was specifically rejected by the State Board of Education in reversing two Commissioner's decisions which denied a tenured teacher's entitlement claim on the grounds that he or she had not served under the pertinent endorsement. Grosso, supra; Barbara Ellicott v. Board of Education of the Township of Frankford, Sussex County, 1990 S.L.D. 1714

Moreover, petitioner's tenure rights cannot be thwarted by the fact that her two teaching certificates were assigned by the State Board of Education to two different categories of certificate, and hence, seniority. First, any tension between tenure and seniority rights must be resolved in favor of tenure. Bednar, supra Second, although her service technically fell under an educational services certificate, she was nonetheless a teaching professional and the teaching nature of the educational media specialist position is underscored by the requirements necessary to obtain that endorsement, which include one successful year of teaching pursuant to N.J.A.C. 6:11-11.17(b)(3) and 6:11-11.19(a)(2).

Petitioner submits that she earned her tenure as a teacher who taught in the library rather than in the classroom, and whose subject was research and retrieval of information; thus, for purposes of N.J.S.A. 18A:28-5, she falls under the tenure category of "teacher" rather than "such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners***." To hold otherwise is to place form over substance and ignore the mandate of the Supreme Court that tenure rights be liberally construed. Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982)

THE BOARD'S ARGUMENT

The Board argues that the question raised by petitioner has been definitively addressed by the Commissioner and State Board of Education in Carmen DiSimoni v. Board of Education of the Passaic County Regional High School District #1, Passaic County, 1990 S.L.D. 1249 and 1991 S.L.D. 2540, and Maurice Kaprow v. Board of Education of the Township of Berkeley, Ocean County, 1989 S.L.D. 2885. These cases plainly stand for the proposition that tenure is achieved in, and attaches to, a specific "position" of employment and is limited by the certificate required for such employment. The precedents primarily relied upon by petitioner, Capodilupo, supra, Bednar, supra, Ellicott, supra, and Grosso, supra, are clearly distinguishable in that in each case the position claimed was within the scope of the same certificate as that under which the claimant had served and achieved tenure; indeed, Ellicott took pains to establish the distinction between separate certificates and separate endorsements on the same certificate. Therefore, since petitioner's

employment was entirely in the position of librarian/media specialist, which required her solely to hold an educational services certificate with appropriate endorsement, her tenure protection cannot extend to other certificates she may also happen to hold independent of that required for the position in which she attained tenure.

COMMISSIONER'S DETERMINATION

Upon review of the facts and arguments herein and consideration of applicable law, the Commissioner determines, for the reasons set forth below, that petitioner is not entitled to the relief she seeks.

It is undisputed that petitioner has been employed in the district solely as a librarian/media specialist. The State Board of Education has consistently found, in the wake of the line of cases cited by petitioner, that:

> ***tenure is achieved within a "position," Howley v. Bd. of Ed. of Ewing Township, decided by the Commissioner of Education, 1982 S.L.D. 1328, aff'd by the State Board of Education, 1983 S.L.D. 1554, and tenure protection as against nontenured individuals following a reduction in force extends only to assignments within that tenured position for which the individual is qualified by virtue of his or her certification. [citations omitted] Such protection does not extend to assignments within the purview of other separately tenurable positions in which the staff member has not achieved tenure pursuant to N.J.S.A. 18A:28-5 or 18A:28-6.*** (emphasis in text)

Elissa A. Kish v. Board of Education of the Borough of Elmwood Park, Bergen County, State Board decision May 6, 1992, affirming Commissioner's decision of January 16, 1992; see also Ellicott, supra; DiSimoni, supra; Kaprow, supra, State Board decision 1991 S.L.D. 2561, aff'd New Jersey Superior Court Appellate Division March 25, 1992.

More specifically, the Board has held that:

> With the exception of school nurse, assignments within the purview of the educational services certificate are not enumerated in N.J.S.A. 18A:28-5 as separately tenurable positions. Under regulations promulgated by the State Board, moreover, teaching staff members holding an educational services certificate are authorized and qualified for service in any assignment under that certificate for which they possess the appropriate endorsement. *** Consequently, we conclude that, with the exception of school nurses, who are separately tenured by statute, staff members serving under educational services certificates achieve tenure in "educational services" and are entitled to tenure protection in all assignments within that tenurable position for which the endorsements on their certificates qualify them.***
>
> Thus, in the instant case, we find that Petitioner, who was employed as a teaching staff member in the district under her educational services certificate since 1981, served thereunder for the requisite period of time pursuant to N.J.S.A. 18A:28-5 and thereby achieved tenure in educational services.*** Ellicott, supra, 1990 S.L.D. at 1718; aff'd 251 N.J. Super. 342 (App. Div. 1991)

Applying these holdings to the matter herein, petitioner has clearly achieved tenure within the position of "educational services" but not within the separately enumerated position of "teacher;" she cannot, then, claim entitlement to the latter position by tenure right. Nor is this determination altered by petitioner's contention that her position was that of "teacher" for tenure purposes by virtue of the duties she performed and the regulatory prerequisites for certification as a media specialist. While it is certainly true that both petitioner's position and her training included a significant instructional component, it is equally true that the positions of "teacher" and "media specialist" are substantially distinct both generally and in terms of the

instant district's job descriptions, even granting every inference to petitioner by accepting completely the account of her instructional contributions provided by her supervisor in opposition to the affidavit of the district superintendent. Kish, supra, distinguishing Dennery v. Passaic Valley High Sch., 251 N.J. Super. 144 (App. Div. 1991), cert. granted _____ N.J. _____ 1992.

Accordingly, the Commissioner finds that petitioner has no entitlement to a position as teacher of English by virtue of her tenured service as a librarian/media specialist, and the Petition of Appeal so claiming is hereby dismissed.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 27, 1992

DATE OF MAILING - OCTOBER 28, 1992

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* The Commissioner notes that although both parties alleged bad faith and sought attorney fees in this matter, it is well established that the Commissioner has no authority to award such fees. Balsley v. North Hunterdon Regional High School Bd. of Educ., 117 N.J. 434 (1990)

268-92

C #268-92
SB #59-92

HARRIET WALLEN,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE RANCOCAS VALLEY REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, October 27, 1992

For the Petitioner-Appellant, Harriet Wallen, pro se

For the Respondent-Respondent, Stephen J. Mushinski, Esq.

The State Board of Education affirms the decision of the Commissioner for the reasons expressed therein. In so doing, we concur with the Commissioner that the positions of "teacher" and "media specialist" are distinct. Consequently, in contrast to the positions involved in Dennery v. Passaic Valley High Sch. 251 N.J. Super. 144 (App. Div. 1991), certif. granted, 127 N.J. 561 (1992), the position of teacher does not encompass a substantial amount of the work that petitioner performed while she was employed in the position of media specialist.

March 3, 1993

Date of mailing MAR - 5 1993

269-92

269-92

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH : DECISION
OF LAUREL SPRINGS, CAMDEN COUNTY. :
:

SYNOPSIS

Petitioning unsuccessful candidate requested inquiry into special board election held July 7, 1992, alleging irregularities in voting procedure.

ALJ found that two people did cast ballots unlawfully and could have changed outcome of the close election. Therefore, ALJ concluded new election was necessary as soon as possible.

Commissioner set aside the determination of the ALJ. Commissioner found that petitioner did not meet her burden of proof in this matter. There was no proof positive that challenged voters voted illegally or that their votes were cast against petitioner. Commissioner determined results of special election were to stand as announced on recount.

OCTOBER 27, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5356-92
AGENCY DKT. NO. 308-7/92

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE BOROUGH OF LAUREL SPRINGS.

Donald J. Stein, Esq., for Veronica Mulhearn (Slotnick, Schwartz & Stein, attorneys)

Barbara E. Riefberg, Esq., for poll workers and Laurel Springs Board of Education (Jeffrey I. Baron, attorney)

Record Closed: September 9, 1992 Decided: September 10, 1992

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

Inquiry into a special school election upon the application of a defeated candidate. *N.J.S.A.* 18A:14-63 12.

Veronica Mulhearn, an unsuccessful candidate in a special board election requested the Commissioner to conduct an inquiry, alleging irregularities in voting procedure such as to cast the outcome of the election in doubt.

The matter was opened before the Commissioner of Education on July 13, 1992. On July 17, 1992, the Department of Education transmitted the matter to the Office of Administrative Law for a determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. Expedited scheduling was requested because of the nature of the case.

Upon receipt of the matter, the Office of Administrative Law set it down for hearing on August 27, 1992. Thereupon, the matter was assigned to this judge. Counsel had scheduling difficulties and, for good cause, the matter was scheduled

for September 9, 1992, at which time it was heard at the Office of Administrative Law, Mercerville.

The parties stipulated the following facts:

1. A special Board election was held on Tuesday, July 7, 1992, in the Laurel Springs School District.

2. At the annual school election held on April 7, 1992, two candidates, Michael Caccia and Veronica Mulhearn, received the same number of votes. The votes were verified and a special election set for July 7, 1992.

3. On July 7, 1992, the announced results of the vote for school board member were 183 for Caccia and 180 for Mulhearn. Upon recount, the count stood 183 for Caccia and 181 for Mulhearn.

Veronica Mulhearn asserts irregularities in the voting conducted on July 7, 1992. She served as challenger on her own behalf. When two persons known to her entered the polls, she challenged their right to vote because she believed they had moved out of district. She secured a copy of a deed between the couple and the buyers for their Laurel Springs property (P-1). The exhibit shows that the property was transferred on April 30, 1992, although recorded nearly five weeks later.

Mulhearn stated that the judge of elections, unsure of what to do in the face of the challenge, called the borough's clerk's office and the County Superintendent of Elections' office. The election judge called the latter upon the suggestion of the Board secretary. The borough clerk returned the election judge's call and told her that so far as the clerk was concerned, the challenged voters could cast ballots. The challenged couple voted and left. They executed no affidavits, signed no statements and swore no oaths. Shortly thereafter, the County Superintendent of Election's office called and said that the challenged couple could not vote.

Mulhearn knew the challenged voters socially and politically. Prior to this school election, Mulhearn had voted to dismiss from employ by the Board one of the couple's relatives. This severed all cordial relationships between the couple and the Mulhearns. In fact, there was considerable hostility exhibited by the couple toward Mrs. Mulhearn.

Mulhearn determined that mail addressed to the couple was forwarded from the Laurel Springs post office beginning on May 8, 1992. As of July 8, 1992, their mail is being forwarded to an address in Florida. Mulhearn also stated that she did not see the couple move or know surely when the house was vacated. She also stated the couple was openly hostile to her on election night.

Linda Capie, a certified poll worker, testified. She served at the special election of July 7, 1992, and recalls the incident complained of. A couple entered the polls, gave their name to another poll worker and Ms. Mulhearn challenged them. The election judge left the room to try to determine if they could vote. Several minutes later, the election judge returned and reported that the borough clerk had said that the couple could vote but added, "I called the Election Board." The challenged couple got voter authorizations, cast their ballots and left. Shortly thereafter, the election judge reentered the poll area and stated that the couple could not properly vote.

When Mulhearn challenged the couple, the election judge asked them when they sold their house. The witness could not hear any answer, but observed that the election judge and the challenged couple went to the Board secretary's office. The couple returned, voted and left. The executed no affidavits, made no statements and swore no oaths. The witness was not present when the election judge made her telephone calls, but recognized the name of a person in the county election's office.

The witness knew the challenged couple prior to the incident, but had no specific knowledge of when they moved from Laurel Springs. She could not hear what address they gave when they entered the poll area. When the election judge announced that the couple could vote, the witness said to a co-worker that she believed the information that the couple could vote was wrong. The election judge overruled her. The witness later checked and found that procedures had been violated.

The challenger introduced a sworn statement of Dolores Marella, who served as judge of the special board election on July 7, 1992. She states the following:

1. I was appointed the Judge of the special school board election that took place on July 7, 1992, and am personally familiar with the facts and circumstances set forth in this affidavit.

2. Two voters, Donald and Barbara Walsh, came into the voting hall to vote. A challenge was made as to their

ability to vote by Veronica Mulhearn, who claimed that they no longer lived in the district, and had moved approximately two months ago.

3. I placed my initial call to the Borough Clerk, Barbara Hawk. At this time she indicated that Donald and Barbara Walsh could vote.

4. I attempted to follow proper procedures by calling the county to obtain a ruling. I was informed by the County that a ruling would be made promptly and someone would call back.

5. I decided to wait for a response from the county; however Donald and Barbara Walsh left the room. I later discovered that Walshes had voted and left. They signed no affidavits or certifications at any time.

6. After the Walshes had voted and left, I received a call back from the County indicating that they were ineligible to vote since they no longer met the residence requirement.

Frank Badessa, secretary, Laurel Springs Board of Education, testified. He opened and closed the polls as required by law. He was in his office when the challenged couple entered. After Ms. Mulhearn's challenge, the election judge came to him and said there was a problem. She called the borough clerk. The witness advised that she should call the County Board of Elections. The election judge did so. The borough clerk was first to return the call and advised the election judge to let the challenged couple vote. Later, after the challenged couple had left his office, the County Board of Elections returned the election judge's telephone call and advised the opposite.

The witness went to the poll area to tell the election judge of what the County board had advised. He discovered the challenged couple had voted and left. The witness also stated that on the day of the election the Walshes told him they were living in the municipality of Lindenwald.

Michael Caccia, who has been seated on the Laurel Springs Board of Education, declined to testify. The Board called no witnesses.

Mrs. Mulhearn believes that she had shown the Walshes were not residents in Laurel Springs at the time they voted in the special election contested here. They now live in Florida and could not be subpoenaed to attend this proceeding. It is clear that the two votes cast against her would have produced another tied vote.

DETERMINATION

An irregularity must be the producing cause of illegal votes which would not otherwise have been cast or the cause of defeating legal votes which would have been counted but for the irregularity, and to such an extent as to change the result of the election. *In re Wene*, 26 *N.J. Super.* 363 (Law Div. 1953), aff'd 13 *N.J.* 185 (1953). *N.J.S.A.* 18A:14-3.2 provides that all special elections shall be called in the manner provided for the calling of the annual school election and the qualification of voters, conduct of the election, and other things, shall be in all respects the same as the annual school election.

N.J.S.A. 18A:14-44 provides:

> No person shall be permitted to vote at any school election unless--
>
> a. He is a citizen of the United States of the age of 18 years;
> b. He has been a resident of the state and the county 30 days before the election.
> c. He shall be registered to vote in an election district included within the school district, as the case may be, at least 29 days prior to the date of the election, and his name shall appear upon the signature copy register furnished for such school district or polling district, respectively, or he shall make proof to the election board at such election that he is entitled to vote at such election, notwithstanding that his name does not appear on the said signature copy register, in the manner prescribed in this chapter.

N.J.S.A. 18A:14-51.2 provides that upon a challenge of a voter who appears to be duly registered, it shall be the duty of the election board [that is, the election judge and poll workers] and the privilege of all its members to put such questions as are proper to determine the right of the voter to vote. The affidavit of the election judge describes what steps she took when the voters in this case were challenged, but does not indicate that any questions were put to the challenged couple.

N.J.S.A. 18A:14-51.3 provides that, in the event the right of any voter to vote is challenged, the right to vote shall be determined in accordance with the provisions of Title 19, Elections, of the Revised Statutes.

N.J.S.A. 19:15-18 provides that members of district board [of elections] and any duly authorized challenger shall at any election challenge every person who shall claim to have a right to vote whom the board or challenger shall know, suspect or believe not to be qualified or entitled to so vote, and said members or challenger shall have the power and right to ask all necessary questions to determine such person's right. *N.J.S.A. 19;15-21* provides that if a person is challenged as not qualified or entitled to vote, the election judge may tender the prospective voter an oath or affirmation in the following form:

> You do swear (or affirm, as the case may be,), that you are a citizen of the United States; that you have resided in the State and in this County for 30 days next before this election, and not elsewhere; that you are now a resident of this election district; that as far as you know and thoroughly believe, you are 18 years of age and in all respects qualified to vote in this election, in this election district, and that you have not voted elsewhere in this election. . . .[Emphasis added.]

If the challenged person refuses to take the oath or affirmation, the person shall be deemed not qualified or not entitled to vote.

In consideration of the testimony which is uncontested and congruent, and in consideration of the statutes set forth above, I **FIND** and **CONCLUDE** that Donald and Barbara Walsh unlawfully cast ballots in the special school board election held on July 7, 1992, in the school district of Laurel Springs. I further **FIND** and **CONCLUDE** that it is more likely than not that the unlawfully cast ballots were not cast for Veronica Mulhearn.

Inasmuch as only two votes separated candidates Caccia and Mulhearn, a shift of one vote could have produced a tie and a shift of two votes could have changed the outcome of the election. Accordingly, I **CONCLUDE** that a new election is necessary and **ORDER** the same to be held as soon as possible, consistent with law. Because this election could be scheduled within six months of July 7, 1992, the approval of the date by the Commissioner of Education is required. *N.J.S.A.* 18A:14-3.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to

make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10 SEPTEMBER 1992
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

9/15/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 17 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

am

WITNESSES

Veronica Mulhearn
Linda K. Capie
Frank Badessa

EXHIBITS IN EVIDENCE

P-1 Deed, Walsh and Walsh to Bradis and Bradis, April 30, 1992

P-2 Affidavit of Dolores Marella, September 9, 1992

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF LAUREL SPRINGS, CAMDEN COUNTY.	:	

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

Upon review, the Commissioner cannot concur with the ALJ that petitioner has met her burden of proof in this matter and that a new election is warranted.

The entire thrust of petitioner's case is that two votes were cast illegally and, because of the closeness of the results, were sufficient to change the outcome of the election. With regard to the illegality of the challenged votes, however, petitioner has proven only that an election worker was advised by the County Board of Elections that the challenged voters should not be permitted to vote. There is nothing in the record to indicate what information the Board was given by the election worker, so that there is no way to know the basis of the Board's decision or to judge the accuracy of the information given to the Board or the conclusion drawn by it; nor was it conclusively proven in these proceedings that the challenged voters did not in fact reside in Laurel Springs. The sale of a home does not in itself establish lack of residency, and,

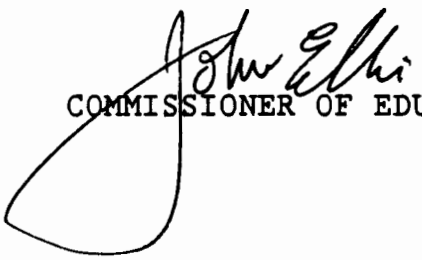
although petitioner "determined" that mail was being forwarded from Laurel Springs beginning May 8, 1992 (no location specified), and that it was being forwarded to Florida beginning July 8, 1992 (the day after the election), there is nothing in the record to indicate how petitioner obtained this information or to substantiate its accuracy. While petitioner's credibility is not in doubt, the consequences of her allegations are sufficiently serious to prevent the Commissioner from finding, absent corroborating testimony or evidence, that the challenged voters in fact voted illegally.

Moreover, even accepting arguendo that the challenged voters cast their ballots illegally, there is no proof as to how they voted, only inference based on petitioner's uncorroborated testimony as to their hostility toward her both in general and on election night. However plausible that inference might be under the circumstances, the fact remains that it cannot serve as proof positive where the consequences of the Commissioner's review--setting aside the results of an entire election--are so serious and petitioner's burden so heavy. This is particularly so in that there is no evidence in the record to indicate that any attempt was ever made to obtain testimony from the challenged voters; rather, it appears that they were not contacted at all, on the assumption--unproven in these proceedings--that they were living in Florida. In the Matter of the Annual School Election Held in the School District of the Township of Pennsauken, Camden County, decided June 12, 1992, citing Application of Murphy, 101 N.J. Super. 163, 167 (App. Div. 1968), cert. den. 52 N.J. 172 (1968) and Matter of Mallon, 232 N.J. Super. 249 (App. Div. 1989), and distinguishing

In the Matter of the Annual School Election Held in the School District of the Borough of Chesilhurst, Camden County, decided January 28, 1992.

Accordingly, for the reasons expressed herein, the initial decision of the Office of Administrative Law is reversed and the Commissioner finds and determines that the results of the special school election held on July 7, 1992 shall stand as announced on recount.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

OCTOBER 27, 1992

DATE OF MAILING - OCTOBER 28, 1992

270-92

270-92

J.B. AND D.B., on behalf of their minor child, D.B.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF HILLSDALE, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parents alleged Board's courtesy busing policy was improperly applied. Board denied courtesy busing as child lived less than one mile from school (using rear entrance of school in determining distance).

ALJ found rear door of school was "nearest public entrance." Thus, student was properly denied courtesy busing as distance was less than one mile. Board was ordered to ensure that rear door was open by 8:45 a.m. on school days. Otherwise, petition was dismissed.

Commissioner concurred with ALJ's determination.

OCTOBER 27, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11212-91
AGENCY DKT. NO. 417-11/91

DAVID BUONOCORE, a minor,
by his parents JAMIE BUONOCORE
and DENNIS BUONOCORE,
Petitioner,
v.
HILLSDALE BOROUGH
BOARD OF EDUCATION,
Respondent.

Jamie Buonocore, *pro se*

Stephen R. Fogarty, Esq., for respondent
(Fogarty & Hara, attorneys)

Record Closed: June 8, 1992 Decided: September 18, 1992

BEFORE **KEN R. SPRINGER,** ALJ:

Statement of the Case

This is an action by the parents of a public elementary school student seeking transportation to school or, alternatively, a determination that the district's courtesy busing policy is invalid. By law, public school districts are only required to provide

transportation for remote students, including elementary students "who live more than two miles from their public school of attendance." See *N.J.S.A.* 18A:39-1 and the implementing regulation, *N.J.A.C.* 6:21-1.3. Nevertheless, school districts may voluntarily offer courtesy busing to resident students who do not qualify under the remoteness standard.

Basically, the dispute involves the application of the district's courtesy busing policy which extends busing privileges to children in the lower grades who live one mile or more from their school of attendance. Two issues are raised: first, whether the district may properly utilize the distance to the rear entrance of the school in determining eligibility for courtesy busing; and, second, whether the courtesy busing plan is arbitrary, capricious and unreasonable as applied in this case.

Procedural History

Petitioners Jamie and Dennis Buonocore filed their petition with the Commissioner of Education ("Commissioner") on November 27, 1991. Respondent Hillsdale Board of Education ("Board") filed its answer on December 11, 1991. Subsequently, on December 24, 1991 petitioners filed an amended petition with the Commissioner. At or about the same time, the Board filed an answer to the amended petition.

Meanwhile, on December 17, 1991 the Commissioner had transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. Initially, the OAL scheduled a hearing for May 27, 1992, which was adjourned to accommodate the parties. The OAL held a hearing on June 9, 1992, on which date the record closed. Witnesses and exhibits are listed in the appendix. Time for preparation of the initial decision has been extended to September 7, 1992.

Findings of Fact

(1) Background Circumstances

Many of the relevant facts are undisputed. Mr. and Mrs. Buonocore and their two children reside in the Borough of Hillsdale in a development known as Stoney Ridge Estates. Their son David, who is eight years old, is enrolled in the third grade of the Hillsdale public school system. During the 1991-92 school year, he was assigned to attend the Smith School. Next year (1992-93), he will continue in the fourth grade at the same school. David's younger brother is not yet old enough to attend school.

Prior to 1991-92, the Hillsdale district did not have a courtesy busing program. It provided free transportation only to those students entitled to busing under state law. Because both parents work, the Buonocores had arranged for subscription transportation with a private bus company. Now that many of the other children in the neighborhood qualify for free school transportation, however, the private company is no longer able to offer bus services. The Buonocores have been unable to find any other private bus company willing to establish a route near their house. Due to busy work schedules, neither spouse can reciprocate in ride pool arrangements with other parents.

Hillsdale is a K-to-8 district which operates three elementary schools. Currently, the district is in the process of implementing a reconfigeration plan designed to create a middle school. The new plan will be phased in over three years. In 1990-91, the White School was a K-to-8 school, while the Smith School and the Meadowbrook School were K-to-6 schools. 1991-92 is a transition year, in which the White School is primarily a 3-to-8 school, and the other two are K-to-5 schools. By 1993-94, the White School will be the middle school, comprising grades 5-to-8, and the other schools will be limited to grades K-to-4.

Adoption of the reconfigeration plan caused considerable controversy in the community, especially among the parents of "displaced" children living near the White School who would now have to travel greater distances to Meadowbrook or Smith Schools. School officials acknowledge that transportation was "one of the biggest hang-ups" to reconfigeration To alleviate parental concerns about safety

and loss of their neighborhood school, the Board modified its transportation policy in June 1991 to authorize courtesy busing. Under the new busing policy, the district provides free transportation to students in grades K to 4 who live one mile or more from school and to students in grades 5 to 6 who live one-and-a-half miles or more from school.

In addition, the districts offers "school-to-school shuttle" service for all students in the district, regardless of how close a child happens to live to his assigned school. Illustratively, a child can board a bus at White School and be taken to either Meadowbrook or Smith schools. Significantly, the child qualifies even if his home is located less than one mile from his assigned school. Shuttle service is available only between schools. Those who live within a mile of school must enter and exit the bus at a school location. Youngsters are issued color-coded passes to distinguish between those entitled to courtesy busing from their homes and those entitled to shuttle service. Moreover, the policy applies to children enrolled in private or parochial schools as well as to children in public school.

(2) Shortest Distance to the Nearest Public Entrance

Whether the Buonocore home is more or less than one mile from the Smith School depends on whether the measurement is made to the front or rear door of the school. It is undisputed that the distance along the original route to the front door of the Smith School exceeds one mile. Representatives from the County Superintendent's Office measured the distance, starting at the Buonocore residence on Oak Trial Road, proceeding east on Wierimus Lane, south on Pascack Road, and west on Hillsdale Avenue to the front of Smith School. Door-to-door, the distance is 5,924 feet or 1.12 miles.

But the Board contends that the "nearest public entrance" from the Buonocore home is the rear door of Smith School. Martin Hughes, former school business manager and board secretary, measured the distance from the Buonocore residence, turning west on Wierimus Lane, south on Plymouth Road, west on Fairhaven Drive and south across school property to the rear door. That route is 4,682 feet or .89 mile.

Proofs suggest that the rear door to the Smith School was not always open when students arrived in the morning. Students line up to enter the building at 8:50 a.m. and must be inside the building by 9:00 a.m. Dennis Buonocore, who usually drives his son to school in the morning, testified that the rear door is "always locked" at 8:50 a.m. and that "on numerous occasions" David had to use the front door. As recently as June 3, 1992, David came to school at 8:50 a.m. and couldn't gain entry through the back door. Nevertheless, schools superintendent Anthony DeNorchia has instructed his staff that the rear door should be unlocked every weekday morning at 8:45 a.m. so that students can enter by 8:50 a.m. A school bus regularly lets off children at the rear of Smith School at about 8:55 a.m. One of the teachers greets the bus and accompanies the children into the building. They enter the school through the rear door. At the end of the school day, the same children exit the building by the rear door. A bus is waiting behind the school at 3:00 p.m. to bring them home. Security considerations require that all visitors to Smith School enter through the front door and sign in at the office.

When school authorities made the determination that petitioner is ineligible for busing, they used the route to the rear door. Since then, in October or November 1991 the district finished work on a new pedestrian path which connects the front entrance of the school to the back route at the corner of Fairhaven Drive and Plymouth Avenue. This newly constructed short-cut is a macadam paved pathway, 4 feet wide and 55 yards long. An employee of the County Superintendent measured the distance from the Buonocore residence via the path to the front entrance of the school. It is 4,561 feet or .86 mile.

I **FIND** that the rear door used by students to enter and exit Smith School constitutes a public entrance to the building. If the rear door is sometimes locked at 8:50 a.m., the remedy is more vigorous enforcement of custodial responsibilities. As long as students and teachers have access through the rear door, it does not matter if strangers must use a different entrance for security purposes. Using the rear door, the Buonocore home is located less than one mile from a public entrance to the school.

In any event, the new path has shortened the walking distance between the Buonocore home and the school. Even if the rear door is not regarded as a valid

public entrance, the Buonocore home would still be less than one mile from the front door via the new path.

(3) Safety Considerations

Traffic safety concerns are of utmost importance, but not material to this case because the school district is not responsible for maintaining public roads or providing police protection in the municipality. Evidence shows that Wierimus Lane has a blind spot at the crest of a hill, that it has no sidewalks, and that it is a favorite target for police radar checks. Patrolman Peter Leighton, an experienced traffic safety officer of the Hillsdale police department, testified that Wierimus Lane is unsafe for a child to walk and that he "would not allow [his own] children to walk on Wierimus Lane, either up or down the hill."

(4) Individual Exceptions to the Courtesy Busing

Allegations that the Board created unfair individual exceptions to its courtesy busing policy proved unfounded. One particular child who lives on Beech Street has to cross the street several times to stay on the sidewalk. Although the measurement was very close, the distance from his home to school was just over a mile. Another child was picked up from his babysitter's house rather than his parents' house. Both the babysitter and the parents live more than one mile from the school. For 1991-92, the district allowed fifth graders living less than a mile from school to ride the bus together with their younger siblings, but that temporary exception was for a single year only and is no longer in effect.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that rear entrance of the school is a public entrance; that the classifications adopted by the Board are reasonable and applied uniformly; and, therefore, that petitioner is ineligible for courtesy busing.

Authority for free transportation to public schools derives from Art. VIII, §4, paragraph 3 of the State Constitution of 1947, which confers on the Legislature the express power to provide for transportation of school-aged children to and from any

school "within reasonable limitations as to distance." Courts have required local boards to provide transportation for children living "remote" from the school house. See *West Morris Reg. Bd. of Educ. v. Sills,* 58 *N.J.* 464, 474 (1971), *cert. den.* 404 *U.S.* 989, 92 *S.Ct.* 450, 30 *L. Ed.* 2d 370 (1971). *N.J.S.A.* 18A:39-1, as recently amended to conform to existing state regulations, requires a local public school district to provide free transportation to elementary school pupils "who live more than two miles from their public school of attendance." Such statutory language is consistent with *N.J.A.C.* 6:21-1.3(a), which defines remoteness as "beyond two miles for elementary pupils." The parties concur that petitioner resides less than two miles from school and, thus, that *N.J.S.A.* 39-1 does not confer any legal right to be bused. Nor is there any claim that petitioner has an educational handicap which might entitle him to busing under *N.J.S.A.* 18A:46-23. *See A.A. v. Cooperman*, 218 *N.J. Super.* 32 (App. Div. 1987).

Apart from required transportation for remote or handicapped students, the decision whether to transport students rests entirely within the sound discretion of the local school board. *West Morris Reg. Bd. of Educ. v. Sills,* at 474. *Pepe v. Livingston Bd. of Educ.,* 69 *S.L.D.* 47, 49. State aid for transportation of pupils is unavailable if the board elects to bus students for lesser distances than the statutory two-mile minimum. *N.J.S.A.* 18A:39-1.1. Here the Board has voluntarily opted to provide transportation to children in grades K to 4 who live at least one mile from school. Petitioner urges that he satisfies the one-mile standard if the measurement is made to the front rather than the rear door to the school.

Regulations prescribe that the measurement shall be made by the shortest route along public roadways or walkways from the entrance of the pupil's residence to "the nearest public entrance of the assigned school." *N.J.A.C.* 21-1.3(b). While the regulation is intended "[f]or the purpose of determining remoteness," it provides useful guidance in the case of courtesy busing as well. As used in the regulation, public entrance means "the entrance to the school building used by those members of the public who are entitled to enter the building by that entrance." *Nelson v. Glen Ridge Bd. of Educ.*, 246 *N.J. Super.* 467, 471 (App. Div. 1991). Since school children are regularly permitted to enter and leave the premises via the rear door, it fits the definition of a public entrance. Requiring school visitors to use a different entrance for security reasons does not detract from the public nature of the rear entrance for those "entitled to enter" by that way At least one prior school law decision has

utilized the rear entrance to a building in ascertaining the shortest route between home and school. *Trossman v. Highland Park Bd. of Educ.*, 1969 *S.L.D.* 61. Concern that the rear door is not opened early enough in the morning to allow convenient access is a separate issue which may be corrected by a less drastic remedy than busing. Now that the new path has been constructed, the Buonocore home is less than one mile from school even by way of the front entrance. *Mangieri v. Cresskill Bd. of Educ.*, OAL DKT. EDU 8927-89 (Nov. 30, 1990), *adopted* Comm'r (Jan 11, 1991).

Insofar as the parents have raised questions of general highway safety, the question falls outside the jurisdiction of the local school board. Traffic safety hazards are the responsibility of municipal or county government and not of the school district. *Melick v. Lopatcong Twp. Bd. of Educ.*, OAL DKT. NO. EDU 2280-85 (Oct. 28, 1985), *adopted* Comm'r (Dec. 4, 1985). Thus, the Commissioner has ruled that a school board lacks the "authority to enforce traffic laws, to provide sidewalks, traffic lights, crossing guards, police patrols, overpasses, etc. to meet the requirements of safe travel for school children." *Schrenk v. Ridgewood Bd. of Educ.*, 1961 *S.L.D.* 185, 187. See also, *Yedwab v. Fair Lawn Bd. of Educ.*, OAL DKT. NO. EDU 7765-80 (June 22, 1981), *adopted* Comm'r (Aug. 4, 1981); *Lo Rocco v. Hillsborough Bd. of Educ.*, OAL DKT. NO. EDU 1579-80 (Aug. 20, 1980), *adopted* Comm'r (Oct. 4, 1980); *Trossman, supra*. Any deficiencies of this nature should be brought to the attention of the appropriate body responsible for maintaining Wierimus Lane.

Next, petitioner challenges the reasonableness of the classification which allows school-to-school transportation for students living less than one mile from school. Although any student resident in the district may use shuttle transportation, petitioner does not benefit because he is already assigned to the school closest to his home. Generally, school boards are vested with broad authority to determine which less-than-remote students should be bused because of hazardous road conditions or for other good reasons. *Beggans v. West Orange Bd. of Educ.*, 74 *S.L.D.* 829 , *aff'd* St. Bd. 75 *S.L.D.* 1071, *aff'd* N.J. Super. Ct., App. Div., 75 *S.L.D.* 1071. It is well established that the Commissioner will not substitute his own judgment for that of a local board in matters which lie within discretionary authority, unless there is a clear showing of abuse. *Pepe, supra,* at 50.

A school board may, in good faith, "make reasonable classifications for furnishing transportation, taking into account differences in the degree of traffic

and other conditions existing in the various sections of the district." *Schrenk, supra,* at 188. Similarly, the Commissioner will not disturb the good faith decision by the local board to locate bus stops at certain places rather than others, *Baldanza v. Tinton Falls Bd of Educ.*, 1976 *S.L.D.* 362 and *Centofanti v. Wall Bd. of Educ.,* 1975 *S.L.D.* 513, or to select one bus route as distinguished from an alternative route, *Walters v. Mendham Bd. of Ed.*, 77 *S.L.D.* 854.

Perfect equality is not necessary, so long as the lines are drawn to treat alike all children in similar circumstances. *See Beggans*, at 840. Governmental bodies may choose among various rational objectives, and the particular "choice is not made intolerable merely because another choice might also be reasonable." *West Morris Reg. Bd. of Educ.*, 58 *N.J.* at 479. Regardless of one's personal views on the subject, it cannot be said that the Board acted irrationally or arbitrarily when it adopted shuttle service in order to accommodate students no longer assigned to the closest school. Petitioner does not properly fall into this category because he still attends the nearest school located less than a mile from his home. Consequently, no basis exists for invalidating the district's courtesy busing policy.

Order

It is **ORDERED** that the Board take immediate measures to insure that the rear entrance to the Smith School is open by at least 8:45 a.m. on school days.

And further **ORDERED** that petitioner's request for additional relief is denied.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Sept. 18, 1992
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

Sept 21, 1992
Date

Maureen R. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 22 1992
Date

Lynne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

1. Dennis Buonocore

2. Ptl. Peter J. Leighton, Borough of Hillsdale Police Department

3. Martin Hughes, former business manager and board secretary, Hillsdale Public School District

4. Anthony DeNorchia, superintendent of schools, Hillsdale Public School District

List of Exhibits

No.	Description
J-1	Joint stipulation of facts, dated June 8, 1992
J-2	Map of first route from the Buonocore home to the front entrance of Smith School
J-3	Map of the route from the Buonocore home to the rear entrance of the Smith School
J-4	Map of second route from the Buonocore home via the Fair Haven path to the front entrance of the Smith School
J-5	Map of the routes from the rear entrance to the front entrance of the Smith School
P-1	Videotape, prepared May 26, 1992
P-2	Videotape, prepared June 3 and 4, 1992

P-3 Letter addressed To Whom It May Concern from Tiedemann's Service, Inc., dated June 4, 1992

P-4 Parent news letter, dated February 6, 1992

P-5 Copy of a letter on Hillsdale Police Department stationery to Chief Arnold Schramm from Sgt. Floyd W. Kuhr, dated May 3, 1991

P-6 id. Copy of a letter to Mayor Robert T. Elder from Rabbi H. Phillip Berkowitz, dated April 25, 1991

P-7 (a) Check in the amount of $275 payable to Tiedemann's Service and signed by Jamie S. Buonocore, dated August 9, 1988

(b) Check in the amount of $300 payable to Tiedemann's Service, Inc. and signed Jamie S. Buonocore, dated August 3, 1989

(c) Check in the amount of $325 payable to Tiedemann's Service, Inc. and signed by Jamie S. Buonocore, dated June 21, 1990

P-8 Municipal map of the Borough of Hillsdale, revised January 2, 1991

R-1 Copy of extract of the minutes of a regular meeting of the Hillsdale Board of Education held on June 3, 1991

R-2 Certified copy of an extract of the minutes of a regular meeting of the Hillsdale Board of Education held on June 24, 1991

R-3 Copy of an extract of the minutes of the regular meeting of the Hillsdale Board of Education held on August 26, 1991

R-4 Copy of a letter to Jamie Buonocore from Anthony S. DeNorchia, dated August 29, 1991

R-5 Copy of the written policy of the Hillsdale Board of Education on courtesy busing eligibility, dated June 24, 1991

R-6 Copy of a memorandum on transportation courtesy measurement prepared by Martin E. Hughes, dated February 13, 1992

R-7 Copy of an informal legal opinion to the New Jersey Department of education by Arlene Goldfus Lutz, Deputy Attorney General, dated February 11, 1992

R-8 Copy of a memorandum to chief school administrators and school business administrators from the Bergen County Office of Education, dated March 2, 1992

R-9 Copy of a letter to the Hillsdale School District from the Bergen County Office of Education, dated June 3, 1992

R-10 Copy of a letter to Stephen R. Fogarty, Esq. from the Bergen County Office of Education, dated June 5, 1992

R-11 (a) thru (e) id.
Copies of various letters to parents whose children are ineligible for courtesy busing

R-12 List of students ineligible for busing to Smith School because of proximity to the rear entrance, dated June 4, 1992

R-13 Photograph of Smith School path as seen from the athletic field

R-14 Photograph of path at Smith School as seen from the entrance to the playground

R-15 Photograph of the path at Smith School as seen from Hillsdale Avenue

R-16 Photograph of the path at Smith School as seen from Plymouth Road

R-17 Photograph of the path at Smith School as seen from the approximate mid point

R-18 Photograph of the path at Smith School as seen from Hillsdale Avenue

OAL DKT. NO. EDU 11212-91

J.B. AND D.B., on behalf of their minor child, D.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HILLSDALE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon review, the Commissioner concurs with the ALJ that the Board's courtesy busing policy is neither arbitrary nor unreasonable, nor was it unfairly applied to petitioners; therefore, the Commissioner cannot substitute his own judgment for the lawful discretion of the Board so as to grant petitioners the relief they seek.

Accordingly, the initial decision of the Office of Administrative Law, dismissing the Petition of Appeal and directing the Board to ensure timely opening of school doors, is affirmed for the reasons well expressed therein.

IT IS SO ORDERED.

OCTOBER 27, 1992

COMMISSIONER OF EDUCATION

DATE OF MAILING - OCTOBER 28, 1992

271-92

271-92

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION : COMMISSIONER OF EDUCATION
OF THE BOROUGH OF CHESILHURST, : DECISION
CAMDEN COUNTY. :
:

NOVEMBER 2, 1992

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION : COMMISSIONER OF EDUCATION
OF THE BOROUGH OF CHESILHURST, : DECISION
CAMDEN COUNTY. :
:

For the Petitioner, Jeffrey I. Baron, Esq.

For the Respondent, John B. Kearney, Esq. (Kearney & Brady)

This matter was opened before the Commissioner on May 20, 1992 by way of a Petition of Appeal from the Chesilhurst Board of Education (Board) seeking restoration of a cap waiver denied by the voters of the Borough of Chesilhurst on April 7, 1992. On June 4, 1992 the Borough Council of the Borough of Chesilhurst (Council) filed its Answer to the Petition of Appeal. On June 22 and July 2, 1992, respectively, the Board and the Council filed Position Statements. Replies to the Position Statements were filed on July 13 by the Board and July 27 by the Council whereupon the record was closed in the absence of further filings by the parties.

It is the contention of the Board that $110,243 of the $136,018 cap waiver request placed before the voters of the district is essential to the district's ability to provide a thorough and efficient system of education. The Board notes in its Position Statement that the Camden County Superintendent of Schools approved the 1992-93 budget for advertisement as being sufficient to provide

a thorough and efficient system of education upon condition of the submission of a cap waiver in the amount of $110,243, the remaining $25,775 of the $136,018 being submitted to the voters not being deemed essential to a thorough and efficient education as set forth below.

ACCOUNT NO.	ACCOUNT TITLE	AMOUNT
120's	Professional/Technical Services	$ 6,000.00
130's	Other Administrative Expenses	15,500.00
220's	Textbooks	5,000.00
230's	School Library & A/V Materials	750.00
240	Teaching Supplies	3,500.00
250's	Other Instructional Expenses	1,550.00
300's	Attendance Services	285.00
400's	Health Services	1,450.00
520-A	Contracted Services & Public Carriers	5,000.00
510	Transportation Staff Salaries	14,820.00
550's	Other Transportation Services i.e. Bus Repairs	2,609.00
600's	Safety Operation of the School	6,100.00
700's	Maintenance of the School Facilities	10,100.00
820-C-1	Medical Insurance (Bd. pays 100% Coverage)	13,980.00
830's	Operation/Maintenance of the Community Building	7,100.00
870	Special Education Tuition (outside placements)	16,000.00
900's	Lunch Program Services	499.00
GRAND TOTAL		$110,243.00

(Board's Position Statement, Exhibit A)

After conferring with the Board as required by statute, the Council on April 20, 1992 by way of Resolution 92-99 adopted a tax levy for current expense purposes of $362,285 which it certified to be sufficient to provide a thorough and efficient system of education for the School District of Chesilhurst. The Council, however, declined to certify an additional tax levy to fund the amount included within the requested cap waiver, instead urging some $131,419 in other budget reductions in order to fund the $110,243 in programs deemed essential by the Board and the County

Superintendent. The reductions urged by the Council are set forth below:

Item	Reduction
Freeze all salaries	$ 38,217
Lay off one teacher	28,000
Lay off one teacher aide	8,598
Eliminate Preschool/Kindergarten	23,468
Lay off one secretary	8,080
Contract custodial services	25,056
Total	$131,419

The monies in contention in this matter are set forth below:

Proposed Tax Levy Adopted by Board	Amount of Tax Levy Certified by Council
Current Expense	Current Expense
$362,285	$362,285
136,018 (Cap Waiver)	
Total $498,303	

Amount in Dispute before Commissioner

$136,018	
25,775	(deemed not essential)
Total $110,243	

BOARD'S POSITION

Initially, the Board argues that the Council's resolution setting forth some $131,419 in budget cuts failed to address itself to the specific cap waiver line items deemed essential to a thorough and efficient education by the Board and the County Superintendent. The Board therefore addresses itself to those line items within the cap waiver request, deeming them to be the only items appropriately before the Commissioner. The Board's position on each of those items is set forth below:

LINE ITEM/ACCOUNT NUMBERS	AMOUNT NEEDED
120's Legal Fees and Other Professional/ Technical Services	$ 6,000.00

Explanation:

This includes the anticipated legal expenses to litigate this matter. Litigation is required since the voters rejected the Cap Waiver of which $110,243.00 is for items required to maintain a thorough and efficient school system. Moreover, the contract with the teachers is up for renegotiation and this entails additional expenses for legal and professional services.

130's Other Administrative Expenses $ 15,500.00

Explanation:

$10,000.00 is for Board Members to attend workshops and other board administrative expenses.

$1,000.00 is for expenses of the Board Secretary's office, such as professional dues.

$3,500.00 is for expenses of the Chief School Administrator, such as professional dues.

$1,000.00 is for publications and professional journals. This also includes the cost of an outside payroll service.

220's Textbooks $ 5,000.00

Explanation:

New textbooks are needed since the current textbooks are outdated in certain key areas such as Science and Social Studies. Our students are placed at a severe disadvantage when they enter Junior High School due to this. The current Science and Social Studies textbooks are over ten years old and need to be replaced and Health Education materials need to be updated to cover new health issues such as AIDS.

230's School Library and Audio-Visual Materials $ 750.00

Explanation:

This expense represents no increase over 1991-92. This expense is necessary to obtain additional supplies for the library including books, periodicals and audio-visual materials.

240 Teaching Supplies $ 3,500.00

Explanation:

Since the 1991-92 budget contained less funds for this item than in 1990-91, many items need to be purchased. The reduction from 1990-91 to 1991-92 was from $10,871.00 to $9,000.00. This required the deferral of purchases of supplies and the depletion of stock which needs to be replenished. The cost of these supplies has increased since 1990-91.

250's Other Instructional Expenses $1,550.00

Explanation:

This is another area that was significantly cut in 1991-92. The increase over 1990-91 is not that significant. Expenses in this category include equipment rental, curriculum supplies, in-service materials for professional staff and registration expenses.

300's Attendance Services $ 285.00

Explanation:

This includes $135.00 for personnel and $150.00 for travel expenses for the Attendance personnel. These are mandatory expenses.

400's Health Services $ 1,450.00

Explanation:

This includes the cost of the School Physician, stipend for the School Nurse who is also the Health Teacher, as well as necessary medical supplies for the provision of health services to the students.

520-A Contracted Services and Public Carriers $ 5,000.00

Explanation:

This is busing for special education students supplied by Camden County Educational Services Commission. This is required by applicable law.

510 Transportation Staff Salaries $ 14,820.00

Explanation:

This is the salary of the bus driver and the two monitors for permissive busing. The Borough has no crossing guards or sidewalks so safety of the children mandates this expense.

550's Other Transportation Services
(i.e., Bus Repairs) $ 2,609.00

Explanation:

This includes insurance and repairs for the district's only bus.

600's Safety Operation of the School $ 6,100.00

Explanation:

This includes extermination and bi-annual cleaning of septic system.

700's Maintenance of the School Facilities $ 10,100.00

Explanation:

This includes roof repairs and other building repairs.

820-C-1 Medical Insurance $ 13,980.00

Explanation:

An increase in the cost of medical insurance for employees is anticipated. This item is covered by contracts and cannot be reduced.

830's Operation/Maintenance of the Community Building $ 7,100.00

Explanation:

The Chesilhurst Board of Education has contracted with the Borough of Chesilhurst to utilize the Community Building for educational programs. The agreement requires that the Board pay for utilities, custodial services and maintenance services.

870 Special Education Tuition (Outside Placements) $ 16,000.00

Explanation:

Director of Special Services has anticipated outside placement for 8 current students and at least 2 new students. New referrals are still being evaluated and may also need outside placement.

900's Lunch Program Services $ 499.00

Explanation:

This included the purchase of all of the supplies and equipment utilized in the cafeteria. This represents no increase over 1991-92.

GRAND TOTAL $110,243.00
(Board's Position Statement, at pp. 4-9)

COUNCIL'S POSITION

The Council's position makes no representation that the cap waiver amount of $110,243 deemed essential to a thorough and efficient education by the Board and the County Superintendent is invalid. Instead, it focuses upon what it perceives to be "fat" in the basic current expense budget to the amount of $131,419. (Council's Position Statement, at p. 4)

The main thrust of the Council's position is that financial circumstances in the community require that the school budget be

trimmed. It bases its belief that the funds necessary for maintenance of the programs contained within the cap waiver requested can be funded through staff reductions. It cites the following enrollment figures as proof of the ability to reduce staff:

Pre-Kindergarten	6
Kindergarten	22
Grade 1	20
Grade 2	21
Grade 3	18
Grade 4	15
Grade 5	17
Grade 6	14
Special Education I	7
Special Education II	9
Total	149

The reasoning of the Council is set forth below:

> Council's position is that the fiscal realities require the elimination of the pre-kindergarten program. This would eliminate a teaching position resulting in savings of $23,468.00 from line item 54.
>
> The gifted and talented program employs two teachers with salaries budgeted at $63,124.00. One of these positions can be eliminated with a resulting savings of $32,304.00 from line item 55.
>
> Special education is handled by two teachers and two aides with salaries budgeted at $81,212.00. As there are only 14 students in this program one teaching position and one aide position can be eliminated for savings of $41,950.00 from line item 146. Also one secretary is employed for the special education department with a salary of $9,996.00. This position can be consolidated with [one] handled by another secretary with a savings of $9,996.00 from line item 60. The Board also employs a special education coordinator for $39,885.00. This position can be made part time with a savings of $20,000.00 from line item 60.
>
> Staff reductions and realignment would result in an overall savings of $127,718.00. A freeze on salaries would result in additional savings of approximately $25,000.00.

> The School Board employs 44 persons as administrators, teachers, aides, secretaries and maintenance people for 150 students. The ratio of 1 staff person for every 3 and 1/2 students is simply too great. Reductions must occur.
>
> B) Maintenance. The School Board has budgeted $125,808.00 for maintenance and operation of the plant (line items 88 through 101). Council's position is that these services should be privatized which would result in substantial savings.
>
> (Council's Position Statement, at pp. 6-7)

COMMISSIONER'S DETERMINATION

Initially, the Commissioner notes that the Council in this matter has created considerable confusion by virtue of the manner in which it has set forth its recommended reductions and reasoning. As pointed out by the Board, the Council certified a tax levy amount for current expense purposes which was sufficient to fund the basic budget (budget up to cap) presented to the voters ($362,285); however, in its resolution establishing such tax levy it recommended $131,419 in reductions in the basic budget without addressing itself to the items within the cap waiver request nor identifying those reductions by line item. Further, in its Position Statement the Council proceeded to identify in excess of $150,000 in reductions by line item while still failing to address the specific line items and programs deemed essential by the Board in applying for a cap waiver, even though it was clear that the Board's appeal encompassed only the cap waiver.

In light of the fact that the Council has failed to address itself to the specific items for which the cap waiver was requested and the Board's Position Statement addresses itself solely to the cap waiver, the positions presented by each side are like two ships passing in the night. The Council's approach in this regard has

made it impossible to assess its position in regard to the cap waiver items in question except for its tacit admission in its Position Statement that the amounts required to fund the programs contained within the cap waiver request may indeed be necessary to a thorough and efficient system of education.

While Council's Position Statement seems to fault the Board for only addressing the justification offered for the cap waiver amounts, this is precisely the standard utilized by the Commissioner in reviewing cap waiver appeals. Having appropriated an amount sufficient to fund the basic budget, the Council's recommendations as to how to allocate those funds were entirely within the Board's purview and the Board chose to ignore those recommended cuts and appealed the denial of the cap waiver to the Commissioner. At that point, it was the Council's responsibility to address the specifics of the cap waiver request and not pursue its own ends. Had the Council desired to challenge the appropriations of the basic budget, it should have done so by reducing the tax levy, thereby obligating the Commissioner to examine not only those line items within the cap waiver but also those recommended reductions within the basic budget. Having failed to do so, the Council has created a circumstance in which the Commissioner is asked to compare apples and oranges. He cannot do so.

In light of the foregoing and in consideration of the fact that the basic budget and the cap waiver request were carefully examined by the County Superintendent in order to determine whether reallocations could be made for purposes of funding those programs without necessity for a cap waiver and approved by him as providing a thorough and efficient education only upon condition of presenting

a cap waiver request to the voter, the Commissioner finds and determines that the Council of the Borough of Chesilhurst has failed to address itself to the items within the cap waiver request deemed necessary for a thorough and efficient system of education. The Commissioner further finds and determines that the Board of Education of the Borough of Chesilhurst has met its burden of demonstrating that the items contained within this cap waiver appeal totaling $110,243 are necessary to permit the school district to provide a thorough and efficient system of education.

Accordingly, the Commissioner of Education directs the Camden County Board of Taxation to adjust the Chesilhurst School District's tax levy for 1992-93 to reflect an increase of $110,243 which shall result in a total current expense tax levy of $472,528.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 2, 1992

DATE OF MAILING - NOVEMBER 2, 1992

272-92

272-92

JOHN SHEFFIELD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF HUMAN SERVICES, ANCORA PSYCHIATRIC HOSPITAL,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, former Supervisor of Educational Programs II at Ancora Psychiatric Hospital, whose position was riffed, alleged Board improperly reassigned him to Supervisor at Marlboro Psychiatric Hospital. Petitioner contended Marlboro was unreasonably distant from his home and reassignment was done in bad faith.

ALJ found petitioner's tenure rights were not violated. Board may transfer, reassign, etc., in its discretion as a matter of inherent managerial prerogative. (Williams) Also tenure rights are system-wide in Department of Human Services and not limited to institution where one serves. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

NOVEMBER 2, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON MOTION TO DISMISS
OAL Dkt. No. EDU 558-92
Agency Dkt. No. 432-12/91

JOHN SHEFFIELD,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF HUMAN SERVICES, ANCORA PSYCHIATRIC HOSPITAL,

Respondent.

Tara Levy, Esq. for petitioner (Reitman, Parsonnet and Duggan, attorneys)

Bruce A. Velzy, Deputy Attorney General, for respondent (Robert J. Del Tufo, Attorney General of New Jersey, attorney)

Argued: September 3, 1992 Decided: September 14, 1992

BEFORE **JAYNEE LaVECCHIA,** CHIEF ALJ:

STATEMENT OF THE CASE

Petitioner, John Sheffield, brings this Petition of Appeal before the Commissioner of Education alleging a violation of his tenure and seniority rights occasioned by certain events which occurred in the fall of 1991. These events culminated with the abolition of his Supervisor of Educational Programs II position at Ancora Psychiatric Hospital and his reassignment to a Supervisor of Educational Programs II position at Marlboro Psychiatric Hospital.

Petitioner maintains that Marlboro Psychiatric Hospital is in a location unreasonably distant from his home in Gloucester County. He claims that the abolishment of his position was a reduction in force, triggering application of the seniority and tenure provisions of the education statutes. Petitioner claims that he was dismissed from Ancora and reemployed at Marlboro. He argues that this should have occurred in accordance with seniority rights to the position of Supervisor of Educational Programs II as calculated department-wide.

At the conclusion of the presentation of petitioner's case in chief, respondent moved for dismissal of petitioner's case because petitioner had failed to prove that he suffered a dismissal, demotion or reduction in pay that would trigger the protections of education laws. Moreover, to the extent petitioner included in his petition a claim that the reassignment was done in bad faith, petitioner has had an opportunity to present his case in chief and respondent contends that he has utterly failed to produce any competent evidence to support his claim. Accordingly, respondent has moved for dismissal of this action. For the reasons which follow, I have determined that the motion to dismiss should be granted.*

FACTUAL DISCUSSION

Virtually all of the factual aspects of this case have been either a matter of stipulation between the parties or were not disputed. The following stipulations were presented to the undersigned at the commencement of the evidential hearing in this matter:

1) On July 1, 1987, petitioner acquired tenure in the position of Supervisor of Educational Programs in the Department of Human Services.

2) Petitioner served as a tenured Supervisor of Educational Programs II while at Ancora Psychiatric Hospital ("Ancora") from July 1, 1987, until November 15, 1991.

3) Petitioner is currently a tenured Supervisor of Educational Programs II working at Marlboro Psychiatric Hospital ("Marlboro") and has been since November 16, 1991.

---

*A motion to dismiss was made by respondent upon the case's transmission to the Office of Administrative Law. Because I determined that material issues of fact required that petitioner be permitted to present his evidential case, I denied the earlier motion by order dated April 15, 1992. This motion to dismiss was made following the presentation of petitioner's case and is addressed in accordance with the same standards utilized by the courts when a judgment of involuntary dismissal is sought at the end of petitioner's case. *See R.*4:37-2(b).

4) By letter dated September 12, 1991, from Alan Gibbs, DHS Commissioner, petitioner was informed that effective November 15, 1991, his position was being eliminated to reduce DHS's budget. That letter also informed him that the layoff was for economic reasons. (J-1).

5) By memorandum dated October 17, 1991, from Patricia Monzo, petitioner was offered and accepted a position at Marlboro as a Supervisor of Educational Programs II, effective November 16, 1991. (J-2).

6) Petitioner's annual salary from August 2, 1991, until at least June 5, 1992, was $48,219.38 and his bi-weekly gross pay was $1,840.43.

7) Petitioner received his bi-weekly gross pay of $1,840.43 every two weeks from at least August 2, 1991, until at least June 5, 1992.

In his direct testimony, petitioner admitted that he holds tenure status in no other positions within the Department of Human Services even though he is a holder of a Principal/Supervisor certificate and a certificate of Teacher of the Handicapped, and has served in the following positions while at Ancora but before tenure status could be legally acquired: Assistant Supervisor of Educational Programs, Teacher I, and Teacher II. It was also undisputed that petitioner has wide experience in the education arena from having held various teaching positions in-state and out-of-state.

Petitioner explained that the duties of the Supervisor of Educational Programs include coordinating the patient education programs, supervising teachers and ordering supplies for the educational programs provided within the institution. The supervisor and the teachers comprise the "education department" within Ancora and, administratively, this education department is located within the larger rehabilitation services section. The section head of rehabilitation services is responsible for supervising the education unit as well as other units encompassed in the rehabilitation services section of Ancora. Petitioner testified that the individual who was the Assistant Supervisor of Educational Programs, Mrs. Audrey Doty, was reassigned as the acting section head for rehabilitation services effective September 1, 1991, due to maternity leave taken by the incumbent holder of that position. It was Mrs. Doty who referred him to the personnel department on September 12, 1991, where he first learned that his position was being abolished as part of a department-wide reduction in force for budgetary reasons (J-1). Thereafter, on October 17, 1991, petitioner was called to the personnel department and offered the position of Supervisor of Educational Programs II at Marlboro, which he accepted.

It is undisputed that petitioner was not offered any other positions within the Department of Human Services even though he inquired about a Teacher of the Handicapped position at Ancora, which he believed would become vacant due to the imminent retirement of the incumbent. Petitioner's last day of employment at Ancora was November 15, 1991 and his first day of employment at Marlboro was November 16, 1991. It is also not disputed that petitioner requested a listing of those positions within the Department of Human Services to which he has seniority, but that no such listing has been provided.

In support of his allegation that his reassignment was for bad faith reasons, petitioner testified that he had complained about the child study team services that were being provided at Ancora; that he had criticized two teachers whom he felt were not doing an appropriate job and were being considered for tenure; and that he had written a memorandum arguing for an increase in the hourly wage paid to special services teachers. Through cross-examination, it was revealed that the criticism of the child study team's performance was reviewed by outside staff of the Department of Human Services' Office of Education and no merit was found in the criticism leveled. As for the remaining two "reasons" why petitioner believes the abolishment of his position at Ancora was done in bad faith, petitioner testified that he has no personal knowledge that these items were in any way related to the determination to abolish the Supervisor of Educational Programs II position at Ancora.

In the context of arguing the motion to dismiss, respondent stipulated that it has now calculated that as of November 15, 1991, there were other individuals in the position of Supervisor of Educational Programs II within the Department of Human Services who had less seniority than petitioner. Respondent had no knowledge as to whether, in fact, there were any nontenured Supervisors of Educational Programs II as of that date. Further, no individual has held either the Supervisor of Educational Programs I or II position at Ancora since November 15, 1991. The education unit is supervised by the acting section head of rehabilitation services.

LEGAL DISCUSSION

In substance, petitioner contends that since his transfer from Ancora to Marlboro ensued on account of a reduction in force, he should have been allowed placement within the system on the basis of seniority, *i.e.* he should have been allowed to displace less senior employees at institutions more geographically favorable to him. He does not allege any other consequence to him flowing from the transfer. Respondent's essential position is that petitioner has suffered no diminution of position or pay, and his tenure rights consequently have not been violated. Petitioner does not allege any diminution in position or pay as a consequence of his transfer to Marlboro. He holds precisely the same position at Marlboro - Supervisor of Educational Programs II - as he previously did at Ancora.

The employment, tenure, and reduction in force of persons, whose employment with the Department of Human Services requires them to possess educational certification as a condition of that employment, is governed by the provisions of *N.J.S.A.* 18A:60-1 through -15 and the accompanying regulations at *N.J.A.C.* 10:11-1 through -1.19. *See also* State Facilities Education Act, *N.J.S.A.* 18A:7B-1 through -13 and *N.J.S.A.* 18A:6-10 ("No person shall be dismissed or reduced in compensation ... if he is or shall be under tenure of office, position or employment during good behavior and efficiency"). Reduction in force in the circumstances presented in these statutes is governed by *N.J.S.A.* 18A:60-3 and *N.J.A.C.* 10:11-1.9.

These provisions, *N.J.S.A.* 18A:60-3 and *N.J.A.C.* 10:11-1.9, address specifically the permissibility of a reduction in force due to natural diminution in the number of pupils in an institution. They have also been applied in circumstances where financial exigency is the genesis of a managerial determination to reduce the number of teaching staff members who have tenure status by virtue of *N.J.S.A.* 18A:60-1. *See O'Toole v. Forestal,* 211 *N.J. Super.* 394, 401 (App. Div. 1986). Teaching staff members in human services institutions are unique in their tenure rights under *N.J.S.A.* 18A:60-1 due to the Department of Human Services' determination to recognize tenure rights as being department-wide, and not limited to the particular institution in which the individual serves. *N.J.A.C.* 10:11-1.4 provides:

> Once tenure is acquired by an employee, such standing shall apply throughout the Department of Human Services. If, however, the employee experiences a break in service, he or she will forfeit tenure rights. A break in service for tenure purposes is defined as resigning or leaving a tenured position to enter a career service, unclassified, non-tenured or Senior Executive Service position.

Compare O'Toole, supra, 211 *N.J. Super.* at 399-401. Accordingly, it is undisputed in this matter that petitioner enjoys tenure status department-wide in the position of Supervisor of Educational Programs II.

The Commissioner of Education is "expressly empowered to hear and determine all controversies arising under the school laws or under the rules of the State Board or the Commissioner." *Dunellen Board of Education v. Dunellen Ed. Ass'n,* 64 *N.J.* 17, 23 (1973); *see also N.J.S.A.* 18A:6-9. Review of reduction in force (RIF) controversies is, therefore, properly before the Commissioner of Education as a school law dispute, even though it involves an employee of another cabinet-level department.

As noted, petitioner holds the same position at Marlboro - Supervisor of Educational Programs II - as he previously held at Ancora; moreover, his pay has not

been diminished in any way. Tenure is a legislative stature; one enjoys its protections only if one meets the statutory prerequisites, and even if applicable, the protection of the tenure status cannot extend beyond that legislatively granted. *N.J.S.A.* 18A:60-2, the statute at issue here, protects those who have acquired tenure in a position -- in this case petitioner had acquired tenure in the position of Supervisor of Educational Programs II -- from being dismissed from that position or being reduced in compensation except for "inefficiency, incapacity, conduct unbecoming a teacher or other just cause...." The protection afforded the human services tenured education staff is the same as that provided to teaching staff members of local school districts, namely, safeguards available pursuant to *N.J.S.A.* 18A:6-9 *et. seq.* However, since tenure only protects an employee from dismissal from a particular position or a reduction in pay therefor, and since petitioner has suffered neither here, the question is: have petitioner's tenure rights been violated by the transfer from Ancora to Marlboro. The answer, in my judgment, is clearly no. None of petitioner's tenure rights have been violated.

The seminal case in this area is *Williams v. Plainfield Board of Ed.*, 176 *N.J. Super.* 154 (App. Div. 1980), *certif. den.* 87 *N.J.* 306 (1981). In *Williams*, petitioner was a tenured high school principal who, because of deficiencies in her performance, was involuntarily transferred to the position of administrative assistant, a nontenure-eligible position. *Id.* at 156. She was then transferred to an elementary school principalship, and her compensation was frozen at the high school principal's salary . *Id.* at 156-57. However, because the board's formula for the calculation of increments was at a lower ratio for elementary school principals than high school principals, it was conceded that petitioner would receive much less compensation over time as an elementary school principal than as a high school principal. *Id.* at 157. Petitioner appealed to the Commissioner of Education, alleging the initial transfer to administrative assistant and the subsequent transfer to elementary school principal were illegal and violative of her tenure status. *Ibid.* She argued that her transfer resulted in a reduction of compensation and thus a reduction in her rank, because her salary expectancy was less as an elementary school principal than as a high school principal. *Id.* at 160. The Commissioner found for her on this issue, but the State Board of Education reversed.

The Appellate Division affirmed the State Board's finding that the transfer from high school principal to elementary school principal was not a demotion, but a transfer to a position of equivalent rank which could occur without petitioner's consent. *Id.* at 158. For tenure purposes, the protected position was deemed to be that of principal. The Appellate Division held that such a transfer was not a violation of tenure rights, even though it might result in a reduction in her future salary; it found that a tenured high school principal has no vested right to future salary increases, and that the tenure laws simply protect the right to the tenured position and salary. In *Williams*, tenure protection extended only to the position of principal and present salary.

As noted , *Williams* is the seminal case in the transfer area. Under the teaching of *Williams*, had petitioner simply been transferred from Ancora to Marlboro, retaining his tenured position as Supervisor of Educational Programs II and rate of pay, it is quite clear that his tenure rights would not have been violated and he would have no cause of action on account thereof. The only question here is whether a different result should obtain when the transfer from Ancora ensues upon a reduction in force at that institution.

It is well settled that a school board may employ, transfer, reassign, or promote employees in its discretion as a matter of inherent managerial prerogative, so long as its actions are not arbitrary or unreasonable. *Dunellen, supra*, 64 *N.J.* at 23; *Ridgefield Park Education Association v. Ridgefield Park Board of Education,* 78 *N.J.* 144, 156 (1978); *Boehler v. Board of Education of East Brunswick*, OAL DKT. EDU 4732-79 (September 8, 1980), adopted, Commissioner of Education (October 24, 1980). This same authority exists for the Department of Human Services for its certificated education staff. Indeed, *N.J.A.C.* 10:11-1.4 provides for an individual to have tenure that is department-wide, not tenure limited to the institution in which the individual serves.

The power to transfer is limited only to the extent provided by the tenure law. A tenured employee may be transferred to another assignment within his position, but may not be transferred involuntarily from one position to another. *Williams, supra*. 176 *N.J. Super.* 154. Nothing in the statutes precludes the utilization of the transfer power consequent upon a RIF, and, in fact, in many instances transfer follows RIF. In brief, to satisfy the need to reduce numbers at a particular institution, a reasonable management decision by the Department of Human Services would be to implement a transfer.

No one would suggest that to direct transfers incident to a RIF would be an arbitrary or unreasonable act; to the extent petitioner has included allegations that his transfer was for reasons of bad faith, I find based on the record presented through to the conclusion of petitioner's case that he has failed to substantiate in any way these allegations. The question that remains here is whether RIF seniority rights and bumping rights protections necessarily attach if a transfer occurs incident to a RIF. *See N.J.S.A.*18A:28-9; *N.J.A.C.* 6:3-1.10. Added to the mix for this analysis is the virtually admitted fact that had the involuntary transfer been directed for other reasons, no seniority rights would attach.

The fact that an RIF has occurred of itself confers no rights. Seniority is a concept which only applies if tenure rights are affected by a RIF. The concept of seniority rights flowing from a RIF has its source in the tenure laws, *see N.J.S.A.* 18A:28-9, -10 and -13 and *N.J.S.A.* 18A:60-2 and -3, and is designed to deal with the disruption of tenure rights which usually, but not always, attends a RIF. As previously discussed, tenure laws protect only the right to a position and pay, *Williams, supra* 176 *N.J. Super.* 154; consequently the protections of those laws cannot extend beyond the protections specifically accorded by the Legislature.

Where, as here, no tenure rights have been impacted by a transfer, which ensues upon a RIF, seniority rights do not come into play. To hold otherwise, in this case, would be to afford petitioner greater protections than those afforded by the tenure laws. In effect, he would be accorded tenure in his position at Ancora, even though he admits his tenure protection is department-wide, not by institution. That would be an anomalous result, which should be avoided. The tenure laws simply were not intended to allow petitioner to select his transfer by requiring the displacement of others in this circumstance when no dismissal, demotion or reduction in pay has been visited upon him.

There has been no competent proof here that the RIF which occurred at Ancora was in bad faith, *Popovich v. Bd. of Ed. of the Borough of Wharton*, 1975 *S.L.D.* 737, 739 (1975), or that it and the resultant transfer were a sham or an attempt to defeat tenure protection. *See Sorenson v. Bd. of Ed. of Wayne Township*, OAL DKT. EDU 7948-82 (June 22, 1983), adopted, Commissioner of Education (August 8, 1983).

In these circumstances, I conclude that where, as here, tenure in a position is admittedly system-wide, when a transfer to another institution ensues upon a RIF at a particular institution, seniority rights pursuant to *N.J.S.A.* 18A:60-3 are not implicated unless the transfer results in a loss of position or pay. Petitioner has no right to bump others in such circumstances simply to secure an easier commute to work for himself. To hold otherwise would unduly impinge on the authority of the Department to make a transfer.

The tenure laws protect only the position of a tenured employee, and preclude a reduction in pay except by proceedings under *N.J.S.A.* 18A:6-10 *et seq.* But for these two limitations, the authority to transfer in good faith, which I find to be the case here, is plenary. The extent of the appointing authority's power to transfer is no different when it ensues upon a reduction in force, than when it is triggered by other legitimate management decisional factors. To hold otherwise would dramatically expand the reach of tenure protection beyond the limits set by the Legislature.

In conclusion, petitioner's tenure rights were not adversely affected by his transfer to Marlboro, albeit he may have been personally inconvenienced by the move since he now has a longer commute. The tenure laws, however, do not protect against employee inconvenience. Petitioner's tenure protection is system-wide, not by institution. Respondent's motion to dismiss is granted. I **ORDER** that the instant petition of appeal be dismissed.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 14, 1992
Date

Jaynee LaVecchia
JAYNEE LaVECCHIA, CHIEF ALJ

Receipt Acknowledged:

Sept. 16, 1992
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 18 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

J-1 Letter dated September 12, 1991 to John Sheffield from Commissioner Gibbs

J-2 Memorandum dated October 17, 1991 to John Sheffield from Patricia Monzo, Personnel Director of Ancora Psychiatric Hospital

P-2 Principal's Certificate - John Sheffield

P-3 Teacher of the Handicapped Certificate - John Sheffield

P-4 Memorandum dated September 17, 1991 to John Sheffield from Patricia Monzo, Personnel Director of Ancora Psychiatric Hospital

P-5 Monthly Report for Rehabilitation Service at Ancora dated 9/91

P-6 Letter to Pat Holliday, Director, Office of Education, from John Sheffield dated October 7, 1991

P-7 Memorandum to Beth Dolinski from John Sheffield dated May 13, 1991

P-8 Memorandum dated August 13, 1991 from John Sheffield to Patricia Monzo, Personnel Director of Ancora Psychiatric Hospital. Re: Teacher Salaries

P-9 Memorandum dated April 26, 1991 to Carolyn Wade of CWA Local 1040 from David Zaleski, Director of Employee Relations. Re: Shop Steward Designation

P-10 Memorandum dated September 18, 1991 from Patricia Holliday, Director, Office of Education, to Catherine Farley, Acting Assistant Commissioner, Human Resources - Personnel

P-11 Memorandum dated October 19, 1991 from Patricia Monzo, Personnel Director, to William J. Camarota, Chief Executive Officer of Sycamore Hall

R-1 Memorandum dated July 24, 1991 from Mark Gelardo, Ph.D., Manager of Child Study Services, Office of Education, to Beth Dolinski, Director of Rehabilitation Services, Ancora Psychiatric Hospital

JOHN SHEFFIELD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF HUMAN SERVICES, ANCORA PSYCHIATRIC HOSPITAL,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner, by extension granted, filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Attorney General's office filed timely reply exceptions as well.

Petitioner submits four exceptions, claiming first that the ALJ failed to address two of his claims as specified in Count One and Count Four of the petition. In Count One he alleged that his position was not abolished because his duties as Supervisor of Educational Programs II at Ancora Psychiatric Hospital were transferred in toto to another employee, Audrey Doty, Ancora Assistant Supervisor of Educational Programs, after he was dismissed from the position. Citing Viemeister v. Bd. of Educ. of Prospect Park, 5 N.J. Super. 215 (App. Div. 1949) and Victor Catano v. Bd. of

Educ. of the Township of Woodbridge, 1971 S.L.D. 448, aff'd State Board 1972 S.L.D. 665, petitioner contends this case law stands for the proposition that a tenured employee's position may not be abolished by transferring the duties of the position to another employee. He argues that the initial decision should be reversed in that it dismisses Count One of the petition, and he claims entitlement to a decision in his favor as a matter of law based on the above two cases.

Exception II avers the Initial Decision should be reversed because the decision did not address petitioner's claim that the Board's failure to provide notice of his seniority status upon the abolition of his position violated N.J.S.A. 18A:28-11 and his procedural due process rights.

Exception III claims the initial decision should be reversed because the conclusion of the ALJ that petitioner was transferred is contrary to the evidence. Citing the stipulated facts and his own testimony, petitioner claims that to deem him to have been transferred, as the ALJ concluded, is to retroactively revise the facts. He claims what transpired was not a transfer but an attempted abolition of an employee's position and after time, a subsequent reassignment.

Exception IV contends the initial decision must be reversed because the ALJ erred in concluding that the appellant's rights were not violated. Relying on Philip Howley and Dewey Bookholdt, Jr. v. Board of Education of the Township of Ewing, Mercer County, 1982 S.L.D. 1328, petitioner contends N.J.A.C. 6:3-1.10(i) does not limit

the exercise of seniority rights in the event of RIF to a tenured employee only if he or she loses position or pay. Instead, he argues, seniority rights attach "[w]henever any person's particular employment shall be abolished in a category." (Exceptions at p. 10, citing N.J.A.C. 6:3-1.10(i)) He submits transfer may be a right available to the Board, but it was not exercised here. He claims the facts should not be revised to afford the Board a right which it failed to use.

Finally, petitioner claims no case other than the Williams v. Plainfield Bd. of Ed, 176 N.J. Super. 154 (App. Div. 1980), cert. denied, 87 N.J. 306 (1981) matter relied upon by the ALJ, permits the Board to abolish his position and thereafter to reassign him to another position without regard to relative seniority rights. He claims the issue here is whether he has seniority rights as a tenured employee whose position was abolished in a RIF. He advances the position that the conclusion is compelled that his seniority rights entitle him, upon the elimination of his employment, to bump any employee in his position with less seniority. He seeks enforcement of such rights and requests reversal of the initial decision.

Upon a careful and independent review of the record of this matter, the Commissioner concurs with the conclusion of the Office of Administrative Law that petitioner's tenure rights were not adversely affected by his being assigned as a Supervisor of Educational Programs II at Marlboro Psychiatric Hospital for the

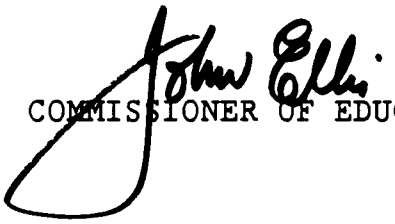
reasons expressed in the thorough and cogent initial decision rendered in this matter. The Commissioner would add the following regarding petitioner's exceptions.

Assuming arguendo that petitioner's contention is correct that a RIF occurred affecting his employment with the New Jersey State Department of Human Services, his tenure and seniority rights were not violated in that he was not assigned a position other than one in which he enjoys tenure, that is, as a Supervisor of Educational Programs II. Neither were his seniority rights implicated because he remained in the same tenured supervisory category and position that he enjoyed at Ancora. On the other hand, assuming arguendo that there was no RIF because his duties at Ancora were allegedly assumed by another, petitioner's argument again must fail because he remains in a tenured supervisor's position and seniority category, albeit at another State facility, said tenure rights and any seniority flowing from such tenure having already been established as being state-wide. See, Initial Decision, at p. 5. See also, N.J.A.C. 10:11-1.4. In this regard, the Attorney General's reply exceptions cogently summarize the misconception in petitioner's reasoning:

> The key fallacy that underlies petitioner's analysis is his belief that he is entitled to a specific position at Ancora. That is incorrect. His position is that of a Supervisor, Cf. Howley v. Board of Ed. of Ewing Tp., [supra], and that supervisory position is Department-wide. N.J.A.C. 10:11-1.4. Because he still has such a position within DHS, which is all he is entitled to under the laws, no tenure laws have been violated and no need for "bumping" arises. It's that simple. Therefore, petitioner's exceptions, which are based on this fundamental analytical flaw, should be rejected and do not warrant reversal of the Chief ALJ's decision. (emphasis in original) (Reply Exceptions, at p. 3)

As to petitioner's concern regarding a preferred eligibility list, an individual is only entitled to a RIF list upon dismissal or leaving the position and category in which service had been rendered at the time of the RIF, not when one leaves a building or institution within the Department of Human Services.

Accordingly, for the reasons expressed in the initial decision, as augmented herein, the Petition of Appeal is dismissed, with prejudice.



COMMISSIONER OF EDUCATION

NOVEMBER 2, 1992

DATE OF MAILING - NOVEMBER 2, 1992

272-92

EDU # 558-92
C # 272-92
SB # 62-92

JOHN A. SHEFFIELD, :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

NEW JERSEY STATE DEPARTMENT OF HUMAN SERVICES, ANCORA PSYCHIATRIC HOSPITAL, : DECISION

RESPONDENT-RESPONDENT. :

Decided by the Commissioner of Education, November 2, 1992

For the Petitioner-Appellant, Reitman, Parsonnet & Duggan, Jesse H. Strauss, Esq., of Counsel

For the Respondent-Respondent, Bruce A. Velzy, Deputy Attorney General, (Deborah T. Poritz, Attorney General of New Jersey)

Petitioner is a tenured employee of the Department of Human Services (DHS). By letter of September 12, 1991, the Commissioner of Human Services notified him that his position as Supervisor of Education Services II at Ancora Psychiatric Hospital was being eliminated for economic reasons, effective November 15, 1991. By memorandum of October 17, the Department of Human Services offered him continued employment as Supervisor II at Marlboro Psychiatric Hospital, effective November 16.

Petitioner accepted the assignment at Marlboro. However, prior to that, he requested a list of those positions within the Department of Human Services to which he might be entitled by his seniority. The Department of Human Services did not provide him with such listing.

Nov. 2, 1994

Petitioner filed a petition of appeal to the Commissioner of Education, contending, in part, that following elimination of his position at Ancora, he should have been permitted to displace less senior employees at institutions that were more geographically favorable to him than Marlboro.

The matter was transmitted to the Office of Administrative Law (OAL) for hearing. After petitioner presented his case, the Department of Human Services moved for dismissal, arguing that no reduction in staff had occurred and that the education laws did not preclude its action because petitioner had not suffered dismissal, demotion or reduction in pay as a result.

The Administrative Law Judge (ALJ) recognized that petitioner's assignment to Marlboro had followed a reduction in force. She, however, agreed with the Department of Human Services that nothing precluded it from "transferring" petitioner to another assignment as a Supervisor II under these circumstances. Initial Decision, at 7.

The ALJ rejected the view that seniority rights attached in this case as a result of the reduction in staff that had occurred. She reasoned that such rights apply only if tenure rights are affected by a reduction in force, and she found that petitioner's tenure rights had not been affected because his tenure was systemwide and he had not suffered a loss in pay.

The Commissioner adopted the ALJ's decision and dismissed the petition. He agreed with respondent that the tenure laws had not been violated and found that petitioner was not entitled to a "RIF list" because he had not been "dismissed."

Petitioner appealed, contending that he had not been merely "reassigned", but rather had been "laid off" when his position at

Ancora had been abolished. He asserts that he was thereby entitled to tenure protection, including the ability to exercise his seniority rights. He also renews the claim that his assignment at Ancora had not really been abolished because his duties had been transferred to the individual employed as the Assistant Supervisor at Ancora.

For the reasons that follow, we reverse the Commissioner's decision.

The threshold question here is whether a reduction in staff occurred. Even cursory consideration of the circumstances leaves no doubt that, as the ALJ recognized, this question must be answered in the affirmative. That being the case, the Department of Human Services was required to act in conformity with the mandates of the education statutes and petitioner was entitled to the protections afforded by those statutes.

The Legislature first granted tenure protection to teachers and other professional educators employed in State institutions within the Department of Human Services in 1986. See N.J.S.A. 18A:60-1 et seq. Although the tenure protections afforded such personnel are part of the education laws and the protections parallel those afforded teaching staff members employed by district boards, the statutes involved are not identical to those applicable to teaching staff members employed by district boards of education. Compare N.J.S.A. 18A:28-5 through N.J.S.A. 18A:28-12 (tenure and seniority for teaching staff members employed by district boards) with N.J.S.A. 18A:60-1 through N.J.S.A. 18A:60-3 (tenure and seniority for professional educators employed by State institutions under DHS).

N.J.S.A. 18A:60-1 provides in pertinent part that:

> The services of all professors, associate professors, assistant professors, instructors, supervisors, registrars, teachers, and other persons employed in a teaching capacity..., and teachers and other certified persons employed in State institutions within...the Department of Human Services, shall be under tenure...

N.J.S.A. 18A:60-2 further provides that

> No such professor, associate professor, assistant professor, instructor, supervisor, registrar, teacher, or other person employed in a teaching capacity, so under tenure, shall be dismissed or subjected to a reduction in salary except for inefficiency, incapacity, conduct unbecoming a teacher, or other just cause, and only in the manner prescribed by [N.J.S.A. 18A:6-9 et seq.].

As is the case with school districts, N.J.S.A. 18A:28-9, the statutes applicable to State institutions also guarantee that:

> Nothing contained in this chapter shall be held to limit the right of...the Commissioner of Human Services, in the case of any State institution conducted under [his] jurisdiction, supervision or control;..., to reduce the number of...persons employed in a teaching capacity in any such institution or institutions when the reduction is due to natural diminution of the number of students or pupils in the institution or institutions...

N.J.S.A. 18A:60-3

In this case, there is no question that the Commissioner of Human Services acted under authority of N.J.S.A. 18A:60-3 when he determined to reduce the number of "persons employed in a teaching capacity" at Ancora by eliminating one assignment as Supervisor II for economic reasons. His letter of September 12, 1991, informing petitioner that he would be the one affected by this determination served as notice of the action. This gave rise to a cause of action under the education laws subject to the primary jurisdiction of the Commissioner of Education. N.J.S.A. 18A:6-9. See, e.g., Parisi v. Board of Education of the City of Asbury Park, decided by the State

Board, October 24, 1984 (subsequent history omitted). The fact that petitioner's employment was ultimately continued in another assignment might affect the relief to which he is entitled. Parker and Pellegrino v. Board of Education of the Matawan-Aberdeen Regional School District, decided by the State Board, May 2, 1990. That fact, however, can not excuse the Department of Human Services from the obligations imposed on it by the education laws or insulate its actions from administrative review.[1] Id.

In his petition to the Commissioner of Education, petitioner claimed that his position as Supervisor II had not actually been abolished, but rather that the duties had been transferred to the individual employed at Ancora as Assistant Supervisor. Petition, count one. Neither the ALJ nor the Commissioner considered this question. Under the education laws, petitioner is entitled to a determination of this claim. E.g., Lingelbach v. Board of Education of the Borough of Hopatcong, Docket #A-4783-83T7 (App. Div. 1985), certif. denied, 101 N.J. 333 (1986). We would remand the matter on this basis alone.

Petitioner has also claimed that, even if the abolishment of his assignment at Ancora were valid, he was entitled to notice of his seniority status and to be retained on the basis of his seniority. Petition, counts three and four. We agree.

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[1] We note that Williams v. Plainfield Bd. of Ed., 176 N.J. Super. 154 (App. Div. 1980), certif. denied, 87 N.J. 306 (1981), upon which the ALJ relied in sustaining the validity of DHS's actions, did not involve a reduction in staff. This fact was critical to the State Board's decision in the case, 1980 S.L.D. 1552, at 1555, and this distinguishing fact was reiterated in the Appellate Division's opinion. Williams can not be read to in any way support the proposition that tenure and seniority rights do not attach where the district board or appointing authority has reassigned individuals following formal action taken to reduce its staff.

N.J.S.A. 18A:60-3 provides that:

> ...When...persons employed in a teaching capacity under tenure are dismissed by reason of such reduction,... [such] persons employed in a teaching capacity having the least number of years of service to their credit shall be dismissed in preference to those having longer terms of service.

When the Department of Human Services acted to reduce its numbers and notified petitioner that he was the one who would be affected, it was required to notify petitioner of his seniority. Cf. Parisi, supra. Certainly, petitioner was entitled to such notice when he requested it on October 7, 1991. To hold otherwise would effectively insulate actions such as those involved here from challenge and render meaningless the protections afforded by N.J.S.A. 18A:60-3. Id. See N.J.S.A. 18A:28-11 (protections that parallel those at issue herein expressly require that district boards notify each affected person of his seniority in the case of any reduction in staff).

The record before us is not sufficiently developed to decide either petitioner's claim that the Department of Human Services did not in fact abolish his assignment at Ancora or, in the event that the assignment was in fact abolished, whether petitioner was entitled by seniority to be retained in any assignment other than that as Supervisor of Education Services II at Marlboro.[2] We

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[2]DHS's exceptions to our Legal Committee's Report, assume, as did its earlier submissions, that petitioner's tenured "position" was that of "Supervisor 2."

As stated above, we have concluded the record developed thus far is not a sufficient one upon which we could determine the scope of petitioner's "position" or the category or categories in which he may have accrued seniority. In this respect, we note that, although

therefore remand the matter for further hearing and determination of these claims.

Attorney exceptions are noted.

November 2, 1994

Date of mailing NOV 04 1994

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the education statutes do not include any reference to "tenure applicable titles," N.J.A.C. 10:11-1.3 uses this concept in defining one year of service for seniority purposes and that one of the examples listed in the regulation is "Supervisor of Educational Programs I and II."

We also note that pursuant to N.J.S.A. 18A:28-5, the scope of the position in which a teaching staff member achieves tenure and to which tenure protection attaches is either one specifically enumerated in statute or some other employment for which a certificate is required, either instructional, educational services or administrative and supervisory. Capodilupo v. West Orange Bd. of Ed., decided by the State Board of Education, September 3, 1986, aff'd, 218 N.J. Super. 510 (App. Div. 1987), certf. den., 109 N.J. 514 (1987). Further, under the education laws, the scope of tenure protection is not necessarily congruent with the category in which seniority is acquired. Id.

Finally, we note that pursuant to N.J.A.C. 10:11-1.9, any reduction in the number of instructional staff in any state institution is subject to the seniority standards established by the Commissioner of Education under N.J.S.A. 18A:28-13, which were previously codified at N.J.A.C. 6:3-1.10 and are now codified at N.J.A.C. 6:3-5.1.

272-92

EDU #558-92
C #272-92
SB # 62-92

JOHN A. SHEFFIELD,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF HUMAN SERVICES, ANCORA PSYCHIATRIC HOSPITAL,	:	DECISION ON MOTION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, November 2, 1992

Decided by the State Board of Education, November 2, 1994

For the Petitioner-Appellant, Reitman, Parsonnet & Duggan, Jesse H. Strauss, Esq., of Counsel

For the Respondent-Respondent, Bruce A. Velzy, Deputy Attorney General, (Deborah T. Poritz, Attorney General of New Jersey)

Petitioner in this case is a tenured employee of the Department of Human Services (DHS), who was employed as a Supervisor of Education Services II (Supervisor II) at Ancora Hospital. In his petition to the Commissioner of Education, he challenged the validity of DHS's action in abolishing that position. He also alleged that DHS had violated his tenure by failing to provide him with a seniority list thereafter and by employing him as a Supervisor II at Marlboro Hospital following the reduction.

On November 2, 1994, the State Board of Education decided this case on appeal from a decision by the Commissioner of Education. In that decision, the Commissioner had summarily

Feb. 1, 1995

dismissed the petition. We reversed the Commissioner's decision, holding that petitioner was entitled to a determination of his claim that his position at Ancora had not actually been abolished. We further found that even if the abolishment were valid, petitioner had been entitled to notice of his seniority status and to be retained on the basis of his seniority.

We, however, concluded that the record before us was not sufficiently developed to determine whether the position had in fact been abolished or whether petitioner's seniority rights entitled him to retention at Marlboro in any assignment other than Supervisor II. We therefore remanded the matter for determination of these claims.

On December 16, 1994, DHS filed a motion with the State Board seeking reconsideration of our decision. DHS asserts that the question of whether the abolishment of petitioner's position at Ancora was valid is irrelevant because it had not acted improperly by assigning him to Marlboro and that, therefore, there is no need for a remand to decide the issue. It also maintains that because notice of petitioner's seniority status would not entitle him to relief in the form of his old job and attorneys fees, there is no need to remand this matter at all.

Petitioner counters that the motion should be denied because DHS has not raised any new issues and has not provided any newly discovered evidence warranting reconsideration. He also argues that because he was not reassigned, but rather was laid off as the result of a reduction in staff, he was entitled to a seniority list and to exercise his rights of retention on the basis of his tenure and seniority. Petitioner also contends that the

issue of whether his position was in fact abolished is relevant because if DHS's action was not valid, the reduction as it affected petitioner would be null and void.

The State Board of Education denies the motion for reconsideration. DHS has not provided any new evidence or pointed to anything that would warrant reconsideration of our decision. In this respect, we stress that, as embodied in our decision of November 2, the fact that a reduction in staff occurred in this case is pivotal to the outcome. This is not a case where DHS acted merely to reassign one of its employees. Because petitioner falls within the scope of N.J.S.A. 18A:60-1 et seq., providing tenure to certified persons employed in State institutions within the Department of Human Services, different rights and responsibilities are implicated than would have been the case had this matter involved only a transfer or reassignment of a non-certified staff member.

February 1, 1995

Date of mailing FEB 3 1995

273-92

273-92

R.J.P., on behalf of his minor child, C.R.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL SCHOOL DISTRICT, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent challenged district policy preventing his son, C.R.P., a high school senior, from participating in first-marking period varsity sports for failure to obtain grade point average of 1.2 in the last marking period of the prior year.

Commissioner determined petitioner was not entitled to relief. Commissioner found C.R.P.'s eligibility status was determined and effectuated entirely within terms of Board policy and petitioner was not denied due process or opportunity to apply for exception. Moreover, Commissioner found Board policy itself was not arbitrary, capricious, or unreasonable. NJSIAA Interpretive Guidelines clearly sanction local district imposition of stricter eligibility requirements than those imposed by NJSIAA. Thus, Commissioner cannot substitute his own judgment for that of the Board acting within its discretionary authority. Petition was dismissed.

NOVBEMBER 6, 1992

R.J.P., on behalf of his minor child, C.R.P.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL SCHOOL DISTRICT, CUMBERLAND COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

For Petitioner, R.J.P., Pro Se

For Respondent, Samuel J. Serata, Esq.

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed on October 14, 1992 and duly perfected on October 22, 1992, together with a request for emergent relief. In his filings, petitioner challenged a district policy preventing his son C.R.P., a high school senior, from participating in fall varsity sports due to failure to obtain a grade point average of 1.2 (2.0 = C) for the preceding marking period (the fourth period of the prior year) and sought a directive from the Commissioner overriding the Board's eligibility determination.

In his papers, petitioner argues that the Board's policy is unreasonable and unfair because under it, a student could attain a 1.2 average for the marking period while failing for the year, and still be eligible for fall sports so long as the failure did not

drop his total credit amount below the earned credit requirement of the New Jersey State Interscholastic Athletic Association (NJSIAA), thus giving a student who fails an entire subject an advantage over a student who merely fails the last marking period but still passes the course. Petitioner further argues that it is inherently wrong and not in the best interest of motivating students for district policy not to permit summer remediation of fourth marking period deficiencies, particularly since NJSIAA permits summer remediation for its annual earned credit requirement. In support of his request for emergent relief, petitioner points to the fact that any appeal would be mooted by passage of the football season and to his allegation that the district failed to notify C.R.P. of his ineligibility until after completion of summer sessions and after being chosen as a member of the starting team.

In reply papers filed on October 27, 1992, the Board argues that adoption of more stringent eligibility requirements than those of NJSIAA is its specific prerogative under both the law and NJSIAA rules, and that the Board fully considered the pros and cons of adopting such a policy when it so acted in 1985; C.R.P. does not deny that he was treated in accord with that policy, and the fact that he and his father believe the policy unfair, harsh or counterproductive cannot serve as a basis to defeat the Board's lawfully exercised discretion. With respect to notification, the Board observes that eligibility requirements are explicitly set forth in student handbooks and athletic guidelines routinely provided to all students and staff, so that C.R.P. cannot rely on the absence of specific personal notice of ineligibility to claim lack of awareness of the policy and its potential impact on him.

Finally, the Board notes that should C.R.P. obtain a 1.2 or better average for the current marking period, he will be eligible for second marking period participation in football and other sports.

Upon careful review of the papers filed, the Commissioner finds that this matter can be addressed in its entirety on the basis of those papers, as no facts are in dispute, there is substantial documentary evidence provided, and the parties' positions are clear and fully developed.

The undisputed material facts of this matter are that C.R.P. had a 1.0 average for the fourth marking period of the 1991-92 school year, thereby rendering him ineligible for participation in varsity sports for the first marking period of the 1992-93 school year under the following district policy (Policy 6145.1):

> N.J.S.I.A.A. Requirements
>
> All students participating in interscholastic athletic programs shall be required to meet the current eligibility requirements of the New Jersey State Interscholastic Athletic Association. These standards shall be first applied to a student's academic record to determine eligibility.
>
> District Requirements
>
> Pending a student meeting the N.J.S.I.A.A. criteria, students at CRHS shall also be required to maintain a 1.2 grade point average as computed by the CRHS system at the beginning of the sports season. Freshman in their initial marking period shall be exempt. Note, this infers adherence to the attendance policy.
>
> To remain eligible throughout the entire sports season, the student must meet the district requirements each marking period.
>
> A student may acquire academic eligibility mid-season and participate if they meet the athletic program standards.

> The time frame for loss of eligibility and regaining eligibility shall be the day that report cards are issued.
>
> Should a conflict exist due to changes in the N.J.S.I.A.A. standards, state level requirements shall supersede local policy.
>
> (Respondent's Answer, at p. 2)

Receiving no notification of ineligibility at the end of the fourth marking period and apparently unaware of district policy, petitioner "worked out" during the summer in preparation for football, participated in early practices and continued participating until September 10, 1992, when he received personal notice of ineligibility. This notice was duly appealed by seeking an exemption through appropriate administrative channels, culminating in a hearing before the Board of Education. On September 24, 1992, after discussion and consideration of several points of view, the Board voted to deny C.R.P.'s request for exemption by a 7-1 vote; the instant appeal was filed as a result.

After due consideration of the above facts and arguments, the Commissioner finds that petitioner is not entitled to the relief he seeks, either on an emergent basis or on the merits.

The facts of this matter make it plain, and petitioner does not dispute, that C.R.P.'s eligibility status was determined and effectuated entirely within the terms of the policy cited above, neither does he challenge the Board's action on grounds of disparate treatment between himself and other similarly situated students. Nor can he claim that he was denied due process or opportunity to apply for exception, as the record shows that his request received careful and deliberate consideration by both the administration and the Board. Petitioner's only remedy, then, lies in successfully challenging the policy itself.

However, it is well established that the Commissioner cannot substitute his own judgment for that of a board of education when it acts within the lawful scope of its discretionary authority, and that the Commissioner can void a duly adopted board policy only when it is found to be arbitrary, capricious, or violative of law. The policy at issue herein cannot be characterized as any of these, as it is clearly designed to effectuate, in an objective, even-handed manner, the Board's lawful discretionary determination that district students must continuously maintain a minimum level of scholastic achievement in order to enjoy the privilege of continuous participation in sports. Indeed, the result sought by petitioner, ability to remediate fourth marking period deficiencies through attendance at summer school, would give an unfair advantage to students whose low average occurred in the fourth marking period rather than in one of the other three. Neither can petitioner point to the less stringent and differently structured requirements of NJSIAA to claim inequity, as NJSIAA Interpretive Guidelines (Section 3b, interpreting Bylaws Article V, Section 4.E) clearly sanction local district imposition of stricter eligibility requirements than those imposed by the state organization. Nor can he rely on deficiency of notice, as the district's eligibility policy is long-standing, clear on its face and published in the student handbook, and C.R.P.'s personal ineligibility notice was substantially in compliance with the policy term indicating computation of relevant averages at the "beginning of the sports season."

While it is unfortunate that C.R.P. evidently did not realize the consequences of his fourth marking period low grades,

and the sincerity is clear of his father's belief that the district's requirement is unduly harsh and may negatively affect student attitudes toward school rather than encouraging them to do better, the fact remains that ignorance of published rules and differences of philosophy between a parent and school district cannot suffice as a basis for successful appeal to the Commissioner, who cannot, it is repeated, substitute his own judgment for that of a board acting within the scope of its discretionary authority.

Accordingly, the Commissioner finds and determines that the Board's policy is lawful on its face and that the Board's decision to deny C.R.P. eligibility for first marking period participation in 1992-93 sports is consistent with that policy and not subject to reversal by the Commissioner. The Petition of Appeal and request for Emergent Relief are dismissed.

IT IS SO ORDERED.

NOVEMBER 6, 1992

DATE OF MAILING - NOVEMBER 6, 1992

COMMISSIONER OF EDUCATION

274-92

274-92

BOARD OF EDUCATION OF THE TOWNSHIP OF MANCHESTER, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND COUNCIL OF THE TOWNSHIP OF MANCHESTER, OCEAN COUNTY, RESPONDENT.	:	DECISION

NOVEMBER 6, 1992

BOARD OF EDUCATION OF THE TOWNSHIP OF MANCHESTER, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND COUNCIL OF THE TOWNSHIP OF MANCHESTER, OCEAN COUNTY, RESPONDENT.	:	DECISION

For Petitioner, Richard K. Sacks, Esq.

For Respondent, Joseph L. Foster, Esq. (Russo, Foster, Secare & Ford)

This matter was opened before the Commissioner on June 5, 1992 by way of a Petition of Appeal filed by the Township of Manchester Board of Education (Board) appealing the 1992-93 budget reduction imposed by the Mayor and Council of the Township of Manchester (Township Council) after the defeat of the budget by the voters of the school district on April 7, 1992. On June 15, 1992, the Township Council submitted its Answer to the petition. Position statements were filed by the Board and Township Council on July 6 and 13, respectively. Replies were filed on July 29 by the Township Council and August 10 by the Board whereupon the record was closed.

On April 7, 1992, voters of the Manchester Township School District defeated the current expense and capital outlay tax levy

proposed by the Board in the amount of $17,897,675 for current expense and $189,500 for capital outlay.

Subsequent to the defeat of the budget by the voters, the Board and the Township Council, pursuant to the requirements of N.J.S.A. 18A:22-37, consulted on the defeated budget whereupon the Council reduced the current expense budget by $193,180 and the capital outlay budget by $16,000. In addition to reducing the current expense tax levy as indicated above, the Council, by way of Appendix A attached to its resolution of April 27, 1992 establishing the tax levy, proceeded to detail a total of $463,180 in budget reductions with the difference between the $193,180 reduction in the tax levy and the $463,180 in reductions detailed, some $270,000, to come from the district's unappropriated free balance. Additionally, the Council presumed to add additional amounts above those requested by the Board in its original budget for Student Body Activities and Student Body Expenses.

The monies in contention in this dispute are set forth below:

Proposed Tax Levy Adopted by Board		Amount of Tax Levy Certified by Township Council	
Current Expense	$17,897,675	Current Expense	$17,704,495
Capital Outlay	189,500	Capital Outlay	173,500

Amount of Reduction by Township Council

Current Expense	$ 193,180
Unappropriated Free Balance	270,000
Capital Outlay	16,000

Amount of Reduction in Dispute Before Commissioner

Current Expense	$ 463,180
Capital Outlay	16,000

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

In the instant matter, the Township Council upon defeat of the 1992-93 budget by the electorate did confer with the Board as required by N.J.S.A. 18A:22-37 and established a tax levy to be used for school purposes. The aforesaid tax levy was established by imposing the following line item reductions in the budget and in the Board's unappropriated free balance for the reasons set forth below:

CURRENT EXPENSE REDUCTIONS

Account

120 - Attorney Fees

Budgeted	Revised Amount	Proposed Reduction
$ 30,000	$ 22,000	$ 8,000

This line item has been reduced by $8,000 to $22,000 based on historic spending by the Board of Education. As of March 30, 1992, only $7,971 was expended by the Board for this line item for the 1991-92 budget. The Board of Education representatives who met with representatives of the governing body acknowledged that $22,000 would be sufficient in this line item in the 1992-93 budget.

520c - Transportation - Contracted Services

$180,000	$150,000	$30,000

This line item has been reduced by $30,000. The budget proposed by the Board of Education would appropriate $180,000 for this line item. As of March 30, 1992, only $102,375 has been expended under this line item from the 1991-92 budget. Representatives of the Board acknowledged that only about $140,000 would be spent in the 1991-92 fiscal year for this purpose. On that basis the governing body has found that $150,000 would be sufficient in this line item.

540 - Insurance - Pupil Transportation

$120,000	$115,000	$ 5,000

This item has been reduced by $5,000 to $115,000 based on historic spending practice by the Board of Education. In 1990-91 the Board spent $104,656 for this line item. As of March 30, 1992, the Board spent $107,271 from this line item and has admitted that the remaining balance of $7,729 will not be spent this year.

Account

545 - Insurance - Extra curricular Activities

Budgeted	Revised Amount	Proposed Reduction
$ 35,722	$ 28,722	$ 7,000

This item has been reduced by $7,000 to $28,722 based on historic spending by the Board of Education. The governing body found that $20,000 of the remaining appropriation is necessary to provide for transportation for extracurricular athletic activities. Such sum should be available for such purpose due to the fact that none of the amount appropriated in this line item for 1990-91 and 1991-92 was expended by the Board of Education.

550 - Transportation - Other Expenses

$226,740	$190,000	$36,740

This line item has been reduced by $36,740. The budget proposed by the Board of Education would appropriate $226,740 under this line item. As of March 30, 1992, only $120,579 has been expended from this line item in the 1991-92 fiscal year. On that basis, the governing body has found that $190,000 would be sufficient in this fiscal year under this line item.

620 - Contracted Services - Plant Operation

$110,000	$ 90,000	$20,000

This line item has been reduced by $20,000. The budget proposed by the Board of Education for this line item would appropriate $110,000. As of March 30, 1992, the Board of Education has expended an amount considerably less than that appropriated for this line item in the 1991-92 budget. Representatives of the Board of Education acknowledged that there will be a minimum free balance from this line item in 1991-92 in the amount of $18,692.

Account

640 - Utilities

Budgeted	Revised Amount	Proposed Reduction
$580,000	$450,000	$130,000

This line item has been reduced by $130,000. The budget proposed by the Board of Education would have appropriated $580,000 for this line item. As of March 30, 1992, the Board of Education has expended $286,610 from this line item. As of the middle of February 1992, the Board of Education opened its new school. The governing body has taken this factor into account by making an allowance for additional utility costs estimated from a comparable size school building operated by the Board of Education. After making that allowance, the governing body has found that $450,000 will be sufficient to cover utility costs for 1992-93.

730 - Equipment Replacement

$ 32,513	-0-	$ 32,513

This line item has been reduced by $32,513 which is the total amount proposed by the Board of Education in the defeated budget. The line item had been appropriated by the Board of Education for new replacement equipment which the governing body has found may be purchased from a free balance which will exist in the 1991-92 budget of the Board of Education in the approximate amount of $700,000. Representatives of the Board of Education, in consultation with representatives of the governing body, have acknowledged that the free balance remaining in the 1991-92 budget will approximate that amount.

Account

730c - New Equipment

Budgeted	Revised Amount	Proposed Reduction
$254,477	$192,400	$62,077

This line item has been reduced by $62,077. The original amount appropriated by the Board of Education is in the amount of $254,477. The Board of Education has already committed and/or contracted for $192,400 from the amount appropriated by the Board of Education in this line item. As with the preceding line item, the governing body has found that the difference in the amount of $62,077 can be financed from the estimated free balance which will remain from the 1991-92 budget.

740 - Other Expenses

$161,850	$140,000	$21,850

This line item has been reduced by $21,850. The Board of Education had proposed an appropriation in this line item in the 1992-93 budget in the amount of $161,850. As of March 30, 1992, the Board of Education has expended $77,824 from this line item. The Board of Education has acknowledged that a minimum free balance will exist in this line item from the 1991-92 school budget in the amount of $17,520. On that basis, the governing body has found that $140,000 should be a sufficient appropriation in this line item.

Account

870e - Tuition - Special Education

Budgeted	Revised Amount	Proposed Reduction
$ 582,683	$ 472,683	$110,000

This line item has been reduced by $110,000. The Board of Education had appropriated $582,683 in the proposed 1992-93 budget. In the school year 1991-92 the Board of Education expended only $304,901. As of March 30, 1992, the Board of Education has expended only $216,017 out of an original appropriation in the amount of $480,500. Based on historical spending, the governing body has found that $472,683 will be sufficient in the 1992-93 budget under this line item.

TOTALS	$2,313,985	$1,850,805	$463,180

CAPITAL OUTLAY REDUCTION AND STATEMENT OF REASONS

1230 - Buildings

$155,500	$139,500	$16,000

This line item has been reduced by $16,000. The budget proposed by the Board of Education had appropriated $155,500 under this line item. The Township Council has found that it is inappropriate to expend sums of money for these items from a defeated school budget. The Council has further found that the deferral of expenditures for these items will not threaten the Board of Education's ability to provide a thorough and efficient education. The amount of the reduction was appropriated by the Board for the replacement of garage doors in the Board office and for the replacement of carpeting in the arts room in the Middle School.

BOARD'S POSITION

Prior to setting forth its specific reasoning as to why the individual line item reductions are necessary to provide a thorough and efficient system of education, the Board sets forth several general arguments.

Initially, the Board argues that its 1992-93 proposed budget represented only a 3.4% increase over the 1991-92 budget which it claims provides for a per pupil expenditure below the average of the county, state and similar districts. (See copy of Cost of Education Index for 1990-91 attached to Board's Position Statement.) Additionally, the Board cites a letter from the Ocean County Superintendent expressing serious reservations as to the adequacy of the 1992-93 budget as presented to the voters. (See Letter attached to Board's Position Statement.)

The Board likewise decries and declares illegal the Township Council's attempt to add monies to the budget to restore reductions in the middle and high school athletic and club programs to placate community outcry.

The Board's specific arguments to the line item reductions imposed by the Township Council are set forth below:

Account 120 - Attorney's Fees $8,000

Council was informed, in confidence, of pending extraordinary litigation that may take place during the 1992-93 fiscal year. Council has chosen to ignore this information as represented by its reduction of funds in this account. The Board indicated to Council that the budgeted amount may in fact be insufficient to cover this pending litigation. Historical spending patterns in this account have no bearing for future estimates.

Account 520c - Transportation/Contracted Services $30,000

Council inaccurately states that the Board acknowledges that only $140,000 will be expended by the end of fiscal 1991-92. The Board recognizes the transient nature of the special education student and provides the necessary To and From transportation in this account. The budget appropriation of $180,000 for the 1992-93 fiscal year represents the Board's best and reasonable estimate due to contract renewals and/or the re-bidding of existing contracts.

Account 540 - Transportation/Insurance $ 5,000

Council has failed to consider the general cost of inflation as it relates to the renewal of insurance policies governing the automobile and liability coverage maintained by the Board for its school bus fleet. The increase from the 1991-92 budget to the proposed 1992-93 budget is 4.3%. Additionally, the Board reinstated non-mandated bussing for students grades six through twelve which will have an effect upon the overall insurance premium.

Account 545 - Extracurricular Activities $ 7,000

Council has failed to understand explanations provided during the consultation meeting with the Board regarding the manner in which appropriations were made into this account. The Council was informed that previous expenditures for these activities were placed into overtime salary accounts which will no longer be the practice in the 1992-93 budget. Additionally, Council was taken into the Board's confidence regarding the use of this account to provide funds for the school bus drivers bargaining unit as negotiations are not complete at the present time.

Account 550 - Transportation/Other Expenses $ 36,740

The appropriation of $226,740 for the 1992-93 fiscal year represents a 6.2% decrease from the budget of 1991-92. The Board believes that additional reductions in this account would significantly curtail the fleet operation and maintenance and reduce the efficiency of the fleet. Funds for appropriate repairs and supplies for same have been allowed for in this account.

Account 620 - Contracted Services/Plant Operation $ 20,000

Council inaccurately alleges the Board acknowledges a free balance in this account. The increase from the 1991-92 budget to the proposed 1992-93 budget is 3.2%. This account establishes the necessary fund for increase in trash removal, water testing services and Right-To-Know materials. The appropriation represents the funds needed to provide these services to the new elementary school.

Account 640 - Utilities $130,000

Council has failed to understand the budgeting in the utility account for the opening full year of the new elementary school, a projected 15.1% rate increase approval for Jersey Central Power and Light Company, adding water and sewer service fees for the new elementary school and full year telephone service for the same. This account represents a 14.1% increase overall from the 1991-92 budget. Additionally, the Council has failed to consider that two schools are total electric, two are completely air conditioned, and one will be used for special education extended school year programs.

Account 730 - Replacement of Equipment $ 32,513

Council inaccurately states the Board represented knowledge of the free balance. Additionally, the budgeting proposal as set forth by the Council in this line is inconsistent with sound fiscal

management practices, especially in that balances at the present time are unaudited. The Board has appropriated needed funds for the replacement of both instructional and non-instructional equipment for the 1992-93 school year. The majority of funds are to replace aging and worn equipment in the schools.

Account 730c - Purchase of New Equipment $62,077

Council has used an inappropriate budgeting and expenditure concept as it relates to unaudited account balance and the spending of same during the current fiscal year. The Board has allowed sufficient funds to purchase new instructional and non-instructional equipment for the coming school year. Some of these purchases are to be made to assist in the district reorganization plan of the three elementary schools to provide parity within the two older facilities. Additional purchases of equipment related to the operations, care and upkeep of the buildings and grounds are budgeted within this account.

Note: The J730 account in total represents a decrease of 10.0% from the 1991-92 budget.

Account 740 - Other Expense/Buildings and Grounds $21,850

Council incorrectly alleges that the Board acknowledges a free balance in this account. Council has failed to consider the additional expenses consistent with the full year opening of the new elementary school. In particular, it is the belief of the Board that this facility will receive a great deal of community utilization which shall necessitate the increase in on-going maintenance of the grounds and building.

Account 870e - Tuition/Special Education $110,000

Prior to the consultation meeting between the Council and the Board, a listing documenting the anticipated placements and associated costs for special education students for the 1992-93 school year, (see attachment), was provided to Council. The document clearly demonstrates the need for the full appropriation with the potential of needing additional funds during the course of the school year. The budget increase from the 1991-92 fiscal to the 1992-93 fiscal is less than one-half of one percent.

Account 1230 - Capital Outlay/Buildings $ 16,000

The amount reduced by Council represents necessary replacement of a durable floor covering which is in the ninth year of use. Additionally, the reconfiguration of the Middle School has necessitated the re-flooring of instructional space consistent with the rest of the facility.

TOWNSHIP COUNCIL'S POSITION

The Township Council's position is set forth in its original resolution of April 27, 1992 setting the tax levy for the 1992-93 school year. It determined not to submit a further position but relied upon its original submission and its rebuttal of the Board's Position Statement.

COMMISSIONER'S DETERMINATION

Initially, the Commissioner would note that the actions of the Township Council in directing increases over those projected by the Board within specific line items is strictly without authority. Once the governing body has established a tax levy amount, the manner in which those funds are expended lies exclusively within the Board's purview. Therefore, the Commissioner's determination in the

matter will be limited to the $193,180 reduction in the current expense tax levy and the $270,000 reduction in free balance directed by the Township in current expense and the $16,000 reduction in capital outlay.

The Commissioner notes that the Township Council asserts in its recommended reductions under line item 730 (Equipment Replacement) that the Board acknowledged an estimated free balance of $700,000 at the conclusion of the 1991-92 school year. While there are no audited figures to prove or disprove such an assertion, the Board offers no rebuttal to its accuracy other than to point out in its Reply that it was at the time of the filing of that document still in negotiations with its staff for settlement of the 1992-93 contract. Nonetheless, the Commissioner notes that even if such figure is accurate, a $700,000 unappropriated free balance in a budget of over $21,000,000 represents, as argued by the Board, only approximately 3% of the total budget and not an excessive amount to retain against unanticipated needs during the 1992-93 school year.

Having dealt with the two issues considered above, the Commissioner directs his attention to the specific line item reductions delineated by the Township Council. Dealing with this issue, however, has been particularly complicated by virtue of the fact that the Council has not clearly articulated those reductions which it meant to be specifically taken from the tax levy and which were to be funded out of the unappropriated free balance.

Account 120 Attorney Fees $ 8,000

After examining the arguments of the parties in their final summations, the Commissioner notes that the Township Council bases its reduction upon historic spending patterns while the Board

contends that there are extraordinary requirements due to existing litigation and negotiation. Notwithstanding the Board's contentions, the Commissioner is unconvinced without more specific data as to the actual anticipated costs of the litigation in question that the Board cannot sustain a reduction in the amount designated by the Council. The reduction of $8,000 in this account is sustained.

Account 520c Transportation - Contracted Services $30,000

The Commissioner notes that the parties disagree as to whether the Board of Education acknowledged that its expenditures in 1991-92 would be only $140,000 in this account. Further, the Commissioner notes the Superintendent's statement to the effect that actual expenditures in 1991-92 were $167,436.05, an amount greater than than which was recommended by the Township's reduction to $150,000.

The Commissioner notes that the Township Council did not seek to rebut that contention by way of filing of a final summation. In light of the foregoing and the uncertainties relative to the number of pupils to be transported, the Commissioner determines that the $30,000 in this account be restored to the tax levy.

Account 540 Insurance - Pupil Transportation $ 5,000

The Commissioner notes that neither party has addressed this item in its Reply submissions. Based upon the history of past expenditures contended by the Township Council and the likelihood of rebuttal by the Board, the Commissioner determines that the reduction of $5,000 imposed by the Council be sustained.

Account 545 Insurance - Extracurricular Activities $ 7,000

While the Board has failed to address this line item in its Reply, the Township Council continues to rely upon its assertion of past patterns of spending which stands unrebutted by the Board's failure to address it. The $7,000 reduction is sustained.

Account 550 Transportation - Other Expenses $ 36,740

Based upon the Board's unrebutted assertion that its 1991-92 actual expenditures and encumbrances were $233,564, an amount greater than that deemed necessary by the Township Council, the Commissioner deems the Board's anticipated expenditure of $226,740 in this account to be a reasonable estimate and therefore directs restoration of $36,740 in this account.

Account 620 Contracted Services - Plant Operation $ 20,000

In this account as in the other accounts, the parties differ as to whether a surplus for 1991-92 was acknowledged by the Board at the time of their conference. The Commissioner is, however, convinced that the operation of a new school plant for an entire year justifies an anticipated expenditure greater than the $90,000 projected by the Township Council after its reduction, particularly when the initial budgeted amount in 1991-92 was only $86,084.17 and that amount only anticipated operation of the new plant for one-half the school year. Therefore, the Commissioner directs the restoration of $20,000 in this account.

Account 640 Utilities $130,000

Despite claims by the Township Council that the Board had expended only $286,610 in this account by March 1992, the Board in its Reply contends that its actual expenditures in this line item for 1991-92 were $500,099 and that its anticipated expenditures for

1992-93 include the operation of a new plant for an entire year. Since the Council took no opportunity to rebut the Board's contention by way of filing a final summation, the Commissioner accepts the figures as delineated by the Board and determines that the $130,000 reduction in this account be restored.

Account 730 Equipment Replacement $ 32,513

The Board in its Reply has delineated the equipment to be replaced as including student furniture, AV equipment, cafeteria tables, science equipment and instructional computer replacement. The Commissioner notes that the Township Council does not dispute their necessity but argues that the items can be purchased out of surplus. Since the Commissioner has already determined the Board's surplus to be well within permissible limits, the Commissioner directs the restoration of the $32,513 by which the Council reduced this account.

Account 730c New Equipment $ 62,077

Again the Township Council argues for the funding of the expenditure in this line item out of free balance. The Board's arguments that the funds are necessary to equip five new classrooms is convincing in light of the Commissioner's earlier finding regarding the Board's free balance. The $62,077 is deemed necessary for providing a thorough and efficient education.

Account 740 Other Expenses $ 21,850

This is another account in which the parties are in dispute as to whether the Board acknowledged a surplus at its conference meeting. After examining the arguments raised by the parties, the Commissioner finds that the Board has failed to meet its burden in demonstrating the necessity for the significant increase in this account. The reduction of $21,850 is sustained.

Account 870e Tuition - Special Education $110,000

The Board in its Reply contends that actual tuition for Special Education in 1991-92 was $454,986 and thus the $110,000 reduction directed by the Township Council would allow for expenditures in 1992-93 below the 1991-92 actual. The Commissioner notes that the Board is in error in that the reduction imposed by the Township would permit expenditures in 1992-93 of $472,683, approximately $18,000 above the 1991-92 expenditures. Notwithstanding the above, the Commissioner notes that special education tuition is unpredictable at best, therefore he directs that the $110,000 be deemed necessary for a thorough and efficient education.

CAPITAL OUTLAY

Account 1230 Buildings $ 16,000

The Commissioner notes that the Board makes no attempt to defend this appropriation in its Reply. Having considered the argument of the Township Council as to the necessity for this expenditure in a defeated budget, the Commissioner agrees with the Council that the necessity for these expenditures has not been demonstrated by the Board and, therefore, the reduction of $16,000 capital outlay is sustained.

In summary, because of the difficulty in determining the precise amounts of the reductions the Township Council designated as coming out of surplus, the Commissioner reviewed each of the designated reductions line item by line item. Out of the $463,180 in current expense reductions, the Commissioner determined that $41,850 were sustainable and $421,330 were either restored or deemed to be necessary for providing a thorough and efficient system of

education. Since the Board's unappropriated free balance was deemed to be no more than sufficient to meet unanticipated costs and since the Commissioner can restore no more than the amount by which the current expense tax levy was reduced, the Commissioner finds and determines that $41,850 of the reductions in the current expense tax levy by the Township Council be sustained and that the Ocean County Board of Taxation be directed to restore $151,330 to the Manchester Board's current expense tax levy bringing the total current expense tax levy for 1992-93 to the amount of $17,855,825.

The Commissioner further directs that the $16,000 reduction in the capital outlay tax levy for 1992-93 be sustained and that the 1992-93 capital outlay tax levy remain at $173,500 as previously certified by the Township Council.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 6, 1992

DATE OF MAILING - NOVEMBER 6, 1992

275-92

275-92

BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL DISTRICT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND COUNCIL OF THE BOROUGH OF ALLENDALE AND MAYOR AND COUNCIL OF THE BOROUGH OF UPPER SADDLE RIVER, BERGEN COUNTY,	:	DECISION
RESPONDENTS.	:	

NOVEMBER 9, 1992

BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL DISTRICT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND COUNCIL OF THE BOROUGH OF ALLENDALE AND MAYOR AND COUNCIL OF THE BOROUGH OF UPPER SADDLE RIVER, BERGEN COUNTY,	:	DECISION
RESPONDENTS.	:	

Albert O. Scafuro, Esq. (Scafuro & Gianni) for Petitioner

Robert T. Regan, Esq., for Respondent Upper Saddle River

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed by the Board of Education of the Northern Highlands Regional School District (Board) on May 6, 1992, seeking restoration, on the grounds of necessity for a thorough and efficient education, of reductions by the Mayor and Council of the Borough of Allendale and Mayor and Council of the Borough of Upper Saddle River (Councils) in the current expense tax levy for the 1992-93 school year. These reductions were made pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2 following voter rejection of the Board's proposed current expense budget on April 7, 1992 and after consultation with the Board as required by law.

The total proposed and certified budgets as well as the amounts in dispute in this matter are set forth below:

	Proposed Tax Levy Adopted by Board	Amount of Tax Levy Certified By Councils
Current Expense	$7,670,739	$7,570,739

	Amount of Reduction By Councils	Amount of Reduction in Dispute Before Commissioner
Current Expense	$ 100,000	$ 100,000

The reductions at issue were effectuated by Respondent Upper Saddle River in its resolution dated April 20, 1992 and by Respondent Allendale in its resolution dated April 23, 1992. The rationale for the reductions was specified by Respondent Upper Saddle River in its resolution dated May 7, 1992 and by Respondent Allendale in its resolution dated May 14, 1992. The reductions with rationale are as follows:

Account	Reduction
214E - Salaries, Other Instructional	$39,931
Elimination of AV/TV salaries position	
730C - New Equipment	$ 7,350
Deferral of purchases	
810A - Employees, Retirement	$ 2,800
Reduction because of personnel reduction in 214E	
820B - Employee Insurance	$49,919

Reduction because of State offer to allow a one month premium delay/benefit option

Respondent Upper Saddle River filed an Answer on May 18, 1992 admitting the amounts set forth above but leaving the Board to its proofs on all other respects. Respondent Allendale filed an

Answer on June 17, 1992 which confirmed the amounts listed above. On July 14, 1992, Respondent Allendale submitted a letter stating that it would rely on the Mayor and Council of Upper Saddle River in this case. On August 12, 1992, the Board submitted its position statement. The Council submitted its position statement, with minor corrections, on August 17, 1992. On August 18, 1992 the Council submitted its reply to the Board's position statement. On August 21, 1992, the Board filed a letter stating that no more submissions would be sent.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Mindful, then, of the balance to be applied in his standard of review, the Commissioner makes the following determinations with respect to the specific line items reduced by the Councils.

Account 214E - Salaries, Other Instructional $39,931

The Councils' position is that there is no need for a staff person who has no direct classroom assignments and only attends to a variety of AV/TV matters which have some involvement with the school programs. The Board's position is that the duties of the Director of TV Studio and AV Services cannot be assigned to other staff members, such as vice principal, without having a deleterious impact on library and media services. The Board, however, has reduced the position to half-time and will thus need only $20,000 of the $39,931 budgeted. The Commissioner finds and determines that there is no evidence that the position of Director of TV Studio and AV Services, although worthwhile, is essential to a thorough and efficient educational program. The reduction of $39,931 is sustained.

Account 730C - New Equipment $ 7,350

The Councils' position is that the expenditures in this account have been high over the past several years. They also note that there were still open orders as of April 13, 1992 and they state that it is late in the year to purchase equipment for the current year since approximately 75% of the school year has already lapsed. They conclude that some purchases could be deferred by all departments or purchased from existing funds in the current budget without any negative impact on the school system. The Board accepts the Councils' rationale for a reduction in Account 730C, but states

that it now will need those funds on another line because they are underbudgeted due to the recently negotiated contract with the teachers' association.

It must be noted that an appeal of tax levy reductions may only focus on the specific line item reductions and may not involve requests for additional funds for other line items. The Commissioner determines, therefore, that the reduction of $7,350 is sustained.

Account 810A - Employment Retirement $ 2,800

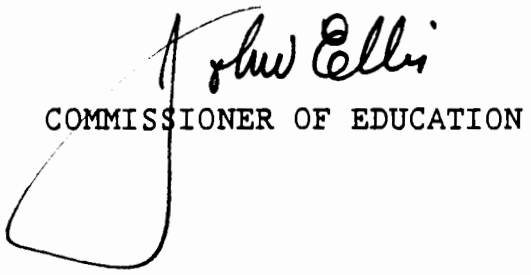
The position of the Councils is that this reduction in FICA/ Pensions obligations is possible because of the elimination of the TV/AV position. The Board's position is that these funds will be needed for the additional teachers necessitated by the negotiated contract. It must be noted that social security and pension obligations for teachers are not budgeted in Account 810A but rather in 810B and 810D, respectively. Therefore, based on the restrictions for appeal as specified above, the Commissioner determines that the reduction of $2,800 is sustained.

Account 820B - Employee Insurance $49,919

The position of the Councils is that this reduction can be realized by the Board taking advantage of the offer by the State Health Benefits Program for a one month premium delay option. The Board accepts the Councils' rationale but again states that the funds will be needed for teachers' salaries. Again, based on the restrictions for appeal as specified above, the Commissioner determines that the reduction of $49,919 is sustained.

Thus, for the reasons set forth above, the Commissioner determines that the reduction in the current expense tax levy of $100,000 is sustained. The tax levy of $7,570,739 originally certified to the Bergen County Board of Taxation by the Councils for current expense purposes for 1992-93 will remain unchanged.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

NOVEMBER 9, 1992

DATE OF MAILING - NOVEMBER 9, 1992

276-92

276-92

BOARD OF EDUCATION OF THE BOROUGH OF OCEAN GATE, PETITIONER, V. MAYOR AND COUNCIL OF THE BOROUGH OF OCEAN GATE, OCEAN COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION
IN THE MATTER OF THE CAP WAIVER APPEAL OF THE BOARD OF EDUCATION OF THE BOROUGH OF OCEAN GATE, OCEAN COUNTY.	:	

NOVEMBER 9, 1992

BOARD OF EDUCATION OF THE BOROUGH OF OCEAN GATE,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF OCEAN GATE, OCEAN COUNTY,

RESPONDENT.

IN THE MATTER OF THE CAP WAIVER

APPEAL OF THE BOARD OF EDUCATION

OF THE BOROUGH OF OCEAN GATE,

OCEAN COUNTY.

COMMISSIONER OF EDUCATION

DECISION

For Petitioner, Arthur Stein, Esq. (Arthur Stein & Associates

For Respondent, Richard S. Haines, Esq. (Haines & Thompson)

This consolidated matter was opened before the Commissioner on May 26, 1992 by way of Petitions of Appeal filed by the Borough of Ocean Gate Board of Education (Board) appealing the budget defeated by the voters of the school district on April 7, 1992 and the defeated cap waiver. On June 19, 1992 the Mayor and Council of the Borough of Ocean Gate (Borough) submitted its Answers to both the appeal of the defeated budget and the defeated cap waiver. A position statement was filed by the Board on July 13, 1992. The Borough submitted a packet of materials on July 7, 1992 and

indicated its willingness to rely on its Resolution #92-45 which contained its reductions of the current expense tax levy and the reasons presented for such reductions. No other papers being filed by the parties, the record closed.

On April 7, 1992, the voters of the Borough of Ocean Gate defeated the current expense tax levy proposed in the amount of $648,625. They likewise defeated a proposed current expense cap waiver of $51,540 which the Ocean County Superintendent of Schools approved on March 5, 1992 as necessary for a thorough and efficient system of education of the students of Ocean Gate and which resulted in the County Superintendent granting only a conditional approval of the district's budget for the 1992-93 school year. The specific line item accounts for the T&E cap waiver are as follows:

CURRENT EXPENSES	LINE ITEM BUDGET	
Account Title	Account No.	Amount
Instruction - Salaries - Teachers Music Teacher - $ 5,500.00 Art Teacher - $17,500.00	57B-213	$23,000
Instruction - Salaries - Other Inst. Staff - Librarian	60-214	$16,500
Instruction - Textbooks Music Books	63-220	$ 2,000
Instruction - School Library A./V. - Library Books/Mag	64-230	$ 3,000
Instruction - Supplies Art Supplies	65-240	$ 1,500
Instruction - Purchase Prof. Ed. Serv. Curriculum Dev.	67-260a	$ 3,000
Instruction - Technical Ed. Serv.	68-260b	$ 500
Maintenance of Plant - Cont. Serv. Roof Repair	97-720	$ 2,040
TOTAL ADDITIONAL CURRENT EXPENSE APPROPRIATION		$51,540

Subsequent to the defeat of the budget by the voters, the Board and the Borough, pursuant to the requirements of N.J.S.A. 18A:22-37, consulted on the defeated budget whereupon the Borough reduced the current expense budget by $13,628. Consequently, the monies in contention in this consolidated matter are set forth below:

	Proposed Tax Levy Adopted by Board	Amount Certified by Borough
Current Expense	$648,625	$634,997
Capital Outlay	-0-	-0-
Cap Waiver		
Current Expense	$ 51,540	
Capital Outlay	-0-	
Total	$700,165	$634,997

Amount in Dispute before Commissioner

Defeated Budget	$13,628
Cap Waiver	51,540
Total	$65,168

I. DEFEATED BUDGET

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East

Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

In the instant matter, the Borough upon defeat of the 1992-93 budget by the electorate did confer with the Board as required by N.J.S.A. 18A:22-37 and established a tax levy to be used for school purposes. The aforesaid tax levy was established by imposing the following line item reductions:

Account

110-49 - Administration - Salaries

Budgeted	Revised Amount	Proposed Reduction
$ 85,793	$ 82,915	$ 2,878

Feel increase is too high and a cost of living increase of 3% would be sufficient. These high increases continue to compound problems.

120b-50 - Administration - Legal Fees

$ 4,000	$ 3,500	$ 500

Board should exercise some restraint in fees paid to attorneys.

213-57b - Instruction - Salaries

$301,358	$298,358	$ 3,000

Feel increases are too high and a cost of living increase of 3% would be sufficient.

310-70 - Attendance & Health Services - Salaries, Attendance

$ 500	$ -0-	$ 500

Feel this should be included in duties of Superintendent.

Account

410-73 - Salaries - Health

Budgeted	Revised Amount	Proposed Reduction
$14,788	$14,038	$ 750

Feel increase is too high and increase of 3% based on cost of living would be sufficient.

430-75 - Purchased Professional/Technical Services - Health

$ 2,780	$ 2,280	$ 500

Feel Board has over-estimated number of students requiring this examination.

610-88 - Operation of Plant - Salaries

$42,006	$36,506	$ 5,500

Feel increase is too high and a cost of living increase of 3% would be sufficient.

TOTAL $13,628

BOARD'S POSITION

The Board in its Position Statement sets forth a general description of the current state of the district regarding its financial, instructional and facilities circumstances. The details of such descriptions are summarized below:

1. District consists of a single school which is actually three schools on one site. One building, constructed in 1969, contains grades 2-6 as well as administrative offices. A second building houses grades 2-6 with two classrooms approximately 50 years old and, additionally, a Kindergarten building which is over 70 years old.

2. A growing district which projects a 6% growth in population between 1991-92 and 1992-93 and which projects a student population of 266 by 1996-97. (See Board's Position Statement, Exhibit A.)

3. A high level of classified students which increased from 19 in 1991-92 to 33 in 1992-93 (74% increase).

4. Inability to obtain state certification in the absence of a plan for providing additional space to eliminate substandard conditions.

5. Substandard facilities are as follows:

- Use of library for classroom
- Use of Superintendent's office for Child Study Team meetings, nurses' examinations and speech therapy.
- Stage used for storage denying use for programs.
- Absence of a business office and required use of main office for Board Secretary.
- Approval by the County Superintendent of continued use of substandard space in 1992-93 only upon the undertaking of a building program during that school year.

6. Failure of monitoring in 1989-90 due to curriculum deficiencies resulting in the necessity to hire teachers to do curriculum upgrading. This process is continuing with 1992-93 designated for curriculum revision in reading.

7. District received award in 1991-92 from the Commissioner's Discretionary Fund in order to continue its ability to provide a thorough and efficient education.

8. District applied for a cap waiver in 1991-92 which the Commissioner granted in the amount of $29,000.

9. District stands below comparable districts in per pupil expenditure and teachers' salaries. (See Report Card attached as Exhibit D.)

10. Budget surplus estimated at $40,000 for 1992-93.

11. Negotiations in progress at the time of filing of the Petition of Appeal.

The following represents the Board's position on a line item by line item basis relative to the reductions imposed by the Borough:

Account 110 Administration - Salaries $2,878

The Board essentially argues that the 3% increase limit imposed by the Borough for administrative salary increases is entirely unrealistic and that there is no school board labor contract, to its knowledge, in the State as low as 3%. The Board also contends that its present salary level for all employees stands at the lower level for comparable districts in the region and State as indicated by the Report Card.

Account 120b Administration - Legal Fees $ 500

The Board argues that its budget in this area contains only $2,000 for the budget appeal herein and $2,000 for general counseling services throughout the year. The Board points out that its attorney's fee is $95 an hour and that the counseling services which are utilized are necessary to function efficiently.

Account 213 Instruction - Salaries $3,000

Again the Board argues that a 3% salary increase is unrealistic. It has provided for a salary increase of 7% in preparation for negotiations with its teachers since this is the average expected increase in Ocean County. The Board points out its

adverse position relative to county and comparable districts. The Board also points out that its salary account for teachers represents an increase of only $819 over the 1991-92 year, a percentage increase of only .0027%.

Account 310 Attendance and Health Services - Salaries, Attendance $ 500

The money in this account is for an additional stipend for the Superintendent to undertake duties of attendance officers. Such duties are not normally part of a chief school administrator's duties. Without the Superintendent's assumption of these duties, the cost of hiring additional personnel would be more expensive.

Account 410 Salaries - Health $ 750

The amounts in this account are for an increase in the salary of a half-time school nurse. The reduction which the Borough proposes would leave only a 1.7% increase of $152.

The remainder of the budget in this account is for a school doctor whose stipend of $1,000 is the same as for 1991-92.

Account 430 Purchased Professional/Technical Services - Health $ 500

The amount budgeted in this account represents the funds necessary to provide for Child Study Team services as detailed below:

General Physicals at $40 X 13	$ 520
Ophthalmologic Exams at $65 X 7	455
Audiological Exams at $81 X 5	405
Neurological Exams at $175 X 5	875
Psychiatric Exams at $175 X 3	525
	$2,780

These estimates, contends the Board, are its best estimates of the actual examinations required.

Account 610 Operation of Plant - Salaries $5,500

The amounts in this line item are for compensation increases for one full-time and one part-time custodian and the hiring of an additional part-time custodian to provide maintenance services in three prototype trailers which the district has rented for 1992-93 to compensate for its substandard conditions.

The Board argues that it saves money through the hiring of an additional part-time custodian rather than extending the time of the existing part-time custodian by not having to provide benefits which would have been necessary if the part-time custodian had been extended in time.

BOROUGH'S POSITION

As noted earlier in this decision, the Borough has indicated its willingness to stand on the reasons it presented in its Resolution #92-45.

COMMISSIONER'S DETERMINATION

The Commissioner has carefully reviewed the positions of both parties as presented to him. Based upon that review, it is abundantly clear that the reasons for the reductions set forth by the Borough are essentially arbitrarily based upon the assumption that the Board could limit salary increase for its personnel to 3%. Such assumptions as they relate to the salary accounts are entirely unrealistic given the state of salary increases in the region, as well as the relatively low standing of the district in relation to comparable districts in the region and State as indicated by the School District Report Card, attached as Exhibit D to the Board's Position Statement.

As to the other reductions imposed by the Borough relative to fees for legal and professional services, the Commissioner finds

that the reasons advanced by the Borough are unsubstantiated, based upon "feelings" rather than data, while the Board has provided substantial hard data justifying its needs.

Consequently, the Commissioner finds and determines that the amount of $13,628 be restored to the Board of Education of the Borough of Ocean Gate's 1992-93 current expense tax levy.

II. CAP WAIVER

The Board sets forth the following reasons for seeking the cap waiver:

Acct. 213/Line 57b Instruction - Salaries, Teachers $23,000

These funds are necessary in order to provide a music and art program for the students. Without these funds, the District will have no music or art program. These funds are intended to provide what can be described at best as a modest music and art program. Proposed is a one day per week (1/5) music teacher and a two day per week (2/5) art teacher. There is no other art/music teacher on the staff. In the 1991-92 school year, this modest program was paid for from the Commissioner's Discretionary Funds awarded to the District. The 1/5 music teacher salary for the 1991-92 school year was $5,154.40 with the projected cost for 1992-93 to be $5,515.20. The cost of the 2/5 art teacher during 1991-92 was $16,356.80 with the cost anticipated for 1992-93 to be $17,501.80. Both of the salary increases for the 1992-93 school year represent a 7% increase in accordance with the District's reasonable anticipation of the result of its negotiations, presently ongoing, with its teachers. The circumstances of these negotiations have been more fully spelled out in the other certifications. See, for example, discussion at Paragraph 5, Account 110, Pages 3 through

5 of Certification as to Current Expense Budget Defeat. These services are needed for the District to function efficiently and properly and to provide for a thorough and efficient education for all students.

Acct. 214/Line 60 Instruction - Salaries - Other Instructional Staff - Librarian $16,500

These funds are intended to provide a more traditional library program for the school. Prior to the 1991-92 school year, the District traditionally employed a librarian on a two day per week (2/5) basis. During the 1991-92 school year, this time was reduced to a one day per week (1/5) time basis because the library was being used as a substandard emergency classroom facility for the sixth grade. As a result, the librarian was forced to work with a cart going from classroom to classroom. The use of the library as a substandard classroom facility, by law, must be terminated. As a result, arrangements have been made by the District to house the sixth grade class in a temporary trailer. This will allow reuse of the library room for its designated purpose as a library. Since the library will now be back in use, a commitment of a librarian on a 2/5 time basis is again required. This will permit the more traditional library program that the District has always had with the exception of the time when the library has been used as a substandard instructional area. That traditional library program includes library instruction and overseeing the collection including ordering and cataloging. The amount budgeted during the 1991-92 school year for the 1/5 librarian was $7,695.00. The amount budgeted for the 1992-93 2/5 librarian is $16,500.00. Any difference is attributable to the 7% increase anticipated as the result of the completion of labor negotiations. The services are

needed for the District to function efficiently and properly and to provide for a thorough and efficient education for all students.

Acct. 220/Line 63 Instruction - Textbooks - Music Books $2,000

Prior to the 1991-92 school year, the District had a music curriculum but no instructional materials or textbooks. During the 1991-92 school year the District purchased music books for three of the grades spending approximately $2,000.00. If the music program is to continue, it is necessary that the District purchase books for the remaining three grades. The cost of the books plus equipment and records to accompany the series is $12.00 per book. This purchase includes such items as rhythm instruments for the third grade. The purchase is necessary in order to provide any form of reasonable music program to all of the students. Accordingly, the materials are needed for the District to function efficiently and properly and to provide for a thorough and efficient education for all students.

Acct. 230/Line 64 Instruction - School Library A/V - Library Books/Magazines $3,000

During the school year 1991-92 no books or magazines of any type were purchased. Prior to that, when the school was using the library for its intended purposes, the District spent $4,268.03 during the 1990-91 school year for these purposes. The District has presently fallen behind with reference to this service. If this modest purchase of $3,000.00 is not made at this time, the District will fall further behind. This will require at some point a substantial one year expenditure. Based upon experience of the Chief School Administrator, that is not reasonable budgeting.

If the District does not receive these funds, the District expenditure for these educational materials for the school years

1991-92 and 1992-93 will total $0. That means no library books, not even one periodical or magazine, or any supplies, will have been received for two years.

The materials are needed for the District to function efficiently and properly and to provide for a thorough and efficient education for all students.

Acct. 240/Line 65 Instruction - Supplies - Art Supplies $1,500

The District intends to provide an art program. If we have such a program, supplies are needed. During the 1991-92 school year, we spent approximately $1,500.00. This represents approximately $8.70 per student for the entire school year. There is no provision for the purchase of these supplies anywhere else in the budget because the District did not want to provide for their purchase if funds for the teacher were not also provided. It is respectfully submitted that the program as outlined is modest in scope but is necessary for the District to function efficiently and properly and to provide for a thorough and efficient education for all students.

Acct. 260a/Line 67 Instruction - Purchased Professional Ed. Service - Curriculum Development $3,000

This is part of the aftermath of the District's failure of monitoring in 1989 with reference to curriculum development. During 1991-92, the District spent $2,500.00 to upgrade the language arts curriculum to current standards. This money is intended to upgrade the reading currriculum to current standards. This was last done more than five years ago. Accordingly, it is necessary to expend these funds now. This particular curriculum involves the most comprehensive curriculum review for this District. These funds are

needed in order for the District to function efficiently and properly and to provide for a thorough and efficient education for all students.

Acct. 260b/ Line 68 Instruction-Technical Education Services $ 500

This is the same amount as spent during the 1991-92 school year. It is to pay for professional services for the development of curriculum. The District intends to hire a consultant to provide guidance and advice on the development of curriculum. It is necessary to adequately develop the curriculum to current standards.

This expenditure is particularly pertinent because, as previously noted, the District was cited for a deficiency in its curriculum development. This expenditure is consistent with the action plan already approved by the New Jersey Department of Education. It is, therefore, an expenditure that is necessary for the District to function efficiently and properly to provide for a thorough and efficient education for all students.

Acct. 720/Line 97 Maintenance of Plant - Contracted Services - Roof Repair $2,040

The roof on the main building presently leaks in 13 different locations. Some of these leaks are in classroom areas. Nothing has been spent on this problem for the last five years. It is a long overdue repair as some of the leaks have existed for as long as four to five years. There is a legitimate concern about the eventual structural damage to the roof and the building. This is a necessary repair to preserve the plant. The expenditure is needed for the District to function efficiently and properly and provide for a thorough and efficient education for all students.

BOROUGH'S POSITION

The Commissioner notes that the Borough offers no specific position relative to the cap waiver relying exclusively on its Resolution #92-45.

COMMISSIONER'S DETERMINATION

Upon review of the Board's position, the Commissioner finds and determines that the record amply establishes that the additional $51,540 in current expense cap waiver monies sought by the Board are necessary for the district to provide a thorough and efficient system of education to the pupils of the Ocean Gate School District. East Brunswick, supra; Deptford Township, supra

Accordingly, the Commissioner directs that the Ocean County Board of Taxation increase the 1992-93 current expense tax levy for Ocean Gate to reflect a restoration of the $13,628 reduction effectuated by the Borough and an additional $51,540 in cap waiver monies which sum amounts to $65,168. Therefore, the total current expense tax levy for Ocean Gate shall be $700,165.

	Amount Certified By Borough	Amount Restored	Tax Levy After Restoration
Current Expense	$634,997	$65,168	$700,165

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 9, 1992

DATE OF MAILING - NOVEMBER 9, 1992

277-92

277-92 -

IN THE MATTER OF THE TENURE :
HEARING OF LUIS VELEZ, SCHOOL : COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF VINELAND, : DECISION
CUMBERLAND COUNTY. :
:

NOVMEBER 9, 1992

6, 1992, a copy of which is attached hereto as Exhibit "A," the Secretary of the TPAF Board of Trustees so informed Luis Velez.

4. By virtue of the TPAF's approval of his retirement, Luis Velez has been certified as "physically or mentally incapacitated for the performance of duty" as a school social worker. N.J.S.A. 18A:66-39.

5. As Luis Velez is no longer employed with the Board but has retired from said employment, the tenure charges seeking his dismissal are no longer of any force and effect and the Board hereby dismisses same.

WHEREFORE, counsel for the respective parties, in full agreement with the above, place their hands and seals on the dates indicated below.

For LUIS VELEZ:

SELIKOFF & COHEN, P.A.

By: Kenneth Sandler
KENNETH A. SANDLER

Dated: 9/15/92

For the VINELAND BOARD OF EDUCATION:

GRUCCIO,PEPPER, GIOVINAZZI & DeSANTO

By: R A D
ROBERT A. DeSANTO

Dated: 9/11/92

JIM FLORIO
GOVERNOR

STATE OF NEW JERSEY
DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS
CN 295
TRENTON, N.J. 08625-0295

SAMUEL CRANE
STATE TREASURER
MARGARET M. McMAHON
DIRECTOR

July 6, 1992

Luis I. Velez
693 W. Walnut Road
Vineland, NJ 08360

In reply, refer to:
TPAF #273143
Notice of Determination

Dear Mr. Velez:

The Board of Trustees, Teachers' Pension & Annuity Fund at its meeting of July 2, 1992 approved your application for Ordinary disability under Maximum allowance effective January 1, 1992.

Your retirement allowance as a disability retirant under age 60 is subject to adjustment if your earnings from employment after retirement exceed the difference between the pension portion of your retirement allowance and the salary attributable to your former position.

It is noted that you elected to receive benefits under Maximum allowance. You have the right to change this election to another type of retirement payment provided you file an amended application within 30 days from the date of Board approval; otherwise, retirement will stand as approved and may not be changed for any reason whatsoever thereafter.

The statute permits the Board of Trustees to require a disability retirant who is under 60 years of age to undergo annual medical examinations to determine if he continues to be totally and permanently disabled and therefore eligible for continued receipt of his disability retirement allowance.

Your first retirement check cannot be disbursed until a minimum of 30 days has elapsed from the date of Board approval or your effective date of retirement, whichever is the later date.

Sincerely,

Regina M. Trauner

Regina M. Trauner
Secretary
Teachers' Pension and Annuity Fund

jc
c: Marie Schweickert w/file
Employer - Vineland Board of Education

New Jersey Is An Equal Opportunity Employer

EXHIBIT A

OAL DKT. NO. EDU 1048-92

IN THE MATTER OF THE TENURE	:	
HEARING OF LUIS VELEZ, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF VINELAND,	:	DECISION
CUMBERLAND COUNTY.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standard for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983) The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

NOVEMBER 9, 1992

DATE OF MAILING - NOVEMBER 9, 1992

278-92

CHESTER KAMINSKI, ARSENIO SILVESTRI, ROSEMARIE VICICONTI, LOUIS LANZILLO AND FRANKLIN WILLIAMS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY AND ELENA J. SCAMBIO, STATE DISTRICT SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	

NOVEMBER 9, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NOS. EDU 749-90, 750-90, 751-90, 752-90, 753-90 and 6110-90 (CONSOLIDATED)

CHESTER KAMINSKI, ARSENIO SILVESTRI, ROSEMARIE VICICONTI, LOUIS LANZILLO and FRANKLIN WILLIAMS,
Petitioners,
v.
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY and ELENA J. SCAMBIO, STATE DISTRICT SUPERINTENDENT,
Respondents

Melissa Vance Kirsch, Esq., for petitioners

Karen A. Murray, Esq., for respondents (Murray, Murray and Corrigan, attorneys)

Record Closed: September 21, 1992 Decided: September 29, 1992

BEFORE **ARNOLD SAMUELS**, A:

In early 1990, the petitioners filed verified petitions with the Commissioner of Education, contesting certain actions taken by respondent in connection with the State takeover of the Jersey City school district. The disputes involved transfers, demotions, abolition of positions and other personnel actions that affected the petitioners and their positions at the time of and after the takeover. The petitioners' claims specifically dealt with accumulated vacation time and terminal leave, salary reductions, statutory compensation allegedly due because of the abolition of previously held positions and entitlement to certain replacement positions.

The matters were transmitted to the Office of Administrative Law for hearing and determination as contested cases after the petitions were filed. On April 16, 1990, a prehearing conference was held and a prehearing order was entered, defining and limiting the issues to be decided, fixing hearing dates, providing for discovery and regulating other procedural aspects of the forthcoming hearing.

A series of motions were filed by counsel thereafter, which were duly disposed of by the judges assigned to the matter. (The first judge to whom the matter was assigned retired, necessitating reassignment of the case to this judge). In addition, the majority of the issues were thereafter amicably resolved by the parties, and only two issues ultimately remained for disposition. The first issue involved the petitioner's entitlement, if any, to 60 days' pay upon the abolition of positions previously held by them, pursuant to *N.J.S.A.* 18A:7A-44, in addition to salary received in their transferred positions during the same period of time. The second issue involved a claim by petitioner Franklin Williams to be transferred to the position of Deputy Superintendent on October 4, 1989, rather than to the position of Assistant Superintendent for Elementary Education.

A series of briefs were filed in preparation for final argument and possible plenary hearing relating to the above two issues. However, in June 1992, counsel advised that both issues had been settled and that the petitioners would withdraw their requests for hearing.

On September 3, 1992, written settlement agreements were filed in the Office of Administrative Law. Copies of the agreements entered into with four of the five petitioners are attached hereto and made a part hereof. Petitioner Arsenio Silvestri had previously withdrawn any and all claims in the matter.

Copies of each of the settlement agreements, and a copy of counsel's advice relating to Mr. Silvestri's withdrawal, are attached hereto and made a part hereof.

Having reviewed and considered the issues involved in this dispute, it is **CONCLUDED** that the parties have voluntarily and knowingly agreed to the settlements, or withdrawn their claims, as evidenced by the attached documents. It is further **CONCLUDED** that the settlements are fair and fully dispositive of all issues in controversy between the parties.

It is therefore **ORDERED** that the settlements and one withdrawal be approved and all matters **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 29, 1992
Date

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

10/1/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 02 1992
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

ms

MELISSA VANCE KIRSCH
ATTORNEY AT LAW
920 WEST STATE STREET
TRENTON, NEW JERSEY 08618

TELEPHONE (609) 599-2900

September 21, 1992

VIA Fax Transmission
(201) 648-6124

The Honorable Arnold Samuels,
Administrative Law Judge
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

RE: *Chester Kaminski, Arsenio Silvestri, Rosemarie Viciconti, Louis Lanzillo and Franklin Williams v. State-Operated School District of Jersey City and Elena J. Scambio, State District Superintendent*, OAL Dkt. Nos. EDU 749-90, 750-90, 751-90, 752-90 & 753-90; *Franklin Williams v. State-Operated School District of Jersey City and Elena J. Scambio, State District Superintendent*, OAL Dkt. No. EDU 6110-90

Dear Judge Samuels:

This letter is to confirm that petitioner, Arsenio Silvestri, has withdrawn any and all claims in the above-captioned matter.

Thank you for your consideration in this matter.

Respectfully yours,

Melissa Vance Kirsch

Melissa Vance Kirsch, Esq.
Counsel for Petitioners

MVK:alc

C: Karen Murray, Esq.

MELISSA VANCE KIRSCH, ESQ.
920 West State Street
Trenton, New Jersey 08618
609/599-2900
Attorney for Petitioners

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

CHESTER KAMINSKI, ARSENIO SILVESTRI, ROSEMARIE VICICONTI, LOUIS LANZILLO, and FRANKLIN WILLIAMS,	OFFICE OF ADMINISTRATIVE LAW State of New Jersey
Petitioners	OAL Dkt. Nos. EDU 749-90, 750-90, 751-90, 752-90, 753-90, and 6110-90
v.	
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY and ELENA SCAMBIO, STATE DISTRICT SUPERINTENDENT,	**SETTLEMENT AGREEMENT**
Respondent	

Petitioner, Chester Kaminski, and respondents hereby agree to settle any and all claims remaining which relate to the issue of sixty-days pay in lieu of sixty-days notice as set forth in the Petition of Appeal, OAL Docket No. EDU 749-90.

1. Petitioner, Chester Kaminski, shall withdraw, with prejudice, his claim for and/or relating to the issue of sixty-days notice in lieu of sixty-days pay. A settlement agreement shall be executed and filed with Judge Arnold Samuels, A.L.J., upon full execution of this document.

2. In consideration of petitioners' withdrawal with prejudice, respondents shall pay petitioner, Chester Kaminski, the gross amount of six thousand, five hundred dollars ($6,500), which shall be subject to standard and ordinary deductions (federal, state and SSI) prior to disbursement.

3. The check shall be drawn to both petitioner, Chester Kaminski, and Margaret Murphy, Esq., and shall be forwarded to Melissa Vance Kirsch, Esq. for distribution to petitioner.

4. Petitioner, Chester Kaminski, in consideration of the above payment of monies, agrees to release respondents from any and all claims which he has, and/or may have, relative to or arising out of his claim for sixty-days notice in lieu of sixty-days pay. Petitioner also agrees to release respondents from any and all claims relating to, or arising out of, or in connection with, the instant claim being settled and/or withdrawn from the Office of Administrative Law.

5. Petitioner, Chester Kaminski, agrees to bind anyone who succeeds to his rights and responsibilities, including his heirs or executors of his estate, to the terms of this Settlement Agreement.

6. Petitioner, Chester Kaminski, and respondents acknowledge that this Settlement Agreement terminates any and all litigation between the parties regarding the claims contained in their individual petitions.

7. Petitioner, Chester Kaminski, has voluntarily and without coercion entered into this Settlement Agreement with respondents.

STATE-OPERATED SCHOOL
DISTRICT OF JERSEY CITY

Chester Kaminski
CHESTER KAMINSKI
Petitioner

DATE:

Helen J. Scambio
DR. ELENA SCAMBIO
State District Superintendent

DATE: August 28, 1992

Melissa Vance Kirsch
MELISSA VANCE KIRSCH, ESQ.
Counsel for Petitioners

DATE:

Karen Murray
KAREN A. MURRAY, ESQ.
Counsel for Respondents

DATE:

MELISSA VANCE KIRSCH, ESQ.
920 West State Street
Trenton, New Jersey 08618
609/599-2900
Attorney for Petitioners

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CHESTER KAMINSKI, ARSENIO SILVESTRI, ROSEMARIE VICICONTI, LOUIS LANZILLO, and FRANKLIN WILLIAMS,	OFFICE OF ADMINISTRATIVE LAW State of New Jersey
Petitioners	OAL Dkt. Nos. EDU 749-90, 750-90, 751-90, 752-90, 753-90, and 6110-90
v.	
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY and ELENA SCAMBIO, STATE DISTRICT SUPERINTENDENT,	**SETTLEMENT AGREEMENT**
Respondent	

Petitioner, Louis Lanzillo, and respondents hereby agree to settle any and all claims remaining which relate to the issue of sixty-days pay in lieu of sixty-days notice as set forth in the Petition of Appeal, OAL Docket No. EDU 752-90.

1. Petitioner, Louis Lanzillo, shall withdraw, with prejudice, his claim for and/or relating to the issue of sixty-days notice in lieu of sixty-days pay. A settlement agreement shall be executed and filed with Judge Arnold Samuels, A.L.J., upon full execution of this document.

2. In consideration of petitioners' withdrawal with prejudice, respondents shall pay petitioner, Louis Lanzillo, the gross amount of six thousand, five hundred dollars ($6,500), which shall be subject to standard and ordinary deductions (federal, state and SSI) prior to disbursement.

3. The check shall be drawn to both petitioner, Louis Lanzillo, and Margaret Murphy, Esq., and shall be forwarded to Melissa Vance Kirsch, Esq. for distribution to petitioner.

4. Petitioner, Louis Lanzillo, in consideration of the above payment of monies, agrees to release respondents from any and all claims which he has, and/or may have, relative to or arising out of his claim for sixty-days notice in lieu of sixty-days pay. Petitioner also agrees to release respondents from any and all claims relating to, or arising out of, or in connection with, the instant claim being settled and/or withdrawn from the Office of Administrative Law.

5. Petitioner, Louis Lanzillo, agrees to bind anyone who succeeds to his rights and responsibilities, including his heirs or executors of his estate, to the terms of this Settlement Agreement.

6. Petitioner, Louis Lanzillo, and respondents acknowledge that this Settlement Agreement terminates any and all litigation between the parties regarding the claims contained in their individual petitions.

7. Petitioner, Louis Lanzillo, has voluntarily and without coercion entered into this Settlement Agreement with respondents.

STATE-OPERATED SCHOOL
DISTRICT OF JERSEY CITY

LOUIS LANZILLO
Petitioner

DATE: 7/27/92

DR. ELENA SCAMBIO
State District Superintendent

DATE: August 28, 1992

MELISSA VANCE KIRSCH, ESQ.
Counsel for Petitioners

DATE: August 1992

KAREN A. MURRAY, ESQ.
Counsel for Respondents

DATE: August 1992

MELISSA VANCE KIRSCH, ESQ.
920 West State Street
Trenton, New Jersey 08618
609/599-2900
Attorney for Petitioners

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OFFICE OF ADMIN LAW

CHESTER KAMINSKI, ARSENIO SILVESTRI, ROSEMARIE VICICONTI, LOUIS LANZILLO, and FRANKLIN WILLIAMS,	OFFICE OF ADMINISTRATIVE LAW State of New Jersey
Petitioners	OAL Dkt. Nos. EDU 749-90, 750-90, 751-90, 752-90, 753-90, and 6110-90
v.	
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY and ELENA SCAMBIO, STATE DISTRICT SUPERINTENDENT,	**SETTLEMENT AGREEMENT**
Respondent	

Petitioner, Rosemarie Viciconti, and respondents hereby agree to settle any and all claims remaining which relate to the issue of sixty-days pay in lieu of sixty-days notice as set forth in the Petition of Appeal, OAL Docket No. EDU 751-90.

1. Petitioner, Rosemarie Viciconti, shall withdraw, with prejudice, her claim for and/or relating to the issue of sixty-days notice in lieu of sixty-days pay. A settlement agreement shall be executed and filed with Judge Arnold Samuels, A.L.J., upon full execution of this document.

2. In consideration of petitioners' withdrawal with prejudice, respondents shall pay petitioner, Rosemarie Viciconti, the gross amount of seven thousand dollars ($7,000), which shall be subject to standard and ordinary deductions (federal, state and SSI) prior to disbursement.

3. The check shall be drawn to both petitioner, Rosemarie Viciconti, and Margaret Murphy, Esq., and shall be forwarded to Melissa Vance Kirsch, Esq. for distribution to petitioner.

4. Petitioner, Rosemarie Viciconti, in consideration of the above payment of monies, agrees to release respondents from any and all claims which she has, and/or may have, relative to or arising out of her claim for sixty-days notice in lieu of sixty-days pay. Petitioner also agrees to release respondents from any and all claims relating to, or arising out of, or in connection with, the instant claim being settled and/or withdrawn from the Office of Administrative Law.

5. Petitioner, Rosemarie Viciconti, agrees to bind anyone who succeeds to her rights and responsibilities, including her heirs or executors of her estate, to the terms of this Settlement Agreement.

6. Petitioner, Rosemarie Viciconti, and respondents acknowledge that this Settlement Agreement terminates any and all litigation between the parties regarding the claims contained in their individual petitions.

7. Petitioner, Rosemarie Viciconti, has voluntarily and without coercion entered into this Settlement Agreement with respondents.

STATE-OPERATED SCHOOL
DISTRICT OF JERSEY CITY

Rosemarie Viciconti
ROSEMARIE VICICONTI
Petitioner

DATE: July 24, 1992

DR. ELENA SCAMBIO
State District Superintendent

DATE: August 28, 1992

MELISSA VANCE KIRSCH, ESQ.
Counsel for Petitioners

DATE: July 9, 1992

KAREN A. MURRAY, ESQ.
Counsel for Respondents

DATE: August 11, 1992

MELISSA VANCE KIRSCH, ESQ.
920 West State Street
Trenton, New Jersey 08618
609/599-2900
Attorney for Petitioners

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STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

CHESTER KAMINSKI, ARSENIO SILVESTRI, ROSEMARIE VICICONTI, LOUIS LANZILLO, and FRANKLIN WILLIAMS,	OFFICE OF ADMINISTRATIVE LAW State of New Jersey
Petitioners	OAL Dkt. Nos. EDU 749-90, 750-90, 751-90, 752-90, 753-90, and 6110-90
v.	
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY and ELENA SCAMBIO, STATE DISTRICT SUPERINTENDENT,	**SETTLEMENT AGREEMENT**
Respondent	

FRANKLIN WILLIAMS,	OFFICE OF ADMINISTRATIVE LAW State of New Jersey
Petitioners	OAL Dkt. No. EDU 6110-90
v.	
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY and ELENA SCAMBIO, STATE DISTRICT SUPERINTENDENT,	**SETTLEMENT AGREEMENT**
Respondent	

AK

Petitioner, Franklin Williams, and respondents hereby agree to settle any and all claims remaining which relate to the issue of sixty-days pay in lieu of sixty-days notice as set forth in the Petition of Appeal, OAL Docket No. EDU 753-90, and the issue of his entitlement to the position of Deputy Superintendent as set forth in Petition of Appeal, OAL Docket No. EDU 6110-90.

1. Petitioner, Franklin Williams, shall withdraw, with prejudice, his claims for and/or relating to the issues of: (a) sixty-days notice in lieu of sixty-days pay; and, (b) his entitlement to the position of Deputy Superintendent following the initial state-takeover. A settlement agreement shall be executed and filed with Judge Arnold Samuels, A.L.J., upon full execution of this document.

2. In consideration of petitioners' withdrawal with prejudice, respondents shall pay petitioner, Franklin Williams, the gross amount of twenty-five thousand dollars ($25,000), which shall be subject to standard and ordinary deductions (federal, state and SSI) prior to disbursement.

3. The check shall be drawn to both petitioner, Franklin Williams, and Margaret Murphy, Esq., and shall be forwarded to Melissa Vance Kirsch, Esq. for distribution to petitioner.

4. Petitioner, Franklin Williams, in consideration of the above payment of monies, agrees to release respondents from any and all claims which he has, and/or may have, relative to or arising out of his claim to sixty-days notice in lieu of sixty-days pay. Petitioner also agrees to release respondents from any and all claims which he has, and/or may have, relative to or arising out of, his claims to the position of Deputy Superintendent. Petitioner further agrees to release respondents from any and all claims which he has, and/or may have, relative to or arising out of, or in connection with, the instant claim being settled and/or withdrawn from the Office of Administrative Law.

5. Petitioner, Franklin Williams, agrees to retire from the employ of respondent school district as of June 30, 1992. Petitioner shall be entitled to any and all benefits for which he is eligible (including, but not limited to, sick leave reimbursement) and are due those employees retiring from the district this year. Petitioner further agrees to submit a letter of resignation, effective June 30, 1992 to Dr. Scambio.

6. Petitioner, Franklin Williams, agrees to bind anyone who succeeds to his rights and responsibilities, including his heirs or executors of his estate, to the terms of this Settlement Agreement.

7. Petitioner, Franklin Williams, and respondents acknowledge that this Settlement Agreement terminates any and all litigation between the parties regarding the claims contained in their individual petitions.

8. Petitioner, Franklin Williams, has voluntarily and without coercion entered into this Settlement Agreement with respondents.

STATE-OPERATED SCHOOL
DISTRICT OF JERSEY CITY

Franklin Williams
FRANKLIN WILLIAMS
Petitioner

DATE: Aug 2, 1992

DR. ELENA SCAMBIO
State District Superintendent

DATE: August 28, 1992

MELISSA VANCE KIRSCH, ESQ.
Counsel for Petitioners

DATE: Aug 6 1992

KAREN A. MURRAY, ESQ.
Counsel for Respondents

DATE:

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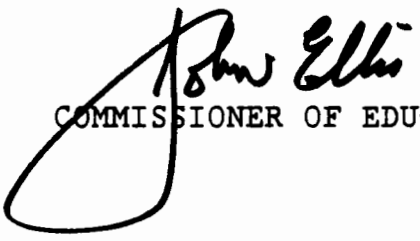
OAL DKT. NOS. EDU 749-90, 750-90, 751-90, 752-90, 753-90 AND 6110-90
(CONSOLIDATED)

CHESTER KAMINSKI, ARSENIO SILVESTRI, ROSEMARIE VICICONTI, LOUIS LANZILLO AND FRANKLIN WILLIAMS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY AND ELENA J. SCAMBIO, STATE DISTRICT SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.



COMMISSIONER OF EDUCATION

NOVEMBER 9, 1992

DATE OF MAILING - NOVEMBER 9, 1992

279-92

279-92

PATRICIA KESHENEFF, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY, RESPONDENT.	:	DECISION

SYNOPSIS

Petitioner, tenured elementary teacher, appealed withholding of her employment and adjustment increments for school year 1991-92. Petitioner had sent letter to parents through students ("kid mail") to advise them of her involuntary transfer. Board withheld her increments for such inappropriate action. Petitioner argued she never received proper notice of Board's action.

ALJ found Board's decision to withhold was correct and within scope of its discretionary authority and that Board properly noticed petitioner. ALJ did find, however, that Board violated Open Public Meetings Act (OPMA) by not discussing the matter, just "rubber stamping" the superintendent's recommendation. ALJ ordered Board to cure the defect through de novo decision to withhold within 40 days or increments would be restored to petitioner.

Commissioner rejected ALJ's conclusion that OPMA had been violated due to lack of discussion by the Board prior to voting on the superintendent's recommendation to withhold petitioner's increments. The Commissioner determined, nonetheless, that it is necessary for the Board to have before it sufficient information to make an informed decision prior to its vote on a withholding recommendation. Matter was remanded to OAL to supplement the record in order to document what information the Board had before it prior to its vote and how that information was secured.

NOVEMBER 9, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7746-91
AGENCY DKT. NO. 288-7/91

PATRICIA KESHENEFF,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL,
Respondent.

Patricia Kesheneff, petitioner, pro se

Martin M. Barger, Esq., for respondent (Reussille, Mausner, Carotenuto, Bruno & Barger, attorneys)

Record Closed: August 31, 1992 Decided: September 18, 1992

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

Patricia Kesheneff (petitioner) appeals withholding of her employment and adjustment increments for the 1991-92 school year by the Holmdel Board of Education (respondent).

This matter was opened before the Commissioner of Education on July 31, 1991. The Board filed an answer on August 5 and on August 9, the Department of Education transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. After notice, a prehearing conference was held by telephone on

November 12, 1991. Participating in the conference were Board counsel, petitioner's then counsel and this judge. Among other things, the matter was set down for hearing on April 24 and May 20, 1992.

Subsequently, counsel decided the matter could proceed on the papers, there being no factual disputes. Hearing dates, accordingly, were adjourned. Later, the petitioner discharged counsel and decided to proceed pro se. The attorney advised the judge by letter of June 30, 1992. The petitioner then wrote directly to the judge, enclosing exhibits and pleading her case. Neither the letter nor the exhibits were cognized and the matter was set down for hearing on July 30. That date then was moved to August 31 when the superintendent of schools was unavailable for July 30. The matter was heard on August 31, 1992 at the Colts Neck Municipal Court and the record closed on that day.

PAROL AND DOCUMENTARY EVIDENCE

The parties stipulate that the petitioner was involuntarily transferred effective Septemher 1, 1991. She wrote a two-page letter addressed "Dear Parents" under date of June 10, 1991. She sent the letter to parents via pupils. This is known in the district as "kid mail." The Board believed this action inappropriate and, as a result, voted to deny the petitioner's salary and adjustment increments for the 1991-92 school year. No Rice notice was provided to the petitioner. There was no private or executive consideration of the question by the Board. Based on a memorandum from the superintendent to the Board, the Board voted the withholdings at a public meeting. It was further stipulated that the petitioner has a good teaching record and received uniformly good evaluations. Stipulated into evidence were the letter to parents (J-1) and a memorandum from Superintendent Brennan to the Board, dated June 25, 1991 (J-2).

Petitioner's Case

The petitioner testified that she was notified on the morning of June 25, 1991 that she would be on the agenda at a special Board meeting to be held that night. She received no Rice notice and believes that, therefore, her rights were violated. The superintendent wrote to her under date of July 1 informing her of the Board's June 25 vote. The letter also explained that the petitioner had failed to follow certain procedures. She stated at hearing that she was unaware of any procedures and unaware of doing any wrong. She sent the letter to parents because

she wanted pupils to be assured they had done nothing wrong. She takes exception to the superintendent's letter believing it betrayed trust.

The petitioner believes she did not put pupils in the middle of a controversy. She simply wanted parents and pupils to know and to know from her what had happened. The petitioner did discuss her transfer with pupils.

The petitioner argues she never received proper notice of the Board's June 25 action. Because there was no prior indication that this would happen and because of the injustice worked on her she should receive her salary and adjustment increments retroactively, with interest.

Board's Case

The Board chose to present no witnesses. The Board asserts that a Rice notice must be given to an employee if and only if there will be private or executive session discussion of the employee action. The individual then is to be notified and given the option to elect public discussion of the issue. Where there is no private discussion scheduled, no Rice notice is necessary.

The Board had no private discussion. There was only a public vote. It was an administrative choice to proceed in this way. The petitioner seems to argue that there should have been private discussion. There was not. This does not rise to the level of a Rice violation, however.

The petitioner admits she discussed the transfer with pupils. This is inappropriate on its face. The letter to parents (J-1) is not merely factual. It says there is no professional reason for the decision to transfer the petitioner. The petitioner then used "kid mail," thereby involving pupils. The "kid mail" procedure is reserved for notices and announcements and public information. There is no provision for personal use of the procedure.

The petitioner could have grieved her transfer under the collective bargaining agreement but did not. She decided to discuss the matter with pupils and decided to send a letter to parents via pupils. The Board acted properly under Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960). There is no proof of arbitrariness or caprice or procedural defect.

DETERMINATION AND ORDER

It is long established in New Jersey that the scope of review in an increment withholding matter is not for the commissioner or administrative law judge to substitute judgment for those who made the decision to withhold increments, but to determine whether they had a reasonable basis for their decision. Kopera at 295.

It is also well established that local board action which lies within the area of a board's discretionary powers will not be upset unless patently arbitrary, without rationale basis or induced by improper motives. Boult and Harris v. Board of Education of Passaic, 1939-49 S.L.D. 7, 13, aff'd St. Bd. of Ed. 1939-40 S.L.D. 15, aff'd 135 N.J.L. 329 (Sup. Ct. 1947), 136 N.J.L. 521 (E. & A. 1948).

Here, the underlying facts are not in dispute. The only question is whether it was reasonable for the Board to conclude as it did upon those facts.

It is difficult to believe that an experienced teacher would not know that only official or, at least, school sanctioned materials could be carried by pupils to parents. The undisputed facts yield only two possible inferences. First, the petitioner truly did not know that personal use of "kid mail" was improper or, second, the petitioner knew, but used "kid mail" for her own purposes. Both propositions are unacceptable.

I **FIND** and **CONCLUDE** that the Board's action withholding the petitioner's employment and adjustment increments was substantively correct. The facts are undisputed, the Board acted upon the facts and the Board's act was not beyond the scope of its discretionary authority.

Procedurally, the Open Public Meetings Act carries nine exceptions to the goal of conducting all meetings of public bodies as open to the public. The personnel exception says that any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of performance, promotion or discipline of any perspective or current public officer or employee may be done at closed session unless the individuals whose rights could be adversely affected request in writing that such matters be discussed at a public meeting. In Rice v. Union Cty. Reg. High School Bd. of Ed., 155 N.J. Super. 64 (App. Div. 1977), it was held that a closed session to discuss the termination of employees is

valid under this exception. However, the public body is required to provide the employees concerned with reasonable notice of its intention to consider in closed session matters related to them in order that they may exercise their statutory right to request that the matter be discussed in public session.

The Board here argues that the act, as interpreted in Rice, requires notice only when there will be a closed session to discuss an employee action. Nevertheless, the Board presents Exhibit J-2, a memorandum from the superintendent to the petitioner. It is stipulated that the petitioner received the memorandum at approximately 11 a.m. on June 25, 1991. In its entirety, the memorandum states:

> Pat, I have been unable to reach you by phone. I was calling to let you know that you will be on the agenda at a special board meeting, June 25, 1991.
>
> I will be recommending to the Board that your increment be withheld for the 1991-92 school year. The reason for this is that you involved children in sending home the letter to parents regarding your transfer. There will be no discussion of this matter between the Board and me, either private or public. The motion will simply appear on the agenda and will be voted on without comment.
>
> Please give me a call if you have any questions or require further information.

It may fairly be inferred from the memorandum that the superintendent had tried to contact the petitioner at least the day before the meeting. When he could not, he resorted to a memorandum delivered by messenger. I **FIND** and **CONCLUDE** that this constitutes reasonable notice.

> N.J.S.A. 10:4-12(b) provides
>
> A public body may exclude the public only from that portion of a meeting at which the public body discusses:
>
> . . .
>
> (8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.

A board of education being a deliberative body, it is difficult to see how it could vote on a matter as important as increment withholding without discussion. Possible explanations include (1) the Board was simply rubber stamping the superintendent's recommendation, a clear failure to cast informed votes, or (2), there had been informal agreement to approve the withholdings before the vote was held, a violation of both the letter and spirit of the act.

This judge observes that certain acts of a board are ministerial; that is, they involve obedience to instructions, but demand no special discretion, judgment or skill. Other actions are not ministerial and do involve the exercise of judgment or discretion. This judge believes that an increment withholding is such a nonministerial action.

I **FIND** and **CONCLUDE** that the foregoing constitutes a procedural violation of the Open Public Mettings Act.

However, a public body may correct an action that does not comply with the Open Public Meetings Act by acting anew at a time when the body does comply with the act. The subsequent de novo action has the remedial effect of retroactively ratifying the prior action nunc pro tunc. Municipal Council of City of Newark v. Essex County Bd. of Elections, _____ N.J. Super. _____ (Law Div. 1992).

The fault not only may be cured but must be cured if the Board does not wish the withholdings, in effect, rescinded and paid to the petitioner. The Holmdel Board of Education and all boards are reminded that assiduous adherence to the requirements of the Open Public Meetings Act is expected of all public bodies.

It is **ORDERED** that the Holmdel Board of Education take action within forty days of the date of final decision in this matter to cure the identified defect or the increments withheld will be deemed restored to the petitioner.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

18 SEPTEMBER 1992
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

9/23/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 28 1992
Date

OFFICE OF ADMINISTRATIVE LAW

km

WITNESS

Patricia Kesheneff

EXHIBITS

J-1 Letter, Parents from Kesheneff, June 10, 1991, 2 pp.

J-2 Memorandum, Brennan to Kesheneff, June 25, 1991

P-1 Observation/Evaluation Forms and Annual Performance Report, Patricia Kesheneff, September 30, 1991; November 21, 1991; May 15, 1992; January 6, 1981; November 4, 1981; January 28, 1977; October 28 and 30, year not stated; November 2, 1983

P-2* Letter, Harvill to Campbell, July 13, 1992

P-3* Letter, HTEA Vice president to Campbell, July 26, 1992

R-1 Memorandum, Corrado to Brennan, June 7, 1991 with Kesheneff letter, 1990-91 Annual Performance Report and Pupil Petition attached

R-2 Letter, Brennan to Kesheneff, July 1, 1991

* Admitted to show receipt, but not the truth or falsity of the matter contained.

PATRICIA KESHENEFF,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Pursuant to the provisions of N.J.A.C. 1:1-18.4, petitioner filed timely exceptions, wherein she averred that, contrary to the initial decision at p. 3 above, she did grieve the transfer that was the subject of the "kid mail" dispute herein, and that she only sent the controverted letter in response to concerns expressed by her students regarding their being to blame for her transfer. No reply was filed by the Board.

Upon careful consideration, the Commissioner cannot concur with the ALJ that this matter should be remanded to the Board for de novo action on petitioner's withholding as a result of OPMA defect.

Initially, the Commissioner rejects the notion that a Board's failure to discuss a recommendation for increment withholding prior to acting on such recommendation constitutes a violation of OPMA; indeed, OPMA places no such mandate on any action taken by a Board.

Notwithstanding the above, it is required, prior to a board's action to accept or reject a recommendation to withhold, that the board have before it sufficient information on which to make an informed decision.

The record of the present matter, however, is devoid of testimony or evidence as to what the Board actually had before it when it voted, as the memorandum described at p. 2 above as being from Superintendent Brennan to the Board (J-2) is in fact from Brennan to petitioner. (See further discussion at p. 5, where memorandum is cited in full.) Therefore, it is necessary to remand this matter to supplement the record in order to document what information the Board had before it when it voted and how that information was secured.

Accordingly, the initial decision of the Office of Administrative Law is reversed and the present matter remanded for supplementation of the record consistent with the Commissioner's directive herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 9, 1992

DATE OF MAILING - NOVEMBER 9, 1992

279-92

EDU #7746-91
C # 279-92
EDU #9075-92
C # 39+-93
SB # 17-93

PATRICIA KESHENEFF,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Remanded by the Commissioner of Education, November 9, 1992

Decision on remand by the Commissioner of Education, March 15, 1992

For the Petitioner-Appellant, Patricia Kesheneff, pro se

For the Respondent-Respondent, Reusille, Mausner, Carotenuto, Bruno & Barger (Martin M. Barger, Esq., of Counsel)

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

June 2, 1993

Date of mailing 04 JUN 1993

279-92

39+-93
(279-92)

PATRICIA KESHENEFF,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY.

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON REMAND

SYNOPSIS

Initial decision of September 18, 1992 had found and concluded that Board's action in withholding increments of tenured elementary teacher was substantively correct and petitioner had reasonable notice that Board would act. (Rice) Also, ALJ had concluded withholding decision was not merely ministerial but involved exercise of discretion, judgment or skill. Decision was remanded by Commissioner, however, for narrow purpose of supplementing the record and of determining what information the Board had before it when it voted to withhold petitioner's increments so that a determination could be made as to whether the Board had acted arbitrarily or unreasonably.

On remand, ALJ found that Board had sufficient information before it at time it voted to withhold and that Board's action may not be upset unless it is patently arbitrary, without rational basis or induced by improper motives. (Kopera) ALJ concluded withholding was proper. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

MARCH 15, 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9075-92
AGENCY DKT. NO. 288-7/91
(EDU 7746-91 ON REMAND)

PATRICIA KESHENEFF,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL,
Respondent.

Patricia Kesheneff, petitioner, pro se

Martin M. Barger, Esq., for respondent (Reusille, Mausner, Carotenuto, Bruno & Barger, attorneys)

Record Closed: January 7, 1993 Decided: January 26, 1993

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

Patricia Kesheneff (petitioner) appealed withholding of her employment and adjustment increments for the 1991-92 school year by the Holmdel Board of Education (respondent). The matter was opened before the Commissioner of Education on July 31, 1991. The Board filed an answer and the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. After a

prehearing conference, the matter was set down for hearing on April 24 and May 20, 1992. The petitioner was at that time represented by counsel.

Subsequently, counsel decided the matter could proceed on the papers, there being no facts in dispute. Hearing dates were adjourned. Later, the petitioner discharged counsel and decided to proceed pro se. Her attorney advised the judge by letter of June 30, 1992. The petitioner then wrote directly to the judge, enclosing exhibits and pleading her case. Neither the letter nor the exhibits were cognized and the matter was set down for hearing on July 30. That date then was moved to August 31 because the superintendent of schools was unavailable on July 30. The matter was heard on August 31, 1992 at the Colts Neck Municipal Court.

An initial decision issued on September 18, 1992. The decision found and concluded that the Board's action withholding the petitioner's employment and adjustment increments was substantively correct and that the petitioner had reasonable notice that the Board would act as required by Rice v. Union Cty. Reg. High School Bd. of Ed., 155 N.J. Super. 64 (App. Div. 1977). The decision also determined that the withholding decision was not merely ministerial; that is, it involved the exercise of discretion, judgment or skill. The decision found a technical violation of the Open Public Meetings Act and explained how the defect could be cured. The Board was ordered to take action within forty days to cure the identified defect.

On November 9, 1992, the Commissioner agreed with the first two holdings and rejected the third. Among other things, the Commissioner stated that it is required that a board have before it sufficient information on which to act before accepting or rejecting a recommendation to withhold increments. The matter was remanded for the narrow purpose of determining what information the Board had before it when it voted to withhold the petitioner's increments and to determine how that information was secured.

Further hearing was conducted, by telephone, on January 7, 1993. Dr. Timothy C. Brennan, who was superintendent of schools at the time the withholdings were voted, testified. He stated that the petitioner's building principal sent him a copy of a letter the petitioner sent home to parents via pupils dated July 7, 1991 (R-1). It was the superintendent's practice to send to Board members each Friday a mailing containing information related to Board business. On Friday, June 7, 1991, he sent the two-page Kesheneff letter and the principal's transmitting

memorandum to the Board. Petitioner's evaluation was attached by her to her letter. The superintendent did not transmit a copy of a pupil petition the building principal had sent to the superintendent.

The witness stated there was no other information in the mailing itself. His cover memorandum stated, "Please see confidential memorandum from Frank Corrado, attached, " or words to that effect. The witness also stated that petitioner's letter is dated June 10, 1991 and the memorandum from the principal is dated June 7, 1991. The witness could not explain the discrepancy.

The petitioner testified that the principal's memorandum is hearsay, the dates on the letter to parents and the principal's memorandum do not agree and that she generally denies all allegations although she admits sending the letter home. She did not know of a pupil petition until after the fact.

DETERMINATION AND ORDER

Whether the building principal's information was correct or not, his cover memorandum, the petitioner's letter to parents and the evaluation sheet enclosed with the letter were before the Board when the Board considered the resolution to withhold increments. The petitioner admits sending the letter and using pupils to carry it to parents.

Having reviewed the entire record, I **FIND** that the Board had sufficient information before it at the time it voted to withhold the subject withholdings. An action by a local school board that lies within the area of its discretionary powers may not be upset unless it is patently arbitrary, without rational basis, or induced by improper motives. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960). The same case directs that the focus in a withholding appeal must be whether the Board had a reasonable basis for its conclusion and action to withhold. I **FIND** and **CONCLUDE** that the Board has satisfied the Kopera mandate here and that the complained of withholding was in all respects proper.

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

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

26 JANUARY 1993
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

1/28/93
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 1 1993
Date

OFFICE OF ADMINISTRATIVE LAW

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WITNESSES

Dr. Timothy C. Brennan
Patricia Kesheneff

EXHIBITS

J-1	Letter, Parents from Kesheneff, June 10, 1991, 2 pp.
J-2	Memorandum, Brennan to Kesheneff, June 25, 1991
P-1	Observation/Evaluation Forms and Annual Performance Report, Patricia Kesheneff, September 30, 1991; November 21, 1991; May 15, 1992; January 6, 1981; November 4, 1981; January 28, 1977; October 28 and 30, year not stated; November 2, 1983
P-2*	Letter, Harvill to Campbell, July 13, 1992
P-3*	Letter, HTEA Vice president to Campbell, July 26, 1992
R-1	Memorandum, Corrado to Brennan, June 7, 1991 with Kesheneff letter, 1990-91 Annual Performance Report and Pupil Petition attached
R-2	Letter, Brennan to Kesheneff, July 1, 1991

* Admitted to show receipt, but not the truth or falsity of the matter contained

OAL DKT. NO. EDU 9075-92

PATRICIA KESHENEFF,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

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

Upon review, the Commissioner concurs with the ALJ that the record of this matter, supplemented in accordance with the Commissioner's prior directive on remand, supports the Board's contention that its decision to withhold petitioner's increment was neither arbitrary nor unreasonable and is therefore not subject to upset by the Commissioner. Kopera, supra

Accordingly, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

MARCH 15, 1993

COMMISSIONER OF EDUCATION

DATE OF MAILING - MARCH 15, 1993

280-92

280-92

UPPER TOWNSHIP EDUCATION ASSOCIATION ON BEHALF OF CHRISTINE ARGOE ET AL.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF UPPER TOWNSHIP, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners, Education Association and two teaching staff members, claimed entitlement to sick and personal leave under N.J.S.A. 18A:30-3. Issues concerning Petitioner Argoe were resolved. Remaining issue was whether Petitioner Peltz was entitled to accumulated prior unused sick leave.

Citing Court interpretations of term "steadily employed," ALJ found because Petitioner Peltz did work 90% of time for last 5 school years, she was steadily employed since September 1, 1987. ALJ concluded Petitioner Peltz was entitled to accumulate sick leave of 26 days unused prior to January 1991.

Commissioner adopted findings and determination in initial decision.

NOVEMBER 10, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 346-92

AGENCY DKT. NO. #422-12/91

UPPER TOWNSHIP EDUCATIONAL ASSOCIATION ON BEHALF OF CHRISTINE ARGOE, ET AL

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF UPPER, CAPE MAY COUNTY,

Respondents.

Richard A.Friedman, Esquire, and Tanya Pushnock Friedman, Esquire, (Zazzali, Zazzali, Fagella and Nowack, attorneys) for petitioners

Phyllis Coletta, Esquire, (Megargee, Youngblood, Franklin and Corcoran, attorneys) for respondent

Record Closed: August 14, 1992 Decided: September 25, 1992

BEFORE **EDGAR R. HOLMES, ALJ:**

The petitioners appealed to the Commissioner of Education to resolve a dispute arising under the School Laws, pursuant to N.J.S.A. 18A:6-9. The matter was transmitted to the Office of Administrative Law (OAL) on January 13, 1992, to be heard as a contested case according to N.J.S.A. 52:14B-1 et. seq. and N.J.S.A. 52:14F-1 et. seq. The parties submitted a stipulation of facts and relied upon briefs in lieu of oral argument. In the stipulation of facts the parties stated that they had resolved all issues between the Board of Education and Christine Argoe. The stipulation indicates that the single issue remaining is whether Caroline Peltz is entitled to accumulate prior unused sick leave.

Caroline Peltz has been employed by the Upper Township Board of Education in a variety of positions since 1987 except for a five month period from January 29, 1991, through the end of the school year in June of 1991. She is entitled to her accumulated sick leave of 26 days, if and only if, with this employment record, she can be characterized as having been "steadily employed." N.J.S.A. 18A:30-3. The term "steadily employed" has frequently been recited in both agency and judicial opinions. However, It has seldom been explained in more than a cursory fashion.

In DeGroot v. Board of Education of Passaic County; 13 N.J.A.R. 438, a teacher who was also a football coach, argued, (in the alternative) that he was also steadily employed as a football coach in addition to being steadily employed as a teacher for the purpose of receiving full pay (teaching and coaching salary) during a period of sick leave. The Administrative Law Judge (ALJ) concluded that coaching duties did not constitute steady employment because they were not "regular or continuous employment for the entire school year or for the entire academic year." DeGroot, Ibid. 448. Both the Commissioner and the State Board of Education adopted and affirmed the ALJ's reasoning in that case.

In Schwartz v. Dover Public Schools: 180 N.J. Super. 222 (App. Div. 1981) the Court also defined the term "steadily employed." It held that: It is more likely that the legislature was contemplating regular, full time employees and did not contemplate employees who are hired for less than a full school year. Schwartz, Ibid. p. 227

No more extensive definitions of the term "steadily employed" have been cited by these parties. Yet both DeGroot and Schwartz can be distinguished from the instant case. DeGroot claimed steady employment as a football coach, a twelve week period of time. The ALJ illustrated the absurdity of this claim by positing the claim of "club advisors or even someone hired to perform a single task for only a few days during the year." DeGroot, Ibid., p. 448. In Schwartz the Court was interpreting a contract provision which required that sick leave be granted at the rate of one per month for those persons employed after the school year began. However, the Court implicitly recognized that employees who work less than the full school year are "steadily employed." The Court said that a "... reasonable interpretation is to allow a proportionate amount of sick leave for those employed less than a full school year." Schwartz, Ibid. p. 227

In South Orange - Maplewood Education Association, et al v. Board of Education, 1985 S.L.D. _____ (Comm'r of Education, June 3, 1985) referred to by Arnold Samuels, ALJ in DeGroot supra. p. 445, the term "steadily employed" was defined quantitatively. There, lunch room employees who worked two to four weeks less than the number of school days were found to be "steadily employed." In South Orange the ALJ and the Commissioner actually calculated the percentage of time the lunch room aids worked compared to a school year and found that in 1983-84, they worked 91.26 percent of the time and in 1984-85, they worked 94.4 percent of the time.

Petitioner Peltz is still employed by the respondent Board of Education. For the past five (5) school years, 87/88, 88/89, 89/90, 90/91, 91/92., Peltz has been employed all but five (5) months. Therefore, she has been employed 45 months of a possible 50 months, or 90 percent of the time.

In addition, the intent of the statute is to reward long term, faithful employees. It serves no other purpose. Peltz is a long term faithful employee. She accepted every position offered to her during the five years. She accepted a temporary appointment as a resource room long term substitute in 1990, then returned to her position as an aide when that appointment expired. She is entitled to the protection of the statute. A contrary result would deprive the statute of its full force and effect. A parsimonious school board could regularly lay off long term faithful employees at four (4) or five (5) year intervals and save accumulated sick time. Such a plan could also backfire when the practice was recognized for what it is, an attempt to circumvent the statute. Many employees would utilize sick leave to the fullest extent possible so that they would not lose it; thereby requiring the Board to employ extra people for the contingency.

I **FIND** and **CONCLUDE** that petitioner Peltz has been steadily employed by the Board of Education of Upper Township since September 1, 1987 and is entitled to the accumulated sick leave of 26 days earned prior to January 1991.

I **FURTHER CONCLUDE** that petitioner Argoe has withdrawn her request for a hearing and her appeal is **DISMISSED WITH PREJUDICE.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9/25/92
Date

EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

9/30/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 02 1992
Date

OFFICE OF ADMINISTRATIVE LAW

lmh

UPPER TOWNSHIP EDUCATION ASSOCIATION ON BEHALF OF CHRISTINE ARGOE ET AL.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF UPPER TOWNSHIP, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review and consideration, the Commissioner concurs with the ALJ that Petitioner Peltz, whose sick leave usage is the only issue remaining herein, was steadily employed by the Board within the intent of controlling statute and is therefore entitled to accumulated sick leave as specified.

Accordingly, the initial decision of the Office of Administrative Law is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

NOVEMBER 10, 1992

COMMISSIONER OF EDUCATION

DATE OF MAILING - NOVEMBER 10, 1992

281-92

281-92

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH BOUND BROOK, PETITIONER, V. MAYOR AND COUNCIL OF THE BOROUGH OF SOUTH BOUND BROOK, SOMERSET COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

NOVEMBER 13, 1992

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH BOUND BROOK,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF SOUTH BOUND BROOK, SOMERSET COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

Paul H. Green, Esq., for Petitioner
(Green & Dzwilewski, P.A.)

William T. Cooper, Esq., for Respondent

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed by the Board of Education of the Borough of South Bound Brook (Board) on May 26, 1992, seeking restoration, on the grounds of necessity for a thorough and efficient education, of reductions by the Mayor and Council (Council) in the current expense tax levy for the 1992-93 school year. These reductions were made pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2 following voter rejection of the Board's proposed budget on April 7, 1992 and after consultation with the Board as required by law. On July 14, 1992, the Board submitted a position paper which reduced the amount of tax levy in dispute by $2,000.

The total proposed and certified budgets, as well as the amounts in dispute in this matter, are set forth below:

Proposed Tax Levy Adopted by Board	Amount of Tax Levy Certified by Council
Current Expense $2,956,898	$2,702,798

Amount of Reduction By Governing Body	Amount in Dispute Before Commissioner
Current Expense $ 254,100	$ 252,100

The reductions at issue were effectuated by the Council in its resolution dated April 28, 1992 and are as follows:

Account 110.1 - Salary - Board Secretary's Office $11,000

Elimination of secretarial help and stipend for superintendent.

Account 120.4 - Other Contracted Services *$ 4,000

Elimination of professional negotiator.

Account 130.4 - Administrator's Office, Expenses **$ 1,000

Having administrators pay own dues.

Account 130.6 - Administration, Misc. Expenses **$ 2,000

Having administrators pay own dues.

Account 212 - Salaries, Supervisors $72,000

Elimination of two supervisory positions.

Account 213 - Salaries, Teachers $10,000

Reduction of teacher salary increase to 6.8%.

Account 214 - Salaries, Other Instructional $49,600

Elimination of full-time guidance counselor.

Account 215.2 - Salaries, Secretarial $20,000

Reduction because of cut in account 212.

Account 230.1-2 - Library Books/Periodicals $ 1,000

Amount not expended in 1991 budget.

Account 230.3 - AV Materials $ 1,000

Amount not expended in 1991 budget.

Account 240 - Teaching Supplies	$ 5,000
Amount not expended in 1991 budget.	
Account 250.3-- Instruction - Misc. Expenses	$ 1,000
Amount not expended in 1991 budget.	
Account 610.1 - Salaries, Custodial	$30,000
Elimination of one full-time and one part-time custodian.	
Account 720.1 - Contracted Services, Grounds	$ 1,000
Reduction of outside contractors.	
Account 720.2 - Contracted Services, Buildings	$ 1,000
Reduction of outside contractors.	
Account 720.3 - Contracted Services, Equipment Repair	$ 1,000
Reduction of outside contractors.	
Account 730.3 - Purchase of Equipment	*$ 1,000
Elimination of purchase of T.V., Cart, V.C.R.	
Account 820.2 - Employee Insurance	$25,000
Reduction of health benefit costs because of eliminated positions.	
Account 920 - Other Expenses, Food Service	$ 5,000
Should stay at 1991-92 costs.	
Account 930 - Deficit, Food Service	$12,500
Should stay at 1991-92 costs.	

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* The Board had initially appealed the entire amount reduced by the Council, but in its position paper of July 14, 1992 it agreed to accept $1,000 of the reduction in Account 120.4 and the entire $1,000 reduction in Account 730.3.

** The Council in its response of August 3, 1992 stated that since the dues in Accounts 130.4 and 130.6 are contracted benefits, the funds should remain in the budget.

On June 10, 1992, the Council filed an answer admitting to the amounts set forth above and the procedures specified in the Petition of Appeal, but denying the allegation by the Board that the reductions will result in insufficient funds to provide a thorough and efficient education. On June 24, 1992, the Council submitted a copy of its resolution and the specific suggested line item reductions. On July 14, 1992, a position paper was filed by the Board pursuant to N.J.A.C. 6:24-7.8. The Council filed a response on August 3, 1992, also pursuant to N.J.A.C. 6:24-7.8. On August 17, 1992, the Board filed a reply to the Council's response.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals the Commissioner must determine whether a district board of education has demonstrated that the

amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Mindful, then, of the balance to be applied in his standard of review, the Commissioner makes the following determinations with respect to the specific line items reduced by the Council and appealed by the Board.

Account 110.1 - Salary, Board Secretary's Office $11,000

The Council's position is that the superintendent can take on the additional responsibility of school business administrator without the necessity of an additional fee. The Council also stated that no further clerical assistance should be needed in the superintendent's office. The Board's position is that an agreement was reached with the superintendent under which he would assume the duties of school business administrator for an additional stipend and that it would be unreasonable to expect the superintendent to accept the additional workload and responsibility without some additional compensation. The Board also stated that there are two full-time secretaries in the central office and that additional hourly clerical help is required to complete all the necessary paperwork imposed by State and Federal statutes and regulations.

The Commissioner finds that the Board has already taken steps to reduce costs by eliminating a central office administrative position and assigning additional duties to the superintendent. It is not unreasonable that a stipend be paid for these additional responsibilities which are mandated by statute and code. The Board also has demonstrated the necessity for the hourly clerical services to meet the demands of State and Federal requirements. Accordingly,

the Commissioner determines that the Council's reduction of $11,000 in this account would significantly impair the district's ability to provide a thorough and efficient education, and this amount is restored.

Account 120.4 - Other Contracted Services $ 4,000

The Council's position is that a professional negotiator is not needed since the teacher contract has been settled. The Council further stated that any assistance needed for development of a salary guide and wording of the contract could be taken out of the district's legal budget. The Board's position is that $1,000 of this amount was budgeted for potential arbitration, and this reduction will be accepted. The Board appeals the $3,000 for the professional labor negotiator on the basis that the Board does not have the expertise necessary to properly safeguard the district's interests with the Education Association, which, the Board states, is represented by a professional negotiator. It should be noted that the Council in its rationale alludes to the potential necessity of professional services in this area by stating that costs could be funded from the district's legal budget.

The Commissioner determines that, while he is sympathetic to the Board's concern for expert assistance in this matter, he must find such services, while highly desirable, do not meet the standard of being necessary for a thorough and efficient education. The entire reduction in this account of $4,000 is sustained.

Account 130.4/130.6 - Administration, Expenses $ 3,000

The Council, in its response of August 3, 1992, reversed its initial position on these reductions and stated that, since these line items for payment of administrative dues are contracted

benefits, they should remain in the budget. The Board's position is based on the contractual obligations for these expenditures. The Commissioner determines that in light of the agreement between Board and Council on the necessity for these funds, the $3,000 is restored.

Account 212 - Salaries, Supervisors $72,000

The Council's position is that the size of the school district does not warrant five supervisors and that the two principals can be assigned additional supervisory duties. The Board states that the district has only two supervisors, one for special services and one for reading, and that their duties cannot be assigned to the building principals. The Board states that the other three positions cited by the Council are the two principals and the superintendent. The Board notes the highly technical provisions of special education and the critical necessity of an effective reading program for a thorough and efficient education. The Board also states that it just completed the second year of a newly developed reading program which could not be continued with the elimination of the supervisor.

The Commissioner determines that the instructional areas involved in this issue are both critical to the provision of a thorough and efficient educational program and that proper supervision of these services can most effectively be provided by persons appropriately trained in those disciplines. The reduction of $72,000 is therefore restored.

Account 213 - Salaries, Teachers $10,000

The Council's position is that a reduction of $10,000 in the account will still allow for a 6.8% increase in salaries which it feels is sufficient. The Board's position is that the Council's

calculation was based on a comparison of the amount budgeted in 1991-92 with the amount proposed in 1992-93, but that the amount actually spent in 1991-92 exceeded the amount budgeted. The Board submitted documentation, Exhibit D, demonstrating the necessity for the full amount proposed for 1992-93. It should be noted that the Board has taken steps to control costs in this area and that the proposed budgeted amount for 1992-93 is less than the audited expenditure in this account in 1990-91.

The Commissioner finds that the Board has effectively justified the need for these funds to provide a thorough and efficient education, and the $10,000 is restored.

Account 214 - Salaries, Other Instructional $49,600

The Council's position is that a guidance counselor is not needed in a district of the size. The Board's position is the district has many pupils with problems that only a full-time guidance counselor can address. The Board also notes that the guidance counselor provides many services beyond individual student counseling and submitted a summary of the counselor's job functions in Exhibit E.

The Commissioner finds and determines that a concern with the total child is a critical element in the provision of a thorough and efficient education and that the district has effectively justified the need for a guidance counselor. The reduction of $49,600 is therefore restored.

Account 215.2 - Salaries, Secretarial $20,000

The Council's position is that a secretary for the supervisor of special services is not necessary, based on its elimination of the two supervisory positions. The Board's position

is, as stated above, that the two supervisory positions are indeed necessary, but that, under any circumstances, a secretary to handle the many filing and typing requirements under special services is necessary.

The Commissioner finds that the Council's reduction in this area was arbitrary since it did not consider the specific duties of this position but rather made a judgment based on its rationale for other positions. The reduction of $20,000 is therefore restored.

Account 230.1-3 - Library Books, AV Materials $ 2,000

The Council's position is based on its understanding that the amount budgeted in this account in 1990-91 was not spent. The Board states that the amount budgeted in 1991-92 was almost entirely expended and that the amount budgeted in 1992-93 for line items 230.1 and 230.2 was not increased and for 230.3 was decreased.

The Commissioner finds that the Council's position is arbitrary since there were audited expenditures in 1990-91 and a reduction in the amount budgeted for 1992-93 in comparison with that for 1991-92. The Commissioner also determines that provision of sufficient school library and audio-visual materials is essential to a thorough and efficient education. The reduction of $2,000 is therefore restored.

Account 240 - Teaching Supplies $ 5,000

The Council's position is based on its understanding that the amount budgeted in this line item in 1990-91 was not spent. The Board states that much of this account has been expended for 1991-92 and that the increase for 1992-93 in only 2.3%. Based on the reasons specified for Account 230, the Commissioner determines that the $5,000 must be restored.

Account 250.3 - Instruction - Misc. Expenses $ 1,000

The Council's position is based on its understanding that the amount budgeted in this account in 1990-91 was not spent. The Board explained the purpose of this account for many miscellaneous expenses for instruction but did not demonstrate any negative impact with the reduction on the provision of a thorough and efficient education. The Commissioner determines that the $1,000 reduction is sustained.

Account 610.1 - Salaries, Custodial $30,000

The Council's position is that the building can still be maintained in a safe and healthy condition with the elimination of one full-time and one part-time custodian. The Board's position is that the current staffing of five full-time and three part-time custodians is essential to properly maintain the three buildings and the grounds. There is contradiction between the parties as to whether or not the Borough of South Bound Brook maintains the school athletic fields and playgrounds. It is not disputed, however, that the custodians are responsible for not only cleaning and maintaining the inside of the buildings, but also maintaining the grounds by mowing grass, trimming shrubs and picking up trash.

The Commissioner finds that the Board has supported the necessity for the current custodial staffing level and that the $30,000 is therefore restored.

Accounts 720.1-3 Contracted Services $ 3,000

The Council's position is that the Board should make every effort to reduce its reliance on outside contractors. The Board states that it has already reduced the amount proposed for 1992-93 by $3,450 from the 1991-92 appropriations and that further

reductions are not possible. The Board further states that there are maintenance projects that require experienced contractors. It should be noted that the district has obviously made an effort to control costs in this area since the 1992-93 proposed amount is not only less than the budgeted amount for 1991-92 but also less than the audited expenditures for 1990-91. The Commissioner therefore determines that the $3,000 be restored.

Account 730.3 - Purchase of Equipment $ 1,000

The Council eliminated the purchase of one television and cart and one video cassette recorder. Although the Board initially appealed this reduction, it subsequently agreed. This reduction of $1,000 is sustained.

Account 820.2 - Employee Insurance $25,000

The Council's basis for this reduction was the personnel reductions it recommended. The Board's position is that neither the personnel reductions nor this employee insurance reduction are justified.

The Commissioner finds that since the employee reductions proposed by the Council have not been upheld, sufficient funds must be provided for employee insurance. The Commissioner therefore determines that this $25,000 is restored.

Accounts 920/930 - Food Service $17,500

The Council's position is that these costs for food services should be held to the 1991-92 costs. The Board's position is that it contracted with a food service company for 1991-92 and that the budgeted amounts for 1991-92 do not accurately reflect the expenditures for this service.

The Commissioner finds that the Council presented no reasonable procedure for its reduction to be implemented and that contractual obligations must legally be upheld. Therefore, it is determined that the $17,500 is restored.

SUMMARY

For the reasons set forth above, the Commissioner determines to restore $248,100 and sustain $6,000 of the $254,100 in current expense reductions appealed herein, as summarized by the chart below:

Account		Restored	Sustained
110.1	Salary, Board Secretary's Office	$ 11,000	
120.4	Other Contracted Services		$4,000
130.4/ 130.6	Administration, Expenses	3,000	
212	Salaries, Supervisors	72,000	
213	Salaries, Teachers	10,000	
214	Salaries, Other Instructional	49,600	
215.2	Salaries, Secretary	20,000	
230.1-3	Books, AV Materials	2,000	
240	Teaching Supplies	5,000	
250.3	Instruction, Misc. Expenses		1,000
610.1	Salaries, Custodial	30,000	
720.1-3	Contracted Services	3,000	
730.3	Purchase of Equipment		1,000
820.2	Employee Insurance	25,000	
920	Food Service		
930		17,500	
	TOTAL	$248,100	$6,000

Accordingly, the Somerset County Board of Taxation is directed to make the necessary adjustment as set forth below to reflect a total of $2,950,898 to be raised in tax levy for current expense purposes for the Borough of South Bound Brook Board of Education for the 1992-93 school year.

	Current Expense
Original Tax Levy	$2,956,898
Reduction	$ 254,100
Tax Levy After Reduction	$2,702,798
Restoration	$ 248,100
Tax Levy After Restoration	$2,950,898

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 13, 1992

DATE OF MAILING - NOVEMBER 13, 1992

281-92

C #281-92
SB # 64-92

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH BOUND BROOK,

PETITIONER-RESPONDENT,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF SOUTH BOUND BROOK, SOMERSET COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, November 13, 1992

For the Petitioner-Respondent, Green & Dzwilewski
(Paul H. Green, Esq., of Counsel)

For the Respondent-Appellant, William T. Cooper, III, Esq.

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

April 7, 1993

Date of mailing 12 APR 1993

282-92

BOARD OF EDUCATION OF THE BOROUGH OF SEASIDE HEIGHTS,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF SEASIDE HEIGHTS, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

NOVEMBER 13, 1992

BOARD OF EDUCATION OF THE BOROUGH OF SEASIDE HEIGHTS,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF SEASIDE HEIGHTS, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

For Petitioner, David M. Casadonte, Esq.

For Respondent, Thomas M. Savon, Esq. (Gilmore & Monahan)

This matter was opened before the Commissioner on June 17, 1992 by way of a Petition of Appeal from the Seaside Heights Board of Education (Board) appealing the reductions in the 1992-93 current expense tax levy imposed by the Mayor and Council of the Borough of Seaside Heights (Borough) after the defeat of the budget by the voters of the district on April 7, 1992. On July 8, 1992 the Borough submitted its Answer. Position Statements were filed by the Board and the Borough on July 22 and August 7, respectively, whereupon the record in this matter closed.

On April 7, 1992 the voters of Seaside Heights defeated the current expense tax levy proposed by the Board in the amount of $1,275,044. They likewise defeated a $150,000 capital outlay cap waiver for a roof replacement which was subsequently appealed to the Commissioner on an emergent basis which was granted by the

Commissioner and not opposed by the Borough. (See In the Matter of the Cap Waiver Appeal of the Seaside Heights School District, July 13, 1992.) This matter before the Commissioner is therefore limited solely to the reductions imposed in the 1992-93 current expense tax levy.

Subsequent to the defeat of the budget by the voters of Seaside Heights, the Board and the Borough, pursuant to the requirements of N.J.S.A. 18A:22-37 consulted on the defeated budget whereupon the Borough reduced the current expense tax levy by $50,000. Consequently, the monies in contention in this consolidated matter are set forth below:

	Proposed Tax Levy Adopted by Board	Amount of Tax Levy Certified by Borough
Current Expense	$1,275,044	$1,225,044

Amount of Reduction By Borough	Amount in Dispute Before Commissioner
$ 50,000	$ 50,000

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East

Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

In the instant matter, the Commissioner notes that the Board in its Position Statement contends that the Borough has failed to meet the criteria for providing a statement of reasons for the reductions imposed by it subsequent to the budget defeat as set forth in Deptford, supra. The Board contends that in order to meet the requirements of Deptford the governing body must set forth a statement of detailed reasons for each of its line item reductions at the time such reductions are certified to the county board of taxation. In the instant matter, the Board argues that the Borough "...simply sets forth the percentage increase from the previous year's budget, without a detailed statement as mandated by the Court's decision in Deptford." (Board's Position Statement, at p. 1)

The Commissioner notes that the Board's argument presented above, if found to be persuasive by the Commissioner, impacts significantly upon the standard of review to be applied by him in deciding this case. In reversing the Commissioner in the case of Board of Education of the Township of Rochelle Park v. Mayor and Council of the Township of Rochelle Park, 1991 S.L.D. 1736, reversed/remanded July 1, 1992, the State Board held that failure to

meet the requirements of Deptford, supra, shifts the burden of proof to the governing body. In rendering judgment in this matter, therefore, the Commissioner must also determine whether the Borough has met the criteria established in Deptford as a prerequisite to determining what standard of review to apply.

The Commissioner notes that the Borough established the aforesaid tax levy by imposing the following reductions:

Administration Salaries	$ 2,400
Instructional Salaries	24,700
Operation of Plant - Salaries	1,500
Operation of Plant - Heat	4,000
Fixed Charges - Soc. Sec.	4,000
Fixed Charges - Insurance	1,000
Fixed Charges - Unemployment	3,000
Food Services - Deficit	5,000
Percep. Imp. Salaries	2,000
Preschool Salaries	1,200
Speech Salaries	1,200
Total	$50,000

The reductions indicated above are taken directly from the copy of Resolution #92-97 of the Borough provided to the Commissioner by the Board in its Petition of Appeal as Exhibit A.

When the Borough provided its Answer to the Petition of Appeal, it included the same resolution as its own Exhibit A which then included "reasons" hand-printed onto the resolution as indicated below:

Administration Salaries	$ 2,400	8-16% Increase Excessive
Instructional Salaries	24,700	8-16% Increase Excessive
Operation of Plant - Salaries	1,500	8% + OT Increase Excessive
Operation of Plant - Heat	4,000	31% Increase Unjustified
Fixed Charges - Soc. Sec.	4,000	Figures Duplicated
Fixed Charges - Insurance	1,000	20% Increase Uncalled for
Fixed Charges - Unemployment	3,000	Fund Should Have Surplus
Food Services - Deficit	5,000	Extraordinary Expense One Year Only
Percep. Imp. Salaries	2,000	Salary Increase Excessive
Preschool Salaries	1,200	9-13% Increase Excessive
Speech Salaries	1,200	20% Increase Excessive
Total	$50,000	

Since the copy of the aforesaid resolution provided by the Board at the time of its appeal and containing no reasons is a copy of the Borough's original resolution as certified by its Borough Clerk, the Commissioner must conclude that the reasons provided by the Borough in the form of hand-printed additions to its resolution establishing the tax levy was first provided to the Commissioner and the Board with its Answer.

BOARD'S POSITION

As indicated by the Commissioner in considering the standard of review to be applied in this matter, the Board presents the general argument that the Borough has failed to meet the criteria for justifying its line item reductions as delineated in Deptford, supra. The Board, for its part, sets forth the following as justification for requesting that the Commissioner restore the amounts by which the Borough has reduced its current expense tax levy.

Administration Salaries $2,400

The Superintendent's contract expires on July 30, 1992 and, as a result, the Board is in the process of hiring a new Superintendent. In order to assist in the search process, the Board has contracted with a Search Service in order to find a qualified Superintendent, at a cost of $6,200. The position is being advertised at a starting salary of $55,000.

In addition, certain staff positions, besides the teachers' positions, are subject to negotiations for the 1992-93 school year, including the following:

(a) The Board Secretary presently earns $24,000 and the Board budgeted $28,000 for the position, which salary seems to be the norm according to other districts.

(b) The Board office clerk presently earns $6,000 and the Board budgeted $7,581.60 for the position.

(c) The Treasurer of School Monies presently earns $1,800 and the Board budgeted $1,944, which is a minor increase.

(d) The Superintendent presently earns $55,000 and the Board budgeted $59,400, which is approximately an eight percent increase and said salary is based on the norm of similar districts.

Instructional Salaries $24,700

The instructional salaries are subject to negotiations for the 1992-93 school year with the Teachers Association.

The Board budgeted $385,630.51. The Board arrived at the budgeted figure by using the present teachers' salaries as a base and factoring in an eight percent increase, because of the new contract that is anticipated.

The eight percent increase, although tentative, seems to be the norm in the industry for this type of district.

In arriving at the line item appropriation, the Board also factored in substitute teachers' pay for grades kindergarten through sixth and special education class teachers, which figure was based on the current year's average substitute wages.

In addition, it is important to point out that due to the changes in programs, such as Comp Ed, the State Aid for at risk students is $6,481 less for the 1992-93 school year and, as a result, the aforementioned funds must be made up by the Board for salaries.

Operation of Plant - Salaries $1,500

The Borough did not provide an explanation for justifying its deduction to the operation of plant/salaries. The salaries for operation of the plant consist of two full-time custodians, one substitute custodian and the payment of overtime.

The Board arrived at the budgeted figure using $1,000 for the substitute custodian, $5,000 for overtime and approximately an eight percent increase in custodian wages. The overtime pay is based on the current year's average payment and the eight percent increase is based on the norm in similar districts.

Operation of Plant - Heat $4,000

The Board budgeted $35,000 toward the operation of the plant for heat. The Board had budgeted $35,000 from the previous budget because of the mild winter. However, after reviewing the current electric bills, it seems that the total bills will exceed the $35,000 figure. The bills paid as of May 1992 totalled $35,858.67. In addition, the budget reflects a probable rate increase and must anticipate a harsher winter in terms of the weather.

Fixed Charges - Social Security $4,000

The Board arrived at the figure based on the current charges, which is a fixed rate and is not discretionary.

Fixed Charges - Insurance $1,000

It is the Board's position that the present insurance plan is the most economical available, especially in light of the fact that the group insurance for the Board is part of the group coverage for the Borough.

The Board budgeted $200,000 toward this line item. The Board has paid Garden State the sum of $49,000 and Aetna Insurance the sum of $147,498.40, for a total of $196,498.40. However, on May 4, 1992, the hospitalization for Garden State was increased and it is anticipated that in February of 1993, Aetna will increase its rates. The increase will take effect on June 1, 1992, and there is an anticipated increase around the beginning of January of every fiscal year. The anticipated increase is approximately $3,000 per month average.

As a result, for the remaining months in 1992, it will cost the Board an additional $15,000, which when added to the monies expended, totals $211,498, which sum exceeds the amount budgeted.

Fixed Charges - Unemployment $3,000

The Board budgeted $14,000 for unemployment, an increase of $2,500 from the previous year.

As of May 1992, the Board has paid out $6,100 for unemployment, since it is self-insured for unemployment insurance.

As of the last quarterly report, six people are presently collecting unemployment. The Board was forced to factor in an increase for the unemployment because the temporary substitute employees are eligible for benefits.

Also included in this line item is the cost for the Workers' Compensation insurance, which sum was factored in based on the premium amount for the current year and adjusted payments from prior years. The Workers' Compensation insurance premiums are fixed figures and are based on the wages of the employees of the district and are not discretionary.

Food Services - Deficit $5,000

The school district does not have a cafeteria facility program. As a result, lunches are prepared on a daily basis outside the school. The Board budgeted $15,000 and paid out approximately $20,000 in 1991.

The Board must supplement the cafeteria during the first three to four months before the State reimbursements are received. The Board advances the money to the cafeteria, which is to be reimbursed by the State based on the State Lunch Program. The Board is to be reimbursed by the cafeteria after the State funds are received for the School Lunch Program. For the last several years the account has been in deficit because the State has been late in its payments and the Board must advance any of the deficits by June 1992. The reimbursements by the State do not cover the advances by the Board. The State has determined that it will not be making reimbursements for May 1992 and June 1992 and, therefore, the Board will not receive any funds from the cafeteria account for those months.

In addition, the Board's auditor has recommended that the account should not be in deficit at the end of a school year. As a result of the decrease of funds available from the State Lunch Program, the Board has to budget additional monies for the operation of the cafeteria, with anticipation of additional cuts by the State.

The Board budgeted $15,000 and according to records has advanced at least that amount to the cafeteria program without anticipation of reimbursement.

Perceptually Impaired - Salaries $2,000

The Borough reduced this line item by $2,000 without explanation. The perceptually impaired salaries are subject to negotiation for the fiscal 1992-93 school year.

There are eight students in the perceptually impaired class and the budget consists of salaries for one full-time teacher, one aide, one occupational therapist (three times per week at an average wage of $41 per hour) and a guidance counselor (one day per week).

There are no revenues generated from the district since predominantly the students are transient in nature.

The perceptually impaired program also consists of two special education teachers and one aide.

The full-time teacher presently earns $23,490; the aide earns $6,930; the occupational therapist earns $20,000; the guidance counselor earns $4,463; one special education teacher earns $27,261; one special education teacher earns $26,100; and one aide earns $6,535, the total being $114,779.

Pre-School Salaries $1,200

The account consist of one full-time teacher and one aide. The teacher earns $29,274 and the aide earns $6,930. Both salaries are subject to negotiation at a range of seven to eight percent increase.

In addition, the account consists of an occupational therapist at a salary of approximately $5,500, plus professional fees for evaluations by the Child Study Team.

Speech Salaries $1,200

The line item consists of a salary for a full-time speech teacher, although the district presently employs a part-time teacher. As a result, the Board budgeted sufficient funds to carry a full-time teacher whose salary ranges from $26,000 to $29,000. The part-time teacher works three days per week, however, a full-time teacher is required in order to serve the demands of the students.

BOROUGH'S POSITION

After having failed to identify special line items and grouping its recommended reductions into broad categories, the Borough in its Position Statement proceeds to address itself to individual line item reductions. This aberration creates a circumstance in which the Board, as cited above, in its Position Statement addressed itself to the broad categories of reductions such as administrative salaries as cited in the Borough's Resolution #92-97 and breaks down the items within those categories without identifying line item numbers. The result is utter confusion from the Commissioner's perspective.

Additionally, when the reductions itemized by the Borough in its Position Statement are tallied, they end up being greater than the total of $50,000 proposed in the Borough's certification.

As a consequence of the above, the Commissioner will summarize the Borough's position in two ways. All proposed reductions in salary accounts will be considered together since the reason advanced by the Borough for each of them is the same. All proposed reductions in accounts other than for salaries will be dealt with individually.

The Borough proposes a reduction in the salary accounts based upon its belief that the general eight percent salary increase which the Board built into its proposed budget for 1992-93 is excessive. The Borough's position is that all salary increases should not exceed five percent since this is the amount which it built into its own budget for compensation to municipal employees.

The Borough declares such salary increases to be excessive and not necessary for a thorough and efficient system of education. The salary accounts so impacted and the amounts of the reductions are set forth below:

Administrative Salaries	$ 2,400
Instructional Salaries	24,700
Operation of Plant Salaries	1,500
Perceptually Impaired Salaries	2,000
Preschool Salaries	1,200
Speech Salaries	1,200
Total	$33,000

The following represents the Borough's recommended reductions in non-salary accounts as itemized by it in its Position Statement:

a. Line 104(b), Account No. 010(c) appropriation of $22,000.00 for social security - amount is overstated by $8,000.00. The 100% increase over 1990-1991 expenditures is not merited. The Municipal governing body also recognizes a State reimbursement as well as the possibility of duplication of expenses.

b. Seaside Heights Board of Education has appropriated $200,000.00 as medical/ hospital, representing an increase of $50,000.00 over the prior year. It is recommended that $190,000.00 be allocated representing a $10,000.00 over statement by the Board of Education. A decrease in the teaching staff has occurred rendering the appropriation excessive and, therefore, should be reduced.

c. The Seaside Heights Board of Education has apportioned $14,000.00 as building insurance, representing an increase of $3,000.00 over the prior year. The Municipal governing body has recommended a $12,000 apportionment, representing a $2,000.00 overstatement by the Board of Education. A 20% increase is not substantiated by the Seaside Heights Board of Education.

d. The [Board] has apportioned $14,000 as unemployment [costs] representing a $3,000.00 increase over the prior year. The Municipal governing body recommends a total of $11,500.00 representing a decrease of $2,500.00 of the overstated Board of Education amount.

e. Line 120, Account No. 930 appropriation of $15,000.00 for expenditure to cover deficits is overstated by $7,000.00. Increase of price of lunch and/or unusual purchases during the years 1991-1992 to account for the increase are unjustified.

COMMISSIONER'S DETERMINATION

Initially the Commissioner must address himself to the Board's argument that the Borough has failed in its obligation to provide the Board with a statement of specific written reasons for its reductions at the time the reductions were made. After examining the record as presented in this matter, the Commissioner must conclude that the Borough has not met the criteria set down in Deptford, supra. It is clear from the record that the Borough not only failed to identify specific line items for reduction at the time reductions in the tax levy were certified, it likewise failed to provide specific written reasons for each of those reductions. (See Resolution #92-97 provided as Exhibit A in the Board's Petition of Appeal.) Furthermore, when the Borough finally did go beyond the mere indication of the broad categories in which reductions were imposed, it did so by hand-printing reasons beside the reductions as

part of its own Exhibit in the Answer to the Petition of Appeal. The Commissioner further notes that the reasons as presented lacked any specificity other than a contention that the Board's proposed expenditures were excessive.

The consequence of the aforesaid failure on the Borough's part results in shifting the burden of proof to the Borough to demonstrate that the amounts by which it has reduced the tax levy are not necessary to provide a thorough and efficient education. Rochelle Park, supra

While the Commissioner cannot make his judgment in matters of this kind strictly upon procedural grounds, the failure on the Borough's part is not without consequences. As pointed out by the Supreme Court in Deptford:

> ...if the municipality fails to submit reasons contemporaneously with its certification of budget cuts, the Commissioner of Education in the course of an ensuing appeal is entitled to invoke a heavy presumption against the educational validity of the proposed budget cuts. Hence, the greater the delay in the submission of detailed reasons in support of such cuts, the stronger will be the presumption against their validity and the heavier will be the municipality's burden on appeal to establish the validity of the reduced budget. In that posture, the Commissioner will be entitled initially to presume that such cuts have been made purely for extra-educational reasons or for political expediency without specific cognizance taken of their educational effects. Nonetheless, even if reasons are supplied after the cuts have been certified, the Commissioner has an obligation to review those cuts to determine whether the municipality was mindful of appropriate educational considerations at the time they were made and whether educational goals will be jeopardized. (emphasis supplied)
>
> (116 N.J. at 320-21)

In considering the reason presented by the Borough relative to the salary accounts, the Commissioner deems the reasoning of the Borough to hold all salary increases to an arbitrary figure of five

percent solely because the municipality intends to impose such a restoration upon itself is in itself arbitrary since it fails to take into consideration the position of the teachers and other staff of Seaside Heights in relation to teachers in the region, county and similarly situated communities. The Borough offers no comparative information which would enable the Commissioner to determine whether eight percent represents an excessive figure. The only comparative data offered by the Borough is a comparison of the proposed Seaside Heights budget of $1,870,688.12 with the proposed budget of Ocean Gate of $1,250,991 and having the same number of students. Such broad comparisons, however, offer no means of comparing the relative position of the employees of the two districts, nor does it offer a comparison of the assessed valuation or the ability to pay of the two districts.

Accordingly, the Commissioner orders restoration of the $33,000 in the salary accounts.

Operation of Plant - Heat $4,000

Upon review of the papers the Commissioner finds no justification presented by the Borough to sustain the reduction in this area. The Commissioner directs the restoration of $4,000 in this account.

Fixed Charges - Social Security $4,000

While the Board offers no argument other than the amount budgeted in this area is in conformity with fixed rates, the Borough offers no proof to dispute this fact other than a statement to the effect that the amount budgeted is overstated. In light of the burden which falls on the municipality in this case, the Commissioner finds that the Borough has not met its burden and the $4,000 reduction is restored.

Fixed Charges - Insurance $1,000

The Borough's contention of overbudgeting in this area is not borne out by the Board's contentions relative to the amounts expended in 1991-92. The Commissioner notes that the Borough offered no rebuttal to the figures cited in the Board's Position Statement. Consequently, the $1,000 reduction imposed by the Borough in this area is restored.

Fixed Charges - Unemployment $3,000

Based upon the expenditures as of May 1992 reported by the Board, i.e. $6,100 out of $11,500 budgeted for 1991-92, the Commissioner deems the Borough to have met its burden in this area and the $3,000 reduction is sustained.

Food Service - Deficit $5,000

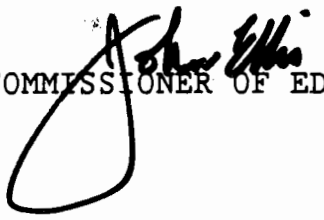
The Borough offers no concrete reason for supporting this reduction other than its unsubstantiated perception that the amount budgeted to cover the deficit is too great. The Commissioner directs restoration of the $5,000 by which this area was reduced by the Borough.

By way of summary, the Commissioner directs the restoration of the following amounts to the 1992-93 tax levy out of the $50,000 by which the Borough reduced the Seaside Heights School District's budget:

Salaries	$33,000
Operation of Plant - Heat	4,000
Fixed Charges - Social Security	4,000
Fixed Charges - Insurance	1,000
Food Services - Deficit	5,000
Total	$47,000

Accordingly, the Commissioner directs that the Ocean County Board of Taxation increase the 1992-93 current expense tax levy for Seaside Heights to reflect a restoration of $47,000 which when added to the original-certification of $1,225,044 will result in a total current expense tax levy for the aforesaid year of $1,272,044.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

NOVEMBER 13, 1992

DATE OF MAILING - NOVEMBER 13, 1992

283-92

IN THE MATTER OF THE CAP WAIVER	:	
APPEAL OF THE BOARD OF EDUCATION	:	COMMISSIONER OF EDUCATION
OF THE BOROUGH OF SAYREVILLE,	:	DECISION
MIDDLESEX COUNTY.	:	
	:	

NOVEMBER 13, 1992

IN THE MATTER OF THE CAP WAIVER :
APPEAL OF THE BOARD OF EDUCATION : COMMISSIONER OF EDUCATION
OF THE BOROUGH OF SAYREVILLE, : DECISION
MIDDLESEX COUNTY. :
:

For the Board, Joseph J. Jankowski, Esq. (Wilentz, Goldman & Spitzer

For the Borough, Jeffrey A. Warsh, Esq. (Ansell, Zaro, (Bennett, Kenney & Grimm)

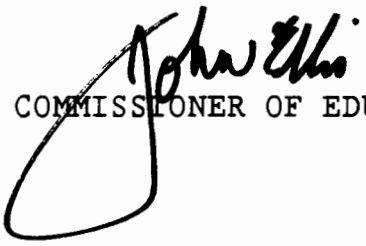
This matter was opened before the Commissioner of Education by way of a Petition filed by the Board of Education of the Borough of Sayreville (Board) on June 2, 1992, seeking restoration, on the grounds of necessity for a thorough and efficient education, of the capital outlay cap waiver tax levy for the 1992-93 school year. This cap waiver had been proposed to the voting public and rejected at the annual school election on April 7, 1992. This cap waiver, in the amount of $276,180, was approved for submission to the voters by the Middlesex County Superintendent of Schools.

The Board stated in its appeal that the capital outlay cap waiver monies are essential for partial payment for the replacement of the roof at the Truman Elementary School. The Board submitted a roof audit completed by the district roofing consultants verifying the need for roof replacement at the school. The governing body does not object to the Board's request for these capital outlay cap waiver monies. (See Borough's Answer.)

Upon review of the Board's position and supporting documentation, the Commissioner notes that physically deficient educational facilities are not acceptable under the mandates of a thorough and efficient educational program. The Commissioner therefore finds and determines that the Board has demonstrated the necessity for the capital outlay cap waiver monies to provide a safe and healthy environment for a thorough and efficient education for the students of the Borough of Sayreville.

Therefore, the Commissioner directs that the Middlesex County Board of Taxation strike a tax levy which shall afford the Borough of Sayreville Board of Education the additional amount of $276,180 for capital outlay cap waiver monies.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

NOVEMBER 13, 1992

DATE OF MAILING - NOVEMBER 13, 1992

284-92

284-92

BOARD OF EDUCATION OF THE TOWNSHIP OF DELANCO,

PETITIONER,

V.

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF DELANCO, BURLINGTON COUNTY.

- - - - - - - - - - - - - - - - - - - -

IN THE MATTER OF THE CAP WAIVER APPEAL OF THE DELANCO TOWNSHIP SCHOOL DISTRICT, BURLINGTON COUNTY.

COMMISSIONER OF EDUCATION

DECISION

NOVEMBER 13, 1992

BOARD OF EDUCATION OF THE TOWNSHIP OF DELANCO,

PETITIONER,

V.

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF DELANCO, BURLINGTON COUNTY.

IN THE MATTER OF THE CAP WAIVER APPEAL OF THE DELANCO TOWNSHIP SCHOOL DISTRICT, BURLINGTON COUNTY.

COMMISSIONER OF EDUCATION

DECISION

For Petitioner, Stephen J. Mushinski, Esq.

For Respondent, John T. Barbour, Esq. (Barbour & Costa)

Petitioner, the Board of Education of Township of Delanco, hereinafter "Board," opened this matter before the Commissioner of Education on May 26, 1992, alleging that the action of the Township Committee of the Township of Delanco, hereinafter "Township Committee," reducing the proposed amount to be raised by local taxation for the 1992-93 school year, will prevent the Board from operating a thorough and efficient system of free public schools in violation of the requirements of the New Jersey Constitution. On June 10, 1992 the Township Committee submitted its Answer to the budget appeal and on July 13, 1992 its Answer to the cap waiver appeal.

On April 7, 1992 the voters of the district defeated the Board's proposal to raise the sum of $1,922,670 for current expenses for the 1992-93 school year. Additionally, the voters defeated a cap waiver in the separate ballot proposal in the amount of $137,517, which had been previously authorized by the Burlington County Superintendent of Schools. The County Superintendent had advised the Board that a voter rejection of the proposed cap waiver question would require that an appeal be filed with the Commissioner.

These matters have been consolidated for determination by the Commissioner, since they both specifically pertain to the amount to be raised by local taxation for current expenses of the school district during the 1992-93 school year. There was no capital outlay question submitted to the voters.

Following the defeat by the voters, the Township Committee consulted with the Board as required by statute, and thereafter adopted a resolution on April 27, 1992, certifying to the Burlington County Board of Taxation a levy for current expenses in the amount of $1,768,452, which represented a reduction in the amount of $154,218 from the Board's proposal.

In its Petition of Appeal, the Board accepts reductions in the amount of $40,570, which will be detailed, post. Accordingly, the amounts in contention are as follows:

	Proposed Tax Levy Adopted by Board	Amount Certified by Borough
Current Expense	$1,922,670	$1,768,452
Cap Waiver		
Current Expense	137,517	
Total	$ 2,060,187	$1,768,452

	Amount Reduced By Township Committee	Amount of Reduction Accepted by Board
Current Expense	$ 154,218	$ 40,570

Amount in Dispute before Commissioner

Defeated Budget	$113,648
Cap Waiver	137,517
Total	$251,165

The Township Committee suggested the following specific reductions in the Board's proposed 1992-93 school budget:

Current Expenses

Line Item	Reduction
J213 Kindergarten Teacher	$ 30,570
J211 Principal's Salary	65,284
J520 Transportation	30,000
J820 Fixed Charges	8,274
Unemployment Compensation	90
J870 Tuition - Regular	20,000
Total	$154,218

In its Petition, the Board accepts the reduction of $30,570 for a kindergarten teacher, inasmuch as the identical amount for this purpose was included in its cap waiver proposal. Also, the Board accepts $10,000 of the suggested $20,000 reduction in line item J870 Tuition - Regular. Said agreed upon reductions to the proposed budget were reviewed and approved by the County Superintendent, Arthur Merz.

The following items constituted the cap waiver which was part of the proposed 1992-93 school budget conditionally approved by the Burlington County Superintendent of Schools:

Cap Waiver

Line Item		Amount
J213-01	Kindergarten Teacher Salary	$ 32,911
J213-02	Teacher Salary (1-5)	43,193
J213-03	Teacher Salary (6-8)	22,596
J216	Instruction, Other Salaries	11,580
J810	Fixed Charges, F.I.C.A.	809
J820	Insurance	26,428
	Total	$137,517

I. DEFEATED BUDGET

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

In the instant matter the Commissioner will address the arguments of the parties with respect to each of the specific line item reductions.

J213 Kindergarten Teacher $30,570

The Board's acceptance of this specific reduction in its Petition of Appeal has been discussed, ante. The reduction is sustained.

J211 Principal's Salary $65,284

The Township Committee proposes the elimination of one of the existing elementary principal positions on the grounds that the Walnut Street School, which houses grades 6-8, has an enrollment of approximately 113 pupils. Pearson School contains grades K-5 in this two school, K-8 district. The Superintendent of Schools' office is located in the Walnut Street School. The assumption of the Township Committee is that either the Superintendent of Schools could serve in the dual capacity of principal of the Walnut Street School, or the one remaining principal could serve both schools. To support its argument, the Township Committee cites the 1992 School District Report Card, which indicated that the percentage of district administrators was 6.8% compared to a regional (seven county) average of 4.4%, and a State average of 4.7%. Given these percentages, and the Township Committee's belief that there is no legal requirement for a principal in each school, it concludes that the elimination of one principal would neither disrupt nor interfere with the provision of a thorough and efficient education by the school district. (Answer to Petition of Appeal, at pp. 2-3)

The Board asserts that it would be a physical impossibility for the Superintendent and remaining principal to absorb the total

workload of one principal. The Board states that the Walnut Street School principal devotes his full time year-round to the administration and supervision of the school, and additionally serves as the district's Affirmative Action Officer, Title 504 Handicapped Compliance Officer, Testing Coordinator and Curriculum Supervisor. The Board avers that the Superintendent already carries a heavy workload and is required to work long hours and participate in many night meetings. It concludes that the imposition of the full-time responsibilities of the principal upon the Superintendent would cause significant harm to the detriment of the children.

The Board acknowledges that the 1991-92 enrollment report of the Walnut Street School was 113, but asserts that its Long Range Facility Plan of June 1990 forecasts an increase to 150 pupils for the 1993-94 school year. It also argues that the many administrative and supervisory activities currently undertaken by the administrators would be either significantly curtailed, or many would be eliminated. (Board's Position Statement, at pp. 8-9)

The Commissioner is constrained to correct the Township Committee's misunderstanding of the legal requirement for a full-time principal in each public school. Schools are required to have full-time principals. The only exceptions occur when a local board of education formally requests a waiver by the Commissioner. See N.J.A.C. 6:8-3.3(b). These are granted only under compelling circumstances in instances wherein it can be proven that no harm will result to the education process. This record is devoid of any factual information to show that such a waiver was ever requested by the Board.

The Township Committee's recommended reduction of the position of one principal cannot be sustained. The Board has offered ample proof of the necessity to maintain this position. Accordingly, the amount of $65,284 will be restored.

J520 Transportation, Contracted $30,000

For the 1992-93 school year the Board budgeted the proposed amount of $42,500, an increase of $2,500 over the 1991-92 amount of $40,000. Actual expenditures for the 1990-91 school year for these contracted services were $28,021.68.

The Township Committee states that the local school district is reimbursed by other school districts for transporting its pupils, primarily to special education classes, by these contracted services. According to the Township Committee, this reduction will leave funds in the amount of $12,500, which represents a balance for two and one-half months of operation. The Township Committee believes that this is a sufficient amount to maintain solvency in this line item and to provide adequate operation.

The Board maintains that the total J500 Transportation account is always under-budgeted. It avers that for the 1990-91 school year the Board expended $16,592 more than the budgeted amount.

An examination of the 1990-91 audit report discloses that the total amount budgeted for the J500 Account was $99,600, which was revised downward to $93,892.37, with total expenditures of $65,416.80. This resulted in an unexpended balance of $28,475.57, which does not include any reimbursements from other school districts for the prior 1989-90 school year. (Exhibit A-3b, p. 17)

Such reimbursements are deposited in the current expense account, either as reimbursements or miscellaneous revenues. The audit pages for 1990-91 show refunds totaling $4,681.90 (Exhibit A-1) and miscellaneous revenues of $67,912.93, which is an excess of $17,912.93 above the amount anticipated. (Exhibit A-3, p. 14) There is no breakdown provided to show what amount constitutes reimbursements of contracted transportation costs by other school districts.

The 1989-90 audit pages disclose that the J500 Transportation account was increased from $170,905 to $183,816.43, with expenditures of $181,708.27 and a balance of $2,108.16. (Exhibit A-3b, p. 17) For 1989-90, the miscellaneous revenues exceeded the anticipated budget figure of $55,000 by $64,726.37. (Exhibit A-3a, p. 14) No breakdown is provided for these revenues. It is not possible to determine any contracted transportation reimbursements for the 1989-90 school year.

The Board has failed to prove the necessity for restoration in this line item, therefore the recommended reduction of $30,000 must be sustained.

J820 Fixed Charges	$8,294
Unemployment Compensation	90
	$8,384

This recommended reduction represents the amount of insurance benefits and unemployment insurance costs which the Township Committee calculates as a total savings from the elimination of one principal's position. The determination has been made that the reduction for the principal's position must be restored, therefore these corollary costs, which represent indirect compensation, must also be restored to the 1992-93 school budget.

J870 Tuition - Regular $20,000

The Board has determined to accept a reduction of $10,000 in this line item; therefore, the amount of $10,000 remains in contention.

Under a sending-receiving agreement, this district pays tuition to the Riverside School District to educate its pupils enrolled in grades 9-12 in Riverside High School.

The Township Committee's reduction is based upon its conclusion that monies have been transferred out of this line item in prior years, and that it is overstated. The Township Committee states that the Board can sustain a reduction of less than two percent in this line item for the 1992-93 school year.

The Board asserts that it had 115 pupils enrolled in Riverside High School during 1991-92, and that number will increase to 120 for 1992-93. It has budgeted for these 120 pupils at the rate of $8,996 each, as a tentative tuition rate, for a total appropriation of $1,079,520. The Board also contends that the anticipated number of 120 could increase by pupils moving into its school district. It avers that 14 high school age pupils moved into the district between September 1991 and June 1992, all of whom were unanticipated. The Board states that it requires the entire proposed appropriation to adequately provide high school tuition for the 1992-93 school year. It claims that it did not receive a tentative tuition rate from the Riverside School District, and therefore it adjusted the 1991-92 rate upward by ten percent, which may not be sufficient for 1992-93, since the actual increase for 1991-92 was sixteen percent.

The audit pages for the 1990-91 school year show that the Board decreased its original appropriation for this line item from $775,280 to $681,822.36, a reduction of $93,457.64. An unexpended balance of $6,920.12 remained as of June 30, 1991. (Exhibit A-3b, p. 18) A reduction was also made of $147,140 during 1989-90, with a balance of $6,584.53. (Exhibit A-3b, p. 18) During the 1991-92 school year the Board made transfers between October 1991 and May 1992 totaling $41,868.11 from J870 to various line items.

The Board has not proved the necessity to restore the recommended reduction of the disputed $10,000, therefore it must be sustained.

The Board is reminded that it shares a mutual responsibility with the Riverside Board of Education to agree upon a tentative tuition rate within the prescribed time limit. If such agreement is not set in a timely manner, the Board has the affirmative obligation to request the Commissioner of Education to set a tentative tuition rate for the succeeding school year. The Commissioner hereby directs the Burlington County Superintendent of Schools to monitor this process for the 1993-94 school year.

A summary of the determination regarding the current expense items is set forth as follows:

	Line Item	Proposed Reduction	Amount Not Restored	Amount Restored
J213	Kindergarten Teacher	$ 30,570	$30,570	$ -0-
J211	Principal Salary	65,284	-0-	65,284
J520	Transportation, Contr.	30,000	30,000	-0-
J820	Fixed Charges	8,274	-0-	8,274
	Unemployment Comp.	90	-0-	90
J870	Tuition - Regular	20,000	20,000	-0-
	Total	$154,218	$80,570	$73,648

II. CAP WAIVER

The appeal of the defeated cap waiver will be considered on an item by item basis. The following chart sets forth these specific items:

	Line Item	Amount
J213-01	Kindergarten Teacher	$ 32,911
J213-02	Teacher Salary (1-5)	43,193
J213-03	Teacher Salary (6-8)	22,596
J216	Instruction, Other Salaries	11,580
J810	Fixed Charges, F.I.C.A.	809
J820	Insurance	26,428
	Total - Additional Current Expense	$137,517

The Township Committee's Answer to the Board's Appeal of the defeated cap waiver sets forth several affirmative defenses as follows:

1. The Petition of Appeal fails to state a claim upon which relief may be granted.

2. There are no statutory provisions or rules of the State Board of Education authorizing the instant appeal.

3. The Commissioner is without jurisdiction to grant the requested relief.

4. Petitioner has no right or standing to pursue the instant appeal.

5. The programs included in the cap waiver petition are neither for the provision of a thorough and efficient education nor mandated to be provided under State statute or rule.

The Commissioner observes, in summary, that the constitutional mandate for the provision of a thorough and efficient system of education supersedes all other requirements or limitations imposed by either statute or regulation. The implementation of this constitutional imperative has been thoroughly described by the

Supreme Court of New Jersey, including the duties and responsibilities of the Commissioner, in East Brunswick, supra, and Deptford, supra. Accordingly, the Township Committee's defenses are denied.

The arguments and proofs regarding the specific cap waiver items will be hereinafter addressed.

J213-01 Kindergarten Teacher Salary $32,911

The Township Committee makes no specific statement regarding this item, but contends that none of the cap waiver items are necessary.

The Board asserts that this kindergarten teacher is necessary to continue the district's full day kindergarten program which the district has operated for the past eight years. It describes the many benefits of improved readiness, higher achievement levels, improved socialization skills and greater progress in learning skills which have accrued to its pupils through this program.

Adequate proof of the necessity for this program has been presented, therefore the funds will be restored.

J213-02 Teacher Salary (Grades 1-5) $43,193

The Township Committee's general objection to these cap waiver items has been stated, ante.

The Board asserts that during the past five years the services of a certified substance awareness coordinator have been necessary to provide assistance to a growing number of troubled child with many problems, including separation and divorce, low self-esteem, drug and alcohol family problems, behavioral problems, child abuse, school adjustment, theft, illness and death in the

family, depression and suicide and many other types of emotional and social problems. This is the only position which provides full-time guidance and counseling to pupils within the district.

The Board has proved the necessity for the restoration of this amount.

J213-03 Teacher Salary (Grades 6-8) $22,596

The Township Committee's general objection to the cap waiver items has been previously stated.

The Board asserts that this item supports its general music program which has been part of the instructional program for many years. This program is taught by a full-time instrumental music teacher and a part-time, three-fifths general music teacher. The part-time position is the specific item herein addressed.

This teaching assignment includes all pupils in grades K-8 on a weekly basis for instruction in music theory, music history, styles of music, composers, instrumental groups, music reading, music appreciation and vocal music.

The instrumental teacher instructs a third grade band, a fourth and fifth grade beginning band, sixth-eighth grade stage band and a jazz band.

The weight of the evidence presented by the Board proves the necessity to restore the funds to maintain this instructional program.

J216 Instruction, Other Salaries $11,580

The Township Committee's general objection has been noted.

The Board explains that this item represents one-half time for one of two teachers who provide remedial instruction and compensatory education for pupils who fall below or do not attain locally determined academic achievement standards, which are

somewhat higher than State standards. The program encompasses all grades K-8. The Board asserts that this basic skills program has prevented many pupils from failing to achieve State standards, because identification occurs at an early stage, and pupils who might otherwise be overlooked do receive a coherent and progressive program of remedial instruction. The Board avows that early age intervention has been most significant because young children are enabled to overcome deficiencies and strengthen their weak skill areas.

The Board has met its burden of proof of the necessity to restore the funds required for this instructional program.

J810 Fixed Charges, F.I.C.A.	$ 809
J820 Insurance	$26,428

The Township Committee includes these items in its general objection.

These two items may be considered together, since they consist of fixed charge and insurance benefit costs for the teaching positions which will be restored. These fixed costs are a form of indirect, contractual compensation, and therefore must be restored in order to adequately compensate the two and one-half restored positions.

The following chart summarizes the determination regarding the specific cap waiver items:

	Line Item	Amount Not Restored	Amount Restored
J213-01	Kindergarten Teacher	$ -0-	$ 32,911
J213-02	Teacher Salary (Gr. 1-5)	-0-	43,193
J213-03	Teacher Salary (Gr. 6-8)	-0-	22,596
J216	Other Salaries - Instructional	-0-	11,580
J810	Fixed Charges, F.I.C.A.	-0-	809
J820	Insurance	-0-	26,428
	Total		$137,517

In summary, the Commissioner finds and determines that the sum of $73,648 shall be restored from the Board's appeal of the Township Committee's budget reduction, and the additional current expense amount of $137,517 shall be restored for the cap waiver items as set forth above. This resolution is necessary in order to insure that a thorough and efficient system of education will be conducted by the Delanco Board of Education for the 1992-93 school year.

The Commissioner hereby orders the Burlington County Board of Taxation to certify the additional amount of $211,165 by local taxation for current expenses for the 1992-93 school year in the Delanco Township School District so that the total amount to be raised for current expense purposes shall be $1,979,617 for the 1992-93 school year.

	Current Expense
Amount Previously Certified	$1,768,452
Amount Restored (Defeated Budget)	$ 73,648
Amount Restored (Cap Waiver)	$ 137,517
Total Tax Levy	$1,979,617

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 13, 1992

DATE OF MAILING - NOVEMBER 13, 1992

Corrected Copy 284-92

C #284-92
SB # 65-92

BOARD OF EDUCATION OF THE TOWNSHIP OF DELANCO, PETITIONER-RESPONDENT, V. TOWNSHIP COMMITTEE OF THE TOWNSHIP OF DELANCO, BURLINGTON COUNTY, RESPONDENT-APPELLANT, AND IN THE MATTER OF THE CAP WAIVER APPEAL OF THE DELANCO TOWNSHIP SCHOOL DISTRICT, BURLINGTON COUNTY.	STATE BOARD OF EDUCATION DECISION

Decided by the Commissioner of Education, November 13, 1992

For the Petitioner-Respondent, Stephen J. Mushinski, Esq.

For the Respondent-Appellant, Barbour & Costa
(John T. Barbour, Esq., of Counsel)

The State Board of Education has reviewed the proposed settlement by the parties in this appeal concerning the Board of Education of the Township of Delanco's school budget for 1992-93 and finds it to be in accord with the principles expressed in In the Matter of the Tenure Hearing of Frank Cardonick, School District of the Borough of Brooklawn. The State Board therefore approves the settlement in this matter. In so doing, we direct that the Commissioner's decision be modified to direct that the total amount to be certified by the Burlington County Board of Taxation for current expenses for 1992-93 is $1,842,100.

May 5, 1993

285-92

IN THE MATTER OF THE TENURE	:	
HEARING OF EMMET M. ROBINSON,	:	COMMISSIONER OF EDUCATION
MARLBORO PSYCHIATRIC HOSPITAL,	:	DECISION
NEW JERSEY DEPARTMENT OF HUMAN	:	
SERVICES.	:	
	:	

NOVEMBER 18, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10745-90
AGENCY DKT. NO. 377-11/90

IN THE MATTER OF THE TENURE HEARING OF EMMET M. ROBINSON, MARLBORO PSYCHIATRIC HOSPITAL,

---

Bruce A. Velzy, Deputy Attorney General, on behalf of petitioner (Robert J. Del Tufo, Attorney General of New Jersey, attorney)

John L. Bonello, Esq., on behalf of respondent (Manna & Bonello, attorneys)

Record Closed: September 18, 1992 Decided: October 8, 1992

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of tenure removal charges against respondent. The matter was transmitted to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 to 13.

The parties have now submitted a settlement agreement in the matter which is annexed. Having reviewed the terms of the settlement and it appearing that it fully disposes of all issues in controversy and was entered into voluntarily, I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the terms of settlement and that these proceedings be and hereby are **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10/8/92
Date

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

OCT 12, 1992
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 15 1992
Date

OFFICE OF ADMINISTRATIVE LAW

/cae

ROBERT J. DEL TUFO
Attorney General of New Jersey
Attorney for Marlboro Psychiatric Hospital
R.J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625

By: Bruce A. Velzy
Deputy Attorney General
(609) 984-7650

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
DOCKET NO. EDU 10745-90

MARLBORO PSYCHIATRIC HOSPITAL, Petitioner, v. EMMET M. ROBINSON, Respondent.	)	Administrative Action CONSENT ORDER

WHEREAS, pursuant to N.J.S.A. 18A:6-10 et seq., Marlboro Psychiatric Hospital and the New Jersey Department of Human Services ("the Petitioner") initiated tenure removal charges against Emmet M. Robinson ("the Respondent"), a tenured Human Services teacher, for conduct unbecoming a teacher arising out of allegations of sexual harassment,

WHEREAS, the Respondent denied those charges and requested an administrative hearing under the Tenure Education Act, N.J.S.A. 18A:6-10 et seq.,

WHEREAS, the Petitioner certified this case to the Department of Education for a determination of the tenure dispute,

WHEREAS, the Respondent was suspended for 120 days without pay, but has been suspended with pay from the 121st day,

WHEREAS, the Respondent has been employed for over 26 years at Marlboro Psychiatric Hospital,

WHEREAS, the parties agree that a settlement would benefit all witnesses by allowing them to avoid the embarrassment and humiliation associated with testifying to allegations of sexual harassment,

WHEREAS, the tenure charges had created friction and tension at Marlboro Psychiatric Hospital between the supporters of the Respondent and those who were either testifying against Emmet Robinson or were opposed to the alleged actions of Emmet Robinson,

WHEREAS, both parties agree that a settlement of this matter will avoid any potential embarrassment to all the witnesses and remove the tension and friction among the employees at Marlboro Psychiatric Hospital,

WHEREAS, an amicable resolution of this matter will allow the Respondent to resign from 26 years of employment without the stigma of sexual harassment attached to his reputation,

WHEREAS, an amicable resolution of this matter will allow the Petitioner to accomplish its goal of removing the Respondent from a teaching position within the Department of Human Services, and

WHEREAS, the Petitioner and Respondent are desirous of amicably resolving this matter,

IT IS ORDERED AND AGREED ON THIS DAY OF , 1992 THAT:

1) The Respondent shall be allowed to voluntarily retire from his position as a Teacher II at Marlboro Psychiatric Hospital, effective September 1, 1991 and apply for any pension benefits to which he is entitled.

2) The Petitioner accepts Respondent's offer to retire from his position as a Teacher II at Marlboro Psychiatric Hospital, effective September 1, 1991.

3) The Respondent shall voluntarily withdraw this administrative law appeal with prejudice.

4) The Respondent agrees to never seek employment with the New Jersey Department of Human Services ("DHS"); any of its divisions, agencies or institutions; or with any persons or entities who contract with any of the foregoing entities to provide services to DHS, its divisions, agencies or institutions.

5) The Respondent hereby releases and agrees to not sue DHS, its divisions, agencies, institutions or personnel for any legal, administrative or equitable relief arising out of or

related to the subject matter of the above-captioned litigation.

6) By entering into this agreement, the Respondent does not admit the allegations against him.

7) By entering into this agreement, the Petitioner does not admit that its actions were unjustified or not in accord with law or equity.

8) The Petitioner agrees not to oppose the Respondent's application for retirement. In doing so, the Petitioner will endeavor to provide all information requested by the Division of Pensions to process Emmet Robinson's application for retirement, including any information relating to the facts surrounding this present action.

9) The Petitioner agrees to pay the following benefits to the Respondent to the degree allowed by law:

a) 45 days vacation time;

b) 90 days sick time;

c) 3 days administrative leave;

d) 21 days salary which accrued and was not paid to Petitioner during his 120 day suspension without pay.

10) The Petitioner makes no promises that Respondent's application for retirement benefits will be successful and any dispute between Respondent and the appropriate pension agency will not constitute a revocation of the Petitioner's acceptance of Respondent's retirement, nor

will any unsuccessful application for pension benefits allow Respondent to withdraw his retirement.

11) This agreement, its contents and terms do not constitute precedent of any kind to be used against DHS, its divisions, agencies, institutions or personnel.

12) The consent agreement is by and between DHS, its successors and assigns, and Emmet M. Robinson, his successors and assigns.

13) This consent order is subject to the ultimate review and/or approval of the Commissioner of the New Jersey Department of Education or his designee.

14) By way of this agreement, the Respondent acknowledges that he has been informed of the duty of the Commissioner of the New Jersey Department of Education to refer this matter to the State Board of Examiners for possible revocation of certificate.

Date: 8/17/92

Donald Mangus, Asst. Dir.
Office of Employee Relations
Department of Human Services

Date: 6/16/92

John L. Bonello, Esq.
Manna & Bonello, P.C.
Attorney for Emmet Robinson

The undersigned, by his signature, hereby acknowledges his understanding of and voluntary consent to entry of the foregoing terms of this document.

Date: 6/16/92

Emmet M. Robinson

IN THE MATTER OF THE TENURE HEARING OF EMMET M. ROBINSON, MARLBORO PSYCHIATRIC HOSPITAL, NEW JERSEY DEPARTMENT OF HUMAN SERVICES.	:	COMMISSIONER OF EDUCATION DECISION

The record and initial decision rendered in the form of a joint stipulation of settlement have been reviewed. Based upon such independent review, the Commissioner rejects the settlement terms and remands the matter to the Office of Administrative Law for the following reason.

It is noted that as a term of settlement, respondent has agreed to retire from his tenured employment as a teaching staff member at Marlboro Psychiatric Hospital, effective September 1, 1991. However, notwithstanding the Commissioner's cognizance that respondent is aware of the duty of the Commissioner of the New Jersey State Department of Education to refer this matter to the State Board of Examiners for possible revocation of certificate, due to the very serious nature of the charges in this matter, which allege sexual harassment, and for the protection of the public interest, the Commissioner is compelled to reject the settlement absent an agreement from respondent that he will not seek employment in <u>any</u> educational setting in the future, not just within the Department of Human Services. If such accord cannot be reached, it

is hereby directed that this matter proceed to a plenary hearing to afford respondent a full and fair opportunity to defend himself against the charges levied. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983) See also, In the Matter of the Tenure Hearing of John H. Wagner, Office of Employee Relations, Department of Human Services, Woodbine Developmental Center, decided by the Commissioner November 13, 1991.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 18, 1992

DATE OF MAILING - NOVEMBER 18, 1992

285-92

111-95R
(285-92)

IN THE MATTER OF THE TENURE :
HEARING OF EMMETT M. ROBINSON, :
MARLBORO PSYCHIATRIC HOSPITAL, :
NEW JERSEY DEPARTMENT OF HUMAN :
SERVICES. :
:

COMMISSIONER OF EDUCATION

DECISION ON REMAND

MARCH 5, 1995

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9330-92
AGENCY DKT. NO. 377-11/90
(ON REMAND EDU 10745-90)

IN THE MATTER OF THE TENURE HEARING OF EMMET M. ROBINSON, MARLBORO PSYCHIATRIC HOSPITAL, DEPARTMENT OF HUMAN SERVICES

Eileen C. Stokley, Deputy Attorney General, for petitioner (Deborah T. Poritz, Attorney General of New Jersey, attorney)

John L. Bonello, Esq., for respondent (Manna & Bonello, attorneys)

Record Closed: February 14, 1995 Decided: February 22, 1995

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

This matter first was filed in 1990. Marlboro Psychiatric Hospital filed tenure charges against Emmet M. Robinson. The case was transmitted to the Office of Administrative Law and, nearly a year later, settled. OAL DKT. NO. EDU 10745-90 (Oct. 8, 1992).

The Commissioner of Education rejected the settlement.

This matter was transmitted to the Office of Administrative Law on November 30, 1992 for a hearing pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13 and thereafter assigned to me.

After long discussions, the parties again reached resolution.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement. These terms address the concerns expressed by the Commissioner in 1992.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

22 FEBRUARY 1995
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

2/27/95
DATE

Hope R Blackburn
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 02 1995
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cae

DEBORAH T. PORITZ
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Petitioner, New Jersey
Department of Human Services
R.J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625

By: Eileen C. Stokley
Deputy Attorney General
(609) 292-6336

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
DOCKET NO. EDU-9330-92

MARLBORO PSYCHIATRIC HOSPITAL,	)	
Petitioner,	)	**Administrative Action**
v.	)	**CONSENT ORDER**
EMMETT M. ROBINSON,	)	
Respondent.	)	

WHEREAS, pursuant to N.J.S.A. 18A:6-10 et seq., Marlboro Psychiatric Hospital and the Petitioner, New Jersey Department of Human Services ("the Department") initiated tenure removal charges against Respondent, Emmett M. Robinson ("Robinson"), a tenured Human Services Teacher, for conduct unbecoming a teacher arising out of allegations of sexual harassment;

WHEREAS, Robinson denied those charges and requested an administrative hearing under the Tenure Education Act, N.J.S.A. 18A:6-10 et seq.;

WHEREAS, the Department certified this case to the Department of Education for a determination of the tenure dispute;

WHEREAS, Robinson was suspended for 120 days without pay (from November 20, 1990 to March 20, 1991), but has been suspended with pay from the 121st day;

WHEREAS, Robinson was employed for over 26 years at Marlboro Psychiatric Hospital;

WHEREAS, a substantial amount of time has lapsed since the alleged actions occurred;

WHEREAS, Robinson has an exemplary record at the Marlboro Psychiatric Hospital and has been recognized for his accomplishments with troubled youths;

WHEREAS, Robinson's employment record contains no history of discipline or record of any misconduct occurring in the past;

WHEREAS, Robinson has agreed to not seek employment as a teacher in New Jersey for eighteen (18) months from September 1, 1993, and further agrees that he will never seek employment with the Department of Human Services in the future;

WHEREAS, Robinson has received full pay from the Department of Human Services for a period subsequent to the 120 day suspension, and attorneys for the parties will determine the

exact amount of days for which Robinson is entitled to payment to comply with the applicable statutes, and pursuant to N.J.S.A. 18:6-24, the Department is entitled to a set-off for the amounts that Robinson earned through secondary employment subsequent to this receipt of pay after his suspension;

WHEREAS, the Department and Robinson agree that a settlement would benefit all witnesses by allowing them to avoid potential emotional distress associated with testifying to allegations of sexual harassment;

WHEREAS, the tenure charges had created friction and tension among employees of Marlboro Psychiatric Hospital;

WHEREAS, both parties agree that a settlement of this matter will avoid any potential emotional distress to the witnesses and relieve the tension and friction among the employees of Marlboro Psychiatric Hospital;

WHEREAS, amicable resolution of this matter will allow Robinson to resign from his 26 years of employment and retire without the stigma of sexual harassment attached to his reputation;

WHEREAS, an amicable resolution of this matter will allow the Department to accomplish its goal of removing Robinson from a teaching position within the Department of Human Services; and

WHEREAS, the Department and Robinson are desirous of amicably resolving this matter,

IT IS AGREED ON THIS DAY OF , 1994, THAT:

1. This consent agreement is by and between the Department, its successors and assigns, and Robinson, his successors and assigns;

2. This consent order is subject to the ultimate review and/or approval by the Commissioner of the New Jersey Department of Education, or his designee;

3. All terms of this consent agreement are null and void if this agreement should not be approved by the Commissioner of the Department of Education;

4. Robinson acknowledges that the Department has informed him that it is the duty of the Commissioner of the New Jersey Department of Education to refer this matter to the State Board of Examiners for possible revocation of Robinson's teaching certificate;

5. Robinson agrees not to seek employment as a teacher in the State of New Jersey for eighteen (18) months from September 1, 1993;

6. Robinson agrees to voluntarily retire from his position as Teacher II at Marlboro Psychiatric Hospital, effective as soon as possible;

7. The Department agrees to accept Robinson's resignation in good standing;

8. Within 30 days of the approval of this agreement by the Commissioner of Education, Robinson shall provide the

Department with documentary proof (in the form of all 1993 W-2 forms, 1993 tax returns, 1994 earnings stubs indicating current salary, and all other available proof of income), of all income, other than his salary from the Department of Human Services, that Respondent earned between March 21, 1991, and the date of retirement;

9. After the approval of this agreement by the Commissioner of Education, Robinson agrees to reimburse the Department the amount of income earned through secondary employment between March 21, 1991, and the date of retirement, minus the set-offs he is entitled to for compensation time, sick leave, annual leave and other benefits he may be entitled to pursuant to law;

10. The Department agrees to allow Robinson to enter into a separate agreement for a reasonable period of extended repayment if Robinson is unable to make immediate reimbursement;

11. Robinson will voluntarily withdraw this administrative law appeal with prejudice and without costs;

12. Robinson agrees never to seek employment with the Department;

13. Robinson accepts the terms of this agreement in full settlement for all claims in this matter;

14. Robinson agrees that this Settlement and Release, when finally approved, is intended to be a final resolution of all issues arising out of this matter, except for the above described accounting, offset and reimbursement, and is intended

3e

to release the Department from any past, present or future liability arising out of the claims at issue in this matter;

15. In consideration of the provisions hereof, including this release, Robinson and on behalf of his insurers, agents, employees, heirs and assigns, executors and personal representatives, releases the Department and the State of New Jersey and its Departments, Divisions, officials and their insurers, agents, employees, heirs, executors, personal representatives and assigns from all claims, demands, damages, causes of action, or suits which have been, could have been, or might have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information and disputes giving rise to this action, including but not limited to any claim for payment of counsel fees pursuant to 42 U.S.C. 1988 and/or common law;

16. Nothing herein shall constitute an admission or concession of liability by any party;

17. By entering into this agreement, Robinson does not admit the allegations against him;

18. By entering into this agreement, the Department does not admit that its actions were unjustified or not in accord with law or equity;

19. This agreement, its contents and terms do not constitute precedent of any kind to be used against the Department, its divisions, agencies, institutions or personnel.

FOR Respondent, EMMETT M. ROBINSON

DATE: _____

JOHN L. BONELLO, ESQUIRE
MANNA & BONELLO, P.A.

THE UNDERSIGNED, BY HIS SIGNATURE, HEREBY ACKNOWLEDGES HIS UNDERSTANDING OF AND VOLUNTARY CONSENT TO ENTRY OF THIS CONSENT ORDER.

DATE: 1/9/95

EMMETT M. ROBINSON

FOR PETITIONER, DEPARTMENT OF HUMAN SERVICES:

DATE: 2/1/95

DEBORAH T. PORITZ
ATTORNEY GENERAL OF NEW JERSEY

By: Eileen C. Stokley
Eileen C. Stokley
Deputy Attorney General

DATE: 2/6/95

DONALD MANGUS, ASST. DIRECTOR
Office of Employee Relations
Department of Human Services

APPROVED BY OFFICE OF ADMINISTRATIVE LAW:

DATE: 21 FEBRUARY 1995

BRUCE CAMPBELL, A.L.J.

OAL DKT. NO. EDU 9330-92 (EDU 10745-90 ON REMAND)

IN THE MATTER OF THE TENURE HEARING OF EMMETT M. ROBINSON, MARLBORO PSYCHIATRIC HOSPITAL, NEW JERSEY DEPARTMENT OF HUMAN SERVICES.	:	COMMISSIONER OF EDUCATION DECISION ON REMAND

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846). The matter is hereby dismissed, subject to compliance with the terms of the settlement.

Notwithstanding the Commissioner's acceptance of this settlement under the Cardonick standards, due to the very serious nature of the charges in this matter, i.e., allegations of sexual harassment, and to assure the promotion of the public interest, the Commissioner shall transmit this matter to the State Board of Examiners, pursuant to N.J.A.C. 6:11-3.6, for action against respondent's certificate as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 5, 1995
DATE OF MAILING MARCH 5, 1995

286-92

BOARD OF EDUCATION OF THE CITY OF GLOUCESTER, CAMDEN COUNTY,

PETITIONER,

V.

NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

NOVEMBER 16, 1992

BOARD OF EDUCATION OF THE CITY OF GLOUCESTER, CAMDEN COUNTY,

PETITIONER,

V.

NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

William D. Dilks, Esq., for Petitioner

Picco, Mack, Herbert, Kennedy, Jaffe and Yoskin, for Respondent (Michael J. Herbert, Esq., of Counsel)

This matter has come before the Commissioner of Education by way of Petition of Appeal and Motion for Emergent Relief filed by the Board of Education of the City of Gloucester (Board) seeking a stay of the determination of the New Jersey State Interscholastic Athletic Association's (NJSIAA) Eligibility Appeals Committee (EAC) of October 26, 1992 denying a waiver of the forfeiture of the Board's football game victory of September 19, 1992 against Burlington Township High School, resulting from the Board's playing an allegedly ineligible player, C.P., pursuant to Article V, Section 4K(2) of the NJSIAA Rules. Said rule requires that a pupil whose parents do not move with him or her to a new school district must abstain from participation in interscholastic contests until the expiration of thirty (30) days from the start of school.

The Board seeks emergent relief because such forfeiture will most likely disqualify its football team from the South, Group I Football Championships, which are to begin on Saturday, November 21, 1992 based upon final selections to be made by the NJSIAA on Monday, November 16, 1992. It contends that C.P., a sophomore, registered in the usual manner, and that until after the Burlington game, it had no knowledge that C.P. was living with a relative other than his mother and guardian, in tranferring to Gloucester City High School from the Clayton School District, where the mother still resides. The Board would have the Commissioner "revisit" the case law concerning the thirty-day rule and to decide in its favor because C.P. moved to Gloucester City to live with an uncle who would present a positive role model, and to encourage his staying in school to graduate, not for athletic advantage.

NJSIAA filed a Letter Brief and accompanying documents in Opposition to the Motion for Emergent Relief on November 12, 1992. Its submission also included the minutes of the EAC's hearing in this matter conducted on October 21, 1992, the decision of the Committee dated October 26, 1992 as well as numerous Commissioner of Education and Court decisions regarding the issue at hand. Said submission advances the argument that no basis existed in the record developed before the EAC to warrant vacating the forfeiture of the September 19, 1992 game, noting that NJSIAA does not have the discretion to vacate the automatic forfeiture required pursuant to Article V, Section 4K(2) of the NJSIAA Bylaws.

The EAC's letter of October 26, 1992 argued that if it were to vacate the forfeiture in this matter, it might encourage parents and students to take a risk in attempting to circumvent the

eligibilty rules by improper transfers. NJSIAA notes that the telephone number given by C.P.'s mother, which was not a Gloucester City exchange, provided an adequate basis for further due diligence on behalf of the school to assess C.P.'s eligibility to participate in interscholastic sports during the thirty-day waiting period. Hence, respondent argues, the forfeiture was reasonable, and the Commissioner should not substitute his judgment for that of the NJSIAA. In this regard, NJSIAA cites such case law as Board of Education of the City of Trenton, Mercer County v. NJSIAA, 1991 S.L.D. 2217; Hunterdon Central High School Board of Education v. NJSIAA et al., decided by the Commissioner November 22, 1985; Board of Education of North Arlington et al. v. NJSIAA, 1983 S.L.D. 1221 and Board of Education of the Northern Highlands Regional High School District v. NJSIAA, petition filed November 10, 1982, Appellate Division reversed and stay granted November 18, 1982, reversed Supreme Court and stay vacated November 29, 1982, decision on remand Appellate Division October 17, 1984 in support of its contention that forfeiture is appropriate under the instant circumstances.

On November 12, 1992 the Commissioner of Eduction designated his authority to hear and decide the Motion for Emergent Relief and the merits of the matter pursuant to N.J.S.A. 18A:4-33 to Deputy Commissioner John C. Woodbury. Oral argument was held by telephone conference call with the parties representatives on that date. For the reasons which follow, the Deputy Commissioner of Education denies petitioner's Motion for Emergent Relief for failure to meet the standards for pendente lite restraints as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982) and dismisses the instant Petition of Appeal on its merits.

In considering petitioner's claim of irreparable harm, the Deputy Commissioner relies on Burnside et al. v. NJISAA, unpublished decision of App. Div., November 15, 1984, Dkt. No. A-625-84T7 for the proposition that participation in interscholastic sports is a privilege, not a right. Hence participation in interscholastic sports playoffs does not constitute irreparable harm.

Similarly, the Deputy Commissioner is compelled to reject the Board's position on the merits of its claim. The Board recognizes that case law has consistently upheld the thirty-day rule. Neither does the Board contest the fact that C.P. played football on September 19, 1992 for the Gloucester City team when, in fact, he had transferred to the Board's district from Clayton in early September to live with his uncle while his mother and guardian, remained a resident of Clayton, a different school district. Nothing presented in the Board's papers nor during oral argument convinces the Deputy Commissioner to disturb the opinion of the Appellate Division decision in Northern Highlands Regional, supra. Neither does he find a basis for revisiting the thorough opinion expressed by the Office of Administrative Law, affirmed by the Commissioner, in North Arlington, supra. Accordingly, it is found and determined that the Board has failed to meet its burden of demonstrating a likelihood of succeeding on the merits of its claim, and such arguments are hereby dismissed as being without merit.

Finally, while recognizing the importance of sports in a student's growth and development, the Courts of New Jersey and the Commissioner of Education have made it plain that participation in athletics is a privilege, not a right, and that a voluntary organization, such as NJSIAA, has a public policy interest in

preserving the rules by which all participating schools agree to abide. See Burnside, supra, and N.J.S.A. 18A:11-3. In light of the fact that NJSIAA provided the Board with full due process and considering the Association's consistent application of its rules to this case, the Deputy Commissioner finds and determines that his standard of review has been met by NJSIAA in this matter; that is, if due process has been provided and there is an adequate basis for the decision reached by the NJSIAA committees, the Commissioner will not substitute his judgment even when he would otherwise decide in a de novo review. See, D.J.K. and H.J.K v. NJISAA 1987 S.L.D. 259. Based on these precedents and a careful review of the record of this matter, the Deputy Commissioner rejects the Board's arguments on the merits of this matter as well as under the standards established by the courts for pendente lite restraints, and dismisses the Petition of Appeal, with prejudice, for the reasons expressed herein.

IT IS SO ORDERED.

John C Woodbury

DEPUTY COMMISSIONER OF EDUCATION

NOVEMBER 16, 1992

DATE OF MAILING - NOVEMBER 16, 1992

288-92

288-92

FAIRVIEW HOMEOWNERS ASSOCIATION, SHERYL FALL, CLIFF OLSEN AND CATHERINE STONE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIRVIEW, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

NOVEMBER 19, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 2981-92
AGENCY REF. NO. 148-4/92

FAIRVIEW HOMEOWNERS ASSOCIATION,
SHERYL FALL, CLIFF OLSEN AND CATHERINE STONE,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF FAIRVIEW, BERGEN COUNTY,
Respondent.

Jospeh Rotolo, Esq., for petitioners Fairview Homeowners Association, Sheryl Fall and Catherine Stone

Cliff Olsen, *pro se*

Dennis Oury, Esq., for respondent
(Oury, Mizdol & Brovarone, P.C., attorneys)

Record Closed: September 14, 1992 Decided: October 13, 1991

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

This matter concerns a request for a preliminary injunction in order to hold in abeyance the demolition of the English Neighborhood School in the Borough of Fairview which was granted by John Futey ALJ, on April 30, 1992. The matter was originally transmitted to the Office of Administrative Law (OAL) on April 27, 1992 for

determination as a contested case on an application for emergent relief. The petition was granted on April 30, 1992 and the matter was transmitted to Marylouise Lucchi-McCloud, ALJ for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to 15 and 52:14F-1 to 13.

Prior to the onset of the hearing the petitioners requested to amend the prehearing order and expand the scope of the hearing and essentially amend their original petition to include acts of mismanagement which were not originally alleged in the petition. On September 14, 1992 the request for an amendment to the prehearing order was denied. Subsequent to the denial of the order a motion was made to dismiss the petition as being moot based upon the petitioners requesting that the preliminary injunction be dismissed. Oral argument was held on September 14, 1992 and the record closed. After a careful review of the petition and having considered the fact that the petitioners have removed their objections to the demolition of the Neighborhood School based upon their ability to make an inspection of the school upon reasonable notice to the respondent board of education through its secretary Patrick Coffield, it was then determined that the issue of the petition was moot. An order was signed dismissing the matter due to the fact that no issues remained for adjudication.

As a result, it is hereby **ORDERED** that the petition in the above-captioned matter be and hereby is dismissed as moot.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Date

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

10/16/92

Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 20 1992

Date

OFFICE OF ADMINISTRATIVE LAW

am

OAL DKT. NO. EDU 2981-92

FAIRVIEW HOMEOWNERS ASSOCIATION, SHERYL FALL, CLIFF OLSEN AND CATHERINE STONE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIRVIEW, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner concurs that this matter has been rendered moot by removal of petitioners' objections to the proposed demolition of the Neighborhood School and their concomitant request that the preliminary injunction granted on April 30, 1992 be dissolved.

Accordingly, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal on the basis that no issues remain for adjudication is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 19, 1992

DATE OF MAILING - NOVEMBER 19, 1992

289-92

289-92

U.K. AND G.K., on behalf of their minor child, D.K.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parents of student D.K., who was injured by another student, alleged Board failed to properly discipline student who caused injury.

ALJ found petitioners did not seek additional entitlement for themselves or their child but to impose additional burden on third person not a party to this proceeding. Since petitioners' legitimate interests would not be "substantially, specifically and directly affected by the outcome" (N.J.A.C. 6:24-1.1), ALJ dismissed petition.

Commissioner concurred with ALJ that petitioners did not have standing to appeal the penalty imposed by the Board upon another student. Petition was dismissed.

NOVEMBER 20, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1943-92

AGENCY DKT. 45-2/92

U.K. and G.K., parents,
on behalf of their
minor child, D.K.,
Petitioners,
v.
BOARD OF EDUCATION
OF THE CITY OF CLIFTON,
Respondent.

U.K. and G.K., *pro se*

Anthony P. Sciarrillo, Esq., for respondent

Record Closed: October 2, 1992 Decided: October 14, 1992

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal by parents from a public school district's alleged failure to discipline properly another student who caused injury to their son. Petitioners allege that the local board of education failed to follow its own written policy guidelines for student discipline. The threshold issue is whether petitioners have standing to challenge the appropriateness of disciplinary action taken against

someone else's child. For the reasons which follow, the school board's motion to dismiss the petition is granted.

Procedural History

U.K. and G.K., parents of D.K., filed a verified petition with the Commissioner of Education ("Commissioner") on February 20, 1992, requesting a review of "all documents involved in this matter" and an inquiry into the "investigative process within the Clifton High School system." Respondent Clifton Board of Education ("Board") filed its answer on March 9, 1992, denying the allegations and raising the issue of petitioners' standing to bring this lawsuit. Subsequently, on March 16, 1992, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

On July 16, 1992, respondent filed a motion to dismiss the petition for lack of standing. Thereafter, on August 19, 1992, petitioners filed opposing papers. The case was submitted on October 2, 1992 for ruling on the papers.

Findings of Fact

All of the material facts are undisputed or, for the limited purpose of deciding this motion, may be assumed as true based on the petition and other documents submitted by petitioners. **I FIND:**

During the 1991-92 school year, D.K. was an eleventh-grade student attending public high school in Clifton, New Jersey. On Friday October 4, 1991, while D.K. was "walking across the upper field" on his way to band practice, he was "attacked from behind and thrown to the ground" by a fellow student, B.B, who was "considerably larger in size and weight." Immediately before being tackled, D.K. heard a voice from behind say, "Let's get [D.K.]." Another student, M.P., was also involved in the attack, but B.B. has been identified as the leader and chief instigator. D.K. had done nothing to provoke the attack and was certainly not a willing participant. When rehearsal started at around 3:00 p.m., band director Robert Morgan saw that D.K. was in pain and unable to move his arm. Mr. Morgan sent him unescorted to the office to call his parents. Later that same day, D.K. went to the hospital, where he was diagnosed as having suffered a broken collarbone. As a result of his injury, D.K.

had to wear a clavicle strap for six weeks, and he missed the remainder of the band season.

The following morning, Saturday October 5, 1991, Mr. Morgan spoke by telephone with D.K. and asked him what had happened. On Tuesday, October 8, 1991, the father, U.K., visited the school and discussed the incident with the building principal and the vice principal in charge of discipline. Over the next few days, U.K. or his wife, G.K., had conversations with various individuals, including B.B.'s parents and Mr. Morgan. At one point, Mr. Morgan agreed with the characterization of B.B. as a "bully," although he later explained that B.B.'s behavior "seemed more of a childish immature nature rather than one of malicious intent." Mr. Morgan described the incident as a "game" called "pile on," in which D.K. was unfortunately "singled out as the person to pile on." No one refuted petitioners' assertion that some two weeks earlier B.B. had "shoved" D.K. "into the blackboard" of the band room, and that a year ago he had "pushed him around a few times" and "made fun of his hair being greasy." It does not appear, however, that anyone had reported these prior incidents to a teacher or other responsible school staff member until after the most recent episode.

Meanwhile, school administrators conducted an investigation into the circumstances of the most recent incident and determined that, while the two other students had engaged in irresponsible conduct, they had not intended actually to hurt D.K. Petitioners themselves recognize this distinction, when they acknowledge that B.B. may not have had the "malicious intent" of causing bodily injury, but that he did intend "to thrust" with full force against D.K. Less than one week after the band practice incident, on October 10, 1991, Vice Principal Henry Dougherty disciplined the two guilty students by imposing a five-day detention, removal from one band activity, and community service.

Guidelines for discipline set forth in the district's official student handbook establish several categories, depending on the seriousness of the infraction. Category I, which includes disruptiveness in class, rudeness to staff member, dress code violations, and "other offenses of similar seriousness," is punishable by a wide range of sanctions, including referral to the time-out program, parent conference, detention and Saturday school suspension. Category II, which refers to "disorderly conduct" and "fighting with other students," among other offenses, is punishable

by many of the same sanctions and, in addition, by an "out-of-school suspension" of "up to five days." Category III, reserved for the most serious offenses, including "assault on a student or other person causing injury," is punishable by much more severe sanctions, including "mandatory out-of-school suspension for five to twenty-one days" and "elimination of all student activities including athletic and non-athletic program for one calendar year."[1] Evidently, the school administration decided that the particular circumstances in this case, especially the absence of any specific intent to cause harm, did not rise to the level of a Category III offense and, therefore, that a lesser penalty would be sufficient punishment.

Dissatisfied with this outcome, petitioners requested an opportunity to address the Board members at a school board meeting. On November 20, 1991, petitioners made a ten-minute presentation to the Board, in which they expressed their views that the incident had not been thoroughly investigated; that the administration's handling of the matter and "seeming indifference" to their concerns has "trivialized [their] pain"; that the "minimal" punishment meted out sends the wrong message to students; and that B.B. may have received "preferential treatment" because of his status as "an accomplished swimmer, who brings recognition to the high school." By letter dated November 27, 1991, William Liess, superintendent of schools, notified petitioners that the Board members had met in executive session and voted to sustain the disciplinary measure taken by the school administration, "based on what is considered to be an assault with intent to harm versus an injury as the result of horseplay."

There followed this appeal to the Commissioner, in which petitioners accuse the Board of "supporting a whitewash of this matter" by the school administration. Although the pleadings do not clearly articulate what relief is being sought, the

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[1] A sneak attack from behind, which the victim does not even know is coming, may not fit the technical legal definition of "assault," which implies "an intentional display of force such as would give the victim reason to fear or expect immediate bodily harm." *Black's Law Dictionary* 105 (5th ed. 1979). Undoubtedly, however, the student handbook uses the word in its broader sense of "a violent attack with physical means." *Webster's New International Dictionary* 130 (3d ed. 1978).

supporting documents show that petitioners want a reopening of the disciplinary proceeding below and imposition of a penalty commensurate with the offense.

It should also be noted that petitioners have hired an attorney, who has served separate notice on the Board of a tort claim for damages allegedly caused by an "assault during a poorly supervised school activity."

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that petitioners do not have standing to challenge the disciplinary action taken against a child who is not under their parental care or custody.

As used in the law, the term "standing" is a jurisdictional concept. Simply stated, it means that a particular litigant must have sufficient interest in the subject of the litigation so that a genuine clash between opposing viewpoints will be presented. *Kenwood v. Montclair Bd. of Educ.*, OAL DKT. EDU 8858-81 (April 23, 1982), *adopted*, Comm'r (June 14, 1992). New Jersey courts have adopted a generous approach toward recognition of standing in order that aggrieved parties will not be denied easy access to the legal system. *See Crescent Park Tenants Ass'n v. Realty Equities Corp.*, 58 *N.J.* 98 (1971). State administrative agencies are even more liberal in allowing persons with only a tangential interest to assert a claim. One authoritative treatise has gone so far as to predict that "New Jersey may be approaching a standing rule which permits citizens at large to challenge any administrative decisions that are of interest to them." S. Lefelt, *Administrative Law & Practice*, 37 *N.J. Practice Series* § 308 (1988).

Nonetheless, there are accepted limits as to who may seek to vindicate rights belonging to others. In the leading case of *Crescent Park Tenants Ass'n, supra,* at 107, the New Jersey Supreme Court declined to entertain proceedings by parties "who are mere intermeddlers" or "merely interlopers or strangers to the dispute." Generally, two prerequisites must exist to establish standing: First, petitioner must demonstrate a sufficient stake in the outcome of the proceedings; and, second, his position must be truly adverse to the opposing party. *Home Builders League of So. Jersey, Inc. v. Berlin Twp.*, 81 *N.J.* 127, 132 (1979). Sometimes the first requirement is described in terms of the "substantial likelihood of harm" to the complainant if the

requested relief is not granted. *Home Builders*, at 134. Where a case is of great public interest, however, "any slight additional private interest" will be sufficient to afford standing. *Salorio v. Glaser*, 82 *N.J.* 482, 491 (1980). But courts still continue to look for some measurable amount of detrimental impact on the complaining party's personal rights.

Similar restrictions are imposed on those who would initiate administrative proceedings before the Commissioner of Education. While *N.J.S.A.* 18A:6-9 confers upon the Commissioner jurisdiction to hear and determine "all controversies and disputes arising under the school laws," the Commissioner has adopted regulations clarifying exactly who may be considered interested persons for purposes of such hearings. *N.J.A.C.* 6:24-1.1 defines "interested person(s)" as anyone "who will be *substantially, specifically and directly affected* by the outcome of a controversy." (Emphasis added.) Such language is consistent with the Administrative Procedure Act, which limits the definition of a contested case to proceedings where the "legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or by statute to be determined." *N.J.S.A.* 52:14B-2(b)

Thus, the Commissioner has consistently refused to hear cases brought by petitioners who would not be affected by the outcome in a direct and meaningful way. *See Kenwood v. Montclair Bd. of Ed, supra*, (concerned citizen seeking to rewrite school attendance policy); *Lobis v. Maple Shade Bd. of Educ.*, OAL DKT. EDU 3630-79 (June 11, 1980), *adopted*, Comm'r (Aug. 11, 1980), *aff'd,* St. Bd. (Nov. 5, 1980) (parent whose son no longer attended school in the district complaining about the quality of education received by remaining students); *Delaney v. Woodbridge Bd. of Educ.*, OAL DKT. EDU 382-78 (Dec. 12, 1979), *adopted*, Comm'r (June 11, 1980) (taxpayer questioning propriety of filling job vacancies); *Ricardelli v. Newark Bd. of Educ.*, OAL DKT. EDU 1894-79 (Sept. 26, 1979), *adopted*, Comm'r (Nov. 16, 1979) (taxpayer challenging legality of school board's decision to transfer personnel); *Accord, G.G. v. New Providence Bd. of Educ.*, 1975 *S.L.D.* 502 (parent of high school graduate challenging attendance policy).

Significantly, petitioners have not cited any legal authority for the proposition that a parent may appeal the school discipline imposed on someone else's child. Typically, it is the parent or guardian of the child subject to discipline who possesses

the right of appeal. *Tibbs v. Franklin Twp. Bd. of Educ.*, 59 *N.J.* 506 (1971). Research has produced two school law decisions in which a parent has successfully sued a local district for inadequate disciplinary procedures, but both are readily distinguishable on their particular facts. In *Venezia v. Ocean Twp Bd. of Educ.*, 92 *N.J.A.R.* 2d (Vol. 3) 370 (Comm'r of Educ.), a parent sued to obtain greater adult supervision for her ten-year-old daughter, who had been tormented mercilessly by a number of juveniles when changing classes, in the lunch area, and on the school bus. Similarly, in *R.P. v. Delran Bd. of Educ.*, OAL DKT. EDU 3446-85 (Nov. 18, 1985), *adopted,* Comm'r (Dec. 30, 1985), parents removed their eighth-grade daughter from school for her physical safety and then sued to recover the cost of enrolling her in a neighboring school district. Evidence substantiated that the home district had failed to take effective disciplinary action to prevent continuing name-calling, harassment, and physical abuse carried out by an organized group of students.

Both of these cases involved parents who sought to provide a safe and secure learning environment for their own child, not to impose a harsher punishment on another child. In contrast, petitioners in this matter are not asking to protect their son against a credible threat of future violence. They admit that school authorities took immediate action to apprehend the guilty individuals, that the wrongdoers received swift punishment, and that the Board listened to their objections before passing final judgment. Their disagreement is merely with the degree of the penalty, which they perceive to be too lenient and indulgent. Apart from double jeopardy considerations, the situation is analogous to that of a crime victim seeking

to appeal a light sentence handed down to a convicted defendant.[2] Petitioners do not seek an additional benefit for themselves or their child, but rather to impose an additional burden on a third person who is not a party to this proceeding. In the language of the regulation, petitioners' legitimate interests will not be "substantially, specifically and directly affected" by the outcome.

If D.K. has sustained damages because agents or employees of the Board negligently failed to take reasonable precautions for his safety and well-being, petitioners may pursue their tort remedy in an appropriate forum. *Jackson v. Hankinson*, 51 *N.J.* 230 (1968); *Titus v. Lindberg*, 49 *N.J.* 66 (1967).

Order

It is **ORDERED** that the Board's motion to dismiss the petition is granted.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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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[2]Crime victims have the statutory right to provide a written statement for inclusion in the presentence report prepared by the Probation Department. *N.J.S.A.* 2C:44-6(b). Additionally, the Crime Victim's Bill of Rights recognizes a victim's right to submit a written statement to a representative of the Prosecutor's Office prior to the filing of formal criminal charges and to make an in-person statement directly to the sentencing court concerning the impact of the crime. *N.J.S.A.* 52:4B-36(m) and (n). Victims of serious crimes have the right to present a written statement to the Parole Board or testify before a parole hearing officer in opposition to early release. *N.J.S.A.* 30:4-123.55. None of these statutes confers on the crime victim any right to appeal the sentence imposed by the court.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Oct. 14, 1992
Date

Ken R. Springer
KEN R. SPRINGER, A.J

Receipt Acknowledged:

10/16/92
Date

Maureen L. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 20 1992
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

al/e

U.K. AND G.K., on behalf of their minor child, D.K.,	
PETITIONERS,	
V.	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	DECISION
RESPONDENT.	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioners' exceptions were untimely filed pursuant to N.J.A.C. 1:1-18.4 and are not addressed herein. Replies by the Board were timely filed, but need not be summarized below because of the untimeliness of petitioners' filing.

Upon careful review and consideration, the Commissioner concurs with the ALJ that, under the circumstances of this case, petitioners do not have standing to appeal the penalty imposed by the Board upon another student. As noted by the ALJ, petitioners do not seek a safer environment for their own child, nor do they deny that they were given an opportunity to express their views to the Board, nor do they deny that the district took prompt investigative and punitive actions in response to the incident at issue, notwithstanding that they disagree with the outcome of those actions. Further, the record shows that petitioners' objections have led the Board to undertake a review of its own policies and

procedures for considering matters such as that brought before it by petitioners. Thus, apart from redress of a type which must be pursued through the tort claims process, petitioners have not shown a sufficiently direct and specific interest in the matters raised in their petition so as to be found to have standing in this forum.

Accordingly, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 20, 1992

DATE OF MAILING - NOVEMBER 20, 1992

290-92

290-92

NORTH BRUNSWICK TOWNSHIP EDUCATION ASSOCIATION,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK AND GERARD PARILLO, MIDDLESEX COUNTY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Education Association sought to disqualify Respondent Parillo from service as Board member because of his position as police officer for Township of North Brunswick wherein he provided security services at high school athletic events.

ALJ dismissed petition finding no Board action was ever taken to enter into contract with Respondent Parillo or the police department and no Board action conferred any direct or indirect benefit on Respondent Parillo. Payment rates for security services were set by police department and assignment of officers was made exclusively by police department.

Commissioner adopted findings and determination in initial decision with the modification that Parillo must abstain from any deliberations and actions of the Board relative to security at school events. In so ruling, the Commissioner emphasized that there must be strict enforcement of a wall of separation between Parillo's role and responsibilities as a Board member and his role, responsibilities and employment as a police officer assigned to school-related events.

NOVEMBER 20, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL Dkt. No. EDU 7371-91
Agency Dkt. No. 235-6/91

NORTH BRUNSWICK TOWNSHIP

EDUCATION ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP

OF NORTH BRUNSWICK and GERARD

PARILLO,

Respondents.

Steven Klausner, Esq., for petitioner (Klausner, Hunter, Cige and Seid, attorneys)

Jack Borrus, Esq., for respondents (Borrus, Goldin, Foley, Vignuolo, Hyman and Stahl, attorneys)

Record Closed: June 30, 1992 Decided: October 8, 1992

BEFORE **JAYNEE LaVECCHIA,** CHIEF ALJ:

This is an action to disqualify Gerard Parillo from service as a member of the Board of Education of the Township of North Brunswick. It is brought by the North Brunswick Township Education Association, which alleges that Mr. Parillo's services as a police officer with the Township of North Brunswick and his payment, as a result of that position, for the provision of security services at school athletic

activities, are in violation of *N.J.S.A.* 18A:12-1.1, or in the alternative, *N.J.S.A.* 18A:12-2. Respondents, the Board and Mr. Parillo, deny that there is a disqualifying conflict of interest present in these circumstances.

The matter was transmitted to the Office of Administrative law as a contested case proceeding. At the prehearing conference conducted in this matter, it was determined that it would proceed by way of cross motions for summary decision.

The motions with their supporting affidavits and exhibits were submitted to the undersigned and the record closed on June 30,1992. An order of extension was submitted in this matter extending the time for submission of the initial decision.

FACTUAL DISCUSSION

The material facts in this matter are not in dispute. Mr. Parillo has been a duly elected member of the North Brunswick Township Board of Education for six years. He also has been employed by the North Brunswick Township Police Department for the past seventeen years. North Brunswick Township police officers provide security at special events for the school district pursuant to a long-established practice. This relationship is not the subject of a special approval or vote by the Board of Education.

The director of athletics provides the North Brunswick Police Department each year with the dates and times of all special events for which security is required, and the number of security people required. North Brunswick Township police officers are assigned to work special events by the police department based on PBA procedures and guidelines which govern the assignment of Township police officers to work at off-duty details. The PBA guidelines were submitted in this matter and they reveal that the factors used to determine assignment of special event details relate to seniority and the number of hours worked. There is no allegation here and no proof that Mr. Parillo is treated differently when it comes to assignment to work at special event details for the school district.

All members of the North Brunswick Police Department who work special events for the school district are paid the same rates of compensation as all other police officers assigned to such special events. This rate is not set by the Board of

Education or the school district. As a member of the class of North Brunswick Township police officers eligible to work special events, Mr. Parillo receives no special benefit from the Board of Education that is different from all other members of the North Brunswick Township Police Department who provide security services for the school district as determined by the police department.

Payment for off-duty police officers who provide security at school special events is also a matter of long-established procedure. Checks are drawn on the high school athletics account which are made payable to the individual officers and are either mailed or picked up by representatives of the North Brunswick Township Police Department individually or for groups of officers. Petitioner has submitted for this record representative samples of checks paid to Mr. Parillo for his security work.

Mr. Turco, the business administrator of the school district, averred that payment for the police security comes out of the North Brunswick Township high school athletics account, which is part of the school district's overall budget. Receipts from high school special events are deposited in the Board of Education's general operating account, from which the high school's athletics account is funded.

Mr. Turco states in his affidavit, which is uncontradicted, that the Board of Education does not directly control payments from the high school athletics account, except through the overall budget and accounting process. The athletic account is administered by the high school treasurer, who operates under guidelines for receipts and disbursements established by the Board of Education and under the direct supervision of the principal and assistant principal of the high school, who co-sign the checks. The high school treasurer submits periodic reports to the secretary of the Board of Education and disbursements from the high school athletics account are included in the statement of expenditures reported each month to the Board of Education by the secretary. The high school athletics account is reviewed monthly by the secretary of the Board of Education and audited annually as part of the regular school audit conducted each year and submitted to the New Jersey Department of Education for review.

LEGAL DISCUSSION

There is a breadth of case law in which the Commissioner of Education and appellate tribunals have interpreted what is a disqualifying interest or position which would preclude a member of a board of education from continued membership. The pertinent statutes are *N.J.S.A.* 18A:12-1.1, which provides:

> No member of a board of education shall, during the term for which he is elected or appointed, be eligible for appointment to any paid office or position required to be filled by the board unless he shall resign or cease to be a member at least 6 months prior to his appointment, except in cases where the office or position is by law required or permitted to be filled by a member of the board.

and *N.J.S.A.* 18:12-2, which provides:

> No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board, nor, in the case of local and regional school districts, shall he hold office as mayor or as a member of the governing body of a municipality, nor, in the case of county special services school districts and county vocational school districts, shall he hold office as a member of the governing body of a county.

At the outset, I find *N.J.S.A.* 18A:12-1.1 to be inapplicable to the present controversy. The record is absent any proof that Mr. Parillo, as a police officer of North Brunswick Township, is holding a "paid office or position required to be filled by the board" in violation of *N.J.S.A.* 18A:12-1.1. The Board of Education does not determine who is hired as a police officer by North Brunswick Township and it is the police department which assigns police officers to off-duty security work pursuant to PBA guidelines. Accordingly, I find no basis in this record to support a disqualifying conflict for Mr. Parillo pursuant to the strictures of *N.J.S.A.* 18A:12-1.1.

With regard to application of *N.J.S.A.* 18A:12-2, and the prohibition against a board member being "interested directly or indirectly in any contract with or claim against the board", I note first that this case involves no "claim" by Mr. Parillo against his board. This simply is not a situation wherein a sitting board member is pursuing some claim against the body of which he is a component part.

Hence, the focus of this analysis will be on the language prohibiting a direct or indirect interest in a "contract with . . . the board."

The various cases addressing *N.J.S.A.* 18A:12-2 and its application to members of local boards of education have dealt with two basic questions, namely: 1) does a conflict exist and, if so, 2) is it a substantial and materially sufficient conflict. Two scenarios in which these questions generally arise are: where the board member or a close family member receives a benefit through a collective bargaining agreement covering a class of beneficiaries, and where the board is called upon to consider and award a particularized commercial contract which provides a special benefit to an individual.

Turning to the first category, the school law decisions have held that an individual may serve on a board of education notwithstanding that a member of the board member's immediate family is a board employee. *See In re Bayless*, 1974 *S.L.D.* 595, *rev'd.*, St. Bd. of Ed., 1974 *S.L.D.* 603; *Elms v. Mount Olive Board of Ed.*, 1977 *S.L.D.* 713. In *Elms*, the close family members included a spouse, a sister, a son and a grandson. In this case the board members involved abstained from acting to ratify the collective bargaining agreement that would have covered the related family members and the Commissioner found no disqualifying conflict posed by the situation.

Salerno v. Old Bridge Board of Education, 6 *N.J.A.R.* 405 (1984), addressed a situation in which a school board member, whose spouse was a teaching staff member within the school district, did vote to ratify the collective bargaining agreement that pertained to his wife. *Salerno* is instructive because the Board's argument focused on the nature of the difference between a benefit conferred on a group which may include a board member's spouse, and a benefit conferred by a commercial contract. As set forth in the administrative law judge's (ALJ's) initial decision, which was affirmed by the Commissioner (*see* 6 *N.J.A.R.* at 413):

> In the Board's view, the Commissioner has recognized a clear distinction between a commercial contract which provides a specific benefit to an individual and a collective bargaining agreement which benefits an entire class of employees. In this case, the collective bargaining unit covers a unit containing hundreds of Board employees. The connection between the economic benefit to a single family member is an indirect and remote consequence of

> participation in negotiations or a vote for ratification of the agreement. It cannot be disputed that labor relations is a major concern of any board of education. To foreclose a board member from participation in labor relations matters because a relative happens to be a board employee would severely and unduly restrict an individual's ability to perform his or her obligations as a board member. Of course, board members are required to abstain from voting on matters directly affecting their relatives. Examples would include, but not be limited to, renewal or nonrenewal of individual employment contracts. *See, Elms, supra.*
>
> The Board also argues that the petitioner here offers no credible explanation as to why such drastic restrictions should be imposed on Board members. No evidence of impropriety has been alleged, let alone shown. The petitioner has failed to demonstrate a "substantial and materially sufficient" conflict of interest as required by *Bayless.*
>
> [*Salerno, supra*, 6 *N.J.A.R.* at 409]

The ALJ found the difference persuasive, stating:

> The negotiated labor agreement between a board and its employees obviously has an effect on an employees, whether they be related to board members or not. However, as stated by the Commissioner in *Elms*, it is not a commercial contract that would bestow special economic advantage on an individual. Rather, it affects all employees in a bargaining unit as a direct outgrowth of their statutory right to bargain collectively.
>
> [*Id.* at 412]

Accordingly, the ALJ held that the board member must abstain from participating in or voting on any matter that directly pertained to the relative, but held it to be not necessary for the board member to abstain from voting on a collective bargaining agreement that would impact on the spouse only as a member of the entire group of people affected by the collective bargaining agreement.

This "class impact" analysis of the alleged conflict was elaborated upon in the Commissioner's decision in *Karabin v. Board Attorney and Board of Education of*

the Township of Woodbridge (September 18, 1990). Mr. Karabin was a duly elected board member who was also a former educator in the district. As a retiree of the district, he received health benefits pursuant to the current employee agreement. However, because that agreement was about to expire, the board was in the process of negotiating with the education association on, among other topics, employees' health benefits. The Commissioner determined that Mr. Karabin did not have a conflict pursuant to *N.J.S.A.* 18A:12-2 were he to vote on the newly negotiated teacher contract. Even though the alleged benefit would inure directly to Mr. Karabin, the Commissioner's analysis recognized that:

> . . . any benefits negotiated in this contract are negotiated for an entire group, including all teachers, per diem substitutes, clerks and secretaries, etc. Thus, the Commissioner finds that no specific benefit will accrue solely to the petitioner, as contemplated by the Legislature in crafting *N.J.S.A.* 18A:12-2.
>
> [*Karabin, supra,* at 12]

The Commissioner's analyses in these cases acknowledges that the connection between the economic benefit to a single family member is only an indirect and remote consequence of the board member's participation in discussion and vote on ratification of a collective bargaining agreement.

The Commissioner's decision in *Karabin* underscores that the earlier decisions finding no conflict were a board member to vote on an increase to a spousal teaching staff member occasioned by a new collective bargaining agreement, did not turn on the fact that the money went to one spouse as opposed to the board member spouse. This approach in consistent with the case law of this State recognizing that marital assets are normally so commingled it would not be possible to sufficiently segregate funds for political contributions by a judge's wife, *In re Gaulkin*, **69** *N.J.* 185 (1976), or to separately identify salary paid to the spouse of a judge if earned in a casino-licensed activity, *Greenberg v. Kimmelman*, 99 *N.J.* 552 (1985). Although these cases were not cited in *Karabin*, the Commissioner's conclusion in *Karabin* is consistent with *Gaulkin* and *Greenberg* and its outcome supports the logical reasoning that "class benefits" are unobjectionable from a conflict perspective whether they be conferred on the board member's spouse or the board member him or herself.

Here, Mr. Parillo's "interest" is not a particularized interest, but is one shared by the entire class of police officers within the North Brunswick Police Department. That is, like any police officer within North Brunswick, he may be called upon to take an assignment for the provision of security at a school athletic event. That interest is so remote and so generalized to the entire class of police officers, that I find no disqualifying interest pursuant to *N.J.S.A.* 18A:12-2 present in this matter when compared with the situations set forth in *Salerno, Elms* and *Karabin.*

Moreover, there is not even any contract involved here. There was never any commercial contract presented to the Board for its action.

By way of comparison to the instant circumstances, in *Babcock Computer Corporation v. Southern Regional High School Board of Ed. and IBM Corp.,* Commissioner of Education (December 11, 1990), the Commissioner held that the close familial relationship between Kevin A. Babcock, president and sole stockholder of Kevin A. Babcock Computer Corporation, and his mother, who served on the board of education, disqualified the Babcock Corporation from the award of a computer contract. The relationship rendered suspect the award of this commercial contract to this particular bidder despite the corporation's status as the lowest bidder.

Similarly, in *Oehlke v. Hoffman and the Tewksbury Township Board of Education*, Commissioner of Education (August 12, 1991), the Commissioner found a conflict of interest that required removal of a member of the board of education due to his employment as a school bus driver by the company that received the Board's contract to provide school transportation services to the pupils of the district. In *Pauze v. Young*, Commissioner of Education (June 11, 1990), a conflicting interest was found for a board member who sold insurance to school bus companies and to individuals who provide contractual school bus service to the school district. The Commissioner found that the board member derived special economic advantage from the awarding of these contracts since without the contract the income would not have been earned.

In each of the above instances, the Commissioner found fault with the board member being involved in the debate and/or vote on the award of a commercial contract to a vendor or provider of services, which as a direct result conferred economic benefit to either the board member or a close family member.

This particularized awarding of a benefit through a competitive bid contract process is unlike the generalized benefit found to be nonproblematic in the collective bargaining situation.

I find, based upon the undisputed facts in this matter, no board action was ever taken to enter into a contract with Mr. Parillo or the police department. No contract was ever brought before the Board even to be discussed. There simply was no Board action which could be said to have conferred a direct or indirect benefit on Mr. Parillo.

Mr. Parillo's benefit, to the extent a recognized benefit exists in this case, was that he would be called upon to serve additional duty during off-duty time to provide security for the school athletic events and was compensated at rates set, not by the school district, but by the police department. These assignments are made exclusively by the police department in accordance with its own procedures. The fact that the payment, at rates set by the police department, is from the high school athletics account, fails to convert this situation to a prohibited direct or indirect interest in a contract covered by *N.J.S.A.* 18A:12-2.

Mr. Parillo's status is no different from that of any police officer called upon to provide additional security at events within the town, including school athletic events. No disqualifying conflict is presented merely because the police department charges this additional drain on the limited police force to the user: here the school district. The situation presented here does not justify the harsh result of disqualifying this duly elected board member. The petition of appeal is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 8, 1992
Date

Jaynee LaVecchia
JAYNEE LaVECCHIA, CHIEF ALJ

Receipt Acknowledged:

10/9/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 15 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

NORTH BRUNSWICK TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.		COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK AND GERARD PARILLO, MIDDLESEX COUNTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner, as were replies thereto by respondents, pursuant to the provisions of N.J.A.C. 1:1-18.4.

In its exceptions, petitioner reiterates the arguments of its prior submissions and contends that the ALJ's findings to the effect that Parillo receives no special benefit from this membership on the Board are erroneous and unsupported by the record, which, to the contrary, shows that Parillo is paid with Board funds, picks up his check from district staff members apart from normal check distribution and profits by Board decisions setting the athletic calendar and agreeing to use off-duty police to provide athletic event security. In reply, the Board argues for acceptance of the ALJ's decision in its entirety and further notes the decision's consistency with a case issued after closing of the present record, wherein no conflict of interest was found on the part of a Board

member employed by the city police department as a juvenile officer assigned to high school security duty. Italo N. Ubaldini v. Pedro Cancel and the School District of the City of Passaic, Passaic County, decided by the Commissioner on July 24, 1992

Upon careful review, the Commissioner concurs with the ALJ that, under the circumstances prevailing herein, Respondent Parillo's work as a security officer at district athletic events constitutes no conflict of interest so as to disqualify him from Board membership under N.J.S.A. 18A:12-1.1 or 18A:12-2. The ALJ's findings of fact regarding the nature of Parillo's employment, the Board's lack of meaningful control thereover or involvement therein, and the absence of any specific benefit to Parillo arising from his Board membership, are fully supported by the record, and the Commissioner finds no merit in petitioner's claims to the contrary.

However, notwithstanding the above, the Commissioner recognizes that Parillo's employment arises under policies and procedures of the Board that could conceivably place him in a position to influence, for example, routine determinations as to how many security guards will be necessary for a particular event or broader issues such as whether the district should continue to obtain security services in its present manner. Therefore, lest there be even the slightest appearance of conflict, and in order to maintain a strictly enforced wall of separation between his role and responsibilities as a Board member and his role, responsibilities and employment as a police officer assigned to school-related events, Parillo is directed to abstain from voting or participating in deliberations, no matter how remote, on any policies or

procedures of the Board which would have a direct or indirect bearing on issues related to security at school events.

Accordingly, with the modification set forth herein limiting Parillo's ability to participate in certain Board matters, the initial decision of the Office of Administrative Law is affirmed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 20, 1992

DATE OF MAILING - NOVEMBER 20, 1992

290-92

EDU #7371-91
C # 290-92
SB # 66-92

NORTH BRUNSWICK TOWNSHIP EDUCATION ASSOCIATION,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK AND GERALD PARILLO, MIDDLESEX COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, November 20, 1992

For the Petitioner-Appellant, Klausner, Hunter, Cige & Seid (Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Respondent, Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl (Jack Borrus, Esq., of Counsel)

The State Board of Education affirms the decision of the Commissioner for the reasons expressed therein. In so doing, we stress that the sole question raised and decided in this case was whether a conflict of interest was present here so as to disqualify respondent Parillo from Board membership under N.J.S.A. 18A:12-1.1 or N.J.S.A. 18A:12-12, and that no questions relating to the School Ethics Act, N.J.S.A. 18A:12-21, were considered or decided.

April 7, 1993

Date of mailing 12 APR 1993

291-92

291-92

IN THE MATTER OF THE TENURE HEARING OF ADDIS NEAL, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.

COMMISSIONER OF EDUCATION

DECISION

NOVEMBER 23, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO. EDU 3945-92
AGENCY DKT. NO. 185-5/92

In the Matter of the Tenure Hearing of ADDIS NEAL, STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON

Gregory G. Johnson, Esq., for petitioner (Carroll & Weiss, attorneys)

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

Record Closed: October 19, 1992 Decided: October 27, 1992

BEFORE **JAYNEE LaVECCHIA,** CHIEF ALJ:

This matter was transmitted to the Office of Administrative Law on May 27, 1992, for a hearing pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.*

A prehearing telephone conference was conducted by Mumtaz Bari-Brown, ALJ, on September 15, 1992, and the matter was set down for hearing in May, 1993. The three hearing dates were subsequently adjourned and the matter was reassigned to the undersigned in order to expedite the hearing in the matter.

The parties have since conferred for purposes of settlement, and have agreed to settle this matter and have prepared the attached Settlement Agreement indicating the terms of settlement.

I have reviewed the record and the Settlement Agreement and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I CONCLUDE that the Settlement Agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision approving settlement with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 27, 1992
Date

Jaynee LaVecchia
Jaynee LaVecchia, CHIEF ALJ

Receipt Acknowledged:

10/29/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 2 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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OCT 19 11 25 AM '92

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2490
(201) 773-5665
Counsel for Respondent

IN THE MATTER OF THE	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF
TENURE HEARING OF ADDIS	:	ADMINISTRATIVE LAW
NEAL, STATE OPERATED	:	O.A.L. DOCKET NO. EDU 3945-92N
		AGENCY REF. NO. 185-5/92
SCHOOL DISTRICT OF THE	:	
CITY OF PATERSON.	:	**SETTLEMENT AGREEMENT**

The parties hereby agree as follows relative to the tenure charges filed against the respondent Addis Neal by the petitioner, State Operated School District of the City of Paterson ("District"):

1. The District certified tenure charges against the respondent on April 30, 1992.

2. The respondent filed his Answer to the charges on May 21, 1992.

3. On September 15, 1992, a prehearing conference in this matter was conducted by the Honorable Mumtaz Bari-Brown, A.L.J. The following dates were set aside for the hearing, May 12, 18 and 19, 1993.

4. The respondent, Mr. Neal, tenders his resignation to be effective November 30, 1992. The respondent intends to retire effective December 1, 1992. The District agrees to cooperate in submitting all requisite data and forms to PERS in connection with respondent's retirement

application. However, this Agreement is not contingent on such application being accepted. The Board makes no representations, and shall bear no responsibility regarding respondent's rights and options under PERS.

5. The District hereby agrees, upon receipt of the written resignation, to withdraw the tenure charges filed with the Commissioner on May 4, 1992, Agency Ref. 185-5/92 and O.A.L. Docket No. 03945-92N.

6. Respondent shall be compensated in total $4,157.25 (three months salary at $16,629.00). Respondent's salary payments are to resume retroactive September 1, 1992, which is the 121st day after suspension. The payment of the salary amount of $4,157.25 shall be the only salary due to respondent from the District for the period from September 1 through November 30, 1992 and shall be in lieu of any monies otherwise due or claimable by him. All rights to salary will cease as of November 30, 1992, assuming this agreement is approved by the Commissioner of Education and Administrative Law Judge.

7. The parties respectively acknowledge that each has had ample opportunity to seek independent legal counsel, financial or other advice regarding this Agreement, and that each is signing this Agreement freely and voluntarily, without coercion, duress or pressure from the other party.

8. By entering this Agreement, each party releases and discharges the other with respect to all claims or rights

that either party may have against the other. This includes all claims, including those of which either party is not aware and those not mentioned herein. The releases by each party apply to all claims resulting from anything which has happened up to now. It specifically includes, without limitation, all claims which Neal may have respecting tenure, discrimination on any basis, rights under any collective bargaining agreement, disability payments, sick leave, salary or any other matter pertaining to his employment.

9. This Agreement is subject to approval by the Office of Administrative Law and the Commissioner of Education.

FOR THE RESPONDENT

Addis Neal

Dated: 10/5/92

Louis P. Bucceri, Esq.

Dated: 10/5/92

FOR THE STATE-OPERATED SCHOOL DISTRICT OF PATERSON

Dr. Laval S. Wilson

Dated: 10/9/92

Gregory G. Johnson, Esq.

Dated: 10/15/92

OAL DKT. NO. EDU 3945-92

IN THE MATTER OF THE TENURE HEARING OF ADDIS NEAL, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms in this matter against respondent, a tenured custodian, as they comport with the Cardonick standard for review of settlements in tenure charge cases and he adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983) The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

NOVEMBER 23, 1992

DATE OF MAILING - NOVEMBER 23, 1992

292-92

292-92

DAVID DEUTSCH,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF PARK RIDGE, BERGEN COUNTY,

RESPONDENT,

AND

MAUREEN CONNOLLY,

INTERVENOR.

COMMISSIONER OF EDUCATION

DECISION

NOVEMBER 23, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11178-91
AGENCY DKT. NO. 409-11/91

DAVID DEUTSCH,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF PARK RIDGE, BERGEN COUNTY,
Respondent
and
MAUREEN CONNOLLY,
Intervenor.

Louis P. Bucceri, Esq , for petitioner
(Bucceri and Pincus, attorneys)

Stephen R. Fogarty, Esq., for respondent
(Fogarty & Hara, attorneys)

Alfred F. Maurice, Esq., for intervenor
(Springstead & Maurice, attorneys)

Record Closed: October 13, 1992 Decided: October 20, 1992

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

David Deutsch, petitioner, a tenured teaching staff member employed by the Board of Education of the Borough of Park Ridge, Bergen County, was given notice by the Board on May 21, 1991 that his employment was to be terminated as of end

of the 1990-91 school year due to an alleged reduction in force. Tenured and certified in the position of teacher of science, he learned subsequently that no reduction in force had actually occurred among teachers of science in the Board's employ for 1991-92, the Board acting to replace petitioner with an individual with seniority in science and English. The Board did conduct a reduction in teaching periods in the English subject matter area for 1991-92 and reassigned the aforementioned tenured teacher with dual certification from her four English classes to a schedule of all science classes, thereby displacing petitioner while retaining a non-tenured teacher. In a petition of appeal filed with the Commissioner of the Department of Education on November 20, 1991, petitioner alleged Board action was in contravention of seniority provisions of *N.J.S.A.* 18A:28-11 and abridged petitioner's rights under *N.J.S.A.* 18A:28-5 by eliminating his employment without certification of charges or reduction of force in his area of seniority. He sought reinstatement and differential back pay. In answer filed by the Board on December 5, 1991, the Board denied allegations of improper termination contending petitioner's dismissal was the result of legitimate reduction in force and claiming petitioner's petition was barred for untimeliness under *N.J.A.C.* 6:24-1.2. The Commissioner transmitted the matter to the Office of Administrative Law on December 16, 1991 for hearing and determination as a contested case in accordance with *N.J.S.A.* 52:14F-1 *et seq*.

Prior to the scheduled hearing date, the parties advised that the matter had been settled amicably. Thereafter, a stipulation of settlement was submitted.

I have reviewed the record and stipulation of settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the agreement;

2. The settlement fully disposes of all issues in controversy, is in the interest of parties and public and should be implemented forthwith.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and accordingly I approve the settlement and **ORDER** that the parties comply with the terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 20, 1992
Date

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

Maureen L. Keller

10/22/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 23 1992
Date

Jayne LaVecchia

OFFICE OF ADMINISTRATIVE LAW

amr

FOGARTY & HARA
COUNSELLORS AT LAW

RODNEY T. HARA
STEPHEN R. FOGARTY

JANE GALLINA MECCA
ELLEN MARIE WALSH
GARY P. HALL
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23 HIGHLAND CROSS
RUTHERFORD, N.J. 07070-2110

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RECEIVED
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October 7, 1992

The Honorable James A. Ospenson, A.L.J.
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: David Deutsch v. Board of Education
of the Borough of Park Ridge
Docket No. EDU 11178-91

Dear Judge Ospenson:

We are enclosing original and one copy of fully executed Stipulation of Settlement in the above-entitled matter for your review and approval. The proposed Stipulation of Settlement disposes of all issues in this controversy.

If you should have any questions, of course, do not hesitate to contact us.

With kind regards, we are

Very truly yours,

FOGARTY & HARA

By: Stephen R. Fogarty

SRF:ms
Enclosure

cc: Louis P. Bucceri, Esq. (w/enc.)
Alfred F. Maurice, Esq. (w/enc.)
Mrs. Catherine Mozak

OCT 13 10 29 AM '92

FOGARTY & HARA, ESQS.
23 Highland Cross
Rutherford, New Jersey 07070
(201) 935-0440
Attorneys for

DAVID DEUTSCH, Petitioner, vs. BOARD OF EDUCATION OF THE BOROUGH OF PARK RIDGE, Respondent, vs. MAUREEN CONNOLLY, Intervenor	BEFORE THE COMMISSIONER OF EDUCATION O.A.L. DKT. NO. EDU 11178-91 AGENCY DKT. NO. 409-11/91 STIPULATION OF SETTLEMENT

WHEREAS, Petitioner, David Deutsch (hereinafter "Deutsch") a tenured teaching staff member in the employ of the Respondent, Park Ridge Board of Education (hereinafter "Board") who was riffed, alleged that the Board retained a non-tenure teacher in violation of Deutsch's tenure and seniority rights; and

WHEREAS, the Board filed a timely answer generally denying Deutsch's allegations and stating that its actions were in all respects proper and in compliance with statutes and regulations governing a reduction in force; and

WHEREAS, a telephone prehearing conference was held on or about April 3, 1992 pursuant to N.J.A.C. 1:1-13.1, et seq.; and

WHEREAS, the Administrative Law Judge, James A. Opsenson, issued a prehearing order on or about April 14, 1992 which, among other things, directed Deutsch to give notice to district teachers Maureen Connolly (hereinafter "Connolly") and Douglas Gipple (hereinafter referred to as "Gipple"), of the opportunity to move before the Administrative Law Judge for leave to intervene or participate in the matter, in accordance with N.J.A.C. 1:1-16.1, et seq.; and

WHEREAS, on May 7, 1992, Maureen Connolly moved before the Administrative Law Judge for leave to intervene which application was granted on May 8, 1992; and

WHEREAS, Gipple did not move before the Administrative Law Judge for leave to intervene in this matter; and

WHEREAS, the parties wish to amicably resolve their differences without the need to resort to any further litigation.

NOW, THEREFORE, based on the foregoing premises and the mutual promises and covenants contained herein, the parties agree as follows:

1. The Board acknowledges that Deutsch should have been employed for the 1991-1992 school year as a .6 teacher of science, thereby entitling him to seniority credit for the same period of time as if he had actually been employed by the Board.

2. Deutsch shall remain upon a preferred eligible list in the order of district seniority for re-employment in accordance with the provision of N.J.S.A. 18A:28-12 and N.J.A.C. 6:3-1.10, et seq.

3. Deutsch hereby waives any entitlement to any lost salary or emoluments of his tenured position suffered as a result of him being riffed and shall withdraw his verified petition with prejudice.

4. Since Connolly shall retain her position as a teacher of science and english and her tenure and seniority rights will be unaffected by Deutsch's receipt of .6 seniority credit for the 1991-1992 school year, she consents to the form of this Stipulation of Settlement and waives any rights which she may have as an intervenor in this matter.

5. The parties recognize that each has been represented by legal counsel of his, her or its own choosing and that they sign this Stipulation of Settlement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein. This Stipulation of Settlement shall be subject to the laws of the State of New Jersey.

6. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Stipulation of Settlement and bind the Board to its terms.

7. All terms of this Stipulation of Settlement are considered material. This document may not be altered, amended, modified or revoked, except by instrument executed in writing by all parties.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

Neil Giovanniello
Board President
Park Ridge Board of Education

Dated:

Catherine Mozak
Acting Board Secretary
Business Administrator

Dated:

WITNESS:

Dated: 8/27/92

David Deutsch

WITNESS:

Dated: Oct. 5, 1992

Maureen Connolly

OAL DKT. NO. EDU 11178-91

DAVID DEUTSCH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PARK RIDGE, BERGEN COUNTY,	:	DECISION
RESPONDENT,	:	
AND	:	
MAUREEN CONNOLLY,	:	
INTERVENOR.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

NOVEMBER 23, 1992

DATE OF MAILING - NOVEMBER 23, 1992

293-92

293-92

R.F. ET AL. AND L.H. ET AL., :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF PARK RIDGE, BERGEN COUNTY, : DECISION

RESPONDENT. :

SYNOPSIS

Petitioning former students (R.F. and L.H.) by their parents sought damages from respondent Board for denying them privilege of participating in year-end school activities including graduation in June 1992.

ALJ found consumption of alcohol on way to prom was sufficient violation for Board's actions. Board did not owe students an apology for their missing graduation and prom, as attendance at these functions is a privilege not a right. Students were aware of school rules and violated them. ALJ found matter was moot and there was no relief to be granted as petitioners acted illegally -- violating school policy, education policy, Board policy, health policy, safety policy and New Jersey Law. Summary decision was granted Board. Petition was dismissed.

Commissioner adopted findings and determination in initial decision.

NOVEMBER 30, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 4470-92

R. F., ET AL. AND L. H., ET AL.,
Petitioners,
v.
BOARD OF EDUCATION OF PARK RIDGE, BERGEN COUNTY,
Respondent.

M. F., for petitioner **R. F.**, a minor

T. H., for petitioner **L. H.**, a minor

Stephen R. Fogarty, Esq., for respondent (Fogarty & Hara, attorney)

Record Closed: October 2, 1992 Decided: October 19, 1992

BEFORE **EDITH KLINGER**, ALJ:

Petitioners, R.F. and L.H., by their parents, M.F. and T.H., sought an order from the Commissioner of Education allowing them to participate in graduation ceremonies and granting them compensatory and punitive damages from respondent, the Board of Education of Park Ridge (Board), which denied them the privilege of participating in year-end school activities, including their graduation. They further seek attorney's fees and costs of their suit.

In an Order on Application for Emergent Relief dated June 18, 1992, Bruce R. Campbell, ALJ, denied the petitioners' requests that R.F. and L.H. be permitted to take part in the June 18, 1992 graduation exercise at Park Ridge High School on the grounds that they were unlikely to prevail upon the merits at hearing. The Order was affirmed by the Commissioner on June 19, 1992.

The matter was set down for plenary hearing on October 2, 1992.

Prior to that date, the Board made a motion for summary decision to dismiss the petition on the grounds that there were no material facts in dispute, that respondent was entitled to summary decision as a matter of law, and that the matter was moot, there being no relief which could be granted to petitioners.

The Board's motion was received by the undersigned on September 22, 1992. Because petitioners were *pro se*, they expressed their concern about preparing responses to the Board's motion by October 2, the date set down for hearing. Petitioners were directed to submit their response, which was received on September 29, 1992, and the motion was argued on the record on October 2, rather than having the hearing proceed on that date.

Petitioners argued in their papers and on the record that summary decision should be denied to the Board because it did not follow its own regulations in disciplining the students and because the discipline imposed was too harsh. They further argued that these students were not sufficiently warned in the prom regulations of the consequences that would follow from a breach. They also claim that the school district has no legal authority to regulate the activities of students which do not take place on school premises or at school functions.

The Board promulgated its Policy 5132-6: Substance Abuse pursuant to the direction of *N.J.S.A.* 18A:40A-9 through 21. "Substance" as defined in *N.J.S.A.* 18A:40A-9 includes alcoholic beverages. "Substance abuse" as defined in the same statute includes the consumption or use of alcoholic beverages "for purposes other than for the treatment of sickness or injury as prescribed or administered by a person duly authorized by law to treat sick and injured human beings." I **CONCLUDE** from the statute that it is not necessary that a student be under the influence of alcohol to come within the statute; mere consumption is sufficient.

N.J.S.A. 18A:40A-11 directs each board of education to adopt and implement policies and procedures for dealing with substance abuse as defined above "on school property or at school functions." From this, I **CONCLUDE** that a local board has the statutory authority to adopt policies and procedures governing the discipline of pupils involved in the use of substances at school functions. The only requirement is that these policies and procedures

be adopted and implemented in accordance with the rules and regulations promulgated by the State Board. *N.J.S.A.* 18A:40A-11,

Board Policy 5131.6 provides in relevant part:

> The Park Ridge Board of Education recognizes that substance use and abuse is a serious problem in society. It also recognizes that the school plays a vital role in efforts of the community to control this problem. The Board further believes that a combination of an educational and corrective approach to the problem of substance abuse is more effective than one which is solely punitive.
>
> The use by students of illegal substances is prohibited at all times in all school buildings, on school property, and at any activity sponsored by and under the supervision of school officials.
>
> Consistent with NJSA 6:29-9, the Park Ridge Board of Education directs the Superintendent of Schools to develop administrative procedures for the evaluation and treatment of students who possess, consume, or who on reasonable grounds are suspected of being under the influence of alcoholic beverage or a controlled substance as identified in NJSA 24:21-2; and/or any chemical or chemical compound which releases vapor or fumes causing a condition or intoxication inebriation, excitement, stupefication [sic] or dulling of the brain or nervous system including but not limited to glue containing a solvent having the property of releasing toxic vapors or fumes, as defined in NJSA 2A:170-25 9

Pursuant to the Board policy, the Superintendent of the district developed the Prom/Snowball Regulations. These provide in relevant part

> 1. Recent court rulings have stated that hosts of parties where alcohol/drugs are served and consumed will be held liable for injuries ensuing. We insist that students not host or attend pre-prom/snowball parties where alcohol/drugs will be served.
>
> 2. School officials reserve the right to inspect limousines which chauffeur students to and from the Prom/Snowball if there is reasonable suspicion of alcohol/drug consumption.
>
> * * *
>
> 9. State Statute (N.J.S.A. 6:29-9) requires that students suspected of being under the influence of drug/alcohol by school officials be examined and tested immediately. Parents and guardians of those involved will be notified during the evening and will be asked to take their child for an immediate examination for drug/alcohol testing purposes. If the parent/guardian cannot be reached, the student involved will be accompanied to the nearest medical facility by a staff member who is chaperoning the Prom/Snowball. The school must and will implement action

> against those who attempt to attend the Prom/Snowball in an unsatisfactory condition and/or are found to be in possession of alcohol and or/drugs. The school may decide to prosecute violators to the fullest extent of the law (i.e. pressing charges and the like with local authorities). In addition, school penalties will be administered where appropriate. The penalty for members of the senior class will be restriction from participating in all end of year school sponsored activities, including graduation exercises. In addition, one will not be permitted to attend any future school-sponsored Prom/Snowballs as a guest. Guests, when in violation of these rules, will not be permitted to attend any future Park Ridge High School dances.

The regulations end by warning that any student or guest who violates the regulations will be asked to leave the Prom/Snowball.

There is no dispute that prior to the prom, these regulations were sent to the parents with a sheet for their signatures and that of their child. A covering letter addressed to both parents and students specifically states, "Your signature indicates your intent to comply with these regulations." The district also met with the students to discuss these rules. There is no dispute that R.F. and L.H. drank champagne in the limousine on the way to the prom/snowball; they admit to the consumption of an alcoholic beverage There is also no dispute that R.F. and L.H. did not appear to be under the influence of alcohol and it was not required that they submit to examination and testing Both young women were under the legal age for drinking alcoholic beverages at the time

The only disciplinary actions taken against R.F. and L H. in regard to this incident were that they were directed to leave the prom and were barred from participating in year-end ceremonies at the school. In particular, they were not allowed to attend their graduations. No reference to the incident appears in the school record of either student.

I **FIND** that these are the only material facts in this matter and that they are not in dispute. The only issue to be resolved is whether the district acted reasonably and within the scope of its authority in regard to the action taken against the students and whether the issue is moot since no relief may be granted to petitioners.

R.F. and L.H. argue that the Board had no authority to impose sanctions for the consumption of alcohol in the limousine since it did not take place on school property, nor had the students yet arrived at the school function. They further argue that the sanction imposed was too harsh and also, somewhat inconsistently, that the district did not act in

accord with *N.J.S.A.* 18A:40A-12 and *N.J.S.A.* 6:29-6.5 when it failed to refer the students for an immediate examination for alcohol testing (*see N.J.S.A.* 18A:40A-9); it was even argued by M.F. and T.H. that the school should have made the incident a matter for the police, which could have resulted in the imposition of a six-month suspension of driving privileges and a $500 fine to each of the students. At the time of hearing, petitioners requested as additional relief that the school board write an apology to the two students for causing them to miss their graduation exercises.

After determining that there were no material facts in dispute, the following decision was rendered by the undersigned orally upon the record pursuant to *N.J.A.C.* 1:1-18.2. The oral decision has been edited for purposes of clarity and grammatical accuracy.

ORAL DECISION

There are certain operative facts that are not in dispute. Both of these women admitted to having consumed champagne in a limousine or a party bus on the way to the hotel. The issue here is not inebriation. There is a school policy which prohibits consumption of alcohol in any activity sponsored by the school, including the school prom, and there are certain regulations that the Board has drawn up to implement this. The prom regulations prohibit consumption of alcoholic beverages during travel to the prom and, in fact, because of the limousine provision in the regulations, create the right to search the limousine.

I will not take any words of these regulations out of context here. The whole context of them prohibits the use of alcohol during travel, and I will not accept petitioner's attempt to distinguish between "warning" and "prohibiting." A warning is sufficient. These are not young children; these are college-age young people. They should not have had the alcohol in the limousine. They were warned that something would happen, and it did.

I am also not persuaded by your argument that the school cannot govern a student's behavior other than as to consumption of alcohol on school premises or at school functions. I do not think that is true. These are not regular school functions. These are special privileges that are given to the students. They are not something that students have to be allowed to attend. There does not have to be a prom; they do not have to have the graduation. These are privileges that are given to the students, and these privileges can be revoked for infractions of school rules, of school policy, and certainly of state law.

I think that whether or not these regulations could have been more artfully drafted, whether they could have used different words, prohibiting rather than warning, they are certainly reasonable. The Board took every reasonable step to warn that there would be sanctions imposed for that type of behavior. There was a special meeting with the students, and there were letters. The parents were involved in it. The regulations were sent to the parents, and you and your children agreed to abide by the prom rules, and there was a violation of them by your children.

There was no reason that they had to drink the champagne. It was a completely voluntary act, they were caught, and the consequences that they were warned of followed. The consequences that could have followed did not. I do not accept your argument that the school should have taken more drastic measures, and I do not think that in a calmer moment you will feel that way. The measures that were taken were moderate, to say the least -- that they could not attend subsequent functions. The school could have made a police matter out of it, and I do not really think that would have been preferable.

So, I think that what the policy says is clear. It might have been phrased better, but I think it is absolutely clear. I think that there was adequate warning from the written regulations and from the meetings with the students, and there was warning to the parents of what could happen. I think there was an agreement by both sides that they would comply with the rules. I think there was a breach of rules by the students, and I think that the Board acted reasonably in light of what it could have done in implementing its discipline when the rules were breached. It does not have to be what you or I would have done. It does not have to be what you might think of now, as an afterthought. That does not matter. The fact is that they acted reasonably and in accord with their regulations and with their agreement with the students. I do not **FIND** that there was any unreasonable behavior on behalf of the Board, and I do not **FIND** that their acts were arbitrary and capricious.

The students were barred from attending graduation in accordance with the school rules, and no trace of it remains in their records. The incident is over. I **CONCLUDE** that the matter is moot and there is no relief that can be granted. I certainly would not, under any circumstances, order the Board to send a letter of apology to students that have acted illegally -- apologizing for enforcing a very important state policy, education policy, Board policy, health policy, and safety policy. There is no way I could ever do that.

I **CONCLUDE** that the District acted reasonably and in accord with its regulations, and there is no relief that can be granted. I **CONCLUDE** that the Board is entitled to summary decision dismissing this matter on all grounds. So, I **ORDER** that this petition be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who, by law, is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Oct 19, 1992
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

10/20/92
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 2 1992
DATE

OFFICE OF ADMINISTRATIVE LAW

md/e

APPENDIX

C-1 Hearing Tape, EDU 4470-92, October 2, 1992

R.F. ET AL. AND L.H. ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PARK RIDGE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered on Motion for Summary Judgment have been reviewed. Petitioners filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4 and the Board filed timely reply exceptions.

Petitioners cite three exceptions. The first claims the ALJ did not consider their written response to the Board's motion for summary decision when the initial decision was rendered. Petitioners aver they are entitled to consideration of a written response.

Exception two avers the Board's counsel misstated facts that were later denied by the ALJ and counsel regarding whether the minors in question were under the influence of alcohol at the time of their attendance at the school prom in June 1992.

Exception three claims the ALJ refused to look at or consider the guidelines of Student Codes of Conduct: a Guide to Policy Review and Code Development, a publication of the New Jersey State Department of Education, that they feel is pertinent in

dealing with "unique situations of student conduct outside of school and after school hours***." (Exceptions, at p. 6) Petitioners find such publication is useful for purposes of "clarifying the authority of school administrators in disciplining students." (Id.)

Upon careful and independent review of the record of this matter, which includes a review of all the written submissions of the parties, the Commissioner adopts as his own the findings and determination of the Office of Administrative Law granting summary judgment to the Board. As noted by the ALJ, this matter is now moot because the students in question have graduated, no record of the incident in question remains in their records and because the Commissioner is without authority to grant punitive damages or attorney costs and fees as sought in petitioners' prayer for relief. The important public policy question raised in this matter, however, and petitioners' entitlement to a review of the plenary hearing on the merits of their claims of arbitrary action on the Board's part in denying the pupils in question attendance at the prom and graduation ceremonies as a result of their admission of having drunk champagne on the way to the prom last June warrant some further comment on this case notwithstanding its mootness

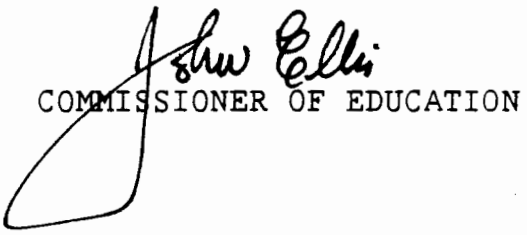
The Commissioner's review of the record comports with the ALJ's finding that the Board's policy regarding pupil conduct at the school prom was known to the students and that it warned of sanctions to be meted upon any student found to have imbibed in alcoholic beverages before, during or after attendance at the prom. See initial decision at pages 5-6. The record also reveals the uncontested fact that the minor pupils in question did drink champagne in a limousine on the way to said prom.

Based upon such findings, the Commissioner cannot express strongly enough his agreement with the ALJ's determination that the Board's assessing the penalties it did against the pupils in question was in accord with its regulations, education policy and state law. Let there be no misunderstanding of the Commissioner's conviction in this regard: be it a sip, a slug or a keg of alcohol consumed on the way to, during or following a school-sponsored event, such behavior as exhibited by these teen-aged students, who were fully cognizant of the consequences that could flow from their voluntary act, cannot and will not be sanctioned, excused or mitigated in the face of the Legislature's clear intent as stated in N.J.S.A 18A:37-1 and reflected in the Board's policy on prom deportment, "that the public schools of the State of New Jersey will act to 'help control the problem of youth/alcohol abuse, especially in the school.' (Senate Education Committee Statement)" G.L.H., by his guardians ad litem, G.H.H. and G.R.H. v. Board of Education of the Hopewell Valley Regional School District et al, Mercer County, 1987 S.L.D 891, 901, aff'd as moot State Board 906

Further, as bespoken by the ALJ and embodied in case law, the Board's disciplinary authority in such situations extends beyond the four corners of the school building, to include school functions that take place off premises. See, e.g., A.F., by her guardian ad litem B.M.H. v. Board of Education of the Township of Holmdel, Monmouth County, 1991 S.L.D. 914. Moreover, as mentioned by the ALJ, such activities as attending a school-sponsored prom or graduation ceremonies are special privileges. As such these privileges can be revoked for infractions of school rules, of school policy and of state law. See initial decision at page 5. Thus, the

Commissioner finds the Board was entirely within its discretionary authority and exhibited no abuse of such authority in assessing the penalties at issue herein. Boult and Harris v. Board of Education of Passaic, 1939-49 S.L.D. 7 (1946), aff'd State Board 15, aff'd 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E.&A. 1948)

In so concluding, the Commissioner notes that the instant decision has considered, addressed and disposed of all pertinent issues raised in petitioners' filings, including its Brief in Opposition to the Board's Motion for Summary Judgment. Hence, there is no basis for remanding this matter for further review by the Office of Administrative Law, and the instant Petition of Appeal is dismissed, with prejudice.



COMMISSIONER OF EDUCATION

NOVEMBER 30, 1992

DATE OF MAILING - NOVEMBER 30, 1992

293-92

EDU #4470-92
C # 293-92
SB # 67-92

R.F. ET AL. AND L.H. ET AL.,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF PARK RIDGE, BERGEN COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, November 30, 1992

For the Petitioners-Appellants, Meredith Freedman, pro se and Thomas Hennessy, pro se

For the Respondent-Respondent, Fogarty & Hara (Stephen R. Fogarty, Esq., of Counsel)

The State Board of Education affirms the decision of the Commissioner of Education. In so doing, we concur with the Administrative Law Judge (ALJ) that

> ...what the policy says is clear. It might have been phrased better, but ... it is absolutely clear...there was adequate warning from the written regulations and from the meetings with the students, and there was warning to the parents of what could happen...there was an agreement by both sides that they would comply with the rules...there was a breach of rules by the students, and ... the Board acted reasonably in light of what it could have done in implementing its discipline when the rules were breached.

Initial Decision, at 6.

May 5, 1993

Although we recognize that there is no relief that could be granted to petitioners' children in that graduation has passed, our decision does not rest on those grounds. Rather, our review of the papers filed in this appeal reinforces our conclusion that, for the reason expressed in the decision below, the Board was entitled to summary judgment based on the merits of the case.

Additionally, as indicated above, we agree with the ALJ that the Board's policy was clearly communicated in this case. However, to reduce the possibility of misunderstanding in the future concerning the wording of the Board's policy, we urge the Board to review its written policy to determine if it can be phrased better.

John T. Klagholz opposed.

May 5, 1993

Date of mailing MAY 07 1993

295-92

295-92

IN THE MATTER OF THE TENURE	:	
HEARING OF RUSSELL SAMANO,	:	COMMISSIONER OF EDUCATION
SOUTHERN STATE CORRECTIONAL	:	DECISION
FACILITY, NEW JERSEY STATE	:	
DEPARTMENT OF CORRECTIONS.	:	
	:	

SYNOPSIS

Department of Corrections certified charges of unbecoming conduct against respondent, teacher of skilled trades since 1984 for three charges 1) undue familiarity with inmates; 2) bringing contraband into facility; 3) giving keys to an inmate. Department alleged these were violations spelled out in Department of Corrections Handbook of Information and Rules and in an Employee Handbook.

ALJ found Department did not prove the charges to be true and respondent did not feel he committed any violation. Respondent was a teacher not a corrections officer whose charge and duty is to ensure inmates are controlled at all times. Respondent was ordered reinstated with mitigated back pay.

Commissioner concurred with findings and determination in initial decision, but clarified that non-custodial personnel share with custodial employees a duty to maintain the security of the institution and its charges and must exhibit due sensitivity to that duty.

DECEMBER 2, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9284-91

AGENCY DKT. NO. #319-8/91

IN THE MATTER OF THE TENURE HEARING OF RUSSELL SAMANO, SOUTHERN STATE CORRECTIONAL FACILITY, NEW JERSEY DEPARTMENT OF CORRECTIONS.

Lisa Morowitz, Esquire, for petitioner, (District Counsel, Communications Workers of America, AFL-CIO)

Alan C. Roth, Deputy Attorney General, for respondent, (Robert J. DelTufo, Attorney General of New Jersey, attorney)

Record Closed: September 4, 1992 Decided: October 19, 1992

BEFORE **EDGAR R. HOLMES, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) on October 1, 1991, for determination as a contested case pursuant to the Administrative Procedures Act, *N.J.S.A.* 52:14B-1 *et. seq.*; the act establishing the OAL, *N.J.S.A.* 52:14F-1 *et. seq.* the act granting tenure to teachers employed by the Department of Corrections, and others, *N.J.S.A.* 18A:60-1 and the act granting jurisdiction to hear controversies and disputes involving teacher tenure to the Commissioner of Education, *N.J.S.A.* 18A:6-9 and 10.

This matter is the appeal of Russell Samano from his dismissal as a tenured teacher from Southern State Correctional Facility (Southern State or institution) operated by the New Jersey Department of Corrections (DOC). The three charges against Samano are framed in terms of conduct proscribed by the DOC. They are (1) undue familiarity with inmates; (2) bringing contraband into the correctional facility and violating security; and (3) improperly relinquishing keys to an inmate. In order to warrant dismissal these charges must be equivalent to "... inefficiency, incapacity, unbecoming conduct, or other just cause ..." *N.J.S.A.* 18A: 6-10. These are the grounds specified under the tenure act which support dismissal.

Russell Samano is a certified teacher of skilled trades. He was employed by Southern State in 1984 and obtained tenure in 1989. His evaluations during the seven years of employment improved steadily from satisfactory, to moderately above standard, to significantly above standard. He had no prior disciplinary actions.

The program which Samano taught at Southern State consisted of a combination of classroom work and hands on training. He also supervised an inmate unit which made furniture or repairs at the institution. These were called Institutional Projects. The classroom work of six weeks duration focused on theory, safety and blue print reading. Thereafter, the inmates in the program worked on an individualized project of their choice.

When an inmate selected a project he had to obtain Samano's approval. Samano also had to obtain the approval for the project from his supervisor or his assistant supervisor. In the course of his employment Samano must have done this hundreds of times. A form was actually developed to institutionalize the process so that even the Superintendent of the Institution signed the approval form. Copies of the form were sent to the Center Keeper and the mail room; Samano kept one and presumably, a copy was kept by the Superintendent. The form also indicated whether or not the completed project could be sent home by the inmate. One of Samano's responsibilities was to obtain the materials required for the project.

Each inmate had a budget of ten dollars ($10.00) for his special project. Samano purchased the materials in two ways. Standard items were obtained by filling out a purchase order. Suppliers would then ship the materials to the institution if the order warranted shipping, such as plywood or lumber. If an inmate required specialized materials,Samano would pick the items up personally and be

reimbursed by the petty cash fund controlled by the business office. This was a frequent method of obtaining materials because the Millville Fabric Center, for instance, did not deliver. Apparently the inmates utilized more materials in their projects than mere plywood or lumber. Sometimes Samano would obtain a purchase order in advance for an approved project. Sometimes Samano would purchase material outright for an approved project and seek reimbursement from the business office. Samano estimated that he obtained reimbursement almost weekly in this fashion. Samano would have bulky items delivered through the receiving gate. Small items he carried in himself. He apparently did this over a period of seven years.

Harry Thornbourgh, an administrative analyst for procurement at the institution, confirmed that Samano was frequently reimbursed for small cash outlays he made on behalf of inmates for approved materials. In addition, Thornbourgh also obtained approval from his supervisor before he reimbursed Samano, so that there were cross checks upon cross checks on individual projects.

Inmate Paul May's approved project was a jewelry box he constructed as a wedding gift for his brother. He told Samano he wished to line the box with a better quality felt than was available within his budget. He told Samano his brother would furnish the felt if Samano could pick it up. His brother owned or operated a gas station across the street from Peter Lumber Company; one of Samano's stops. When Samano was at Peter Lumber sometime in the summer of 1989, he stopped at the gas station and picked up the felt from inmate May's brother. This is the only time Samano ever met inmate May's brother. Samano examined the box to make sure that only felt was in the box and brought it in for inmate May to use in his project. May used what he needed and the balance of the felt was left in Samano's shop.

Inmate Oxley was a teacher's aide. He was making a quilt rack in the shop. In the rack he wanted to use a piece of old cherry wood his father owned. Inmate Oxley's father brought the cherry wood to the institution on visiting day and Samano went out to Oxley's father's car and obtained the cherry wood from him. Samano carried the wood into the institution on a cart in plain view of the Receiving Gate.

Inmate Monihan is a paraprofessional assigned to the wood shop. His duties include setting the classroom up, distributing tools and materials, putting away tools and materials after class, keeping the classroom neat and clean and

assisting the teacher with inmate projects. He actually supervised institutional projects in Samano's absence, although members of the custody staff had to give him and inmates under his supervision access to the wood shop. For this reason Samano described Monihan as the "shop foreman."

Approximately three years ago Samano gave Monihan three keys. One key was to a glass bookcase where inmate project plans and blueprints were filed. A second key was to the cabinet which contained the shop coffee pot. The third key was to the drawer of a work table Monihan had made in which mechanical drawing equipment for class use was kept. Samano explained that these items were locked up to keep them from disappearing.

When Monihan was discovered in possession of these three keys an investigation commenced and Samano was charged with the offenses enumerated above: (1) undue familiarity with inmates; (2) bringing contraband into the facility; (3) giving keys to an inmate.

The institution recites Rules and Regulations of DOC which it alleges Samano violated. These Rules and Regulations are found in the Department of Corrections Handbook of Information and Rules and in an Employee Handbook. They are as follows:

> **Department of Corrections Handbook**
>
> **Page 2, paragraph C**
>
> Every inmate must have an equal chance to earn all the privileges the rules allow. There is no place for favoritism or privileged classes in corrections. No employee should become unduly familiar with any inmate or group of inmates or permit himself to become obligated in any way to an inmate or his family. A sincere interest in every inmate's efforts to improve himself is expected, but intimate friendships and close personal relationships are to be avoided. Similarly, no employee should become unduly familiar with any parolee or group of parolees or permit himself to become obligated in any way to a parolee or his family.
>
> **Page 5, paragraph I**
>
> Employees shall not indulge in undue familiarity with inmates or parolees or permit inmates or parolees to be unduly familiar toward them.

Page 5, paragraph K

Employees must not give or receive from any inmate or parolee or any inmate or parolee's friend, relative or representative, anything in the nature of gift or promise of a gift or favor, however trivial.

Page 5, paragraph L

No employee shall receive any gift or object of value from any source which may be offered with the intent to influence the employee in the performance of his public duty. No personal services shall be rendered by an inmate or parolee to any employee except as provided by regulations approved by the Commissioner of Corrections.

Page 6, paragraph N

Employees may not convey, either to or from any inmate or parolee any message, written or oral, or any article except such as is necessary and authorized by the Department/institution for the transaction of the business of the Department/institution.

Employee Handbook

Page 9, paragraph 1.

Employees shall not indulge in undue familiarity with inmates or parolees or permit inmates or parolees to be unduly familiar toward them. An employee cannot perform his job properly if he attempts to be "one of the boys." The word fraternizing implies an association with the inmates on equal terms. The correctional employee constantly represents authority to the inmates. It is therefore impossible for you to fraternize with the inmates and maintain the role model which is essential to successfully perform your job.

Page 9, paragraph 9

Under no circumstances are employees to carry mail or other articles in or out of the institution for inmates, their friends, relative or representatives.

Page 32, Control

Each employee of Southern State Correctional Facility will be held responsible for the safekeeping of any key issued or entrusted to his/her possession. Employees should exercise the utmost caution to ensure that keys are not lost, misplaced, broken or available to be stolen. Carelessness in the handling of keys can result in disciplinary action against the careless employee. Any employee who removes a key from its' assigned area or off grounds without permission may be required to return the key immediately upon discovery. If and when an employee inadvertently takes a key off grounds

> without permission, and the employee discovers this error, the employee should immediately notify Center Control.
>
> The institution controls and accounts for the keys by using a "chit" system. A "chit" is a small, round numbered, brass tag. Those employees drawing a key from Center Control are required to surrender a "chit" receipt. Upon returning the drawn key to Center Control, the employee will have their "chit" returned to them.

Russell Samano received these handbooks when first employed. He also attended civilian non-custody orientation training sessions on April 27, 1984, March 28, 1985, February 28, 1986, September 9 and 10, 1987 and November 20, 1989 through November 23, 1989.

Instructors from the institution and DOC testified that the subject of fraternization with inmates, contraband and key control were discussed at the training sessions which Samano attended.

The institution argues that by obtaining the felt from May's brother and by obtaining the cherry wood from Oxley's father, Samano had "undue familiarity" and a prohibited "relationship" with an inmate's family.

The institution argues that Samano showed favoritism to both May and Oxley by obtaining contraband for them and illicitly bringing it into the institution.

It also argues that the materials are contraband because they have been brought into the institution in an improper fashion, *i.e.*, not through the mail room.

The institution argues that Samano violated the "chit" system of key control by providing Monihan with keys.

Finally, the institution argues that Samano failed to treat all inmates similarly because he had a "relationship" with Monihan.

These arguments are without merit. They fail to recognize that Samano is not a custodial officer but a teacher. They also depend upon a to literal reading of the Rules and Regulations which cannot be the correct reading.

For instance, of course Samano and Monihan had a relationship. Monihan was the paraprofessional assigned to assist Samano in his duties. They were a team. This was recognized by the institution in the enhanced status it

afforded Monihan. He had supervisory responsibilities over other inmates. He had access to tools. He was the foreman of the inmate institutional project work group in Samano's absence. He was paid by the institution to perform these services.

The institution described the felt and cherry wood as contraband despite the fact that the projects which incorporated these materials were approved by the Superintendent of the institution and many members of his staff. It argues that the felt was contraband since it was blue and yellow and could have been used to simulate the shoulder patch of a corrections officer. It was not so used and Samano demonstrated that he had ordered blue and yellow felt on prior occasions through the business office. No one had ever objected to his prior purchases or raised this possibility with him.

The institution argued that the cardboard box that the felt came in was contraband because it could have concealed a weapon or drugs inside the corrugation. Only this point makes any sense at all, although Samano demonstrated that the institution contains numerous cardboard boxes which "could have concealed weapons or drugs inside the corrugations."

Samano testified that he had attended lectures on contraband in the training sessions. He was under the distinct impression that they were talking about guns and drugs and alcohol. Of course this must have been the emphasis.

The key policy of the institution was explained by Senior Correction Officer Robert Dubuque who is a training officer at the Correction Officer Recruits Training Academy. He formerly taught at Southern State.

He testified that there were two kinds of keys; security keys issued on a "chit" basis to civilians and non-security keys. The keys which Samano gave to Monihan were not security keys. They were not issued to him by the institution under the "chit" system. Dubuque defined non-security keys as "civilian's personal keys such as keys to their house, car or personal lock on lockers or footlockers." He testified that these keys should not be given to inmates because "inmates have no business with your personal keys."

He was asked if these keys were security keys or non-security keys. He described only the "desk key" as a security key. However, this key was mis-described

by the institution. The key identified as a desk key was actually a key to a drawer in a table that the inmate had constructed himself, apparently as an institutional project.

The key control policy in the Employee Handbook describes only security keys issued on the "chit" method. It is silent as to personal keys or keys to shop cabinets which have not been issued on the "chit" basis. None of these keys was identified at any time as a "chit" key.

The institution also argued that Samano violated security whenever he went outside and brought supplies in without having them checked in through the mail room or inspected by a corrections officer stationed at an entrance, called a "sally port officer." But it was clear from the testimony of all parties that there was no policy in effect at Southern State which required a civilian employee to submit packages to a search. Samano had no such experience, neither did his union representative Francis J. Fiore. Even the institution's witnesses were divided over whether all civilians were required to submit to a search when entering the facility.

Roland Hester, an Assistant Superintendent produced a"custody operational procedure" dated September 12, 1987 which said that "all packages brought into the institution will be inspected by the front house officer, mail room officer for contraband, or the sally port officer in their absence." But Hester admitted that he had no way of knowing whether Samano had even seen the policy statement since it was distributed to "department heads."

Dubuque insisted that everything a civilian brought into the facility would have to be inspected by the mail room or sally port officer. In addition, the civilian would need to have prior written approval in order to bring anything into the prison.

Glen Robinson, an investigator with the institution's internal Affairs Unit testified that in his opinion it was not mandatory for a staff member to be searched. He said searches were done infrequently. He said there was no mandatory inspection policy. He opined that an inspection would be required only if a staff person was bringing something into the facility for an inmate.

It is clear however, that Samano was never searched. It is equally clear that he had approval to obtain the materials in question. Each inmate project was approved by numerous persons including the superintendent of the institution.

Samano points out that the heart of petitioner's case is an apparent misunderstanding of the role of teaching staff in a correctional facility. He says this misunderstanding is illustrated in a colloquy between him and the Deputy Attorney General at the hearing:

> Q. Now, a portion of your job is security, isn't it?
> A. No.
> Q. At no point in time is it your job?
> A. I'm not a custody officer.
> Q. That's not what I asked you, sir. If you seen an inmate with a gun in the
> institution, would you report it?
> A. Well, certainly.
> Q. Are you allowed to issue disciplinary reports, write disciplinary infractions,
> for an inmate?
> A. Yes, we can.
> Q. So, therefore, part of your job is custody-oriented?
> A. No, it's not.
> Q. Sir, as a teacher in the vocational shop, is it in your normal everyday duty to
> confiscate contraband, if you found it?
> A. No, I report it.
> Q. You report it.
> A. (Witness shakes head.)
> Q. And is it in your everyday course of business to write a disciplinary report,
> if needed, against an inmate?
> A. If it was needed.
> Q. And you don't believe part of your job is security?
> A. No, because I don't handle the discipline of the inmate. In effect, the disciplinary report goes to custody, which handles it.

Perhaps Samano could have been more sensitive to the institution's concerns that drugs or other contraband do not come into the institution. On the other hand, Samano is not just another corrections officer whose whole charge and duty is to insure that inmates are controlled at all times. He is a teacher. A teacher

has a wholly different charge. It is to enlighten, to uplift and to instruct. Nevertheless, a teacher's role in a correctional institution ought to be modified to accommodate the institutional concerns.

Everything that Samano did has a rational basis and he does not appear to be conscious of having committed any violation. The institution has failed to prove that he has violated a procedure and it is equally clear that Samano does not feel that he has committed a violation.

While it is clear that Samano intended no harm, and that in fact no harm occurred, there existed the possibility that a controlled dangerous substance could have been inserted into the corrugation in the box which contained the felt.

The procedure by which Samano actually obtains materials for inmate projects can be tightened up to forestall that possibility. The institution can also consider whether the arrangements for the safekeeping of blueprints, mechanical drawing implements and a coffee pot can be done without providing a key to a paraprofessional. These are administrative functions which ought to have taken place without the necessity of filing a tenure complaint.

There is simply no evidence that Samano committed conduct unbecoming a teacher or public official. He appears on the contrary to have always had the best interests of his students in mind.

I therefore, **FIND and CONCLUDE** that the DOC failed to prove by a preponderance of the credible evidence that Samano committed conduct unbecoming a teacher by (1) having undue familiarity with inmates; (2) bringing contraband into the correctional facility and violating security; and (3) improperly relinquishing keys to an inmate.

I **DISMISS** the teacher tenure complaint filed herein.

I **ORDER** that Russell Samano be **REINSTATED** to his position as a teacher and be granted back pay, benefits and seniority for the 120 day period following his termination. The amount of back pay awarded herein is to be reduced and mitigated to the extent of any income earned by appellant during this period.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Oct 19, 1992
Date

Edgar R. Holmes per JLP, AL
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

10/19/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 21 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

PETITIONER:
HARRY THORNBOROUGH
FRANCIS J. FIORE
RUSSELL SAMANO

RESPONDENT:
ROBERT DUBUQUE
GLENN ROBINSON
KEITH ARCH
ROLAND HESTER

DOCUMENTS IN EVIDENCE

JOINT EXHIBITS

J-1 MEMORANDUM DATED FEBRUARY 14, 1991
J-2 MEMORANDUM DATED FEBRUARY 14, 1991
J-3 MEMORANDUM DATED FEBRURY 15, 1991
J-4 MEMORANDUM DATED FEBRUARY 13, 1991
J-5 MEMORANDUM DATED FEBRUARY 14, 1991
J-6 SSCF TRAINING ATTENDANCE RECORD
J-7 HANDBOOK OF INFORMATION AND RULES
J-8 EMPLOYEE HANDBOOK
J-9 PERFORMANCE AGREEMENT
J-10 MEMORANDUM DATED FEBRUARY 19, 1991
J-11 STATE OF NEW JERSEY PURCHASE ORDER/INVOICE

PETITIONER:

P-1 LESSON PLAN #13.2
P-2 LESSON PLAN #13.4
P-3 MEMORANDUM DATED SEPTEMBER 24, 1987
P-4 CUSTODY OPERATIONAL PROCEDURE
P-5 DEPARTMENT OF CORRECTIONS STANDARE 171

RESPONDENT:

R-1 MEMORANDUM DATED AUGUST 15, 1985
R-2 MEMORANDUM DATED NOVEMBER 28, 1990
R-3 PACKAGE/PROJECTS DONE BY INMATES
R-4 EIGHT EMPLOYEE EVALUATIONS
R-5 SYLLABUS OF BUILDING TRADES PROGRAM
R-6 INMATE WAGE SCALE VARIANCE PLAN
R-7 MEMO

IN THE MATTER OF THE TENURE HEARING OF RUSSELL SAMANO, SOUTHERN STATE CORRECTIONAL FACILITY, NEW JERSEY STATE DEPARTMENT OF CORRECTIONS.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions by the Department of Corrections, and replies thereto by respondent, were timely filed pursuant to the provisions of N.J.A.C. 1:1-18.4.

In its exceptions, the Department reiterates its post-hearing contention that it presented sufficient evidence to support its charges, and proposes anew a factual recitation and policy analysis somewhat different from that of the ALJ. In arguing for reversal of the initial decision, the Department avers that it is in the best position to interpret its own rules and regulations and to determine what does or does not constitute a security breach under them, and that all Department employees are responsible for knowing these rules and abiding by them. Giving the Department proper deference, then, the Commissioner must find the Department's charges proven and respondent guilty of conduct warranting dismissal.

In reply, respondent provides citations to the hearing transcript countering the claims made by the Department in its factual recitation, particularly those which suggest that respondent was dishonest or uncooperative during investigation of his conduct, that respondent's training encompassed specific areas related to the tenure charges, and that he engaged in relations with inmates' families that were more than casual. Respondent further urges support of the ALJ's distinction between educational and custodial duties, and rejects the Department's arguments on agency deference by observing that in tenure proceedings the Commissioner, through the ALJ, is charged with de novo review and vested with final jurisdiction precisely to avoid the vice of the employer acting simultaneously as investigator, prosecutor and judge. In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967)

Upon careful review of this matter, the Commissioner deems the ALJ's findings of fact to be fully supported by the record, which includes a complete transcript of hearings. Nor can he see any basis in that transcript to challenge the credibility assessments underlying the ALJ's resolution of conflicting testimony. The Commissioner further concurs with the ALJ that respondent's conduct did not rise to the level of the tenure charges brought against him and that no penalty can be therefore assessed against him.

However, the Commissioner does see a need to clarify that portion of the initial decision which suggests a dichotomy between educational and custodial duties in the correctional setting. As

the Commissioner has previously recognized in another matter involving a teacher in a correctional facility, In the Matter of the Tenure Hearing of Robert Vaughn, New Jersey State Department of Corrections, 1990 S.L.D. 34:

> Respondent does not work for a public school district; he works for a correctional facility where custody and supervision of students take on a dimension which is simply not present in the routine school setting. To be negligent, careless or casual in this environment compromises the very purpose of incarceration and is regarded within the correctional community as a breach of the most serious order***. (at 44)

In the correctional setting, while educational employees may be primarily responsible for teaching, they cannot simply take the stance that their employment is non-custodial in nature; to the contrary, they work in an institution having custody as its overriding purpose and share with custodial employees a duty to maintain the security of their institution and its charges. Educational employees must be ever mindful of this in carrying out their responsibilities, exhibiting a constant sensitivity to the potential implications of their actions in the correctional environment--even actions which, like those of respondent herein, are well-intended, rationally related to performance of educational duties and not at all likely to be problematic in other contexts. Only in this way can the integrity of the correctional system, which of necessity employs a number of non-custodial personnel, be ensured.

Therefore, while respondent's actions in the present matter did not rise to a breach of his custodial duty such that conduct unbecoming a teaching staff member was demonstrated, they were

indicative of insufficient sensitivity to his duty to uphold the custodial mission of the institution he serves.

Accordingly, with the above clarification regarding the role of non-custodial personnel in correctional facilities, the initial decision of the Office of Administrative Law dismissing the charges against respondent is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

John C Woodberg

ACTING COMMISSIONER OF EDUCATION

DECEMBER 2, 1992

DATE OF MAILING - DECEMBER 2, 1992

296-92

296-92

GUS SICILIANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CAMDEN COUNTY VOCATIONAL-TECHNICAL SCHOOL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning retired teacher, employed as a technician through a series of one-year contracts, was suspended as a result of arrest for Klu Klux Klan activities, with pay until the time of his indictment and without pay thereafter. Upon completion of Pre-Trial Intervention Program (PTI), petitioner sought back pay and reinstatement.

ALJ found petitioner not entitled to back pay as he was properly suspended and completion of PTI does not constitute an adjudication of innocence so as to merit restitution of pay withheld. ALJ further found petitioner not entitled to reinstatement, as he was under indictment at the time his contract was due for renewal and received legitimate reasons for the Board's decision not to continue his employment, which related to threatening a student who intended to expose petitioner's Klan membership. Petition was dismissed.

Commissioner affirmed findings and determination of initial decision.

DECEMBER 4, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1042-92

AGENCY DKT. NO. #161-5/91

GUS SICILIANO,

Petitioner,

v.

BOARD OF EDUCATION OF THE

CAMDEN COUNTY VOCATIONAL-

TECHNICAL SCHOOL, CAMDEN COUNTY

Respondent.

Timothy P. Reilly, Esquire, for petitioner

William C. Davis, Esquire, for respondent, (Davis, Reberkenney & Abramowitz, attorneys)

Record Closed: September 9, 1992 Decided: October 22, 1992

BEFORE **EDGAR R. HOLMES, ALJ:**

This matter was transmitted to the Office of Administrative Law (OAL) on February 7, 1992, for determination as a contested case pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et. seq. ; the Act establishing the OAL, N.J.S.A. 52:14F-1 et. seq. , and the Act granting jurisdiction to hear controversies and disputes involving school laws to the Commissioner of Education, N.J.S.A. 18A:6-9.

Gus Siciliano retired from a tenured teaching position as a "Journeyman" at the respondent's Vocational-Technical School in 1982. He taught masonry. Thereafter, he was employed by the respondent Board of Education (Board) as a "Technician" on successive one year contracts including the school year beginning September 1, 1990 and ending June 30, 1991.

On December 20, 1990, petitioner was advised by letter that he was suspended with pay from his employment with respondent Board due to his arrest. On February 22, 1991, petitioner and others were indicted by a State Grand Jury for two third degree crimes, conspiracy and making threats to a student in order to protect the Invisible Empire, Knights of the Klu Klux Klan.

On February 26, 1991, the respondent Board advised petitioner by letter that his suspension would continue without pay "as a result of his indictment for various criminal acts." On January 10, 1992, the indictment was dismissed as a result of the petitioner's successful completion of a Pre-Trial Intervention Program (PTI).

The annual contract of employment between petitioner and the respondent Board gave either party the right to terminate the contract by giving two weeks written notice to the other party of intention to terminate the contract.

Now comes the petitioner who argues that the Board did not terminate his contract, it merely suspended him because of a pending indictment. The indictment has been dismissed and therefore he claims back pay and reinstatement.

These are two separate issues. The first is whether he is entitled to back pay. The second is whether he is entitled to a new contract.

In support of his claim for back pay petitioner argues that this matter is controlled by the reasoning found in Ott v. Board of Education of Hamilton Township, 160 N.J. Super. 333 (1978). Ott tried to restrain the Board from certifying tenure charges while criminal charges were pending, he also sought to be paid in the interim. He was successful below and the Appellant Division affirmed in part and reversed in part. The Court's opinion deals at length with the dilemma occasioned by the school law requirement that a teacher respond to tenure charges and a criminal defendant's right to keep silent. The Appellate Court continued to restrain the Board from proceeding to a tenure hearing but reversed the lower Court's Order to continue the teacher's salary. In the course of explaining its

decision the Court said "of course, in the ultimate, if plaintiff is cleared of the disciplinary charges, he will be entitled to reinstatement with full back salary." Ott., supra., 342.

Because no disciplinary charges were filed against petitioner in this matter, he argues by analogy that the dismissal of the indictment leaves him in the same position as Ott would be if Ott were cleared of disciplinary charges.

Other analogies however, are more apt. But a word must be said about this analogy. Petitioner was not "cleared" of the criminal charges in the sense intended by the Court in Ott. To be "cleared" of tenure charges the Commissioner must determine that the teacher is not inefficient or not incapacitated, or did not commit conduct unbecoming a teacher, or did not commit other conduct which would constitute "just cause" for dismissal or reduction in compensation. N.J.S.A. 18A:6-10.

The dismissal of a criminal indictment as a result of entering PTI is not a determination that the individual was not guilty of the conduct complained of; only that the matter was "adjusted." R. 3:28 (c) (1). A note to R. 3:28 points out that "A defendant's consideration for admission (to PTI) must be measured according to his/her amenability to correction, responsiveness to rehabilitation and the nature of the offense." In other words PTI is only applicable if the criminal defendant committed some illicit conduct, otherwise he or she would not need correction or rehabilitation.

The Board points out that school law provides for suspension without pay when an employee is indicted. N.J.S.A. 18A:6-8.3. The Board also relies upon the rationale expressed by Administrative Law Judge J. Roger Persichilli who rendered an initial decision which was adopted by the Merit System Board on July 6, 1992, Carmella Armison v. NJ Dept. of Environmental Protection, 92 N.J.A.R. 2d. (CSV) 568. Armison, a Secretarial Assistant in the DEP, was charged with drug offenses. She successfully completed PTI and moved for back pay. The Merit System Board denied the request.

In that decision the ALJ points out that the common law rule was "no work-no pay." But that the "public policy behind awarding back pay is to prevent the punishment of employees who are improperly suspended." 92 N.J.A.R. 2d. (CSV)

569. Armison was suspended without pay under the authority of N.J.A.C. 4A:2-2.4 (b). She was not "improperly suspended."

There is no suggestion that petitioner here was improperly suspended, improperly arrested, or improperly indicted. No public policy is served by awarding him back pay.

I **CONCLUDE** therefore that petitioner Siciliano is not entitled to back pay.

The petitioner also alleges that he is entitled to a new contract since no grounds appear to disqualify him and he has never been advised that his contract with the Board would not be continued. He is entitled to have the Board enunciate its reason for non-retention. Gilcrest v. Board of Education of Haddonfield, 155 N.J. Super., 358 (1978). However, he was still under indictment when the time came to renew his contract. Furthermore, he has now received notice of the reasons for his non-retention by way of the Board's pleading and filings in this action. He was involved in threatening a student who was going to expose petitioner's membership in the Invisible Empire, Knights of the Klu Klux Klan. He never denied this at the OAL hearing. I cannot think of a better reason to withhold a contract from the petitioner.

I **CONCLUDE** that the petitioner has failed to establish that he is entitled to a new contract with the Board.

I **DISMISS** the petitioner's complaint with prejudice.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10-22-92
Date

Edgar R Holmes
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

10/28/92
Date

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 30 1992
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

PETITIONER:
GUS SICILIANO

RESPONDENT:
NONE

DOCUMENTS IN EVIDENCE

JOINT EXHIBITS:

J-1 CONTRACT
J-2 LETTER SUSPENDING SICILIANO IN DECEMBER 20, 1990 EFFECTIVE DECEMBER 19, 1990
J-3 INDICTMENT 91-02-00032-S
J-4 LETTER SUSPENSION WITHOUT PAY FEBRUARY 26, 1991
J-5 ORDER OF DISMISSAL

PETITIONER'S EXHIBITS:

P-1 JULY 15, 1992, LETTER MOORE TO REILLY (RECEIVED IN EVIDENCE JULY 24, 1992)
P-2 AUGUST 19, 1992, LETTER MORINA TO REILLY (RECEIVED IN EVIDENCE SEPTEMBER 9, 1992)

OAL DKT. NO. EDU 1042-92

GUS SICILIANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CAMDEN COUNTY VOCATIONAL-TECHNICAL SCHOOL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon review, the Commissioner concurs with the ALJ that petitioner is entitled to neither back pay nor a new contract as a result of the criminal indictment against him being dismissed through completion of a pre-trial intervention program.

Accordingly, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

DECEMBER 4, 1992

DATE OF MAILING - DECEMBER 4, 1992

297-92

297-92

BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND COUNCIL OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY, RESPONDENT.	:	DECISION
IN THE MATTER OF THE CAP WAIVER APPEAL OF THE RUTHERFORD BOROUGH SCHOOL DISTRICT, BERGEN COUNTY.	:	

DECEMBER 8, 1992

BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND COUNCIL OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY, RESPONDENT.	:	DECISION
IN THE MATTER OF THE CAP WAIVER APPEAL OF THE RUTHERFORD BOROUGH SCHOOL DISTRICT, BERGEN COUNTY.	:	

For Petitioner, Rodney T. Hara, Esq. (Fogarty & Hara)

For Respondent E. Michael Donovan, Esq. (Donovan & Cucchiara)

This consolidated matter was opened before the Commissioner on May 27, 1992 through the filing of a Petition of Appeal by the Board of Education of the Borough of Rutherford (Board) seeking restoration, on the grounds of necessity for a thorough and efficient education, of reductions by the Mayor and Council (Council) in the current expense tax levy for the 1992-93 school year, and a Petition of Appeal of its defeated current expense cap waiver. The Council filed Answers to both the Petition on the reductions in the current expense tax levy and to the current expense cap waiver matter on June 10, 1992. The Board filed

position papers on the current expense tax levy reductions and on the current expense cap waiver issue on July 20, 1992. Council submitted a position statement on July 20, 1992, and then submitted responses to the Board's position on the current expense tax levy and on the current expense cap waiver on July 30, 1992. The Board had responded to the Council's position statement of July 20, 1992 on July 29, 1992 and then submitted summation statements on both issues on August 4, 1992.

On September 11, 1992, the Council's attorney requested consideration of the appeal process being deferred to allow the two parties to negotiate further and on October 2, 1992, requested that the appeal process be held in abeyance to allow the parties to have settlement discussions. On October 6, 1992, the Board requested that the appeal not be held in abeyance. On October 7, 1992, it was determined that, in view of these conflicting recommendations, the matter of the appeals to the Commissioner would go forward.

On April 7, 1992, the voters of the Rutherford Borough School District defeated the proposed current expense tax levy in the amount of $14,171,960, the capital outlay tax levy in the amount of $83,037, and the cap waiver question in the amount of $1,079,616, which included $996,579 for current expense and $83,037 for capital outlay. This cap waiver had been approved on March 5, 1992 by the Department of Education as required to provide a thorough and efficient education in the Borough of Rutherford School District. Subsequent to that determination, the Board, with approval of the Bergen County Superintendent of Schools, revised the budget and included the $83,037 tax levy for capital outlay in the regular budget within the cap. After the defeat by the public vote, the

Council restored the $83,037 to the capital outlay budget. That amount, therefore, is not part of the cap waiver appeal even though it was mistakenly included as part of the cap waiver question.

The reduction to the current expense tax levy in the amount of $750,725, and the restoration of the capital outlay tax levy were made pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2 following voter rejection of the proposals and after consultation with the Board as required by law. During these discussions, the Board accepted $71,878 in reductions as set forth below which were approved by the Bergen County Superintendent. The Board, therefore, is appealing $678,847 as confirmed by the Board's summation of August 4, 1992.

The total proposed and certified budgets, as well as the amounts in dispute in this matter, are set forth below:

	Proposed Tax Levy Adopted by Board		Amount of Tax Levy Certified by Council
Current Expense	$14,171,960	Current Expense	$13,421,235
Capital Outlay	83,037	Capital Outlay	83,037
Cap Waiver	1,079,616	Cap Waiver	-0-

	Amount of Reduction By Council		Amount in Dispute Before Commissioner
Current Expense	$ 750,725	Current Expense	$ 678,847
Capital Outlay	-0-	Capital Outlay	-0-
		Cap Waiver	996,579

The reductions to the current expense tax levy effectuated by the Council are as follows:

Acc't/Line	Budgeted	Revised Amount	Proposed Reduction
Line 10 - Miscellaneous Revenue			
	$172,000	$192,000	$20,000

Increase to reduce taxes

Acc't/Line	Budgeted	Revised Amount	Proposed Reduction
120b-50 Legal Fees			
	$ 30,000	$ 23,700	$ 6,300
Arrange for lower rate			
120b-51 Other Professional Services			
	$ 15,000	$ 10,000	$ 5,000
Arrange for lower rate			
130-52 Other Expenses			
	$104,591	$97,166	$ 7,425
Reduce travel and conference expenses			
213-54-57a Salaries - Teachers			
	$5,627,969	$5,607,969	$20,000
Keep advanced degree monies to 1991-92 level			
213-55-57a Salaries - Teachers			
	$5,457,688	$5,392,688	$65,000*
Reduce because of anticipated retirement and new hires at lower salaries			
214-60 Other Instructional Staff			
	$ 824,881	$ 783,881	$41,000
Believes funded by a different account			
220-63 Textbooks			
	$ 180,181	$ 140,181	$40,000
Smaller increase based on prior year expenditures			
230-64 Library and A/V Materials			
	$ 114,644	$ 79,644	$35,000
Reduce to 1990-91 level			
240-65 Teaching Supplies			
	$ 222,466	$ 197,466	$25,000
Based on past expenditures			

Acc't/Line	Budgeted	Revised Amount	Proposed Reduction
250-66 Other Expenses			
	$266,380	$187,880	$78,500
Based on past expenditures			
520-78 Transportation - Contracted Services			
	$292,650	$278,615	$14,000*
Believes math error allows reduction			
530-80 Replacement of Vehicles			
	$ 63,000	$-0-	$ 63,000
Deferral of purchases			
620-89 Contracted Services			
	$ 61,100	$ 39,100	$ 22,000*
Borough will do garbage collection			
730-99 Replacement of Equipment			
	$ 140,532	$ 134,032	$ 6,500*
Reduction of estimated costs			
730c-99 Purchase of New Equipment			
	$ 159,963	$ 76,463	$ 83,500
Elimination of some purchases			
810a-103 Other Employee Retirement Contributions			
	$ 58,150	$ 52,150	$ 6,000*
Believes math error allows reduction			
850-110a Other Fixed Charges			
	$1,589,530	$1,464,530	$125,000
Deduct one month benefit from State Health Plan			
870e-115 Tuition - Special			
	$ 891,100	$ 841,000	$ 50,000
Reduction of increase			

Acc't/Line	Budgeted	Revised Amount	Proposed Reduction
1010-122 Salaries - Student Body Activities			
	$ 290,645	$ 283,145	$ 7,500
Reduction of increase			
1020-123 Other Expenses - Student Body Activities			
	$ 188,586	$ 178,586	$ 10,000
Reduction of increase			
134-198 - Special Education			
	$1,156,921	$1,136,921	$ 20,000
Reduction of increase			
		Total	$750,725*

* The Board accepted a total of $71,878 with some or all of the reductions on these lines. (Board's Summation of August 4, 1992)

The specific line items for the T & E cap waiver are as follows:

Account 213 - Salaries - Teachers	$775,000
Account 216 - Lunch Monitor Program	70,000
Account 213 - Evening Tutorial Program	50,000
Account 730 - Purchase of Computer Equipment	10,579
Total	$996,579

I. DEFEATED BUDGET

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient

system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17, and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

Mindful, then, of the balance to be applied in his standard of review, the Commissioner makes the following determinations with respect to the specific line items reduced by Council.

Line 10 Miscellaneous Revenue $20,000

The Council's position is that the Board's estimate for interest income and pool income is overly conservative and can be increased by $20,000 and thus reduce the tax levy by that amount. The Council states that the interest earnings should reach the 1991-92 level and pool fees should be raised. The Board states that the revenues cited by the Council for 1991-92 are not accurate and that interest rates have continued to decline.

The Commissioner finds and determines that any estimated revenues must be realistically conservative to ensure support of a balanced budget. Also, the general economy at this time does not ensure either an increase in or maintenance of current interest rates. Therefore, the miscellaneous revenues are not increased and the $20,000 reduction to the tax levy is restored.

Account 120b Legal Fees $ 6,300

The Council's position is that the billing rate of the Board attorney is higher than that of the Borough attorney and could, therefore, be reduced. The Board's position is that such a comparison is flawed because the Borough attorney receives an annual retainer and benefits whereas the Board attorney receives only the hourly rate. Both sides agree that the total expenditure for legal fees has remained relatively level in recent years.

The Commissioner finds that the Council's basis for this reduction is arbitrary and the $6,300 is restored.

Account 120d Other Professional Services $ 5,000

The Council's position is that the amount budgeted reflected an unusually high rate for architectural services. The Board's position is that the fees that were budgeted are based on projects planned for 1992-93 and unresolved problems on projects performed prior to that school year. It also notes that a licensed architect is required under the New Jersey Administrative Code for development of plans for construction work.

The Commissioner finds that sufficient monies must be provided for these professional services and that the $5,000 is therefore restored.

Account 130 Other Expenses $ 7,425

The Council reduced expenses in four areas in this account. It states that Board members should only attend the NJSBA conference in alternate years or that smaller per diems be established. It reduced this area by $2,925. The Council also eliminated $2,000 budgeted for a display booth at the NJSBA as an unnecessary expense. It reduced the Board Secretary travel expenses by $1,000, stating that this item had increased by 72% from the 1990-91 actual expense and that no Board policy exists for the number of conferences which may be attended annually. The Council further reduced the Superintendent travel expenses by $1,000 based on prior expenditures and eliminated $1,500 for recruiting costs as not necessary with the low turnover rate and ample supply of local teacher candidates.

The Board's position on these items is that Board members should attend the NJSBA conference to keep abreast of current legal and educational developments and that this is particularly important for newly elected Board members. The Board further states that the display booth at the NJSBA conference gives the Board the opportunity to demonstrate aspects of the district academic programs. The Board states that the Board Secretary has been allowed to attend national, state and county conferences to keep abreast of current legal and educational developments. The Board states that the reduction to the Superintendent travel expense would leave only $500 which it believes is inadequate and would prevent the Superintendent from attending conferences to keep breast of recent legal and educational developments. It also notes that the sum of all the reductions in this account is $8,425, not the $7,425

specified by Council, and it questions whether the Council intended to reduce the $1,000 for Superintendent travel. The Board also states that the reduction in funds for recruiting would prevent active recruiting for minority candidates, and that such recruitment has been a consistent goal of the Board.

The Commissioner finds and determines on each of these areas in this account as follows. Membership in NJSBA is a statutory obligation in New Jersey for all public school district boards of education and attendance at the annual conference is not only reasonable but also recommended. The $2,925 for that expense is restored. The display booth at the conference, although possibly worthwhile, is in no way essential to the operation of a thorough and efficient educational program. The reduction of $2,000 is sustained. Provision for the Superintendent and Board Secretary to attend professional conferences to ensure their knowledge and awareness of current issues is certainly worthwhile. However, the Commissioner finds that the reductions made by the Council may be absorbed by the district without adversely affecting the efficient operation of the school district. Provision of some funds for a minority recruitment program is valid to address the Board's goal and affirmative action obligations, but in light of a defeated budget, a lesser expenditure with prudent decisions for the expenses is reasonable. It is unclear whether or not the Council made a mathematical error in the total reduction for this account or included the reduction of $1,000 travel in the reduction of $1,500 for minority recruitment. In any case, the total of restored funds and sustained reductions should not exceed the total reduction effectuated by the Council. Therefore, the reductions of $2,000 for

the conference display booth and $2,000 for Superintendent and Board Secretary travel are sustained. The balance of $3,425 for attendance at the NJSBA conference by Board members and for some minority recruitment is restored.

Account 213 Salaries - Teachers $20,000

The Council's position is based on past annual expenditures for advanced degree and retirement salary adjustments and the belief that the 1992-93 estimate was based on the anticipated State retirement incentive program and was not necessary since the Board did not participate in this program. The Board states that the funds were budgeted for salary guide adjustments for teachers who earn advanced degrees or postgraduate credits and for payment for accumulated sick leave upon retirement. The Board states that both benefits are required under the teachers' collective negotiations agreement. The Board states that the amount budgeted was not based on the State retirement incentive program. The Board also states that the expenditures for these benefits in 1990-91 and 1991-92 exceeded the amount budgeted in 1992-93.

The Commissioner determines that sufficient funds must be budgeted for contractual obligations and that the Council's reduction was arbitrary. The reduction of $20,000 is therefore restored.

Account 213 Salaries - Teachers $65,000

The Council based this reduction on known and anticipated retirements and lower salaries for replacement. The Board in its summation accepted a reduction in this account for teacher salaries of $45,000, but states that there was no justification for the assumption of additional savings of $20,000 due to additional

retirements or resignations. The Board also states, however, that an additional $11,000 is needed for the salary of the substance abuse counselor budgeted in Account 214. It must be noted that appeals of budget reductions are restricted to the funds budgeted for specific accounts and do not allow for request of restoration of funds to be transferred to another account.

The Commissioner determines that the $45,000 reduction as accepted by the Board in this account is sustained. Since a board cannot risk underbudgeting because of potential retirements or resignations, the balance of $20,000 of this account reduction is restored.

Account 214 Salaries - Other Instructional Staff $41,000

The Council's reduction was based on its conclusion that the cost of this program is funded by a different account since no expenses have been entered for this program in this account in 1991-92. The Board responds that the 1991-92 services were provided by the Bergen County Council on Alcoholism and Drug Abuse and the budgeted amount was therefore not in this account for salaries. The Board adds the Bergen County Council advised that it could not provide these services for 1992-93, and the Board then hired the same substance abuse counsellor directly.

The Commissioner finds there is no question about the necessary services provided by a substance abuse counsellor and hereby determines that the $41,000 be restored. As noted above, the Board's request for an additional $11,000 to be transferred from Account 213 to meet the contractual salary of $52,000 for the substance abuse counsellor cannot be approved.

Account 220 Textbooks $40,000

The Council's reduction is based on prior year expenditures with a smaller increase than that budgeted by the Board. The Board states the budgeted amount was based on a detailed request submitted by administrators and teachers to substantiate purchase of new and replacement textbooks.

Since it is obvious and indisputable that current and updated textbooks are essential to provision of a thorough and efficient education, a reduction based on prior year expenditures with an estimated inflationary cost increase is determined to be arbitrary. The Commissioner finds that the $40,000 is to be restored.

Account 230 Library and AV Materials $35,000

The Council's reduction was based on 1990-91 actual expenditures and intended to eliminate what it termed unnecessary requests and to increase interschool sharing of materials. The Board's position is that there are some materials which are only applicable to specific grade levels, thus limiting the possibility of interschool sharing, and that library and reference materials must be updated, supplemented and replaced.

The Commissioner determines that appropriate library and audio-visual materials are essential to the provision of a thorough and efficient education and that a reduction to the level of 1990-91 expenditures is arbitrary. The amount of $35,000 is therefore restored.

Account 240 Teaching Supplies $25,000

The Council's reduction is based on prior year expenditures plus a smaller increase than that budgeted by the Board. The Board states that the budgeted amount is not based on spending history and

the rate of inflation, but rather on detailed requests by administrators and teachers to substantiate the teaching supplies budget.

The Commissioner determines that sufficient supplies are required for a thorough and efficient educational program and that a reduction based only on past expenditures is arbitrary. The amount of $25,000 is restored.

Account 250 Other Expenses $78,500

The Council's reduction is based on prior year expenditures plus a smaller increase than that budgeted by the Board. The Board states that part of the increase in this account is for a staff development program initiated in one of the schools, the need to purchase revised editions of testing and scoring materials, provision to attend conferences and workshops for a new principal in the second year of that position, plus a number of expenditures related to the educational process. The Board, in its statement, specifically explains increases of $27,440, of which $1,300 is for the new principal to attend conferences. The Board does acknowledge that, of the amount budgeted in 1991-92, 86% was expended. This amounts to a balance in this account for 1991-92 of approximately $30,000.

The Commissioner finds that although some specific funds are justified in this account, the Board has not demonstrated that restoration of the entire $78,500 is essential for the provision of a thorough and efficient educational program. Certainly attendance at fewer conferences and workshops, reduction of travel over and above that contractually required, and elimination of non-essential expenses can be reasonably expected. It is therefore determined that the amount of $26,140, based on the $27,440 substantiated by

the Board less $1,300 for conferences for the new principal, is restored and the balance of $52,360 is sustained.

Account 520 Transportation - Contracted Services $14,000

The Council's reduction was based on its understanding that there was an error of $14,000 in the calculations for this account. The Board agrees that this is correct and accepts the reduction. The reduction of $14,000 is sustained.

Account 530 Replacement of Vehicles $63,000

The Council's reduction was based on a deferral of the replacement of two school buses. The Board's position is that the vehicles should be replaced because of age, safety reasons, and large repair costs.

The Commissioner determines that the Board's position on the replacement of the two vehicles is reasonable and prudent. The reduction of $63,000 is restored.

Account 620 Contracted Services $22,000

The Council's reduction was based on its plan to provide garbage removal services at all the schools and eliminate the need for private contractor services in the school district. The Board accepts the change in arrangements, but notes that the contract with the private company was to be terminated at the end of August, resulting in a cost of $3,782 for July and August. In addition, the Board states it will have an expense of $2,840 to purchase the required garbage containers since the private company will be taking back its containers.

It would appear that a reasonable and realistic arrangement has been negotiated between Council and Board, but that there will still be some expenses for the Board at the beginning of the school year. The Commissioner therefore determines that $6,622 is restored

and $15,378 is sustained. (It should be noted that the Board documents have a figure of $15,378 as accepted and $3,782 and $2,840 (totalling $6,622) as additional charges. However, the amount requested for restoration is listed as $6,222, apparently a typographical error.)

Account 730 Replacement of Equipment $ 6,500

The Council's decision was based on a reduction of the price of a copy machine by $5,000 in view of current market prices of $15,000 instead of $20,000, and a reduction of $1,500 with a proposed purchase of a more modest lifeguard chair of $500 instead of $2,000. The Board states that it has now entered into a three year lease purchase agreement for a copier, with an anticipated 1992-93 cost of $17,500. The Board then accepts $2,500 of the reduction for the copy machine and asks that $2,500 be restored. The Board states that a lifeguard chair with the qualities required for an indoor olympic-size pool used for instructional, competitive, and recreational activities is $2,073.21 and cannot be purchased for $500. It asks that the $1,500 be restored.

The Commissioner finds that the Board has demonstrated the necessity of the expenditures in this account. Therefore, it is determined that $4,000 is restored and $2,500 is sustained.

Account 730c Purchase of New Equipment $83,500

The Council eliminated $15,000 for electronic music equipment as not essential, $7,500 for a "Text on Microform" system as easily deferred or not necessary at all, $11,000 for a pool thermal blanket as an item which has been deferred in recent years and for which it has no cost/benefit information, and $50,000 for new computer equipment as easily deferred. The Board states that the cost of $11,365 for the music equipment is valid because the

equipment, although not traditional, is effective for music instruction. The Board states that the "Text on Microform" system provides students access to periodicals and specific articles, teaches research techniques and improves computer literacy. The Board states that the thermal pool blanket at a cost of $10,500 will result in savings of utility costs over the life of the blanket. The Board states that the reduction of $50,000 for the purchase of computers will result in the elimination and/or reduction of computers in certain classes. The Board argues that the computers are consistent with the goals of a thorough and efficient education.

The Commissioner finds that the purchase of electronic music equipment, a "Text on Microform" and a pool thermal blanket, all possibly worthwhile, may be deferred. It is further determined that the provision of computer equipment and instruction is vital to ensure staying abreast with electronic technology and is essential to a thorough and efficient education. Therefore, the reduction of $33,500 is sustained and $50,000 is restored.

Account 810a Other Employee Retirement Contributions $ 6,000

Both parties agree that a $6,000 error was made and that the reduction is appropriate. This reduction is thus sustained.

Account 850 Other Fixed Charges $125,000

The Council effectuated this reduction based on the option offered by the State Health Benefits Program to delay payment of one month's premium. The Board states that there are risk in accepting this option. This would be, if sometime later the Board withdraws from the program or if the program discontinues the delay option, that a thirteen month payment at higher rates would be required in one school year.

This is a difficult issue to resolve, because a health benefits program must be provided for employees and accepting the one month payment deferral option, may, although not likely, result in the financial risk described by the Board. The Commissioner therefore determines that a reduction which forces a board into a situation which is optional and which ultimately may have a financial impact is not justifiable. The reduction of $125,000 is restored.

Account 870e Tuition - Special $50,000

The Council recognizes that significant unanticipated costs can occur in this account, but states that the reduction still leaves a substantial increase for unanticipated expenses and that any increases beyond this can be funded with surplus monies. The Board states that expenditures in 1991-92 exceeded the budgeted amount by $176,197 and that it does not have the same level of surplus funds to finance unexpected tuition costs. It also notes that the anticipated increase in costs for 1992-93 was reviewed by the State Department of Education and resulted in approval for a cap waiver in special education tuition.

The Commissioner determines that the Board has presented solid documentation in this account, and the $50,000 is restored.

Account 1010 Salaries - Student Body Activities $ 7,500

The Council reduced the increase in this account to 6.7%, the amount of wage adjustment. The Board states that the Council ignored the additional budget for the increased pool staff.

The Commissioner finds that there must always be sufficient staff to provide not only proper instruction but also security and safety for all participants in school programs. It is, therefore, determined that the $7,500 is restored.

Account 1020 Other Expenses - Student Body Activities $10,000

The Council's reduction is based on the actual budget for 1991-92, after transfers, plus 4% for inflation. The Board agrees that funds for the athletic trainer were transferred in 1991-92 from account 1020 to 1010, but states that the additional funds budgeted for 1992-93 are necessary for increases in other relevant costs.

The Commissioner determines that the Board has not satisfactorily documented the increased costs in this account. The reduction of $10,000 is sustained.

Lines 134-198 Special Education $20,000

The Council agrees that these accounts had unanticipated cost increases in 1991-92, but the reduction is based on its belief that the increase for 1992-93 was overly conservative and unnecessarily high. The Board states that there were unanticipated costs in 1991-92 that impact the 1992-93 budget and that also additional staff has to be hired for 1992-93 to meet the needs of special education students.

The Commissioner determines that the provision of appropriate educational services to special education students is not only essential to a thorough and efficient education but also vital to implement the individualized educational programs for special education students. The reduction of $20,000 is restored.

Thus, for the reasons set forth above, the Commissioner determines to restore $567,987 and sustain $110,860 of the $678,847 in current expense reductions appealed herein, as summarized by the chart below:

Line Item/ Account		Council's Reduction	Amount Not Restored	Amount Restored
10	Misc. Revenue	$ 20,000	$	$ 20,000
120b	Legal Fees	6,300		6,300
120d	Other Prof. Services	5,000		5,000
130	Other Expenses	7,425	4,000	3,425
213	Salaries - Teachers	20,000		20,000
213	Salaries - Teachers	31,000	11,000	20,000
214	Salaries - Other Instr.	41,000		41,000
220	Textbooks	40,000		40,000
230	Library, AV	35,000		35,000
240	Teaching Supplies	25,000		25,000
250	Other Expenses	78,500	52,360	26,140
530	Replacement of Vehicles	63,000		63,000
620	Contracted Services	6,622		6,622
730	Replacement of Equipment	4,000		4,000
730c	Purchase New Equipment	83,500	33,500	50,000
850	Other Fixed Charges	125,000		125,000
870c	Tuition - Special	50,000		50,000
1010	Salaries - Student Body Activities	7,500		7,500
1020	Other Expenses	10,000	10,000	
134-198	Special Education	20,000		20,000
		$678,847	$110,860	$567,987

II. CAP WAIVER

In setting forth its position with respect to the $996,579 it seeks in current expense cap waiver monies, the Board states that these funds are essential for the provision of a thorough and efficient educational program. The cap waiver monies would provide for the following:

- 15.5 teaching staff members (elementary, science, English, social studies and foreign language) including salaries and benefits
- Staff for the lunch monitor program
- Staff for the evening tutorial program
- Purchase of computer equipment.

The Board states that the cap waiver was approved as required for thorough and efficient education by the Department of Education. The Board in its position paper specifies the impact that lack of these monies would have on the district, including

elimination of programs and increases in class size because of teaching staff reductions, elimination of staff for the lunch monitor program at the elementary school which has been provided for the safety of the children during the lunch hour, elimination of teaching staff for the evening tutorial program which would result in the reduction of remedial programs for students in grades seven through twelve, and reduction of the purchase of computer equipment, software and materials which are utilized in programs that are "responsive to changing educational, technological work place demands***." (Position Statement, at pp. 15-16) The Board submitted documentation on the impact of the elimination of the cap waiver monies, including the reduction of academic programs and increases in class sizes, in some cases to over 30 students; the Board policy on the lunch monitoring program for pupils in grades one to eight; the specific programs offered and numbers of students served in 1991-92 in the evening tutorial program -- these numbers are significant with 1,874 served in 1991-92 at the high school, 2,190 at the Pierrepont School, and 1,405 at the Union School -- and the necessity of the computer funds to provide equipment to improve teaching methodology and to provide students with the "tools needed for functioning in the 21st century." (Id., at I5)

The Council submitted a response in which it denies that any of these reductions would impact the provision of a thorough and efficient education. The Council does not dispute the benefits of the lunch monitoring program and evening tutorial program, but suggests that the former be provided either by volunteer parents or with charges for the service, and the latter be provided with local

college students at lower salaries instead of certificated teachers. The Commissioner rejects these suggestions as neither reasonable nor feasible.

Upon review of the Board's position and supporting documentation, the Commissioner finds and determines that the record amply establishes that the $996,579 in current expense cap waiver monies are necessary for the district to provide a thorough and efficient education to the students of the Rutherford Borough School District.

Accordingly, the Commissioner directs that the Bergen County Board of Taxation increase the 1992-93 current expense tax levy to reflect the restoration of $567,987 of the reduction effectuated by the Council and an additional $996,579 in cap waiver monies, or $1,564,566. This amount, when added to the amount of $13,421,235 originally certified by the Council, will result in a total 1992-93 current expense tax levy for Rutherford Borough of $14,985,801 as set forth below:

Current Expense

Tax Levy Certified	$13,421,235
Restoration	567,987
Cap Waiver Approval	996,579
Total Tax Levy	$14,985,801

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

DECEMBER 8, 1992

DATE OF MAILING - DECEMBER 9, 1992

297-92

C #297-92 (consolidated)
SB #1-93

BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
MAYOR AND COUNCIL OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, December 6, 1992

For the Petitioner-Respondent, Fogarty & Hara, (Rodney T. Hara, Esq., of Counsel)

For the Respondent-Appellant, Donovan & Cucchiara, (E. Michael Donovan, Esq., of Counsel)

This is an appeal from a decision made on behalf of the Commissioner of Education by the Acting Commissioner involving the budget for 1992-93 of the Board of Education of the Borough of Rutherford (hereinafter "Board"). In his decision in this consolidated case, the Acting Commissioner passed upon both the Board's appeal from reductions made by the Council of the Borough of Rutherford (hereinafter "Council") pursuant to N.J.S.A. 18A:22-37 following defeat of the education budget by the voters[1] and an

1 N.J.S.A. 18A:22-37 provides in pertinent part that:

> If the voters reject any of the items submitted at the annual school election, the board of education shall deliver the proposed school budget to the governing body of the municipality, or of each of the municipalities included in the district within 2 days thereafter. The governing body of the municipality, or of each of the municipalities, included in the district shall, after consultation with the board, and by April 28, determine the amount which, in the judgment of said

July 7, 1993

appeal of amounts included in a current expense cap waiver presented to the voters pursuant to N.J.S.A. 18A:7D-28(f),[2] which was also defeated.

Based on his review of the specific line item reductions appealed to him, the Acting Commissioner sustained $110,860 in reductions, but directed restorations totaling $567,987 in nineteen line items. On the basis of his review of the Board's position and the supporting documentation, he also found that $996,579 in "current expense cap waiver monies" was necessary for the District to provide a thorough and efficient education to its students. The Acting Commissioner therefore directed that the Bergen County Board of Taxation increase the 1992-93 current expense tax levy by $1,564,566 so as to include both the amount of the Council's reductions which he had restored and the "cap waiver monies."

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body or bodies, is necessary to be appropriated, for each item appearing in such budget, to provide a thorough and efficient system of schools in the district, and certify to the county board of taxation the totals of the amount so determined to be necessary for each of the following:

a. Current expenses of schools;
b. Vocational evening schools or classes;
c. Evening schools or classes for foreign-born residents;
d. Appropriations to capital reserve fund; or
e. Any capital project...

The statute further provides for appeal from that determination to the Commissioner of Education.

2 N.J.S.A. 18A:7D-28(f) provides:

Any school district may submit a proposal to raise the amount of tax levy necessary to exceed the maximum permissible net budget permitted by this section to the legal voters of the district for type II school districts without a Board of School Estimate and to the Board of School Estimate for those school districts with a Board of School Estimate as required during the school budget approval process pursuant to chapters 22 and 54 of Title 18A of the New Jersey Statutes and section 13 of P.L.1971, c.271 (C. 18A:46-41). The proposal to raise additional tax levy to exceed the maximum permissible net budget shall be in addition to the amounts required to be approved for each

The Council appealed to the State Board, seeking reversal of the Acting Commissioner's determination to restore $567,987 of the line item reductions it had made pursuant to N.J.S.A. 18A:22-37 and his award of the $996,579 "cap waiver monies" which he had directed to be included in the tax levy.

Following the submission of briefs by the parties, our Legal Committee issued its Legal Committee Report (hereinafter "Report"), recommending therein affirmance of restoration of the line item reductions effectuated by the Council. However, the Legal Committee further recommended, essentially for the reasons subsequently discussed, that we remand this matter before directing any increase to the education budget.

Our Legal Committee's Report was mailed to the parties on May 20, 1993. On that same date, the Committee received a request from the Council to withdraw its appeal "in consideration of" the Board's decision not to appeal the Council's action with respect to the 1993-94 education budget, which had been defeated by the voters.

By letter of May 21, the parties were advised that they were required to submit their proposed settlement for review in order for the State Board to consider withdrawal of the appeal. The parties were further advised that their desire to settle the matter

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school district in accordance with chapters 22 and 54 of Title 18A of the New Jersey Statutes and section 13 of P.L.1971, c.271 (C. 18A:46-41). In the event that a school district's proposal to raise the tax levy to exceed the maximum permissible net budget is not approved in accordance with the budget approval process set forth in chapter 22 of Title 18A of the New Jersey Statutes to type II districts and for type I districts, chapter 54 of Title 18A of the New Jersey statutes for county vocational school districts and section 13 of P.L.1971, c.271 (C. 18A:46-41) for county special services school districts, that disapproval shall be deemed final and shall not be subject to further review of appeal.

did not alter the date by which they were required to file any exceptions they might have to the Legal Committee Report.

On May 26, the Council filed its exceptions to the Report, along with a resolution adopted by the Council which memorialized the agreement between the parties with respect to the appeal of the 1992-93 school budget. By letter of May 27, the Board provided us with its resolution pertaining to the agreement, and, on May 28, it filed its exceptions to the Legal Committee Report.

After reviewing the resolutions submitted by the parties, we conclude that we can not permit withdrawal of the appeal on the basis of the agreement embodied therein. Further, review of the parties' exceptions to the Legal Committee's Report reinforces the validity of the conclusions set forth in that Report.

As the Committee reiterated and as the State Board of Education emphasized in our decision in Board of Education of the Borough of Lincoln Park v. Borough Council of the Borough of Lincoln Park (hereinafter "Lincoln Park"), decided by the State Board, December 2, 1992,

> The starting point for resolving this matter is arriving at a proper appreciation of the Commissioner's obligation to assure that each school district has sufficient fiscal resources to provide a thorough and efficient education to its students. Robinson v. Cahill 69 N.J 449, 463 (1976) (Robinson V); Abbott v. Burke, 119 N.J. 287 (1990). This obligation is an integral part of the Commissioner's responsibility for assuring that the State's constitutional mandate is fulfilled and it is of such importance as to vest in the Commissioner the authority to direct an increase in a district's budget beyond those amounts approved by the district's voters. In re Upper Freehold Reg'l School District, 86 N.J. 265 (1981). Given the nature of the responsibility entrusted to the Commissioner, we have no doubt that the authority to fulfill it must embrace the power to direct an increase in a district's education budget in any case where such increase

> is necessary to satisfy the constitutional mandate, including a case where voters have defeated a proposal to exceed its statutory budget limitation. See Administrative Agency Advice (AAA) 91-0036 (July 8, 1991).

Lincoln Park, supra, slip op. at 5.

Furthermore, although we had no hesitation in affirming the Commissioner's implied authority to direct an increase in a local education budget, we reaffirm that

> the power to direct such increase may properly be exercised only where an increase is necessary to enable the district to provide a thorough and efficient education. Upper Freehold, supra. Further, any increase must be limited to those amounts the district needs in order to provide a thorough and efficient education. Id. Consequently, it is necessary to assess the adequacy of the budget as advertised and to determine whether it is possible to reallocate amounts within that budget before directing any increase. See AAA 91-0036, supra, at 6.

Id. at 5-6. (Emphasis added).

In contrast to this case, although defeating the cap waiver question, the district's voters in Lincoln Park had approved the budget proposed by the district board. Our review of the record in Lincoln Park revealed nothing to indicate that the possibility of reallocation within the budget approved by the voters had been considered at any point following defeat of the district's cap waiver proposal. Consequently, we concluded that it was necessary to remand the matter to the Commissioner to determine whether or to what extent the budget could be reallocated to include those amounts of the cap waiver proposal he found necessary in order for the district to provide a thorough and efficient education. Lincoln Park, supra, slip op. at 10.

In the case now before us, as emphasized by the parties in their exceptions to our Legal Committee's Report, the budget

proposed by the district Board and approved by the County Superintendent for advertisement was defeated by the voters. This circumstance, however, did not eliminate the necessity to review the budget for the specific purpose of determining whether reallocation within that budget could be made so as to include the programs that the District originally intended to support by the "cap waiver monies." In this respect, we stress not only that the County Superintendent's review of the budget did not involve any determination of the minimal level of funding necessary in order for the District to provide a thorough and efficient education to its students, but also that N.J.S.A. 18A:22-37 did not charge the Council with reducing the budget to that level following voter defeat.

There is no indication in the record before us that reallocation within the budget proposed by the Board was considered at any point either prior to the County Superintendent's approval of the budget or at any point subsequent to defeat of the cap waiver proposal. Again, that the budget approved for advertisement and presented to the voters did not represent the minimal amount necessary is clearly demonstrated in this instance by the fact that the Acting Commissioner sustained $110,860 in reductions in the specific line items presented to him. The Acting Commissioner did not however extend his review beyond those line items so as to consider whether any additional reallocation was possible.

Furthermore, while review of the "cap waiver monies" was not within the scope of review with which it was charged by N.J.S.A. 18A:22-37, the Council in these proceedings did raise questions as to whether those amounts were necessary in their entirety to the

provision of a thorough and efficient education. Again, as delineated in Lincoln Park, the fact that the County Superintendent designated the monies as "T & E" amounts for purposes of presenting a cap waiver question to the voters under N.J.S.A. 18A:7D-28(f) did not insulate those amounts from review on appeal.

Review of the agreement between the parties further reinforces our view that it is necessary to remand this case. Essentially, that agreement provides that the Council withdraw its appeal of the Commissioner's decision with respect to the 1992-93 school budget, in exchange for which the Board agrees not to appeal reductions made by the Council in the 1993-94 education budget following its defeat by the voters. The concerns that compel us to reject this agreement relate to both of the budget years involved.

First, as detailed above, the Commissioner's decision with respect to the 1992-93 budget established a budget which, despite voter defeat of the proposal made pursuant to N.J.S.A. 18A:7D-28(f), exceeds the "maximum permissible budget" allowed by the statutes. Again, as set forth above, the additional amounts were added to the District's budget without any determination of whether it was possible to make reallocations such that it would be possible for the District to provide a thorough and efficient education while staying within its maximum permissible budget. To permit this result, given defeat of the proposal made to the voters pursuant to N.J.S.A. 18A:7D-28(f), would be to contravene the express terms of that statutory provision without the assurance that to do so is necessary in order for the Commissioner to fulfill her statutory obligations. In this respect, we emphasize that nothing in N.J.S.A. 18A:22-37, or, for that matter, any other statutory provision

provides for delegation to a municipal governing body of the Commissioner's authority to direct an increase in a local education budget. This would be the result were we to permit withdrawal of this appeal on the grounds that, as argued by the parties, the Council reviewed the entire budget when it reduced it.

Moreover, notwithstanding either the acceptance by the Council of the necessity of the programs which the Board sought to fund by its cap waiver proposal or the documentation in the record supporting the cost of those programs, the record before us does not provide a sufficient basis upon which to determine whether or not the programs which the District intended to fund with the "cap waiver monies" are in fact necessary in order for the District to meet its constitutional obligations. See Exhibits in Support of Position Statement on Behalf of the Rutherford Board of Education (cap waiver appeal). Nor is it sufficient to establish the exact amount necessary to fund those programs found to be essential to the provision of a thorough and efficient education.

Secondly, as indicated above, our concerns extend beyond the 1992-93 budget to that portion of the proposed agreement that would fix the 1993-94 budget at the amount that was set by the Council following voter defeat of that budget. Quite simply, to the extent that the Commissioner's determination pursuant to the remand of this matter alters the District's budget for 1992-93, the District's budget for 1993-94 would also be affected. Consequently, in the event of any change in the 1992-93 budget, the 1993-94 budget must be scrutinized carefully to assure both that the calculation of State aid for 1993-94 is proper and that the budget is constitutionally adequate. Cf. Abbott v. Burke, 119 N.J. 287 (1990).

In sum, for the reasons expressed, we reject the settlement proposed by the parties. We affirm that portion of the Acting Commissioner's decision directing restoration of specific amounts to the line items before him, but remand the matter to the Commissioner for a determination of whether reallocation within the District's maximum permissable budget for 1992-93 is possible so as to provide support for those programs which the District proposed originally to fund by the "cap waiver monies," as well as for a determination of whether or to what extent the specific programs at issue are in fact essential in order to enable the Board to meet its constitutional obligations. In the event that the District's budget for 1992-93 is altered by the Commissioner's determination, we direct her to again review the District's 1993-94 budget as set forth above.

Attorney exceptions are noted.

July 7, 1993

Date of mailing 09 JUL 1993

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(297-92)

BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON REMAND
MAYOR AND COUNCIL OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,	:	
RESPONDENT.	:	

JANUARY 26, 1994

BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON REMAND
MAYOR AND COUNCIL OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,	:	
RESPONDENT.	:	

For Petitioner, Rodney T. Hara, Esq. (Fogarty & Hara)

For Respondent, E. Michael Donovan, Esq. (Donovan & Cucchiara)

The matter was remanded to the Commissioner of Education by way of a July 7, 1993 decision of the State Board of Education, wherein it was held that the Commissioner, in the December 8, 1992 decision on appeal to the State Board, had not made a determination as to whether it was possible to make reallocations within the district's maximum permissible expense budget prior to overriding the will of the voters and ordering proposed cap amounts to be funded through local tax levy, and that the record of that matter did not demonstrate any such determination having been made by the County Superintendent of Schools during the pre-election budget approval process. The State Board also held that the existing record was insufficient to reach a determination on whether the programs to be funded and the amounts proposed for such funding were in fact necessary for provision of a thorough and efficient education ("T & E") in the district. Finally, the Board directed that, should the Commissioner's determination on remand result in a

change to the 1992-93 school budget, that the impact of such change on the 1993-94 budget also be reviewed to ensure accurate calculation of State aid and Constitutional adequacy.

As a result of the State Board's decision, it was determined, and the parties were informed by July 23, 1993 letter from the Director of the Bureau of Controversies and Disputes, that the County Superintendent was to submit to the Commissioner, and to the parties, a sworn affidavit setting forth his reasons as to 1) why he found reallocation not to be possible within the maximum permissible budget and 2) why the programs and amounts to be funded were necessary for T & E. Thereafter, the parties were to be given opportunity to submit responses to the County Superintendent's filing(s).

Accordingly, on September 17, 1993, the County Superintendent submitted to the record a sworn affidavit setting forth the review conducted by his office as it related to the State Board's directives on remand, followed on September 21, 1993 by documentation in support thereof. On October 28, 1993, the Board of Education submitted its responsive papers, wherein it expanded upon and endorsed the statements of the County Superintendent, both in terms of review processes employed and actual determinations reached. On the same date, the Borough submitted a letter indicating its agreement with the positions taken by both the County Superintendent in his affidavit and supporting papers and the Board of Education in its response thereto.

Upon review of the submissions on remand, together with the record of the Commissioner's prior decision, the Commissioner is satisfied both that no further reallocation is possible within the maximum permissible expense budget and that the programs and amounts proposed by the Board for funding through cap waiver are, in fact, necessary for T & E. Thus, no alteration of the Commissioner's prior directives as to amounts to be certified for the 1992-93 Rutherford school budget is warranted, and by this determination, the need for review of the 1993-94 budget as a result of any alterations to the 1992-93 budget is rendered moot.

Accordingly, for the reasons expressed in the Commissioner's decision of December 8, 1993 as supplemented on remand above, the total current expense tax levy for the 1992-93 school year in the School District of the Borough of Rutherford shall remain at $14,985,801.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

JANUARY 26, 1994

DATE OF MAILING - JANUARY 26, 1994

298-92

298-92

BOARD OF EDUCATION OF THE BOROUGH OF WALLINGTON, PETITIONER, V. MAYOR AND COUNCIL OF THE BOROUGH OF WALLINGTON, BERGEN COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

DECEMBER 8, 1992

BOARD OF EDUCATION OF THE BOROUGH OF WALLINGTON,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF WALLINGTON, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

For Petitioner, Joseph A. Banas, Jr., Esq.

For Respondent, Le Roy D. Safro, Esq.

This matter was opened before the Commissioner by way of a Petition of Appeal filed by the Board of Education of the Borough by Wallington (Board) appealing the reduction in the current expense tax levy imposed by the Mayor and Council of the Borough of Wallington (Borough) upon defeat of the 1992-93 budget by the voters of the district on April 7, 1992.

The Petition of Appeal in this matter was filed by the Board on May 20, 1992 and the Borough's Answer was filed on June 8, 1992. On June 19, 1992 the Borough filed a copy of its resolution of April 27, 1992 setting forth the amount to be raised by taxation of $5,280,607.50 for current expense purposes and the amount of its proposed reduction of $500,000. In addition, the Borough's filing of that date sets forth the following account and line item reductions which, it is noted, set forth $795,358 in reductions, some $295,358 greater than the $500,000 reduction adopted by the Borough in its resolution of April 27, 1992:

Account	Expenditure	Proposed 1992-1993	Cut
J-130	Expenses of Members of B.O.E.	$ 16,000.00	$ 3,200.00
	Expenses Board Office	4,800.00	1,850.00
	Board Secretary Travel Expenses	1,000.00	150.00
	Expenses for School Board Election	2,800.00	925.00
	Expenses Superintendent's Office	5,750.00	1,750.00
	Superintendent Travel Expenses	2,350.00	1,150.00
	Misc. Expenses for Administration	6,000.00	3,000.00
Instruction	Preschool/Kindergarten Salary Teacher Aides	13,532.00	6,000.00
	Grades 1-5 Salary - Substitutes	25,445.50	11,046.00
	Other Salaries for Instruction Subtotal	13,100.00	2,500.00
J-220	Textbooks	26,170.00	8,920.00
J-230	School Library and Audio Visual Materials	29,575.00	9,275.00
J-240	Teaching Supplies Elementary	49,525.00	8,525.00
J-240	Teaching Supplies High School	56,200.00	13,650.00
J-250-A	Other Expenses Subtotal Office Supplies	33,350.00	9,350.00
J-250-B	Other Expenses Teacher Tuition and Travel	16,150.00	6,450.00
J-250-C	Misc. Subtotal	7,150.00	1,350.00
J-410	Attendance and Health Subtotal	81,912.00	5,812.00
J-420	Other Expense Health Subtotal	2,750.00	1,525.00
J-430	Purchase Prof./Tech. Services - Health	30,000.00	20,900.00

Account	Expenditure	Proposed 1992-1993	Cut
J-520	Subtotal	221,610.00	42,010.00
J-630	Heat - Subtotal	33,000.00	4,400.00
J-640	Utilities Subtotal	92,626.00	3,126.00
J-650	Supplies Subtotal	21,000.00	4,700.00
J-660	Other Expenses Subtotal	8,500.00	5,300.00
J-720	Repair of Grounds Subtotal	15,000.00	3,000.00
J-720	Repair of Buildings Subtotal	61,641.00	18,641.00
J-720	Repair of Equipment Subtotal	46,000.00	15,600.00
J-730	Replacement of Equipment Elementary Subtotal	1,575.00	475.00
J-740	Materials for Upkeep Grounds Subtotal	6,900.00	5,400.00
J-740	Materials for UpKeep Buildings Subtotal	8,000.00	2,700.00
J-820	Insurance and Judgments		
	Hospitalization - Medical	654,000.00	187,000.00
	Dental Plan	65,000.00	4,780.00
	Prescription Plan	76,750.00	11,350.00
	Workers' Comp.	28,000.00	15,750.00
	Special Services Tuition	187,000.00	87,000.00
	Special Education Programs Subtotal	305,000.00	86,000.00
	Food Services Subtotal	21,940.00	2,000.00
	Other Expenses Subtotal	760.00	260.00
	Expenditure to Cover Deficit Subtotal	3,000.00	2,080.00

Account	Expenditure	Proposed 1992-1993	Cut
J-1010	Salaries		
	Football	20,100.00	1,300.00
	Basketball	21,000.00	1,365.00
	Baseball	7,450.00	740.00
	Cheerleaders	4,275.00	1,470.00
	Track	8,600.00	735.00
	Band 6,500.00	615.00	
	Softball	7,450.00	850.00
	Volleyball	7,450.00	830.00
	Bowling	3,100.00	240.00
	Weight Training	1,800.00	205.00
	Auxiliary Police	7,892.00	4,395.00
	Clinics	2,250.00	1,750.00
	Equipment and Supplies	32,600.00	5,600.00
J-1020	Reconditioning of Equipment Subtotal	11,005.00	3,463.00
	Combined Activities Subtotal	11,000.00	2,900.00
	General		150,000.00
	TOTALS:	$2,431,333.50	$795,358.00

It is noted by the Commissioner that the above-cited areas of reductions imposed by the Borough constitute a second resolution of the governing body which added a general cut of $150,000 added to the original reductions which totaled $645,358, still some $145,358 greater than the amount by which the tax levy was reduced.

Notwithstanding the above, the Commissioner notes that the dollar amount in dispute in this matter as set forth by the Board is as follows:

	Proposed Tax Levy Adopted By Board	Amount of Tax Levy Certified by Borough
Current Expense	$5,780,607.50	$5,280,607.50

Amount of Reduction By Borough	Amount of Reduction In Dispute Before Commissioner
$ 500,000.00	$ 500,000.00

The Board submitted its Position Paper on May 20, 1992 and the Borough's Position Statement was not filed until August 31, 1992. A Reply paper was submitted by the Board on September 10, 1992 whereupon the record in this matter closed.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

In the instant matter, the Council upon defeat of the 1991-92 budget by the electorate did confer with the Board as required by N.J.S.A. 18A:22-37 and established a tax levy to be used for school purposes; however, the Commissioner notes that the

budgetary reductions set forth above provide no reasons for the reductions imposed. Pursuant to Deptford, supra, the Commissioner notes that the aforesaid decision, while affirming the reversal of the Commissioner's and the State Board's awarding of summary decision on procedural grounds to the board for failure to provide a statement of reasons at the time of the resolution setting the tax levy reduction, nevertheless concluded that the later the statement of reasons for the reductions imposed was provided, the greater the assumption of arbitrariness the Commissioner could assign. Further, in interpreting the standard of review to be applied in circumstances where a governing body failed to provide reasons for its reductions at the time such reductions were made, the State Board of Education concluded in Rochelle Park Board of Education v. Mayor and Council of Rochelle Park, decided July 1, 1992, that under such circumstances the burden of proof to demonstrate the validity of the reductions imposed is transferred to the governing body.

BOARD'S POSITION

Initially it is noted that the Board argues that the actions of the Borough in this matter are arbitrary and capricious both procedurally and substantively. It is the contention of the Board that when it met with the Borough on April 27, 1992 in conformity with N.J.S.A. 18A:22-37 it was presented with a resolution reportedly passed on April 23, 1992, prior to any consultation as required by the aforesaid statute and which contained a reduction in the tax levy for current expense of $500,000. The Board further contends that after the discussions between the Board and the Borough, the Borough Council passed a second resolution which imposed the same $500,000 reduction in the

tax levy but which set forth $795,358 in reductions as opposed to the $645,358 set forth in the original resolution, both being in excess of the $500,000 tax levy reduction.

It is the Board's contention that the failure of the Borough to provide a rationale for each of the line items in which reductions were imposed simultaneously with the certification of the tax levy constitutes an arbitrary and capricious action on the part of the governing body. Further, the Board contends that the provision of two lists of reductions, each greater than the overall $500,000 reduction imposed in the tax levy, not only further demonstrates the arbitrary nature of the reductions but also increases the difficulty of responding to the reductions.

Given the above-cited circumstances, the Board determined to address each of the reductions imposed by the Borough in its second resolution and its reasoning as set forth below:

Account

Expenses of Board Members - J130

Actual Expenditure 1990-1991	Revised Appropriations 1991-1992	Proposed 1992-1993	Recommended Reduction
$12,111.88	$15,000	$16,000	$3,200

This appropriation includes dues, county and state meetings and dinners, conventions and workshops. Expenditures to date for 1991-92 are $15,076. The Board believes this expenditure is necessary to maintain an informed, competent board of education.

Full restoration is requested.

Account

Expenses Board Office

Actual Expenditure 1990-1991	Revised Appropriations 1991-1992	Proposed 1992-1993	Recommended Reduction
$ 2,809.19	$ 4,400	$ 4,800	$1,850

There is an increase in supplies projected due to the need to implement the GAAP accounting system and to computerize services. This area includes all office supplies, postage and miscellaneous expenses. If GAAP software and appropriate hardware are considered for purchase, the appropriation of $4,800 is already insufficient. This expenditure is necessary to operate the office of the Board of Education.

Full restoration is requested.

Board Secretary Travel Expenses

$ 800.00	$ 1,000	$ 1,000	$ 150

This item shows no increase for 1992-93. It covers dues and travel expenses for the School Board Secretary. According to the Board, it is already minimal.

Full restoration is requested.

Expenses for School Board Election

$ 1,777.71	$ 2,800	$ 2,800	$ 925

This item shows no increase for 1992-93. It includes advertising, printing, voting machines, etc. No reduction is justified.

Full restoration is requested.

Expenses - Superintendent's Office

$ 1,894.55	$ 2,950	$ 5,750	$1,750

The projected increase of $2,800 is due to plans to implement a computer system with a modem to the high school. Currently,

all records, applications, state forms, etc. are in the files. The Board believes that there is a need to computerize these items.

Account

Superintendent's Travel Expenses

Actual Expenditure 1990-1991	Revised Appropriations 1991-1992	Proposed 1992-1993	Recommended Reduction
$1,140.00	$ 1,400	$ 2,350	$1,150

This expenditure includes a $30 per month traveling expense for the Superintendent in addition to expenses for workshops, seminars, conventions, etc. State, county and association dues are also included. According to the Board, the Superintendent previously attended the Academy in Trenton and has indicated an interest in attending this program and a national convention next year.

Full restoration is requested.

Miscellaneous Expenses for Education

$2,821.70	$ 5,400	$ 6,000	$3,000

This includes the high school student handbook, subscriptions and fingerprinting for volunteers (aides, coaches, etc.). The student handbook needs to be completely reprinted due to the upcoming Middle States visitation in 1993-94.

Full restoration is requested.

J130 Salary - Teacher Aides (Instruction)

$ -0-	$13,136	$13,532	$6,000

The Board has three full-day kindergartens. Enrollment for 1992-93 is already at 72. History indicates that it will increase by at least 10-12 more. By law, if enrollment exceeds 25 students as of September 1, the Board must provide an aide in that class.

It anticipates the need for at least one, maybe more. Its policy calls for a salary of $13,532 for one aide with a degree.

Full restoration is requested.

Account

J213 Salary - Substitutes Grades 1-5

Actual Expenditure 1990-1991	Revised Appropriations 1991-1992	Proposed 1992-1993	Recommended Reduction
$13,719.00	$20,180.50	$25,445.50	$11,046

This area includes all substitutes, internal and external, at this level. It also reflects a proposed $5 increase in 1992-93 to $60 per day. Experience has taught the Board that a greater amount of money is needed at the elementary level than the secondary because of the greater probability of maternity or child-rearing leaves due to a large percentage of female faculty members. There are also occasions where extended absences result in the Board compensating a substitute at $75 per day after the 20th day.

Full restoration is requested.

J213 Other Salaries for Instruction

$10,020	$11,360	$13,100	$2,500

This area covers class advisors, yearbook and newspaper advisors and those of other co-curricular activities. It is based on a projected increase of $100 to $200 per advisor and a $5 per hour increase for evening SAT instruction. The recommended cut would not enable the Board to even meet this year's financial responsibility.

Full restoration is requested.

Textbooks - J220

$13,790.23	$29,617	$26,170	$8,920

Textbook needs are based upon relevant educational concerns. The junior-senior high school has projected $8,200 for replacement texts. This comes to $18 per student. They have also requested $11,200 for new texts. These new texts are needed based upon a review of present texts. Updating is necessary prior to the Middle States visitation in 1993-94.

The elementary total projected expenditure for 1992-93 comes to $19 per student. A list of texts currently in use and to be ordered are available.

Full restoration is requested.

Account

J230 School Library and Audio Visual Materials

Actual Expenditure 1990-1991	Revised Appropriations 1991-1992	Proposed 1992-1993	Recommended Reduction
$19,334.46	$29,000	$29,575	$9,275

New technology and expansion of media services, computer software, AVA equipment, periodicals, reference material, books and video and audio tapes are included here. The high school has a total appropriation of $14,600.

Books and paperbacks.....	$ 6,000
Newspapers and periodicals	3,000
Audio-Visual Materials	3,500
Supplies (Paper, batteries, cassettes, binding, jackets, book cards, etc.).....	2,100
Total	$14,600

The expenditure for books and periodicals includes the cost of a new set of encyclopedias, World Book, which is 8 years old. It is recommended by the American Library Association that encyclopedias be updated every five years. This expenditure alone is $1,100. The district also utilizes Paperbacks on Parade which provides ten paperback titles each month. This service is very

popular with the students and costs $450 per year. The remaining money is used to add to the overall book collection at both the Junior and Senior High level. Hardcover books cost approximately $25 - $30 dollars each.

The elementary schools (2) have a total of $14,975.

Books	$ 6,000
Newspapers and periodicals	5,400
Audio-Visual Materials	2,575
Supplies	1,000
Total	$14,975

Periodicals are important as a source of current information for students. They are also a teaching tool and a source for reading and for doing research. They are also used by the teachers when units on consumer education are taught. Periodicals in the library allow teachers to introduce quality magazines to children. Professional periodicals are an important source of additional material to augment the curriculum.

AVA materials are an essential part of the curriculum. The teachers use these filmstrips and video cassettes as teaching tools to illustrate points they are teaching. The teachers often use them to introduce a unit as well as a culminating activity for a particular unit, chapter, or book, read in class.

AVA equipment: the tape recorders ordered are needed as replacement for old and worn equipment. Since the cost of repair is as much or more than new recorders, it is cost effective to order new ones. The overhead projectors ordered will allow the data shows to be permanently set up for use by the teachers. They will also be used with transparencies, both commercially made and teacher made.

Computer software is important as a teaching tool. These programs are used as reinforcement for concepts already taught. They are also used by teachers when introducing new concepts.

Library books must be updated each year. The objective is to improve, encourage and entice children to read. Students use the library as a resource for doing class assignments. Since all children, particularly elementary school children, cannot go to the public library, the school library becomes more important.

Teachers use the books as a resource to introduce history, literature and science, as well as leisure-time reading. As education moves towards a whole-language, literature based approach to learning, more books, records and audio tapes are imperative to a successful curriculum. The price of books had risen tremendously over the last several years, and therefore, it costs more to buy fewer books.

The Board believes that the library is the center of learning, research, media development, and language arts in its schools.

Full restoration is requested.

Account

Teaching Supplies - Elementary

Actual Expenditure 1990-1991	Revised Appropriations 1991-1992	Proposed 1992-1993	Recommended Reduction
$38,832.11	$44,150	$49,525	$8,525

The $49,525 is actually $2,750 less than what the principal has requested to operate two elementary schools with a combined enrollment of 499 children (May 11, 1992). This amount comes to $131 per student. It includes material needed to address the new testing programs in grades 4 and 8. A review of the actual elementary school proposed budget will reveal the areas and items in greater detail.

Full restoration is requested.

Account

J240 Teaching Supplies - High School

Actual Expenditure 1990-1991	Revised Appropriations 1991-1992	Proposed 1992-1993	Recommended Reduction
$40,524.55	$54,300	$56,200	$13,650

This amount for 1992-93 is $6,100 under what was requested by the principal of the junior-senior high school. The average proposed expenditure is $140 per student. State testing, curriculum adjustment and revision and Middle States considerations have significant input into this line-item. A more detailed account of what is being proposed is available in the tentative budget.

Full restoration is requested.

J250A Other Expenses - Office Supplies

$22,869.14	$40,000	$33,350	$9,350

These office supplies reflect needs generated by Middle States, a new computer reporting system in the high school and state testing. It also reflects an attempt to provide more up-to-date technology in the Board's offices such as word processors. The $33,350 appropriated for 1992-93 is a 1.6% decrease over the amount appropriated for 1991-92. (It should be noted that the Board has already spent over $39,000 this year.)

Full restoration is requested.

J250B Other Expenses - Tuition and Travel

$ 9,251.59	$17,400	$16,150	$6,450

In order to promote more efficient teacher training and preparation the district has increased the availability to attend appropriate workshops and seminars for all teachers. They will be exposed to a variety of areas such as technology, math and science

curriculum, core proficiencies, special education laws, cooperative learning and subject matter pertaining to specific disciplines. This material is always shared with appropriate staff.

The Board is already allowing for a reduction of $1,250 (7%) for the coming school year.

Full restoration is requested.

Account

J250C Misc. Subtotal

Actual Expenditure 1990-1991	Revised Appropriations 1991-1992	Proposed 1992-1993	Recommended Reduction
$ 5,530.75	$ 7,000	$ 7,150	$1,350

This area includes dues for Middle States, N.J.S.I.A.A. and the B.C.S.L., graduation and transition materials, assemblies, elementary school music supplies, speech, ESL, elementary school special education services, academic decathlon and the math league. It should be noted that the Board is adding a formal graduation ceremony at the grade 8 level.

Full restoration is requested.

J410 Attendance and Health Subtotal

$ 72,479.20	$ 75,451	$ 81,912	$ 5,812

This includes contracted salaries for the two nurses, medical personnel (vision, hearing, dental and general), the attendance officer and summer assistance by the high school nurse for athletic physicals.

Full restoration is requested.

J420 Other Expenses - Health

$ 1,165,09	$ 2,250	$ 2,750	$ 1,525

This includes all supplies for the elementary and secondary schools plus a 24-hour hotline ($500)

Full restoration is requested.

Account

J430 Purchase Prof./Tech. Services - Health

Actual Expenditure 1990-1991	Revised Appropriations 1991-1992	Proposed 1992-1993	Recommended Reduction
$ 8,660.00	$ 20,584	$ 30,000	$20,900

The proposed expenditure for 1992-93 includes the district's student assistance counselor (2 days per week at $16,000 per year), all athletic physicals and all other physicals done for staff, special education students, etc. The Board is hoping to expand the SAC to 3 days per week for 1992-93.

Full restoration is requested.

J520 Transportation Subtotal

$166,279.47	$210,000	$221,610	$42,010

This includes transportation for all educationally disadvantaged students (26 Region VII, 5 special needs, 5 in private placement, including one in Kansas, Bergen Tech. and Satellite School).

The increase is projected at 10%. This figure does not allow for the added expenditures for students attending the Academy of Science and Technology in 1992-93 or special services summer programs (1992) which will exceed $10,000.

Full restoration is requested.

J630 Operation of Plant - Heat

$27,199.78	$50,000	$33,000	$4,400

The budget already shows a $17,000 (34%) decrease for the coming school year. Heating needs are very difficult to project because of the uncertainty of the weather.

Full restoration is requested.

Account

J640 Utilities

Actual Expenditure 1990-1991	Revised Appropriations 1991-1992	Proposed 1992-1993	Recommended Reduction
$85,170.67	$97,626	$92,626	$3,126

Utilities include water, gas and electric and phone expenses. This amount is subject to increases from all of these areas. The Board has already expended close to $90,000 this school year. The projection allows for a 5% increase for the 1992-93 school year.

Full restoration is requested.

J650 Operation of Plant - Supplies

$15,505.43	$24,000	$21,000	$4,700

The projection for 1992-93 provides for a $3,000 (12.5%) decrease from the current year. This includes all custodial and maintenance supplies for three buildings and the adjacent grounds and athletic fields. The position of supervisor of building and grounds was dropped from the 1992-93 budget.

Full restoration is requested.

J660 Other Expenses

$ 3,034.13	$ 8,500	$ 8,500	$5,300

Current expenses have run close to $7,000 in this area. No increase for 1992-93 is projected. This includes uniforms for custodial staff, gas and oil for equipment and vehicle and some cleaning supplies.

Full restoration is requested.

Account

J720 Maintenance of Plant - Repair of Grounds

Actual Expenditure 1990-1991	Revised Appropriations 1991-1992	Proposed 1992-1993	Recommended Reduction
$11,418.95	$32,000	$15,000	$3,000

The Board has already reduced the appropriation by $17,000 from 1991-92 (53%). This expenditure includes athletic fields, parking areas, walkways, fences and drainage. It does not include approximately $10,000 that will be needed to cover the balance of repairs to existing fencing and gates.

Full restoration is requested.

J720 Repair of Buildings

$40,767.51	$70,000	$61,691	$18,641

The 1992-93 appropriation indicates a 12% decrease from 1991-92. This line item includes windows, electrical, plumbing, carpeting restoration, boilers, gym floor, AC/Heat, shades and drapes and roofs. A portion of it will be used to repair the roof of one of the elementary schools.

Full restoration is requested.

J720 Repair of Equipment

$28,878.41	$42,400	$46,000	$15,600

The addition of new technological equipment for instructional and office use has required a greater appropriation in this area. Included are copy and duplicator machines, fire alarms systems, PA systems, lighting, clocks/bells, computers, networking system, telephones, library equipment, musical instruments, bleachers, scoreboards, etc.

Full restoration is requested.

Account

J730 Replacement of Equipment Elementary

Actual Expenditure 1990-1991	Revised Appropriations 1991-1992	Proposed 1992-1993	Recommended Reduction
$ 484.92	$ 4,025	$ 1,575	$ 475

This expenditure includes audio-visual, projection screens, a computer printer and any other needs which may surface during the school year. The budget shows a 61% decrease from last year.

Full restoration is requested.

J740 Material for Upkeep of Grounds

$ 1,423.50	$ 9,000	$ 6,900	$ 5,400

This area includes material for the upkeep of athletic fields and all areas adjacent to the district's buildings. It also covers any painting or restoration needed in classrooms, hallways, locker rooms, etc. A reduction of $2,100 (23%) is already shown for 1992-93. There are many areas in the Junior-Senior High School in need of painting.

Full restoration is recommended.

J740 Material for Upkeep of Buildings

$ 5,053.35	$ 9,000	$ 8,000	$ 2,700

This includes paint, brushes, floor tiles, lumber, locks, keys, etc., for work done on the repair of the district's buildings.

Full restoration is recommended.

J820 Fixed Charges - Insurance Medical/Hospital

$402,458.45	$530,000	$654,000	$187,000

The 1991-92 premium was $505,726. It is estimated that $625,000 is the minimum that will be needed based upon current staff. This could change as changes in staff, status or the inclusion of teacher aides surface.

Full restoration is requested.

Account

J820 Dental

Actual Expenditure 1990-1991	Revised Appropriations 1991-1992	Proposed 1992-1993	Recommended Reduction
$ 51,912.89	$ 62,000	$ 65,000	$ 4,780

Estimated cost for 1992-93 based upon current staff and contracted services is $64,000. This leaves only $1,000 for reserve.

Full restoration is requested.

J820 Prescription

$ 56,372.02	$ 69,250	$ 76,750	$11,350

Current expense for 1991-92 will be $66,000+. The Board has projected a 10% increase. This would require $72,000+ for the 1992-93 school year. The excess $4,750 is held for unexpected change in staff.

Full restoration is requested.

J820 Workers' Compensation

$ 11,130.00	$ 26,000	$ 28,000	$15,750

The low amount in 1990-91 is due to a rebate that was received. The Board is unaware of any such rebate this year. This program has cost $25,958 this year. Any increase over 7% will require the Board to spend more than the $28,000 that is appropriated for 1992-93.

Full restoration is requested.

J870 Special Services - Tuition

$ 89,649.00	$167,000	$187,000	$87,000

Tuition is not an item of choice or debate. It is set by the receiving school.

Full restoration is requested.

Account

J870 Tuition - Special Programs

Actual Expenditure 1990-1991	Revised Appropriations 1991-1992	Proposed 1992-1993	Recommended Reduction
$199,071.45	$275,000	$305,000	$86,000

This expense is dictated by tuition as per attendance at a particular school. It is not negotiable. (See enclosure h, page 29.)

Full restoration is requested.

J910 Sundry Accounts - Food Services - Salaries

$18,127.00	$20,790	$21,940	$2,000

This program consists of a coordinator and seven lunch aides. The coordinator's salary was $5,700 in 1991-92. The lunch aides made $11.50 per day. A projected increase of $.50 per day for each lunch aide and a 7% increase ($400) for the coordinator would result in an appropriation of $20,800 for 1992-93.

Full restoration is requested.

J920 Other Expenses - Lunch

$ 451.87	$ 500	$ 760	$ 260

This money is needed to operate the lunch program for all participants in grades K-12. It is used to purchase miscellaneous supplies such as straws, napkins, etc.

Full restoration is requested.

J930 Expenditures to Cover Deficit

$ 834.49	$ 3,000	$ 3,000	$2,080

There has been an increase in the number of participants in free and reduced lunch programs. This is due to a more careful

approach to identify at-risk students. This money is needed to cover the deficit resulting from the purchase of school lunches.

Full restoration is requested.

Account

J1010 Student Body Activities - Salaries, Sports

Actual Expenditure 1990-1991	Revised Appropriations 1991-1992	Proposed 1992-1993	Recommended Reduction
$73,150.00	$82,271	$87,725	$8,350

The $87,725 projected for 1992-93 represents an increase of 6.6% over 1991-92. This figure is a contractual item and must remain once settled through negotiations. This was ruled by the Commissioner in Board of Education of the Borough of Freehold v. Mayor and Council of the Borough of Freehold (November 4, 1991.).

Full restoration is requested.

J1010 Auxiliary Police

$ 3,185.00	$ 4,823	$ 7,892	$4,395

The auxiliary police are used for PTA, Home and School, athletic and evening programs. The Board also uses them for several evenings around graduation time and Halloween. An increase was necessary for 1991-92 and 1992-93 since the Board is now requesting their services on Friday and Saturday evenings to prevent vandalism and to address complaints of residents.

Full restoration is requested.

Account

J1020 Clinics

Actual Expenditure 1990-1991	Revised Appropriations 1991-1992	Proposed 1992-1993	Recommended Reduction
$ 444.39	$ 2,250	$ 2,250	$1,750

Clinics are provided for all coaches and the athletic director per contractual agreement.

Full restoration is requested.

J1020 Equipment Supplies

$24,495.79	$33,400	$32,600	$5,600

This money is needed to provide equipment and supplies for all athletic activities, cheering and band/marching unit. It must also cover emergency expenditures that may arise due to increased participation, damage and the need for odd sizes. The Board has already reduced $8,400 from the athletic director's request.

Full restoration is requested.

J1020 Reconditioning of Equipment

$ 6,857.23	$10,475	$11,005	$ 3,463

This appropriation is required for reconditioning of all equipment, some of which is required by law, and the cleaning of uniforms on a weekly basis (football) and at the end of the season for all other sports.

Full restoration is requested.

J1020 Combined Activities

$ 7,287.07	$ 9,925	$11,000	$ 2,900

This line item covers the school newspaper, association dues, championship banners, awards, letters and tournament fees.

Full restoration is requested.

Account

General - J1020

Actual Expenditure 1990-1991	Revised Appropriations 1991-1992	Proposed 1992-1993	Recommended Reduction
			$150,000

According to the Board, this figure was not present in the material presented to it on the evening of April 27, nor was it discussed with the Board at any time. The Board had no knowledge of it until it received the second resolution (see enclosure c). The first resolution (enclosure b) presented to the Board on the 27th has no evidence of such a reduction. It has no idea what area this money is attributed to. This additional cut is clearly unilateral and arbitrary.

Full restoration is requested.

BOROUGH'S POSITION

The reasoning of the Borough in imposing the reductions listed in its resolution of April 27, 1992 was set forth for the first time in its Position Statement. The Borough argues that the 1992-93 budget appropriations requested by the Board constituted a 29.6% increase over its actual expenditures in 1990-91 while the cost of living in each of the two intervening years rose only 3.5% and private sector pay increases were limited to the 4 and 5% range. It further contends that the actual increase between 1990-91 and 1992-93 was greater than the 29.6% indicated by the raw figures since the Borough contends that the 1990-91 budget contained one

time charges for capital equipment and improvements such as removal of oil tanks ($20,000), kindergarten room renovations ($17,000), word processors, etc. ($31,900) and maintenance equipment ($11,700).

The Borough further sets forth its belief in its responsibility to the taxpayers, many of whom are senior citizens, to maintain a stable tax rate. The Borough sets forth its concern of how it can explain a Board of Education budget which increased by 15% per year to citizens whose Social Security increases have been limited to 4% while earnings on their savings have been reduced from 8% to 3.5%.

The reasons for the line item reductions are set forth below:

J130 Expense of Board Members

Increase of 32.1% over two year period excessive for taxpayers. Areas to decrease: dinners, workshops and donations. Amounts of decrease $3,200. This would have little effect on the competency of the Board of Education and take nothing from the students.

Expenses Board Office

Increase of 70.9% over two year period excessive for taxpayers. Areas to decrease: supplies, postage and miscellaneous, GAAP accounting requirements as highlighted by school board not mandated for 1992-93 school year. Amount of decrease $1,850. No effect on students.

Board Secretary Travel Expense

Increase of 25% over two year period excessive for taxpayers. Board Secretary salary of $79,880 for 1992-93 school year increased by 15.2% over 1990-91 actuals. All this salary and

the size of the school district we feel the Board Secretary should be able to absorb some of his travel costs in performing his duties. Amount of decrease $150. No effect on students.

Expenses for School Board Elections

Increase of 58% over two year period excessive for taxpayers. Advertising and printing costs should be reduced. Actual expenses to May 1992 per Board Secretary $1,772 same as 1990-91 school year. No increase warranted. Amount of decrease $925. No effect on students.

Expenses - Superintendent's Office

Increase of 203.5% over two year period excessive for taxpayers. Need to computerize is desired but not crucial in these economic times and can be put off for a year or two. No increase warranted. Amount of decrease $1,750. No effect on students.

Superintendent's Travel Expenses

Increase of 106.1% over two year period excessive for taxpayers. Superintendent's salary appropriation of $86,800 for 1992-93 school year increase by 18.1% over 1990-91 actuals. At this salary and the size of our school district we feel there should be no travel allowance or full reimbursements for professional seminars. Actual expenses to May 1992 per Board Secretary $1,332 which is close to $1,140 actuals of 1990-91 school year. Amount of decrease $1,150. No effect on students.

Miscellaneous Expenses for Educations

Increase of 112.6% over two year period excessive for taxpayers. Board request for additional funds for reprinting of student handbooks due to 1993-94 Middle States deemed unnecessary for 1992-93 school year. Handbooks appear to have been printed in

both 1990 and 1991 school year and appropriated for the 1991-92 school year. Miscellaneous category increased by 130.4% with no School Board explanation. Actual expense to May 1992 per Board Secretary $2,470 which is lower than actual expenditures of $2,822 for 1990-91 school year. Amount of decrease $3,000. No effect on students.

Instruction Salary - Teacher Aides

Increase of 100% over two year prior excessive for taxpayers. Actual expense to May 1992 per Board Secretary $0. Based on Board's enrollment statistics for 1992-93 school year of 72 we feel that at this time the Board should revert back to half day sessions. Full day sessions are not mandated by State and we feel that total of 84 students or 21 per morning and afternoon sessions could also reduce staffing from three teachers to two. We request a decrease in Salary-Teacher Aides of $6,000 which would leave a contingency of $7,532.

Salary Substitutes Grades 1-5

Increase of 85.5% over two years period excessive for taxpayers. Actual expense to May 1992 per Board Secretary $6,364 to $7,355 less than actual expenditures for 1990-91 school year. Board request of $25,446 for 1992-93 translates to 19 days absent for each teacher listed. Amount of decrease $11,046. No effect on students.

J213 Other Salaries for Instruction

Increase of 30.7% over two year period excessive for taxpayers. In today's economy, with people getting laid off or receiving 4-5% increases we feel the Board's negotiation procedures should be reviewed if they can find 15% increases for the last two years the norm. We also feel there could be an elimination of paid

chaperones if volunteers from the Home and School Organization would be available. Amount of decrease $8,920. No effect on students.

Textbooks

Increase of 89.8% over two year period excessive for taxpayers. Per Board response $11,200 of new texts required for Middle States visitation in 1993-94. This purchase should be postponed for one school year. Amount of decrease $8,920. No effect on students.

School Library and Audio Visual Materials

Increase of 53% over two year period excessive to taxpayers. Actual expenses per Board Secretary to May 1992 $21,395 which is closer to the 1990-91 actuals of $19,334 [than] the appropriations of $29,000 for 1991-92 and $29,575 for 1992-93. Amount of decrease $9,275. No effect on students.

J240 Teaching Supplies Elementary

Increase of 27.5% over two year period excessive for taxpayers. This item could only be analyzed in total as there was no breakdown of 1990-91 actual expenditures. Amount of decrease $8,525.

Teaching Supplies High School

Increase of 38.7% over two year period excessive for taxpayers. Actual expense per Board Secretary to May 1992 $44,511 which is approximately $10,000 less than 1991-92. Also purchase of microcomputer for $2,500 shows up in both the 1991-92 and 1992-93 appropriations. Breakdown of 1990-91 actual expenditures not available for further analysis. Amount of decrease $13,650. No effect on students.

J250A Other Expenses Subtotal Office Supplies

Increase of 45.8% over two year period excessive for taxpayers. Even more staggering is the increase from 1990-91 actuals to 1991-92 appropriations of 74.9% for a one year period. There is no breakdown of actual expenditures for 1990-91 to compare individual line items but an increase of that magnitude would suggest the purchase of capital equipment type items such as computers or word processors. Amount of decrease $9,350. No effect on students.

J250B Other Expenses Tuition and Travel

Increase of 74.6% over two year period excessive for taxpayers. Based on salaries of teachers we feel that any continued education or seminars should be the responsibility of the professional to better prepare themselves and maintain professional standards. Amount of decrease is $6,450. No effect on students.

J250C Miscellaneous Subtotal

Increase of 29.3% over two year period excessive for taxpayers. As there are no actual figures for 1991-92, we can only rely on 1990-91 actuals. Amount of decrease $1,350.

J410 Attendance and Health Subtotal

Based on the salaries of the two nurses we feel the Board should look for alternative methods of securing health services. Calculating the High School nurse's salary based on a 6 hour work day for 181 days the Board's paying approximately $36 per hour which is the equivalent of paying a registered nurse in private industry based on a 7 hour work day for 240 work days $60,480. The Elementary School nurse using the same theory would be $47,040. An

298-92

C #298-92
SB # 5-93

BOARD OF EDUCATION OF THE BOROUGH OF WALLINGTON,

PETITIONER-RESPONDENT,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF WALLINGTON, BERGEN COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION ON MOTION

Decided by the Commissioner of Education, December 8, 1992

For the Petitioner-Respondent, Joseph A. Banas, Jr., Esq.

For the Respondent-Appellant, Riccardelli & Rosa
(Joseph Rosa, Jr., Esq., of Counsel)

By decision of December 8, 1992, the Commissioner of Education directed restoration of $500,000 of the amount by which the Council of the Borough of Wallington had reduced the budget proposed by the Board of Education following defeat of that budget by the voters.

The Council appealed to the State Board of Education, filing its notice on January 21, 1993, along with a motion for an extension of time within which to file its appeal. In its papers, the Council argues that extension of time is warranted because of circumstances relating to its receipt of the Commissioner's decision and political changes in the Borough's administration. For the reasons that follow, we deny the Council's motion and dismiss the appeal.

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

April 7 1993

filed." In contrast to the period for filing petitions to the Commissioner of Education, see 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 dated December 8, 1992, and the date of mailing indicates that 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 deemed filed on December 11, and the Council was required to file its notice of appeal by January 11, 1993. See N.J.A.C. 6:2-1.1; N.J.A.C. 6:2-1.2; N.J.A.C. 6:2-1.5. As stated, it did not file until January 21.

We reject the Council's argument that it should be excused from complying with the statutory time limit because it did not actually receive the Commissioner's decision until December 14. Even were we to consider this to be the filing date of the decision, the Council would have been required by N.J.S.A. 18A:6-28 to file its notice of appeal by January 13. Again, it did not do so until January 21. In that we find nothing in any of the circumstances represented by the Council, including those relating to the change of administration, which would alter the statutory time period established by N.J.S.A. 18A:6-28, the State Board of Education dismisses this appeal.

April 7, 1993

Date of mailing 12 APR 1993

299-92

UNIVERSITY BUS COMPANY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY, CHERRY HILL BUS COMPANY, UNIFIED BUS COMPANY, A&A CHARTER BUS, INC., AND RUDCO, INC.,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning bus company protested acceptance of bids and awarding of bus route contracts for 1991-92 school year, claiming respondent bus companies failed to include statament of noncollusion as required by N.J.A.C. 6:21-15.2(d)5 and that the district erred in waiving a requirement of the State Board of Education.

ALJ found no showing of fraud, bad faith or collusion, nor any indication of prejudice to the competitive bidding process, in either the successful bidders' actions or the District's decision to permit them to provide the required statement upon discovery of its omission, within approximately 48 hours of bid opening. Bids were found to be properly awarded and petition was dismissed.

Commissioner affirmed findings and determination of initial decision, stressing that the District did not waive a State Board regulation, but merely permitted correction of a non-material defect under circumstances and in a manner that in no way compromised free and competitive bidding.

DECEMBER 9, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9119-91

AGENCY DKT. NO. 356-9/91

UNIVERSITY BUS COMPANY,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY, CHERRY HILL BUS COMPANY, UNIFIED BUS COMPANY, A&A CHARTER BUS, INC., AND RUDCO, INC.,

Respondents.

Gary J. Cucchiara, Esq., for petitioner (Donovan & Cucchiara, attorneys)

John M. Walsh, Esq., for respondent State-Operated School District of the City of Paterson, Passaic County (Wolff, Helies& Duggan, attorneys)

Anthony Benevento, Esq., for respondents Cherry Hill Bus Company, Unified Bus Company, and Rudco, Inc. (Fontanella & Benevento, attorneys)

Record Closed: September 15, 1992 Decided: October 22, 1992

BEFORE **ARNOLD SAMUELS,** ALJ:

This matter involves an appeal by petitioner, University Bus Company, protesting the acceptance of bids and awarding of bus route contracts for the 1991-92 school year. The bids were accepted and awards made by respondent, State-Operated School District of the City of Paterson (District), to the co-respondents listed above. The petitioner claims that the bids should have been invalidated because of the failure by respondents Cherry Hill Bus Company and Unified Bus Company to include a statement of noncollusion with their bids, as required by regulation.

PROCEDURAL HISTORY

The petition was filed with the Commissioner of Education on September 27, 1991. It was accompanied by a notice of motion for emergent relief requesting that the respondents be restrained from entering into formal contracts for the bus transportation services. Petitioner also requested a stay of the operation and performance of such services pending the Commissioner's final decision. The matter was transmitted to the Office of Administrative Law on September 27, 1991, for disposition of the application for emergent relief and for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

A hearing was held on the petitioner's emergent relief application on October 3, 1991. An oral decision, denying the application, was rendered on the same day, and a written order confirming the decision was filed on October 16, 1991. A copy of the order on application for emergent relief is attached to this decision in the Appendix.

Several unsuccessful status and settlement conferences were held thereafter, and hearing dates were fixed, allowing for the completion of discovery. It was then agreed that plenary testimony was not necessary, but that the matter could be heard on cross-motions for summary decision, based on a joint stipulation of uncontested facts.

On June 9, 1992, a consent order was entered permitting respondents Cherry Hill Bus Company, Unified Bus Company, and Rudco, Inc. to withdraw from this matter as parties respondent, based upon representations by the remaining parties that no damage claims would be sought against the withdrawn parties, and that the disputed bus transportation contracts would not be automatically renewed by the

district for 1992-93, but would be rebid. (The 1991-92 bid specifications provided that the district had the option to renew for a second year.) The withdrawal of the parties was accepted.

Respondent A & A Charter Bus, Inc. never appeared in this matter at any stage of the proceeding, and no application was made by petitioner to compel an appearance by this respondent. This party is considered to have defaulted.

The stipulated facts and briefs were filed and oral argument was held on September 11, 1992, at the Office of Administrative Law in Newark. The record closed on September 15, 1992.

FACTS

The material facts, partially taken from the parties' stipulation, are as follows:

1. University Bus Company conducts business at 93 Prospect Place, Hillsdale, New Jersey, and was and is a bus company engaged in the business of providing bus transportation services for public school system pupils.

2. The State-operated school district of the city of Paterson was in need of bus transportation services for pupils in its school district (for the 1991-92 school year).

3. On or about August 17, 1991, the district advertised and solicited bids for bus transportation for various bus routes.

4. The district issued specifications, bid forms, and a standard form questionnaire.

5. On or about August 27, 1991, the district received sealed bids. The petitioner was the second lowest bidder on 13 individual routes which were awarded to Cherry Hill Bus Company. The petitioner was the third lowest bidder on six other individual routes which were also awarded to Cherry Hill Bus Company.

6. Unified Bus Company was the lowest bidder for ten other bus routes and was awarded contracts for those routes.

7. After the various bids were opened, petitioner discovered that all of the bids submitted by Cherry Hill and Unified did not include a statement of noncollusion. Petitioner brought this to the attention of the district.

8. The district then asked Cherry Hill and Unified to submit statements of noncollusion, and they did so.

Additional enumerated stipulations of fact need not be repeated in their entirety, but are summarized below.

9. At the end of August 1991, petitioner communicated with the district and contended that the Cherry Hill and Unified bids were defective because of the failure to include statements of noncollusion when the bids were submitted and opened. In mid-September 1991, the district advised petitioner that the Cherry Hill and Unified bids would be accepted, and contracts were thereafter awarded to the two firms for the routes in which they were the lowest bidders.

Additional findings of fact (not stipulated) are as follows:

10. The omissions were unintentional and inadvertent.

11. Exercising its discretion, the board waived fulfillment of the noncollusion statement requirement as of the time the bids were opened, but asked for the statements to be submitted before the awards were made. That was complied with, and the omitted statements were filed within 48 hours after the bids were opened.

12. The awards followed.

13. The specifications, which had been approved by the Passaic County Superintendent of Schools, did not contain the noncollusion affidavit requirement, but the same is applicable as a requirement set forth in *N.J.A.C.* 6:21-15.2(d)5.

14. There is no allegation of bad faith on the part of those who omitted the statement of noncollusion.

15. No collusion has been alleged on the part of any of the respondents.

LEGAL DISCUSSION AND CONCLUSIONS

> All purchases, contracts or agreements which require public advertisement for bids shall be awarded to the lowest responsible bidder.
> [*N.J.S.A.* 18A:18A-37.]

This general pronouncement has been defined and interpreted by the courts and the Legislature:

> The law is clear that bids must meet the terms of the notice. The significance of the expression "lowest bidder" is not restricted to the amount of the bid; it means also that the bid conforms with the specifications.
> [*Hillside Twp. v. Sternin*, 25 *N.J.* 317, 324 (1957).]

> No bid shall be accepted which does not conform to the specifications furnished therefor. Nothing contained in this chapter shall be construed as depriving any board of education of the right to reject all bids.
> [*N.J.S.A.* 18A:18A-22.]

N.J.S.A. 18A:18A-37 also states in pertinent part, that

> the award thereof shall be made, in accordance with *N.J.S.* 18A:18A-3 or *N.J.S.* 18A:18A-4, as the case may be, on the basis of the lowest responsible quotation received, which quotation is most advantageous to the board of education, price and other factors considered. . . .

The petitioner does not contend that the respondent bidders failed to conform to the specification or that their bids were not lowest. However, certain statutes and regulations are superimposed upon individual specifications, by operation of law. *N.J.A.C.* 6:21-15.2 requires that certain procedures be followed in the submission of bids for pupil transportation. Among these requirements is *N.J.A.C.* 6:21-15.2(d)5, which states, "The bid shall also include . . . [a] statement of noncollusion."

In its argument, the petitioner succinctly stated the essential question in this matter: Is the omission of the statement of noncollusion capable of being waived or cured? The petitioner's position answers this question in the negative, for two reasons: First, that the inclusion of the statement of noncollusion in the bid is mandatory, and secondly, that the regulatory requirement is a material condition imposed on the specifications.

The petitioner has also cited the provisions of *N.J.A.C.* 6:21-15.6(b), which states:

> A district board of education cannot impose new conditions and bidders cannot be allowed to change bids or make oral bids after they are opened. Specifications may not be modified after bids have been received, and the contract awarded to one of the bidders upon revised specifications.

The law is settled in that minor irregularities and immaterial variances in the form of the bid may be waived where they do not interfere with competitive bidding. *Terminal Const. Corp. v. Atlantic County Sewerage Authority*, 67 *N.J.* 403 (1975); *Saturn Const. Co. v. Middlesex County Freeholders*, 181 *N.J. Super.* 403 (App. Div. 1981). Where a governmental body receiving bids on public contracts reserves the right to waive minor irregularities and defects, there is no requirement to invalidate such bids, particularly when there is no showing of fraud, bad faith, or collusion. *Township of River Vale v. R.J. Longo Construction Co.*, 127 *N.J. Super.* 207 (Law Div. 1974); *George Harms Construction Co. v. Borough of Lincoln Park*, 161 *N.J. Super.* 367 (Law Div. 1978). The same authorities indicate that material variations from advertised terms and conditions will result in invalidation of nonconforming bids. *George Harms Construction Co., supra.*

The courts of this State have developed a two-fold test to determine whether a bid is in material and substantial compliance with contract specifications. In *Township of River Vale v. D.J. Longo Construction Co., supra,* at 216, the court sets forth the following criteria:

> whether the effect of a waiver would be to deprive a municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements and second, whether it [the bid irregularity] is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.

The courts have further recognized a municipal body's discretionary authority in dealing with contract bid irregularities.

> Further, a municipal body has a greater function in dealing with irregularities in such matters than merely exercising a ministerial and perfunctory role. It has inherent discretionary power, and what is more, a duty to secure, through competitive bidding, the lowest responsible offer, and to effectuate that accomplishment it may waive minor irregularities.
> [*Bryan Construction Co. v. Bd. of Trustees of the Free Public Library of the Town of Montclair*, 31 *N.J. Super.* 200, 206 (App. Div. 1954).]

The prerogative of public body contracting units to resolve problems arising from insubstantial contract bid deviations in a sensible or practical way has also been recognized by the courts. *See, Terminal Const. Corp. v. Atlantic City Sewerage Authority, supra.*

The Commissioner of Education has stated, in connection with the bidding process and the issue of irregularities, that "the pivotal point is whether the lowest bid was materially and substantially in accord with the specifications." *Aetna Supply, Inc. v. Bd. of Education of the City of Camden*, 1971 *S.L.D.* 151.

While many disputes have been litigated that involve the ability of boards of education to waive or vary particular details contained in bid specifications, no

decision has been made that deals with a delay in furnishing the statement of noncollusion, as here. In addition, the prior cases have not dealt with a failure or delay based on a regulatory requirement.

In *Lucy George v. Matawan Regional Board of Education*, 1963 *S.L.D.* 218, a bidder failed to submit a prescribed form of questionnaire and accompanying schedule, as called for in the specifications. The questionnaire furnished information relating to the nature of the bond to be furnished, the extent and nature of the bidder's experience in school transportation, the bidder's familiarity with the conditions of the contract, and the name of the proposed driver and information relating to approval of the bus to be used by the county superintendent. The schedule to be attached called for precise information as to the description of the seating arrangement and length of each seat.

The Commissioner held that by granting a waiver of the above requirements, the local board was improperly relinquishing a specification imposed by the State Board of Education, and that the waiver permitted the bidder to supplement the bid in essential details. However, the Commissioner also noted that his strict position was in no sense inconsistent with the right of a board to waive a minor irregularity in the form of the bid, which is not material to the bid itself.

See also Belousofsky v. Board of Education of the City of Linden, 54 *N.J Super* 219 (App. Div. 1959).

In *Marvec Allstate, Inc. v. Gray & Fear, Inc.*, 148 *N.J. Super.* 481 (App. Div. 1977), the low bidder inadvertently submitted a bond in the amount of $20,000 instead of the required $122,000. The proper bond was delivered a day later, and the board of education permitted the short-term waiver. The court upheld the award to the low bidder, despite the failure to submit the proper bond when the bids were opened The court noted that there was substantial compliance with the requirements and that the lowest responsible bidder was prepared to, and did, furnish sufficient security for its performance. It was further held that it was in the public interest that the bid, although irregular, be accepted. It was observed that the correction of the irregularity did not change the substance of the bid.

See also P. Michelotti & Sons, Inc. v. Fair Lawn, 56 *N.J. Super.* 199 (App. Div. 1959), where a certified check needed to be submitted with the bid. The low bidder's check was uncertified, but the error was later corrected with a certification. The court held that the defect could be waived and did not constitute a material departure or substantial variance from the bidding requirements.

The submission of an erroneous schedule was again considered by the court in *In re Route 280 Contract*, 179 *N.J. Super.* 280 (App. Div. 1981). A schedule of contracts on hand by the bidder as of September 30, 1980, was to be submitted with the bid. The low bidder's submission erroneously showed the status of its contracts on hand as of August 31, 1980, one month earlier than required by the bid specifications. Citing *Marvec Allstate, supra,* the court held that the deviation could be waived by the Commissioner. The Appellate Division noted that the error was inadvertent, not made in bad faith, and was promptly corrected. The omission did not substantially alter the bidder's ability to perform, and no prejudice was shown either to the other bidders or the public agency.

In *Hillside Township v. Sternin, supra,* 25 *N.J.* at 317, the New Jersey Supreme Court noted that a school board may waive minor, inconsequential, technical, or other such omissions and deviations from bidding specifications so long as the waiver does not prevent the spirit of the statute from being carried out and equitable results are obtained. In general, the function of bid specifications and the requirement to fully comply with them is derived from a concern for fairness and equality in bidding opportunity. While all bidders may not be the same -- having different capacities, levels of reliability, financial strength, etc. -- the bidding statutes are generally designed to provide all potential bidders with the same information, the same specifications and the same data upon which to compute their bids. So long as the essential equality of opportunity among prospective bidders is maintained, the courts have permitted the award of contracts to bidders whose submissions have, to some degree, deviated from the bid specifications.

In permitting public bodies to exercise discretion in the matter of irregularities, the Commissioner of Education has stated that "[t]he pivotal point is whether the lowest bid was materially and substantially in accord with the specifications." *Aetna Supply, Inc. v. Bd. of Education of the City Camden, supra,* 1971 *S.L.D.* at 154.

See also Trap Rock Industries v. Kohl, 59 *N.J.* 471 (1971); *Young v. West Orange Redevelopment Agency,* 125 *N.J. Super.* 440 (App. Div. 1973).

The question of whether a particular requirement in bid specifications or controlling regulations is material cannot always be answered with black-and-white inflexibility. The inquiry often needs to be fact-sensitive. In the instant matter, there was no showing of fraud, bad faith, or collusion. The competitive bidding process was not interfered with, and the lowest responsible bidder was produced. The waiver of the statement of noncollusion for approximately forty-eight hours did not prevent the spirit of the bidding statutes from being carried out. There were no variations from the substance, technical terms, or requirements of the bus transportation specifications themselves that would have placed one bidder at an advantage over another. The essential equality of opportunity among the bidders was maintained, even with the short-term waiver.

The statement of noncollusion provides some protection of the public interest in the integrity of the bidding process itself, but the requirement does not relate to the substance of the specifications or their details. Under the circumstances, prompt correction of the irregularity did not alter the substance or fairness of the bid, and the public received its assurance of noncollusion before the awards were made.

Therefore, although the requirement for a statement of noncollusion is capable of being material, the circumstances surrounding the late arrival of the statement in this case did not create a materially adverse effect on the bidding process. Under the circumstances, the lapse of time was not a substantial or consequential deviation that should invalidate the bidding process.

It is therefore **CONCLUDED** that the low bids accepted by the board and the contracts awarded thereon were proper and not in violation of applicable legal requirements. The board acted within its statutory authority in permitting the statements of noncollusion to be submitted as indicated above. The resulting awards were therefore not improper or contrary to law.

Based upon the above determination, any consideration relating to the question of damages, as argued by the parties, is moot.

ORDER

It is therefore **ORDERED** that the petition be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 22, 1992 — Date

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

Oct. 26, 1992 — Date

Maureen K. Keller

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 27 1992 — Date

OFFICE OF ADMINISTRATIVE LAW

ms/e

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
185 Washington Street
Newark, NJ 07102
(201) 648-6084

Arnold Samuels
Administrative Law Judge

October 16, 1991

John Ellis, Commissioner
Department of Education
225 West State Street - CN 500
Trenton, New Jersey 08625

RE: University Bus Company v. State-Operated School District of Paterson, Passaic County, Cherry Hill Bus Company, Unified Bus Company, A & A Charter Bus, Inc. and Rudco, Inc.
OAL DKT. NO. EDU 9119-91

Dear Commissioner Ellis:

Enclosed please find a copy of an order entered regarding an application for emergency relief in the above-captioned matter. Pursuant to *N.J.A.C.* 1:1-12.6(j), this order will become effective forty-five (45) days from the date of its entry unless, for good cause shown under *N.J.A.C.* 1:1-18.8(e), the time period is extended by the joint action of the Director of the Office of Administrative Law and the agency head.

Very truly yours,

Arnold Samuels
Administrative Law Judge

AS/ms
Enc.
cc: Gary J. Cucchiara, Esq.
Anthony Benevento, Esq
Russell Schumacher, Esq.
Thomas F. Lowe, Court Clerk

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER ON APPLICATION FOR EMERGENT RELIEF

OAL DKT. NO. EDU 9119-91

AGENCY DKT. NO. 356-9/91

UNIVERSITY BUS COMPANY,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY, CHERRY HILL BUS COMPANY, UNIFIED BUS COMPANY, A & A CHARTER BUS, INC., AND RUDCO, INC.,

Respondents.

Gary J. Cucchiara, Esq., for petitioner (Donovan & Cucchiara, attorneys)

Anthony Benevento, Esq., for respondents Cherry Hill Bus Company and Rudco, Inc. (Fontanella & Benevento, attorneys)

Russell Schumacher, Esq., for respondent State-Operated School District of the City of Paterson, Passaic County (Rand, Algier, Tosti & Woodruff, attorneys)

BEFORE **ARNOLD SAMUELS**, ALJ:

This matter was opened by the attorney for petitioner, University Bus Company, on application for an order granting emergent relief, pursuant to *N.J.A.C.* 1:1-12.6. The relief sought requests a stay of an award of a bus contract or, in the alternative, rejection of the bids and an order directing new bids; for failure of respondent bus companies to submit a noncollusion form with their bids. The respondents, State - Operated School District of the City of Paterson, Cherry Hill Bus Company, and Rudco, Inc., appeared in opposition to the application. Memoranda were filed by the above-named respondent bus companies. The other respondents mentioned in the caption have not appeared.

Having reviewed the papers filed in support of and in opposition to the application and having heard oral argument on October 3, 1991, the following facts become apparent:

Respondent bus companies were low bidders on August 27, 1991, when the bids were opened. An award was made several days thereafter by the school district. Affidavits of noncollusion were omitted by the respondent bus companies at the time the bids were opened. These affidavits are required to be attached to submitted bids by virtue of *N.J.A.C.* 6:21-15.2(d). That requirement was incorporated by reference into the bid specifications, although the bid specifications did not particularly mention the requirement separately. The affidavits of noncollusion were filed approximately 48 hours, or two days, after the bids were opened, based upon the school district's indication that it would waive that requirement, which in its opinion, was immaterial at the time. Nevertheless, the affidavits were filed. The one condition attached to the waiver was that the affidavits should be filed before the awards were made. That was done.

Based on the preliminary evidence before me at this time, there was no showing of bad faith or collusion on the part of the bidders who omitted the affidavits. Therefore, I **CONCLUDE** that the omission was inadvertent.

The routes that were awarded to the respondent bus companies have been in operation during the past four weeks, and the children of the City of Paterson, or those who are affected by these routes, are now, and have been over the past four weeks, being transported in accordance with these awards.

There was also no showing that any collusion was involved in the omission and, in fact, no collusion was alleged by the petitioner.

The granting of emergent relief is an extraordinary remedy which can only be granted based upon a showing that irreparable harm will result if it is not granted, and a further showing that there is a likelihood of success on the merits. There has been an allegation that economic loss will be visited upon the unsuccessful bidders simply by virtue of the fact that they do not have the business, and they therefore cannot earn profits.

I do not find that any further showing of harm by petitioner will result in other than a strictly economic loss, for which compensation would be available upon prevailing on the merits. It is noted that a substantial portion of the arguments of the parties were directed towards the merits. While that argument is necessary in order to build the framework for the application, it is the two elements mentioned above that are of primary importance in this application.

With respect to a showing of a likelihood of eventual success, it is concluded that, at best, the present record shows petitioner's chances of eventual success to be in equipoise, since the petitioner was not the lowest bidder, and the only potential for fraud or collusion appears to lie in the petitioner's allegation regarding the commonality of the omission of the noncollusion affidavit.

In addition, it is noted that if this application is granted, some harm and disruption might be visited upon the school children of the City of Paterson, who will suddenly find their bus transportation interrupted. Such a situation definitely would not be in the public interest.

Therefore, it is **CONCLUDED** that petitioner has not shown that immediate and irreparable harm will result if the requested emergent relief is not granted, nor has petitioner demonstrated a likelihood that it will prevail on the merits when the application is fully argued.

Therefore, it is **ORDERED** that the petitioner's application for emergent relief be **DENIED**. It is further **ORDERED** that the matter be scheduled for a full plenary hearing at the earliest possible opportunity in the Office of Administrative Law in Newark, New Jersey.

This recommended order on application for emergency relief may be adopted, modified or rejected by the Commissioner of the Department of Education, who by law is empowered to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of the Department of Education does not so act in forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

October 16, 1991
Oral decision rendered
on October 3, 1991

DATE

ARNOLD SAMUELS, ALJ

ms

UNIVERSITY BUS COMPANY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY, CHERRY HILL BUS COMPANY, UNIFIED BUS COMPANY, A&A CHARTER BUS, INC., AND RUDCO, INC.,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions, having been received on November 12, 1992, were untimely filed pursuant to N.J.A.C. 1:1-18.4 and are not addressed herein. No reply was filed by the District, the only remaining respondent as indicated at pp. 2-3 of the initial decision.

Upon careful review, the Commissioner concurs with the ALJ that the bids awarded by the District herein were proper and not in violation of applicable law. In so determining, the Commissioner stresses that the District did not waive the State Board regulation at issue; it merely permitted the low bidder to correct a non-material technical deficiency in a manner which honored the intent of law and regulation and in no way disadvantaged other bidders.

Accordingly, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

DECEMBER 9, 1992

DATE OF MAILING - DECEMBER 9, 1992

299-92

EDU # 9119-91
C # 299-92
APP. DIV.# A-2504-92T5
SB # 3-93

UNIVERSITY BUS COMPANY,

PETITIONER-APPELLANT,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY, CHERRY HILL BUS COMPANY, UNIFIED BUS COMPANY, A & A CHARTER BUS, INC., AND RUDCO, INC.,

RESPONDENTS-RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 9, 1992

Referred to the State Board of Education by the Appellate Division, May 27, 1993

For the Petitioner-Appellant, Torre & Torre (Joseph R. Torre, Esq., of Counsel)

For the Respondent-Respondent State-Operated School District of the City of Paterson, Wolff, Helies & Duggan (John M. Walsh, Esq., of Counsel)

For the Respondents-Respondents Cherry Hill Bus Company, Unified Bus, Inc., and Rudco, Inc., Fontanella & Benevento (Anthony Benevento, Esq., of Counsel)

On December 9, 1992, the Acting Commissioner of Education dismissed the petition filed in this matter by University Bus Company (hereinafter "petitioner"), an unsuccessful bidder who challenged the acceptance of bids and awarding of bus route contracts for the 1991-92 school year by the State-Operated School District of the City of Paterson (hereinafter "District").[1]

[1] We note that respondents Cherry Hill Bus Company, Unified Bus Company and Rudco, Inc. were permitted to withdraw as parties during proceedings before the Administrative Law Judge ("ALJ") and that respondent A & A Charter Bus, Inc. was considered by the ALJ to have defaulted.

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Petitioner alleged that the bids should have been invalidated for failure to include a statement of noncollusion as required by regulation. The Acting Commissioner adopted the determination of the Administrative Law Judge that the bids awarded by the district were proper and not in violation of applicable law, stressing that "the District did not waive the State Board regulations at issue; it merely permitted the low bidder to correct a non-material technical deficiency in a manner which honored the intent of law and regulation and in no way disadvantaged other bidders." Commissioner's Decision, slip op. at 13.

Petitioner appealed to the State Board of Education from the decision of the Acting Commissioner, faxing its notice of appeal dated January 13, 1993 on that date. Counsel for petitioner was notified in a telephone call that day from the State Board Appeals Office that the appeal was filed two days late and would therefore be referred to the Legal Committee of the State Board for consideration of the effect of petitioner's failure to file timely notice. He was also advised that while a fax copy may be used to establish a filing date, he was required to provide the State Board with a notice of appeal with an original signature.

That conversation was subsequently confirmed in a letter to counsel for petitioner in which he was again notified that the appeal had been due on or before January 11 and that the matter was being referred to the Legal Committee for consideration of the effect of petitioner's failure to file timely notice. He was given until February 8 to file an affidavit setting forth the circumstances of the late filing. He was also reminded of the necessity of filing a signed original copy of the notice of appeal

and advised that he was required to file a substitution of attorney since he was not the attorney of record in the proceedings below.

On January 21, however, counsel for petitioner faxed a letter to the State Board in which he advised that "my client desires to appeal this matter to the Superior Court of New Jersey, Appellate Division as it is strictly a question of law. Our offices will re-notice you with a copy of that notice of appeal accordingly." On January 25, the State Board received a copy of an appeal dated January 22 which had been filed by petitioner directly to the Appellate Division from the decision of the Acting Commissioner in this matter. Accordingly, by letter dated January 26, the Counsel to the State Board acknowledged the withdrawal of petitioner's appeal to the State Board.

On May 7, 1993, the Attorney General's office filed a motion with the Appellate Division on behalf of the Department of Education (hereinafter "Department") to dismiss the appeal filed by petitioner in that court "for failure to timely apply for leave to appeal [to the Appellate Division] from an interlocutory decision and for failure to exhaust administrative remedies."[2] Motion to Dismiss, at 1. The Department argued therein that petitioner's direct appeal to the Appellate Division from a decision of the Acting Commissioner "thwarts the statutory scheme, enacted by the Legislature and endorsed by the Appellate Division, which makes the State Board of Education the ultimate administrative decision-maker for controversies arising under the school laws." Id. at 3. Accordingly, the Department argued, petitioner's appeal to the

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2 We note that the Department of Education has respondent status in cases on appeal from that agency to the Appellate Division.

Appellate Division was interlocutory and, pursuant to the rules governing practice and procedure in that court, was untimely. The Department further argued that "[a]llowing University Bus to bypass the State Board of Education and secure judicial review of an interlocutory decision would undermine the integrity of the administrative system established by the Legislature and contravene the rule of administrative exhaustion which ensures that claims will be heard, as a preliminary matter, by the body having expertise in the area." Id. at 5. In a paragraph at the conclusion of its brief, the Department added that, in addition to having its appeal dismissed, petitioner should also be precluded from obtaining State Board review by remand because of its failure to file its appeal to the State Board in a timely manner.

In response to said motion, petitioner argued that the Department should be precluded from seeking further administrative review. Petitioner contended that its appeal to the Appellate Division from the decision of the Acting Commissioner should be considered an appeal from a final agency decision, arguing that "the necessity for exhaustion of administrative remedies and further administrative appeal was futile." Brief in Opposition to Motion to Dismiss, at 5. Petitioner did not address, argue or provide any justification for its late filing before the State Board.

On May 27, 1993, the court issued an order on the motion as follows, in full:

> The motion to dismiss is denied. The case is referred to the New Jersey State Board of Education without prejudice. Jurisdiction is not retained.

In light of such referral, the Counsel to the State Board notified the parties in a letter dated August 3 that the Legal

Committee was again providing them with the opportunity to address the effect of petitioner's failure to file an appeal to the State Board within the 30-day statutory time limit. The parties were given until August 25 to file briefs addressing that issue.

In a letter brief dated August 10, the District argued that petitioner's appeal should be dismissed for untimely filing. Council for petitioner, however, did not file a brief, contending in a letter dated August 11 that "[t]he issues you are requesting I re-argue in your letter of August 3, 1993 have already been presented and decided by the Appellate Court." He requested that the State Board "reschedule a hearing on the merits of this case."

By letter dated August 16, 1993, the Counsel to the State Board reiterated that the parties were being afforded the opportunity to file briefs addressing the effect of petitioner's failure to file its appeal to the State Board within the statutory time limit. Petitioner's counsel was informed that "in the event that you choose not to file any other letter brief, we will consider your letter of August 11 to be the extent of your arguments on this question."

Counsel for petitioner responded by letter dated August 19, stating that the issue of petitioner's late filing had been determined by the Appellate Division and that "the Department of Education simply seeks a 'second bite at the apple.'" Counsel for petitioner again failed to provide any justification for or circumstances surrounding the late filing or to file a brief addressing that issue.

By letter dated August 24, Counsel for the State Board confirmed a telephone conversation in which counsel for petitioner

had argued that the State Board did not have the jurisdiction to consider the effect of petitioner's failure to file its appeal within the statutory time period and had also challenged the requirement that he provide the State Board with 17 copies of a brief. Counsel for the State Board pointed out that the education regulations required parties before the State Board to file an original and 17 copies of their briefs. She further stated:

> Secondly, as I indicated in my letters of August 3 and August 16, the State Board will consider the effect on your appeal of the fact that it was not filed within the 30 day statutory time limit applicable to appeals to the State Board. Although the Appellate Division's Order does not on its face decide this issue, any argument with respect to jurisdiction should properly be made in your briefs so that it may be considered.
>
> In view of your apparent unfamiliarity with this forum, we are again extending the time limit in order to afford you the opportunity to put forward your arguments. Accordingly, please file an original and 17 copies of all arguments you wish to be considered by September 9, 1993. If you choose to forgo this opportunity, the State Board will have no choice but to proceed to consider the matter without benefit of your response.

By letter dated September 8, counsel for petitioner asserted:

> In response to your letter of August 24, 1993, your apparent unfamiliarity with the Appellate Division and the Res judicata effect of an Order issued therefrom is troubling. I state this in light of your conclusion "... the Appellate Division's Order does not on its face decide this issue...", which statement was made in your letter of August 24, 1993.
>
> I am sure you did not expect the Appellate Division's Order to fully regurgitate the arguments raised by the Attorney General on behalf of the Department of Education to dismiss my client's appeal for the same reasons which you now convene your Board to consider.

Counsel for petitioner attached copies of previous correspondence, but again failed to offer the circumstances surrounding the late filing or to file a brief arguing petitioner's position on that issue.

After a thorough review of the record, including all correspondence from petitioner's counsel, we dismiss the appeal in this matter.

We reject petitioner's contention that the Appellate Division's order of May 27, 1993 on the Department's motion to dismiss precluded the State Board from addressing petitioner's failure to file its appeal to the State Board within the statutory time limit.[3] The motion to dismiss filed by the Department was expressly predicated on petitioner's "failure to timely apply for leave to appeal [to the Appellate Division] from an interlocutory decision and for failure to exhaust administrative remedies." Brief in Support of Motion to Dismiss, at 1.

In response to that motion, petitioner argued that its appeal to the Appellate Division was a final appeal pursuant to R. 2:2-3(2) based upon the record and that if the decision below were deemed to be interlocutory, leave to appeal to the Appellate Division should be granted nunc pro tunc since the notice of appeal to the court was filed within the time frame required for appeals from final judgments. Petitioner did not address the issue of its untimely filing before the State Board or provide any of the

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[3] Although counsel for petitioner took the position that the Appellate Division's order precluded the State Board from considering the effect of petitioner's failure to file a timely appeal, he ignored repeated opportunities to file a brief in support of such position.

circumstances surrounding that filing, except to acknowledge that the time for that appeal "may have run." Brief in Opposition to Motion to Dismiss, at 5.

Given the nature and content of the motion and briefs before the court, which dealt with a request to dismiss the appeal for failure to exhaust administrative remedies, and the wording of the order issued, we find entirely without merit petitioner's contention that the court rendered a determination on the timeliness of petitioner's appeal to the State Board.

Without addressing the substantive and procedural issues raised by petitioner's withdrawn appeal to the State Board, the court simply "referred" this matter to the State Board. See R. 1:13-4(a) ("...if any court is without jurisdiction of the subject matter of an action or issue therein..., it shall, on motion or on its own initiative, order the action ... transferred to the proper court or administrative agency, if any, in the State"). That order did not expressly or by fair implication determine the effect of petitioner's failure to file timely notice of appeal to the State Board. Nor did the court remand this case to us for consideration of the merits of the appeal. Although the Department made brief reference to petitioner's untimely appeal to the State Board, the basis for its motion to dismiss was that petitioner, in appealing directly to the Appellate Division from a decision of the Commissioner, had failed to comply with statutory and judicial mandates. Indeed, petitioner's response to that motion did not address the timeliness of its appeal to the State Board or provide

any of the circumstances surrounding that filing.[4] Consequently, we conclude that the order issued by the Appellate Division referring this matter to the State Board did not preclude our consideration of petitioner's failure to comply with the statutory time limit. We turn then to a review of that issue.

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." The State Board may not grant extensions. N.J.A.C. 6:2-1.5(a). 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. 6:24-1.15, 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 of Education, November 4, 1987.

In this case, the Acting Commissioner's decision was rendered on December 9, 1992 and mailed to the parties on that date. Accordingly, pursuant to N.J.A.C. 6:2-1.4, the decision appealed from was filed on December 12. Therefore, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6:2-1.3(a); N.J.A.C. 6:2-1.4(a), as

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[4] We note that the Appellate Division has strictly applied the statutory time limit for appeals to the State Board. In Yorke v. Board of Education of the Township of Piscataway, decided by the State Board of Education, July 6, 1988, aff'd, Docket #A-5912-87T1 (App. Div. 1989), the court upheld the dismissal of an appeal by the State Board where it found that the notice of appeal had been filed one day late by appellant's counsel who alleged that he had misread or misunderstand the applicable regulations. The court added that even if the statute could be construed to permit enlargement of the time for filing an appeal, the appellant therein had failed to establish good cause.

computed under N.J.A.C. 6:2-1.4(b), petitioner was required to file a notice of appeal on or before January 11, 1993. Petitioner faxed a notice of appeal dated January 13, 1993 to the State Board of Education on that date. In that the appeal was filed two days late, the matter was referred to the Legal Committee for consideration of the effect of petitioner's failure to file timely notice.

Counsel for petitioner was notified of such referral on the day the appeal was filed and on several occasions thereafter, and provided with considerable opportunity to respond thereto. He has failed to provide an affidavit setting forth the circumstances of the filing or to file a brief in support of his position that the State Board was precluded from considering that issue. Nor has he alleged at any time that the notice of appeal was filed in a timely fashion. We conclude that the statutory filing requirement with which petitioner failed to comply is of such significance that we dismiss the appeal in this matter. See Yorke, supra.

Even if N.J.S.A. 18A:6-28 can be construed to provide us with the authority to enlarge the time limit for filing an appeal, we find no substantive basis in the record before us for relaxing such requirement in this particular instance. Despite being provided with repeated opportunities to do so, petitioner, as noted, has failed to provide any indication of the circumstances surrounding its filing or justification of any kind for filing beyond the statutory time limit. Nor do we find this case to present us with a matter of public importance or with substantive issues of transcendent importance warranting a determination on the merits.

We note in addition that, although petitioner argued before the Appellate Division that further administrative appeal would be futile, it did indeed file an appeal with the State Board, but withdrew that appeal shortly after being notified that it was untimely.[5] To allow petitioner's appeal under the circumstances presented herein would be to sanction facile contravention of the statutory filing requirements.

Accordingly, we dismiss the appeal in this matter for failure to file notice thereof within the statutory time limit as computed under the applicable regulations.[6]

Attorney exceptions are noted.

January 5, 1994

Date of mailing JAN 07 1994

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5 We note that this case does not present a situation in which a party filed an appeal directly to the Appellate Division from a decision of the Commissioner within the statutory time period for appeals to the State Board.

6 We note that, in its exceptions to our Legal Committee's report in this matter, petitioner contends for the first time in these proceedings that its appeal to the State Board was timely filed. We find no support for this contention. As petitioner's counsel was notified on January 13, 1993 when he filed the notice of appeal, such notice was due on January 11, thirty days after the Commissioner's decision was filed, which is deemed to be three days after its mailing date. Petitioner withdrew such appeal shortly thereafter and did not, at any time in the subsequent proceedings, question or contest such due date. Moreover, we reject as entirely without merit petitioner's exception raising for the first time circumstances surrounding its late filing. Such facts are not in the record and, in any event, we find that they do not modify our decision herein in any way.

300-92

300-92

IN THE MATTER OF THE TENURE :
HEARING OF DOMINIC PARISI, CITY : COMMISSIONER OF EDUCATION
OF ELIZABETH BOARD OF EDUCATION, : DECISION
UNION COUNTY. :
:

DECEMBER 14, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11179-91
AGENCY DKT. NO. 401-11/91

ELIZABETH BOARD OF EDUCATION,
Petitioner,
v.
DOMINIC PARISI,
Respondent.

James S. Rothschild, Jr., Esq., and **Vito A. Gagliardi, Jr.**, Esq., for petitioner (Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Edwin J. McCreedy, Esq., and **Patrick J. Hermesmann,** Esq., for respondent (McCreedy & Cox, attorneys)

Record Closed: November 16, 1992 Decided: December 1, 1992

BEFORE **DIANA C. SUKOVICH,** ALJ:

NATURE OF THE CASE AND PROCEDURAL HISTORY

This matter constitutes a tenure proceeding pertaining to charges brought by the Elizabeth Board of Education (Board or petitioner) against Dominic Parisi (respondent) of unbecoming conduct, sexual harassment, and insubordination. The charges essentially focused on allegations of harassment by respondent, who

is the Executive Principal of Elizabeth High School (School), of a nontenured teacher at the School and alleged insubordination regarding a change in the classroom assignment of the complainant. The alleged incidents occurred in the summer of 1990 and continued through December 1990. Respondent has at all times denied the substance of the charges and denied any wrongdoing on his part.

Tenure charges were filed against respondent with the Board on October 11, 1991. A copy of the charges and a statement of supporting evidence were delivered to Mr. Parisi on October 11, 1991. Respondent submitted a written statement of position and evidence to the Board on October 25, 1991. On November 7, 1991, petitioner considered the charges and evidence and determined to certify the charges to the Commissioner of the State Department of Education (Department) for a hearing pursuant to *N.J.S.A.* 18A:6-16. Respondent was suspended with pay upon the filing of the charges.

The matter was transmitted by the Department to the Office of Administrative Law on December 16, 1991, for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13. Telephone conferences were conducted on February 11, 1992; July 20, 1992; September 2, 1992; September 23, 1992; October 2, 1992 and October 16, 1992. This judge issued orders on discovery and on motions for summary decision on July 11, 1992 and July 16, 1992, respectively.

Hearings were initially scheduled for April 1993 and were rescheduled for October and November 1992. In-person conferences were conducted on October 29, and November 16, 1992. On the latter date, the parties finalized a resolution of the matter and executed a document entitled "Retirement Agreement" (Agreement), which constitutes a stipulation of settlement. Mr. Parisi testified on November 16, 1992 that he understood the terms of the Retirement Agreement and voluntarily agreed to it. The record was closed on November 16, 1992. Attached herewith is a copy of the Retirement Agreement, as well as a statement which is referenced and incorporated in the Retirement Agreement.

FINDINGS OF FACT

The Retirement Agreement articulates Findings of Fact and a purpose of the Agreement, which address the procedural history of the matter, certain relevant

facts, and the terms of the Agreement. The Findings of Fact referenced in the Agreement are adopted herein.

As noted hereinabove, Mr. Parisi is Executive Principal of the School. As set forth in the Agreement, he is now sixty-three years of age and has been employed by the Board since 1961.

The Agreement sets forth the terms of respondent's retirement, which is the focus of the Retirement Agreement. Respondent has agreed to tender his retirement as Executive Principal of the School on December 31, 1992, effective on March 1, 1993. Monies contractually due him from petitioner are reflected, such monies pertaining to contractually accumulated sick days, accumulated vacation days, missed milestones, and unpaid salary due, retroactive to 1989-90. The Retirement Agreement explicitly provides that Mr. Parisi shall receive no consultant fees, bonuses, or severance payments and that he will obtain no more than he was entitled to by contract as a Board employee. In addition, both parties agree to bear their own costs and attorney fees in connection with the current matter.

The Retirement Agreement recognizes that respondent has certain pension benefits due him unrelated to the monies due from petitioner. The Board agrees to refrain from any action which could interfere with Mr. Parisi's receipt of pension benefits due him pursuant to *N.J.S.A.* 18A:66-1 to -205. The Agreement reflects that respondent will retire at a salary of $92,135.00, effective July 1, 1992. The computation of this figure is set forth in more detail in the Agreement. The Agreement recognizes that its effectuation is contingent upon the approval of the Commissioner of the Department and explicitly states that all payments which come due under the Agreement prior to the Commissioner's approval shall be paid to the trust account of respondent's counsel.

The Agreement also provides that it shall have no effect on any life insurance benefits or obligations currently owed to Mr. Parisi by the Board. Finally, the Board agrees to recommend the dismissal of the tenure charges filed against respondent on October 11, 1991, recognizes that the filing and dismissal of these charges will not give rise to a cause of action on the part of either party against the other, and recognizes that the Agreement is not an admission of guilt by respondent nor an admission by the Board that the charges are not meritorious.

The voluntary resolution of litigation through settlement is favored. *Judson v. Peoples Bank & Trust Co.*, 25 *N.J.* 17 (1957); *Honeywell v. Bubb*, 130 *N.J. Super.* 130 (App. Div. 1974). I am persuaded that the Retirement Agreement should be adopted. Respondent is at the end of his career with the Board, after having served some thirty years in the Elizabeth School District. Litigation of this matter was likely to be lengthy. As the statement notes, the filing of the charges in question generated publicity and divided the community, and such divisiveness and negative publicity could be expected to recur during litigation. The expenses of litigation would be borne by the parties, as well as, in part, taxpayers. Potential witnesses included not only respondent and complainant, but other employees of the District. The Board anticipates immediately beginning the process of seeking a replacement for Mr. Parisi and moving ahead with plans to consider restructuring the School.

As noted, respondent agrees pursuant to the Agreement to tender his retirement on December 31, 1992, effective on March 1, 1993. He will receive no monies to which he is not contractually entitled. It is noteworthy, as discussed, that Mr. Parisi will receive no consultant fees, bonuses, severance payments, or costs. Based upon a review of the Retirement Agreement and Mr. Parisi's testimony on November 16, 1992, I **FIND** the following **FACTS**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

CONCLUSIONS AND ORDERS

I **CONCLUDE** that the tenure charges filed against respondent by the Board on October 11, 1991 should be **DISMISSED** and that the Retirement Agreement should be adopted.

It is hereby **ORDERED** that the attached Retirement Agreement be and is hereby **APPROVED** and that the parties comply with the Agreement. It is also hereby **ORDERED** that the tenure charges filed by petitioner against respondent on October 11, 1991 be and are hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 1, 1992
Date

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

12/3/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 04 1992
Date

OFFICE OF ADMINISTRATIVE LAW

le/e

RETIREMENT AGREEMENT

Retirement Agreement made this 16th day of November 1992, by and between Dominic Parisi ("Parisi"), Executive Principal of Elizabeth High School, Elizabeth, New Jersey, and the Elizabeth Board of Education ("the Board").

STIPULATED FACTS

The following facts are hereby agreed and stipulated to by the undersigned parties:

On October 11, 1991, tenure charges were brought against Parisi alleging unbecoming conduct and insubordination. The Board certified these charges to the Commissioner of Education for hearing, pursuant to N.J.S.A. 18A:6-11. Parisi has at all times denied the substance of the charges and denied any wrongdoing on his part. The Board and Parisi have both agreed to settle this matter as per this agreement. This agreement is not an admission of guilt by Parisi nor an admission by the Board that the charges are not meritorious and should be construed as neither.

PURPOSE

The purpose of this agreement is to set forth the terms of Dominic Parisi's retirement.

It is hereby agreed and declared as follows:

1. Parisi, age 63, is the Executive Principal of Elizabeth High School and has been employed by the Board since 1961.

2. As part of this agreement, Parisi will tender his retirement as Executive Principal of Elizabeth High School on December 31, 1992, effective on March 1, 1993, thereby concluding his 30-year career in New Jersey public education.

3. Certain monies are contractually due Parisi from the Board of Education. These monies represent

contractually accumulated sick days, accumulated vacation days, missed milestones (totalling $54,460.00) and unpaid salary due, retroactive to the year 1989-90 (totalling $28,877.00). Half of this money is payable on or before December 20, 1992 and the other half is payable on or before March 1, 1993. The Board agrees to pay, and Parisi agrees to accept, as payment in full of all monies that are owed him, the payment set forth in this agreement.

4. Parisi shall receive no consultant fees, bonuses or severance payments. This agreement gives Parisi no more than he was entitled to by contract as a Board employee.

5. Parisi has certain pension benefits due him which are unrelated to the monies due from the Elizabeth Board of Education. The Board of Education agrees to refrain from any action which could interfere with Parisi's receipt of pension benefits due under N.J.S.A. 18A:66-1, et seq.

6. Parisi will retire at a salary of $92,135.00, which is effective July 1, 1992. This adjustment in pay will take effect on December 1, 1992. During his last year of employment, Parisi's compensation will total $90,397.00. This compensation figure of $90,397.00 will be the basis for the computation of his retirement allowance, pursuant to N.J.S.A. 18A:66-71. It is computed by adding his pay for the period of July 1, 1992 to March 1, 1993 at the rate of $92,135.00 per annum to his pay for the period from March 1, 1992 to June 30, 1992 at the rate of $86,920.00 per annum.

7. This agreement is contingent upon the approval of the Commissioner of Education. All payments which come due prior to the Commissioner's approval shall be paid to the trust account of McCreedy & Cox, to be held there until approval is obtained and to be returned to the Board if approval is not obtained.

8. The Board and Parisi will bear their own costs and attorneys' fees in connection with this matter.

9. This agreement shall have no effect on any life insurance benefits or obligations currently owed Parisi by the Board.

10. As part of this agreement, the Board will recommend the dismissal of the tenure charges filed against Parisi on October 11, 1991. The filing and dismissal of these charges shall not be construed to give rise to a cause of action on the part of either party against the other.

11. The attached statement will be released on November 16, 1992. The statement is a mutual release and represents the official position of the Board and Parisi.

RIKER, DANZIG, SCHERER, HYLAND & & PERRETTI
Attorneys for Elizabeth Board of Education

By: _____
JAMES S. ROTHSCHILD, JR.

MC CREEDY & COX
Attorneys for Dominic Parisi

By: _____
EDWIN J. MC CREEDY

STATEMENT

The Board of Education of the City of Elizabeth and Dominic Parisi hereby jointly issue the following statement.

Dominic Parisi has been employed by the Elizabeth Board of Education since 1961. In 1971, he became Principal of Battin High School. After the merger of Battin High School and Thomas Jefferson High School, he was appointed Principal of the newly formed Elizabeth High School in 1976. In 1982, he was named Executive Principal, and thereafter served in that capacity. After serving the Elizabeth schools for 30 years, Mr. Parisi planned to retire in 1991 or 1992.

On October 11, 1991, charges were filed against Mr. Parisi by the Elizabeth Board of Education which sought the termination of his tenure. These charges were based upon an allegation by an Elizabeth High School teacher that she had been sexually harassed by Mr. Parisi. A second charge alleged insubordination on the part of Mr. Parisi. Mr. Parisi was suspended with pay upon the filing of these charges.

The filing of these charges divided the community and generated a great deal of publicity which disrupted the normal educational activity of Elizabeth High School. Mr. Parisi has steadfastly denied the validity of these charges and his accusers have also continued to assert the correctness of their position.

As the date approached for the commencement of Mr. Parisi's tenure hearing, it became evident that the publicity which

would attend those hearings would again disrupt Elizabeth High School, and detract from the purpose of the school -- the education of its students. In addition, it became clear that a fully contested hearing, and attendant appeal, would be extraordinarily expensive, with part of the cost to be borne by the taxpayers.

The Board of Education is committed to making Elizabeth High School the best high school in New Jersey. Dominic Parisi has devoted the last 16 years to that goal. Both parties believe that the students of Elizabeth High School should be spared the unwelcome publicity and divisiveness that would attend such hearings. The parties also wish to spare the witnesses the inconvenience of testifying at a hearing. In light of these facts, the Board has determined that it will recommend the dismissal of the tenure charges against Mr. Parisi. Subject to the approval of this recommendation by the Commissioner of Education, Mr. Parisi will retire as Principal of Elizabeth High School on December 31, 1992, effective March 1, 1993.

Thereafter, it is the fervent hope of both parties that these actions will serve to refocus the administration and faculty on the education of the students at Elizabeth High School. The Board will immediately begin the process of seeking a replacement for Mr. Parisi and hopes to have a successor as soon as possible. It will also press ahead with its recently announced plans to consider restructuring of the High School.

OAL DKT. NO. EDU 11179-91

IN THE MATTER OF THE TENURE	:	
HEARING OF DOMINIC PARISI, CITY	:	COMMISSIONER OF EDUCATION
OF ELIZABETH BOARD OF EDUCATION,	:	DECISION
UNION COUNTY.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

In view of respondent's agreement to retire, thereby concluding his career in public education as set forth in term two of the settlement, the Commissioner approves the settlement terms as they comport with the Cardonick standard for review of settlements in tenure matters and he adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983) The matter is hereby dismissed, subject to the parties' compliance with the terms of the settlement.

ACTING COMMISSIONER OF EDUCATION

DECEMBER 14, 1992

DATE OF MAILING - DECEMBER 14, 1992

301-92

JAMES FARROW AND OAKCREST/ ABSEGAMI EMPLOYEE ASSOCIATION, PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY, RESPONDENT.	:	DECISION

SYNOPSIS

Petitioning janitor and Employee Association questioned Board's right pursuant to Board Policy No. 822 to transfer petitioner from one location and work shift to another when his relative was promoted to head custodian. Petitioner was employed since 1985 and claimed protection by Policy No. 822's "grandfather clause."

ALJ found, in addition to Policy No. 822 (Nepotism), Board Policy No. 405 vested in Board Secretary/Business Administrator the unfettered right to transfer nonprofessional staff. ALJ found since supervisory relationship occurred after adoption of Policy No. 822, petitioner did not qualify for grandfather provision as policy, even absent clause, had only prospective application. Petition was dismissed.

Commissioner concurred with ALJ that Board was correct in relying upon Policy No. 822 before amendment when effecting petitioner's transfer. Commissioner held plan reading of Policy No. 822 indicates grandfather clause applied to neither petitioner nor his relative. Therefore Board's determination to transfer petitioner to different shift and job site was appropriate based on policy's intent to prevent the appearance of a conflict between supervisors and staff who are related. Petition was dismissed.

DECEMBER 14, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2029-92
AGENCY REF. NO. 38-2/92

JAMES FARROW AND
OAKCREST/ABSEGAMI EMPLOYEE
ASSOCIATION,
Petitioners,
v.
BOARD OF EDUCATION OF THE GREATER
EGG HARBOR REGIONAL HIGH SCHOOL
DISTRICT, ATLANTIC COUNTY,
Respondents.

Audrey J. Becker, Esquire, for petitioners (Freeman, Zeller & Bryant, attorneys)
Louis J. Greco, Esquire for respondent

Record Closed: September 18, 1992 Decided: October 28, 1992

BEFORE **JOSEPH E. KANE, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Respondent school district transferred petitioner, a custodian, to a different job location and changed his work hours. Petitioner objected to this action and requested that the matter be transmitted to the Office of Administrative Law (OAL) to be heard 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 hearing was conducted at the Atlantic City OAL, 1201 Bacharach Boulevard, Atlantic City, New Jersey on August 18, 1992. The record was held open until September 18, 1992 in order to permit the filing of post hearing briefs. A decision was rendered on October 28, 1992.

ISSUE

The sole issue in this matter is whether the school board's policies give it the unfettered right to transfer petitioner from one location and work shift to another.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner has been a custodian for the Greater Egg Harbor Regional School District, Board of Education (hereinafter referred to as the District) since 1985. The District does not question petitioner's qualifications to perform his job duties. On the contrary, petitioner has an excellent work history with the District. Instead, the issue is whether the District has the unfettered right to transfer the petitioner from one job site and shift assignment to another.

The District argues that it has the right to effect such a transfer based upon two school board policies, Policy 405 and 822. The petitioner claims that pursuant to Policy 822, he is protected by that policy's "grandfather clause" and as such, he should not have been transferred.

The facts in this matter are not in dispute. Petitioner has been employed by the District as a custodian since March 13, 1985. From his date of hire, until November 17, 1991 petitioner was assigned to the Absegami High School, second shift. From May 1985 through September 16, 1991, Robert Burroughs, petitioner's brother-in-law was employed as a custodian at Absegami High School. On September 16, 1991 Robert Burroughs was promoted to Head Custodian which is a supervisory position. In this new title, Robert Burroughs became petitioner's supervisor. Mr. Burroughs and petitioner have been related by marriage since October 17, 1984.

On June 24, 1991, the District adopted Board Policy No. 822 entitled Nepotism. This policy was enacted without previous negotiations with the Absegami Employee Association.

Shortly after Robert Burroughs promotion, the Board Secretary Ralph Martin became aware that petitioner and Robert Burroughs were related by marriage. Utilizing Board Policy No. 822, the District unilaterally and involuntarily transferred petitioner from Absegami High School custodial shift number two (7:00 A.M. to 3:00 P.M.) to the Oakcrest High School, custodial shift number three (3:00 P.M. to 11:00 P.M.). Since the date of this transfer, petitioner has been assigned to Oakcrest High

School, custodial shift number three and Robert Burroughs has remained assigned to the second shift at Absegami High School.

Petitioner was notified of the transfer by memo dated October 30, 1991 from Ralph Martin. Thereafter, the Oakcrest/Absegami Employee's Association filed a grievance objecting to petitioner's transfer. This grievance was rejected by Mr. Martin in a letter dated November 12, 1991 which states in relevant part:

> The intent of the Policy is to prohibit administrative or supervisory staff from supervising staff members in a line relationship that are related by blood or marriage.
>
> Since Mr. Burroughs appointment on September 16, 1991 as Mr. Farrow's supervisor (relationship/marriage) was subsequent to the Board's Policy adopted June 24, 1991, then Paragraph 5 of Policy 822 governs this matter. Mr. Burroughs was not regularly employed as a supervisor prior to the adoption of Policy.
>
> Based upon the intent and declaration of Policy 822, this grievance is denied.

There are no written standards involving job site transfers other than instances of nepotism which is covered by Board Policy 822. This Policy has never been implemented against any other employee other than the petitioner.

On April 13, 1992, the District amended Policy 822 to delete the "grandfather" provision. The rationale for the deletion of the grandfather clause was that based upon the language of the policy, the grandfather clause was redundant. The District never utilized the grandfather clause while it was in effect.

Petitioner does not object to the transfer on the grounds that his job duties have been increased or changed or that he is commuting a further distance. Instead, he opposes the transfer because it requires that he work during a time period that his son is out of school and home alone. Petitioner received custody of his son from his wife because she was having difficulty disciplining him. With the new transfer, he is no longer home in the afternoon and he feels he is not providing his son with proper guidance and supervision.

Petitioner contends that pursuant to the grandfather clause in Board Policy 822, he should have been exempted from the dictates of the policy and as a result, his transfer should be negated. Respondent counters that based upon two policies, it has the unfettered right to transfer petitioner to a different location and work

shift. In addition, the District claims that petitioner's transfer was in keeping with the intent and dictates of Board Policy 822 since petitioner was not in violation of that Policy until several months after its adoption.

Policy 822 states in relevant part:

> Persons related by blood or marriage to a member of the administrative or supervisory staff shall not be appointed to a position that is in a line relationship involving supervision and evaluation of the position.
>
> It is the intent of this policy to avoid any situation where there can arise the appearance of a conflict of interest either on the part of a member of the Board or a member of the administrative or supervisory staff.
>
> When necessary, the transfer of a staff member to another position, for which the member is qualified, shall be utilized to comply with the intent of this policy.

The grandfather clause of Policy 822 that was subsequently deleted stated in relevant part:

> This shall not apply to any person within such relationships who has been regularly employed by the board prior to the inception of the relationship, the adoption of this policy, or a board member's election.

This grandfather clause was deleted because the policy on its face stated that any conflicts from the date of its adoption forward were to be dealt with and accordingly, the District considered the grandfather clause to be surplusage and to only confuse the policy.

In addition to Policy 822, Mr. Martin testified that Board Policy 405, which was adopted by the District in 1977, vests in the Board's secretary the unfettered right to transfer nonprofessional staff. This policy states in pertinent part:

> The judicious placement of employees within the district is concomitant to the employment of qualified and competent personnel for the successful functioning of the district. Responsibility for the assignment and transfer of non-instructional employees shall be vested in the Board Secretary/Business Administrator.

The Management Agreement states in pertinent part:

> Notice of an involuntary transfer (i.e., either a change from school-to-school, change of shift assignment or a change i job assignment or a totally different assignment, i.e., cafeteria worker to secretary or custodian, etc.) shall be given to an employee as soon as practicable. If requested, a conference with the Board Secretary-Business Administrator will be provided prior to such transfer or if not feasible, within forty eight (48) hours of becoming effective.

I **FIND** that petitioner's argument that he qualifies for the grandfather provision of Policy 822 to be without merit. Petitioner was related by marriage to Mr. Burroughs prior to the adoption of Policy 822, however, he was not supervised by Mr. Burroughs until after the adoption of the policy. The policy, even absent the grandfather clause, has only prospective application. The supervisory relationship occurred after adoption of the policy and accordingly, the intent of Policy 822 applies to the petitioner.

Petitioner next argues that Policy 822 does not apply since he was not "appointed" to a position as set forth in the policy. This argument ignores the intent and purpose of this legislation. Specifically, Policy 822 contains language which permits the district to transfer an employee when the spirit and intent of the policy is being violated.

> When necessary, the transfer of a staff member to another position, for which the member is qualified, shall be utilized to comply with the intent of this policy.

In order to give full and effective meaning to the intent of this policy, this language cannot be ignored. To do so would thwart the intent of the policy which is to avoid nepotism.

Overlaying Policy 822 and entirely consistent with Policy 822 is Policy 405. This latter policy gives the absolute and unfettered right to transfer staff. The only restriction on Policy 405 is that such a transfer cannot violate Policy 822.

I herein **CONCLUDE** that the District was correct in relying upon Policy 822 when effecting petitioner's transfer. As such, I herein **DISMISS** the within petition.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 28, 1992
Date

JOSEPH E. KANE, ALJ

Receipt Acknowledged:

10/30/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 4 1992
Date

OFFICE OF ADMINISTRATIVE LAW

psa

DOCUMENTS IN EVIDENCE

FOR PETITIONER:
NONE

FOR RESPONDENT:
R-1 POLICY NO. 405

JOINT EXHIBITS:
J-1 POLICY NO. 822
J-2 MEMO DATED OCTOBER 30, 1991
J-3 MEMO DATED NOVEMBER 12, 1991
J-4 POLICY NO. 822

WITNESSES

FOR PETITIONER:
JAMES FARROW
GEORGE WILLIAMS
TOM PATTERSON

FOR RESPONDENT:
RALPH W. MARTIN

JAMES FARROW AND OAKCREST/ ABSEGAMI EMPLOYEE ASSOCIATION, PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY, RESPONDENT.	:	DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioners filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Said exceptions essentially mirror those arguments which were fully developed in petitioners' post-hearing submission, and which were fully addressed by the ALJ. Briefly, petitioners except to the ALJ's reliance upon Board Policy No. 822 as amended on April 13, 1992, as a basis for sustaining the Board's transfer of Petitioner Farrow, noting that the amended Policy No. 822 deleted the grandfather clause. Petitioners claim the Board had not taken any formal action against Farrow with respect to revised Policy No. 822.

Petitioners further claim the ALJ erred in relying on Board Policy No. 405 as a basis for his decision because the Board never mentioned it as a reason for Petitioner Farrow's transfer, the Board

having only mentioned Policy No. 822 as its explanation for transferring him. Petitioners claim the Board first raised Policy No. 405 at hearing, and they claim Farrow had a right to know the basis for his tranfer at the time of notification of his transfer. They aver that if the Board considered Policy No. 405 in its decision to transfer Farrow, then his due process rights and the Open Public Meetings Act were violated, since the Board did not provide advance notice.

Additionally, petitioners again raise their contention that the ALJ misapplied Policy No. 822, particularly the second and fifth sentences of the policy, in transferring Petitioner Farrow, arguing that Farrow's promoted uncle (earlier reference to Mr. Burroughs indicates that he is Farrow's brother-in-law) should have been transferred, not Farrow. Petitioners claim the policy protects Petitioner Farrow because he was regularly employed prior to the inception of the supervisory relationship and the adoption of the policy. Moreover, petitioners submit that the ALJ erred in not applying the intent of the grandfather clause to Farrow, arguing that while it is the intent of Policy No. 822 to avoid nepotism, it is also the intent of the policy to exclude certain people from its application, and Farrow falls within that category of those persons protected.

Finally, petitioners advance the position that the ALJ erred by taking words, phrases and sentences out of the context of Policy No. 822, which policy they aver was written haphazardly and imprecisely. They argue that the ALJ ignored the exemption and protection provided Petitioner Farrow by the grandfather clause from any involuntary transfer. Consequently, petitioners seek reversal of the initial decision.

Upon a careful and independent review of the record of this case, the Commissioner affirms the dismissal of the instant Petition of Appeal, but for the reasons which follow.

Exhibit J-1, Policy No. 822, adopted June 24, 1991, was in effect at the time of the Board's action on September 16, 1991, promoting Mr. Borroughs, a relative by marriage of Petitioner Farrow, to a supervisory position, and at the time it transferred Petitioner Farrow to a different job site and shift as a custodian on October 30, 1991, effective November 18, 1991. As relied on by the ALJ in his decision at page 4, said policy contained five paragraphs, including a grandfather clause. For clarity, the policy in question is recited herein, in toto:

> Persons related by blood or marriage to a board member may be employed in this school district but the interested board member must abstain from the vote.
>
> Persons related by blood or marriage to a member of the administrative or supervisory staff shall not be appointed to a position that is in a line relationship involving supervision and evaluation of the position.
>
> This shall not apply to any person within such relationships who has been regularly employed by the board prior to the inception of the relationship, the adoption of this policy, or a board member's election.
>
> It is the intent of this policy to avoid any situation where there can arise the appearance of a conflict of interest either on the part of a member of the board or a member of the administrative or supervisory staff.
>
> When necessary, the tranfer of a staff member to another position, for which they are qualified, shall be utilized to comply with the intent of this policy.

A plain reading of the policy in question makes clear that paragraph two does not protect Petitioner Farrow. The first part of

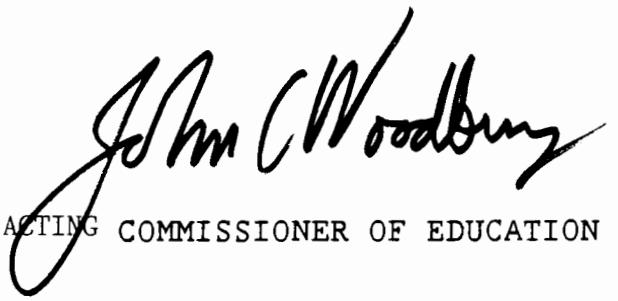
the sentence, "Persons related by blood or marriage to a member of the administrative or supervisory staff***," speaks to Petitioner Farrow. He is related by marriage to Mr. Borroughs, who was promoted, during the effective period of this policy to a supervisory position. However, the next part of the sentence does not apply to Petitioner Farrow: "***shall not be appointed to a position that is in a line relationship involving supervision and evalution of the position." Petitioner Farrow was not appointed to a position in line relationship to his relative, Mr. Borroughs. Rather, in accord with paragraph five, Petitioner Farrow was transferred, as a staff member, to another job site and shift for which he was qualified, to comply with the intent of the policy, which is expressed in the preceding paragraph of the policy as a means of avoiding any situation where there can arise the appearance of a conflict of interest either on the part of a member of the Board or a member of the administrative or supervisory staff. It bears noting that because paragraph two is inapplicable to Petitioner Farrow, paragraph three, the grandfather clause, is similarly inapplicable to his situation. Consequently, petitioners' exceptions addressing Policy No. 822 are hereby dismissed as being without merit.

As to petitioners' exception to the Board's application of Policy No. 405, which gives the absolute and unfettered right to transfer staff to the Board through the Board Secretary/Business Adminsitrator, the Commissioner likewise finds that Policy No. 405 was appropriately applied to the instant situation without reference having been provided within the written notice accorded Petitioner Farrow at the time of his transfer, insofar as it deals with the

agent of the Board authorized to effectuate such a transfer, not with whether Policy No. 405 constituted a basis for such tranfer. Thus, the Commissioner deems petitioners' contention that Board Policy No. 405 constituted a basis for Farrow's transfer to be without merit, and accordingly finds no violation of either Farrow's due process rights or the Open Public Meetings Act because the basis of his transfer was Policy No. 822, Exhibit J-1.

Accordingly, the Commissioner adopts the initial decision's findings of fact and the conclusion of the Office of Adminsitrative Law that respondent was correct in relying upon Policy No. 822 when effecting Petitioner Farrow's transfer, but for the reasons expressed herein. Having so found, the instant Petition of Appeal is dismissed, with prejudice.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

DECEMBER 14, 1992

DATE OF MAILING - DECEMBER 14, 1992

302-92

302-92

N.B.M., on behalf of his minor child, J.M.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LITTLE EGG HARBOR AND GEORGE MITCHELL, SUPERINTENDENT OF SCHOOLS, OCEAN COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

DECEMBER 14, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION ON MOTION AND ORDER
OAL DKT. NO. EDU 8873-92
AGENCY DKT. NO. 494-11/92

N.B.M., ON BEHALF OF
HIS MINOR CHILD, J.M.M.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP
OF LITTLE EGG HARBOR AND GEORGE MITCHELL,
SUPERINTENDENT OF SCHOOLS,
Respondents.

N.B.M., petitioner, pro se

Edward J. Naughton, Esq., for respondents

BEFORE **LILLARD E. LAW**, ALJ:

This matter having been opened before the Commissioner of Education (Commissioner) through the filing of a Petition of Appeal and Amended Petition of Appeal dated November 12, 1992 (N.B.M., pro se on behalf of his minor child, J.M.M.) which challenges, among other things, a policy of the Board of Education of Little Egg Harbor Township (Board) requiring his son to maintain a "C" grade average in all subjects in order to participate in the Board's instrumental music programs; and

The matter having been transmitted to the Office of Administrative (OAL) on an application by petitioner seeking to restrain the Board from suspending J.M.M. from instrumental music programs pending an adjudication on the merits, pursuant to N.J.A.C. 6:24-1.5; and

Oral arguments of the parties having been heard on November 19, 1992, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey; and

The argument of petitioner having been heard regarding his allegation that irreparable harm will result if Respondent Board is not restrained from suspending J.M.M. from its instrumental music program; and

That the Board's computation of J.M.M.'s grade average is in error; and

That the Board's policy to require a pupil to maintain a "C" grade average in all subjects in order to participate in its instrumental music program is arbitrary and discriminatory; and

J.M.M.'s suspension from the instrumental music program constitutes a punishment by definition and retribution for not attaining arbitrarily good grades; and

The Board breached an implied contract resulting in the loss of money for the rental of a music instrument from a third party; and

The arguments of the Board having been heard, together with documents moved into evidence by it and petitioner, regarding the application of its policy of pupils maintaining a "C" average in order to participate in the instrumental music program; and

Having considered the criteria set forth by the courts for the exercise of discretion in the issuance of a pendente lite restraint, Crowe v. DeGioia, 90 N.J. 126 (1982).

I, therefore, **CONCLUDE** that no irreparable harm will be visited on J.M.M. through the application of the Board's policy to maintain a "C" grade average in all subjects in order to participate in the Board's instrumental music program.

It is **ORDERED** that petitioner's request for emergent relief, pendente lite, is hereby **DENIED**, and

It is **ORDERED** that this matter proceed to an evidentiary de novo hearing as expeditiously as possible.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

September 3, 1992
Date

Lillard E. Law by JRT
LILLARD E. LAW, ALJ

jz

OAL DKT. NO. EDU 8873-92

N.B.M., on behalf of his minor child, J.M.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LITTLE EGG HARBOR AND GEORGE MITCHELL, SUPERINTENDENT OF SCHOOLS, OCEAN COUNTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been submitted to the Commissioner of Education for review pursuant to N.J.S.A. 52:14B-10.

However, petitioner has advised the Commissioner by letter received on December 4, 1992, that he no longer wishes to pursue this matter and now seeks its dismissal.

Accordingly, the Petition of Appeal and Request for Emergent Relief are deemed withdrawn and this matter is dismissed as a controversy before the Commissioner.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

DECEMBER 14, 1992

DATE OF MAILING - DECEMBER 14, 1992

303-92

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY, PETITIONER, V. JEANETTE DIXON, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

DECEMBER 16, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION-
ORDER OF DISMISSAL
OAL DKT. NO. EDU 1517-92
AGENCY DKT. NO. 438-12/91

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON,
Petitioner,
v.
JEANETTE DIXON,
Respondent.

John M. Holliday, Esq., on behalf of petitioner (Paglione & Massi, attorneys)

Jeanette Dixon, respondent, pro se

Record Closed: October 21, 1992 Decided: November 2, 1992

BEFORE **STEVEN C. REBACK**, ALJ:

This matter was initiated by the petitioner (Hamilton) pursuant to a petition filed with the Commissioner of Education seeking to remove petitioner's child from the school district because it was alleged that the respondent was not a resident of the school district.

Following prehearing conversations, on October 21, 1992, counsel for Hamilton submitted a letter, indicating that following further investigation there was no basis for pursuing the petition. Accordingly, he moved without objection that the matter be dismissed.

Having reviewed the file in this matter, it is my judgment that the motion by petitioner to dismiss its petition is based upon good cause. Accordingly, it is **ORDERED** that the petition be and is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 2, 1992
Date

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

11/5/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 9 1992
Date

OFFICE OF ADMINISTRATIVE LAW

jz

PAGLIONE & MASSI
ATTORNEYS AT LAW
2662 NOTTINGHAM WAY
TRENTON, NEW JERSEY 08619
TELEPHONE (609) 890-2662

MICHAEL R. PAGLIONE
(MEMBER NJ AND PA BAR)
ANTHONY M. MASSI
(MEMBER NJ, PA AND FLA BAR)

JOHN M. HOLLIDAY
(MEMBER NJ AND PA BAR)
KEVIN H. MAIN
(MEMBER NJ AND PA BAR)

FAX NO. (609) 890-1295

RECEIVED
STATE OF N.J.
OFFICE OF ALJ
OCT 23 10 34 AM '92

October 21, 1992

The Honorable Steve C. Reback, ALJ
State of New Jersey
Office of Administrative Law
CN 049
Quakerbridge Plaza, Building 9
Trenton, New Jersey 08625

Re: Board of Education of the Township of Hamilton, Mercer County v. Jeanette Dixon
OAL Docket No. EDU 1517-92
Agency Docket No. 438-12/91

Dear Judge Reback:

Please be advised that recently I have had an opportunity to meet with my investigator concerning the above captioned matter. During the meeting we reviewed all of the additional documentation supplied by the respondent concerning her residency. At this stage my investigator and I are satisfied that the respondent has taken the appropriate and necessary action with respect to this matter. Accordingly, I am writing to respectfully request that the above captioned matter be administratively dismissed.

Should you have any questions or concerns regarding this matter, please do not hesitate to contact me.

Very truly yours,

JOHN M. HOLLIDAY

JMH:dd
cc: Jeanette Dixon
Mr. John E. Conner

OAL DKT. NO. EDU 1517-92

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JEANETTE DIXON, RESPONDENT.	:	DECISION

The record and order of withdrawal granted by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner agrees with the withdrawal order. Consequently, the matter is no longer deemed to be a dispute before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

DECEMBER 16, 1992

DATE OF MAILING - DECEMBER 16, 1992

304-92

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
LISA M. GLASS,	:	DECISION
RESPONDENT.	:	
	:	

DECEMBER 16, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION-
ORDER OF DISMISSAL
OAL DKT. NO. EDU 3625-92
AGENCY DKT. NO. 74-3/92

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON,
Petitioner,
v.
LISA M. GLASS,
Respondent.

John M. Holliday, Esq., on behalf of petitioner (Paglione & Massi, attorneys)

Thomas W. Sumners, Jr., Esq., on behalf of respondent (Sumners, Council & Inniss, attorneys)

Record Closed: October 21, 1992 Decided: November 2, 1992

BEFORE **STEVEN C. REBACK**, ALJ:

This matter was initiated by the petitioner (Hamilton) pursuant to a petition filed with the Commissioner of Education seeking to remove petitioner's child from the school district because it was alleged that the respondent was not a resident of the school district.

Following prehearing conversations, on October 21, 1992, counsel for Hamilton submitted a letter, indicating that following further investigation there was no basis for pursuing the petition. Accordingly, he moved without objection that the matter be dismissed.

Having reviewed the file in this matter, it is my judgment that the motion by petitioner to dismiss its petition is based upon good cause. Accordingly, it is **ORDERED** that the petition be and is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Date

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

11/5/92

Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 9 1992

Date

OFFICE OF ADMINISTRATIVE LAW

jz

PAGLIONE & MASSI
ATTORNEYS AT LAW
2662 NOTTINGHAM WAY
TRENTON, NEW JERSEY 08619
TELEPHONE (609) 890-2662

MICHAEL R. PAGLIONE
(MEMBER NJ AND PA BAR)
ANTHONY M. MASSI
(MEMBER NJ, PA AND FLA BAR)

JOHN M. HOLLIDAY
(MEMBER NJ AND PA BAR)
KEVIN H. MAIN
(MEMBER NJ AND PA BAR)

FAX NO. (609) 890-1295

October 21, 1992

The Honorable Steven C. Reback, ALJ
State of New Jersey
Office of Administrative Law
CN 049 Quakerbridge Plaza
Building No. 9
Trenton, New Jersey 08625

Re: Board of Education of the Township of Hamilton, Mercer County v. Lisa Glass
OAL Docket No. EDU 32525-92
Agency Docket No. 74-3/92

Dear Judge Reback:

Recently, I have had an opportunity to meet with my investigator to discuss the above captioned matter. As you may recall, since the institution of these proceedings the respondent has submitted additional documentation indicating that she is indeed, a resident of Hamilton Township. This verification includes copies of her Public Service bill, tax documents and her lease agreement. Upon having an opportunity to review this verification with my investigator along with some additional follow up investigations, we are now satisfied that the respondent has become a legal resident of Hamilton Township. Accordingly, it is respectfully requested that the complaint filed in the above captioned matter be administratively dismissed.

Should you have any questions or concerns regarding this matter, please do not hesitate to contact me.

Very truly yours,

PAGLIONE & MASSI

JOHN M. HOLLIDAY

JMH:dd
cc: Thomas W. Sumners, Jr., Esq.
Mr. John E. Conner

OAL DKT. NO. EDU 3625-92

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
LISA M. GLASS, RESPONDENT.	:	DECISION

The record and order of withdrawal granted by the Office of Administrative Law pursuant to N.J.A.C. 1:1-19.2 have been reviewed. The Commissioner agrees with the withdrawal order. Consequently, the matter is no longer deemed to be a dispute before the Commissioner and is dismissed with prejudice.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

DECEMBER 16, 1992

DATE OF MAILING - DECEMBER 16, 1992

305-92

BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TOWNSHIP COUNCIL OF THE TOWNSHIP OF BRICK, OCEAN COUNTY, RESPONDENT.	:	DECISION
IN THE MATTER OF THE CAP WAIVER APPEAL OF THE BRICK TOWNSHIP SCHOOL DISTRICT, OCEAN COUNTY.	:	

For Petitioner, Dr. Louis Aragona, Superintendent of Schools

For Respondent, Thomas E. Monahan, Esq. (Gilmore & Monahan)

This consolidated matter was opened before the Commissioner of Education of June 9, 1992 through the filing of a Petition of Appeal of a defeated school budget by the Brick Township Board of Education (Board) pursuant to the provisions of N.J.A.C. 6:24-7.1 et seq. and a Petition of Appeal of its defeated cap waiver. On July 6, 1992, the respondent Brick Township Council (Council) filed its Answer to the petitions.

Written replies, position papers and summations were filed by the respective parties and the record closed on August 20, 1992.

On April 7, 1992, the voters of the Brick Township School District defeated the Board's 1992-93 current expense tax levy

proposal amounting to $39,668,251. The voters also defeated a proposed current expense cap waiver, $1,800,000 of which was approved on March 6, 1992 by the Ocean County Superintendent of Schools as being necessary for the implementation of a thorough and efficient education for the students of Brick Township School District.

In his letter of March 6, 1992 the County Superintendent, in pertinent part, specifically informed the Board of the following with respect to the approval of its 1992-93 current expense school budget proposal and its current expense cap waiver request:

> The proposed 1992-93 Brick Township School District budget was submitted for approval indicating the need for a cap waiver to the legal voters in order to provide sufficient funds to implement a thorough and efficient education.
>
> As a result of my review, I am conditionally approving the 1992-93 school budget subject to the advertisement of the following budget cap waiver proposal.
>
> The items which are listed in Column 2 of the following chart are conditionally approved, and must be included at the end of the advertised budget. As you know, in the event this cap waiver of conditionally approved items is rejected by the voters, the district must file an appeal with the Commissioner of Education.***
>
> (at p. 1)

The specific line item accounts for the T&E cap waiver were as follows:

CURRENT EXPENSES

Account Title	Account No.	Request	Conditionally Approved
	100		
1 Asst. Business Admin.	110A	$ 55,000	$ -0-
1 Director of Personnel	110B	65,000	-0-
	200		
1 Asst. Principal HS	211A	12,500	12,500
4 Supervisors	212	40,432	40,432

	Account Title	Account No.	Request	Conditionally Approved
1	Supv. Guidance	212	71,000	-0-
1	Supv. Social Studies	212	71,000	71,000
1	Supv. Special Education (partially funded)	212	25,000	25,000
2	Elementary Supervisor	212	142,000	71,000
1	Supervisor Technology	212	71,000	71,000
1	High School Teacher	213A	25,065	-0-
6	Elementary Teachers	213B	150,390	-0-
4	Phys. Ed. Teachers	213E	100,260	-0-
2	Teachers BSI	213E	80,130	80,130
2	Counselors M.S.	214B	60,940	-0-
7	Secretarial Staff	215C	97,300	-0-
	Textbooks	220	134,960	34,960
	Library & AV	230A	48,000	48,000
		230B	14,500	14,500
		230C	76,000	76,000
		230E	4,000	4,000
	Teaching Supplies	240	331,911	131,911
	Other Expenses	250A	20,050	20,050
		250B	11,835	11,835
		250C	95,596	95,596
		400		
2	School Nurses	410A	50,130	25,065
6	Social Workers	410A	182,820	182,820
	Supplies	420A	3,000	-0-
	Miscellaneous Expense	420C	3,500	-0-
		500		
4	Bus Drivers	510B	68,388	34,194
4	Attendants	510C	55,600	27,800
		600		
5	Custodians	610A	86,250	-0-
2	Grounds Keepers	610B	45,000	-0-
	Contracted Service	620	1,000	-0-
		700		
4	Maintenance Emp.	710B	102,800	-0-
	Repair of Buildings	720B	1,102,100	-0-
	Repair of Equipment	720C	14,320	14,320
	Replace of Equipment	730A	464,514	27,245
	New Instr. Equipment	730C	890,408	-0-
	New Non Instr. Equip.	730D	71,993	21,993
	Repair Buildings	740B	282,155	-0-
	Repair of Equipment	740C	6,500	6,500
		800		
	Employee Insurance	820B	717,880	466,380
		1000		

Account Title	Account No.	Request	Conditionally Approved
Salary Honor	1010	136,000	-0-
Other Expenses	1020	156,300	-0-
	1100		
Summer School	1106	115,500	115,500
Special Education	1110	70,269	70,269
Total Current Expense		$6,430,296	$1,800,000

Subsequent to the defeat of the budget by the voters of Brick Township the Board and Council, pursuant to the requirements of N.J.S.A. 18A:22-37, consulted on the defeated budget whereupon Council reduced the current expense budget by $1,130,000. Therefore, the current expense funds in contention between the parties in this consolidated matter are as follows:

	Proposed Tax Levy Adopted By Board	Amount of Tax Levy Certified By Council
Current Expense	$39,668,251	$38,538,251
Cap Waiver		
Current Expense	$ 1,800,000	-0-
Total	$41,468,251	$38,538,251

Amount In Dispute Before the Commissioner

Defeated Budget	$1,130,000
Cap Waiver	1,800,000
Total	$2,930,000

I. DEFEATED BUDGET

STANDARD OF REVIEW

In rendering judgment relative to budget appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and

efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. East Brunswick Board of Education of Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

The Commissioner has reviewed the respective position statements and written summations filed by the parties which are incorporated herein by reference unless specifically relied upon for the purpose of further clarification and set down in the body of this decision.

Initially it must be noted that Council, in setting forth its current expense line item reductions, avers that its reasons for imposing such reductions were grounded upon the information it obtained from the following sources:

- the joint meeting held on April 27, 1992 with members of the Board, the Superintendent and School Business Administrator;
- a review of the proposed 1992-93 school budget (Exhibit A, Statement of Position) in conjunction with previous years' budget documents in order to analyze the School District's trends and patterns in expenditures;

- a review of the Board's 1991-92 school budget (Exhibit B, Statement of Position);

- a statement of expenditures supplied by the Board of the 9 month period ending March 30, 1992 (Exhibit C, Statement of Position).

As the result of such review and in support of its line item reductions, Council has concluded that the Board's 1992-93 budget overstates those funds necessary to provide a thorough and efficient education for the students of Brick Township and, further, that its total reduction of $1,130,000 in the current expense tax levy is justified.

The Board on the other hand, rejects Council's position as being overly simplistic and argues that it fails to take into account the following factors which impact on the current school budget:

- The Township has experienced enormous growth over the last two decades and currently has a student population of 9,500 which represents 71 more pupils than in 1990-91 and which is projected to increase by 150 pupils during the 1992-93 school year.

- The per pupil expenditure for the school district is far below the county and statewide averages as witnessed by the 1992 School District Report Card. (Additional Evidence, Board's Statement of Position)

- The School District Report Card shows that the Brick Township tax rate is 25% below the average for other districts with budgets supporting the same grades in the region and 21% below the statewide average. The Brick Township School District, however,

ranks in the top 40-50% of all New Jersey school districts in community wealth. Revenue raised in the school district by local taxes was 56.2% in 1991-92 as compared to 76.7% in 1990-91.

- Brick Township has been classified by the Department of Education as a "D" district factor group inasmuch as it has 12 senior citizen housing complexes consisting of 4,217 dwellings. This concentration of senior citizen housing within the district has a direct effect on the success of school budget approvals. Only 4 school budgets were approved by the voters since 1978.

- In past years the school budgets presented by the Board were well below the cap limitation except for the past two years when the State mandated caps were lower.

- Except for the 1991-92 school year when Council did not cut the Board's defeated budget, it has cut the school budgets of other years ranging from $143,000 (1983-84) to a high of $1,130,000 in the 1992-93 school year. In the past the Board has absorbed such reductions by the either appropriating surplus revenues or making corresponding line item reductions.

In the current year the Board has neither the surplus revenues ($993,050 estimated as of June 30, 1992) which are less than 1.5% of its total budget for 1992-93, nor the capability to sustain any further line item reductions in the budget and still permit it to provide a thorough and efficient education as mandated by State Law.

- Any reduction in the Board's 1992-93 school budget would have a detrimental effect on its ability to provide a mandated thorough and efficient education for the 9,500 pupils currently attending the schools of Brick Township. This position has been

supported by the Department of Education and the Assistant Commissioner of Education upon issuing its conditional approval of the Board's 1992-93 school budget. A Decision on Motion ordered on March 23, 1992 upheld the Ocean County Superintendent's decision to conditionally approve the Board's budget based upon its submission of a limited cap waiver approval. (Affidavit of Superintendent of Schools, Board's Position Statement)

In the instant matter, Council, upon defeat of the 1992-93 current expense budget established the aforesaid tax levy by imposing the following line item reductions:

Account	Budgeted	Revised Amount	Reduction
110B Salaries - Board Secretary's Office			
	$299,606	$269,606	$30,000

Justification: Number of clerical personnel in this department is excessive and should be reduced.

110F Salaries - Superintendent's Office			
	$541,618	$531,618	$10,000

Justification: Number of clerical personnel in this department is excessive and should be reduced.

110I Salaries - Business Administrator's Office			
	$266,935	$236,935	$30,000

Justification: Number of clerical personnel in this department is excessive and should be reduced. In addition, the Business Administrator is retiring. The Board of Education should be able to obtain a Business Administrator for a lesser salary than that which is paid to the current Business Administrator who has accumulated significant amounts in longevity.

110L Salaries - Personnel Office

$102,374	$ 92,374	$10,000

Justification: Number of clerical personnel in this department is excessive and should be reduced.

Account	Budgeted	Revised Amount	Reduction
120A-001 Contracted Services - Legal			
	$ 20,000	$ 10,000	$10,000

Justification: The Township Council has reviewed the Brick Township School's budget in this account for the last several years and also has reviewed the purchase orders to date. A review of these documents indicates that this line item is over-budgeted in that the expenses, based upon its history and current items charged against it, will be far less than that which is budgeted.

120D Other Contracted Services - Administration

$140,000	$120,000	$20,000

Justification: The Township Council has reviewed the Brick Township School's budget in this account for the last several years and also has reviewed the purchase orders to date. A review of these documents indicates that this line item is over-budgeted in that the expenses, based upon its history and current items charged against it, will be far less than that which is budgeted.

130B Board Secretary's Office - Other Expenses

$ 47,500	$ 40,000	$ 7,500

Justification: The Township Council has reviewed the Brick Township School's budget in this account for the last several years and also has reviewed the purchase orders to date. A review of these

documents indicates that this line item is over-budgeted in that the expenses, based upon its history and current items charged against it, will be far less than that which is budgeted.

Account	Budgeted	Revised Amount	Reduction
130F Superintendent's Office - Other Expenses			
	$18,000	$16,000	$ 2,000

Justification: The Township Council has reviewed the Brick Township School's budget in this account for the last several years and also has reviewed the purchase orders to date. A review of these documents indicates that this line item is over-budgeted in that the expenses, based upon its history and current items charged against it, will be far less than that which is budgeted.

130J Administration Building & Grounds - Other Expenses			
	$73,000	$63,000	$10,000

Justification: The Township Council has reviewed the Brick Township School's budget in this account for the last several years and also has reviewed the purchase orders to date. A review of these documents indicates that this line item is over-budgeted in that the expenses, based upon its history and current items charged against it, will be far less than that which is budgeted.

130M Printing and Publishing - Other Expenses			
	$28,000	$21,500	$6,500

Justification: The Township Council has reviewed the Brick Township School's budget in this account for the last several years and also has reviewed the purchase orders to date. A review of these documents indicates that this line item is over-budgeted in that the expenses, based upon its history and current items charged against it, will be far less than that which is budgeted.

Account	Budgeted	Revised Amount	Reduction
211A Salaries - Principals - High School			
	$668,316	$598,316	$ 70,000

Justification: The Township Council recommends that each high school have one principal and three assistants. In one of the high schools, there are four assistants. One assistant principal position should be eliminated.

213L-000 Salaries - Attendance Policy			
	$ 35,000	$ 25,000	$ 10,000

Justification: The Township Council believes that there is a duplication of efforts performed by this person which could be absorbed by others within the school system.

213M Salary Adjustment - Teachers			
	$490,000	$250,000	$240,000

Justification: The Board of Education could not offer any justification for such a large amount of money being in this account for retirement of teachers. No effort was made to determine who was retiring. The reduction suggested would more accurately reflect the probable number of those who will retire.

510C Salaries - Bus Attendants			
	$196,178	$183,178	$ 13,000

Justification: Salaries for bus attendants are exaggerated and should be reduced.

Account	Budgeted	Revised Amount	Reduction
520A Contracted Services - To and From School			
	$1,195,000	$800,000	$395,000

Justification: The Township Council has reviewed the Brick Township School's budget in this account for the last several years and also has reviewed the purchase orders to date. A review of these documents indicates that this line item is over-budgeted in that the expenses, based upon its history and current items charged against it, will be far less than that which is budgeted.

540 Pupil Transportation - Insurance			
	$ 149,500	$130,000	$ 19,500

Justification: The Township Council has reviewed the Brick Township School's budget in this account for the last several years and also has reviewed the purchase orders to date. A review of these documents indicates that this line item is over-budgeted in that the expenses, based upon its history and current items charged against it, will be far less than that which is budgeted. Amount has been reduced to the 1991-92 fiscal year.

550A Gasoline - Pupil Transportation Vehicles			
	$ 88,521	$ 28,521	$ 60,000

Justification: School Board fails to utilize cooperative buying which would result in a significantly lower cost of gasoline per gallon.

Account	Budgeted	Revised Amount	Reduction
550A-001 Transportation - Diesel			
	$122,000	$72,000	$50,000

Justification: School Board fails to utilize cooperative buying which would result in a significantly lower cost of gasoline per gallon.

550C Tire and Tube Replacement			
	$ 60,000	$50,000	$10,000

Justification: The Township Council has reviewed the Brick Township School's budget in this account for the last several years and also has reviewed the purchase orders to date. A review of these documents indicates that this line item is over-budgeted in that the expenses, based upon its history and current items charged against it, will be far less than that which is budgeted.

550F Transportation - Contracted Services			
	$ 45,000	$35,000	$10,000

Justification: The Township Council has reviewed the Brick Township School's budget in this account for the last several years and also has reviewed the purchase orders to date. A review of these documents indicates that this line item is over-budgeted in that the expenses, based upon its history and current items charged against it, will be far less than that which is budgeted. Amount has been reduced to the 1991-92 fiscal year.

Account	Budgeted	Revised Amount	Reduction
610A Salaries - Custodial Services			
	$1,780,762	$1,755,762	$25,000

Justification: The Township Council has reviewed the Brick Township School's budget in this account for the last several years and also has reviewed the purchase orders to date. A review of these documents indicates that this line item is over-budgeted in that the expenses, based upon its history and current items charged against it, will be far less than that which is budgeted. As budgeted, the amount represents a 300% increase from previous fiscal year. Reduced amount represents 200% increase from previous fiscal year, which is more than sufficient to cover this line item.

610A-002 Salaries - Custodial Overtime			
	$ 200,000	$ 175,000	$25,000

Justification: The Township Council has reviewed the Brick Township School's budget in this account for the last several years and also has reviewed the purchase orders to date. A review of these documents indicates that this line item is over-budgeted in that the expenses, based upon its history and current items charged against it, will be far less than that which is budgeted. Amount has been reduced to the 1991-92 fiscal year.

610C-001 Salaries - Operation of Plant - Overtime			
	$ 15,000	$ 3,000	$12,000

Justification: The Township Council has reviewed the Brick Township School's budget in this account for the last several years and also has reviewed the purchase orders to date. A review of these documents indicates that this line item is over-budgeted in that the expenses, based upon its history and current items charged against

it, will be far less than that which is budgeted. Amount has been reduced to the 1991-92 fiscal year.

Account	Budgeted	Revised Amount	Reduction
630 Heat for Buildings			
	$504,641	$454,641	$50,000

Justification: The Township Council has reviewed the Brick Township School's budget in this account for the last several years and also has reviewed the purchase orders to date. A review of these documents indicates that this line item is over-budgeted in that the expenses, based upon its history and current items charged against it, will be far less than that which is budgeted.

650D Other Supplies - Operation of Plant			
	$ 5,000	$ 3,000	$ 2,000

Justification: The Township Council has reviewed the Brick Township School's budget in this account for the last several years and also has reviewed the purchase orders to date. A review of these documents indicates that this line item is over-budgeted in that the expenses, based upon its history and current items charged against it, will be far less than that which is budgeted.

660D Misc. Expenses - Operation of Plant			
	$7,500	$5,000	$ 2,500

Justification: The Township Council has reviewed the Brick Township School's budget in this account for the last several years and also has reviewed the purchase orders to date. A review of these documents indicates that this line item is over-budgeted in that the expenses, based upon its history and current items charged against it, will be far less than that which is budgeted.

TOTAL REDUCTIONS	$1,130,000

The Commissioner observes that the total current expense reduction in the local tax levy of $1,130,000 represents approximately 2.8% of the overall current expense tax levy proposal amounting to $39,668,251.

There are, however, twenty-six line item reductions to be addressed herein ranging from as low as $2,000 to as much as $395,000.

The Commissioner has carefully reviewed all of the evidence and arguments submitted by the parties in support of their respective positions for either the approval or rejection of each of the current expense line item tax levy reductions contested herein.

The Board's contention regarding the action taken by Council is best expressed by those general comments contained in its written summation which state in pertinent part:

> ***The Board of Education asserts that the Council's $1,130,000 cut of the "conditionally approved" budget has, in fact, left the budget it fixed so deficient as to constitute a purely arbitrary exercise of discretion devoid of any reasonable foundation, which if allowed to stand, deprives the students of the Township of Brick of the "minimum educational standards" required by the constitutionally mandated thorough and efficient educational system. The Board cites as the basis of its determination the contents of two letters from the Ocean County Superintendent of Schools, Joseph Zach, dated March 6, 1992 and March 12, 1992, the Commissioner of Education's Decision on Motion signed by the Deputy Commissioner, John C. Woodbury and information provided herein as well as in previous submittals.
>
> School officials had one meeting with the Township Council on April 27, 1992 to discuss the school budget. The meeting was convened at 7:10 p.m. and discussion between the parties [was] completed after about two hours. School officials left the meeting and the Council continued to meet approximately one hour and twenty minutes more. That evening the Council cut $1,130,000 from the "conditionally approved" budget. During the meeting with school

officials, the Township Council raised some questions about accounts and answers were provided, however, no in-depth discussion was pursued by the Council about any items, and the school district's management goals for 1992-1993 were never discussed.

***The Council did not inquire about or engage school officials in discussion about the "conditionally approved" nature of the budget addressed by the Ocean County Superintendent of Schools in his letters dated March 6, 1992 and March 12, 1992, although reports of the existence of the letters were published in newspapers widely distributed in the Township of Brick. The Council's focus was on what it perceived as excessive budgeting from a cold numerical point of view rather than the actual needs of the school district for 1992-1993.

The Township Council after approximately two hours of discussion with school officials cut $1,130,000 from a budget that required months of preparation and review by school personnel and the Board of Education. In addition, the County Superintendent wrote in his letter of March 12, 1992, that the budget was "thoroughly scrutinized" by a panel of the Department of Education, which included three members of the Division of County and Regional Services, two members of the Division of Finance and the County Superintendent for six hours, not including numerous telephone discussions held by the County Superintendent with other members of the panel. The County Superintendent further wrote that he spent more than five full working days in the examination and review of the proposed 1992-1993 school budget and two cap waiver applications, and that the panel's final recommendation was reviewed and approved by the Assistant Commissioner of the Division of County and Regional services and the Assistant Commissioner of the Division of Finance. The "conditionally approved" budget recommended by the aforementioned panel and approved by two Assistant Commissioners was by definition inadequate, thus requiring a voter cap waiver in order to provide a thorough and efficient system of education for the 1992-1993 school year.

The thorough review conducted by the Department of Education, which led to the budget being "conditionally approved", when compared to the minimal time spent by the Township Council reviewing and discussing the "conditionally approved" budget with school officials, and, the

size of the cut, leaves the Board of Education no alternative but to conclude that the Council failed to consider the seriousness of cutting a "conditionally approved" budget and that the budget the Council fixed "was so deficient as to constitute a purely arbitrary exercise of discretion devoid of any reasonable foundation."***

(Board's Written Summation, at pp. 1-4)

Council argues alternatively that:

***The determination concerning the reasonableness of the Township Council's budget reductions should be based only upon the items included in the School Board's budget submitted to the voters on April 7, 1992 and the facts surrounding the need for these items as they existed as of the date of the Township's April 27, 1992 budget resolution.

The School Board has attempted to justify its appropriations based upon facts available subsequent to the adoption of the Township Council's April 27, 1992 budget resolution (year end expenditures). The issue on appeal must be limited to the items in the April 7, 1992 budget and the changes to these items as set forth in the April 27, 1992 resolution. Later developing information could not possibly have been known and used as a basis for the Township's actions, and they are irrelevant to the reasonableness of the Township's actions on April 27, 1992.***

1. The Budget was submitted to the Municipal governing body for its determination of the amount which, in its judgment, is necessary to provide a thorough and efficient system of education for the schools of the Township of Brick.

2. The Governing Body did consult with members of the Board of Education including its Superintendent and Business Administrator, and have reviewed the proposed budget of the said Board at a joint meeting held on April 27, 1992 in accordance with N.J.S.A. 18A:22-37.

3. The Township Council has reviewed the Brick Township schools' proposed 1992-1993 budget in conjunction with previous years' budget documents in order to analyze the District's trends and patterns in expenditures.

4. The Township Council has reviewed the Brick Township schools' 1991-1992 budget.

5. The Township Council has reviewed a statement of expenditures for the nine month period of operation ending March 30, 1992, provided by the Brick Township Board of Education.

(Council's Written Summation, at pp. 4-5)

The Commissioner will now address the current expense line item reductions imposed by Council totalling $1,130,000.

110B Salaries - Board Secretary's Office $30,000

Council maintains that the number of clerical personnel (10 clerks) in this line item is excessive and can be reduced through a redistribution of work and greater utilization of existing staff. It is Council's position that reductions have been made in this line item in previous years without a detrimental effect to the school district. Moreover, Council maintains that the affidavit of the Superintendent dated July 9, 1992 erroneously overstates the amount and previous reductions of clerical personnel reduced from this line item in previous school years.

Council states that ten clerical personnel were budgeted in this line item during the 1990-91, 1991-92 and 1992-93 school year budgets. Consequently, no reductions in clerical personnel have been made in this line item for the previous two school years as represented by the Superintendent in his affidavit. Council further claims that while the Board asserts that the reductions in this line item have been "detrimental," it is important to note that the Board did not seek increased funding in this line item for additional staff in its 1992-93 school budget. (Council's Summation, at p. 7) Additionally, Council takes issue with the Board's assertion as found in the Superintendent's affidavit that:

> It must be pointed out that four of the ten personnel listed in this account are department heads for purchasing, payroll, accounting and the assistant board secretary. The department heads in these critical areas are classified under Civil Service rules and regulations as supervisory personnel. Thus, six remaining clerical personnel would be subject to the Council's recommended reduction of $30,000. This cut, as specified by the Council, would eliminate two clerical workers or 33 1/3% of the clerical work force and severely cripple the district's ability to perform the vital accounts payable and payroll functions. Furthermore, there will be an additional increase in workload for personnel budgeted in the 100-b account to implement the mandated GAAP program during the 1992-1993 school year. (Emphasis added). (Id., at p. 7)

Council likewise takes issue with the Board's assertion in its reply to Council's Position Statement as follows:

> The Council did not address the increased workload of the clerical staff to implement the mandated GAAP program during the school year 1992-1993; nor did they provide a solution as to who would be assessing the workload for the recommended reduction of 33 1/3% of the staff. (Council's Summation, at pp. 7-8)

Council believes that its assessment of the clerical workload for its recommended reduction in this line item is appropriately placed with the remaining four department heads/supervisors who will subsequently have only one subordinate to supervise. It further claims that the increased workload of the clerical personnel to implement the GAAP program during the 1992-93 school budget is due to the fact that pending legislation establishes the implementation date of this program to be July 1, 1994. Finally, Council in reply to a further claim made by the Board with respect to the reduction in this line item states the following:

> ***The reductions made by Council pursuant to its Resolution were in consideration of discussions and consultation with members of the Board and

> its professional staff, including the School Superintendent and Business Administrator. Said discussions and consultation took place at a joint meeting of the Township Council and Board of Education in accordance with the requirements of N.J.S.A. 18A:22-37. Therefore, the Board's claim that "[t]he Townshp Council has no expertise, nor sought any expertise or understanding...," (Petitioner's reply to Respondent's position statement, Section a, paragraph b) or that the Council's recommendations were made "without discussion" (Id.) are unfounded and without merit.
>
> The Board relies on actual expenditures as of June 30, 1992, which information could not possibly be available to the Township on April 27, 1992 at which time the reductions were made. The determination concerning the reasonableness of the Township Council's budget reduction should be based only upon the items included in the School Board's budget submitted to the voters on April 7, 1992 and the facts as they existed as of the date of the Township's April 27, 1992 budget Resolution. To allow the Board to justify its position based on information concerning actual expenditures developed after the fact will only encourage School Boards to "spend down" line items after reductions have been made in order to substantiate their appeal.*** (Id., at pp. 8-9)

The Board reaffirms its position in its objection to Council's line item reduction of this account as recited by Council, ante. However, by way of further clarification, the Board admits that the clerical positions in this account were reduced from twelve in 1983 to ten in 1992-93. It further acknowledges the fact that the most recent reduction did not occur in the previous two school budget years. The Board, however, points out that:

> ***
>
> 1. The Council's allegation that clerical personnel in this department is excessive is simply a bare allegation. The Board reaffirms that this account was reduced from twelve clerical personnel in 1983 to ten in 1992-93. The most recent reduction did not occur in the previous two fiscal years.

2. The Board and/or superintendent has not stated that reductions in this account in the past years were brought about by respondent council's cuts. In prior years cuts were made by the Board itself, as economy measures, due to its fiscally conservative makeup. This goes to the point that the Board itself makes cuts as it deems necessary. Because the Board made cuts in the past does not mean it is capable of sustaining an additional cut in 1992-1993. Nor does it mean that the cuts made by the Board weren't detrimental because it is admitted they were detrimental. As the staff decreased, the workload increased and this has created a backlog. A decision by the Board to maintain the same number of staff as last year rather than increase staff should not be interpreted that there is an excess of staff.

3. In order to implement the State mandated GAAP Program, definite steps must be taken now during the 1992-1993 school year.

The Council is wrong to rely on pending legislation to delay its implementation. In short, the GAAP format must be implemented this year. This is a fact. As of August 17, 1992, S-675 has been amended in the Assembly and is due for Senate concurrence with the Assembly amendments in late September or October, 1992. Also, there is no predicting whether the Governor will sign or veto the double entry accounting component of GAAP. As of August 17, 1992, we are still required to implement the chart of accounts charge and double entry accounting components of GAAP effective July 1, 1993. We must begin to make the necessary computer software changes during the 1992-1993 school year for effective implementation of GAAP effective July 1, 1993. If S-675 becomes law, we will continue to develop the software changes in 1992-1993 so that we may pilot and test the double entry accounting component during the 1993-1994 school year. The date processing software work must be completed, tested and piloted well in advance of the legal effective date and funding for this work is desperately needed.

The Council is under the false impression that the four department heads budgeted in this account and classified under Civil Service rules and regulations as supervisory personnel do not work but merely supervise. This is not the case as was pointed out in Petitioner's Reply to Respondent's Position wherein it was stated that "all Civil Service personnel budgeted in this

account are hands-on employees and are absolutely needed." The department heads/supervisors work is by no means limited to supervision. The titles are imposed by Civil Service. The Council wants the Commissioner to believe that the current four hands-on department heads/supervisors just sit around and watch others work and that they will be able to do more work with fewer clerical workers because they will not have as many workers to supervisor. The Council refuses to recognize that the department heads/supervisors have a full workload plus supervision. They work overtime to get the job done.*** (Board's Summation, 110B, at pp. 1-3)

In rejecting Council's cut of this line item, the Board continues in pertinent part:

***

The Board reaffirms that the Council has no expertise, nor sought any expertise or understanding of the work of this department. The Commissioner should weigh heavily the fact that the Council conferred for only about two hours with school officials and then made cuts in 26 items of a "conditionally approved" budget.***

Further, the Council's argument does not address the 1992-1993 budget, and that is what this appeal is about.

6. This account was thoroughly scrutinized by the County Superintendent, three members of the Division of County and Regional Services and two members of the Division of Finance. They approved the amount budgeted in this account for the personnel listed to carry out the needs and workload of the Board Secretary's Office for the school [year] 1992-1993. Their final recommendation was approved by the Assistant Commissioner of County and Regional Services and the Assistant Commissioner of the Division of Finance. The Board was directed by the County Superintendent, in the letter of March 12, 1992, that it could not make deletions of any programs, services or staff positions in the proposed 1992-1993 school budget. This was upheld on appeal to the Commissioner by the Deputy Commissioner, John C. Woodbury. Thus, the Board asserts that it has offered competent evidence for the Commissioner to restore the full amount to this account.*** (Id., at pp. 3-4)

And;

***

> The Township Council does not want the Commissioner to consider the Board's actual expenditure for the entire 1991-1992 school year. It only wants the Commissioner to consider expenditures for the first nine and one-half months of the 1991-1992, and asks that the Commissioner swallow hook, line and sinker the Council's low ball projection for the remainder of the year. This denies the reality that schools must be funded on a 12-month basis.***
>
> (Id., at p. 3)

The Commissioner has reviewed the respective positions of the parties pertaining to this line item reduction. In the Commissioner's view there is insufficient evidence in the record of this matter which would result in a finding and determination in the Board's favor that Council fails to comply with the applicable provisions of N.J.S.A. 18A:22-37. Moreover, the Board's claim that Council lacks the expertise or understanding to perform its statutorily prescribed function is equally without merit. The statutorily prescribed function of Council pertaining to defeated school budgets is not only an integral part of the total school budget appeals and review process, it must also be implemented independent of any previous review or determination which requires the Board to submit its initial school budget for scrutiny by the Department of Education for a cap waiver approval prior to its submission to the voters for approval. Council, of course, in consultation with the Board, should avail itself of all information in the Board's possession which would permit it to reach an intelligent and reasoned determination with regard to what sum or sums of money, if any, could be reduced from the school tax levy certification without compromising the Board's ability to provide a thorough and efficient education for the school district.

On the other hand, once the school budget appeals process has been opened before the Commissioner, the Board may not be precluded by Council or the Commissioner from presenting evidence regarding accurate and detailed expenditures for its budgeted line items, notwithstanding the fact that such information was not available to Council at the time it rendered its determination with regard to the certification of the local school budget tax levy. Council's argument to the contrary is hereby rejected by the Commissioner. The Commissioner observes that both parties in part have relied on identical or similar arguments in support of their positions with respect to many of the remaining current expense line item reductions controverted herein. To the extent that such arguments by the parties are repeated by the parties, the Commissioner's findings and determination above are incorporated by reference and shall apply. The Commissioner so holds.

With regard to the line item reduction of $30,000 in line item account 110B, the Commissioner finds and determines that the Board has met its burden of proving that this amount is necessary to provide a thorough and efficient education during the 1992-93 school year. Accordingly, for the reasons set forth by the Board herein, the Commissioner directs that the $30,000 reduction be restored.

110F Salaries - Superintendent's Office $10,000

The respective arguments by the parties in part have been addressed by the Commissioner. The Board argues that the clerical personnel budgeted in this account is not excessive as stated by Council. The Board maintains that the amount budgeted in this account was previously reduced from $714,660 in 1991-92 to $541,618 in the 1992-93 school budget. Moreover, the Board avers its latest

reduction of a clerical position in this line item in the 1992-93 budget was in error. Consequently, it is seeking a restoration of $20,000 in this account, rather than the $10,000 reduction by Council.

Council argues that the Board cannot be now heard to complain about the inadequacy of its own budget regarding its failure to provide for an additional clerical position. This is especially so, according to Council, since the number of clerks has been originally overstated in the Board's 1992-93 budget.

According to the evidence presented by the parties herein, the Commissioner observes that the clerical positions in this account have been reduced from five to four (1991-92 to 1992-93 school year). It is further observed that the total amount of funds in this account have been previously reduced from $714,660 (1991-92) to $541,618 (1992-93) which represents a prior total reduction of $173,042. In light of the above, the Commissioner considers such reduction a reasonable effort on the Board's behalf to control its budget expenditures for the 1992-93 school year. Consequently, it is found and determined that Council's reduction of $10,000 in this line item cannot be sustained. The Commissioner hereby directs that the $10,000 reduction in this line item be restored to the 1992-93 local tax levy.

Finally, the Commissioner rejects the Board's request to restore an additional $10,000 to this account by virtue of its error to pre-budget for another clerical position. The Commissioner finds such request to be without merit especially since the Board has had sufficient time to review its budgeted positions upon the prior submission of its school budget to Department of Education officials for a cap waiver approval.

110I Salaries - Business Administrator's Office $30,000

Council maintains that the Board was aware of the fact that its School Business Administrator was retiring at the end of the 1991-92 school year as early as April 27, 1992 when the Board consulted with Council about its defeated 1992-93 school budget. Council argues that a significant saving could have been realized by the Board at that time if it had obtained a new Business Administrator at a lesser salary. The Board argues that this line item was budgeted in the amount of $89,212 less in the 1992-93 school year ($266,935) than in the 1991-92 school year ($356,147).

Additionally, the Board points out that the four clerical positions have not been increased in its budget from the 1991-92 to the 1992-93 school year. The Board concedes that it employed a new School Business Administrator on May 28, 1992 at a budgeted salary (1992-93) of $85,000. The former School Business Administrator received a salary of $93,911 during the 1991-92 school year. Council complains that this action by the Board was unreasonable and unjustified in light of the pending nature of the 1992-93 budget appeal. The Board points out that an additional reduction of $30,000 to this line item by Council would necessitate a further reduction in its clerical staff of four clerks who are needed.

***

> The decrease represented 20% of the work force. Two of the four clerical workers budgeted in this account for 1992-1993 are assigned to the data processing department. This department performs functions affecting the entire district of 9,500 pupils, 1,100 full-time employees and numerous part-time employees. There are only two clerks and a working manager in this department. Any reduction will require cutting back services such as daily attendance for students and staff, California Test scoring, student scheduling, and a host of other vital services that would

> severely cripple the district. The alternative to the disaster a cut in this account would cause is to pay substantial overtime to the remaining employees; thus negating the purpose for cutting and at the same time receiving fewer services. It just doesn't make good sense.***
> (Board's Statement, 110I, at p. 1)

The Commissioner has reviewed the record with regard to this line item and finds and determines that the Board has met its burden of proof to warrant a restoration of $30,000. It is so directed.

110L Salaries - Personnel Office $10,000

In addition to stating that the number of clerical personnel in this account is excessive and should be reduced, Council avers that reductions have been met in previous years without detriment to the school district as argued by the Board. Council maintains that proof of its position appears in the Board's own evidence which establishes that the positions of three clerks have been consistently budgeted in this line item including the 1992-93 year, notwithstanding prior cuts in expenditures made by the Board. (Board's Statement, 110L) The Board rejects the justification advanced by Council for its $10,000 salary reduction in this line item as being wholly without merit. In the Board's view, Council's cut was predicated upon funds expended through March 1992 and failed to acknowledge that these three salaried clerks are employed on a twelve month basis. Moreover, the Board argues that the salaries of these three clerical personnel were underbudgeted for both the 1991-92 and 1992-93 school years by virtue of salary increases which were subsequently contractually negotiated. Consequently, Council's reduction of $10,000 herein only places this account in deeper deficit and would further require a reduction of

one clerical position which constitutes a 33 1/3% reduction in the existing clerical workforce. (Board's Summation, 110L, at pp. 1-2)

The Commissioner observes that the supplemental testimony by way of the affidavit of its Superintendent buttresses the Board's position which reads in pertinent part:

> "***
>
> A reduction of one employee, or 33 1/3% of the work force budgeted in this account, would be extremely detrimental to the district with its 1,100 full-time and 500 part-time employees. While there has been no clerical increases in this account over the years, the number of employees and applicants they serve has; thereby, increasing the workload considerably. It should be pointed out that the introduction of mandated criminal checks on potential employees has substantially increased their workload.***
>
> (Board's Statement, 110L)

The Commissioner finds and determines that the Board has met its burden in proving that Council's $10,000 reduction in this line item adversely impacts upon its ability to carry out a thorough and efficient system of public education for its pupils. The Commissioner therefore directs that Council's recommended reduction of $10,000 in this line item be set aside.

120A-001 Contracted Services - Legal $10,000

Council maintains that the Board has consistently overbudgeted and underexpended this line item during the 1990-91 and 1991-92 school years.

Council points out that while the Board budgeted $20,000 in this line item for the 1990-91 school year, its actual expenditures were $7,955 leaving a year-end free balance of $445, with $11,600 being transferred to other accounts. Council further contends that, based on the Board's actual expenditure in this line item for the 1991-92 school year ($4,070.26) as of March 30, 1992, it can be

projected and concluded that the expenditures in this account will be $5,427 for the entire school year. (Council's Summation, at pp. 15-16) Council therefore maintains that a $10,000 reduction in this line item is justified. The Board concedes that $20,000 was budgeted in this line item for the 1991-92 and 1992-93 school years.

However it maintains that the current amount budgeted for the 1992-93 school year provides for current ongoing litigation which will extend into the 1992-93 school year. Additionally, the Board claims in part that:

> ***When unforeseen suits such as this arise, the district's insurance carriers advise the Board that the cost of litigation is covered with reservation. This means the Board must pay for legal representation of employees by counsel other than the board attorney. In such instances, the Board pays attorney fees out of the budget and may not be reimbursed. In instances where a reimbursement is made, it is at a much later date -- even in another budget year. It would, therefore, be imprudent to cut this account.
>
> Furthermore, a study of school district expansion is nearing completion and it is likely there will be a need for legal services in connection with building additional facilities.
>
> (Board's Statement, 120A-001)

In the Commissioner's view, the Board's rationale for the restoration of the $10,000 line item reduction in this account by Council is reasonable. Moreover, the Commissioner cannot ignore the fact that the Board will incur additional legal expenses stemming from the instant budget appeal. The Commissioner therefore directs that the line item reduction of $10,000 in this account be restored.

120D Other Contracted Services - Administration $20,000

Council maintains that the spending pattern of the Board during the 1990-91 and 1991-92 school years reveals the following:

1990-91 - $100,779.88
1991-92 - $ 24,066.52 (As of March 30, 1992)

Council maintains that given this spending pattern it is projected that the Board will expend $32,088.70 for the entire 1991-92 school year.

Consequently, it is Council's position that:

***

> 2. The Board fails to identify what projects it may reasonably complete in a single fiscal year. To date, the Board has not adequately demonstrated its ability to spend more than $100,000.00 in a single fiscal year. Accordingly, the Board's proposed budget of $140,000.00 far exceeds any reasonable expectation of its ability to fully expend this line item.*** (Council's Summation, at p. 18)

The Board argues that it has specified those projects which must be completed during the 1992-93 school year and relies on the affidavit of its Superintendent dated July 9, 1992 which specifies that the mandated projects budgeted in this line item exceed the $140,000 budgeted during the 1992-93 school year. The Superintendent states that there is a demonstrated need for $202,750 which should have been budgeted in this line item for the year in question. (See Board's Statement, 120D.)

The Commissioner cannot agree with the position taken by the Board that its need for funds in this line item exceeds that which it had origianlly budgeted. It is incomprehensible that the Board could not have projected the actual amount of money that was required to be expended in this line item. This is especially so since the Board specifically relies upon the close scrutiny given to the budget as conditionally approved by the Ocean County Superintendent of Schools and other State Department officials.

With regard to the $140,000 budgeted in this line item by the Board, the Commissioner finds that Council's reduction of $20,000 must be and is hereby sustained for the reasons set forth above. The Commissioner so holds.

130B Other Expenses - Board Secretary's Office $ 7,500

Council maintains that the Board has not expended the $47,500 budgeted in this account during the 1990-91 or the 1991-92 school years. Council therefore contends that its reduction of this line item from $47,500 to $40,000 is sufficient for the 1992-93 school year (Council's Summation, at pp. 19-20)

The Board maintains that curtailing this account would severely impact on its ability to communicate with the public and its vendors. Moreover, the Board argues that it has no control over the inflationary costs of office supplies, postage, printing and duplicating. Finally, the Board claims that these funds are needed since it plans to communicate more frequently with the public during the 1993-94 school year. This will be accomplished by reinstating a publication which will reach approximately 30,000 residents.

The Commissioner finds that he is unpersuaded by the evidence presented by the Board which lacks specificity with regard to its request for the reinstatement of the $7,500 reduced by Council. Accordingly, the reduction of $7,500 in this line item is sustained.

130F Other Expenses - Superintendent's Office $ 2,000

Based on the past record of expenditures in this line item for 1990-91 ($12,073) and 1991-92 ($12,977.46 projected), Council reasons that a reduction of $2,000 to $16,000 is sufficient not to impair the function of the Superintendent's office. The Board

contends that Council ignores the need for increased communications with the parents, students and staff by the Superintendent during the 1993-94 school year. The Board further points out that $3,000 of this budgeted line item has been earmarked to be expended by virtue of a contractual obligation with the Superintendent and Assistant Superintendent. (Superintendent's Affidavit, July 9, 1992 and Board's Summary)

The Commissioner finds that there is insufficient information provided by the Board which would warrant further consideration by him to reinstate the reduction of $2,000 to this line item. Accordingly, Council's reduction of $2,000 is hereby sustained.

130J Data Processing Office $10,000

In the Commissioner's view, the reduction of $10,000 in this account is focused upon the Board's failure to expend more than $52,799 in 1990-91 and the expenditures projected by Council of $50,149 during the 1991-92 school year. Council also takes issue with the fact that the Board's request for additional funding for the GAAP program is premature insofar as the pending legislation (S-675) would establish the implementation date of this program as being July 1, 1994. (Council's Summation, at pp. 21-22)

The Board argues that expenditures in this line item amounted to $94,936 for the 1991-92 school year. Additionally, the Board maintains that

> 2. Board of Education work to implement the mandated GAAP program must commence in 1992-1993. Regardless of any pending legislation that might possibly delay the actual implementation date, as suggested by the Council, the planning and groundwork must be done this year. We cannot convert to a double entry system

> of accounting at the last minute. Nor can the Board sit by hoping the legislature will delay GAAP. (Board's Summation, 130J)

The Commissioner upon review of the respective positions of the parties finds and determines that the Board must have the latitude to project its needs with respect to the anticipated implementation of the GAAP program, notwithstanding the actual date of passage of the mandatory legislation now pending. It appears reasonable to the Commissioner that the Board will incur those expenses that it has claimed herein to be in a position to act in an efficient manner to implement the GAAP program in the ensuing school year. The Commissioner hereby directs that the $10,000 reduction to this line item be restored.

130M Other Expenses - Printing and Publishing $ 6,500

After an examination of the respective positions of parties with respect to this line item reduction, the Commissioner finds that Council has projected an expenditure requirement of $21,287.81 for the 1991-92 school year. The $6,500 reduction of the $28,000 budgeted in this account, however, is insufficient to meet the printing and publishing needs over a twelve-month period which includes July and August 1992. It is therefore directed that the $6,500 line item reduction be restored.

211A Salaries - Principals - High School $70,000

Council's recommended reduction in this line item involves the reduction of the equivalent of one assistant high school principal.

The Board rejects this reduction which it claims amounts to nothing more than a bare statement made by Council without justification. In reply the Board argues:

***

> Brick Township is a changing community. The change is reflected in the day to day operation of the high schools. There has been highly publicized racial confrontations between students during the 1991-1992 school year which prompted the Board to employ off duty police and assign them to the high schools for protection of the pupils and staff. This is not the time to reduce assistant principals as was done in 1987 and again in 1990. Both high school principals have repeatedly requested restoration of those assistant principals which were reduced against the advice of the building principals and superintendent, but to no avail. It must be pointed out that there is a cap waiver item to extend the contract of one ten month assistant principal to twelve months. More assistance is needed not less. Another reduction here is short sighted, foolhardy and potentially dangerous to the welfare of the pupils and staff.
>
> (Superintendent's Affidavit, July 9, 1992)

In light of the Board's position, the Commissioner finds and determines that any reduction in this line item would be counterproductive and diminish the Board's ability to provide a thorough and efficient education for its pupils. It is therefore directed that the $70,000 reduction by Council in this line item be restored.

213L-000 Salaries - Attendance Policy $10,000

Council maintains that the Board is in a position to maintain this line item at the same funding level as the 1991-92 school year. This is so, Council reasons, because the stipends were paid to award professional staff members for improved attendance and the State-mandated level of 96.5% was achieved during the 1991-92 school year. Consequently, it is Council's view that the increase of $10,000 in this line item for the 1992-93 school year is excessive and unwarranted for the reasons stated above and supported in its Summation.

The Board points out that the $35,000 budgeted in this line item is necessary to fund a Board policy and negotiated agreement providing employees with a monetary stipend for excellent attendance. The past improvement made by this policy has reduced the need for substitutes and has improved the continuity of instruction.

More specifically the Board states:

> ***The maximum honorarium that a staff member can receive in a year is a token $100. However, each reduction in absenteeism of one day saves the Board $65. Attendance has improved for professional staff since the program was implemented from 95% to 96.5%. This is a considerable improvement. This translates to thousands of tax dollars in savings over the course of a year.
>
> The Board is planning to improve attendance even more in 1992-1993 because better staff attendance benefits children. The Council's cut of $10,000 would leave only $25,000 to implement the long standing attendance policy with an increased staff for 1992-1993 over that of 1991-1992.
>
> If the Board is successful in improving staff attendance even more, additional money will be needed in this account rather than less.***
> (Superintendent's Affidavit, August 6, 1992)

In the Commissioner's judgment the Board has met its burden of proof with respect to the restoration in this line item. The Commissioner so finds and determines. It is directed that the $10,000 be restored.

213M Salary Adjustments - Teachers $240,000

Council's reason for this recommended line item reduction is that the Board could not offer any justification for the excessive amount budgeted herein. Additionally, Council maintains that no effort was made by the Board to determine who was returning.

In reply, the Board relies on the affidavits of its Superintendent dated, respectively, July 9 and August 6, 1992 which state in pertinent part.

> The 1992-1993 budgeted amount is $490,000. It was $250,000 in 1991-1992. The Council specified a cut of $240,000 which would bring the account back to the 1991-1992 level.
>
> The Council was told that the Board surveyed the teaching staff to determine the number of anticipated retirements during the 1992-1993 school year. Sixty-one staff members indicated they planned to retire by the end of the 1992-1993 school year. The sixty-one was scaled back to forty-nine after administrative review. There is a contractual obligation by the Board to pay staff for accumulated unused sick days upon leaving the district. It has been determined that the amount needed is $490,000 or an average of $10,000 per staff member.***
>
> (Superintendent's Affidavit, July 9, 1992)

And,

> "***The Board of Education ended the 1991-1992 school with a budget surplus of only $260,180.83. The free balance available to the Board is only 1.25% of the 1992-1993 budget. A shortfall in the 213M account could be considerable depending on the number of staff who retire and leave the district by June 30, 1993. It could also be disastrous because there is a lack of funds in the accounts throughout this conditionally approved budget and a small free balance available to the Board this year.***"
>
> (Superintendent's Affidavit, August 6, 1992)

The Commissioner finds and determines that there is sufficient justification provided by the Board for the necessity of the restoration of the $240,000 reduction imposed by Council. It is therefore directed that the $240,000 be restored.

510C Salaries - Bus Attendants $13,000

The Board categorically rejects Council's reasons for its recommended reduction of $13,000. The $196,178 budgeted line item is specifically for the salaries of bus attendants who ride on

school transportation vehicles carrying handicapped children to school. The Board points out that it is required that bus attendants be placed on school buses to assist with the transportation of multiply handicapped and emotionally disturbed pupils. The Board asserts that the salaries of two additional school bus attendants have been approved by the Ocean County Superintendent of Schools and the State Department of Education and have been included in the 1992-93 Voter Cap Waiver.

The Commissioner upon review of the record herein finds and determines that the necessity of having the $13,000 reduction recommended by Council restored to the tax levy has been justified. It is directed that the amount of $13,000 be restored.

520A Contracted Services - To and From School $395,000

In its Position Statement, Council states that the amount of $1,195,000 budgeted in this account for pupil transportation services is drastically overstated by the Board. It cites the Board's expenditures over the previous two school years as the basis for its recommended reduction:

	Amount Budgeted	Amount Expended
1990-91	$726,000	$594,786.88 (Actual)
1991-92	$800,000	$807,587.00 (Estimated as of 3/20/92)

Council maintains that the amount of $1,195,000 budgeted for the 1992-93 school year is totally excessive and cannot be justified by the Board.

The Board argues that Council's statement of the expenditures in this account is inaccurate. The Board maintains that its actual expenditures in this line item for pupil

transportation establishes that this account was actually underbudgeted for the 1990-91 and 1991-92 school years. Those year end expenditures were as follows:

	Amount Expended
1990-91	$747,230
1991-92	$943,398

(Superintendent's Affidavit, August 20, 1992)

According to the affidavit of July 9, 1992 submitted by the Superintendent, the increase in the 1992-93 budget in this line item can be justified for the following reasons.

> ***Here is why the additional money is needed. Transportation contract renewals for 1992-1993 will cost the Board 5% more than the $943,398.91 expended in 1991-1992 or an amount equal to $47,169.94. To this must be added a conservative projected increase of $35 per day to transport each of at least 50 more already identified handicapped pupils to and from out of district schools in 1992-1993 for an additional $315,000. Adding the $47,169.94, for the 5% contract increase, and $315,000 to transport the additional 50 handicapped children we need $362,169.94 over and above the $943,398.91 expended for the 1991-1992 school year. It is plain to see that $1,305,568.85 is needed in the 520A account for the school year 1992-1993, but the Board has budgeted only $1,195,000.***
> (Superintendent's Affidavit, August 6, 1992)

The Commissioner finds that the amount budgeted in this line item cannot be further reduced without compromising its ability to provide the integrity of its budgetary expenditures essential for the transportation of its pupils. Accordingly, it is determined that Council's recommended reduction must be and is hereby set aside. The Commissioner directs that the amount of $395,000 be added in the local tax levy for this purpose during the 1992-93 school year.

540 Pupil Transportation - Insurance $19,500

Council again relies on the actual expenditure for the 1990-91 school year and its projection of expenditures for the 1991-92 school year to conclude that the amount of $149,500 budgeted in this line item by the Board is excessive by $19,500. The Board relies on the affidavit of its Superintendent to justify an increase of $19,500 over the previous school year for the following reasons.

> The Board of Education budgeted $149,500 for 1992-1993. It anticipates spending $132,300, which excludes $12,500 budgeted to cover the $1,000 deductible on its vehicles for each occurrence in the event of accidents. Adding $132,300 and $12,500 produces a total of $149,500 for 1992-1993.
> (Superintendent's Affidavit, August 6, 1992; see also Affidavit of August 20, 1992)

The Commissioner does not find that the increased amount of $19,500 budgeted in this line item for the 1992-93 school year is excessive, but rather that such increase is essential to cover costs over which the Board has little or no control in complying with its mandated obligations to provide pupil transportation.

It is therefore directed that the recommended reduction of $19,500 in this line item be restored.

550A Gasoline - Pupil Transportation Vehicles $60,000

550A-001 Transportation - Diesel $50,000

Council considers each of the above accounts as being overbudgeted for the 1992-93 school year and relies on its statistics indicating that these line items were not or will not be fully expended during the 1990-91 and 1991-92 school years. Moreover, Council avers that in each of these line items economies can be realized if the Board engages in cooperative purchasing of its gasoline and diesel fuels. (Council's Position Statement filed July 27, 1992 and Summation filed August 14, 1992)

The Board disagrees with Council's recommendations initially by stating that the 520A account was actually underbudgeted by $7,806 during the 1991-92 school year. Moreover, the Board maintains that it does engage in cooperative buying of both gasoline and diesel fuels through purchases under State contract which is governed by the Public Schools Contract Law. Finally the Board maintains that higher prices for the purchase of gasoline and diesel fuels are already being experienced. (Superintendent's Affidavits of August 6 and 20, 1992)

Upon examination of the respective positions of the parties as evidenced by their submissions in the record of this matter, the Commissioner is not persuaded by Council's contention that a total amount of $110,000 can be sustained.

It is therefore directed that the $60,000, as well as the $50,000, reduction recommended by Council in the above line items be restored.

550C Tire and Tube Replacement $10,000

Council maintains that the Board has historically overbudgeted this account.

	Amount Budgeted	Amount Expended
1990-91	$33,000	$30,918
1991-92	$60,000	$33,042 (As of 3/30/92)

Council therefore contends that its reduction of $10,000 is reasonable and would leave the Board with $50,000 in this line item which is substantially more than the Board expended in each of the previous school years.

The Board on the other hand argues that:

> ***The amount of $60,000 budgeted for 1992-1993 is based upon a physical inspection of the tires on all vehicles used in the transportation department, numbering one hundred.
>
> We are purchasing only six new vehicles in 1992-1993. Our replacement cycle in 1992-1993 is at the lowest that it has been in years. When more buses are purchased, as in prior years, the new rear tires are removed and replaced with high quality all-weather recaps and the removed new tires are put on the front end of buses in need of tires. We cannot do this to the extent we would like this year because of the limited number of buses being purchased. Therefore, more new tires will have to be purchased in 1992-1993, not fewer.***
>
> (Superintendent's Affidavit, August 20, 1992)

The Commissioner finds and determines that the Board has failed to delineate its need for the restoration of the $10,000 reduction in this line item. While the Commissioner does not doubt that the Board will experience an increased need for funds in this line item, he nevertheless finds that the Board should be in a position to quantify the specific amount of funds needed based on projected unit cost of such tires especially since it claims it has made an assessment based upon a physical inspection of the tires needed in its 100 school bus fleet.

In light of the foregoing, the Commissioner hereby sustains the reduction recommended by Council in this line item.

550F Transportation - Contracted Services $10,000

Council maintains that the Board has overstated its budget request in this line item during the 1991-92 school year.

	Amount Budgeted	Amount Expended
1991-92	$35,000	$18,464 (As of 3/30/92)

(Council's Position Statement, at p. 13)

> This account is for contracted repairs to transportation vehicles. The budgeted amount for 1992-1993 is $45,000. It was $35,000 in 1991-1992, the same as in 1990-1991. However, in 1990-1991, the account was over-expended by $7,530.69. The 1991-1992 account should have been budgeted at $42,530.69. Due to the fact that our transportation fleet is a year older and an assessment of our needs has been conducted, it is not unreasonable to have budgeted $2,500 more than the actual amount spent in 1990-1991.
>
> (Superintendent's Affidavit, July 9, 1992)

While the Commissioner has no reason to doubt the Board position with regard to its expenditures in this line item for the 1990-91 school year, he cannot ignore the fact that the Board has failed to give any further accounting of its expenditures after March 30, 1992, at which time it had only expended $18,464 of the $35,000 budgeted in this line item for the 1991-92 school year.

Accordingly, the Commissioner determines that the Board has failed to meet its burden of proving that its needs for the 1992-93 school year warrant an increase of $10,000 in this line item. Council's recommended reduction of $10,000 in this line item is therefore sustained.

610A Salaries - Custodial Services $25,000

Council again relies on its Position Statement that the Board has underexpended the amounts budgeted in this line item for the 1990-91 and 1991-92 school years. (See Council's Position Statement, at pp. 13-14.) The Board, in rejecting Council's reasons for its recommended reduction, maintains that the $1,780,762 budgeted for the 1992-93 school year is required because it represents its actual contractual obligation to 78 custodians and custodial workers for the 1992-93 school year. The previous years balances in this line item are attributed by the Board to the following reasons:

***

> There are cases during the school year when employees in this account retire and the Board is able to hire replacements at a lower salary. Some custodians, due to the nature of the work and perhaps their ages, are more prone to injury on the job and are, therefore, out of work for a time and paid through Workman's Compensation instead of being charged to this account. Sometimes leaves of absence are granted to employees in this account without pay and substitutes are hired in their place. The pay for substitutes is charged to the 610A-001 account, which in 1991-1992 was over expended by $29,063.37.***
>
> (Superintendent's Affidavit, August 20, 1992)

The Commissioner finds persuasive the justification provided by the Board in this line item in support of its request to restore Council's reduction of $25,000. It is directed that the $25,000 controverted herein be added to the local tax levy for the 1992-93 school year.

610A-002 Salaries - Custodial Overtime $25,000

The Commissioner has examined the record which includes the opposing arguments submitted by the parties regarding the recommended line item reduction. This reduction is rejected specifically for the reason stated by the Board in its Position Statement which reads in pertinent part:

> ***It must be pointed out that substantial amount is spent due to student activities on weekends and holidays; community use of facilities on weekends and holidays; security checks on weekends and holidays. All of this requires the payment of overtime based upon the board's negotiated contractual obligations.***
>
> (Superintendent's Affidavit, July 9, 1992)

It is hereby directed that $25,000 be added to the local tax levy for the 1992-93 school year in order to fully fund this line item.

610C-001 Operation of Plant - Overtime $12,000

Council points out that the Board had budgeted $3,000 in this line item for the 1990-91 and 1991-92 school years without expending any funds in either of these school years. Consequently, Council contends that $3,000 is sufficient to be budgeted in this account for the 1992-93 school year. (Council's Position Statement, at p. 15)

The Board's justification for the restoration of $12,000 recommended to be cut from this account reads in pertinent part:

> ***A major reason as to why $15,000 was budgeted for 1992-1993 is that overtime for warehouse employees will increase dramatically. In 1992-1993 there are only two central warehouse employees servicing 13 buildings. Two employees are responsible for receiving, warehousing, distributing and maintaining inventory records for all materials, equipment and supplies pertaining to the school district.
>
> There had previously been three employees in the warehouse. One was eliminated. The district is relying on the $15,000 in this account to pay the existing two warehousemen who will be working overtime hours as a result of the reduced staff.***
>
> (Superintendent's Affidavit, August 20, 1992)

The Commissioner finds and determines that the Board has demonstrated to his satisfaction that the $15,000 budgeted in this line item is needed for its use during the 1992-93 school year. It is therefore directed that $12,000 be restored.

630 Heat for Buildings $50,000

The Commissioner observes that the Board in its supporting documentation has erroneously reported this line item as having been budgeted at $540,641 instead of $504,641 as it appears on the Board's budget worksheets. (See Exhibit A, Council's Position Statement) In any event, the Board maintains that it expended

$497,538.76 on heat for the 1991-92 school year, Council's nine month analysis ($375,715) and projection of this line item notwithstanding. Additionally, the Board points out that to further complicate matters it was informed of the following:

> ***New Jersey Natural Gas representatives informed the school district's business administrator that a 4.8% increase went into effect in January, 1992. The full effect of the increase is not reflected in the 1991-1992 expenditure figure. Another rate increase, we were informed, will be announced in October, 1992.
>
> A reasonable and conservative projected requirement for 1992-1993 would be $497,538.76 expended for heat in 1991-1992 plus $23,881.86, which represents the 4.8% increase that went into effect last January. These two figures provided a conservative projected amount of $521,420.62 for 1992-1993. The school district has budgeted an additional $16,779.62 for an expected increase next October based on gas company information and because last winter was unusually warm.***
>
> (Superintendent's Affidavit, August 20, 1992)

It is observed from the analysis of this line item submitted by the Board that it is underbudgeted at $504,641 for the 1992-93 school year.

This matter is further complicated by the fact that no supporting documentation by way of a final audit report for the 1991-92 school year was submitted by the Board in support of this line item or any of the other line items controverted herein. However, in balancing the interests of both parties with respect to this line item reduction, the Commissioner finds that the funds appropriated for this account are too critical for the welfare of the pupils not to grant the Board's original request for the full $504,641. This is especially true if, in fact, the Board's projection of $521,420 turns out to be the amount that should have been budgeted herein for the year in question. Accordingly, the

Commissioner directs that $50,000 be added to the local tax levy for this purpose to be available for the 1992-93 school year.

650D Other Supplies - Operation of Plant	$ 2,000
660D Miscellaneous Expenses - Operation of Plant	$ 2,500

Council maintains that the recommended reductions in each of these line items must be sustained for the reasons that the Board has underexpended the amounts budgeted for the 1990-91 and 1991-92 school years. (Council's Position Statement, at pp. 16-17; Summation, at pp. 38-41)

In its Summation, the Board points out that these line items were not increased in appropriations over the previous 1991-92 school year (650D - $5,000; 660D - $7,500). It argues that the 650D line item was fully expended during 1991-92 and that there was a remaining balance of $423.59 in the 660D line item for the same school year. The Board therefore argues that Council's respective reductions of $2,000 and $2,500 in these line items are unreasonable and totally without merit. (Superintendent's Affidavit, August 20, 1992)

The Commissioner does not find the amounts originally budgeted by the Board in these line items to be excessive. The Board's requested appropriations have remained constant for a two-year period. Moreover, the Commissioner finds credible the Superintendent's statement that each of these line items has been fully expended for the 1991-92 school year, with the exception of $423.59 remaining in the 660D line item.

It is therefore directed that the amounts of $2,000 and $2,500 be added to the local tax levy for the purpose of fully funding these line items for the 1991-93 school year.

This concludes the Commissioner's findings and determination with respect to each of the recommended line item reductions pertaining to the original budget appropriations controverted herein which affect the Board's current expense budget for the 1992-93 school year.

Account		Council's Reduction	Amount Not Restored	Amount Restored
110B	Sals., Board Sec'y Office	$ 30,000	$	$ 30,000
110F	Sals., Supt. Office	10,000		10,000
110I	Sals., Bus. Admin. Office	30,000		30,000
110L	Sals., Personnel Office	10,000		10,000
120A-001	Contr. Services, Legal	10,000		10,000
120D	Other Contr. Servs., Admin.	20,000	20,000	
130B	Bd. Secy's Off., Oth. Exps.	7,500	7,500	
130F	Supt. Off., Other Expenses	2,000	2,000	
130J	Data Processing Office	10,000		10,000
130M	Printing/Publishing	6,500		6,500
211A	Salaries, Principals	70,000		70,000
213L-000	Salaries, Attend. Policy	10,000		10,000
213M	Salary Adjust., Tchrs.	240,000		240,000
510C	Salaries, Bus Attend.	13,000		13,000
520A	Contr. Servs. - To and From	395,000		395,000
540	Transportation, Insurance	19,500		19,500
550A	Transportation, Gasoline	60,000		60,000
550A-001	Transportation, Diesel	50,000		50,000
550C	Tire and Tube Replacement	10,000	10,000	
550F	Trans., Contracted Services	10,000	10,000	
610A	Salaries, Custodial Servs.	25,000		25,000
610A-002	Custodial, Overtime	25,000		25,000
610C-001	Oper. of Plant, Overtime	12,000		12,000
630	Heat	50,000		50,000
650D	Oper. of Plant, Supplies	2,000		2,000
660D	Oper. of Plant, Misc.	2,500		2,500
	TOTALS	$1,130,000	$49,500	$1,080,500

In summary, the Commissioner finds and determines that of the $1,130,000 tax levy reduction imposed by Council on the Board's 1992-93 budget appropriation, a sum of $49,500 of line item reductions has been sustained. The Commissioner further finds and

determines that the remaining amount of $1,080,500 is essential to enable the Board to provide a thorough and efficient education for the pupils of Brick Township School District during the 1992-93 school year.

It is therefore ordered and directed that the local school tax levy for the 1992-93 school year in Brick Township be increased by $1,080,500 over that amount of $38,538,251 which was previously certified by Council for such purpose to the Ocean County Board of Taxation.

CAP WAIVER

In setting forth its position with respect to the $1,800,000 it seeks in current expense cap waiver monies, the Board relies on the fact that its cap waiver was thoroughly scrutinized by a panel from the Department of Education which included three members of the Division of County and Regional Services, two members of the Division of Finance and the Ocean County Superintendent of Schools.

The recommendation of the six-member panel was that the voter cap waiver was required for the provision of a thorough and efficient education in the Brick Township School District for the 1992-93 school year. The Board emphasizes that the cap waiver recommendation was reviewed and a final approval was given by the Assistant Commissioner of the Division of County and Regional Services and the Assistant Commissioner of the Division of Finance. More specifically, the Board relies upon the comments made by the Ocean County Superintendent of Schools in support of its claim that the cap waiver is an integral part of its 1992-93 budget request as follows:

***

> Your proposed 1992-93 school budget is by definition inadequate, and therefore the Brick Township school district requires a voter cap waiver in order to provide a thorough and efficient system of public education for the 1992-93 school year. We consider your proposed school budget as the minimum or "base budget", as we refer to it, and the items conditionally approved for your voter cap waiver are considered necessary "in addition to" all the items in the proposed budget. For this reason no deletions may be made of any programs, services, or staff positions in the proposed 1992-93 school budget. All of these items are considered necessary, and are the base for the conditionally approved cap waiver items.
>
> Stated another way, your proposed budget is now final, and the conditionally approved voter cap waiver items are necessary to make your total budget adequate.***
>
> (Board's Cap Waiver Petition, Schedule B)

Council advances no specific argumentation relative to each cap waiver amount set forth on pages 2 and 3 herein. Rather, it urges the Commissioner to reject the Board's cap waiver appeal on the following grounds:

- The Commissioner is without authority to review the instant cap waiver appeal to raise the tax levy to extend the maximum permissible net budget as a matter of law. In support of its position, Council relies on what it considers the prohibitive provisions of N.J.S.A. 18A:7D-28 of the Quality Education Act; and

- Brick Township's School District budget at cap level is sufficient to provide the fiscal resources necessary for a thorough and efficient education.

In this regard Council maintains that the Board has failed to demonstrate that the amount of funds requested above the budget cap are necessary to provide a thorough and efficient education and

further that it has failed to demonstrate that a reallocation within the permissible budget cannot be accomplished. (See Council's Position Statement, at pp. 2-4.)

The Commissioner finds and determines that Council's arguments against his review and determination with respect to the Board cap waiver appeal are totally without merit. In support of this determination the Commissioner is guided by the Opinion of the Attorney General dated July 8, 1991 which expressly states in pertinent part:

> ***
>
> In enacting L. 1991 c. 62, sect. 19(f), the Legislature did intend to broaden the availability of cap waivers and also to limit the review and appeal of cap waiver disapprovals where the constitutional mandate was not at issue. Thus, where the board of school estimate or city council certifies an amount for the budget that is consistent with the amount that the county superintendent approved as sufficient, no further review or appeal is available. Cf. N.J.S.A. 18A:22-14 (board of education can appeal board of school estimate's budget determination); N.J.S.A. 18A:22-17 (board of education can appeal governing body's certification for school budget); N.J.S.A. 18A:22-37 (if voters reject budget, governing body to determine amount of budget; board of education can appeal that determination). See also Deptford, supra. Moreover, the Legislature intended the Commissioner to exhaust all available administrative solutions to meet the constitutional mandate such as directing reallocation before exercising his constitutional authority to set a budget above cap. This administrative discretion would include the authority to allocate monies from a $25 million discretionary fund in the FY 92 State Budget designed to "ensure the continuation of educational quality," L. 1991, c. 62 sect. 39, and thereby diminish the number of instances where resort to the cap waiver remedy is needed to meet the constitutional standard.
>
> A district whose budget was "conditionally approved" has an affirmative obligation to petition the Commissioner for additional funds so

> that the fiscal resources to meet the constitutional mandate are available. See Deptford, 116 N.J. at 315 ("local boards have not only the power but the duty to appeal actions that threaten to deprive the local school system of necessary teaching staffs and physical facilities"). In considering the petition, the Commissioner should exercise restraint in overriding the expressed desires of the voters or board of school estimates. See Deptford, 116 N.J. at 314; Upper Freehold, 86 N.J. at 280. The district should be required to demonstrate not only that a particular amount of funds above the cap is necessary to provide a thorough and efficient education to children in the district but also that reallocation within the permissible budget amount cannot be accomplished.***
> (Attorney General's Opinion, July 8, 1991, at pp. 5-6)

The Commissioner has made a thorough review of the Board's line items, together with its reasons for requesting a cap waiver in the amount of $1,800,000, the specific line items and amounts for which are set forth ante. The Commissioner adopts as his own herein those reasons advanced by the Board with ample supporting documentation in its cap waiver Position Statement for each of the line item appropriations and incorporates them as his own.

In the Commissioner's judgment the record is sufficiently developed to establish through the review conducted by the Ocean County Superintendent of Schools, as well as those Department of Education officials who participated in the review and approval of the Board's conditionally approved budget and cap waiver, that the reallocation of funds within the permissible budget could not be accomplished without a cap waiver approval. The Commissioner so holds.

Accordingly, the Commissioner finds and determines that the $1,800,000 in current expense cap waiver funds sought by the Board are necessary for the district to provide a thorough and efficient education to the pupils of Brick Township.

The Commissioner therefore directs the Ocean County Board of Taxation to increase the 1992-93 current expense tax levy for the Brick Township School District to reflect a restoration of $1,080,500 in the reduction effectuated by Council and an additional $1,800,000 in cap waiver appropriations which sums reflect a total current expense tax levy increase of $2,880,500. Accordingly, the total 1992-93 current expense tax levy for the Brick Township School District shall be $41,418,751.

CURRENT EXPENSE

Tax Levy Certified by Council	$38,538,251
Restored by Commissioner (Defeated Budget)	1,080,500
Cap Waiver Ordered by Commissioner	1,800,000
TOTAL	$41,418,751

IT IS SO ORDERED.

John C. Woodbury
ACTING COMMISSIONER OF EDUCATION

DECEMBER 17, 1992

DATE OF MAILING - DECEMBER 17, 1992

306-92

IN THE MATTER OF THE TENURE	:	
HEARING OF MARGUERITE PENN,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF JERSEY CITY,	:	
HUDSON COUNTY.	:	
_____	:	

DECEMBER 21, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

OAL DKT. NO. EDU 10691-91
AGENCY DKT. NO. 387-10/91

IN THE MATTER OF THE TENURE HEARING OF MARGUERITE PENN, STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY

OAL DKT. NO. EDU 356-92
AGENCY DKT. NO. 439-12/91
(CONSOLIDATED)

Charlotte Kitler, Esq., General Counsel, for petitioner

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

Record Closed: October 30, 1992 Decided: November 12, 1992

BEFORE **STEPHEN G. WEISS,** ALJ:

These two matters, consolidated for purposes of decision, involve tenure charges filed against the respondent and which were transmitted by the Commissioner of Education to the Office of Administrative Law on November 29, 1991 and January 13, 1992, respectively. Plenary hearings were scheduled to take place in March 1992. However, in advance of those hearings, the undersigned was advised by counsel that the matter should be adjourned as the result of ongoing settlement discussions primarily related to respondent's intention to apply for ordinary disability retirement. As a result, the hearings were adjourned awaiting the outcome of that process.

Recently, a stipulation of settlement signed by the district superintendent of schools and her attorney, together with respondent and her attorney, was submitted to me for review and approval. That document sets forth that tenure

charges had been certified against Penn as set forth above, and following that action respondent underwent an examination by a licensed physician who reported that respondent was totally and permanently disabled from teaching. Accordingly, respondent applied for ordinary disability retirement and the Board of Trustees of the Teachers' Pension and Annuity Fund approved the same in July 1992.

Thus, in light of respondent's continued incapacity to perform her duties and her retirement on account of total permanent disability, the parties agreed that respondent would be considered to have resigned from her employment effective March 1, 1992. The Board therefore has determined to withdraw the tenure charges since they have been rendered moot. Respondent has represented in the settlement agreement that she is aware that as a result of the charges brought against her by the Board, and despite her resignation, the matter could be referred by the Commissioner to the State Board of Examiners with respect to potential revocation of her certification. In the event such proceedings were to be instituted, the Board agreed diligently to pursue the same if respondent chose to contest.

Having reviewed the file in this matter, I find that the settlement entered into between the parties is fair and reasonable and in the best interests of the public. First, since respondent resigned, effective March 1992, and has retired as of July 1992, it is reasonable to assume that she will never return to a teaching position. Also, she is aware that revocation of her certification could be recommended to the State Board of Examiners.

In light of the retirement and respondent's acknowledgement of a potential revocation proceeding, there is no reason to expend time and public resources in pursuing tenure hearings in this case. Thus, the settlement proposal is fair and reasonable in all respects, in the public interest, and will be recommended to the Commissioner for his approval.

I therefore **CONCLUDE** that the attached settlement agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 12, 1992
Date

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

11/16/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 17 1992
Date

OFFICE OF ADMINISTRATIVE LAW

amr

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2490
(201) 773-5665
Counsel for Respondent

Oct 30 12 22 PM '92

IN THE MATTER OF THE TENURE :	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF
HEARING OF MARGUERITE PENN, :	ADMINISTRATIVE LAW
STATE-OPERATED SCHOOL :	DOCKET NOS. EDU 10691-91 and EDU 356-92N
DISTRICT OF JERSEY CITY :	
	SETTLEMENT AGREEMENT

WHEREAS, Marguerite Penn (hereinafter "Ms. Penn") has been employed by the School District of the City of Jersey City since 1972; and

WHEREAS, Ms. Penn's employment continued in said district when it became the State-Operated School District of Jersey City (hereinafter the "District"); and

WHEREAS, tenure charges (Agency Reference #387-10/91, O.A.L. Docket #EDU 10691-91) of excessive absenteeism and medical incapacity were certified against Ms. Penn by the District Superintendent on October 29, 1991; and

WHEREAS, Ms. Penn's attorney filed an answer to said charges dated November 14, 1991, in which past absenteeism and incapacity were admitted but current incapacity or absenteeism was denied; and

WHEREAS, the District Superintendent certified additional tenure charges (Agency Reference #439-12/91, O.A.L. Docket #EDU 356-92N) against Ms. Penn on December 19, 1991, alleging the use of corporal punishment on November 1, 1991, and

on alleged other occasions for which dates were not specified and asserting unbecoming conduct, incapacity and unfitness to teach; and

WHEREAS, Ms. Penn's attorney filed an answer dated January 7, 1992, denying any unbecoming conduct, incapacity or unfitness; and

WHEREAS, after further consultation between Ms. Penn and her attorney, Ms. Penn underwent an examination by a licensed doctor; and

WHEREAS, said doctor's confidential report established that Ms. Penn was totally and permanently disabled from teaching; and

WHEREAS, Ms. Penn applied for an ordinary disability retirement to be effective March 1, 1992; and

WHEREAS, the Board of Trustees of the Teachers' Pension and Annuity Fund approved Ms. Penn's ordinary disability pension on July 2, 1992; and

WHEREAS, Ms. Penn continues to be incapacitated from performing her duties as a teacher and has been found to be totally and permanently disabled from performing said duties by the Board of Trustees of the Teachers' Pension and Annuity Fund,

NOW THEREFORE, it is hereby agreed between the parties as follows:

1. Ms. Penn hereby resigns and retires from employment with the District effective March 1, 1992.

2. The State-Operated School District hereby withdraws the tenure charges filed with the Commissioner of Education on October 29, 1992 and on December 19, 1991, and transmitted to the Office of Administrative Law, Docket Nos. EDU 10691-91 and EDU 356-92N, since said charges have been rendered moot by Ms. Penn's disability retirement and the necessary finding of the Board of Trustees of the Teachers' Pension and Annuity Fund that Ms. Penn is totally and permanently incapacitated from teaching.

3. Ms. Penn enters into this agreement voluntarily and without coercion.

4. Ms. Penn is aware that, as a result of the charges brought against her, this matter may be referred to the State Board of Examiners for review regarding certification revocation proceedings. If such proceedings are instituted, the District agrees to diligently pursue said proceedings in the event that Ms. Penn should choose to contest that proceeding.

5. The District and Ms. Penn acknowledge that the terms of this Agreement are contingent upon the review and approval of both the Office of Administrative Law and the Commissioner of Education. In the event that either agency disapproves of the terms of settlement, this Agreement shall be null and void and the parties shall return to the same positions which they held prior to this settlement.

6. The parties recognize that each has been represented by legal counsel of her or its own choosing and that each signs this Agreement as their own voluntary act and deed,

and that they fully understand the duties and obligations enumerated herein.

7. This Agreement shall be subject to the laws of the State of New Jersey.

8. All terms of this Agreement are deemed material. This document may not be altered, amended or modified or revoked except by an instrument executed in writing by the parties.

9. For all of the previously noted reasons, the parties agree that this settlement is in the public interest, as well as the best interests of the parties.

FOR THE RESPONDENT

Marguerite Penn

Louis P. Bucceri, Esq.

FOR THE STATE-OPERATED SCHOOL DISTRICT

Dr. Elena Scambio, State District Superintendent

Charlotte Kitler, Esq.

OAL DKT. NOS. EDU 10691-91 and EDU 356-92 (Consolidated)

IN THE MATTER OF THE TENURE	:	
HEARING OF MARGUERITE PENN,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF JERSEY CITY,	:	
HUDSON COUNTY.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standard for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983) The matter is hereby dismissed, subject to compliance with the terms of the settlement.

However, in view of the charges against respondent, which include allegations of multiple incidents of striking students, pulling hair, throwing objects and using abusive language, this matter is also forwarded to the State Board of Examiners for action against respondent's certificate as it deems appropriate pursuant to N.J.A.C. 6:11-3.6.

DECEMBER 21, 1992

DATE OF MAILING - DECEMBER 21, 1992

ACTING COMMISSIONER OF EDUCATION

307-92

JOHN GREEN,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY, AND COSKEY ELECTRONICS,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner sought to challenge as improper the specifications and procedure under which said specifications were set forth that were promulgated by Board in soliciting competitive bids for new intercom system for schools. Board sought summary decision of petition.

ALJ found since petitioner was not a taxpaying resident of Old Bridge School District and he was not a bidder in respect to contract at issue in second round of bids, there was no legal authority under which standing could be conferred on petitioner to adjudicate issues set forth in his petition. Moreover, he did not timely challenge Board's rejection of the first round of bids in which he was a bidder. Petition was dismissed. Board's motion for summary decision was granted.

Commissioner adopted findings and determination in initial decision but corrected initial decision to the extent that case law has held that under certain circumstances not only does a taxpayer have standing to challenge bidding law, but also an unsuccessful bidder. (H. A. DeHart)

DECEMBER 21, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ORDER GRANTING SUMMARY DECISION
OAL DKT. NO. EDU 7191-92
AGENCY DKT. NO. 423-9/92

JOHN GREEN,
Petitioner,
v.
BOARD OF EDUCATION OF
THE TOWNSHIP OF OLD BRIDGE,
Respondent.

John Green, petitioner, pro se

Francis X. Journick, Jr., Esq., on behalf of respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: October 16, 1992 Decided: November 4, 1992

BEFORE **STEVEN C. REBACK**, ALJ:

This is a motion instituted by the respondent, the Old Bridge Township Board of Education (Old Bridge or Board) seeking summary decision of the petition filed in this matter with the Commissioner of Education on or about September 8, 1992. For the following reasons, the motion is **GRANTED**.

On or about September 8, 1992, the petitioner, John Green, filed his petition before the Commissioner of Education setting forth in 23 paragraphs his effort to seek a temporary restraining order enjoining Old Bridge from awarding a bid for the construction and emplacement of two intercom systems in its school district, alleging *inter alia* that the specifications for the bid were deficient. Following the filing of the petition, Mr. Green sought emergent relief and the Commissioner transmitted the matter to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to 13 and *N.J.S.A.* 52:14B-1. On September 23, 1992, the matter was heard on Mr. Green's motion for an emergent stay of the award of the contract at issue by administrative law judge Robert S. Miller, who denied Mr. Green's motion. An order was issued on September 24, 1992, supported by a tape recorded ruling. To the best of my knowledge, either Judge Miller's order was never interlocutorily reviewed or, if it was, the Commissioner upheld it.

On October 5, 1992, the Office of Administrative received Old Bridge's motion and supporting papers seeking summary decision in the matter. On October 13, 1992, Mr. Green submitted his response and on October 16, 1992, the date on which the record closed, Mr. Journick submitted a letter reply.

The standard under which a motion for summary decision should be addressed in an administrative forum is substantially the same as it is when brought in the judiciary. Pursuant to *N.J.A.C.* 1:1-12.5, the motion shall be granted if it is shown through the moving papers and any discovery that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. Based upon this standard, I shall address the merits of the motion.

As noted, the petitioner is seeking to challenge as improper the specifications and the procedure under which they were set forth that were promulgated by Old Bridge in soliciting competitive bids for a new intercom system to be installed in several of its schools within the district. Initially three bids were received and opened by the Board on June 23, 1992, including Mr. Green's, which was the highest, and all three bids were rejected by the Board which determined to readvertise for new bids. The Board received and opened new bids on July 31, 1992. Mr. Green did <u>not</u> challenge the rejection of the bids opened on June 23, 1992, nor did he <u>submit</u> any bid in response to the second advertisement for bids. The contract was awarded on August 25, 1992. The successful bidder has already commenced the work required by the contract which, pursuant to Mr. Journick's brief, includes the

purchase of materials and the prefabrication of equipment to be installed in the school buildings which are targeted for the installation.

As an incident to its motion, respondent moves for summary decision on a variety of grounds. Primary among these is Old Bridge's assertion that Mr. Green lacks standing to dispute the bids or specifications or any aspect of the award of the bid because he was a non-bidder and because his effort to undermine the result of the bidding process was untimely. Mr. Journick cites to the general proposition that a party which does not bid on a publicly advertised contract has no standing to challenge the specifications for the contract or any other action taken with respect to the contract, citing to *Farrell v. Board of Education of Newark*, 137 *N.J.L.* 408, 409-10 (Sup. Ct. 1948); and *McGovern v. Trenton,* 60 *N.J.L.* 402, 403-04 (Sup. Ct. 1897). While as a general Mr. Journick is correct, in my view, that is not the basis under which Mr. Green lacks standing. I base this qualification on the holding in *Ruehl Company v. Board of Trustees, Industrial Ed.*, 85 *N.J. Super.* 4 (1964). In *Ruehl* which, to the best of my knowledge is still good law, the Superior Court of New Jersey, Law Division, explicitly concluded that while an unsuccessful bidder was without standing to challenge the award of the contract to a rival bidder or to attack the alleged illegal specifications, "a citizen and taxpayer. . . may attack the award and also raise the question of the legality of the specifications." Here therefore, the mere fact that Mr. Green was not a bidder would not oust him from an effort to attack the award of the contract to a rival bidder or the specifications; ironically, it would only have been if, pursuant to *Reuhl* Mr. Green was an unsuccessful bidder that he would be without standing.

Mr. Journick also cites to the proposition that challenges to the bid specifications, such as the one undertaken here, may not be made "post-bid and even unsuccessful bidders lack the standing to support a challenge to bid specifications after the opening of bids." Brief, Francis X. Journick, Jr., at 5. Mr. Journick in support of that proposition cites to *Camden Plaza Parking v. Camden*, 16 *N.J.* 150, 158 (1954). While I agree with the proposition cited by Mr. Journick in *Camden*, that holding goes beyond the principle stated. While the court in *Camden* did specifically indicate that an unsuccessful bidder had no standing to make the attack at issue, as was the case in *Reuhl,* the Supreme Court also concluded that "citizens and taxpayers, may attack the award. . . and also raise the question of the sufficiency of the specifications for bidding.' *Camden,* 116 *N.J.* at 158-59.

Thus, in my view it is not Mr. Green's standing as a non-bidder that would oust him from legal standing to challenge the issues he sets forth in his petition in this proceeding. ~~He~~ is, however, ousted from standing for another reason. Mr. Journick represents as an officer of the court in his moving papers that Mr. Green "is not a taxpayer of the Old Bridge School District." Brief, Francis X. Journick, Jr., at 4. I must accept this representation. Moreover it should be noted that to the best of my knowledge Mr. Green does not dispute that issue. Given that Mr. Green is not a taxpaying resident of the Old Bridge School District and given that he was not a bidder in respect to the contract at issue, it is my view that there is no legal authority under which standing can be conferred upon Mr. Green to adjudicate the issues set forth in his petition. Therefore, in my judgment, and I **CONCLUDE** that as a matter of law, Old Bridge is entitled to prevail.

As a result of this determination I shall not address the second legal argument raised by Mr. Journick concerning Mr. Green's failure to join as a necessary party the company which received the bid. It should be noted as an aside, however, that in my judgment that argument would not have compelled me to grant Old Bridge's motion. Since Mr. Green is a *pro se* litigant, I would have exercised my discretion and apprised the successful bidder of the pendency of this action and given it the opportunity to intervene should it have chosen to. I would have delayed the proceedings on the substantive issues until the bidder would have been given the opportunity to exercise its right to intervene or to indicate its willingness to abide by the decision in this proceeding absent its intervention.

Accordingly, and based upon the foregoing, respondent's motion for summary decision is **GRANTED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 19 1992
Date

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

11/9/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 12 1992
Date

OFFICE OF ADMINISTRATIVE LAW

JOHN GREEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY, AND COSKEY ELECTRONICS,	:	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 a careful and independent review of the record of this matter, the Commissioner affirms the grant of summary judgment to the Board of Education for the reasons which follow.

In reviewing the initial decision order dated November 4, 1992, the Commissioner takes note that on page 2 the ALJ mentions the motion heard in this matter on emergent relief on September 23, 1992, with an order denying such relief on September 24, 1992. The Commissioner of Education did, in fact, review that recommended initial decision on motion, and on October 7, 1992 adopted the findings and conclusions of the Office of Administrative Law as set forth in a tape recording of the hearing conducted on September 24, 1992, denying Petitioner's Motion for Emergent Relief.

A second procedural issue is a vital part of the review of this case. At page 3 of the initial decision of November 4, 1992 the ALJ discusses petitioner's standing to bring this matter before the Commissioner of Education. In this regard, the Commissioner concurs with the Board's premise that petitioner lacks standing to bring this matter because he was a non-bidder at the time the Board readvertised for bids on the subject contract, and because he failed to timely challenge any objection he may have had to the Board's rejecting, in toto, the first round of bids. Farrell, supra, and McGovern, supra While it is the Commissioner's view, as well as the ALJ's, that Ruehl Company, supra, remains good law, our later-enacted statutes governing the bidding process, The New Jersey Public School Contracts Law, N.J.S.A. 18A:18A-1 et seq. (effective June 2, 1977), has been interpreted as affording unsuccessful bidders standing to challenge certain aspects of the school bidding laws in this forum. See e.g. H. A. DeHart and Son v. Board of Education of Kingsway Regional High School District et. al., 1989 S.L.D. 2438, citing Saturn Construction Co. v. Middlesex Cty. Freeholders, 181 N.J. Super. 403, 407 (App. Div. 1981).

The Commissioner does agree with the ALJ that Ruehl, supra, stands for the proposition that citizens and taxpayers may have standing to attack the award of a bid. Insofar as the record establishes that petitioner is not a taxpayer of Old Bridge, though, he is without standing to appeal the bid award on that basis. However, as a matter of law, the Board is entitled to prevail in its Motion for Summary Judgment in this case because petitioner was neither a bidder in the second round of bids sought for the contract

in question, nor did he timely challenge the Board's rejection of the first round of bids on such contract. Consequently, petitioner both lacks standing to bring such petition and also is untimely pursuant to N.J.A.C. 6:24-1.2(c).

Accordingly, for the reasons expressed herein, the Board's Motion for Summary Judgment is adopted as the Commissioner's own and the Petition of Appeal is dismissed, with prejudice.

ACTING COMMISSIONER OF EDUCATION

DECEMBER 21, 1992

DATE OF MAILING - DECEMBER 21, 1992

308-92

308-92

KATHLEEN WHITE AND RENEE DORFMAN, :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION, : DECISION

RESPONDENT. :

SYNOPSIS

Petitioners, two field hockey coaches, contested determination of respondent NJSIAA that they had violated NJSIAA coach disqualification (red card) rule and were therefore subject to two years' probation.

Upon review of record, including the proceedings before NJSIAA Controversies Committee and Executive Committee, Commissioner upheld decision of NJSIAA. Commissioner found petitioners had in fact violated the disqualification rule by allowing Coach White to coach two games from which she had been disqualified. Even if coaches had some question as to White's disqualification status, they should have recognized their obligation to resolve any uncertainties before permitting White to coach. Further, petitioners were not deprived of due process and the penalty imposed was within NJSIAA's lawful discretionary authority. Petition was dismissed.

DECEMBER 24, 1992

KATHLEEN WHITE AND RENEE DORFMAN, :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION, : DECISION

RESPONDENT. :

For Petitioners, David B. Friedman, Esq. (Balk, Oxfeld, Mandell and Cohen)

For Respondent, Steven P. Goodell, Esq. (Picco, Mack, Herbert, Kennedy, Jaffe and Yoskin)

This matter was opened before the Commissioner of Education on August 17, 1992 by the filing of a Petition of Appeal, wherein petitioners, field hockey coaches at Cranford High School, contested the determination of respondent (hereinafter "NJSIAA") that they had violated the NJSIAA coach disqualification ("red card") rule and were therefore subject to two years' probation. An answer having been duly filed by NJSIAA, a briefing schedule was established and the record of proceedings before the NJSIAA Controversies Committee and the Executive Committee were submitted to the Commissioner. Upon receipt of NJSIAA's responsive brief on October 14, 1992, the record of this matter was deemed closed.

In their filings, petitioners argue that Petitioner White's coaching, with the full knowledge and consent of Petitioner Dorfman, of the two games immediately following issuance of a "red card" to White on October 10, 1991, was in no way due to a deliberate defiance of NJSIAA or disregard of its rules; to the contrary, petitioners were well acquainted with those rules and sincerely believed that White was free to coach pending a determination as to whether her red card was issued for "flagrant" misconduct, which petitioners understood to be the only circumstance that would result in automatic as opposed to discretionary disqualification. Petitioners, therefore, who believed that White's conduct was not serious enough to warrant automatic disqualification, are guilty at most of a misunderstanding based on information relayed at a pre-season rules interpretation session and not contradicted by their athletic director at his meeting with them on the day following the disqualification.

NJSIAA in turn argues that 1) the rule in question is clear on its face, as there is no basis for disqualifying a coach other than "unsportsmanlike and flagrant verbal or physical misconduct;" 2) contrary to petitioners' representation, the athletic director did in fact advise petitioners, who did not agree with his position based on what they viewed as the minimal nature of White's infraction, that White was automatically disqualified for two games due to issuance of the red card; and 3) even setting these considerations aside and accepting arguendo that White and Dorfman may have had some question about White's disqualification status, there is no reason why two coaches with 35 years of experience between them should not have recognized their obligation to resolve

any uncertainties before permitting White to coach in view of the potential consequences to themselves and their team.

Upon careful and independent review of this matter, the Commissioner determines to uphold NJSIAA's decision for the reasons set forth below.

Initially, the Commissioner finds that the regulations controlling this matter, which were undisputedly known to petitioners, are clear on their face and state as follows:

> Any coach/player disqualifed before, during or after an interscholastic event for unsportsmanlike and flagrant verbal or physical misconduct will be disqualified from the next two (2) regularly scheduled games/meets, with the exception of football which will carry a one (1) game disqualification, at that level of competition and all other game(s)/meet(s) in the interim at any level in addition to any other penalties which the NJSIAA or a league/conference may assess. Such disqualification prevents a coach/player from being present at the site.
> (NJSIAA Handbook, at p. 107)

> Officials are reminded that prudent judgement should be utilized prior to any disqualification. An official may not have a "change of mind" after the disqualification has been enforced; there is no such condition as "the act was not serious enough for the player/coach to be disqualified from additional game(s)." All disqualifications for misconduct of any degree will always carry the additional game(s) penalty; misconduct is not a "playing rule" violation.
> (Ibid., at p. 108)

> Attention: (a) Once a coach/player has been disqualified, NO appeals will be honored from the player, coach, official or any other party. Disqualification is a judgement call and officials must be certain the act warrants disqualification. All complaints against an official must be directed to the official's Chapter Secretary and the NJSIAA.
> (Ibid, at p. 109)

> ***Failure of a coach/official to follow the prescribed procedure in reporting the disqualification does not void the penalty and, if the official is at fault, it should be reported to the official's Chapter Secretary and the NJSIAA. (Ibid.)
>
> ***Any questions relative to period of disqualification should be referred to NJSIAA.*** (Ibid.)

The Commissioner further notes that, even accepting petitioners' contention--a contention in plain contradiction to the rules cited above--that they were in a position to question the severity of the official's decision to disqualify White and that some discretion was permitted as to penalty based on the degree of offense, the rules are equally clear on their face that any questions regarding disqualification status are to be referred directly to NJSIAA. While the Commissioner sees no basis in the transcript of proceedings before NJSIAA to challenge the credibility determinations whereby the athletic director's testimony was accepted rather than petitioners' as to what transpired at, and subsequent to, their meeting on the day following disqualification, the Commissioner finds that even if petitioners' account were accepted instead, they would not have been relieved of the burden of resolving any doubts on ambiguities before having White coach two games from which they were fully aware she may have been disqualified. Under these circumstances, there can be no question that, whatever their intentions may have been, petitioners did in fact violate the disqualification rule and are therefore subject to appropriate penalty.

The record of this matter is also clear that petitioners were deprived of no due process in proceedings before NJSIAA, and

that the conduct and results of those proceedings could in no way be characterized as arbitrary, capricious or unreasonable. The Commissioner, therefore, will not substitute his judgment for that of NJSIAA and upset its lawful determination to impose a term of probation as prescribed by NJSIAA regulation. Dam Jin Koh and Hong Jum Kim v. NJSIAA, 1987 S.L.D. 259

Accordingly, the decision of respondent NJSIAA is sustained for the reasons expressed in the January 10, 1992 decision of the Controversies Committee and subsequently affirmed by the Executive Committee, and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

DECEMBER 24, 1992

DATE OF MAILING - DECEMBER 24, 1992

309-92

SANFORD LUBER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

DECEMBER 24, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL FOR FAILURE TO PROSECUTE
OAL DKT. NO. EDU 4993-92
AGENCY DKT. NO. 294-7/92

SANFORD LUBER,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,
Respondent.

Sanford Luber, petitioner, pro se

Richard K. Sacks, Esq., on behalf of respondent

Record Closed: November 9, 1992 Decided: November 13, 1992

BEFORE **STEVEN C. REBACK**, ALJ:

This is an appeal by the petitioner seeking an order restraining respondent Board of Education from taking a variety of contemplated actions. The matter was transmitted to the Office of Administrative Law as a contested case by the Commissioner of Education on July 1, 1992 on Mr. Luber's petition seeking emergent relief by way of a stay. On July 7, 1992, an oral decision was issued by my office following proceedings occurring on July 6, 1992, which denied Mr. Luber's motion for stay. That decision was reduced to a transcript forwarded to both parties.

Following the issuance of that decision and pursuant to a conversation which my secretary had with him, Mr. Luber was informed that should he choose not to pursue the matter further he would send me a letter withdrawing his appeal. He was to advise us by letter to be submitted by July 8, 1992. No letter was submitted or

received. After additional efforts to dispose of this matter were unsuccessful, on September 25, 1992, I addressed a letter to Mr. Luber indicating the following:

> As you will recall in late July 1992, you indicated that you would forward a letter to my office withdrawing your appeal in the above-entitled matter. To date, none has been received. Kindly submit a one sentence letter withdrawing your appeal in this matter forthwith.

Mr. Luber did not have the courtesy to respond to this letter or any of the other previous requests.

Accordingly and based upon the foregoing, I **CONCLUDE** that Mr. Luber has abandoned his rights to appeal these proceedings any further. It is accordingly **ORDERED** that the appeal be and is hereby **DISMISSED** with prejudice for failure to prosecute.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

11/13/92
Date

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

11/17/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 19 1992
Date

OFFICE OF ADMINISTRATIVE LAW

rmp

SANFORD LUBER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon review, the Commissioner concurs with the ALJ that petitioner has by his conduct in these proceedings abandoned his right to pursue this matter further.

Accordingly, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal for failure to prosecute is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

DECEMBER 24, 1992

DATE OF MAILING - DECEMBER 24, 1992

310-92

310-92

BOKEY, INC.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF FRENCHTOWN, FRANK BELL, DE SAPIO BROTHERS, INC., AND GRAFAS PAINTING CONTRACTORS, INC.,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, unsuccessful bidder, alleged improper awarding of contract for general repairs and maintenance work and sought money damages.

ALJ concluded petitioner was not entitled as a matter of law to recovery of damages following completion of contracted work even if bid award was in violation of N.J.S.A. 18A:18A-1 et seq. Citing N.J.S.A. 18A:18A-46 and M.A. Stephen Constr. Co., ALJ found petitioner's claim would twice penalize the public, contrary to the intent of bidding laws designed to protect the public rather than bidders. Moreover, respondents were not entitled to counsel fees.

Commissioner affirmed findings and determination in initial decision.

DECEMBER 24, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 357-92
AGENCY DKT. NO. 329-8/91

BOKEY, INC.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF FRENCHTOWN, FRANK BELL, DE SAPIO BROTHERS, INC., AND GRAFAS PAINTING CONTRACTORS, INC.,
Respondents.

John Bocchino, President, appearing pursuant to *N.J.A.C.* 1:1-5.4(a)5, for petitioner

Cowles W. Herr, Esq., for respondent Board of Education of the Borough of Frenchtown (Herr, Pursel and Espey, attorneys)

Michael J. Holub, Esq., for respondent Frank Bell (Kelly, Gaus and Holub, attorneys)

John P. Gallina, Esq., for respondent DeSapio Brothers, Inc. (Gaetano M. DeSapio, attorney)

Anthony J. Peterpaul, Esq., for respondent Grafas Painting Contractors, Inc. (Yauch, Peterpaul, Clark and Vitolo, attorneys)

Record Closed: October 1, 1992 Decided: November 16, 1992

BEFORE **JOSEPH F. FIDLER,** ALJ:

STATEMENT OF THE CASE

Petitioner Bokey, Inc., filed a petition of appeal with the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-9 and *N.J.A.C.* 6:24-1.2, alleging that it was the low bidder on an elementary school upgrade project, but that the contract was improperly awarded to a higher bidder, contrary to the Public School Contract Law, *N.J.S.A.* 18A:18A-1 to -59. The relief sought by petitioner is an award of damages in the amount of $26,000, which petitioner alleges represents its loss of profit.

Each of the respondents has filed or joined in a motion for summary decision, pursuant to *N.J.A.C.* 1:1-12.5. The respondents assert that even if the petitioner's claims are accepted as being true, they are entitled to prevail as a matter of law.

PROCEDURAL HISTORY

On August 29, 1991, the Commissioner of Education received a letter from the petitioner which set forth allegations regarding a bid opening for general repairs and maintenance work for the Frenchtown Elementary School District Board of Education. By notice dated September 4, 1991, the petitioner was informed that his filing would be deemed a petition of appeal with request for emergent relief. The petitioner was further informed that the Commissioner would be unable to take any action to process the appeal and render a decision on the petitioner's request for a stay until three items were provided: an amended caption specifically naming as respondents both the Frenchtown Board of Education and the firm alleged to have been improperly awarded the disputed bid; proof, pursuant to *N.J.A.C.* 6:24-1.2(b), that the Board of Education and the named firm had been served with a copy of the amended caption and all materials filed with the Commissioner of Education; and a brief addressing the criteria for emergent relief set forth in *N.J.A.C.* 6:24-1.5. A copy of the applicable regulations was also provided to the petitioner.

By notice dated October 10, 1991, the Department of Education informed the petitioner that it had received further filings in response to the earlier notice advising of deficiencies in the initial petition. However, the Department also noted that, notwithstanding its prior instructions conveyed to the petitioner both through regulation and numerous telephone conversations, the petitioner had yet failed to submit a brief addressing the criteria for granting of the emergency relief. The petitioner was further notified that, in view of the time elapsed since the action complained of and the ample opportunity to properly file for a stay, the

Commissioner of Education would not consider the petition as an application for emergency relief, but would rather proceed to handle it as a regular petition of appeal. The respondents' answers were filed with the Commissioner of Education on November 4, December 16 and December 19, 1991. On January 13, 1992, the Department of Education transmitted the matter to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to -13.

Prehearing conferences were conducted on June 4 and August 12, 1992. The respondents thereafter filed and joined in motions for summary decision and the petitioner submitted its response. When I determined that the last of the papers on the motions had been submitted, the record was closed on October 1, 1992.

FINDINGS OF FACT

The undisputed facts necessary for resolution of the summary decision motions are set forth in the papers submitted by the parties. For purposes of their motions, the respondents accept as true the facts stated in the petitioner's petition of appeal. The material facts are these:

1. Petitioner and others submitted bids to the respondent Board of Education of the Borough of Frenchtown for general repairs and maintenance at the Edith Ort Thomas Elementary School.

2. Petitioner was the lowest bidder on the project.

3. The respondent Board of Education did not accept the petitioner's bid; rather, contracts were awarded to respondents DeSapio Brothers, Inc. and Grafas Painting Contractors, Inc. The minutes of the school board's meeting of July 15, 1991 state that the bid documents submitted by the petitioner "were not in order."

4. The petitioner suffered monetary damages, in the form of loss of anticipated profit, for which he now seeks recovery.

5. The awarded contracts have been executed.

DISCUSSION AND CONCLUSIONS OF LAW

The respondents assert that even if the foregoing is true, the petitioner is not entitled to monetary damages and that they are entitled to decision as a matter of law. The petitioner argues that it should have been awarded the contract and that it lost its anticipated profit when the contract was awarded to other bidders. The petitioner contends that it should now be awarded damages in the amount of $26,000.

The purpose of requiring contracts for the performance of public work to be let upon competitive bidding is to secure competition and to guard against favoritism, improvidence, extravagance, and corruption. Statutes directed toward these ends are for the benefit of the taxpayers and not the bidder; they should be construed with sole reference to the public good. *Hillside Tp. v. Sternin*, 25 *N.J.* 317, 322 (1957). It is well settled that a bidder claiming to be entitled to the award of a contract for public work has sufficient standing to challenge the rejection of the bid or the letting of the contract to another bidder, and to compel the award of the contract to him. But such standing was granting simply and solely in order that the public interest might be served by compelling the lax or erring public official to properly perform his public trust. It was not thereby intended to create or establish in the bidder entitled to the award of the contract a right which, if violated, would render the public agency liable in damages to the bidder. *M.A. Stephen Constr. Co. v. Borough of Rumson*, 125 *N.J. Super.* 67, 74 (App. Div. 1973).

In *Commercial Clean. Corp. v. Sullivan*, 47 *N.J.* 539 (1966), a low bidder brought suit to review the action of the State Director of Purchase and Property in rejecting plaintiff's bid, under a statute which directed that the award should be made to the "responsible bidder whose bid . . . will be most advantageous to the State, price and other factors considered." The Court there said:

> It should be noted that appellant quite properly makes no claim for damages based upon the alleged improper failure to award it the contract. Submission of the lowest bid in answer to an advertisement for bids by the State for public work cannot be the basis of a claim for damages based upon the failure or refusal to accept such bid. [*Id.* at 546.]

The court in *M.A. Stephen Constr. Co., supra*, 125 *N.J. Super.* at 75-76, described the public policy supporting this principle of law:

> Nor should it be overlooked that, to allow the lowest responsible bidder to recover damages not only would violate and run counter to sound and long established principles of law, but also would invert the very policy and reasons which gave rise to the obligation of the public official to accept the bid proposal which best serves the public interest. Thus, where a public authority improperly rejects the lowest bid and awards the contract to the next lowest bidder, who performs the contract work before the ultimate resolution of the legal propriety of the rejection, to permit the low bidder to recover damages would simply twice penalize the public.

The relief which the petitioner seeks is an award of damages for his anticipated loss of profit. Based upon the foregoing discussion, I **CONCLUDE** that the petitioner is not entitled to the recovery of any damages against the respective respondents by reason of the rejection of his bid, even assuming that such rejection was in violation of the Public School Contract Law, *N.J.S.A.* 18A:18A-1 to -59. Further support for this conclusion may be found at *N.J.S.A.* 18A:18A-46. Although not expressly relied upon by the respondents, this section of the Public School Contract Law provides that "[n]o action for damages shall lie against the State board, any State official, or any board of education or any of its officers because of any action taken by virtue of the provisions of this chapter." Thus, the petitioner's claim must be rejected.

Pursuant to *N.J.A.C.* 1:1-12.5(b), summary decision may be rendered when the moving and responsive papers show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as matter of law. *Judson v. Peoples Bank and Trust Company of Westfield*, 17 *N.J.* 67, 73-75 (1954). Based upon the undisputed material facts and in accordance with the foregoing discussion, I **CONCLUDE** that the respondents have established that they are entitled to prevail on their motions for summary decision as a matter of law. Thus, their motions are **GRANTED**, pursuant to *N.J.A.C.* 1:1-12.5 (b).

Respondent Grafas Painting Contractors, Inc., has raised an additional matter. This respondent requests that an order be entered requiring the petitioner to pay the reasonable attorney fees incurred by Grafas, since it owes no legal or other obligations to the petitioner. However, respondent Grafas has offered no authority in support of its request.

Under *N.J.S.A.* 18A:6-9, the Commissioner of Education has "jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws. . . ." In *Balsley v. North Hunterdon Reg. High Sch.,* 225 *N.J. Super.* 221 (App. Div. 1988), the plaintiff had petitioned the Commissioner to

allow her to try out for the high school football team. Following a hearing, the administrative law judge awarded attorney fees, concluding that the Commissioner had ancillary authority to award counsel fees in contested cases. The Commissioner disagreed, ruling that he had no statutory authority to award such fees. The Appellant Court agreed with the Commissioner's decision, determining that he does not have plenary authority to award counsel fees in determining controversies and disputes presented to him under *N.J.S.A.* 18A:6-9. *Id.* at 225. Citing *State, Department of Environmental Protection v. Ventron Corp.*, 94 *N.J.* 473, 504 (1983), the court found that, "[s]ince 1948, New Jersey has consistently adhered to the general principle that 'legal expenses, whether for the compensation of attorneys or otherwise, are not recoverable absent express authorization by statute, court rule, or contract.'" Thus, I further **CONCLUDE** that respondent Grafas Painting Contractors, Inc., is not entitled to an award of attorney fees.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 16, 1992
Date

Joseph F. Fidler
JOSEPH F. FIDLER, ALJ

Receipt Acknowledged:

11/16/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 20 1992
Date

OFFICE OF ADMINISTRATIVE LAW

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BOKEY, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FRENCHTOWN, FRANK BELL, DE SAPIO BROTHERS, INC., AND GRAFAS PAINTING CONTRACTORS, INC.,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner pursuant to N.J.A.C. 1:1-18.4, as was a reply thereto by respondent Board of Education. Both petitioner's exceptions and respondent's reply reiterate prior arguments as set forth in the initial decision and need not be further addressed herein.

Upon review, the Commissioner concurs with the ALJ for the reasons well stated by him that, even accepting all of petitioner's factual allegations arguendo, the relief he seeks cannot be granted him as a matter of law. The Commissioner further concurs that an award of legal fees to respondent Grafas Painting Contractors, Inc. is not within the Commissioner's scope of authority.

Accordingly, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal and denying Respondent Grafas's request for attorney fees is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

DECEMBER 24, 1992

DATE OF MAILING - DECEMBER 24, 1992

310-92

EDU #357-92
C #310-92
SB # 4-93

BOKEY, INC.,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF FRENCHTOWN, HUNTERDON COUNTY, FRANK BELL, DE SAPIO BROTHERS, INC., AND GRAFAS PAINTING CONTRATORS, INC.,

RESPONDENTS-RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 24, 1992

For the Petitioner-Appellant, John Bocchino, pro se

For the Respondent-Respondent Board of Education of the Borough of Frenchtown, Herr, Pursel, & Espey (Cowles W. Herr, Esq., of Counsel)

For the Respondent-Respondent Frank Bell, Kelly, Gaus & Holub (Michael J. Holub, Esq., of Counsel)

For the Respondent-Respondent DeSapio Brothers, Inc., John P. Gallina, Esq.

For the Respondent-Respondent Grafas Painting Contractors, Yauch, Peterpaul, Clark & Vitolo (Anthony J. Peterpaul, Esq., of Counsel)

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

Maud Dahme abstained.

April 7, 1993

Date of mailing 12 APR 1993

311-92

311-92

KEVIN GRIFFIN,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF PATERSON, PASSAIC COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning custodian sought back pay and payment of legal fees from Board following acquittal (sexual assault, attempted sexual assault and/or endangering welfare of child).

Citing Beatty Commissioner decision, ALJ found petitioner was entitled to back pay for period from December 7, 1988 to March 31, 1991. ALJ determined petitioner was not entitled to reimbursement of counsel fees pertaining to criminal charges relevant to indictment in question and current matter (N.J.S.A. 18A:16-6.1) since charges were not of nature constituting act of omission arising out of or in course of performance of employment duties.

Commissioner adopted findings and determination in initial decision and rejected Board's exception requiring that absent statutory authority for awarding of back pay, petitioner be subject to the "public officer" standard set forth in DelRossi Appellate Division decision. Additionally, Commissioner noted that only Board not Board attorney can authorize any proposition relative to expenditure of funds.

DECEMBER 24, 1992

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7743-91

AGENCY DKT. NO. 164-5/91

KEVIN GRIFFIN,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PATERSON,

Respondent.

Raymond A. Reddin, Esq., for petitioner

David W. Carroll, Esq., for respondent
(Carroll and Weiss, attorneys)

Record Closed: September 28, 1992 Decided: November 12, 1992

BEFORE **DIANA C. SUKOVICH**, ALJ

PROCEDURAL HISTORY

On approximately May 30, 1991, Kevin Griffin (Griffin or petitioner) filed a petition with the State Department of Education (Department) seeking back pay and payment of legal fees from the City of Paterson Board of Education (Board or respondent). Respondent filed an answer, and the matter was transmitted by the Department to the Office of Administrative Law on August 9, 1991 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to 13.

Telephone conferences were held on March 5 and May 18, 1992. The parties filed prehearing memoranda, and a hearing was held on September 28, 1992 The parties presented oral argument at the close of the hearing By telephone conference conducted on November 2, 1992, this judge requested that the parties file supplemental memoranda. The parties did so on November 5, 1992. However, the closing of the record was not extended, and the record was closed on September 28, 1992

NATURE OF THE CASE

Petitioner, while employed by respondent, was arrested on May 23, 1988, was indicted on December 6, 1988, and was subsequently acquitted on July 10, 1990. He was suspended without pay by respondent on the date of the indictment and was restored to the payroll effective April 1, 1991 pursuant to a court order issued April 4, 1991.

Griffin seeks back pay for the period of his suspension, as well as reimbursement of counsel fees related to defense of the criminal action and the current matter. The latter request is based on an argument that respondent represented, at the time of the indictment, that if Griffin were acquitted, he would be restored to his former employment and reimbursed back pay and legal fees. Griffin argues that he is entitled to back pay based on the interpretation of relevant statutory provisions by the Commissioner of the Department (Commissioner). Respondent denies any agreement with petitioner and also argues that he is not entitled to the relief requested pursuant to applicable law.

STIPULATIONS

The parties entered into the following stipulations:

1. During the 1987-88 and 1988-89 school years, and for several years prior thereto, petitioner was employed by the Board as a custodian.

2. On May 23, 1988, petitioner was arrested and charged with various sexual offenses by two young female students of the school to which he was assigned.

3. Following his arrest, petitioner was transferred to another school where he continued his employment pending further developments.

4. Petitioner was indicted by the Passaic County Grand Jury on December 7, 1988 and charged with eight counts of sexual assault, attempted sexual assault and/or endangering the welfare of a child. The acts were alleged to have occurred during the 1987-88 school year and to have involved three girl students. Exhibit R-1 is a true copy of the indictment.

5. As a result of the indictment, petitioner was suspended that same day without pay pursuant to statutes. Exhibit R-2 is a copy of the letter notifying petitioner of his suspension. This letter was personally handed to petitioner on Wednesday, December 7, 1988.

6. Petitioner, following a jury trial, was acquitted of most counts of the indictment on July 10, 1990. The remaining counts were dismissed by the court on September 7, 1990.

7. On July 11, 1990, petitioner, through his attorney requested reinstatement with back pay and reimbursement of attorney fees.

8. When no decision was forthcoming from the Board, petitioner in March, 1991, through his attorney, filed a Verified Complaint and Order to Show Cause in the Superior Court, Passaic County.

9 On April 4, 1991, the Honorable Amos C. Saunders J.S.C., entered an Order directing petitioner's restoration to payroll as of April 1, 1991 and directing that all further issues be submitted to the Commissioner. The Order is as stated in Exhibit R-3.

10. Petitioner was restored to payroll April 1, 1991 and has ever since continued his employment with the Paterson School District at his appropriate salary.

11. The Board was abolished by Order of the State Board of Education dated

August 7, 1991, and a State operated district was created pursuant to *N.J.S.A.* 18A:7A-15.1. The parties agree that this change in governance does not affect the liabilities or defenses and that whatever liabilities or defenses were applicable to claims against the Board are likewise attributed to or available to the current State operated school district.

12. Had petitioner remained in the employment of the Paterson School District from December 1, 1988 through March 31, 1991, petitioner would have earned a total of $52,611.04. Exhibit R-4 is a statement of what his earnings would have been during that period, broken down on a monthly basis.

13. Pursuant to the above-referenced Order, petitioner filed the instant petition with the Commissioner on or about May 9, 1991.

14. From the date of his suspension, December 7, 1988, until the date of his reinstatement, April 1, 1991, petitioner earned no income from any source.

15. The amount of counsel fees incurred by petitioner, $12,000, is reasonable

16. If Sonia Williams (Williams) were to testify, her testimony would be as stated in Exhibit R-5.

FINDINGS OF FACT

Petitioner offered the testimony of Robert Graves Rosenberg, Esq. (Rosenberg), respondent's counsel during relevant time periods. As noted hereinabove, the parties stipulated to the testimony of Williams, who is a secretary in the Paterson School District. Respondent offered no witnesses. The documents referenced in the stipulations were moved into evidence.

Williams' certified statement was that she was a secretary assigned to respondent's then superintendent, Dr. Frank Napier (Napier) during the 1988-89 school year. Her responsibilities included provision of clerical support to the Board's

Personnel Committee (Committee). The thrust of Williams' certification was that the Committee instituted a practice of taping Committee meetings commencing May 25, 1989, that she did not attend meetings after that practice was instituted, although she assisted in the preparation of notes and /or transcriptions, and that she did not attend meetings of the Committee prior to May 25, 1989, but had access to all written Committee records that were maintained. Williams certified that she recently reviewed all available records of the Committee from the 1988-89 school year and did not find any documents referencing Griffin or communications from Rosenberg pertaining to Griffin or Griffin's attorney, Raymond Reddin (Reddin). Williams certified that she did find references to two Committee meetings on December 5, 1988 and October 13, 1988 and that none of the documents referenced the current subject matter. Rosenberg testified regarding his understanding of policies and practices of respondent generally pertaining to suspensions and reimbursement of costs and of respondent's determinations in that respect regarding Griffin specifically.

Rosenberg impressed me as a sincere witness. However, his testimony regarding prior practices of respondent regarding the awarding of back pay and reimbursement of costs was very general. Similarly, his testimony regarding any communications or authorizations for reimbursement of costs to Griffin was not grounded in detail. I am persuaded that the record does not establish any clear cut policies, either in the past nor during the applicable time periods, of awarding of back pay or reimbursement of costs nor any such agreements with Griffin authorized by the Board.

Based upon a review of the entire record, I **FIND** the following to be additional **FACTS**.

Rosenberg commenced employment with respondent in September 1984, at which time he was an assistant counsel to the Board. He also maintained a private law practice. He became acting chief counsel to the Board in November 1987, and counsel, as well as secretary to the Board, in February 1985. Rosenberg was employed by respondent until June 30, 1990. During his tenure with the Board, he maintained a private practice. He devoted approximately 75 percent of his professional time to respondent's affairs; and 25 percent, to his practice.

In May of 1988, Rosenberg attended a meeting with Napier, respondent's then Superintendent of Schools, Edward Magliaccio (Magliaccio), the Board's Business Administrator, who ultimately was in charge of all custodians employed by respondent, and Norm Malone (Malone), the direct supervisor of custodians. During this meeting, Rosenberg was informed of allegations of sexual assault by petitioner and was queried regarding what the Board should do and what standard policy was. As of that time, petitioner was not yet indicted. Rosenberg recommended that petitioner be transferred to a facility which had in the past been used as a school, but which for the past 20 years has been used as a "shop" by respondent, that is, for maintenance activities and storing of supplies. This recommendation was made so that petitioner would not be in daily contact with any students because only adults are present at the facility. As stipulated, petitioner was transferred subsequent to the May 23, 1988 arrest.

Rosenberg attended another meeting with Board personnel on approximately December 5, 1988, which meeting was held in Napier's office. Rosenberg, Napier, Magliaccio, and Malone were present, as was the then Board president, Elysse Evans (Evans). The individuals present generally discussed what should be done with petitioner, what action should be taken by the Board, and various recommendations of Rosenberg, Napier, and Maggalioccio. Evans was to report back to the Board on the recommendations of the Superintendent's office.

As stipulated, petitioner was suspended without pay December 7, 1988 and was notified of this action by a letter handed to him on December 7, 1988. This letter, which was sent over Rosenberg's signature, informed Griffin that because of an indictment alleging sexual crimes with children, he was suspended by the Superintendent without pay pursuant to state statutes. The letter contained no references or any discussion pertaining to the question of back pay or reimbursement of costs.

Approximately within one week of the December 1988 meeting, the Board considered the suspension determination at a Board meeting. In addition, Reddin called Rosenberg and requested that petitioner be suspended with pay. Rosenberg told Reddin that this could not be done because applicable statutes required a suspension without pay and told Reddin that it was Board policy to provide back pay and reimbursement of costs to employees suspended because of pending charges

who are subsequently vindicated. During the course of the conversation, Reddin referenced the possibility of legal action by petitioner regarding the suspension without pay. It was Rosenberg's conclusion at the time that if petitioner sued regarding the suspension without pay, Griffin would lose.

Available records of the Committee for the 1988-89 school year do not contain any notes or other documents referencing petitioner or any communications from Rosenberg regarding Griffin or petitioner's attorney, Reddin. The documents contain references to two Committee meetings held in the last three months of 1988. One was held on December 5, 1988; and the other, on October 13, 1988. None of the documents contain any reference to the matters at issue.

In the past, a principal employed by respondent, a Mr. Orbach (Orbach), was charged on two separate occasions with second degree sexual assault, transferred prior to indictments being issued, and then suspended without pay after indictments were issued. Orbach was acquitted on both occasions, and respondent paid him back pay plus attorney fees, as well as the costs of private investigators. The first case involving Orbach was in approximately 1976, and the second; in 1976-77, prior to Rosenberg's tenure as counsel to the Board. Another case involved Joseph Clark (Clark), a Board employee involved in a criminal contempt charge The matters involving Clark occurred in approximately 1987, 1988 and 1989 Respondent reimbursed Clark for counsel fees. The specific circumstances regarding these incidences, as well as reimbursement by respondent, cannot be determined from the record. There are no written documents memorializing any prior practice by respondent regarding awarding of back pay or reimbursement of costs.

In the past, the Division of Youth and Family Services (DYFS) of the State Department of Human Services (DYFS), has been involved in situations pertaining to allegations involving Board employees and students. The Board has, in the past, reimbursed employees involved in DYFS investigations for costs when the employees have been vindicated. The circumstances pertaining to any such instances cannot be determined from the record. Respondent has also, in the past, provided reimbursement in other cases, the exact nature of which and specific relevant facts pertaining to which also cannot be determined from the record.

During Rosenberg's tenure, respondent's Superintendent would, on occasion, notify Rosenberg of various agreements to reimburse costs reached with employees, and Rosenberg would negotiate reimbursement with employee's counsel. In some instances, respondent negotiated set fees at the outset with employees' attorneys, for example, on issues involving municipal court matters, in efforts to minimize costs to respondent. This was sometimes done in conjunction with efforts of respondent's corporation counsel. In other instances, including indictments, the Board subsequently negotiated fees with employees' counsel, rather than setting a minimum fee at the outset. Whatever approach was taken in the past, each matter was presented to the Board for formal action via a resolution approving the issuance of checks. It cannot be determined from the record whether any such practices of the Board are reflected in collective bargaining agreements with Board employees. Rosenberg did not negotiate fees with Reddin. No Board resolutions were issued regarding reimbursement to Griffin.

Rosenberg unexpectedly became ill in March 1990 and never returned to employment with the Board. As stipulated, petitioner was acquitted of most counts of the indictment on July 10, 1990, and the remaining counts were dismissed by the court on December 7, 1990. Rosenberg was not counsel to the Board as of July 1990 nor September 1990.

Petitioner's salary for December 1988 was $1,428.58.

CONCLUSIONS AND ORDERS

Petitioner seeks relief pursuant to *N.J.S.A.* 18A:6-9, which vests the Commissioner with jurisdiction to hear and determine all controversies and disputes arising under the school laws. Local school boards have the authority to discontinue the salary of employees who are under criminal indictment:

> 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. N.J.S.A. 18A:6-8.3 (emphasis added).

However, *N.J.S.A.* 18A:6-8.3 does not address the question of restoration of lost salary subsequent to an acquital of criminal charges. In contrast, an unindicted school employee subject to a tenure charge is expressly entitled to resumption of full salary after expiration of 120 calendar days from certification of a charge and, if the charge is dismissed, such person shall be reinstated immediately with full pay from the first day of the suspension. *Id.* at §14.

Any person holding employment in a public school system of the State who is illegally dismissed or suspended is entitled to compensation for the period covered by the illegal dismissal or suspension, if such shall be finally determined to have been without good cause, upon written application therefore with the board or body with whom he was employed, within 30 days after such determination. *Id.* at §30. The suspension of Griffin, however, was not without good cause at the time it was made. As discussed, the suspension without pay of an employee who is indicted is authorized pursuant to *N.J.S.A.* 18A:6-8.3. *See also, Slater v. Ramapo-Indian Hills Bd. of Ed.*, 237 *N.J. Super.* 424 (App. Div. 1989). Petitioner was indicated for sexual assault and sexual conduct with minor females. Such charges do not constitute acts or omissions arising out of or in the course of a performance of the duties of a school district employee. *McCorkle v. Pittsgrove Tp. Bd. of Ed.*, A-5550-81T2, unreported App. Div., dec'd June 2, 1983 (*McCorkle*).

It is reasonable to conclude that there is no express statutory right to back pay subsequent to an acquittal. Notwithstanding, in a recent case involving the question of whether a suspended teacher should receive back pay following acquittal of criminal charges, the Commissioner held that "fundamental fairness" dictated that the teacher be granted back pay, including sick pay and vacation pay, in light of the fact that a trial by jury yielded a verdict of not guilty on an indictment. *Beatty v. Newton Bd. of Ed.*, 1991 *S.L.D.* (Comm'r. June 25, 1991) (*Beatty*).

At all relevant times, Beatty was a tenured teacher in the Town of Newton School District. In 1988, a complaint was issued against him alleging aggravated sexual assault in violation of *N.J.S.A.* 2C:14-2(a)(2) and endangering the welfare of a child in violation of *N.J.S.A.* 2C:24-4A, both charges naming Beatty's stepdaughter as the alleged victim. As a result, the Newton Board of Education suspended Beatty from his teaching duties, but continued paying a salary while the case was pending grand jury presentation. On approximately June 8, 1989, the Sussex County Grand

Jury handed up a six-count indictment against Beatty, alleging various acts of sexual conduct against minor females, including his stepdaughter. Following the indictment, Beatty was suspended without pay. A jury trial was held in December 1990, and a verdict of not guilty, completely acquitting Beatty of all charges on all counts, was returned on September 20, 1990. Beatty thereafter requested reinstatement and back pay. Newton's superintendent notified Beatty by letter dated December 20, 1990 that he would be continued to be suspended pending the investigation of disciplinary charges, but that the suspension would be with pay commencing December 21, 1990. The board subsequently determined that Beatty was not entitled to back pay pursuant to *N.J.S.A.* 18A:6-8.3 and thereafter served tenure charges on Beatty on April 24, 1991. *Beatty* at 1-3.

The Commissioner characterized the issue presented in *Beatty* as "a case of first impression," distinguishing a prior decision of the State Board of Education, *Pawlak v. Board of the Borough of Hopatcong*, (App. Div. July 12, 1989), which involved disposition of an indictment through completion of a pretrial intervention program. *Beatty* at 8. The Commissioner determined that in the context of the *Beatty* facts, there should be an award of back pay:

> Notwithstanding the absence of specific statutory language, the Commissioner believes that in weighing the equities of this matter, fundamental fairness dictates that petitioner be granted back pay for the period of his unpaid suspension given that a trial by jury yielded a verdict of not guilty on the indictment which provided the basis for his suspension without pay under *N.J.S.A.* 18A:6-8.3. At the present time, petitioner has not been found guilty of any wrongdoing and the indictment upon which the suspension is based has been disposed of in his favor; therefore, it is concluded that as a matter of equity, back pay is warranted under the circumstances, less mitigation for monies earned during the period of his lawful suspension without pay from June 1989 to December 20, 1990. The fact that tenure charges are pending against petitioner and he has been lawfully suspended without pay under the provisions of *N.J.S.A.* 18A:6-10 does not alter the equities of the matter. If petitioner is found guilty of the tenure charges, an appropriate penalty shall be fashioned by the Commissioner, which could include but is not limited to reduction in salary or dismissal. *N.J.S.A.* 18A:6-10 *Beatty* at 9-10.

Relying on *Balsley v. North Hunterdon Board of Education*, 117 *N.J.* 434 (1990), the Commissioner determined that he did not have the authority to grant attorney fees

but, concerning Beatty's request for sick pay and vacation pay, held that "petitioner is to have restored to him whatever emoluments and benefits he would have had owing to him if he had never been suspended without pay under N.J.S.A. 18A:6-8.3." *Id.* at 10.*

The facts of the *Beatty* case are strikingly similar to those of the current one. In addition, the fact that respondent did not issue tenure charges against petitioner bolsters Griffin's claim for back pay. However, this distinction is not determinative.

I am, however, persuaded that petitioner is not entitled to legal fees pursuant to *N.J.S.A.* 18A.16-6.1, which provides that if any criminal action is instituted against an individual for an act or omission, and such proceeding is dismissed or results in a final disposition in favor of such person, a local board of education shall reimburse him for the course of defending the proceeding, including reasonable counsel fees. "N.J.S.A. 18A:16-6.1 is specifically tied in legislative context to N.J.S.A. 18A:16-6." *McCorkle* at 2. The latter provision provides that whenever any civil action is brought against any person holding employment under the jurisdiction of any board of education, for an act or omission arising out of and in the course of the performance of his duties, the board shall defray all costs of defending such action, including reasonable counsel fees and expenses. *N.J.S.A.* 18A:16-6. In *McCorkle*, the court rejected a claim for counsel fees by a teacher indicted for sexual assault on a minor female student who subsequently was accepted into a pre-trial intervention program and completed a six-month program resulting in an order dismissing the indictment and a marking of his case as 'Complaint Dismissed--Matter Adjusted'. *McCorkle* at 1. Without reaching the question of whether the 'dismissal' constituted the type of dismissal the Legislature contemplated as grounds for reimbursement, the court determined, as referenced hereinabove, that the employee was not entitled to reimbursement because a criminal charge of the nature implicated was

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* The Commissioner's reliance on *Balsley* appears to be misplaced. In *Balsley*, the Court held that the Commissioner is not authorized to award counsel fees in education-discrimination proceedings brought before the Commissioner or transferred to the Commissioner. However, it is apparent that the counsel fees in question related to the costs of litigation before the Department. *Balsey* did not address a situation in which an individual seeks a determination from the Commissioner on the obligation of a local school board to reimburse an employee for counsel fees to litigate a proceeding in another forum.

not of the nature constituting an act or omission arising out of or in the course of the performance of employment duties. *Id.* at 2. The same reasoning applies to petitioner.

The only basis on which petitioner can therefore claim reimbursement of counsel fees is in essence a contract theory. The Commissioner's jurisdiction to resolve a contract issue is assumed in light of the applicable court order.

I am not persuaded that a binding contract has been established by petitioner, who has the burden of proof. The inference in Rosenberg's testimony was that Napier and other personnel agreed to reimbursement in return for an agreement by Griffin not to take legal action against his suspension without pay subsequent to the indictment. I am persuaded that there is no credible evidence on which to base a finding that this was expressly decided by respondent's personnel, nor communicated to Griffin, notwithstanding the question of whether or not formal action was required by the Board. Parenthetically, I am not persuaded by respondent's argument that consideration was not provided by Griffin, assuming that there were such communications, because he had no legal claim to reimbursement subsequent to the indictment. It is apparent that costs and some uncertainty are always associated with legal proceedings, which respondent may very well have wanted to avoid. However, I am persuaded by respondent's argument that quasi-contract has not been established in this case, the evidence does not establish reliance, even assuming communications of the nature implicated by Griffin.

The expenditure of funds by a local school board in the custody of its treasurer representing school moneys shall be effectuated in a certain specified manner and circumstances, including after audit of the account or demand to be paid, by the secretary, after approval by the board of education, or when provided by resolution of the board, after audit of the account or demand to be paid, and approval by a person designated by the Board. *N.J.S.A.* 18A:19-1. Similarly, applicable statutes provide that no claim or demand against a school district shall be paid unless approved by a board of education or a person designated by the board for such purpose:

> No claim or demand against a school district shall be paid by the treasurer unless it is authorized by law and the rules of the board of education of the district, is fully itemized and verified, has been duly audited as required by law, has been presented to, and approved by, the board at a meeting thereof, or presented to, and approved by, a person designated by the board for that purpose, and the amount required to pay the same is available for said purpose. *Id.* at §19-2.

Expenditures exceeding $150, except for payrolls and debt service, shall be verified by affidavit or signed declaration in writing. *Id.* at §19-3. (Supp. 1992-93). All claims and demands against a school board, except those to be paid from funds derived from athletic events or other activities of pupil organizations, shall, unless otherwise provided by resolution of the board, be examined, audited, and certified in writing by the secretary and presented to the board for its approval at a regular meeting and, if found to be correct, shall be ordered paid by the board. *N.J.S.A.* 18A:19-4. A board of education may, by resolution, designate a person, in addition to the secretary, to audit an account and demand to be paid and provide for approval of such account or demand by such person or the secretary prior to presentation to the board. Any such approval shall be presented to the board at their next meeting for ratification. A board may establish a maximum dollar amount for which payment may be authorized without prior board approval. *Id.* at §4.1.

As respondent argues, there is no evidence that a request for reimbursement was ever presented and approved by the Board, or that the Board designated anyone, including Rosenberg, to approve such a request. In fact, the absence of a formal Board resolution, in light of its past practices, raises an inference that the Board did not approve petitioner's request for reimbursement.

There is no evidence that the Committee ever endorsed or discussed Rosenberg's "promise" on behalf of respondent. In fact, Williams' certification supports an inference that it did not do so. The evidence does not support a finding that the Superintendent expressly authorized Rosenberg to make an express promise to petitioner or his attorney that Griffin would be reimbursed.

Rosenberg acknowledged on cross-examination that to a substantial degree the basis for the Board's practices in the past of reimbursement of costs was legal

advice given by a former Board attorney 10 to 15 years ago that such was legally required. Prior advice of counsel, especially of such distant tenure, does not support a finding that the Board's practice at the time in question was to provide reimbursement. In any event, there is nothing, as respondent argues, to prevent a change in Board policy nor does the evidence support petitioner's position that there were binding assurances of reimbursement made to him. Absent approval of the Board or an individual designated by the Board for such purpose, any promise made to petitioner cannot bind respondent. *See, e.g., Vandenbren v. Board of Education of the School District of Wanaque*, 1967, *S.L.D.* 4 (Jan. 19, 1967), *aff'd* State Board of Education, 1967 *S.L.D.* 6 (Jan. 8, 1968), *Cardman v. Board of Education of the Township of Millburn*, 1977, *S.L.D.* 746, (June 23, 1977). In the analogous area of municipal corporations, the unauthorized consent of a municipal attorney cannot bind the governing body. *City of Jersey City v. Roosevelt Stadium*, 210 *N.J. Super.* 315 (App. Div. 1986).

Based on the foregoing, I **CONCLUDE** that petitioner is entitled to back pay for the period from December 7, 1988 through March 31, 1991. As stipulated, had petitioned remained in respondent's employ from December 1, 1988 through March 31, 1991, he would have earned a total of $52,611.04. Strictly speaking, petitioner should only receive back pay commencing December 7, 1988, the date of his suspension without pay. Petitioner should not receive back pay for the first week of December 1988. However, the record does not contain data indicating what would constitute the equivalent of a weekly salary For Griffin. This Judge takes notice of the fact that December 1988 had 22 weekdays. Converting petitioner's monthly salary for December 1988 into a daily rate of $64.94 ($1,428.58 divided by 22), a reduction for five working days representing the first week of December would result in a decrease of $324.68 ($64.94 times 5), or total reimbursement of back pay in the amount of $52,286.36 ($52,611.04 minus $324.68). I also **CONCLUDE** that petitioner is not entitled to reimbursement of counsel fees pertaining to the criminal charges relevant to the indictment in question and the current matter.

It is hereby **ORDERED** that respondent reimburse petitioner for back pay for the period December 7, 1988 through March 31, 1991 in the amount of $52,286.36 within 90 days of the effective date of this decision. It is also hereby **ORDERED** that petitioner's request for counsel fees associated with defending the indictment issued on December 7, 1988 and with the current matter be and is hereby **DENIED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 12, 1992
Date

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

11/16/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 17 1992
Date

OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

LIST OF WITNESSES

For Petitioner:
Robert Rosenberg, Esq.

LIST OF EXHIBITS IN EVIDENCE

R-1	Indictment number 88 12 1973 1
R-2	Letter dated December 7, 1988
R-3	Order dated April 4, 1991
R-4	Monthly salaries for petitioner for December 1988 through March 1991
R-5	Certification of Sonia Williams

KEVIN GRIFFIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner and Respondent filed timely exceptions in accordance with N.J.A.C. 1:1-18.4.

Petitioner concurs with the initial decision of the ALJ regarding the awarding of back pay but urges that the decision be reversed regarding reimbursement for counsel fees incurred. Although petitioner disagrees that the charges levied against him did not arise out of or in the course of the performance of his duties as a school employee, he acknowledges that the ALJ utilized the applicable case law in making this determination. Petitioner does, however, believe that the ALJ erred in determining that, absent ratification by the Board, an agreement reached with the Board's attorney regarding reimbursement for legal fees incurred by the petitioner is not an enforceable contract. Petitioner contends that he entered into an agreement, in good faith, with the Board's attorney who had the apparent and seemingly express authority to bind the Board. Petitioner avers that he has established the existence of a contractual relationship and the burden should now be placed on the Board to prove that its agent did not have the authority to bind it.

The Board's exception avers that the ALJ erred in essentially deciding the back pay issue on the authority of Beatty v. Newton Board of Education, 1991 S.L.D. 1001, appeal pending, State Board of Education. The Board concedes that Beatty supports the ALJ's finding but disputes the soundness of using this decision as precedent in light of an intervening Appellate Division decision, as well as consideration of an analogous municipal statute and Supreme Court case law which was not cited or discussed in Beatty.

The Board contends that the absence of a statutory provision for back pay is significant. To support its position the Board utilizes a municipal statute authorizing compensation for police officers in circumstances similar to those of the petitioner and Supreme Court discussion regarding the Legislature's ability to provide compensation for police officers in such circumstances if it so desired. The Board avers that, absent authorizing legislation, the back pay determination in the instant case should be made in accordance with the common-law rule articulated in DelRossi v. DHS, 256 N.J. Super. 286 (App. Div. 1992). Essentially, this rule specifies that "public officers" are not entitled to compensation for periods of time they did not serve the public even if the period of no service was due to the pendency of criminal charges ultimately dismissed. Therefore, the Board seeks reversal of that portion of the initial decision allowing back pay.

Upon review of the record in this matter, the Commissioner adopts the recommended ALJ decision for the reasons outlined in the decision. The Commissioner would add the following in response to petitioner's exception, regarding the establishment of a contract, to the ALJ's cognizant disposition recited at pages 12-14. The

Commissioner notes that pursuant to N.J.S.A. 18A:19-2 no expenditures may be authorized by other than the Board in accordance with its prescribed policies and procedures. Consequently, petitioner could not have reasonably relied on assurances from a Board attorney regarding any proposition related to the expenditure of funds without formal Board approval and action.

In response to the Board's exception, the Commissioner rejects the Board's contention that, absent specific statutory authority, petitioner should be denied back pay under the common-law public officer standard outlined in DelRossi. The Commissioner notes the footnote on page 290 of DelRossi where the court acknowledges that the common-law rule articulated does not apply to public employees who are not public "officers." The footnote continues that DelRossi qualifies as a public "officer" by virtue of his position as a police lieutenant (or sergeant). The Commissioner determines that the Board's argument that the school custodian petitioner in the instant case should be viewed as a "public officer" is without merit.

Additionally, the Commissioner notes that the police officer plaintiff in DelRossi would also not qualify for back pay under the "fundamental fairness" standard expressed in Beatty since the indictment upon which his suspension was based was not disposed of in his favor but through completion of PTI.

Accordingly, the initial decision of the Office of Administrative Law awarding petitioner back pay but denying reimbursement for legal fees is affirmed.

ACTING COMMISSIONER OF EDUCATION

DECEMBER 24, 1992

DATE OF MAILING - DECEMBER 24, 1992

CUSTODIAL AND MAINTENANCE STATUS 311-92
x Criminal Charges
x Legal Fees
x Sexual Abuse
x Suspension (Stat)

CP
12/92
GRS

311-92

KEVIN GRIFFIN,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF PATERSON, PASSAIC COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning custodian sought back pay and payment of legal fees from Board following acquittal (sexual assault, attempted sexual assault and/or endangering welfare of child).

Citing Beatty Commissioner decision, ALJ found petitioner was entitled to back pay for period from December 7, 1988 to March 31, 1991. ALJ determined petitioner was not entitled to reimbursement of counsel fees pertaining to criminal charges relevant to indictment in question and current matter (N.J.S.A. 18A:16-6.1) since charges were not of nature constituting act of omission arising out of or in course of performance of employment duties.

Commissioner adopted findings and determination in initial decision and rejected Board's exception requiring that absent statutory authority for awarding of back pay, petitioner be subject to the "public officer" standard set forth in DelRossi Appellate Division decision. Additionally, Commissioner noted that only Board not Board attorney can authorize any proposition relative to expenditure of funds.

DECEMBER 24, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7743-91
AGENCY DKT NO. 164-5/91

KEVIN GRIFFIN,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF PATERSON,
Respondent

Raymond A. Reddin, Esq., for petitioner

David W. Carroll, Esq., for respondent
(Carroll and Weiss, attorneys)

Record Closed: September 28, 1992 Decided: November 12, 1992

BEFORE **DIANA C. SUKOVICH, ALJ**

PROCEDURAL HISTORY

On approximately May 30, 1991, Kevin Griffin (Griffin or petitioner) filed a petition with the State Department of Education (Department) seeking back pay and payment of legal fees from the City of Paterson Board of Education (Board or respondent). Respondent filed an answer, and the matter was transmitted by the Department to the Office of Administrative Law on August 9, 1991 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to 13.

Telephone conferences were held on March 5 and May 18, 1992. The parties filed prehearing memoranda, and a hearing was held on September 28, 1992 The parties presented oral argument at the close of the hearing By telephone conference conducted on November 2, 1992, this judge requested that the parties file supplemental memoranda. The parties did so on November 5, 1992. However, the closing of the record was not extended, and the record was closed on September 28, 1992

NATURE OF THE CASE

Petitioner, while employed by respondent, was arrested on May 23, 1988, was indicted on December 6, 1988, and was subsequently acquitted on July 10, 1990. He was suspended without pay by respondent on the date of the indictment and was restored to the payroll effective April 1, 1991 pursuant to a court order issued April 4, 1991

Griffin seeks back pay for the period of his suspension, as well as reimbursement of counsel fees related to defense of the criminal action and the current matter. The latter request is based on an argument that respondent represented, at the time of the indictment, that if Griffin were acquitted, he would be restored to his former employment and reimbursed back pay and legal fees Griffin argues that he is entitled to back pay based on the interpretation of relevant statutory provisions by the Commissioner of the Department (Commissioner). Respondent denies any agreement with petitioner and also argues that he is not entitled to the relief requested pursuant to applicable law.

STIPULATIONS

The parties entered into the following stipulations:

1. During the 1987-88 and 1988-89 school years, and for several years prior thereto, petitioner was employed by the Board as a custodian.

2. On May 23, 1988, petitioner was arrested and charged with various sexual offenses by two young female students of the school to which he was assigned.

3. Following his arrest, petitioner was transferred to another school where he continued his employment pending further developments.

4. Petitioner was indicted by the Passaic County Grand Jury on December 7, 1988 and charged with eight counts of sexual assault, attempted sexual assault and/or endangering the welfare of a child. The acts were alleged to have occurred during the 1987-88 school year and to have involved three girl students. Exhibit R-1 is a true copy of the indictment.

5. As a result of the indictment, petitioner was suspended that same day without pay pursuant to statutes. Exhibit R-2 is a copy of the letter notifying petitioner of his suspension. This letter was personally handed to petitioner on Wednesday, December 7, 1988.

6. Petitioner, following a jury trial, was acquitted of most counts of the indictment on July 10, 1990. The remaining counts were dismissed by the court on September 7, 1990.

7. On July 11, 1990, petitioner, through his attorney requested reinstatement with back pay and reimbursement of attorney fees.

8. When no decision was forthcoming from the Board, petitioner in March, 1991, through his attorney, filed a Verified Complaint and Order to Show Cause in the Superior Court, Passaic County.

9 On April 4, 1991, the Honorable Amos C. Saunders J.S.C., entered an Order directing petitioner's restoration to payroll as of April 1, 1991 and directing that all further issues be submitted to the Commissioner. The Order is as stated in Exhibit R-3.

10. Petitioner was restored to payroll April 1, 1991 and has ever since continued his employment with the Paterson School District at his appropriate salary.

11 The Board was abolished by Order of the State Board of Education dated

August 7, 1991, and a State operated district was created pursuant to *N.J.S.A.* 18A:7A-15.1. The parties agree that this change in governance does not affect the liabilities or defenses and that whatever liabilities or defenses were applicable to claims against the Board are likewise attributed to or available to the current State operated school district.

12. Had petitioner remained in the employment of the Paterson School District from December 1, 1988 through March 31, 1991, petitioner would have earned a total of $52,611.04. Exhibit R-4 is a statement of what his earnings would have been during that period, broken down on a monthly basis.

13. Pursuant to the above-referenced Order, petitioner filed the instant petition with the Commissioner on or about May 9, 1991.

14. From the date of his suspension, December 7, 1988, until the date of his reinstatement, April 1, 1991, petitioner earned no income from any source.

15. The amount of counsel fees incurred by petitioner, $12,000, is reasonable

16. If Sonia Williams (Williams) were to testify, her testimony would be as stated in Exhibit R-5.

FINDINGS OF FACT

Petitioner offered the testimony of Robert Graves Rosenberg, Esq. (Rosenberg), respondent's counsel during relevant time periods. As noted hereinabove, the parties stipulated to the testimony of Williams, who is a secretary in the Paterson School District. Respondent offered no witnesses. The documents referenced in the stipulations were moved into evidence.

Williams' certified statement was that she was a secretary assigned to respondent's then superintendent, Dr. Frank Napier (Napier) during the 1988-89 school year. Her responsibilities included provision of clerical support to the Board's

Personnel Committee (Committee). The thrust of Williams' certification was that the Committee instituted a practice of taping Committee meetings commencing May 25, 1989, that she did not attend meetings after that practice was instituted, although she assisted in the preparation of notes and /or transcriptions, and that she did not attend meetings of the Committee prior to May 25, 1989, but had access to all written Committee records that were maintained. Williams certified that she recently reviewed all available records of the Committee from the 1988-89 school year and did not find any documents referencing Griffin or communications from Rosenberg pertaining to Griffin or Griffin's attorney, Raymond Reddin (Reddin). Williams certified that she did find references to two Committee meetings on December 5, 1988 and October 13, 1988 and that none of the documents referenced the current subject matter. Rosenberg testified regarding his understanding of policies and practices of respondent generally pertaining to suspensions and reimbursement of costs and of respondent's determinations in that respect regarding Griffin specifically.

Rosenberg impressed me as a sincere witness. However, his testimony regarding prior practices of respondent regarding the awarding of back pay and reimbursement of costs was very general. Similarly, his testimony regarding any communications or authorizations for reimbursement of costs to Griffin was not grounded in detail. I am persuaded that the record does not establish any clear cut policies, either in the past nor during the applicable time periods, of awarding of back pay or reimbursement of costs nor any such agreements with Griffin authorized by the Board.

Based upon a review of the entire record, I **FIND** the following to be additional **FACTS**.

Rosenberg commenced employment with respondent in September 1984, at which time he was an assistant counsel to the Board. He also maintained a private law practice. He became acting chief counsel to the Board in November 1987, and counsel, as well as secretary to the Board, in February 1985. Rosenberg was employed by respondent until June 30, 1990. During his tenure with the Board, he maintained a private practice. He devoted approximately 75 percent of his professional time to respondent's affairs; and 25 percent, to his practice.

In May of 1988, Rosenberg attended a meeting with Napier, respondent's then Superintendent of Schools, Edward Magliaccio (Magliaccio), the Board's Business Administrator, who ultimately was in charge of all custodians employed by respondent, and Norm Malone (Malone), the direct supervisor of custodians. During this meeting, Rosenberg was informed of allegations of sexual assault by petitioner and was queried regarding what the Board should do and what standard policy was. As of that time, petitioner was not yet indicted. Rosenberg recommended that petitioner be transferred to a facility which had in the past been used as a school, but which for the past 20 years has been used as a "shop" by respondent, that is, for maintenance activities and storing of supplies. This recommendation was made so that petitioner would not be in daily contact with any students because only adults are present at the facility. As stipulated, petitioner was transferred subsequent to the May 23, 1988 arrest.

Rosenberg attended another meeting with Board personnel on approximately December 5, 1988, which meeting was held in Napier's office. Rosenberg, Napier, Magliaccio, and Malone were present, as was the then Board president, Elysse Evans (Evans). The individuals present generally discussed what should be done with petitioner, what action should be taken by the Board, and various recommendations of Rosenberg, Napier, and Maggalioccio. Evans was to report back to the Board on the recommendations of the Superintendent's office.

As stipulated, petitioner was suspended without pay December 7 1988 and was notified of this action by a letter handed to him on December 7, 1988. This letter, which was sent over Rosenberg's signature, informed Griffin that because of an indictment alleging sexual crimes with children, he was suspended by the Superintendent without pay pursuant to state statutes. The letter contained no references or any discussion pertaining to the question of back pay or reimbursement of costs.

Approximately within one week of the December 1988 meeting, the Board considered the suspension determination at a Board meeting. In addition, Reddin called Rosenberg and requested that petitioner be suspended with pay. Rosenberg told Reddin that this could not be done because applicable statutes required a suspension without pay and told Reddin that it was Board policy to provide back pay and reimbursement of costs to employees suspended because of pending charges

who are subsequently vindicated. During the course of the conversation, Reddin referenced the possibility of legal action by petitioner regarding the suspension without pay. It was Rosenberg's conclusion at the time that if petitioner sued regarding the suspension without pay, Griffin would lose.

Available records of the Committee for the 1988-89 school year do not contain any notes or other documents referencing petitioner or any communications from Rosenberg regarding Griffin or petitioner's attorney, Reddin. The documents contain references to two Committee meetings held in the last three months of 1988. One was held on December 5, 1988; and the other, on October 13, 1988. None of the documents contain any reference to the matters at issue.

In the past, a principal employed by respondent, a Mr. Orbach (Orbach), was charged on two separate occasions with second degree sexual assault, transferred prior to indictments being issued, and then suspended without pay after indictments were issued. Orbach was acquitted on both occasions, and respondent paid him back pay plus attorney fees, as well as the costs of private investigators. The first case involving Orbach was in approximately 1976, and the second; in 1976-77, prior to Rosenberg's tenure as counsel to the Board. Another case involved Joseph Clark (Clark), a Board employee involved in a criminal contempt charge The matters involving Clark occurred in approximately 1987, 1988 and 1989 Respondent reimbursed Clark for counsel fees. The specific circumstances regarding these incidences, as well as reimbursement by respondent, cannot be determined from the record. There are no written documents memorializing any prior practice by respondent regarding awarding of back pay or reimbursement of costs.

In the past, the Division of Youth and Family Services (DYFS) of the State Department of Human Services (DYFS), has been involved in situations pertaining to allegations involving Board employees and students. The Board has, in the past, reimbursed employees involved in DYFS investigations for costs when the employees have been vindicated. The circumstances pertaining to any such instances cannot be determined from the record. Respondent has also, in the past, provided reimbursement in other cases, the exact nature of which and specific relevant facts pertaining to which also cannot be determined from the record.

During Rosenberg's tenure, respondent's Superintendent would, on occasion, notify Rosenberg of various agreements to reimburse costs reached with employees, and Rosenberg would negotiate reimbursement with employee's counsel. In some instances, respondent negotiated set fees at the outset with employees' attorneys, for example, on issues involving municipal court matters, in efforts to minimize costs to respondent. This was sometimes done in conjunction with efforts of respondent's corporation counsel. In other instances, including indictments, the Board subsequently negotiated fees with employees' counsel, rather than setting a minimum fee at the outset. Whatever approach was taken in the past, each matter was presented to the Board for formal action via a resolution approving the issuance of checks. It cannot be determined from the record whether any such practices of the Board are reflected in collective bargaining agreements with Board employees. Rosenberg did not negotiate fees with Reddin. No Board resolutions were issued regarding reimbursement to Griffin.

Rosenberg unexpectedly became ill in March 1990 and never returned to employment with the Board. As stipulated, petitioner was acquitted of most counts of the indictment on July 10, 1990, and the remaining counts were dismissed by the court on December 7, 1990. Rosenberg was not counsel to the Board as of July 1990 nor September 1990.

Petitioner's salary for December 1988 was $1,428.58.

CONCLUSIONS AND ORDERS

Petitioner seeks relief pursuant to *N.J.S.A.* 18A:6-9, which vests the Commissioner with jurisdiction to hear and determine all controversies and disputes arising under the school laws. Local school boards have the authority to discontinue the salary of employees who are under criminal indictment:

> 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. N.J.S.A. 18A:6-8.3 (emphasis added).

However, *N.J.S.A.* 18A:6-8.3 does not address the question of restoration of lost salary subsequent to an acquital of criminal charges. In contrast, an unindicted school employee subject to a tenure charge is expressly entitled to resumption of full salary after expiration of 120 calendar days from certification of a charge and, if the charge is dismissed, such person shall be reinstated immediately with full pay from the first day of the suspension. *Id.* at §14.

Any person holding employment in a public school system of the State who is illegally dismissed or suspended is entitled to compensation for the period covered by the illegal dismissal or suspension, if such shall be finally determined to have been without good cause, upon written application therefore with the board or body with whom he was employed, within 30 days after such determination. *Id.* at §30. The suspension of Griffin, however, was not without good cause at the time it was made. As discussed, the suspension without pay of an employee who is indicted is authorized pursuant to *N.J.S.A.* 18A:6-8.3. *See also, Slater v. Ramapo-Indian Hills Bd. of Ed.*, 237 *N.J. Super.* 424 (App. Div. 1989). Petitioner was indicated for sexual assault and sexual conduct with minor females. Such charges do not constitute acts or omissions arising out of or in the course of a performance of the duties of a school district employee. *McCorkle v. Pittsgrove Tp. Bd. of Ed.*, A-5550-81T2, unreported App. Div., dec'd June 2, 1983 (*McCorkle*).

It is reasonable to conclude that there is no express statutory right to back pay subsequent to an acquittal. Notwithstanding, in a recent case involving the question of whether a suspended teacher should receive back pay following acquittal of criminal charges, the Commissioner held that "fundamental fairness" dictated that the teacher be granted back pay, including sick pay and vacation pay, in light of the fact that a trial by jury yielded a verdict of not guilty on an indictment. *Beatty v. Newton Bd. of Ed.*, 1991 *S.L.D.* (Comm'r. June 25, 1991) (*Beatty*).

At all relevant times, Beatty was a tenured teacher in the Town of Newton School District. In 1988, a complaint was issued against him alleging aggravated sexual assault in violation of *N.J.S.A.* 2C:14-2(a)(2) and endangering the welfare of a child in violation of *N.J.S.A.* 2C:24-4A, both charges naming Beatty's stepdaughter as the alleged victim. As a result, the Newton Board of Education suspended Beatty from his teaching duties, but continued paying a salary while the case was pending grand jury presentation. On approximately June 8, 1989, the Sussex County Grand

Jury handed up a six-count indictment against Beatty, alleging various acts of sexual conduct against minor females, including his stepdaughter. Following the indictment, Beatty was suspended without pay. A jury trial was held in December 1990, and a verdict of not guilty, completely acquitting Beatty of all charges on all counts, was returned on September 20, 1990. Beatty thereafter requested reinstatement and back pay. Newton's superintendent notified Beatty by letter dated December 20, 1990 that he would be continued to be suspended pending the investigation of disciplinary charges, but that the suspension would be with pay commencing December 21, 1990. The board subsequently determined that Beatty was not entitled to back pay pursuant to *N.J.S.A.* 18A:6-8.3 and thereafter served tenure charges on Beatty on April 24, 1991. *Beatty* at 1-3.

The Commissioner characterized the issue presented in *Beatty* as "a case of first impression," distinguishing a prior decision of the State Board of Education, *Pawlak v. Board of the Borough of Hopatcong*, (App. Div. July 12, 1989), which involved disposition of an indictment through completion of a pretrial intervention program. *Beatty* at 8. The Commissioner determined that in the context of the *Beatty* facts, there should be an award of back pay:

> Notwithstanding the absence of specific statutory language, the Commissioner believes that in weighing the equities of this matter, fundamental fairness dictates that petitioner be granted back pay for the period of his unpaid suspension given that a trial by jury yielded a verdict of not guilty on the indictment which provided the basis for his suspension without pay under *N.J.S.A.* 18A:6-8.3. At the present time, petitioner has not been found guilty of any wrongdoing and the indictment upon which the suspension is based has been disposed of in his favor; therefore, it is concluded that as a matter of equity, back pay is warranted under the circumstances, less mitigation for monies earned during the period of his lawful suspension without pay from June 1989 to December 20, 1990. The fact that tenure charges are pending against petitioner and he has been lawfully suspended without pay under the provisions of *N.J.S.A.* 18A:6-10 does not alter the equities of the matter. If petitioner is found guilty of the tenure charges, an appropriate penalty shall be fashioned by the Commissioner, which could include but is not limited to reduction in salary or dismissal. *N.J.S.A.* 18A:6-10 *Beatty* at 9-10.

Relying on *Balsley v. North Hunterdon Board of Education*, 117 *N.J.* 434 (1990), the Commissioner determined that he did not have the authority to grant attorney fees

but, concerning Beatty's request for sick pay and vacation pay, held that "petitioner is to have restored to him whatever emoluments and benefits he would have had owing to him if he had never been suspended without pay under N.J.S.A. 18A:6-8.3." *Id.* at 10.*

The facts of the *Beatty* case are strikingly similar to those of the current one. In addition, the fact that respondent did not issue tenure charges against petitioner bolsters Griffin's claim for back pay. However, this distinction is not determinative.

I am, however, persuaded that petitioner is not entitled to legal fees pursuant to *N.J.S.A.* 18A.16-6.1, which provides that if any criminal action is instituted against an individual for an act or omission, and such proceeding is dismissed or results in a final disposition in favor of such person, a local board of education shall reimburse him for the course of defending the proceeding, including reasonable counsel fees. "N.J.S.A. 18A:16-6.1 is specifically tied in legislative context to N.J.S.A. 18A:16-6." *McCorkle* at 2. The latter provision provides that whenever any civil action is brought against any person holding employment under the jurisdiction of any board of education, for an act or omission arising out of and in the course of the performance of his duties, the board shall defray all costs of defending such action, including reasonable counsel fees and expenses. ***N.J.S.A.*** 18A:16-6. In *McCorkle*, the court rejected a claim for counsel fees by a teacher indicted for sexual assault on a minor female student who subsequently was accepted into a pre-trial intervention program and completed a six-month program resulting in an order dismissing the indictment and a marking of his case as 'Complaint Dismissed--Matter Adjusted'. *McCorkle* at 1. Without reaching the question of whether the 'dismissal' constituted the type of dismissal the Legislature contemplated as grounds for reimbursement, the court determined, as referenced hereinabove, that the employee was not entitled to reimbursement because a criminal charge of the nature implicated was

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* The Commissioner's reliance on ***Balsley*** appears to be misplaced. In ***Balsley***, the Court held that the Commissioner is not authorized to award counsel fees in education-discrimination proceedings brought before the Commissioner or transferred to the Commissioner. However, it is apparent that the counsel fees in question related to the costs of litigation before the Department. *Balsey* did not address a situation in which an individual seeks a determination from the Commissioner on the obligation of a local school board to reimburse an employee for counsel fees to litigate a proceeding in another forum.

not of the nature constituting an act or omission arising out of or in the course of the performance of employment duties. *Id.* at 2. The same reasoning applies to petitioner.

The only basis on which petitioner can therefore claim reimbursement of counsel fees is in essence a contract theory. The Commissioner's jurisdiction to resolve a contract issue is assumed in light of the applicable court order.

I am not persuaded that a binding contract has been established by petitioner, who has the burden of proof. The inference in Rosenberg's testimony was that Napier and other personnel agreed to reimbursement in return for an agreement by Griffin not to take legal action against his suspension without pay subsequent to the indictment. I am persuaded that there is no credible evidence on which to base a finding that this was expressly decided by respondent's personnel, nor communicated to Griffin, notwithstanding the question of whether or not formal action was required by the Board. Parenthetically, I am not persuaded by respondent's argument that consideration was not provided by Griffin, assuming that there were such communications, because he had no legal claim to reimbursement subsequent to the indictment. It is apparent that costs and some uncertainty are always associated with legal proceedings, which respondent may very well have wanted to avoid. However, I am persuaded by respondent's argument that quasi-contract has not been established in this case, the evidence does not establish reliance, even assuming communications of the nature implicated by Griffin.

The expenditure of funds by a local school board in the custody of its treasurer representing school moneys shall be effectuated in a certain specified manner and circumstances, including after audit of the account or demand to be paid, by the secretary, after approval by the board of education, or when provided by resolution of the board, after audit of the account or demand to be paid, and approval by a person designated by the Board. ***N.J.S.A.*** **18A:19-1.** Similarly, applicable statutes provide that no claim or demand against a school district shall be paid unless approved by a board of education or a person designated by the board for such purpose:

> No claim or demand against a school district shall be paid by the treasurer unless it is authorized by law and the rules of the board of education of the district, is fully itemized and verified, has been duly audited as required by law, has been presented to, and approved by, the board at a meeting thereof, or presented to, and approved by, a person designated by the board for that purpose, and the amount required to pay the same is available for said purpose. *Id.* at §19-2.

Expenditures exceeding $150, except for payrolls and debt service, shall be verified by affidavit or signed declaration in writing. *Id.* at §19-3. (Supp. 1992-93). All claims and demands against a school board, except those to be paid from funds derived from athletic events or other activities of pupil organizations, shall, unless otherwise provided by resolution of the board, be examined, audited, and certified in writing by the secretary and presented to the board for its approval at a regular meeting and, if found to be correct, shall be ordered paid by the board. *N.J.S.A.* 18A:19-4. A board of education may, by resolution, designate a person, in addition to the secretary, to audit an account and demand to be paid and provide for approval of such account or demand by such person or the secretary prior to presentation to the board. Any such approval shall be presented to the board at their next meeting for ratification. A board may establish a maximum dollar amount for which payment may be authorized without prior board approval. *Id.* at §4.1.

As respondent argues, there is no evidence that a request for reimbursement was ever presented and approved by the Board, or that the Board designated anyone, including Rosenberg, to approve such a request. In fact, the absence of a formal Board resolution, in light of its past practices, raises an inference that the Board did not approve petitioner's request for reimbursement.

There is no evidence that the Committee ever endorsed or discussed Rosenberg's "promise" on behalf of respondent. In fact, Williams' certification supports an inference that it did not do so. The evidence does not support a finding that the Superintendent expressly authorized Rosenberg to make an express promise to petitioner or his attorney that Griffin would be reimbursed.

Rosenberg acknowledged on cross-examination that to a substantial degree the basis for the Board's practices in the past of reimbursement of costs was legal

advice given by a former Board attorney 10 to 15 years ago that such was legally required. Prior advice of counsel, especially of such distant tenure, does not support a finding that the Board's practice at the time in question was to provide reimbursement. In any event, there is nothing, as respondent argues, to prevent a change in Board policy nor does the evidence support petitioner's position that there were binding assurances of reimbursement made to him. Absent approval of the Board or an individual designated by the Board for such purpose, any promise made to petitioner cannot bind respondent. *See, e.g., Vandenbren v. Board of Education of the School District of Wanaque*, 1967, *S.L.D.* 4 (Jan. 19, 1967), *aff'd* State Board of Education, 1967 *S.L.D.* 6 (Jan. 8, 1968), *Cardman v. Board of Education of the Township of Millburn*, 1977, *S.L.D.* 746, (June 23, 1977). In the analogous area of municipal corporations, the unauthorized consent of a municipal attorney cannot bind the governing body. *City of Jersey City v. Roosevelt Stadium*, 210 *N.J. Super.* 315 (App. Div. 1986).

Based on the foregoing, I **CONCLUDE** that petitioner is entitled to back pay for the period from December 7, 1988 through March 31, 1991. As stipulated, had petitioned remained in respondent's employ from December 1, 1988 through March 31, 1991, he would have earned a total of $52,611.04. Strictly speaking, petitioner should only receive back pay commencing December 7, 1988, the date of his suspension without pay. Petitioner should not receive back pay for the first week of December 1988. However, the record does not contain data indicating what would constitute the equivalent of a weekly salary For Griffin. This Judge takes notice of the fact that December 1988 had 22 weekdays. Converting petitioner's monthly salary for December 1988 into a daily rate of $64.94 ($1,428.58 divided by 22), a reduction for five working days representing the first week of December would result in a decrease of $324.68 ($64.94 times 5), or total reimbursement of back pay in the amount of $52,286.36 ($52,611.04 minus $324.68). I also **CONCLUDE** that petitioner is not entitled to reimbursement of counsel fees pertaining to the criminal charges relevant to the indictment in question and the current matter.

It is hereby **ORDERED** that respondent reimburse petitioner for back pay for the period December 7, 1988 through March 31, 1991 in the amount of $52,286.36 within 90 days of the effective date of this decision. It is also hereby **ORDERED** that petitioner's request for counsel fees associated with defending the indictment issued on December 7, 1988 and with the current matter be and is hereby **DENIED**.

I hereby FILE this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 12, 1992
Date

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

11/16/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 17 1992
Date

OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

LIST OF WITNESSES

For Petitioner:
Robert Rosenberg, Esq.

LIST OF EXHIBITS IN EVIDENCE

R-1	Indictment number 88 12 1973 1
R-2	Letter dated December 7, 1988
R-3	Order dated April 4, 1991
R-4	Monthly salaries for petitioner for December 1988 through March 1991
R-5	Certification of Sonia Williams

KEVIN GRIFFIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner and Respondent filed timely exceptions in accordance with N.J.A.C. 1:1-18.4.

Petitioner concurs with the initial decision of the ALJ regarding the awarding of back pay but urges that the decision be reversed regarding reimbursement for counsel fees incurred. Although petitioner disagrees that the charges levied against him did not arise out of or in the course of the performance of his duties as a school employee, he acknowledges that the ALJ utilized the applicable case law in making this determination. Petitioner does, however, believe that the ALJ erred in determining that, absent ratification by the Board, an agreement reached with the Board's attorney regarding reimbursement for legal fees incurred by the petitioner is not an enforceable contract. Petitioner contends that he entered into an agreement, in good faith, with the Board's attorney who had the apparent and seemingly express authority to bind the Board. Petitioner avers that he has established the existence of a contractual relationship and the burden should now be placed on the Board to prove that its agent did not have the authority to bind it.

The Board's exception avers that the ALJ erred in essentially deciding the back pay issue on the authority of Beatty v. Newton Board of Education, 1991 S.L.D. 1001, appeal pending, State Board of Education. The Board concedes that Beatty supports the ALJ's finding but disputes the soundness of using this decision as precedent in light of an intervening Appellate Division decision, as well as consideration of an analogous municipal statute and Supreme Court case law which was not cited or discussed in Beatty.

The Board contends that the absence of a statutory provision for back pay is significant. To support its position the Board utilizes a municipal statute authorizing compensation for police officers in circumstances similar to those of the petitioner and Supreme Court discussion regarding the Legislature's ability to provide compensation for police officers in such circumstances if it so desired. The Board avers that, absent authorizing legislation, the back pay determination in the instant case should be made in accordance with the common-law rule articulated in DelRossi v. DHS, 256 N.J. Super. 286 (App. Div. 1992). Essentially, this rule specifies that "public officers" are not entitled to compensation for periods of time they did not serve the public even if the period of no service was due to the pendency of criminal charges ultimately dismissed. Therefore, the Board seeks reversal of that portion of the initial decision allowing back pay.

Upon review of the record in this matter, the Commissioner adopts the recommended ALJ decision for the reasons outlined in the decision. The Commissioner would add the following in response to petitioner's exception, regarding the establishment of a contract, to the ALJ's cognizant disposition recited at pages 12-14. The

Commissioner notes that pursuant to N.J.S.A. 18A:19-2 no expenditures may be authorized by other than the Board in accordance with its prescribed policies and procedures. Consequently, petitioner could not have reasonably relied on assurances from a Board attorney regarding any proposition related to the expenditure of funds without formal Board approval and action.

In response to the Board's exception, the Commissioner rejects the Board's contention that, absent specific statutory authority, petitioner should be denied back pay under the common-law public officer standard outlined in DelRossi. The Commissioner notes the footnote on page 290 of DelRossi where the court acknowledges that the common-law rule articulated does not apply to public employees who are not public "officers." The footnote continues that DelRossi qualifies as a public "officer" by virtue of his position as a police lieutenant (or sergeant). The Commissioner determines that the Board's argument that the school custodian petitioner in the instant case should be viewed as a "public officer" is without merit.

Additionally, the Commissioner notes that the police officer plaintiff in DelRossi would also not qualify for back pay under the "fundamental fairness" standard expressed in Beatty since the indictment upon which his suspension was based was not disposed of in his favor but through completion of PTI.

Accordingly, the initial decision of the Office of Administrative Law awarding petitioner back pay but denying reimbursement for legal fees is affirmed.

ACTING COMMISSIONER OF EDUCATION

DECEMBER 24, 1992

DATE OF MAILING - DECEMBER 24, 1992

312-92

IN THE MATTER OF THE TENURE	:	
HEARING OF LISA GAIL JACKSON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
NEWARK, ESSEX COUNTY.	:	
	:	

DECEMBER 28, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11373-91
AGENCY REF. NO. 425-12/91

IN THE MATTER OF THE TENURE HEARING OF LISA GAIL JACKSON, SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.

Carolyn Ryan Reed, Esq , General Counsel, for petitioner

Nancy I. Oxfeld, Esq., for respondent
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: November 17, 1992 Decided: November 17, 1991

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on December 24, 1991 for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and 52:14F-1 to -13.

On November 17, 1992 a Stipulation of Settlement was received. Having reviewed the record and the settlement terms I **FIND**

1 The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is further **ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

11/17/92
Date

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

11/19/92
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 20 1992
Date

OFFICE OF ADMINISTRATIVE LAW

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STATE
OFFICE

BALK, OXFELD, MANDELL & COHEN
50 Commerce Street
Newark, New Jersey 07102
(201) 642-0161
Attorneys for Respondent

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY

OAL DKT. NO. EDU-11373-91
Agency Dkt. No. 425-12/91

IN THE MATTER OF THE TENURE	:	
HEARING OF LISA GAIL JACKSON,	:	STIPULATION OF SETTLEMENT
SCHOOL DISTRICT OF THE CITY	:	
OF NEWARK, ESSEX COUNTY	:	

The parties to the above matter have agreed to an amicable resolution of this litigation. The resolution is based upon agreement as to the following facts:

1. The Respondent, Lisa Gail Jackson, is a tenured speech correctionist employed by the Petitioner School District of the City of Newark.

2. On a number of occasions during her employment, the Respondent exhibited performance problems which were documented in observations conducted by a number of supervisors and administrators employed by the Petitioner, as well as in memoranda prepared by co-workers, supervisors and administrators.

3. As a result of these problems, the Petitioner voted in September, 1991 to certify tenure charges against the Respondent.

The charges filed against the Respondent were charges of incapacity and unbecoming conduct based upon an alleged psychiatric disability.

4. On September 16, 1991, at the request of the Petitioner, the Respondent was evaluated by a psychiatrist, Ralph F. Brandon, M.D. Dr. Brandon diagnosed the Respondent as suffering from schizophrenia of the disorganized type and found her unable to function in a teaching capacity.

5. The performance problems which the Respondent exhibited in the classroom are attributable to the fact that the Respondent suffers from a psychiatric illness.

6. The Respondent has filed an application to the Teachers' Pension and Annuity Fund requesting ordinary disability retirement benefits to become effective February 1, 1992.

Based upon the above factual agreements, the parties hereby agree to resolve this matter on the following basis:

1. Lisa Gail Jackson will resign her position of employment as speech correctionist with the Newark Board of Education effective January 1, 1993. In the event that Ms. Jackson lacks the required service time to qualify for an ordinary disability retirement effective January 1, 1993 said resignation will be submitted effective February 1, 1993;

2. Lisa Gail Jackson will continue to pursue her applicati for ordinary disability retirement from the Teachers' Pensi Annuity Fund effective January 1, 1993;

3. Based upon the documentation of disability, the Respondent will be placed upon paid sick leave through January 1, 1993;

4. The Board of Education will withdraw the tenure charges in this matter;

5. Should the Board of Trustees of the Teachers' Pension and Annuity Fund refuse to approve the granting of an ordinary disability pension to the Respondent, the tenure charges will proceed to hearing;

6. This agreement represents a complete resolution of all issues outstanding between the parties. Neither parties shall be entitled to any relief in this matter other than the relief set forth in this agreement.

BALK, OXFELD, MANDELL & COHEN
Attorneys for Respondent
By:

NANCY I. OXFELD

Dated: 11/3/92

MARVIN L. COMICK, ESQ.
General Counsel for the
Newark Board of Education
By:

CAROLYN RYAN REED

Dated: 11/9/92

OAL DKT. NO. EDU 11373-91

IN THE MATTER OF THE TENURE HEARING OF LISA GAIL JACKSON, SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the Cardonick standard for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. (In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983) The matter is hereby dismissed, subject to compliance with the terms of the settlement.

However, due to the nature of the charges and respondent's undisputed psychiatric illness, this matter is further referred to the State Board of Examiners for action as it deems appropriate pursuant to N.J.A.C. 6:11-3.6.

ACTING COMMISSIONER OF EDUCATION

DECEMBER 28, 1992

DATE OF MAILING - DECEMBER 28, 1992

313-92

313-92

LINDA DALLMEYER,

PETITIONER

V.

BOARD OF EDUCATION OF UNION, UNION COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, English teacher and supervisor, alleged Board violated her seniority and tenure rights as she was assigned to supervise 15 teachers, as well as teach two English classes, while less senior supervisor was not given teaching assignment.

ALJ found petitioner's seniority and tenure rights were not violated. No riff occurred. Board made a good faith determination to assign teaching position to petitioner based upon all facts and circumstances. Thus, petitioner was properly asked to perform in a capacity which may be assigned rightfully under contract. Petition was dismissed.

Commissioner adopted findings and determination in initial decision noting no basis in equity existed for relief.

DECEMBER 29, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11372-91
AGENCY DKT. NO. 415-11/91

LINDA DALLMEYER,
Petitioner,
v.
BOARD OF EDUCATION OF UNION,
UNION COUNTY,
Respondent.

Patricia L. Ratner, Esq., for petitioner
(Wills, O'Neill & Mellk, attorneys)

Louis M. Flora, Esq., for respondent
(Levy, Bybeck & Bertele, attorneys)

Record Closed: October 15, 1992 Decided: November 18, 1992

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

PROCEDURAL HISTORY

The petitioner in this matter filed a verified petition of appeal alleging a violation of her seniority and tenure rights by the respondent. The respondent filed an answer to the complaint and the Department of Education transmitted the matter to the Office of Administrative Law (OAL) on December 24, 1991, for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The matter was then set down for a number of hearing days in September 1992 however only one hearing day was necessary. That hearing took place on September 16, 1992 at the OAL, 185 Washington Street, Newark, New

Jersey At the close of testimony the record remained open for posthearing submissions until October 15, 1992 on which date both sides filed letter memoranda. At that time the record closed.

It should be noted at the outset that the petitioner concedes that this is not a classic seniority case inasmuch as no reduction in force (RIF) occurred.

STIPULATED FACTS

At the time of the hearing both sides entered into a number of stipulated facts which were set out on the record and marked as J-7 in evidence. The stipulations read as follows:

1. Petitioner is a tenured employee of respondent having been employed within respondent's district since September 1967 through the present.

2. Petitioner is certified as a teacher of English (grades 7 through 12), speech (grades K through 12) and holds a supervisors and principal's certificate.

3. Since the school year 1982-83, petitioner has been employed as a supervisor of English for grades 10 through 12 exclusively. In 1981-82, petitioner received her supervisor's certificate.

4. In June 1991, petitioner was advised that she would teach two English classes for the 1991-92 school year.

5. Pursuant to the Collective Bargaining Agreement for the academic years 1989-1992, Article IV provides a job description for supervisors and states.

> The job description of supervisors and Test Coordinator shall be set forth in Schedule A which is attached hereto. This job description may be changed by the board without negotiations, and any such changes shall not be the subject of a grievance.

6. On or about September 3, 1991 petitioner's assignment was changed by respondent in that she was required to teach two classes of English and to

supervise all English teachers for grades 9 through 12. The supervisor assignment for 1991-1992 increased the number of teachers supervised by petitioner from 11 to 15 as a result of a reorganization of the high school to also include grade 9.

7. Petitioner was offered the choice of teaching two classes of high school English at the high school or proctoring the SAT review program, in addition to supervising English at the high school for grades 9 through 12 for the year 1991-92. No other supervisor was added to the high school English staff.

8. Barbara Lombardi had six years seniority as a supervisor in 1991-92 and petitioner had 10 years of seniority as a supervisor in 1991-92.

9. Barbara Lombardi, in addition to other supervisors, was not given a teaching assignment in the 1991-92 academic year.

As these facts have been stipulated to by the parties, I **FIND** them to be operational facts in this case.

TESTIMONY

Linda Dallmeyer, the petitioner, testified at the hearing. She stated that she became a supervisor in 1982 and has been exclusively a supervisor since then. Until the 1990-1991 school year her duties included supervision at the high school and she had never taught classes nor was she asked to.

Barbara Lombardi, a supervisor in the department with less seniority than the petitioner, was never asked to teach any other classes. No one asked the petitioner to take over Ms. Lombardi's supervisor position so that Ms. Lombardi in turn could teach those assigned classes either.

The petitioner acknowledged that supervisors from other departments have taught classes but this has never occurred in the English department while she has been there. She also stated that the science supervisor teaches by choice.

Ms. Dallmeyer made the choice between proctoring the SAT program and teaching and determined to teach. She felt that it was her area of expertise and it would also be better to teach in the morning rather than tie up the middle of the day with the proctoring.

Ms. Dallmeyer stated that when teachers are assigned a sixth period of teaching assignment they receive additional compensation for their work however that it is governed by a collective bargaining agreement. In her case she acknowledged that the contract under she works does not provide for extra compensation in a situation where a teaching assignments are made.

Robert J. Bergen, the assistant superintendent, also testified. He is in charge of personnel matters as well as a number of other areas. He stated that in the 1990-91 school year there were two supervisors in the English department. One was at the high school level and one served K through 8. It was Ms. Dallmeyer in the high school and Barbara Lombardi who actually dealt with grades K through 8. Ms. Dallmeyer managed and supervised the English program in the high school which consisted of one building. Ms. Lombardi dealt with K through 8 and was the language arts coordinator for other schools. This gave her a range of duties over 10 schools in the district. She travels mostly however between the two middle schools although she must go to other schools as well. Ms. Lombardi had been at the school approximately six years while Ms. Dallmeyer had been there approximately 11 years. Ms. Dallmeyer had received a full year's credit for seniority purposes for that particular school year and no reduction in force occurred with respect to her.

This witness was involved in the decision to assign Ms. Dallmeyer to teaching classes. The district had been confronted with shortages and they assigned 9 out of 17 supervisors a variety of teaching assignments. No additional stipends were paid to supervisors for these assignments.

Mr. Bergen acknowledged that Ms. Dallmeyer could have been assigned to supervise K through 8 under her certificate. She could also have taken over for Ms. Lombardi however he stated that based upon an evaluation of the situation it appeared most appropriate that Ms. Dallmeyer be assigned the two teaching classes. The witness stated that they looked at the enrollment of the individual teachers and

supervisors who were available and made a decision based upon all the factors which came to their attention.

As the facts in the testimony are not in dispute, in addition to those facts stipulated to by the parties, I **FIND** these to be the operational facts of this case.

LEGAL DISCUSSION

The petitioner originally claimed a violation of her seniority and tenure rights as found in *N.J.S.A.* 18A:28-1 to -14. At the time of the hearing and confirmed in the posthearing submissions however it was made clear that this is not a classic seniority case inasmuch as there was no RIF which occurred. The petitioner's argument is essentially that although respondent has the prerogative to make the assignment as it did, that prerogative is not unfettered. It is essentially inequitable, according to the petitioner, for Ms. Lombardi, who had less seniority than the petitioner, to not have been the one assigned to teach the two classes.

It should also be noted that the petitioner does not contend that there is a contractural right to increased compensation for such an assignment and agrees that the collective bargaining agreement does not provide for such compensation.

Ms. Dallmeyer's claim which she enunciated while on the stand as well as through counsel in posthearing submission is basically that she does not feel that she was treated fairly. Quite simply she feels that since she had been there longer than Ms. Lombardi that, as a matter of at the very least courtesy and deference, she should not have been the one given the teaching assignment. She agrees that there was every right to assign those teaching positions to her it should nonetheless not have occurred. She feels that she has been treated in a manner inferior to the manner in which Barbara Lombardi was treated. Although agreeing that the assignment could be made petitioner cites *Klinger v. Cranbury Twp. Board of Ed.*, 190 *N.J. Super.* 354 (App. Div. 1982) to stand for the position that it is inappropriate to give "better treatment" to one with less seniority than an individual who has greater seniority. That case is distinguishable on its facts because it dealt with a RIF. The proposition standing alone without a RIF or other violation of seniority or tenure rights may have some appeal on a purely human level. Notwithstanding this however the logic of it would make assignment of supervisors to teaching positions

dependent solely and exclusively, on the amount of seniority which they possessed and not upon considerations such as ease and convenience in delivering services as well as continuity of program and other integral facts which go into a determination of whom should be assigned to what appropriate task. This of course may not extend beyond those situations where the individual is asked to perform in a capacity which may be assigned to them rightfully under their contract. In this case it is clear that the petitioner was not treated in a manner inferior to that of Ms. Lombardi but in a manner different from that of Ms. Lombardi. That difference is credibly accounted for by the considerations which Mr. Bergen enunciated at the time of the hearing While the two individuals' certificates made them interchangeable for this assignment their physical location as well as their responsibilities did not make them identical. A good faith determination was made that it would be most useful to assign the teaching positions to Ms. Dallmeyer based upon all the facts and circumstances.

It is clear that no specific violation of the petitioner's seniority and tenure rights have occurred in this case by the respondent. It is also clear that while petitioner wishes she were extended the courtesy of having been given a choice of the assignments offered, or the position of Ms. Lombardi in the alternative, there is no statutory obligation upon the respondent to do this. Beyond the question of whether or not a statutory obligation existed comes the question of equity. In this case the petitioner was not treated in a manner inferior to that of an identically situated teacher with less seniority and therefore no inequity is found to exist. While Ms. Dallmeyer's reaction to being assigned the teaching classes instead of someone with less seniority is understandable it is within managerial prerogative to do so and it was done in good faith by the respondent.

CONCLUSION

Based upon the foregoing I **CONCLUDE** that petitioner's tenure and seniority rights have not been violated in this case. I further **CONCLUDE** that no equitable basis exists for relief in this case.

ORDER

Therefore, it is hereby **ORDERED** that the petition in this case, be and hereby is **DISMISSED.**

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSISON OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Date — **MARYLOUISE LUCCHI-McCLOUD,** ALJ

Receipt Acknowledged:

11/23/92
Date — DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 25 1992
Date — OFFICE OF ADMINISTRATIVE LAW

am

For petitioner:

Linda Dallmeyer

For respondent:

Robert J. Bergen

EVIDENCE LIST

J-1	Collective Barganining Agreement 1989-92 (Supervisors) with Schedule A
J-2	Petitioner's salary history
J-3	1992 Seniority List
J-4	1985-1986 Assignments of Supervisors/Coordinators
J-5	1990-1991 & 1991-1992 Supervisors Assignments
J-6	Letter from BOE to petitioner

R-1	Supervisors Statistical Report 1991-1992

R-2, ID only - Decision of PERC June 5, 1992

For petitioner:

None

OAL DKT. NO. EDU 11372-91

LINDA DALLMEYER,	:	
PETITIONER	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF UNION, UNION 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 and independent review of the record of this matter, the Commissioner adopts as his own the findings and conclusion of the Office of Administrative Law that petitioner's tenure and seniority rights have not been violated in this matter, and no basis in equity exists for relief in the case.

Accordingly, for the reasons expressed in the initial decision, the instant Petition of Appeal is dismissed, with prejudice.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

DECEMBER 29, 1992

DATE OF MAILING - DECEMBER 29, 1992

I.P., on behalf of his minor child, J.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LEONIA, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner sought judgment that he did not owe Leonia Board tuition as he lawfully resided in the district and further sought order allowing his daughter J.P. to attend Leonia High School not Dwight Morrow High School in Englewood. Board contended Englewood Cliffs decision enjoined Board from accepting on a tuition basis students who are domiciled in Englewood Cliffs.

ALJ found J.P. was not entitled to free education in Leonia, as her father was not domiciled within school district nor residing temporarily therein between February 1992 and June 1992. Therefore, I.P. owes respondent tuition for J.P.'s illegal attendance at Leonia High School and J.P. is enjoined from further attendance there on a tuition basis. (Englewood Cliffs)

Commissioner adopted findings and determination in initial decision.

DECEMBER 29, 1992

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6870-92
AGENCY DKT. NO. 382-8/92

I. P.,

Petitioner,

v.

BOARD OF EDUCATION OF BOROUGH OF LEONIA, BERGEN COUNTY,

Respondent.

I. P., *pro se*

Rodney T. Hara, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: October 14, 1992 Decided: November 19, 1992

BEFORE **EDITH KLINGER**, ALJ:

On August 6, 1992, I.P. filed a petition with the Commissioner of the Department of Education seeking an order allowing his daughter, J.P., to attend Leonia High School for the 1992-93 school year and further seeking a declaratory judgment that he did not owe any tuition to the Leonia Board of Education of Borough of Leonia (Board) respondent, for his daughter's attendance at Leonia High School between February and June 1992. The Board counterclaimed against him for the tuition.

The Board filed its answer with the Commissioner on September 3, 1992, claiming as a defense that J.P. was domiciled in the Borough of Englewood Cliffs and therefore should be enrolled in Dwight Morrow High School in Englewood, New Jersey. The Board cited *Englewood Cliffs v. Englewood*, 257 *N.J. Super.* 413 (App. Div. 1992) to show that it is enjoined from accepting on a tuition basis students who are domiciled in Englewood Cliffs.

On September 9, 1992, the Department of Education transmitted the matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. An emergent hearing on petitioner's request to allow his daughter, J.P., to enroll in the Leonia School District and attend Leonia High School pending the outcome of the plenary hearing was heard by Stephen G. Weiss, ALJ. An order issued by Judge Weiss on September 14, 1992, denied the application for emergent relief. The order was affirmed by the Commissioner in a decision dated September 28, 1992.

The matter was assigned to the undersigned for plenary hearing. The hearing took place on October 9 and 14, 1992, at the Office of Administrative Law, Newark, New Jersey, and the record closed at that time.

REVIEW OF EVIDENCE

Petitioner, I.P., lived with his wife and daughter, J.P., in Englewood Cliffs. Englewood Cliffs has no high school and sends its students to Dwight Morrow High School in Englewood.

Between the fourth grade and completion of the eighth grade, J.P. went to the Englewood Cliffs schools. She attended the Northern Valley High School (NVHS) for her freshman and sophomore years in high school (the 1989-90 and 1990-91 school years), for which I.P. paid tuition. He testified that the family originally intended to move to Demarest but their plans changed.

J.P. began her junior year of high school at NVHS. However, her last day of enrollment in that district was January 2, 1992, because I.P. failed to pay her tuition.

I.P. testified that he and J.P. lived in Englewood Cliffs during the fall of 1991. He claims that in about October or November, he separated from his wife and went to live with a friend in Palisades Park for about two months. J.P. remained with her mother in Englewood Cliffs. I.P. then testified that he could not remember whether he lived in Englewood Cliffs or Palisades Park in November 1991.

I.P. stated that J.P. actually stopped going to NVHS in November 1991. He could not remember the exact date and could not say whether she attended any high school in

November 1991. He admitted that he knew that he would not have to pay tuition if his daughter attended Dwight Morrow High School, but he claimed that he knew he was moving out of Englewood Cliffs and did not want his daughter to start school there He signed a lease on an apartment on Hillside Avenue in Leonia on December 29, 1991

At this time, I.P. revised his prior testimony to state that before December 1991, he lived in Palisades Park on some days and on other days he lived in Englewood Cliffs, in December 1991, he lived in Palisades Park on some days and with his sister, K.S., on other days; and only went to Englewood Cliffs to obtain changes of clothing.

The lease on the apartment in Leonia began on December 29, 1991, and ran for one and one-half years until June 30, 1993. The duration of the lease was exactly the same length of time as it would take his daughter to complete her education and graduate from Leonia High School. He testified that there was no reason that it ended on June 30, 1993; it was the landlord's idea to terminate it on that date. I.P. explained that he used the Englewood Cliffs address on the lease because he had no other permanent address at the time

I P. further testified that as of December 29, 1991, he had separated from his wife. There was no separation agreement, and no divorce proceedings were started. He could not state whether or not they intended to reconcile, and his lawyer is now deceased He suggested that the eighteen-month term of the lease could also correspond to the eighteen months necessary to establish a cause of action for divorce on the grounds of irreconcilable differences. He added that he thought he might return to Korea, his native country, after his daughter graduated from high school.

According to I.P., he moved into the Leonia apartment on January 2, 1992. He said that he lived there and slept there except on a few occasions when he stayed at friends' houses.

He claims that he did not sleep in the Englewood Cliffs house at any time, nor did he eat any meals there. His visits were confined to approximately ten minutes and were only for the purpose of picking up clothing. I.P. denied that he spent any time visiting his son, who still lived with his mother in Englewood Cliffs. I.P. goes to the house early in the morning when his son is still sleeping, and the last time he did this was four to five months ago at the beginning of summer 1992.

The Leonia apartment has only one bedroom. I.P. testified that he sleeps in the living room and J.P. uses the bedroom. He has an older daughter who is away at college and shares the bedroom with J.P. on those weekends when she is home.

I.P. stated that J.P. never slept overnight in Englewood Cliffs and did not visit his wife. He said that he and J.P. did the cooking for themselves and that his wife never cooked meals and brought them over.

As of the date of hearing, he still had not changed the address on his driver's license from Englewood Cliffs to Leonia.

Arthur Taub, head counselor of the guidance department at Leonia High School, is the employee responsible for enrollment of new students. On about January 6, 1992, J.P., I.P, and K.S. came to his office to enroll J.P. in Leonia High School and brought with them the lease to the Hillside Avenue apartment to substantiate her residence in the district. She had no health or academic records.

Taub, aware that the decision of the Appellate Division in the *Englewood Cliffs* case enjoined other school districts from accepting on a tuition basis students who are domiciled in Englewood Cliffs, observed that the address I.P. gave on the apartment lease was in Englewood Cliffs, and his suspicions became aroused. He also noticed that I.P.'s driver's license had the Englewood Cliffs address.

He consulted with his supervisor, who said that there must be only one primary address and, at the direction of his supervisor, Taub asked I.P. for water and utility company bills as proof that he resided in Leonia.

I.P., J.P., and K.S., who was with them, were very upset. Taub took them to the office of the principal, where J.P. became "hysterical" and asked why they denied her access to the school. When Taub and the principal attempted to explain the restraining order to them, they were clearly not interested. I.P. said, "If you were her father, you would be doing the same thing." Taub inferred from this that I.P. did not want J.P. to go to Dwight Morrow High School.

When Taub reviewed the copies of the utility and telephone bills from the Leonia apartment provided by I.P., he found them to be "ridiculously low." According to the lease, the landlord supplies heat and hot water, so that the Public Service Electric and Gas (PSE&G) bill received by I.P. in Leonia would be for electricity and for gas used in cooking.

Dr. Frank M. Marlowe, superintendent of the Leonia school district, instructed Taub to register J.P. temporarily until they could consult with the attorney for the Board. She was temporarily registered in Leonia High School on January 6, 1992, and withdrew on January 10, 1992.

According to Marlowe, when he received the lease and the extremely low utility bills, he consulted the Bergen County office of the Department of Education. On January 31, 1992, he received a letter from Angelo J. Castellano from the office of the acting county superintendent suggesting that J.P. be registered in Leonia High School since she was not attending school anywhere at the time. On the basis of this letter, Marlowe permitted her to register in February 1992. He met with I.P., J.P., and K.S. on February 3.

Marlowe was still not convinced that I.P. was living at the Hillside Avenue address. He instructed Taub to monitor the situation and undertook an informal investigation of his own.

Marlowe asked one of his staff members, an audio-visual technician, to observe the Hillside Avenue apartment on occasion. The technician reported that at times he saw J.P. meet her mother in a car in front of the apartment and the two returned to Englewood Cliffs. At other times, he saw J.P. return to the Hillside Avenue address.

On February 4, 1992, at 7:00 p.m., Taub stopped off at the apartment, rang the bell, and knocked on the door. There was no answer. He tried again at 10:00 p.m. and there was still no one there. On February 11, on his way to a public meeting of the Board, he stopped by, rang the bell, and knocked on the door with no response. He saw a very low level of light in the apartment.

Another faculty member who was asked to monitor the apartment followed J.P. from school at 2:40 p.m. J.P. went past the Hillside Avenue apartment and entered I.P.'s car, which was followed to Englewood Cliffs.

Taub made a total of nine attempts to visit the home following the 1991-92 school year without ever finding anyone there. On July 1, 1992, he tried at 7:35 a.m. On July 2, he was there at 8:00 a.m. and 12:15 p.m. On July 7, he went at 7:15 a.m. On July 8, he was there at 11:20 a.m. On August 27, he was there at noon. On August 28, he was there at 8:15 a.m. On September 8, he was there at 7:30 a.m., and on October 8, he was there at 4:15 p.m. There was never any response. He attempted to call the house on August 27 between 10:00 and 11:00 a.m., on August 28 between 9:00 and 10:00 a.m., and on October 8 at 3:00 p.m. Each time, he was answered by a telephone recording stating that the telephone had been disconnected. Taub contacted New Jersey Bell, which confirmed that service had been shut off sometime between June 24 and June 28.

William Eickelberg is a physical education teacher employed by the Leonia Board. He lives on the corner of Hillside Avenue and was able to see the building in which I.P. allegedly lived from his home. He walked by on Friday, October 2, between 7:30 and 8:00 p.m. and saw no activity. He walked by again on Saturday night, October 3, between 9:00 and 9:30 p.m. and Sunday night, October 4, between 8:30 and 9:00 p.m., and saw no sign of occupancy. The apartment on the second floor of the building has a large picture window in the living room. The shades were open and nothing covered the window. A light was on, so that if anyone walked past the window, he or she would be visible from the street below.

On Friday, October 9, the first day of hearing in this matter, Eickelberg parked in front of the apartment from 7:05 to 8:15 a.m. No one came to the apartment or left it during that time. On October 10, he rang the doorbell in the morning and there was no answer. On October 11, he rang the doorbell at 6:05 p.m. J.P. answered the door. Eickelberg did not know if her father was present. On October 12 and 13, he did not notice any activity, but he did not ring the doorbell. He watched the apartment again on October 14, the second day of hearing, between 7:00 and 8:30 a.m. No one entered or left.

The PSE&G statements in evidence are for utility service during the months of January through August 1992. On the February bill, the average gas use was four CCF and the actual number of kilowatt hours of electricity used during the month was thirty-eight. The entire utility bill was $20.54. In March, the average use of gas was two CCF and 110 kilowatt hours of electricity. The entire bill for March was $39.62. The PSE&G bills for April and May show the average use of four CCF of gas and 153 kilowatt hours of electricity and three CCF (averaged) and 130 kilowatt hours of electricity, respectively. The total bills for

May and June were $65.24 and $87.90. The total bill for utility service for July was $28.40. In September, I.P. received a credit of $99.53 on his bill, leaving him with a credit balance of $87.80 from PSE&G.

The credit resulted from the actual reading of the gas meter in July and August 1992; the other gas bills were based upon average gas charges between the actual reading on January 15, 1992, and the actual reading in July 1992. The statement reveals that the actual use of gas for the period between January 15 and July 10, 1992, was only three CCF. This was for an apartment where two people were allegedly living and cooking.

The telephone bill for the Hillside Avenue address was $76.25 in February, $28.28 in March, $22.46 in April, $48.12 in July, and $25.46 in August.

As further evidence that he occupied the apartment, I.P. produced letters mailed or forwarded to him and received at the Hillside Avenue address. He produced several Korean language newspapers mailed directly to the Hillside Avenue address. The earliest of these newspapers is dated April 9, 1992, but nothing shows the date on which they were mailed. One letter, mailed coincidentally on January 6, 1992, the date of J.P.'s application to Leonia High School, from New York to the Englewood Cliffs address, appears to have been forwarded on January 9, 1992, to the Hillside Avenue address. A letter from the New Jersey Department of Education postmarked January 29, 1992, was sent to I.P. at Hillside Avenue.

The record shows that I.P. had his personal checks imprinted with the Hillside Avenue address sometime before February 1, 1992.

I.P. registered J.P. from the Leonia address in Scholastic Aptitude Test (SAT) classes in the First Academy of New Jersey between March 14 and June 6, 1992. A letter from her counselor at the First Academy states that it provided J.P. with bus service, picking her up at 4:00 p.m. and dropping her off at 6:30 p.m. at Hillside Avenue. She was enrolled in First Academy again in the fall semester 1992 for the after-school SAT course This was apparently the only education she received during this period.

Petitioner produced Internal Revenue Service Form 1040 for the year ending December 31, 1991, showing his address as Hillside Avenue in Leonia and claiming J.P. and her sister, R.P., but not his son as dependents. The form was prepared for I.P. as a married

person filing singly. The form was not signed by I.P., and there is nothing in the record showing that it was ever filed with the Internal Revenue Service. The form was designated by the accountant as the "client's copy." The financial information was removed from the copy of the exhibit at hearing to protect petitioner's privacy.

Robert Peacock, a detective with the Leonia Police Department, was assigned to the Asian Task Force of the Bergen County Police in June 1992. While driving through Leonia, he observed a vehicle parked on the street overnight. He identified the vehicle as one used in an armed robbery in New York City by a young Asian man.

Peacock was met by members of a New York City robbery squad. Together they interviewed another young Asian male, and he directed them to J.P.'s apartment because he knew that there were "some kids staying with her." Peacock went back to Leonia with the New York City police officers, and they set up a surveillance on J.P.'s apartment. Precautions were taken because it was believed that the young man was armed and dangerous.

The police were able to observe three people walking around the apartment through the large picture window. The lights were on and the shades were open as usual They decided that the young man they were searching for was there. The police first rang the doorbell. When there was no response, they began to pound on the door. J.P. came to the door and they asked for her parents. She told them they were not there. They asked to speak to "Johnny," the young man they were seeking. A New York City police officer coaxed him out of the apartment, and he was taken into custody.

Since they were concerned about the weapon and there were no parents present, the police searched the apartment. They found one chair and a small sofa in the living room. There were two young women hiding in a closet; one had identification as an adult. Both were runaways who disappeared the following day. The bedroom had one bed. The closets contained only girl's clothing. They searched the bedroom and the bathroom. There was no evidence of male occupation anywhere. There were no men's clothes or toiletries, and there were no suitcases in the closet. There was no sign of any adult presence in the apartment. Peacock told J.P. to have her father contact him because he was going to send Thomas O'Meara, the youth officer with the Leonia Police Department, to the apartment on the next day.

At 9:12 a.m. on the next day, June 2, 1992, O'Meara was assigned to the motor patrol. He received a telephone call from the dispatcher that someone was requesting help at J.P.'s address. When he arrived, he knocked on the door and was met by J.P. She explained to him the incident of the prior night involving "Johnny." Since his arrest, she had been receiving telephone calls from his friends and relatives, and she was in fear for her life. When O'Meara asked to speak to her parents, she said that no one was home. He searched the apartment and found no evidence of parents living with her. She told O'Meara that she lived with her father but that he was away on a business trip, and she could not give a telephone number. She further told him that her father slept on the mattress on the floor in the bedroom and she slept in the living room on the chair. O'Meara found no signs of male adult habitation. There were no clothes in the closet, no shoes, *etc.*

Because J.P. was frightened, O'Meara took her into custody and brought her to police headquarters for further investigation. He had found an envelope in the kitchen of the Hillside Avenue apartment with her father's name and an Englewood Cliffs address on it. He called the telephone number belonging to the address on the envelope and asked if they knew J.P. J.P. finally gave him the telephone number of her father's business in New York City. She admitted to O'Meara that her father did not live in Leonia with her, but he or her mother came over once a day to bring her food.

When the police called her father, they told him that she was in their custody because she had called them for help and that someone would have to be sent to the police station to pick her up

When I.P. came to the police station to get his daughter, Peacock explained to him that the police had found her living alone. A relative or friend who came with I.P. explained to them that I.P. wanted J.P. to go to school in Leonia with her friends and that she had threatened to kill herself if she could not. That is why I.P. rented the apartment in Leonia. Peacock warned them that the Division of Youth and Family Services (DYFS) would be following up on the case and it was important that his daughter live with him. She could not live on her own at the age of sixteen.

When J.P. was released in the custody of her father on June 2, 1992, he gave the police a statement saying that she resided with him in Englewood Cliffs.

A few days later, Peacock began to stop sporadically at the Hillside Avenue address, about a dozen times altogether. There was no answer when he rang the bell. There were newspapers in the mailbox but no other mail. Once he observed J.P. sitting on the steps. He never saw any activity in the apartment.

When Taub received a report from Peacock, O'Meara, and others on the Leonia Police Department about the incidents and learned that J.P. had said that her father did not live there with her, Taub directed that the matter be referred to DYFS because J.P. was a minor in need of supervision. Subsequently, on June 8, 1992, a DYFS investigator questioned J.P. in the presence of Barbara Silverman, the guidance counselor at Leonia High School. Silverman reported to Marlowe that J.P. told the DYFS worker that, as of that date, she was living with her mother in Englewood Cliffs. J.P. said that before that date, she lived alone in Leonia during the week and spent the weekend with her parents in Englewood Cliffs. She told the DYFS investigator that she wanted to go to school in Leonia and not in Englewood.

After considering all the evidence involving the living arrangements of J.P., the Leonia Board decided that the Hillside Avenue address was that of an apartment leased solely for the purpose of establishing residency in Leonia in order to permit J.P. to attend Leonia High School free of charge; it was the determination of the school administration that J.P. actually resided with I.P. in Englewood Cliffs.

A letter dated July 20, 1992, was sent to I.P. by the attorney for the Board to inform him that his daughter would not be permitted to attend Leonia High School in the fall because of the Appellate Division decision barring enrollment of nonresident tuition students from Englewood Cliffs, and it recommended that he enroll her in Dwight Morrow High School in Englewood. It also stated that, since the Board had determined that J.P. would have been enrolled as a nonresident tuition student at Leonia High School if it were legally possible, I.P. owed the district $4,555.20 for her attendance between February and June 1992, and payment was requested.

During his testimony, I.P. denied receiving this letter. However, his petition filed in this matter has appended to it a letter dated July 30, 1992, written by I.P. in which he refers to this letter and a copy of the July 20 letter itself is attached to the petition.

As of the week before this hearing, there was no sign of occupancy in the apartment and the telephone remains disconnected.

I.P.'s assertions that he continues to live in Leonia with his daughter is incredible in light of the fact that no witness has found any evidence since the beginning of July 1992 that anyone lives in the Leonia apartment. The last information in the record as to where J.P. might be living was the statement she gave to the DYFS investigator in the presence of Barbara Silverman on June 8, 1992, that she moved back with her mother in Englewood Cliffs. J.P. was in the hearing room during the testimony of Marlowe when Silverman's report of June 12, 1992, was introduced into the record, but I.P. elected not to have her testify to controvert the content of this report.

During the course of the hearing, it was asserted at various times by I.P. and his sister, K.S., that he had a problem with the English language which would handicap him in the presentation of his case. However, neither I.P. nor his sister, K.S., requested that an interpreter be provided for the hearing and, in fact, it appeared to the undersigned, and I **FIND**, that none was necessary It must be recalled that I.P. participated in not one but two separate hearings in this appeal. He appeared on the emergent application and had the opportunity to request an interpreter for the plenary hearing. He owns and operates a delicatessen in New York City. He was able to review the lease on his Leonia apartment during his testimony and pick out a relevant provision and, in general, appeared to have no problem with the English language except when confronted with a question which he did not wish to answer. When he did answer, his answers were either unresponsive or evasive.

In his direct testimony, I.P. insisted that he only wanted his daughter to attend school and that it was bad for her to be missing school, yet he admitted that he made no attempt to send her to Dwight Morrow but preferred to see her stay at home and receive no education. It was confirmed by the Board that no attempt was made to enroll her at Dwight Morrow H.S., although I.P. claimed to have been turned away by Dwight Morrow because he said that J.P. lived in Leonia.

I.P.'s testimony was generally inconsistent as to where he or J.P. lived at any particular time, where she was or was not attending school, and why she was or was not attending any particular school. On cross-examination, he refused to respond to questions and instead berated the representative of the Board and berated the Board and its witnesses

for preventing his daughter from obtaining an education. He demanded to know why they would not allow his daughter to attend Leonia High School since he lived in Leonia.

I.P.'s sister, K.S., who claimed a better command of the English language than I.P., was present throughout the hearing, and had knowledge, personal and otherwise, of the circumstances surrounding J.P.'s attendance at Leonia H.S. She declined to testify for reasons of health. She did, however, respond aloud from her seat at counsel table to questions posed to I.P. during his testimony by respondent or by the forum. Despite repeated warnings, this conduct continued until she was cautioned that she would be directed to leave the hearing room.

J.P., who had knowledge of all of the events in question, was present through the entire hearing and sat at counsel table. She speaks English fluently. On the second day of hearing, after I.P. had concluded his testimony, she appeared to be too ill to take the witness stand. Respondent proceeded with its witnesses throughout the remainder of the day. I.P. was offered the opportunity several times during the day to allow J.P. to testify then or to return at another time when she felt well enough to testify. After respondent finished its case, I.P. once more declined the opportunity to continue the hearing to permit J.P. to testify, and the record closed at that time.

Based upon the evidence presented, I **FIND** that I.P. did not reside at Hillside Avenue in Leonia from January 2, 1992, until the present time. In spite of the documents produced with his name and the Leonia address on them, there is no evidence that he actually resided in the apartment at any time. I **FIND** that he is not a credible witness and, therefore, his statements as to his residency are given little weight. No traces of his presence in the apartment were ever found, and J.P. herself told the police, the DYFS investigator, and the school administration that I.P. did not live with her.

I **FIND** that J.P., at sixteen years of age, was not an emancipated child but was nevertheless living alone in the apartment in Leonia at times. I **FIND** that she lived with her parents, I.P and his wife, in Englewood Cliffs at other times. I **FIND** that there is no evidence that anyone has lived in the Hillside Avenue apartment since at least the beginning of July 1992.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 19, 1992
DATE

Edith Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

11/23/92
DATE

Maureen K. Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 25 1992
DATE

Janice LaVecchia
OFFICE OF ADMINISTRATIVE LAW

md/e

APPENDIX

WITNESSES

For Petitioner:	For Respondent:
I.P.	Arthur Taub
	Dr. Frank Marlow
	Thomas O'Meara
	Robert Peacock
	William Eickelberg

EXHIBITS

P-4	Lease
P-5	Three rent checks
P-6	Bills from New Jersey Bell
P-7	Registration for First Academy
P-8	Two PSE&G bills
P-9	Certification from First Academy
P-10	Edited Tax Returns
P-11	Packet of Documents
R-1	Juvenile Release
R-2	Letter, July 20, 1992
R-3	Petition with attached letter, dated July 20,1992
R-4	Tenafly High School summer school registration forms
R-5	Personal Record Sheet, Leonia High School
R-6	Bus 166 Schedule
R-7	Letter from Bergen County office of Department of Education
R-8	Report of B. Silverman
R-9	Fax from NVHS
R-10	Cover for Exhibit R-9
R-11	Leonia Police Complaint Report

I.P., on behalf of his minor child, J.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LEONIA, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 1:1-18.4, as were replies thereto by the Board.

In his exceptions, petitioner first complains of the ALJ's failure to provide him with an interpreter, or alternatively, to let his sister interpret for him in view of his difficulty with English. Second, he objects to the ALJ's statement regarding the possible non-filing of his 1991 income tax return and submits a communication from the Internal Revenue Service (IRS) indicating that it was in fact filed. Third, he contends that the Board never proved that he and his daughter resided in Englewood Cliffs, and that the Board and ALJ ignored all his evidence that they resided in Leonia as claimed. Finally, he complains of the manner in which the district sought to verify his residency by visiting and phoning his apartment at all hours and disturbing his and his daughter's sleep. During the course of these exceptions, petitioner offers statements of events which run counter to, or provide additional information about, factual events as recounted by the ALJ.

In reply, the Board first notes that pursuant to N.J.A.C. 1.1-14.3(a) it was petitioner's responsibility, not OAL's, to secure an interpreter, and that petitioner had ample opportunity to do so; moreover, given petitioner's sister's intimate involvement in the substance of this controversy, the ALJ properly restricted her procedural participation at hearing. Second, the Board notes that the ALJ's statement about filing of income tax returns was correct based on the record before her at the time of her ruling, and petitioner should not at this juncture be permitted to produce evidence not submitted at hearing. Third, the Board argues that it and the ALJ did not ignore evidence of petitioner's purported residency in Leonia; rather, they reviewed it carefully and concluded that it was insufficient to support his claims. Finally, the Board affirms its right to investigate suspected cases of false residency claims and objects to petitioner's attempts to use his exceptions to introduce testimony from his daughter and sister, who, by their own and petitioner's choice, did not testify at hearing and whom the Board now has no opportunity to cross-examine or challenge through rebuttal witnesses.

Upon careful review of the record of this matter, the Commissioner affirms the determination of the ALJ for the reasons well stated by her in the initial decision.

Even granting arguendo petitioner's contention that he needed an interpreter, the record of both emergent and plenary proceedings demonstrates that he had ample opportunity to secure one and that it was made abundantly and immediately clear by the presiding judges in both proceedings that his sister could not properly fulfill this role for him under the circumstances of this matter. Moreover, even granting petitioner his further claim that

the 1991 tax return showing a Leonia address for himself and his daughter was actually filed with IRS, the voluminous evidence in support of the Board's contention that petitioner did not reside in Leonia is still not sufficiently overcome to alter the results of these proceedings. Finally, the Board is correct in objecting to what amounts to an attempt to testify after the fact to matters which petitioner had ample opportunity to address at hearing through his own testimony or that of others whom he chose not to call as witnesses despite every attempt at accommodation by the ALJ.

The Commissioner is well satisfied that the ALJ gave careful consideration to all available evidence and properly weighed the credibility of the various witnesses who appeared before her in this matter, and he fully accepts her findings of fact, conclusions of law and emphasis on the State policy imperatives of Englewood Cliffs, supra.

Accordingly, the initial decision of the Office of Administrative Law, finding that I.P. did not reside in Leonia during the period at issue and that his daughter J.P. was therefore not entitled to attend school there, is affirmed for the reasons well expressed therein. Petitioner's appeal is dismissed and petitioner is directed to reimburse the Board for tuition costs incurred during the periods of his daughter's illegal attendance in the Leonia public schools.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

DECEMBER 29, 1992

DATE OF MAILING - DECEMBER 29, 1992