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NEW JERSEY

SCHOOL LAW

DECISIONS

January 1, 1987 to December 31, 1987

VOLUME 2

PAGES 891-1834

Saul Cooperman
Commissioner of Education

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G.L.H., by his guardians ad litem, G.H.H. AND G.R.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HOPEWELL VALLEY REGIONAL SCHOOL DISTRICT ET AL., MERCER COUNTY,	:	DECISION ON MOTION
RESPONDENTS.	:	
	:	

For the Petitioner, G.H.H. and G.R.H., Pro Se

For the Respondent, Norris, McLaughlin & Marcus (Peter R. Knipe, Esq., of Counsel)

On April 1, 1987 a Motion for Interlocutory Review was filed with the Commissioner of Education by the Board seeking review of an Order issued by Steven L. Carnes, ALJ, denying the Board's Motion to Dismiss for Mootness and granting petitioner's Motion to Compel Discovery in the above-captioned matter. The Board's Request for Interlocutory Review was accompanied by the papers it submitted to ALJ Carnes on the two motions in question dated February 12, 1987. The Commissioner informed the ALJ and the respective parties in writing on April 3, 1987 that said Order would be reviewed interlocutorily pursuant to the applicable provisions of N.J.A.C. 1:1-9.7.

On April 6, 1987, petitioner filed his letter briefs dated March 9 and March 26, 1987 which were submitted to ALJ Carnes in response to the Board's motion for dismissal based on mootness and its opposition to discovery.

This case arises as a result of sanctions imposed upon G.L.H., a high school junior in the Board's district, following events that took place on October 4, 1986, involving the consumption of beer by this student, among others, on school property at night, and his removal of a field hockey net from its frame on school property later the same night. Other facts involving the events of that evening are disputed by the parties. The legal arguments of the parties presented on motion before the ALJ are summarized below.

As to the Board's Motion to Dismiss for Mootness, the Board states at page 5 in Point I of its letter brief dated February 12, 1987:

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PETITIONER'S CLAIM IS MOOT BECAUSE NO RELIEF CAN BE GRANTED BY THIS COURT, NO IMPORTANT PUBLIC QUESTIONS ARE PRESENTED AND NO SUBSTANTIAL LEGAL ISSUES ARE INVOLVED

The Board contends that no viable issues remain in the instant matter because the "athletic, academic and social sanctions have expired and provisions have been made for the expungement of the sanctions from G.L.H.'s records." (Board's Letter Brief, at p. 7) Citing New Jersey Builders Association v. Byrne, 80 N.J. 469, 472 (1979) for the proposition that when relief requested in a pleading has been satisfied prior to a judicial determination by the passage of time or otherwise, the matter will be dismissed as moot. The Board suggests that Ronald Victoria v. Board of Education of the Township of Woodbridge, 1982 S.L.D. 1 sets forth the definition of mootness as applied in school law cases as follows:

> A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. Id. at p. 5. (Id., at p. 6)

It avers that the instant Petition of Appeal should be dismissed as moot since no relief can be granted. The Board avers that the legal issues surrounding the suspension of G.L.H. from the soccer team are not issues of great public concern and do not affect matters which are bound to recur, citing Playcrafters v. Teaneck Twp. Bd. of Ed. et al., 177 N.J. Super. 66 (App. Div. 1981), aff'd 88 N.J. 74 (1981), among other cases in support of its position in this regard. The Board further notes that it is crucial to this matter to note that

> ***New Jersey school law cases have consistently held that "participation in sports at public schools is a 'privilege' not a right." A.B., as Parent and Guardian Ad Litem on behalf of C.B. v. Board of Education of the Township of Freehold, OAL DKT. NO. EDU 3545-86 (June 15, 1986) (affirmed by the Commissioner of Education on July 11, 1986) (summary dismissal of claim seeking reinstatement to baseball team and permission to participate in other extra-curricular activities)*** (Id., at p. 8)

Further, citing H.O. v. Board of Education of the Township of Montgomery et al., decided by the Commissioner April 28, 1986, aff'd State Board September 3, 1986, the Board contends that the legal issues herein are insubstantial and neither affect matters of public importance nor involve factual circumstances bound to recur and, thus, the matter must be dismissed. Failure to do so, the Board argues "would be to require an inappropriate and unwarranted expenditure of public resources in a situation in which due process rights were meticulously protected and the Petitioners were given every opportunity to make a case but failed to do so. A.B. v. Board of Education of the Township of Freehold, supra." (Id., at pp. 8-9)

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In Point II of its brief dated February 12, 1987, the Board states:

> SINCE THE MATTER IS MOOT, PETITIONER DOES NOT NEED TO PROBE THE RECORDS OF RESPONDENTS AND NO DISCOVERY BEYOND WHAT ALREADY HAS BEEN SUPPLIED SHOULD BE ORDERED

In responding to petitioner's having filed (and later having been granted) a Motion to Compel Discovery, the Board contends that the instant matter is not a trial de novo, but rather a narrow review of respondents' action below, focusing on whether the Board had an adequate factual basis for its findings and, if so, whether as a matter of law it had the power to take the action it did. The Board cites McCabe v. Board of Education of the Township of Brick, 1974 S.L.D. 299, 307, quoting Boult and Harris v. Bd. of Ed. of Passaic, 1939-49 S.L.D. 7, aff'd St. Bd. 15, 135 N.J.L. 329 (Sup. Ct. 1947), 136 N.J.L. 521 (E.&A. 1947) for the proposition that "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. (McCabe, supra)" (Id., at p. 10) The Board argues, "It is improper to compare one student's case with that of another because it is impossible to identify the myriad of factors that may have influenced the exercise of discretion in any given case.***" (Id., at pp. 10-11)

The Board contends it has met many of the discovery demands of petitioner already and that further compliance with his demands would require an unwarranted expenditure of public resources as well as undue effort and also would violate the confidentiality to which the other students are entitled.

Finally, the Board argues that petitioner's understanding of the legitimate purposes of school sanctions is flawed. Countering petitioner's allegation that the sanction imposed on G.L.H. was for the improper purpose of making a public example of him, the Board claims that not only does the sanction imposed on G.L.H. and his companions serve to generally deter other students from engaging in similar conduct, but it specifically deters the sanctioned students from repeating their prohibited behavior. The Board cites State v. Roth, 95 N.J. 334, 345-346 (1984) and State v. Conk, 180 N.J. Super. 140, 144 (App. Div. 1981) as supporting the legitimacy of these goals.

Petitioner prays that the Order entered by ALJ Carnes denying the Board's Motion to Dismiss for mootness and compelling discovery be affirmed and that further delay of the proceedings in this matter be prohibited.

Averring that to dismiss this matter on the basis of mootness would constitute "a miscarriage of justice and an egregious denial of Petitioner's due process rights" (Petitioner's Letter Brief, dated April 6, 1987, at p. 1), petitioner posits that

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> [T]he academic and athletic suspensions are still on Petitioner's records, Petitioner and other Hopewell Valley students are still subject to the policies and practices being challenged in this litigation, Petitioner is entitled to a hearing and a determination as to his substantial due process allegations, and the issues are of public importance and likely to repeatedly occur but evade review. (Id., at p. 1)

Petitioner states that not only does the suspension presently remain on G.L.H.'s record, but also, even after expungement, he remains subject to Board Policy No. 5177 and the Athletic Code until he graduates, and therefore remains subject to "possible improper sanctions under those policies. In that respect, the wrong alleged in this case is one capable of repetition yet evading review and therefore not moot. Cain et al. v. New Jersey State Parole Board, 78 N.J. 253 (1978); Ammond v. McGahn, 532 F. 2d 325 (3rd Cir. 1976)." (Petitioner's Letter Brief, dated March 9, 1987, at p. 6) Petitioner claims that the cases cited by the Board in this regard suggest that "dismissal on the basis of mootness is only granted when the petitioner no longer retains even a remote interest in the disposition; even in cases that are technically 'moot', the Commissioner consistently addresses the substantive issues." (Id., at p. 7) Further, petitioner contends that the instant matter involves important public concerns and substantive issues, such as the authority of school boards to suspend athletes from interscholastic teams and the due process to which such athletes are entitled. He avers that such questions of general public importance are bound to recur and are in need of clarification by the courts of this state. Citing Braesch v. DePasquale, 265 N.W. 2d 842 (1978); Dennis v. Board of Education of the Township of Holmdel, 1977 S.L.D. 388, aff'd State Board July 6, 1977; and A.B. v. Board of Education of the Township of Freehold, supra, the latter two cases having been relied upon by respondents, petitioner counters the Board's position by stating:

> The findings in these cases that school boards can promulgate reasonable rules concerning participation in athletics is irrelevant to the issues with respect to the athletic suspension in this case, in which Petitioner alleges that Respondents did not promulgate any rule prohibiting consumption of alcohol outside of the school environment, that the relevant rule only specifies athletic sanctions for violations of school conduct rules, that Petitioner did not violate any school conduct rule with respect to alcohol since he was not under the school's supervision at the time that he consumed alcohol, that even had he violated a school alcohol rule, the specific penalty provided was for one-fifth of the season and Respondent was bound by that specific penalty, and that Respondent

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> deliberately and in bad faith circumvented its Athletic Code and "mooted" Petitioner's viable appeal of the sanction imposed under that Athletic Code for the improper purpose of upholding administration action, right or wrong, and making a public example of G.L.H., at the expense of his due process rights. These issues demand disposition despite the fact that this particular student can no longer be reinstated to his soccer team: He remains subject to unclear Athletic Code policies and to the disciplinary authority of the school board which considers itself not bound by specific sanctions in a District Athletic Code and which subordinates student due process rights to its policy and practice of upholding administration disciplinary action and making an example of high profile students by overly severe and public sanctions.
>
> (Id., at pp. 9-10)

Petitioner's challenge to the Board's jurisdiction in the instant matter is predicated upon his argument that N.J.S.A. 18A:37-2 "was clearly not meant to address consumption of alcohol when a student was not under the supervision and control of the school, whether or not that consumption was on school property." (Id., at p. 11) He claims that there are no reported New Jersey cases holding that N.J.S.A. 18A:37-2 authorizes suspension for consumption of alcohol on school property at any time. Further, petitioner cites a panoply of cases, including Goss v. Lopez, 419 U.S. 565 (1975) and R.R. v. Board of Education of the Shore Regional High School, 109 N.J. Super. 337 (Ch. Div. 1970) for the proposition that G.L.H.'s procedural and substantive due process rights were violated during the course of the Board's review of the matter at hand. Petitioner avers that written notice of the specific charges against G.L.H. was inadequate, as was the opportunity to cross-examine witnesses. Petitioner alleges the hearing was not impartial as a result of his parents being lawyers, and that the Athletic Code sanction was inappropriate under the circumstances, made in "furtherance of Respondents' policy and practice of assuring affirmance of administration action and discouraging challenge to such action by Hopewell Valley students." (Id., at p. 15)

Petitioner's Motion to Compel Discovery, he claims, is to acquire

> information concerning the academic and athletic sanctions imposed on other Hopewell Valley students, both before and after the incident at issue in this case, seeks evidential support for its contention that the sanctions imposed on G.L.H. and the others involved in the October 4 incident were so disproportionate as to be

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> arbitrary, capricious and an abuse of discretion and for its contentions that those sanctions were imposed in bad faith and for improper purposes. (Id., at p. 15)

Petitioner cites R. 4:10-2 (Rules Governing the Courts) and N.J.A.C. 1:1-11.1(d) suggesting that all the information sought is relevant and reasonably calculated to lead to admissible evidence. Petitioner asserts that the minutes of the closed Board meeting are sought "for the purpose of ascertaining the basis for the findings and determinations made with respect to G.L.H." (Id., at p. 16) Petitioner avers that "[a]ny privacy interests normally requiring such student disciplinary discussions to be in closed session are not relevant to a request by the student and/or his parents for disclosure of the nature of those discussions." (Id., at p. 16) With respect to the request for correspondence and memoranda regarding Board Policy No. 5177 and the Athletic Code, petitioner avers that "these documents are relevant to the issues of Respondents' interpretation and application of those policies." (Id., at p. 17)

Petitioner asserts that he is

> entitled to a full hearing on the facts of the incident, as well as the facts with respect to his due process allegations, and to an independent determination by this Court as to whether the sanctions imposed under the circumstances were properly imposed or were arbitrary, capricious, unreasonable or an abuse of discretion. (Id., at pp. 17-18)

Upon review of the moving papers, as well as the entire record amassed to date in this matter, the Commissioner rejects the Office of Administrative Law's Order denying the Board's Motion to Dismiss for Mootness and granting petitioner's Motion to Compel Discovery for the reasons that follow.

The Commissioner's review of the record before him reveals the following uncontested facts:

1. On Saturday night, October 4, 1986, G.L.H., a minor and a junior at Hopewell Valley High School, consumed two beers in the company of a group of his fellow students, on the grounds of Toll Gate/Grammar Elementary School in the Board's district.

2. Thereafter, on the same night, G.L.H. accompanied by other students, proceeded to the Central High School grounds, entered onto the school property, where he removed a net from the field hockey goal.

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3. Thereafter, on the same night, G.L.H. was present on the high school property with the group that later was found to have broken into an athletic storage building and, without authorization, to have removed soccer balls, kicking them around the field.

4. G.L.H. at the time of incident in question was a member of the varsity high school soccer team.

5. As a result of the above events, G.L.H. was removed from his classes and placed in in-school suspension on October 7, 1986, following a discussion of the events and charges among G.L.H., the athletic director and the vice principal.

6. On October 8, 1986, G.L.H. and his parents met with the vice principal and the athletic director to review the incident at which time it was announced that an athletic sanction would be recommended to the Board in addition to the in-school academic suspension.

7. On October 9, 1986 G.L.H. and his parents appealed the October 8 decision to the principal. Their appeal was denied.

8. On October 10, 1986, G.L.H. and his parents appealed the principal's denial of the appeal from the October 8 determinations to the local superintendent. Their appeal was denied.

9. On October 20, 1986 a Board hearing was held. In advance of that hearing G.L.H. received a notice of the meeting and a list of proposed witnesses.

10. On October 21, 1986 the Board Secretary advised petitioner and his parents that G.L.H. was to return to regular classes immediately, that the Board had imposed an athletic sanction in which he would be denied participation for one full sports season, including all post-season play, and that he would be denied social activities participation for the first semester. Petitioner was, at the same time, informed that records of said sanctions would be destroyed at the end of the school year. Additionally, G.L.H. was required to comply with substance abuse counseling.

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11. G.L.H. was restored to his regular classes at the end of an eight day in-school suspension, he did not participate in soccer for the rest of the season, and his suspension from social activities was enforced throughout the first semester of the 1986-87 school year.

Predicated upon the above-stated uncontested facts, the Commissioner will first consider the jurisdictional question raised by petitioner, that is, whether the Board of Education was empowered to sanction G.L.H. at all, in that his admitted consumption of alcohol on school premises was after school hours, did not involve a school-sponsored activity, and thus, he alleges, was not at a time when he was accountable to the school for his conduct.

N.J.S.A. 18A:37-1 et seq. make clear that the right to a free public education in the State of New Jersey is subject to certain restrictions. Those students who do not obey the reasonable rules of the school system or who otherwise act in a manner so as to disrupt the school system are subject to punishment and to suspension or expulsion from school. (N.J.S.A. 18A:37-2) This same statute at paragraph j provides for suspension or expulsion for "[k]nowing possession or knowing consumption without legal authority of alcoholic beverages or controlled dangerous substances on school premises, or being under the influence of intoxicating liquor or controlled dangerous substances while on school premises." In addition, Board Policy No. 5177, which deals with drug and alcohol abuse in paragraph (a), states:

7. Policies Related to Drug and Alcohol Abuse

a. If a student is found to have been in possession of, under the influence of, in the act of selling, or in any other way providing narcotics, alcohol, or other illegal drugs in a school building or on school grounds, or at any time when he is accountable to the school for his conduct, the circumstances of the case will be reported to the appropriate law enforcement authorities, and the student will be immediately placed on internal suspension by the principal and will attend an alternate program at the Administration Building. The principal will see that appropriate lesson assignments are forwarded to the Administration Building by 9:00 A.M. the following day and that future lessons will be supplied until such time as the student is returned to the school. The incident will be reported

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> to the superintendent immediately so that appropriate transportation arrangements may be made and he/she will in turn review the case with the Board of Education. The sale or providing of narcotics, alcohol, or other illegal drugs is regarded as a particularly grave matter by the Board. The members of the Board of Education regard any offense of this nature as extremely serious and will consider expulsion of the student as a probable result if the nature of the offense warrants this action.

Both the school policy and the statute proscribe the use of alcohol on school premises. Case law through the years has clearly established the Board's power to enforce the above law and regulations and to mete out sanctions as punishment for violations in situations such as the instant matter.

The Commissioner rejects entirely petitioner's contention that because the alcohol consumption occurred on school premises on a Saturday night, that the Board had no jurisdiction to punish him. In the 1960's the Commissioner established the jurisdiction of a Board of Education to act beyond the confines of school hours when a matter touches and concerns the legitimate interest of the school and its charges. See Ralph F. Angelillo, Sr. et al. v. Board of Education of the Manchester Regional High School District, 1964 S.L.D. 74, 77 (Pupils are accountable to the Board of Education when their conduct on school premises "reaches back within the school to the harm of the proper order and educational purposes of the school *** [so long as] the conduct to be controlled through the exercise of such power must necessarily be relevant to the legitimate interests and purposes of the school.").

Similarly, in 1982 in a case entitled F.G., individually, and as guardian ad litem for F.G. v. Hamilton Township Board of Education, 1982 S.L.D. 382, 391, the Commissioner determined that a student may be sanctioned for possession of an alcoholic beverage occurring after school hours at a school-sponsored sporting event not on the team's home premises. The Commissioner held therein that such sanctions were proper, and he noted that

> Ordinarily, school authorities have no right of control over pupils for acts of misbehavior outside of school and school hours, but such acts may subject a pupil to punishment where they are detrimental to good order and to the best interest of the school or where they adversely affect school discipline. 79 C.J.S., Schools and School Districts, sec. 496 at 445. (emphasis supplied) (Id., at 390-391)

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In J.C. v. Board of Education of the City of Long Branch, decided by the Commissioner June 18, 1984, a student claimed his suspension following his arrest for possession of marijuana, not on school grounds, was an inappropriate sanction by the Board because any such out-of-school activities, unrelated to operation of school in any manner, must reasonably relate to a danger to the students, faculty or property of the district in order to fall under the Board's jurisdiction. Citing R.R. v. Bd. of Ed. of Shore Regional High School, 109 N.J. Super. 337 (Chan. Div. 1970), the Commissioner held that given the circumstances in that controverted matter, the board had reasonable cause to act in accordance with N.J.S.A. 18A:37-2 and dismissed J.C.'s arguments to the contrary as being without merit.

Clearly, a student who admits sitting in a playground on school property drinking alcoholic beverages, who is an athlete and who subsequently was present at a time when clear acts of vandalism were perpetrated cannot claim that those actions are not "detrimental to good order and to the best interest of the school or where they adversely affect school discipline." To deny that such events lie beyond the role and responsibility of school authorities to sanction, in the Commissioner's judgment, rises to the level of an absurdity. The Commissioner finds petitioner's arguments herein to be without merit as to this denial of the danger that G.L.H. presented to himself, as a minor who violated the laws of this State and of the Board of Education by consuming alcohol on school premises.

Further, there is no doubt in the Commissioner's mind whatsoever that G.L.H. did in fact vandalize school property in removing the field hockey net from its rightful place, notwithstanding his contention that there was no permanent damage to the equipment. The later events of the evening of October 4, 1986, in the Commissioner's opinion, were directly related to the earlier drinking episode. The Commissioner's comments in D.K.P., by his guardian ad litem J.P., and J.P. and B.P. v. Board of Education of the Hunterdon Central Regional High School District et al., decided by the Commissioner October 23, 1986 are apposite to the instant matter. Therein, in considering the actions of that board in imposing extracurricular sanctions against a minor student who admitted he had consumed beer and smoked marijuana while conducting a school-related activity at night at the school's radio station, the Commissioner stated in his Decision on Motion, dated October 23, 1986:

> In reaching the conclusion above, the Commissioner is mindful of the heavy responsibility which rests upon school administrators to deal swiftly and decisively with incidents of drug use within the school environment. He takes particular note of the fact that D.K.P. does not deny the fact that he knowingly and deliberately consumed alcoholic beverages and smoked a controlled and dangerous

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substance within the school environment. He could not or should not have been unaware of the fact that his role as a member of the football team, as well as his status as a student in the school, was in jeopardy when he decided to take the actions he did. The seriousness of the undisputed offenses committed by the student in this matter cannot be overstated. Not only was there alcohol on school property involved but also drugs. As was stated in E.E. v. Bd. of Ed. of Township of Ocean, 1971 S.L.D. 71:

> Offenses involving the abuse of drugs are a serious menace to the mental health of our society, and the introduction and abuse of drugs in the public schools must be dealt with swiftly, in order to prevent their further introduction to other students.*** (at p. 101)
> (Slip Opinion, at pp. 5-6)

Petitioner's argument that he was merely present but did not participate in such acts of vandalism constitutes pure sophistry in that he neither absented himself nor sought to dissuade his companions from their acts of vandalism, which neither he nor they deny occurred. To argue as does petitioner herein that the one act which he admitted having carried out, namely the removal of the net, does not represent misconduct because no "permanent" damage was done, in the Commissioner's view, begs the question of G.L.H.'s obvious misbehavior. The Commissioner further finds and determines that Policy No. 5177 and N.J.S.A. 18A:37-1 et seq. are consonant in carrying out the intendment of the Legislature 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) The Commissioner finds that the laudable purpose of N.J.S.A. 18A:37-1 et seq. and the Board's policy developed thereupon are well met by the Board's acting swiftly and forcefully to sanction the students involved in the incidents in question herein.

As to the particular sanctions meted out to G.L.H., the Commissioner deems these to have been entirely warranted and appropriate under the circumstances, and in full compliance with his due process rights as embodied in Goss v. Lopez, 419 U.S. 565 (1975). First, as to the eight-day academic suspension, G.L.H. was provided far greater due process than that required by law. The Commissioner rejects soundly the argument that petitioner to date has received no meaningful hearing. "Short-term suspensions of 10 days or less may be imposed by school administrators provided minimal due process rights are provided pursuant to Goss v. Lopez. The Commissioner holds that no New Jersey statute or court decision holds to the contrary." (D.K.P., at p. 4) Goss states:

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> ***Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him, and if he denies them, an explanation of the evidence the authorities have and opportunity to present his side of the story. ***
>
> There need be no delay between the time "notice" is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is***. (emphasis supplied)(43 LW 4186)

It cannot be argued seriously that the Board failed to meet the informal hearing requirements articulated in Goss for suspension of fewer than 10 days in the instant matter. Not only did petitioner receive three such informal hearings, for what amounted to an eight day in-school academic suspension, but he also received a formal hearing before the full Board due to the seriousness of the infractions. Accordingly, such arguments advanced by petitioner alleging a violation of due process are dismissed as being without merit.

Concerning the athletic and social sanctions imposed upon G.L.H., the Commissioner agrees with the Board that it was entirely within its rights in barring G.L.H. from participation in sports. He adopts as his own the argument contained in respondents' Statement and Brief in Opposition to petitioner's Application for an Emergency Stay as found on pages 13-15, which states:

> In A.B. as parent and guardian ad litem on behalf of C.B. v. Board of Education of the Township of Freehold, Commissioner of Education Decision, July 15, 1986, it was held that participation in co-curricular activities is a privilege and not a right. The Commissioner held that the Board had properly employed rules and regulations for participation in these activities. (See also D.K.P. v. Hunterdon Central, supra.) The fact that the School District in this case has a separate code pertaining to athletic activities does not bar the Board from utilizing this sanction.

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The Athletic Code is a separate, lower-level mechanism designed to be implemented by the coaches, the Athletic Director, and the principal without entailing Board action. In a more serious case such as this one, in which the matter involves suspension and procedurally goes to the Board, the Board is free to and indeed must impose sanctions according to its general policies and within its overall discretion. A.B. v. Freehold, supra.

The Code of Ethics and Guidelines for Athletes, ("Athletic Code") in paragraph C-3 provides that "if a team-associated student is suspended from school, he/she will not be permitted to practice or play during that period of suspension." While the academic suspension is at an end in this case, the Board continued the suspension from extra-curricular activity; therefore, there is no violation of the Athletic Code.

Secondly, Section 7 of paragraph C provides for suspension for the entire season for a second offense concerning violations involving alcohol and vandalism, among other violations.

In this case, there were at least two offenses committed, the first involving alcohol, even though the infraction did not take place during school hours. In Larry and Arline Dennis, on behalf of Scott Dennis, v. Board of Education of the Township of Holmdel, 77 S.L.D. 388, a member of the varsity football team, who was found to have been drinking at a restaurant during the season, was denied his athletic award. Here, again, the Commissioner held that participation in co-curricular activities is a privilege: "In the instant matter, the Board had rules governing the conduct of the members of its football team, which Petitioner admittedly violated" (page 390). It is one of the rules of training that a team member will not drink during the season. It is irrelevant whether he drinks on school premises, during school hours; or off the premises before or after school hours. It is the act of drinking which is detrimental to his physical condition and thereby to the welfare of the team.***

The second offense of which this petitioner was guilty was vandalism in the form of removing the net***.

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> There is clearly no violation of the school district Athletic Code in imposing this sanction for a second offense and no discrepancy between the Athletic Code and the Board Policy. Even if there were such a discrepancy, a Board of Education can override its own policies where it is necessary to do so for the welfare of the school system. This principal (sic) was established decades ago and continues to be followed. Greenway v. Board of Education of the City of Camden, 39-49 S.L.D. 151, Affirmed State Board 39-49:155, Affirmed 129 N.J.L. 46 (Superior Court, 1942) Affirmed 129 N.J.L. 461 (E and A, 1943); Porcelli et al. v. Newark Board of Education, 68 S.L.D. 225; Belmont v. Ridgefield Board of Education, Commissioner of Education Decision, December 30, 1980.

Based on the above, and considering the totality of circumstances, the Commissioner finds and determines there was no abuse of the Board's discretion in assigning the sanctions it did to G.L.H. "[I]t 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.***" James McCabe v. Board of Education of the Township of Brick, 1974 S.L.D. 299, 307, quoting Boult and Harris v. Board of Education of Passaic, 1939-49 S.L.D. 7, aff'd St. Bd. 15, 135 N.J.L. 329 (Sup. Ct. 1947), 136 N.J.L. 521 (E.& A. 1947) In the absence of any such abuse of its discretion, unlawfulness, or bad faith, the Commissioner dismisses petitioner's arguments to the contrary as being without merit.

Finally, as to the issue of mootness, because the Commissioner finds the Board in this case met and indeed exceeded the minimal due process entitlement afforded to suspension cases of fewer than 10 days, and because the Commissioner further finds there was no breach of the Board's discretion in sanctioning G.L.H. as it did, there remains no basis for this matter to proceed further. The Commissioner finds and determines that the instant circumstances do not rise to a level of such public importance as to require further review of what is otherwise an appropriate exercise of the Board's discretion. In light of G.L.H.'s admissions, neither is he entitled to expungement of the record of the sanctions assigned him, except as Board policy so requires. Because the Board has agreed to expunge the record at the end of the year in compliance with its policy, this matter too is laid to rest. Lastly, as to petitioner's Motion to Compel Discovery, since he is not entitled to further due process proceedings, the matter of further discovery is also made moot.

In the Commissioner's view, this case of a student who admittedly violated training rules and accepted modes of good conduct of both an athlete and an honors student has occupied more than a sufficient amount of energy and public monies.

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Accordingly, the Order of the Office of Administrative Law, Steven L. Carnes, ALJ is rejected as to the Motion to Dismiss for Mootness, and rejected as to the Motion to Compel Discovery. For the reasons set forth above, the entire Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

April 20, 1987

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G.L.H., by his guardians ad litem, G.H.H. AND G.R.H.,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE HOPEWELL VALLEY REGIONAL SCHOOL DISTRICT ET AL., MERCER COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, April 20, 1987

For the Petitioner-Appellant, Lenox, Giordano, Devlin, Delehey and Socey (Gail R. Henningsen, Esq., of Counsel)

For the Respondent-Respondent, Norris, McLaughlin and Marcus (Peter R. Knipe, Esq., of Counsel)

This is an appeal from a decision of the Commissioner of Education granting the motion of the Respondent Board of Education to dismiss this matter for mootness. The underlying case involves a challenge by a high school student, brought on his behalf by his parents, to disciplinary action that was imposed on him by the Board. The sanctions were imposed as a result of Petitioner's involvement in an incident where he admittedly consumed two beers in the schoolyard of one of the District's elementary schools on a Saturday night and, accompanying other students, went to the high school where Petitioner tampered with an athletic net and was present while others pried open a door to an athletic storage shed and removed soccer balls which were later returned. The sanctions imposed on Petitioner by the Board included an in-school suspension from October 8, 1986 to October 21, 1986, a period that included eight school days, suspension from the soccer team for the remainder of the season and prohibition on his participation in extra-curricular social activities for the first semester. Any records of the sanctions were to be destroyed at the end of the school year.

By petition to the Commissioner, Petitioner's parents sought their son's immediate reinstatement to the soccer team, reversal of the academic suspension and expungement of the records, reversal of his suspension from athletic eligibility and expungement of those records, reversal of suspension from extra-curricular activities and expungement of those records, all academic assistance required to allow him to catch up in his school work and prevent his grades from suffering from his extended suspension from his classes and such other relief as appropriate. Petitioner's parents also

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sought a stay of the imposition of the sanctions pending disposition of the matter. Petitioner's application for interim relief was considered on an emergent basis in administrative proceedings and by the courts, and was denied. 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, motion denied by the Commissioner, October 30, 1986, interim stay by the Appellate Division, October 30, 1986, stay vacated, 107 N.J. 28 (1986), Commissioner's denial of motion aff'd by the State Board, November 5, 1986, application denied by Appellate Division, November 6, 1986, motion denied by the New Jersey Supreme Court, November 10, 1986.

Following commencement of discovery, the Administrative Law Judge (ALJ), upon motions by the parties, denied the Board's motion to dismiss for mootness and granted in part Petitioner's motion to compel discovery. Upon request by the Board, the Commissioner granted interlocutory review. Following review of the arguments of the parties, and based on his review of the entire record, the Commissioner rejected the ALJ's determination.

Synopsizing the uncontested facts, the Commissioner considered Petitioner's arguments that the Board was not empowered to sanction him at all under these circumstances, that the sanctions imposed on him were in any event arbitrary and unreasonable and imposed in violation of his due process rights, and that the Board could not properly sanction him by barring him from participation in athletic activity. Rejecting these arguments, the Commissioner determined that the Board did not abuse its discretion in imposing the sanctions at issue on Petitioner. Finally, finding that the Board had met and exceeded minimal due process requirements and because of his further finding that the Board had not breached its discretion in sanctioning Petitioner, the Commissioner concluded that there was no basis for the matter to proceed further. Determining that the circumstances did not rise to the level of such public importance as to require further review and that the Board's agreement to expunge the record at the end of the year laid that question to rest, the Commissioner dismissed the petition.

After careful consideration, we concur with the Commissioner that the matter is moot and affirm his dismissal of the petition on that basis. Review of the record indicates since Petitioner's athletic, social and academic suspensions have already been served and provisions have been made for the expungement of his record, further litigation can not afford the relief sought in his pleadings. Further, although we recognize that in any case involving short term suspensions such as here, the sanctions imposed may have been served prior to hearing on the merits, we conclude that the issues raised by this particular case are neither bound to recur nor are of such public importance so as to warrant further proceedings. In that we base our affirmance of the Commissioner's determination on our conclusion that the matter is moot, the State Board of Education does not find it necessary to further consider the underlying substantive issues involved in the matter.

September 2, 1987

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BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
KENNETH A. RIKER, RESPONDENT.	:	DECLARATORY JUDGMENT

For the Petitioner, Riker, Danzig, Scherer, Hyland & Perretti (James S. Rothschild, Jr., Esq. of Counsel)

For the Respondent, Wayne J. Oppito, Esq.

This matter was opened before the Commissioner by way of a Petition for Declaratory Judgment from the Livingston Board of Education (Board) requesting that the Commissioner construe the meaning of N.J.S.A. 18A:28-1 et seq. and N.J.A.C. 6:3-1.10 et seq. as they pertain to a dispute which has arisen between the Board and Respondent Kenneth A. Riker.

Upon receipt of the answer to the above-cited petition, a conference call was held between counsel for the Board and for respondent and the Commissioner's representative. It was agreed between the parties that a Joint Stipulation of Facts would be presented and that each party would present a brief, setting forth their respective arguments of law. Based upon the aforesaid Stipulation of Facts and the briefs, the Commissioner would render Declaratory Judgment.

By way of explanation, it should be noted that the controversy in this matter has emerged from circumstances which arose out of a decision rendered by the Commissioner entitled Donald Turner v. Board of Education of the Township of Livingston, decided November 26, 1985. Therein, the Commissioner had rendered a determination that petitioner was entitled by way of seniority to retain his position as high school guidance director when a reduction in force had taken place reducing the number of guidance directors in the district. The Commissioner's determination in the aforesaid matter was based upon two conclusions of law. Pursuant to N.J.A.C. 6:3-1.10(1)10

> ***(each approved supervisory title shall be a separate category. District boards of education shall adopt job descriptions for each supervisory position which shall set forth the qualifications and specific endorsements required for such position.)*** (emphasis supplied)

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Secondly, the Commissioner concluded that the record in Turner, supra, did not contain "***evidence that the directors of guidance at the two junior high schools were required to possess a Educational Services Certificate with a Director of Pupil Personnel Services endorsement." (Slip Opinion, at p. 15) Based upon the absence of proof that the aforesaid Director of Student Personnel Services endorsement was required for the position of guidance director at the junior high school and his own analysis of the actual duties performed, the Commissioner further concluded that the position was not a supervisory position and that those duties could have been performed by a person holding a student personnel services certificate (guidance counselor). This conclusion of the Commissioner was further heightened by virtue of the fact that the Livingston Board of Education had never requested approval of the county superintendent of schools for unrecognized titles as required by N.J.A.C. 6:11-3.6(b).

After the decision of the Commissioner in Turner, supra, the parties in that matter settled their differences amicably and Donald Turner resigned his position as high school guidance director and Respondent Riker was subsequently assigned to that position. Such assignment has given rise to the controversy in this matter, namely whether Riker, by virtue of his earlier assignment as Director of Guidance of the Livingston Junior High School, has acquired tenure under his Educational Services Certificate endorsement as a Director of Student Personnel Services.

Joint Stipulation of Facts

1. The petitioner is a duly constituted public body, and is charged with the administration of the public school system in the Township of Livingston, County of Essex, State of New Jersey.

2. The respondent is an employee of the petitioner, presently holding the position of Director of Guidance at the Livingston Senior High School.

3. Prior to assuming the duties and responsibilities of Director of Guidance in the Livingston Senior High School, the respondent held the following positions of employment with the petitioner: Social Studies teacher, 1956-1959; Guidance Counselor 1959-1961; Director of Guidance assigned Mt. Pleasant Junior High School (Livingston), 1961-1974; Vice Principal assigned to the Mt. Pleasant Junior High School (Livingston), 1974-1985.

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***

5. In or about January, 1985, petitioner had in its employ, one Donald Turner ("Turner"), who was serving as Senior High School Director of Guidance, and one Evans Herman ("Herman"), who was serving as Director of Guidance of the Heritage Junior High School (Livingston).

6. When petitioner determined to reduce in force at that time, it notified Turner that it believed that he had the least seniority of the three individuals involved as a Guidance Director and that he could not continue as such since petitioner only required two Guidance Directors, not three.

7. Turner thereupon brought an action before the Commissioner of Education denominated Donald Turner, Petitioner v. Board of Education of the Township of Livingston, Essex County, Respondent, OAL Dkt. No. EDU 1717-85. In that action, in which both respondent and Herman entered appearances, Turner asserted that his position as Director of Guidance, Senior High School, was a separate and distinct category from Director of Guidance, Junior High School, and that, accordingly, he held greater seniority in the position of Director of Guidance, Senior High School, than did either respondent or Herman, both of whom had only served as Director of Guidance, Junior High School. The OAL Judge disagreed, dismissing Turner's petition.

8. The Commissioner of Education rejected the Initial Decision and determined that Donald Turner had greater seniority in the position of Director of Guidance at the high school because said position was in a different category for seniority purposes than Director of Guidance at the junior high school.

9. The Commissioner of Education, in rejecting the Administrative Law Judge's recommendation, issued a written decision dated November 26, 1985. While the parties herein do not stipulate the following facts for the purpose of the within litigation, it is stipulated by and between the parties that the Commissioner's written decision contained the following findings and/or statements:

(a) "Since the high school and junior high schools encompass grades seven through

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twelve, the ALJ incorrectly identified the three positions herein as being within the secondary category as defined in N.J.A.C. 6:3-1.10(1)15 and subject to the further application of N.J.A.C. 6:3-1.10(1)17, namely, additional categories of educational service endorsements issued by the State Board of Examiners.";

(b) "a careful examination of the duties of the positions in question clearly reveals that the position of Guidance Director at the senior high school is a supervisory position.";

(c) "Specifically, N.J.A.C. 6:3-1.10(1)10 dictates that each approved supervisory title shall be a separate category, which implies that tenure in such a position is separately accrued.";

(d) "nowhere in the record is there evidence that the directors of guidance at the two junior high schools were required to possess an Educational Services Certificate with a Director of Pupil Personnel Services endorsement. Even though all three directors of guidance in the district hold such certificates and endorsements, only the unofficial job description for the position of Director of Guidance at the senior high school listed the certification as a requisite qualification for the job.";

(e) "The position of Director of Guidance at the senior high school cannot be equated with the junior high school Director of Guidance positions pursuant to N.J.A.C. 6:3-1.10(1)15 and 17 because the job functions differ profoundly.";

(f) "it is inappropriate to calculate their comparative seniority because the senior high school position is supervisory while the duties of Director of Guidance at the junior high schools could be performed without the Director of Pupil Personnel Services endorsement.";

(g) "Based on the unofficial job descriptions and the testimony of the witnesses, it is the opinion of the Commissioner that the guidance directors at the junior high schools perform duties that do not require a

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Director of Pupil Personnel Services certificate because their positions entail little supervisory activity.";

(h) "The Commissioner notes Exhibit P-1 marked into evidence, a letter dated December 21, 1981 from a Mr. Riker to a Mr. Alan Berlin, indicating that, as of that date, the Director of Guidance at the high school assumed additional responsibilities. Petitioner stated at the hearing that he

> '...had to assume -- in addition to the job duties that I had previously had to assume -- several others which the previous Director nor the two junior high school Directors ever had to deal with --.' (Tr. 47)";

(i) "The letter indicates that commensurate with these additional administrative duties his salary at that time was raised to that of vice principal.";

(j) "The transcript concurs with the fact that the salary of the Director of Guidance has historically been 'equated with the level of Vice Principal' while at the junior high schools, it is not.";

(k) "In this regard, Mr. Andlauer, the Deputy Superintendent of Schools, was asked whether

> 'the position of Director of Guidance at the high school proved different than the Director of Guidance at the junior high school?'
>
> He replied, 'yes.' (Tr. 34)";

(l) "The record establishes that the Director of Guidance at the high school does not carry a full counseling load, but rather only occasionally intercedes in particular cases.";

(m) "By contrast, the junior high school guidance directors counsel as many as 200 students during any given year. (Tr 27, 32)";

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(n) "Further, it is clear from the record that the Director of Guidance at the high school conducts all evaluations of counselors and other staff in the high school guidance department himself, while at the two junior high schools, the principal conducts such evaluations with 'input' from the directors. (Tr. 40-41, 44-45)";

(o) "Responsibility for such evaluations is unquestionably a supervisory function and, at Livingston Senior High School, that responsibility rests primarily with petitioner.";

(p) "Notwithstanding the contention of the deputy superintendent that the three positions are comparable, such contention is refuted by the job description, as well as his own testimony that the position of Director of Guidance at the high school 'proved different than the Director of Guidance at the junior high school.' (Tr. 34) and his admission that he had no evidence that Mr. Herman, one of the junior high school guidance directors, conducted evaluations of counselors. (Tr. 40)";

(q) "Consequently, even though the titles of the three positions are identical, the duties clearly indicate that the position at the senior high school is the only one of the three that is supervisory, so petitioner is the only individual among the three concerned herein who may lay claim to seniority entitlement in such position.";

(r) "Thus, it is determined that the position of Director of Guidance at the senior high school falls under the provisions of the 'Supervisory' category, N.J.A.C. 6:3-1.10(1)10.";

(s) "However, the two junior high school Director of Guidance positions do not fall under the supervisory category; rather, it is determined that those positions fall under the 'secondary' category, N.J.A.C. 6:3.10(1)(15)iii, which states that:

> 'Any person employed at the secondary level in a position requiring an educational services certificate or a special

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> subject field endorsement shall acquire seniority only in the secondary category and only for the period of actual service under such educational services certificate or special subject field endorsement.'"

10. Due to Turner's dismissal following the decision of the OAL Judge, a vacancy existed in his position in or about the Spring of 1985. Respondent was directed to assume the duties of the Director of Guidance of the high school on at least a part-time basis on or about May 1, 1985 and was appointed Director of Guidance of the high school on or about July 1, 1986 (since Turner did not return following his victory before the Commissioner). As such, respondent has acted in the capacity of Director of Guidance of the high school since May 1, 1985.

11. Petitioner and respondent disagree as to whether respondent has acquired tenure in the position of Director of Guidance of the high school.

Omitted from the above-cited Stipulation of Facts is Stipulation No. 4 which states:

> 4. During the period 1961-1974 when respondent served as Director of Guidance, he was required to have an Educational Services Certificate with the Director of Student Personnel Services endorsement. Respondent was properly certified during the entire period that he served as Director of Guidance assigned to Mt. Pleasant Junior High School.

When presented to the Commissioner, the aforesaid statement appeared to be at variance with the Commissioner's finding in Turner, supra. Upon being informed by the Commissioner's representative of the apparent discrepancy, it became clear that the parties were not prepared to stipulate that which was contained in the statement. Consequently, the Commissioner determined to transmit the matter to the Office of Administrative Law for a limited finding of fact as to whether any record existed that respondent in this matter was "***required to have an Educational Services Certificate with the Director of Student Personnel Services endorsement." Although the Commissioner had concluded in Turner, supra, that the record did not reflect such requirement, he felt that fairness required that he provide respondent an opportunity to provide any proofs which he may have had as to the certificate endorsement required by the Livingston Board of Education for the position of

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Director of Guidance for the junior high school. After transmittal to OAL, the parties agreed in the interest of expeditious determination to submit all the documentary evidence available upon which to render judgment on the endorsement requirement and to allow the Commissioner to reach a conclusion on that issue without necessity for hearing.

ARGUMENTS OF THE PARTIES

The Board's principal argument is that the matter controverted herein is capable of resolution based upon the precise finding of fact reached by the Commissioner in Turner, supra. The Board further contends that respondent is collaterally estopped from relitigating factual finding already made by the Commissioner in Turner, supra. Since all factual issues were argued and briefed in the Turner matter before both the ALJ and the Commissioner, and since the Commissioner has not modified his findings in that matter, there remain no justiciable issues and Turner is dispositive.

The Board further argues that Respondent Riker has not acquired tenure in the position of Director of Guidance of Livingston High School by virtue of having previously obtained tenure in the position of Guidance Director of one of the districts junior high schools. In support of such position the Board argues as follows:

> The respondent advances the argument that he has obtained tenure in his present position as Director of Guidance, Livingston Senior High School, by virtue of his prior service over an approximate thirteen-year period as Director of Guidance of the Livingston Junior High School. To arrive at this conclusion, the respondent must maintain that the positions of Director of Guidance at the Senior and Junior High Schools are the same, with the only difference being a matter of building assignment. Thus, an individual would obtain tenure in the generic position of Director of Guidance, without regard to building assignment, much as one would obtain tenure in the position of, for example, Social Studies teacher, without regard to particular building assignment. Such an analysis is erroneous since respondent has not obtained tenure in the separate and distinct supervisory position of Director of Guidance, Livingston Senior High School.
>
> It is clear from the opinion of the Commissioner in the Turner matter that the positions of Director of Guidance, Livingston Senior High School and Director of Guidance at the Junior High Schools are separate and distinct, in terms of job functions, duties and responsibilities.

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> Further, it is clear that the Senior High School position is primarily a supervisory position, and thus is properly classified in the "supervisory" category pursuant to N.J.A.C. 6:3-1.10. The Junior High School position involves "little supervisory activities" Turner, supra, Commissioner's Decision at 16, and is properly classified in the "secondary" category.

In further support of its contention the Board, while conceding that respondent had obtained tenure protection in the "position" of Guidance Director of one of its junior high schools, argues that he has not obtained tenure in his "new" position of Guidance Director of the Livingston Senior High School because he has not fulfilled the provisions of N.J.S.A. 18A:28-6(a) which provide for the obtaining of tenure in a new position upon transfer or promotion with consent upon "***the expiration of a period of employment of two consecutive calendar years***."

Respondent Riker disputes the contentions of the Board in this matter arguing contrarily that he has earned tenure in the position of Guidance Director by virtue of service under an appropriate certificate issued and required by the Department of Education for the holding of the position of Director of Guidance. In support of such contention respondent cites Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982) and Howley and Bookholdt v. Ewing Board of Education, 1982 S.L.D. 1328, aff'd State Board June 1, 1983.

Respondent further argues that Turner, supra, is not applicable inasmuch as that decision was one involving a seniority determination rather than the issue herein of whether tenure had been obtained by virtue of service under an appropriate, required certificate for the requisite period of time. Respondent's arguments relative to the distinction between tenure and seniority are excerpted below:

> The issue in this matter has arisen because petitioner has confused "tenure" with "seniority" as a result of the Commissioner's Decision in Turner v. Livingston Board of Education, 1985 S.L.D. _____ (Comm. Dec. November 26, 1985) Although there is a relationship between "tenure" and "seniority", they are two different matters. "Tenure" is a status conferred by the legislature (N.J.S.A. 18A:28-5), while "seniority" is the procedure set forth by the Commissioner of Education to determine which staff members remain in positions of employment after a reduction in force or reorganization. (N.J.A.C. 6:3-1.10). Tenure is attained in a position, i.e., Director of Guidance. Seniority is acquired in specific categories, i.e., secondary or elementary.

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It is consistent with the laws and regulations for respondent to be tenured as the Director of Guidance, but not have a seniority entitlement to the high school assignment. Respondent relies on the Commissioner's decision in Howley and Bookholdt v. Ewing Bd. of Ed., 1982 S.L.D. 1328, aff'd State Board of Education, June 1, 1983. In the Initial Decision which was affirmed and wholeheartedly endorsed by the Commissioner, the Administrative Law Judge sets forth a complete finding as to "tenure" in Howley/Bookholdt 1982 S.L.D. at 1336-1339, "seniority" at 1340-42 and "category" at 1342-1345. Respondent will not present lengthy excerpts from that decision, but rather asks the Commissioner to make note of it. Respondent suggests that petitioner in this matter has confused tenure and seniority in a manner similar to the parties in Howley/ Bookholdt, supra.

As in Howley/Bookholdt, supra, petitioner has incorrectly opined that respondent does not have tenure in the position of Director of Guidance at Livingston High School. The correct posture is that respondent has tenure in the position of Director of Guidance. Pursuant to Turner v. Livingston Board of Education, supra, he did not have a seniority entitlement in the high school category. As the Administrative Law Judge noted in Howley/Bookholdt at p. 1345:

> "Categories" are not synonymous with "positions", although sometimes they happen to be the same, e.g., superintendent of schools; nor are they necessarily the same as endorsements, although they may be, under N.J.A.C. 6:3-1.10k(30) which creates additional categories of "specific categories." Categories are nothing; more than what the Commissioner has said they are and their only purpose is for determining a tenured teaching staff member's rights in a RIF. Williams v. Plainfield Bd. of Ed., 1979 S.L.D. [220], [decided by the State Board 1980 S.L.D. 1552], aff'd 176 N.J. Super. 154 (App. Div. 1980), certif. den. 87 N.J. 300 (1981). [emphasis in text]

Since this matter does concern a reduction in force, seniority is not an issue. In accordance with the Supreme Court decision in Spiewak, supra, and the Commissioner's decision in

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> Howley/Bookholdt, supra, it is patently clear that respondent has tenure in the position of Director of Guidance.

The Commissioner has carefully reviewed the arguments of the parties, as well as the exhibits submitted in this matter. Based upon such review the Commissioner concludes that the Board is correct in the contention that this matter may be decided based upon the finding of facts and conclusions in Turner, supra. However, the Commissioner does not concur with the Board's reasoning that Respondent Riker must obtain tenure in the "separate position" of Senior High School Guidance Director presuming that he had previously obtained tenure as Director of Guidance in the junior high school. In that regard, the Commissioner finds that Respondent Riker is correct when he cites Howley and Bookholdt, supra, for the proposition that positions and categories are not synonymous with tenure. Respondent is also correct when he distinguishes between tenure which is obtained in a position and seniority which is obtained in a category. (Respondent's Brief, at p. 6)

Tenure pursuant to N.J.S.A. 18A:28-5 is acquired by individuals by virtue of service "***in positions which require them to hold appropriate certificates issued by the board of examiners***." In the instant matter, while it is undisputed that Respondent Riker did at all times when serving in a position called Director of Guidance at one of the district's two junior high schools hold, among others, a certificate endorsement as a Director of Student Personnel Services. To prove he had obtained tenure, however, respondent must demonstrate pursuant to Spiewak, supra, that he was in a position which required him to hold the certificate endorsement of Director of Student Personnel Services; he must have held that certificate while serving in such position; and he must demonstrate that he had served the period of time required by N.J.S.A. 18A:28-5 to obtain tenure. While it is clear that the stipulated facts in this matter demonstrate that Respondent Riker did hold a certificate endorsement as Director of Pupil Personnel Services and did serve in a position called Director of Guidance well beyond the period of time required under N.J.S.A. 18A:28-5 to acquire tenure, what must be decided in this matter is whether the position held by Respondent Riker is one which required its holder to possess such certificate endorsement. The Livingston Board of Education never requested the county superintendent to review the job description of the individual assigned as Director of Guidance in the junior high school pursuant to N.J.A.C. 6:11-3.6(b) to determine the appropriate certificate endorsement for the position. Consequently, the Commissioner must look to two factors which would impinge upon the conclusion as to respondent's tenure status. The nature of the duties performed and a determination of whether those duties of the position would require that individual to hold a certificate endorsement as a Director of Student Personnel Services which is an endorsement required of any person who would perform supervisory or administrative duties over other persons holding student personnel services endorsements. Secondly, the Commissioner must determine whether the Livingston Board of Education required the Director of Guidance of

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the junior high school to hold a Director of Student Personnel Services endorsement. Such review of the duties being necessary because of the well-established principle that the endorsement required to hold a specific position is dictated not by the title of the position but by the duties performed. (See Elizabeth Boeshore v. Board of Education of the Township of North Bergen, 1974 S.L.D. 805; Howley and Bookholdt, supra; John German v. Board of Education of Cape May County Vocational-Technical School, decided by Commissioner January 12, 1984, aff'd with modification State Board August 8, 1984, aff'd New Jersey Superior Court, Appellate Division December 6, 1985.)

Having so determined, the Commissioner notes his finding in Turner, supra, at p. 16 wherein he stated:

> "Based on the unofficial job descriptions and the testimony of the witnesses, it is the opinion of the Commissioner that the guidance directors of the junior high schools perform duties that do not require a Director of Pupil Personnel Services Certificate because their positions entail little supervisory activity.
>
> The Commissioner's decision further goes on to point out
>
> ***that, when in circumstances such as those that prevail in the instant matter there exists no officially adopted job description, case law clearly provides that the nature of a position is dictated by the duties performed rather than by the title assigned. See, e.g., Lori Boehm v. Board of Education of the Township of Pennsauken, decided by the Commissioner June 19, 1984. See also Ann A. Quinlan v. Board of Education of the Township of North Bergen, 1959-60 S.L.D. 113, 114 (the duties performed rather than the title of a position must be controlling in determining whether a position is protected by tenure).
>
> (Slip Opinion, at p. 17)

Having determined as in Turner, supra, that the duties of the position of Director of Guidance at the junior high school did not require a Director's endorsement, the second factor impinging upon tenure eligibility in this matter is the question of whether the Livingston Board of Education required the Director of Guidance at each of its junior high schools to hold the endorsement of Director of Student Personnel Services. Notwithstanding the finding in Turner, supra, that nothing in the record of that matter indicated such a conclusion, the Commissioner permitted respondent to offer any proof which he may have had to demonstrate such requirement. By agreement between the parties, a search of the records and minutes of the Livingston Board of Education was conducted by the Board Secretary and copies of such records and minutes were jointly submitted to the Commissioner for his review. (See list of

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exhibits.) A careful review of each of the exhibits so submitted has failed to provide any significant evidence that the Livingston Board of Education ever required Respondent Riker to hold the endorsement of Director of Student Personnel Services. Thus, by virtue of failure to prove that he was required to hold a Director of Student Personnel Services endorsement, respondent can not meet the first test of the Spiewak formula for acquisition of tenure in a position.

Consequently, having determined that the duties of the position of Director of Guidance in the junior high school were not of a supervisory nature requiring an endorsement of Director of Student Personnel Services and having further found that no evidence has been presented that the district board of education required Respondent Riker to hold a Director's endorsement, the Commissioner determines that Respondent Riker never served in a position which was truly that of a Director of Student Personnel Services and therefore never obtained tenure as a Director of Guidance. In conclusion, therefore, the Commissioner finds that Respondent Riker shall acquire tenure as a Director of Guidance of the Livingston Senior High School only upon completion of the two-year requirement of N.J.S.A. 18A:28-6 for acquisition of tenure upon transfer or promotion.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

April 23, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3752-86
AGENCY DKT. NO. 156-5/86

B.W., A MINOR CHILD BY HIS PARENTS, J.W. AND B.W.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF BRIGANTINE, ATLANTIC COUNTY, AND SAFETY BUS SERVICE, A CORPORATION OF THE STATE OF NEW JERSEY,
Respondents;
and
BOARD OF EDUCATION OF THE CITY OF BRIGANTINE, ATLANTIC COUNTY,
Claimant,
v.
SAFETY BUS SERVICE, A CORPORATION OF THE STATE OF NEW JERSEY,
Respondent;
and
SAFETY BUS SERVICE, A CORPORATION OF THE STATE OF NEW JERSEY,
Claimant,
v.
BOARD OF EDUCATION OF THE CITY OF BRIGANTINE, ATLANTIC COUNTY,
Respondent.

John A. Beranbaum, Assistant Deputy Public Advocate, for petitioner (Alfred A. Slocum, Public Advocate of New Jersey, attorney)

Maurice Y. Cole, Jr., Esq., for respondent and cross-claimant Board of Education (Cole and Cole, attorneys)

Howard E. Drucks, Esq., for respondent and cross-claimant Safety Bus Service (McGahn, Friss and Miller, attorneys)

Record Closed: January 27, 1987 Decided: March 13, 1987

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BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE

Petitioner, a classified pupil pursuant to N.J.S.A. 18A:46-1 et seq. and N.J.A.C. 6:28-1.1 et seq., alleges, among other things, that respondents improperly and illegally refused to provide him with transportation to and from a private school located in Atlantic County.

PROCEDURAL ASPECTS

Petitioner perfected his Petition of Appeal before the Commissioner of Education on May 6, 1986. The respondent Board of Education of the City of Brigantine (Board) filed its Answer on May 14, 1986, and respondent Safety Bus Service (Safety Bus) filed its Answer on June 5, 1986. A prehearing conference was held on July 21, 1986 at which, among other things, the issues to be determined by this tribunal were set forth, and hearing dates of November 18 through 26, 1986 and December 1 and 2, 1986, were established. At the close of the hearing, the parties were granted leave to submit post-hearing briefs. The last submission was received on January 27, 1987, which constituted the closing of the herein record.

ISSUES

The issues to be determined by this tribunal were agreed upon at the July 21, 1986, prehearing conference and are set forth as follows:

1. Whether the Board has discriminated against B.W., a classified handicapped pupil, by denying B.W. pupil transportation to a non-public school, where such pupil transportation is afforded to other pupils under the Board's direction and control.

2. Whether respondent Safety Bus Service, Inc., has discriminated against B.W., a classified handicapped pupil, by denying pupil transportation to B.W. to a non-public school, where respondent is under contract with the Board to transport such other pupils to the non-public school.

3. Whether the Board is obligated, under the applicable federal laws, to provide B.W. with pupil transportation to a non-public school.

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4. Whether the Board is obligated, under the applicable New Jersey statutes, to provide B.W. with pupil transportation to a non-public school.

5. Whether Safety Bus Service, Inc. breached its contract with the Board by virtue of its refusal to transport B.W. to a non-public school.

6. Whether the Board has made every effort to provide pupil transportation for B.W. to attend a non-public school, provided such transportation is required by State or federal laws.

7. Whether the contract between the Board and Safety Bus Service, Inc., providing pupil transportation to public and non-public schools, applies to B.W. because of the nature and extent of his handicap.

8. Whether the contract between the Board and Safety Bus Service, Inc., requires Safety Bus to provide equipment capable to handle handicapped pupils.

UNDISPUTED FACTS

A review of the pleadings, the testimonial and documentary evidence, and the briefs submitted by the parties reveals the following facts which are neither disputed nor controverted and therefore, are hereby adopted as **FINDINGS OF FACT** in this matter:

In or about 1977, when petitioner was enrolled in the Folsom, Atlantic County, New Jersey public schools, the Folsom Child Study Team (CST) classified petitioner as Multiply Handicapped (Chronically Ill and Orthopedically Handicapped) pursuant to N.J.S.A. 18A:46-6 and 8, N.J.A.C. 6:28-3.5(e)6. In or about September 1981, petitioner moved with his family from Folsom to Brigantine, Atlantic County, New Jersey, where he was enrolled in the herein Board's fifth grade, attending its Brigantine North School. Petitioner remained in the Board's public schools until June 1985, at which time petitioner completed the eighth grade — the terminal grade level offered by the Brigantine Board. The Brigantine Board is under a sending-receiving relationship with the Atlantic City Board of Education for the secondary education of the Brigantine pupils in grades nine through twelve. Upon his completion of the eighth grade, petitioner, through his parents, elected to enroll in Holy Spirit High School, Absecon, Atlantic County, New Jersey, a private/parochial secondary school.

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While petitioner was enrolled in the Board's North School, the Board's CST classified petitioner as Multiply Handicapped (Chronically Ill and Orthopedically Handicapped). From grades five through eight, petitioner attended the regular school program and received physical therapy and occupational therapy. Petitioner received average to above average grades in all subject matter areas. On at least three occasions during the eighth grade (1984-85 school year), petitioner participated in class trips which required his transportation on the Board's regular contracted 54-passenger school bus. Petitioner, who weighs approximately 55 pounds, was carried on and off the school bus by his mother, who accompanied him on the class trips.

The extent of petitioner's handicap is described as follows. At the age of four, B.W. developed acute lymphatic leukemia, for which he was treated with chemotherapy. At the same age, he also developed listeria meningitis (an inflammation of the membranes of the brain or spinal cord), which was treated successfully with medication. At the age of seven, he again developed leukemia. He was retreated and since then has been in a stable remission. Secondary to his treatment of leukemia and meningitis, he incurred damage to the brain and spine. A shunt was placed in B.W.'s brain, which did not interfere with his cognitive functioning. B.W. also developed scoliosis (a curvature of the spine) and an oblique or tilted pelvis. In addition, one of B.W.'s legs grew to be two inches longer than the other.

Since October 1980, petitioner has been treated by Roger J. Packer, M.D. Dr. Packer is an Associate Professor of Medicine and Director of the Neuro-Oncology Service at the Children's Hospital of Philadelphia. He is board certified in Pediatrics and Neurology with Special Competence in Child Neurology. He has written widely on the subject of neurology, and his articles have appeared in leading journals in the field. Dr. Packer diagnosed B.W. as having arachnoiditis, an inflammation of the membrane surrounding the brain and spinal cord. As a result of his condition, petitioner has had a long history of weakness in his arms and legs. At the age of nine, petitioner was paralyzed for six months. He was unable to attend school during his sixth-grade year and had to receive home instruction. Prior to 1984, petitioner was unable to ambulate without using a wheelchair. He also suffered periodic muscle spasms in his leg.

During the past four years, petitioner's neurologic functioning has improved progressively. Currently, petitioner's strength in his arms is normal, and he has good to fair strength in his legs. The frequency and severity of petitioner's muscle spasms have

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decreased significantly. The spasms now occur only once every few months and then during the night. B.W. is now able to walk with crutches for distances over 200 feet without stopping, and with a walker for distances of over 700 feet, although he continues to use a wheelchair to get around in public areas, such as shopping malls and between classes at school. Petitioner is able to complete all self-care activities such as dressing, toileting, and bathing, without assistance, with the exception of getting in and out of the bathtub. B.W.'s prognosis is one of continuing neurologic improvement.

In the 1984-85 school year the Board's CST reevaluated petitioner and prepared a Classification Conference Report and an Individualized Education Plan (IEP) dated June 10, 1985 (P-1). Petitioner's mother, B.W., signed the IEP on May 31, 1985, approving of its contents and recommendations for petitioner's educational program in the 1985-86 school year. The IEP contained, among other things, the provision that petitioner was to be enrolled in the non-public Holy Spirit High School commencing September 1985, and that the Board would provide petitioner with physical and occupational therapy. Petitioner's IEP also contained the provision that petitioner was to be transported to and from Holy Spirit High School by the Board's contracted regular school bus (P-1, p.5). Petitioner's mother completed the B6T form application for private school transportation as required by N.J.A.C. 6:21-2.6 (R-1).

In June 1985, petitioner participated in the Board's North School eighth grade graduation exercise. On separate physical therapy sessions held in May and June 1985, petitioner practiced for graduation where, under the direction of his physical therapist, he walked up and down three steps to the school stage using a Rolator Walker without hands-on assistance by the physical therapist. Subsequently, the steps were modified to a ramp whereby petitioner was able to use his walker to traverse to and from the stage without any assistance. Petitioner performed one practice session on the ramp under the direction of his physical therapist and successfully completed the task without any assistance at the graduation ceremony. Subsequent to petitioner's completing the eighth grade in June 1985, he received physical therapy three times per week at the Children's Seashore House, Atlantic City, New Jersey.

Respondent Board and respondent Safety Bus entered into transportation contracts whereby Safety Bus, pursuant to the Board's specifications, is authorized to transport the Board's resident pupils to non-public parochial schools, i.e., Saint Philip the Apostle School, Brigantine and Holy Spirit High School, Absecon, New Jersey (R-7). The

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transportation contract between respondents, dated November 14, 1985, and approved by the Atlantic County Superintendent of Schools on February 20, 1986, contained no language, either inclusive or exclusive, with respect to the transportation of handicapped pupils.

On September 4, 1985, the opening day for the 1985-86 school year, petitioner and his mother arrived at the designated school bus stop at the appointed time. Subsequent to the arrival of the contracted Safety Bus, petitioner's mother carried petitioner up the bus steps and placed him in the right front seat of the bus. Thereafter, petitioner's mother folded up petitioner's wheelchair and placed it in the aisle of the school bus, exited the bus and left the scene. Petitioner was transported from Brigantine to Holy Spirit High School without incident or assistance. Upon arrival at Holy Spirit, there were no school personnel to meet and assist petitioner from the school bus. Consequently, a pupil on the school bus removed petitioner's wheelchair from the bus and the school bus driver proceeded to carry petitioner from the bus to place him in his wheelchair. At the close of the school day, a pupil carried petitioner onto the bus while another pupil carried his wheelchair and placed it in the aisle of the school bus. Petitioner was transported to his designated home bus stop in Brigantine, where his mother removed the wheelchair and carried petitioner off the vehicle.

On September 4, 1985, Alicia James, school bus driver in the employ of Safety Bus, telephoned Thomas P. Dugan, Sr., president of Safety Bus, and reported the events of the morning pick-up and transportation of petitioner to Holy Spirit High School. Between 9:00 a.m. and 9:30 a.m. on September 4, 1985, Dugan telephoned James Foreman, the Board's CST Director, to inquire as to why he had placed a handicapped, wheelchair-bound pupil on the regular school bus route. Dugan asserted that there was no one at Holy Sprit to meet and assist petitioner off the school bus when it arrived and, further, that he was concerned for petitioner's safety. Foreman responded that he had observed petitioner walk at the June 1985 graduation ceremony and assumed that petitioner could negotiate the school bus steps.

On September 5 or 6, 1985, Mr. Dugan spoke with Mr. Steve Lovett and Mr. Carl Franks of New Jersey State Department of Education, Pupil Transportation, regarding the advisability of allowing petitioner to ride on the regular school bus. Dugan was advised not to allow petitioner to ride the bus. Dugan also spoke with Gustav Ruh, Superintendent of Schools for Atlantic County. Mr. Ruh recommended that the bus

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company not transport petitioner because of the potential risk to petitioner and to other pupils' safety.

On or about September 5, 1985, Mr. James J. Dugan, vicepresident of Safety Bus and son of Thomas Dugan, related to the company's insurance agent the events of September 4, 1985. According to Mr. Dugan, the agent advised him that the company's insurance policy would cover petitioner as well as the people placing him on and off the bus; however, there was a possibility that the policy would be cancelled should petitioner make a claim.

Safety Bus's insurance liability policies for the operation of its school buses effective for the 1985-86 and 1986-87 school years do not distinguish between coverage afforded a handicapped and non-handicapped pupil who suffers an injury while riding a school bus. The policies would extend coverage in the event that petitioner were involved in an accident while riding a school bus. In addition, the premium costs would not increase if petitioner were allowed to ride the bus.

On September 4, 1985, Mr. Sherwin C. Radase, the school board secretary, advised Safety Bus not to transport petitioner under the current circumstances. (RB-8, "Chronological," p. 3). On the morning of September 5, 1985, when Safety Bus's driver stopped at petitioner's bus stop, the driver refused to allow petitioner to board the bus, stating that her employer told her to do so. Petitioner's mother then contacted various school board officials to protest the school bus company's refusal to transport her son. On September 12, 1985, petitioner's mother attended a regularly scheduled Board meeting and renewed her request that the Board provide her son with transportation service. At the meeting, Thomas Dugan, Sr., expressed concerns regarding safety and insurance liability should petitioner be allowed to use the school bus. He advised the Board that he could not permit the bus driver to lift petitioner on and off the bus and that the wheelchair could not be placed in the aisle (R-2, p.2). In a letter dated September 11, 1985, which Dugan presented to the Board at its September 12 meeting, he requested of the Board a disclaimer of liability "for any injury that occurs to the child or any party aiding him on and off the vehicle" (P-12).

In the afternoon of September 12, 1985, after the conclusion of the Board meeting, a Board member informed petitioner's mother that her son would not be allowed to ride the school bus. Safety Bus made its decision to exclude petitioner from the school

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bus without reviewing petitioner's medical or CST record, and without speaking to petitioner, his parents, CST members, his teachers, his doctor, or his physical therapist about the nature and extent of petitioner's disability. In September 1985, when Safety Bus made its decision, it had no procedures or standards, written or otherwise, regarding handicapped pupils' use of its conventional 54-seat school busses. However, it had received no notice in any form from the Board that it was required to provide transportation for petitioner.

The Board did not rely upon any medical findings regarding petitioner's ability to ride safely in a school bus when it concurred in Safety Bus's decision not to allow petitioner to use the school bus (P-11, Interrogatory Answer, 13).

As a consequence of Safety Bus's assertion that it had not contracted to provide transportation to handicapped pupils, the Board never contended, either formally or informally, that Safety Bus had breached its contractual commitments. Rather, the Board extended the contract for the 1986-87 school year and continued to make all payments due under the terms and conditions of the contracts.

As a consequence of Safety Bus's refusal to transport petitioner since September 5, 1985, and continuing to the present, petitioner's mother has transported petitioner to and from school in her car. The distance between their home and Holy Spirit High School is 15 miles, which she traverses four times a day, five days a week throughout the school year. Had she not needed to be available to drive petitioner to and from school, petitioner's mother would have sought part-time employment. During the 1985-86 school year, the Board offered to pay petitioner's parents the sum of $406, the maximum per pupil transportation cost established by N.J.S.A. 18A:39-1, in lieu of actually transporting petitioner. The parents refused the payment and maintained that the Board should provide transportation services for their son.

During petitioner's ninth-grade year, the 1985-86 school year, petitioner attended the regular school program at Holy Spirit High School. His attendance was good. His classes were located on the first floor, and he was able to use his wheelchair to attend his classes. As part of his physical therapy sessions during the ninth grade, petitioner regularly climbed up and down the one flight of stairs at Holy Spirit. It consists of 22 uncarpeted steps. Petitioner was unassisted by mechanical device. Ms. Horwath, his physical therapist, would accompany him up and down the stairs but would not touch him.

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At the hearing, Ms. Horwath stated that she would feel confident standing at the bottom of the stairway while petitioner climbed up and down the stairs. During the physical therapy sessions, petitioner never stumbled or rested while climbing the stairs. During that year, petitioner also climbed the stairs on several occasions accompanied by Ms. Roseanne Dennehy, Holy Spirit High School nurse.

During petitioner's ninth-grade year, his father built a hand railing in the family home along the side of the stairway to enable petitioner to climb the stairs. Petitioner's bedroom is located on the first floor and the kitchen and living room are on the second floor. Currently, petitioner walks up and down the flight of stairs approximately three times per day. Petitioner uses the railing, but otherwise climbs and descends the stairs without assistance. Petitioner's mother accompanies him up and down the stairs, and only once in a while will she lightly touch his elbow with her hand. On occasion, petitioner slides down the stairs on his backside. It takes petitioner about the same amount of time to slide down the stairs as it takes a nonhandicapped adult to walk down the stairs.

During the summer of 1986, petitioner held a summer job with the Brigantine Beach Patrol. During that same summer, petitioner travelled by himself to California to visit his brother. Using his walker, petitioner walked the length of the airplane ramp and continued to his seat in the plane where he sat down. Similarly, without any other assistance apart from his walker, petitioner exited the plane.

In his current tenth-grade year at Holy Spirit High School, petitioner attends the regular school program. He takes part in extra-curricular activities, such as school dances. His religion class is located on the second floor. Accordingly, every day of the school year, petitioner walks up and down the 22 steps. He does so usually in the accompaniment of the school nurse. Petitioner climbs up the stairs holding the railing with both arms. On the way down, he holds the railing with one hand and rests his other hand on the outstretched arm of Ms. Dennehy. Ordinarily, petitioner does not climb the stairs between class periods when there is a great rush of pupils in the stairway. However, on a few occasions he had walked up and down the stairs successfully during these times. Petitioner is able to go up and down the stairs significantly faster than last year. It now takes him approximately one minute. On several occasions, petitioner slid down the stairs on his backside without problem. In addition, Ms. Dennehy has lifted petitioner down the stairs without difficulty. Petitioner weighed approximately 55 pounds.

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In September 1986, Ms. Susan Horwath, petitioner's physical therapist, evaluated him. She determined that the range of motion in petitioner's arm was within normal limits. Petitioner has sufficient range of motion in his lower extremities to get in and out of his wheelchair, to ambulate with a walker or crutches, and to climb stairs. Petitioner's gross motor strength is within the fair to good range. He has sufficient strength to perform all the tasks for entering and exiting a school bus. As to gross motor skills, petitioner can roll, creep, kneel stand, kneel walk, and pull to stand. He can stand momentarily without support. He can ambulate independently with a walker for long distances. He can also walk with crutches for over 200 feet without stopping. Petitioner is able independently to get in and out of his wheelchair. The only assistance he needs is getting into and out of a bathtub. Petitioner is able, without assistance, to walk up and down a flight of stairs using a railing. As to petitioner's balance, it is good while he is sitting. Because of the obliquity of his pelvis and one leg being shorter than the other, his balance while standing without assistance is poor. However, with a walker or crutches, his balance is good. Ms. Horwath testified that petitioner's range of motion, strength and endurance, balance, and ambulation had all improved since her assessment of petitioner in September 1986.

In early October 1985, Ms. Dennehy arranged with Safety Bus officials to conduct a demonstration of petitioner's ability to board and exit a regular 54-passenger school bus. Present at the demonstration, which was held at Holy Spirit, were Ms. Dennehy, petitioner, an occupational therapist, six pupils, and employees of the school bus company. Three times in succession, petitioner lifted himself out of his wheelchair and climbed the three steps of the bus using the hand rail on the left side of the stairwell. Upon reaching the top of the stairwell, he sat down at the front, right seat. Petitioner then lifted himself from the seat to the top of the stairwell and climbed down the stairs again using the hand railing, and sat down in his wheelchair. The only assistance petitioner received throughout this exercise consisted of another person's walking behind him holding his belt, while he climbed the stairs, and walking in front of him, not touching him, while he descended the stairs. It appeared to Ms. Dennehy, who stood at the entrance of the bus during the demonstration, that the other person did not exert any physical force in assisting petitioner up the stairs. With each trial, petitioner was able to enter and exit the bus more rapidly.

Subsequent to the demonstration, Safety Bus continued to refuse petitioner transportation to and from Holy Spirit High School.

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During the 1985-86 school year, Holy Spirit High School officials were willing and continue to be willing to meet petitioner with a wheelchair when he arrives at school on the bus in the morning and in the afternoon to escort him to the bus with his wheelchair. It is no longer necessary to place petitioner's wheelchair on a school bus for transport to Holy Spirit.

This concludes a recital of the undisputed facts in this matter.

OPINION TESTIMONY

The opinion of testimony of those individuals qualified as experts by this tribunal is set forth in pertinent part as follows:

As part of her September 1986 evaluation, Ms. Horwath twice testified as to petitioner's ability to enter and exit a school bus. Each time petitioner was able to climb up and down the school bus steps without any assistance by holding onto the railing with both hands. It took petitioner approximately one minute to go down the stairs. A large part of that time was spent negotiating up the first step and figuring out the logistical arrangements of his footing. Horwath testified that petitioner could climb the stairs faster if a small stool were placed on the ground in front of the step. Petitioner did not fall or stumble on either attempt. Petitioner also was able to sit and rise from the school bus seat without any assistance.

At the hearing, Ms. Horwath opined that petitioner can ride safely in a school bus. In particular, she testified that petitioner is able to board and exit the bus without a problem. His good sitting balance and reflex reactions enable him to sit safely while the bus is in motion. In the event of an accident requiring rapid evacuation, petitioner could go out the bus's front exit by sliding down the steps on his backside. If it becomes necessary to evacuate by the rear door, petitioner could ambulate down the aisle by using the backs of the seats for support, as if they were crutches, or by crawling.

Dr. Packer also opined that petitioner could ride safely a conventional 54-seat school bus. Dr. Packer based his opinion on his evaluation of petitioner in May 1986, and his knowledge of the functional abilities of children with similar neurological impairments. Dr. Packer testified that he also evaluated petitioner on November 22, 1986. However, this Administrative Law Judge ruled that he was not permitted to state

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the findings he made on the grounds that the information was not contained in his expert report. Dr. Packer testified that petitioner has the degree of motor function to rise from his wheelchair independently and stand at the school bus entry and to climb up and down the stairs without assistance by using the hand railing. Petitioner's balance and reflexes are sufficient to sit on the seat while the bus is in motion, and to adjust to jolts or bumps. Dr. Packer recommended that petitioner use a seat belt, but added that he recommended seat belts for all children riding school buses. In case of an emergency requiring rapid exit, Dr. Packer stated that petitioner would be able to slide down on his backside using the stairs of the front door within 20 seconds, or to ambulate to the rear door of the bus within 30 to 60 seconds either by using the backs of the seats for support or by crawling. In reaching his conclusion that petitioner could safely ambulate to either exit, Dr. Packer specifically considered the situation where the bus was involved in a collision and the other children were pressing to evacuate. Dr. Packer concluded that petitioner's use of the school bus represents no safety hazard to himself or other children on the bus. Dr. Packer also opined that since petitioner is able to ride safely in the school bus, it is important for his sense of self-confidence and self-worth that he be allowed to do things that other children do.

Thomas Dugan testified that he observed petitioner exit the school bus on the afternoon of September 4, 1985, in Brigantine, while seated in his parked automobile some 30 to 40 feet behind the school bus. Dugan asserted he observed pupils remove petitioner's wheelchair from the bus and petitioner's mother carry petitioner from the bus to the wheelchair.

Dugan also testified that he observed the demonstration in early October 1985, at Holy Spirit High School, while seated in his private vehicle parked some 150 feet from the school bus. Dugan asserted that it appeared that one of the two adult women at the scene of the demonstration lifted petitioner from the wheelchair by petitioner's belt before petitioner attempted to climb the stairs of the bus.

Dugan asserted that subsequent to his investigation of petitioner's status as a handicapped pupil, he offered the opinion that petitioner was nonambulatory and, therefore, was concerned about petitioner's safety, as well as other pupils, with respect to loading and unloading of the bus and in an emergency situation. Dugan also expressed his concern that those individuals who might aid petitioner to get on and off the bus could be negligent with a consequent effect upon Safety Bus's liability insurance.

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Gustav H. Ruh, Atlantic County Superintendent of Schools, appeared as a fact witness on behalf of respondents and was also qualified as an expert witness with regard to pupil transportation. As a fact witness, Ruh testified it was his responsibility to review and approve all pupil transportation supplied by local boards of education within the jurisdiction of Atlantic County. Such approval includes, but is not limited to, transportation routes for regular, nonhandicapped pupils and handicapped pupils. Ruh asserted, among other things, that he had conducted several conversations initiated by Thomas Dugan, Sr., in early September 1985, with respect to the transportation of a handicapped pupil and Safety Bus's contract for pupil transportation with the Brigantine Board. Ruh advised Dugan to contact the Board to inform petitioner's parents that free pupil transportation was available if the parents sent petitioner to the public schools. Ruh testified that where a pupil has any physical handicap of any nature, special consideration is given with respect to transportation. He asserted, however, that transported by a regular 54-passenger school bus may be available to certain handicapped pupils such as: speech handicapped, perceptually impaired (P.I.), emotionally disturbed (E.D.) and pupils suffering with dyslexia. Ruh asserted that he was not directly involved in the evaluation of handicapped pupils, vis-a-vis, whether transported by a regular or special bus but, rather, his approval for handicapped pupil transportation was generally limited to the vendor's routes. When reviewing transportation contracts between vendors and local boards of education for approval, Ruh asserted that he assesses the form of the contract rather than the substance of the contract.

In his testimony as an expert in pupil transportation, the Atlantic County Superintendent of Schools responded to a series of hypothetical questions proffered by counsel for Safety Bus and opined as follows:

1. A pupil who cannot stand alone without the aid of a mechanical or fixed device, is not suitable for transportation on a regular 54-passenger school bus. A safety hazard exists where a pupil is not completely mobile and presents a problem to himself and others.

2. A wheelchair-bound pupil who is limited to one floor of an educational facility for his academic classes is not suitable for transportation in a 54-passenger vehicle.

3. A wheelchair-bound pupil who can ascend and descend stairs between classes in an educational facility must be completely ambulatory in order to avail himself of transportation on a regular 54-passenger school bus.

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4. In the event of a front-end accident involving the school bus on which the handicapped pupil is a passenger, and where the pupil can ambulate to the rear door safety exit by grasping the back, upright portions of the fixed seats, Ruh opined that the handicapped pupil would take an excessive period of time to exit the vehicle, placing himself and other pupils in jeopardy where time is of the essence to evacuate. Such a condition would represent a clear zone of danger to all.

5. In the situation where an accident occurred and the school bus came to rest at an angle, the pupil would be completely immobile and not be able to use the fixed back of the seats to ambulate to the rear door safety exit, therefore placing the pupil and others in jeopardy.

On cross-examination by counsel for petitioner, Ruh asserted that Dugan had provided him with a copy of petitioner's IEP of June 1985 (P-1) and objected to the Board's CST recommendation that petitioner be transported to Holy Spirit High School by regular school bus. Notwithstanding that Ruh agreed that petitioner's IEP conformed to all the legal requirements and agreed that the Board's CST are educational experts with regard to educational programs for handicapped pupils, Ruh contended that the CST did not possess expertise in the field of pupil transportation. Ruh objected to the CST's recommendation based upon safety considerations.

Ruh admitted on cross-examination, that there was nothing in education law or regulation which prevents or precludes transportation of a handicapped pupil by a regular 54-passenger school bus. He asserted, however, that where parents choose to send their children to private school and the local board cannot provide the transportation economically, the board of education may, by statute, reimburse the parents to transport their child to the private facility.

LEGAL ARGUMENTS OF THE PARTIES

The legal arguments of the contending parties are summarized below as follows:

PETITIONER'S ARGUMENT

At Point I of his brief, petitioner asserts that he is capable of riding safely in a conventional school bus and that respondents' exclusion of him because of his handicap is

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invidious discrimination in contravention of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. (the Act). The Act specifically forbids the denial of "...the accommodations, advantages, facilities, and privileges of any place of public accommodation..." because of an individual's physical handicap. N.J.S.A. 10:5-4. As articulated by the New Jersey Supreme Court, "[t] he paramount purpose of the statute is to secure to handicapped individuals full and equal access to society, bounded only by the actual physical limits that they cannot surmount." Andersen v. Exxon Co., 89 N.J. 483, 495 (1982). Discrimination due to invidious classification is repugnant because it denies the individual the right to be judged on his or her own merits. Id. at 495; Peper v. Princeton University Bd. of Trustees, 77 N.J. 55, 80 (1978).

Petitioner observes that there is a strong public policy in this State against discrimination. Andersen, 89 N.J. at 492. "New Jersey has always been in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types from our society." Id. at 492, quoting Peper, 77 N.J. at 80. The Law Against Discrimination is remedial legislation to protect handicapped persons which should be construed liberally in order to advance its humanitarian nature. See, Andersen at 495; Panettieri v. C.V. Hill Refrigeration, 159 N.J. Super 472, 483 (App. Div. 1978).

Petitioner contends that the parties are governed by the Act and that he is a member of the protected class of handicapped persons by virtue of his neurological impairment which meets the statutory definition of physical handicap under N.J.S.A. 10:5-5(q). Petitioner argues that the respondent Board provides a kind of public accommodation, i.e., a "public conveyance" (N.J.S.A. 10:5-5(l)), in the form of a bus service for resident Brigantine pupils attending non-public schools. Specifically, pursuant to N.J.S.A. 18A:39-1, the Board, in contract with Safety Bus, provides pupil transportation to non-public school pupils living within 20 miles of Brigantine. Consequently, petitioner is eligible for the pupil transportation service provided by the Board by virtue of his residence being within 20 miles of Holy Spirit High School.

Petitioner argues, that in construing the Act, the courts have assigned the burden of proof to the handicapped individual claiming unlawful discrimination. Andersen, at 489. The handicapped person must demonstrate that he or she is physically qualified for the employment position, or in this case the privilege of using the school bus. Ibid. Petitioner contends, among other things, that the facts demonstrate convincingly that he is capable of riding safely in a conventional 54-passenger school bus.

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Petitioner asserts that Safety Bus's arguments at the hearing were not so much that petitioner was physically incapable of riding its school bus but, rather, that petitioner's presence on the bus would pose a safety hazard to himself and other pupils. Petitioner argues, however, that it is not enough for Safety Bus to make the bold claim that petitioner's use of the bus would be hazardous. Petitioner cannot lawfully be excluded from the bus unless his presence would entail "a materially enhanced risk of death or serious injury." See, Panettieri at 492; See Also, Jansen v. Food Circus Supermarkets, Inc., (N.J. App. Div., Nov. 22, 1986), A-5386-84T1), (unreported) at 10-11; N.J.A.C. 13:13-2.8(a)(2). Petitioner contends that Safety Bus has the burden of producing evidence to show a substantial safety risk, and petitioner has the ultimate burden of persuasion on the issue. Jansen at 11.

Petitioner notes that the Board did not present evidence at the hearing or argue that petitioner's presence on the school bus would present a safety hazard. Petitioner opines that the Board appeared to indicate that it believed petitioner should be allowed to ride the bus. Petitioner contends that the Board's counsel, in his opening statement, stated that when Safety Bus refused to allow petitioner to ride the bus, the Board had no alternative but to provide petitioner's family with monetary compensation. Petitioner also contends that at one point in the proceedings, Board's counsel labelled Safety Bus's decision to exclude petitioner as unlawful discrimination.

Petitioner observes that the Division on Civil Rights regulations require that a decision to exclude a handicapped person because of safety reasons be based upon "an objective standard supported by factual or scientifically validated evidence." N.J.A.C. 13:13-2.8(a)(2). Petitioner argues that Safety Bus has not met its burden of production, having failed to produce factually based or scientifically validated evidence showing that petitioner's use of the bus would represent a significant safety hazard. Petitioner contends, among other things, that the only support Safety Bus offered for its safety-risk claim was a series of hypothetical situations involving a school bus collision requiring pupils to evacuate rapidly. He argues that respondent may not improperly seek to substitute speculation for "factual or scientifically validated evidence." Ibid. Such an approach represents, at most, "weak and inadequate threads" to support a decision having important consequences for this handicapped minor child. See, Pushkin v. Regents of the University of Colorado, 658 F. 2d 1372, 1391 (10th Cir. 1981) (regarding federal anti-discrimination statute, section 504 of Vocational Rehabilitation Act of 1973, 20 U.S.C. § 794); See Also, New York State Association for Retarded Children v. Carey, 512 F. 2d

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644, 648 (2nd Cir. 1979) (exclusion of handicapped children from regular classes not justified under section 504, 29 U.S.C. §794, where a school board failed to demonstrate that a health hazard posed by handicapped children was more than a remote possibility).

Petitioner asserts that respondent's demonstration of his handicap does not preclude him from riding safely on respondent Safety Bus's conventional school bus, petitioner has made out a prima facie case of discrimination, Andersen, and, therefore, the burden shifts to Safety Bus to demonstrate a nondiscriminatory reason for its exclusion of petitioner. Panettieri at 484.

Petitioner observes that the courts have construed the Act to excuse employment discrimination against a handicapped person where the employer is found to have reasonably arrived at an opinion that a job applicant cannot perform the job either because the applicant is unqualified or because of a given handicap. Anderson at 497; Panettieri at 487. The courts look to the statutory provision found at N.J.S.A. 10:5-2.1 in fashioning this affirmative defense, which reads as follows:

> Nothing contained in this act. . .shall be construed. . .to prohibit the establishment and maintenance of bona fide occupational qualifications. . .nor to prevent the termination or change of employment of any person who in the opinion of his employer, reasonably arrived at, is unable to perform adequately his duties. . . .

Petitioner observes that the "reasonably arrived at" defense has been accepted only in employment discrimination cases, Andersen at 497-498, Panettieri at 485, Jansen at p.10, and it is inappropriate to extend its reach to public accommodation cases, such as the instant matter. Petitioner contends that the language of N.J.S.A. 10:5-2.1 is limited to employment matters. Moreover, the legislature and the courts created the "reasonably arrived at" defense to protect an employer's traditional prerogative of establishing legitimate job qualifications and the selection of job applicants. Andersen, at 483; Panettieri at 486-487.

Petitioner argues that whereas employment is a selective process, access to a public accommodation is available to all citizens who meet the basic eligibility requirements. Uston v. Resorts International Hotel, Inc., 89 N.J. 163, 173 (1982); Evans v. Ross, 57 N.J. Super 223, 231 (App. Div. 1959). The proprietor of a public accommodation is not accorded the same "leeway," Panettieri, in selecting or rejecting benefit recipients as is an employer in selecting or rejecting job applicants. Ulston at 173; Evans

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v. Ross at 231. Thus, the "reasonably arrived at" defense, aimed at preserving the employer's traditional hiring and firing prerogative serves no legitimate purpose in public accommodation matters. Assuming, arguendo, that N.J.S.A. 10:5-2.1 is applicable to public accommodation matters, petitioner argues that Safety Bus cannot demonstrate that it reasonably arrived at the opinion that petitioner's handicap precluded his riding the school bus in a safe manner.

Finally, petitioner argues, Safety Bus's insurance concerns about carrying petitioner does not excuse its invidious discrimination. In Panettieri, the court held that an employer's fear that rehiring a heart victim would lead to increased workers' compensation insurance premium costs was not legitimate grounds for rejecting the employee. Id. at 492. Under N.J.A.C. 13:13-2.8(a)(3)(ii), the refusal to hire a handicapped person because of anticipated or actual increase in the cost of an employee insurance plan is unlawful. Similarly, the Act will not countenance Safety Bus in excluding petitioner for fear that its current insurance policy will be cancelled.

At point II of his brief, petitioner argues that as a consequence of the unlawful discrimination, he is entitled to reimbursement for monetary losses, Goodman v. London Metals Exchange, 86 N.J. 19 (1981), Jackson v. Concord Co., 54 N.J. 113 (1969) and, an award of damages for emotional distress pursuant to the Act. Andersen at 502. In addition, petitioner argues, he is entitled to compensation for contributed service, Hurry v. Jones, 560 F. Supp. 500, affd., 734 F. 2d 879, as well as the $406 per year the Board is obligated to pay his parents, by statute, for providing petitioner's transportation to and from Holy Spirit High School since September 1985.

Alternatively, petitioner argues at Point III in his brief that in the event it is found by this tribunal that petitioner is unable to ride safely in a conventional school bus supplied by Safety Bus, then it is incumbent upon the Board to provide petitioner with specialized transportation to and from Holy Spirit High School. The federal Education for All Handicapped Children Act (EHA), as amended, 20 U.S.C. §1400 et seq., obligates the Board to provide necessary related services, such as transportation, to handicapped pupils, such as petitioner, attending non-public schools.

The EHA provides that "[i]t is the purpose of this chapter to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique

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needs. . . ." 20 U.S.C. §1400(c). Petitioner, as a handicapped child within the meaning of the EHA, is therefore entitled under the Act to "special education" and "related services."

Petitioner argues that it is clear from both the statute at 20 U.S.C. §1401(a)(17), and the implementing regulations at 34 C.F.R. §300.13, that "related services" specifically include "transportation." This is, in turn, defined to include both "travel to and from school and between schools" and "specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a handicapped child." 34 C.F.R. §300.13(b)(13) (i) and (iii).

The EHA continues to require, at 20 U.S.C. §1413 (a)(4)(A) that a state desiring to participate in and to receive to benefits under the program established by the Act shall submit a state plan which shall:

> (4) set forth policies and procedures to assure:
>
> > (A) that, to the extent consistent with the number and location of handicapped children of the state who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services;....

At 20 U.S.C. §1414(a)(6) the EHA imposes the further requirement that a local or an intermediate educational agency shall submit an application which shall:

> (6) provide satisfactory assurance that policies and programs established and administered by the local educational . . . unit shall be consistent with the provisions of. . . section 1413(a) of this title;. . . .

Thus, petitioner, contends, the Board is under a federal mandate to ensure that handicapped children enrolled in private schools are included in the Part B program, the program funded by the EHA.

Subpart D of the EHA regulations pertains to "private schools" and provides, at 34 C.F.R. §300.403, with respect to students voluntarily and unilaterally placed by their parents in private schools that:

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PLACEMENT OF CHILDREN BY PARENTS

(a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school facility. However, the public agency shall make services available to the child as provided under 300.450 to 300.460.

Section 300.452, referred to in the above-quoted regulatory language, provides:

LOCAL EDUCATIONAL AGENCY RESPONSIBILITY

(a) Each local educational agency shall provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the Agency.

Thus, petitioner argues, under the plain language of 34 C.F.R. §300.452, the Board is directly and expressly required by EHA regulations to provide "related services," which include transportation by special or adapted bus, if required, to a handicapped child, such as petitioner, placed by his parents in a private school.

Petitioner observes that in a recent decision, the New Jersey Commissioner of Education put a gloss on the requirement of 34 C.F.R. §300.452 to provide related services to non-public school students. In A.A. v. Board of Education of the Freehold Regional High School District, OAL DKT. EDU 6027-85, (Dec. 18, 1985), decided by Commissioner (February 10, 1986), (N.J. App. Div., March 14, 1986, A-5725-8518) the Commissioner ruled that 34 C.F.R. §300.452, read in pari materia with 34 C.F.R. §300.451 and 34 C.F.R. §§76.651 to 76.663 (the Education General Administrative Regulations, or EDGAR, governing all federal grant in aid programs) simply gives the local school board the discretion to decide to which individual non-public students it will provide related services, based upon their needs and the availability of funds. The regulations do not mandate that each non-public school handicapped student be provided related services. Id. at 18,19.

As the Commissioner's decision makes clear, the grant of discretion is conditioned upon the school board's developing a service plan, in consultation with representatives of non-public school students. Id. at 19. Such consultation is required to identify non-public school students' needs and to develop the program to meet those needs. Id. at 19. 34 C.F.R. §76.652.

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Petitioner contends that the Brigantine Board of Education failed to develop a valid service plan regarding the provision of related services to non-public school pupils, and thus its decision denying petitioner transportation was unlawful. In developing its 1985-86 service plan, the Board's consultation consisted of merely sending letters to private school officials informing them of services available to non-public school students. (See P-11, Board's Interrogatory Answer #17 and attachments; R-11, Application for Part B, P.L. 94-142 Flow Through Grants, p.8.) The Board failed to solicit the views of the parents of the private school pupils, although they are obviously the most qualified individuals to identify the needs of the handicapped children. The parents were denied their right to "a genuine opportunity to express their views." 34 C.F.R. §76.652(c). The Board's failure to consult the parents of handicapped students violated not only 34 C.F.R. §76.652, but also the broad federal mandate that parents of handicapped children be allowed to participate in all the critical educational decisions affecting their children. See, Bd. of Ed. of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 182 n.6; 206, 208-09.

Petitioner asserts that the Board drew up its service plan without receiving the viewpoints of any interested individuals. The Board did not seek the private school officials' views regarding the needs of their handicapped pupils, and not surprisingly, it did not receive any responses. (P-11, Board's answer to Interrogatory #18).

The school board's failure to adhere to the procedural protections of the EHA by rendering a flawed service plan renders void its decision denying petitioner transportation service. See, Rowley, at 208; Hall by Hall v. Vanie County Board of Education, 774 F.2d 629, 635 (4th Cir. 1985); Bonadona v. Cooperman, 619 F. Supp. 401, 410 (D. N.J. 1985) (failure to comply with EHA's procedural safeguards is grounds for voiding school board special education decision). The Board may not arbitrarily and without due process except petitioner from the broad federal entitlement to related services shared by non-public and public handicapped students alike. The Board is obligated to provide petitioner with specialized transportation service should he be barred from using the conventional school bus supplied by Safety Bus.

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RESPONDENT BOARD'S POSITION

The Board's arguments, with respect to the herein cause of action, may fairly be summarized as follows:

I. Given the facts of petitioner's condition in September 1985, i.e., the necessity of having to carry petitioner on and off the school bus, demonstrates that petitioner could not safely ride a regular, conventional school bus and, thus, petitioner has failed to meet his burden of proof he was discriminated against as required by the court's standards enunciated in Anderson.

II. Under N.J.S.A. 18A:39-1, which has been upheld on constitutional grounds,[1] petitioner's parents are entitled to only payment in lieu of actual transportation mandated by the statute and are not entitled to reimbursement for alleged monetary losses, nor is petitioner entitled to specialized transportation under the Commissioner's holding in A.A. v. Bd. of Ed. of the Freehold Reg. H.S. Dist.

III. The pupil transportation contract between the Board and Safety Bus obligates Safety Bus to transport all pupils attending Holy Spirit High School. The contract contains no provision to exclude the transportation of handicapped pupils which, if so provided, would be in violation of N.J.S.A. 10:5-1 et seq.

IV. The Board is without fault and is entitled to common law indemnity from any award of reimbursement or damages to petitioner's parents pursuant to the standards set down in Schramm v. Arsenal Esso Station, 124 N.J. Super. 135 (App. Div. 1973) by virtue of Safety Bus's decision not to transport petitioner rather than the Board's decision not to transport. Under such circumstances, the Board had no alternative but to reimburse petitioner's parents pursuant to N.J.S.A. 18A:39-1.

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[1] McCanna v. Sills, 103 N.J. Super. 480 (Ch. Div. 1968); West Morris Reg. Bd. of Ed., et al v. Sills et al, 58 N.J. 464 (1971) cert. den. 404 U.S. 486 (1971); Reed by and through Reed v. Attorney General, 195 N.J. Super. 172 (App. Div. 1984).

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RESPONDENT SAFETY BUS'S POSITION

Safety Bus contends, among other things, that based upon its factual observations made of petitioner on the first day of school in September 1985, where it was necessary to physically carry petitioner on and off the school bus, it did not engage in actionable discrimination against petitioner in violation of N.J.S.A. 10:5-1 et seq. Safety Bus concedes that petitioner is handicapped. However, it argues that under prevailing law the Board is not required to provide petitioner transportation to and from Holy Spirit High School (N.J.S.A. 18A:39-1) and that Safety Bus never contracted with the Board to transport handicapped pupils.

Safety Bus observes that a local school board's obligation to provide transportation services to the students who reside in its district is codified in N.J.S.A. 18A:39-1. In pertinent part this statute provides that:

> When any school district provides any transportation for public school pupils to and from school pursuant to this section, transportation shall be supplied to school pupils residing in such district in going to and from any remote school other than a public school, not operated for profit in whole or in part, located within . . . 20 miles from the residence of the pupil.

Hence, if a district provides transportation to a public school for pupils whose residence is remote from the schoolhouse, the district is obliged to provide an equivalent transportation service for remote pupils enrolled in private non-profit institutions. There can be no reasonable dispute that petitioner in September 1985 was validly classifiable as multiply handicapped and wheelchair bound. Had his parents not elected to enroll him in a sectarian school, the Board would have had the statutory power and obligation to provide transportation services under N.J.S.A. 18A:46-23. The provision of such transportation would have been contingent on petitioner's formal classification as handicapped -- hardly

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debatable — and the approval of the cost and method of suchtransportation by the County Superintendent. It is noteworthy that Superintendent Ruh testified that conventional transportation of a pupil suffering from petitioner's disabilities was entirely inappropriate.[2]

Safety Bus observes that petitioner's parents, however, elected to seek a sectarian education for their child. Given this choice, they have foregone the benefit of free transportation mandated by the controlling law. Although decisional authority is sparse, it is clear that handicapped students are excepted from the general transportation mandate of N.J.S.A. 18A:39-1. It is stated in Bd. of Ed. Woodbury Hts. v. Gateway Reg. H.S., 104 N.J. Super. 76, 84 (Law Div. 1968) that:

> No longer need private, non-profit school pupils living remote have to depend upon established public school bus routes in order to be entitled to transportation to school. Now [as a result of N.J.S.A. 18A:39-1, as amended], so long as any public school pupil living remote is transported by a school district . . . except handicapped, vocational or technical school students all non-public school pupils similarly situated are also to be transported. [emphasis added][3]

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[2] N.J.S.A. 18A:46-23 provides for a reimbursement to the district of 90 percent of the expenses incurred in providing the mandated transportation to a public facility. It is certainly reasonable to suspect that had B.W.'s parents enrolled him in a non-sectarian school, thus triggering the provisions of this statute, the Board would have had no difficulty in separately contracting for the appropriate special transportation. Stated differently, it is precisely the absence of statutory reimbursement for the substantial cost of transporting a single handicapped student to a sectarian school that has probably motivated the Board's position that Safety Bus must provide the service pursuant to the general contract.

[3] N.J.S.A. 18A:39-1 has been frequently amended since the Gateway case; hence the statute under review in that case is not identical in all of its terms to the present statute. The dissimilarities, however, are not material to the point made above, i.e., that districts are not required as part of their transportation mandate to provide such service for handicapped children whose parents elect to enroll them in private non-profit schools.

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Safety Bus asserts that the proposition that school districts are not subject to the statutory duty of providing transportation for handicapped students enrolled in private schools was recently affirmed in A.A. v. Bd. of Ed. of the Freehold Regional High School District. In that case, the Commissioner of Education held, inter alia, that parents who voluntarily place a handicapped pupil in a private school are not entitled to transportation to and from school "because the relief sought, transportation, is not a service mandated by State statute or code to private/non-public handicapped children" (Commissioner's Slip Op. at 21).

With regards to Safety Bus's contention that it did not contract with the Board to transport handicapped pupils, it fairly represents that at the hearing it specifically noted on the record the industry-wide understanding of special and specific contracts between vendors and boards of education for the special transportation needs of handicapped pupils; i.e., specially designed and equipped school buses. Safety Bus contends that notice of the special service sought and the requisite equipment must be given to prospective bidders by the terms of the bid specifications. It is quite clear that the Board never indicated in its bid specification that a wheelchair-bound pupil, who had to be carried on and off the bus, required transportation; nor did the board make any reference to a handicapped student in its contract documents, which were executed by the Board and submitted for approval by the County Superintendent after Safety Bus indicated its refusal to carry petitioner. This is hardly surprising given the absence of a statutory mandate for such service. It is even less surprising that Safety Bus's principals were taken aback by petitioner's presence at the bus stop and ultimately took the position that his transportation was unsafe and was not encompassed in the contract.

Safety Bus observes that the Board has argued that the language of the contract and the antecedent bid specifications are framed in general terms and do not expressly except handicapped pupils from Safety Bus's obligation to provide transportation. To a degree this observation is accurate: the bid and specifications are entirely mute regarding the handicapped. But this contractual silence, given the special character and needs of transportation for the handicapped, denotes an exclusion from the scope of the contract of such a specialized service, particularly in light of the sectarian destination for such transportation. In light of the testimony at trial, it simply cannot be asserted that the standard practice in the pupil transportation industry is to carry wheelchair-bound students who are unable to stand or walk independently on conventional 54-seat school buses. The exact contrary is the truth and was so evidenced at trial.

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Safety Bus argues that the circumstances of the contracting and the pattern of standard practices between school districts and bus companies relative to the provision of special transportation for handicapped students is legitimately within the purview of this court in its effort to define the contractual duties of the bus company:

> It is also permissible to shed further light on the parties' intent, to consider and examine the circumstances that existed when the contract was made. [Communications Workers v. Monmouth Co. Bd., 96 N.J. 442, 452 (1984)]
>
> In the quest for the common intention of the parties to a contract the court must consider the relations of the parties, the attendant circumstances, and the objects they were trying to attain. An agreement must be construed in the context of the circumstances under which it was entered into and it must be accorded a rational meaning in keeping with the express general purpose. [Tessmar v. Grosner, 23 N.J. 193, 201 (1957)]
>
> Generally, a contractor is bound according to the meaning that he "induces another to understand and act upon, if he knows or has reason to know that the other will so understand and act;" and in this inquiry the surrounding circumstances are relevant and competent. [George M. Brewster & Son v. Catalytic Const. Co., 17 N.J. 20, 28 (1954)]

Safety Bus asserts that the Brewster holding is particularly pertinent to the question of the scope of the transportation obligations assumed by Safety Bus in its contract with the Board. As argued above, the absence of a statutory mandate for the provision of transportation of handicapped students to parochial schools, the specialized equipment and contractual format for the provision of such a service to a public school, and the absence of any reference to handicapped students in any bid specification or contractual document submitted to Safety Bus should bind the Board, under the authority of Brewster, to a conventional contract limited to the provision of transportation of non-handicapped children to their respective public or private schools. See also, Medivox Production, Inc. v. Hoffman-LaRoche, Inc., 107 N.J. Super 47 (Law Div. 1969); Schnakenberg v. Gibraltar Savings & Loan Ass'n, 37 N.J. Super 150 (App. Div. 1955).

Safety Bus contends that its representatives who testified at hearing clearly attested to their knowledge of the specialized arrangements which typically constitute the agreements for the transportation of handicapped pupils. Further, Safety Bus asserts that while the Board chose not to produce any witnesses on its behalf, this tribunal, under the Brewster standards, can surely hold that the Board knew or had reason to know that Safety Bus could not have understood, under all of the relevant circumstances, that its

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contractual obligation encompassed the provision of transportation for a handicapped pupil enrolled in a private institution.

Safety Bus argues that this fact as to the contractual understanding between the parties is confirmed by virtue of the Board's award of the pupil contract to Safety Bus on September 12, 1985, despite Mr. Dugan's unequivocal refusal to assume the responsibility of transporting petitioner. Moreover, the formal contract was executed by the Board on November 14, 1985, and subsequently submitted for approval by Atlantic County Superintendent Ruh on February 20, 1986, well after Safety Bus had made clear its intentions to the Board. In engaging in such ratifying action and providing timely payments to Safety Bus, the Board never asserted that Safety Bus had breached its contractual obligations in any fashion. Further, by the Board extending its contract with Safety Bus, the Board induced and confirmed Safety Bus's understanding that it was not contractually bound to provide transportation to a handicapped pupil on a conventional school bus.

Safety Bus observes that much has been made in these proceedings of the insurance issues raised by Safety Bus before the Board. The suggestion is that these issues were insignificant and merely a pretext for an illicit discriminatory intention. It must be noted that the extent and cost of insurance is a central and highly regulated ingredient in the contractual relationship between a bus company and the contracting district:

> Liability insurance covering the operation of every bus transporting pupils to and from schools. . .shall be furnished by each contractor. . .in such amounts, with such indemnity, with such coverage, and in such manner, as shall be prescribed by rule of the state board. [N.J.S.A. 18A:39-6]
>
> In every contract for the transportation of pupils to and from school entered into by a board of education, the costs of furnishing the liability insurance coverage required under N.J.S.A. 18A:39-6 shall be based on the insurance rate applicable only to such transportation. [N.J.S.A. 18A:39-6.1]

Hence, Safety Bus argues, it was clearly appropriate and reasonable for Safety Bus to express intense concern that the extent and cost of the insurance it had obtained did not contemplate the kind of risk associated with the transportation of a multiply handicapped child. This, in fact, was confirmed by the communication to Safety Bus from its insurance agent. To be concerned with the viability of its insurance coverage was nothing less than to be concerned with its capacity to provide the service sought by the

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Board. Without insurance coverage there would be no contract. It is also simply untrue to argue that Safety Bus would have provided the service if the Board had entered into an indemnity agreement. As Mr. Dugan testified, his conduct before the Board was a tactical effort to induce the Board to provide the appropriate specialized transportation for petitioner. Dugan's conduct is clearly suggestive of his perception that transportation of petitioner was not encompassed in the Board's contractual arrangement with Safety Bus.

In summary of Safety Bus's defense with respect to petitioner's allegation of its discrimination, Safety Bus asserts that because its obligations are contractual and flowing to the Board rather than the general public, the public accommodation analogy made by petitioner is dubious. Likewise, because Safety Bus's responsibilities are defined by its contract with the Board, the employment comparison is also not exact. The employment cases, however, do suggest a general analytical framework within which this controversy can be resolved: Petitioner must establish, under the contract, that he is within the class entitled to the requested service, and that he sought the service which was denied despite his qualification. Safety Bus should be relieved of any liability should it establish the defense of having "reasonably arrived" at the opinion that petitioner was not entitled to the contracted service. See generally, Andersen v. Exxon Co. Safety Bus argues that it has done so in this matter.

Finally, Safety Bus contends that the Board failed to contract for transportation services to be provided petitioner. Hence, should it be determined that petitioner was legally entitled to such service, the Board rather than Safety Bus should be held liable for any consequential damages.

In addition, petitioner's mother testified that petitioner was "disappointed" that he could not ride the regular school bus, but soon got over this feeling of disappointment. Thus, there is no real basis for the imposition of damages for emotional distress or humiliation.

DISCUSSION AND CONCLUSIONS

Having carefully considered the entire record in this matter it is apparent that the eight enumerated issues to be determined may more properly be reduced and categorized under three broad headings; i.e., Discrimination, Contract, and State and

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Federal Laws. Consequently, the factual and legal analysis herein will concentrate on these major issues with an incorporation of such sub-issues as is required.

DISCRIMINATION

There is no doubt nor argument that petitioner's claim of invidious discrimination is cognizable before the Commissioner of Education. Hinfey v. Matawan Regional Board of Education, 77 N.J. 514 (1978). It has been said that the purpose of our civil rights legislation has essentially two aspects; i.e., defining the areas of activity as to which discriminatory practices will not be tolerated, and delineating generic characteristics which may not be used to deny equal treatment. Whateley v. Leonia Board of Education, 141 N.J. Super., 476, 479 (Ch. Div. 1976). As to the latter, petitioner's generic characteristic is that of a physically handicapped person, N.J.S.A. 10:5-4.1; N.J.S.A. 18A:46-8; N.J.A.C. 6:28-3.5(d)6; and thus, he is afforded protection under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. As to the former purpose, the Court has held that:

> Public schools and public education assuredly are covered by the anti-discrimination law. Public schools under the supervision of the Commissioner of Education are specifically "[a] place of public accommodation" under the Law Against Discrimination. N.J.S.A. 10:5-5; Jenkins v. Morris Twp. School Dist. and Bd. of Ed., 58 N.J. 483, 496 (1971). A place of public accommodation is forbidden to discriminate invidiously in the offering of any of its "advantages, facilities *** or privileges***" N.J.S.A. 10:5-4. [Hinfey at 523]

Petitioner, therefore, alleges that respondents Board and Safety Bus discriminated against him because of his handicap in contravention of N.J.S.A. 10:5-1 et seq. when they denied him access to "public accommodation" by refusing to transport him to a private/parochial school on a conventional school bus. N.J.S.A. 10:5-5.1. Given the facts in the instant matter I can neither find nor conclude that either respondent engaged in invidious discrimination against petitioner.

The facts clearly demonstrate that on the opening day of school in September 1985, it was necessary to physically carry petitioner on and off the school bus at his home route stop and Holy Spirit High School. During his transport, petitioner's folded wheelchair was in the aisle of the school bus, thus, creating a hazard to him and other pupil passengers. Safety Bus's equipment consists of a conventional 54-passenger school

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bus, lacking any features to accommodate a nonambulatory pupil passenger; e.g., hydraulic lift, floor locks for wheelchairs, etc. Safety Bus's decision to deny petitioner transportation was grounded, in part, upon safety considerations; a legitimate basis for his exclusion, where a ". . .materially enhanced risk of injury or death is a consideration. . ." Panettieri at 492. Safety Bus President Dugan's "reasonably arrived at" opinion that petitioner was "unable to perform adequately" was a consequence of his direct observation of petitioner's performance on September 1985. Id. at 492. Mr. Dugan formed the opinion that petitioner could not negotiate the school bus steps, to embark or disembark, under his own power or initiative and, therefore, reasonably concluded that petitioner posed a hazard to himself and others. Mr. Dugan reasonably arrived at the same opinion and conclusion at the experimental procedure in October 1985, where petitioner was provided the opportunity to demonstrate his ability, or lack thereof, to board and exit a school bus. The evidence clearly shows that petitioner is unable to walk without the aid of mechanical devices or other forms of support.

This tribunal notes that the experimental demonstration in October 1985 was conducted under favorable weather conditions which raises questions concerning petitioner's ability to similarly perform in inclement weather; i.e., rain, sleet, snow, etc. Additionally, petitioner did not perform an emergency exit drill from the school bus as prescribed by N.J.A.C. 6:21-11.4. Considerable testimony was advanced by respondent Safety Bus with respect to this issue through Mr. Dugan and Atlantic County Superintendent Ruh. Notwithstanding petitioner's physician's opinion to the contrary, both Mr. Dugan and Superintendent Ruh were of the opinion that the safety of petitioner and other pupils would be jeopardized in the event of a school bus accident involving a head-on collision, of a fire on the vehicle, and/or if subsequent to an accident the school bus became tilted on an angle.

Accordingly, I **CONCLUDE** that petitioner has failed to show that his exclusion from Safety Bus's conventional 54-passenger school bus because of his physical handicap was in any manner invidious discrimination but, rather, was based upon Safety Bus's consideration that to allow petitioner to ride on the vehicle would ". . .materially enhance (his and others) risk of injury or death." Panettieri.

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CONTRACT

The facts in this matter demonstrate that the Board's pupil transportation bid specifications neither included nor excluded terms or conditions for the transport of handicapped pupils. The facts do show, moreover, that subsequent to Mr. Dugan's refusal and objection to transport petitioner the Board, nevertheless, entered into a transportation contract with Safety Bus for the 1985-86 school year. The Board, therefore, entered into the pupil transportation contract with the knowledge, understanding and approval that Safety Bus was ill-equipped to provide pupil transportation to handicapped pupils and, moreover, it had refused to do so.

Even subsequent to its entry of contract with Safety Bus, the Board did not claim, infer nor charge Safety Bus with a breach of contract. Rather, the Board accepted Safety Bus's objections to the transport of petitioner and, thereafter, offered petitioner's parents the alternative payment in lieu of transportation pursuant to N.J.S.A. 18A:39-1.

Upon hearing the complaint of petitioner's mother and Mr. Dugan's objections in September 1985, the Board had available to it the option of rejecting Safety Bus's bid and readvertising the transportation routes incorporating the single handicapped pupil route to and from Holy Spirit High School in its bid specifications. Or, alternatively, the Board had the option to accept Safety Bus's bid, enter into the contract, and assert a claim of breach for its failure to transport a handicapped pupil. The Board did neither.

For the Board to now assert a claim of indemnification for its own actions, taken openly and with the full knowledge of Safety Bus's position, is unconscionable and beyond reason or prudence. I **CONCLUDE**, therefore, that the Board's sought-for relief is unwarranted and is hereby **DENIED**.

FEDERAL AND STATE LAWS

Petitioner alleges among other things that the Board failed to develop a valid service plan regarding the provision of related services to non-public school pupils by denying parents of handicapped pupils a genuine opportunity to express their views, pursuant to 34 C.F.R. §76.652. The Board counters by asserting that it has, by all measure, complied with federal and state laws, rules and regulations concerning handicapped pupils under its direction and control.

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I **FIND** and **CONCLUDE** that there is insufficient evidence before this administrative tribunal to sustain petitioner's allegations in regards to a violation of 34 C.F.R. §76.652.

Accordingly, I **CONCLUDE** that petitioner's allegations with respect to this issue are without merit and, therefore, are hereby **DENIED** and **DISMISSED.**

The Commissioner has held, among other things, that where federal funds are not used to provide transportation services to handicapped pupils voluntarily placed in private/non-public schools by their parents, the handicapped pupil so placed holds no entitlement to transportation by a local board of education. A.A. v. Bd. of Ed. of the Freehold Regional H.S. Dist. Therein, the Commissioner said, "There is no federal requirement that local educational agencies expend any funds other than those generated by EHA Part B funds for private/non-public handicapped children voluntarily enrolled by their parents." (Commissioner's Slip Op. at 18). Where, as here, EHA Part B (federal) funds are not used to provide transportation for private/non-public school handicapped pupils voluntarily placed by their parents in a private/non-public school, no entitlement to such pupil transportation exists.

Consequently, petitioner's argument of alleged violations 20 U.S.C. § 1400 et seq., the regulations found at 34 C.F.R. § 300.13 et seq. and 34 C.F.R. § 300.450 to 300.460 are not found in the instant matter and, therefore, are hereby **DISMISSED.**

Having found and determined that Safety Bus's actions to refuse petitioner transportation on its conventional school bus did not constitute invidious discrimination but, rather, that its decision was grounded upon safety factors; and having found that the Board violated no federal statutes or regulations with respect to its denial of transportation to a handicapped pupil voluntarily placed in a private/non-public school, it is now necessary to turn to the issue as to whether the Board was under an obligation to provide petitioner with transportation to Holy Spirit High School under New Jersey statutes and the State Board of Education regulations.

The facts in this matter clearly demonstrate that the Board's CST executed an IEP for petitioner in May and June 1985, the purpose of which was to assure petitioner's continued educational and physical progress as a handicapped pupil upon his leaving the Board's schools. Petitioner's IEP, executed with his mother's participation and

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concurrence, specifically stated that petitioner would enroll and attend the Holy Spirit High School, a private/non-public school, for the 1985-86 school year. Petitioner's IEP also stipulated that petitioner would be afforded pupil transportation by the Board to Holy Spirit by regular school bus. As a consequence of the Board's CST execution of petitioner's IEP pursuant to N.J.A.C. 6:28-3.6, was the Board therefore committed to provide petitioner with a related service; i.e., transportation, pursuant to N.J.A.C. 6:28-3.7(a)5? The relevant regulations read as follows:

> N.J.A.C. 6:28-3.7 Related services
>
> (a) Related services shall be provided to an educationally handicapped pupil according to his or her individualized education program and may include the following:
>
> . . . .
>
> 5. Transportation shall be provided in the following manner:
>
> i. The district board of education shall provide transportation as required in the individualized education program or as prescribed by the school physician. Such services shall include special transportation equipment, transportation aides and special arrangements for other assistance to and from and in and around the school.
>
> ii. When out-of-district placement for educational reasons is made by a district board of education, transportation shall be provided consistent with the school calendar of the receiving school.
>
> iii. When necessary, the case manager shall provide the transportation coordinator and the bus driver with specific information including safety concerns, mode of communication, health and behavioral characteristics of a pupil assigned. . . [Emphasis added]

The facts in this matter are similar to those stipulated facts found in A.A. v. Bd. of Ed. of the Freehold Reg. H.S. District, where the Freehold Board's CST evaluated A.A. to find him eligible for classification as orthopedically handicapped in need of related services-transportation. The facts in A.A., as here, demonstrate that A.A. was voluntarily placed in a private/non-public school with such placement unrelated to his classification and/or special needs related to his handicap (Initial Decision at pp. 2-3). From this point the facts differ. In A.A.'s situation, the Freehold Board provided A.A.

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with transportation to and from the private/non-public school by way of a conventional school bus — the very relief sought here by petitioner B.W. A.A., however, sought special transportation by way of a special van or, in the alternative, with the aid of an adult assistant to accompany him on the regular, conventional school bus. The Freehold Board denied A.A.'s request and as an alternative to A.A.'s use of its conventional school bus, it offered A.A.'s parents the statutory maximum of $406 annually for them to provide for A.A.'s transportation to and from the private/non-public school. N.J.S.A. 18A:39-1.

The major factual distinctions between A.A. and the instant matter are these: (1) A.A. is ambulatory, albeit with restricted mobility, where petitioner B.W. is nonambulatory; (2) the Freehold Board provided A.A. pupil transportation to the private/non-public school by way of a conventional school bus where here the Board, through its private contracted carrier Safety Bus, denied petitioner transportation based upon safety considerations.

While I am impressed with petitioner's fortitude and am sympathetic to his situation, given the facts in this matter together with the Commissioner's holding in A.A. v. Bd. of Ed. of the Freehold Reg. H.S. District, I can only **CONCLUDE** that petitioner's sought-for relief must be **DENIED.**

I further **CONCLUDE** that pursuant to N.J.S.A. 18A:39-1, petitioner is eligible for the annual payment of $406, retroactive to September 1985 and continuing through the 1986-87 school year. In all other respects, the herein Petition of Appeal is hereby **DISMISSED.**

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

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

13 March 1987
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

MAR 13 1987
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed ~~To Parties~~:

MAR 18 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

ij

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B.W., a minor child by his parents, J.W. AND B.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BRIGANTINE, ATLANTIC COUNTY, AND SAFETY BUS SERVICE, A CORPORATION OF THE STATE OF NEW JERSEY,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were timely filed by petitioner pursuant to N.J.A.C. 1:1-16.4a, b and c.

Petitioner objects to each conclusion of law reached by the Administrative Law Judge. Specific objections and allegations of errors of law and fact made by the ALJ are summarized below. The legal and factual basis for petitioner's objections to the initial decision have been set forth in Proposed Findings of Fact and Memorandum of Law, dated December 16, 1986, and a letter brief of January 23, 1987 which are incorporated in the record by reference.

Petitioner objects to:

1. The denial of petitioner's claim that Safety Bus Service and the Brigantine Board of Education discriminated against B.W., in violation of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq., when they refused and continue to refuse to permit B.W. to ride the conventional school bus.

2. The denial of respondent school board's claim that Safety Bus Service violates its contractual duty when it refused and continues to refuse to transport B.W. because he is handicapped.

3. The denial of petitioner's claim that even if B.W.'s disability prevents him from riding the conventional school bus the school board is obligated to provide him specialized transportation under the Education of the Handicapped Act, as amended, 20 U.S.C. sec. 1400 et seq.

4. The denial of petitioner's claim for reimbursement from the bus company and school board for their unlawful exclusion of B.W. from the school bus.

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The specific errors of law and fact alleged to have been made are as follows:

1. The ALJ improperly extended the scope of the "reasonably arrived at" defense to a public accommodation case.

2. The ALJ failed to rule on the lawfulness of respondents', continued exclusion of B.W., and inexplicably limited his ruling to the bus company's prior action.

3. The ALJ erred in upholding respondents' decision to exclude B.W. because it is not based on any competent medical evidence.

4. The ALJ erroneously upheld respondents' decision to exclude B.W.: it was not based on an objective standard supported by factual or scientifically validated evidence, in violation of Division of Civil Rights' regulations.

5. The ALJ's conclusion that B.W. cannot now ride safely in a school bus is neither supported by a preponderance of the evidence nor flows from his own findings of facts.

6. The ALJ's conclusion that respondents' decision in September 1985 to exclude B.W. from the school bus was reasonably arrived at is against the weight of the evidence.

7. The ALJ did not even consider the issue of the school board's failure to develop a service plan for the provision of related services to non-public schools handicapped students, as required by 34 C.F.R. sec. 70.652.

8. The ALJ improperly restricted the scope of petitioner's evidence.

Upon an independent and thorough review of the record in this matter including petitioner's exceptions, the Commissioner concurs with the findings and conclusions of the ALJ and adopts them as his own for the reasons expressed in the initial decision and as delineated below.

Firstly, the Commissioner is in agreement with the ALJ that the decision reached by the Safety Bus Company to deny B.W. access to transportation on its conventional 54 passenger school bus due to safety considerations was a legitimate basis for exclusion under Panettieri, supra, and that such decision was reasonably arrived at based on Mr. Dugan's direct observation of petitioner's performance.

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Moreover, the Commissioner does not agree with petitioner's allegation that the ALJ's reliance on "the reasonably arrived at" standard was inappropriate, notwithstanding the fact that this is not an employment discrimination case. In the absence of an expressly articulated standard by the courts applicable to the specific circumstances in this matter, namely, the refusal to allow a handicapped student to travel on a conventional school bus, the ALJ's resort to employment discrimination law for guidance is not deemed to be erroneous.

Federal and state statute and code require that a determination be made as to a handicapped pupil's related service needs, including those for specialized transportation. The determination for eligibility for related services by regulation in New Jersey rests with the child study team. N.J.A.C. 6:28-3.1 states specifically that

> (a) A child study team is an interdisciplinary group of appropriately certified persons who shall:
>
> 1. Evaluate and determine eligibility of pupils for special education and/or related services***. (emphasis supplied)

More specifically, N.J.A.C. 6:28-3.5 requires that:

> (a) When an evaluation is completed, the child study team and parent(s) shall meet with the school principal and referring staff member(s), if they choose to participate, in order to:
>
> 1. Develop a collaborative evaluation summary;
>
> 2. Determine whether the pupil is eligible for special education and/or related services***. (emphasis supplied)

In developing a handicapped pupil's individualized education program (IEP) consideration must be given to whether related services are necessary and, if so, the IEP must include a statement describing the specific related services to be provided. N.J.A.C. 6:28-3.6(e)(5)(vii)

N.J.A.C. 6:28-3.7, the related service regulations, dictates in subparagraph 5 that:

> 5. Transportation shall be provided in the following manner:
>
> i. The district board of education shall provide transportation as required in the individualized education program or as

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prescribed by the school physician. Such services shall include special transportation equipment, transportation aides and special arrangements for other assistance to and from and in and around the school.

ii. When out-of-district placement for educational reasons is made by a district board of education, transportation shall be provided consistent with the school calendar of the receiving school.

iii. When necessary, the case manager shall provide the transportation coordinator and the bus driver with specific information including safety concerns, mode of communication, health and behavioral characteristics of a pupil assigned.***

Thus, a determination as to what transportation needs exist for a handicapped pupil or a determination as to whether he or she is able to be transported by regular transportation are determinations which fall under the evaluation and IEP processes.

In the instant matter, the IEP did, in fact, address the issue of transportation, stating that regular transportation was to be provided. (P-1) Except for a most unusual circumstance, such a determination would be controlling and beyond the purview of the bus company to contravene since the decision as to transportation needs is based on child study team evaluation and by law rests with the multidisciplinary team and IEP participants.

However, in the instant matter, the Commissioner determines that the conclusion reached by the child study team and IEP participants for regular bus transportation is entirely unsupported by the evaluation information available on May 31, 1985, the date of the IEP conference. Further, the Commissioner concludes that the child study team failed in its responsibility to actually assess whether or not petitioner was in need of specialized transportation/capable of being transported by a 54 passenger conventional bus.

The record indicates that approximately three times during petitioner's eighth grade year (1984-85) he was transported by regular bus on field trips, each time carried on and off the bus by his mother. Moreover, given the date of the IEP conference (May 31, 1985) or the date of the typed report (June 10, 1985), a determination that regular bus transportation was appropriate could not have been based upon consideration of how petitioner ambulated at graduation since graduation did not occur until later in June. (See physical therapist reports P-6 and P-7.)

Even granting that the physical therapist report for May was available for review at the May 31, 1985 IEP meeting (which is questionable since P-1 contains no record either of her presence at

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the conference or that a review of her reports was considered), the physical therapy progress reports clearly indicate that on May 22, 1985 petitioner could not independently negotiate steps and that stair training was a new skill being learned. It reads that petitioner "can go up steps independently with 2 railings with close guarding for safety. Down with 2 railings and minimal assistance with knee buckling."

Neither physical therapy report provides support for a determination that petitioner could safely and without hazard to himself consistently manage independently the physical requirements of regular bus transportation. For example, the June reports read in pertinent part:

> June 5 - Ambulated to gym. Up and down steps x 3 flights each. Practiced both Independently and with assistance to decide what is best approach to use during actual graduation. Now [B.] is Independent both up and down with 2 railings with close supervision for safety.***
>
> ** At end of treatment, found out that there will be a ramp for graduation so that [B.] can walk up and not have to do stairs. All the students will walk up the ramp.
>
> June 12 - Continued as out-lined above, stressing distance ambulation and endurance training in wheelchair. Final session will be during graduation practice next week to practice ramp.
>
> June 19 - Final P.T. session. Graduation practice. [B.] had already walked up the ramp during a previous practice - was able to do, although with some dizziness. During practice today, went up ramp x 2 and then down ramp with close guarding. [B.] now knows that he is able to descend the ramp with walker independently. Discussed plans for limiting [B.'s] ambulation distance in and out of graduation in order to limit fatigue and allow safe and efficient ramp ambulation.
>
> Summary
>
> [B.] was seen for three P.T. sessions during June. The focus was on distance ambulation in preparation of ambulating to graduation. [B.]

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> demonstrated his overall improved strength and endurance by successfully completing Independent walker ambulation for long distances to allow him to ambulate to graduation. Despite stair training, a ramp was made which [B.] was able to walk both up and down. He was successful on graduation night and ambulated up the ramp to the stage, and back down, along with his fellow students***. (emphasis supplied)

While progress is certainly noted in petitioner's strength and endurance, climbing stairs was clearly a newly introduced skill being developed and certainly not mastered in May or June.

In addition, it must be pointed out that neither an orthopedic evaluation nor Dr. Parker's neurological report (P-14) nor a report of a May 1986 neurological assessment alluded to but not contained in the record appears to have been a part of the child study team evaluation process or to have been considered in arriving at transportation conclusions during the IEP conference in May 1985. N.J.A.C. 6:28-3.5(e)9 requires that for pupils to be deemed orthopedically handicapped there must be an evaluation by a physician qualified to conduct an orthopedic evaluation. P-1 neither summarizes nor lists any evaluation conducted to meet this requirement. Dr. Parker's neurological report (P-14) was not written until a year after Safety Bus refused to transport B.W. and several months after the filing of this Petition of Appeal in this matter. It apparently was generated at the request of B.W.'s attorney, not that of the Board or the child study team.

Thus, given the above, and the undisputed fact that:

1. On the opening day of school for the 1985-86 school year, B.W. was carried on and off the bus by his mother;

2. Petitioner's folded wheelchair was in the aisle. (See RB-1);

3. During the demonstration of October 1985 petitioner needed assistance and supervision to negotiate the steps. (Petitioner's Proposed Findings of Fact and Memorandum of Law No. 31, at pp. 9-10)

4. While petitioner has progressed in his ability to handle stairs, this is done accompanied by and under the supervision of physical therapist, school nurse or his mother. (Id., Nos. 38, 39, at pp. 11-13)

5. Although the physical therapist and neurological reports of 1986 report progress in petitioner's ability to handle stairs, when

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> negotiating stairs in school he is usually in the accompaniment of the school nurse who has on occasion lifted him. (Id., No. 42)

As such, the Commissioner concurs with the ALJ that the Safety Bus Company's decision to refuse B.W. transportation was not invidious discrimination but was a result of bona fide safety concerns. One need only review the highly stringent requirements of N.J.A.C. 6:21-5.1 et seq., the regulations for pupil transportation, and the New Jeresy School Bus Specifications (RB-1) to understand that pupil transportation is heavily regulated because pupil safety is of the utmost importance.

Concerns with pupil safety, be it that of an individual pupil or groups of pupils, as well as the planning for emergency situations, are not mere hypothetical speculation. Rather, they are a strict necessity districts must be vigilant to address. N.J.A.C. 6:21-11.4 As correctly pointed out by the ALJ, the physical therapist and neurological reports are based on optimum fair weather scenarios, even when dealing with the emergency situation. There can be no guarantee that in an emergency evacuation the bus will be upright enabling him to use the back of the seats as supports or crawl.

Even granting that petitioner is able to crawl or otherwise get to the emergency exit door, how will he safely drop 30 inches to the ground? Because of the paramount concern with safety, the transportation regulations recommend that during each emergency drill only a few students demonstrate the 30-inch jump. N.J.A.C. 6:21-11.4(d)3 Regardless of which exit is used, how will he ambulate in an emergency away from the bus without a walker, wheelchair, or other mechanical device? Could he exit through a kicked out windshield?

These as well as other concerns apparently raised by the county superintendent and Mr. Dugan with respect to collisions, fire and the like are not merely "grasping at straws" but are legitimate considerations to address when determining whether a pupil is able to be transported on a regular bus or is in need of specialized transportation. This is perhaps even more critical when considering that petitioner's bus trip is at least 30 miles daily.

By way of summary, a decision as to whether B.W. can be transported by regular bus transportation or is in need of specialized transportation does not rest with the bus company or its insurance carrier but by law rests with the child study team and IEP participants. However, given the determination of the Commissioner that the child study team failed in its responsibility to adequately assess B.W.'s transportation needs and the glaring absence of evaluation data to support its blithe recommendation for regular transportation, it is deemed as reasonable and appropriate that the Safety Bus Company took the "bull by the horns" and acted on its conclusion that allowing petitioner to ride the bus would "***materially [enhance his or others'] risk of injury or death." (Panettieri, supra, at 492)

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Notwithstanding the above, it is now necessary to review petitioner's IEP and to conduct and/or review any evaluations/assessments as to his current status to correct for the deficiencies in the IEP of record (P-1) and to plan for the 1987-88 school year. Therefore, the child study team is ordered to conduct forthwith an IEP review which, by law and code, must be done at least annually. N.J.A.C. 6:28-3.6(j)

Since petitioner's progress is described by his neurologist and physical therapist as continuing, the most current evaluation information is to be considered. The child study team is to develop an evaluation plan, if necessary, consistent with N.J.A.C. 6:28-3.4(a) and (j), given the flaws in the 1985 reevaluation, to assure that sufficient, specific, and appropriate assessment data is obtained to address the full panoply of safety issues that must be considered in reaching an informed, supportable conclusion on petitioner's transportation needs. Independent orthopedic evaluation may be advisable in addition to any information provided by B.W.'s parents and neurologist.

Turning now to the allegation that the ALJ improperly limited the scope of the neurologist and physical therapist evidence, the Commissioner notes that N.J.A.C. 1:1-15.2 vests the ALJ with the authority to so act. While it may well be true that he could have allowed evaluation information not contained in the September 1986 expert reports, the ALJ had the discretion not to allow this information. Given that petitioner's exceptions do not demonstrate prejudice to the case and do not contend that the "new" information would have significantly altered the outcome of the case, the Commissioner does not find reversal of the ALJ's action to be warranted. Moreover, the above-ordered IEP review and reevaluation will address petitioner's current status for 1987-88 planning.

As to petitioner's argument that should he be found in need of specialized transportation, the district must then provide for such, the ALJ's rejection of such conclusions is correct. Although the particular factual circumstances of A.A., decided by the Commissioner February 10, 1986, aff'd St. Bd. July 2, 1986, and the instant matter differ in that A.A. was seeking specialized transportation, that case has thoroughly examined the obligation of districts under federal and state law to provide transportation to handicapped pupils voluntarily placed by the pupils' parents. As such, the ALJ was correct in determining that no violations of law or code have occurred in the instant matter.

The following passages from A.A. are repeated below because they have direct applicability to the instant matter:

> The ALJ correctly notes that 34 C.F.R. 300:452 requires that each local educational agency shall provide special education and related services to meet the needs of handicapped children residing within its jurisdiction in private schools not placed or referred by a public agency. However,

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this requirement must be read in pari materia with 34 C.F.R. 300:451 and 34 C.F.R. 76.651-76.663, all of which regulate the manner and extent to which such services must be provided. 34 C.F.R. 300:451 reads:

> The State educational agency shall insure that -
>
> (a) To the extent consistent with their number and location in the State, provision is made for the participation of private school handicapped children in the program assisted or carried out under this part by providing them with special education and related services; and
>
> (b) The other requirements in 34 CFR 76.651-76.663 of EDGAR are met.

There is no federal requirement that local educational agencies expend any funds other than those generated by Education of the Handicapped Act (EHA) Part B funds for private/nonpublic handicapped children voluntarily enrolled by their parents. See May 1984 letter from W. Cullar, Director, Office of Special Education Programs to J. Osowski, Director, Division of Special Education, New Jersey State Department of Education (C-1) and EHA ruling, inquiry by Brian T. Hartman, Education for the Handicapped Law Report, Supplement 95, April 29, 1983, 211:294 (C-2) for further clarification.

There are a number of factors which determine whether a particular handicapped child, voluntarily enrolled in a nonpublic school, will receive services under EHA Part B. These include such factors as the amount of Part B funds available to a local educational agency and the relative needs of the public and private school children. 34 C.F.R. 76.652 mandates that the local district develop a service plan in consultation with representatives of the private/nonpublic school students during all phases of the development and design of the project/program covered by its application for Part B funds when determining the amount of funds to be used. Such consultation is required for identification of private/nonpublic handicapped pupils' needs and for development of the project/program to meet those needs.

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However, the ultimate responsibility and authority for deciding how to apply those funds and which students participate in the EHA Part B program/project rest with the local district.

In the instant matter, EHA Part B (federal) funds are not used to provide transportation for private/nonpublic school handicapped pupils voluntarily placed by their parents in private/ nonpublic schools.***

If petitioner has a complaint as to the Board's service plan with respect to private school handicapped children pursuant to 34 C.F.R 300.450-300.452 and the EDGAR provisions at 34 C.F.R. 76.651-76.662, he has recourse in the procedures under 34 C.F.R. 76.780(a) (EDGAR). It must be emphasized that these complaint procedures are separate and distinct from the due process procedures available to parents under 34 CFR 300.500-300.514.

***

Any entitlement petitioner has to transportation, therefore, is controlled by N.J.S.A. 18A:39-1***. Upon examination of that statute, it is the determination of the Commissioner that the Board is providing the maximum statutory amount required by law***. (emphasis supplied, pp. 18-22)

As to the remainder of petitioner's exceptions, the Commissioner finds nothing to warrant reversal of the ALJ's determination with respect to the service plan allegations or the contractual issues addressed by the ALJ in the initial decision, ante.

Accordingly, the recommended decision of the ALJ is adopted as the final decision in this matter for the reasons stated therein and elaborated on herein. The Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

April 24, 1987
STATE BOARD DISMISSED AS UNTIMELY NOVEMBER 4, 1987

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BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND COUNCIL OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY, RESPONDENT.	:	DECISION

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

It is observed that the exceptions of both parties to the initial decision as well as the reply to exceptions submitted by Council were filed pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

Upon review of the submissions of the parties setting forth their respective positions to the recommended findings and conclusions in the initial decision, the Commissioner observes that the Board argues that the ALJ erred in denying its Motion for Summary Judgment at the conclusion of Council's cross-examination of the School Business Administrator.

The Board's reasons as set forth in its exceptions read in pertinent part as follows:

> A review of the procedural history will demonstrate that initially the Deptford Township Council cut $611,000..00 from the budget. After a meeting, or possibly two, with Peter Contini, the Superintendent of Schools for Gloucester County present, the Council because of the adverse impact to them for tax purposes resulting the following year, reinstated most of this money leaving a cut of $183,300.00 and certified same to the Board of Taxation after having previously certified to the Board of Taxation a cut of $611,528.00. This was done timely so as not to adveresly impact on the taxes but nevertheless demonstrates the arbitrariness of the cuts. It should be pointed out procedurally, my Motion for Summary Judgment was made at the close of the Council's case. My reasons for doing same were tactical in that it would preclude the Council from going back and attempting, at the time of the trial, to remedy their defect. I relied on

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the Board of Education of East Brunswick Township vs. Township Council of East Brunswick, 48 N.J. 94 (1966) as well as several other cases cited specifically The Pompton Lakes Board of Education vs. Pompton Lakes (1980)s.l.d. decided May 8, 1980 and affirmed by the Commissioner on May 12, 1980, Union Township Board of Education vs. Township Committee of Union (1981), decided June 5, 1981. Lyndhurst Township Board of Education vs. Lyndhurst (1984), decided September 11, 1984. affirmed by the Commissioner October 23, 1984 and Paterson Board of Education vs. Paterson City Council (1981), decided December 1, 1981. The aforementioned cases rely on the fact that the governing body relied on inarticulated reasons at the time it reduced the Board's budget. And the Court in each of these cases concluded that the line items which the governing body sought to reduce, and the reasons for such a reduction, constituted a fatal flaw in the appeal procedure warranting a full restoration of the money cut by the governing body.

Enclosed herewith and marked as "Exhibit A" is the original document sent to the Deptford Township Board of Education which contains the Resolution in summary form and the attached explanation of recommended line item reductions. A review of this document clearly shows that the adjustments made by the Township Council show the appropriations in a column. Next to that column, the reduction and to the extreme right, the adjusted new amount. Not one single reason is stated, therefore, permitting one to conclude that the reductions are, in fact, arbitrary. This was later amended to $183,300.00 and documentation of the exact same nature, as shown here as "Exhibit A", was also submitted wilfully (sic) lacking in reasons. A review of the transcript will clearly demonstrate that the questioning by the Deptford Council, at the time of trial, of the officials of the Deptford Township Board of Education was, in fact, discovery or a fishing exposition, all of which could have been accomplished beforehand by virtue of interrogatories or depositions.

In the East Brunswick case cited above, the Court held, in part, as follows:

> Where its action (councils) entails a significant aggregate reduction in the budget and a resulting appealable

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> dispute with the Local Board of Education, it should be accompanied by a detailed statement setting forth the governing bodies underlying determinations and the supporting reasons. This is particularly important since, on the Board of Education appeal under R.S. 18:3-14, the Commissioner will undoubtedly want to know quickly what individual items in the budget the governing body found could properly be eliminated or curbed and on what basis it so found.

In this case, at bar, Judge Masin centered his decision on the word "should" as found on page seven (7) of his opinion wherein he distinquished (sic) language such as "should be accompanied" as it appears in the East Brunswick decision from language that could have appeared such as "must be accompanied". However, those other cases that I relied upon and cited herein, clearly emphasize an affirmative obligation on the part of the Township Council to be specific. Borrowing further language from the East Brunswick decision, the Council clearly had the affirmative obligation for their cuts to be

> Independent ones, properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards in its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view in the make up of the community.

Judge Masin argues that the remedy for this defect was corrected in the Answer filed to the Complaint of the Board of Education by "Exhibit B" which was attached. A review of "Exhibit B" on practically each and every line item does set forth a reason. However, that reason is tied almost entirely to last year's budget and expenses per line item rather than meeting the mandates of the East Brunswick decision calling for a recognition of the State's educational standards. The cuts made and demonstrated in "Exhibit B", submitted by Council, clearly demonstrate no more thought than what was last year's expense item versus how much the Board is

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> requesting this year and a mathematical determination to slice the budget in areas where there is, in fact, an increase.
>
> Judge Masin's decision clearly comes back to the intent of the New Jersey Supreme Court decision in New Brunswick wherein Judge Masin states that "this decision in no way implies that the ruling would be the same where no such statement attached to the answer, where it provided at some date following the Board's initial filing with the Commissioner or where the statement merely reflected a blanket percentage reduction, all circumstances which have arisen in prior cases before the Commissioner. In other words, if it is determined by the Commissioner that the line item cuts set forth in "Exhibit B" are deficient, Judge Masin's decision would have been to grant the Motion for Summary Judgment and restore and for that reason, the Board's position is that the line item cuts and the reasons provided by Council are deficient, for the reasons set forth above, and therefore the entire $183,300 should be reinstated. (Board's Exceptions, at pp. 2-4)

The remaining exceptions taken by the Board deal with its objections to the current expense line item reductions in the amount of $103,350 sustained by the ALJ in the initial decision which are incorporated by reference herein.

Similarly, Council's exceptions to the current expense line item restorations in the amount of $79,950 in the initial decision are also incorporated by reference herein.

The Commissioner observes that Council in its reply to the Board's exceptions related to the ALJ's denial of the Board's Motion for Summary Judgment maintains that:

> The Township's argument with regard to this Motion is best set forth on pages 1 through 9 of its Brief submitted to the Office of Administrative Law. The Township wishes to incorporate this argument in its response to this exception filed by the Board. It, therefore, attaches hereto a copy of its Brief with attachments.
>
> In addition to the aforesaid arguments, Township takes exception with the Board's conclusionary statement indicating that Council reduced its initial cut of $611,528 because of the adverse impact on them (Council) for tax purposes in the following year. No basis for this conclusion is

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found in any of the transcripts, submissions or other evidence before the Commissioner. To the contrary, Judge Masin's recitation with regard to the procedural history is correct wherein he notes that the reduction from $611,528 to $183,300 came after a joint meeting between the Board and Council before Gloucester County Superintendent of Schools.

With regard to the merits of Judge Masin's decision concerning the Board's Motion, it is clear that the Court carefully considered the facts surrounding the proposed reductions and the propriety of the reductions in light of the Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (166).

Judge Masin's rationale with regard to this Motion goes well beyond a semantical distinction between the words "should" and "must." The procedural history, to which the Board does not take exception, clearly shows the efforts on the part of the Township to diligently evaluate the Board's budget prior to making cuts. In fact, after meeting with the Board on May 21, 1986, Council amended its initial reduction of $611,528 to $183,300. It did so after reviewing the proposed cuts with the Board and receiving their explanations for their position on the various line items. Certainly, this process was anything but arbitrary and demonstrated further deliberation on the part of Township Council. One cannot ignore Judge Masin's review of the merits of the Township's reductions in which he sustains $103,350 of the proposed $183,300 (56% of the proposed reductions). Had the Township's reductions been arrived at in such an arbitrary fashion, it is doubtful that the Court would have made the aforesaid reductions after hearing the testimony of both parties in this matter.

Lastly, it should be noted that the Board's Motion came at the conclusion of this case which consisted of approximately 15 hours of testimony. Exception is taken to his argument wherein he states that the Motion was made at the end of the case for tactical reasons so that Council would be precluded from going back and attempting at the time of trial to remedy their defect. This statement makes little sense since the Board's argument is that the Resolution reducing the $183,300 was fatal in that it did

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> not provide reasons for the reduction. Given this argument, there would appear no way that the Council could remedy its Resolution prior to, in the middle of, or after hearing this matter. Therefore, the Board's assertion that they waited for the conclusion of the matter prior to making its Motion for Summary Judgment is not logical. Normally, the proper time for bringing such a Motion would be in advance of the hearing. See Board of Education of the Township of Lower Alloways Creek v. Township Committee of the Township of Lower Alloways Creek, 1981 S.L.D. 1204 affirmed by the Commissioner.
>
> (Council's Reply Exceptions, at pp. 1-2)

The Commissioner has made an independent review of the record of this matter including the transcripts, exhibits and the briefs filed by the parties.

The Commissioner agrees with the position taken by the Board that Councils' failure to provide timely reasons for those reductions it made in the Board's 1986-87 current expense proposal at the times of Council's original tax levy certification and its amended tax levy certification on May 8 and May 22, 1987 is fatal to these proceedings.

In this regard the Board appropriately relied on those prior school law decisions rendered by the Court in East Brunswick, supra, and by the Commissioner in Lyndhurst, supra; Pompton Lakes, supra; Lakehurst Borough Bd. of Ed. v. Borough Council, decided by the Commissioner October 31, 1986; Old Bridge Township Bd. of Ed. v. Mayor and Council of Township of Old Bridge, decided by the Commissioner, October 28, 1985; and Union Township Bd. of Ed. v. Township Committee of Union, decided by the Commissioner July 9, 1981.

In Union Township the Commissioner adopted the language set forth in the initial decision which reads in pertinent part:

> The failure of the governing body to know, identify and set forth the specific line items of the budget and to enunciate supporting reasons therefor at the time of the reduction becomes an arbitrary, capricious and unreasonable act. The submission of such information at a later date does not cure this defect. The governing body must have the rationale for its reductions at the time it acts and shall not be permitted subsequently to construct one in a "boot-strap" manner.

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The Commissioner, in Union Township, further concluded as follows:

> In the opinion of the Commissioner ***the law set forth in E. Brunswick, supra, [requires] the municipal government to recommend to the Board the supporting reasons for the reduction or elimination of specific line items which it believes necessary to total budgetary reduction. The Commissioner deems it proper that such decisions be made at the time of the reduction and not on a contingency basis only, if and when the budget reduction is appealed by the Board to the Commissioner.

The Commissioner has reviewed the original document entitled Recommended Line Item Reductions which was sent to the Board on May 6, 1987 by the Township Manager. It is clear that this document does not set forth reasons for specific recommended line item economies, but rather raises questions about the amounts budgeted in these line items. Nevertheless the record establishes that Council's original reduction of $611,528 was based upon this document when it resolved to certify the school tax levy on May 8, 1986. Moreover, it is observed that when Council amended its initial reduction of $611,528 to $183,300 on May 22, 1986 the underlying documentation and reasons for this action was not forthcoming until it filed its Answer to the original Petition of Appeal on June 18, 1986. (Exhibit B)

The Board argues that documentation and reasons set forth in Council's amended reduction amounting to $183,300 in current expense appropriations (Exhibit B) were arbitrary, untimely and woefully inadequate and represented nothing more than a blanket percentage reduction based upon this 1984-85 current expense line item budget appropriations and expenditures.

The Commissioner agrees with the Board's contention in this regard and finds that the Recommended Line Item Reductions (Exhibit B) filed by Council with its Answer to the Original Petition of Appeal was untimely and lacks specificity with respect to the reasons for its underlying determination in support of its $183,300 amended reduction imposed upon the 1986-87 current expense appropriations. In support of this finding the Commissioner relies on the transcripts in the record of these proceedings which clearly reveal that Council, upon cross-examination of the School Business Administrator, was not prepared to attack the credibility of his written testimony but rather it was compelled to engage in a process of discovery in attempting to support the reasons for the current expense line item reductions amounting to $183,300 which it imposed upon the Board's 1986-87 school budget.

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Moreover, the Commissioner is not persuaded by Council's arguments that the Board was precluded from advancing its Motion for Summary Judgment at the conclusion of the hearing. N.J.A.C. 1:1-13.1 specifically provides that:

> At any time after a case is determined to be contested, a party may move for summary decision upon all or any of the substantive issues therein.

It is clear from a reading of the regulations cited that the Board was not precluded from advancing its Motion for Summary Judgment at the conclusion of the hearing in this matter.

In the Commissioner's judgment, Council's revised reduction of $183,300 imposed upon the Board's current expense appropriations for the 1986-87 school year is violative of the provisions of N.J.S.A. 18A:22-37 for the reasons enunciated by the Court in East Brunswick, supra, and the prior decisions of the Commissioner in Union Township, supra; Lakehurst, supra; and Old Bridge, supra.

Having found that Council failed to provide timely and sufficient reasons to the Board of its original reduction of $611,528 on May 8, 1986 and again on May 22, 1986 when it amended its reduction in current expenses to $183,300, the Commissioner hereby reverses the ALJ's initial determination denying the Board's Motion for Summary Judgment and hereby grants judgment in the Board's favor to have $183,300 restored in the local tax levy in current expenses for school purposes during the 1986-87 school year.

The Commissioner, having granted the Board's Motion for Summary Judgment herein, further finds and determines that it is unnecessary to reach any further determination with respect to those recommended findings in the initial decision pertaining to the specific current expense line item reductions previously imposed by Council.

Accordingly, the Commissioner hereby directs the Gloucester County Board of Taxation to include an amount of $183,300 in the tax levy for current expense purposes for use by the School District of the Township of Deptford during the 1986-87 school year. This amount of $183,300 when added to the $8,020,389 in current expenses previously certified in the local tax levy shall result in a total tax certification of $8,203,689 in current expenses for the 1986-87 school year.

IT IS SO ORDERED this 27th day of April 1987.

COMMISSIONER OF EDUCATION

April 27, 1987

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BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
MAYOR AND COUNCIL OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, April 27, 1987

For the Petitioner-Respondent, Zane, Lozuke and Baker
(Raymond Zane, Esq., of Counsel)

For the Respondent-Appellant, Albertson, Ward and McCaffrey
(Eugene McCaffrey, Jr., Esq., of Counsel)

This is an appeal from a decision of the Commissioner of Education, which held that the failure of the Council of the Township of Deptford to provide reasons for the line item reductions it made in the Board of Education's current expense proposal at the time it made the reductions pursuant to N.J.S.A. 18A:22-37 was violative of the statute so as to warrant restoration of the total amount in the local tax levy. Accordingly, the Commissioner directed the Board of Taxation to restore the total amount reduced in the tax levy for current expense purposes for use during the 1986-87 school year by the School District of the Township of Deptford. The question presented by the Council's appeal is whether the failure of a governing body to provide the district board of education with the reasons for its line item reductions at the time it acts to reduce those amounts pursuant to N.J.S.A. 18A:22-37 invalidates the reductions so as to require restoration of the amounts. We conclude that its does.

In Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966), the New Jersey Supreme Court considered the question of whether the Commissioner of Education had jurisdiction over a controversy between a township council and a board of education resulting from the council's reduction of the board's proposed budget that had been twice rejected by the voters. Resolving that question in the

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affirmative, the court further discussed the operation of the applicable statute[1] and the obligations of governing bodies thereunder. In this regard, the court emphasized that

> The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the state's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local Board of Education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons. This is particularly important since, on the Board of Education's appeal under R.S. 18:3-14, the Commissioner will undoubtedly want to know quickly what individual items in the budget the governing body found could properly be eliminated or curbed and on what basis it so found.

Id. at 105-106 (emphasis added).

We conclude that the language of the court clearly requires that a governing body provide reasons for its reductions at the time it acts pursuant to N.J.S.A. 18A:22-37. Further, we emphasize that the Commissioner has long held that the rationale for the reductions must be provided at that time, e.g. Union Township Bd. of Ed. v. Township Committee, decided by the Commissioner, July 9, 1981, and we fully concur with the Commissioner that the failure of the governing body to know, identify and set forth the specific line items of the budget and to ennunciate supporting reasons at the time of the reduction renders the reduction an arbitrary act. Union Township, supra. We also agree that such arbitrariness is not negated by the subsequent submission of information or subsequent construction of a rationale. Id. We therefore affirm that the failure of the Council in this case to provide reasons for its line item reductions either at the time of its original tax levy certification or of its amended certification invalidated the reductions so as to warrant restoration of the total amounts. To hold otherwise would ignore the primary obligation of governing

[1] We note that the statute involved in that case was a predecessor to N.J.S.A. 18A:22-37. We however emphasize that the obligations elucidated by the court in East Brunswick also apply when a governing body acts pursuant to current statute. Branchburg Bd. of Ed. v. Branchburg, 187 N.J. Super, 540, 545 (1983).

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bodies acting pursuant to N.J.S.A. 18A:22-37 to act conscientiously at every step to effect savings that do not impair the educational process. East Brunswick, supra, at 105-106.

Our view of the significance of a failure of the governing body to provide the board of education with the rationale for reductions at the time it acts is reinforced by the specific requirement imposed by N.J.S.A. 18A:22-37 that the board of education notify the governing body if it intends to appeal to the Commissioner within 15 days after the governing body certifies to the county board of taxation the amount it judges to be necessary to be appropriated. In light of this requirement, we conclude that to allow a governing body to act without providing the district board with its rationale at the time it makes the reductions would place an undue burden on the board of education, and would, as here, force district boards to file appeals in the absence of any indication from the governing body as to why it concluded that the reductions were justified. This would result in unnecessary litigation and also would undermine the Commissioner's ability to determine quickly on what basis the governing body in fact made its judgments.

Therefore, for the reasons expressed in this decision, as well as those expressed by the Commissioner, we affirm.

August 5, 1987

Pending N.J. Superior Court

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4726-86
AGENCY DKT. NO. 215-6/86

EUGENE J. WILLIAMS,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,
Respondent.

Arnold S. Cohen, Esq., for the petitioner (Oxfeld, Cohen & Blunda, attorneys)

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

Record Closed: February 3, 1987 Decided: March 20, 1987

BEFORE BEATRICE S. TYLUTKI, ALJ:

PROCEDURAL HISTORY

This matter concerns the allegations of Eugene J. Williams, petitioner, that he gained tenure status during the 1985-86 school year, and that he was improperly dismissed from his position at the end of the 1985-86 school year. The respondent, the Board of Education of the City of Orange (Board), denied the allegations, and the matter was transmitted to the Office of Administrative Law for a 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.

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A prehearing conference was held by way of a telephone conference call on September 3, 1986, and at that time, the parties agreed that the issues in this matter are:

A. Did the petitioner gain tenure status during the 1985-86 school year and, if so, was he improperly dismissed at the end of that school year? Specifically, is the petitioner's employment during the 1982-83 school year countable towards tenure?

B. If the petitioner was improperly dismissed, what is the appropriate remedy, less any mitigation of damages?

The hearing took place on December 1, 1986, and after receipt of briefs, the record in this matter closed on February 3, 1987.

FACTUAL FINDINGS

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

Mr. Williams filed an application with the Board for a substitute teacher position on November 9, 1982, and attached to this application was a copy of his certificate as a substitute teacher for all subjects, kindergarten through 12th grade, issued for Essex County on September 17, 1982 (J-3). Shortly thereafter, Mr. Williams started to work for the Board as a substitute teacher and he was assigned to various elementary schools.

In January 1983, Mr. Williams was favorably interviewed by an employee of the Board (J-4), and he started to work continuously at Orange High School. It was the petitioner's understanding that he was substituting for Peter Marucci, a physical education teacher at the high school, who had not been at work for substantial periods of time during the 1982-83 school year, and who probably was going to retire at the end of that school year. Mr. Williams was told by the high school administrators that they were looking for a new full-time physical education teacher and that the petitioner could probably have the job if he received a standard teaching certificate.

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By letter dated March 28, 1983, Mr. Marucci notified Dr. Woodrow Zaros, the Superintendent of Schools, that he would retire on May 15, 1983 (J-1a). Mr. Marucci was not working on March 28, 1983, and he did not return to work prior to his retirement on May 15, 1983.

In March 1983, Mr. Williams received a standard teaching certificate as a school social worker and teacher of health and physical education, and a copy of this certificate was received by the Board on March 25, 1983 (J-2). Also about that time, Mr. Williams testified that he started to perform all the duties of a regular teaching staff member. By letter dated May 12, 1983, Mr. Williams was notified by Mr. Zaros that he had been appointed to the position of permanent substitute teacher to temporarily replace Mr. Marucci from April 13, 1983 to the end of the 1982-83 school year, and that he would be paid for that period a salary equivalent to Step 1, B.A. degree scale, on the teachers' salary guide (J-1b). This was the standard salary paid to permanent substitute teachers and was not based on Mr. Williams' educational and professional background. Prior to that time, he had been paid a per diem salary for each day he worked. However, as a permanent substitute teacher, he was still not entitled to any fringe benefits, including accrued sick time, health insurance and participation in the pension fund.

In April 1983, Mr. Williams was informed again that there was a good chance he would get a permanent teaching position starting in September 1983, and he was interviewed for such a position on June 8, 1983 (J-5, J-6). By letter dated July 5, 1983, Mr. Williams was notified that the Board approved his appointment as a physical education teacher, effective September 1, 1983, at a salary of $16,400, which is Step 6, M.A. degree scale, on the teachers' salary guide (J-1c, J-1d). Mr. Williams submitted an application dated July 14, 1983, for a permanent teaching position with the Board (J-7).

By memorandum dated June 14, 1983, Mr. Williams was requested to submit a physician's statement regarding his health and a copy of his military discharge (R-1), and by letter dated July 27, 1983, the petitioner was informed that his contract for the 1983-84 school year was being withheld until he submitted a copy of his military discharge papers (J-12). Mr. Williams submitted a note from his physician indicating that he was in good health (J-13).

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Starting in September 1983 (J-1c, J-1d), and until the termination of his employment on June 30, 1986, Mr. Williams was a full-time physical education teacher at Orange High School. Mr. Williams' salary for the 1984-85 school year was $18,300 (Step 7, M.A. degree scale, on the teachers' salary guide) and for the 1985-86 school year his salary was $22,020 (Step 3, M.A. degree +15 scale, on the teachers' salary guide).

By letter dated March 27, 1986, Mr. Williams was informed that his contract would not be renewed for the 1986-87 school year for the reasons given regarding an observation on January 9, 1986 and an evaluation dated February 3, 1986, and that he could discuss the matter of his discharge with the Board (J-8, J-9). By letter dated April 10, 1986, Mr. Williams asked for the opportunity to discuss his termination with the Board (J-10). After the Board meeting, during which Mr. Williams was given the opportunity to discuss his termination, Mr. Williams was notified of the Board's decision to terminate his employment as of June 30, 1986, for unsatisfactory performance (J-11).

During the hearing, Dr. Zaros testified that in the 1982-83 school year, Mr. Marucci, who was the Director of Physical Education for the school district and the Athletic Director of Orange High School, as well as a high school physical education teacher, was out on sick leaves for long periods of time. Dr. Zaros was aware that there was a possibility that Mr. Marucci would retire at the end of the school year. While he was out during the 1982-83 school year, Mr. Marucci's administrative responsibilities were temporarily assigned to Lantonio Lewis, a high school physical education teacher. Mr. Williams and other substitute teachers were employed to take over Mr. Marucci's classes and some of Mr. Lewis's classes. According to Dr. Zaros, the Board did not know definitely until receipt of the letter of March 28, 1983 (J-1a), that Mr. Marucci would retire, and it was only then that discussions were initiated as to how to handle Mr. Marucci's teaching and supervisory responsibilities for the following school year. These discussions involved the question of whether the Board should give the supervisory responsibilities to one person or divide the responsibilities among several teachers. According to Dr. Zaros, the Board did not make a decision until the end of the 1982-83 school year.

Dr. Zaros stated that by Board policy a permanent substitute teacher only needed a county substitute certificate and that it was also Board policy to give a teacher a permanent substitute teacher position if the regular teaching staff member was absent

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more than ten days so that the substitute teacher could receive a better salary According to Dr. Zaros, the only difference between a permanent and temporary substitute teacher is the rate of pay.

Dr. Zaros stated that Mr. Williams was hired as a regular teaching staff member as of the start of the school year in September 1983, by a specific Board resolution. This type of a resolution is used to employ new permanent teachers and is different than the salary resolution which is used to continue the employment of permanent teachers after the initial appointment.

On cross-examination, Dr. Zaros stated that the Board's response to Interrogatory No. 8(b) (J-1) was incorrect since Mr. Williams did not replace Mr. Marucci because he did not assume Mr. Marucci's supervisory duties, and the correct response is that Mr. Williams was placed in an open position created by the retirement of Mr. Marucci.

It was stipulated at the hearing that Mr. Williams filed a claim for unemployment compensation benefits after his termination by the Board and that he started collecting benefits on July 12, 1986. Mr. Williams was deemed eligible for $5,564 in unemployment compensation benefits and he actually collected $4,280. The projected salary of Mr. Williams, if he had worked for the Board during the 1986-87 school year is $24,570, which is Step 4, M.A. +15 scale, on the teachers' salary guide. As of October 3, 1986, Mr. Williams obtained employment as a physical education teacher with the Newark Board of Education and he is receiving a prorated salary based on an annual salary of $24,800.

Further, it was stipulated that if it is determined that the petitioner did not obtain tenure before June 30, 1986, the petitioner does not question the reasonableness of his termination or the procedure used by the Board.

CONCLUSIONS OF LAW

Arthur S. Cohen, Esq., on behalf of the petitioner, in his brief, argued that a substitute or a temporary teacher replacing a teaching staff member who has resigned or retired and who performs all of the duties and responsibilities of the position, accrues

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credit for tenure purposes. In support of his argument, Mr. Cohen cited the decision in Rossi v. Newark Bd. of Ed., 1977 S.L.D. 734; Weigand v. Marlboro Bd. of Ed., OAL DKT. EDU 5737-83 (February 23, 1984), aff'd. by Comm. (April 9, 1984), aff'd. by State Bd. of Ed. (September 5, 1984), aff'd., N.J. App. Div., November 19, 1985, A-764-84T7 (unreported); Sayreville Ed. Ass'n. v. Sayreville Bd. of Ed., 193 N.J. Super. 424 (App. Div. 1984).

Mr. Cohen argued that the facts in this matter are similar to those in the Weigand and Sayreville cases. Mr. Cohen noted that the petitioner was given a standard teacher certificate in March 1983, that the petitioner was appointed as a permanent substitute teacher as of April 13, 1983, and from that date he performed all of the duties of a regular teaching staff member. Mr. Cohen argued that the resignation of Mr. Marucci, which was received by the Board on March 28, 1983, created an immediate teaching staff member vacancy, even though the resignation did not take effect until May 15, 1983, and that Mr. Williams, who was appointed to fill that vacancy as of April 13, 1983, is entitled to tenure credit from that date. In addition, Mr. Cohen argued that the vacancy existed even though the Board may not have been in a position as of April 13, 1983, to decide who would handle Mr. Marucci's administrative responsibilities during the following school year.

Lastly, Mr. Cohen argued that since the petitioner was entitled to tenure credit from April 3, 1983, he was a tenure teacher prior to the end of the 1985-86 school year and, therefore, he was improperly terminated since tenure charges had not been filed against him.

In her briefs, Nathanya G. Simon, Esq., on behalf of the Board, argued that it has been well established by school case law that tenure does not accrue unless the precise statutory conditions are satisfied, Zimmerman v. Newark Bd. of Ed., 38 N.J. 65 (1962), Canfield v. Pine Hill Bd. of Ed., 51 N.J. 400 (1968), and that by statute a person is not entitled to tenure credit for service as a substitute teacher. N.J.S.A. 18A:16-1.1; Biancardi v. Waldwick Bd. of Ed., 139 N.J. Super. 175 (App. Div. 1976), aff'd, 73 N.J. 37 (1977); Driscoll v. Clifton Bd. of Ed., 165 N.J. Super. 241 (App. Div. 1977).

In this matter, Ms. Simon stated that Mr. Williams knew that his appointment from April 13 through June 30, 1983 was as a permanent substitute teacher; that he accepted the position knowing he would be paid as a permanent substitute teacher and

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would not be entitled to any fringe benefits given to regular teaching staff members; and that he had to apply for the position of regular teaching staff member. Ms. Simon argued that at no time between April 13 and June 30, 1983, did the Board consider Mr. Williams to be anything but a substitute teacher.

In addition, Ms. Simon argued that when the petitioner was appointed as a permanent substitute teacher there was no vacancy since Mr. Marucci's resignation did not take effect until May 15, 1983, and Mr. Williams and other substitute teachers were used temporarily to take over the classes of Mr. Marucci as well as the other physical education teachers who were temporarily assigned Mr. Marucci's administrative responsibilities.

Ms. Simon recognized that in the Sayreville case, the court had determined that three substitute teachers who had been hired to fill vacancies created by resignations or retirements were entitled to tenure credit for the period of time they were considered to be substitute teachers by the local board. However, she argued that in order to qualify for such tenure credit, the court in the Sayreville case had established three conditions: (1) the existence of a true vacancy; (2) a relatively substantial period remained in the school year and the local board was prepared to fill the vacancy for the remainder of the school year, and (3) the position required the holding of a standard, provisional or emergency certificate. Ms. Simon argued that Mr. Williams does not meet these conditions since there was no vacancy at the time of his appointment as a permanent substitute teacher; that the period between May 15, 1983, the effective date of Mr. Marucci's resignation, and the end of the school year was a short period of time; that the Board was not prepared to fill the vacancy created by Mr. Marucci's resignation until the end of the school year; and that the Board does not require a permanent substitute teacher to hold a standard, provisional or emergency certificate.

Based on these facts, Ms. Simon argued that Mr. Williams is not entitled to any tenure credit for the time he was a permanent substitute teacher during the 1982-83 school year.

In his reply brief, Mr. Cohen argued that the respondent was in error in relying on the decisions in the Biancardi and Driscoll cases since the Appellate Division of the Superior Court in the Sayreville case ruled that Spiewak v. Rutherford Bd. of Ed., 90 N.J.

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63 (1982), rather than the Biancardi case, is the New Jersey Supreme Court's last word regarding the tenure rights of substitute teachers. Further, Mr. Cohen argued that the fact that Mr. Williams was designated a substitute teacher is not a controlling factor in view of the holding in the Spiewak and Sayreville cases that tenure is a statutory rather than contractual matter to be determined based on the functional rather than the contractual character of the teacher's employment. He also noted that pursuant to N.J.A.C. 6:11-4.4, the Board cannot employ a substitute teacher for more than 20 consecutive days.

In addition, Mr. Cohen argued that the petitioner's employment from April 13, 1983 to the end of the school year qualifies for tenure credit pursuant to the holding in the Sayreville case, and he disagreed with Ms. Simon's analysis that pursuant to the Sayreville case, tenure credit would be denied if the board of education does not require a standard, provisional or emergency certificate for the position.

Having reviewed the arguments of the parties, I agree with most of the legal arguments of Mr. Cohen; however, I **CONCLUDE** that Mr. Williams is not entitled to any tenure credit for the period between April 13, 1983 and the close of the school year.

I agree with Mr. Cohen that the decision in the Spiewak case is the latest decision of the New Jersey Supreme Court relevant to questions relating to the tenure rights of substitute teachers and that a properly certified teacher is generally entitled to tenure credit if hired to replace a regular teaching staff member who has resigned or has retired even if the position does not require a standard, provisional or emergency certificate. However, the court in the Sayreville case stated:

> We recognize that there may be special situations beyond those implicated in this case in which a board may have a legitimate need to appoint a short-term substitute for a relatively brief time when a vacancy occurs during a school year. It may be, for example, that a board may not be immediately prepared to fill a vacancy suddenly occurring for the balance of the school year. It would, therefore, require the flexibility of being able to appoint a short-term temporary substitute while it determined the best course to follow in permanently assigning the former teacher's duties for the balance of the year. We do, however, hold that if a relatively substantial balance of the school year remains when the vacancy occurs and the board is prepared, as here, to fill that vacancy until the end of the school year, it may not resort to the long-term substitute technique in doing so [Sayreville at 433-434.]

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I **CONCLUDE** that this situation existed in this matter. Although it is evident from the testimony of both Mr. Williams and Dr. Zaros that it was anticipated that Mr. Marucci would retire before the end of the 1982-83 school year, the Board did not know this definitely until Mr. Marucci submitted his letter of March 28, 1983. Since Mr. Marucci was both a teacher and an administrator, it is reasonable that the Board wanted to consider a number of options, as testified by Dr. Zaros, before deciding on how to handle Mr. Marucci's administrative and teaching responsibilities in the 1983-84 school year. Therefore, I **CONCLUDE** that the regular teaching staff member vacancy which was eventually filled by Mr. Williams did not exist until the Board made this decision, and as testified by Dr. Zaros, this was not done until the end of the 1982-83 school year.

DISPOSITION

Therefore, I **CONCLUDE** that since Mr. Williams was not entitled to tenure credit for the period between April 13 and June 30, 1983, the petitioner was not tenured at that time his employment was terminated, and the termination procedure used by the Board was correct. Finally, I **ORDER** that the decision of the Board be **AFFIRMED**, and that this matter be **DISMISSED WITH PREJUDICE.**

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

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

March 20, 1987
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

3/20/87
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 2 5 1987
DATE

Ronald L. Parker, Jr.
OFFICE OF ADMINISTRATIVE LAW

ij/ee

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EUGENE J. WILLIAMS,	:	
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. Petitioner's exceptions and the Board's reply were timely filed pursuant to N.J.A.C. 1:1-16.4a, b and c and are summarized in pertinent part below.

Petitioner alleges, inter alia, that the ALJ misapplied the facts of the matter to the applicable law when concluding that:

> Having reviewed the arguments of the parties, I agree with most of the legal arguments of Mr. Cohen; however, I CONCLUDE that Mr. Williams is not entitled to any tenure credit for the period between April 13, 1983 and the close of the school year.
>
> ***
>
> ***Although it is evident from the testimony of both Mr. Williams and Dr. Zaros that it was anticipated that Mr. Marucci would retire before the end of the 1982-83 school year, the Board did not know this definitely until Mr. Marucci submitted his letter of March 28, 1983. Since Mr. Marucci was both a teacher and an administrator, it is reasonable that the Board wanted to consider a number of options, as testified by Dr. Zaros, before deciding on how to handle Mr. Marucci's administrative and teaching responsibilities in the 1983-84 school year.

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> Therefore, I CONCLUDE that the regular teaching staff member vacancy which was eventually filled by Mr. Williams did not exist until the Board made this decision, and as testified by Dr. Zaros, this was not done until the end of the 1982-83 school year. (Petitioner's Exceptions, at p. 2, quoting Initial Decision, at pp. 8-9)

More specifically, petitioner alleges that he was, in fact, hired to fill Mr. Marucci's instructional/teaching responsibilities and the sole inquiry by the Board was the way in which Mr. Marucci's administrative duties would be distributed for 1983-84. That a physical education teaching staff member would be needed as a replacement was never in question. (See J-1, No. 8(b); J-1c.) Further, he contends that one of the other teachers took over Mr. Marucci's supervisory/administrative duties as department chairperson.

Petitioner also argues strenuously that Weigand, supra, is on all fours with the instant matter. In Weigand, the Superior Court, Appellate Division affirmed that the petitioner who was hired to fill a position in language arts from April 28, 1980 to the end of the school year for a teacher who had resigned had acquired tenure as he was not acting as a substitute. He likewise argues that the Sayreville, supra, Appellate Court decision is supportive of this position, contrary to the ALJ's conclusion otherwise. In particular, petitioner argues that there was a true vacancy. Secondly, the period of time was not too brief as his contract was effective April 13, 1983 - June 30, 1983. (Weigand, supra) Thirdly, a teacher's certificate was required, contrary to the Board's contention that only a county substitute certificate was

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sufficient since that certificate does not allow one to teach more than 20 consecutive days in the same position. N.J.A.C. 6:11-4.4

The Board rejects the arguments advanced by petitioner avowing, inter alia, that petitioner and other substitute teachers were employed to take over Mr. Marucci's classes and some of Lantonio Lewis' classes, the individual who was temporarily assigned Mr. Marucci's administrative responsibilities. In addition, it contends that petitioner's exceptions noticeably avoid any reference to testimony, any reference to specific facts or any discussion addressing the issue of Mr. Marucci's replacement. Moreover, it maintains that Weigand, supra, is distinguishable and it reiterates that the Sayreville, supra, standards have not been met as was determined by the ALJ.

Upon review of the record and exceptions the Commissioner determines the matter must be remanded to supplement the record prior to his rendering a final determination in this matter. N.J.S.A. 52:14B-10(c) Specifically, what must be brought to the record is:

> 1. Petitioner's exact teaching schedule for the disputed period April 13, 1983 - June 30, 1983 with exact specification of whose classes he was teaching.
>
> 2. What certification Mr. Marucci was required to hold for the "administrative" duties he filled; what his exact schedule for 1982-83 was, including a list of the individuals who filled each time slot/period when he was not present during that year.
>
> 3. Lantonio Lewis' teaching schedule before assuming Mr. Marucci's administrative duties which indicates the exact dates he filled this schedule and only this schedule.

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4. Mr. Lewis' schedule during the entire period he assumed Mr. Marucci's administrative duties.

5. Information as to exactly how the Board structured/restructured Mr. Marucci's position for 1983-84; the date it took formal action to structure/restructure the position; the name of the individual who filled it; and the date the person was appointed.

Accordingly, the matter is remanded to the Office of Administrative Law to obtain the information specified above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 1, 1987

DATE OF MAILING - MAY 1, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3013-87
(ON REMAND EDU 4726-86)
AGENCY DKT. NO. 215-6/86

EUGENE J. WILLIAMS,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ORANGE,
Respondent.

Arnold S. Cohen, Esq., for the petitioner (Oxfeld, Cohen & Blunda, attorneys)

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

Record Closed: October 2, 1987 Decided: November 13, 1987

BEFORE **BEATRICE S. TYLUTKI, ALJ:**

This matter concerns the allegations of Eugene J. Williams, the petitioner, that he gained tenure status during the 1985-86 school year, and that he was improperly dismissed from his position at the end of the 1985-86 school year. The respondent, the Board of Education of the City of Orange (Board), denied the allegations, and the matter was transmitted to the Office of Administrative Law for a determination, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

After the prehearing conference on September 3, 1986, the hearing on December 1, 1986, and the receipt of briefs, I rendered an initial decision in this matter on March 20, 1987. This initial decision was reviewed by the Commissioner of Education

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(Commissioner), and he remanded the matter by order, dated May 1, 1987, for the purpose of supplementing the record with the answers to the following questions:

1. Petitioner's exact teaching schedule for the disputed period April 13, 1983 - June 30, 1983 with exact specification of whose classes he was teaching.

2. What certification Mr. Marucci was required to hold for the "administrative" duties he filled; what his exact schedule for 1982-83 was, including a list of the individuals who filled each time slot/period when he was not present during that year.

3. Lantonio Lewis' teaching schedule before assuming Mr. Marucci's administrative duties which indicates the exact dates he filled this schedule and only this schedule.

4. Mr. Lewis' schedule during the entire period he assumed Mr. Marucci's administrative duties.

5. Information as to exactly how the Board structured/restructured Mr. Marucci's position for 1983-84; the date it took formal action to structure/restructure the position; the name of the individual who filled it; and the date the person was appointed.

After the remand, the parties agreed that a supplemental hearing would not be needed and that the Commissioner's questions could be answered by a stipulation of facts. The supplemental stipulated facts are:

Answer to Question 1 - The petitioner's exact teaching schedule for the time period April 13, 1983 to June 30, 1983, was as indicated on the attached Master Teachers' Schedule for the 1982-1983 school year (Exhibit A). All classes taught by petitioner were those previously assigned to Peter Marucci, physical education and health teacher.

Answer to Question 2 - Originally, the department heads, systems coordinators and department chairs for the Board of Education of the City of Orange were

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not required to hold other than a regular teaching certificate with endorsement in the subject area. In or about 1980, the requirement for all new appointments to these positions was a supervisory or administrator certificate. Mr. Marucci holds a teacher certificate for elementary and secondary education with endorsements in physical education, health and driver education. He does not hold any supervisory or administrator certificate. Antonio Lewis holds a teacher's certificate with endorsements in physical education, health and driver education, a supervisor's certificate, a principal/supervisor certificate, and a school administrator certificate. During the 1982-1983 school year, all duties previously held by Peter Marucci as systems coordinator for health and physical education and as driver education department chair were assigned to Antonio Lewis for the entire 1982-1983 school year. A supervisory or administrator's certificate was required for these positions.

The exact teaching schedule of Mr. Marucci is as set forth in the attached Master Teachers' Schedule (Exhibit A). Mr. Marucci's absence record during the 1982-1983 school year is attached hereto (Exhibit B). For all absences of Mr. Marucci from September 18, 1982 through March 28, 1983, substitute Frank Carr was used. For all absences of Mr. Marucci subsequent to March 29, 1983, the petitioner was used.

Answers to Questions 3, 4, and 5 - Mr. Lewis did not teach at all during the 1982-1983 school year. He was the systems coordinator for physical education and health and the driver education department chair on a full-time basis for the entire school year 1982-1983. Additionally, in fall 1983, Mr. Lewis was appointed to the position of athletic director, replacing Michael Williams, an English teacher (See, testimony of Dr. Woodrow Zaros, Superintendent of Schools, attached hereto (Exhibit C)). At the regularly scheduled meeting of the Board of Education of the City of Orange held on June 28, 1983, Mr. Lewis was reappointed to his position as systems coordinator for health and physical education and driver education department chair for the 1983-1984 school year and Eugene Williams, the petitioner, was appointed as a physical education teacher effective September 1, 1983 for the 1983-1984 school year. See attached letter confirming appointment of petitioner (Exhibit D, also identified as Evidence J-1D).

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I FIND that the facts pertinent to this matter are those set forth in my initial decision, dated March 20, 1987, which is attached and fully incorporated herein, as supplemented by the above stipulated facts and documents.

In addition to the supplemental stipulated facts, the parties submitted supplemental briefs. After receipt of said briefs, the record in this matter closed on October 2, 1987.

In his supplemental brief, Arnold S. Cohen, Esq., on behalf of the petitioner, noted that the facts establish that between April 13, 1983 and June 30, 1983, Mr. Williams taught all the classes previously taught by Mr. Marucci. Mr. Cohen argued that Mr. Williams replaced Mr. Marucci as a teaching staff member, and that Mr. Williams is entitled to tenure credit for the period between April 13, 1983 and June 30, 1983. Further, Mr. Cohen argued that the Board's position that it was still developing its plan for the replacement of Mr. Marucci during the latter part of the 1983-1984 school year is a "sham."

In the supplemental brief on behalf of the Board, Nathanya G. Simon, Esq. argued that Mr. Williams was not entitled to tenure credit for any period of time during the 1982-1983 school year and, in support of this position, Ms. Simon cited the decision of the Commissioner in Lowicki et al v. Bd. of Ed. of the City of Jersey City (partial decision, September 16, 1986). Ms. Simon noted that in the unreported decision in Zaremba v. Bd. of Ed. of the Middlesex County Vocational and Technical School District (N.J. App. Div., A-1295-83-T2), November 7, 1984, the Appellate Court stated that:

> The petitioners contend that they were not hired to act in place of an absent employee, but were full-time employees, paid on an annual basis and not per diem as other substitutes, and performed the same services as regular staff teachers, relying upon Spiewak v. Rutherford Bd. of Ed., supra, 90 N.J. 63, and Sayreville Educ. Ass'n. v. Bd. of Educ., etc., 193 N.J. Super. 424 (App. Div. 1984). We disagree. In Spiewak, the question was whether remedial and supplemental instructors who met all the criteria of 'teaching staff members' should be deprived of their tenure rights. The Court held that since none of the remedial teachers was a temporary replacement, N.J.S.A. 18A:16-1.1 did not apply. In Sayreville, the Court concluded that the substitute teacher technique was not available for filling what was a permanent vacancy rather than a temporary absence. Sayreville Educ. Assn. v. Board of Educ., etc., supra, 193 N.J. Super. at 434. Each case expressed the rule that N.J.S.A. 18A:16-1.1 '. . . is limited to employees hired to take the place of

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> an absent teacher.' Spiewak v. Rutherford Bd. of Ed., supra, 90 N.J. at 77. Although petitioners were hired on a full-time basis and reported to the schools daily, the purpose of their hiring was 'to act in place of' regular classroom teachers who were temporarily absent. [Id. pp. 6-7.]

Based on these decisions, Ms. Simon argued that the designation of Mr. Williams as a permanent substitute is not depositive since he was given this designation, pursuant to the Board's practice, when there was no vacancy in the position. Also, Ms. Simon argued that the permanent substitute position only required Mr. Williams to hold a county substitute certificate and that at no time during the 1982-1983 school year was Mr. Williams ever misled by the Board as to the nature of his employment.

After reviewing the entire record, I agree with Ms. Simon, and I again **CONCLUDE** that Mr. Williams was not entitled to tenure credit for the period between April 13, 1983 and June 30, 1983, that the petitioner was not tenured at the time his employment was terminated, and that the termination procedure used by the Board was correct.

Therefore, I **ORDER** that the decision of the Board be **AFFIRMED**, and that the matter be **DISMISSED WITH PREJUDICE.**

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

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

November 13, 1987
DATE

BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

Nov. 16, 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

NOV 18 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

ml/EE

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EUGENE J. WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

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

Petitioner contends that the ALJ misapplied the facts to the applicable law in this matter. He avows that his employment during the 1982-83 school year is countable towards tenure, arguing that it is well-settled that when a teaching staff member replaces another teaching staff member who has resigned his/her employment, the replacement teacher must accrue credit for tenure purposes. He cites in support thereof, Rossi v. Bd. of Ed. of the City of Newark, 1977 S.L.D. 734 which reads in part:

> ***It has already been held that performance of the duties of an office either as a so-called "substitute" or in an acting capacity begins to accrue or accrues if the position of employment is otherwise vacant. The title affixed to a position may not in such circumstances abort a tenured entitlement.*** (at 739)

Moreover, petitioner contends that Weigand, supra, is on all fours with the instant matter wherein the Commissioner ruled that petitioner's service from April 28, 1980 through June 30, 1980 was not that of a substitute because the teacher who had occupied the position had resigned and was no longer employed by the district.

In a similar view, petitioner points to Sayreville, supra, wherein three individuals who were hired without contract and paid as per diem substitutes for the balance of the school year were determined to be teaching staff members for that period and which time accrued to the acquisition of tenure. In particular, he cites the following portions of the Appellate Court decision construing N.J.S.A. 18A:16-1.1, the statute authorizing the employment of "substitutes" or "acting" staff:

> We construe the authorization of this provision as applying when the services of the substitute teacher are required because of the temporary

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> absence, even if protracted, of a regular teacher whose return to duty is contemplated.*** 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.*** (193 N.J. Super. at 428)
>
> We ... hold that if a relatively substantial balance of the school year remains when the vacancy occurs and the board is prepared, as here, to fill that vacancy until the end of the school year, it may not resort to the long-term substitute technique in doing so. (193 N.J. Super. at 434)

Petitioner also argues that under N.J.A.C. 6:11-4.4, it is improper for a board to employ a substitute functioning under a county substitute certificate for more than 20 consecutive days.

The Board's reply exceptions urge affirmance of the initial decision on remand. It relies upon its post-hearing brief in support thereof and supplements its legal argument with reference to a recent State Board of Education decision entitled Rumson-Fair Haven Ed. Assoc. and N.J.E.A. v. Bd. of Ed. of Rumson-Fair Haven Regional School District, decided August 5, 1987 which analyzed the definition of "permanent substitute" in relation to the Teacher Quality Employment Act, N.J.S.A. 18A:29-5.1 et seq. As to this, the Board states the following:

> In this decision, the State Board commented that "careful review of the applicable statutory and regulatory scheme indicates that employment as a substitute teacher is not of a character that requires an individual so employed to hold a valid standard, provisional or emergency certificate appropriate to employment as a substitute in order to be qualified. To the contrary, there is no standard, emergency or provisional certification appropriate to employment as a substitute teacher." Further, the State Board noted that while the regulations do not address the assignment of persons holding instructional certificates within their area of certification, it was concluded that the service as a substitute as defined by the regulations is not of such a character as to require the certification and that individual possession of certification which is applicable to any particular substitute assignment does not alter the character of the employment as substitute. In the words of the State Board: "In essence, as established by the certification rules, the character of employment as a substitute serving in particular assignments

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> on a short-term basis is not such as to require certification, and, accordingly, there is no requirement under New Jersey law that an individual possess standard, provisional or emergency certification 'appropriate' to employment as a substitute in order to serve that in that capacity within the limitations established by the regulations. . . [n]or does the fact that individuals employed by the Board as 'permanent substitutes' contracted to serve as substitute teachers on an annual basis alter our conclusion that the character of the employment is not such to require appropriate certification within the meaning of N.J.S.A. 18A:1-1. Examination of the job description indicates that, as concluded by the ALJ, regardless of their contractual relationship with the Board on an annual basis, the function performed by the 'permanent substitutes' in this case is to substitute for absent staff members.... [T]he prerequisite for the entitlement conferred by N.J.S.A. 18A:29-5 is employment as a teaching staff member, which in turn requires that the employment be of such character so as to require appropriate certification. As stated, we conclude that employment as a 'permanent substitute' is not employment as a teaching staff member, and therefore we find that 'permanent substitutes' employed by the Board are not entitled as a matter of law to the benefit conferred on teaching staff members by N.J.S.A. 18A:29-5." [Slip Opinion, at pp. 8-11]
>
> (Board's Reply Exceptions, at p. 2)

Further, the Board contends that the only certification upon which it relied was the county substitute certificate held by petitioner and it was only when filling a permanent position for 1983-84 that permanent certification was required. Moreover, the Board argues:

> It is clearly without dispute that Mr. Williams, the Petitioner, applied for a position as substitute, submitted his county substitute certification as the qualifying certification for the position of substitute teacher, knew in January when he was called by the Orange School District that his position was that of a substitute and knew even after he was named a permanent substitute that his employment status remained that of a substitute only. Further, he knew that the District was compensating him throughout the 1982-83 school year only as a substitute regardless of the duties being performed. Never during the time period which is most relevant herein, namely April, May and June 1983, did the Peti-

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> tioner question his status or request a review by the District of his status. Both by mutual understanding and effect, Petitioner's status was purely that of a substitute. At no time during 1982-83 did the character of his employment change. Furthermore, as noted above, in order for the Petitioner to qualify for a permanent position, he was required to submit a new application with updated information. Additionally, he was requested to submit to a new interview. By separate resolution the Board employed him in his new status as teaching staff member and, from September 1, 1983 on, employment certainly was considered tenure eligible.
>
> (Board's Reply Exceptions, at p. 3)

Upon review of the record in this matter, the Commissioner initially determines that contrary to the Board's legal argument and the ALJ's acceptance thereof, petitioner was prohibited by N.J.A.C. 6:11-4.4 from filling Mr. Marucci's position by virtue of a county substitute certificate from April 13 to June 30, 1983 or for that matter from April 13 to May 15, 1983, the effective date of Mr. Marucci's resignation, or from May 15 to June 30, 1983 as the entire period, as well as the smaller portions, exceeded 20 consecutive days in the same position. Thus, petitioner's functioning/assignment in this matter is not of the nature dealt with in Rumson-Fair Haven, supra, where there was no allegation of a person serving beyond 20 consecutive days in the same position. See State Board Decision, at pages 4 and 8. Rather, it is a case of an individual serving for more than two months for a teaching staff member who ultimately resigned effective May 15, 1983.

Secondly, the Commissioner is in complete agreement with petitioner that the factual circumstances in this matter are quite similar to those of Weigand v. Bd. of Ed. of the Township of Marlboro, Monmouth County, decided by the Commissioner April 9, 1984, aff'd State Board September 5, 1984, aff'd N.J. Superior Court, Appellate Division, November 19, 1985 and Sayreville, supra.* Having submitted his letter of resignation in March 1983 with an effective date of May 15, 1983, Mr. Marucci maintained an employment relationship with the Board until that latter date. However, after May 15, 1983 there is no question that the employment relationship ceased to exist and a vacancy occurred. Thus, petitioner's service, at least from May 15 to June 30, 1983, certainly was not of the type which is "required because of the temporary absence, even if protracted, of a regular teacher whose return to duty is contemplated." (emphasis supplied) Sayreville, supra, at 428 The

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* The circumstances are not precisely the same since the staff members in these two cases who were replaced had already terminated their employment prior to the date the petitioners assumed their positions.

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court's interpretation of N.J.S.A. 18A:16-1.1 in the Sayreville decision bears repeating here:

> In each district the board of education may designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee subject to the provisions of section 18A:17-13.
>
> The act of any person so designated shall in all cases be legal and binding as if done and performed by the officer or employee for whom such designated person is acting but no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting.

We construe the authorization of this provision as applying when the services of a substitute teacher are required because of the temporary absence, even if protracted, of a regular teacher whose return to duty is contemplated. We do not construe it as authorizing the use of a substitute to fill a vacant position on a long-term basis. This interpretation, in our view, accords with the plain meaning of the statutory provision. The phrase, "to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee," clearly implies a temporary arrangement. That is, the "place" which is the intended subject of the statute is the place of another which that other will reclaim when his period of absence is over. The substitute is appointed to act for the other during that period. If that other employee has, however, terminated his employment, then the place which the appointee is filling is not the place of the other but rather a vacant place, and the statute ordinarily does not apply. This interpretation is, moreover, in accord with the observation in Spiewak v. Rutherford Bd. of Ed., supra, 90 N.J. at 77, that the exception to the tenure statute which N.J.S.A. 18A:16-1.1 constitutes "is limited to employees hired to take the place of an absent teacher." Again the implication is clear that the place for which the temporary substitute teacher was hired is not vacant but only temporarily unoccupied by its incumbent.

Clearly, a local board of education could not indefinitely fill a vacancy by the statutory

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> substitute technique, no matter how financially advantageous it might be. Nor could it use that technique to fill a vacancy for a full academic year. Any such attempt would constitute an obvious effort to circumvent the school laws and would be condemned as such. Cf. Jersey City Bd. of Educ. v. Wall, 119 N.J.L. 308 (Sup. Ct. 1938); Downs v. Hoboken Bd. of Educ., 13 N.J. Misc. 853 (Sup. Ct. 1935).
>
> We perceive no basis on which to distinguish between filling a vacancy for a full academic year and filling a vacancy for a substantial part of an academic year. The role the teacher plays in terms of the extent and scope of responsibility for his class is virtually the same in either case, as are his duties and the way in which he functions as part of the faculty. It is therefore obviously unfair to deny that teacher the same benefits to which all of his colleagues, doing the same job, are entitled.
>
> We do not, moreover, see how the filling of a vacancy by appointment of a regular staff member for less than a full academic year could prejudice the legitimate interests either of the board or of the public in promoting sound educational policy.*** (emphasis supplied) (at 428-429)

Thus, what must be determined in this matter is whether petitioner's service was for a "relatively substantial balance of the school year", Weigand, supra; Sayreville, supra and/or whether it constituted a "special situation" as described by the court in Sayreville, for it is upon this issue that tenure acquisition would hinge. In Sayreville the court stated:

> We recognize that there may be special situations beyond those implicated in this case in which a board may have a legitimate need to appoint a short-term substitute for a relatively brief time when a vacancy occurs during the school year. It may be, for example, that a board may not be immediately prepared to fill a vacancy suddenly occurring for the balance of the school year. It would, therefore, require the flexibility of being able to appoint a short-term temporary substitute while it determined the best course to follow in permanently assigning the former teacher's duties for the balance of the year. We do, however, hold that if a relatively substantial balance of the school year remains when the vacancy occurs and the board is prepared, as here, to fill that vacancy until the end of the

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> school year, it may not resort to the long-term substitute technique in doing so. (emphasis supplied) (at 433-434)

As to this issue, the Board argues and the ALJ accepts its argument that it was not prepared to fill the vacancy created by Mr. Marucci because it wanted to consider a number of options on how best to handle his duties as teacher and administrator. Thus, it contends having a short-term substitute was proper.

Upon careful consideration of the facts in this matter, the Commissioner rejects this argument as meritless. Mr. Marucci was not a teacher and an administrator. He possessed neither supervisory nor administrative certification, only instructional certification. (Initial Decision on Remand, ante) Thus, his service by law was limited to instructional duties. Moreover, it cannot be said that the Board had to "consider options" on how to handle those duties Mr. Marucci fulfilled that it characterizes as "administrative." It made that decision prior to or right at the opening of the 1982-83 school year as it had, in fact, transferred to Mr. Lewis for the entire 1982-83 school year those duties which were related to systems coordinator and department chair (which he kept beyond that school year) as part of a full-time position requiring supervisory or administrative certification. (Id.) Likewise, it had already determined for 1982-83 to appoint Mr. Michael Williams as athletic director.

In other words from the very onset of the 1982-83 school year, the Board had already determined what it was going to do with Mr. Marucci's so-called administrative duties, having given him a schedule of teaching duties which the record indicates petitioner assumed in toto. See Master Teachers Schedule (Exhibit A) where petitioner's name is handwritten over Mr. Marucci's name. Further, as stipulated by the parties in J-14, page 4, petitioner fulfilled Mr. Marucci's duties for all absences subsequent to March 29, 1983. Thus, it is clear that petitioner was not serving as a substitute for a teaching staff member, temporarily absent, whose return was contemplated (Sayreville, supra) such as occurred in Rumson-Fair Haven, supra, Lowicki, supra, or Zaremba, supra.

Nor can it be said that the vacancy came up suddenly in the school year, just as in Weigand, supra, the court pointed out that a sudden vacancy had not occurred. In that case, the vacancy occurred on April 28, 1980 but the petitioner was interviewed two weeks prior to the teacher's resignation date, a factor the court found significant. In the instant matter petitioner commenced Marucci's duties from April 13 to June 30, 1983. It would appear from Exhibit B that Mr. Marucci did not work at all from the opening of the 1982-83 school year to the effective date of his retirement.

As such the Commissioner determines that there was not a "special situation" such as described by the court in Sayreville, supra, which would "require the flexibility of being able to appoint a short-term temporary substitute while it determined the best course to follow in permanently assigning the former teacher's

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duties for the balance of the year." (emphasis supplied, at 434) Further, he determines that petitioner did not function as a substitute, having filled a vacant position for a relatively substantial balance of the school year. As previously mentioned in Weigand, supra, petitioner therein assumed the duties of the former teacher from April 28 to June 30, 1980, a period of time the court determined to be a substantial balance of the school year. Even discounting petitioner's service from April 13 to May 15, 1983 when it was known that Mr. Marucci's absence was no longer temporary but he had not yet actually retired, and counting strictly from May 15, 1983, the effective date of Mr. Marucci's retirement, at least 45 days remained in the school year, an amount determined to constitute a relatively substantial balance of the school year, such as in Weigand, supra (see Slip Opinion, at p. 3).

Accordingly, the recommended decision of the ALJ is rejected. It is hereby determined that as of May 15, 1983 petitioner functioned as a teaching staff member because in accordance with Sayreville, supra, (a) a true vacancy existed, (b) which he filled by Board action for a relatively substantial period of the school year and which position (c) required a standard or provisional certificate in physical education, the former of which petitioner possessed. Since more than 45 days remained in the school year, the position could not have been filled for that period by a person with a county substitute certificate or instructional certificate in another area. N.J.A.C. 6:11-4.4 Thus, it is determined that petitioner, having been employed for more than the equivalent of three academic years, acquired tenure in May 1986 (N.J.S.A. 18A:28-5) and, therefore, could not be terminated absent action under the Tenure Employees Hearing Act, N.J.S.A. 18A:6-10 et seq.

Consequently, it is ordered that petitioner be reinstated to a position in the Orange School district and be accorded all emoluments and benefits he was deprived of as a result of his wrongful termination, less mitigation of any monies earned during that period.

COMMISSIONER OF EDUCATION

December 30, 1987

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4724-86
AGENCY DKT. NO. 232-7/86

PATRICK CAPORASO,
Petitioner,
v.
BOARD OF EDUCATION OF BELLEVILLE TOWNSHIP, ESSEX COUNTY,
Respondent.

Sanford R. Oxfeld, Esq., for the petitioner (Oxfeld, Cohen & Blunda, attorneys)

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

Record Closed: February 5, 1987 Decided: March 18, 1987

BEFORE **BEATRICE S. TYLUTKI,** ALJ:

PROCEDURAL HISTORY

The petitioner, Patrick Caporaso, is a teacher formerly employed by the Belleville Township Board of Education (Board) who was dismissed from his position after tenure charges were filed against him. This matter concerns the allegations of the petitioner that he was improperly compensated by the Board during the 1983-84, 1984-85 and 1985-86 school years. The Board denied the allegations and the matter was transmitted to the Office of Administrative Law by the Commissioner of Education (Commissioner) for a 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.

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A prehearing was held by way of a telephone conference call on September 3, 1986, and at that time, the parties agreed that the issues in this matter are:

I. Whether during the 1983-84 school year the petitioner worked for 13 days and did not receive any salary for said days.

II. Whether the statutory 120 days, provided by N.J.S.A. 18A:6-14, expired in August or September 1984. If the time period expired in August, whether the petitioner is entitled to a salary payment for the month of September 1984, less any salary payments received for any days during said month.

III. Whether the petitioner is entitled to a salary payment for the period between September 1, 1985, date of the initial decision, and October 15, 1985, the date of the final decision of the Commissioner in the tenure matter.

IV. Whether the petitioner is entitled to reimbursement for private insurance coverage for the period between October 1, 1985 (Board's insurance for the petitioner expired on September 30, 1985) and October 15, 1985, the date of the final decision of the Commissioner in the tenure matter.

V. If the petitioner is entitled to any relief in this matter, whether there is any mitigation or setoff.

VI. Whether any of the reliefs claimed by the petitioner are barred by the 90-day rule set forth in N.J.A.C. 6:24-1.2(b) or by the doctrines of estoppel, unjust enrichment or unclean hands.

The hearing took place on October 24, 1986, and during the hearing, Nathanya G. Simon, Esq., on behalf of the respondent, stated that the Board would not pursue Issue No. VI and, therefore, I will not consider this issue. After receipt of briefs and the lapse of the period of time established for the receipt of reply briefs, the record in the matter closed on February 5, 1987.

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FACTUAL FINDINGS AND CONCLUSIONS OF LAW

I FIND the facts in this matter are not in dispute. The pertinent facts will be set forth in the following discussion of the issues.

ISSUE I

The petitioner was suspended on March 15, 1984, after the tenure charges were filed against him. Prior to this suspension, the petitioner's salary payments during the 1983-84 school year were based on the calculations described at the hearing by Edward J. Appleton, the prior financial officer for the Board. Mr. Appleton stated that the teachers are paid on a 10-month basis and their monthly salary is determined by dividing their annual salary by ten. The teachers receive a check for one-half of their monthly salary on the 15th of the month and the remainder on the 30 or 31st of the month. Although the Board uses as a guide the fact that the law requires there be 200 teaching days in each school year,[1] the teachers' bi-monthly salary payments are not based on the actual number of teaching days within the pay period.

The petitioner's salary for the 1983-84 school year was $25,200 (P-1), and Mr. Appleton stated that for the six full months that the petitioner worked during the 1983-84 school year prior to his suspension, his salary payments were based on the above-stated calculations. As to the petitioner's salary payment for the period that he worked in March 1984, Mr. Appleton stated that this payment was determined by taking the amount of days he was not going to teach during the remainder of March, multiplying that number by 1/200 of his annual salary, and subtracting this amount from 1/10 of the petitioner's annual salary. According to Mr. Appleton, it would have been in violation of the Board's accounting practices to pay the petitioner 1/2 of his monthly salary for the period he worked in March. The calculations that was used to determine the March salary payment were consistent with the statute governing teachers' pensions and have been consistently used to determine salary payments in other tenure cases and to determine salary payments for teachers on leave and for new teachers.

---

1. It was a recognition by the parties that there were 180, rather than 200, school days in the 1983-84 school year (R-1).

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The petitioner alleges that the calculations used to determine his salary payments during the 1983-84 school year were improper, and that based on the actual number of days he taught prior to his suspension, he was not paid for two days a month from September through February, and for one day in March 1984. Based on his calculations, the petitioner alleges that the Board owes him $1,352. Mr. Caporaso arrived at this figure by determining the number of days he taught before his suspension and multiplying that number by a per diem salary rate, which was based on the 180 actual school days in the 1983-84 school year.

Ms. Simon disputes the petitioner's calculations and argues that he received the correct salary payments during the 1983-84 school year. Further, she argues that the use of the 200-school-day standard is proper and is based on the only statute which addresses what constitutes a per diem rate, N.J.S.A. 18A:30-6. This statute provides that a day's salary for purposes of sick leave is 1/200th of the annual salary. See, In the Matter of the Tenure Hearing of Kathy Windsor, 1978 S.L.D. 696.

Having considered the facts and the arguments of the parties, I agree with Ms. Simon, and I CONCLUDE that although the petitioner has shown that there is another way to calculate the salary payments which would be to his benefit, he has not shown that the salary payments he received from the Board were improperly calculated or that the calculations as outlined by Mr. Appleton were unreasonable or inconsistent with law.

ISSUE II

Based on advice of the Board's attorney, Mr. Caporaso remained suspended without pay until September 24, 1984. For the remainder of September 1984, Mr. Appleton stated that the petitioner was paid a per diem rate of 1/200 of his annual salary for the five school days remaining in September 1985. Mr. Appleton recognized that these calculations were different then those used to determine the petitioner's salary payment for March 1984, and he stated that the reason for the difference was the fact that the petitioner was not on the school payroll at the beginning of the 1984-85 school year. Therefore, Mr. Caporaso was paid a per diem rate for part of September 1984, which was the calculation procedure used to determine the salary payments for new teachers. Starting on October 1, 1984, and for the remainder of the school year, the petitioner received salary payments based on the same calculations used for his salary payments between September 1983 and February 1984.

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Sanford R. Oxfeld, Esq., on behalf of the petitioner, argues that the statutory 120-day period was improperly calculated by the Board since it did not count the days that the school was not in session during the summer months. Since the statute, N.J.S.A. 18A:6-14, provides for "120 calendar days," Mr. Oxfeld argues that the period expired on July 14, 1984, and that the petitioner was entitled to receive salary payments for the entire month of September 1984. In support of his argument, Mr. Oxfeld cites the decision of the State Board of Education in Theodore A. Burns v. Bd. of Ed. of the City of Newark, OAL DKT. EDU 3128-83 (January 23, 1984), aff'd by Comm. (March 8, 1984), aff'd by State Bd. of Ed. (Oct. 24, 1984). For September 1984, the petitioner alleges that the Board owes him an additional salary payment of $2,032.50 (the salary payment of $2,520 due for September, less $487.50, the amount already paid to the petitioner).

Ms. Simon disagrees and argues that the 120-day period should not include the summer months when school is not in session and during which time the teachers are not entitled to any salary payments. In support of her argument, Ms. Simon cites the Commissioner's decision in Armstrong v. the Bd. of Ed. of East Brunswick Twp., 1975 S.L.D. 112, reversed by State Bd. of Ed., 1975 S.L.D. 117, aff'd by App. Div. of Sup. Ct., 1976 S.L.D. 1104 (a matter involving the 60-day notice of termination); In the Matter of the Tenure Hearing of Alan S. Tenney, OAL DKT. EDU 6225-84 (January 21, 1985), aff'd by Comm. (March 18, 1985) (a matter involving the 90-day notice of inefficiency); and the decision of the Appellate Division of the Supreme Court in In The Matter of the Tenure Hearing of Paula M. Grossman, 127 N.J. Super. 13 (App. Div. 1974), certif. den., 65 N.J. 292 (1974) (a matter in which the court recognized that N.J.S.A. 18A:6-14 was adopted to relieve the teachers of an economic hardship).

In addition, Ms. Simon argues that the State Board of Education's determination in the Burns case should not be followed in this matter since it could result in disparate treatment depending on what time in the school year the tenure charges are certified against a teacher.

As to this issue, I agree with Mr. Oxfeld, and I **CONCLUDE** that N.J.S.A. 18A:6-14 requires the resumption of salary payments on the 121st consecutive day following the certification of the tenure charges. See, In the Matter of the Tenure

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Hearing of Anthony Polito, 1974 S.L.D. 662 (decision on motion). The cases cited by Ms. Simon are distinguishable based on the facts, and the clear intent of the statute is to resume salary payments on the 121st day or on the next day that salary payments are made to the teachers. Therefore, I CONCLUDE that the petitioner is entitled to a salary payment for the full month of September 1984, and since he received a partial payment for the month, he is to be paid $2,032.50 by the Board.

ISSUE III AND IV

After a hearing, Administrative Law Judge James A. Ospenson issued an initial decision on July 22, 1985, in which he sustained the tenure charges filed against the petitioner and ordered his dismissal from his tenured postition, In the Matter of the Tenure Hearing of Patrick Caporaso, OAL DKT. EDU 2724-84 (July 22, 1985), aff'd by Comm. (October 15, 1985), aff'd by State Bd. of Ed. (May 7, 1986). An appeal is now pending before the Appellate Division of the Supreme Court. The Board removed the petitioner from its payroll after the issuance of the initial decision and Mr. Caporaso did not receive any salary payments during the 1985-86 school year. The petitioner's fringe benefits, including health insurance, were cancelled as of September 30, 1985.

The petitioner argues that he is entitled to salary payments for the six-week period between the initial decision and the final decision in the tenure matter and he calculates that the Board owes him $4,020 for that period. The petitioner arrived at this figure by using the annual salary of $27,100 (P-1) and prorating the salary for the six-week period.

In addition, the petitioner alleges that his Blue Cross - Blue Shield insurance coverage should have continued until the date of the Commissioner's final decision in the tenure matter. Based on the Blue Cross - Blue Shield bill he received, the petitioner alleges that the Board owes him $85.50 for coverage from October 1 through October 15, 1985. The petitioner admitted that he did not pay for the continuation of his Blue Cross-Blue Shield coverage since his wife was working as a teacher and he was covered under her policy; however, he representes that his wife's policy is not as comprehensive as the policy he had when he was employed by the Board.

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Mr. Appleton stated that if the petitioner were entitled to be paid for the six-week period, the payment for September 1985 should be one-tenth of his annual salary and the partial payment for October 1985 should be calculated in the same way as the salary payment for March 1984.

As to this issue, Mr. Oxfeld argues that Mr. Caporaso was entitled to receive salary payments and his fringe benefits until the Commissioner rendered a final decision in the tenure matter. Mr. Oxfeld argues that N.J.S.A. 18A:6-14 provides that salary payments shall continue until there is a determination by the Commissioner. In addition, he argues that it has been recognized that it is the Commissioner's determination rather than the initial decision by an administrative law judge that is controlling in any administrative matter. Pietrunti v. Bd. of Ed. of Brick Twp., 128 N.J. Super. 149 (App. Div. 1974), certif. den., 65 N.J. 573 (1974), cert. den., 419 U.S. 1057 (1974); In re Uniform Adm. Procedures Rules, 90 N.J. 85, 98 (1982).

Ms. Simon disagrees and argues that the petitioner was not entitled to any salary payments or benefits beyond the date of the initial decision. According to Ms. Simon, the provisions of N.J.S.A. 18A:6-14 make it clear that the salary payments and benefits should cease if the tenure charges are sustained, and she argues that this was accomplished by the initial decision rendered by the administrative law judge.

Further, Ms. Simon argues that the petitioner is not entitled to any payment for insurance coverage for the period between October 1 and October 15, 1985. Ms. Simon argues that even if he were entitled to fringe benefits until October 15, 1985, a payment of $85.50 would not be appropriate since he did not pay for any insurance coverage for that period of time. Hansen v. Bd. of Ed. of Borough of Runnemede, OAL DKT. EDU 9697-82 (August 15, 1983), aff'd by Comm. (Nov. 14, 1983).

Having considered the arguments of the parties, I CONCLUDE that the petitioner was entitled to receive salary and fringe benefits until the Commission's final decision in the tenure matter on October 15, 1985. See, In the Matter of the Tenure Hearing of Anthony Castaldo, OAL DKT. EDU 3760-84 (Sept. 12, 1985), modified by Comm. (Oct. 31, 1985). Having read the provisions of N.J.S.A. 18A:6-14, I CONCLUDE that a teacher's salary and benefits are terminated if the tenure charges are sustained by

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a final decision of the Commissioner based on the record in the initial hearing before an administrative law judge. An initial decision of an administrative law judge becomes the final decision in a matter only if the department head does not act within the 45-day period, unless that period has been extended as provided by statute, N.J.A. C. 1:1-16.6.

As to the payment for the six-week period of time, I **CONCLUDE** that the petitioner is entitled to a full monthly salary payment for September 1985. The amount of this payment should be $2,520, which is 1/10 of $25,200, the salary the petitioner was earning in the 1983-84 school year. The salary payment should not be based on a salary of $27,100 as argued by Mr. Oxfeld, since it has been determined that a suspended teacher is not entitled to any increments. Castaldo; DeMarco v. Bd. of Ed. of Glassboro Borough, 1981 S.L.D. 1034, aff'd by State Bd. of Ed., 1982 S.L.D. 1971. In addition, the petitioner is entitled to a salary payment for the period between October 1 and October 15, 1985, based on the calculations described by Mr. Appleton for determining the petitioner's partial salary payment for March 1984.

As to the payment for insurance coverage, I **CONCLUDE** that the petitioner would have been entitled to the $85.50 payment only if he had purchased this insurance. Since the petitioner did not incur this expense, he is not entitled to such a payment.

ISSUE V

As to mitigation, the petitioner testified that he did not seek another job after he was suspended or at any time during calendar year 1984. During that period, he spent a substantial amount of time consulting with his attorney and preparing for the tenure hearing as well as consulting with another attorney regarding a possible criminal action based on the same facts that were the basis of the tenure charges. Mr. Caporaso stated that while he was suspended, his wife obtained a job and he took care of their young child.

During his suspension, the petitioner stated that he continued his part-time job with Dr. Harold Weiner, which he had held after school hours since 1983. This job consists of teaching a visual training program to children, and Mr. Caporaso stated that it was not possible for him to increase the number of hours he worked for Dr. Weiner.

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During the calendar year 1985, the petitioner worked as a substitute teacher for St. Mary's Church School in Nutley, New Jersey. For this employment, Mr. Caporaso received a salary of $600 in 1985 (P-2).

In addition, it was established at the hearing that the petitioner received unemployment benefits in the amount of $947 for December 1985, $744 for January 1986 and $382 for February 1986.

In her briefs, Ms. Simon argues that if the petitioner was entitled to any salary payments for the period between September 1 and October 15, 1985, the Board was entitled, pursuant to N.J.S.A. 18A:6-14, to credit for the $600 that the petitioner received from St. Mary's Church School and for the compensation he received from Dr. Weiner. Ms. Simon recognizes that the petitioner received the unemployment benefits after the final decision of the Commissioner in the tenure matter.

Having reviewed the facts and the arguments of Ms. Simon, I CONCLUDE that the Board is entitled to a setoff for the portion of the $600 received from St. Mary's Church School that represents the petitioner's earnings before October 15, 1985. Further, I CONCLUDE that the Board is not entitled to any setoff for the amount of monies Mr. Caporaso received from Dr. Weiner since this employment was for periods of time after the regular working hours of a teacher. See, In the Matter of the Tenure Hearing of Ernest E. Gilbert, OAL DKT. EDU 3388-80, decision on motion (Dec. 1, 1981), aff'd by Comm. (January 18, 1982).

Lastly, in the petition, Mr. Caporaso requests the assessment of interest on any monies owed to him by the Board. Based on the facts in this matter, I CONCLUDE that the petitioner is entitled to such interest payments. Newark Bd. of Ed. v. Levitt, 197 N.J. Super. 239 (App. Div. 1984); Law v. Parsippany-Troy Hills Bd. of Ed. (N.J. App. Div., October 25, 1983, A-280-82T2) (unreported).

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DISPOSITION

Therefore, I **ORDER** that:

(1) The Board pay to the petitioner the amount of $2,032.50, as the remainder of the monies due to Mr. Caporaso for September 1984, with interest from September 30, 1984, in accordance with R. 4:42-11(a).

(2) The Board pay to the petitioner the amount of $2,520 for September 1985, and a salary payment for the period between October 1 and October 15, 1985, to be calculated by the Board in accordance with the procedure outlined by Mr. Appleton at the hearing, with interest from October 15, 1985, in accordance with R 4:42-11(a).

(3) The Board is entitled to a setoff against the monies due to petitoner equal to the amount of monies received by Mr. Caporaso in 1985 from St. Mary's Church School prior to October 15, 1985.

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

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OAL DKT. NO. EDU 4724-86

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

March 18, 1987
DATE

BEATRICE S. TYLUTKI, ALJ

MAR 19 1987
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

MAR 23 1987
DATE

Mailed To Parties:
OFFICE OF ADMINISTRATIVE LAW

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PATRICK CAPORASO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The parties filed exceptions within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

In its exceptions the Board concurs with the analysis and holding of the ALJ as to Issue I that petitioner had his salary calculations done in a reasonable manner consistent with law. Further, the Board takes no exception to the conclusion of the ALJ that "a suspended teacher is not entitled to any increments." (Board's Exceptions, at p. 1, citing the Initial Decision, ante) Also, the Board supports the ALJ's conclusion that petitioner is not entitled to claim reimbursement for insurance and, further, that there be a financial setoff equal to the amount of monies received by petitioner in 1985 from St. Mary's Church by way of mitigation.

The Board excepts to the holding of the ALJ relative to Issues II, III, and IV of the initial decision, however. The Board reiterates the argument it posited at hearing in its post-hearing brief and in its post-hearing reply brief that the 120-day period "contemplates school work days such that the resumption of salary payments on the 121st day following certification of tenure charges should be during the school year without counting intervening summer months." (Board's Exceptions, at p. 2) Acknowledging that the decision entitled In the Matter of the Tenure Hearing of Theodore Augustine Burns, School District of the City of Newark, Essex County, decided by the Commissioner March 8, 1984, aff'd State Board October 24, 1984 held that the 120-day period runs during the summer recess, the Board urges that that decision should not be followed herein because to do so would result in disparate treatment of individuals "since a person suspended during the early part of a school year suffers a more severe economic penalty than a teacher suspended shortly before the end of the school year." (Board's Exceptions, at pp. 2-3) The Board urges that its calculation of salary owed petitioner was accurate, that petitioner was not entitled to receive compensation for any time during the months of July and August 1984, and that, therefore, the 120 days of petitioner's suspension without pay did not expire during the summer of 1984 but rather on September 23, 1984.

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The Board further excepts to the ALJ's conclusion that petitioner was entitled to receive salary and fringe benefits until the date of the Commissioner's decision on October 15, 1985. The Board reiterates its argument that the language of N.J.S.A. 18A:6-14 which speaks to the "original hearing" means the date of the initial decision, which was rendered on July 22, 1985, not the Commissioner's decision, which was rendered on October 15, 1985. The Board urges that petitioner not be held entitled to any salary for the time period September 1 to October 15, 1985, by virtue of the language of N.J.S.A. 18A:6-14 which states, in part, "[s]hould the charge be sustained on the original hearing *** then the suspension may be continued unless and until such determination is reversed.***"

The Board strongly excepts to the ALJ's conclusion that petitioner is entitled to interest payments on any salary amounts owed him. The Board claims that pursuant to N.J.A.C. 6:24-1.18 the Commissioner may award pre-judgment and/or post-judgment interest "pursuant to established criteria in those cases in which the Petitioner seeks the relief and successfully establishes a claim to a monetary award." (Board's Exceptions, at p. 4) The Board avers:

> There was never a claim made by the Petitioner nor proof provided nor opportunity for the Respondent to rebut that the actions taken were in bad faith or in deliberate violation of statute or rule. Therefore, pre-judgment interest is totally unwarranted and legally impermissible without an allowance for such proofs and findings of fact. With regard to post-judgment interest, the precise amount of the claim has yet to be established, there is no final judgment from which the Respondent could request a stay at this point and the 60-day period in which the Board should have an opportunity to make payment has not even begun to toll." (Board's Exceptions, at pp. 4-5)

The Board cites Board of Education of the City of Newark v. Ruth Levitt et al., 197 N.J. Super. 239 (App. Div. 1984), for its position that there was no finding of bad faith on the part of the Board or a finding that the Board acted in deliberate violation of statute or rule and no reasoning proffered by the ALJ as to why interest was deemed appropriate under the facts and circumstances presented in this case.

Relying on the foregoing arguments, as well as those previously submitted in the form of a post-hearing brief and post-hearing letter to the ALJ, the Board urges the Commissioner to affirm that part of the initial decision concerning all of Issue I, Issue IV as to denial of insurance, Issue IV as to cost reimbursement and entitlement to economic setoff for earnings received prior to October 1985, as well as the language contained in Issues III and IV which holds that a suspended teacher is not entitled to any

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increments. It is further urged that the Commissioner reverse as to Issue II concerning the ALJ's interpretation of the 120-day suspension period under N.J.S.A. 18A:6-14 and modify as to Issues III and IV such that there be no entitlement for salary beyond the date of the initial decision, July 22, 1985. Lastly, it is urged that the Commissioner reverse as to the award of interest on any monies due and deny the award of interest. In the alternative, the Board asks that the matter be remanded on the issue of whether interest is appropriate under the circumstances so that the Board is given full opportunity to make factual presentation in opposition to the award of interest.

Petitioner's exceptions aver that those exceptions filed by the Board "directly parallel the arguments that the Board made to the Administrative Law Judge" and thus "the petitioner will rely on the arguments initially made in this matter." (Petitioner's Exceptions, at p. 1) Petitioner filed no cross-exceptions. For the record, the Commissioner notes the following chronology:

1983-84 School Year

Sept. 1, 1983-Mar. 14, 1984	Petitioner employed by the Board as a tenured teaching staff member.
March 15, 1984	Petitioner suspended without pay, pending outcome of tenure charges for conduct unbecoming a teaching staff member.
June 20, 1984	End of school term. Suspension without pay has endured for 97 days.
July 14, 1984	Petitioner avers 120-day suspension without pay expires on this date.

1984-85 School Year

September 24, 1984	Board avers 120-day suspension without pay ends on this date, 23 days after the commencement of the new school year.

Although the Commissioner agrees with the conclusions reached by the ALJ regarding Issues I, II in part, III in part, IV and V and also the ALJ's conclusion concerning the matter of interest, for the reasons that follow, the initial decision is rejected regarding Issues II and III concerning the mode of salary payment made by the Board and, thereby, the amounts due petitioner herein.

Issue I concerns whether during the 1983-84 school year petitioner worked for 13 days and did not receive any salary for said days. The Commissioner concurs with the ALJ that "although the petitioner has shown that there is another way to calculate the salary payments which would be to his benefit, he has not shown that the salary payments he received from the Board were improperly

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calculated or that the calculations as outlined by Mr. Appleton were unreasonable or inconsistent with law." (Initial Decision, ante) See N.J.S.A. 18A:30-6; In the Matter of the Tenure Hearing of Kathy Windsor, 1978 S.L.D. 696. Because the Commissioner's review of the record does not disclose any objection by petitioner to P-1 as representing his salary entitlement for the 1983-84 school year, the Commissioner adopts as his own the conclusions of the ALJ concerning Issue I.

Issue II concerns whether the statutory 120-day suspension period, provided by N.J.S.A. 18A:6-14, expired in August or September 1984. Secondly, Issue II asks if the time period expired in August, whether petitioner is entitled to a salary payment for the month of September 1984, less any salary payments actually received for any days during said month.

As to the first part of Issue II, the Commissioner notes his agreement with petitioner's argument and the ALJ's affirmance thereof that the 120-day suspension without pay expired on July 14, 1984, not on September 24, 1984, as the Board avers. In this regard, he adopts as his own the reasoning of the ALJ as set forth on pages 5-6 that finds that "N.J.S.A. 18A:6-14 requires the resumption of salary payments on the 121st consecutive day following the certification of the tenure charges. See, In the Matter of the Tenure Hearing of Anthony Polito, 1974 S.L.D. 662 (decision on motion)." (Initial Decision, ante) He affirms that petitioner's full salary should have resumed as of the start of the 1984-85 school year. However, he does not concur with the ALJ's recitation of the exact amount of money petitioner is entitled to as of September 1984.

The Commissioner notes the absence in the record of formal action taken by the Board at any time during the periods in question herein to withhold petitioner's increment(s). Absent a resolution by the Board establishing a basis for so withholding an increment and a vote on the matter by a majority of the membership of the Board, a tenured teaching staff member, during the pendency of tenure charges, but following the 120-day suspension period, is entitled to receive increments as though he had not been suspended. See In the Matter of the Tenure Hearing of Matilda Grabert, School District of the Township of Egg Harbor, 1977 S.L.D. 163 and In the Matter of the Tenure Hearing of Franklin Johnson, School District of the Township of Cherry Hill, 1981 S.L.D. 660, 677-678. Accordingly, petitioner is entitled to the same emoluments of his tenured employment with the Board that he would have received in the 1984-85 school year had he not been suspended, absent Board action to deny said increments. Such sums should be calculated dating from the start of the 1984-85 school year until October 15, 1985. To the extent that this determination conflicts with the findings of the ALJ in Issue II, the initial decision is rejected.

Issue III posits whether petitioner is entitled to a salary payment for the period between September 1, 1985, the beginning of the school year, and October 15, 1985, the date of the final deci-

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sion of the Commissioner in the tenure matter. In this regard, the Commissioner agrees with the ALJ that petitioner was entitled to receive salary and fringe benefits until the Commissioner's final decision in the tenure matter. N.J.S.A. 18A:6-14 plainly states:

> Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for the said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made.***(emphasis supplied)

See also N.J.S.A. 52:14B-10 and In re Uniform Adm'v Procedure Rules, 90 N.J. 85 (1982).

Based on the above, as well as the rationale advanced by the ALJ in the initial decision, ante, the Commissioner adopts the conclusion of the ALJ that

> a teacher's salary and benefits are terminated if the tenure charges are sustained by a final decision of the Commissioner based on the record in the initial hearing before an administrative law judge. An initial decision of an administrative law judge becomes the final decision in a matter only if the [agency] head does not act within the 45-day period, unless that period has been extended as provided by statute, N.J.A.C. 1:1-16.6. (Initial Decision, ante)

The Commissioner rejects, however, the conclusion of the ALJ that said salary and benefits should be calculated based upon his 1983-84 salary. Rather, said sums should be predicated upon his salary and increments for the 1984-85 school year, and for the 1985-86 school year, in the absence of Board action to withhold his increments for the latter two school years.

Issue IV concerns whether petitioner is entitled to reimbursement for private insurance coverage for the period between October 1, 1985 (Board's insurance for petitioner expired on September 30, 1985) and October 15, 1985, the date of the final decision of the Commissioner in the tenure matter. In this regard, the Commissioner adopts as his own the conclusions reached by the ALJ in the initial decision, ante.

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Issue V asks if petitioner is entitled to any relief in this matter, whether there is any mitigation or setoff owed the Board. In this regard, the Commissioner adopts as his own the findings and conclusions of the ALJ on the matter of mitigation as found in the initial decision, ante.

Finally, in the original Petition of Appeal, petitioner requests an assessment of interest on any monies owed to him by the Board. Based on the facts in this matter, the Commissioner agrees that interest payments are due on any monies owed him by the Board. Levitt, supra

In the Commissioner's view, the Board herein acted improperly. In the first instance, the Board acted improperly and in contravention of long-established case law which holds that absent an affirmative act by a board to withhold a tenured teaching staff member's increment, said teacher is entitled by the passage of time to the increment he would have received had he continued in the Board's service and not been suspended. In re Grabert, supra; In re Johnson, supra

In the second instance, the Board acted improperly in calculating petitioner's 120-day period of suspension without pay pursuant to N.J.S.A. 18A:6-14 so as not to include the summer months, which flies in the face of the case law directly on point and also the plain language of the statute which states in pertinent part "***but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made.***" (emphasis supplied) Words in a statute must be accorded their plain meaning. Newark Div. of Public Welfare v. Ragin, 197 N.J. Super. 225 (1984). As to the case law supporting the proposition cited herein, see also In re Polito, supra, and Burns, supra.

In the third instance, the Board clearly acted improperly when it presumed to stop all salary payments to petitioner from the date of the initial recommended decision of the Office of Administrative Law which, it is firmly established in law, becomes the final decision in a matter only if the agency head does not reject or modify the initial decision within 45 days, unless that period has been extended as provided by statute. N.J.A.C. 1:1-16.5 and 1:1-16.6 Because the Commissioner's decision on the tenure matter herein was issued on October 15, 1985, petitioner was entitled to salary payments until that date, less mitigation and less the 120-day suspension period without pay.

It is the Commissioner's determination that the Board herein knew or should have known, in all three of the above-stated instances, the requirements of statute, regulation and case law applicable to the instant matter. Under the given circumstances and pursuant to N.J.A.C. 6:24-1.18(c)2, (d)2 and R. 4:42-11(a), the

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Commissioner awards post-judgment interest based upon the amounts specified by the ALJ in the initial decision below, modified to include, where applicable, increment entitlements due petitioner for the 1984-85 school year, and at the prevailing rate of interest established by court rules as of the date of this decision. R. 4:42-11(a).

Accordingly, the initial decision is adopted in part and rejected in part. The parties are required to comply forthwith with the directives contained herein in recalculating the amounts owed to petitioner.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 1, 1987

State Board Dismissed, October 1, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8408-86
AGENCY DKT. NO. 363-10/86

BOARD OF EDUCATION OF
THE CITY OF TRENTON,
MERCER COUNTY,
Petitioner,
v.
WILLIE WHITE,
Respondent.

Hope R. Blackburn, Esq., for the petitioner (Lemuel H. Blackburn, Jr., attorney)

No appearance by or on behalf of the respondent

Record Closed: February 20, 1987 Decided: March 17, 1987

BEFORE BEATRICE S. TYLUTKI, ALJ:

Procedural History

This matter concerns the tenure charges brought against the respondent, Willie White, a custodial employee of the Board of Education of the City of Trenton (Board), which were certified to the Commissioner of Education (Commissioner). The respondent did not file a response to the charges or request a hearing; however, the matter was transmitted to the Office of Administrative Law for a determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

The Board is seeking to dismiss the respondent from his tenured position based on the charges of excessive absenteeism and chronic tardiness, and for inefficiency.

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The matter was scheduled for a prehearing conference on January 9, 1987, and a notice of this conference was sent to the parties on December 22, 1986. On the date scheduled for the prehearing conference, Hope R. Blackburn, Esq., appeared for the petitioner, and there was no appearance by or on behalf of Mr. White.

Since Mr. White did not appear for the prehearing conference, I wrote him a letter, dated January 27, 1987, in which I informed Mr. White that he had a right to a hearing for the purpose of contesting the tenure charges and that if he wanted such a hearing, he would have to notify me in writing by February 13, 1987. Further, I indicated in this letter that if I did not hear from Mr. White by February 13, 1987, I would assume that he was not contesting the matter, and I would render an initial decision based on the papers filed by the Board.

In addition, I requested Ms. Blackburn to submit an affidavit indicating what attempts had been made by the Board to serve the tenure charges on the respondent. On February 20, 1987, I received the affidavit of Thomas W. Mitchell, the assistant superintendent and business administration secretary for the Board. In his affidavit, Mr. Mitchell stated that the Board attempted unsuccessfully to deliver notification of the tenure charges to Mr. White on seven occasions, and a notice of the charges was sent to him by both certified and regular first-class mail. As of the date of the affidavit, February 12, 1987, neither the certification nor the letter sent by first-class mail has been returned to the Board.

Therefore, there are two issues in this matter. The first is whether the Board satisfied the requirements of N.J.S.A. 18A:6-11 as to the service of the tenure charges on Mr. White. The second issue is whether the papers filed by the Board contain sufficient legal justification for the dismissal of Mr. White from his tenured position.

Factual Findings

In summary, Dr. Crosby Copeland, Jr., the Superintendent of Schools, in his sworn statement of the charges and sworn statement of the evidence, both dated May 19, 1986, stated that:

(1) Mr. White became a tenured custodian employed by the Board on August 13, 1984.

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(2) Mr. White was absent 31.5 days during the period between July 1985 and March 1986; was absent 57 days during the period between July 1984 and June 1985; was absent 86.5 days during the period between July 1983 and June 1984; and was absent 27 days during the period between September 1982 and June 1983, as shown in the attendance records for Willie White, which are attached to Dr. Copeland's sworn statements.

(3) Mr. White was chronically tardy, as indicated in the March 11, 1986 letter and attachment from Stanley C. Patykula and the March 11, 1986 letter from Ellison McCall, which are attached to Dr. Copeland's sworn statements.

(4) When at work, Mr. White frequently did not satisfactorily perform his work responsibilities in that he would not follow orders, would read a newspaper, sleep or conduct personal business during his working hours, and would sometimes leave prior to the end of the working day, as indicated in the May 17, 1985 letter from Ed Malloy, the September 24 and 27, 1982 letters from Samuel W. Scrivin, and the September 28, 1982 letter from Ms. Pearson, which are attached to Dr. Copeland's sworn statements.

(5) Mr. White has a drug problem and the Board gave him a leave of absence during the 1983-84 school year so that he could get help to overcome his drug addiction; however, after the leave, Mr. White did not change his patterns of work performance. Also, the Board transferred Mr. White on five occasions in the hope that the transfers would improve his job performance.

(6) Mr. White was out of work for a period of time in February 1986, and he informed his supervisor that he was entering a drug rehabilitation center.

(7) Mr. White abandoned his position on or about March 17, 1986, when he failed to report to work or to call in with an excuse. At that time, Mr. White admitted to Mr. Patykula that he could not perform his duties because he was using drugs and that he was going to enter a drug rehabilitation program.

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By letter dated May 29, 1986, Mr. White was advised that tenure charges had been filed against him with the Board and that the Board was giving Mr. White a 90-day period, commencing on June 3, 1986, in which to correct his inefficiency. Also, by this letter, Mr. White was informed that the Board was taking this action rather than suspending him without pay and certifying the charges to the Commissioner since he had voluntarily entered and and successfully completed a drug rehabilitation program.

By letter dated September 22, 1986, Mr. Mitchell indicated that between June 3, 1986 and September 19, 1986, which included 78 working days, Mr. White was out sick for 18 days, used 12 vacation days, had 19 days of unauthorized absences and worked only 29 days. Based on this information as well as an evaluation of Mr. White's performance submitted by Mr. McCall, the head custodian, it was determined that Mr. White had not shown any significant improvement during the 90-day period.

After consideration, the Board filed the tenure charges with the Commissioner on October 31, 1986.

I **FIND** that the sworn statements of Dr. Copeland as documented by the attached records, reports and letters, which are part of the official records of the Board, are not in dispute.

CONCLUSIONS OF LAW

Based on the facts in this matter, I **CONCLUDE** that the Board has satisfied the statutory requirements for notice of the tenure charges as set forth in N.J.S.A. 18A:6-11. The courts in this State have recognized that service by mail is adequate notice, Amodio v. Civil Service Commission, 81 N.J. Super. 22, 27 (App. Div. 1963), and in this matter, the Board went beyond this requirement by sending the notice by certified mail as well as by trying to make personal service on the respondent.

Further, I **CONCLUDE** that the facts establish sufficient justification for the dismissal of Mr. White based on his record of chronic absenteeism and tardiness and his inefficiency, which was not corrected within the 90-day period. Therefore, I **ORDER** that Willie White be removed from his tenure position as a custodial employee.

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

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

March 17, 1987
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

MAR 18 1987
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 20 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

ij/ee

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IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIE WHITE, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF TRENTON,	:	DECISION
MERCER COUNTY.	:	
	:	

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

Upon a careful review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law establishing that the Trenton Board of Education has satisfied the statutory requirements for notice of the tenure charges herein as set forth in N.J.S.A. 18A:6-11. Further, the Commissioner is in accord with Beatrice Tylutki, ALJ that the facts establish sufficient justification for the dismissal of respondent herein based on his record of chronic absenteeism and tardiness and his inefficiency, which was not corrected within the 90-day period provided for in statute, notwithstanding his absence from these proceedings.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law and directs that Willie White be removed from his tenured position as a custodial employee for inefficiency as of the date of this decision. The initial decision is affirmed for the reasons stated therein.

COMMISSIONER OF EDUCATION

May 1, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4725-86
AGENCY DKT. NO. 226-6/86

MELVIN SANDERS,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,
Respondent.

Robert M. Schwartz, Esq., for the petitioner

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

Record Closed: February 19, 1987 Decided: March 20, 1987

BEFORE **BEATRICE S. TYLUTKI, ALJ:**

This matter concerns the petition filed by Melvin Sanders which alleges that the Board of Education of the City of East Orange (Board) acted arbitrarily and unreasonably, and in violation of N.J.S.A. 18A:29-14, when it denied the petitioner a salary increment and adjustment for the 1986-87 school year, and that the petitioner's removal from the management team was improper and in violation of his constitutional rights. The Board denied the allegations 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 et seq. and N.J.S.A. 52:14F-1 et seq.

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PROCEDURAL HISTORY

A prehearing conference was held by way of a telephone conference call on September 3, 1986, and the hearing in the matter took place on November 5, 6 and December 2, 1986. After receipt of briefs, the record in the matter closed on February 19, 1987.

During the first day of the hearing, I dismissed that portion of the petition relating to Mr. Sanders' removal from the management team since this matter had been submitted to arbitration pursuant to the collective bargaining agreement. The arbitrator had determined that the removal was not in violation of the agreement and had ordered the reinstatement of Mr. Sanders to the team as of October 1, 1986, after finding that his suspension from the team was originally intended to be for a temporary period of time.

FINDINGS OF FACT

Dr. Theodore Josiha Haig, the Superintendent of Education, testified that he has been employed by the Board since September 1983, initially in the capacity of Deputy Superintendent. On August 2, 1985, Dr. Haig was appointed the Acting Superintendent and on March 28, 1986, he was given the permanent title.

According to Dr. Haig, he developed written criteria for the evaluation of principals while he was the Deputy Superintendent and the criteria used for the 1985-86 school year (P-1) were similar to those used in prior years with certain modifications. The written criteria for the 1985-86 school year (P-1) were given to the principals during a workshop in August 1985. Also while he was Deputy Superintendent, Dr. Haig initiated the requirement that the principals prepare annual operational management guides in which they were required to articulate their goals and strategies for the school year.

Starting with the 1985-86 school year, Dr. Haig decided that the comments of the management visitation team regarding their observations at the principal's school would be part of the criteria for the evaluation of principals (P-1). This management visitation team consists of Dr. Haig and a selected group of central office administrative supervising personnel. During the August 1985 workshop, the principals were given a draft copy of the school visitation report form that would be used by the members of the management visitation team to note their observations. This report form outlines the

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various items which would be reviewed by the team in the areas of instructional leadership, school climate, administration, finance and finance/plant operations and personnel, and contains columns for use by the members of the management visitation team to indicate whether the various items contained in the report form were documented and/or observed.

Prior to the initiation of the school visits program in the 1985-86 school year, the principals were to be given a copy of the final draft of the school visitation report (P-7) and were to be told when the management visitation team would be at their schools (R-4).

Mr. Sanders has been employed by the Board for 21 years. He has been a principal since 1968. Since the 1980-81 school year, Mr. Sanders has been the principal of Vernon L. Davey Junior High School.

The Vernon L. Davey Junior High School was the first school to be visited by the management visitation team. Mr. Sanders was given advance notice that the team would be at his school on October 2, 1985, and he also received an advance copy of the school visitation report form (P-7).

Mr. Sanders met with Dr. Haig and Dr. Shirle Moone-Childs, a member of management visitation team, immediately after the team completed its visit on October 2, 1985. Mr. Sanders received a letter from Dr. Haig indicating that the team was "extremely impressed" during its visit on October 2, 1985, and appreciated the warm and cordial welcome the team members had received from Mr. Sanders and his staff (P-8). Also, by letter dated October 9, 1985, Mr. Sanders was sent a copy of the report of the management visitation team (J-1 at pp. 17-27), and he was requested to meet with Dr. Haig on October 17, 1985, to discuss the report (R-1).

The meeting with Dr. Haig did not occur on October 17, 1985, since Dr. Haig was called out of town. By a memorandum dated January 13, 1986, Dr. Haig requested Mr. Sanders to attend a meeting regarding the recommendations of the management visitation team on January 16, 1986 (R-5). This meeting was terminated when Mr. Sanders had to leave to handle an emergency at his school.

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The management visitation team again visited the Vernon L. Davey Junior High School on January 29, 1986, and a report regarding this visit was also given to Mr. Sanders (J-1 at pp. 28-47).

For the 1985-86 school year, Mr. Sanders submitted his operational management guide on November 22, 1985 (J-1 at pp. 57-83), and he also submitted the urban initiative management guide (P-2). On March 21, 1986, Mr. Sanders received an evaluation report regarding his performance during the 1985-86 school year, which had been prepared by Dr. Haig (J-1 at pp. 1-16).

I FIND that the facts as stated above are not in dispute. In the evaluation report, Dr. Haig concluded that Mr. Sanders' performance was not satisfactory based on the evaluation criteria for the 1985-86 school year (J-1). The evaluation report contains the following summary:

EVALUATION CRITERIA	POSSIBLE POINTS	PETITIONER'S POINTS
Improving achievement/school climate/principal effectiveness	20	10
Development and management of the operational management guide	15	05
Student and staff attendance; suspension/ disruptive behavior[1]	10	05
Routine administrative tasks	10	03
Academic focus of the school and recognition of academic achievement	20	10
Central administration, staff/students and parents/community relations	10	05
School visitation reports	15	05
TOTAL	100	43

[1]In the evaluation report, it was recognized that all of the data relating to this item had not been collected (J-1 at p. 2).

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As to the criteria points, it is stated in the evaluation report that if a principal's performance is given less than 70 points, it is considered to be less than satisfactory (J-1 at p. 2).

The evaluation report contains a lengthy explanation as to why Dr. Haig determined that Mr. Sanders' performance was not satisfactory. In summary, Dr. Haig concluded that:

(1) The operational management guide submitted by Mr. Sanders for the 1985-86 school year (J-1 at pp. 57-83) was not acceptable since it did not set forth clear and appropriate goals and measurable objectives for the school year. Attached to the evaluation report is Dr. Haig's analysis of the petitioner's operational management guide, which sets forth in detail his comments and criticisms of the operational management guide (J-1 at pp. 48-56).

(2) Based on the first observation by the management visitation team (J-1 at pp. 17-27), Mr. Sanders was considered to be unsatisfactory in the area of instructional leadership and school climate, and he was criticized for his failure to present records and/or reports to the team members regarding the specific items listed in the school visitation report, and for not requiring the timely submission of teacher lesson plans.

(3) Several of Mr. Sanders' monthly reports were submitted late and two monthly reports were not submitted.

(4) Mr. Sanders is not visible in the school and he spends too much time in his office.

(5) Although Mr. Sanders has a good rapport with parents and the community, he does not have a good working relationship with the central office staff. Specific reference is made to a January 1986 problem which involved a substantial amount of time by central staff members to correct a problem regarding requisitions.

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At the hearing, Mr. Sanders testified that prior to receiving the evaluation report on March 21, 1986, he was not told by Dr. Haig during the 1985-86 school year that his performance was unsatisfactory, and that Dr. Haig did not give him an explanation as to why low criteria points were given to him in the evaluation report. Mr. Sanders stated that he submitted the operational management guide on November 22, 1985, and since he was not told that it was not satisfactory until he received his evaluation report on March 21, 1986, he did not have an opportunity to revise the guide. In addition, Mr. Sanders disputed many of the negative statements made by Dr. Haig about the operational management guide in the evaluation report and in the attached analysis, and he pointed out that a number of the items Dr. Haig noted as missing were in fact included in the operational management guide (J-1 at pp. 57-83) or were in the urban initiative guide (P-1).

As to the first report of the management visitation team (J-1 at pp. 17-27), Mr. Sanders stated that he was not told what reports and/or records should be given to the members of the team and that records and reports were available and not requested by any of the team members. Mr. Sanders stated that he was concerned about some of the statements made by team members in the report regarding the October 2, 1985 visit, but that he did not request a meeting with Dr. Haig regarding this report after the scheduled meeting on October 17, 1984, was canceled. According to Mr. Sanders, he did express some concern regarding the report to Dr. Moone-Childs.

Mr. Sanders stated that he was not criticized by the members of the management visitation team regarding his visibility in the school and that he had told them that he felt he was spending too much time in his office and that he planned to make an effort to get out of his office more often. Also, Mr. Sanders stated that he was never told that he was collecting lesson plans incorrectly or that it was important to submit his monthly reports on time. Mr. Sanders did not deny that on several occasions his monthly reports were not submitted or were submitted late.

As to the January 7, 1986 problem cited in the evaluation report (J-1 at p. 7), Mr. Sanders said that there was a problem but he was not aware that anyone was critical of his role in the matter prior to the receipt of the evaluation report. He denied that he had a poor rapport with the central office staff.

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Mr. Sanders stated that the grades of the students in his school are on a par with other students in the district (P-4a, P-4b), and that students in his school have won prizes in spelling, mathematics, science and foreign languages.

It is Mr. Sanders' opinion that the Board had no justifiable reason to withhold his salary increment and adjustment for the 1986-87 school year, and that Dr. Haig's recommendation that his increment and adjustment be withheld, as well as his removal from the management team, was based on Dr. Haig's animosity towards the petitioner because of certain negative statements made by Mr. Sanders at a meeting of the parents-teachers organization.

Dr. Haig denied that there was any animosity, and he stated that he recommended the denial of Mr. Sanders' salary increment and adjustment based on his objective evaluation of Mr. Sanders' performance. According to Dr. Haig, he had developed the criteria for the evaluation of principals in order to avoid subjective decisions and to establish objective standards to govern the evaluation procedure.

During the hearing, there was extensive questioning of Dr. Haig about the comments he made regarding the petitioner's performance in the evaluation report and in the analysis of the operational management guide, and Dr. Haig repeated the comments contained in those documents. Dr. Haig admitted that there were errors in those documents as to whether a number of specific items were covered in the petitioner's operational management guide. However, Dr. Haig stated that if an item was mentioned only in the urban initiative plan, this was not acceptable since all of the items which relate to school objectives should be in the operational management guide.

Dr. Haig stated that the petitioner's operational management guide for the 1985-86 school year was basically a copy of the guide he submitted for the prior year, and that the guide was deficient since it lacked a comprehensive delineation of measurable objectives. According to Dr. Haig, in prior school years he had given the principals an opportunity to change their operational management guides after they received his analysis. This was not done in the 1985-86 school year since he had given the principals additional time to submit the operational management guides and there was not enough time for revisions. However, Dr. Haig stated that the principals were aware from prior years what should be included in the operational management guides and he was available

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to discuss the guides during the time they were being prepared by the principals. Dr. Haig said that his analyses of the operational management guides, which were given to Mr. Sanders and the other principals with the evaluation reports, were intended to help Mr. Sanders and the other principals to prepare their guides for the following school year.

Dr. Haig stated that in evaluating the principals, he placed more emphasis on the report regarding the first visit by the management visitation team and that it was up to each principal to produce the documents needed by the management visitation team to evaluate the principal's organization and to evaluate the specific areas of concern that were itemized in the report form (P-7). Also, Dr. Haig stated that when he spoke to Mr. Sanders immediately after the observation by the team on October 2, 1985, he asked to see a number of documents, and Mr. Sanders was unable to produce all of them. Based on this first visit, Dr. Haig concluded that Mr. Sanders lacked leadership and organization.

Although the management visitation team saw some improvement during the second visit, Dr. Haig stated that this was not given much weight in his evaluation of Mr. Sanders' performance since his prime concern was the ability of the principal to initiate and organize the school programs in the beginning of the school year.

According to Dr. Haig, the letter he sent to Mr. Sanders after the October 2, 1985 visit was a form letter which he sent to all principals, and that when he stated the team was "impressed" during the visit (P-8), he did not mean that the team was satisfied with Mr. Sanders' organization.

Dr. Haig stated that after he was unable to attend the meeting he scheduled to discuss the report regarding the October 2, 1985 visit, it was up to Mr. Sanders to schedule another meeting. Since Mr. Sanders failed to take the initiative, Dr. Haig again scheduled a meeting in January 1986. When this meeting had to be terminated, Dr. Haig requested the petitioner to arrange another meeting and this was not done.

As to Mr. Sanders' visibility in the school, Dr. Haig stated that he was aware that Mr. Sanders had a habit of staying in his office. Dr. Haig felt that this was inappropriate since it is one of the responsibilities of a principal to be visible and to walk around the school and visit classrooms in order to ensure that the school goals and programs are being implemented.

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As to the principals' monthly reports, Dr. Haig stated that he needed the information contained in these reports and that Mr. Sanders was advised to submit his reports on time. Mr. Sanders was contacted by members of Dr. Haig's staff when his monthly reports were late.

Based on the testimony at the hearing, I **FIND** that the petitioner showed that there were some minor inaccuracies and discrepancies in Dr. Haig's comments in the evaluation report and in his analysis regarding several items that were contained in the petitioner's operational management guide for the 1985-86 school year. Also, I **FIND** that the petitioner was not able to show that Dr. Haig had any animosity towards Mr. Sanders or that his recommendation that Mr. Sanders' salary increment and adjustment be denied was not based on the evaluation criteria for the 1985-86 school year (P-1). Although Mr. Sanders differs with Dr. Haig's opinion regarding his performance, the petitioner did not show that there were any substantive inaccuracies in the evaluation report.

CONCLUSIONS OF LAW

Pursuant to N.J.S.A. 18A:29-14, a board of education may withhold a salary and/or adjustment increment for "inefficiency or other good cause."

Both Robert M. Schwartz, Esq., on behalf of the petitioner, and Melvin Randall, Esq., on behalf of the respondent, recognized in their briefs that the decision in Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960), sets forth the standard for review as to cases involving the withholding of a salary increment and/or adjustment. In that case, the court stated that the Commissioner is not to substitute his judgment for that of the board of education, but is to determine whether the board of education had a reasonable basis for its decision to withhold the salary increment and/or adjustment, and that the burden of proving unreasonableness is on the teacher.

Mr. Schwartz argued that there was no reasonable basis for the denial of the petitioner's salary increment and adjustment. Further, Mr. Schwartz stated that the reasons for the increment denial are to be clearly articulated, Carney v. Bd. of Ed. of Freehold Regional High School, OAL DKT. 6356-83 (June 12, 1984), aff'd by Comm. (July 20, 1984), aff'd by State Bd. of Ed. (February 6, 1985), because a teaching staff member has the right to know why his or her performance is considered to be inadequate so that he or she can decide how to achieve an improvement. In this matter,

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Mr. Schwartz argued that there was an unclear articulation of reasons for an increment denial in the evaluation report and by Dr. Haig at the hearing. Mr. Schwartz argued that Dr. Haig was unable to give specific reasons for the low criteria points, and was unable to explain the disparity between the low criteria points and the narrative portion of the evaluation report which contains statements that are substantially less negative. In addition, Mr. Schwartz argued that Dr. Haig should have told Mr. Sanders about his dissatisfaction with his performance prior to giving him the evaluation report so that Mr. Sanders would have the opportunity to improve. For these reasons, Mr. Schwartz argued that Mr. Sanders is entitled to a salary increment and adjustment for the 1986-87 school year.

In his brief, Mr. Randall argued that the Board's decision should be upheld since there were good and sufficient reasons articulated in the evaluation report for the withholding of the petitioner's salary increment and adjustment. Mr. Randall argued that prior to the receipt of the evaluation report, Mr. Sanders should have known that his performance was not considered to be satisfactory, based on the criticisms contained in the report regarding the October 2, 1985 visit, the failure of the petitioner to submit timely monthly reports, and his poor working relationship with central staff which led to his removal from the management team.

Having considered the arguments of the parties, I **CONCLUDE** that the petitioner has not shown that there was no reasonable basis for the Board's decision to withhold his salary increment and adjustment for the 1986-87 school year. Further, I **CONCLUDE** that the criticisms contained in the evaluation report are good and sufficient reasons for the withholding of the petitioner's increment and adjustment.

DISPOSITION

For the above reasons, I **ORDER** that the Board's determination to withhold the petitioner's salary increment and adjustment for the 1986-87 school year be **AFFIRMED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul

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Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

March 20, 1987
DATE

BEATRICE S. TYLUTKI, ALJ

MAR 2 [illegible] 1987
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:
MAR 25 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

ml/EE

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

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed exceptions within the time prescribed by N.J.A.C. 1:1-16.4a and b. The Board's reply exceptions were untimely, however, pursuant to N.J.A.C. 1:1-16.4c.

Petitioner's exceptions reiterate those arguments raised at hearing and in his post-hearing submission. Essentially, he contends that the Superintendent's evaluation of him failed to provide a clear, cogent explanation of the basis for the withholding of his 1986-87 increment. Citing Carney v. Board of Education of the Freehold Regional High School District, decided by the Commissioner July 20, 1984, aff'd State Board February 6, 1985, aff'd Superior Court, Appellate Division November 8, 1985, petitioner argues, inter alia, that "[a]bsent an explanation by the Respondent Board of Education, its action to withhold Petitioner's increment cannot be deemed to have been based upon good and sufficient reason." (Petitioner's Exceptions, at p. 11) He contends the withholding came as a "surprise" and also was in violation of the Superintendent's own criteria adopted by the Board for the evaluation of principals in the district. Additionally, petitioner avers that the "Superintendent was unable to explain to the Petitioner during their evaluation conference as to how he arrived at the 43 points given to Petitioner. Further, he was unable to explain to the Court how he arrived at this point system." (Petitioner's Exceptions, at p. 14) Petitioner asserts that the Superintendent chose to ignore the criteria for evaluation the Board adopted by failing to communicate with Petitioner his dissatisfaction with his management guide and also with the results of the first site visitation team visit.

Petitioner submits that the action of the Board in denying his increment for the 1986-87 school term was arbitrary and capricious. He asks the Commissioner to reverse the initial decision herein.

Upon a careful review of the record the Commissioner adopts the initial decision of the Office of Administrative Law for the reasons that follow.

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The Commissioner is unpersuaded that petitioner was not provided adequate articulation of the reasons for an increment denial. In addition to those explanations noted by the ALJ in the initial decision, ante, which represent a summary of the lengthy explanation as to why Dr. Haig determined that petitioner's performance was not satisfactory, the Commissioner notes that accompanying the evaluation criteria and points which were assigned petitioner (J-1, at pp. 1-2) is a concise Administrator Evaluation synopsis written by Dr. Haig, dated March 20, 1986 and signed also by petitioner on March 21, 1986. Therein, it is stated:

> The common denominator that constantly surfaces is your inability to translate all of the functions and skills required of the principalship into an effective delivery system. Consequently, the data suggest that your total movement does not positively influence the principalship at Vernon L. Davey consistent with the District-wide thrust of this administration.
>
> Even though there may be the appearance that you "run" VLD effectively, schools are self-sustaining organizations. They can literally operate without an effective principal. The issue is not how well do you "run" VLD, it is how effectively do you "lead" VLD. All of the effective school studies focus in on the principal as the most important factor in an effective school. Given this widely accepted body of research, in no way can I state that VLD is effectively led or that you have demonstrated or have the potential to transform VLD into an effective school.
>
> Lastly, I am certain that many "good things" are going on with staff/students at VLD. However, you were not organized to be able to identify and document those "things" within the context of the Evaluative Criteria. You were afforded many opportunities to do. So, again, I am very disappointed in your overall performance this year.

This synopsis by the Superintendent followed a five-point narrative explanation of the overall score on his evaluation. Therein, it was clearly stated:

> Your overall score reflects your ability or inability to plan, coordinate, monitor, direct and organize to meet district/school-wide goals and objectives. I am extremely disappointed in your performance this school year. I have not

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seen any improvement in your ability to operate consistent with the above throughout the school year. That is despite:

1) Pre: Service Workshops (see attached)

2) Principal Effectiveness Workshops: OSR (see attached)

   a) District Initiated (reflective of the 1984-85 assessment)

   b) State Department Initiated (reflective of the 1984-85 assessment)

3) Site Visitation follow-up: you did not take the initiative in spite of the documented memo I attached to your report asking you to review your report and if you had any concerns to schedule a meeting with me. If you recall, I took the initiative to schedule a meeting to review the document more than three (3) months later. While reviewing the report with the Assistant Superintendent of Instruction, you had an emergency at your school. Subsequent to leaving you never took the initiative [to] reschedule.

4) Monthly Management Team Meetings: Time used for the Acting Superintendent to Inservice on District-Wide initiatives (reflective of the 1984-85 assessment).

5) Weekly availability: you have not made an appointment with me once this year to discuss your concerns. As you know, I have set aside Thursday's (3:00-5:00 p.m.) for principals. As a matter of fact, that time availability grew out of concerns you expressed to me in the past about the lack of availability of previous Superintendents.
(J-1, Evaluation dated March 20, 1986)

The Commissioner determines that the above summaries render meritless petitioner's arguments that he was "surprised" by the withholding of his increment, especially in light of the fact that he was criticized for failing to set up an appointment in which to discuss any comment made in the report. The Commissioner finds the Administrator Evaluation report, on the whole, reflects those comments and observations made within the evaluation packet, which included the operational management guide submitted by petitioner

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(J-1, at pp. 57-83) and the Superintendent's evaluation of it (J-1, at pp. 48-56) and the observations made on the two visitations by the management team (J-1, at pp. 17-27 and 28-47).

Moreover, the Commissioner is in accord with the ALJ that any inconsistencies in said reports are minor in nature and do not rise to the level of invalidating the report.

As to the testimony adduced at hearing, the Commissioner notes the absence of a transcript of the record. Consequently, the Commissioner adopts as his own the conclusions of the ALJ concerning the credibility of witnesses and the findings of fact established thereon. Therefore, the Commissioner concurs with the ALJ's finding that petitioner has not shown

> that Dr. Haig had any animosity towards Mr. Sanders or that his recommendation that Mr. Sanders' salary increment and adjustment be denied was not based on the evaluation criteria for the 1985-86 school year (P-1). Although Mr. Sanders differs with Dr. Haig's opinion regarding this performance, the petitioner did not show that there were any substantive inaccuracies in the evaluation report.
> (Initial Decision, ante)

Having reviewed the record herein, and the standard of review articulated in Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960), for the withholding of increments, the Commissioner finds and determines that petitioner herein has failed to establish that there was no reasonable basis for the Board's decision to withhold his salary increment.

Accordingly, the initial decision of the Office of Administrative Law is adopted for the reasons stated therein. The Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

May 5, 1987

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MELVIN SANDERS,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, May 5, 1987

For the Petitioner-Appellant, Robert M. Schwartz, Esq.

For the Respondent-Respondent, Love and Randall
(Melvin Randall, Esq., of Counsel)

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

September 2, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3891-86
AGENCY DKT. NO. 171-5/86

NORTH PLAINFIELD EDUCATION ASSOCIATION,
Petitioner,
v.
NORTH PLAINFIELD BOARD OF EDUCATION,
Respondent.

Richard A. Friedman, Esq., for petitioner (Ruhlman, Butrym and Friedman, attorneys)

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

Record Closed: March 6, 1987 Decided: March 24, 1987

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

The North Plainfield Education Association (Association), petitioner, alleges and the North Plainfield Board of Education (Board), respondent, denies that the Board has failed and refused to pay full-time supplemental teachers in accordance with the New Jersey Minimum Salary Law, N.J.S.A. 18A:29-5 et seq.

The matter was opened before the Commissioner of Education and was transmitted as a contested case on June 13, 1986, 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. After notice, a prehearing conference was held on August 20, 1986. Among other things, it was settled that the issue to be tried is whether the subject teaching staff members are full-time employees for the purposes of the act and, if so, to what relief they are entitled. Counsel

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were directed to submit a joint stipulation of facts by September 26. It was also settled that the petitioner Association would move for summary judgment on or before October 16 and the respondent Board would cross-move for summary judgment on or before October 30. Counsel encountered some difficulty and a second prehearing conference was held on November 20. I granted extension of the times of submission and the stipulation of facts was received on December 8, 1986. A third conference of counsel was conducted on February 11, 1987, and the parties supplied further documentation following the conference.

I.

The parties stipulate and I **FIND** the following to be **FACTS** in this matter:

1. The petition of appeal in this matter was filed on behalf of supplemental and compensatory education teachers who are both tenured and non-tenured employees of respondent.

2. All of said teachers were required to hold, and in fact, held appropriate teaching certificates by the State Board of Examiners.

3. The hours of the supplemental teachers which require their presence at the school or schools of employment vary from five to five and one-half hours per day and 175 to 180 days per year.

4. The hours of compensatory education teachers varies per day from four hours to five and one-half hours and 180 days per year.

5. Title I teachers are required to be at the schools five and one-half hours per day, 180 days per year.

6. Article XIII of the negotiated agreement between petitioner and respondent, a copy of which is attached as Exhibit A, sets forth the hourly compensation of compensatory, supplemental and title I teachers, and further sets forth their fringe benefits.

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7. Classroom teachers at the elementary schools of respondent are required to be at the schools from 8:10 a.m. to 3:05 p.m., and receive 45 minutes as a duty-free lunch period per day.

8. Classroom teachers at the high school of respondent are required to be at the schools from 7:45 a.m. to 3:00 p.m., and receive a duty-free lunch period of 45 minutes per day.

9. The supplemental, compensatory and title I teachers receive a 45-minute duty-free lunch period daily

10. The contract referred to above between the petitioner and respondent became effective July 1, 1984. The petition in this matter is dated May 12, 1986.

The petitioner proposed modification of the stipulation. By agreement of the parties, the following stipulations are a part of this record and I FIND them to be FACTS in this matter:

1. Nothwithstanding Article XIII of the negotiated agreement (Exhibit A), the petitioner does not stipulate that the teachers in question are part-time employees within the meaning of the Teacher Quality Employment Act, N.J.S.A. 18A:29-5 et seq.

2. The following is added to stipulation 9, above: "The teachers involved in this litigation are assigned paid preparation periods and are assigned related in-service duties, in addition to classroom duties, for which they receive extra compensation.

3. The teachers in question are enrolled in the New Jersey Teachers' Pension and Annuity Fund (TPAF).

Another stipulation was proposed by the petitioners but was unacceptable to the Board. It would have stated: "The teachers involved in this litigation are assigned the same amount of actual teaching time as regular classroom teachers." Although the

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parties could not agree on this stipulation, the petitioners were able to supply, from Board records, the number of hours per day worked by each supplemental teacher, compensatory education teacher and title I teacher in the 1985-86 school year. See, Appendix A.

II.

The petitioner urges that supplemental teachers, compensatory education teachers and title I teachers employed by the Board meet the standards for and qualify as full-time teaching staff members. N.J.S.A. 18A:29-5 sets the minimum salary for full-time teachers in this State:

> The minimum salary of a full-time teaching staff member in any school district, who is certified by the local board of education as performing his duties in an acceptable manner for the previous academic year pursuant to N.J.A.C. 6:3-1.19 and 6:3-1.21 and who is not employed as a substitute on a day-to-day basis, shall be $18,500 for an academic year, and a proportionate amount for less than an academic year.

The statute also sets forth a definition of "full-time":

> For the purpose of this amendatory and supplementary act, "full-time" means the number of days of employment in each week and the period of time in each day required by regulations of the State Board to qualify a person as a full-time teaching staff member.

"Full-time" is also defined at N.J.A.C. 6:20-5.6(b) as "the number of hours in a day and the number of days in a week the district board of education prescribes for a teaching staff member to receive the full salary designated for their [sic] step on the district board of education's salary schedule."

The Association knows of no formulated Board policy that prescribes the number of hours in a day and the number of days in a week required for this purpose. However, actual assignments indicate that regular teachers devote from five to five and one-half hours daily to their professional duties. Under this circumstance, it is logical to conclude that the standard for this district for a full-time employee is five to five and one-half hours.

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A majority of the contract teachers in the Association are contracted to work five and one-half hours per day. Further, as part of their duties, they are required to prepare comments for report cards, do year-end evaluations, assist in writing individual education programs, attend parent-teacher conferences and annual review conferences and perform other in-service duties. Therefore, these teachers are furnishing time and effort in their functions equal to those of regular teachers. They qualify to receive the benefits of the provisions of the Teacher Quality Employment Act. The differences between effective classroom time rendered by these supplemental and compensatory teachers and that rendered by regular teaching staff members are so minimal that excluding supplemental and compensatory staff members from the category of full-time employment would be an unreasonable, harsh and absurd result.

In Biancardi v. Waldwick Bd. of Ed., 139 N.J. Super. 175 (App. Div. 1976), aff'd 73 N.J. 37 (1977), the court referred to the fact that enrollment in the TPAF is evidence of permanent full-time employment. The teachers in question here are, in fact, members of and enrolled in TPAF.

The petitioner cites three out-of-state cases to buttress its arguments for full-time status.

The petitioner concludes that the individuals involved in this matter have entered into contracts to work for the full school year on a regular daily schedule, and in addition, they perform duties requiring time and effort other than and in addition to classroom functions.

III.

The Board maintains that the teachers in this matter are employed for three and one-half to five and one-half hours per day and do not qualify as full-time teaching staff members for the purpose of being compensated pursuant to N.J.S.A. 18A:29-5. The statute defines "full-time" 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 [of Education] to qualify a person as a full-time teaching staff member." The State Board adopted N.J.A.C. 6:20-5.6 which, in essence, provides that if a local board is willing to pay a teacher on a full-time basis, then the state aid received pursuant to the Teacher Quality Employment

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Act shall be on the basis that such teacher is full-time. This, however, does not help to resolve the present issue and the Board does not have a policy defining full-time.

In practice, full-time elementary teachers in the district must report to their schools for work at 8:10 a.m. and may leave at 3:05 p.m. with a duty-free lunch period of 45 minutes. Thus, they are on duty for other than their own lunch periods, a total of six hours and ten minutes daily.

Full-time high school teachers employed by the Board must report daily to their schools at 7:45 a.m. and may leave at 3:00 p.m., with a duty-free lunch period of 42 minutes. Thus, they are on duty — for other than their own lunch periods — a total of six hours and 33 minutes daily.

Both full-time elementary and full-time high school teachers have homerooms, prepare report cards, attend back-to-school meetings with parents, have parent-teacher conferences without additional pay and must attend faculty meetings. In addition, the high school teachers provide hall and cafeteria monitoring without special compensation.

Compensatory education and supplemental teachers employed by the Board do not prepare report cards, do not attend back-to-school meetings with parents, do not have parent-teacher conferences unless they receive additional pay and do not attend faculty meetings unless requested, in which case they receive additional compensation.

Elementary school teachers in North Plainfield are on duty at least 120 hours more annually than the five and one-half hour per day compensatory education and supplemental teachers. There is an even greater disparity when comparing elementary teachers with compensatory education and supplemental teachers who teach less than five and one-half hours per day.

High school teachers in North Plainfield are on duty for at least 189 hours more annually than the five and one-half hour per day compensatory education and supplemental teachers.

Biancardi, above, dealt with whether the plaintiff was entitled to tenure when during part of the period she claimed should count toward tenure acquisition she was

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enrolled in the TPAF. The Board argues that the Appellate Division decision holds that enrollment in TPAF was not determinative for Biancardi's purpose.

Compensatory education and supplemental teachers are represented in labor negotiations by and are generally members of the local union. Their union negotiated on their behalf an employment contract covering the period July 1, 1984 through June 30, 1987. Article XIII, entitled "Part-time hourly employees wages and benefits," provides:

> A. Part-time hourly employees, currently identified as compensatory, supplemental and title I teachers shall receive $15.20 per hour for the 1984-85 school year, $16.50 per hour for the 1985-86 school year and $17.80 per hour for 1986-87.
>
> B. These employees shall also receive:
>
> 1. Pro rata tuition reimbursement.
>
> 2. Pro rata insurance if entitled under master policies and employed twenty (20) hours or more per week regularly.
>
> 3. Pro rata sick leave in accordance with current New Jersey State Board of Education mandates.

The petitioner now seeks to have the Board classify these teachers as full-time employees as a result of the Teacher Quality Employment Act, contrary to their own union's classification.

The subject teachers, in fact, are being paid at an hourly rate in excess of a full-time rate of $18,500, notwithstanding that there is no legal requirement to pay part-time workers at the full-time rate. In fact, the compensatory and supplemental teachers receive additional pay for every minute they work on such things as parent-teacher conferences and faculty meetings. No matter how viewed, the period of time in each day and the number of days per year worked by these teachers are substantially less than worked by full-time teachers. If classroom teaching hours were the sole criterion, then perhaps the petitioner would be correct. However, there is a myriad of other duties performed by full-time teachers that are not performed by the teachers petitioner here represents.

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V.

DISCUSSION AND DETERMINATION

Preliminarily, it is noted that Biancardi, above, merely held that the fact that Biancardi was not enrolled in the pension plan was additional evidence that she knew she was taking a temporary appointment and was working as a substitute teacher. 139 N.J. Super. at 178.

In Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982), the Court, reversing Point Pleasant Beach Teachers' Ass'n. v. Callam, 173 N.J. Super. 11 (App. Div. 1980), certif. den. 84 N.J. 469 (1980), held that part-time remedial or supplemental teachers are teaching staff members under N.J.S.A. 18A:1-1 and may acquire tenure if they meet the specific criteria set forth in N.J.S.A. 18A:28-5. Since the decision in Spiewak, its retroactivity and scope have been extensively explored. See, e.g., Kalisch v. Hasbrouck Heights Bd. of Ed., OAL DKT. EDU 435-83 (Sept. 23, 1983), adopted, Comm'r of Ed. (Nov. 14, 1983), aff'd, State Bd. of Ed. (March 7, 1984); Hyman v. Teaneck Bd. of Ed., OAL DKT. EDU 7719-82 (May 18, 1983), mod., Comm'r of Ed. (Aug. 15, 1983), mod., State Bd. of Ed., (Mar. 6, 1985), aff'd, N.J. App. Div. (Feb. 26, 1986, A-3508-84T7) (unreported); Arndt v. Rockaway Tp. Bd. of Ed., OAL DKT. EDU 2362-84 (Sept. 14, 1984), mod., Comm'r of Ed. (Nov. 2, 1984). In Hyman, the petitioners, auxiliary instructors, appealed a State Board of Education determination upholding the local board's adoption of a separate negotiated salary schedule for auxiliary instructors from that adopted for regular classroom teachers. The petitioners argued there that, as auxiliary instructors, they were entitled to be compensated under the same salary scale governing regular classroom teachers, citing Spiewak. The State Board concluded that under Spiewak, petitioners' "auxiliary" time should be considered in determining whether they had earned tenure, but that Spiewak did not preclude a local board from negotiating different salary guides for different categories of teachers. The Appellate Division affirmed (at p. 2.).

Accepting the Board's representation that "regular" teachers devote not less than six hours and ten minutes per day to their duties, and assuming that regular teachers must report on 182 days, $18,500 prorated over the approximately 1120 hours involved, yields a figure of just over $15.50 per hour. By the terms of the negotiated labor agreement quoted above, the complaining teachers received $16.50 per hour for the 1985-86 school year. Thus, even if the teachers for whom the petitioner pleads are full-time employees,

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they are being compensated at an hourly rate greater than that of the regular classroom teachers employed by the district. Neither party has suggested a method of comparison other than by hourly rate of pay and a review of the cases cited indicates that, in practice, hourly rate of pay is, indeed, the standard of comparison. In Odenwald v. Oakland Bd. of Ed., OAL DKT. EDU 7385-83 (June 19, 1984), adopted, Comm'r of Ed. (Aug. 6, 1984), aff'd in part, rev'd in part, State Bd. of Ed. (Feb. 4, 1987), comparison on an hourly basis was approved. Also in Odenwald, the State Board iterated that compensation is a mandatory subject of collective negotiations and the education laws do not specify any standards governing the compensation of teachers who are not full-time, aside from the requirement that the compensation of a tenured teacher may not be reduced, N.J.S.A. 18A:28-5, except as provided by N.J.S.A. 18A:6-10. Slip opinion at p. 5. The State Board also stated:

> Thus, as in the case of full-time members, there is no requirement under the education laws that all categories of part-time teachers be compensated at the same rate or in the same manner. Therefore, . . . we find the agreement of the Association and the Board establishing a category designated as "hourly rate teachers" does not contravene the requirements of the education laws, so long as application of the provision does not result in reduction in the compensation of a tenured teaching staff member. [Slip opinion at pp. 5-6.]

More recently, the Commissioner decided Monahan v. Clifton Bd. of Ed. v. State Dept. of Ed., OAL DKT. EDU. 2778-86 (Nov. 20, 1986), aff'd, Comm'r of Ed. (Dec. 24, 1986). In that matter, basic skills teachers alleged they were not properly compensated in the 1985-86 school year because they were not paid the minimum salary of $18,500. The Board argued the petitioners were part-time employees paid according to resolutions duly adopted by the Board. The Board brought in the Department of Education as a third party respondent from which it sought additional state aid to cover salary funds if the petitioners were successful.

The administrative law judge found that the petitioners were part-time employees, were not included in the local bargaining unit and did not come under the Teacher Quality Employment Act which covers full-time teaching staff only. Further, the petitioners were aware of the salaries they were to receive when they accepted their positions. The administrative law judge determined that the Board had properly compensated the petitioners. The Commissioner affirmed the findings and determinations

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in the initial decision, emphasizing that the petitioners failed to demonstrate that they were full-time teachers under the intendment of the act.

In consideration of the foregoing, I **FIND**, in addition to the facts set forth above:

1. Full-time teaching staff members in the North Plainfield district work not less than 30 hours and 50 minutes per week and not less than 180 days per year, although the 180-day figure may be exceeded in a given year.

2. The teachers represented by the petitioner work a maximum of 27 hours and 30 minutes per week and a maximum of 180 days per year, although the 180-day figure may not be reached in a given year.

3. These teachers knew of their status at the time they accepted their positions.

4. The Board could have, but did not, set the work week for these teachers at 30 hours and 50 minutes.

5. The teachers represented by the petitioner are part-time teaching staff members in fact and by designation in the negotiated labor agreement between the Board and Association and, presumably, in Board minutes.

The regulations of the State Board of Education in effect during the 1985-86 academic year provide:

> The period of time in each day required for full-time employment shall be the number of hours prescribed by the district board of eduation but shall not be less than four clock hours. [N.J.A.C. 6:3-1.13.]

A local board of education is vested with the authority to define what constitutes a school day. N.J.S.A. 18A:11-1 specifically gives local boards the power to make, amend and repeal rules for their own government, the transaction of business, the government and management of the public schools and public school property in the district, and for the

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employment, regulation of conduct and discharge of employees. N.J.A.C. 6:3-1.13 merely elaborates on the legislatively invested power. See, Hyman, above.

I **CONCLUDE** that the teachers on whose behalf the Association brings this petition had been properly classified as part-time employees by the North Plainfield Board of Education. I further **CONCLUDE** that the Teacher Quality Employment Act, N.J.S.A. 18A:29-5, does not apply to these teachers.

For the foregoing reasons, the Board's motion for summary decision in its favor is **GRANTED**. The petition of appeal is **DISMISSED**. It is so **ORDERED**.

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

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

24 MARCH 1987
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

MAR 25 1987

MAR 2 5 1987
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 27 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

ds

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NORTH PLAINFIELD EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH PLAINFIELD, SOMERSET 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 examination of the record in this matter, the Commissioner adopts the recommended initial decision for the reasons expressed therein. The ALJ's analysis, findings, and conclusion are deemed appropriate and correct.

COMMISSIONER OF EDUCATION

May 5, 1987

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THOMAS DE GISE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board's exceptions and petitioner's reply were filed in a timely manner pursuant to N.J.A.C. 1:1-16.4a, b and c.

The Board excepts to the ALJ's determination that petitioner is entitled to tenure as a social studies teacher and that he has 5.9 years of seniority as a social studies teacher. It argues that the decision relied upon by the ALJ, Boehm, supra, is faulty and erroneous in that the Commissioner misconstrued the term "appropriate certificate" contained in the New Jersey Supreme Court's decision in Spiewak, supra. More specifically, the Board alleges that the Commissioner erred in Boehm (Slip Opinion, at p. 25) when determining that

> ***tenure and seniority attach not to unrecognized position but to teacher of health and physical education by virtue of Board's self-imposed certification requirement. (emphasis in text) (Board's Exceptions, at p. 3)

With respect to this point, the Board avers the following:

> Clearly, the Commissioner found the certificate for an unrecognized title to be "appropriate" solely because the Board deemed it to be so.***
>
> It is the Jersey City Board's position that this notion of a "self-imposed" certification of an unrecognized title by a Board of Education is the central error in the Commissioner's reasoning. There is no support in law to allow a Board to "self impose" a certificate on an unrecognized title. The Board asserts that only the County Superintendent of Schools may determine the appropriate certification for an unrecognized title. This contention is demonstrated by reference to N.J.A.C. 6:11-3.6 "Assignment of Titles". This regulation requires that prior to

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> appointing someone to an unrecognized position, the board must submit a written request to do so to the County Superintendent of Schools.***
>
> Thus, the term "appropriate certification" utilized by the Supreme Court in Spiewak, supra, as pertaining to an unrecognized title, refers to the certification approved by the County Superintendent as a matter of law.
>
> Since the Board never submitted a request for permission to utilize that title to the County Superintendent, the Superintendent never determined what the "appropriate certification" for that position should be. Petitioner therefore could not have fulfilled the "appropriate certificate" prerequisite to tenure as required by the Court in Spiewak, supra, 90 N.J. at 74, and as adopted by both the Court and the Commissioner in Boehm. Having failed to meet this requirement, the time petitioner spent as a Dean of Students cannot accrue to his achievement of tenure as a social studies teacher.
>
> ***[T]he Board believes*** the intention of the Supreme Court in circumstances such as the present, is that unless the certification has been deemed appropriate for the actual work performed by the County Superintendent (as required by N.J.A.C. 6:11-3.6) the services performed in an unrecognized title cannot count towards the achievement of tenure.***
>
> (Board's Exceptions, at pp. 3-4)

Upon a thorough review of the record in this matter including the legal arguments advanced by the Board in its exceptions, the Commissioner is in complete agreement with the ALJ that petitioner has acquired tenure as a teacher and finds the Board's arguments to the contrary to be entirely without merit as explained below.

Firstly, the Commissioner was fully cognizant of and specifically addressed the requirement for county superintendent review and approval of unrecognized titles in Boehm, supra. The decision reads in pertinent part:

> The position of NTA is an unrecognized title. There is nothing contained within the record herein to demonstrate that the Board submitted a written request to the county superintendent of schools for approval to use this title and to determine what certification requirement was warranted pursuant to N.J.A.C. 6:11-3.6(b). Unrefuted testimony indicates the Board required

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> that petitioner hold a valid teaching certificate to serve as a NTA [Non Teaching Assistant]. Nor did the board seek approval of the county superintendent for the position as a paraprofessional pursuant to N.J.A.C. 6:11-4.9 as noted in the initial decision. Therefore, tenure and seniority with respect to petitioner's assignment as an NTA must be attached to the valid teaching certificate required by the Board, which in relation to petitioner was that of a teacher of health and physical education.
>
> ***
>
> The Commissioner also finds no merit in the Board's argument that the instant matter is distinguishable from Spiewak, supra, because petitioner's duties as an NTA were nonacademic and nonteaching. While it is clear from the record petitioner was not engaged in instruction on a regular basis, the Board in requiring a teaching certificate clearly viewed the position as one which warranted the professional expertise inherent in or associated with a teaching certificate.***
>
> ***
>
> ***It is further ordered that, regardless of the position to which petitioner is reinstated, the Board is to immediately submit a job description for the NTA position to the county superintendent for approval pursuant to regulation. (emphasis supplied) (Slip Opinion, at pp. 22-25)

In no manner did the Commissioner deem the certificate in Boehm to be an appropriate certificate "solely because the Board deemed it to be so" as alleged by the Board in its exceptions. Nor was there the acceptance, endorsement or advancement of the notion that a board may "self impose" a certificate rather than following the mandate of N.J.A.C. 6:11-3.6 to submit an unrecognized title to the county superintendent. What Boehm does stand for is the proposition that a teaching staff member will not be deprived of the legislatively granted status of tenure in a situation where a board of education has failed in its responsibility to follow state statutes and regulations, be it from ignorance, neglect or other form of inaction on the part of the board. See also Michael Furst v. Bd. of Ed. of Rockaway Twp., decided by the Commissioner May 18, 1984, aff'd State Board October 24, 1984. To rule otherwise would permit a board with unclean hands to deprive an individual of tenure acquisition.

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Therefore, given the facts in the instant matter that (1) a teaching certificate was required for the position; (2) petitioner possessed a teaching certificate; and (3) he fulfilled the requisite period of time specified in N.J.S.A. 18A:28-5, the Spiewak, supra, standard for tenure eligibility and acquisition has been met.

The State Board of Education recently addressed the issue of tenure acquisition in Thomas McHugh v. Bd. of Ed. of Westfield, decided April 1, 1987. It reads in pertinent part:

> ***[W]e emphasize that tenure is achieved in a position as defined by statute. See N.J.S.A. 18A:28-5. In contrast, seniority is credited in a category or categories established by the Commissioner for seniority purposes. N.J.S.A. 18A:28-10; -13. Accordingly, the scope of the position in which tenure is achieved is not necessarily the same as the category in which seniority is to be credited pursuant to the seniority regulations now in effect. Capodilupo v. Board of Education of the Town of West Orange, decided by the State Board, September 3, 1986. See Howley v. Bd. of Ed. of the Township of Ewing, 1982 S.L.D. 1328, aff'd by the State Board, June 1, 1983.
>
> As we concluded in Capodilupo after careful examination of the statutes, the position in which tenure is achieved and to which tenure protection attaches is either one of those specifically ennumerated (sic) in N.J.S.A. 18A:28-5 or other employment for which a certificate is required, either Instructional, Educational Services or Administrative and Supervisory. Capodilupo, supra at 8. The scope of the position in which a member is entitled to tenure protection is however limited by the scope of the endorsements held by such member that define the assignments within the tenurable position for which he is qualified. Id. at 11.*** (at p. 4)

Hence, petitioner has acquired tenure as a teacher, the scope of which is limited to the scope of the endorsement(s) served under, in this instance, social studies as correctly determined by the ALJ. The Commissioner does not, however, agree with the amount of seniority calculated by the ALJ. Petitioner's employment history pertinent to this matter is as follows:

Time Period	Assignment
10/76 - 6/77	Teacher of Social Studies (History)

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Time Period	Assignment
9/77 - 6/78	Pool Substitute
9/78 - 6/79	Pool Substitute
9/79 - 6/80	Pool Substitute
9/80 - 6/81	Pool Substitute
9/81 - 6/82	*Dean of Students
9/82 - 6/83	*Dean of Students
9/83 - 6/84	*Dean of Students
9/84 - 6/85	*Dean of Students
9/85 - 6/86	Teacher of Social Studies (History)

* Position known as "Teacher Assigned to the Principal's Office in Charge of Discipline" (J-1, #3,D)

The period of time petitioner served as a substitute does not count toward tenure acquisition. See Spiewak, supra, at 74. See also Lowicki et al. v. Bd. of Ed. of Jersey City, decided by the Commissioner September 16, 1986 which determined that pool substitutes in Jersey City are substitutes as defined by N.J.S.A. 18A:16-1.

Consequently, it was not until September 1984 that petitioner fulfilled the requisite period of time for tenure acquisition pursuant to N.J.S.A. 18A:28-5. Hence, the nine-month period of time as a history teacher from October 1976 to June 1977 is not credited for seniority purposes as it was not time leading toward tenure acquisition.

Accordingly, the Commissioner modifies the initial decision insofar as the 5.9 years seniority as a teacher of social studies determination is concerned. The correct figure should be 5.0 years in the secondary category, limited to the endorsement of social studies since petitioner's service was at the high school level. N.J.A.C. 6:3-1.10(1)15 In all other respects the initial decision is adopted. Petitioner is to be reinstated to a position to which his tenure and seniority rights qualify him and he is to be reimbursed all monies and emoluments due him, less mitigation.

Further, the Commissioner must again express his grave concern with respect to the Jersey City Board of Education's continued and flagrant disregard of N.J.A.C. 6:11-3.6. The instant matter is yet another case where the Board has failed to submit an unrecognized title to the county superintendent for review,

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approval, and designation of certificate. The Commissioner cannot fail to emphasize that had the Board complied with this long-standing regulatory mandate, it would not be necessary in this and numerous other cases to engage in prolonged and costly litigation. The Board is therefore once again strongly admonished that it is to strictly comply with N.J.A.C. 6:11-3.6 for each and every unrecognized title in the district.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 5, 1987

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THOMAS DE GISE,	:	
PETITIONER-RESPONDENT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, May 5, 1987

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

For the Respondent-Appellant, William A. Massa, Esq.

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

September 2, 1987

Pending N.J. Superior Court

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7146-86
AGENCY DKT. NO. 330-9/86

BOARD OF EDUCATION OF
HARRISON TOWNSHIP,
GLOUCESTER COUNTY,
Petitioner,
v.
C.W., by his parents, J.R.W.
and K.T.W.,
Respondents.

William B. Sparks, Esq., for petitioner (Boakes & Sparks, attorneys)

K.T.W., respondent, pro se

Record Closed: March 19, 1987 Decided: March 24, 1987

BEFORE NAOMI DOWER-LABASTILLE, ALJ:

The Board of Education of Harrison Township (Board) claimed that C.W. was a nonresident student of its district and owed tuition payment of $624.60 for the period April 17 to June 10, 1986, pursuant to N.J.S.A. 18A:38-1. The Commissioner transmitted the matter to the Office of Administrative Law (OAL) on October 22, 1986, for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing was held on December 5, 1986, and the matter was scheduled for hearing on January 2, 1987. Petitioner's counsel was hospitalized on that date and I granted an adjournment to March 9, 1987, when a hearing was held in Mullica Hills.

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Respondents had originally retained an attorney but filed a substitution on February 5, 1987, to appear pro se. The record closed on March 19, 1987, after a ten-day briefing period.

The issue was whether or not C.W. was entitled to a free public education in petitioner's district under N.J.S.A. 18A:38-1(a), as a domiciliary, or 18A:38-1(d), as a person whose parent resided temporarily in the district.

Discussion of Testimony:

Superintendent Thomas Summerill testified that the Board does not accept nonresident students, even on a tuition basis, but five or six such students require investigation almost every year. Thus, when he got a call from Deptford, asking if C.W. had registered with them and advising him that Deptford believed Mrs. W. had pulled her child out of their schools because of a dispute, and when some local Harrison Township people complained of the attendance of a nonresident student, Summerill directed the Attendance Officer, Janeth Lacy, to investigate.

Lacy reported facts which were consistent with nonresidence of C.W. in Mullica Hill, and asked the township police to supplement the investigation. Patrolman Edward Selb performed a record check (tax records, license, registration, post office and voting) and surveillance. While the record check was fairly consistent with nonresidence, the surveillance did not indicate C.W. was a nonresident. All three witnesses testified to their observations, which showed numerous comings and goings which seemed inconsistent with residence in the district. The Board's staff, not being privy to all the facts from Mrs. W.'s side of the story, were of the opinion that Mrs. W. was trying to make it appear she was a resident when she was not.

Mrs. W., who was the only witness for respondents, was fully credible, however. Although the facts and circumstances were inordinately involved, she never hesitated, at any step of the way, to provide a full explanation for what assuredly appeared to outsiders as unusual living arrangements, and I am convinced not only that she told the truth but that it would be almost impossible for her to invent the story she related.

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Findings of Fact:

1. Mr. and Mrs. W. lived with their two children, a daughter and a younger son, C.W., on O. Road in Deptford in 1985, but they also owned a property on M. Street in Mullica Hill (Harrison Township), where for seven years, Mrs. W. had a beauty salon business downstairs and rented one apartment upstairs.

2. The W.'s wanted to build a new house somewhere in Harrison Township, looked for land there, and in December 1985, began renovation of their O. Road home to prepare it for sale.

3. To remodel the O. Road property, Mr. W. had to remove all the inside wide board interior wall finishing in the three upstairs bedrooms, so that it was not possible for the family to use the upstairs during the work.

4. The family decided to split up temporarily. Since their daughter had one year to finish at her school in Deptford and was active in band and other co-curricular work, and since Mr. W. had to work on the house for sale, Mr. W. and their daughter were to remain in Deptford at the O. Road home for the rest of the school year, at the end of which they hoped they would be ready to move to a new home in Harrison Township. Mr. W. slept downstairs on the couch and their daughter slept upstairs.

5. Mrs. W. and her son, C.W., were to move into a second apartment above the business, which had previously been used for an employee rest area. The family determined C.W. had to go with her because C.W. had long since been prescribed a special diet by Children's Hospital, and it was too difficult for his father to prepare special food for him. Mrs. W. was unaware that a certificate of occupancy (C.O.) was required for the second apartment in Mullica Hill into which they moved in February 1986, enrolling C.W. in Harrison Township.

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6. Mr. W. does shift work at a large oil refinery, so that at least once a month, he works the 11 p.m. to 7 a.m. shift. The other shifts he works are 6 a.m. to 3 p.m. and 3 p.m. to 11 p.m.

7. The W.'s have a truck and a van, both registered to Mr. W., who did not change the registration address, since he still lived in Deptford. Both the W.'s drove the van, but often Mrs. W. didn't need to use it, so Mr. W. drove either one.

8. Mr. W. tried to sell the O. Road house himself. In January 1986, he began posting notices at his place of business without success, so he finally listed the house with a realtor, but the sale and settlement was postponed five times and, in fact, the Deptford house closing did not occur until February 1987.

9. When Mr. W. was on the night shift, their daughter had to stay in her grandparents' home in Paulsboro at night and spend weekends with her mother in Mullica Hill. This plan was in effect during one week in March when the Board's attendance officer was making her investigation.

10. Between March 11 and March 20, 1986, all the W.'s had to stay overnight in Paulsboro because the grandparents were terribly upset: the grandfather had to appear as a witness in a criminal trial since the defendants had attacked his father. During that period, Mrs. W. would go to Paulsboro between 8 p.m. and 9 p.m., stay overnight, and would drive her son to Mullica Hill, where the school bus picked him up and dropped him off at school. Either one of the W.'s might have driven each of their two children to school from the north during that period, and they sometimes stopped off at O. Road on the way to retrieve items for their daughter.

11. From April 2 to 9, 1986, the W.'s went on vacation, leaving their children with the grandparents in Paulsboro. During that period, the grandparents delivered one child to Deptford and the other to school in Harrison Township in a gray cadillac.

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12. Early in April, one of Mrs. W.'s acquaintances in Harrison Township told her a school board election was coming up and urged her to register to vote, which she did on April 14, 1986.

13. On occasions when investigators saw Mrs. W. or her husband (in the van) turn north after delivering C.W. to school in Harrison Township, the W.'s were on the way to a shop called the Breadbasket, which was the only place Mrs. W. could buy some of the items in her son's special diet, or they were on the way to their bank in Woodbury Heights, since Mrs. W. had to make deposits from her business almost every day.

14. On May 19, Mrs. W. had a conference with the Superintendent, who preliminarily and subject to receipt of Iowa basic skills test results, advised Mrs. W. that C.W. would probably be retained in his present grade and recommended for CST evaluation, since in the staff's opinion he was not mature enough to adjust to departmentalization the following year.

15. Late in May or early June, Mrs. W. had difficulties with her hand and was advised that she would need cortisone treatments and, if these were unsuccessful, surgery on one or both hands, so that she would be unable to work for six weeks.

16. Since the W.'s were encountering great difficulties in getting their Deptford home sold, and since Mrs. W. was now unable to perform work at her beauty salon or drive her car due to her physical problems, the attendant financial and physical circumstances required her to move back to Deptford with her son.

17. Probably due to snow days, Harrison Township extended its school year in June 1986. Mrs. W. had already bought plane tickets to attend her godchild's graduation in Florida, so she called the school to explain why she would have to take her son out of school a few days early.

18. Just before she left for Florida, Mrs. W. came to the school office to obtain her son's records for a transfer back to Deptford. The superin-

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tendent was not present that day when she explained to a staff member (Mr. Datz) about her medical problem, that she didn't know how long recovery would take, and that they had found land on which to build in Harrison Township, but they couldn't afford to build on it until the financial and medical problems were resolved.

19. C.S. reentered school in Deptford in September 1986, but subsequently, Mrs. W. recovered use of her hands, the O. Road house was sold, the whole family moved to Harrison Township at the Mullica Hill address, the new house was begun, and both children enrolled in Harrison Township schools.

Conclusory Findings:

20. From the time Mrs. W. and C.W. moved to Mullica Hill in February 1986, the W.'s intentions were to become permanent residents in Harrison Township at the M. Street, Mullica Hill address and, subsequently, to a new address there.

21. In any event, even if Mrs. W. could be viewed as a domiciliary of the Deptford home, she and her son were, at the least, legitimate temporary residents in Harrison Township, a change which was required by renovation of the bedrooms in the Deptford house. If not for the financial and medical interruption to their plans, they would have become permanent residents of Harrison Township in 1986.

22. While Mrs. W. may not have agreed with either school board's opinion concerning the education of C.W., that was in no respect the reason for her move or move back, and her present residence in Harrison shows that the family's actions were not related to dissatisfaction with the Harrison Township schools.

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Conclusions of Law:

N.J.S.A. 18A:38-1 states that the following persons must be given a free public education:

(a) Any person who is domiciled within the school district;

. . .

(d) Any person whose parent . . . is residing temporarily therein. . . .

I **CONCLUDE** that the facts clearly show that Mrs. W. was, at the least, residing temporarily in the Harrison Township district during the period February to June 1986, including the period April 17 to June 10, for which time the Board has sought $624.60 in tuition monies. I would go further and **CONCLUDE** based on the evidence that Mrs. W. and C.W. were domiciled at the Mullica Hill address, and that their sojourn in Deptford from June into the 1986-87 school year was temporary in all the facts and circumstances. Their domiciliary intentions are clearly shown by the fact that the whole family now resides in the district.

It is therefore **ORDERED** that the petition of the Harrison Township Board of Education be **DISMISSED WITH PREJUDICE.**

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

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OAL DKT. NO. EDU 7146-86

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

March 24, 1987
DATE

Naomi Dower LaBastille
NAOMI DOWER-LABASTILLE, ALJ

MAR 25 1987
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:
MAR 27 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

ml/EE

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BOARD OF EDUCATION OF HARRISON TOWNSHIP, GLOUCESTER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
C.W., by his parents, J.R.W. and K.T.W.,	:	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 review of the record in this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that Mrs. W. herein, mother of C.W., resided temporarily in the Harrison Township school district during the period February to June 1986, including the period April 17 to June 10, 1986, for which time the Board has sought $624.60 in tuition. The Commissioner further concurs with the ALJ that Mr. and Mrs. W. were domiciled at the Mullica Hill address and that the comings and goings to and from Deptford from June into the 1986-87 school year were temporary, this demonstrated, in part, by the fact that the whole family now resides in the district.

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

COMMISSIONER OF EDUCATION

May 5, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 590-87
AGENCY DKT. NO. 413-12/86

IN THE MATTER OF THE TENURE HEARING OF LINDA LANE, SCHOOL DISTRICT OF THE CITY OF NEWARK.

Marvin L. Comick, Esq., for petitioner (Vickie A. Donaldson, General Counsel, attorney)

No appearance by or on behalf of respondent

Record Closed: March 10, 1987 Decided: March 30, 1987

BEFORE BRUCE R. CAMPBELL, ALJ:

The Newark Board of Education (Board) filed a charge of unbecoming conduct against Linda Lane (respondent) on December 22, 1986 with the Commissioner of Education. The essence of the charge is that the respondent, who was on a leave of absence from teaching duties September 1, 1984-August 30, 1985, failed to return to her teaching duties and has given no notice or explanation for her continued absence nor has she requested an extension of her leave.

The Board made good faith efforts to contact the respondent regarding her intentions (Exhibit C). The Board's personnel director wrote to the respondent at her last known address in an attempt to clarify the respondent's employment status. The letter was returned marked "returned to sender, forwarding expired" (Exhibit B).

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On November 10, 1986, the present charges were filed against the respondent for being absent without leave. The Board attempted to serve the respondent by certified mail. The envelope was returned marked "moved, not forwardable" (Exhibit C). The Board made other efforts. The Board wrote to the last known address of the respondent's husband, to the Division of Motor Vehicles, to the Newark Police Department and to the Hackensack Post Office inquiring as to the address of Linda Lane (Exhibits D, E, F and G). Responses were received from the Division of Motor Vehicles and the Hackensack Post Office. Both indicated that the last address known to them was the Poplar Avenue address in Hackensack (Exhibits H and I).

On December 16, 1986, at its regularly scheduled meeting, the Newark Board of Education certified the present charges against the respondent (Exhibit J). On December 18, the Board again attempted to serve the respondent by certified mail. The envelope again was returned marked "moved, not forwardable" (Exhibit K).

The papers were sent to the office of the Commissioner in Trenton. The Bureau of Controversies and Disputes also made efforts to contact the respondent. When these proved unsuccessful, the matter was transmitted, without answer, to the Office of Administrative Law for disposition pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

Upon receipt of the papers, I directed a letter to the respondent's last known address informing her that the Board had filed tenure charges against her with the Commissioner of Education and if the Board were successful, that she might be stripped of her tenure rights. The letter was returned to this office marked "returned to sender, forwarding expired."

In consideration of the foregoing, I FIND that the Newark Board of Education made diligent efforts to contact the respondent both before and after the preferment of charges. In State v. Wenof, 102 N.J. Super. 370 (Law Div. 1968), the court stated, "There is always a risk that notice may not reach the intended person, but this is not the test for legal sufficiency. The test is, rather, whether the notice was reasonably calculated to reach the intended parties. [citations omitted]."

The respondent had an obligation to advise the Board of her intention not to return to her teaching duties. Courtesy alone would have demanded that she inform the

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Board of any change of address during her leave of absence. Tenure of Hayes, 1975 S.L.D. 18.

I **CONCLUDE** that the charges against Linda Lane are true. Therefore, I **CONCLUDE** that Linda Lane has abandoned and forfeited her tenured position with the Newark Board of Education. It is so **ORDERED.**

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

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

30 MARCH 1987
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

MAR 31 1987
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 2 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

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

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

Upon review of the record herein, the Commissioner concurs with the conclusion of the ALJ that the charges of conduct unbecoming a tenured teaching staff member are true, inasmuch as respondent has been continuously absent from her teaching duties with the Newark Board of Education without authorization, following a leave of absence, commencing on September 5, 1985 to date, and has failed to respond to diligent efforts on the Board's part to notify her of said tenure charges.

Accordingly, the Commissioner adopts as his own the findings of the ALJ that respondent herein has abandoned and forfeited her tenured position with the Newark Board of Education.

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Pursuant to N.J.A.C. 6:11-3.7 the Commissioner is forwarding this matter to the State Board of Examiners for determination of possible revocation or suspension of respondent's teaching certification.

COMMISSIONER OF EDUCATION

MAY 5, 1987

DATE OF MAILING - MAY 5, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
CONSOLIDATED CASES
OAL DKT. NO. EDU 3154-86
AGENCY DKT. NO. 161-5/86

ROSE STAHNTEN,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF HILLSIDE,
Respondent.

OAL DKT. NO. EDU 3186-86
AGENCY DKT. NO. 163-5/86

BARBARA A. WASHINGTON,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF HILLSIDE,
Respondent.

Jeffrey A. Bartges, Esq., for petitioner Stahnten

Wayne J. Oppito, Esq., for petitioner Washington

Sanford A. Meskin, Esq., for respondent
(Meskin & Ziegler, attorneys)

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OAL DKT. NOS. EDU 3154-86 and EDU 3186-86

Record Closed: November 20, 1986 Decided: April 1, 1987

BEFORE KEN R. SPRINGER, ALJ:

Statement of the Case

These are consolidated appeals to the Commissioner of Education from the action of respondent Hillside Board of Education ("Board") abolishing the position of assistant superintendent as a reduction in force under N.J.S.A. 18A:28-9, resulting in dismissal of a tenured elementary school principal with less seniority. Petitioner Rose Stahnten, currently an elementary school principal, seeks reinstatement to her former position of assistant superintendent and difference money damages for any loss of salary. Petitioner Barbara Washington, the terminated employee, seeks reinstatement to her job as elementary school principal together with payment of salary and other benefits. Four issues are raised: (1) whether the Board satisfied its obligation to consult with the chief school administrator before abolishing the position in question; (2) whether the position of assistant superintendent was genuinely abolished within the meaning of N.J.S.A. 18A:28-9; (3) whether the Board's action was taken in good faith; and (4) whether the Board's action is contrary to its legal responsibilities under the affirmative action program mandated by N.J.A.C. 6:4-1.3.[1]

[1]In addition, Stahnten sought to argue that the Board had violated certain procedural aspects of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., and that the Board's action is tainted by an alleged conflict of interest of one of its members. These issues are outside the scope of the pleadings and are thus not properly raised in this proceeding, except insofar as they may have some bearing on the general issue of the Board's good faith. At the hearing, Stahnten voluntarily abandoned any claim that the Board had violated the provisions of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq., or that it had violated her rights by paying her a lower salary than male employees doing comparable work.

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Procedural History

On May 8, 1986, Stahnten filed a petition with the Commissioner of Education. Next day, on May 9, 1986, Washington filed a separate petition with the Commissioner. Before the filing of any answer by the Board, the Commissioner transmitted both cases to the Office of Administrative Law ("OAL") for ruling on Stahnten's application for interim relief. The OAL heard oral argument on Stahnten's application on May 23, 1986. By order entered on June 10, 1986, the OAL directed that Stahnten continue as affirmative action officer in the district, but denied her request for a stay of the Board's decision to abolish the position of assistant superintendent. Meanwhile, the Board filed its answers on May 28, 1986 and May 30, 1986 respectively. At the request of the parties, the OAL issued an order on June 23, 1986 consolidating both cases for hearing in a single proceeding.

Subsequently, the OAL held hearings on September 16, 17 and 22, 1986. Upon receipt of the last paper from the parties, the record closed on November 20, 1986. Time for preparation of the initial decision has been extended to April 1, 1987.

Findings of Fact

(1) Undisputed Facts

Many of the background facts are undisputed. Rose Stahnten has been employed by the Board since 1947, with a short break-in-service between 1961 and 1963. She worked as a classroom teacher from 1947 to 1961. After a two-year interval, she returned to the district in 1963 as the elementary school principal of Calvin Coolidge School. Later, in 1968, she was given dual responsibility as elementary principal of two buildings, Calvin Coolidge and George Washington Schools. In 1974 she became affirmative action officer, an assignment which she performed until 1977 when a new assistant superintendent assumed those duties. Ultimately, in 1982, Stahnten herself was appointed assistant superintendent. In that capacity, Stahnten resumed her role as affirmative action officer. Stahnten continued as assistant superintendent until the Board acted to abolish that

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position effective June 30, 1986. Although Stahnten's petition also seeks reinstatement to the position of affirmative action officer, the Board has clarified that its action did not abolish the job of affirmative action officer and, consequently, that Stahnten still holds that position. During the current school year (1986-87), Stahnten has displaced Barbara Washington as the elementary principal of Calvin Coolidge School, at a salary loss of some $7,000.

Barbara Washington started working for the district in 1982. For the last four years, she has served as elementary principal at Calvin Coolidge School. Currently, Washington has been placed on the preferred eligibility list for reemployment. It is stipulated that Stahnten has greater seniority than Washington in the position of elementary school principal. Both Stahnten and Washington possessed appropriate certifications for the positions which they occupied. The Board was fully satisfied by the job performance of each individual. Anthony Ferra Jr., president of the Board, admitted that Stahnten has been an "excellent" assistant superintendent and he had "no problems with her capabilities." Likewise, the Board acknowledged that Washington had "performed competently in her duties" and her dismissal was not due to any shortcomings on her part. Instead, the Board's action was purportedly taken "for reasons of economy" and because of the "reduction in the number of pupils enrolled in the Hillside Schools."

There is no genuine dispute about the detrimental effect of the Board's action on the district's affirmative action plan. Washington, who is black and female, was one of only a handful of minority members and females employed by the Board in administrative or supervisory positions. Indeed, in its affirmative action plan approved on January 21, 1985, the Board had recognized that minorities were "underutilized by one" and females were "underutilized by two." The affirmative action plan, which had been submitted to the County Superintendent's Office, represented a commitment by the Board "to hire a minimum of one employee in each category as vacancies occur." At the end of the 1985-86 school year, state monitoring authorities regarded the district as being in compliance

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with its goals under the plan. As a result of the abolition of the assistant superintendent's position and the consequent dismissal of a black female administrator, the district will no longer be in compliance with its own affirmative action goals.

Meanwhile, the Board was also contemplating elimination of an assistant principal at the elementary school level, but decided not to do so when it learned that he had seniority over a recently-hired black male assistant principal at the high school. School superintendent Dr. Anthony Avella had recommended to the Board that the more senior elementary school administrator would not be as well suited to the high school setting. Board members followed Avella's recommendation to keep the elementary assistant principal in order to save the job of the high school assistant principal, whom one member described as a "good role model" for young black students.

(2) Prior Consultation with the Chief School Administrator

Testimony differed sharply on the extent to which the Board had sought the advice of its superintendent before voting to abolish the assistant superintendent position. Dr. Vito Gagliardi, Union County superintendent of schools, emphasized the importance of obtaining the consent of the chief school administrator at the initial hiring stage for key administrative personnel. He referred to an unrelated earlier incident in July 1985 where the same Board had disregarded the recommendation of its superintendent in making an appointment to a reading teacher position. With regard to the assistant superintendent position, Dr. Gagliardi expressed his opinion that the requirement of approval of the chief school administrator should be extended to cover "abolition" as well as original "appointment." Since Dr. Gagliardi was not personally present at relevant Board meetings, his understanding of what occurred came exclusively from his reading of the Board's minutes, particularly of a statement in which Dr. Avella complained that he had not been adequately consulted regarding abolition of the assistant superintendent title.

According to Dr. Avella, the Board did not provide any "opportunity for [his] input" before reaching its decision. His assertion, however, is contradicted by his own

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admissions concerning the events which led to the Board's final action at its meeting on April 21, 1986. As Dr. Avella admitted, as early as January 1986 the Board asked him to prepare a list of possible budget cuts ranging from a high of $600,000 to a low of $100,000. Dr. Avella submitted such a list on Janaury 13, 1986, which proposed cuts in teaching staff, instructional supplies, repair and maintenance, and every other item except administrative expenses. Thereafter in February 1986, Kevin Davis, head of the Board's Finance Committee, requested information about the administrative staff and the procedure for effectuating a reduction in force. Dr. Avella responded by supplying a list of all administrators in the district, their years of service and 1986-87 salaries. An accompanying memorandum from Dr. Avella explained that an administrator "with previous tenure service in a lesser administrative position can opt to assume the lesser administrative position."

On April 14, 1986, just one day prior to defeat of the 1986-87 budget at the annual school election, the Board held a special meeting and, for the first time, asked Dr. Avella for a description of the assistant superintendent's duties and an indication of which duties could be reassigned to other administrators. Then the Board reconvened in executive session, excluding Stahnten from attendance at its deliberations. During its executive session, the Board inquired of Dr. Avella the number of teaching jobs which might be saved by abolition of two administrative positions. No formal action was actually taken by the Board on April 14, 1986. Rather, the Board placed the subject on the agenda for its next regularly scheduled meeting and instructed the board secretary to notify all persons who might be adversely affected, including Stahnten and Washington. A few days later, on April 18, 1986, Dr. Avella furnished Board members with a copy of the assistant superintendent's job description on which he had marked those duties "assignable . . . to principals."

The next regular meeting of the Board was held on April 21, 1986. Present at this meeting were Dr. Avella, Rose Stahnten and her legal representative, and numerous members of the public, all of whom were allowed to be heard. Dr. Avella made a lengthy public statement in which he took issue with the Board's estimate of the impact of

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declining enrollment, criticized the Board for not accepting his recommendation to spare administrative positions from any budget cuts, and outlined the major accomplishments which Stahnten had achieved in her term as assistant superintendent. Despite Dr. Avella's vigorous opposition, the Board voted 5 to 2 to abolish the position of assistant superintendent in order to reduce the number of administrative posts in the district.

Recollections of various Board members present an even stronger picture of efforts to consult with Dr. Avella. Thomas Pydeski, for instance, recalled that in February 1986 the Board had informed Dr. Avella that it was considering cutting administrators as well as teachers. Similarly, Kevin Davis confirmed that Dr. Avella was fully "aware" that the Board was thinking about administrative cuts. Anthony Ferrara Jr., current Board president, remembered that Dr. Avella had assured them that they could "move the money around" so long as the bottom line remained unchanged. When Board members suggested the possibility of abolishing Stahnten's position, Pydeski observed that Dr. Avella was "opposed from the start." Davis testified that Dr. Avella was reluctant to discuss details on April 14th in the absence of proper notice to persons whose jobs might be affected. Therefore, the Board deferred any further consideration of the matter to its open public meeting on April 21, 1986.

I FIND that the Board did solicit and receive Dr. Avella's views before making its decision to abolish the assistant superintendent position. Beginning on January 1986, the Board invited Dr. Avella's comments on where cuts could be made to realize certain desired levels of savings. Dr. Avella must have known that the Board was considering other alternatives when it requested information about reduction of administrative staff. On the eve of the budget defeat at the polls, the Board specifically asked Dr. Avella for his input on how Stahnten's duties could be redistributed to the remaining administrators on staff. One week later, at its public meeting of April 21, 1986, the Board listened to the objections of Dr. Avella, but nonetheless voted against his recommendation.

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(3) Redistribution of the Assistant Superintendent's Responsibilities

Historically, the Hillside school system has functioned for periods without any assistant superintendent on its staff, most recently from 1973 to 1977. In December 1977 the Board adopted the current job description for the position. The job description enumerated various responsibilities, including: providing leadership in improving instruction and curriculum development; assisting in the evaluation of administrators; recruiting and screening candidates for teaching positions; conducting in-service programs for all personnel; chairing all major educational committees; serving as advisor to the adult evening school; and the catch-all category of assuming any other duties which may be assigned by the superintendent.

Asked by the Board last April how these duties could be redistributed, Dr. Avella designated which could be handled by existing building principals and which would revert back to the superintendent himself. Without an assistant superintendent, the district still retains 14 administrators available to assume Stahnten's prior responsibilities. Significantly, Dr. Avella never suggested to the Board that redistribution of the duties would violate any state requirement. However, he urged that some of Stahnten's district-wide duties (such as responsibility for preparation of state-mandated reports) could be more logically performed by central office personnel. On the other hand, Board witnesses regarded the assistant superintendent's duties as "overlapping" or "duplicative" of those of the superintendent and other directors. While acknowledging that an assistant superintendent was "a nice thing to have," Board member Kevin Davis regarded it as a luxury rather than a necessity. County superintendent Gagliardi was critical of the Board for abolishing the position in April, without specifying exactly who would take over each of Stahnten's former duties. Curiously, Dr. Avella disagreed with this criticism, contending that there was no "dire need" to redistribute Stahnten's duties until the beginning of the new school year in September.

I FIND that it is feasible for the Board to redistribute Stahnten's old duties among the remaining administrators already on staff. Hence, it will be unnecessary for

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the Board to hire someone from outside the district or promote someone from within to replace Stahnten. Undoubtedly, the loss of the assistant superintendent will increase the workload of the superintendent and the remaining administrators. But the Board's action will also accomplish its intended result of reducing administrative staff by one extra person. Nothing on the record suggests that any indispensable work previously performed by the assistant superintendent will not get done with one less administrator. Clearly the transition would have been smoother if the Board had reassigned Stahnten's duties at the same time that it was abolishing her former position. Absent a showing of bad faith, however, the fact that the Board engaged in poor planning is not grounds for setting aside its otherwise valid action.

(4) Good Faith on the Part of the Board

Board members presented several plausible reasons in support of their decision to abolish the assistant superintendent position. Because the school administration's requested 1986-87 budget represented a one million dollar increase over the 1985-86 budget, the Board resolved to pare the request by some $400,000. In response to the Board's direction to reduce the budget by that amount, Dr. Avella proposed a series of budgetary cuts involving termination of 14 teachers, curtailment of the summer program and across-the-board decreases in instructional materials such as books and teaching supplies. Due to public outrage over the proposal to terminate so many teachers, the Board examined cost-cutting measures other than those recommended by Dr. Avella. Davis explained that the Board estimated it could realize savings of roughly $55,000 in salary and fringe benefits by terminating Washington and replacing her with Stahnten, enough money to restore two full-time teachers. Neither side called Martin Lynch, the school business administrator, to verify the precise amount of the savings. While Dr. Avella predicted that the remaining administrators would demand pay increases which would offset any savings, he conceded that future pay raises depend on the outcome of

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collective negotiations. On April 28, 1986, exactly one week after the Board voted to abolish the position of assistant superintendent, the Board restored a speech teacher and a home economics teacher to the payroll at a total salary expense of $43,550.

As further justification for the elimination of an administrative position, the Board pointed to the declining enrollment in the district. Enrollment figures show a steady decline of more than 18% in the student population during the five years from September 30, 1981 to September 30, 1985 (from 3,346 students to 2,729 students). Dr. Avella attributed the post-1982 decline to a backlash to court-ordered desegregation and indicated that the district has added 65 students at the beginning of the 1986-87 school year. He anticipated that further enrollment increases would occur. Nonetheless, the record reflects that enrollment has steadily declined in each of the five years from 1981-82 to 1985-86. Although Dr. Avella also stated that staffing decisions must be based on "the needs of the student population" rather than enrollment trends, he failed to articulate clearly why one administrator would be more valuable than two teachers in meeting those needs. Moreover, the electorate has consistently rejected the school budget at successive school elections. Board president Anthony Ferrara remarked that the voters have "always" rejected the budget. County superintendent Dr. Gagliardi indicated from experience that the Hillside school budget has been "generally defeated" at the polls.

Contrasted with the specificity of the Board's proofs, petitioners offered unsubstantiated charges about possible improper motives of individual Board members. Most serious was the allegation that abolition of Stahnten's position was intended as retaliation for her active participation in implementation of the court-imposed desegregation plan. Apparently the only basis for this charge was a comment by Anthony Ferrara during cross-examination that he does not believe in desegregation and that he removed his son from the Hillside school system to avoid the desegregation program. None of the other Board members who voted to abolish the administrative position voiced similar sentiments. Careful review of Ferrara's statement reveals that it was made in response to a question about <u>when</u> rather than <u>why</u> he proposed making administrative

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cuts. In proper context, it appears that Ferrara was simply trying to say that he did not think of the administrative cuts sooner because his son attended school in another district. Ferrara himself insisted that he did not actually decide how to vote until after listening to the public discussion at the April 21st meeting. However abhorrent Ferrara's personal philosophy, there is insufficient evidence to draw the inference that it improperly influenced his vote on the budget.

Petitioners alleged that Gennaro Messano and other Board members voted against Stahnten because of her past opposition to a favored candidate for appointment to a reading teacher job. Stahnten related how in July 1985 she had been approached by Messano for help in assuring that one Grace Conway receive the appointment. Dr. Avella, a close friend of Messano at that time, also testified that Messano pressured him to back Conway's appointment. Both Dr. Avella and his deputy, Rose Stahnten, resisted Messano's efforts and spoke in favor of another candidate whom they regarded as better qualified for the job. As it turned out, Messano did not need their support to achieve his goal. The Board ignored the recommendations of its chief administrators and appointed Conway to the position anyway. Since that incident, Stahnten has had a "feeling" that Messano was less friendly to her. She admits, however, that her suspicion about a link to the Board's later action is based purely on "rumors." Other Board members deny that Messano attempted to influence their votes on the resolution to abolish the position of assistant superintendent. One of them, Kenneth Davis, thought that Dr. Avella alone had opposed the Conway appointment and was surprised to learn that Stahnten had also been involved.

I FIND that the Board's resolution to abolish Stahnten's position was based on objective factors, including the substantial decline of enrollment, the potential reduction of teaching staff, and the difficulty of convincing voters to approve the school budget. Reasonable Board members could fairly conclude from the facts that the quality of education could best be preserved if the impact of any necessary budget cuts was shared by administrative personnel. Proofs establish that the elimination of one extra administrator has saved the jobs of two teachers. Given the availability of remaining administrators to assume the duties of assistant superintendent, the Board has sufficient

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assurance that all essential duties would continue to be performed. Regardless of whether or not a judge would make the same decision, it cannot be said that the choice of the elected representatives on the Board was arbitrary, unreasonable or capricious. Petitioners have failed to demonstrate convincingly that the Board's action was taken for ulterior motives, such as a desire to punish Stahnten or diminish her effectiveness. Speculation about why individual Board members might have voted a particular way is heavily outweighed by the Board's strong showing of the rational considerations which entered into its decision-making process.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Board's decision to abolish the position of assistant superintendent was a reasonable exercise of its statutory powers.

N.J.S.A. 18A:28-9 expressly empowers a local board of education to abolish any position, including that of assistant superintendent, "for reasons of economy or because of a reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause[.]" Generally, a reduction in force is "entirely within the authority of the board if done for reasons of economy." Klinger v. Cranbury Twp. Bd. of Ed., 190 N.J. Super. 354, 357 (App. Div. 1982); In re Maywood Bd. of Ed., 168 N.J. Super. 45, 55 (App. Div. 1979), certif. den. 81 N.J. 292 (1979). Recently, in Deutsch v. Hudson Cty Area Vo-Tech. Schs., 1985 S.L.D. ___ (St. Bd. April 3, 1985), the State Board of Education prescribed the following standard for review of the abolition of a particular position:

> . . . such decision is presumed correct and will not be disturbed unless it is demonstrated by a preponderance of the credible evidence that the board acted arbitrarily, capriciously or unreasonably. Thomas v. Morris Twp. Bd. of Ed., [89 N.J. Super. 372 (App. Div. 1965), aff'd 46 N.J. 581 (1966)]; Quinlan v. No. Bergen Twp. Bd. of Ed., [73 N.J. Super. 40, 46 (App. Div. 1962)]. Unless such proofs are offered, it is not the prerogative of a reviewing agency to substitute its judgment for that of the

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> local board. See Boult v. Passaic Bd. of Ed., [1939-40 S.L.D. 7, aff'd 135 N.J.L. 521 (E. & A. 1949)]. Hence, if a reasonable basis exists for the board's conclusion, it must be sustained. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 295 (App. Div. 1960) (Parallel citations omitted).

Notwithstanding such a stringent standard of review, Stahnten urges that the Board's action must be overturned for failure to consult adequately with the chief school administrator. She relies on N.J.S.A. 18A:17-16, which authorizes school boards by majority roll call vote to appoint assistant superintendents "upon nomination of the superintendent" and to remove such employees "by a like vote of the members of the board." Since the statute requires "nomination" by the superintendent for initial appointment, Stahnten assumes that consent of the superintendent is required for removal as well. Stahnten finds additional support for her view in the regulation which directs each local board to adopt efficient administrative procedures "after consultation with the chief school administrators." N.J.A.C. 6:8-4.7(a).

Surely a school board should be encouraged to consult regularly with the chief school administrator before making any important decision. But the fact that the superintendent's concurrence is mandated in connection with initial appointment of an assistant superintendent does not necessarily mean that the superintendent has veto power over removal. Anyone hired as assistant superintendent must be able to work cooperatively in the school system and, consequently, approval by the superintendent of his second in command may be deemed essential to development of a successful working relationship. If a school board decides for economy reasons to dispense with the services of an assistant superintendent, however, it is less crucial that the superintendent concur in the result. Where the Legislature wanted to make consent of the superintendent a prerequisite to Board action, it knew exactly what language to use. The fact that the Legislature made provision for removal of an assistant superintendent "by like vote" of the board without any corresponding mention of the superintendent suggests that the omission was intentional. What is missing from the statutory language cannot be supplied by a general regulatory provision applicable to "administrative procedures" as opposed to the hiring and removal of personnel.

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Cases cited by Stahnten are readily distinguishable from the present factual setting. Unlike the current case, Ross v. Jersey City Bd. of Ed., 5 N.J.A.R. 393 (Comm'r of Ed. 1981) dealt with appointment rather than removal of an assistant superintendent. In that context, the Commissioner ruled that the nomination requirement of N.J.S.A. 18A:17-16 is mandatory rather than permissive. The Commissioner's statutory interpretation rests on the expressed need for the chief school administrator to have assistants "with whom he can work and in whom he has confidence." 5 N.J.A.R. at 396. Thus, the rationale, on which the decision depends, does not pertain to situations where there will no longer be any assistant superintendent in the district. Although DiNardo v. Jersey City Bd. of Ed., 1984 S.L.D. ___ (Comm'r of Ed. 1984) did involve abolition of the assistant superintendent position, the action was taken without any consultation whatsoever. Under such circumstances, the Commissioner found that the board's failure to consult with its top executive constituted an abuse of discretion. As detailed in the findings of fact, the Hillside Board sought and received Dr. Avella's advice on where budget cuts could be made and how to redistribute Stahnten's duties. Even if the statute and regulation are read to require advance consultation, they still would not bind the Board to accept whatever recommendations the superintendent might make. Merely because the Board exercised its independent judgment and chose not to follow Dr. Avella's recommendations does not mean that the Board was derelict in any duty to seek the advice of its superintendent.

Next, Stahnten argues that the Board's action was violative of her tenure rights because of the reassignment of her former duties to persons with lesser seniority. As authority for this proposition, Stahnten relies on the Commissioner's decision in Polaha v. Buena Reg. Sch. Dist., 1984 S.L.D. ___ (Comm'r of Ed. 1984), rev'd on other grounds, 198 S.L.D. ___ (St. Bd. 198), rev'd and remanded 212 N.J. Super. 628 (App. Div. 1986). Polaha was a tenured supervisor who devoted a portion of his time to an adult school program and the remainder to a community education program. After purportedly eliminating Polaha's full-time position, the school district advertised for a part-time hourly employee to perform some of the same duties which Polaha had previously performed. Holding that the full-time position had been "bifurcated" rather than abolished, the Commissioner ordered that Polaha be awarded his pro-rated salary for the community education portion

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of his position. On appeal, the State Board of Education reversed and dismissed the case for petitioner's failure to comply with the 90-day time limitation. Subsequently, the Appellate Division reversed the State Board and remanded the matter to the Commissioner for consideration of whether the 90-day rule should be relaxed. 212 N.J. Super. at 635.

To the extent that the Commissioner's analysis in Polaha survives appellate review, it is consistent with a determination in favor of the Board here. Obviously, the outcome in Polaha was greatly influenced by the fact that the school board went outside the district to find a replacement for the terminated employee, creating the impression that its action was a subterfuge to rid itself of an unwanted employee. In the present case, however, the Board kept Stahnten on its staff and redistributed her former duties among its existing supervisory personnel. Petitioners have not referred to any law requiring each district to employ an assistant superintendent or prohibiting certified supervisors from performing the types of duties involved. Thus, the situation is different from Viemeister v. Prospect Park Bd. of Ed., 5 N.J. Super. 215 (App. Div. 1949), where the supervisory duties of a principal were illegally transferred to a teacher.

When a board of education abolishes a position, it does not necessarily follow that the duties associated with that position must be abolished as well. Klig v. Palisades Park Bd. of Ed., 1975 S.L.D. 168 (Comm'r of Ed. 1978). It is well established that the duties of an abolished position may be combined with the duties of another existing position where the consolidation is undertaken for sound educational reasons. Arangio v. Clifton Bd. of Ed., 1978 S.L.D. 207, 211 (Comm'r of Ed. 1978); Johnson v. West Windsor Twp. Bd. of Ed., 1964 S.L.D. 145 (Comm'r of Ed. 1964), aff'd 1965 S.L.D. 174 (St. Bd. 1974). Many of Stahnten's duties as assistant superintendent, such as providing leadership or evaluating administrators, are managerial functions which can be assumed by the superintendent himself. Blumstein v. Weehawken Bd. of Ed., 1985 S.L.D. ___ (St. Bd. Aug. 7, 1985). Other of her duties, such as interviewing applicants for teaching positions, chairing committees, or conducting in-service training, can be delegated to the building principals or department heads.

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This is not like the case where a school board merely transferred identical duties from one employee to another, without regard to certification requirements and without achieving any economic savings. Sampietro v. Ridgefield Park Bd. of Ed., 1986 S.L.D. ___ (St. Bd. Nov. 5, 1986). Nor is it like the case where a school board abolished tenured custodial positions and engaged a private subcontractor to perform the same work. Hunterdon Cent. High Sch. Ed. Ass'n v. Hunterdon Cent. Reg. High Sch. Dist., 1986 S.L.D. ___ (Comm'r of Ed. Dec. 24, 1986). Rather, the Board genuinely abolished a nonessential administrative position and offered Stahnten the next highest position to which she was entitled by virtue of her seniority. Washington and Stahnten have stipulated that the Board correctly applied the seniority regulations and that, as between the two of them, Stahnten has more seniority in the category of elementary principal. No other teaching staff member was treated more favorably or given any position to which Stahnten has any greater rights. Stahnten has no valid claim to any particular duties or assignment, but only to a preference for employment which the Board has already acknowledged.

Insofar as the good faith of the Board is concerned, that issue is largely a factual question which has been fully discussed above. Court decisions dealing with layoffs of public employees recognize that an employer's motives are immaterial if a position is unnecessary or useless and can be abolished without impairing efficiency. Greco v. Smith, 40 N.J. Super. 182 (App. Div. 1956); Santucci v. Paterson, 113 N.J.L. 192 (Sup. Ct. 1934). Here, of course, that problem does not arise, in view of the express finding that the Board's decision was motivated by legitimate considerations, including declining pupil enrollment in the district, the educational priority of retaining teachers and the necessity of gaining public support for passage of the budget. Consequently, the factual setting is not truly comparable to Ivan v. Princeton Reg. Day Sch. Dist., No. A-4873-82T3 (App. Div. March 12, 1984) (unreported), wherein the school board's action was found to be "infected" by the bad faith of school administrators who sought to retaliate against teachers for the filing of a grievance.

Lastly, petitioners assert that the incidental effect of abolishment of the assistant superintendent position, namely Wahsington's loss of employment, constitutes a

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violation of the Board's obligations under its affirmative action plan. Washington correctly states that the Commissioner of Education has approved the use of affirmative action plans "in the hiring process." As noted, Washington does not contend that the Board misapplied the seniority standards in determining who must go. Essentially, then, Washington's argument is an attack on the validity of the seniority system itself.

In striking down a provision of a collective bargaining agreement, the United States Supreme Court recently rejected virtually the same argument. A school board had contracted to protect certain minority group members against layoffs. Drawing a clear line between hiring (where race may be taken into account to remedy prior discrimination) and layoffs (where it may not), a plurality of the Court declared:

> While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive. We therefore hold that, as a means of accomplishing purposes that otherwise may be legitimate, the Board's layoff plan is not sufficiently narrowly tailored. Other, less intrusive means of accomplishing similar purposes — such as the adoption of hiring goals — are available. For these reasons, the Board's selection of layoffs as the means to accomplish even a valid purpose cannot satisfy the demands of the Equal Protection Clause. (Footnotes omitted)
>
> Wygant v. Jackson Bd. of Ed., 90 L.Ed. 2d 260, 274-75 (1986)

By the same token, the Commissioner's policy of affirmative action in the hiring of new school employees does not extend to layoffs of existing employees. Washington is not entitled to relief on that ground. Also, Stahnten is not entitled to relief because she is not a member of the class sought to be benefitted by the affirmative action program.

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Order

It is **ORDERED** that the relief requested by petitioners Stahnten and Washington is hereby denied.

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

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

April 1, 1987
DATE

KEN R. SPRINGER, ALJ

APR 1 1987
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 6 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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ROSE S. STAHNTEN AND BARBARA A. WASHINGTON,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Pursuant to N.J.A.C. 1:1-16.4a, b and c, Petitioner Stahnten's primary exceptions were untimely. Accordingly, the Board's reply exceptions to those exceptions were not considered in this decision. However, Petitioner Washington's primary exceptions were timely, as were the Board's reply exceptions thereto.

Petitioner Washington filed one exception to the initial decision:

> THE ADMINISTRATIVE LAW JUDGE FAILED TO ADDRESS THE ISSUE REGARDING THE VIOLATION OF N.J.A.C. 6:4-1.1 et seq.

Petitioner Washington excepts to the ALJ's conclusion in the initial decision wherein he determined that "Washington's argument is an attack on the validity of the seniority system itself." (Exceptions, at p. 1, quoting the Initial Decision, ante) Rather, her argument is that the abolition of the position of assistant superintendent was arbitrary, unreasonable and/or capricious because the elimination of said position had a direct, negative impact on the Hillside School District's affirmative action program.

Petitioner Washington contends that the ALJ was obliged to balance a board of education's right to abolish a position with its duty to comply with the mandates of N.J.A.C. 6:4-1.1 et seq. and that the ALJ failed to address this matter. She argues that the Board's duty to comply with its own adopted affirmative action plan outweighs its authority to abolish the position of assistant superintendent. Petitioner Washington concedes that absent a substantial negative impact on the affirmative action plan, the Board herein would have the discretion to reorganize the administration of the district by adding or deleting positions. She argues:

> ***However, in this matter, the abolition of the position of Assistant Superintendent frustrates

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> the legitimate governmental objective of correcting a previous pattern of discrimination. Petitioner Washington was the only black, female in an administrative or supervisory position. In fact, the only other female in the aforesaid type of position is Rose Stahnten, whose position of Assistant Superintendent was abolished. Milton James, a high school assistant principal is the only other black. (Exceptions, at p. 2)

Relying upon N.J.A.C. 6:4-1.3(b)2, 6:4-1.7 and Appel et al. v. Board of Education of the City of Camden, 1978 S.L.D. 607, aff'd State Board 617, Petitioner Washington argues that the Board identified two groups as being underutilized in its administrative and supervisory staff: females and minorities. She avers that "[n]ot only did respondent not take appropriate steps to eliminate the underutilization, it took action that exacerbated the problem and frustrated its own affirmative action objectives." (Exceptions, at p. 3)

Further, in suggesting that the ALJ avoided dealing with the issue of the Board's affirmative action plan as it affected her, Petitioner Washington adds that since she is not attacking the validity of seniority, the decision of Wygant v. Jackson Board of Education, 90 L.Ed. 2d 260, 274-75 (1986) is neither relevant nor material to this matter.

Petitioner Washington requests that the Commissioner reject the initial decision and determine that the right of the Board to abolish a position is outweighed by its statutory duty to comply with its affirmative action plan and, thus, the decision to abolish a position of assistant superintendent was arbitrary, unreasonable and capricious.

The Board's reply to the above exceptions avers that the ALJ correctly stated that Petitioner Washington's argument was an attack on the validity of the seniority system. The Board states that the Courts have ordered Hillside to integrate. While conceding that N.J.A.C. 6:4-1.1 et seq. does conflict with N.J.S.A. 18A:28-9, the Board contends that "board[s] must have the ability to make management decisions, and they cannot legitimately do so if they are shackled by an affirmative action plan that must be rigidly adhered to." (Board's Reply Exceptions, at p. 2) The Board further argues, "Minorities must gain seniority like everyone else and that is by the passage of time. If affirmative action plans were paramount, then race would control who was employed and who was not employed." (Id., at p. 2)

The Board cites Wygant, supra, as being apposite to the instant matter and states the holding of that case as declaring unconstitutional a Michigan school board's plan for layoff of teachers that gave preference to members of minority groups. The Board is in accord with the ALJ's reliance upon Wygant in this matter. Further, the Board cites the opening sentence of N.J.S.A.

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18A:28-9 for its proposition that seniority determinations outweigh affirmative action plans. The statute 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***.

The Board asserts that this statute indicates that no other law can prohibit the Board from properly abolishing positions in the exercise of its management prerogatives. Further, it argues, "The board cannot determine whether a black should stay and a white should go because 'seniority' is the polestar *** as is set forth in N.J.S. 18A:28-11 et seq." (Reply Exceptions, at p. 3)

The Board further posits that Appel, supra, is inapposite to the instant matter. "The language in this straight affirmative action case is good, proper and true, but it simply has no applicability in our case. The Appel case didn't have anything to do with seniority or the right of a board to abolish a position." (Reply Exceptions, at p. 3) The Board avows it "was between a 'rock and a hard place' with reference to the bumping of the Petitioner Washington but it had to follow the statute and as a result the least senior principal, who was tenured, and had been employed for four (4) years, had to be 'bumped.' It had no choice even though it wished otherwise." (Id., at p. 3)

The Board submits that the initial decision should be affirmed in its entirety.

Upon review of the record in this matter, including a careful perusal of the transcripts of the hearing below, the Commissioner concurs with the findings and conclusion of the ALJ that the Board's decision to abolish the position of assistant superintendent was a reasonable exercise of its statutory powers for the reasons that follow. The issues will be addressed seriatim.

Issue I queries whether the Board satisfied its obligation to consult with the chief school administrator before abolishing the position in question.

Having reviewed the testimony of the witnesses, the Commissioner is in accord with the ALJ that testimony differed sharply on the extent to which the Board had sought the advice of its superintendent before voting to abolish the assistant superintendent position. While Dr. Gagliardi's testimony, as an expert in New Jersey Public School Administration (Tr. I - 21, 26) suggested that the requirement of the superintendent's approval should be extended to cover both the appointment and the abolition of positions in the school district and that, based on his review of the pertinent Board minutes, inadequate consultation was carried out by the Board with the superintendent on the abolition of Petitioner Stahnten's position as assistant superintendent, there was considerable testimony elicited from Board Members Ferrara, Davis and Pydeski to suggest

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that there was indeed adequate discussion between Dr. Avella and the Board on this subject. (See Initial Decision, ante; see also Board's Post-hearing Brief, at pp. 8-13.) The Commissioner concurs with Dr. Gagliardi's testimony that while there is no requirement in law that obliges the Board to consult with its superintendent in other than hiring situations, the superintendent's approval should be sought and considered by the Board in abolishing positions.

Notwithstanding the above, however, the Commissioner finds and determines that petitioners have failed to prove, by a preponderance of the credible evidence in the record, that the Board did not receive Dr. Avella's opinion before voting to abolish the assistant superintendent's position.

Issue II posits whether the position of assistant superintendent was genuinely abolished within the meaning of N.J.S.A. 18A:28-9. There is no question that the position of assistant superintendent was abolished and that Dr. Avella had indicated to the Board which duties of that position could or would be distributed among other administrators already on staff. Notwithstanding this finding, the Commissioner notes Petitioner Stahnten's argument in support of her retention as assistant superintendent, citing Polaha v. Board of Education of the Buena Regional School District, Atlantic County, decided by the Commissioner December 17, 1984, rev'd State Board October 16, 1985, rev./rem. N.J. Superior Court October 7, 1986, Commissioner's Decision on Remand November 20, 1986. She posits whether her duties, if redistributed, could be "effectively" carried out without disruption of the thorough and efficient education of the children of this district. (Initial Decision, ante) In this regard, the Commissioner takes notice of the ALJ's observation that Dr. Avella himself contended "that there was no 'dire need' to redistribute Stahnten's duties until the beginning of the new school year in September." (Id., ante)

Moreover, a careful review of the transcripts reveals no significant demonstration by Petitioner Stahnten to convince the Commissioner that the duties of the assistant superintendent could not be effectively carried out by the superintendent in conjunction with other administrative staff. Neither Dr. Avella nor County Superintendent Gagliardi describe, to any appreciable extent, a set of circumstances existing in the Hillside District which would permit the Commissioner to conclude that the absence of the services of an assistant superintendent would result in a less than thorough and efficient education, notwithstanding such statement as that made by Dr. Gagliardi that to his knowledge all other urban schools in Union County do have assistant superintendent positions.

As to the other cases and arguments proffered by Petitioner Stahnten in support of her contention that the Board's action was violative of her tenure rights, the Commissioner adopts as his own the reasoning found in the initial decision at pages 14-16, distinguishing Polaha, supra, Viemeister v. Prospect Park Bd. of Ed., 5 N.J. Super. 215 (App. Div. 1949) and the panoply of other cases from

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the instant matter. Accordingly, the Commissioner finds and determines that the position of assistant superintendent in the Hillside District was genuinely abolished within the meaning of N.J.S.A. 18A:28-9.

Issue III concerns whether the Board's action was taken in good faith. Initially, the Commissioner notes, as did the ALJ, that no issues concerning the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., are raised in this proceeding "except insofar as they may have some bearing on the general issue of the Board's good faith." (Initial Decision, ante)

The Commissioner further expresses his concern as manifested at several places in the record of inappropriate action on the part of an individual Board member seeking to influence the recommendation of the administration to hire an individual based upon pressures brought to bear by apparently influential individuals in the community. The Commissioner condemns such machinations and directs that such behavior cease and desist in all future interactions between Board members and administrators in this district. cf., In the Matter of the Tenure Hearing of Richard Onorevole, School District of the Township of Weehawken, decided by the Commissioner January 22, 1987.

Notwithstanding such determination by the Commissioner, there is nothing in the record to demonstrate that the Board's choice of a candidate other than the one recommended by the administration generated the ill will toward Petitioner Stahnten that she avers resulted in the Board's decision to eliminate her position. Neither does the record substantiate Petitioner Stahnten's contention that her role in the desegregation activities of the district were an additional basis for the Board's abolition of her position. The Commissioner so determines.

Further, the Commissioner concurs with the ALJ that the Board's decision was motivated by legitimate considerations, including declining pupil enrollment in the district and the educational priority of retaining teachers over administrators. The Commissioner finds no merit, however, in the Board's third rationale for its abolition of the position of assistant superintendent, that is, the necessity of gaining public support for passage of the budget. This rationale is not borne out by the facts because the official decision to abolish the position was made after the budget was rejected by the voters in Hillside. Insofar as this determination conflicts with the finding of the ALJ, the initial decision is modified. Further, the Commissioner corrects the ALJ's recitation concerning Lawrence Ivan and Thomas Murray v. Board of Education of the Princeton Regional School District et al., 1982 S.L.D. 1287, aff'd State Board May 4, 1983, reversed Superior Court, Appellate Division March 12, 1984, remanded N.J. Supreme Court June 19, 1984, Decision on Remand September 28, 1984, aff'd State Board April 3, 1985, aff'd Superior Court, Appellate Division November 19, 1985, cert. den. 103 N.J. 472 (1986). On remand from the Appellate Division, the Commissioner found the board's action was not "infected"

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by the bad faith of school administrators and, thus, the case stands more strongly for the proposition advanced by the Board herein, that its action in choosing to abolish Petitioner Stahnten's position was within its prerogative.

Finally, Issue IV asks whether the Board's action is contrary to its legal responsibilities under the affirmative action program mandated by N.J.A.C. 6:4-1.3. In regard to whether the incidental effect of abolishment of the assistant superintendent position, that is, Petitioner Washington's loss of employment, constitutes a violation of the Board's obligations under its affirmative action plan, the Commissioner cannot agree with petitioners that the right of the Hillside Board to abolish a position is outweighed by its statutory duty to comply with its affirmative action plan. In this regard, the Commissioner concurs with the Board's Reply Exceptions to Petitioner Washington's Exceptions and adopts them as his own. In particular:

> It is true that N.J.A.C. 6:4-1.1 does come into conflict with N.J.S. 18A:28-9 but the board must have the ability to make management decisions and they cannot legitimately do so if they are shackled by an affirmative action plan that must be rigidly adhered to.
>
> Minorities must gain seniority like everyone else and that is by the passage of time. If affirmative action plans were paramount, then race would control who was employed and who was not employed.
>
> The Administrative Law Judge was correct in citing Wygant v. Jackson Board of Education, 90 L. Ed. 2nd 260, 274-75 (1986). In Wygant, the United States Supreme Court did on May 19, 1986, hold unconstitutional a Michigan school board's plan for layoff of teachers that gave preference to member[s] of minority groups.
>
> The Court upheld a suit by white teachers in Jackson, Michigan, who contended that their right to equal protection of law was violated when they were laid off while blacks with less seniority kept their jobs. The layoff followed an affirmative action program which was part of a collective bargaining agreement, aimed at keeping minority members on staff as role models.
>
> The Court in Wygant agreed with the Justice Department's arguments that governments must not lightly grant racial preferences and that there was not strong enough justification for the layoff plan.

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The U.S. Supreme Court says that layoffs cannot be by way of race. The only proper method of layoff is by seniority. This is set forth by statute and nothing in the affirmative action regulations contradicts that. As a matter of fact N.J.A.C. 6:4-1.6 talks about "employment" practices and certainly in no way suggests "discrimination" in layoff matters. This is exactly what the Supreme Court in Wygant, supra, is saying.

As a matter of fact, N.J.S. 18A:28-9 starts out by saying

> 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....

This statute indicates that no other law can prohibit the Board of Education from properly abolishing positions in the exercise of their management prerogatives. The board is precluded from determining what personnel shall be discharged because the board by law is concerned only with the abolition of positions. The board cannot determine whether a black should stay and a white should go because "seniority" is the polestar *** as is set forth in N.J.S. 18A:28-11 et seq.

The Hillside Board of Education is mindful of its obligations pursuant to its affirmative action plan and this is brought out on page five (5) of the Administrative Law Judge's opinion, specifically at the first full paragraph. At the time the assistant superintendent's position was abolished, the board also wanted to abolish one assistant principal's position. The board was then advised that a black assistant principal had less seniority than a white assistant principal, as a result the board no longer pursued the abolishment of that position because the black administrator would be "bumped" while the white administrator would stay. The board did not want to lose the less-senior black administrator (Milton James) so the idea of the abolishment of the position of assistant principal was dropped.

Petitioner Washington quotes some very nice language from Appel et al. v. Board of Education, City of Camden, 1978 S.L.D. 609, aff'd, State Board 617. The language in this straight

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> affirmative action case is good, proper and true, but it simply has no applicability in our case. The Appel case didn't have anything to do with seniority or the right of a board to abolish a position.
>
> The Hillside Board did not want to lose the black, female principal (Petitioner Washington) but as long as the former assistant superintendent had seniority over the Petitioner Washington, the board had no choice because the law tells us who bumps who (sic). The board, by law, cannot make that determination.
>
> The board was between a "rock and a hard place" with reference to the bumping of the Petitioner Washington but it had to follow the statute and as a result the least senior principal, who was tenured, and had been employed for four (4) years, had to be "bumped." It had no choice even though it wished otherwise. (emphasis in text)
>
> (Reply Exceptions, at pp. 2-3)

Insofar as the ALJ finds that Petitioner Stahnten is not entitled to relief because "she is not a member of the class sought to be benefitted by the affirmative action program" (Initial Decision, ante), the Commissioner does not agree since Petitioner Stahnten is a woman. However, he does concur with the ALJ's determination that affirmative action programs are designed to assure opportunity for employment and not a protection against reductions in force, which are governed by seniority determinations.

Based upon his studied review of the record of this matter, the Commissioner notes the fact that the process of continuing the implementation of the desegregation plan has apparently not proceeded during the pendency of this matter. Notwithstanding the fact that the Commissioner's decision affirms the initial decision of the ALJ herein, which in turn affirms the action of the Board in eliminating the position of assistant superintendent in the Hillside District, such affirmance may not be construed as authorizing a halt to the ongoing requirements that the Hillside Board of Education address its responsibilities to appropriately remedy the racial imbalance that exists in Hillside.

He therefore directs the Hillside Board of Education, in cooperation with the County Superintendent of Schools, to take such steps as are necessary to carry out its responsibility in this regard.

Accordingly, the recommended decision of the Office of Administrative Law is adopted in part, modified in part. The Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

May 15, 1987

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ROSE S. STAHNTEN AND BARBARA WASHINGTON,	:	
PETITIONERS-APPELLANTS,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, May 15, 1987

For the Petitioner-Appellant Washington, Wayne J. Oppito, Esq.

For the Petitioner-Appellant Stahnten, Jeffrey A. Bartges, Esq.

For the Respondent-Respondent, Meskin and Ziegler (Sanford A. Meskin, Esq, of Counsel)

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

September 2, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 6626-85
and EDU 418-86
(CONSOLIDATED)
AGENCY DKT. NOS. 345-10/85
and 401-11/85

ARTHUR L. PAGE,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON,
Respondent,
and
JEANNE PEARSON AND CLIFFORD ZDANOWICZ,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON,
Respondent.

Mark J. Blunda, Esq., for the petitioners (Oxfeld, Cohen & Blunda, attorneys)

Robert B. Rottkamp, Jr., Esq., for the respondent (Rottkamp & Flacks, attorneys)

Record Closed: February 24, 1987 Decided: April 1, 1987

BEFORE BEATRICE S. TYLUTKI, ALJ:

Arthur L. Page filed a petition on October 7, 1985, with the Commissioner of Education (Commissioner), seeking remedies for wrongs allegedly flowing from a decision by the Trenton Board of Education (Board) to reorganize its administrative staff structure

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(EDU 6626-85). Thereafter, Jeanne Pearson and Clifford Zdanowicz filed a similar petition with the Commissioner on November 27, 1985 (EDU 418-86). The respondent denied the allegations set forth in both petitions, and the matters were referred to the Office of Administrative Law for determinations as contested cases pursuant to N.J.S.A. 52:14F-1 et seq.

PROCEDURAL HISTORY

As to the petition filed by Dr. Page, a prehearing conference was held on January 27, 1986, before Administrative Law Judge Joseph Lavery. At that time, it was recognized that Ms. Pearson and Mr. Zdanowicz had also filed a petition and Robert B. Rottkamp, Esq., on behalf of the Board, indicated that he would file a motion to consolidate the matters. Judge Lavery issued a prehearing order on January 31, 1986.

After receipt of the motion to consolidate and a letter dated February 27, 1986, indicating that the pertitioners did not object to the consolidation, Judge Lavery issued an Order of Consolidation on March 17, 1986. In addition, after receipt of cross-motions filed by the parties relating to the status of the Corrective Action Plan (CAP) for the Trenton School District, Judge Lavery issued an order on April 22, 1986, in which he concluded that the CAP continued in effect during the period of time in issue in the matter (EDU 6626-85).

Thereafter, the consolidated matter was transferred to Administrative Law Judge August E. Thomas, and by letter dated June 9, 1986, Judge Thomas recused himself because of his familiarity with at least one of the litigants. The consolidated matter was then transferred to the undersigned. On June 17, 1986, there was another prehearing conference, at which time the parties agreed that the issues are:

A. Whether Arthur L. Page should be returned to his former title and duties of assistant superintendent for personnel and support services. Mr. Page complains that these duties were improperly subsumed under the new titles of executive assistant (later changed to administrative assistant to the superintendent) and director of personnel.

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B. Whether Jeanne Pearson should be returned to her former title and duties of director "C"- field services/affirmative action officer.

C. Whether Clifford Zdanowicz should be returned to his former title and duties of director "C"- certified personnel

D. Whether the Board's reorganization and the specific transfer of Dr. Page were actions taken in retaliation for his appeals from earlier Board actions.

E. (1) Whether the Board based its reorganization decision and action on Kittrels' "District Administrative Organization Study," and if so,

(2) Whether the numerous flaws cited by petitioners as characterizing that report render the Board's decision unlawful.

F. Whether the Board's reorganization decision and implementation actions are in conflict with the CAP and are thus arbitrary, capricious and unreasonable.

G. The remedies that petitioners seek are:

(1) That the Board's reorganization plan be ruled null and void;

(2) That petitioners be returned to their prior titles; and

(3) That petitioners be awarded counsel fees and costs.

A prehearing order listing these issues was sent to the parties on June 25, 1986, and an amended complaint consistent with the issues was sent to the Commissioner on June 27, 1986. Mr. Rottkamp submitted an answer to the amended petition by letter dated July 11, 1986.

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In this consolidated matter, the petitioners were initially represented by members of the law firm of Murray and Granello. After a motion to disqualify counsel was filed by Mr. Rottkamp on July 16, 1986, I was notified by the Murray and Granello law firm in August 1986, that it was removing itself from the consolidated matter and would be replaced by Mark J. Blunda, Esq., of the law firm of Oxfeld, Cohen and Blunda.

The hearing took place on October 1, 3, 6, 9, 10 and 28, 1986, and the record in the consolidated matter was to close on December 19, 1986. Since there was a delay in the receipt of the transcripts, by letter dated December 23, 1986, I gave the parties additional time to submit their briefs. After receipt of briefs and the lapse of the period allowed for the submission of a reply brief by the petitioners, the record in this consolidated matter closed on February 24, 1987.

Part I
FACTUAL FINDINGS

Prior to consideration of the facts relating to the specific allegations of the petitioners, it is appropriate to set forth certain background facts which are relevant to this consolidated matter.

CORRECTIVE ACTION PLAN

An order to show cause was issued by the Commissioner on February 5, 1979, which required the Board and its Superintendent of Education to show cause why the Commissioner should not exercise his broad supervisory powers and take appropriate action to ensure that a thorough and efficient system of public schools be operated for the Trenton School District. After conducting a hearing, the Assistant Commissioner of Education, Division of Controversies and Disputes, recommended the adoption of the CAP, In the Matter of the Trenton Bd. of Ed., 1979 S.L.D. 648. On November 7, 1979, the CAP was adopted by the Commissioner, 1979 S.L.D. 699, and approved by the State Board of Education, 1979 S.L.D. 707. This decision was affirmed by the Appellate Division of the Superior Court, 176 N.J. Super. 553 (App. Div. 1980), and the New Jersey Supreme Court, 86 N.J. 327 (1981).

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The CAP provides for the appointment of a monitor general to act as general supervisor of all activities within the Trenton School District. As to personnel functions, the CAP provides that the monitor general and the county superintendent shall review all personnel recommendations, and that:

> 3. Such personnel recommendations shall be presented to the Board for formal approval. The Board shall not be permitted to table such recommendations, but shall conduct a recorded roll call vote upon them as required by law. If any Board member wishes to oppose such recommendation, he/she shall state such objection which shall be recorded in the minutes of the meeting. No recommendation of personnel shall be identified by any code designating sex and/or race.
>
> a. No recommendations for the appointment, transfer or promotion of certificated support service personnel shall be made by members of the Board.
>
> b. The Commissioner shall declare null and void the Board's policy requiring the recommendation of three candidates for each position of employment.
>
> c. The Board shall consider personnel matters only once each month as a committee of the whole.
>
> d. The Board's personnel committee shall be dissolved and shall cease to function. [1979 S.L.D. at 696-697]

On March 11, 1981, the Commissioner and the monitor general, Dr. Anthony Catrambone, created a task force consisting of 25 area leaders in business and education to study the central administration of the Trenton School District. In its first report, the Trenton Task Force found:

> With the exception of the office of the Business Administrator, no clearly defined organizational reporting responsibilities exist in

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> Trenton School District's central administration. This results in poor communication, questionable administration, and a corresponding absence of accountability.
>
> School Board interference in the management of the Trenton School District has undermined the Superintendent's administrative authority. Board members maintain direct lines of communication with district employees and use information from these contacts to intervene in administrative matters. Board members participate directly in negotiations to hire, terminate or promote individuals. The Board should approve or disapprove administrative recommendations. The problems created by the Board's interference are severe. [P-25 at p. 1.]

Having identified the problem, the Trenton Task Force recommended that: (1) the Board must not participate directly in the administration of the Trenton School District; (2) the superintendent must develop and present for Board approval an organization chart that identifies lines of responsibility, and the district activities must be separated into three function areas — educational programs, business, and support services; (3) the Board must employ a consulting firm to study and make recommendations concerning the classification and compensation levels of administrative positions not in any barganing unit; (4) the superintendent must request desk audits of all positions; (5) the Board must employ a professional negotiator to handle negotiations with bargaining units, and (6) the superintendent needs to install word processing equipment (P-25 at pp. 3-6).

As to these specific recommendations, the Trenton Task Force in its second report, dated February 1982, noted that there had been little or no progress as to the implementation of the recommendations, except that an organizational chart had been established by the superintendent (P-26 at p. 2, sect. I).

In his final report, Dr. Catrambone stated the improvements that had been implemented in the Trenton School District and recommended the termination of the supervision of the remedial plan by the monitor general in March 1982 (P-24). In his report, Dr. Catrambone stated:

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> Administrative procedures have been established to improve district efficiency. The recomendations in the Trenton Task Force reports, when fully implemented, will contribute significantly to the business and management efficiency of the district. [P-24 at p. 3]

While Dr. Cantrambone was the monitor general, Dr. Page's title was changed from assistant superintendent for personnel to assistant superintendent for personnel and support services (R-2).

Dr. Cantrambone served as monitor general until March 1982, and during that period, Dr. Jean F. Emmons was the superintendent of education. Dr. Emmons resigned on February 15, 1982, and Dr. Pasquale Maffei was appointed the interim supervisor. Dr. Crosby Copeland, Jr., who has been employed by the Board for 28 years, became the superintendent in July 1982.

The 1985 Organization Plan

In the latter part of 1984, the Board (consisting of elected board members) issued a request for proposals regarding a study of the administrative organization of the Trenton School District (R-1). Several bids were received from consultants, and the Board chose the lowest responsive bidder, Kittrels Educational and Training Systems, Inc. (R-1), which was the consulting firm that had completed the August 1984 study of secretarial positions in the school district (R-5).

In November 1984, the voters approved a referendum which provided that future board members shall be appointed by the mayor. On February 1, 1985, a new Board (consisting of appointed board members) took office. Except for Pedro Medina, the new Board president, none of the newly appointed board members had served on the previous elected board.

Alonzo W. Kittrels, the president of Kittrels Educational and Training Systems, Inc., was the person primarily responsible for conducting the administrative organization study, and he met with the Board on several occasions after February 1, 1985, regarding the study.

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At the hearing, Mr. Kittrels testified as to his philosophy regarding organization and the problems he felt existed with the then current administrative structure (R-2). In conducting the study, Mr. Kittrels stated that he interviewed the administrative staff members, the county superintendent and Dr. Copeland, as well as teachers, parents and community leaders. Mr. Kittrels stated that Greta Shepherd, the county superintendent, thought an organization study was necessary as recommended by the Trenton Task Force, and her only concern was that the organization not be used to create jobs for the friends of influential persons.

In his report, Mr. Kittrels set forth an organization chart for the Trenton School District (Kittrels Plan), and he recommended new positions and the elimination or modification of 22 positions within the then current structure (P-10). Mr. Kittrels did not refer in his plan to any individuals employed by the Board and his report does not make any recommendations as to who should fill any of the recommended positions (P-10). According to Mr. Kittrels, his study addressed functions and was not aimed at one person or area of responsibility. However, he admitted that Donald D. Jones, a Board member, expressed a concern about Dr. Page's position and other people who were not Board members made adverse comments about Dr. Page, who was called a "power broker." Mr. Kittrels denied that the recommendations in his study were influenced by any Board members or by the superintendent of education.

The Kittrels Plan eliminates the titles of assistant superintendent for personnel and support services (the title held by Dr. Page) and the five director "C" positions under the assistant superintendent for personnel and support services (Ms. Pearson and Mr. Zdanowicz held director "C" titles) (R-2, P-10 at p. 22). The Plan transfers the personnel functions, excluding labor relations, grievances and the affirmative action program, to a new position of director of personnel (P-10 at p. 46), and the other responsibilities of the assistant superintendent for personnel and support services are transferred to other titles (P-10 at pp. 49-51). Mr. Kittrels also recommended the creation of the position of executive assistant to the superintendent (P-10 at p. 44), with responsibility for labor relations, grievance hearings, and the affirmative action program (P-10 at p. 50).

Mr. Kittrels stated that he made these recommendations since he concluded that there was no organizational justification for giving departmental status to the personnel office (P-10 at pp. 26-27), that labor negotiations, grievance procedures and the

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affirmative action program should be assigned to a staff person who works directly for the superintendent (P-10 at p. 33), and that unrelated responsibilities such as food and transportation should not be part of the personnel office (P-10 at p. 32).

In May 1985, the Kittrels Plan (P-10) was submitted to the Board, and at the public meeting it was announced that if anyone had any questions regarding the organization plan, they were to contact Mr. Kittrels, who would respond to their questions.

Upon receiving the Kittrels Plan, Mr. Medina appointed an ad hoc committee consisting of three Board members, with Dr. Copeland and the school board attorney as advisors, to study the Kittrels Plan and to make recommendations to the Board. At the hearing, both Dr. Copeland and Mr. Jones, an ad hoc committee member, stated that the committee met several times, but played virtually no role in the development of the organization plan and did not submit a report to the Board.

After reviewing the Kittrels Plan and evaluating its impact on the present staff members and on educational services, Dr. Copeland prepared an organization plan, which in part was based on the Kittrels Plan (R-3, R-4). Dr. Copeland stated that he prepared the plan quickly since the Board wanted to reorganize before the start of the new school year.

In his recommended organization plan, Dr. Copeland also eliminated the titles held by the three petitioners in this matter, and he took the responsibilities for union negotiations, grievances and the affirmative action program away from the personnel office. Labor negotiations were to be handled by a consultant reporting to the superintendent, and the grievance procedure and affirmative action programs were to be in his office. As part of his organization plan, Dr. Copeland suggested a new title of assistant superintendent for pupil and support services, and he recommended that Dr. Page be transferred to this position since he felt that Dr. Page was qualified for it and would do a good job. At the hearing, Mr. Jones testified that he suggested to Dr. Copeland that Dr. Page be given a lateral change in title.

Dr. Copeland presented his organization plan to the ad hoc committee at its first meeting and then to the Board on June 24, 1985. The Board accepted the organization plan presented by Dr. Copeland and adopted the implementing motions on

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June 24 and 25, 1985 (P-1), and transferred personnel, including the three petitioners, to 54 new positions on July 9, 1985 (P-1). Thereafter, Dr. Copeland was contacted by Ms. Shepherd about the unrecognized titles that had been created by the Board as part of the organization plan; however, she did not question the right of the Board to adopt a new organization plan. Dr. Copeland submitted the unrecognized titles as well as the qualifications for certain positions to Ms. Shepherd for her approval (P-6). Several of the Board members were upset with the personnel office about the fact that the unrecognized titles had not been submitted to Ms. Shepherd before the Board acted on the organization plan. However, Dr. Copeland indicated that it was his fault since Dr. Page had not been involved in the organization study and had not been asked to get any approvals from Ms. Shepherd. At its August 7, 1985 meeting, the Board had to rescind the abolishment of 33 new titles and to transfer 33 people back to their previous titles, including Ms. Pearson and Mr. Zdanowicz (P-8). By memorandum dated August 29, 1985, Ms. Shepherd approved titles and made some modifications, and she also expressed a concern that certain Board actions were inconsistent with the CAP; however, the memorandum does not clearly identify her specific concerns (P-12). At its August 29, 1985 meeting, the Board completed the implementation of the 1985 organization plan (P-13).

In general, and depending on attendance, the motions implementing the organization plan recommended by Dr. Copeland received the affirmative votes of a majority of the Board members—specifically, Mr. Medina, Donald B. Dileo, Philip Plumeri and Robert T. Rahl (P-1, P-8, P-13). Abstaining or voting in the negative were Dr. W. Curtis Bank, Mr. Jones and Juanita M. Joyner (P-1, P-8, P-13).

Two of the Board members who abstained or voted against these motions testified at the hearing. Mr. Jones stated that before he was appointed to the Board, he had expressed his opposition to an organization study. As a Board member and a member of the ad hoc committee, Mr. Jones had the opportunity to review both the Kittrels Plan and the plan prepared by Dr. Copeland. Mr. Jones recognized that the organization plans were intended to establish better communications; however, he felt that the plans were also intended to break up the personnel office, and to discriminate against Dr. Page while taking care of other employees. Ms. Joyner felt that the organization plan was pushed through without sufficient time for evaluation, and she felt that it had the greatest impact on the personnel office. Ms. Joyner stated that even though all the black members of the Board voted against or abstained from voting on the plan, this was not done as a block vote because of a race-related concern.

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Also at the hearing, Alexander Brown, a former board member, testified it was his opinion that the organization study was aimed at the personnel office, and the appointed Board members wanted to weaken the personnel office to make it easier for them to get approvals for the job applicants they wanted.

On behalf of the Board, Dr. Lawrence Kaplan, an assistant professor at Rutgers University and an expert on organization structure and behavior (R-6), stated that he had reviewed the background information relating to the Board's adoption of the 1985 organization plan. Based on this review, Dr. Kaplan concluded that the prior organization structure was inadequate since it lacked clear lines of authority, resulting in poor communications, and required people to do things which could have been done more efficiently in another way. As to the Kittrels Plan, Dr. Kaplan stated that it was a classic organization plan and was an attempt to upgrade and improve the existing organizational structure. Dr. Kaplan stated that the 1985 organization plan adopted by the Board improved the Kittrels Plan and provides an effective structure that has strengthened the role of the superintendent and is better designed to deliver educational services.

According to Mr. Kaplan, the division of the administrative office of a school district into the three functional departments of business, curriculum and services is a logical organizational structure and is the type of structure used in most school districts in New Jersey.

PETITIONERS

Dr. Page has been employed by the Board since September 1, 1957, initially as an elementary school teacher, and he has held various administrative positions with the Board. Dr. Page is certified as an elementary school teacher, a health and physical education teacher, a principal and a school administrator.

Prior to this matter, Dr. Page filed two petitions with the Commissioner relating to his job titles. In 1973, the Board abolished Dr. Page's position as assistant to the assistant superintendent of personnel and he was demoted to a teaching position. After an administrative hearing, the Commissioner ruled that the abolishment of this position was not done in good faith and Dr. Page was restored to his former position. Page v. Trenton Bd. of Ed. and Pasquale A. Maffei, 1973 S.L.D. 704, remanded by St. Bd.

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of Ed. (May 1, 1974), decision on remand, 1975 S.L.D. 644, aff'd. by St. Bd. of Ed., 1976 S.L.D. 1158, appeal dismissed, N.J. App. Div. (September 16, 1976, A-1839-75) (unreported). Several years later, Dr. Page held the title of executive director of personnel and he filed a petition with the Commissioner alleging that the Board had discriminated against him and that by reason of his job duties and length of service, he was entitled to the tenured position of assistant superintendent for personnel. After an administrative hearing, it was determined that Dr. Page was entitled to the position of assistant superintendent for personnel and was entitled to tenure in that position as of June 30, 1978. Page v. Trenton Bd. of Ed., 1980 S.L.D. 1193, aff'd by Comm'r (October 20, 1980), aff'd by St. Bd. of Ed. (June 3, 1981).

As already stated, Dr. Anthony R. Catrambone, while he was monitor general, changed Dr. Page's title to assistant superintendent for personnel and supportive services, and he was given the responsibilities for transportation, food services and medical services.

After the Board initially adopted the 1985 organization plan, Dr. Page was notified by Dr. Copeland on July 10, 1985, that he would be transferred to the position of assistant superintendent for pupils and support services as of September 1, 1985, without any change in salary or benefits (P-5).

Clifford J. Zdanowicz has worked for the Board since September 1, 1959, and he is certified as a teacher, principal and supervisor. Mr. Zdanowicz was a principal prior to taking the position of director "C" for certified personnel, an unrecognized title with no tenure rights, in December 1983. In his director "C" position, Mr. Zdanowicz was responsible for job application screening, board agenda items, labor negotiations and the discipline of certified personnel.

Pursuant to the 1985 organization plan, Mr. Zdanowicz was transferred as of September 1, 1985, to the position of assistant director of personnel, which is also an unrecognized title with no tenure rights, without any change in salary or benefits. Mr. Zdanowicz's job responsibilities have not changed except that he is not now involved in grievances or labor negotiations.

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Jean O. Pearson has been employed by the Board since September 1, 1958, and she is certified as an elementary school teacher, reading teacher, supervisor and school administrator. Ms. Pearson did not receive her school administration certificate until March 1986. Ms. Pearson's former position was director "C" for field services and affirmative action, an unrecognized title with no tenure rights. In that position, Ms. Pearson was the superintendent's representative and handled the second step in grievance procedures. She was involved in labor negotiations, and she was the superintendent's representative for the affirmative action program. Pursuant to the 1985 organization plan, Ms. Pearson was given the title of acting director of personnel as of September 1, 1985, without any change in salary or benefits.

The director "C" titles formerly held by Mr. Zdanowicz and Ms. Pearson are confidential titles and they received better salaries and benefits than those given to holders of regular director titles. As holders of director "C" titles, Mr. Zdanowicz and Ms. Pearson were not members of the union (TASA). By memorandum dated April 8, 1986, Dr. Copeland stated that both Ms. Pearson and Mr. Zdanowicz were removed from any involvement with collective bargaining negotiations (P-23).

I FIND that the facts as stated above are not in dispute.

Part II
PETITIONERS' ALLEGATIONS

The petitioners seek to have the Board's 1985 organization plan declared null and void. It is the petitioners' opinion that the authorization for the organization study, the ad hoc committee to evaluate the Kittrels Plan, and the Board meetings to consider and adopt the organization plan recommended by Dr. Copeland, were in violation of the provisions of the CAP. Further, the petitioners assert that the organization plan was also in violation of the CAP because it did not receive the prior approval of the county superintendent.

Also, it is the petitioners' opinion that the Kittrels Plan (P-10) contains numerous flaws. At the hearing, Dr. Page represented that there were incorrect statements, as well as problems with job titles, qualification and responsibilities in the

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Kittrels Plan. In particular, Dr. Page noted that the unrecognized titles recommended in the Kittrels Plan needed the approval of the county superintendent prior to any Board action. Dr. Page was also critical of the fact that Mr. Kittrels did not ask him for his suggestions or discuss his report with Dr. Page before giving it to the Board. According to Dr. Page, he was advised that Mr. Kittrels was told not to talk to administrators while preparing his plan.

It is Dr. Page's opinion that the 1985 organization plan was designed to weaken the personnel office so that the Board members could exercise a greater influence over personnel matters, contrary to the prohibition in the CAP. In support of this position, the petitioners testified regarding a number of personnel matters which allegedly involved improper input from Board members.[1]

The first matter related to Dr. Demos' request for salary credit for outside employment, which was denied by Dr. Page since he did not think the outside experience warranted such credit. Dr. Demos filed a grievance and Mr. Medina and Mr. Dileo thought that Dr. Demos, the director of the bilingual program, was entitled to the credit. The matter was submitted to arbitration and an arbitrator determined that Dr. Demos was not entitled to the credit.

The second matter relates to Mr. Medina's wife, Aide Medina. Ms. Medina was employed by the Board as a Spanish teacher when she applied in 1985 for the position of teacher of gifted and talented students. Pursuant to the evaluation procedure then used by the personnel department, Ms. Medina was ranked third among the candidates (P-14). Dr. Page recommended to Dr. Copeland the appointment of the person who came out first in the evaluation procedure; however, Dr. Copeland recommended to the Board the appointment of Ms. Medina (P-3, P-4). The Board approved Ms. Medina's appointment. Ms. Pearson stated that it was her understanding that Dr. Copeland was asked by Mr. Medina to recommend his wife for the position.

The third matter relates to the fact that Domenic Castaldo told Ms. Pearson on July 18, 1985, that Dr. Copeland wanted to have Vito Delli appointed as custodian and Mr. Castaldo was told that the request came from Mr. Medina (P-21).

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[1] There was limited testimony regarding some of these personnel matters since there was an ongoing grand jury investigation regarding the activities of the Board during the administrative hearing.

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The fourth matter relates to Mr. Castaldo. Both Ms. Pearson and Mr. Zdanowicz testified that when Mr. Fraschella, the manager of buildings and grounds, died in October 1984, Mr. Castaldo, his assistant, was appointed acting manager. Since there had been a Board decision to upgrade Mr. Fraschella's former position, on January 3, 1985, the personnel office posted a vacancy notice for the position of manager of operations, which required the possession of a college degree (P-17). Since the Board wanted to give the position to Mr. Castaldo, the personnel office was directed to post another vacancy notice for the position of manager of buildings and grounds, without a requirement of either a college degree or a high school education (P-18). Mr. Castaldo was given the position and after he retired on June 1, 1986, the personnel office was directed to post another vacancy notice for the manager of buildings and grounds position, and to require again the possession of a college degree (P-19).

The fifth matter relates to Dr. Page's testimony that certain Board members tried to get Dr. Copeland to hire Mr. Cortina as the superintendent's executive assistant (now designated as the administrative assistant). When Dr. Copeland refused to hire Mr. Cortina, Dr. Page stated that the position was not filled.

The sixth matter was Dr. Page's testimony that he was told that Mr. Medina asked Dr. Copeland to hire Lisa Brady.

The seventh matter was Mr. Zdanowicz's testimony that he was told by Dr. Copeland to hire Diane Cyri and that this request came from Mr. Plumeri.

The eighth matter relates to Ms. Pearson's testimony that she was directed by Dr. Copeland to hire Hispanics for openings as school aides and as home-community aides and was told that the request came from Mr. Medina. Both Dr. Page and Ms. Pearson testified that they were told by Dr. Copeland that Mr. Medina was pressuring him to hire more Hispanics, and Dr. Copeland requested them to consider certain persons for employment.

In addition, Ms. Pearson questioned the appointment of Mr. Dileo as chairperson of a labor relations committee, in view of the fact that he was an elected union leader.

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During his testimony, Dr. Copeland denied that the Kittrels Plan or his organization plan was aimed at any particular administrative office and he denied that the 1985 organization plan was intended to weaken the personnel office. As to the specific personnel matters given as examples by the petitioners, Dr. Copeland disagreed that there was anything inappropriate about what had occurred.

As to the first matter, Dr. Copeland stated that when Dr. Demos' request for credit for outside employment was submitted to arbitration, the Board's attorney for the arbitration matter, Leonard Blackman, Esq., advised the Board that in his opinion Dr. Page had not acted properly. Dr. Copeland said a number of Board members were upset by this statement and Mr. Medina accused Dr. Page of discriminating against Dr. Demos because he was Hispanic.

As to Ms. Medina, Dr. Copeland stated that he had reservations regarding the evaluation procedure since it placed too much emphasis on length of service with the Board. In reviewing the names of the applicants, Dr. Copeland decided to recommend Ms. Medina since she had the advantage of speaking Spanish and being familiar with Spanish culture, and he considered her appointment to be consistent with the affirmative action program. Dr. Copeland emphatically denied that Mr. Medina had asked or in any way tried to influence his decision as to this position.

Dr. Copeland stated that he, Mr. Medina and other Board members met with representatives of the Hispanic community regarding employment opportunities. The Hispanic community group was critical of the personnel department and stated that the staff of the personnel department did not give Hispanic applicants the same consideration as black applicants. At this meeting, the Hispanic community representatives were asked to give the names of Hispanic applicants to either Mr. Medina or Dr. Copeland, and Dr. Copeland promised that all Hispanic applicants would be given an equal opportunity for employment. Dr. Copeland indicated that the statements during this meeting reminded him of the statements made some time previously by black community leaders regarding equal employment opportunities for black applicants, and he was sympathetic with the position of the Hispanic community representatives.

According to Dr. Copeland, there was a concern that Hispanic applicants would not get equal consideration for appointments as school aides and Mr. Medina expressed his opinion that at least one or two of the aides should be Hispanic. Dr. Copeland did not consider such a statement by Mr. Medina to be inappropriate.

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As to the appointment of Mr. Castaldo to the position of manager of operations, Dr. Copeland testified that he recommended to the Board that it upgrade the position and that he also recommended that it temporarily delete the educational requirements so that Mr. Castaldo, a long-time Board employee, could have the title for a short time before he retired.

In addition, Dr. Copeland stated that Board members periodically suggested names to him for employment consideration and sometimes Board members would talk to him about a personal matter after they were contacted by someone in the community. According to Dr. Copeland, Mr. Medina's concerns regarding personnel matters were on a par with other Board members. However, Dr. Copeland indicated that no Board member had ever directed him to hire a certain person. As to the memorandum regarding the employment of Mr. Delli (P-21), Dr. Copeland indicated that he did not recall who had recommended Mr. Delli. However, he was sure that he did not mention Mr. Medina's name since he would not identify any Board member by name. Dr. Copeland said that he gave Ms. Cyri's name to Ms. Pearson as a possible candidate for a position and admitted that the name was suggested by Mr. Dileo.

As to the appointment of Mr. Cortina to the administrative assistant position (formerly designated as the executive assistant), Dr. Copeland stated that Mr. Medina and Mr. Dileo asked that Mr. Cortina be appointed since he had performed some of the duties of the position in the past. However, Dr. Copeland did not recommend Mr. Cortina for the position and he stated that it is vacant since there is no money allocated for the position.

As to Dr. Page's allegations regarding discrimination, it is Dr. Page's opinion that the 1985 organization plan was another attempt by the Board to deprive him of a position to which he was entitled, and the Board's action was in retaliation for the prior administration actions filed by Dr. Page. Dr. Page stated that no reason was given to him for his transfer and he indicated that his performance in his former title had been always given a favorable evaluation by Dr. Copeland. Dr. Page stated that after he was notified of his transfer, Dr. Copeland on August 26, 1985, asked him to continue to perform his former duties regarding personnel matters (P-9). Dr. Page's role in personnel matters terminated on or about May 15, 1986.

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Dr. Page stated that he was told by Dr. Copeland that certain Board members, including Mr. Medina, wanted to demote him and that Dr. Copeland was recommending that he be laterally transferred to another position.

Dr. Page recognized that there was some animosity between him and Mr. Medina, and that Mr. Medina had on several occasions voiced his dissatisfaction with the personnel department, particularly with Dr. Page. Dr. Page mentioned that at the July 9, 1985 meeting, Mr. Medina improperly blamed him for the fact that unrecognized titles in the organization plan had not been approved by the county superintendent and that on several occasions, Mr. Medina would not allow Dr. Page to speak at Board meetings. On one occasion, Mr. Medina would not allow Dr. Copeland to have Dr. Page present during the executive session meeting of the Board. Both Mr. Jones and Ms. Joyner testified that they heard Mr. Medina say that he wanted to see Dr. Page "cringe" when he was told of his transfer. Also, Mr. Jones and Ms. Joyner testified that after a Board meeting, Mr. Dileo pointed his finger at Dr. Copeland and said that if Dr. Copeland did not reprimand Dr. Page, he had four votes to "box" him in.

Dr. Copeland did not dispute that a number of Board members had made derogatory comments regarding Dr. Page; however, he stated that Dr. Page made frequent loud outbursts at Board meetings, and sometimes accused him or Board members of fraud, and stated that he was going to file a report with the prosecutor's office. According to Dr. Copeland, on one occasion, both Mr. Medina and Mr. Dileo wanted him to reprimand Dr. Page, and he had insisted that he was the only person to decide when and if an employee had to be disciplined. Mr. Dileo became upset and told him that he would have to have better control of his staff or the Board would take action. Dr. Copeland stated that Mr. Dileo later apologized.

All three petitioners denied that Dr. Page had frequent outbursts at Board meetings.

As to Dr. Page's allegation of racial discrimination, it should be noted that both Dr. Page and Ms. Pearson are black, as are Dr. Copeland and Mr. Kittrels. Three of the four members of the Board who voted for the implementation of the 1985 organization plan are white and the fourth member is Hispanic. All three black members of the Board

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either abstained from voting or voted against the plan. As already stated, Mr. Jones and Ms. Joyner both testified that the organization plan was intended to weaken the powers of the personnel department and was aimed at Dr. Page.

During their testimony, both Ms. Pearson and Mr. Zdanowicz expressed concern regarding their current positions, and were concerned as to whether they were still confidential employees.

Although Ms. Pearson recognizes that her current title is a promotion, she expressed concern regarding her future in that position since she has been designated as "acting" director, and further because she has been told that Mr. Medina stated that she might be just as bad as Dr. Page. Lastly, Ms. Pearson was obviously unhappy about the fact that she was no longer involved in union negotiations, grievance procedures and the affirmative action program.

Mr. Zdanowicz shared Ms. Pearson's concern regarding his future, and he considers his present position to be a two-step demotion, notwithstanding the fact that his job responsibilities remain basically the same and his salary and benefits were not reduced.

Dr. Copeland stated that there was no question that Ms. Pearson and Mr. Zdanowicz were still confidential employees. Also, he stated that Mr. Medina had reservations about Ms. Pearson's appointment and suggested he conduct interviews for the position of director of personnel.

Based on the testimony of the witnesses relating to the petitioner's allegations, I **FIND** that the additional pertinent facts are:

(1) The petitioners have not shown that there are numerous flaws in the Kittrels Plan, but rather that there are differences of opinion as to the significance of certain matters discussed therein.

(2) Board members did make recommendations to Dr. Copeland relating to personnel matters, and Mr. Medina and Mr. Dileo tried to get Dr. Copeland to hire Mr. Cortina.

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(3) Board members have objected to some of the actions of the personnel department and have criticized Dr. Page's performance.

(4) Mr. Medina has a concern regarding the hiring of Hispanic employees, and this is a legitimate affirmative action concern.

(5) Dr. Page has antagonized a number of Board members by his attitude and statements at Board meetings, and there is hostility between Dr. Page and Mr. Medina.

(6) There was no testimony presented to support Mr. Page's allegation that his transfer was in retaliation for his prior administrative actions.

(7) There was no testimony to support Dr. Page's allegation that his transfer was based on racial discrimination.

(8) There was no indication that Dr. Page ever requested the position of director of personnel or that he would have been denied this position if he desired it.

(9) Ms. Pearson was promoted and was designated as an "acting" director of personnel since at the time of her appointment, she did not have the necessary certificate for the position. Mr. Medina has reservations regarding Ms. Pearson's performance.

(10) It is Mr. Zdanowicz's position that he was demoted by the 1985 organization plan; however, the facts do not support his position.

(11) Ms. Pearson and Mr. Zdanowicz are still confidential employees.

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CONCLUSIONS OF LAW

Mr. Blunda, on behalf of the petitioners, noted in his brief[2] that even though there is no longer a monitor general, the CAP for the Trenton School District is still in effect, and he cited the decision of Administrative Law Judge Joseph Lavery regarding a motion in this matter, as well as the Commissioner's decision in Dent v. Trenton Bd. of Ed., OAL DKT. EDU 9838-83 (February 1, 1984), aff'd by Comm'r (Feb. 27, 1984). Mr. Blunda argued that the Board violated the CAP when it utilized an ad hoc committee to consider both the Kittreis Plan as well as the organization plan suggested by Dr. Copeland since the CAP requires that all Board personnel functions are to be performed as a committee of the whole (1979 S.L.D. at 697).

Since the Board improperly used an ad hoc committee to evaluate the organization plans, Mr. Blunda argued that the plan that was adopted was void. In addition, Mr. Blunda argued that the plan was also void since the Board had not received the prior approval of the county superintendent for the abolishment of positions, the creation of new positions and the transfer of staff to new positions as required by the CAP (1979 S.L.D. at 696). Further, he argued that the organization plan is void since it changes the structure recommended by the Trenton Task Force in its first report (P-25 at p. 3) as implemented by the monitor general and the Board.

Also, Mr. Blunda argued that the facts clearly show that Board members have been making recommendations regarding personnel matters in violation of the limitations placed on them by the CAP (1979 S.L.D. at 697).

Further, Mr. Blunda argued that the transfer of the three petitioners was arbitrary, retaliatory and discriminatory. He noted that Mr. Kittreis did not seek any input from the members of the personnel department in formulating his plan and that the facts show that Mr. Medina wanted to demote Dr. Page as part of the organization plan, notwithstanding the fact that he had a tenured position. Mr. Blunda argued that the organization plan was intended to remove Dr. Page from the personnel office and to limit the responsibilities of Ms. Pearson and Mr. Zdanowicz, thereby removing formidable obstacles to the Board members' input into personnel matters.

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[2] Mr. Blunda in his brief refers to exhibits not admitted into evidence. Since these exhibits are not part of the record in this matter, they cannot be considered in rendering the decision.

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Lastly, Mr. Blunda argued that Dr. Copeland's memorandum of April 8, 1986, which removed Ms. Pearson and Mr. Zdanowicz from any role in collective negotiations, was in retaliation for their filing the petition in this matter.

Robert B. Rottkamp, Jr., Esq., on behalf of the respondent, argued in his brief[3] that the 1985 organization plan was intended to correct the administrative organization problems which existed in the Trenton School District, which were recognized in the Trenton Task Force reports and which were set forth in detail in the Kittrels Plan.

Mr. Rottkamp argued that the CAP does not prohibit the adoption of an organization plan by the Board and that after the termination of the supervision by the monitor general in March 1982, the prior approval of the county superintendent is no longer necessary. Mr. Rottkamp noted that Ms. Shepherd was aware of the organization study and organization plans, and that Ms. Shepherd had never sought to review the plan prior to its adoption.

Further, Mr. Rottkamp argued that the transfers of the three petitioners were procedurally correct. Mr. Rottkamp argued that the petitioners' objections to their transfers were based on their personal preferences as to job titles and responsibilities, and that the Board clearly had the right to transfer them. Further, he argued that neither Ms. Pearson nor Mr. Zdanowicz had any right to be involved in collective bargaining negotiations.

In addition, Mr. Rottkamp argued that the petitioners had not shown that there were any illegal recommendations in the Kittrels Plan or any basis to declare the 1985 organization plan null and void.

Mr. Rottkamp argued that there was no evidence to show that any of the transfers were based on racial discrimination. The fact that one Hispanic and three white Board members voted for the organization plan does not in itself prove discrimination in view of the lack of any evidence of racial bias underlying the votes. Also, Mr. Rottkamp argued that Dr. Page had not produced any evidence to show that his transfer was in retaliation for his prior administrative actions.

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[3] Mr. Rottkamp in his brief refers to exhibits not admitted into evidence. Since these exhibits are not part of the record in this matter, they cannot be considered in rendering the decision.

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Mr. Rottkamp conceded that the CAP indicated that there should be no Board committees; however, he indicated that the Board has established committees and has never received any adverse comments from the monitor general or the county superintendent. He stated that if the ad hoc committee was a violation of the CAP, it was a de minimis violation, in view of the fact that the committee had virtually no role in the preparation of the organization plan and submitted no report to the Board.

Lastly, Mr. Rottkamp argued that the list of personnel matters mentioned by the petitioners to show improper activities by Board members are trivial and questionable matters which were clearly refuted by the testimony of Dr. Copeland, and some of these incidents show only that there was a personality conflict between Dr. Page and Mr. Medina.

Based on my review of the facts and the legal arguments of the parties, I CONCLUDE that:

(1) The CAP is still in effect in the Trenton School District; however, in evaluating what effect the CAP has on the Board's role in personnel matters, it is necessary to recognize that the Board's activities are no longer subject to the immediate and direct supervision of a monitor general.

(2) Since March 1982, neither the monitor general nor the county superintendent has been directly involved in personnel matters pursuant to the CAP. However, by regulation, the county superintendent must approve in advance all unrecognized titles, N.J.A.C. 6:11-3.6.

(3) Neither the provisions of the CAP nor the recommendations of the Trenton Task Force were intended to limit the right of the Board to reorganize its administrative structure or to limit the right of the Board to create new positions and to abolish other positions.

(4) Although the CAP prohibits the use of committees, a reading of the CAP clearly reveals that the Commissioner was primarily concerned with prohibiting decisions by committee

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rather than by the entire Board at a public meeting. Therefore, the use of an ad hoc committee to review the Kittrels Plan was not in violation of the purposes for the CAP. As argued by Mr. Rottkamp, it was at best a technical violation which was de minimis since the committee had no substantial role in the review of the Kittrels Plan or in the preparation of the organization plan that was finally adopted by the Board.

(5) The facts show that on occasion, Board members have given the superintendent specific names for possible job appointments in the school district, thereby intentionally or unintentionally placing pressure on the superintendent and his staff to accomodate the Board members, and this activity does raise a concern as to whether the Board members are complying with the CAP. This is not to say that the Board members cannot complain to the superintendent regarding the performance of the personnel office staff and to encourage affirmative action programs, even to the extent of having community leaders forward lists of candidates to the superintendent by way of a Board member.

(6) Although some Board members may have acted in violation of the CAP as to personnel appointments, the petitioners have not shown that this had any bearing on the recommendations in the Kittrels Plan or on the organization plan prepared by Dr. Copeland.

(7) The facts show that several Board members wanted Dr. Page to remain in personnel and be demoted to director of personnel, and that it was Mr. Jones and Dr. Copeland who initiated the suggestion that Dr. Page be laterally transferred to another assistant superintendent position. In addition, if the Board considered the petitioners' activities to be an obstacle, it could have also transferred both Ms. Pearson and Mr. Zdanowicz out of the personnel office.

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(8) The petitioners have not shown that the deletion of their former titles was an arbitary act, and in fact, both the Kittrels Plan and the testimony of Mr. Kaplan are persuasive as to the reasonableness of the 1985 organization plan.

(9) Dr. Page has not shown that his transfer was in retaliation for his prior administrative cases.

(10) The petitioners have not shown that their tranfers were discriminatory actions by the Board.

(11) Ms. Pearson and Mr. Zdanowicz have not shown that their removal from collective bargaining negotiations by Dr. Copeland was in retaliation for the filing of their petition in this matter since this was done as part of the 1985 organization, which was adopted prior to the filing of their petition.

(12) The petitioners have not shown that the 1985 organization plan is void or unlawful.

(13) The petitioners have not shown that they are entitled by law to have their transfers rescinded and to be returned to their former titles.

DISPOSITION

Based on my conclusions set forth above, I ORDER that the consolidated matter be DISMISSED.

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

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

April 1, 1987
DATE

BEATRICE S. TYLUTKI, ALJ

APR 2 1987
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 2 1987
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OFFICE OF ADMINISTRATIVE LAW

ij/ee

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ARTHUR PAGE, JEANNE PEARSON AND CLIFFORD ZDANOWICZ,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The exceptions filed by petitioners were untimely pursuant to N.J.A.C. 1:1-16.4a and b.

Upon a thorough and comprehensive review of the record in this matter, the Commissioner is in agreement with the ALJ's recommended decision dismissing the Petitions of Appeal and he adopts as his own the findings of fact and conclusions reached by the ALJ except as modified below.

Firstly, the Commissioner does not accept the finding of fact with respect to the lack of tenure rights associated with the former positions held by Petitioners Pearson and Zdanowicz. Such a determination can be reached only after careful examination of the facts of the matter in light of the New Jersey Supreme Court decision in Spiewak v. Rutherford, 90 N.J. 63 (1982). Given that the record does not contain sufficient information about the former positions, particularly if a certificate was required, he defers judgment on the accuracy of the finding that the positions were non-tenurable (Initial Decision, ante), notwithstanding the fact that no dispute is indicated.

While the Commissioner accepts the ALJ's finding that the Board President "has a concern regarding the hiring of Hispanic employees, and this is a legitimate affirmative action concern" (Id.), he finds that this may not serve as a basis to violate or circumvent the Corrective Action Plan (CAP) which dictates that no recommendations for the appointment, transfer or promotion of staff shall be made by Board members. The district's affirmative action plan and procedures constitute the appropriate mechanism to achieve the district's goals for the hiring of minorities, not tactics which smack of Board member interference and questionable operating procedures. Thus, it is determined that the hiring process for all positions in Trenton must conform to duly approved policies and procedures which shall not include giving the names of Hispanic applicants to either Mr. Medina or Dr. Copeland (Id.), or to "having community leaders forward lists of candidates to the superintendent by way of a Board member." (Id.)

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Further, the Commissioner does not concur with the conclusion that Petitioners Pearson and Zdanowicz have not shown that their removal from collective bargaining negotiations was in retaliation for the filing of their petitions in this matter. While the record does support that the transfers of both of these individuals resulted in their removal from regularly assigned duties for negotiations, the record is equally clear that notwithstanding this fact, the superintendent had appointed Petitioner Pearson to the ad hoc secretarial committee but she was later removed upon the directive of the Board President because of her "suit" against the Board. See P-23.

P-23 is of grave concern for two reasons, the first being that it appears to signify undue involvement of the Board President in the administration of the district and secondly, the filing of a Petition of Appeal with the Commissioner of Education should not, except in extraordinary circumstances, serve to prevent a staff member from being assigned duties appropriate to the position held, be it regular duties or those of an ad hoc committee nature. Dr. Copeland was fully cognizant of the petitions filed in this matter and apparently, in his judgment, saw no threat or obstacle being posed by Petitioner Pearson's appointment to an ad hoc negotiating committee. It was not the role of the Board President to determine, based on his own interpretation of the matter, to order her removal because she had a Petition of Appeal before the Commissioner.

Moreover, the Commissioner finds that the appointment of the Board President's wife to the position of teacher of Spanish-Academically Gifted pupils at a minimum gives the appearance of violating the CAP. The Commissioner finds the superintendent's handling of the appointment indicative of a serious error in judgment give the existence of the CAP and the history of highly questionable irregularities in the hiring, transfer and promotion of staff in the district.

While it may well be that the superintendent was concerned that the evaluation/screening procedure in Trenton placed too much emphasis on length of service in the district as a selection criteria, it clearly stretches the bounds of credibility that he suddenly "saw the light" with respect to this perceived flaw when confronted with a decision on an appointment involving the Board President's wife, a candidate who was ranked third. It is noted upon review of the record that the candidate ranking first in the selection process was a teacher of Spanish who possesses a master's degree and who has extensive experience in that field. This factor seriously calls into question at least one of the alleged criteria cited by the superintendent for changing the recommendation from the first to third-ranked candidate.

Notwithstanding the above, this does not alter the Commissioner's conclusion that the ALJ did not err in determining that petitioners failed to demonstrate that the Board acted illegally or was otherwise arbitrary, capricious or discriminatory in the reorganization of the administrative level of the district.

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While it is true that the CAP is still in effect, the Commissioner is in complete agreement with the ALJ that the record does not demonstrate that the ad hoc committee on reorganization was in violation of the CAP. He thus adopts as his own the ALJ's conclusion which reads:

> Although the CAP prohibits the use of committees, a reading of the CAP clearly reveals that the Commissioner was primarily concerned with prohibiting decisions by committee rather than by the entire Board at a public meeting. Therefore, the use of an ad hoc committee to review the Kittrels Plan was not in violation of the purposes for the CAP. As argued by Mr. Rottkamp, it was at best a technical violation which was de minimis since the committee had no substantial role in the review of the Kittrels Plan or in the preparation of the organization plan that was finally adopted by the Board.
>
> (Initial Decision, ante)

A careful reading of Board Member Jones' testimony, a member who did not favor the reorganization, supports that the ad hoc committee met only twice, the second of which was a meeting wherein the superintendent presented his own reorganization plan and that virtually no input of the ad hoc committee members was given at that meeting as the superintendent had it all laid out. See Tr. II-8-14.

Clearly, the reorganization ad hoc committee was not a reincarnation of the personnel committee ordered disbanded in the CAP.

Moreover, the record is quite clear that the county superintendent was fully aware of the reorganization and that neither she nor the department of education took any steps to curtail the implementation of the reorganization because it was in contravention of the CAP. The county superintendent's role in this matter was not limited to merely the approval of unrecognized titles pursuant to N.J.A.C. 6:11-3.6. The CAP provided the mechanism for the county superintendent to intervene if she or the department of education perceived the reorganization and/or the process of reorganization as being a violation of the CAP. Absent any opposition to or intervention by the county superintendent into the reorganization, the Commissioner must conclude that at least tacit acceptance existed that the reorganization was not in violation of the CAP.

Additionally, the Commissioner concurs with the ALJ that neither the provisions of the CAP nor the recommendations of the Trenton Task Force were intended to limit the right of the Trenton Board of Education to reorganize its administrative structure or to limit its right to create and abolish positions so long as the CAP was not violated. Further, there is nothing in the record to

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indicate that since the withdrawal of the Monitor General in 1982, the county superintendent has approved each personnel action of the Board, although clearly that power is available to her in the CAP if the need arises.

Upon an extensive examination of the record, the Commissioner finds nothing therein to warrant reversal of the ALJ's conclusions that:

> a. Although some Board members may have acted in violation of the CAP as to personnel appointments, the petitioners have not shown that this had any bearing on the recommendations in the Kittrels Plan or on the organization plan prepared by Dr. Copeland. (Conclusion No. 6)
>
> b. The facts show that several Board members wanted Dr. Page to remain in personnel and be demoted to director of personnel, and that it was Mr. Jones and Dr. Copeland who initiated the suggestion that Dr. Page be laterally transferred to another assistant superintendent position. In addition, if the Board considered the petitioners' activities to be an obstacle, it could have also transferred both Ms. Pearson and Mr. Zdanowicz out of the personnel office. (Conclusion No. 7)
>
> c. Dr. Page has not shown that his transfer was in retaliation for his prior administrative cases. (Conclusion No. 9)
>
> d. The petitioners have not shown that their transfers were discriminatory actions by the Board. (Conclusion No. 10)
>
> e. The petitioners have not shown that the 1985 organization plan is void or unlawful. (Conclusion No. 12)
>
> f. The petitioners have not shown that they are entitled by law to have their transfers rescinded and to be returned to their former titles. (Conclusion No. 13)
>
> (Initial Decision, ante)

There is certainly no question that the personnel department was significantly affected by the reorganization and that the reorganization of that aspect of the administrative structure was deliberate and purposeful. This does not, however, make the action illegal or discriminatory, notwithstanding the animosity of the Board President and Mr. Dileo toward Dr. Page that is demonstrated

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in the record. Mr. Jones and Ms. Joyner's testimony supports that the specific reorganization plan adopted by the Board was ultimately formulated by the superintendent and that Dr. Page was neither demoted, as apparently desired by the Board President, nor was he reprimanded as demanded by Mr. Dileo. Further, the record substantiates that the Board President was dissatisfied with the appointment made for the Director of Personnel position.

Ms. Joyner who voted against the reorganization stated:

Q In your opinion, was the most important effect of the reorganization the alteration of personnel department?

A Not from my point of view, no -- let me see if I can rephrase this, I don't think that was the point with the reorganization.

I do think that it's something that did come out of it, though.

Q I want you to understand my question. The net result, what was it in your opinion?

A Well, I think the fairly obvious -- you don't even have to be a Board member, if you just look at the chart. The personnel department was reconstructed. People were moved. And in other areas, it was almost just like name title changes and one or two changes in responsibility, but at the very top levels, I would say it's where most of the changes occurred.

Q In personnel?

A I would say yes. I'm not going to say that personnel was the only department that was affected, because that's not true.

All of the high level positions were affected. I would say, peoplewise, probably they were moved around to the greatest extent.

Q And is it your testimony that that result is somewhat different than what the Board and you intended originally?

A It was different than what I intended. It was different than what I thought -- wait. Let me reconstruct that, because I think you have to understand what I thought the Board

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was trying to do in the very beginning, which was to reorganize the entire district if it needed reorganizing. There was a possibility some departments may have needed reorganizing and others would not. I thought that's the way we were going to approach it.

We ended up doing, as I said before, just came in on high level positions, and we haven't done anything else, so in effect, no, I don't think the end result was what we really thought we were going to be doing in the beginning.

Q Do you think anyone other than Dr. Page, Mr. Zdanowicz, and Miss Pearson were hurt ultimately by the reorganization?

A May I ask a question for clarification?

THE COURT: If you don't know the question, just say "Please reword the question."

A When you say hurt, I don't understand what you mean by hurt.

Q Do you know of any other individual affected by the reorganization other than Dr. Page, Mr. Zdanowicz and Miss Pearson?

A Yes. There were several people and it's still going on, that are affected by the reorganization. Every time we have a Board meeting there are things on the agenda, people on the agenda, their title changes, a job description changes, which actually it's coming out of the reorganization.

When you asked me if they're the only people that were moved, no. They're not the only people. One of the things in that reorganization that -- in the very beginning, even going back to the very beginning when we were thinking about this and talking about it, one of the things that he [Mr. Kittrels] kept impressing upon is, number one, you had to make sure that you didn't take away from anyone, anything they had. All right, either keep them at the same level or increase it, not just money but in job function as well, but also the importance of the entire Board meeting in accordance to the final vote.

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Q Was the full Board in accordance?

A No.

Q Now, with regard to Mr. Kittrels' statements that it's important that you do not take away from people that which they had, you indicated both money and functions.

Is that correct?

A Yes.

Q Did Dr. Page suffer loss in his job functions?

A Dr. Page was previously the head of personnel. He's now head of support services and I don't even have the whole title, so he's still the assistant superintendent. (Tr. II-111-114)

Upon a thorough review of the record, particularly the testimony of the Board members testifying who did not vote affirmatively for the reorganization, the Commissioner adopts as his own the following findings of fact and conclusions of the ALJ:

a. Board members have objected to some of the actions of the personnel department and have criticized Dr. Page's performance.

b. Dr. Page has antagonized a number of Board members by his attitude and statements at Board meetings, and there is hostility between Dr. Page and Mr. Medina.

c. There was no testimony presented to support Mr. Page's allegation that his transfer was in retaliation for his prior administrative actions.

d. There was no testimony to support Dr. Page's allegation that his transfer was based on racial discrimination.

e. Ms. Pearson was promoted and was designated as an "acting" director of personnel since at the time of her appointment, she did not have the necessary certificate for the position. Mr. Medina has reservations regarding Ms. Pearson's performance.

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f. It is Mr. Zdanowicz's position that he was demoted by the 1985 organization plan; however, the facts do not support his position.

g. Ms. Pearson and Mr. Zdanowicz are still confidential employees.

(Initial Decision, ante)

The Commissioner finds as irrelevant, however, the finding that "[t]here was no indication that Dr. Page ever requested the position of director of personnel or that he would have been denied this position if he desired it." (Id.) It is hardly likely that Dr. Page would request a restructured position that constitutes a demotion to him. Thus, in the Commissioner's judgment this finding has no bearing whatsoever on the matter.

Lastly, notwithstanding the determination that prior approval by the county superintendent was not required for the reorganization, the total record in this matter raises serious concerns that the Trenton Board of Education may be slipping back into the very same type of inappropriate behaviors and actions which served to trigger the original order to show cause, the oversight of the Monitor General and the CAP in that district. The record unequivocally gives indication that some board members, particularly Board President Medina and Mr. Dileo, are inappropriately interfering with the administration of the district.

Consequently, the Commissioner orders that the county superintendent become more directly involved with and pay greater attention to all appointments, promotions and transfers occurring in the district. This shall be accomplished through the submission of a monthly letter of assurance from the superintendent that all personnel actions taken during that month are in compliance with the directives of the CAP. Moreover, the Commissioner reserves to the county superintendent the right to question and to acquire as much information as she deems necessary on any and all personnel actions of the Board.

Should the county superintendent ascertain/determine that the Board's actions, or any member's thereof, in this regard are not in strict conformance with the CAP, she shall immediately report same to the Commissioner for appropriate action. The members of the Trenton Board are cautioned that the provisions of the CAP can and will be invoked in their entirety if the county superintendent and the department of education find that this step is warranted to prevent regression or reversion to the very improprieties which prompted the CAP in the first place.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 18, 1987

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ARTHUR PAGE, JEANNE PEARSON AND CLIFFORD ZDANOWICZ,	:	
PETITIONERS-APPELLANTS,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, May 18, 1987

For the Petitioners-Appellants, Oxfeld, Cohen, Blunda, Friedman, Levine and Brooks (Mark J. Blunda, Esq., of Counsel)

For the Respondent-Respondent, Rottkamp and Flacks (Robert B. Rottkamp, Jr., Esq., of Counsel)

The State Board of Education affirms the decision of the Commissioner for the reasons expressed therein. In affirming the Commissioner's decision, we fully concur that although the petitioning employees are not entitled to relief, the record in this case raises serious concerns that the Trenton Board of Education may be slipping back into the very same type of improper action that originally created the necessity for oversight by the Monitor General and for the Corrective Action Plan. We therefore are in full accord with the Commissioner's directives concerning the involvement of the County Superintendent with personnel actions in the District, and with the imposition by the Commissioner on the County Superintendent of responsibilities associated with effectuating his directives.

October 1, 1987

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IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF MATAWAN-ABERDEEN REGIONAL, MONMOUTH 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, 1987 in the School District of Matawan-Aberdeen Regional, Monmouth County, were as follows:

	AT POLLS	ABSENTEE	TOTAL
MATAWAN BOROUGH			
William J. Martin	351	4	355
Jerome Moshen	247	1	248
ABERDEEN TOWNSHIP			
Ardis Kisenwether	381	6	387
J. Douglas Scott	383	6	389
Hy Rosenberg (write-in)	402	3	405
James Smith (write-in)	384	4	388

Pursuant to a letter request from James Smith received April 14, 1987, 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 May 1, 1987, at the Monmouth County Voting Machine Warehouse, Freehold.

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At the conclusion of the recount the tally of the uncontested ballots stood as follows:

	AT POLLS	ABSENTEE	TOTAL
MATAWAN BOROUGH			
William J. Martin	351	4	355
Jerome Moshen	247	1	248
ABERDEEN TOWNSHIP			
Ardis Kisenwether	381	6	387
J. Douglas Scott	383	6	389
Hy Rosenberg (write-in)	235	3	238
James Smith (write-in)	220	4	224

The issue with respect to the recount of the write-in votes cast for James Smith is focused upon the two full three-year terms to be filled on the Matawan-Aberdeen Regional Board of Education from the constituent municipality of Aberdeen Township.

The Commissioner's representative had determined not to count 165 write-in ballots (C-1 through C-165). The 165 write-in ballots were considered to be irregular ballots and subject to the provisions of N.J.S.A. 19:49-5. Petitioner Smith contested the determination by the Commissioner's representative not to count these irregular ballots. These ballots were not counted in the final tally and were contested because there were multiple votes for write-in candidates appearing on designated lines #1 or #2 of the paper rolls of the voting machines. According to N.J.S.A. 19:49-5 such ballots are void and may not be counted. The Commissioner's representative forwarded the paper rolls containing these contested ballots to the Commissioner for final determination.

* * * *

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The Commissioner has reviewed the report of the recheck of the voting machines conducted by his authorized representative. He has also reviewed the 165 contested write-in ballots (C-1 through C-165) appearing on the paper rolls which were removed from the four voting machines used in the school election in question.

The Commissioner confirms the fact that the contested write-in votes appear on lines 1 and 2 of the paper rolls of the voting machines. It must be noted at this juncture that lines 1 and 2 on the paper rolls were the designated lines upon which individual votes could be cast for write-in candidates at the annual school election. These lines on the paper rolls correspond with write-in slots #1 and #2 on the voting machines used in this election.

In the Commissioner's judgment, his authorized representative correctly voided the write-in ballots (C-1 through C-165) cast by certain voters where more than one name was written on lines #1 or #2 of the paper rolls. Lines #1 and #2 on the paper rolls were designated as the only lines on which individual write-in votes could be cast for candidates from Aberdeen Township who were seeking to fill the two vacant seats on the Board for full terms of three years each.

The applicable provisions of N.J.S.A. 19:49-5 pertaining to write-in votes cast on voting machines read as follows:

> Ballots voted for any person whose name does not appear on the machine as a nominated candidate for office are herein referred to as irregular ballots. Such irregular ballot shall be written or affixed in or upon the receptacle or device provided on the machine for that purpose. No irregular ballot shall be voted for any person for any office whose name appears on the machine as a nominated candidate for that office; any

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> irregular ballot so voted shall not be counted. An irregular ballot must be cast in its appropriate place on the machine, or it shall be void and not counted. (emphasis added)

The plain language and meaning of the above-cited statute is clear on its face and not subject to further interpretation by the Commissioner.

The question of the improper and illegal placement of the names of multiple write-in candidates in the larger window of slot #1 on the voting machines is not a case of first impression except that, in this instance, slot #2 was also used by certain voters in the same fashion.

The Commissioner has ruled previously upon multiple write-in votes being cast in slot #1 of the voting machines in re: In the Matter of the Annual School Election Held in the Township of Hillsborough, 1965 S.L.D. 74:

> ***There appears to be no clear practice with respect to the use of irregular ballot slot #1 among the various election boards of the State. This larger write-in space is provided primarily for use in presidential elections in which the voter may want to write the names of a series of electors. Use of this slot in school district elections varies among counties. In some areas slot #1 is locked out and small slots equal in number to the candidates whose names appear on the ballot are able to be opened. In other sections none of the slots are locked out and a voter may write an irregular ballot in any one of 40 openings. The Commissioner has observed, in his experience in recounting contested elections, that where large slot #1 is not locked out it is often necessary to void a ballot because more than one name has been written in this space. From his experience, the Commissioner would recommend that slot #1 not be used in school elections.*** (emphasis supplied) (at 76)

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See also, In the Matter of the Annual School Election Held in the Borough of Ringwood, 1974 S.L.D. 591, 593-594; In the Matter of the Annual School Election Held in the Borough of Mount Arlington, 1975 S.L.D. 231, 232.

The inherent problem which arises when voters cast multiple votes in one or more of the write-in slots is that it permits overvoting for more than the required number of candidates. In this instance two full three-year terms on the Board were to be filled either by two nominated candidates, two write-in candidates or any combination thereof from Aberdeen Township.

In instances where overvoting occurs when the voter has cast more than the required number of write-in votes, such irregular ballots are voided because the overvote is easily detected upon a recount of the paper rolls of the voting machines. However, when a voter has cast multiple write-in votes in one slot on the voting machine where two or more positions are open, there is no way to determine whether votes were also cast for any of the nominated candidates whose names appear printed on the ballot. This is so because all votes cast for the nominated candidates on the voting machines are automatically numerically tabulated.

Consequently, the Commissioner determines that the contested irregular write-in ballots (C-1 through C-165) must be voided for the reasons set forth above.

Accordingly, the Commissioner finds and determines that at the conclusion of the recheck of the voting machines used in the annual school election held on April 7, 1987, in the Matawan-Aberdeen School District, the results as originally

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announced have been sufficiently altered from Aberdeen Township to change the outcome of the election of Board members to the extent that William J. Martin, from Matawan Borough, Ardis Kisenwether and J. Douglas Scott from Aberdeen Township are declared to have been duly elected to full terms of three years each on the Matawan-Aberdeen Regional Board of Education.

This decision may be reversed or modified by the Commissioner in the event that, upon receipt and review of the initial decision of the inquiry into this matter, the Commissioner finds and determines that there were violations of statutorily prescribed procedures sufficient to change the outcome of this school election.

The Commissioner hereby directs that a copy of this decision be forwarded to the Office of Administrative Law for the purpose of supplementing the record of the inquiry now pending before that agency.

COMMISSIONER OF EDUCATION

MAY 19, 1987

DATE OF MAILING - MAY 19, 1987

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C #116-87
SB # 31-87

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF MATAWAN-	:	DECISION
ABERDEEN REGIONAL, MONMOUTH	:	
COUNTY.	:	
	:	

Decided by the Commissioner of Education, May 19, 1987

For the Petitioners-Appellants, Greenberg and Prior
(James F. Schwerin, Esq., of Counsel)

For the Respondent-Respondent, DeMaio and DeMaio
(Vincent DeMaio, Esq., of Counsel)

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

September 2, 1987
Date of Mailing SEP 4 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 3702-86 &
EDU 4911-86 (CONSOLIDATED)
AGENCY DKT. NOS. 196-6/86 &
238-7/86

LAWRENCE TAVE,
Petitioner,
v.
BOARD OF EDUCATION OF
THE MANALAPAN-ENGLISHTOWN
REGIONAL SCHOOL DISTRICT,
MONMOUTH COUNTY,
Respondent.

Arnold M. Melik, Esq., for the petitioner (Katzenbach, Gildea & Rudner, attorneys)

Gerald L. Dorf, Esq., and Eric Bernstein, Esq., for the respondent (Gerald L. Dorf, attorney)

Record Closed: March 2, 1986 Decided: April 16, 1987

BEFORE BEATRICE S. TYLUTKI, ALJ:

PROCEDURAL HISTORY

This matter concerns the petition filed by Lawrence Tave, the petitioner, with the Commissioner of Education (Commissioner) on June 3, 1986, alleging that the respondent, the Board of Education of the Manalapan-Englishtown Regional School District (Board) acted in an arbitrary and capricious manner when it directed the petitioner to submit to a psychiatric examination pursuant to N.J.S.A. 18A:16-2. In

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addition to the petition, Mr. Tave filed a motion for interim relief requesting the stay of the Board's directive that the petitioner undergo said examination. The Board denied the allegations set forth in the petition and opposed the motion for interim relief. The matter (EDU 3702-86) was transmitted to the Office of Administrative Law for a determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

At the prehearing conference held on June 30, 1986, I heard oral arguments regarding the motion for interim relief and by order, dated June 30, 1986, I stayed the Board's directive relating to the psychiatric examination. Also at this prehearing conference, Arnold M. Melik Esq., on behalf of the petitioner, indicated that he would be filing another petition on behalf of Mr. Tave which related to certain other Board actions based on the same incident. In addition, Mr. Melik stated that he would be filing a motion to consolidate the matters.

On July 8, 1986, the second petition was filed by Mr. Tave with the Commissioner alleging that the Board acted in an arbitrary, capricious and unreasonable manner when it determined to withhold the petitioner's salary increment and salary adjustment for the 1986-87 school year and when the Board transferred Mr. Tave from the Pine Brook School to the Milford Brook School. The Board denied the allegations, and the matter (OAL DKT. EDU 4911-86) was transmitted to the Office of Administrative Law for a determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

In addition to the second petition, Mr. Melik filed a motion to consolidate the matters and he argued that there were similarities as to the facts and issues and that all of the Board's actions were taken as a result of an April 4, 1986 incident. In opposition to the motion, Eric Bernstein, Esq., on behalf of the Board, argued that the matters did not concern common facts and issues; specifically, he claimed that there were no facts to show that Mr. Tave's transfer to another school had any commonality with the Board's decision to require a psychiatric examination or to withhold his salary increment and salary adjustment. After reviewing the arguments of the parties, I concluded that there was a similarity as to facts and issues, and on August 8, 1986, I ordered that the matters be consolidated for hearing.

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The issues in the consolidated matter are:

(1) Whether the Board acted in an arbitrary or unreasonable manner when it directed the petitioner to undergo a psychiatric examination.

(2) Whether the Board acted in an arbitrary, capricious or unreasonable manner when it determined to withhold Lawrence Tave's salary increment and salary adjustment for the 1986-87 school year.

(3) Whether the transfer of Mr. Tave from the Pine Brook School to the Milford Brook School starting with the 1986-87 school year was ordered by the Board as a punitive action and/or was an arbitrary, capricious or unreasonable action by the Board.

(4) Whether the Board acted in an arbitrary, capricious or unreasonable manner when it sent Mr. Tave a letter of reprimand (added as an issue at the request of Mr. Mellk on the first day of the hearing).

The hearing in the consolidated matter took place on August 25, 26, 27 and December 5, 1986, and after receipt of briefs, the record in the matter closed on March 2, 1987.

Prior to the last day of the hearing, Mr. Mellk requested that I inspect Mr. Tave's classroom at the Pine Brook School, and after receipt of Mr. Bernstein's letter in opposition, I orally denied Mr. Mellk's request during the hearing on December 5, 1986.

FINDINGS OF FACT

Mr. Tave testified that he has been employed by the Board since 1968, and for 13 years he was a sixth-grade math teacher at the Pine Brook School (1T 16). Prior to the incident which is the subject matter of this consolidated matter, no disciplinary action had ever been filed against Mr. Tave and he has been considered to be an excellent teacher who relates well to his students (P-13, 1T 71-78). Mr. Tave is very active in community and school extracurricular activities, which includes acting as the coach for the wrestling team.

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The incident in issue occurred on Friday, April 4, 1986, during the tenth period, which is the last class period of the day. During this class period, Mr. Tave stated that on several occasions a student, M.S., caused a disturbance and Mr. Tave asked him several times to refrain from his disruptive activities and to pay attention. Later, while Mr. Tave was writing on the blackboard, he heard another disturbance, and when he turned around, he saw that M.S. was violently rocking the desk in front of him where R.O. was seated (1T 38). R.O., who is a small-built child with a timid personality, was just sitting at his desk while it was being rocked (1T 38). Since Mr. Tave thought that the chair might topple over and R.O. might be hurt, he ran over to M.S. and placed the palms of his open hands on M.S. in the pectoral area. He pushed M.S. back in his chair, thereby stopping him from rocking the chair in front of him (1T 38). Mr. Tave then told M.S. to stand up, take his books and go to the principal's office (1T 38). As M.S. was getting up, Mr. Tave said to R.O., "You better learn to protect yourself because you were almost injured" (1T 38 at lines 22-23). In response to R.O.'s question as to what he should have done, Mr. Tave said, "You better learn to do something to protect yourself. If you have to turn around and hit him, to protect yourself from being injured, you better" (1T 38 at lines 24-25, and 1T 39 at lines 1-2). R.O. stated that he could get in trouble if he did that and Mr. Tave said, "You will leave that to the authority who's investigating to decide whether you were right or wrong in protecting yourself" (1T 39 at lines 5-8). Mr. Tave stated that as M.S. walked out of the class, M.S. told R.O. that he could still beat him (1T 39). According to Mr. Tave, M.S. left his classroom at approximately 1:40 p.m., and the class was scheduled to end at 2:05 p.m.

Mr. Tave stated that he only touched M.S. in the pectoral area and since he had been writing on the board, there were yellow chalk marks on M.S.'s clothes in that area. Mr. Tave denied touching M.S. anywhere else, and specifically denied pinching his throat or choking him (1T 42).

According to Mr. Tave, M.S. is a bright boy who was getting marginal grades because he did not do his school work, and who has the reputation of being a troublemaker (1T 50-53). M.S. had been in Mr. Tave's class for the entire school year and on several occasions, Mr. Tave had sent him out of the room. Mr. Tave had also met with M.S.'s mother several times (1T 52). Mr. Tave stated that while working as a cafeteria supervisor, he was told by students and a cafeteria employee that M.S. was stealing things (1T 53). When confronted by Mr. Tave and two other teachers, M.S. denied he stole anything; however, one of the teachers found bags of potato chips under his shirt (1T 54).

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Hubert E. Arbietman, a health and physical education teacher at the Pine Brook School and a friend of Mr. Tave, testified that he had witnessed the potato chip incident and that M.S. had stolen them and had denied stealing (3T 3-5). According to Mr. Arbietman, there was also another incident of M.S. being caught stealing--this time from a lunch wagon (3T 4).

Mr. Arbietman testified that he heard students in the locker room congratulate M.S. on "getting" Mr. Tave and they gave him a "high five" as a sign of approval (3T 5, 12-14).

Subsequent to the April 4, 1986 incident, Mr. Tave saw a fight in the hallway involving M.S. and another student, and he had both students taken to the principal's office. Later, Mr. Tave was told by Carmen Daccurso, the principal of the Pine Brook School, that M.S. had denied that they were fighting. M.S. had claimed that they were just fooling around, and that he had been sent to the principal's office because Mr. Tave had something against him. Since the other boy admitted that they had been fighting, the principal suspended M.S. (1T 55-56, 58). In addition, Mr. Tave stated that he was told by Mr. Daccurso that M.S. had accused another teacher, Alan Meeker, of hurting or hitting him (1T 54-58).

Francis James Murphy, an eighth-grade teacher employed by the Board, stated that in November 1985, he saw M.S. approach a student who was kneeling in front of his locker; M.S. then pulled the feet of this student, causing the student to tumble into his locker (1T 120). Mr. Murphy stopped M.S., and helped the other student to his feet. Based on what was said to him, Mr. Murphy felt that this student was being bullied by other students in the school. Mr. Murphy (1T 121) took M.S. to Thomas Sherman, the assistant principal in charge of discipline (1T 120-122).

Alan Meeker stated that M.S. was in his music class during the 1985-86 school year and that he had tried to stop a fight in the hall between M.S. and S.R. Mr. Meeker took the students to the principal's office, where M.S. stated that they were joking and that Mr. Meeker overreacted to the situation and punched him. According to Mr. Meeker, the principal said to M.S. that he had believed him once and that a problem had resulted. M.S. was transferred from Mr. Meeker's class.

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At the hearing, M.S., a twelve-year-old boy who is now in the seventh grade, testified that on April 4, 1986, while he was in Mr. Tave's class, he was moving the seat in front of him, which was occupied by his friend, R.O. According to M.S., he moved the seat back and forth, but the movement did not disturb the books that R.O. had on his desk (3T II 9-12). According to M.S., Mr. Tave saw what he was doing, but did not say anything; rather, he walked quickly toward him. With his right hand, Mr. Tave grabbed and twisted the skin on M.S.'s neck (3T II 12). Mr. Tave then yelled at him and told him to go to the principal's office. As M.S. was walking out of the door, Mr. Tave told R.O. that he should have turned around and punched M.S. in the face (3T II 13). M.S. said that he liked Mr. Tave before the incident and he did not want to get Mr. Tave into trouble (3T II 18-19).

According to M.S., he did not stop to go to the bathroom or to get a drink on his way to the principal's office (3T II 13-14). When he arrived in the principal's office, M.S. testified that he saw Norma Frudden, the school nurse, and inquired as to whether his neck was red. He then told her that Mr. Tave did it to him, and Ms. Frudden called the principal.

M.S. said that the students found out about the incident, and he admitted that on one occasion, he was given a "high five" as an indication of approval by another student (3T II 20-21).

According to M.S., he had never heard of a "blue Louie" or "blue Louis" prior to being asked about it by Mr. Bernstein (3T II 23-24). It was represented at the hearing that a "blue Louie" or "blue Louis" is a self-inflicted pinch of the skin in order to cause a red mark.

M.S. admitted that he got into trouble once in the cafeteria when he stole a packet of potato chips (3T II 24-25), and he admitted that he had been suspended from school on two occasions. As to the incident relating to the boy near the locker, M.S. said that he and another friend were fooling around and he denied that he had caused the student to fall into the locker (3T II 38).

D.G., a 13-year-old student who was in Mr. Tave's class on April 4, 1986, stated that he was sitting to the right of R.O. and that he saw that M.S. was moving R.O.'s desk back and forth (3T II 44-46). D.G. testified that he saw Mr. Tave walk quickly

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over to M.S. and grab M.S. by his throat, and it seemed to him that Mr. Tave was choking M.S. (3T II 46-47). Mr. Tave then told M.S. to go to the principal's office and told R.O. that he should have punched M.S. in the face (3T II 47-48).

D.G. stated that M.S. fools around in class and frequently does not pay attention (3T II 51). According to D.G., he is friendly toward M.S. at school; however, he has never been to M.S.'s house (3T II 48-49).

When the principal came to the classroom, D.G. stated that he told them what M.S. and Mr. Tave had said about the incident and asked then what was the truth (3T II 52-53). In response to the principal's question, D.G. raised his hand and said that both stories were true (3T II 55 at line 7). According to D.G., he had never heard of a "blue Louis" or "blue Louie" prior to talking to Mr. Bernstein (3T II 57).

Ms. Frudden testified that on April 4, 1986, at approximately 1:55 p.m., she saw M.S. in the principal's office. M.S. called her, pulled his shirt open, and said, "look what Mr. Tave did to me" in a loud voice (R-3, 3T 19 at line 8). According to Ms. Frudden, she saw that M.S.'s neck was very red and that there was a white streak down the middle. It was her professional opinion that M.S.'s neck had been squeezed fairly recently, within a five-minute period (3T 19-20). Ms. Frudden said that M.S. sounded angry, but he did not appear to be upset (3T 29). At the time, Ms. Frudden did not observe any chalk on M.S.; however, she was looking mainly at M.S.'s neck. Ms. Frudden was sure that there was no chalk around M.S.'s neck (3T 20). In view of M.S.'s accusation, Ms. Frudden notified Mr. Daccurso and M.S. was taken into the principal's office.

Later on the same day, Mr. Daccurso asked Ms. Frudden whether she saw any chalk on M.S.'s neck and she indicated that she had not (R-3, 3T 20-23). At Mr. Daccurso's request, she signed a memorandum he had prepared regarding the incident (R-3). However, she indicated her signature meant that she agreed only to that part of the statement that referred to her observations.

Sometime thereafter, she was told by Mr. Tave that M.S. had left his classroom approximately 15 minutes before she saw him, and it was her professional opinion that the white streak would not have remained on M.S.'s neck for that length of time if, in fact, Mr. Tave had pinched M.S.'s neck (3T 24).

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Later, Ms. Frudden was told by cafeteria workers that students were pinching their skin in order to cause red marks (3T 20). According to Ms. Frudden, there is no way to tell whether the mark on M.S.'s neck was self-inflicted.

A few minutes before the end of the class period on April 4, 1986, at approximately 2:00 p.m., Mr. Tave was asked to go to the principal's office. David Farley, a guidance counselor, came into his classroom to watch the class for the remainder of the period (1T 44). When he arrived in the principal's office, Mr. Tave was advised by Mr. Daccurso that M.S. had accused him of choking him (1T 44). Mr. Tave denied the accusation, told Mr. Daccurso what had occurred and indicated that if he had choked M.S., there would be chalk marks around his neck (1T 45). Mr. Daccurso and Mr. Tave went into another room to look at M.S., and Mr. Tave stated that M.S. had chalk marks on the front of his sweatshirt but there were no chalk marks on his neck (1T 45). At that time, Mr. Tave stated that the principal acknowledged that there were no chalk marks on M.S.'s neck (1T 49).

Mr. Daccurso then went alone to Mr. Tave's classroom to talk to the students. According to David Farley, who was in Mr. Tave's classroom, the principal told the students how M.S. and Mr. Tave each had described the incident and asked which version was correct. Mr. Farley said that approximately six students raised their hands, and Mr. Daccurso questioned several who said that M.S. was right; however, he did not question the other students in the class.

After he returned to his office, Mr. Daccurso spoke to Mr. Tave, along with Eileen Polensky and Beth Susan Tennenbaum, both senior representatives for the Pine Brook Faculty Association.

At the hearing, Ms. Polensky testified that she and Ms. Tennenbaum were called to the principal's office and told about the incident on April 4, 1986. The principal told them that after talking to M.S. and Mr. Tave, he went to Mr. Tave's classroom and told the students what each person said had occurred, and asked the students which version was correct (1T 155). Later, it was agreed that Mr. Tave should call M.S.'s mother and explain what had happened (1T 156-157). Mr. Tave called Ms. Polensky that night to say that M.S.'s mother would meet with him and the principal the next school day (Monday). Ms. Polensky thought the matter was settled until she was told by Mr. Tave on Sunday that he had been suspended (1T 157).

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Joseph S. Scozzari, the superintendent of education, stated that he first learned of the April 4, 1986 incident when he was called that evening by Harry Bernstein, the director of personnel, who had been contacted by the principal (3T II 60-61). After he talked to Mr. Daccurso on Sunday evening, it was decided that Mr. Tave should be suspended until Mr. Scozzari could conduct an investigation (3T II 61).

Thomas Sherman, the assistant principal at the Pine Brook School during the 1985-86 school year, stated that the principal had asked him to be present the morning of April 7, 1986, while he interviewed M.S. regarding the incident of April 4, 1986. Also present were M.S., Joseph Murphy, an eighth-grade teacher at Pine Brook and the president of the Manalapan-Englishtown Education Association (MEEA), and Beatrice Fanelli, treasurer of MEEA. Mr. Sherman stated that Mr. Daccurso asked M.S. to tell the group what had occurred in the classroom and he also asked M.S. a series of questions.

According to Mr. Joseph Murphy, it was a prejudicial interview since after M.S. said that Mr. Tave had pushed him back into his chair, Mr. Daccurso asked M.S. leading questions such as "Didn't he also grab you by your neck like this and twist and pinch you?" (1T 130), and it was only then that M.S. stated that Mr. Tave had grabbed him by the neck.

At the principal's request, Mr. Sherman took notes at the meeting (R-1a) and prepared a written summary (R-1), which was distributed to all the parties who attended the meeting. In his written statement (R-1), Mr. Sherman stated that both Mr. Murphy and Ms. Fanelli were concerned about the way Mr. Daccurso had interrogated Mr. Tave's class on April 4, 1986.

Mr. Joseph Murphy testified that he regarded Mr. Sherman's memorandum to be self-serving and that it did not adequately state what occurred during the meeting. Mr. Murphy stated that he did not indicate his objections to the memorandum to Mr. Sherman nor did he prepare a response memorandum; however, he indicated that later he did orally state his objections to the contents of the memorandum to the superintendent (1T 138). In addition, Mr. Murphy told Mr. Scozzari that in his opinion, Mr. Daccurso did not conduct an impartial investigation (1T 138-139).

Later on April 7, 1986, after the principal submitted a report to him, Mr. Scozzari arranged to meet with Mr. Tave to give the petitioner an opportunity to present his version of the incident of April 4, 1986 (3T II 62-63). Attending this meeting

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were Mr. Tave and Mr. Scozzari as well as Mr. Bernstein, Mr. Daccurso, Ms. Polensky, and Mr. Joseph Murphy. During this meeting, Mr. Tave indicated what had happened but was not allowed to mention M.S.'s reputation as a troublemaker. Mr. Daccurso, who stated he was at the meeting to help Mr. Tave, gave the attendees a written statement indicating that he saw chalk on M.S.'s neck and that M.S. had been traumatized by the incident (1T 60-62). Also during the meeting, Mr. Tave was asked to submit a written signed statement regarding the incident (P-2). Mr. Tave prepared a statement but gave it to his union, based upon the advice of his attorney.

At this April 7, 1986 meeting, Ms. Polensky and Mr. Joseph Murphy indicated that Mr. Tave's rights has been violated by the principal's presentation of both versions to the students (1T 172). Ms. Polensky noted that student peer pressure is especially prevalent while the students are in a group, and it would have been better if Mr. Daccurso talked to the students individually (1T 175-176).

As a result of this meeting, Mr. Scozzari decided that he wanted to talk to M.S. Mr. Scozzari interviewed M.S. on April 8, 1986, in the presence of Mr. Sherman (3T II 63-64). In addition, on that day, Mr. Scozzari interviewed the five students who Mr. Daccurso stated had witnessed the incident and they corroborated what Mr. Daccurso had indicated in his report (3T II 65). Also, Mr. Scozzari spoke to the nurse on April 8, 1986 (3T II 65). Except for D.G.'s parents, the parents of the other students he interviewed refused to allow their children to be witnesses at the hearing in this matter (3T II 67).

Mr. Sherman confirmed that on April 9, 1986, he was present while Mr. Scozzari interviewed individually the five students from Mr. Tave's class. Four of these students stated that Mr. Tave grabbed M.S. by the throat, and the fifth student, R.O., who was sitting at the desk which was being rocked by M.S., stated that he did not see the incident between Mr. Tave and M.S.

Within the first week of his suspension, Mr. Tave received a call from Mr. Scozzari, who indicated that he should return to school the following Monday and asked him not to mention anything about the incident to the students or staff. During this conversation, Mr. Tave indicated to Mr. Scozzari that when he was exonerated, he would hold the principal (Mr. Daccurso) responsible for the way the matter was handled and would pursue the matter (1T 63-64). According to Mr. Tave, he did not mean this as a

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threat to the principal, as implied in Mr. Scozzari's letter to him, dated April 28, 1986 (P-5), but as an indication that he intended to file a grievance.

When he was told by Mr. Scozzari to return to school, Mr. Tave thought the matter had ended and that he had been absolved; however, Mr. Tave admitted that the superintendent did not tell him that the Board was dropping the matter.

Ms. Tennenbaum stated that the MEEA had filed a grievance on behalf of Mr. Tave. In the grievance, it was alleged that Mr. Tave had used the correct amount of force needed in the situation and that Mr. Daccurso was damaging his reputation and violating his rights (1T 159-160, 184). The grievance was denied at the superintendent level (1T 162).

When Mr. Tave returned to school, M.S. had been taken out of his class, and except for stopping the subsequent fight between M.S. and another student, Mr. Tave did not talk to M.S. for the remainder of the school year.

On May 8, 1986, Mr. Scozzari sent four letters to Mr. Tave. In the first letter, Mr. Scozzari stated that the Board had concluded that he used unnecessary force on M.S., and had decided to deny his salary increment for the following year (P-3). The Board also requested that he undergo a psychiatric examination, and informed him that he was being transferred to another school and would be given a letter of reprimand (P-3). In this letter, Mr. Scozzari also advised Mr. Tave to refrain from this type of inappropriate conduct and warned him that any further action by him of this nature would result in further disciplinary action, including possible dismissal.

In the second letter, Mr. Scozzari formally informed Mr. Tave that at its April 22, 1986 meeting, the Board voted to withhold his 1986-87 salary increment and salary adjustment based on its finding that he had committed a serious breach of conduct by the use of unnecessary physical force on a male student. Mr. Tave was warned that any future use of unjustified physical force would result in additional disciplinary actions (P-4).

In the third letter, Mr. Scozzari formally notified Mr. Tave that the Board was requiring him to submit to a psychiatric examination pursuant to N.J.S.A. 18A:16-2, based on its judgment that he had shown evidence of deviation from normal physical or mental

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health; i.e., on April 4, 1986, Mr. Tave had used unnecessary physical force on a student, had urged a student to strike another student, and had threatened the principal during a conversation with the superintendent (P-5). Attached to this letter was a list of psychiatrists acceptable to the Board.

In the last letter, Mr. Scozzari, pursuant to the union contract, gave Mr. Tave official notification that he intended to recommend to the Board that Mr. Tave be transferred to the Milford Brook School. He stated that this transfer was necessitated by Mr. Tave's previous offense against a male student and his attitude toward the Pine Brook administration (P-6).

By letter dated May 8, 1986, Mr. Scozzari reminded Mr. Tave that the Board had directed him to take a psychiatric examination (P-7).

According to Mr. Scozzari, Mr. Tave requested to appear before the Board and the Board agreed to see him on May 27, 1986. At that time, Mr. Tave and his attorney appeared, and Mr. Mellk spoke on behalf of his client and stated that his client would not agree to a psychiatric examination. According to Mr. Scozzari, during the meeting the Board gave Mr. Tave an opportunity to discuss any of the Board's actions and did not limit his testimony to the psychiatric examination (3T II 79-80).

At the hearing, there was a dispute between the attorneys for the parties as to what occurred at the May 27, 1986 executive session meeting of the Board, and it was agreed that the attorneys would submit certifications as to their recollections.

In his certification, Mr. Mellk stated that he requested the Board to allow Mr. Tave to respond to the allegations against him concerning the April 4, 1986 incident and that the Board refused to allow Mr. Tave to address it as requested. Mr. Bernstein certified that he spoke to Mr. Mellk by telephone on May 20, 1986, and again before the Board meeting, and both times indicated that there was no objection to Mr. Mellk and/or Mr. Tave presenting the petitioner's defenses to the Board's actions, including the required psychiatric examination, the withholding of the salary increment and adjustment increment, the letter of reprimand and the transfer to another school. Further, Mr. Bernstein certified that during the Board's closed session, Mr. Mellk informed the Board that the petitioner would not undergo a psychiatric examination since the Board had

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not proved that his actions were in violation of the law, and that the Board's other actions against the petitioner were arbitrary, capricious and unreasonable.

By letter dated May 29, 1986, Mr. Scozzari stated that after considering the information presented by the petitioner's attorney, the Board renewed its directive that Mr. Tave submit to a psychiatric examination (P-8).

Having reviewed the testimony of the witnesses, I FIND that the sequence of events as stated above is not in dispute. Thus, the factual disputes are limited to what happened in Mr. Tave's classroom on April 4, 1986; what occurred when Mr. Daccurso interviewed M.S. on April 7, 1986; what occurred during the conversation between Mr. Tave and Mr. Scozzari on or about April 10, 1986, and what occurred during the Board meeting on May 27, 1986.

The first factual dispute is obviously the pivotal question in this matter. After hearing his testimony and observing his demeanor during the hearing, I FIND Mr. Tave to be a credible witness, and I accept his testimony both as to why and how he touched M.S., and as to what he told R.O. In light of the testimony of Mr. Meeker, Mr. Francis Murphy and Mr. Arbietman, I FIND that M.S. is not a credible witness. M.S.'s testimony at the hearing differed substantially from that of Mr. Francis Murphy and Mr. Arbietman as to the incident involving the student at the locker and the incident in the cafeteria. Further, I FIND that M.S.'s neck was injured after he left Mr. Tave's class and probably just before he entered the principal's office when he was seen by Ms. Prudden. Whether the injury was self-inflicted or was the result of an accident or a confrontation with another person is not a material fact to this determination.

Further, I do not FIND D.G.'s testimony to be persuasive. I have strong reservations about Mr. Daccurso's discussion with Mr. Tave's class on April 4, 1986. Mr. Daccurso should have spoken to the students individually or at least asked them to tell him what occurred without first telling them how both Mr. Tave and M.S. had described the incident. To present both versions initially to the students gained a predictable result; namely, the students sided with their fellow student rather than with the teacher. In addition, as testified by Mr. Farley, the principal did not even call on all the students who raised their hands.

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As to the April 7, 1986 interview of M.S. by Mr. Daccurso, I **FIND** that M.S. did not initially say that Mr. Tave grabbed him by the neck. He did not say this until he was prompted by Mr. Daccurso, as testified by Mr. Joseph Murphy. The testimony of Mr. Sherman is less explicit but not inconsistent with the testimony of Mr. Murphy. Mr. Sherman's memo (R-1) appears to be nothing more than a brief summary of what occurred during the interview; however, it does imply that M.S. made a more positive statement.

As to the telephone conversation between Mr. Tave and Mr. Scozzari, I **FIND** that Mr. Tave did not mean to threaten Mr. Daccurso as implied by Mr. Scozzari's letter of May 8, 1986 (P-5), but that he meant that he would be filing a grievance.

Lastly, regarding the dispute as to whether the petitioner was given the full opportunity to address the Board regarding all of the Board's actions as a result of the April 4, 1986 incident, I **FIND** that there was a misunderstanding between the parties as to what the petitioner or his attorney could do at the meeting, and I also **FIND** that this is not a material fact in this matter since there is no allegation by the petitioner that there were any procedural errors as to the Board's actions in dispute.

CONCLUSIONS OF LAW

Mr. Mellk argued that no legal justification was presented at the hearing to support the Board's decision that Mr. Tave should submit to a psychiatric examination pursuant to N.J.S.A. 18:16-2, and that the petitioner has shown by a preponderance of credible evidence that the respondent has arbitrarily, capriciously and unreasonably withheld his salary increment and salary adjustment for the 1986-87 school year. Further, Mr. Mellk argued that the transfer of Mr. Tave to another school was a punitive action since there was no showing that the transfer served any legitimate educational purposes. Lastly, Mr. Mellk argued that the April 4, 1986 incident was not fairly evaluated by Mr. Daccurso, the school principal, and suggested a negative inference could be drawn by the fact that the Board did not call Mr. Daccurso as a witness at the hearing.

Mr. Bernstein, on behalf of the Board, argued that the facts establish that the petitioner used unnecessary force against the student; that the petitioner, in front of his class, indicated he would have condoned the use of force by one student against his classmate; that the petitioner threatened the principal, and that these facts constituted a

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sufficient basis for the Board's requirement of a psychiatric examination pursuant to N.J.S.A. 18A:16-2.

Mr. Bernstein argued that the Board's prime responsibility is to protect its students, and the courts have recognized that the Board is not required to wait until a teacher causes harm, and that a reasonable possibility warrants the requirement of a psychiatric examination. In support of his position, Mr. Bernstein cited the decisions in Kochman v. Keansburg Bd. of Ed., 124 N.J. Super. 203 (Ch. Div. 1973); Griggs v. Somerville Bd. of Ed., 1980 S.L.D. 136, adopted by Comm'r, 1980 S.L.D. 143; O'Halloran v. Independence Bd. of Ed., OAL DKT. 8063-83 (Nov. 13, 1984), adopted by Comm'r (Dec. 31, 1984), aff'd., St. Bd. of Ed. (June 5, 1985); Gish v. Paramus Bd. of Ed., 145 N.J. Super. 96 (App. Div. 1976).

As to the denial of the salary increment and salary adjustment, Mr. Bernstein noted that N.J.S.A. 18A:29-14 provides that a board of education may withhold a salary increment or salary adjustment for inefficiency and other good cause, that the school case law has recognized that the Commissioner is prohibited from substituting his own judgment for that of the local board, and that the Board's decision should be affirmed if there exists a reasonable basis for denying the salary increment and salary adjustment, Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960). Also, Mr. Bernstein argued that it has also been established that Board decisions are entitled to a presumption of correctness, Thomas v. Morris Bd. of Ed., 89 N.J. Super. 327, 332 (App. Div. 1965).

Further, Mr. Bernstein argued that school law decisions have clearly established that a student has a right to be free from bodily harm as well as the right to be free from offensive bodily touching, even if there is no actual physical harm, Brown v. Sayreville Bd. of Ed., decided by Comm'r (Jan. 14, 1981). Further, he argued that corporal punishment is illegal unless a teacher is engaged in self-defense or in the protection of other persons or property, and that regardless of the degree of provocation, a teacher must never use physical force for disciplinary purposes, Forman v. Scotch Plains-Fanwood Bd. of Ed., decided by Comm'r (Feb. 25, 1982). Also, Mr. Bernstein argued that the school case law has recognized that a single incident is sufficient justification for withholding a teacher's salary increment and salary adjustment, Union Twp. Teachers' Association v. Union Bd. of Ed., 1981 S.L.D. 121; Meyers v. Glassboro Bd. of Ed., 1966 S.L.D. 66.

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As to Mr. Tave's transfer to another school, Mr. Bernstein argued that N.J.S.A. 18A:25-1 allows the Board to transfer a teacher and that the transfer in issue was properly done in accordance with the statute and the existing contract between the Board and the Manalapan-Englishtown Education Association. Mr. Bernstein noted that school case law has established that teacher transfers are within the managerial prerogative of the Board, provided that the decision is not made in an arbitrary, capricious and unreasonable manner, Ridgefield Park Ed. Assn. v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 156 (1978). In this matter, Mr. Bernstein argued that the facts show that the superintendent, after evaluating the situation, properly determined that it was in the best interest of all the parties to transfer Mr. Tave to a new school and that his transfer was not a demotion; he was transferred to another teaching position appropriate to his certification. Mr. Bernstein stated that in Bigart v. Paramus Bd. of Ed., 1979 S.L.D. 123, the Commissioner established the following standards to determine whether there was a bona fide rationale for transferring a teacher:

(1) The transfer must be reasonably proper and exercised in good faith;

(2) The transfer must be for the best interest of the school district;

(3) The work assigned must be of a rank equivalent to that by which the tenure status was acquired;

(4) The assignment must be one for which the teacher is certified; and

(5) The Board must not seek to evade the planned intention of the tenure statute.

Pursuant to the standards, Mr. Bernstein argued that the petitioner made a reasonable determination to transfer Mr. Tave.

As to the letter of reprimand, Mr. Bernstein argued that the letter constituted a valid exercise of the Board's discretionary power and that based on the facts in this matter, the letter of reprimand was not arbitrary, capricious or unreasonable, and he cited the cases of Duffy, et al. v. Brick Twp. Bd. of Ed., 1974 S.L.D. 111, and Ennico v. Washington Bd. of Ed., decided by Comm'r (June 11, 1981).

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Lastly, in his reply brief, Mr. Bernstein argued that no negative inference should be drawn from the fact that the principal did not testify at the hearing because there was no showing that he was a necessary witness and the petitioner could have subpoenaed him as a witness. In support of his argument, Mr. Bernstein cited the decisions in Parentini v. S. Klein Department Stores, 94 N.J. Super. 452 (App. Div. 1967); O'Neil v. Bilotta, 18 N.J. Super. 82 (App. Div. 1952); State v. Clawans, 38 N.J. 162 (1962).

Based on the facts, and after consideration of the legal arguments of the parties, I **CONCLUDE** that the petitioner has shown that he pushed M.S. back into his chair to stop him from rocking R.O.'s chair in order to protect R.O. from bodily harm which could have resulted if the chair toppled over, and that this was an acceptable and reasonable use of force. Further, having accepted Mr. Tave's version of what he said to R.O., I **CONCLUDE** that Mr. Tave's advice to R.O. was inappropriate. It was neither the time nor the place for Mr. Tave to discuss with any student what constitutes self-defense and what are appropriate actions for a student to take in self-defense. If Mr. Tave considered R.O. to be timid, he should have had a private conversation with him to seek ways to help him, rather than encouraging a confrontation between students. Most certainly, such remarks in front of a classroom of students may have been misunderstood by R.O., as well as by other students.

In view of Mr. Tave's outstanding record as a teacher, I **CONCLUDE** that this one incident of making an inappropriate remark to a student, standing alone, does not establish reasonable and sufficient reason for requiring a psychiatric examination or for the withholding of Mr. Tave's salary increment and adjustment increment.

However, the remarks of Mr. Tave were inappropriate, and I **CONCLUDE** that the issuance of a letter of reprimand is reasonable.

Lastly, I **CONCLUDE** that the Board's decision to transfer Mr. Tave to another school is reasonable in view of the obvious notoriety given to the April 4, 1986 incident.

In arriving at these conclusions, I have not taken any negative inference from the fact that Mr. Daccurso did not testify at the hearing.

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DISPOSITION

Therefore, I **ORDER** that the Board withdraw its directive that Mr. Tave submit to a psychiatric examination, that the Board pay Mr. Tave his salary increment and salary adjustment for the 1986-87 school year, that the Board issue a new letter of reprimand consistent with the decision in this matter, and that the Board's decision to transfer Mr. Tave to the Milford Brook School be **AFFIRMED.**

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

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

April 16, 1987
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

APR 16 1987
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 22 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

ml/EE

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LAWRENCE TAVE,	:	
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's exceptions and the Board's reply thereto were timely filed pursuant to N.J.A.C. 1:1-16.4a, b, and c.

Petitioner excepts to the ALJ's failure to award interest on his wrongfully withheld salary and adjustment increments. He also objects to the ALJ's conclusion that the Board's decision to transfer him was reasonable in view of the obvious notoriety given to the incident in this matter. Petitioner argues that because there was no evidence presented by the Board during the hearing as to the effect of the incident upon the school population and its impact on the provision of educational services, the finding is inappropriate. Moreover, he avers that the incident will have receded in memory prior to the commencement of the 1987-88 school year as the Pine Brook School is a middle school. Therefore, petitioner contends he should be given the option of returning to that school for the 1987-88 school year.

The Board in its reply urges the Commissioner to deny petitioner's request for pre-judgment interest because it did not act in bad faith nor did it deliberately violate law or statute. N.J.A.C. 6:24-1.18(c)(1). Moreover, it argues that post-judgment interest should not be granted since the timeline set forth in N.J.A.C. 6:24-1.18(c)(2) has not been exceeded.

The Board avers that the Commissioner should uphold the ALJ's determination with respect to petitioner's transfer relying essentially on the same legal arguments presented in its brief and considered by the ALJ which are summarized below.

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The Board argues Ridgefield Park, supra, establishes that transfers are matters of management prerogative and that they cannot be upset unless proven to be arbitrary, capricious, and unreasonable. Of this it states:

> ***There was no evidence to conclude, through the Initial Decision or the exceptions filed, that such transfer was done in an arbitrary, capricious or unreasonable manner. Additionally, in light of N.J.S.A. 18A:25-1, Respondent also believes that it has the right to make the transfer it made, that it was proper in light of statute and law and consistent with the determination of the Superintendent in light of the statements made to him by Petitioner as to actions he would take against the Pine Brook principal once this case was completed.
>
> Furthermore, as was determined by the Appellate Division in Bayshore Sewerage Co. v. Department of Environment, 122 N.J. Super, 184, 199 (Ch. Div, 1973), aff'd 131 N.J. Super. 35 (App. Div. 1974):
>
> > Arbitrary and capricious means having no rational basis...means willful and unreasoning action, without consideration and disregard for circumstances. When there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. (Emphasis added)
>
> The Superintendent's decision to transfer Petitioner from Pine Brook School to Milford Brook School was exercised properly and in due consideration of all the parties in question. It was done in regard to both the incident of April 4, 1986 and the disturbing statements made by the Petitioner subsequent to the incident. Since there are two opinions (Petitioner's and Respondent's) related to the propriety of the transfer, Respondent relies on Bayshore to hold for the proposition that the transfer was not arbitrary or capricious.
>
> ***

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> The transfer of Petitioner, as noted by the court in its Initial Decision, and not refuted by Petitioner in his exceptions, was reasonable and exercised in good faith pursuant to the recommendations made by the Superintendent of Schools, who had made the decision after several weeks of thought and consideration. There is no requirement in Bigart, much less in Ridgefield Park or Kopera, that there must be showing of impact upon educational services, only that the transfer was not arbitrary, capricious or unreasonable. The work assigned to Petitioner was in a rank equivalent to what he had acquired tenure in, which is elementary certification. He had taught in varying grade levels throughout the district, including the grade level which he is teaching now and will be teaching in next year. Petitioner is properly certified in the endorsement in which he obtained tenure, an endorsement under which he has taught in Respondent's school district since becoming employed with Respondent. Finally, there has been no violation of N.J.S.A. 18A:28-5 as to any demotion, reduction in compensation or emoluments. Therefore, Respondent's transfer of Petitioner does not invade the planned intention of the statute, or the standards set out in Bigart for determining validity of transfers of tenured employees.***
>
> (Board's Reply Exceptions, at pp. 4-6)

Upon a thorough examination of the record, including the parties' exceptions and the transcripts of the hearing, the Commissioner determines that the circumstances of this matter do not warrant the granting of either pre- or post-judgment interest. Notwithstanding the reversal of the increment withholding, the order for a psychiatric evaluation and modification to the letter of reprimand being ordered in this matter, a comprehensive review of the record reveals that neither criterion for the award of the pre-judgment interest expressed in N.J.A.C. 6:24-1.18(c)(1) is present. Namely, the record does not demonstrate that (1) the Board or its agents were motivated by bad faith or that (2) there was a deliberate violation of any statute or rule. Further, the 60-day timeline relative to the granting of post-judgment interest does not even begin to toll until the Commissioner renders his final decision in the matter or 45 days expire pursuant to N.J.S.A. 52:14B-10. Thus, petitioner's request for interest is denied.

Moreover, upon an exhaustive review of the record, the Commissioner is in full concurrence with the findings and determinations of the ALJ and adopts them as his own with the exception of her determination on the transfer of petitioner from the Pine Brook School as explained below.

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With respect to the transfer issue, the Commissioner determines that the Board's May 1986 action to transfer petitioner effective September 1986 was reasonable at that time given the circumstances in the matter. Transfers do legitimately fall under the domain of management prerogative and, as correctly argued by the Board, they will not be disturbed unless proven to be arbitrary, capricious, unreasonable or otherwise improper. As stated in Bd. of Ed. of the Borough of Freehold, 1976 S.L.D. 590,

> A board of education may transfer teaching staff members pursuant to N.J.S.A. 18A:25-1. Such a transfer may be based upon the Board's determination that the teaching staff member, or the individual school, or the entire community or a combination thereof may individually or collectively benefit by such a transfer. For a teaching staff member who is transferred to establish that the underlying reasons for such an action are improper or illegal requires substantial proof that the board acted in a manner which was illegal, or improper, and to the exclusion of all other "bona fide" reasons.*** (emphasis supplied)(at 600)

However, given the reasons for the transfer expressed by the superintendent and as acted upon by the Board, the bases or "bona fide reasons" for the transfer were not found to be supported by the record in this matter and, therefore, the transfer action can no longer be deemed appropriate as explained below.

Contrary to the ALJ's determination that the transfer was reasonable in view of the obvious notoriety given to the April 4, 1986 incident (Initial Decision, ante), the record does not demonstrate that "notoriety" was the reason for the transfer. As can be seen below the official notification for the transfer which is in the form of a letter to petitioner from the superintendent states the following reasons for the transfer:

> This letter serves as official notification, under the contract between the Board and the MEEA, that I intend to recommend to the Board, for action on May 27, 1986, that you be transferred from the Pine Brook School to the Milford Brook School, grade 6. This transfer is necessitated by your recent offense against a male student and your attitude toward the Pine Brook administration.
>
> I urge you to complete this school year in a professional manner and begin your new assignment with a proper professional attitude, which will avoid further actions of the type in question. (P-6)

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Further, the Board's reply exceptions indicate that the transfer decision was done in regard both to the incident of April 4, 1986 and "the disturbing statements made by Petitioner subsequent to the incident," i.e., the statements purportedly made by petitioner as to the actions he would take against the principal once the case was completed. (Board's Reply Exceptions, at pp. 4-5).

Given the fact that the record does not demonstrate that petitioner used illegal or unnecessary physical force on April 4, 1986 against M.S. or that petitioner's statements to the superintendent were intended to mean anything more than the filing of a grievance, the Commissioner determines that the underlying reasons for the transfer have not been found to be "bona fide," notwithstanding the fact that petitioner's spontaneous comments about self-defense to R.O. during the incident were deemed to be inappropriate (see Initial Decision, ante) and deserving of a letter of reprimand.

Consequently, the Commissioner grants petitioner's requested relief that he be given the option to return to the Pine Brook School for the 1987-88 school year.

In all other respects, the initial decision rendered by the ALJ is adopted as the final decision in this matter. The Board is therefore ordered to pay petitioner the salary increments due and owing to him for 1986-87; that he be placed on the salary guide for 1987-88 as though no such withholding action occurred; that the Board issue a new letter of reprimand consistent with the ALJ's determination with respect to petitioner's comments to R.O. on the issue of self-defense; that the Board's directive to petitioner to submit to a psychiatric evaluation be rescinded; and that petitioner be given the option to return to the Pine Brook School in September 1987.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 28, 1987

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LAWRENCE TAVE,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, May 28, 1987

For the Petitioner-Respondent, Katzenbach, Gildea & Rudner (Arnold M. Mellk, Esq., of Counsel)

For the Respondent-Appellant, Gerald L. Dorf (Gerald L. Dorf, Esq., and Eric Bernstein, Esq., of Counsel)

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

November 4, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4728-86
(ON REMAND AND CONSOLIDATED,
OAL DKT. NOS. EDU 1312-83, and
EDU 3139-84)
AGENCY DKT. NOS. 34-2/83A, and
72-4/84

CAPE MAY COUNTY
VOCATIONAL-TECHNICAL
EDUCATION ASSOCIATION, ET ALS.,
Petitioner,
v.
BOARD OF EDUCATION OF THE
CAPE MAY VOCATIONAL-TECHNICAL
SCHOOL DISTRICT, CAPE MAY COUNTY,
Respondent,
and
DONALD P. ECHEVARRIA,
Petitioner,
v.
BOARD OF EDUCATION OF THE
CAPE MAY VOCATIONAL-TECHNICAL
SCHOOL DISTRICT, CAPE MAY COUNTY,
Respondent.

Barbara E. Riefberg, Esq., for petitioners (Selikoff and Cohen, attorneys)

John T. Barbour, Esq., for respondent (Barbour and Costa, attorneys)

Record Closed: February 19, 1987 Decided: April 2, 1987

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BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL ASPECTS

This matter is remanded from the Appellate Division of Superior Court to the Commissioner of Education (Commissioner) for specific findings respecting the amount of military service credits the Board of Education of the Cape May Vocational-Technical School District (Board) claims it gave petitioners and whether such credits, if given, were adequate. The matter was heard and determined by the undersigned whereby an initial decision issued, dated July 31, 1984, concluding that the Board had failed to grant appropriately certain of the petitioner's military service credit to which they were eligible and entitled pursuant to N.J.S.A. 18A:29-11. The Commissioner and the State Board of Education adopted the initial decision on September 14, 1984 and March 6, 1985, respectively, whereby it was ordered that the Board, pursuant to Lavin v. Board of Education of the Borough of Hackensack, 90 N.J. 145 (1982), adjust the salaries of petitioners Albert N. Clark Jr. and William Moore as of February 3, 1983, and Edward Kelly and Arthur Molnar as of July 1983. Thereafter, the Board appealed before the Appellate Division of Superior Court which resulted in the instant remand. Cape May County Vocational-Technical Education Association on Behalf of Albert N. Clark, Jr., Edward Kelly, Arthur Molnar, and William Moore v. Cape May County Vocational-Technical Board of Education (App. Div., June 30, 1986, A-3585-8476) (unreported).

During the original administrative proceedings, the Cape May County Vocational-Technical School Education Association (Association) moved, to amend its pleadings to include Count Twelve of its Petition of Appeal on behalf of Donald T. Echevarra (sic) as a party petitioner. The Board objected and opposed the Association motion to amend grounded upon its assertion that the amendment was untimely, having been advanced at the first day of hearing, and that it precluded the Board from adequate preparation of its defenses thereto. This tribunal agreed with the Board that it would be prejudiced by such an untimely application, and therefore denied the Association's Motion to Amend.

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Thereafter, a separate action was filed before the Commissioner by Echevarria which resulted in a summary decision issued by the undersigned granting petitioner's requested relief dated March 5, 1985. The Commissioner adopted the findings and conclusions of the Initial Decision on May 7, 1985. Thereafter, the State Board affirmed the Commissioner by way of decision dated November 6, 1985.

Although Echevarria was not a party to the appeal before the Appellate Division which is the subject of this remand, he is now in the case as a party by agreement and consensus of the parties.

FINDINGS OF FACTS AND CONCLUSIONS

Based upon the entire record now before this administrative tribunal, the following are incorporated by reference in this decision: The Initial Decision dated July 31, 1984; the Commissioner's Decision dated September 14, 1984; the State Board of Education decision dated March 6, 1985, and the Appellate Division's decision dated June 30, 1986. Accordingly, no additional testimony was required nor offered as a consequence of the order of remand. The Background Facts, as found in the Initial Decision (pp. 3-5) are, therefore, adopted here as my **FINDINGS OF FACT.**

Having found and determined that each of the herein petitioners demonstrated, by a preponderance of the credible evidence, the Board denied them their statutory entitlement to military service credit, pursuant to N.J.S.A. 18A:29-11, and applying the criteria set down by the Appellate Court with respect to the Board's prerogative to advance petitioners only one-half step on its salary guide (unreported decision at pp. 4-5), it is now necessary to analyze the Board's application of its various salary policies on the event of each petitioner's initial employment together with their past teaching/industrial experience and military service credit to determine their individual entitlements.

I **FIND** that William W. Moore was initially employed by the Board in the 1970-71 school year and was placed at step four of the Board's then adopted salary guide. At the time of his initial hire, Moore had 13 years of prior industrial experience and three years of active military service. The Board's salary policy in force and effect for the 1970-71 school year provided as follows:

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> New employees will be placed on the salary guide according to their teaching experience and/or industrial experience beyond the certification requirements on a ratio of two such years of experience for one salary step, to a limit of eight steps, including military experience as regulated by State law. (See, R-1)

Thus, petitioner Moore was entitled to placement at the maximum step eight on the Board's salary guide rather than at step four. The parties have agreed, however, that Moore is only entitled to advance one step on the Board's salary guide as of February 1983, due to the fact that he was one step below the maximum step on the 1983-84 salary guide.

I **CONCLUDE**, therefore, that **WILLIAM W. MOORE** is and was eligible to advance one step on the Board's 1983-84 Salary Guide, its maximum step, as of February 1983.

I **FIND** that Albert N. Clark, Jr., was initially employed by the Board for the 1973-74 school year and was placed at step four. Clark had six years prior teaching experience and twenty years prior industrial experience together with two years, seven days of active military service with the United States Navy. The Board's salary policy in force at the time of Clark's initial employ provided as follows:

> New employees will be placed on the salary guide according to their teaching experience and/or industrial experience including military experience beyond the certification requirements on a ratio of two such years of experience for one salary step, to a limit of step six on the guide. (See, R-3)

Based upon the foregoing, I **CONCLUDE** that **ALBERT N. CLARK, JR.**, was eligible for and entitled to placement at step six of the Board's salary guide upon his initial hire for the 1973-74 school year. I further **CONCLUDE** that petitioner Clark is entitled to a two-year advancement on the Board's adopted salary guide from February 1983 through his date of retirement from the Board's employ in June 1985.

I **FIND** that Edward Kelly had 18 years prior industrial experience and three years, 24 days of active military service in the United States Navy upon his initial employment with the Board for the 1981-82 school year. He was placed at step four of the Board's salary guide.

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The Board's adopted salary policy for the 1981-82 school year provided, in pertinent part, as follows:

> New employees may be placed on the salary guide according to their teaching experience and/or industrial experience beyond the certification requirements on a ratio of two such years of experience for one salary step to a limit of step five on the guide. A limit of four years credit on the guide will be allowed for military experience.

A clear reading of the Board's salary policy shows that Kelly was entitled to the full five years for his prior industrial experience on a two-for-one ratio to the maximum limit of five years. The limitation for prior military experience, however, is that prescribed by statute, N.J.S.A. 18A:29-11 -- i.e, four years. There is nothing in the then Board's policy to demonstrate that military experience was limited to a two-for-one ratio as expressed in other policy statements. To the contrary, the policy specifically states that "A limit of four years credit on the guide will be allowed for military experience."

As the Commissioner observed in In the Matter of the Tenure Hearing of William Lavin, School District of the Lower Camden County Regional High School District Number One, Camden County, 1976 S.L.D. 796, 800-801, a stated policy of a board of education must be reasonable and the interpretation and implementation of a policy must also be reasonable. Therein, the Commissioner reiterated the guidelines for interpretation of a board of education policy as set forth in Harry A. Romeo, Jr. v. Board of Education of the Township of Madison, Middlesex County, 1973 S.L.D. 102, where it was stated that:

> ***In ascertaining the meaning of a policy, just as of a statute, the intention is to be found within the four corners of the document itself. The language employed by the adoption should be given its ordinary and common significance. Lane v. Holderman, 23 N.J. 304 (1957). Where the wording is clear and explicit on its face, the policy must speak for itself and be construed according to its own terms. Duke Power Company, Inc. v. Edward J. Patten, Secretary of State, et al, 20 N.J. 42, 49 (1955); Zietko v. New Jersey Manufacturers Casualty Insurance Company, 132 N.J.L. 206, 211 (E.&A. 1944); Bass v. Allen Home Development Company, 8 N.J. 219, 226 (1951); Sperry and Hutchinson Company v. Margetts, 15 N.J. 203, 209 (1954); 2 Sutherland, Statutes and Statutory Construction (3rd ed. 1943), Section 4502*** (at p. 106)

Thus, the clear meaning of the Board's salary policy must be applied hereto.

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Based upon these findings, I **CONCLUDE** that **EDWARD KELLY** was eligible for placement on step nine of the Board's 1981-82 salary guide. Accordingly, I **CONCLUDE** that petitioner is entitled to four years additional credit and shall be advanced on the Board's salary guide from February 1983 through June 1984, the conclusion of his employment with the Board.

I **FIND** that Arthur P. Molnar, Jr., was initially employed by the Board in September 1980 for the 1980-81 school year. Prior to his employment, he had two prior years of industrial experience and had served for twenty years and nine months with the United States Coast Guard. Upon his initial employment with the Board, Molnar was placed at step three on the Board's salary guide then in force. The Board's salary policy under which he was employed provided that:

> New employees may be placed on the salary guide according to their teaching experience and/or industrial experience beyond the certification requirements on a ratio of two such years of experience for one salary step to a limit of step five on the guide. A limit of four years credit on the guide will be allowed for military experience. (See, P-9)

Given the clear meaning of the Board's salary policy, Lavin,; Romeo, I **CONCLUDE** that at the time of his initial hire by the Board, **ARTHUR P. MOLNAR, JR.**, was entitled to one step on the salary guide for his two years industrial experience pursuant to the two-for-one ratio and the full four years for his military service, placing him at step five on the salary guide. Accordingly, Molnar is entitled to two years advancement on the Board's salary guide as of July 1983 through June 1985, the date of his retirement from the Board's employ.

I **FIND** that Donald P. Echevarria was initially employed by the Board in September 1977, with three years prior teaching experience, three years prior industrial experience and one year, six months of military serivce. Pursuant to the Commissioner's decision in Paul Blue, et al. v. Board of Ed. of the City of Camden, decided by Comm'r (August 3, 1981), aff'd by St. Bd. of Ed. (November 13, 1981), aff'd, N.J. App. Div. (A-01625-81-T03)(unreported). Camden County Vo-Tech. Ed. Assn., et al. v. Bd. of Ed. of Camden County Vo-Tech. Schools, OAL DKT. EDU 4829-80 (July 28, 1983), decided by Comm'r (September 30, 1983), wherein it was held that a teaching staff member with five or more months of military service is entitled to a full year's salary credit for the purposes of N.J.S.A. 18A:29-11. Therefore, Echevarria's one year, six months military service is computed as two years.

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The Board's salary policy in force for the 1977-78 school year provided as follows:

> New employees may be placed on the salary guide according to their teaching experience and/or industrial experience including military experience beyond the certification requirements on a ratio of two such years of experience for one salary step to a limit of step four on the guide.

Based upon the foregoing facts, I CONCLUDE that DONALD P. ECHEVARRIA was eligible for placement on step four of the Board's 1977-78 salary guide, the maximum allowed on a two-for-one ratio, as a consequence of his total of eight years teaching/industrial experience and military service. Accordingly, I CONCLUDE that petitioner Echevarria is entitled to a one-year advancement on the Board's salary guide from April 5, 1984 to the present.

ORDER

It is hereby ORDERED that the Board of Education reimburse the named petitioners to this action in accordance with the above findings and conclusions.

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

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

2 April 1987
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

April 3, 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 7 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

ij/ee

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CAPE MAY COUNTY VOCATIONAL-TECHNICAL EDUCATION ASSOCIATION ET AL.,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE CAPE MAY COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, CAPE MAY COUNTY,	:	
RESPONDENT,	:	COMMISSIONER OF EDUCATION
AND	:	DECISION ON REMAND
DONALD P. ECHEVARRIA,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CAPE MAY COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, CAPE MAY COUNTY,	:	
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

It is observed that no timely exceptions to the initial decision have been filed with the Commissioner by any of the parties in accordance with the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

Upon review of the findings and conclusions of the ALJ with respect to the prior teaching experience and military service to be credited to each of the individually named teaching staff members for the purpose of determining their respective salary entitlements and salary guide placements, the Commissioner cannot agree in all respects with the ALJ's determinations.

It appears to the Commissioner that the ALJ's interpretation of the language employed by the Board in each of its respective salary policies in effect at the times the individually named teachers were initially employed is erroneous insofar as it pertains to the ALJ's interpretations of the Board's separate but identical salary policies then in effect at the times when Petitioners Arthur Molnar and Edward Kelly were initially employed by the Board.

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These identical salary policies read as follows:

> New employees may be placed on the salary guide according to their teaching experience and/or industrial experience beyond the certification requirements on a ratio of two such years of experience for one salary step to a limit of step five on the guide. A limit of four years credit on the guide will be allowed for military experience. (Initial Decision, ante)

The essential difference between the above-cited salary policies affecting Petitioners Molnar and Kelly and those salary policies in effect for Petitioners William W. Moore, Albert N. Clark, Jr., and Donald P. Echevarria is that the reference to four years of military service credit appears in the last sentence of the above-cited salary policy schedule.

By virtue of the placement of this sentence in the salary policy for Molnar and Kelly, the ALJ has concluded that it requires a different result in computing the length of prior teaching service and military service credit in determining their salary placement on the Board's salary guide. It is a significant difference inasmuch as the ALJ has determined that Molnar and Kelly's full military service credit (up to four years) should be granted on a year-for-year basis rather than on a two-for-one basis as was the case with Moore, Clark and Echevarria.

The Commissioner cannot agree with the ALJ's interpretation of the language set forth in the identical salary policies which allows Molnar and Kelly to receive credit for military service on a year-for-year basis rather than a ratio of two years being considered equivalent to one salary step up to a limit of five on the initial policy guide then in effect when Molnar and Kelly were first employed.

In comparing the language set forth in all of the salary guide policies in question, the Commissioner finds and determines that the ALJ has created a distinction without a difference in granting Molnar and Kelly up to four years' military service credit on a year-for-year basis rather that on a two years for one step placement in accordance with the identical salary guide policies cited above.

In the Commissioner's judgment, Molnar's and Kelly's military service credit for the purposes of advanced salary guide placement is subject to the same two years for one step on the salary guide as was the credit granted by the Board to all other teachers for prior teaching and/or industrial experience beyond their certification. Any other interpretation of the language of the pertinent salary guide policies affecting Molnar and Kelly is

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deemed to be contrary to the Appellate Court's decision on remand herein in Cape May County Vocational-Technical Education Association, supra.

In this regard, the Commissioner relies on the specific language of the Appellate Court in the above-cited case which reads in pertinent part as follows:

> It is important to recognize, however, that the touchstone of the military service credit is giving a qualified veteran credit for a year's military service that is equivalent to the credit given for a year's teaching experience. If a local district paid its teachers on the basis of the statutory minimum salary schedule, the military service credit would be one step for each year of military service because N.J.S.A. 18A:29-7 advanced a teacher one step on that schedule for each year of teaching experience. However, if a local district paid its teachers more than the statutory minimum on the basis of its own higher salary schedule, it could require more than one year of military service to advance one step on its salary schedule so long as it required an equivalent amount of teaching experience for the same advancement. See Whalen v. Sayreville Bd. of Educ., 192 N.J. Super. 453 (App. Div. 1983), certif. den. 96 N.J. 312 (1984) (local school district may adopt its own salary schedule which does not give teacher credit for teaching experience in other districts so long as teacher is paid more than the statutory minimum).
>
> (Slip Opinion, at p.4)

Thus, in the Commissioner's view, Molnar's and Kelly's military service credit for the purposes of advanced salary guide placement in the instant matter must be calculated in accordance with the provisions of the above-cited salary guide policies in the same manner and according to the same salary step limitation as was credited to all teachers including Molnar and Kelly for prior "teaching experience and/or industrial experience beyond the certification requirements on a ratio of two such years of experience for one salary step to a limit of step five on the guide." (See Board's salary guide policies 1980-81 and 1981-82 as cited above.)

Accordingly, the Commissioner finds and determines that the facts recited on page 6 of the initial decision with respect to Petitioner Molnar's advanced salary guide placement entitled him to a total of five years' credit for prior teaching and/or industrial experience beyond certification including military service credit.

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Petitioner Molnar is therefore entitled to two additional years' advancement on the Board's salary guide as of July 1983 through June 1985, the date of his retirement from the Board's employ.

Similarly, according to the facts recited in the initial decision, ante, with respect to Petitioner Kelly's advanced salary guide placement, it is found and determined that he is entitled to a total of five years' credit for prior teaching experience and/or industrial experience beyond certification including military service credit.

Given the fact that Petitioner Kelly was initially placed at step four of the Board's salary guide, he was therefore eligible and entitled to be placed at step five of the Board's 1981-82 salary guide. It is determined therefore that Petitioner Kelly is entitled to one additional year credit and shall be advanced on the Board's salary guide from February 1983 through June 1984, the conclusion of his employment with the Board.

Accordingly for the specific reasons stated above, the initial decision is so modified and reversed in part with regard to the advanced salary guide placements of Arthur Molnar and Edward Kelly. In all other respects, the initial decision is adopted.

COMMISSIONER OF EDUCATION

June 1, 1987

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CAPE MAY COUNTY VOCATIONAL TECHNICAL EDUCATION ASSOCIATION ET AL.,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	
BOARD OF EDUCATION OF THE CAPE MAY COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, CAPE MAY COUNTY,	:	
RESPONDENT-RESPONDENT,	:	STATE BOARD OF EDUCATION
AND	:	DECISION
DONALD P. ECHEVARRIA,	:	
PETITIONER-APPELLANT,	:	
V.	:	
BOARD OF EDUCATION OF THE CAPE MAY COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, CAPE MAY COUNTY,	:	
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, September 14, 1984

Decided by the State Board of Education, March 6, 1985

Remanded by the Appellate Division, June 30, 1986

Decided by the Commissioner of Education, June 1, 1987

For the Petitioners-Appellants, Selikoff and Cohen
(Barbara E. Reifberg, Esq., of Counsel)

For the Respondent-Respondent, John T. Barbour, Esq.

We affirm the decision of the Commissioner of Education with the modification that we correct the date from which Petitioner Kelly's relief is to be granted to July 1983. Cape May County Vocational-Technical Education Association, on behalf of Albert N. Clark, Jr., Edward Kelly, Arthur Molnar and William W. Moore, v. Cape May County Vocational-Technical Board of Education, Docket #A-3585-84T6 (App. Div. June 30, 1986), slip op. at 5.

Anne Dillman opposed.
October 1, 1987

Pending N.J. Superior Court

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5143-86
AGENCY DKT. NO. 239-7/86

DR. WAYNE PHILLIPS,
Petitioner,
v.
NORTH HUNTERDON REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION,
Respondent.

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

James P. Granello, Esq, for respondent (Murray & Granello, attorneys)

Record Closed: March 4, 1987 Decided: April 20, 1987

BEFORE BRUCE R. CAMPBELL, ALJ:

Dr. Wayne Phillips, petitioner, alleges and the North Hunterdon Regional High School District Board of Education (Board), respondent, denies that the Board improperly withheld the petitioner's employment and adjustment increments for the 1986-87 school year.

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. After notice, a prehearing conference was held on October 8, 1986. Among other things, issues were defined and the matter was set down for hearing on January 12-16, 20 and 21, 1987. Hearing on January 12 was adjourned because of a death in a participating attorney's family. The matter was heard on January 15, 16 and 20, concluding on that day. Counsel filed posthearing submissions, the time for which was enlarged for good cause shown.

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RELEVANT EVIDENCE

Wayne Phillips, petitioner, testified that he is a certified school psychologist. He has served in the North Hunterdon Regional High School District since August 1968. He was child study team chairman and director of special services from 1968-1980. He presently performs the tasks, duties and functions outlined on exhibit P-12.

He has been observed and evaluated while in the district. There have been no other actions against his salary. In the 1984-85 school year, he became involved in a union child study team referral committee examining the reduced numbers of pupils referred for evaluation. He was also concerned with the question of child study team members testing pupils on the basis of a consultation request.

On May 30, 1985, he met with the child study team chairman and an assistant principal concerning alleged deficiencies in his handling of cases. On June 3, 1985, a memorandum of reprimand was placed in the petitioner's file.

In September 1985, child study team members at North Hunterdon Regional High School were informed that they would be assigned one day per week at Voorhees High School, beginning in October, to work on a backlog. This arrangement continued until May 1986. During that time, the North Hunterdon team had a half-time secretary, compared to a full-time position the year before, and Voorhees had a part-time child study team and a full-time secretary. The petitioner completed annual reviews or referrals of 18 children at Voorhees High School.

The petitioner also testified concerning his January 15, 1986 evaluation report and conference (P-5). He responded specifically to five needs documented in the report. Where the report says he did not exert leadership, leaving others in the conference to provide direction, the witness asserts, "Everyone contributed." Where the report says he did not provide evidence of sufficient preparation for the conference, was unfamiliar with the subject pupil's second semester schedule and did not know the number of credits she had toward graduation, he states he was aware of her grades and schedule.

Concerning an evaluation report and conference of February 6, 1986 (P-7), the petitioner testified similarly. Four needs related to the observation are set out. The

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petitioner's testimony talked about, but did not rebut, the observations recorded in this section of the report. The petitioner was advised to keep in weekly contact with the school disciplinarian concerning pupils with problems.

The team chairman made four recommendations aimed to help the petitioner improve where needs were noted. The petitioner's testimony concerning the recommendations was long and convoluted, but not dispositive. He did acknowledge, however, that he may have failed to hold discussions with teachers and parents before making recommendations for a student program on the assumption that a guidance counselor did it.

Concerning his failure to complete a notice of team action form for a pupil, he recalled that the team chairman came to his office, told him a notice of team action was late and he then promptly got it out. He stated that this sort of thing was "a job to do" and "we did it when we got around to it." It was a priority but he had set it aside and forgotten it.

Concerning a perceived need to improve the clarity of Individual Education Programs, the witness stated that as of September 1985, he was required to use the goal bank developed in 1984-85. He merely had to identify the goal code number for a particular goal statement and then to write objectives designed to meet the goal. The witness stressed that he had not been criticized previously for this nor had he been criticized previously concerning out-of-district placements.

Concerning his observation report and conference of March 6, 1986 (P-8), he noted a criticism concerning filing a report on time. He and a colleague "didn't quite understand" what was required. He called the team chairman at home for further information and instruction.

The report indicates the petitioner had ten reviews outstanding at this time. However, he had completed these by the end of March, although he did not immediately meet the goal of doing four annual reviews per week. He stated he delayed writing annual review reports because of a backlog of work that had built up. At the same time, he was making fewer and fewer errors concerning use of the goal bank. Concerning overdue consultation forms, the witness stated the chairman wanted the forms in two weeks, and e

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found this demand unrealistic. He stated, without corroboration, that other members of the team also believed the goal unrealistic.

Concerning his evaluation and conference of May 25, 1986 (P-10), the witness again addressed needs expressed in the report. The report notes he gave misleading information to a pupil's parent. There was also a failure to ascertain the pupil's medical status for a purpose of excusing her, or not, from physical education. It is noted that health, safety and physical education, adapted to the ages and capabilities of the pupils, is required for graduation. The time devoted to the course in physical education must be at least two and one-half hours per school week. N.J.S.A. 18A:35-5, 7, 8.

During testimony concerning this particular evaluation conference, the witness acknowledged that the resource room teacher told him she had never seen the subject pupil. By the time of the team meeting at which the petitioner was observed, the pupil had been induced by another teacher to attend the resource room.

The petitioner was supplied reasons for withholding his salary on the day after the Board acted (P-23). N.J.S.A. 18A:29-14. Pertinent to this consideration, the letter states:

> The reasons for this action are as follows, which stem from four evaluations by your supervisors indicating consistent substandard performance in the following areas:
>
> A. The conduct of Individual Education Plan conferences in an inadequate manner by failing to make appropriate reference to goals, granting state testing exemptions without adherence to administrative regulation 203.2a (Child Study Team Exemption from State Testing), failing to prepare thoroughly for conferences by consulting all appropriate staff members, and failing to provide leadership and direction.
>
> B. The failure to complete Individual Education Plan forms with thoroughness and accuracy by writing incorrect recommended programs, omitting information from instructional guides and failing to follow procedures for utilizing the goal bank.

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C. The failure to submit documents or forms as required by not completing consultation report forms, annual reviews, weekly reports of evaluations and the notice of team action report in a timely manner.

D. The failure to maintain weekly contact with the Assistant Principal for Student Services as required by his February 3 and March 3, 1986 personnel evaluations.

Concerning part A, the petitioner stated he was unaware of consistently poor performance at IEP conferences. Exhibit P-22, administrative regulation 203.2a, sets forth the procedures for child study team exemption from state testing for certain pupils. The petitioner stated that prior to receipt of the letter from the Board, he was not criticized concerning that regulation. Similarly, concerns with failure to prepare thoroughly for conferences and failure to provide leadership were not made known to him prior the Board's action. He does recall, however, that after he had completed annual review meetings and most of his reports were written, a question came up about his inclination to write conditional programs. He went through each of his written reports and changed the recommended programs in them. He could have forgotten a name or a date, but these criticisms were not raised to him earlier. He believes he corrected any errors the team chairman pointed out. The witness stated he was not advised of his failure to use the goal bank properly before this, but perhaps it did come up in those instances where he had to work with an IEP from another school district whose goals were not stated in the same manner as North Hunterdon Regional goals.

As to timeliness, the petitioner stated that as far as he knew, it is true there were instances of lateness according to established time lines, but he stated, "We did our best." He also stated, without corroboration, that other team members said they had timeliness problems. Concerning his failure to maintain weekly contact with the vice principal as directed in prior evaluations, the witness stated he always contacted the vice principal as needed. "If he sends me a note, I answer or see him," he said.

The witness emphasized that he was not relieved of any duties at North Hunterdon Regional while serving one day per week at Voorhees. In 1985-86, he did submit several reports late; however, he does not attribute the lateness to the fact that there was a part-time secretary at North Hunterdon Regional.

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The respondent also acknowledged he had conferences after each observation at which he could have raised any concern. He submitted written addenda to three evaluations. He did not raise the referral procedure question in conferences. He has no recall of taking exception to the factual content of any evaluation.

The petitioner conceded his response to the January 15, 1986 conference (P-6) mentions alleged failure to consult counselors and teachers. He agrees he did not meet with teachers prior to the conference concerning a particular pupil but maintains he did see her counselor. His response to the test exemption question is that it may have been an oversight. He could not recall actual announcement at the conference of an educational goal.

The petitioner submitted no rebuttal to the February 3, 1986 observation by the team leader. They had a conference, discussed what they perceived as his needs and she made no change in her report as a result of the conference (P-7). The petitioner stated again that he did not make contact on a weekly basis with the disciplinarian, although he had been directed to do so. He made contact as he believed necessary. He was not sure of what pupil was mentioned in this evaluation report but he did not raise that question in conference with the team leader.

He did not ask the team leader to make any corrections in the factual assertions in the March 6, 1986 conference (P-8). He acknowledges that he did not accurately remember the grade a pupil under discussion was in and a number of annual reports he submitted required correction.

Matters concerning another pupil, M.M., were raised at the next conference (P-10). The pupil's record had not been updated in two years. The petitioner acknowledged he made no effort to contact her previous private school. In addition, he had no contact with Bernards High School, the school she had attended prior to the private school placement.

In other testimony, the petitioner stated he was never told pupils would be harmed if his reports were late. He also stated it would be fair to say the team leader had observed his work other than in the two formal observations that were written in evaluation reports.

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The superintendent testified concerning the formation of a pupil support Committee. The number of referrals was not the major motive for formation of the committee, but rather, the committee's aim was to foster quick and positive intervention when a pupil was experiencing difficulty. During the course of the superintendent's testimony and in an in camera ruling, I excluded three documents (P-31, P-32, P-33) for failure to adhere to discovery rules. All discussion and the ruling itself were done on the record and appear in the transcript of proceedings for January 16, 1987.

The superintendent also stated he usually reviews all staff evaluations before going to the Board, although he cannot state positively that he did in this case. He did not consult the vice principal or the team leader concerning the petitioner's withholding but did speak to the building principal three to five times concerning the petitioner. They discussed deficiencies and steps being taken to help the petitioner improve his performance.

The petitioner survived a motion to dismiss and the Board called the child study team chairman, the vice principal and the principal of North Hunterdon Regional High School. The child study team leader has evaluated the petitioner since 1981 or 1982. In 1984-85, she evaluated him twice and made up his annual tenured teacher report. She testified consistently as to the needs and recommendations set down in each of the evaluation reports. Importantly, she testified concerning steps taken to assist the petitioner in overcoming the perceived deficits. She testified in considerable detail concerning each item raised in evaluations of or memorandums to the petitioner. The witness acknowledged what the petitioner had improved in the area of completing monthly reports. This witness recalled that the petitioner did not challenge any facts discussed in evaluation conferences. The team leader pointed out that several of the petitioner's strengths were noted in the evaluations. Needs, however, outweighed them.

The team leader also stated that any late annual review may potentially harm a pupil because the pupil's teachers will be working with an old and possibly outdated review. Related to this was slow completion of IEPs. The witness believed the petitioner knew how to use the goal bank yet he failed to code properly. In addition, there was the matter of overly general goals. For instance, "pass all courses" applies to all pupils and is an insufficient goal statement for a pupil with special problems.

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The team leader followed up evaluation conferences by checking the progress of the respondent's work and by talking to him. The team leader also testified concerning problems with particular pupils -- for example, L.H. and G.B. In the former case, the pupil had been truant for months and the petitioner did not move quickly enough to intervene. Concerning G.B., the pupil had experienced a problem on a school-sponsored trip. A referral was made but nothing was done by the petitioner, who was the pupil's case manager. Finally, the social worker took it upon himself to arrange for pyschological testing of G.B. This witness gave similar testimony concerning several other pupils.

The assistant principal for pupil services testified. His testimony paralleled completely that of the team leader. He also reported meetings with the petitioner in which problems were discussed and suggestions were made so that the petitioner might improve his performance. Among other things, the vice principal stated that the team leader had directed the petitioner in the February 1985 evaluation to have weekly contact with him in his role as disciplinarian. The contacts were sporadic and almost all on the vice principal's initiative. Requests to the petitioner for information were often unanswered by the petitioner for more than a week. This witness discussed the petitioner's performance with the team leader and others before the December 1985 conference evaluation. The witness emphasized that he discussed leadership explicitly with the petitioner.

The high school principal testified that he discussed the petitioner's performance with the superintendent after each of the four evaluations in the record here. The principal and superintendent then discussed the petitioner before the recommendation for withholding went to the Board. The principal wrote a memorandum on April 11, 1986 to the superintendent recommending withholding (R-1) and stating the reasons therefor. He read the petitioner's entire personnel file before making the recommendation. He did not formally observe or evaluate the petitioner himself. The petitioner was advised on or before April 8, 1986, that withholding was being considered.

DISCUSSION AND DETERMINATION

The petitioner stated that he learned for the first time in the conference of February 6, 1986, that there was criticism of his out-of-district placements (P-7). Assuming this to be so, I can find nothing that places a duty upon administrators to notice

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the petitioner of such a fact before the observation and evaluation. In observations and evaluations, needs, problems or weaknesses are identified and suggestions are made for rectifying them. The evaluation process is designed to help teaching staff members improve their performances. When a deficiency is noted over a period of time, this may indicate that the teaching staff member has failed to review the evaluation report, has failed to implement the suggestions for improvement or has tried to implement the suggestions for improvement but the expected improvement has not occurred.

The petitioner's statement that he was never told pupils would be harmed if annual review reports were late, if offered as an excuse for their tardiness, must be rejected. Common sense and common experience should have told the petitioner the contrary. The petitioner's attempts to explain away other purported deficiencies must be rejected similarly.

Teaching staff members, which term is defined at N.J.S.A. 18A:1-1, including the petitioner, are not automatically entitled to salary increments. The determination to withhold salary increments is a matter of managerial prerogative which has been vested in local boards of education by the Legislature. Bernards Tp. Bd. of Ed. v. Bernards Tp. Educ. Ass'n, 79 N.J. 311, 321 (1979). N.J.S.A. 18A:29-14, in pertinent part, provides:

> 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 recorded role call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within ten days, to give written notice of such action, together with reasons therefor, to the member concerned.

The determination of a board of education to withhold salary increments from a teaching staff member may not be set aside unless the action is found to be 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 only question for review when a board withholds a teaching staff member's increment is whether the board has a reasonable basis for its factual conclusions. One who challenges the action of a board to withhold a salary increment carries the ultimate burden to demonstrate that the complained-of withholding is arbitrary, capricious or unreasonable because the board did not have a reasonable basis for its factual conclusion and because the teaching staff member earned the salary

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increment. The scope of review under Kopera is limited to a determination of whether the underlying facts were as those who made the evaluations claimed and whether it was reasonable to conclude as they did based upon those facts that the affected person did not earn a salary increment.

The petitioner's deficient performance is established by the evidence of record. The evaluations in the record identify several deficiencies; most of these are continuing deficiencies. In fairness, the record shows improvement in the area of completing monthly reports. Considering the documents, and particularly the testimony and demeanor of the witnesses, I FIND that the facts underlying the decision to withhold the petitioner's increments are true.

The petitioner's proofs fall short of establishing that the Board did not have a reasonable basis for its conclusion that he did not earn a salary increment. The proofs do not establish he earned the salary increment. The evaluations of his performance by the team leader and the vice principal are detailed and supported by their testimony as well as the testimony of the petitioner himself. Based on those evaluations, the team leader and the vice principal arrived at certain judgments. When viewed in light of the evidence in the record, the judgments are unassailable. The Board, relying upon the evaluations of the petitioner's performance, arrived at the decision that the petitioner did not earn a salary increment.

The standard of review requires this judge to determine whether the Board had a reasonable basis for its conclusion. The evidence of record demonstrates the Board had a reasonable basis for its factual conclusion that the petitioner did not earn a salary increment for the 1986-87 school year. The Commissioner, and therefore this judge, may not substitute their judgment for either the local board or those who made the evaluations of the petitioner's performance, but may only determine whether the underlying facts were as those who made the evaluations claimed and whether it was reasonable for them and the Board to conclude, based upon those facts, that an increment for the following school year was not merited.

The petitioner's deficient performance having been established by the credible evidence in the record, the judgment of the North Hunterdon Regional High School Board of Education must be AFFIRMED. The petitioner's contention that the Board failed to

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provide him meaningful opportunities either to rectify his deficiencies or to convince his superiors that his judgments were correct is rejected.

Accordingly, I **CONCLUDE** that the action of the North Hunterdon Regional High School District Board of Education to withhold the employment and adjustments of Dr. Wayne Phillips for the 1986-87 school year was proper in all respects, was not arbitary and was not capricious. Therefore, the petition of appeal is **DISMISSED**.

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

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

20 APRIL 1987
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

APR 2 7 1987
APR 2 0 1987
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:
APR 2 3 1987
DATE

Ronald D. Parker
OFFICE OF ADMINISTRATIVE LAW

ds

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DR. WAYNE PHILLIPS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTH HUNTERDON REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON 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 N.J.A.C. 1:1-16.4a, b, and c.

It is noted for the record that page 2 of petitioner's exceptions was not included when filed with the Commissioner nor was it included with the corrections he subsequently submitted. The exceptions are summarized below.

1. The Administrative Law Judge failed to comply with those prescriptions of N.J.A.C. 1:1-16.3 (Initial Decision) which require Administrative Law Judges to (1) analyze the facts adduced at the hearing in relation to the applicable law and covering all issues of fact and law raised in the pleadings; (2) delineate findings of fact with regard to disputed factual issues; and (3) specify conclusions of law based upon the findings of fact.

2. The Administrative Law Judge failed to make any factual findings at all with regard to Petitioner's contentions that the Board of Education's withholding of increment decision vis-a-vis Dr. Wayne Phillips was intended to chill the rights of Dr. Phillips and other association activists to challenge district-wide policy changes regarding the administration of special education and special services programs within the North Hunterdon Regional High School District.

3. Dr. Wayne Phillips' performance concerning the preparation of consultation report forms, annual reviews, re-evaluations, weekly and monthly reports and other

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required documents did not deviate from any clearly enunciated district-wide standards, norms or practices.

4. The Administrative Law Judge's findings of fact with regard to the "weekly contact with the Assistant Principal" issue are not substantiated by the record.

5. The Administrative Law Judge failed to make any factual findings to support his apparent determination that there were facts presented by the Board of Education that could support a conclusion that Dr. Phillips had failed to complete Individual Education Plan (IEP) forms with thoroughness and accuracy.

6. The Administrative Law Judge again failed to comply with the prescriptions of N.J.A.C. 1:1-16.3 with regard to the issue raised by the Board of Education that Dr. Phillips had conducted two IEP Conferences in an inadequate manner.

The Board in its reply characterizes as baseless petitioner's allegation that the ALJ made no factual analysis and no specific findings of fact. It avows, inter alia, that limited factual analysis was warranted because "[w]hat Petitioner disputes in this case is not so much the underlying facts but the conclusions of [his] evaluators and the Board stemming from the underlying facts." (Board's Reply Exceptions, at p. 2) Moreover, it contends that the seven pages of information in the initial decision entitled "Relevant Evidence" outline and cite the factual findings of this matter and to have the ALJ repeat under a separate heading all seven pages would be a useless burden. Further, the Board avows that the ALJ used the appropriate legal standard of review articulated in Kopera, supra, to determine that the underlying facts of the matter were true. (Initial Decision, ante)

As to Exception No. 2, the Board contends that the ALJ did not discuss petitioner's anti-union animus argument because it was so far unsupported by any evidence or facts and so clearly an after thought of petitioner as to merit no discussion. The Board likewise characterizes as meritless Exceptions Nos. 3 and 4. With respect to Exception No. 5, the Board avers that the record is clear that petitioner's errors on Individual Education Plan (IEP) forms were numerous and troublesome to his supervisors and that he unjustifiably experienced problems with the goal bank far beyond the beginning of the school year. As regards Exception No. 6, it relies on its post-hearing brief to demonstrate that petitioner's performance was deficient in the two annual review conferences.

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Notwithstanding petitioner's allegations and contentions with respect to the ALJ's failure to comply with N.J.A.C. 1:1-16.3 regarding the analysis of facts and the delineation of specific findings of fact and conclusions of law, the Commissioner finds and determines, based upon his own independent review of the record, including the documentary evidence and the testimony of the witnesses, that petitioner

1. Conducted Individual Education Plan Conferences (IEP) in an inadequate manner by failing to make appropriate reference to goals, granting state testing exemptions without adherence to administrative regulation 203.2a (Child Study Team Exemption from State Testing), failing to prepare thoroughly for conferences by consulting all appropriate staff members, and failing to provide leadership and direction.

2. Failed to complete IEP forms with thoroughness and accuracy by writing incorrect recommended programs, omitting information from instructional guides and failing to follow procedures for utilizing the goal bank.

3. Failed to submit documents or forms as required by not completing consultation report forms, annual reviews, weekly reports of evaluations and the notice of team action report in a timely manner.

4. Failed to maintain weekly contact with the Assistant Principal for Student Services as required by his February 3 and March 3, 1986 personnel evaluations.

Moreover, the Commissioner finds and determines that no basis whatsoever exists in the record to support petitioner's argument that anti-union animus motivated the Board's action to withhold his increments.

The Commissioner is, therefore, in complete agreement with the ALJ that:

> The petitioner's deficient performance is established by the evidence of record. The evaluations in the record identify several deficiencies; most of these are continuing deficiencies. In fairness, the record shows improvement in the area of completing monthly reports. Considering the documents, and

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particularly the testimony and demeanor of the witnesses, I FIND that the facts underlying the decision to withhold the petitioner's increments are true. (Initial Decision, ante)

Further, the Commissioner finds the ALJ's analysis of the matter, in light of the Kopera, supra, standard and Bernards Twp., supra, to be both appropriate and adequate, being in complete agreement that petitioner has failed in his burden of proof to demonstrate that the Board's withholding action was arbitrary, capricious, unreasonable, or otherwise improperly motivated. He therefore adopts as his own the ALJ's determination that:

> The petitioner's proofs fall short of establishing that the Board did not have a reasonable basis for its conclusion that he did not earn a salary increment. The proofs do not establish he earned the salary increment. The evaluations of his performance by the team leader and the vice principal are detailed and supported by their testimony as well as the testimony of the petitioner himself. Based on those evaluations, the team leader and the vice principal arrived at certain judgments. When viewed in light of the evidence in the record, the judgments are unassailable. The Board, relying upon the evaluations of the petitioner's performance, arrived at the decision that the petitioner did not earn a salary increment.
>
> The standard of review requires this judge to determine whether the Board had a reasonable basis for its conclusion. The evidence of record demonstrates the Board had a reasonable basis for its factual conclusion that the petitioner did not earn a salary increment for the 1986-87 school year. The Commissioner, and therefore this judge, may not substitute their judgment for either the local board or those who made the evaluations of the petitioner's performance, but may only determine whether the underlying facts were as those who made the evaluations claimed and whether it was reasonable for them and the Board to conclude, based upon those facts, that an increment for the following school year was not merited.
>
> The petitioner's deficient performance having been established by the credible evidence in the record, the judgment of the North Hunterdon Regional High School Board of Education must be AFFIRMED. The petitioner's contention that the

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> Board failed to provide him meaningful opportunities either to rectify his deficiencies or to convince his superiors that his judgments were correct is rejected. (emphasis supplied)
> (Initial Decision, ante)

Accordingly, having determined that the Board's action to withhold petitioner's increments for the 1986-87 school year was neither arbitrary nor without rational basis nor improperly motivated, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

June 2, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2588-87
AGENCY DKT. NO. 67-4/87

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY.

Charles Abrams, Darlene Simon and William Whitehurst, petitioners, pro se

Paul Ferrell, Jr., Esq., for respondent

Record Closed: April 20, 1987 Decided: April 22, 1987

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

Petitioners, Charles Abrams, Darlene Simon and William Whitehurst (all unsuccessful candidates in the above election) applied on April 10, 1987, for an inquiry into alleged violations of statutorily prescribed procedures in the above election pursuant to N.J.S.A. 18A:14-63.12. The matter was transferred to the Office of Administrative Law on April 16, 1987, and a hearing was conducted in Willingboro on Monday, April 20. Of particular concern to the petitioners was the conduct of poll workers, whom they claim engaged in electioneering and other violations with respect to write-in votes. The issues under the above statute are (1) whether violations of statutorily prescribed procedures occurred, and (2) whether those violations affected the outcome of the election. This opinion concludes that violations and irregularities did take place, but were not of such magnitude or extent as to affect the outcome of the election in which the write-in candidate lost by a substantial margin.

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Petitioners' allegations of violation pertain to the conduct of poll workers and others at the Pennypacker and Country Club Schools. Doris Burgess, a poll watcher at Pennypacker, testified, that between the hours of 8:30 and 9:00 on April 7, she observed a woman voter enter a voting booth, request and receive assistance from a poll worker on the spelling of a write-in candidate's name. She also observed a male voter at Pennypacker, who apparently did not know how to operate the write-in device, request and receive assistance and then spend a total of 10 minutes in the booth. She also stated that she observed write-in stickers being affixed to the roll after the polls closed, but stated that these stickers were being reattached after having fallen from the roll. She further voiced her suspicion that of the some 51 write-in stickers counted, only 16 were actually cast by voters, but could present no evidence to support this allegation.

As to events at the Country Club School, the site of most of the allegations, Ray Findley, a private citizen and voter, testified as to what he described as "flagrant electioneering" by poll workers in which voters were asked if they needed help with write-ins and then assisted in the booth by a Mr. Schimmel, a poll worker. Findley also claims to have observed poll workers telling voters to cast their ballots for candidates Miller, Whittle and a write-in, for which adhesive stickers were handed out. Mr. Findley stated that he raised his objections at the polls and that point was advised that he was not registered, due to a missing affidavit of residence. Mr. Findley stated that he was directed on something of a wild goose chase in search of an affidavit of residence which took him to the municipal building, Board secretary's office and finally the police department (see, police report, P-1) where he lodged a complaint and was escorted back to the County Club School where, after being challenged for a second time, he cast his ballot. Before he did, he claims that the president of the Board of Education, who was present at the poll as a challenger, stated (apparently in jest) that "If you vote for who I tell you, you can vote now." Mr. Findley declined the offer and further recalls that poll workers, whom he could not identify, said among themselves, "Let him vote — we'll take care of him later." Although he suspects that his ballots were not thereafter counted, he has no evidence in support of that contention and concedes that it is pure speculation.

In the course of his odyssey to vote, Mr. Findley encountered the petitioners who were observing at the polls, and recounted his story. Candidate Whitehurst, an encumbent on the Board, went to the Country Club poll and claims that he observed a poll worker entering the booths and instructing voters inside the booth as to its use. He brought this

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to the attention of the election judge, who confirmed that Judge Haas and Schimmel had entered the booth to assist voters. Although Mr. Whitehurst also claimed to have seen other "electioneering," he could not provide specifics and stated that when he voted, he noticed no other irregularities and that "things seemed to go quite well." Petitioners Abrams and Simon also encountered Mr. Findley and went to the Country Club poll, where they observed Mr. Schimmel going in and out of the booths giving instructions to voters and sometimes staying longer than two minutes. Abrams also claimed to have seen candidates within 100 feet of the voting booths talking to voters. Abrams and Simon advised Judge Haas of this. Petitioner Simon further testified that the school board president, who was acting as a challenger at the polls, asked her, "How did it feel to be with losers?"

Candidate Simon also claims to have observed electioneering at the Bookbinder School on April 7, in the form of candidates handing out literature within 100 feet of the polls. She brought this to the attention of Judge Jane Spencer, who advised that she would take care of it. Mr. Abrams visited the Bookbinder site to pick up Ms. Simon and reported that there were no problems and that things were going "extremely well." The total irregularities observed by Simon and Abrams at both sides were estimated to be between six and ten voters who were assisted by poll workers.

The campaign coordinator for the petitioners' unsuccessful slate, Portia Dempsey, testified that she was erroneously advised the challenges were to be designated the day before the election, when by law they were due the Thursday before. As a result of this misunderstanding, the petitioners were unable to designate challengers and personally undertook to observe at the polls. The Board secretary, Ms. Lee Muller, testified in response that she had discussed the question of challengers with candidate Simon on April 6, but only recalled Ms. Simon asking for tally sheets and not for imformation on the challenger due date, which she understood would be the Thursday before the election. Although Ms. Simon may have been given mistaken advice as to the challenger due date, Ms. Muller claims not to have been responsible for it. She further testified that she was called by the candidates regarding problems at the Country Club School as to the poll workers entering the booth to assist voters and took corrective action after this report was confirmed. Ms. Muller also described training and preparation for the election which she described as extensive and stated that she "had never experienced anything like this," referring to the level of preparation and attention to

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detail from the county office. Instructions were issued to the election judge and election board (R-1) which stated, with respect to assistance to voters, that:

> You may, if asked, give instructions on the procedure for a write-in vote. Remind voters to read the instructions in the voting booth. If, asked, [sic] voters should first cast their votes on candidates from the printed ballot and the budget question. After which they will press the lever for write-in, and slide back the appropriate lever, between the numbers (1-10) write name and return lever to open curtain.

The instructions do not otherwise describe the assistance to be given voters.

A tally sheet reflecting the election results was admitted (R-2) and reflects that candidates Whittle, Miller and Reynolds carried the day by substantial margins.

Whittle	950 votes
Miller	990 votes
Reynolds	1016 votes
Whitehurst	717 votes
Abrams	651 votes
Simon	478 votes

A tally sheet also reflects that 577 write-in votes were cast for Gary Chehames, which fell several hundred votes short of the victors. There is no dispute as to the above facts and I so **FIND.**

By way of background on the election, Mr. Robert Rodriquez testified that the teachers' union was seeking to regain three seats on the Board of Education needed to have a majority and that the union was backing candidates Whittle, Miller and write-in candidate Chehames, as well as providing observers and challengers. Mr. Rodriguez did not personally observe any illegal activity, although he felt that the presence of the president of the Board of Education at the poll as a challenger was "unethical" and improper.

The question presented is whether the petitioners have, pursuant to N.J.S.A. 18A:14-63.12, proven by a preponderance of the credible evidence that there were violations of the statutorily prescribed procedures for school elections and that these violations affected the outcome of the election. On the basis of the above facts, I

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CONCLUDE such violations have been established, as discussed below, but that they have not been shown to have affected the outcome of the election and that, accordingly, no new election should be **ORDERED**.

The uncontradicted testimony establishes by a preponderance that poll workers entered the booths at the Country Club School polling place to assist voters with write-ins, contary to the procedures set forth in N.J.S.A. 19:50-3, which is made applicable to school elections by N.J.S.A. 18A:14-56. There is no evidence that any of these voters were illiterate, blind or disabled within the meaning of Title 19 so as to be eligible for the assistance of two Board members of opposite political phase. Had they been so eligible, the statutorily prescribed procedure was violated by having only one poll worker enter the booth. There was also evidence that candidates on the Miller, Whittle and write-in slate were soliciting votes within 100 feet of the poll but that this situation was corrected when reported to the Board secretary. There was no evidence offered as to the precise content of the candidates' conversations with voters near the polls. There is sufficient evidence to support the conclusion that poll workers at the Country Club School, in particular Mr. Schimmel, asked voters, before any assistance was requested, whether they needed assistance with write-in votes. Although this may not have constituted electioneering within the meaning of N.J.S.A. 18A:14-81,[1] it does suggest utilization of a write-in votes, and therefore, is inappropriate conduct. Accordingly, I **CONCLUDE** that the petitioners have proven that the above described violations of statutorily prescribed procedures occurred at the April 7 Willingboro election.

In light of the final election results which indicate margins of victory of several hundred votes, I further **CONCLUDE** that these violations did not affect the outcome of the election in a way which would have thwarted the will of the electorate and required a new election. See, In re Wene, 26 N.J. Super. 363, 376 (Law Div. 1953), affirmed sub nom. Wene v. Meyner, 13 N.J. 185 (1953); In re Annual School Election Held in the Greater Egg Harbor Regional School District, 1978 S.L.D. 11, 20. The statute concerning an

[1] 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.

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application for an inquiry requires that there exist a connection between election irregularities and election results so that the conduct complained of effectively thwarts the free expression of popular will that an election is intended to promote. The burden of proof is on the person contesting the election results. See, In re Application of Abbot Law Moffat, 142 N.J. Super. 217, 224 (App. Div. 1976).

The violations found in this case were not of sufficient magnitude and extent to change the results of the election. I so CONCLUDE.

Despite this ultimate conclusion which is forced by the facts, the record in this matter also reflects several other disturbing aspects of the election worthy of comment. The instructions given to poll workers (R-1) were deficient in that they did not fully reflect the requirements of Title 18A and Title 19 as to rendering assistance to voters who are illiterate, blind or suffering under another physical disability which prevents casting a vote without assistance. In this election, the poll workers at at least one location actively sought out those seeking to cast write-in votes and then proceeded to help them do so. This procedure is not consistent with the election law. It is recommended that the Commissioner of Education take action to ensure that the assistance rendered by poll workers is consistent with that allowed and intended by the statute.

It is further noted that the comment by the Board of Education president (who was present at the polls as a challenger) to Mr. Findley to the effect that he could vote if he voted as directed was, although probably in jest, not conducive to the conduct of an election free from the taint of actual or apparent pressure or intimidation. The provision for the appointment of challengers, N.J.S.A. 18A:14-15, contains no prohibition on the president of the Board of Education or its members serving in that capacity. However, that challenger appointments are filed and certified by the secretary of the Board of Education. See, N.J.S.A. 18A:14-15 and 16. The desirability of having the secretary for the Board of Education certify the Board president and members as challengers is questionable, notwithstanding the fact that it is not prohibited by the statute. This is noted for the record and the Commissioner of Education's information and in no way is intended to suggest that the Board president's service as a challenger violated statutorily prescribed procedures under N.J.S.A. 18A:14-63.12.

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On the basis of the above findings of fact and conclusions of law, it is hereby ORDERED that no new election be held for the school board of Willingboro on the basis of the violations established by this inquiry.

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

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

April 22, 1987
DATE

RICHARD J. MURPHY, ALJ

Receipt Acknowledged:

4/22/87
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 24 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE :
SCHOOL DISTRICT OF WILLINGBORO, :
BURLINGTON 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 a careful review of the record of this matter, the Commissioner agrees with the findings and the conclusions of the Office of Administrative Law that the Willingboro Board was in technical violation of statutorily prescribed procedures which occurred at the April 7, 1987 Willingboro school election, but that said violations did not affect the outcome of the election in a way which would have thwarted the will of the electorate and required a new election. See, In re Wene, 26 N.J. Super. 363, 376 (Law Div. 1953), affirmed sub nom. Wene v. Meyner, 13 N.J. 185 (1953).

Notwithstanding the above conclusions, the Commissioner admonishes the Board herein of its duty hereinafter to comply strictly with the laws concerning school elections.

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

COMMISSIONER OF EDUCATION

June 2, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6196-86
AGENCY DKT. NO. 286-8/86

DENNIS SIEFRING,
Petitioner,
v.
NEW JERSEY STATE BOARD OF EXAMINERS,
Respondent.

Dennis Siefring, petitioner, pro se

Arlene G. Lutz, Deputy Attorney General, for respondent (W. Cary Edwards, Attorney General of New Jersey, attorney)

Record Closed: March 10, 1987 Decided: April 24, 1987

BEFORE RICHARD J. MURPHY, ALJ:

Dennis Siefring (petitioner) appeals from a determination by the State Board of Examiners (Board), respondent, denying him a student personnel services certification. Petitioner complains that the Board unreasonably and arbitrarily denied his request to substitute work experience pursuant to N.J.A.C. 6:11-3.23 for course work in the areas of counseling and interviewing techniques, vocational guidance and placement, and community agencies and institutions. The issue is whether the action of the Board in denying the requested certificate was reasonably based on the facts and consistent with the above regulations. This opinion affirms the denial but recommends that the petitioner be given credit for work experience in the area of community agencies.

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By way of procedural history, the Board denied petitioner's request for a certificate on June 17, 1986. An appeal was filed on August 4 and on September 18, 1986, the matter was transmitted to the Office of Administrative Law for hearing. The prehearing conference was scheduled for October 31 and the matter was set down for hearing on January 23, 1987. The hearing was adjourned, however, until February 23 due to inclement weather. Another storm on February 23 caused the matter to be adjourned until March 10, when the hearing was conducted and the record closed.

The facts are not in dispute. Petitioner seeks certification in the area of student personnel services, which is the endorsement required for any person assigned to perform student personnel services such as studying and assessing individual pupils with respect to their status, abilities, interest and needs; counseling with teachers, students, and parents regarding personal, social, educational, and vocational plans and programs; and developing cooperative relationships with community agencies and assisting children and families. See, N.J.A.C. 6:11-12.13(a). Requirements for this certification, which covers levels K through 12, are a bachelor's or higher degree, both of which petitioner has, as well as a New Jersey teacher certificate, also held by petitioner, and one year of successful teaching. In addition to the above requirements, the regulations prescribe that the recipient of a student personnel services certificate must have completed either a graduate curriculum approved by the Department of Education or a program of college studies including 30 semester-hour credits of post-baccalaureate work in five areas, which may be satisfied in separate or integrated courses. Those areas are set forth below, and the items which the Board concluded were not satisfied by the petitioner's education or experience are underlined:

(1) Guidance and counseling—minimum six semester hours. Areas of study (A), (B) and (C) must be covered.
   (A) Theory and procedures in individual and group guidance;
   (B) Counseling and interviewing techniques;
   (C) Vocational guidance, occupational and educational information, and placement.
(2) Testing and evaluation—minimum three semester hours.
(3) Psychology—minimum six semester hours. Child and adolescent development, psychology of exceptional children, psychology of learning, children and youth study.
(4) Sociological foundations—minimum six semester hours. Area of study (A) below must be covered.
   (A) Community agencies, organization and resources;
   (B) Educational sociology;

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(C) Social problems, juvenile delinquency, law, the family;
(D) Urban sociology.

(5) Electives in such areas as curriculum development, program planning, guidance, psychology, measurement, vocational education, learning disabilities, human relations, group process theory and procedures, labor and industrial relations, and research techniques and interpretation. (Emphasis added.)

The petitioner disagrees with the Board's conclusion and argues that his experience satisfies the three areas in which his credentials were found to be insufficient for certification. In particular, petitioner claims that his experience as an employment counselor with the State Department of Labor from 1977 to 1980, and his later experience as a counselor with the Camden County Employment and Training Center until 1981, constitute sufficient alternative experience pursuant to N.J.A.C. 6:11-3.23 to be substituted for the requirements in the areas of (1) counseling and interviewing techniques; (2) vocational guidance, occupational and educational information, and placement; (3) community agencies, organization and resources, as set forth in N.J.A.C. 6:11-12.13.

He claims that all of the above requirements are satisfied by his experience. In support of his claim, petitioner submitted job descriptions, letters of recommendation and evaluations from those jobs. Review of the employment counselor description from Civil Service, under which petitioner worked between December 1978 and May 1980, reveals that petitioner was engaged in providing employment counseling to applicants who presented occupational problems of choice, change or adjustment. (See, P-4i.) To carry out that function, he interviewed and counseled applicants requiring special assistance; interpreted the results of various tests; provided information on occupational opportunities and training facilities; and generally assisted the applicants in formulating "sound vocational plans." He also was expected to establish and maintain a working relationship with community agencies to provide support services to program participants. In addition, he was responsible for developing and maintaining relationships with local community training, educational, rehabilitation and social agencies in order to carry out the counseling program of the employment service. The focus of his function as an employment counselor was to help clients look for work. Most clients were between the ages of 16 and 21 and were experiencing various problems in entering the job market.

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Prior December 1978, petitioner worked as an employment counselor trainee and also was engaged, under supervision, in conducting interviews and giving counsel to applicants who required special assistance in looking for work (P-6). Performance evaluations and personal memos from this period had been destroyed. The record does reflect recommendation letters from supervisors which describe and applaud petitioner's performance, including one year with the Careers For Youth Program, for dropouts and other school youth, between the ages of 16 and 21. (See, P-4j, P-5b.) After leaving his position as a state employment counselor in May 1980, he went to work for the Employment and Training Center of Camden County as a counselor in the Manpower Services Unit. His general function was to provide specialized employment counseling to applicants presenting problems of occupational choice, change or adjustment. His specific function included individual and group employment counseling, testing and dispensing of information and referral of applicants to community agencies for special services beyond the scope of the local manpower office (P-4d). Petitioner submitted a letter from the Director of the Camden County office indicating that he had been hired because of his expertise and counseling techniques, knowledge of state and county agencies and occupational information, as well as his excellent client counselor rapport (P-4e, P-4f).

In addition to his work experience described above, petitioner presented a transcript from Glassboro State College reflecting a course in individual counsel procedures as part of his study for a master's degree in school psychology (P-1f). The course description and syllabus indicates that it covered basic procedures in establishing rapport with students in helping with vocational problems. Petitioner also relied on the Glassboro course descriptions to provide an outline of requirements in the two other areas, vocational guidance and community agencies in which course work or equivalent experience was required by the Board for certification. He requested guidance as to the precise requirements and was referred to course descriptions that approved college courses, which would include Glassboro. The Glassboro courses, which have not been taken by petitioner, include occupational and education information in vocational guidance, and relations of the public schools with the institutions and agencies of New Jersey. The guidance course places emphasis on knowing and using information available concerning occupations and educational opportunities, as well as locating, organizing and providing for dissemination of such information to students. The agency course concerns the problems of atypical children and methods for assisting them, and included speakers from various government agencies and other services (P-2h).

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Petitioner argues that his work experience has encompassed all of the various aspects of counseling, guidance and community agency experience called for by the regulation and the course curriculum to which he was referred. He also claims that the Board acted capriciously by denying a request to have his hearing rescheduled when he was hospitalized. The petitioner conceded that his work experience had not involved students in grades K through eight and had exclusively focused on the 16-to-21 group, often including so-called "atypical" persons with various special problems. He also admitted that his experience was in vocational counseling for persons seeking to enter the work force and did not deal to any large extent with college placement. He also did not deal with gifted and talented children, who are also present in the regular school population.

The Board presented testimony by Ida Graham, Planning Associate II and Assistant to the Director, who stated that the Board had reviewed an extensive packet of materials assembled by her consisting of materials submitted by the petitioner, as well as her comments and recommendation. She indicated that the Board had considered petitioner's work experience but had concluded that it was insufficient in the areas indicated above. Ms. Graham also stated that petitioner had received credit from the Board for his master's course in individual counseling.

There is no dispute as to the above facts and I so **FIND**.

The issue is whether the Board of Examiners' action in denying the petitioner's request for certification in student personnel services was reasonably based on his application and consistent with the applicable regulations. On the basis of the above facts construed in light of those regulations, I **CONCLUDE** that the Board's denial should be affirmed as discussed below. I **FURTHER CONCLUDE** that the petitioner should be allowed to substitute his work experience for the required course in community agencies and institutions.

The regulation concerning substitution of alternative experience provides, in part, that the Secretary of the State Board of Examiners shall notify unsuccessful applicants of the certification requirements lacking and procedures for submitting evidence of alternative education or experience. See, N.J.A.C. 6:11-3.23. Previous decisions applying and interpreting this provision have asked whether the complaining petitioners provided sufficient reasons to conclude that the Board of Examiners'

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determination was other than a reasonable exercise of the discretionary authority vested in them.

In Babicz v. State Board of Examiners, 1978 S.L.D. 937, aff'd by State Board 1979 S.L.D. 816, the Commissioner upheld the Board's denial of a professional librarian certificate to an employee of the library who had the acquired 30 credit hours in library science but only half of the credits for the required B.A. degree, which she claimed should be made up by her 20 years of experience as a librarian. In holding that the lack of degree in that instance was good and sufficient reason for denial of the requested certificate, the Commissioner noted that "on-the-job experience cannot be presumed to supplant in such large measure the discipline and formal academic studies which broaden the perspectives and abilities of those who successfully complete approved degree of programs." Id. at 939. In the matter of Irwin Stoolmacher v. State Board, 1975 S.L.D. 951, the Commissioner upheld denial of a business administrator certificate to the business manager of an urban school system because his experience had been limited to a single city and his certificate would be valid throughout the state. The Commissioner also noted that the function of the business manager was less pervasive than that of the administrator and that an administrator needs greater knowledge of such matters as school law and organization. Credit was allowed, in light of the petitioner's experience, for accounting courses.

As in the Stoolmacher case, the petitioner here has had experience which is in several significant respects more limited than the certification he seeks. His work experience as an employment counselor did not deal extensively with college placement issues but rather was focused on those seeking to enter the work force, often from a position of disadvantage or difficulty. In addition, the petitioner's experience does not reflect any work whatsoever with students in grades K through eight, which the certificate in student personnel services would also cover. He also has not dealt with other "atypical" groups such as the so-called "gifted and talented." Like the librarian in Babicz, petitioner's experience cannot be presumed to replace and serve as a substitute for education in the areas of individual counseling techniques and vocational guidance. For that reason, the Board of Examiners properly determined that further education or experience in these areas was required.

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With respect to the area of community agencies and institutions, however, I disagree with the Board's conclusion denying credit for work experience. The petitioner's experience as an employee of state and county government in dealing with a multitude of such agencies was extensive. Indeed, his work in this area was more extensive than the course work that the Board would have him take in its stead. On that basis, I **CONCLUDE** that petitioner should be given credit for his work experience in the area of community agencies and institutions.

On the basis of the above findings of fact and conclusions of law, it is **ORDERED** that the action of the State Board of Examiners in denying petitioner's application for certification in student personnel services is **AFFIRMED**; and it is **FURTHER ORDERED** that the petitioner be given due credit under N.J.A.C. 6:11-3.23 for his work experience in the area of community agencies and institutions.

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

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

April 24, 1987
DATE

RICHARD J. MURPHY, ALJ

APR 24 1987
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

APR 29 1987
DATE

Mailed To Parties:
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DENNIS SIEFRING,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

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

Upon a careful review of the record of this matter, the Commissioner agrees with the findings and conclusions of the Office of Administrative Law that the State Board of Examiner's decision denying petitioner a student personnel services certification be affirmed. The Commissioner concurs with the ALJ's determination that petitioner has had experience in counseling, interviewing techniques, vocational guidance, occupational and education information, and placement. However, such experience is "in several significant respects more limited than the certification he seeks." (Initial Decision, ante) He affirms the conclusion of the ALJ in this regard for the reasons stated in the initial decision.

However, the Commissioner does not agree with the ALJ that petitioner should be given credit for his work experience in the area of community agencies and institutions. Initially, the Commissioner finds and determines that the ALJ provides no specific information which would permit the Commissioner to determine how the ALJ reached his conclusion, except that he states he felt petitioner's experience in dealing with such agencies was extensive.

Moreover, the Commissioner finds that the ALJ in this regard is substituting his judgment for that of the State Board of Examiners, whose purpose is to make such expert determinations. In reviewing in a substantive way the Glassboro State College course description upon which petitioner relied in attempting to substitute his experience for college credits, it is evident that the subject matter of the course entitled "Relations of the Public School with the Institutions and Agencies of New Jersey" differs markedly from that experience that petitioner claims is equivalent. The course description states:

> Particular attention is directed to the problem of caring for atypical children, the work of prevention of delinquency and maladjustment and

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the methods which may be used by administrators, supervisors, and teachers to avail themselves of greater assistance with problems surrounding the teaching of atypical students.

It is apparent from the description above that the focus of the course is from the perspective of an employee of the public school interacting with agencies and institutions of the State. Further, the course focus is upon providing methods of assisting school personnel in working with atypical children. In both these instances, it would appear that petitioner's perspective was significantly different. The determination in such areas is the State Board of Examiners to make, absent arbitrariness. The Commissioner finds no basis herein to overturn the determination of the State Board of Examiners.

Accordingly, the Commissioner adopts the ALJ's determination denying petitioner a student personnel services certificate. To the extent that the initial decision finds that petitioner should be credited for work experience in the area of community agencies and institutions, it is rejected.

COMMISSIONER OF EDUCATION

June 2, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2587-87
AGENCY DKT. NO. 78-4/87

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY

Walter F. Campbell, petitioner, pro se

James P. Brady, Esq., for the Board of Education of the Borough of Point Pleasant

Record Closed: April 20, 1987 Decided: April 27, 1987

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE

Walter F. Campbell, petitioner, an unsuccessful candidate for a seat on the Board of Education of the Borough of Point Pleasant (Board) in the annual school election held on April 7, 1987, filed a letter complaint with the Commissioner of Education dated April 10, 1987, seeking an inquiry with respect to certain alleged irregularities in the conduct of the election. Petitioner requests the Commissioner to invalidate the election and conduct a new one as prescribed by statute.

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PROCEDURAL HISTORY

Subsequent to the annual school election held on April 7, 1987, petitioner submitted his letter complaint before the Department of Education, Bureau of Controversies and Disputes, alleging certain violations of the annual school election laws by the Board. On April 16, 1987, the Department of Education acknowledged receipt of petitioner's letter of complaint and 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. An inquiry was conducted on April 20, 1987, at the Point Pleasant, New Jersey, Municipal Court and the record was considered closed on that date.

THE ALLEGED INFRACTIONS

Petitioner alleges specific and general infractions of the school election laws in his letter dated April 10, 1987, which, he asserts, created confusion among the voters with regards to the election of members to the Board. His allegations are set forth hereinbelow as follows:

1. No written notice from the board secretary to candidates to inspect the [voting] machines prior to the election (18A:14-42).

2. No ballot sample was provided.

3. One candidate used the name "Patricia Cawley-Campell" on initial petition and all campaign literature...but was not displayed in that manner on the voting ballot (emphasis in the original).

4. Prior to this year, the ballot of candidates on the machines was displayed vertically in all past elections...not horizonally from left to right...and squeezed next to each other (emphasis in the original).

5. Will supply petition of voters (when requested) to testify to the confusion and deception of the ballot.

6. Because of the narrow margin of victory and the fact that the slate of Walter Campbell and Carmine Sabia proposed defeat of the budget (overwhelming) and passing of board expansion (overwhelming), and Mr. Sabia's victory and Mr. Campbell's narrow loss to opponents that favored the budget, raises speculation (See attached article).

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7. Seek immediate impounding of machines to prevent any alteration of ballot display.

FINDINGS OF FACT

Having carefully considered the testimony and other evidence, and having given fair weight thereto, I **FIND** the following facts in this matter:

The annual school election held on April 7, 1987, had, among other things, four candidates for two three-year terms for membership on the Point Pleasant Board of Education. The names of the candidates, as they appeared on the voting machine, was as follows:

1A	2A	3A	4A
Patricia C. Campbell	Barbara Spanola	Walter Campbell	Carmine Sabia

The first name of each candidate was partially obscured by the machine voting lever before it was depressed to cast the required vote. Patricia Cawley Campbell and Barbara Spanola had campaigned as a slate of candidates for the election as had Walter Campbell and Carmine Sabia as an opposing slate.

The testimony of the witnesses proffered by petitioner at the inquiry demonstrated that the first name of each candidate was of a smaller print then the candidates last name. It was also asserted that the names of the candidates on the horizontal voting row appeared to be squeezed together, with little or inadequate space between the candidates names. As a consequence, the voter was required to read the voting line carefully in order to select the candidate or candidates for which he or she wished to cast his or her vote. All of petitioner's witnesses testified they each cast their ballot(s) for the individual(s) they endorsed for membership on the Board.

One witness testified he had no problem with the voting lever obscuring the candidates first names. He contended, however, that the ballot was confusing to him where it listed "Patricia C. Campbell" rather then "Patricia Cawley Campbell" as he had become to know the candidate throughout the election campaign.

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Petitioner presented nine letters from resident voters who could not appear at the inquiry due to the short notice (P-2 through P-10). Eight of the nine who expressed concerns about the placement of the names on the ballot all conceded that they eventually cast their votes for their chosen candidate. One voter (P-3) asserted she voted for Patricia C. Campbell when she intended to vote for Walter Campbell. Her letter states, in part, that:

> [Patricia's] name was under Row A I saw Campbell & Voted. Upon looking further I saw Walter Campbell under Row 4 I had already pushed 2 buttons down and the button for Walter Campbell would not go down... (P-3)

There was no showing by petitioner herein that the voter (P-3) attempted to nullify her vote for Patricia C. Campbell by; (1) placing the voting lever back in its original position prior to casting the ballot or, (2) seeking the assistance of the election workers to correct her mistake.

The Board stipulates that it failed to comply with the provisions of N.J.S.A. 18A:14-42b, which provides as follows:

> Written notice of the time and place when the machines will be prepared for use at the election shall be mailed to each candidate to be voted upon at such election, stating the time and place where the machines may be examined, at which time and place said candidates shall be afforded an opportunity to see that the machines are in proper condition for use in the election.

The Board concedes, but does not stipulate, it did not use sample ballots for the annual school election held on April 7, 1987. It asserts, moreover, that the use of sample ballots, pursuant to N.J.S.A. 18A:14-29, is discretionary on the part of the Board and that petitioner has not affirmatively demonstrated that the Board determined, by resolution, to use such sample ballot for its recent election.

The official results of the election for membership on the Board of Education were not available at the inquiry. However, the unofficial results which were not disputed shows the following:

Patricia C. Campbell	649
Carmine Sabia	619
Walter F. Campbell	580
Barbara Spanola	578
	(P-1)

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This concludes a recital of my findings of fact.

DISCUSSION AND CONCLUSIONS

A thorough review of the herein record demonstrates, at most, one school election law violation; namely, the failure of the Board's Secretary to give written notice to the candidates for membership on the Board to inspect the voting machines prior to the annual school election held on April 7, 1987, pursuant to N.J.S.A. 18A:14-42b. This issue was addressed by the Commissioner in In the Matter of the Annual School Election Held in the City of West Orange, 1978 S.L.D. 360, where the Commissioner held that such a violation was insufficient to invalidate the election.

The record further demonstrates that while there may have been some confusion on the part of the electorate in the instant matter, that confusion was created as a consequence of two candidates having the indentical last name; i.e. Campbell. All of those who testified before this tribunal admitted they were required to scrutinize the voting lines to distinquish between the two candidates with the last name of Campbell before casting their votes. Further, they all admitted they cast their ballot for the candidate of their choice.

Petitioner has failed to demonstrate, by a preponderance of the credible evidence, that the single violation of N.J.S.A. 18A:14-42b influenced the outcome of the election. Nor has petitioner demonstrated any other violations of the school election laws.

I CONCLUDE, therefore, that while the Board's irregularity with respect to N.J.S.A. 18A:14-42b is not to be in any way condoned, this violation does not warrant the setting aside of the election results. It is the clear intent of the law that elections are to be given effect whenever possible. It has also been held by our courts that even gross irregularities, when not amounting to fraud, will not vitiate an election. Love v. Bd. of Chose Freeholders, 35 N.J.L. 269 (Sup. Ct. 1871); Stone v. Wyckoff, 102 N.J. Super. 26 (App. Div. 1968). Where 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 that will has not been thwarted. Petition of Clee, 119 N.J.L. 310 (Sup. Ct. 1938).

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Accordingly, I **CONCLUDE** and hereby **ORDER** that the letter complaint of petitioner Walter F. Campbell be and is hereby **DISMISSED WITH PREJUDICE.**

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

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

April 27, 1987
DATE

Lillard E. Law, ALJ
LILLARD E. LAW, ALJ

APR 27 1987
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 30 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE BOROUGH OF POINT PLEASANT, OCEAN 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 a careful review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that petitioner has failed to demonstrate, by a preponderance of the credible evidence, that the single violation of school election law, namely, the failure of the Board secretary to give written notice to the candidates for membership on the Board to inspect the voting machines prior to the annual school election held on April 7, 1987 pursuant to N.J.S.A. 18A:14-42b, influenced the outcome of the election. The Commissioner notes for the record in regard to allegation two on page two of the initial decision which states that no sample ballot was provided, that the use of sample ballots, pursuant to N.J.S.A. 18A:14-29 is discretionary on the part of the Board and that no evidence is present in the record to demonstrate that the Board herein determined, by resolution, to use such sample ballot for its recent election.

Notwithstanding the above findings, the Commissioner admonishes the Board herein of its duty hereinafter to comply strictly with the laws concerning school elections.

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

COMMISSIONER OF EDUCATION

June 4, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2586-87
AGENCY DKT. NO. 75-4/87

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE BOROUGH OF EMERSON, BERGEN COUNTY

Jay R. Atkins, Esq., attorney for petitioner Norman J. Atkins (Draesel, Sunshine and Atkins, attorneys)

Irving C. Evers, Esq., for respondent Emerson Board of Education

William Lazarus, respondent, pro se

Record Closed: April 21, 1987 Decided: April 24, 1987

BEFORE JAMES A. OSPENSON, ALJ:

Norman J. Atkins, a defeated candidate for school board membership in the annual school election held in the Borough of Emerson, Bergen County, alleged there were procedural violations of the school election law committed during conduct of the annual school election held in the Borough on April 7, 1987. By letter complaint filed with the

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Commissioner of the Department of Education on April 14, 1987, he sought inquiry into alleged violations of statutorily prescribed procedures under N.J.S.A. 18A:14-63.12 and N.J.A.C. 6:24-6.1(d).[1] The inquiry by the Commissioner into such alleged violations, under N.J.S.A. 18A:14-63.12, is to determine (1) if such violations occurred and (2) if they affected the outcome of the election.

The matter was transmitted by the Commissioner to the Office of Administrative Law on April 20, 1987 for hearing and determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. On short notice to the parties, a hearing on the inquiry was conducted and concluded in the Office of Administrative Law on April 21, 1987. Petitioner's letter complaint declared:

> . . . Therefore, pursuant to N.J.S.A. 18A:14-63.12, I am requesting that [the Commissioner's] office make an inquiry into what I believe were violations of statutorily prescribed procedures: i.e., distribution of stickers for the write-in candidate even in the polling places, distribution of pencils in the polling area with the announcement "here are pencils for the write-in candidate," electioneering by distributing stickers within least than 100 feet of the polls, the candidate [William Lazarus] himself trying to help fix machines when they were stuck as a result of use of his stickers. . . . I would also like to request a recount of the ballots. . . [I]f the facts are found to be correct, I would ask that you take appropriate action. . . .

---

1 To the extent petitioner's request to the Commissioner is for recount of ballots, such recount is cognizable under N.J.S.A. 18A:14-63.1 et seq. and N.J.A.C. 6:24-6.1(a) and is beyond the scope of present proceedings.

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GENERAL FACTS

The Borough of Emerson is a Type II school district covering grades K-12. There are five members of its board of education. The April 7 school election was for two seats. Two names, those of Donald J. Segal and petitioner Atkins, appeared on the machine ballot. Atkins was an incumbent. The name of William Lazarus did not appear on the machine ballot. The Borough is divided for election purposes into six districts. Districts one and four voted at Memorial School. Districts two and three voted at Villano School. District five voted at Church of the Latter-Day Saints. District six voted at the junior-senior high school. Results of the election as certified, according to J-1, were that candidate Lazarus was high vote-getter with 338 write-in votes at the polls and eleven absentee ballots for a total of 349 votes. The second candidate elected was candidate Segal with a total of 346 votes, 340 votes at the polls and six absentee votes. Petitioner Atkins was the third place finisher with a total of 331 votes, 325 at the polls and six absentee ballots. Two other persons each received two write-in votes at the polls. A total of 728 ballots were cast, with 17 total absentee ballots.

EVIDENCE AT HEARING

Roslyn Herman, called by petitioner, testified she voted at district five at Mormon Church about 2:45 p.m. In the polling place she saw some ten or twelve pencils on a table. A woman offered to tell her how to write-in her vote. Another person asked if she needed a pencil. Although there were no legends or campaign reference on the pencils, Herman said she thought the process was improper and said so. One person replied that it was alright to give instruction on how to use the machine.

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Called by petitioner, Frances Dunn testified she voted at district one, Memorial School, about 7:45 p.m. After registering, she handed her slip to an election worker and entered the booth. An official, a man, unsolicited, told her that if she wanted to cast a write-in ballot, she should turn the lever. Dunn, surprised, thought the statement irregular. After exiting the booth, she watched while the worker offered the same remark to three other people. She felt that while she could ask for directions, no directions should be volunteered without request. She conceded the worker did not suggest the name of any particular write-in candidate.

Called by petitioner, Barbara Meyer, said she and her husband voted about 6:00 p.m. at district one, Memorial School. Just after registering, and just before voting, she said, a woman asked if she needed help. Then a man asked her if she wanted a pencil for the write-in candidate. Meyer felt the practice was wrong. In her experience as a worker at the polls, she thought it improper to ask people if they need help. Information should not be volunteered, she said. She conceded the name of no particular person as write-in candidate was suggested to her. She too noticed pencils on a desk.

Called by petitioner, Anne Ida Ennis, testified and her husband voted at district four, Memorial School, about 8:15 p.m. They voted without trouble. She said members of a group told her they had received instructions about how to write-in their votes, a practice she thought irregular since no unsolicited instructions ought to be given. The particular polling place had two districts voting, one and four. She thought it irregular that a group was giving instructions at one district but not at the other. She overheard no instructions given for any particular write-in candidate.

Millie Link, called by petitioner, testified she voted at district five, Mormon Church, at about 6:00 p.m. When she entered her voting booth, she said she saw a slip or a card taped just below the write-in candidate slot bearing instructions of some sort. The precise text of the instructions, however, she said, she could not recall. She said she had never seen that practice before.

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Called by petitioner, Leo Link testified he voted at district five, Mormon Church, about 6:00 p.m. There was a notice posted by tape inside his voting booth concerning instructions for write-in candidate voting, although, he said, he too did not recall the precise language. Before he entered the booth, he saw workers explaining to a group how to cast a write-in vote but, he said, no one offered such explanation to him. He heard a worker announce to a group of four or five voters not to use stickers because they had been jamming machines in other districts and, instead, to cast any write-in vote by pen and then close the slide.

Called by petitioner, Silvio Falato, board secretary and business administrator for the Board, testified that on election day he received a call from a voter who sought permission to vote again because he felt his first attempt had not properly been registered. He checked with the judge of elections in district four and was told she too felt the voter's first attempt had not registered. At the time, Falato said, personnel had left for the business day from the county board of elections and no advice was obtainable. Using his own discretion, Falato said he authorized the judge of elections to permit the voter to vote again. The aborted first attempt, he said, was because the lever had been pulled prematurely.

In another incident, Falato said he received reports that machines were being jammed by stickers. A mechanic from the county board of elections was sent for but the machines were by then working.

Offered into evidence by petitioner was a letter from Larry Ennis dated April 21, 1987 (P-1), which said a poll worker entered a voting booth and gave instruction for placement of stickers bearing the name of the write-in candidate. Another letter from Seymour Turk (P-2), offered by petitioner, said that an election worker who registered him suggested he permit an election worker monitoring the machine to give verbal instruction as how to use it. Turk found those instructions unsatisfactory and felt, in general, there was confusion and absence of decorum, at least in the polling place where he voted.

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Petitioner Norman J. Atkins, the defeated Board incumbent, testified he voted at district one, Memorial School, about 2:30 p.m. He said he noticed one of candidate Lazarus's workers outside the school but less than 100 feet away in the parking lot, handing out stickers to persons entering the polling place. The stickers bore the legend "William Lazarus." Atkins said he told the person he thought it totally improper to be doing that less than 100 feet from the polling place. Atkins said he stepped off a distance and felt the campaigner was only some 75 feet from the polling place.

Inside the polling place, he said, he saw pencils on the table. He saw the machine at district one operating but the machine at district four jammed, with people complaining. He himself had no trouble voting. He telephoned board secretary Falato to tell him of the jammed machine and was advised Falato already knew of the difficulty. Atkins returned at about 3:30 or 4:00 p.m. It was reported to him by a friend that she had seen candidate Lazarus offering his help as to how to unjam a machine in district one. Atkins felt that practice, if true, was not proper for Lazarus to do. He received the calls at his home and returned to the polling place but saw no one outside. Candidate Lazarus was inside. Atkins said he told Lazarus he thought it was not proper for either to be present. He then left.

Petitioner rested.

William Lazarus, a successful candidate, testified he had conducted a write-in campaign before the election by mailing some 2,200 piece of literature to the electorate. He also mailed some 600 or 700 stickers bearing a legend urging a write-in vote for him. He said he had checked with the county board of elections beforehand as to correctness of size of the stickers and felt, as a result, they were perfectly in order. Concerning the allegation that one of his workers was electioneering within 100 feet of the poll, he said the worker had been told expressly to go no closer than 100 feet and when seen by Lazarus, he was so properly distanced. Although there were pencils in the polling place, they were plain pencils and bore no legends. Concerning any improper electioneering inside any place, Lazarus denied that as well.

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DISCUSSION

A principal focus of petitioner's complaint was the practice of giving unsolicited instruction to voters about casting write-in ballots. It was urged the practice of having numerous even unmarked pencils in visible display, as well as a notice concerning write-in voting taped on a machine, was equally irregular. That would be so, it was said, even if the unsolicited instruction was ostensibly neutral because no specific candidate's name was expressly suggested.

It is clear, of course, that any person interfering with the orderly conduct of a school election is guilty of a misdemeanor. N.J.S.A. 18A:14-65. The distribution or display of any circular or printed matter or the offering of any suggestion or the solicitation of any support for any candidate within the polling place or room or within a distance of 100 feet of the outside entrance is a disorderly persons offense. N.J.S.A. 18A:14-81. N.J.S.A. 18A:14-101 provides:

> No person shall . . . 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.

In In Re Election Inquiry in the School District of South River Borough, 74 S.L.D. 1040, a complaint was made that people were electioneering within 100 feet of the polls; that is, two men were stopping potential voters to question them about candidates and public questions on the ballot and telling them which candidates to vote for and how to vote on the public questions. Although the Commissioner determined the election results would stand, he ordered that election officials should be instructed to order loiterers to leave the polls and to secure the assistance of police officers if necessary. Id. at 1046-8.

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Petitioner's complaint bears analysis from evidence of election results in J-1 and from testimony by successful candidate Lazarus. While at first blush it seems that the mere presence of plain pencils in the polling place or unsolicited advice by election officials about how to cast write-in ballots even if without suggesting a name may be relatively innocuous, the vice was perhaps subtler here and thus of graver import. The report of election results in J-1 showed clearly there was a three-person race. Of some 728 votes casted in all, only 18 votes separated first and third place finishers. Candidate Lazarus, whose name did not appear on the machine ballot, was quite obviously the only viable write-in candidate. Thus the degree of suggestibility of unadorned pencils and unsolicited advice about casting write-in ballots was heightened. There was implied invitation to vote for a particular candidate, Lazarus, without his name being mentioned. Unsolicited, facially neutral advice about write-in votes became solicitation for his support and constituted, presumptively, unlawful voter inducement, within the meaning of N.J.S.A. 18A:14-81, 101.[2]

CONCLUSION

Under circumstances here, therefore, I **FIND** that the innocent-sounding practice of supplying pencils close to voting machines and offering unsolicited instruction to voters about how to cast write-in ballots was irregular and violative of statutorily prescribed procedures, if only at the times and in the particular district polling places described by witnesses. What is less than readily apparent, however, is how pervasive the practice was during all voting hours throughout all six polling places in the four schools of the district.

---

2 A pamphlet, "General Information to School Election Officials," for the annual school election of April 7, 1987, declared that "voters desiring assistance may be instructed on the sample machine model" and that "voters having problems - ask them if they need any assistance." See J-4 at 6. [Emphasis added]. The pamphlet also instructed officials to call the county board of elections about voter registration problems, the voting machine warehouse about mechanical failures and the board secretary for general assistance. J-4 at 5.

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As to the practice of offer of unsolicited advice or indications by pencil concerning write-in voting procedures, the Board is DIRECTED to cause its school election workers in future to be instructed properly as to the necessary limitation against undue and/or unlawfully suggestible voter contact or solicitation and, thereafter, to insure no such practices as were here apparent recur.

Even if literal violations of school election laws can be said to have occurred, a defeated candidate's burden of proof is not without more carried. It is only when deviations from statutory procedure are so gross as to produce illegal votes that would not have been casted or to defeat legal that would have been counted, so as to make impossible a determination of the will of the people, that an election would be set aside. In In Re Wene, 26 N.J. Super. 363 (Law Div. 1953), the court said:

> The rule in our State is firmly established that if any irregularity or other deviation from the election law by 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 irregularity and the result of the election; that is, the irregularity must be the producing cause of illegal votes that would not have been cast or of defeating legal votes that 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 . . . [Id. at 383].

No such ultimate showing, even presumptively, has been made by petitioner on the evidence in this case. Accordingly, but subject to the above, petitioner's letter complaint alleging statutory voting irregularities and seeking invalidation of the school election of April 7, 1987, in whole or in part, is DISMISSED. No sufficient showing has been made that such irregularities as occurred necessarily and sufficiently affected the outcome of the election, within the meaning of N.J.S.A. 18A:14-63.12.

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Concerning the allegation of improper electioneering by a worker for candidate Lazarus within 100 feet of the polling place, I am unable to find by a preponderance of the credible evidence, and therefore do not, that it occurred at district one within the forbidden distance.

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

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

April 24, 1987
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

APR 27 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 29 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

Exceptions to the initial decision were filed with the Commissioner by defeated candidate Norman Atkins. Said exceptions were filed in accordance with the applicable provisions of N.J.A.C. 1:1-16.4 a, b and c.

Mr. Atkins argues that the ALJ, in finding that violations of N.J.S.A. 18A:14-81 had occurred at the annual school election, erred in failing to find such violations of law sufficient to invalidate the election. Mr. Atkins argues further that the result of the recount of the votes conducted by the Commissioner's representative on April 28, 1987 preliminarily indicated that there was a tie in the number of votes for a full three-year term on the Board between William Lazarus and himself. Given the fact that only four ballots were contested by Mr. Lazarus at the time of the recount and referred to the Commissioner for final determination, Mr. Atkins contends that even if such votes were counted for Mr. Lazarus, the margin of votes between them is too narrow not to consider the violations of school election procedures, as found herein, to be a significant factor in voiding the school election. Mr. Atkins also takes exception to the fact that one voter was illegally allowed to vote twice in the school election and that such finding was not accorded adequate treatment by the ALJ in the initial decision.

Upon review of the exceptions to the initial decision, the Commissioner notes that his decision on the recount of the ballots in the Emerson School District for full three-year terms of office was rendered on May 29, 1987. The result of that recount establishes that William Lazarus was declared the successful candidate over Mr. Atkins by a two vote margin.

While the Commissioner does not condone those violations of school election laws as found herein, especially those committed by the Board Secretary and the school election officials in an effort to provide assistance to the voters, there can be no finding however that Mr. Atkins has met his burden of proving that such irregularities affected the outcome of the school election.

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In the Commissioner's judgment, it is imperative that the Board Secretary in this instance, as well as the school election officials, are properly instructed with regard to their respective legal responsibilities pertaining to those acceptable procedures to be employed in future school elections held in the Emerson Borough School District. In this regard, the Board is directed to avail itself of the training programs conducted by the Bergen County Board of Elections in cooperation with the office of the Bergen County Superintendent of Schools in order to comply with the mandate set forth in the provisions of N.J.S.A. 18A:14-6.1 pertaining to the instruction of school election officials.

The Commissioner hereby adopts those findings and conclusions set forth in the initial decision as his own.

Accordingly, it is determined that the irregularities which occurred at the annual school election held in the School District of the Borough of Emerson on April 7, 1987 were not sufficient to invalidate the outcome of the election.

The complaint filed by Norman Atkins is hereby dismissed for the reasons set forth herein.

COMMISSIONER OF EDUCATION

June 4, 1987

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IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF EMERSON, BERGEN COUNTY.	:	
	:	

Decided by the Commissioner of Education, June 4, 1987

For the Petitioner-Appellant, Draesel, Sunshine, Atkins, Minassian and Tafuri (Jay R. Atkins, Esq., of Counsel)

For the Respondent-Respondent Emerson Board of Education, Schwartz, Pisano, Simon and Edelstein (Irving C. Evers, Esq., of Counsel)

For the Respondent-Respondent, William Lazarus, pro se

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

October 1, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2461-87
AGENCY DKT. NO. 65-4/87

KEITH H. STRUBLE AIR CONDITIONING, INC.
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,
Respondent.

Andrew M. Wubbenhorst, Esq., for petitioner
(Curtin, Hubner & McKeon, attorneys)

Willard Geller, Esq., for respondent

Record Closed: April 27, 1987 Decided: April 29, 1987

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

The petitioner in this matter, Keith H. Struble Air Conditioning, Inc. (hereafter "Struble"), is an HVAC contractor which filed a petition of appeal with the Commissioner of Education on April 10, 1987, challenging the announced intention of the respondent, Board of Education of the Township of South Brunswick, to award a contract to a competitor bidder with respect to the delivery and installation of a 100-ton air-cooled reciprocating water chiller. Although Struble was the lower of only two bidders, its bid was rejected by the Board because of its failure to accompany its bid with a "Notice of Classification." In view of the nature of the proceedings and the consequent need for an

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expeditious decision, the file was promptly transmitted by the Commissioner to the Office of Administrative Law as a contested case on April 13, 1987, and a plenary hearing was conducted before the undersigned on April 15, 1987. Posthearing memoranda were filed on April 27, 1987.*

TESTIMONY

The sole witness to testify at the hearing was Joseph Borkes, Struble's controller. He related that in early February 1987, the company learned that the Board was advertising for the receipt of bids on February 25, 1987 in connection with delivery and installation of an air-cooled reciprocating water chiller. Struble timely submitted a bid. Ultimately, the Board determined to reject all bids and notice of the Board's decision was provided to Struble and other bidders in a letter dated March 10, 1987 from the Board secretary (see Exhibit B, annexed to Petition). Nevertheless, a day or two later, Borkes learned from the company's project manager, a Mr. Colvin, that the Board was advertising for the receipt of new bids. Accordingly, Struble and Colvin began putting together a proposal for submission by 10:30 a.m. on March 24, 1987, the new deadline set for receipt of proposals (Exhibit R-1).

When Struble's bid in connection with the first advertisement was submitted in February 1987, it included, as required by the general instructions to bidders, a "Notice of Classification" form prepared by the Department of Treasury, State of New Jersey. That form, which had a February 28, 1987, expiration date, revealed that Struble was classified to bid on single HVAC projects up to $250,000 and to bid in the aggregate amount of $500,000 for both HVAC and energy management systems projects. (Exhibit J-1).**

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*At the close of the hearing counsel indicated that despite the urgency of the matter they wished to file briefs on the legal issue and that the additional time was tolerable. Further, since the Board had voted on April 13, 1987 to table taking action on the matter in view of the pendency of the case, some of the time pressure had eased.

**N.J.A.C. 6:20-7.2 delegates to the Department of Treasury the authority to qualify bidders on board of education projects.

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In mid-March 1987, after the first bids were rejected by the Board, Colvin and Borkes worked on the preparation and submission of a new bid. Included again among the general conditions and instructions to bidders was the requirement that the bidder submit a notarized affidavit setting forth the type of work and amount of work for which it has been qualified. Despite this condition, no such notice was submitted with Struble's bid on March 24, 1987. Borkes explained the omission as follows. It seems that in late February 1987, aware of the expiration date of its existing classification (February 28, 1987), Struble applied for a renewal. Sometime during early March, Borkes was orally advised by someone at the State that although the renewal notices were slow in being issued because of a backlog, Struble would retain its $250,000-$500,000 classification and could continue to bid on public work. However, Strubble did not receive the new notice prior to 10:30 a.m. on the morning of March 24, 1987, and its bid had to be submitted without it. As it turned out, Strubble received new notice (Exhibit J-2) in the mail at about noon on March 24.

The particular sequence of events according to Borkes was as follows. Colvin timely hand delivered the bid documents to the Board secretary's office on the morning of March 24, 1987. Colvin returned to Struble's office later that morning and told Borkes that when the two bids were opened by the person in the Board secretary's office who performed that function, a Mrs. Rooney, she informed him that since there was no Notice of Classification submitted with Struble's bid, it could not be considered. As soon as Borkes learned this, he called Rooney and asked if he could send the notice which he had just received in the mail that day to the Board by courier. Rooney told him he could and that she would bring the entire matter to the attention of Mr. Brennan, the Board secretary. Later that day, or the following day, Borkes called Brennan and the Board secretary told him he would have to recommend rejection of Struble's bid because "the law in this area is strict." Borkes also learned from Brennan that the Board was meeting on the evening of April 6, 1987 with respect to the matter. Accordingly, Borkes attended that meeting and made a presentation on Struble's behalf. Nevertheless, the Board president announced that upon advice of counsel, the Board, on April 13, 1987, at a public meeting, would formally reject Strubble's bid and make an award to the only other bidder.

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Borkes readily conceded that although Struble's bid represented to the Board that all necessary documents were included (Exhibit J-3), he was aware that a current Notice of Classification had not yet been received when the bid was submitted on the morning of March 24, 1987. It was, he said, an oversight that some sort of letter or other indication to the Board of the pendency of the issuance of a renewal notice and of the State's oral approval was not submitted with the bid. Nevertheless, Borkes stressed that since the renewal certificate had an issue date of March 13, 1987 and was retroactive to March 1, 1987, Struble was prequalified on March 24, 1987.

During cross-examination, Borkes identified certain contents of the bid package which had been delivered to the Board on March 24, 1987, including a "bidders check list" which made reference to a "prequalification affidavit." Borkes conceded it was his understanding that this meant, among other things, a requirement that the bidder provide proof by way of affidavit that it was classified to bid on the project in the appropriate amount. In addition, the bid package also contained the "general conditions and instructions to bidders" which set forth in paragraph 16 that the bidder must submit a notarized affidavit setting forth, inter alia, the fact and amount of its classification. That same paragraph also includes a verbatim recitation of N.J.S.A. 18A:18A-26, which provides that where a board advertises for the receipt of bids on a project, the entire cost of which will exceed $20,000, it shall require that all persons proposing to bid on any such contract "shall first be classified in accordance with article 6 of this chapter as to the character and amount of public work on which they shall be qualified to submit bids. So long as such requirement is in effect, the board of education shall accept such bids only from persons qualified in accordance with such classification." Article 6 refers to N.J.S.A. 18A:18A-27 to 18A-33, and particularly N.J.S.A. 18:18A-29, which provides that "the department shall classify all such prospective bidders as to the character and amount of public works on which they shall be qualified to submit bids."

Finally, in response to a question from the undersigned, Borkes advised that its bid on March 24, 1987 was $54,258, about $1,300 or $1,400 lower than the other bid. No testimony was offered by the Board and both sides rested following Borkes's testimony.

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FINDINGS OF FACT

Having reviewed the evidence and testimony in this case, I herewith make the following findings of fact:

1. Petitioner, Keith H. Struble Air Conditioning, Inc., is a heating and air conditioning contractor whose principle place of business is Fairfield, New Jersey.

2. Respondent, Board of Education of the Township of South Brunswick, is a public entity subject to the provisions of Title 18A.

3. Sometime during February 1987 respondent advertised for the receipt of bids in connection with its desire to receive and install an air-cooled reciprocating water chiller. Bids were to be delivered on February 25, 1987.

4. Petitioner submitted a bid in timely fashion in connection with that advertisement. Included with its bid documents was a "Notice of Classification" issued in June 1986 by the Department of Treasury, Division of Building and Construction, in which for the period August 1, 1986 through February 28, 1987, Struble was classified to bid on projects having an aggregate amount of $500,000.

5. Following its receipt of bids on February 25, 1987, the Board determined to reject all bids and a formal notice to that effect was sent to Struble on March 10, 1987.

6. Nevertheless, the Board also determined to and again readvertised for the receipt of bids in connection with an air-cooled reciprocating water chiller. The new bid submission deadline date was March 24, 1987 at 10:30 a.m.

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7. Bid documents in connection with the Board's desire to receive new bids for the unit were sent to all interested parties, including Struble.

8. Included among the documents sent to Struble and all other prospective bidders were a "bidders check list" which alerted the bidders to the fact that a "prequalification affidavit" would be required and "general conditions and instructions to bidders."

9. Paragraph 16 of the "general conditions and instructions to bidders" provided as follows:

> Where the bid for public works will exceed $20,000, the bidder must submit with his bid a notarized affidavit setting forth the type of work and the amount of work for which he has been qualified, that there has been no incompleted work on contracts at the time and the date of the classification. (Forms for this purpose are available from the Director of School Building Services, Department of Education, Trenton, New Jersey.)
>
> 18A:18A-26
>
> Classification of bidders as requisite to bidding.
>
> Every Board of Education shall require that all persons proposing to bid on any contract requiring public advertisement for bids with the Board for public work, the entire cost whereof will exceed $20,000.00 shall first be classified in accordance with Article 6 of this chapter as to the character and amount of public work on which they shall be qualified to submit bids. So long as such requirement is in effect, the Board of Education shall accept such bids only from persons qualified in accordance with such classification.

10. Paragraph 17 of the "general conditions and instructions to bidders" then reserved to the Board "the right to waive any informality in any bid."

11. On or about February 25 or 26, 1987, Struble, aware that its then-current classification would expire on February 28, 1987, made application to the State for a renewal.

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12. On or about March 5, 1987, Struble's controller, Joseph Borkes, called the Department of Treasury regarding the issuance of its renewal and was orally informed that because of a backlog, a new notice had not yet been sent. However, Borkes was told that given the information submitted by the company, it continued to be authorized to bid on public works in accordance with its previous classification.

13. A renewal Notice of Classification, bearing an issue date of March 13, 1987, and retroactive to March 1, 1987, classifying Struble as qualified to bid on public works in an aggregate amount of $500,000, was received in the mail by Struble at about noon on March 24, 1987.

14. Struble's receipt of the renewal came too late for it to be included with the bid package which it had been obliged to submit to the Board of Education by 10:30 a.m. on March 24, 1987.

15. Struble's bid was $54,258. The only other bidder submitted a bid approximately $1,300 or $1,400 higher.

16. On the morning of March 24, 1987, the two bids were opened by the secretary to the Board secretary who noted the absence from Struble's bid of the requisite Notice of Classification. Present at the time of the bid opening was Struble's project manager, Mr. Colvin. He returned to Struble's office later that morning and informed Borkes about the situation.

17. Colvin advised Borkes that the secretary had announced that Struble's bid would not be accepted because of the absence of the Notice of Classification. Borkes then called the Board office and advised the secretary the renewal had just been received in the mail that same day. He was told that if he wished, he could send the renewal certificate by courier (which he did) and that the matter would be brought to the attention of the Board secretary.

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18. Later that same day, or the next day, Borkes spoke with Frank J. Brennan, Board secretary/business administrator, who told him that "the law was very strict" and that because of Struble's failure to include the Notice of Classification with its bid, he would recommend that Struble's bid be rejected.

19. On the evening of April 6, 1987, Borkes attended a caucus session of the Board and made a presentation to it. Following his presentation, the Board president announced that upon advice of counsel, Struble's bid would be rejected and that an award of the bid to the only other bidder would be formally made at the next public Board meeting.

20. On the evening of April 13, 1987, the Board met in public session and voted to reject Struble's bid because of its failure to submit a required Notice of Classification with its bid. On that same evening, however, the Board tabled taking any action with respect to any award, pending the outcome of the instant litigation which had commenced on April 10, 1987.

DISCUSSION

The critical issue to be determined is whether the Board's decision on April 13, 1987 to reject Struble's low bid should be set aside because it was arbitrary, capricious, unreasonable or in violation of statute. According to petitioner, the answer to that question must be in the affirmative since Struble was prequalified to bid on a project of this sort; indeed, its qualification was in effect as of March 1, 1987, and it promptly provided that information to the Board on March 24, 1987, three weeks prior to the Board's determination to reject its bid. According to petitioner, its failure to accompany the bid with the requisite Notice of Classification, which was due to circumstances essentially beyond its control, therefore did not constitute a material omission which would justify the Board's rejection.

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The Board, on the other hand, takes the position that the requirement contained in its general conditions and the statute, that every bid must be accompanied by a notarized affidavit respecting the bidder's classification to bid on a project of that sort, is substantive and material and cannot be waived.

The case law in the public bidding area is constantly developing and not always consistent. Thus, there are decisions which arguably provide support for both parties' positions. For example, a recent decision by the Commissioner containing a factual context similar to the instant case, High Fidelity Sound Center, Inc. v. Board of Education of the Township of Hamilton, et al., OAL DKT. NO. EDU 6255-85 (December 30, 1985), affirmed Commissioner of Education (February 13, 1986), involved a situation wherein a bid submitted by High Fidelity with respect to the installation of certain sound equipment in four of respondent's schools did not include the "notice of classification." Although the nearest competitor's base bid was lower than that of High Fidelity, its alternate bid was higher. In view of the absence of the classification form, the board rejected High Fidelity's bid. High Fidelity then instituted suit to restrain the award of any bid pending the outcome of the case.

Although much of the discussion in the Initial Decision in High Fidelity touched upon an allegation that references by the board to various forms was confusing, the basic point had to do with the effect of the absence of the Notice of Classification, and the judge determined that High Fidelity, by failing to submit the form with its bid, was entitled to no relief. He articulated his reasoning as follows:

> By way of brief, counsel for High Fidelity has carefully and thoroughly discussed that case law which can be argued as bearing on the circumstances. Yet, in the face of those facts found today, their holdings cannot be construed as favorable to High Fidelity. To begin with, the bidding process is obviously controlled by statute, N.J.S.A. 18A:18A-21, et seq. Though pertaining to schools, these statutory sections were adapted to conform with the Local Public Contracts Law, which governs municipalities. One implementing regulation, N.J.S.A. 6:20-7.2, which governs bidding qualification, defers to the implementing regulations of the Department of Treasury, See, N.J.S.A. 17:19-1.1 et seq. The statutory and regulatory patterns are parallel. Thus, as the Board correctly asserts, the discretion of the Board should be afforded no more latitude than that accorded municipalities under the Local

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> Public Contracts Law. Thereunder, local authorities must be guided by strict construction. L. Pucillo and Sons, Inc. v. New Milford, Mayor and Council, 73 N.J. 349, 356 (1977). Moreover, under that law, there can be no waiver of disclosure, or extension of time to cure bids after acceptance. George Harms Constr. Co. v. Bor. of Lincoln Pk., 161 N.J. Super. 367, 373 (1978). Strict construction is essential to integrity. Id., at 374. Where an error is material, simple negligence cannot be cured after bids are opened. Id. at 376. Township of River Vale v. R.J. Longo Construction Co., 127 N.J. Super. 207 (Law Div. 1974), cited by High Fidelity, does not support the contrary view, even after application of its two-part test. Waiver there was favored only in the face of minor irregularity or immaterial variance, unaccompanied by fraud, bad faith or collusion. Id. at 215-216. A "Notice of Classification" goes to the heart of the bidding process' integrity. The specific information in that form is crucial, not minor or immaterial. . . . Finally, even accepting High Fidelity's claim to low bidder status, no authority cited supports an award for that reason where there has been an oversight so serious as a missing "Notice of Classification." This is a material omission which cannot be waived, Albert F. Ruehl Co. v. Board of Trustees, Industrial Ed., 85 N.J. Super. 4, 16-17 (Law Div. 1964). High Fidelity at 10 (emphasis added).

The administrative law judge's Initial Decision was then affirmed by the Commissioner of Education who held as follows:

> So long as the Board deemed the "Notice of Classification" as a non-waivable requirement, the Commissioner will not substitute his judgment for the Board's in that regard. Since the record is clear that the Board considered the absence of a "Notice of Classification" form "a material omission which cannot be waived" . . . a presumption of validity attaches to the Board's action. The Commissioner will not overturn its determination since there is no evidence that the Board's so deeming the notice of classification form indispensable was arbitrary, capricious or unreasonable. High Fidelity, at 17-18.

I have read the cases cited by the administrative law judge and the Commissioner in High Fidelity, the cases cited by counsel in their posthearing briefs and others. Based upon my independent review of all those cases, and even in light of the decision in High Fidelity, I am convinced that the Board's determination to reject Struble's bid, given the

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particular circumstances of this case, should be set aside and that an order be entered directing an award to Struble.

To begin with, in the absence of a question as to the financial responsibility of a low bidder, an award should be given to it as a matter of right since the status of such a bidder may not lightly be disturbed. The primary concern should be whether there actually has been an element of unfairness which interdicts the competitive bid process, and absent such actual unfairness, the low bidder is entitled to the award. See, Murdock Contracting Co., Inc. v. Verona, 47 N.J. Super. 102, 107 (Law Div. 1957); Sellitto v. Cedar Grove, 133 N.J.L. 41 (Sup. Ct. 1945); Phifer v. City of Bayonne, 105 N.J.L. 524 (Sup. Ct. 1929); Bryan Construction Co. v. Bd. of Trustees, Montclair, 31 N.J. Super. 200 (App. Div. 1954).

In a comprehensive decision in Tp. of River Vale v. R. J. Longo Construction Co., Inc., 127 N.J. Super. 207 (App. Div. 1974), Judge Pressler reviewed much of the case law to that date in the public bidding area and set forth a two-part test for determining whether an omission was material. See, River Vale at 216. The administrative law judge in High Fidelity applied her test and held that neglecting to submit the required information with a bid could not be deemed a "minor irregularity" or an "immaterial" variance since it went "to the heart of the bidding process' integrity." High Fidelity at 10. Nevertheless, in my judgment the test set out in River Vale actually dictates a contrary result in the circumstances of the case sub judice, particularly given decisions by the courts both prior and subsequent to River Vale to be discussed below.

In River Vale, Judge Pressler reviewed several bidding law decisions, including in particular Hillside Township v. Sternin, 25 N.J. 317 (1957) and P. Michelotti & Sons, Inc. v. Fair Lawn, 56 N.J. Super. 199 (App. Div. 1959), certif. granted, 31 N.J. 75 (1959), app. dism., 31 N.J. 556 (1960). The Sternin case, of course, is often relied upon for the salutary principle that strict adherence to the requirements of the bidding statutes is much to be desired and little tolerance should be given to allowing variances where the public interest is involved. However, the facts in Sternin reveal that the low bidder in that case not only failed to submit any form of security with its bid, but, most

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importantly, at no time thereafter did it evidence any intention to "cure" the defect. This same negative attitude was present in Albert F. Ruehl v. Bd. of Trustees, Industrial Ed., 85 N.J. Super. 4 (Law Div. 1964), cited in High Fidelity, where the low bidder resisted submitting a certified financial statement.

On the other hand, in P. Michelotti & Sons, Inc., the court found waivable the fact that the low bidder submitted an uncertified check instead of the required certified check where a replacement certified check was then delivered the day after the bids were open. So too, in another case mentioned by Judge Pressler, Hanover Township v. Inter. Fidelity Insurance Co., 122 N.J. Super. 544 (App. Div. 1973), where the failure to submit a bid bond in the total required amount was determined to be a waivable omission, the court pointedly referred to the opposite situation in Sternin where the low bidder "neither attempted to, or intended to, submit a check as called for by the advertisement." Hanover Township at 551. See also, Murdock at 106. In River Vale, too, the low bidder delivered a certified check on the morning following the opening of bids which was considered by Judge Pressler strong evidence of the good faith of that bidder. Even though good faith, alone, may not cure a defect, it is, she said, "an appropriate factor for municipal consideration in its determination of whether to waive a minor irregularity." River Vale at 222.*

Another decision dealing with a post-bid opening cure which, I believe, buttresses my view in the instant case is Marvec Allstate, Inc. v. Gray & Fear, Inc., 148 N.J. Super. 481 (App. Div. 1977). There, a low bidder posted a bid bond which was more than $100,000 below the required five percent of the total bid. The Appellate Division reversed the trial court's rejection of the bid upon the ground that the defect was waivable. In reaching that conclusion, the court particularly noted that within 24 hours of the opening of the bids, the low bidder cured the defect. Marvec Allstate, Inc. at 484.

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*Compare with Cubic Western Data, Inc. v. N.J. Tp. Auth., 468 F. Supp. 59 (D. N.J. 1978) in which an effort to "cure" was held insufficient, in part because the trial judge found that the low bidder had negotiated with the Authority regarding contract terms before it submitted missing items.

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In other words, as the court aptly put it in Marvec, where "it appears that the lowest responsible bidder is prepared to execute the proffered contract and furnish sufficient security for its performance, it is in the public interest that such bid, though perhaps irregular, be accepted and, if necessary, that the bidder be given the opportunity to correct any irregularity that will not change the substance of the bid." Marvec at 488-489; see also, Faist v. Hoboken, 72 N.J.L. 361 (Sup. Ct. 1905).

In reaching its decision in Marvec, the Appellate Division also made reference to pertinent language contained in the New Jersey Supreme Court decision in Terminal Construction Corp. v. Atlantic City Sewerage Auth., 67 N.J. 403 (1975). I believe it appropriate for me to do the same:

> Bidding statutes are for the benefit of the taxpayers and are construed as nearly as possible with sole reference to the public good. Their objects are to guard against favoritism, improvidence, extravagance and corruption; their aim is to secure for the public the benefits of unfettered competition. To achieve these purposes all bidding practices which are capable of being used to further corrupt ends or which are likely to affect adversely the bidding process are prohibited, and all awards made or contracts entered into where any such practice may have played a part, will be set aside. This is so even though it is evident that in fact there was no corruption or any actual adverse effect upon the bidding process. . . .
>
> It is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived. Township of Hillside v. Sternin, supra, 25 N.J. at 324; Case v. Trenton, 76 N.J.L. 696 (E. & A. 1909). This rule, however, does not apply to minor or inconsequential conditions. Public contracting units may resolve problems arising from such conditions in a sensible or practical way. Our courts have on a number of occasions considered whether particular conditions might or might not be waived. Hence, while the submission of security with a bid is material and may not be waived, Hillside, supra, the form in which that security is submitted may vary slightly from that set forth in the specifications, P. Michelotti & Sons, Inc. v. Borough of Fair Lawn, 56 N.J. Super. 199 (App. Div. 1959) (uncertified check which was later certified); Township of River Vale v. R. J. Longo Constr. Co., Inc., 127 N.J. Super. 207 (Law Div. 1974) (bid bond in lieu of certified check); Hornung v. Town of West New York, 82 N.J.L. 266 (Sup. Ct. 1911) (cashier's check instead of certified check). A small difference between the amount of security submitted and

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> that specified has been deemed immaterial, Township of Hanover v. International Fidelity Ins. Co., 122 N.J. Super. 544 (App. Div. 1973), as has the arrival of a bid two minutes late, William M. Young & Co., Inc. v. West Orange Redevelopment Agency, 125 N.J. Super. 440 (App. Div. 1973).
>
> On the other hand conditions requiring detailed description of materials . . . or specific amounts of additions or decreases in price if alternate products are to be used, Remsco Associates, Inc. v. Raritan Township Municipal Util. Authority, 115 N.J. Super. 326, 333-34 (App. Div. 1971) or the delivery of certificates demonstrating a present ability to perform, Tufano v. Borough of Cliffside Park, 110 N.J.L. 370 (Sup. Ct. 1933); Albanese v. Machetto, 7 N.J. Super. 188 (App. Div. 1950), have all been found to be so material so as not to be the subject of waiver.
>
> Essentially this distinction between conditions that may or may not be waived stems from a recognition that there are certain requirements often incorporated in bidding specifications which by their nature may be relinquished without there being any possible frustration of the policies underlying competitive bidding. In sharp contrast, advertised conditions whose waiver is capable of becoming a vehicle for corruption or favoritism, or capable of encouraging improvidence or extravagance, or likely to affect the amount of any bid or to influence any potential bidder to refrain from bidding, or which are capable of affecting the ability of the contracting unit to make bid comparisons, are the kind of conditions which may not under any circumstances be waived. Terminal Construction Corp. at 409-410 and 411-412.

Perhaps the most pertinent decision to be added to the list of those cases which, I believe, supports if not compels the recommendation that I am making in this case with regard to the acceptability of Struble's bid is the Appellate Division's decision in Palamar Construction, Inc. v. Tp. of Pennsauken, 196 N.J. Super. 241 (App. Div. 1983). In that case, a challenge was brought to an award of a municipal contract on a construction project to a low bidder. The trial court set the award aside, but its determination was reversed on appeal. One of the reasons for the trial court's action was that the low bidder failed to include a contractor's qualification statement with its bid. The Appellate Division, however, found that a technical irregularity that could be waived. In reaching that result, the court made the following particularly apt observations:

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We now turn to the late submission of the contractor's qualification statement. Taylor's bid did not technically comply with all requirements of the bid proposal. When the bids were opened at 2 p.m. on August 5 Taylor's bid package did not contain the contractor's qualification statement that all bidding contractors were instructed to include. None of the parties contested the fact that the qualification statement was omitted due to a clerical error and was submitted to the Township authorities one and one-half hours after the bids were opened. The sole controversy is whether this omission in Taylor's bid was a material defect that could not be cured after the bids were opened or whether it was merely a technical irregularity that the municipality could waive.

Our courts have been less than consistent in articulating the difference between a defect in a bid that is material and can not be waived and one that is material and can be waived. Here we affirm the findings of the Township Committee that the defect in Taylor's bid was not material and that the defendant should not be disqualified on that ground for these reasons.

In its most recent consideration of the subject, our Supreme Court stated

> It is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived. Township of Hillside v. Sternin, supra, 25 N.J. at 324; Case v. Trenton, 76 N.J.L. 696 (E. & A. 1909). This rule, however, does not apply to minor or inconsequential conditions. Public contracting units may resolve problems arising from such conditions in a sensible or practical way. [Terminal Construction Corp., Inc. v. Atlantic City Sewerage Auth., 67 N.J. 403, 411 (1975)].

The "strict policy" underpinnings announced in Hillside v. Sternin, 25 N.J. 317, 322-323 (1957), have been distinguished in subsequent cases and not all deviations are fatal to an award of the contract. Thus, where a bidder submits a different form of security than that called for by the specifications or mistakenly submits security in an amount substantially lower than that required, and the defect is timely cured, our courts have permitted the municipality to waive the irregularity and accept the bid. See, e.g., Bryan Construction Co. v. Bd. of Trustees, 31 N.J. Super. 200, 206 (App. Div. 1954) (submission of bid bond in lieu of check waivable); Michelotti v. Fair Lawn, 56 N.J. Super. 199, 201-202 (App. Div. 1959) (submission of uncertified check where certified check was called for in specifications, cured within 24 hours and waivable); Marvec Allstate, Inc. v. Gray & Fear, Inc., 148 N.J. Super. 481 (App. Div. 1977) (bidder mistakenly submitted certified check in the amount of $120,000 less than required by within 24 hours, held a waivable irregularity).

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> On the other hand, this court has held that when a defect is material, i.e., it goes to the heart of the bidder's ability to perform the contract, and it is not timely cured, the municipality may not accept the bid. See, e.g., Carey v. Boro of Fair Lawn, 37 N.J. Super. 159 (App. Div. 1955) (bidder's prequalification questionnaire, which was made part of the specifications, was deficient as it did not indicate whether bidder had the type or number of trucks necessary to perform the contract and the bidder never attempted to cure); Turco Paving Constructors, Inc. v. City Council of Orange, 89 N.J. Super. 93 (App. Div. 1965) (bidder failed to supply documentation that he had access to material necessary to perform the contract and attempted to cure only several months later, well past the time the municipality was statutorily-required to accept and award the contract). The common thread in these decisions is whether the defect threatens the policies underlying the competitive bidding statutes. Palamar Construction, Inc. at 253-255 (emphasis added).

Thus, after referring to the two-part test set forth in River Vale and quoting from the decision of the New Jersey Supreme Court in Terminal Construction Corp., the Appellate Division in Palamar Construction went on to hold as follows:

> The failure of defendant Taylor to submit a contractor's qualification statement with its bid in this instance neither deprives the Township of Pennsauken of its guarantee that the contract will be performed nor threatens the integrity of the policies behind the competitive bidding statutes. With regard to the first criterion, depriving the municipality of the guarantee of performance, the omission of the contractor's qualification statement did not affect assurances from either a financial or qualification viewpoint. Defendant Taylor submitted the required security to ensure that the contract would be entered into if the bid was accepted. Likewise, the Township was deprived of no assurances by the short absence of the contractor's qualification statement as there was little the Township could have learned from the qualification statement in the one and one-half hours between the opening of the bids and defendant's ultimate submission of the statement.
>
> With regard to the second criterion, the initial omission of the contractor's qualification statement and its later submission within one and one-half hours could not have adversely affected competitive bidding by granting an edge over his fellow bidders. After the bids were opened at 2 p.m. on August 5, the Township personnel necessarily had to sit down at some time, but not necessarily in the first-two hours, and go over the contractors'

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> qualification statements to determine if any of the eight bidders should be disqualified due to a deficiency in their statements. But the fact that defendant Taylor submitted his contractor's qualification statement one and one-half hours late in no way put him on a better footing than any of the other bidders or prejudiced the Township. Palamar Construction, Inc. at 256-257 (emphasis added).

Finally, I am aware of the decision in Begraft v. Borough of Franklin, 133 N.J. Super. 415 (App. Div. 1975) which held that a board of education had no authority to accept a bid from a contractor who is not classified as to the character and amount of work, and even post-bid but pre-award qualification would not provide grounds for a waiver. Begraft at 417. However, the viability of that blanket view may be in doubt, see Richardson Engineering Co. v. Rutgers, 51 N.J. 207, 214 (1968), and, in any case, the matter sub judice is distinguishable since Struble was, in fact, prequalified at the time of the bid and perfectly capable of performance which, after all, "is of the very essence of any contract for public work." Begraft at 417.

In my view then, given the decisions in several of the cases reviewed above, especially Palamar Construction, Struble's failure to accompany its bid with the required Notice of Classification, which it timely cured, was an error that could and should have been waived by the Board and its failure to do so in this case was an abuse of its discretion. As the New Jersey Supreme Court held in Home Owners Construction Co. v. Glen Rock, 34 N.J. 305, 315 (1961): "The [bidding] statutes must, of course, be faithfully observed and any attempt to evade them must be stricken down. But they must also be construed and applied fairly and sensibly so as to further rather than defeat the legislative goals." In sum, rejection of Struble's bid in the circumstances of this case, where there is no reasonable basis to fear that the principles of the public bidding statutes would be violated, or that the contract would not be performed, would run counter to those principles.

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CONCLUSIONS OF LAW

Accordingly, based upon my review and consideration of the evidence in this case, I CONCLUDE that the failure by petitioner to accompany its bid submission on March 24, 1987, at 10:30 a.m., with a current Notice of Classification, was a waivable defect that petitioner cured by its prompt presentation of such a Notice of Classification that same day, within hours of the opening of the bids. I therefore recommend to the Commissioner that he enter an order determining petitioner to be the low bidder in connection with the respondent's advertisement for receipt of bids for delivery and installation of an air-cooled reciprocating water chiller and that respondent be ordered to award the bid to Struble. In addition, given the nature of the dispute and the desire for an expedited decision, I recommend to the parties that they consider waiving the 10-day exception period and promptly advise the Commissioner of their intentions in that regard.

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

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

April 29, 1987
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

MAY 1 - 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 4 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

amn/e

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KEITH H. STRUBLE AIR CONDITIONING, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Commissioner notes the recommendation in the ALJ's initial decision, ante, which states, "In addition, given the nature of the dispute and the desire for an expedited decision, I recommend to the parties that they consider waiving the 10-day exception period and promptly advise the Commissioner of their intentions in that regard." On May 12, 1987 petitioner's counsel indicated that petitioner would take "no exception to Judge Weiss' decision. On behalf of the Petitioner, I hereby waive the ten day exception period and respectfully ask the Commissioner to affirm the decision of Judge Weiss." However, the Commissioner did not so waive the exception period but rather finds, in the absence of any further submission from the Board, that no exceptions were filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b and c.

Upon a careful review of the record of this matter, the Commissioner agrees with the findings and conclusions of the Office of Administrative Law that, given the particular circumstances of this case, "the failure by petitioner to accompany its bid submission on March 24, 1987, at 10:30 a.m., with a current Notice of Classification, was a waivable defect that petitioner cured by its prompt presentation of such a Notice of Classification that same day, within hours of the opening of the bids." (Initial Decision, ante) In light of the fact that petitioner's otherwise acceptable renewal Notice of Classification, bearing an issue date of March 13, 1987, was retroactive to March 1, 1987 and, through no apparent fault of petitioner's, came too late for it to be included with the bid package which it had been obligated to submit to the Board of Education by 10:30 a.m. on March 24, 1987, the Commissioner will not permit form to prevail over substance. He so determines bearing in mind particularly that petitioner did indeed cure, within hours, what might otherwide have constituted a material defect in the bid package.

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

COMMISSIONER OF EDUCATION

June 8, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2593-87
AGENCY DKT. NO. 74-4/87

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE CITY OF PASSAIC, PASSAIC COUNTY (ELECTION INQUIRY)

Mary Guzman, petitioner, pro se

Matthew J. Michaelis, Esq., for respondent,
City of Passaic Board of Education

Record Closed: April 21, 1987 Decided: April 23, 1987

BEFORE ARNOLD SAMUELS, ALJ:

The annual school election was held in the school district of the City of Passaic, Passaic County on Tuesday, April 7, 1987. Three vacancies on the Board of Education were to be voted upon and filled. Eight candidates appeared on the ballot. Petitioner Mary Guzman was one of five unsuccessful candidates, running eighth (last) in the voting total by 367 votes less than the successful third-place contender. Ms. Guzman received 526 votes and the third place candidate received 893 votes.

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PROCEDURAL HISTORY

On April 13, 1987, Ms. Guzman filed a written request with the Commissioner of Education for inquiry into alleged violations of statutorily proscribed procedures in the conduct of the election, pursuant to N.J.S.A. 18A:14-63.12. The petitioner's letter request reads as follows:

> Passaic Board of Education violated § 203 of the Voting Rights Act of 42 U.S. Code, specifically the language provision (bilingual requirements), to wit: in that it did not provide a sufficient number of bilingual Spanish poll workers.
>
> The Attorney General's office directed that twelve (12) of the fourteen (14) districts in the aforesaid election were required to have bilingual Spanish poll workers. Based upon information and belief, the number of bilingual Spanish poll workers was between five (5) to seven (7) and they did not cover the entire twelve (12) voting districts.
>
> I am Puerto Rican by birth and because of the Board of Education's failure to provide sufficient bilingual Spanish poll workers as required by the Attorney General, I firmly believe such failure effected my candidacy and the election in toto.
>
> See Exhibit P-1.

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. The hearing was held in the council chambers at city hall, Passaic, New Jersey on April 21, 1987.

ISSUES

The arguments presented by petitioner and opposed by respondent were both legal and factual.

The petitioner's claims were essentially as set forth in her letter above. She also argued that a two or three hour voting machine failure at one polling place created an

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additional irregularity, and that some voters were turned away or could not vote for other reasons related to the lack of bilingual poll workers and insufficient notice of the election.

The respondent disputes the petitioner's interpretation of the applicable federal statutes and New Jersey Attorney General's instruction to voting districts based on the federal statutes. The Board also maintains that it did comply with its statutory obligation to the best of its ability.

TESTIMONY AND EVIDENCE

At the beginning of the hearing petitioner requested a one-week adjournment in order to obtain discovery that was unavailable because school offices were closed for the Easter recess. Ms. Guzman also stated that her attorney was unable to attend on the scheduled hearing date and he asked her to obtain the postponement. The request was denied because of the emergent nature of the matter and the need to fit the proceeding into a narrow statutory time frame. N.J.S.A. 18A:12-15, N.J.S.A. 18A:14-3. It was also observed that the hearing was scheduled more than a week earlier and no discovery had been requested. Furthermore, no appearance had been entered at any time by an attorney for petitioner, and he or she had never communicated with this judge or the Clerk of the Office of Administrative Law to enter an appearance or make any other application.

It was stipulated by the parties that there are 14 voting districts (polling places) in the City of Passaic. The alleged irregularities referred to only certain identified districts.

The petitioner Mary Guzman testified that when she visited the District 12 polls at Mt. Carmel School on election day, she noted that there was no bilingual poll worker present. She was told that a woman, Carmen Vasquez, was designated by the Board, but she did not have the necessary working papers. Ms. Guzman spoke to the Board secretary and business administrator, who authorized Ms. Vasquez to work at the polls, which she did for the balance of the day.

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Ms. Guzman also testified that no bilingual pollworker was available at District 1, The Holy Rosary Youth Center. She noticed that a woman who was unable to read or write either English or Spanish wanted to vote, but could not do so because no one was available to help her.

The petitioner stated that, in addition, no bilingual pollworkers were present in Districts 3, 4 (the high school) 8 (Engine House No. 6) and 7. She also said that a voting machine broke down for two or three hours at the high school, at which time some people waiting to vote were unable to do so. She noted, however, that paper ballots were substituted for the period of the breakdown.

Ms. Guzman confirmed that she received 526 votes, 367 less than the third place successful candidate, whose total was 893. The total breakdown was as follows: first successful candidate 1,048; second successful candidate 902; third successful candidate 893; fourth place 873; fifth place 826; sixth place 786; seventh place 691; eighth place 526.

Jose Wbarra, one of Ms. Guzman's campaign coordinators, also testified. He transported voters to the polls on election day, and he commented that a poll worker in District 7 had trouble understanding a young couple because of bilingual difficulty. He volunteered to act as spokesman, but was denied permission. The poll worker claimed that the couple was not registered. After they objected the man's name was found in the registration book, and he voted. The woman's name could not be found. Mr. Wbarra stated that he knows they were both registered.

In addition, Mr. Wbarra noted that several of the candidates were congregating too close to the polls, and in one case he or she was inside the building greeting voters.

Mr. Wbarra spoke of an incident at District 2, where a Hispanic worker was present, having been provided by the Board. However, that person could not read. Consequently, some people were unable to find their names in the book and could not

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vote. Specifically, Mr. Wbarra noted three people who had that difficulty. One of them finally succeeded in voting but two were unable to do so.

Evelyn T. Robinson, Vice President of the Board of Education, testified on behalf of the petitioner. She confirmed that the Hispanic poll worker in the second district could not read, and she related another problem experienced by one voter who was misdirected. Ms. Robinson also indicated that other people had trouble at that polling place because they were turned away by the poll worker.

Oswaldo Maldonado, a concerned citizen, testified to the real need for bilingual workers at the polls, primarily because of the large Hispanic population in the city and county. Mr. Maldonado complained that a large group of newly registered voters did not receive sample ballots by mail, and they were not aware of the date of the election. He acknowledged that no sample ballots were mailed to anyone. Nevertheless, he felt that there was a particular need to send such information to new voters.

Albin J. Stolarik, Assistant Secretary to the Passaic Board of Education, testified for the respondent. He introduced a group of documents into evidence that demonstrated the efforts made by the school board to inform the Hispanic population of the election and to recruit bilingual poll workers. A list of the exhibits is attached to this decision as an appendix. The documents indicated that notices of the election were posted and distributed in both English and Spanish. News articles appeared in local newspapers seeking bilingual assistance. These papers included the Herald News and two spanish language newspapers that are widely distributed in Passaic County, El Diario and El Mondo. A large display ad was also published in the Herald News several weeks before the election asking for people fluent in both English and Spanish to volunteer as poll workers. Another display ad was inserted in El Diorio, and the Bilingual District Advisory Council was asked to help recruit bilingual poll workers.

Mr. Stolarik indicated that the Board had great difficulty finding sufficient people to volunteer for work at the polls. He acknowledged that there were not enough bilingual poll workers, but he maintained that the Board had done as much as

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possible to secure them. He wondered why leaders of the Hispanic community in the city did not see to it that qualified people came forward to help. Mr. Stolarik also stated that the administrators did not realize they hired someone to work in district 2 who may have been proficient in both languages, but could not read. He surmised that the question simply was never asked of the man.

FINDINGS OF FACT

Having heard the testimony and observed the witnesses, having reviewed the exhibits, and having considered the arguments of the parties, I **FIND** the following facts, by a preponderance of the credible evidence:

1. The foregoing discussion and the uncontroverted facts contained therein are incorporated herein by reference.

2. The testimony disclosed that there were not sufficient bilingual poll workers in the subject school districts.

3. The Board made substantial and bona fide efforts to secure more bilingual poll workers, but without success.

4. The Hispanic community did not try hard enough to help the Board in its search for an adequate number of qualified bilingual poll workers.

5. The petitioner has shown, by direct evidence, that approximately five or six people were unable to vote because of difficulties caused by the shortage of bilingual poll workers. It is possible that more voters were adversely affected, but insufficient proofs were adduced to show their actual number.

6. The petitioner has not proven that the failure of the Board to mail election notices to newly registered voters only constitutes an irregularity.

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7. The petitioner lost the election by 367 votes.

LEGAL DISCUSSION

The respondent argues that petitioner's interpretation of the federal law and the New Jersey Attorney General's interpretive opinion - that a bilingual poll worker is required in every voting district with a significant Hispanic population - is inaccurate. The Attorney General's letter opinion, dated March 9, 1987, to the New Jersey Department of Education, provided information regarding the applicability of the Voting Rights Act, 42 U.S.C. § 1971 et seq., to school elections in Hudson and Passaic counties. See Exhibit P-1. After discussing the requirements of the federal statutes, the New Jersey Attorney General summarized the legal obligations of school boards in Passaic County as follows:

> Therefore, you are advised that each elective school board in Hudson and Passaic Counties is legally obliged to determine the need for bilingual assistance within their jurisdiction. That mandate will apply regardless of the number of voters who need assistance, even if there is only one such voter in the district. Thereafter, the Board must determine the level and type of assistance which will be effective.

Pointing to the words of the applicable statute, contained in 42 U.S.C. § 1973 et seq., and the Attorney General's opinion, respondent argued that the City of Passaic school board did fulfill its obligations in the instant case to the best of its ability.

The petitioner disagrees, stating that she interprets the federal statutes and the Attorney General's opinion in a manner that would require bilingual poll workers in every affected district.

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The parties are closer to each other in their positions than they seem to be, because the Board acknowledged that it wanted and tried to obtain bilingual workers to serve at all of the polling places in question, but was unable to do so for reasons that were at least in part caused by lack of response from the Hispanic community.

The primary determination to be made in this inquiry is whether or not violations occurred and if they affected the outcome of the election. N.J.S.A. 18A:14-63.12.

> It is the clear intent of the law that elections are to be given effect whenever possible. It had been held by the courts of this state that gross irregularities, when not amounting to fraud, do not vitiate an election. Love v. Bd. of Chosen Freeholders, 36 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 (App. Div. 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 Wene, 26 N.J. Super. 363 (Law Div. 1953) sets forth the rule as follows:
>
> > 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 elections; 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).
>
> In the Matter of the Election Inquiry in the School District of the Borough of South River, Middlesex County, 1974 S.L.D. 1040.

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CONCLUSIONS

Based upon the foregoing discussion, findings of fact and legal principles, it is **CONCLUDED** that the petitioner has not shown that the irregularities that were proved provide sufficient grounds for voiding the election. There is no question that the five or six proven irregularities did not affect the outcome of the election. Had the complained of incidents not occurred at all, the result would have been the same.

The difficulties of which the petitioner complains are real. There is a genuine need for bilingual assistance at the polls in this community. At the same time, the Hispanic community should become more active in helping to recruit qualified volunteers who will enable the Board to fulfill its obligations. On the other hand, while it is recognized that the Board made genuine efforts to fulfill its obligations to provide a sufficient number of bilingual poll workers, evidently those efforts did not produce the desired results. Therefore, it is also suggested that in the future the Board should expend greater efforts, possibly in different directions, to obtain enough bilingual assistance at its elections.

ORDER

It is therefore **ORDERED** that the result of the annual school election in the City of Passaic held on April 7, 1987 shall stand, and the petition of protest be **DISMISSED.**

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

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

April 23, 1987
DATE

ARNOLD SAMUELS, ALJ

APR 27 1987
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 28 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
PASSAIC, PASSAIC COUNTY.	:	
	:	

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

Upon a careful review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that petitioner has not demonstrated by a preponderance of the credible evidence that the technical violations of the school election laws, namely, there were not sufficient bilingual poll workers in the school district which resulted in five or six citizens being unable to vote, were sufficient grounds for voiding the election.

Notwithstanding this finding the Commissioner further admonishes the Board of its duty hereinafter to comply strictly with the laws concerning school elections.

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

COMMISSIONER OF EDUCATION

June 8, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE BOROUGH OF BELLMAWR, CAMDEN COUNTY	**INITIAL DECISION** OAL DKT. NO. EDU 2594-87 AGENCY DKT. NO. 79-4/87

Robert P. Kephart, Sr., petitioner, pro se

Carol Latter, petitioner, pro se

John Wade, Esq., for Board of Education

Anthony J. Brady, Jr., Esq., for intervenors Mary E. Murphy and James F. D'Angelo

Thomas M. Prosinski, intervenor, pro se

Record Closed: April 21, 1987 Decided: April 28, 1987

BEFORE NAOMI DOWER-LABASTILLE, ALJ:

Defeated candidates Robert P. Kephart, Sr. and Carol Latter requested an inquiry authorized by N.J.S.A. 18A:14-63.12 into alleged irregularities in the school election held on April 7, 1987. On April 16, 1987, the Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14 F-1 et seq.

Mailgram notice for a hearing to be held in Bellmawr on April 21, 1987, was sent to Kephart, Latter, and the Board. No notice was sent to any of the candidates who won the contested three-year term seats on the Board. Subsequently, I learned that on or about Thursday, April 16, 1987, the Commissioner's office wrote to every board secretary in whose school district an election dispute was pending, and notified them to send hearing notices to all successful candidates. Since Friday, April 17 was a State holiday, notice may not have reached the post office until Monday, April 20. In any event, the Bellmawr Board secretary had not yet received the directive and no notices issued.

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One of the three successful candidates, Thomas M. Prosinski, appeared and requested participation. Although the hearer was aware of no statute or precedent concerning Title 18A which required notice to all candidates, as a matter of fairness, Murphy and D'Angelo, the other two of the three successful candidates, were telephoned. They were both able to appear, but their counsel called to request an adjournment. Given the statutory timeframes for determination so that another election may be held if necessary, I denied their motion both then and at hearing when their counsel reiterated the request, citing constitutional due process grounds. Murphy and D'Angelo were granted intervenor status. The record closed at the end of the hearing on April 21, 1987.

In addition to the allegations made in a letter of April 10, 1987, several other allegations of irregularities came to light in the testimony. I allowed consideration of these over objection, since it was clear that the pro se petitioners did not know what was required of them, and since the intervenors had no knowledge in advance of the hearing day of the original allegations, the related allegations stood on the same grounds as the original ones. The allegations and proofs for each will be discussed separately.

It was undisputed that the official statement of votes counted to fill three seats with a term of three years was as follows:

Prosinski	407
D'Angelo	334
Murphy	327
Kephart	324
Latter	310

Three other candidates each had 148 or fewer votes. The two-year term seat is not contested. Thus, a four-vote difference existed betwen the lowest vote of a successful candidate and that of one defeated candidate. A recount has been requested, but has not yet been held.

The Board took no position; however, to assist the administrative law judge in understanding the procedure, especially the situation at the Burke School polling place, the Board offered its secretary, Robert W. Stratton, who had served in his position for 19 years. His testimony was uncontroverted and I FIND it to be true.

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Bellmawr has both a local and regional school district election at the same time. There are two voting machines in each polling place, one for the local and one for the regional vote. The voting authority and poll record slips are in two colors, yellow for regional and white for local, to distinguish the votes for the two school district elections. At the Burke School, where four borough districts (1, 2, 3, and 7) vote, the voters entered a narrow room where the machines were on one side and tables with the registered voter books were on the other. Due to space constrictions, voting authority slips were signed in front of an election worker and the voting authority portion was torn off and given to the voter. A clerk then took the signature portion to the voting books for comparison and initialed the voting authority slip to show that this had been done. After comparison, the voter handed the voting authority slip to the machine worker, who placed it on a spindle in the side of the machines.

At the close of the polls, both the poll list signature slips and the voting authority slips collected at the machines were delivered to the Secretary of the Board. He immediately sealed these items into envelopes and deposited them with the County Superintendent of Schools. Stratton never looks at the slips, and therefore, does not know whether any of the voting authority slips do not contain initials of an election worker showing signature comparison has been made.

SPECIFIC ALLEGATIONS

A. Some persons voted before their signatures were compared and their slips initialed.

Sue Bollinger, a challenger for Latter, testified that there was such confusion at Burke School that persons took their slips and voted before signatures were compared. She states she observed some persons vote and an election worker came to the machine, retrieved the voting authority slip, initialed it and replaced in on the machine. She saw some persons vote before the comparison was made. Kephart testified there was great confusion at Burke school since many more voters arrived than were expected.

I FIND:

1. Election workers at Burke school gave voting authority slips to voters before their signatures on the poll list slips were compared with the signature copy register.

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2. Election worker initials on the voting authority slip evidence comparison of signatures where this practice was followed.

3. No proofs were presented that any person unqualified to vote was permitted to vote as a result of this practice.

N.J.S.A. 18A:14-51 specifies: "After the voter shall have so signed and before an official ballot shall be given to him, one of the election officers shall compare the signature..." I CONCLUDE that the cited statute was violated at the Burke School polling site. Since there is no proof that belated compliance with signature comparison resulted in the casting of even one illegal vote, however, the violation by itself does not require that the election be set aside. In re Annual School Election in the Township of Pittsgrove, 1976 S.L.D. 585. The contestant has the burden of showing not only that violations occurred, but also that this affected the outcome of the election (N.J.S.A. 18A:14-63.12). In interpreting a similar provision of Title 19, N.J.S.A. 19:29-1e, our appellate courts have held that even when contestants allege and show illegal votes were cast in number sufficient to change the result, they must also show to the extent possible for whom the illegal votes were cast. Application of James T. Murphy, 101 N.J. Super. 163, 167 (App. Div. 1968).

B. Voters whose names were not in the book were permitted to sign affidavits to vote without verification by election workers that the persons were registered voters.

Latter testified that she heard from challengers that this had happened. Bollinger testified that a Mr. and Mrs. Kelly said they were registered voters and signed an affidavit to that effect at the Burke school and that she knew that three to five affidavits were received.

I FIND:

4. No proof was given that a Mr. and Mrs. Kelly or any other affiants were unregistered or otherwise unqualified to vote.

The burden is upon the contestants to prove illegal votes were received. This is usually done by a challenger's obtaining the names and addresses of such persons when

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they sign the poll list and having the County Superintendent of Elections check the registration. Petitioners here made no attempt to obtain such proofs. I CONCLUDE there was no violation since N.J.S.A. 18A:14-44c states that the voter shall make proof to the election board at such election that he is entitled to vote. The statute does not say that the affiant cannot vote until the election board worker has checked the accuracy of the voter's sworn statement. N.J.S.A. 18A:14-52 controls the procedure, stating: "If such form has been properly filled out by a school election officer and signed by such person, such person shall be eligible to receive a ballot."

C. Persons who had voted subsequently returned, claimed they had forgotten to vote in both elections and were allowed to vote again.

Latter had no personal knowledge of this allegation, which resulted from a conversation she had with a judge of the election at Burke School. There was no admissible evidence on which findings could be based. I FIND there was no proof that any voter voted more than once in the local district election.

I would note that the procedure and practice of having two poll lists and voting authority slips (in two different colors) makes such alleged conduct either explainable and legal or if improper, then readily determined to be so. It is quite possible that a person signed only one poll list (for the local election), received only one voting authorization and voted in one booth. Subsequently, the voter could have come back, signed a second poll list (for the regional election), recieved a second slip and voted in the other booth. This situation would not result in an illegal vote because there were two separate elections. Only if the voter signed the local (or regional) poll list twice could an illegal duplicate vote have been cast. There is no proof that the election officers allowed any voters to sign the same poll list twice. I CONCLUDE no violation has been proved.

D. Persons were permitted to have another person with them in the voting booth.

Bollinger testified that two persons who advised the judge of elections they were blind and asked to have a member of their family assist them were allowed to do so. Kephart stated he recalls seeing a male go into the booth with assistance. Bollinger recalls that the male was a Mr. Capello, whose wife accompanied him, and a Mrs. Ione went into the booth with her daughter. No other facts are of record. I FIND:

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5. Two persons, who claimed to be blind were permitted to take a person into the voting booth to assist them.

N.J.S.A. 18A:14-42 says that use of voting machines for school elections shall be the same as required under Title 19, with certain exceptions not pertinent here. N.J.S.A. 19:50-3 says: "If any voter, before entering the voting machine booth, declares under oath, and establishes to the satisfaction of a majority of all the members of the district election board that by reason of blindness...he is unable to cast his vote without assistance, he shall have the assistance of two members of the board..." or "...of some person of his own selection."

The name and address of such person shall be recorded. The statute requires that a disability certificate be provided on which the voter declares his disability under oath.

Petitioners contend that the two voters did not prove they were blind. I CONCLUDE they need not "prove" it, but may declare it under oath. If no one challenges the procedure and if the election board members are satisfied, such person may choose another to assist him or her. Petitioners did not allege or prove that disability certificates were not made out for these two persons or that they did not make a declaration under oath. The fact that two persons who claimed to be blind and did not prove it were allowed to have a person in the voting booth with them is insufficient to prove a violation. No proof beyond their declaration under oath is required if the board members are satisfied. I CONCLUDE no violation was proved but even if it were, there is no proof that these persons were not qualified to vote, ie., that their votes cast were illegal.

E. Electioneering was permitted near the voting booth.

Bollinger testified that as one person went toward the booth, one of the challengers called out, "Be sure you vote for number 4." (Number 4 was Mrs. Fedyk, who received far fewer votes than the petitioner.) The voter came out of the booth and said he couldn't find number four. Apparently he was in the regional election voting booth, not the local one. I FIND:

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6. A challenger told a voter near the voting machine to vote for Mrs. Fedyk, a candidate whose total vote was well below those of the contenders here.

I CONCLUDE that in one instance, a person did electioneer within 100 feet of a polling place, contrary to N.J.S.A. 18A:14-72, which makes such action a disorderly persons offense. It appears, however, that the violation could have had no effect on the outcome of the election.

F. Four candidates, including successful candidates Murphy and D'Angelo, published flyers and posters which did not contain a statement of the person who paid for or published them.

Latter testified that she bought a Suburban newspaper and found in it a copy of a flyer for Wagner, Murphy, Fedyk and D'Angelo, who campaigned together (PL-3). Murphy stipulated she paid for it and testified she was entirely ignorant of the requirement of attribution of the material. She admitted that the posters Bollinger found on telephone poles (PL-5) contained no attribution. She testified that in any event, they were all torn down and those which replaced them contained the proper attribution. For example, a later flyer (PL-6) stated, "Ordered and produced by the candidates."

7. Murphy produced and paid for flyers and posters containing names of four candidates, including two successful ones, without attribution to payer and producer stated thereon, but she had no knowledge that such action was illegal and corrected it as soon as she learned that it was.

8. The corrected material, at least in the instance of new flyers containing photographs, stated, "Ordered and produced by the candidates."

9. The posters without attribution were torn down within a day or two.

N.J.S.A. 18A:14-97 states:

> No person shall print, copy, publish, exhibit, distribute or pay for printing, copying publishing, exhibiting or distribution or cause to be distributed in any manner or by any means, any circular, handbill, card, pamphlet, statement, advertisement or other

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> printed matter having reference to any election or to any candidate or to the adoption or rejection of any public question at any annual or pecial school election unless such circular, handbill, card, pamphlet, statement, advertisement or other printed matter shall bear upon its face a statement of the name and address of the person or persons causing the same to be printed copied or published or of the name and address of the person or persons by whom the cost of the printing, copying or publishing thereof has been or is to be defrayed and of the name and address of the person or persons by whom the same is printed, copied or published. (Emphasis added.)

N.J.S.A. 18A:14-104 states that "[a]ny person violating N.J.S.A. 18A:14-97" shall be a disorderly person and shall be punished by a fine not exceeding $500 or by imprisonment not exceeding one year, or both.

I **CONCLUDE** there was clearly a violation of the cited statute as to the earlier flyers and posters, but the Commissioner is without authority to assess the statutory penalty since that matter is within the criminal jurisdiction. It has not been proved, however, that the illegal materials affected the outcome of the election. The posters were torn down within a short period of time. The flyers distributed other than through the Suburban newspaper did identify their producers. Upon these facts I cannot **CONCLUDE** that the outcome of the election was affected. Supporters of the other candidates may have been made aware of the election dates by means of the flyers and posters. The Legislature considered attribution of election materials to be of the utmost importance or it would not have made this conduct a criminal offense. It did not, however, mandate that a successful candidate in violation of the statute should be barred from office. It has done so with respect to violations of N.J.S.A. 19:44A-21b and c, wherein willfully false financial reporting can result in voiding the election of a candidate.

I **CONCLUDE** that the violation proved here does not require that the election be set aside since only pure speculation exists with respect to its affect on the outcome of the election.

G. The posters discussed above were affixed to telephone poles contrary to N.J.S.A. 27:5-1.

Murphy conceded someone put up the posters but testified that most of them were torn down within a day or so. The statute in question is enforced by making a

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complaint to the local police against the person who put posters up without consent of the owner. I CONCLUDE the statute in question does not "prescribe procedures for school elections" within the meaning of N.J.S.A. 18A:14-63.12. Rather, it is a statute in Title 5 concerning advertising along highways.

H. Four candidates used girl scouts to deliver their flyers, contrary to National Girl Scout policy.

Even if true,the violation of a policy of some private organization is irrelevant here since our concern is entirely with violation of statutorily prescribed procedures.

SUMMARY AND ORDER

Although none of the violations proved, even if considered in the aggregate, have been shown to affect the outcome of the election under N.J.S.A. 18A:14-63.12 and require that it be set aside, the voting procedures, particularly those found at Burke School, require correction.

It is therefore ORDERED that the Secretary of the Board consult with the County Superintendent of Schools concerning facilities for the 1987 School election and assure that all election workers are trained in the prescribed statutory procedures, with special attention given to those discussed herein.

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

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

April 28, 1987
DATE

Naomi Dower-LaBastille
NAOMI DOWER-LABASTILLE, ALJ

APR 29 1987
DATE

Receipt Acknowledged:
Seymour Weiss
DEPARTMENT OF EDUCATION

MAY 1 1987
DATE

Mailed To Parties:
Ronald L. Tabb, J.S.
OFFICE OF ADMINISTRATIVE LAW

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

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

Although the parties have not filed exceptions to the initial decision pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c, the Commissioner observes that defeated candidates, Robert Kephart and Carol Latter, corresponded with the ALJ on May 1, 1987, three days after this matter had been decided on April 28, 1987. Copy of said correspondence was filed with the Commissioner on May 5, 1987 and reads as follows:

> As per your discussion at the hearing on the inquiry into the election held on April 21, 1987, the complaintants (sic) requested that the voting authority slips be checked for the initials verifying that the voting signature was compared with the signatured registration at the time of the recount by the County School Business Administrator.
>
> Unfortunately, the County Business Administrator had instructions from the Commissioner of Education not to verify these initials and informed us at the recount that this matter was properly under your jurisdiction.
>
> We also asked that the County Administrator whose responsibility it was to check out the affidavits. Again he informed us that this comes under your jurisdiction and would have to be brought up under your court.
>
> Please consider the above a formal request to have this matter adjudicated by your court. (C-1)

The recount of the ballots cast on the voting machine was conducted by an authorized representative of the Commissioner on April 30, 1987, two days after the matter was decided by the ALJ on April 28, 1987. Apparently, the complainants made no attempt prior to the date of the scheduled recount to determine whether the information they were seeking to include in the inquiry would be considered by the Commissioner's representative. Had they done so

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in a timely fashion, the complainants would have been apprised that the Commissioner's representative lacked jurisdiction to assume responsibility for that aspect of the inquiry which was properly before the ALJ. Moreover, complainants could have, therefore, made a timely appeal to the ALJ to continue that portion of the inquiry by ordering the voting authority slips in question to be made part of the record before her for a finding and determination.

It must be pointed out herein that any allegations regarding violations of school election procedures filed pursuant to the provisions of N.J.S.A. 18A:14-63.12 require that the proof of such violations be submitted to the ALJ in a timely manner in order to be subject to a finding and determination as part of the record of the inquiry. In this case complainants' failure to do so may not be attributed to the Commissioner's representative who conducted the recount and who lacked authority to conduct an inquiry.

In view of the foregoing, the Commissioner will not consider any additional proofs or arguments which complainants failed to present to the ALJ, prior to the time the matter was decided on April 28, 1987.

Accordingly, the Commissioner adopts the findings and conclusions in the initial decision as his own.

The Commissioner agrees that Mr. Kephart and Ms. Latter have failed to establish by a preponderance of credible evidence that their allegations of violations of statutorily prescribed procedures affected the outcome of the annual school election held in the School District of the Borough of Bellmawr on April 7, 1987.

Accordingly, this instant matter can be and is hereby dismissed.

COMMISSIONER OF EDUCATION

June 8, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2613-87
AGENCY DKT. NO. 83-4/87

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, CAMDEN COUNTY

Dr. Donald L. Davis, petitioner, pro se

Joseph M. Weinberg, Esq., for the respondent (Weinberg and McCormick, attorneys)

Record Closed: April 22, 1987 Decided: April 27, 1987

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

PROCEDURAL HISTORY

This matter concerns the result of the April 7, 1987 school board election for one position on the Board of Education for the School District of the Lower Camden County Regional High School District No. 1, Camden County (Board). Dr. Donald L. Davis, a candidate for the Board position, challenged the election result and requested the Commissioner of Education (Commissioner) to initiate an inquiry pursuant to N.J.S.A. 18A:14-63.12.

In his letter of April 10, 1987, Dr. Davis alleged that the instructions on all of the voting machines used for the April 7, 1987 election misinformed the voters by instructing them to vote for three candidates, rather than one candidate, and that the

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voting machines were set to accept three votes and were not corrected until approximately 5:15 p.m. on the voting day. In addition, Dr. Davis alleged that a letter may have been sent from the Board's Office of the Superintendent of Education to the Camden County Board of Elections containing misinformation concerning the voting procedures for the April 7, 1987 election. Dr. Davis requested that the election result be declared null and void and that a new election be required.

The Commissioner referred the matter to the Office of Administrative Law on April 20, 1987, for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. The hearing took place on April 22, 1987, at the Waterford Township Municipal Court in Atco, New Jersey, and the record in the matter closed on that date.

FACTUAL FINDINGS

Based on the testimony of the witnesses and the exhibits received into evidence, I FIND that the pertinent facts in this matter are not in dispute.

For the April 7, 1987 election, the Board used five voting locations and there was one machine at each location. The polls were open between 2:00 p.m. and 9:00 p.m. on April 7, 1987. There were three candidates on the ballot for the one Board vacancy for a full term of three years. The candidates were John L. Pesda, Donald L. Davis and Spurgeon Butler.

On April 1, 1987, Marjorie Graziani, the Assistant Board Secretary, who was the coordinator for the election, met with the printer, Albyn Cardenas, to proofread the drafts of the sample ballot, the election posters and the election information strip which was to be placed on the voting machines. At that time, Ms. Graziani noted that there was an error on the strip and that the information on the strip stated that the voters should vote for three candidates rather than one candidate. Mr. Cardenas made the appropriate correction on the draft; however, his staff failed to make this correction before printing the strips for the voting machines. The strips containing this error were sent to the Camden County Board of Elections and were placed on the five voting machines which were used for the April 7, 1987 Board election.

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Ms. Graziani did not see the strips after she proofread the draft on April 1, 1987, and was not aware that the error had not been corrected by the printer until she received a call from Dorothy Johnson, the election judge at voting location no. 2, at approximately 2:15 p.m. on April 7, 1987.

After the polls opened on April 7, 1987, Dr. Davis, who was at polling location no. 3, was informed of the error in the instructions on the voting machine. Dr. Davis then went to voting location no. 2, which was his designated place to vote. When he was in the voting booth, he saw that the information on the machine erroneously stated that the voters were to vote for three candidates, and he was able to pull the voting levers for all three candidates. Dr. Davis then voted for one candidate and he advised Ms. Johnson, the election judge, of the error. Ms. Johnson, who was registered to vote there, then went to cast her vote and she confirmed that there was misinformation on the machine and that a person could vote for all three candidates. Ms. Johnson told Dr. Davis that she would contact Dr. Paul B. Winkler, the Superintendent of Education and Acting Board Secretary, and inquire as to what corrective action should be taken. Dr. Davis then went to voting location no. 1, where he confirmed that the same misinformation appeared on the voting machine, and thereafter, he went to Dr. Winkler's office.

After Ms. Graziani was informed by Ms. Johnson of the misinformation on the voting machine, she advised Ms. Johnson to tell voters temporarily to vote for only one candidate. Ms. Graziani then contacted the County Clerk and the County Board of Elections, and was told to get in touch with Joseph DiRosa. After trying several times, Ms. Johnson spoke to Mr. DiRosa, who advised her to correct the error by having the words "vote for one candidate" written on a piece of paper taped over the incorrect information on the voting machines. In addition, Mr. DiRosa stated that he and other persons from his office would adjust the machines so that they would accept only one vote by each voter. Ms. Johnson then called the judges at the five voting locations and told them to make the necessary correction on the voting machines. To the best of her knowledge, the corrections were made by the judges immediately after receipt of her calls. Although the information on the voting machines was corrected by 3:00 p.m., the machines themselves were not adjusted so as to prevent a person from voting for more than one candidate until approximately 5:15-5:30 p.m.

When Dr. Davis spoke to Dr. Winkler at approximately 3:00 p.m. on the election day, Dr. Winkler, who had been kept informed by Ms. Graziani, was able to

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inform him that the information on the voting machine had been corrected and he also advised Dr. Davis that he would not terminate the election.

After the polls closed, the ballots were counted and on the following day, Ms. Graziani certified the following results:

CANDIDATES	MACHINE VOTES	ABSENTEE BALLOT
John L. Pesda	711	2
Donald L. Davis	597	3
Sourgeon Butler	105	0
		(R-2, R-3, R-4)

There were a total of 1,413 machine votes cast during the April 7, 1987 Board election, and 1,332 persons voted on that date. Therefore, it is clear that 81 votes were improperly cast during the election (R-2, R-3, R-4).

Although the facts are not in issue, there is a disagreement as to the perception of what effect the misinformation on the voting machines had on the election procedure. Dr. Davis takes the position that the misinformation on the machines and the fact that the machines allowed a person to vote for three candidates were serious errors which caused substantial confusion on the part of the electorate and may have discouraged some people from voting. Since the outcome of the election may have been affected by the errors, Dr. Davis argued that the election result should be set aside and a new election should be required.

In support of Dr. Davis, four persons testified at the hearing, and all of them thought that the taped-on correction on the voting machines had caused substantial confusion. Brian Poaches, Carolyn Bates and Josephine Ward all stated that they had received calls and/or had spoken to voters who were upset and confused by the correction on the voting machine and questioned whether there was a conspiracy against Dr. Davis.

Ms. Ward said she spoke to one woman who indicated that she did not go to vote because she had heard that there was confusion regarding the election. Myrtle Hunt indicated that she became confused when she saw the correction on the voting machine; however, she did vote for one candidate for the Board position.

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On behalf of the Board, Mr. Cardenas, the printer, testified that his staff was responsible for not correcting the error on the information strips for the voting machines, and he indicated that he does not reside within the area from which the Board receives its students nor has he any business or personal interest in the outcome of the Board's election. Mr. Cardenas denied that there was any conspiracy regarding this error. Michael A. Diamond, who acted as an official challenger in the local school election which was being conducted at the same voting locations as the Board election, indicated that he was at various election polling places on April 7, 1987, and that he did not see any confusion. Mr. Diamond stated that at the request of Dr. Davis, the voting machine for the Board's election at voting location no. 1 was closed for 10 minutes because of the misinformation on the voting machine. According to Mr. Diamond, there was a substantial amount of publicity and information distributed about this Board election, and there was a clear understanding by the electorate that there was only one vacancy on the Board.

Based on the testimony of the witnesses, I **FIND** that the petitioner has not shown that there was a conspiracy or that the misinformation on the machine had any different effect on his chances than it did on the chances of the other two candidates. In addition, I **FIND** that the information strips with the misinformation were used by the Camden County Board of Elections to fix the machines to accept three votes by each voter and that there is no evidence to show that these errors were intentional.

CONCLUSIONS OF LAW

In closing, Mr. Weinberg argued that pursuant to N.J.S.A. 18A:14-63.12, a new election will be ordered only if there was a violation of the statutory procedure and that the violation affected the outcome of the election. Mr. Weinberg stated that the misinformation on the voting machines for a short period of time and the fact that the machines allowed a voter to vote for three candidates for several hours might constitute a statutory violation; however, he argued that these errors did not affect the outcome of the election. Mr. Weinberg stated that even if one were to assume that all 81 improper votes had been cast for John L. Pesda, the person with the highest number of votes, and if all 81 votes were excluded from his total votes, Mr. Pesda would still win the election. Further, Mr. Weinberg argued that there was no real confusion during the election since the misinformation had been promptly corrected, the corrected language clearly indicated that the voter was to vote for one candidate, and the corrected language was consistent

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with this information on the posted sample ballots and the election posters. Therefore, Mr. Weinberg argued that the petitioner has not established any legal basis for setting aside the election result and ordering a new election.

In closing, Dr. Davis again argued that he had shown that there was misinformation on the voting machines and that the machines were not adjusted until after 5:00 p.m. and that these errors clouded the election procedure, confused some of the voters and created a feeling there was a conspiracy which adversely affected his chances of winning the election, and therefore, the election results should be set aside and a new election be held.

Having considered the arguments of the parties, I agree with Mr. Weinberg and I **CONCLUDE** that although there were errors, these errors did not materially affect the outcome of the election and the Board had properly determined that John L. Pesda had won the election. It has been clearly established that the election laws are to be liberally construed to effectuate their purpose and should not be construed as to deprive voters of their franchise or render an election void for technical reasons. In re Keogh-Dwyer, 106 N.J. Super. 567 (Law Div. 1969), aff'd, 54 N.J. 523 (1969); In re Altantic Cty. Bd. of El., 117 N.J. Super. 244 (App. Div. 1971); Cavanaugh v. Morris Cty. Democratic Committee, 121 N.J. Super. 430 (Chancery Div. 1972); In re Petition of Hartnett, 163 N.J. Super. 257 (App. Div. 1978); Mays v. Penza, 179 N.J. Super. 185 (Law Div. 1981).

Therefore, I **ORDER** that the petition in this matter be **DISMISSED** and that the election of John L. Pesda to the Board for a full term of three years be **AFFIRMED.**

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

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

April 27, 1987
DATE

BEATRICE S. TYLUTKI, ALJ

APR 28 1987
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 30 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

ml/EE

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IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	
SCHOOL DISTRICT OF LOWER CAMDEN	:	COMMISSIONER OF EDUCATION
COUNTY REGIONAL HIGH SCHOOL	:	DECISION
DISTRICT NO. 1, CAMDEN COUNTY.	:	
	:	

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

Upon a careful review of the record of this matter, the Commissioner agrees with the ALJ that although there were irregularities in the school election conducted on April 7, 1987 in the instant district, which the Commissioner does not in any manner condone, these errors did not materially affect the outcome of the election, and the Board had properly determined that John L. Pesda had won the election.

Notwithstanding the above finding, the Commissioner admonishes the Board herein of its duty to comply strictly hereinafter with the laws concerning school elections.

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

COMMISSIONER OF EDUCATION

June 8, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2614-87
AGENCY DKT. NO. 76-4/87

IN THE MATTER OF:
THE ANNUAL SCHOOL ELECTION
IN THE SCHOOL DISTRICT OF THE
BOROUGH OF GIBBSBORO, CAMDEN
COUNTY

Margie Schieber, petitioner, pro se

Paul Mainardi, Solicitor, Gibbsboro Board of Education, for the respondent (Brown & Connery, attorneys)

Record Closed: April 22, 1987 Decided: April 24, 1987

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

This is a petition by an unsuccessful candidate in the annual school board election, held for seats on the Board of Education, Gibbsboro, New Jersey. The petitioner requests that a new election be held based upon alleged violations of statutorily prescribed procedures for school elections. She charges that violations did occur which affected the outcome of the election. The Gibbsboro Board of Education, while admitting some irregularities, asserts that the violations were procedural or technical in nature, and in any event, did not affect the outcome of the election.

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PROCEDURAL HISTORY

The petitioner filed a petition on April 13, 1987, with the Department of Education requesting a new election and specifying four statutory violations which allegedly occured at the school board election which was held on April 7, 1987. Thereafter, the matter was scheduled for an inquiry pursuant to N.J.S.A. 18A:14-63.12 and N.J.A.C. 6:24-6.1(a), and the matter was transmitted to the Office of Administrative Law on April 20, 1987 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 held on April 22, 1987, at the municipal courtroom, Municipal Building, Lindenwold, New Jersey. The record closed at the completion of the case.

ALLEGED VIOLATIONS

The petitioner's petition (P-6) alleges the following four violations as reason to overturn the election and schedule a new election:

1. N.J.S.A. 18A:14-6 (poll workers)...who are not members or employees of the School Board.

2. N.J.S.A. 18A:14-18.4 Each challenger shall wear a mark of identification as a challenger.

3. N.J.S.A. 18A:14-80...or corruptly gives away any information concerning the appearance of any ballot voted thereon, he shall be guilty of a misdemeanor.

4. N.J.S.A. 18A:14-86...Hinder or prevent willfully in any manner a voter to cast his legal vote therein knowing such a person has the right to do so.

BURDEN OF PROOF

N.J.A.C. 6:24-6.1(b) refers to a "request for inquiry into alleged violations of statutorily prescribed election procedures...." Both the Department of Education and the Office of Administrative Law have interpreted this regulation as not shifting the burden of proof away from the challenger of the school election to the Commissioner. The

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petitioner therefore has a two-tiered burden of proof in this case. She must first prove by a preponderance of the credible evidence that an irregularity in the voting procedures or a violation of the school election law did, in fact, occur. If the petitioner can establish that a voting irregularity or violation did occur, then the petitioner must demonstrate that there is a connection between the irregularity charged and the results of the election. She must show that the irregularities contravened a full and free expression of the popular will, before the election may be overturned. A presumption of correctness reposes in the incumbents. In re Wene, 26 N.J. Super. 377 (Law Div. 1953).

THE FACTS

The following are undisputed facts in this case:

On April 7, 1987, an election was held in the all-purpose room of the Gibbsboro School, Gibbsboro, New Jersey, for the purpose of approving the Gibbsboro School District Budget and electing three members of the Gibbsboro Board of Education. Since Gibbsboro is a small town with only 1,344 registered voters, only one polling location was used and only one voting machine was used.[1] Three members of the Gibbsboro Board of Education were to be elected at this election, and only three candidates filed nominating petitions to have their names placed on the ballot, two incumbents and one other "endorsed" candidate. The petitioner and Mrs. Nikki Thoman began a write-in campaign for election to the Gibbsboro Board of Education subsequent to the filing deadline. Prior to the election date, the petitioner and Mrs. Charlotte Riley spoke with Mr. McKiernan of the Camden County Board of Elections. Mr. McKiernan explained to the petitioner the procedures used to vote for a write-in candidate and assured the petitioner that instructions for voting for write-in candidates would be posted in the voting machine to be used in the Gibbsboro School Board election. As part of their campaign, the petitioner distributed fliers to Gibbsboro residents instructing them how to vote for a write-in candidate (R-3).

When Mrs. Schieber and Mrs. Riley arrived at the polling place at approximately 2 p.m. on April 7, 1987, they first noticed that three school lunchroom aides,

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[1] Gibbsboro has no high school, and as such, Gibbsboro residents who are of high school age attend Eastern High School, which is a regional high school. As such, a second voting machine was at the Gibbsboro polling place to enable Gibbsboro residents to vote for the Eastern High School budget and regional board of education. This was a separate election from the Gibbsboro election, and is not being contested in this action.

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Mrs. Averso, Hubert, and Carr, were working as poll workers. The respondent, Gibbsboro Board of Education, stipulated that at least two, if not all three, of these poll workers were, in fact, employees of the Board of Education and that a technical violation of N.J.S.A. 18A:14-6 did, in fact, occur. They also noticed that Mrs. Gallucci, president of the Gibbsboro Board of Education, was in the room and was not wearing any sort of identification or challenger badge.

When Mrs. Riley voted, she noticed that the voting machine for the Eastern High School election contained instructions for voting for write-in candidates while the voting machine for the Gibbsboro School Board election did not.[2] After voting, Mrs. Riley and Mrs. Scheiber spoke with Mr. O'Neil, secretary of the Gibbsboro Board of Education, and informed him that the voting machine did not have instructions for write-in voters. Mr. O'Neil did not have an official copy of the instructions but he did have a copy of the petitioner's flier (R-3). The flier was cut in half, and the top portion which contained just the write-in voting instructions was posted inside the Gibbsboro School Board election voting machine.

Based on the testimony of the witnesses and the exhibits received into evidence, I FIND that the above pertinent facts are not in dispute.

The following are the contested facts in this case:

Several witnesses testified they had difficulty utilizing the write-in procedures in the voting machine, and that they had to try moving the lever and the window slides several times before the window slides would open. The petitioner introduced letters from individuals who experienced similar problems. One believed the machine was malfunctioning. She followed the instructions, and the window slides would not open. She completed her voting and then reported the problem to a poll worker. The poll worker stated that "it was [her] hard luck that [she] wasted [her] vote." The voter asked for assistance from others but was told there was nothing they could do (P-1). Several voters were unable to get the machine to work at all to enable them to vote for the write-in candidates (P-1, 2, 3). Another voter asked for help in casting write-in ballots prior to entering the voting booth. The poll worker started to explain the procedure but then

---

[2] There was not a write-in campaign in the Eastern High School election but there was a write-in campaign in the Gibbsboro School Board election.

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stated, "Just read the instructions in the booth" (P-8). Two voters wrote that there were no instructions for casting write-in ballots in the voting booth when they voted (P-4 & 10). One of them asked for help and the poll worker told him to push the lever next to the printed names (thereby casting a vote for the candidates on the ballot) and then open the slide windows in order to cast write-in votes. He was told that the opening of the window would "cancel the X's next to the names" (which is not true).

One voter wrote that while standing in line waiting to vote, one of the poll workers stated, "I wish these people (referring to the write-in candidates) would do it in the right way [sic]. This isn't right." The voter interpreted this comment as meaning the poll worker "just did not want to help people vote on a write-in ballot" (P-13). Other complaints were made that several School Board members were present at the election as challengers and they were not wearing challenger badges. After the election commenced, Mr. O'Neil made some challenger badges out of stick on labels (R-1). Mrs. Gallucci testified that her badge would not adhere to her clothes so she put it on the table in front of her. Mrs. Miller, another School Board member who also worked as a challenger, testified that she also did not wear her badge but just put it on the table in front of her.

There was conflicting testimony as to the results of the election. One person testified that a total of 323 persons voted. Mrs. Thoman testified that when the vote totals were announced on the night of the election, they were:

Biddell	187	
Mink	154	
Smith	123	or 127
Schieber	77	
Thoman	72	

Mrs. Miller testified that her recollection of the announcement of the vote was:

Biddell	187
Mink	176
Smith	181
Schieber	77
Thoman	72
White	1

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Mrs. Gallucci testified that her recollection of the announcement of the vote was similar to that of Mrs. Miller.[3]

Finally, the poll workers had difficulty removing the paper roll on which the write-in votes cast had been recorded. The paper roll would not come out properly, and the paper roll was torn into four sections when they attempted to remove it from the machine.

FINDINGS OF FACT

Therefore, after considering the testimony previously set forth and independently assessing the credibility of witnesses and parties, as well as reviewing the record as a whole, I make the following **FINDINGS OF FACT:**

As undisputed facts, I **FIND** those designated on pages 3 and 4 of this opinion.

As to matters which are disputed or **CONTESTED**, pursuant to N.J.A.C. 1:1-16.3(e)7, I **FIND:**

1. It was difficult to operate the write-in voting procedures in the voting machine used in the Gibbsboro School Board election.

2. School Board members were present at the election as challengers, and they were not wearing challenger badges.

3. The results of the election are as follows:

Biddell	187
Mink	176
Smith	181
Schieber	77
Towman	72
White	1

[3] The official vote tally was unavailable due to the short notice of the hearing.

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4. The poll workers had difficulty removing the paper roll from the voting machine, and as a result, the paper roll was torn into four sections.

APPLICABLE LAW

N.J.S.A. 18A:14-6 provides in pertinent part:

> Each board of education shall, . . . at its last regular meeting held not less than 40 days prior to the date fixed for the next annual school election, if voting machines are used in elections in the district, appoint a judge of elections, an inspector of elections, and two clerks of elections for each polling district therein, and may appoint additional clerks for any polling district, not exceeding one for every two signature copy registers used therein, to act as election officers, and shall notify them accordingly. They shall be appointed from the qualified voters of the school district, who are not members or employees of the board of education and who do not intend to stand as candidates for any office of the school district during the ensuing year, and in school districts in which voting machines will be used during the ensuing year they shall be chosen, as far as praticable, from the members of the district boards of election in office in the municipality or municipalities compromising the school district.

N.J.S.A. 18A:14-6.1 provides in pertinent part:

> Not less than 10 nor more than 21 days before each school election, each board of education shall cause the election officers who are to serve in the polling districts to be instructed in the use of the voting machine, and in their duties in connection therewith, and shall cause to be given to each election officer who has received such instruction and is fully qualified to properly conduct the election with the machine, a certificate to that effect. . . . The election officers of each polling district in which a voting machine is to he used, unless excused from attendance as herein provided, shall attend such meeting or meetings as shall be called for the purpose of receiving instruction concerning their duties as shall be necessary for the proper conduct of the election with the machine. No election officer shall serve in any election at which a voting machine is used unless he shall have received instruction and is fully qualified to perform the duties in connection with the machine, and has received a certificate to that effect from the board or a similar certificate from the county board of elections pursuant to R.S. 19:50-1: but this shall not prevent the appointment of a person to fill a vacancy in an emergency, as now provided by law.

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N.J.S.A. 18A:14-46 provides:

A member of the board of education, or in his absence the judge of the election, or in the absence of both, the secretary of the board shall declare the polls open at the time fixed for the opening thereof, and they shall remain open and the balloting shall continue without recess from the time of the opening until the close thereof, and the election officers shall have power to maintain order in the polling place, to require all persons other than challengers, candidates and persons in the process of voting to leave the polling place and to prohibit electioneering in the building in which the election is being conducted while the same is being conducted.

N.J.S.A. 18A:14-15 provides:

Each candidate may act as a challenger and may appoint also a legal voter of the school district to act as a challenger for each municipal election district included within each polling district in which he is to be voted for. If at such election the polls shall be scheduled to be open for more than four hours, each candidate may appoint additional challengers, as alternates, in such number as to permit periodic relief from duty of challengers not more often than every two hours. Challengers shall be appointed in writing, signed by the candidate, specifying the names and addresses of the challengers and the polling district for which they are severally appointed, which shall be filed with the secretary of the board of education not later than five days preceding the election.

N.J.S.A. 18A:14-18 provides:

Each challenger may in the polling district for which he is appointed:

a. Challenge the right of any person to vote in such district at any time after the person claims such right and before his ballot is deposited in the ballot box, or before the screen, hood or curtain of of the voting machine is closed, and ask all necessary questions to determine this right; and

b. Be present while the votes are bing counted, in such position that he can observe the marking on the ballots but not to interfere with the orderly counting of the votes, and challenge the counting or rejection of any ballot or part thereof.

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N.J.S.A. 18A:14-18.4 provides:

Each such challenger shall wear a mark of identification as a challenger which shall be furnished him by the secretary of the board and he shall have all the powers of other challengers appointed for annual school elections.

N.J.S.A. 18A:14-80 provides in pertinent part:

If any election officer . . . fraudulently or corruptly gives any information concerning the appearance of any ballot voted thereon, he shall be guilty of a misdemeanor and shall be punished by a fine not exceeding $2,000.00 or imprisonment not exceeding five years.

N.J.S.A. 18A:14-86 provides in pertinent part:

Whoever, with respect to any election, shall:

. . .

(6) Hinder or prevent, willfully, in any manner a voter to cast his legal vote therein knowing such person to have a right so to vote;...

. . .

shall be guilty of a misdemeanor and punishable by a fine of $500.00 or imprisonment in the state prison for a term of three years, or both.

N.J.S.A. 18A:14-57 provides:

Immediately after the close of the polls, the election officers shall proceed to count the votes for each candidate and the votes for and against the adoption of each proposal, resolution or question submitted to the voters at the election. The counting shall be open and public but the number of persons permitted to be present shall not be such as to hinder, delay or inconvenience the election officers in counting and ascertaining the result. The election officers shall keep tally sheets of the votes as counted which shall be signed by the judge of the election and 2 clerks of the election.

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N.J.S.A. 18A:14-56 provides:

In districts in which voting machines are used, the election shall be conducted and the votes shall be cast by the use of such machines in the manner prescribed by Title 19, Elections, of the Revised Statutes in elections held under that title.

N.J.S.A. 19:48-1 provides in pertinent part:

Any thoroughly tested and reliable voting machines may be adopted, rented, purchased or used, which shall be so constructed as to fulfill the following requirements:

. . .

(l) It shall be provided with a mechanical model, illustrating the manner of voting on the machine, suitable for the instruction of voters;

(m) It must permit a voter to vote for any person for any office, except delegates and alternates to national party conventions, whether or not nominated as a candidate by any party or organization by providing space for writing in such names or name.

N.J.S.A. 19:50-3 provides in pertinent part:

For instructing the voters on any election day there shall, so far as practicable, be provided by the county board of elections or the superintendent of elections or the municipal clerk, as the case may be, having custody of voting machines, for each polling place a mechanically operated model of a portion of the face of the machine. Such model, if furnished, shall, during the election, be located on the district election officers' table or in some other place which the voters must pass to reach the machine, and each voter shall, before entering the voting machine booth, be instructed regarding the operation of the machine and such instruction illustrated on the model, and the voter given opportunity to personally operate the model. The voter's attention shall also be called to the diagram of the face of the machine so that the voter can become familiar with the location of the questions and the names of the officers and candidates.

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DISCUSSION

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 noncompliance 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 (App. Div. 1978).

There must exist a connection between the alleged election irregularities and the election results.

> [T]hat 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.

In re Wene, at 383. Accord, Magura v. Smith, 131 N.J. Super. 395, 401 (Law Div. 1974); In re Application of Abbott Law 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 Law Moffat, 142 N.J. Super. at 224.

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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, 13 N.J. 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 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.

Also 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. (August 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 Election, 1979 S.L.D. 872, 873, rev'g, 1978 S.L.D. 344.

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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, both as to prevent the arbitrary setting aside of election results and to ensure that fair results expressing the electorate's actual will are achieved.

The respondent board of education admitted that a technical violation of the law did occur. Two, if not three, of the poll workers were employees of the school board and therefore, pursuant to N.J.S.A. 18A:14-6, were not eligible to be poll workers. In addition, Mrs. Gallucci admitted that she did not have a challenger badge as required by N.J.S.A. 18A:14-18.4 when the poll initially opened. Mr. O'Neil subsequently made challenger badges; however, the badge would not adhere to Mrs. Gallucci's clothing. As such, she did not wear her badge. Mrs. Miller never even attempted to wear her badge, even though the wearing of the badge is required by N.J.S.A. 18A:14-18.4, but merely placed it on the table in front of her.

There was evidence in this case that at certain times during the election, the instructions for voting for write-in candidates was not posted in the voting booth, voters had difficulty voting for or could not vote for write-in candidates, and that the poll workers did not assist persons attempting to cast write-in ballots. N.J.S.A. 18A:14-56 provides that in school elections where voting machines are used, that the voting procedures shall be those prescribed in Title 19. N.J.S.A. 19:48-1 requires any voting machines used to be able to permit voters to cast write-in votes and that a model be provided to aid in instructing voters in the use of the machine. N.J.S.A. 19:50-3 further provides that on election day, this model must be placed on the district election officers' table and that "each voter shall, before entering the voting booth, be instructed regarding the operation of the machine . . . and the voter given opportunity to personally operate the model." This procedure was not followed in Gibbsboro. In fact, there was some evidence that the poll workers were reluctant to assist voters who requested assistance in casting write-in ballots.

There were also allegations of intimidation in this case. One objection was to the number of school board employees and school board members who were present in the polling place. The fact that some of the poll workers were school board employees was discussed above. N.J.S.A. 18A:14-6 specifically precludes school board members from being poll workers at a school board election. The provision was written into the law to avoid specifically any appearance of impropriety or intimidation. The Legislature did not

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think it was a good idea for school board members to be present and administering school board elections. N.J.S.A. 18A:14-15, however, allows candidates to act as challengers and to appoint "a legal voter of the school district" to act as a challenger in his or her behalf. While it may not be advisable or the better practice, and may in fact raise questions of impropriety or intimidation, if a member of the school board is a legal voter of the school district, he is not statutorily precluded from serving as a challenger on behalf of a candidate for election to the school board.[4] As such, these school board members had a legal right to be present at the election. N.J.S.A. 18A:14-46, N.J.S.A. 18A:14-15, and N.J.S.A. 18A:14-18. There was also some evidence that some voters felt intimidated by the fact that some of these school board member challengers were seen talking about these voters. Challengers have a right to talk about prospective voters in order to determine the voters' rights to vote. The mere fact that challengers were seen talking about certain voters does not in and of itself give rise to illegal intimidation pursuant to N.J.S.A. 18A:14-86. There was also some evidence that a voter felt intimidated because two poll workers and a challenger looked in the voting booth after the voter had left the voting booth. Poll workers have a duty to ensure that the voting machines are working properly, and occasionally do inspect the machines. In any event, if a voter had already left the machine and recorded his vote, another person would not be able to subsequently see that vote. That being true, what harm could there be in looking into the machine, and if a voter had already voted, how could there be any intimidation?

Another allegation of intimidation concerns that there were sometimes three challengers present. In the past in Gibbsboro school elections, usually only one challenger was present. As there were three declared candidates, it was perfectly legal for three challengers to be present (one for each candidate) at the same time. N.J.S.A. 18A:14-15, N.J.S.A. 18A:14-18, and N.J.S.A. 18A:14-46. The fact that the three declared candidates may have been running for office together does not reduce the number of challengers each candidate may have present at the polls. A challenger is the official representative of the candidate, and each candidate has the right to be represented at the polls in order to assure a fair election.

---

[4] I recommend the Commissioner consider proposing a statutory amendment to N.J.S.A. 18A:14-15 which would preclude members of school boards, who are other than candidates, from serving as challengers in school elections.

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Comments by poll workers regarding whether or not people should run as write-in candidates should not have been made in front of voters. While this may be a technical violation of voting procedures, the question to be addressed is whether or not this violation is sufficient to change the result of the election.

The petitioner also felt intimidated and questioned the number of persons present, including board members, when the machines were opened and the votes were tabulated. As indicated above, challengers and candidates have a right to be present when the votes are tabulated. N.J.S.A. 18A:14-18. In addition, N.J.S.A. 18A:14-57 provides that the counting of the votes "shall be open and public but the number of persons permitted to be present shall not be such as to hinder, delay or inconvenience the election officers in counting and ascertaining the result." There was no allegation in this case that the number of people present hindered the ascertaining of the result of the election. In fact, there was testimony that the vote was taken in a large school all-purpose room. As the counting of the votes is public, there is no merit to this challenge.

Finally, there was some question regarding the procedure used to determine the number of write-in ballots. The poll workers had great difficulty unraveling the paper roll, and the paper was torn into several pieces. While this may show some difficulty in extracting the result from the machine, there was no evidence that all of the write-in votes cast were not properly counted.

N.J.S.A. 18A:12-15(d) requires that if a school board election is voided or set aside, a new election must be held within 60 days of the original election. With this in mind, an expedited hearing was held in this case pursuant to N.J.A.C. 1:1-3.2(c), and the parties were given only one day's notice of the hearing. As a result, several persons who had knowledge of the facts in this case were unavailable, and as such, I liberally permitted the petitioner and respondent to introduce documents, statements, and other hearsay evidence in an attempt to gather a complete picture as possible for the Commissioner's consideration. In my preparation of this Initial Decision, however, I have considered only legally competent and relevant evidence.

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CONCLUSION

I **CONCLUDE**, therefore, based on the complete record of this inquiry and after a review of the legal arguments of both sides, that:

1. The reports of incidents complained of by petitioners were deserving of immediate investigation by the Commissioner. This is particularly true in the specific individual assertions that employees of the school board worked as poll workers. The improper use of challengers, accusations of intimidation, and questions regarding the polling procedures would also require the Commissioner's attention.

2. The fact that employees of the school board worked as poll workers and challengers did not wear challenger badges was clearly proved by competent evidence.

3. Considering the total number of votes cast (323) and the disparity in the vote totals between the declared candidate receiving the fewest number of votes cast (176) and the write-in candidate receiving the greatest number of votes cast (77), it has not been demonstrated by competent evidence that the alleged, accumulated violations, even if all were shown to be true, affected the outcome of the election, to the point where the will of the electorate was thwarted.

4. Absent such a showing, the presumed correctness of the election must be sustained.

ORDER

I **ORDER**, therefore, that the charges of petitioner that the School Board Election in the Borough of Gibbsboro does not reflect a full and free expression of the popular will be **DISMISSED**, and that their request to overturn the election be **DENIED**.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul

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Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

24 April 1987
DATE

STEVEN L. CARNES, ALJ

Receipt Acknowledged:

APR 24 10??
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 1 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE :
SCHOOL DISTRICT OF THE BOROUGH :
OF GIBBSBORO, CAMDEN 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. The exceptions filed by Mrs. Riley were not considered herein because she was not a defeated candidate in the election. See N.J.S.A. 18A:14-63.12 which states:

> 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 is noted, however, that Mrs. Riley's testimony and Exhibit P-14, a telephone bill of hers, were considered by the ALJ herein.

Upon careful review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that notwithstanding a technical violation of N.J.S.A. 18A:14-18.4, namely, that not all challengers wore an identifying mark as a challenger, petitioner herein has not demonstrated by competent evidence that the accumulated violations alleged, even if all were shown to be true, affected the outcome of the election, to the point where the will of the electorate was thwarted.

The Commissioner does note for the record an error in the ALJ's recitation of the language of N.J.S.A. 18A:14-6. Effective February 19, 1987, the language of N.J.S.A. 18A:14-6 reads:

> ***They shall be appointed from the qualified voters of the State if qualified voters of the district are not available, who are not members or employees of the board of education and who do not intend to stand as candidates for any office of the school district during the ensuing year, and in school districts in which voting machines

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> will be used during the ensuing year they shall be chosen, as far as practicable, from the members of the district boards of election in office in the municipality or municipalities comprising the school district. (emphasis supplied)

The Commissioner further notes that any difficulties the district may have had in finding appropriately qualified poll workers should be alleviated by the change in N.J.S.A. 18A:14-6. Notwithstanding the outcome of this decision, the Commissioner admonishes the Board herein to be in strict compliance with all the election laws pertinent to school elections.

Accordingly, the instant Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

June 8, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2612-87
AGENCY DKT. NO. 77-4/87

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY.

Theresa M. VanOlst, petitioner, pro se

Thomas Dilts, Esq., for the Board of Education of the Borough of Somerville

Stephen M. Offen, Esq., for intervenor Margery Corrigan (Schachter, Cohn, Trombadore & Offen, attorneys)

Record Closed: April 23, 1987 Decided: April 23, 1987

BEFORE DANIEL B. MC KEOWN, ALJ:

Pursuant to a letter filed April 15, 1987 with the Commissioner of Education by defeated write-in candidate Theresa M. VanOlst (petitioner) alleging certain irregularities in the conduct of the annual school election held April 7, 1987 in the Somerville Borough school district, the Commissioner transferred the matter to the Office of Administrative Law as a contested case on April 20, 1987 under the provisions of N.J.S.A. 52:14F-1 et seq. A hearing on the allegations was conducted April 22, 1987 at the Somerset County Administration Building, Somerville. The record closed at the conclusion of the hearing.

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BACKGROUND FACTS

At the school election conducted April 7, 1987, three regularly nominated candidates vied for three available positions on the Board. During the conduct of the election members of the electorate cast ballots for 15 additional write-in candidates. The announced results of the election had the three regularly nominated candidates voted into office, while petitioner, a write-in candidate, received 16 fewer votes than the lowest vote getter of the three successful regularly nominated candidates. The highest vote total for the remaining 14 write-in candidates was four. In combination, all 15 write-in candidates received 358 write-in votes from a total 815 voters excluding six absentee votes.

Petitioner, in her letter dated April 9, 1987 to the Commissioner asserts in pertinent part as follows:

> As a Candidate in the 1987 Board of Education Election in Somerville, New Jersey, I am writing to initiate an inquiry into the voting process.
>
> Over the past two days, I have been swamped with calls from people who had trouble casting a write-in vote and many who were unable to vote due to a mechanical problem with the voting machines.
>
> * * *
>
> More importantly, though, are the feelings of the people of Somerville who came out to vote only to lose their vote entirely or not be able to write-in a candidate because the machines did not function properly and actually prevented them from doing so. I, myself, did write-in, but I had a hard time prying the write-in tab open. So, for those trusting people who felt themselves robbed of their right to vote, I request an inquiry into this election.

During the election, the Board had two polling districts. One was located at its Middle School, while the other was located at its VanDerveer School. Janice Hoffner, the Somerset County Supervisor of Elections, made known her voluntary presence in the hearing room. Ms. Hoffner arranged for the presence of Steven D. Scannell, the chief voting machine mechanic for the Somerset County Board of Elections, in order for him to give testimony regarding the voting machines used in this election.

Mr. Scannell testified which I find persuasively credible that he prepared four voting machines for use by the Board in its election. Scannell's preparation included

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testing the machines to insure they were working properly, inviting through school authorities candidates and interested persons to inspect the machines on March 31, sealing the machines after the inspection, and delivering two machines each to the Board's two polling places. Scannell testified that all voting machines were in proper working order at the time of delivery.

Mr. Scannell explained that the voting machines used in this election are the same machines used in all primary, general, and presidential elections. He explained that the machines provide for approximately 30 to 40 write-in slots along the top inside the machine, over the regularly nominated candidates' names. Each write-in slot has a protective cover which, during the preparation of the machine, is prepared for use in a number equal to the number of vacancies to be filled at the election. Each write-in slot has a protective cover which, when opened by the voter to cast a write-in ballot, reduces by one the number of regularly nominated candidates among whom the voter may then choose. As an example, if three vacancies are to be filled at the election, three write-in slots beginning on the left of the write-in slot row and moving to the right are prepared by Mr. Scannell in order for the voter to write in their candidate's name who is not otherwise a regularly nominated candidate.

At this election, three candidates were to be elected to fill three seats on the Board. Accordingly, Mr. Scannell prepared for use the first three write-in slots immediately above the regularly nominated candidates' names so that voters may use those first three slots to cast write-in ballots. The next eight to ten slots were locked, while the remaining slots remained unlocked due to an absence of sufficient locking mechanisms by the County[1]. As soon as the voter lifts one of the protective covers of the write-in slots, votes may then be cast for only two regularly nominated candidates. If two protective covers of write-in slots are opened, the voter may cast a ballot for only one regularly nominated candidate.

During the proceeding Ms. Hoffner and Mr. Scannell accompanied this judge, counsel of record, petitioner, and all persons assembled in the hearing room to the first floor of the Somerset County Administration Building where Mr. Scannell had a sample voting machine set up. Having had the opportunity to observe the machine, it is noted

[1]Mr. Scannell, who happened to be present at the counting of ballots following the close of the polls, believes he may have observed ballots written in on the far right of the machines paper roll. The paper roll is to be subject of a recount of ballots cast scheduled for Friday, April 24, 1987 by someone other than this judge.

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that the first write-in slot and its cover are larger than the remaining slots. Mr. Scannell opined that that difference is in deference to presidential elections when two names are to be voted for the offices of president and vice-president. Immediately underneath the row of write-in slots is the following direction:

PERSONAL CHOICE
PUSH UP PROPER SLIDE

DO NOT RAISE SLIDE unless you intend to write in a name. If you do, you will be unable to vote for another candidate on that column. WRITE IN name of person whose name does not appear on ballot.

(C-1)

In addition to that instruction within the voting booth, Scannell also sends to school districts conducting elections the following instruction sheet with a pictorial representation demonstrating a voter casting a write-in ballot for display in their respective polling places:

HOW YOU CAN WRITE IN A
VOTE ON AN
AUTOMATIC VOTING MACHINE

Lift up the write-in slide above the question row and write the name of your candidate. Once a voter lifts a write-in slide, however, he cannot change his mind and use a candidate lever in that office. This prevents over-voting.

(C-2)

Mr. Scannell during the demonstration of the sample voting machine on the first floor of the Somerset County Administration Building demonstrated the proper procedure for casting write-in ballots. The procedure he used, it is noted, is consistent with the instructions (C-1) within each voting machine and the procedure he used is consistent with the written instructions (C-2) election officers receive along with the voting machines from the Somerset County Board of Elections.

PETITIONER'S PROOFS

Petitioner testified that when she reported to her assigned polling place at about 3:15 p.m., she met two persons coming out of the polling place. The woman, otherwise

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unidentified in this record, explained to petitioner she had trouble using the write-in slots on the voting machine. The man, according to petitioner, had no difficulty using the write-in slots. When petitioner finally arrived in the voting machine booth, she too had difficulty opening the write-in slots. She concluded then that more likely than not other people would have difficulty to the extent she may be losing ballots if other voters could not figure out how to open the write-in slots. Nevertheless, petitioner made no complaint to the election officers who were present. According to petitioner, one woman stated she could not figure out how to cast a write-in vote. An unidentified election officer was to have advised the woman to look at the sample machine there present and to read the instructions (C-1) in the voting machine booth. Petitioner testified that when she returned home that evening she received 12 to 15 telephone calls from voters who complained that they had difficulty casting write-in ballots because of difficulty opening the write-in slot protective covers. Petitioner produced testimony from the following persons who cast, or attempted to cast, ballots at the controverted election in support of her claim that the voting machines malfunctioned in regard to write-in ballots.

Eileen R. Boccanfuso, who distributed flyers on behalf of petitioner's campaign during election day, testified upon entering the voting booth she found the instructions (C-1) unclear. She asked an election worker for assistance, she received assistance, and she cast a write-in ballot. Ms. Boccanfuso testified that she heard of no complaints at the Middle School polling district regarding write-in ballots, although she did hear one person complain of an inability to cast a write-in ballot at the VanDeveer polling district. Ms. Boccanfuso also testified that she did have to wait in line to cast her ballots approximately 15 minutes.

Nancy E. Mascaro testified she was told at the VanDeveer polling place by an election worker merely to open any write-in slot she could because the election protective covers were supposed to have been "sticking". It is not clear in this record whether Ms. Mascaro did or did not successfully cast a write-in ballot.

Mary E. Ferris, who did successfully cast a write-in ballot at the school election, testified that about 3:15 p.m. during election day a Margaret Gibson telephoned her to report that the election workers at the Board's VanDeveer polling district could not properly instruct the voters how to cast write-in ballots. Ms. Ferris further testified

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when she personally appeared at the VanDeveer polling place to vote, she was told by the election workers to open any of the 30 or 40 write-in slots she could in order to cast a write-in ballot. Ms. Ferris also testified that her father, who could not get a protective cover off the write-in slot, wrote in his candidates selection on the plastic covering of the slot. His vote did not count. Ms. Ferris' father did not testify before me.

Donna F. Falk, who with the assistance of her husband successfully cast a write-in ballot, testified she did not understand the directions (C-1) found in the voting machine booth to cast a write-in ballot. Ms. Falk testified she experienced a long line at the Middle School polling place waiting to cast ballots and between the long line and the unclear directions on how to cast a write-in ballot she became upset.

Donna A. Garnick, who distributed flyers on behalf of petitioner's campaign during election day, testified that at some point between 4:00 and 7:00 p.m. so many people were waiting in line to cast ballots at the VanDeveer School that the election officials there began using the second voting machine. When she proceeded to cast her ballot she asked the election officers for instructions. Ms. Garnick testified she was told to pull up the cover on the write-in slot and simply write in her choice. When she entered the voting machine booth she cast a ballot for one regularly nominated candidate, proceeded to cast a write-in ballot in one of the write-in slots, partially lifted the cover on another write-in slot, changed her mind, and found she could not vote for the second regularly nominated candidate she wanted to.

Elsie Birch, who lives directly across the street from the VanDeveer School, testified that she had to wait in line 45 minutes at the VanDeveer polling place to cast her ballot. When she asked instructions on how to cast a write-in ballot, she was told to lift the cover on a write-in slot and to write her choice. When she arrived at the voting machine booth, Ms. Birch testified she could not find the write-in slots although she admitted at hearing she did not look high enough. Nevertheless, Ms. Birch did not cast a write-in ballot; consequently, she voted for regularly nominated candidates.

Katherine M. O'Neill testified that when she and her husband went to the Middle School polling place they met another couple who advised them they could not cast write-in ballots because they could not lift protective covers on the write-in slots. Ms. O'Neill testified she could not properly open the write-in slot protective cover in order to cast a write-in ballot.

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Judy Mosley testified that when she was in the voting machine booth she could not figure out the instructions (C-1) for casting a write-in ballot. She asked and received assistance from the election officer on how to cast a write-in ballot. She proceeded to lift the protective cover on the first write-in slot and cast her write-in ballot.

Finally, petitioner presented a letter (P-1) signed by one Daniel M. Budd, who asserts that he had to wait in line over 35 minutes at the VanDeveer polling place in order to cast his ballot. Mr. Budd complains that in his view the line was due to the failure of the election workers to use the second voting machine available to them during the election. He claims that the line was so long that he observed people who left the polling place after registering to vote but without casting their ballots.

On one occasion during the Somerville annual school election Mr. Scannell was dispatched to the VanDeveer polling place at approximately 4:30 p.m. The complaint received was that more than one person was in the voting machine booth at one time. He did in fact observe upon his arrival two election officers plus a voter in the voting machine booth. He advised the officers as well as the voter that only one person at a time is, by law, allowed in the voting machine. On this particular occasion the election workers were explaining to the voter how to cast a write-in ballot. Mr. Scannell advised the voter and the workers of the existence of the instructions (C-1) inside the machine as well as the instructions (C-2) sent to this polling place by him. The voter, following Scannell's direction, successfully cast a write-in ballot. In Mr. Scannell's view all voting machines used in the Somerville annual school election on April 7, 1987 were in proper working order, the protective covers on the write-in slots were not sticking, and the problem, if any existed, was due to the voters lack of understanding the written instructions on which write-in slots to open and how to go about casting write-in ballots.

This concludes a recitation of the testimony and documentary evidence submitted in the matter.

LAW

The hearing or inquiry into the Somerville school district annual school election was conducted pursuant to N.J.S.A. 18A:14-63.12 which provides in part as follows:

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> Upon written request, within five days of the announcement of the result of an election by any defeated candidate * * * the Commissioner of Education or his authorized representative [in this case the administrative law judge assigned the matter by the Acting Director of the Office of Administrative Law] 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.

Boards of education are authorized by N.J.S.A. 18A:14-39 to use voting machines in annual school elections. N.J.S.A. 18A:14-42 states, in part, that:

> The voting machines shall be prepared for use and shall be used at such election in the same manner, and the superintendent of elections or the county board of elections, as the case may be, and all election officers of the district shall perform the same duties, as are required, when the same are used in elections held pursuant to Title 19, Elections, of the Revised Statutes * * *

N.J.S.A. 19:48-1(m) requires that voting machines when used in school elections "* * * must permit a voter to vote for any person for any office whether or not nominated as a candidate * * * by providing space for writing in such names or name." N.J.S.A. 19:50-3 allows election workers to assist any voter who declares under oath assistance is necessary to cast a ballot because of an inability to read or write, or because of blindness, or other physical disability.

If, following the inquiry, it is determined that statutorily prescribed procedures for school elections occurred and that they affected the outcome of the election, the results of the contested election may be set aside and the board may be ordered to conduct a special school election within 60 days of April 7. N.J.S.A. 18A:12-15. Any finding of a violation of statutorily prescribed procedures for the conduct of school elections must be such so as to show that the will of the people at the election was thwarted, was not fairly expressed, or could not properly be determined. In the Matter of the Annual School Election held in the Borough of Ringwood, 1974 S.L.D. 591, 593, quoting with favor In the Matter of the Annual School Election Held in the School District of Manasquan, 1965 S.L.D. 104, 107. Under the view expressed in In re Application of Abbott Low Moffat, 142 N.J. Super. 217 (App. Div. 1976) petitioner here, because she alleges a malfunction of the voting machines resulted in the rejection of legal votes, has the burden to establish legal votes were, in the first instance, so rejected and that the number of rejected votes was sufficient to change the result of election so as to warrant setting

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aside the election. Id. at 224. Accord, In Re 1984 Maple Shade General Election, 203 N.J. Super. 563, 589 (Law Div. 1985).

DISCUSSION, FINDINGS, CONCLUSION

It is to be initially noted that I find the testimony of petitioner and the nine witnesses who appeared before me credible and reliable insofar as their recollection and understanding of the events which occurred during their attempts to cast write-in ballots at this election April 7. That finding, nevertheless, is not intended to convey that what their individual and collective recollection of events are has a causal relationship to the difficulty they may have had casting write-in ballots nor to the inability of two witnesses, perhaps three if Ms. Moscaro is included, to successfully cast a write-in ballot. Mr. Scannell's testimony is clear and persuasive that he prepared four voting machines for use by the Board in its election, he tested the machines to insure they were working properly, he arranged for an inspection of the machines on March 31, he thereafter sealed the machines, and then delivered two machines each to the Board's two polling places. The instructions (C-1) in each voting machine booth immediately under the row of write-in slots are, in conjunction with the physical arrangement of the inside of the voting machines used here, clear on how to cast write-in ballots. Furthermore, the instructions (C-2) provided election officers by Mr. Scannell are clear, in combination with the pictorial representation of the actual write-in ballot process, to voters how to cast write-in ballots. Finally, Mr. Scannell observed the voting machines in the VanDeveer polling place to be operating properly during the election.

Of the ten persons who testified before me including petitioner, two persons, Ms. Birch and Ms. O'Neill, are clear in their testimony that having asked for and received instructions from the election officers on the manner in which write-in ballots are to be cast could not successfully cast a write-in ballot. My notes of the hearing do not clearly reflect whether Ms. Moscaro did or did not successfully cast a write-in ballot. It is recognized that Ms. Ferris testified her father, having difficulty uncovering the protective cover of the appropriate write-in slot, cast a ballot on the plastic covering of the slot thereby causing his ballot to be voided. Under this evidence, two voters could not successfully cast write-in ballots and two other voters may have been unsuccessful in their attempts to cast write-in ballots. Recall that petitioner received 16 fewer write-in ballots than the lowest vote getter of the three successful regularly nominated

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candidates. At best, petitioner established that two, perhaps four voters were unsuccessful in their efforts to cast write-in ballots presumably for her. This evidence is insufficient under In re Application of Abbott Low Moffat, supra, for petitioner to have carried her burden of showing that the number of legal votes rejected was sufficient to change the announced result. Adding either two or four more votes to the number petitioner received would simply reduce by two or four the number of votes by which she lost.

Moreover, the finding on the evidence in this record that two or four voters had difficulty casting write-in ballot is not a finding that any voting machine used in the school election malfunctioned. I am persuaded by Mr. Scannell's testimony that the machines were in proper working order at the time of delivery and that when he was dispatched to the VanDeveer polling place on election day at about 4:30 p.m. he observed the voting machine in use was working properly but that the voter did not fully understand how to cast a write-in ballot. Furthermore, 358 write-in votes were successfully cast during the conduct of this election. Consequently, I **FIND** no evidence to show that the protective covers of the write-in slots were sticking or malfunctioning in any manner.

I acknowledge that each witness who testified before me was honest and candid in their recollections and understanding of what occurred on election day in regard to write-in ballots. Nevertheless, the evidence in this case is overwhelming that the cause of any problem with respect to casting write-in ballots was due not to a voting machine malfunction; rather, the cause of difficulty in casting write-in ballots with some voters is due to the voter's lack of understanding the written instructions (C-1) as well as oral explanations given them by election officers.

Based on all the evidence of record and the facts established by such evidence, I must **CONCLUDE** petitioner failed to carry her burden to show any voting machines malfunctioned resulting in the rejection of legal votes at the annual school election conducted in the Somerville school district on April 7, 1987. I further **CONCLUDE** that petitioner has failed to carry her burden to demonstrate by at least a preponderance of credible evidence that any statutorily prescribed procedures for the conduct of school elections occurred with the result that the will of the people at the election was thwarted, not fairly expressed, or could not properly be determined. Nevertheless, the Somerville Board should fully insure that its appointed election officers in future school elections fully understand how to advise voters to cast write-in ballots and to be able to articulate to voters that understanding.

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In addition to petitioner's allegation that the voting machines malfunctioned on election day, there seems to be an allegation that the will of the electorate was thwarted because of long lines at the polling places with the result that some voters refused to wait in line to cast their ballots. This allegation seems to emerge from the testimony of Ms. Boccanfuso, Ms. Falk, Ms. Garnick, Ms. Birch, and letter (P-1) writer Mr. Budd. Nevertheless, there is no credible evidence before me to find as fact nor to conclude as a matter of law that a 15 minute wait in line to cast a ballot at a school election resulted in thwarting the will of the electorate. Boards of education do have authority at N.J.S.A. 18A:14-4.1 and 5 to designate additional temporary polling districts and places if it anticipates an unusually heavy vote or whenever at two consecutive annual school elections more than 500 ballots are cast in a polling district. In this instance, 301 ballots were cast at the Middle School polling district and 514 ballots were cast at the VanDeveer School polling place. I have no evidence to show whether the 500 plus ballots cast at VanDeveer in the 1987 annual school election was the first or second time more than 500 ballots were cast. Consequently, I **CONCLUDE** that there is insufficient evidence in the record before me to show a 15 minute wait at either polling district is sufficient to conclude that the will of the electorate has been thwarted.

For all the foregoing reasons, the allegations brought by petitioner against the conduct of the annual school election conducted in the Somerville school district on April 7, 1987 are found to be without merit and are hereby **DISMISSED**.

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

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

April 23, 1987
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

APR 23 1987
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:
APR 24 1987
DATE

Ronald L. Parker, Jr. s
OFFICE OF ADMINISTRATIVE LAW

sc

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

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by petitioner within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

Petitioner's exceptions, in pertinent part, are summarized below. Petitioner excepts to the conclusion of the ALJ on page three of the initial decision concerning inspection of the machines. She states that although she was a declared write-in candidate, she was not invited to inspect the voting machines. Also, regarding the voting machines, she further suggests that "[a]ny unlocked slot made available to the voter should be considered a legal vote." (Exceptions, at p. 1) Concerning Exhibit C-2, petitioner's exceptions aver "by Mr. Scannell's own testimony, [it] was neither observed nor displayed in either polling location." Petitioner further states, "The voting machine demonstrated to us was not only not one of those from the election but also a different, newer model (said Mr. Scannell)." (Exceptions, at p. 1)

Concerning the testimony of witnesses, petitioner avers the following:

> Donna Garnick did not open a second write-in slot after casting her write-in. In an effort to find a slot that would open, she partially opened one which wouldn't completely open and abandoned it in an effort to find one which would open completely.
>
> Elsie Birch did not cast a write-in ballot; consequently, she voted for only 2 of the 3 candidates she had intended to vote for.
>
> In Katherine O'Neill's summary, please delete the word "properly" in the last sentence.
>
> Judge Moseley also testified that the election officials laughed at her needing help casting a write-in in the presence of other voters.

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> Mr. Scannell could not have tested the protective covers on the write-in slots for sticking since, if he did during election day or afterward, he would have added to the total voter count on the machine. (emphasis in original)
>
> (Exceptions, at p. 1)

Also, petitioner suggests that the last paragraph on page ten of the initial decision contradicts itself.

Upon a careful review of the record herein which, the Commissioner notes, does not include transcripts of the hearing conducted before the Office of Administrative Law concerning the instant election inquiry, the Commissioner agrees with the findings and the conclusion of the ALJ that petitioner has failed to carry her burden to show by a preponderance of the credible evidence that any voting machines malfunctioned and, thus, resulted in the rejection of legal votes at the annual school election conducted in the Somerville School District on April 7, 1987. Further, the Commissioner, in the absence of transcripts, will rely upon the findings of fact established by the ALJ below concerning the testimony of the witnesses. See In the Matter of Raymond Morrison, 216 N.J. Super. 143 (App. Div. 1987). The Commissioner adopts as his own the findings of fact as established by the ALJ in the initial decision and his further conclusion based on those facts that petitioner has failed to demonstrate by "a preponderance of credible evidence that any statutorily prescribed procedures for the conduct of school elections occurred with the result that the will of the people at the election was thwarted, not fairly expressed, or could not properly be determined." (Initial Decision, ante)

The Commissioner notes for the record that N.J.S.A. 18A:14-42 states in pertinent part:

> b. Written notice of the time and place when the machines will be prepared for use at the elections shall be mailed to each candidate to be voted upon at such election, stating the time and place where the machines may be examined, at which time and place said candidates shall be afforded an opportunity to see that the machines are in proper condition for use in the election***.

The Commissioner notes that while it is stated in the initial decision, ante that according to Mr. Scannell, the chief voting machine mechanic for the Somerset County Board of Elections, his preparation for the herein contested election included "inviting through school authorities candidates and interested persons to inspect the machines on March 31," petitioner presents no evidence to prove that she was omitted from the list of candidates who received such notice, nor that as a write-in candidate she was entitled by law to so inspect said machines.

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Further, notwithstanding the above conclusions, the Commissioner is in agreement with the ALJ also that "the Somerville Board should fully insure that its appointed election officers in future school elections fully understand how to advise voters to cast write-in ballots and to be able to articulate to voters that understanding." (Initial Decision, ante) The Commissioner admonishes the Board herein of its duty to comply strictly with law as it pertains to school elections.

The Commissioner observes that the decision herein comports with that made in the recount of the ballots in the same district decided by the Commissioner May 19, 1987.

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

COMMISSIONER OF EDUCATION

June 8, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2592-87
AGENCY DKT. NO. 71-4/87

HELGA MILAN-VERA, LOUIS MARCHESANI, BRIAN STACK, EDWARD MESA, and MARAUCHY PEREZ,

Petitioners,

v.

BOARD OF EDUCATION OF UNION CITY, HUDSON COUNTY,

Respondent.

For Petitioners:

William Z. Shulman, Esq.
Libero D. Marotta, Esq.
Leonard J. Altamura, Esq.

For the Board:

Richard L. Friedman, Esq.
(Giordano, Halleran & Ciesla, attorneys)

For Intervenor Carlos Perez:

Kevin Kovacs, Esq.
(Lowenstein, Sandler, Kohl, Fisher & Boylan, attorneys)

For Intervenors Adelaide Leone and Francis Mona:

Mark J. Nelson, Esq.
(Vaccaro, Osborne, Curran & Murphy, attorneys)

Record Closed: April 28, 1987 Decided: May 6, 1987

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BEFORE WARD R. YOUNG, ALJ:

PROCEDURAL BACKGROUND

Petitioners, unsuccessful candidates for the Union City Board of Education in the election held on April 7, 1987, seek to have said election set aside and a new election ordered because of improprieties and statutory violations related to the conduct of the election. Petitioners are associated with and supported by C.A.R.E., a coalition Concerned About Responsible Education. The successful candidates are associated with and supported by the Alliance Civic Association (Alliance).

The Board denies most of the alleged improprieties and statutory violations, and asserts that any found to be true are insufficient to have thwarted the will of the electorate; it seeks to have the petitions dismissed. Intervenors concur.

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 April 16, 1987, and was heard at the Union City Recreation Center on April 23, at the Union City Municipal Court on April 24, and at the Union City Recreation Center on April 27 and 28. The record closed at the termination of the hearing on April 28.

MOTION

Fifteen allegations of improprieties and statutory violations were contained in the Petition of Appeal filed with the Commissioner of Education prior to the transmittal of the contested matter to the Office of Administrative Law. At the hearing, respondent made a motion to dismiss four of these, which motion shall now be addressed.

1. Allegation "C," which essentially reads as follows: Contrary to N.J.S.A. 18:14-71 there were documented cases where voters were hindered and delayed in the preparation of absentee ballots [and the] inspection of absentee ballots during

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[their] preparation; after the ballots were prepared, their contents [were] revealed to [certain persons] prior to their submission — was DISMISSED due to lack of jurisdiction.

2. Allegation "L," which essentially reads as follows: At one poll an all out brawl took place after an Alliance worker struck a candidate with a steel chair — was withdrawn, as the incident occurred after the polls were closed.

3. Judgment was RESERVED on Allegation "M" (Residents from neighboring communities were employed to serve as poll workers instead of offering said positions to other residents of the municipality) pending review of an amendment to N.J.S.A. 18A:14-6. After careful review of said amendment, respondent's Motion to Dismiss Allegation "M" is now DENIED, and said allegation will subsequently be addressed in this decision.

4. Allegation "O" (People were given access to blank absentee ballots without authorization of the Hudson County Board of Elections) was withdrawn by petitioners.

MAIN CASE TESTIMONY

Allegations "A" through "N", except as noted above, will now be addressed seriatim.

"A" - CONTRARY TO N.J.S.A. 18A:14-72, THERE WERE PARTIES INTERFERING AND OBSTRUCTING THE POLLING PLACES, OBSTRUCTING AND INTERFERING WITH VOTERS, [AND] BLATANTLY ELECTIONEERING WITHIN 100 FEET OF THE 28 DISTRICT POLLS.

"B" - CONTRARY TO N.J.S.A. 18A:14-73, THE POLL OFFICIALS ALLOWED THERE TO OCCUR WITHIN 100 FEET [OF THE POLLS]: LOITERING [AND] SOLICITING OF VOTES WITH RESPECT TO CANDIDATES.

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The above two allegations are consolidated for disposition because of their similarity. The respondent has stipulated there was electioneering and the solicitation of votes within 100 feet of several polling places. Relative to the alleged interference or obstruction of voters and/or polling places, the statute was construed to encompass physical interference and obstruction. However, petitioners have failed to meet their burden of proof by a fair preponderance of the credible evidence in this regard. Hence, I FIND that electioneering and the solicitation of votes took place in violation of N.J.S.A. 18A:14-73.

"D" - CONTRARY TO N.J.S.A. 18A:14-77, THERE WERE NUMEROUS CASES OF PERSONS NOT ENTITLED TO VOTE, WHO FRAUDULENTLY VOTED, AND SOME EVEN [SIC] VOTED TWICE, THEREBY INTERFERING WITH THE LAWFUL CONDUCTION OF THE ELECTION.

Richard Simeone, a challenger at "7-3" (Ward 7, District 3) for defeated candidate Brian Stack, testified that one voter appeared who was not registered. Simeone requested identification but the voter refused to provide same. Simeone requested the voter to sign an Affidavit, and the voter refused. "7-3" Judge Celia Bracken supported the voter's position and allowed him to vote. On cross-examination, Simeone testified that he did not know the non-affidavit voter personally, and the notes he had taken at the time have been misplaced.

Carol Lyons, a challenger at "1-1" testified that the judge at that district precluded the execution of affidavits by about 20 voters challenged by her; to her belief, 19 were non-residents. The judge at "1-1" was not called to testify by either of the parties to affirm or rebut Lyons' testimony. I found Lyons to be a credible witness.

George Dressler, a challenger at "1-2," testified that about 27 voters were challenged, executed affidavits, and voted. One such voter, Bill DeFazio, lives in Cliffside, but Brooksie Moto, working for the Alliance candidates, had DeFazio registered as a Union City resident. I found Dressler to be a credible witness.

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Carol Nieves, a challenger at "3-3," testified that she challenged one voter who was not registered. The voter left, she said, but returned and was allowed to vote.

Rita Nordberg, a challenger at "4-1," testified that she challenged a young female voter with the first name of Debbie on the basis of non-residency; said voter conceded she lived in Secaucus but always votes in Union City from her mother's Union City address. Nordberg further testified she brought the matter to Judge Agnes Connor's attention, but the challenged voter was allowed to vote without executing an affidavit, because she was registered. I found Nordberg to be a credible witness. Connor was not called to testify in rebuttal of Nordberg's testimony.

Angel Pena, an attorney and legal consultant to C.A.R.E. but not an attorney of record in this matter, testified that one George Wagner was allowed to vote at "2-1," and that Wagner was a non-resident who had also applied for an absentee ballot. Pena also testified that he complained to Judge Mirisolla concerning citizens Lancilotti and Fozza that they should not be permitted to vote as they had received absentee ballots, but did not know if they voted. On cross-examination, Pena testified he had no direct knowledge as to whether Wagner, Lancilotti or Fozza voted absentee ballots or at the polls, or both.

On the basis of the foregoing, I **FIND** that petitioners have not proven by a fair preponderance of the credible evidence that any voters cast absentee ballots and also voted at the polls. Nevertheless, I **ALSO FIND** that some non-residents did in fact vote in the Union City election in violation of N.J.S.A. 18A:14-77.

"E" - CONTRARY TO N.J.S.A. 18:14-74, THERE WERE CASES WHERE PERSON[S] VOTING BY ABSENTEE BALLOT[S] WERE ALLOWED TO VOTE ON THE MACHINES AS WELL.

This allegation was addressed in "D" above when I **FOUND** that petitioners failed to meet their burden of proof by a fair preponderance of the credible evidence. Consequently, allegation "E" is hereby **DISMISSED**.

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"F" - CONTRARY TO N.J.S.A. 18A:14-79, ELECTION OFFICERS ALLOWED CANDIDATES TO ENTER THE POLLING BOOTH WITH VOTERS AND CAST BALLOTS.

Although the statute is erroneously cited, this allegation refers to the assistance candidate Adelaide Leone allegedly gave to one or more voters. Carol Nieves, a challenger at "3-3," testified that candidate Leone stood in front of the voting booth curtain and explained to a number of first time voters the voting process. Nieves also testified that Leone told them to vote for 3 (candidates). Notice is hereby taken that there were three vacancies and that Leone was also the number 3 candidate. Nieves further testified she protested to Leone, who responded that she was the only one available to instruct voters regarding the voting procedure.

Leone testified that she assisted one woman voter who couldn't open the curtain by going to the booth and calling for a worker to assist her, but that she (Leone) did not go into the booth at any time or tell any voter to vote for "number 3."

Both witnesses appeared to be credible. Since Leone did not deny telling the voters to vote for three [candidates], it is not inconceivable that a misperception was made by Nieves.

In any event, I FIND this isolated incident to be de minimis in nature, and I additionally FIND that the allegation is not supported by a fair preponderance of the credible evidence. Accordingly, allegation "F" is hereby DISMISSED.

"G" - CONTRARY TO N.J.S.A. 18A:14-85, PEOPLE WERE DISPLAYING POLITICAL BADGES, INSIGNIAS [AND] CAMPAIGN LITERATURE WAS WORN AND/OR DISPLAYED INSIDE THE POLL.

Challenger Dressler at "1-2" testified that "4 o'clock cards" (indicating the names and numbers of three candidates) were placed close to the voting booth. This testimony was unrefuted.

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Gerald Caputo, a non-resident, but teacher in the Union City schools, testified that one Mr. Realda, an election official at "5-1" was handing out "4 o'clock cards." This testimony was likewise uncontroverted.

Hence, I FIND that campaign literature was displayed inside the poll, in violation of N.J.S.A. 18A:14-85.

"H" - CONTRARY TO N.J.S.A. 18A-88 AND 94, IT APPEARS THAT CERTAIN VOTERS WERE PROMISED HOUSING IN EXCHANGE FOR INDUCING VOTERS TO VOTE IN A CERTAIN MANNER.

With respect to this charge, the record is absolutely devoid of a residuum of legally competent evidence upon which to FIND in favor of the petitioners. Thus, allegation "H" is hereby DISMISSED.

"I" - CONTRARY TO N.J.S.A. 18A:14-10 and 94, IT APPEARS THAT CERTAIN UNION CITY POLICE OFFICERS INTERFERED WITH ELECTION OFFICERS AND VOTERS THEMSELVES.

With respect to this charge, the record is replete with credible testimonial evidence that off-duty policeman worked outside the polls and within 100 feet of them, by distributing campaign literature in support of Alliance. I FIND, however, that no evidence supports the proposition that said police officers interfered with election officers and voters in violation of N.J.S.A. 18A:14-10 and N.J.S.A. 18A:14-94. Thus, allegation "I" should be (and is hereby) DISMISSED.

"J" - CONTRARY TO N.J.S.A. 18A:14-82, POLL LISTS WERE REMOVED INDIRECTLY BY ALLOWING VOTER'S NAMES WHO HAD NOT YET VOTED TO BE GIVEN TO 'RUNNERS' AND POLICE OFFICERS TO CALL UPON THE VOTER, AT HIS RESIDENCE AND PROD HIM TO VOTE.

N.J.S.A. 18A:14-82 relates to the removal, destruction or mutilation of any signature, copy register or poll list. Not one iota of evidence was presented to establish (even on a prima facie basis) that the cited statute was violated, and I so FIND. Hence, allegation "J" is hereby DISMISSED.

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"K" - POLICE OFFICERS, AT CERTAIN POLLS, OUTSIDE AND INSIDE THE POLLS, WERE DISPLAYING WEAPONS AND BADGES AND WERE DISTRIBUTING CAMPAIGN LITERATURE WHICH FAVORED A CERTAIN POLITICAL [PARTY].

It has already been determined herein that off-duty police officers worked the election and distributed campaign literature (see allegation "I"). Although sufficient credible evidence supports a finding that said officers had weapons in their possession, I FIND insufficient credible evidence to establish that the weapons were openly displayed or that said officers displayed badges in an intimidating manner. While some officers wore identifiable P.B.A. jackets, it is noteworthy that many of the officers were identified by the simple familiarity of their faces in the relatively small geographical area of Union City.

As part of allegation "K," it was contended that the police officers were prohibited from such activities as they engaged in by N.J.A.C. 4:1-21.3, which reads as follows:

> (a) An employee shall not directly or indirectly use or seek to use his or her authority or the influence of his or her position to control or modify the political action of another person; and
>
> (b) . . . nor shall he or she at any other time participate in political activities so as to impair his or her usefulness in the position in which he or she is employed.

However, with respect to this contention, it must be noted that the cited regulation is codified under Civil Service. The Commissioner of Education would gain jurisdiction only if a companion complaint was filed with Civil Service, a motion was filed for consolidation of the two matters with a predominant interest to be determined with the Commissioner pursuant to N.J.A.C. 1:1-14.1 et seq. and the motion was granted. This did not occur, so the undersigned cannot retain jurisdiction over this aspect of the case. Since the matter concerning the distribution of campaign literature has already been dealt with herein (see allegation "I"), I hereby DISMISS allegation "K" on the basis of the foregoing.

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"M" - RESIDENTS FROM NEIGHBORING COMMUNITES WERE EMPLOYED TO SERVE AS POLL WORKERS INSTEAD OF OFFERING SAID POSITIONS TO OTHER RESIDENTS OF THE MUNICIPALITY.

Respondent stipulated that non-residents were employed to serve as election officials, but seeks dismissal of the allegation by reason of the amendment to N.J.S.A. 18A:14-6, which became effective February 19, 1987. The amendment permits the appointment of such officials "from the qualified voters of the State if qualified voters of the district are not available." The statute previously restricted appointment to qualified voters of the school district.

The thrust of the legislative intent is found in the Assembly Education Committee Report (Assembly No. 1836 - L. 1987, c. 44), which states in pertinent part: "Under this bill, if a sufficient number of qualified workers cannot be found within the district, the school board has the option of appointing qualified voters who are residents of other districts."

In construing the legislative intent, the words "cannot be found" connote that a bona fide effort need be made to find qualified voters of the district.

In this regard, Richard D. DeLaRoche, Acting Board Secretary, testified that he sent certified letters to all qualified voters from Democratic and Republican lists secured from the County Board of Elections concerning appointment as election officials. Affirmative responses were less than the number of officials needed, so he tried to make up the deficit by the appointment of residents and non-residents who volunteered solely because of information circulated by "word of mouth." DeLaRoche further testified that no volunteer applicant for appointment was rejected unless the applicant was otherwise employed by the Board of Education.

The significant part of DeLaRoche's testimony was that he made no concerted effort to communicate to the qualified voters in Union City his need for election officials through the local newspapers or any other means excepting his reliance on "word of mouth."

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Consequently, I FIND the legislative intent of amended N.J.S.A. 18A:14-6 to have been violated by the Acting Secretary, and therefore the Board, due to the lack of good faith efforts to secure election officials from the qualified voters in Union City.

"N" - A HOUSING INSPECTOR OF A FEDERALLY FUNDED HOUSING PROJECT POSTED CAMPAIGN SIGNS ABOUT THE HOUSING PROJECT AND ALSO ACTED AS A RUNNER FROM POLL WORKERS TO RESIDENTS.

Witnesses Angel Pena and Anthony Dragona both testified that campaign signs were displayed at "8-2," the federal housing project. Their testimony was not disputed. I therefore FIND allegation "N" to be TRUE.

MAIN CASE DOCUMENTATION

Exhibit C-1 is a certified copy of the results of the school election. The tally for candidates, in the order of total votes received, is as follows:

CANDIDATE	POLL VOTES	ABSENTEE VOTES	TOTAL
Francis D. Mona	4,158	463	4,621
Adelaide Leone	4,086	465	4,551
Carlos A. Perez	3,828	445	4,273
Helga Milan-Vera	3,882	178	4,060
Brian Stack	3,732	179	3,911
Louis F. Marchesani	3,722	183	3,905
Maruchy Perez	604	8	612
Domenick Marchesani	581	5	586
John P. Stack	484	14	498
Carmine Varano	486	7	493
Albert P. Coviello	391	7	398
Edward Mesa	328	3	331

Close scrutiny of C-1 reveals that 28,239 votes were cast for candidates. Assuming that each voter cast three votes for candidates, a total of 9,413 voters voted. The votes for Current Expenses totaled 4,047, and for Capital Outlay 3,804. Since considerably less

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than one-half of the voters who voted for candidates voted for appropriations, it is not unreasonable to believe there was greater interest and/or attention given to who would be seated on the Board of Education than to the appropriations to provide a thorough and efficient education for the children in Union City.

DISCUSSION & DISPOSITION

It is obvious that the primary aim of the Petition of Appeal is to set aside the results of the April 7 election by ordering a new election because the improprieties and statutory violations now proven have thwarted the will of the qualified voters of Union City.

It is equally clear that the petitioners seek a remedy to avoid the reoccurrence of said voting irregularities in order to ensure that future school elections will be free of the appearance of voter intimidation and manipulation.

Although it may be perceived that the undersigned is limited to resolving the allegations contained in the Petition, the view here is that the greater public interest in free, democratic elections cannot be ignored. Accordingly, each one of these matters shall now be addressed:

(A)

With respect to setting aside the election results, I **FIND** that a total of 213 votes is the differential between the low winner (Carlos Perez with 4,273) and the high loser (Milan-Vera with 4,060). See Exhibit C-1. Of this number, however, the testimonial evidence reveals, and I so **FIND**, that at most, only 67 votes were "contested" in the sense that they constituted the bases for the allegations levelled. Thus, 146 votes out of the 213 vote differential are not in dispute.

On the basis of the foregoing, I therefore **CONCLUDE** that the improprieties and statutory violations which were proven did not thwart the will of the eligible voters of

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Union City. I **ADDITIONALLY CONCLUDE** that Francis D. Mona, Adelaide Leone and Carlos Perez are properly seated as members of the Union City Board of Education, each for a term of three years.

Accordingly, I **ORDER** that the Petition of Appeal filed herein with the Commissioner of Education be (and is hereby) **DISMISSED**.

(B)

Concerning the avoidance of voting irregularities in the future, the undersigned is mindful that he cannot prescribe a remedy to ensure free school elections in Union City. Such a solution is not within his jurisdictional authority. However, having found sufficient credible evidence in the record to establish a number of blatant violations of N.J.S.A. 18A:14-1 et seq.,* I **HEREBY STRONGLY RECOMMEND** that the Commissioner of Education provide transcripts of these proceedings to the New Jersey Attorney General for prosecutorial consideration.

In this vein, it is specifically noted that:

(1) The population of Union City is about 70% Hispanic and many of these people emigrated to the United States from such places as Cuba to be free from a politically controlled environment and governmental intimidation;

(2) During the April 7, 1987 voting process, non-resident school employees engaged in electioneering;

(3) Police officers and governmental officials played highly-visible, partisan roles during the election;

---

*A statute which embodies the legislative intent to ensure free elections and provides severe penalties including fines and/or incarceration for its violation.

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(4) The impression is inescapable that employment security in Union City is more dependent on political affiliation, than on the quality performance of one's job responsibilities;

(5) There were allegations put forth during the hearing that Alliance leadership persuaded non-Alliance condidates with similar surnames as C.A.R.E. candidates to file nominating petitions to confuse voters, and that the supporters of said candidates worked in support of Alliance candidates; and

(6) The non-partisanship and credibility of Acting Board Secretary DeLaRoche became tainted by his own testimony that he attended a $1,000 a plate Alliance dinner in 1986 while he was legal counsel to the Board prior to his appointment as Acting Board Secretary; also by credible testimony that a request by C.A.R.E. leadership for a copy of the challenger list was granted with reluctance and delay.

In short, the message delivered by the United States Supreme Court in Broadrick v. Oklahoma, 413 U.S. 601, 37 L. Ed.2d 830, 93 S.Ct. 2098 (1973)** should be given its due:

> Appellants do not question Oklahoma's right to place evenhanded restrictions on the partisan political conduct of state employees. Appellants freely concede that such restrictions serve valid and important state interests, particularly with respect to attracting greater numbers of qualified people by insuring their job security, free from the vicissitudes of the elective process, and by protecting them from "political extortion."

See also, Fitzgerald v. Mathesius, 136 N.J. Super. 93 (Law Div. 1975).

**This case involved an Oklahoma statute similar to N.J.A.C. 4:1-21.3, wherein its enforcement was contested.

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

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

6 May 1987
DATE

WARD R. YOUNG, ALJ

MAY - 8 1987
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:
MAY 11 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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HELGA MILAN-VERA, LOUIS MARCHESANI, BRIAN STACK, EDWARD MESA, AND MARUCHY PEREZ,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF UNION CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board's exceptions, in which Intervenor Perez joins, were timely filed pursuant to N.J.A.C. 1:1-16.4a and b.

While the Board urges approval of the ALJ's recommendation to dismiss the Petition of Appeal, it excepts and objects to portions of the initial decision as summarized below.

The Board objects to the ALJ's failure to mention in the initial decision that an employee of the Hudson County Superintendent of Elections was assigned to the Union City Board of Education on April 7, 1987 as part of a court order and that it was to this person that questions of possible election violation were submitted. It also objects to the fact the ALJ accepted the credibility of the testimony of Witnesses Lyons, Nieves, Nordberg, Dressler and Caputo. (Exceptions 3, 4, 5, 6, 8) It likewise objects to the ALJ's finding that election violations occurred through non-resident voting and the display of campaign literature inside the poll. (Exceptions 7 and 8)

The Board further excepts to:

(1) any reference to the failure to execute affidavits since pertinent law merely says this may be done, not that it must be done;

(2) the conclusion that the Acting Board Secretary's actions to secure Union City residents as election officials rose to the level of lack of good faith effort in violation of N.J.S.A. 18A:14-6;

(3) the finding that a housing inspector of a federally funded housing project posted campaign signs in the project or acted as a runner since the only evidence adduced was that the signs were posted; and

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(4) the statement that at most only 67 votes were contested in the sense that they constituted the bases for petitioners' allegations because under education law merely contesting a vote without more is insufficient, namely that they show the votes were illegally cast for the winning candidate.

In addition to the above, the Board strongly objects to the ALJ's language in the initial decision, ante, used to support his recommendation that the Commissioner provide transcripts of the proceedings to the New Jersey Attorney General for prosecutorial consideration. With respect to this recommendation, the Board rebuts each point noted by the ALJ as follows:

> Item 1 makes a statement that many of these people emigrated to the United States to be free from politically controlled environment and governmental intimidation. There is an implication that Union City is a politically controlled environment and there was governmental intimidation. Such an implication is not justified based upon the record before Judge Young.
>
> Item 2 - It is believed that the only non-resident school employee identified as having been engaged in electioneering was Gerald Caputo, a C.A.R.E. worker.
>
> Item 3 - there is nothing legally or ethically wrong in police officers and governmental officials participating in a non-partisan election for the Union City Board of Education. In fact, testimony established that one of the successful candidates, Frank Mona, was a recently retired Union City police officer for whom other police officers campaigned.
>
> Item 4 - the statement made by Judge Young that "the impression is inescapable that employment security in Union City is more dependent on political affiliation, than on the quality performance of one's job responsibilities" is totally without foundation in the record and should be struck from the Opinion.
>
> Item 5 - the allegation put forth with respect to non-Alliance and non-C.A.R.E. candidates with similar surnames filing nominating petitions to confuse voters and that the supporters of some of those candidates worked in support of Alliance

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> candidates was not admitted into evidence based upon a sustained objection and there is no credible evidence that such allegations have any foundation.
>
> Item 6 - Judge Young's finding that Acting Board Secretary DeLaRoche became tainted by his own testimony that he attended a $1,000 a plate Alliance dinner in 1986 while he was legal counsel to the Board prior to his appointment as Acting Board Secretary is totally unjustified since there was absolutely nothing wrong or impermissible in Mr. DeLaRoche attending such a dinner or making such a contribution. Mr. DeLaRoche stated that he did not attend any political dinners while employed as the Acting Board Secretary. His explanation for the delay in providing Mr. Pena with a copy of the challenger list related to his wife's illness.
> (Board's Exceptions, at p. 4)

Upon review of the record before him, including the Board's exceptions, the Commissioner agrees with the recommended decision of the ALJ dismissing the Petition of Appeal.

Upon consideration of the exceptions, the Commissioner concurs with the Board that N.J.S.A. 19:15-24 prescribes, as opposed to mandates, the execution of an affidavit to a challenged voter. However, it is also noted that the statute requires that

> ***The board shall determine the right of the voter to vote, after making use of, and giving due weight to, the evidence afforded by [the individual's] signature, if any, and *** if any member of the board shall give or assent to give a ballot to any person challenged, without requiring him to take the oath or affirmation herein before prescribed to be made upon such challenge, and the person shall not be qualified and entitled to vote, the member so giving or assenting to give a ballot, shall be deemed to have given to such person a ballot, knowing it to be illegal. *** (emphasis supplied)

Thus, while the responsibility for affidavit swearing is not actually mandatory, it is clear that a heavy burden rests with election workers who do not require such. Therefore, the Commissioner disagrees with the Board that the references objected to should be struck from the initial decision.

Moreover, it is noted that the finding reached by the ALJ that non-residents did, in fact, vote in the Union City election in violation of N.J.S.A. 18A:14-77 was based upon a credibility determination by the ALJ. As articulated by the State Board of Education

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in Paternoster v. Board of Education of Leonia, decided March 7, 1984, the Commissioner has the power to make new or amended findings of fact but due regard must be given to the opportunity of the ALJ to judge the credibility of the witnesses. This is consistent with the New Jersey Supreme Court's express delineation of the standard of review the Commissioner is responsible to execute as articulated in In re Masiello, 25 N.J. 590 (1958) which states that in reaching his determination the Commissioner

> "*** must *** give due weight to the nature of the findings below, although his primary responsibility is to make certain that the terms and policies of the School Laws are being faithfully effectuated." Laba v. Board of Education of Newark, supra, 23 N.J. at page 382. More definitively, this means that the burden of the Commissioner is to weigh the evidence and to make an independent finding of fact on the record presented; and in the process of reaching that finding, he should give due regard to the opportunity of the hearer below to observe the witnesses and to evaluate their credibility.*** (emphasis supplied) (at 606)

Further, in the absence of a transcript being provided by the Board to buttress its exceptions in this matter, the Commissioner has no bases upon which to reverse the ALJ on any finding with the exception of Allegation N which will be discussed at a later point. As stated by the Appellate Division in In the Matter of Raymond Morrison, 216 N.J. Super. 143 (App. Div. 1987), pointing out detailed exceptions/errors "is meaningless, however, if the agency is unable to assess the merits of those exceptions absent a copy of the relevant portions of the transcript. Thus, a meaningful review necessitates that the agency be supplied timely with at least those parts of the transcript." (at 157) The Court was quite clear that the responsibility and cost of providing the necessary transcript "must fall on the party asserting any exceptions which reasonably require agency reference to and review of the relevant parts of the record." (at 158) With respect to this, the Court states:

> ***Morrison should have provided the Commission [agency head] with the portions of the transcript relevant to the exceptions which he filed so that it could have reviewed them. Since he failed to do so, no duty arose for the Commission (or its delegate) to review them before deciding on a course of action regarding the findings and recommendation of the ALJ. (at 159)

Notwithstanding the above, the Commissioner does agree with the Board that a finding with respect to the allegation concerning a housing inspector of a federally funded housing project posting

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campaign signs about the project and also acting as a runner from poll workers to residents should be limited to a finding that campaign signs were posted about the project. This determination is reached based upon the fact the ALJ's summary of the testimony by Witnesses Pena and Dragona is limited to the terse statement that "both testified that campaign signs were displayed at '8-2,' the federal housing project. Their testimony was not disputed." (Initial Decision, ante) Therefore, the ALJ's finding that Allegation N is true is hereby modified.

As to the Board's exceptions to the ALJ's statements in regard to avoidance of voting irregularities in the future, the Commissioner finds nothing provided by the Board to warrant striking them from the initial decision. It is quite clear that the ALJ, based upon hearing the testimony in this matter was extremely concerned with the intrusion of partisan politics into the school election in Union City and other voting improprieties, a concern shared by the Commissioner upon review of the record before him. Therefore, he believes it necessary to provide a copy of this decision, in the absence of transcripts, to the Attorney General and County Prosecutor for prosecutorial consideration. As stated by the Commissioner in In the Matter of the Annual School Election Held in the Township of Dover, a Constituent District of the Toms River Regional School District, 1967 S.L.D. 52, 54, partisan politics have no place in school district elections.

Notwithstanding the fact, petitioners have not succeeded in their burden of proof to compel reversal of the school election (despite the finding of voting irregularities), they have succeeded in evoking grave concerns about the taint of partisan involvement in the election as evidenced by such activities as the $1,000 a plate Alliance dinner attended by the Acting Board Secretary in 1986 when he served as Board counsel and the high visibility of police at the polls, albeit that a candidate was a retired police officer and the ALJ did not find that weapons were openly displayed nor were badges found to be displayed in an intimidating manner. Union City is strongly cautioned to heed the words of the Appellate Division in Botkin v. Westwood, 52 N.J. Super. 416 (App. Div. 1958) which states:

> ***The aim is clear that the local school system shall be run by the citizens through their elected representatives on the board of education and not by political parties and that the elections of board members shall be on the basis of educational issues and not partisan considerations.*** (emphasis supplied) (at 431)

Accordingly, the Commissioner adopts the initial decision as his own except as modified herein.

The Petition of Appeal is consequently dismissed with prejudice.

COMMISSIONER OF EDUCATION

June 15, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7047-86
AGENCY DKT. NO. 324-9/86

BARBARA FAYCIK,
Petitioner,

V.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,
Respondent.

Harold N. Springstead, Esq., for petitioner
(Aronsohn & Springstead, attorneys)

Suzanne Raymond, Esq., for the Board
(Gutfleish & Davis, attorneys)

Record Closed: April 15, 1987 Decided: May 12, 1987

BEFORE JAMES A. OSPENSON, ALJ:

Barbara Faycik, a tenured teacher of physical education employed by the Board of Education of the City of Englewood, Bergen County, alleged action of the Board in refusing to employ her in positions of coach of bowling, volley ball or intramural advisor for 1986-87 school year was arbitrary, capricious and unreasonable, since in the past she

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had fulfilled such positions satisfactorily. The Board admitted petitioner's prior employment generally but denied the Board's refusal to employ petitioner was violative of any tenure or seniority rights to co-curricular coaching positions and contended Board action was proper and within its managerial prerogatives.

The petition of appeal was filed in the Bureau of Controversies and Disputes of the Department of Education on September 19, 1986. The Board's answer was filed there on October 16, 1986. Accordingly, the Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law on October 17, 1986 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

On notice to the parties, the matter was heard in prehearing conference on December 1, 1986 and an order was entered establishing, inter alia, hearing dates beginning March 5, 1987. At issue in the matter generally, it was settled, were the following:

A. Whether petitioner shall have proven by a preponderance of the credible evidence that action of the Board and/or administration in not selecting her for the positions of coach of bowling, volley ball or intramural advisor for the 1986-87 school year was arbitrary, capricious and unreasonable;

B. Whether Board action was within its managerial prerogatives; and

C. If Board action was unlawful, scope of remedy therefor.

Hearing was concluded on March 5, 1987. Thereafter, time for posthearing submissions having elapsed, the record closed.

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FACTS AS ADMITTED

From pleadings and admissions, it was conceded by the parties that petitioner is a tenured teacher of physical education in the employ of respondent for the past twenty years. At various schools in the district she has coached the varsity sports of girls field hockey, girls volley ball, girls basketball and boys bowling. She has directed numerous clubs and intramural sports in the district. During the 1985-86 school year, she was head coach of girls varsity and junior varsity volley ball. For the 1986-87 school year, she applied for the position of coach of bowling, volley ball or intramural advisor. On June 24, 1986, she was advised by letter from the athletic director that she had not been selected for any of those posts. P-14.

EVIDENCE AT HEARING

I

Called by petitioner, Thomas Dypko, age 18 years, is a former Englewood High School student and presently attends Montclair State College. He was manager of the girls volley ball team for the 1984-85 season, in charge of bookkeeping and equipment. He attended practices and games for the fall sport. He said he never saw petitioner lose her temper with coaches, players or officials. In 1985, he said, there were morale problems with the team just as there had been some problems, though less serious, in the prior season. A group of four older players in the 1985 season did not seem to get along well with younger players on the team, who came to petitioner for help. The older players looked down upon the younger players and in some cases insulted them and their play. Team meetings were held by petitioner, but the older players did not seem to want to listen to advice. Their parents would come to practices. Dypko experienced abuse from the four older players, who wanted him to take sides against petitioner. He was

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disparaged as being only a manager. All other eighteen team members, he said, respected petitioner. In the 1985 season, halfway through, petitioner left the team but returned later in the year. Dypko, a co-manager and some five or six students went to the athletic director to say they felt petitioner was not being treated fairly. Later in the year, after petitioner's return, matters appeared to improve and petitioner finished the season. Once, he said, parents who attended practices and games shouted at petitioner and the other players about why a certain girl wasn't playing. Dypko said he has had other coaches in other sports and felt that petitioner was a good coach who strove for good relationships with team players.

Petitioner Barbara Faycik testified she has been employed by the Englewood Board of Education for some twenty years as health and physical education teacher and has, during that time, served in numerous co-curricular coaching positions, which were itemized in her resume. P-1. Until 1984, evaluations of her duties in athletics in both high school and middle school coaching positions were superior. P-2. In the fall of 1985, when she was girls volley ball coach at the high school, several team members became critical of her and some of the younger players, in regard to matter of their skill levels and dress. Players became upset after petitioner tried to speak to their parents; she went to athletic director Tracy in September of that year to report the difficulty. She was told to ignore the complaints. She attempted to call an assistant superintendent but her call was never returned. One parent asked her to talk to the older girls and to stop criticizing her daughter. Two players quit the team. She was also told by principal Frazier about that time that she would not be given the volley ball coaching position unless she refrained from funding raising activities, a stipulation to which petitioner said she agreed. In late September or early October of 1985 she had a conference with the principal in the presence of the athletic director. She was told that a number of parents had complained she was divisive. Though she asked to talk to the complaining parents, she said, she was refused an opportunity to do so. Later, the principal and the athletic director visited her gym in the presence of another high school teacher. Still later, she said, about October 14, 1985, she was asked to resign and did so, in writing. P-3. On advice of a union representative, she retracted the resignation two days later. P-4, P-5.

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She then returned to her coaching position. She stayed away from the older students and finished the season with a .500 won-loss record. The season ended November 4, 1985 and was followed by post season games.

She received an athletic activity evaluation of December 5, 1985 that was critical in areas of her coaching competencies. P-6. In three areas, demonstrating sportsmanship, interest in athletes in off-season activities and knowledgeability about and responsibility for equipment, her performance was rated unacceptable. In her December 19, 1985 reply to the December 5 evaluation, petitioner registered her objections and comments.

Petitioner said she had applied for positions of intramural advisor at the middle school in early fall 1985. Although her principal approved it and passed it to the athletic director, she said, she ultimately was informed by an acting assistant superintendent that he had withdrawn his recommendation to the Board. P-7. The matter was grieved by petitioner.

Ultimately, petitioner said, she was appointed by her principal on January 2, 1986 to the position of bowling advisor for the 1986 bowling season. P-12.

In May 1986, coaching and advisorship positions for the 1986-87 school year were posted. P-19. On May 12, 1986, petitioner applied in writing for the position of women's intramural advisor at the middle school. P-20. On June 24, 1986, she was informed by the athletic director that she had not been selected for the positions of either bowling, volley ball or intramural advisor for the ensuing school year. P-14. On July 16, 1986, a memorandum from the athletic director to petitioner's principal was issued detailing reasons for not hiring her in any coaching positions:

1. Gets too involved in students' personal problems.

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2. Talks to one student about another and one group about another - too upsetting for players. This is not her role as a coach.

3. All of this talking around has caused students to dissolve friendships.

4. I met twice with Ms. Faycik and the principal. An attempt was made to get Ms. Faycik to cease and desist with talk, gossip, hearsay, etc. We tried to explain to her that her role as a coach was to teach volleyball skills, make being on the team a pleasant experience and instill school spirit. She obviously continued right on her old ways.

5. The problems with Ms. Faycik as a coach have taken an enormous amount of my time. I am not able to continue giving this time to Ms. Faycik being involved in any other coaching positions.

6. Complaints have come in about fund raising irregularities. Accounts were opened during fund raisers not through the finance officer of the school. Parents have complained that a fair policy was not used to select athletes to go to volleyball camp during the 1985 summer.

General teacher observations of petitioner's conduct of her teaching classes in March 1986 and November 1986 were satisfactory and indicated no fundamental difficulty. P-15 and P-16.

Petitioner has received letter commendations over the years for her general and special contributions as teacher and coach. P-23 is a series of eleven such commendatory letters.

Petitioner rested.

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II

Called by the Board, Russell Major, a Board member for the past twelve years, testified he was present at a meeting of the Board on October 24, 1985. On the Board's agenda then was a proposed resolution appointing petitioner to the position of middle school intramural advisor for 1985-86. Because he had received parental and student complaints concerning respondent's performance as girls' volley ball coach, he felt consideration of the resolution then was not timely and it was ultimately withdrawn by administration before Board vote. Everything he had heard about petitioner's performance, he said, was negative.

Called by the Board, Madeline Tracy, presently athletic director and director of family life and physical education, has been employed by the Board for the past twenty-five years and as athletic director for the past four years. Among her duties are recommendation to coaching positions, hiring referees and umpires, busing of players, league meetings, budgeting and scheduling. Englewood is a member of the NJSIAA. It is her position to evaluate and supervise all teachers in her department and coaches in co-curricular positions. She holds a supervisor/principal's administrative services certificate. In the process of making recommendations for coaching positions to the Board, she said, the chain begins with a posting of availability of positions in May for four weeks, during which applications are accepted. She reviews the applications and makes recommendations to the high school principals or to the middle schools. Those officers reject or deny and then pass their recommendations to the superintendent. She interviews all applicants. Her position in the chain is subordinate to the principal, and the superintendent can, of course, overrule recommendations of the principals, just as can the Board overrule recommendations of the superintendent. The process is to look for experience and good past performance.

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In the fall of 1985, she said, she received complaints about petitioner as girls volley ball coach from team members, who said there were problems and that petitioner seemed more concerned about personal problems than team problems. Petitioner, it was said, would repeat gossip. Parents began calling Tracy to complain. The effect on team morale was divisive. Tracy met with petitioner and the principal. Petitioner was told she was not a child psychologist and to stay out of students' lives and stick to playing the game. The entire process, Tracy said, fielding complaints from various sources, was very time-consuming. The situation did not appear immediately to improve. Complaints still were registered. She met again with petitioner and the principal in early October 1985. She repeated to petitioner the same cautions. Petitioner stormed out of the meeting and returned with a written resignation. P-3. Petitioner was very agitated at the time. Tracy denied ever having asked petitioner to resign and never threatened her if she did not resign. An interim phys-ed teacher was called to take over as coach. That lasted a week until petitioner in writing retracted her resignation and was put back as coach about October 23 or 24, 1985. She completed the rest of the season. Tracy discerned no improvement, however, because complaints continued about petitioner's conduct and attitude. Tracy kept a log of parental complaints during October 1985 and instances of her visits to practices and games. R-1. Shown P-8, Tracy's letter to principal Frazier, she said it was composed about November 8, 1985 after the volley ball season, and detailed Tracy's reasons for not recommending petitioner's hire in any coaching positions. Largely, Tracy said, her objections were because of the undue time consumed in dealing with problems and because she felt petitioner did not work well with the high school age group. In fact, she said, she later recommended petitioner for the intramural advisor position at the middle school. She later learned the Board did not act on that recommendation. Tracy added she had evaluated petitioner as a teacher and found her teaching performance adequate. P-15, P-16 and P-17.

Another teacher, Maureen Fister, was appointed to the position of girls volley ball coach for the 1986-87 school year. Her performance was satisfactory, Tracy said; there were no morale problems with the team members.

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Tracy said she did not recommend petitioner for bowling coach because the position was unpaid and Tracy had philosophical concerns about unpaid positions. Concerning a meeting with the principal and petitioner in August of 1985 about fund raising, she said the principal felt such activities interfered with school time.

DISCUSSION

I

Paragraph eight of the petition of appeal alleged that Board refusal to employ petitioner as a coach of bowling, volley ball or intramural advisor was arbitrary, capricious and unreasonable and, further, that Board refusal violated petitioner's seniority rights to the position. Admittedly, petitioner is a tenured teacher of physical education and health. But normally, absent requirement for a certificate other than that of a teacher, no tenure status (and thus no seniority) accrues to co-curricular coaching positions. They are renewed or discontinued at the sound discretion of a board. Dignan v. Bd. of Ed., Rumson-Fairhaven Regional High School, 1971 S.L.D. 336, 343; aff'd State Board of Education, 1974 S.L.D. 1376; aff'd, Appellate Division, Superior Court, 1975 S.L.D. 1083-4; Furlong v. Bd. of Ed. of Kearny, 1980 S.L.D. 1426; aff'd State Board of Education, 1981 S.L.D. — (March 4, 1981).

Petitioner has conceded the qualifying distinction. [Petitioner's brief at 11]. Accordingly, her claim for relief grounded in tenure or seniority flowing from service in any coaching position is DISMISSED.

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II

Paragraphs five and eight of the petition alleged Board refusal to appoint petitioner to any other coaching position for the 1985-86 school year was arbitrary and unlawful. In her brief (at 9-10), petitioner argued the Board retired into executive or closed session on October 24, 1985 to deal with her application for intramural advisor, without notice to her, contrary to N.J.S.A. 10:4-12(b)(8). The result of the closed session discussion was withdrawal of administrative recommendation, and rejection. Petitioner was formally notified in writing of the action on October 28, 1985. P-7. The Board admitted lack of notice to petitioner. (Board memorandum, March 10, 1987 at 2).

The Board argued petitioner's claims to co-curricular positions for the 1985-86 school year were barred by the doctrine of laches and the bar of the limiting period of N.J.A.C. 6:24-1.2, as properly and timely raised in the Board's third and fourth separate defenses to the petition of appeal. N.J.A.C. 6:24-1.2(b) provides:

> The petitioner shall file a petition no later than the 90th day from 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.

I CONCLUDE that while 1985 Board action in executive or closed session to discuss petitioner's proposed appointment to a co-curricular position was improper and presumptively voidable for want of prior written notice earlier to her, under the Open Public Meetings Act,[1] the action of the Board in permitting administrative withdrawal of her recommendation and in appointing another to the position, which it thereafter proceeded to do, began the running of the regulatory 90-day limiting period,[2] during which petitioner took no action in protest. To that extent, therefore, her present petition may not include any claims as in paragraph 5 of the petition of appeal arising from Board

1 See N.J.S.A. 10:4-12(b)(8); and Rice v. Union Cty. Reg. High School Bd. of Ed., 155 N.J. Super. 64, 73 (App. Div. 1977).

2 It also triggered the 45-day limiting period of N.J.S.A. 10:4-15.

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action in the 1985-86 school year and must be limited, if at all, to claims registered in paragraph 6 of the petition of appeal for the 1986-87 school year. While petitioner's earlier claims are thus barred, the Board is ADMONISHED, nevertheless, to execute carefully its duties and obligations to personnel in future before retiring into executive or closed session under N.J.S.A. 10:4-12(b)(8). Cf. Voll v. Bd. of Ed. Village of Ridgewood, 1986 S.L.D. -- (April 14, 1986; slip op. at 54-58).

III

Paragraph 6 of the petition of appeal alleged that for 1986-87 school year, petitioner applied for the positions of coach of bowling, volley ball or intramural advisor. According to P-19, the co-curricular positions were posted May 2, 1986 and applications were closed May 16, 1986. Petitioner's application in P-20 appeared, however, to be directed only to the position of girls intramural advisor at the middle school. By letter of June 24, 1986, the athletic director informed petitioner she was not selected, presumably at the administrative level, for any of the three positions of bowling, volley ball or intramural advisor. P-14. The reasons advanced by the athletic director were the subject of a memorandum to the principal in P-8. Ultimately, another female teacher was appointed volley ball coach for the 1986-87 school year; a male teacher was appointed as bowling coach; but the position of intramural advisor was not filled since the position for 1986-87 was abolished. Given the proposition that tenure in co-curricular positions does not attach, the question results whether Board action in declining to appoint petitioner for any of the three coaching positions was arbitrary, capricious and unreasonable under the circumstances, or, instead, whether, as contended by the Board, the action administratively and as ratified by the Board was within the Board's managerial prerogative. Clearly, the burden of establishing the arbitrariness of Board action is upon petitioner, since Board action is clothed with a presumption of regularity, propriety and validity. Cf. Dignan v. Bd. of Ed., Rumson-Fairhaven Regional High School, supra, 1975

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1975 S.L.D. at 1084; and Thomas v. Bd. of Ed. Morris Township, 89 N.J. Super. 327, 332 (App. Div. 1965); aff'd, 46 N.J. 561 (1966); and see Furlong, supra, 1980 S.L.D. at 1424:

> The Board is under no legal obligation to renew petitioner as coach. When a board of education acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable. [Id. at 1424].

It is clear that petitioner's performance in a coaching position in a previous year, despite her long record of otherwise good performance in years before the prior year, was responsible for generation of broad dissatisfaction and upset from students, administration and parents. See P-8 and R-1. Having heard the testimony and reviewed all documents in evidence, I **CONCLUDE** that petitioner has failed to carry her burdens of proof and persuasion that Board action here was arbitrary. The testimony, even including that of petitioner, when viewed as a whole, depicted difficulties she experienced in fulfilling coaching responsibilities during the 1985-86 school year. The difficulties prompted student upset, parental complaint and administrative dissatisfaction with her performance at the high school. It is not the function of an administrative law judge initially nor the Commissioner ultimately to determine in a contested case what an appropriate administrative assignment should be, nor whether the Board's choice of another and failure to choose petitioner in and of itself was proper. It is enough to say, as I do, the evidence clearly showed administrative and Board decisions were well within limits of managerial prerogative and, therefore, safe from petitioner's challenge.

CONCLUSION

Based on the foregoing, therefore, I **CONCLUDE** that in declining to employ petitioner in any co-curricular coaching position for the 1986-87 school year, the Board did not act arbitrarily, capriciously or unreasonably. Its action is hereby **AFFIRMED**. The petition of appeal is **DISMISSED**.

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

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

May 13, 1987
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

MAY 14 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

May 15, 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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BARBARA FAYCIK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

Petitioner's exceptions to the initial decision and the Board's reply exceptions thereto have been filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner argues by way of her exceptions that the factual conclusions of the ALJ were contrary to the record. While petitioner does not deny she had problems with several girls who were on the volleyball team, she maintains that the only remedy offered to her by the athletic director, upon seeking her advice, was to put the girls off the team.

Rather than accept such advice, petitioner claims she made attempts to iron out the difficulties these students were having with other teammates and to enlist help from their parents. Petitioner, however, admits that her efforts in this regard were unsuccessful and states that:

> Instead the parents complained to the administrators and the students complained to Russell Major, an authoritative member of the Board. Thus, it was not the Petitioner's difficulties which prompted student upset, parental complaint and administrator's dissatisfaction - it was these things which caused difficulties for the Petitioner.
>
> (Petitioner's Exceptions, at p. 2)

Consequently, petitioner complains that it was not her actions upon which the school administrators relied in judging her performance, but rather reliance was placed upon the mere accusations made against her by certain students and parents.

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Petitioner also maintains that the ALJ ignored the fact that Russell Major, a Board member, was instrumental in having a proposed resolution appointing petitioner to the position of middle school intramural advisor for 1985-86 removed from the Board agenda. This meeting in which the Board was to take such action occurred on October 24, 1985 and petitioner points out that according to Mr. Major's testimony, he persuaded the Board to remove the resolution in question from the agenda because he had received student and parental complaints concerning petitioner's performance as girls' volleyball coach. Petitioner contends that Mr. Major's action at that time was in violation of the Open Public Meetings Act (N.J.S.A. 10:4-12b(8)) and caused the resolution to be tabled. Petitioner further contends that Mr. Major stated that she would never be given future consideration for Board appointment to any extracurricular assignment while he was a Board member.

Petitioner argues that the position taken by Mr. Major as a member of the Board is arbitrary, capricious and unreasonable especially in view of the fact that her past years' performance as to her teaching ability in directing athletics has been adjudged to be excellent by her superiors.

Finally, petitioner asserts that the ALJ findings and conclusions do not take into account the testimony of a disinterested witness, Thomas Dypko. Mr. Dypko was manager of the girls' volleyball team for the 1984-85 season and his testimony establishes that petitioner had the respect of all eighteen members of the team except for the four older girls in question. He further testified that the parents of these girls attended volleyball practice and shouted abuse at petitioner.

In conclusion, petitioner argues that the record of this matter establishes that she has carried her burden of proving that the Board's actions were arbitrary, capricious and unreasonable in not selecting her for the positions of coach of bowling, volleyball or intramural advisor for the 1986-87 school year.

In reply to petitioner's exceptions to the initial decision, the Board states that:

> Although the petitioner has attempted to place responsibility for the volleyball team's problems with the team members rather than the team coach, the bottom line is that the petitioner was unable to handle the team. At the hearing Ms. Faycik's testimony corrorborated (sic) the fact that there were numerous problems and discord with respect to the volleyball team while she coached. Thus, even if we were to assume arguendo, that the team members' behavior rather than Ms. Faycik's own actions caused the problem, the critical point remains that she was unable to control the situation and serve as a competent coach. One of

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> the prerequisites of coaching is the ability to control and deal with individual athletes who create problems for the team.
> (Board's Reply Exceptions, at p. 1)

In support of its reasoning the Board points out that, contrary to the arguments raised by petitioner in her exceptions, the testimony of the athletic director establishes that on October 4 and 14, 1985 she met with petitioner to discuss the problems petitioner was having with the girls' volleyball team. On those occasions petitioner was offered constructive suggestions regarding the team. The athletic director testified that on a subsequent occasion she met with petitioner and offered to hire a junior varsity coach to help alleviate some of the burden petitioner was experiencing and that she also advised petitioner to remove any of the girls from the volleyball team who continued to cause her a problem.

Additionally, the Board maintains that petitioner in her exceptions attempts to create a false impression that Mr. Major is a "one-man school board." The Board rejects petitioner's characterization in this regard and points out that the primary reason not to appoint petitioner as intramural advisor during the 1986-87 school year was due to her poor evaluation as volleyball coach for the 1985 fall season. In the Board's view, Mr. Major's discussion with two members of the volleyball team only served to reinforce what it already knew - that petitioner was not the suitable person to serve as coach or athletic advisor.

Finally, the Board, in reply to petitioner's exceptions regarding the weight to be given to Mr. Dypko's testimony and the argument made with regard to the Board's violation of the Open Public Meetings Act, comments as follows:

> The petitioner has objected to the ALJ's determination not to take into account the testimony of Thomas Dypko. It is axiomatic that it is up to the factfinder to determine how much weight, if any, to impute to the testimony of a particular witness.
>
> The ALJ took cognizance of the fact that Mr. Dypko testified at the hearing but afforded his testimony little weight. Mr. Dypko did state in crossexamination that he had maintained his friendship with the petitioner after his graduation and that his mother was also a friend of the petitioner. Moreover, Mr. Dypko possesses little expertise as a judge of coaching, particularly in comparison with Ms. Tracy, the Athletic Director, and a physical education teacher in the district for twenty-five years.

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> Finally, the issue of an Open Public Meetings Act violation was laid to rest in the ALJ's decision, wherein he held that any allegations of irregularity were time-barred by the regulatory 90 day limiting period and the 45 day limiting period of N.J.S.A. 10:4-15.
>
> (Reply Exceptions, at p. 2)

In the Commissioner's judgment, petitioner's exceptions to those findings and conclusions in the initial decision are without merit. It is clear that petitioner refused to accept the assistance or advice offered to her by the athletic director. She therefore had to assume the responsibility for the independent course of action she decided upon in seeking to resolve the problems she was having with four girls on the volleyball team. Unfortunately, as the record reveals, petitioner's efforts to attempt to resolve this matter through further consultation with the students in question and their parents further complicated matters and the relationship between the students and parents in question became contentious and further impaired her ability to perform her teaching responsibilities.

The Commissioner finds no infirmity in the fact that the affected students or parents complained to a Board member or that he related their complaint to the Board at a time when the question of petitioner's reemployment for other extracurricular positions was under consideration.

Equally without merit, in the Commissioner's view, is petitioner's contention that Mr. Major's testimony or the action taken by him with regard to her failure to obtain continued employment in a cocurricular coaching position are attributable to the entire Englewood Board of Education. The Board member in question is one member of a seven member Board. In this instance, there is no proof that the remaining Board members shared those views espoused by the Board member in question except for the fact that a majority of the Board concluded that petitioner's 1985-86 evaluation as volleyball coach was unsatisfactory.

Finally, the Commissioner finds and determines that the ALJ properly accorded more weight to the testimony of the athletic director's negative assessment of petitioner's performance rather than accept the testimony of Mr. Dypko, which supported petitioner's contention that her performance as coach of the 1985-86 volleyball team was satisfactory.

The athletic director is the qualified person assigned by the Board to observe and evaluate petitioner's performance and the record indicates that this assignment was in the area of the athletic director's expertise. To the contrary, Mr. Dypko was not assigned by the Board to evaluate petitioner's performance.

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Accordingly, the Commissioner concurs with those findings and conclusions in the initial decision and hereby adopts them as his own for the reasons set forth above.

The instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

June 19, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 115-87
AGENCY DKT. NO. 402-12/86

ANASTASIA MICHALS,

Petitioner

v.

BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOLS,

Respondent

Reba Carmel, Esq., for petitioner
(Oxfeld, Cohen & Blunda, attorneys)

John A. Moore, Esq., for respondent
(Moore & Kealy, attorneys)

Record Closed: May 11, 1987 Decided: May 12, 1987

BEFORE WARD R. YOUNG, ALJ:

Petitioner, a non-tenured vice-principal employed by the Board of Education of the Hudson County Area Vocational-Technical Schools (Board) for the 1981-82 school year, seeks reinstatement in that position. She alleged the Board failed to comply with terms incorporated in its negotiated agreements; the Board violated N.J.S.A. 18A:27-10 by its failure to provide petitioner with timely notice of employment non-renewal; the Board failed to respond to a request for non-reemployment reasons requested on her behalf by counsel on October 15, 1986; and the Board's failure to reemploy petitioner was due to sex discrimination.

The Board denies the allegations and seeks dismissal of the petition.

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Petitioner withdrew the allegation of sex discrimination.

The Petition of Appeal was filed with the Commissioner of Education on December 4, 1986, and transmitted to the Office of Administrative Law as a contested case on January 7, 1986 pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on February 26, 1987 and the matter proceeded to plenary hearing on May 11, 1987 at the Office of Administrative Law in Newark. The record was closed at the termination of hearing on that date.

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

1. Petitioner served the Board in the position of vice-principal for the 1981-82 school year.

2. Petitioner was granted a maternity leave of absence for the 1982-83 and 1983-84 school years.

3. No reasons for non-renewal were requested by petitioner until made by counsel on her behalf on October 15, 1986.

EVIDENTIARY DOCUMENTS

A letter dated March 1, 1984 from petitioner to the Superintendent requested an extended leave of absence for the 1984-85 school year due to the anticipation of the birth of her second child. Counsel for the Board represented that no such letter could be located in the files at the Superintendent/Board's office. No response was received.

A letter dated August 27, 1986 from the Superintendent to petitioner responded to petitioner's letter intent to return to her position for the 1986-87 school year indicated petitioner's leave of absence terminated on June 30, 1984, and that she was no longer considered an employee of the district.

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TESTIMONIAL EVIDENCE

Petitioner was the only witness. She testified that in the absence of a response to her letter request for extended leave for the 1984-85 school year she assumed her request was granted.

Petitioner further testified she received a telephone call from the Superintendent's secretary in June 1985 requesting her resignation. After receiving the call, petitioner proceeded to the high school and dictated a letter to the Superintendent, typed by her former secretary, and hand-delivered said letter to the Superintendent's secretary indicating her intention to return to her position for the 1985-86 school year. Although she testified she retained a copy of the letter, she has not been able to locate it. The Board's counsel represented no such letter could be found at the Superintendent/Board's office. No response was received.

Another telephone call from the Superintendent's secretary was received in the Spring of 1986, she said, concerning petitioner's status with the Teachers' Pension and Annuity Fund. She then wrote to the Superintendent indicating her intention to return to her position for the 1986-87 school year. The Superintendent's response of August 27, 1986 has been indicated, ante.

FINDINGS OF FACT

1. An initial cause of action occurred in June 1985, when petitioner's employment was not renewed for the 1985-86 school year.

2. A subsequent cause of action occurred when petitioner's employment was not renewed for the 1986-87 school year, and she was so noticed by the Superintendent in his letter to her under date of August 27, 1986. See P-2.

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3. Petitioner did not appeal employment non-renewal for the 1985-86 school year.

4. Petitioner filed an appeal concerning her employment non-renewal for the 1986-87 school year on December 4, 1986.

5. The 90-day period for filing an appeal on the second cause of action, pursuant to N.J.A.C. 6:24-1.2, expired on November 25, 1986. See New Jersey Lawyers Diary and Manual (1986).

CONCLUSIONS OF LAW

The critical cause of action herein occurred in June 1985 when petitioner's employment was not renewed for the 1985-86 school year, and yet petitioner did not file an appeal until December 4, 1986. It is also noted that the second cause of action occurred more than 90 days prior to the filing of her appeal.

N.J.A.C. 6:24-1.2(b)states:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested contested case hearing.

Petitioner in the instant matter offered no reasons for the filing delay. Decisions of the Commissioner and the Courts support the prevailing strict application of N.J.A.C. 6:24-1.2(b). Riely v. Hunterdon Central High Board of Education, 173 N.J. Super. 109 (App. Div. 1980); Bernards Twp. Bd. of Ed. v. Bernards Twp Ed. Ass'n., 79 N.J. 311 (1979); and Stolte v. Bd. of Ed. of the Twp of Willingboro, 1980 S.L.D. 270.

I **FIND** the Petition of Appeal to be untimely filed pursuant to N.J.A.C. 6:24-1.2(b), and **CONCLUDE**, therefore, that this Petition shall be and is hereby **DISMISSED**, sua sponte.

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

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

11 May 1987
DATE

Ward R. Young
WARD R. YOUNG, ALJ

MAY 14 1987
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

MAY 15 1987
DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

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ANASTASIA MICHALS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOLS, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter including the initial decision rendered by the Office of the Administrative Law has been reviewed by the Commissioner of Education.

No timely exceptions to the initial decision have been filed by the parties pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

Upon review of the findings and conclusions set forth in he initial decision, the Commissioner concludes that the ALJ properly recommended that the instant Petition of Appeal be dismissed by virtue of petitioner's failure to file a timely appeal within the 90 day period in compliance with the provisions of N.J.S.A. 6:24-1.2(b) as contemplated by the court in Riely, supra, and Bernards Township, supra.

Accordingly, the Commissioner adopts the recommended findings and conclusions set forth in the initial decision as his own.

The instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

June 19, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5731-86
AGENCY DKT. NO. 243-7/86

THERESA PALLARINO,
Petitioner,
v.
LIVINGSTON TOWNSHIP BOARD OF EDUCATION,
Respondent.

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

James S. Rothschild, Jr., Esq., for respondent (Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Record Closed: March 26, 1987 Decided: May 11, 1987

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

Theresa Pallarino (petitioner) alleges she had acquired a tenure status as a teacher in the employ of the Livingston Township Board of Education (Board) when, on April 18, 1986, it determined to terminate her contract of employment while continuing to pay her through June 30, 1986. Petitioner claims the Board violated her statutory tenure rights and seeks immediate reinstatement as a teacher together with back pay and the crediting of all benefits and emoluments otherwise withheld from her. The Board denies petitioner acquired the legislative status of tenure in its employ and contends its action on April 18, 1986 to terminate her contract of employment was proper in view of her nontenure status. After the Commissioner transferred the matter to the Office of Administrative Law on September 2, 1986 a prehearing conference was conducted October

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7, 1986 at which the issues of the matter were agreed upon. A hearing was conducted on December 22, 1986 at the Office of Administrative Law, Newark. At the opening of the hearing the Board's motion for summary decision was denied; relevant and material facts were in dispute. Thereafter and upon motion made by the Board, which was opposed by petitioner, the hearing was reconvened March 6, 1987 to "clarify" testimony heard December 22, 1986 from its assistant director of special services. The record closed March 26, 1987 upon receipt of petitioner's letter memorandum in lieu of formal brief. Stenographic transcripts of testimony heard December 22, 1986 and March 26, 1987 are part of this record.

ISSUES

The parties agree petitioner was employed by the Board as a supplemental teacher between September 8 through September 28, 1982. The parties further agree petitioner at all times relevant has been in possession of an instructional certificate with elementary, nursery school and teacher of the handicapped endorsements. The parties agree petitioner was employed by the Board from September 29, 1982 through June 30, 1983 but the nature of her employment during that time is in sharp dispute. The Board claims petitioner was then employed by it as an aide in its resource room, while petitioner contends she was employed as a supplemental teacher during that time. The parties agree petitioner was employed as a teaching staff member through the whole of the 1983-84 and 1984-85 academic years. The parties further agree petitioner was employed by the Board as a teaching staff member from September 1985, the beginning of the 1985-86 academic year, through April 18, 1986, when the Board acted to terminate her employment.

Accordingly, the issues agreed upon at the prehearing conference are these:

1. Whether petitioner's services in 1982-83 in the Board's [employ] is creditable towards tenure as a teaching staff member.

2. If petitioner's service in 1982-83 is creditable towards tenure, has she acquired a tenure status in the Board's employ as a teaching staff member under N.J.S.A. 18A:28-5.

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3. If petitioner acquired tenure prior to April 18, 1986, is her termination of employment on that date in violation of that status and, if so, to what relief is she entitled

SUMMARY OF EVIDENCE REGARDING PETITIONER'S SERVICE BETWEEN SEPTEMBER 29, 1982 AND JUNE 30, 1983

Dr. Leonard Bornstein, now retired, was the Board's director of pupil personnel services between 1980 and June 1986. He offered petitioner employment with the Board, with the approval of the superintendent, during the 1982 summer as a supplemental teacher for four hours a day, five days a week. It is important to note that Dr. Bornstein, who was called as a witness by the Board, testified that the Board approved the initial hiring of petitioner as a supplemental teacher whereupon Board counsel immediately stated on the record "* * * Dr. Bornstein is wrong." (1T-120). Board counsel explained that because he, Board counsel, was not successful in locating a copy of a Board adopted employing resolution he, counsel, concluded that the Board "* * * only approved full time people." (1T-121).

Regardless, petitioner was assigned as a supplemental teacher to teach two hours a day at the Board's Riker Hill Elementary School, grades kindergarten through six, and two hours a day at its Mount Pleasant Junior High School. This assignment continued through September 28, 1982. During the course of this assignment, petitioner taught eight students at each school. At Riker Hill Elementary petitioner taught pupils in grades one through six basic learning skills in reading, mathematics, language arts, spelling, and social studies. Petitioner taught the pupils at Riker Hill in that school's resource room. The resource room teacher was and is Ruth Sandler. Ms. Sandler did not work with pupils assigned petitioner, nor did petitioner work with pupils assigned Ms. Sandler. At the Mount Pleasant School petitioner taught eight pupils at the seventh grade level in mathematics. Petitioner testified at that each assigned school she prepared lesson plans, recorded grades in her grade book, selected materials, prepared and administered examinations to her pupils, and "did everything a teacher would do for that month." (1T-20).

Some time during the middle of September, Dr. Bornstein told her she was needed full time at the Riker Hill school. Dr. Bornstein explained at hearing that at or

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about that time the Riker Hill child study team identified to him a need for assistance in the Riker Hill resource room due to an excess number of pupils assigned there. According to Dr. Bornstein the maximum number of pupils to be assigned a resource room was 20. The resource room at that time had a total of 30 pupils assigned. According to petitioner Dr. Bornstein advised while he needed her full time at Riker Hill, the dilemma he faced was the fact she was limited to four hours a day at $10 per hour as a supplemental teacher. Dr. Bornstein explained that he could not assign her full time at the Riker Hill school and compensate her $10 per hour. Consequently, petitioner testified that Dr. Bornstein advised her she would have to be called an "aide" in order to be assigned full time at Riker Hill. According to petitioner, she immediately advised Dr. Bornstein she did not want an "aides" job nor did she want less money. He then advised her to think about it.

According to Dr. Bornstein, when the Riker Hill child study team identified to him the need for assistance in the Riker Hill resource room because of the excess number of pupils assigned, he had to address that need. He explained that he saw two solutions, one of which he rejected out of hand. That solution, the creation of another resource room for the excess pupils, was rejected because of an insufficient number of pupils to create another resource room and the absence of a room in the Riker Hill facility. The second solution, having petitioner remain full time at Riker Hill while designating her an "aide", was embraced by Dr. Bornstein in order to assist the extra pupils in the resource room. Dr. Bornstein explained that he could not "* * * take a four hour supplemental instructor and extend [that person's job] as another teacher. That job [a full time supplemental instructor] doesn't exist." (1T-119). Consequently, Dr. Bornstein went about the business of creating an "aides" job to solve the need identified to him by the Riker Hill child study team. There is no evidence to reveal the steps taken by Dr. Bornstein to create the designation aide which he assigned petitioner.

Petitioner thought about the offer overnight and decided, and so advised Dr. Bornstein, she did not want to be called an aide at that stage of her career, particularly with having earned three endorsements on an instructional certificate. Petitioner testified that Dr. Bornstein then pleaded with her to agree to be designated an aide for him, that he really needed her, that she should do him a favor, and that he would not forget the favor if she accepted the offer. Petitioner testified she then felt that she was being threatened by Dr. Bornstein. According to petitioner, she had the view that when the "boss" asks you to do something for him you, the offeree, do not build good will by refusing.

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Dr. Bornstein testified that when he asked petitioner to be a full time aide at Riker Hill, he advised that she could "do something for the system in a beneficial manner, which if he worked out well, it would lead to a job or at least being considered for a job." (1T-123-24).

Dr. Bornstein admits not having specifically discussed with petitioner or Ms. Sandler the duties he expected petitioner to perform as an aide after September 28, 1982. He explained that he did discuss the role of aides at meetings with special education staff and aides at various meetings throughout the year. Nevertheless, without his "records" of such meetings Dr. Bornstein could not identify when such meetings were to have occurred or the number of such meetings which were to have occurred at which he addressed the issue of aides with special education staff and special education aides.

Petitioner denies being advised by Dr. Bornstein that if she did a good job as a teacher's aide that she might get a full time teaching job. Nevertheless, she accepted what she considered to be Dr. Bornstein's request, or perceived threat, to be an aide at the Riker Hill Elementary School. While Dr. Bornstein testified he told petitioner she was to be an aide to the resource room teacher, petitioner testified she did not ask nor was she told to whom she would be an aide.

During the course of employment between September 8 through September 28, already agreed upon by the parties to be employment as a supplemental teacher, petitioner prepared weekly pay vouchers for the time spent at Riker Hill and the Mount Pleasant Junior High School. Petitioner also identified on each voucher the pupils with whom she worked at each school. On September 14, 1982 she submitted a pay voucher for the preceding week at Riker Hill for a total of 12 hours worked at $10 per hour for a claim of $120. On this voucher, petitioner identified herself as a supplemental teacher and as having worked with eight pupils. (J-1, p. 1). On the same date, September 14, 1982, petitioner submitted a pay voucher for work as a supplemental teacher performed at the Mount Pleasant Junior High School. On this voucher (J-1, at p. 2)[1] petitioner claims a total of 11 hours worked between September 7 and September 15, 1982 at $10 per hour for a total claim of $160. Petitioner also identifies on this voucher eight pupils with whom she worked. Petitioner submitted two more vouchers for the period ending September 30, 1982 for work performed at each school as a supplemental teacher with the very same pupils. (J-1, at pp. 3-4).

[1]Petitioner apparently performed as a supplemental teacher at Mount Pleasant on September 7, 1982 which is the first date on this voucher.

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Petitioner testified that following September 28, 1982 the duties she performed with pupils at Riker Hill did not at all change in any way, shape, or form. She had the same eight students at Riker Hill between October 1982 through June 1983 that she had in September 1982 but, in addition, she had four more pupils assigned her after September 28, 1982, and one more in March 1983, for a total 13 pupils at Riker Hill. (P-2) She no longer performed any teaching at the Mount Pleasant Junior High School. Petitioner testified that between October 1982 through June 1983 she continued to prepare lesson plans, prepare and administer examinations, and that she had a full time teaching schedule; the physical arrangement of the room did not change, Ms. Sandler never supervised her, she attended faculty meetings and the school's open house for parents; she attended approximately seven to eight parent-teacher conferences and she taught her assigned 12 and then 13 pupils all learning skills, including reading skills, mathematic skills, spelling, language arts, and social studies. Ms. Sandler, it is noted, attended parent conferences with petitioner.

Petitioner explains that with respect to grades she and Ms. Sandler would discuss grades at the end of each marking period to be assigned pupils with whom petitioner worked and, upon the agreement of Ms. Sandler, the grade recommended by petitioner would be the pupil's grade for that marking period. She and Ms. Sandler would discuss lesson plans for the pupils but that it was she, petitioner, who finally prepared the lesson plans. Petitioner had the same students at the end of the 1982-83 academic year that she started with in September 1982.

Petitioner testified that to her knowledge the Board never ratified nor was it involved or even aware of the change in her designation from supplemental teacher to that of an "aide"; that she was never given a job description as an "aide"; that Dr. Bornstein at no time advised her that subsequent to her assignment as a supplemental teacher her duties would change; and, that subsequent to September 28, 1982 her duties did not change in any respect. Rather, petitioner testified that her duties increased because the number of pupils assigned her increased from eight to 12, and then 13.

It is noted that subsequent to September 28, 1982 petitioner continued to submit pay vouchers for hours worked each day, and continued to identify each pupil with whom she worked. However, these vouchers (J-1, pp. 5-22) refer to petitioner as a resource room aide or resource room instructional aide. These vouchers show petitioner was paid $34 per day under the designation aide, not $10 per hour as supplemental teacher.

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Ruth Sandler, the resource room teacher with whom petitioner shared the classroom, testified that petitioner was a supplemental teacher in the resource room during 1982-83. Ms. Sandler noted that a supplemental teacher according to local policy does not assign pupils' grades; a "supplanted" teacher, one who is primarily responsible for a given subject with a pupil other than the regular classroom teacher, does assign grades to that pupil. Because petitioner was a supplemental teacher, she did not individually assign grades. Ms. Sandler testified she did not supervise the preparation of lesson plans by petitioner, nor did she review petitioner's lesson plans once prepared. Furthermore, Ms. Sandler testified that petitioner was under no obligation to have her review lesson plans. Lesson plans were discussed between the two as was the progress of all pupils assigned the resource room. Ms. Sandler did testify that because she was the resource room teacher she had the total responsibility for all pupils in the room. Nevertheless, Ms. Sandler testified that petitioner performed the same duties between October 1982 through June 1983 as she performed during September 1982. Following September 1982 petitioner was assigned the excess pupils in the resource room. Pupil assignments to petitioner were made by her, Ms. Sandler, in consultation with the learning disability teacher consultant, and the Board's department of special services.

Ms. Sandler testified contrary to the testimony of Dr. Bornstein that at no time did the superintendent, the assistant superintendent, the director of special services, or assistant director of special services advise her in October 1982, nor through June 30, 1983, that petitioner was to be an aide. Ms. Sandler further testified that at no time did she ever see in writing or hear explained to her a job description for an aide's position in her classroom. In short, Ms. Sandler's testimony is that petitioner between October 1, 1982 through June 30, 1983 "* * * was instructing small groups of children in the resource room." (1T-72).

Gerard Veglia, the assistant director of the Board's department of special services, testified that all progress reports, report card grades and child study team minutes for pupils with whom petitioner worked during 1982-83 were signed by Ms. Sandler. In Mr. Veglia's view, a supplemental teacher reports to the learning disability consultant, to him, and to Dr. Bornstein. The supplemental teacher does not report to the resource room teacher. Mr. Veglia's testimony in this regard is intended, I infer, to show petitioner was not a supplemental teacher between October 1982 through June 30, 1983 because there is no evidence that she personally reported to the learning consultant, to him, or to Dr. Bornstein regarding pupils with whom she was assigned.

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Mr. Veglia testified that an aide reports directly to the resource room teacher in order to discuss with that teacher what to do and how to proceed in doing what is to be done. Mr. Veglia is of the view that according to Ms. Sandler's testimony which he heard, Ms. Sandler described petitioner's duties to be that clearly of an aide. It is interesting to note that Mr. Veglia testified that in the Livingston schools aides do prepare lesson plans on their own.

Nevertheless, Mr. Veglia testified that he observed petitioner in the performance of her duties throughout 1982-83. The following colloquy between Mr. Veglia and petitioner's counsel on cross-examination is illuminating:

> Q. Okay. Did you ever go in and observe what Mrs. Pallarino was doing in September of 1982?
>
> A. Yes. I was responsible to observe and supervise Mrs. Sandler and the resource room program. I went in to observe Mrs. Sandler and her teaching and also while being in there I was reviewing Mrs. Pallarino's duties.
>
> * * *
>
> Q. And you saw Mrs. Pallarino teaching. Correct?
>
> A. I saw her instructing and remediating.
>
> Q. Okay. And she did that in September of '82?
>
> A. Yes.
>
> Q. And she did that in October of '82?
>
> A. She did it through the year.
>
> (1T:94-95)

At the reconvened hearing Mr. Veglia testified that as a matter of procedure, but not policy, only teachers assigned home instruction, tutors, supplemental teachers and aides identified pupils on pay vouchers submitted. Teachers on home instruction, tutors and supplemental teachers are paid on an hourly basis while aides are paid "by the day". Nevertheless, Mr. Veglia could not identify at hearing nor document any other "aide" who listed the names of pupils with whom they worked on pay vouchers.

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Dr. Herbert Andlaver, the deputy superintendent in charge of curriculum, testified that a supplemental teacher is a properly certificated teacher who has the responsibility of working with aides and who reports directly to the child study team and to the learning disability consultant. A supplemental teacher is assigned to "* * * children who are being supplementally instructed —" (1T-102). The following colloquy between Dr. Andlaver and Board counsel is illuminating with respect to a job description of an aide in the Board's employ:

> Q. Sir, for how long has there been in Livingston a defintion or job description, whatever phrase you want to use, of what an aide does?
>
> A. Since the inception of aides there has been a job description.
>
> Q. And how long has that been, sir?
>
> A. Just about 1982, in the special services department.
>
> Q. Now, I think, just to make things clear, are there two types of aides?
>
> A. There are several categories.
>
> Q. I'm sorry. What are they?
>
> A. Clerical aides, there are special service aides, kindergarten aides, instructional aides, library aides, early arrival aides, and so forth.
>
> Q. Now, let's focus on instructional aides, incidentally just to clarify the subject matter we are involved with the matter of instructional aides. Am I correct?
>
> A. Yes.
>
> Q. What does an instructional aide do?
>
> * * *
>
> Q. From 1982-'83 — Incidentally, were you involved in the — with the formation of the categories and their job description?
>
> (1T-103-104)

At that point in the testimony, this judge advised the witness and counsel that if job descriptions were available, and from the foregoing testimony I inferred that the job description which purportedly existed since 1982 was in writing, the writing is the best evidence. In response the following colloquy occurred:

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> The witness: All right. We do have a job description.
>
> The court: Do you have that available with you?
>
> Mr. Rothschild [Board counsel]: Your honor, we have it available. The only reason I didn't introduce it is, I believe, it was not formally adopted by the Board until after the 1982-'83 school year, and we have already had the evidence dispute on that, otherwise I would be happy to introduce it. But we do have a problem. It was not adopted until 1983-'84.
>
> (1T-105)

Board counsel thereafter affirmed his representation that the job description in question was not formally approved by the Board until "the next year" (1T-106) which would be 1983-84. The job description for special education teacher aide, the subject matter of the foregoing colloquy, was eventually moved into evidence (R-3). On page two of the document is the following notation: BOARD APPROVAL DATE: 2/10/86. No other written job descriptions of an aides position adopted either administratively or by the Board, was introduced at hearing nor was any such description made available if in existence by Board counsel or by school authorities.

It is necessary to recite the responsibilities set forth in the job description for special education teacher aide as adopted by the Board February 10, 1986 because of Mr. Veglia's testimony that Ms. Sandler described petitioner's performance as that of an aide as described in the 1986 aides job description adopted by the Board as well as Dr. Bornstein's testimony that petitioner performed as an aide the duties described therein between October 1982 through June 30, 1983. Prior to a recitation of the pertinent part, it is noted that the stated qualifications for a special education teacher aide include two years of college or current matriculation leading to a degree in special education; successful experience working with children; demonstrated speech and writing proficiency; willingness to participate in personal development activities specific to the nature and demands of the position. The aide, according to the job description, is responsible to the building principal with regard to program operation and to work under the direction of the assigned special education teacher or certified staff member. The stated job goal of the special education teacher aide is "* * * to provide individual and small group instruction" under the direction of the assigned special education teacher. The specific performance responsibilities of a special education teacher aide as adopted by the Board February 10, 1986 are these:

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1. Implements the special education teacher's written and verbal instructions.

2. Assists the special education teacher while he or she is instructing students.

3. Accompanies special education teacher when students are taken from one room to another, to the media center, gym, toilets, cafeteria, auditorium, bus, and on field trips.

4. Assists the teacher in the physical restraint of a child who is acting-out in a manner which is dangerous to him/herself or others.

5. Helps students organize themselves for scheduled activities and dismissal under the teacher's direction.

6. Constructs visual aides and other teacher-developed instructional materials as directed by the teacher.

7. Carries out alternatives to the above duties as determined by the Director of Special Services and the school principal.

Dr. Bornstein specifically testified that he did not provide Ms. Sandler with a written job description of an aide in October 1982 nor at any time during the 1982-83 year. Dr. Bornstein specifically testified he did not discuss a job description with petitioner at any time during the 1982-83 year. Dr. Bornstein specifically testified he did not advise either petitioner or Ms. Sandler at any time during 1982-83 that because she was an aide she should not "* * * do any instructing, preparing any lesson plans, and any exams * * *" (1T-141). Dr. Bornstein specifically admits that no evidence exists to counter petitioner's claim that she did in fact teach each and every one of the 15 pupils whom she was assigned during the course of the 1982-83 year. Nevertheless, Dr. Bornstein suggests that if petitioner performed as a teacher and not as an aide after September 28, Ms. Sandler simply gave petitioner too much responsibility without proper authority.

There is no evidence to show petitioner at any time implemented Ms. Sandler's written and verbal instructions, assisted in the instruction of Ms. Sandler's pupils, accompanied Ms. Sandler when pupils from the resource room were taken from one room to another, to the media center, gym, toilets, cafeteria, auditorium, bus, and on field trips. Nor is there evidence to show petitioner assisted Ms. Sandler in the physical restraint of a child who acted out or constructed visual aides or other instructional materials as directed by Ms. Sandler. Finally, there is no evidence to show that in lieu of

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the foregoing responsibilities the director of special services or the school principal ever instructed petitioner to perform in any way other than the manner and method in which she testified she performed, she taught pupils, which is fully corroborated by Ms. Sandler and Mr. Veglia.

This concludes a recitation of the summary of the evidence presented by the parties regarding the disputed employment status of petitioner between October 1982 through June 30, 1983.

LAW

In order for petitioner to succeed on her claim that she acquired a tenure status in the employ of the Board, she must demonstrate that she complied with the precise conditions articulated in the statute for the acquisition of such tenure status. Zimmerman v. Bd. of Ed. of City of Newark, 38 N.J. 65 (1962). The statute, N.J.S.A. 18A:28-5, provides in part as follows:

> 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, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed * * * after employment in such district or by such board for:
>
> * * *
>
> (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 * * *

In the consolidated cases of Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982), the New Jersey Supreme Court held that supplemental teachers acquire tenure if they meet the precise conditions of N.J.S.A. 18A:28-5. A "Teaching staff member" is defined at N.J.S.A. 18A:1-1 to mean "* * * a member of the professional staff of any district

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* * * board of education * * * holding office, position, or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the state board of examiners * * *."

The Spiewak Court specifically held regarding the acquisition of tenure as follows:

> By the express terms of these statutes [N.J.S.A. 18A:28-5 and 18A:1-1], an 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.

N.J.S.A. 18A:27-2 requires all teaching staff members to be the holder of an appropriate certificate issued by the State Board of Examiners for such teaching assignment.

In regard to "aide" positions, the State Board of Education under its general rule-making power at N.J.S.A. 18A:4-15, promulgated N.J.A.C. 6:11-4.5, Paraprofessional approval. This rule provides in part as follows:

> (a) School aides and/or classroom aides, assisting in the supervision of pupil activities under the direction of a principal, teacher or other designated certified professional personnel, shall be approved in accordance with regulations and procedures adopted by the State Board of Education in February 1968. Copies of these procedures are available from the Bureau of Teacher Preparation and Certification or the offices of county superintendent of schools.
>
> (b) Current rules require school districts employing aides to develop job descriptions and standards for appointment. These descriptions and standards should be based on the study of local needs. The nature of the job descriptions will dictate the qualifications to be met, the proficiency standards needed, and the pay to be received.
>
> (c) The locally developed descriptions and standards adopted by the district board of education shall be submitted by the chief school administrator to the county superintendent for approval, in accordance with the rules outlined below * * *

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There is no evidence in this record regarding the "* * * regulations and procedures adopted * * * in February 1968." Nevertheless, in Scrupski and Soden v. Warren Twp. Bd. of Ed., 1977 S.L.D. 1047, reference is made to the February 1968 regulations and procedures in the following manner:

> The regulations and procedures adopted by the State Board of Education in 1968 provide in pertinent part that
>
> > * * * Personnel policies should provide that aides are not employed to relieve teachers of their teaching responsibilities nor to change the overall student-to-teacher ratio in a school * * *
>
> 1977 S.L.D. 1047, 1053-54

ARGUMENTS OF THE PARTIES

Petitioner contends that on the evidence in this record Dr. Bornstein, with the apparent approval and authority of the superintendent and of the Board, offered her employment during the 1982 summer as a supplemental teacher, a title it is noted recognized by the Education Laws of New Jersey and for which categorical state aid is available to the Board at N.J.S.A. 18A:7A-20(c). Petitioner contends that when Dr. Bornstein, with the apparent acquiescence of the superintendent and the Board, caused her title to be changed from supplemental teacher to that of aide, without changing her duties, that act can only be seen as an act of subterfuge and evasion to deny her the statutory benefit of tenure.

Petitioner points out that during 1982-83 the Board did not engage in creating the position of special education aide nor did it ever adopt a job description for such a position until February 1986. Petitioner relies upon a prior decision of the Commissioner in Elizabeth Boeshore v. North Bergen Board of Education, 1974 S.L.D. 805, 814 for the principle that the duties she performed rather than the title of the position subsequent to September 1982 must control in determining whether she has met the precise conditions of the statute to have acquired a tenure status in the employ of the Board.

The Board argues to the contrary that the evidence is clear petitioner performed as a classroom aide subsequent to September 1982 and relies upon the fact Ms. Sandler registered grades of petitioner's pupils on report cards, signed their progress reports, attended child study team meetings, and met with petitioner at parent conferences. The

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Board also relies on the evidence that a supplemental teacher reports to the child study team, or to Mr. Veglia, or to Dr. Bornstein. The Board suggests that because petitioner assertedly reported only to Ms. Sandler that that fact shows she was a classroom aide subsequent to September 1982.

The Board contends that the responsiblities of Ms. Sandler as compared with the responsibilities of petitioner clearly demonstrate that because Ms. Sandler had a higher level of responsibility for the entire resource room that petitioner clearly was an aide to Ms. Sandler, and not an independent supplemental teacher. Finally, the Board contends that even if the evidence shows petitioner performed as a supplemental teacher subsequent to September 1982 that Ms. Sandler must be seen then to have abdicated her responsibilities as a resource room teacher to allow petitioner to function at that level. In the Board's view, it should not now be held responsible for the conduct of Ms. Sandler who, without authority, allowed petitioner to perform as a supplemental teacher.

FINDINGS OF FACT

A careful analysis of the evidence of record reveals that the testimony of each witness as to their recollection of facts is similar, if not identical. The difference which does exist addresses conclusions which should be drawn on the facts. The preponderance of credible evidence in this record establishes, I **FIND**, the following facts:

1. Some time during the 1982 summer Dr. Bornstein, with apparent authority of the Board and the superintendent, offered petitioner employment as a supplemental teacher on behalf of the Board with the Livingston school district. Petitioner accepted such offered employment. Petitioner performed duties as a supplemental teacher for the Board between at least September 7, 1982 through September 28, 1982. At all times relevant, petitioner was in possession of proper and appropriate teacher certification for the assignment as a supplemental teacher. Petitioner submitted pay vouchers as a supplemental teacher and was paid by the Board for services rendered as a supplemental teacher during this period of time. Petitioner was not enrolled as a member of the Teachers' Pension and Annuity Fund during 1982-83.

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2. During the middle of September 1982 Dr. Bornstein was advised by the Riker Hill child study team that ten pupils in excess of maximum enrollment were assigned the resource room. I infer Dr. Bornstein felt that the Board strictly enforced a written or unwritten policy of limiting supplemental teachers to a maximum of four hours per day. Nevertheless, Dr. Bornstein reasoned that if petitioner, a fully certificated teacher, performed full time at Riker Hill the need identified by the Riker Hill child study team would be satisfied. The only way Dr. Bornstein saw he could secure the services of petitioner full time at Riker Hill would be to have petitioner paid as an aide. Despite petitioner's protestations, and under a reasonably held belief of intimidation, petitioner agreed to be reassigned full time to Riker Hill while being paid as an aide. The evidence, I find, shows Dr. Bornstein unilaterally created in his mind the solution of simply reassigning petitioner from the title supplemental teacher to that of aide, without changing the substance of petitioner's duties as supplemental teacher, in order to address the need of the excess pupils in the resource room.

3. I find that petitioner performed the very same duties and responsibilities as a supplemental teacher subsequent to September 28, 1982 that she performed between September 7 and September 28, 1982. Dr. Bornstein did not advise petitioner that after September 28, 1982 she was not to do any instructing, preparing lesson plans, or preparing and administering examinations to the very same pupils for whom she had engaged in such services in early September. Dr. Bornstein did not advise Ms. Sandler that subsequent to September 28 petitioner was to be considered an aide in her classroom. Dr. Bornstein did not, in fact, discuss with petitioner her duties as an aide. Dr. Bornstein did not discuss these areas with petitioner because, I infer, he wanted petitioner to continue to perform as a supplemental teacher. Petitioner did perform as a supplemental teacher as is evidenced by her testimony, the testimony of Ms. Sandler, and particularly the testimony of Mr. Veglia that he observed petitioner "instructing and remediating" throughout the entire 1982-83 year. Petitioner's status as a supplemental teacher after September 1982 is not altered because petitioner and Ms. Sandler discussed grades to be assigned petitioner's pupils, or that Ms. Sandler recorded grades on report cards, or signed progress reports, or attended parent conferences with petitioner.

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4. Dr. Bornstein's testimony that petitioner performed the duties described in the special education teacher aide job description (R-3) between October through June 30, 1983 is wholly rejected. There is not a scintilla of evidence that petitioner's duties between October 1982 through June 1983 were the duties described in that description. Furthermore, Dr. Bornstein's conduct shows he did not intend to have petitioner perform duties of an aide when he assigned her full time to the Riker Hill school subsequent to September 28, 1982. His intention was to solve a need. The need to be solved was ten extra pupils in the resource room in need of teaching. The need as expressed to and by Dr. Bornstein was the ten extra pupils; not that the resource room teacher needed an aide. Dr. Bornstein did not intend that petitioner's duties change for that would not solve his problem. He solved the need by simply assigning petitioner full time to Riker Hill, not otherwise allowed by the Board of a supplemental teacher, and Dr. Bornstein simply referred to her as an aide. There was no change in petitioner's duties subsequent to September 28.

5. Dr. Bornstein intended to have the ten pupils in excess of the maximum allowed in the resource room to be assigned a fully certificated teacher in the person of petitioner in order to reduce the number of pupils assigned the resource room teacher, Ms. Sandler. The Board, having delegated to Dr. Bornstein authority to employ teachers, is responsible for Dr. Bornstein's conduct through knowledge and acceptance of such conduct imputed to it.

6. Pay vouchers submitted by petitioner after September 1982 as compared to pay vouchers submitted during September 1982 disclose that petitioner was paid as an aide after September while being paid as a supplement teacher during September 1982.

CONCLUSION

It is agreed by the parties that petitioner was employed as a teaching staff member by the Board for September 1982, the whole of 1983-84, 1984-85 and from September 1, 1985 through April 18, 1986. Petitioner's duties between October 1982

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through June 30, 1983 have been found on the evidence in this record to be identical to the duties she performed during September 1982, which the parties agree were duties as a supplemental teacher. It follows, therefore, that petitioner's employment from September 7, 1982 through June 30, 1983 is that of a supplemental teacher.

The argument advanced by the Board that Ms. Sandler abrogated her responsibility by allowing petitioner to assume teaching duties is, in my view, outrageous. Dr. Bornstein knew exactly what he was doing in mid-September 1982 when the Riker Hill child study team approached him regarding the ten extra pupils assigned the resource room. Dr. Bornstein, having the implied delegated authority from the Board to employ supplemental teacher, reasoned that he would secure the services of petitioner full time in order to address that need because petitioner is a fully certificated teacher. Without discussing with petitioner her changed duties between being a supplemental teacher and an asserted aide, Dr. Bornstein knew that petitioner would continue to be a supplemental teacher. The fact that petitioner's pay vouchers between October 1982 through June 30, 1983 state she was being paid as an aide does not translate into a finding that petitioner's assigned duties were duties as an aide. Obviously, Dr. Bornstein arranged that method of payment in order to justify petitioner's full time work at the Riker Hill resource room. The Board, having delegated authority to Dr. Bornstein to engage teachers, cannot now escape the responsibility surrounding Dr. Bornstein's actions. The Board is imputed to have knowledge of Dr. Bornstein's conduct surrounding this matter and his efforts to secure the full time services of petitioner as a supplemental teacher while paying her as an aide. This arrangement is the kind of subterfuge and evasion to deny teachers the statutory benefit of tenure which the Commissioner has condemned on prior occasions.

Petitioner was a supplemental teacher in September 1982. Petitioner's duties did not change after September 1982. Therefore, I **CONCLUDE** petitioner's employment during 1982-83 was as a supplemental teacher and I further **CONCLUDE** that her employment from September 7, 1982 to June 30, 1983 is creditable for tenure purposes. Given all the facts in this case, I **CONCLUDE** petitioner has met the precise conditions of N.J.S.A. 18A:28-5(c) for having acquired the legislative status of tenure in the Board's employ as a teaching staff member. The actual date of tenure acquisition under the statute was September 7, 1985 because petitioner was paid for work performed on September 7, 1982. (J-1, at p. 2).

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I further **CONCLUDE** the Board violated petitioner's tenure rights on April 18, 1986 when it determined to terminate her asserted contract of employment. Petitioner, having acquired a tenure status on September 8, 1985, may not be dismissed from employment accept for lawful reasons and then only in the manner prescribed by the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. Accordingly, petitioner is entitled to reinstatement in the Board's employ as a teaching staff member; she is entitled to salary she would have earned but for her unlawful termination of employment; she is entitled to all benefits and emoluments of employment as a teacher in the Board's employ; and, petitioner's service in the Board's employ from September 7, 1982 forward, including the period September 1, 1986 forward to the date this decision becomes a final decision, is creditable for purposes of seniority.

Accordingly, the Livingston Board of Education is hereby **ORDERED** to reinstate to its employment as a teaching staff member Theresa Pallarino and to tender her back pay for the period September 1, 1986 to the present all back salary, subject to mitigation, she would have earned between September 1, 1986 through the present but for its unlawful termination of her employment. The Board is further **DIRECTED** to arrange Theresa Pallarino's Teachers Pension and Annuity account so as to make her whole regarding creditable pension time and contributions it should have made on her behalf.

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

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

May 11, 1987
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

MAY 11 1987
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

May 14, 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

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THERESA PALLARINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board filed exceptions and petitioner filed reply exceptions thereto within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

The Board takes exception to those portions of the ALJ's initial decision which state:

> (1) that Dr. Bornstein reassigned petitioner's title from supplemental teacher to that of an aide without changing her duties (Finding of Fact No. 2, p. 16); (2) that Dr. Bornstein did not discuss with petitioner her duties as an aide because he wanted her to continue to perform as a supplemental teacher (Finding of Fact No. 3, p. 16); (3) that Dr. Bornstein's conduct showed that he did not intend to have petitioner perform duties of an aide when he assigned her full time to the Riker Hill School (Finding of Fact No. 4, p. 17); and (4) that Dr. Bornstein intended to have ten pupils in excess of the maximum allowed in the resource room assigned to a fully certified teacher "in the person of petitioner" in order to reduce the number of pupils assigned to Mrs. Sandler (Finding of Fact No. 5, p. 17). Respondent also objects to that portion of the court's opinion which rejects the Board's contention that Mrs. Sandler abrogated her responsibility by allowing petitioner to assume teaching duties. (Conclusion, second paragraph, p. 18) (Board's Exceptions, at pp. 1-2)

The Board relies on its pre- and post-hearing submissions in support of the above exceptions, which are incorporated herein by reference.

The Board suggests that its position can be summarized by stating "that to allow an individual to achieve tenure by unilaterally performing greater responsibilities than those delegated to her, without the Board's knowledge, would seriously undermine the concept of the tenure system, as well as lead to

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potentially insurmountable policing problems." (Board's Exceptions, at p. 2) In so stating, the Board proposes the following findings of fact and conclusions of law:

> 1. At the time petitioner's job title was changed, petitioner understood from her conversation with Dr. Bornstein that her position would be that of an aide. He explained that the benefit of accepting the lesser position would be the exposure it would give her as a candidate for a full-time teaching position when an opening occurred. Petitioner agreed to accept the aide position on that basis and it did, in fact, lead to a full-time teaching position for her the following school year. (1T 123-124).
>
> 2. In the Livingston school system, it was the usual situation for an instructional aide to be a certified teacher because of the quality of candidates available. (1T 100) Thus, the fact that petitioner was a certified teacher at the time she was appointed an aide did not increase or decrease her level of responsibility in the classroom.
>
> 3. Any unilateral actions by petitioner in assuming some of the duties of a supplemental instructor during her appointment as an aide, and by classroom teacher Ms. Sandler in allowing her to do so, cannot form the basis for transforming petitioner's position from appointed aide to supplemental instructor, when the Board was unaware that the parties had taken such actions and did not approve of them.
>
> (Board's Exceptions, at p. 2)

Petitioner's reply exceptions posit that

> the entire thrust of the Board's exceptions is that the ALJ made incorrect credibility findings. It is respectfully urged upon the Commissioner that credibility findings, except in the most extraordinary situations, should not be set aside. The ALJ had the opportunity to observe Dr. Bornstein, Mrs. Pallarino and Mrs. Sandler. Based upon the testimony and his observations he found the woman credible and Dr. Bornstein not. The record supports this conclusion. It should not be reversed.
>
> (Reply Exceptions, at p. 1)

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Petitioner affixed to her reply exceptions her post-hearing submission, which is also incorporated herein by reference.

Upon a careful review of the record in this matter, which, it is noted, includes transcripts of the two days of hearing below, the Commissioner adopts the recommended decision of the Office of Administrative Law for the reasons that follow.

Nowhere in the record before him has it been proved that the Board herein, in 1982-83, submitted a request to the Essex County Superintendent of Schools for a special education aide, in compliance with the express language of N.J.A.C. 6:11-4.5(c)1. The Commissioner so finds, recognizing the ALJ's diligent efforts to adduce such information at the hearing. See Tr. I-110. Neither does the record reveal compliance with N.J.A.C. 6:28-4.2(b)(3)vi, as it existed in 1982 as N.J.A.C. 6:28-3.2(c)5 which, in pertinent part, required prior written approval from the Department of Education through its county offices to increase "no more than one third," the number of students in a resource room.

> (c) Resource room programs shall be instructional centers which offer individualized instruction in basic subject skills or other instructional areas which are described in a pupil's individualized education program and meet the following criteria:
>
> 1. Educationally handicapped pupils in resource rooms shall be enrolled on a regular public school classroom register and in a class with their chronological age peers;
>
> 2. The resource room teacher shall hold appropriate certification as "teacher of the handicapped";
>
> 3. A resource room teacher shall be provided time each school week equivalent to one hour per school day in the week for consultation with the regular teaching staff;
>
> 4. Types of special education resource room programs shall be:
>
> i. Single handicap program (all pupils of the same classification);
>
> ii. Mixed handicap program (pupils with different classifications);
>
> iii. Open program (both non-handicapped and handicapped).

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> 5. The number of pupils that can be assigned to a resource room program at any given time shall not exceed five. The total number of pupils that can be assigned to a resource room teacher shall not be fewer than four or more than 20***. (emphasis supplied)

The resource room in question contained 30 students, 10 more than the maximum permitted by regulation. The Board herein appears to have been in violation of this regulation by having attempted, without prior approval from the county superintendent, to increase by one half the number of students in the resource room in 1982-83 by way of adding an aide.

As to the factual circumstances of this case, the Commissioner is in accord with the ALJ that petitioner's duties after September 29, 1982 did not change in any appreciable way from what they had been as a supplemental teacher during the month of September 1982, notwithstanding the change in the job title under which she allegedly served. Further, the Commissioner concurs with the ALJ in dismissing the argument advanced by the Board that it was Mrs. Sandler who abrogated her responsibility by allowing petitioner to assume teaching duties. Based upon his own independent review of the record, the Commissioner concludes, as did the ALJ, that petitioner had sole responsibility for 1) deciding on a daily basis the needs of the students assigned to her; 2) developing and planning strategies necessary for the education of those students; and 3) carrying out the prescribed program for them by teaching and remediating. In the Commissioner's view such activities may only be undertaken by someone properly certified and may not be assumed by an aide. As did the ALJ, the Commissioner further finds the Board's argument to explain such circumstances and to lay the responsibility for what occurred upon Mrs. Sandler to be entirely without merit. Ultimately, such a finding by the Commissioner, wherein there is conflicting testimony between the parties as to the nature of the tasks performed and the understanding of the parties in such regard rests upon the determination of credibility made by the factfinder. See In re Masiello, 25 N.J. 590 (1958) wherein the New Jersey Supreme Court held:

> We do not undertake to say that the hearing shall be had before the Commissioner or at what level of operation it shall be provided. Solution of these problems is left to the discretion of the Department. The concern of the judicial branch of the government is that a hearing be given and an adequate record made either before the Board of Examiners or before the Commissioner. If such a hearing takes place before the former and decision is rendered there after the parties have had a proper opportunity to be heard, then on appeal the latter "[i]n reaching his determination * * * must * * * give due weight to the

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> nature of the findings below, although his primary responsibility is to make certain that the terms and policies of the School Laws are being faithfully effectuated." Laba v. Board of Education of Newark, supra, 23 N.J. at page 382. More definitively, this means that the burden of the Commissioner is to weigh the evidence and to make an independent finding of fact on the record presented; and in the process of reaching that finding, he should give due regard to the opportunity of the hearer below to observe the witnesses and to evaluate their credibility. Cf. R.R. 1:5-4(b). On the other hand, if, as in this case, the hearing demanded by principles of fair play is had before him for the first time, then the obligation to "decide" signifies a completely de novo and independent decision on the facts. (emphasis supplied) at 605-606

Herein, the Commissioner finds petitioner's testimony convincing.

Accordingly, the Commissioner adopts as his own the finding of fact established by the ALJ in the initial decision, ante. Further, the Commissioner is in accord with the ALJ's conclusion as recited in the initial decision that finds petitioner herein to have been a supplemental teacher during the entirety of the 1982-83 school year and that, thereby, her employment from September 7, 1982 to June 30, 1983 is creditable for tenure purposes. The Commissioner finds and determines that petitioner has met the precise condition of N.J.S.A. 18A:28-5(c) for having acquired the legislative status of tenure in the Board's employ as a teaching staff member effective September 7, 1985. See also Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982). Moreover, the Commissioner agrees with the ALJ that the Board violated petitioner's tenure rights on April 18, 1986 when it determined to terminate her asserted contract of employment. See N.J.S.A. 18A:6-10 et seq. Accordingly, petitioner is entitled to reinstatement in the Board's employ as a teaching staff member; she is entitled to salary she would have earned but for her unlawful termination of employment; she is entitled to all benefits and emoluments of employment as a teacher in the Board's employ; and petitioner's service in the Board's employ from September 7, 1982 forward, including the period September 1, 1986 forward to the date of this decision, is creditable for purposes of seniority.

Consequently, the Livingston Board of Education is hereby directed to reinstate to its employment as a teaching staff member Theresa Pallarino and to award back pay for the period September 1, 1986 to the present inclusive of all back salary, subject to mitigation, she would have earned between September 1, 1986 through the present but for its unlawful termination of her employment. The

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Board is further directed to arrange petitioner's Teachers' Pension and Annuity Fund account so as to make her whole regarding creditable pension time and contributions it should have made on her behalf.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

June 19, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8824-86
AGENCY DKT. NO. 386-11/86

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

Wayne J. Oppito, Esq., for petitioner

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

Record Closed: April 3, 1987 Decided: May 15, 1987

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

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

The matter was opened before the Commissioner of Education and was transmitted on December 19, 1986, to the Office of Administrative Law, as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. After notice, a prehearing conference was held on January 30, 1987. It was settled that the issue is whether any of the alleged violations did, in fact, occur and, if so, to what relief the petitioner would be entitled. The parties also agreed that all material facts could be stipulated. Therefore, according to a schedule set at the prehearing conference, the

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petitioner moved for summary judgment in his favor and the Board cross-moved for summary judgment in its favor. The stipulation and all moving papers were received in timely manner and the record closed on April 3, 1987.

STIPULATED FACTS

1. Respondent, Board of Education, is organized under the laws of the State of New Jersey and is responsible for the administration and operation of the North Plainfield School District.

2. Petitioner, Wayne E. Pickering, was employed by respondent in the position of elementary school principal from on or about January 15, 1984 to December 31, 1986 (Exhibit J-1).

3. On September 29, 1986, respondent had a Special Meeting in which there was a three-hour executive session to discuss petitioner's employment. The meeting and executive session were attended by the Board attorney. At the conclusion of the executive session, the respondent in two separate formal resolutions acted to extend petitioner's employment for the period beginning January 1, 1987 and ending June 30, 1987, and to grant petitioner tenure effective September 29, 1986 (J-2).

4. On September 30, 1986, the Board Secretary, Ronald P. Rossi, sent petitioner a "Notice to Professional Employees Having Tenure of Service" indicating petitioner's salary for the 1986-87 school year to be $49,659.00. On October 8, 1986, petitioner signed and returned the lower half of the Notice indicating his understanding of the salary and his intention to remain in the employ of respondent (J-3).

5. On October 29, 1986, respondent had a Special Public Meeting at which the public discussed the granting of early tenure and the lack of consideration for public concern. At such meeting, respondent's attorney stated that in his opinion the action granting early tenure by respondent was void. At the conclusion of such meeting, respondent adopted a resolution setting an emergency meeting for October 31, 1986, to consider the employment of petitioner (J-4).

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6. On October 30, 1986, petitioner was notified by the Board Secretary, Ronald P. Rossi, that respondent was having an emergency meeting on Friday, October 31, 1986, to discuss rescinding its actions of September 29, 1986. Petitioner indicated at the bottom of the letter that, in his opinion, he had not received adequate notice of the meeting (J-5).

7. At its meeting of October 31, 1986, respondent acted in two separate formal resolutions to rescind its offer of a contract and to rescind tenure to petitioner (J-6).

8. Petitioner was not present at the aforesaid emergency meeting.

9. In a letter dated November 3, 1986, petitioner was notified by Mr. Rossi that he had sent a telegram on Friday evening October 31 to petitioner and that said telegram was not delivered (J-7).

10. On November 3, 1986, Mr. Rossi also sent a letter to petitioner indicating the context of the undelivered telegram (J-8).

11. In another letter, dated November 3, 1986, to petitioner from the Superintendent of Schools, Frank A. Herting, Dr. Herting reiterated that the aforesaid telegram had not been delivered (J-9).

12. On the afternoon of November 3, 1986, petitioner did receive the aforesaid telegram from Mr. Rossi (J-10 and J-11).

13. Petitioner ceased employment in the North Plainfield School District on December 31, 1986.

14. By letter of November 11, 1986, petitioner, although not conceding that respondent had properly granted him tenure on September 29, 1986, requested reasons for the action taken by the respondent on October 31, 1986 (J-12).

15. By letter dated December 4, 1986, and hand-delivered to petitioner by the Board Secretary on December 5, 1986, petitioner received a statement of

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reasons for respondent's action of October 31, 1986, rescinding its actions of September 29, 1986 (J-13).

16. By letter dated December 11, 1986, from petitioner and received on the same date by respondent, petitioner requested an informal appearance before respondent pursuant to N.J.A.C. 6:3-1.20 (J-14).

17. By letter dated December 18, 1986, petitioner was advised by respondent that his request for an informal appearance was granted and was scheduled for January 5, 1987 (J-15).

18. On January 5, 1987, petitioner, with a representative of his choice, appeared before respondent for an informal appearance, which meeting was held in closed session since petitioner did not request a public hearing. Petitioner appeared before respondent and presented his views for two and one-half hours.

19. At its regular meeting of January 7, 1987, respondent "affirmed the motions of the meeting of October 31, 1986, regarding Mr. Wayne Pickering, Elementary School Principal." A letter setting forth the actions of respondent on January 7, 1987, was sent to petitioner on January 8, 1987 (J-16).

PETITIONER'S ARGUMENTS

The petitioner asserts, in essence, that the Board granted tenure to him on September 29, 1986, and having done so, the Board could only remove the petitioner from his position in accordance with the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. The Board's actions of October 31, 1986, rescinding tenure and terminating his employment effective December 31, 1986, are ultra vires, null and void because he enjoys a tenured status.

Specifically, the petitioner asserts the Board's action to rescind his tenure and to terminate his employment is without authority and is arbitrary, unreasonable and capricious and in violation of N.J.S.A. 18A:6-10 et seq. The statutes establish a period of

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service as a necessary predicate to the achievement of tenure. N.J.S.A. 18A:28-5. But local boards also are permitted to confer tenure after any shorter period which may be fixed by the employing board for such purpose. In this case, the North Plainfield Board of Education on September 29, 1986, passed two resolutions. They first employed the petitioner as an elementary school principal beginning January 1, 1987 and ending June 30, 1987. The resolution specifically notes that his appointment at this time will result in his achieving tenure (J-2). The second specifically granted him tenure effective September 29, 1986, "with the understanding that this motion shall not set a precedent" (J-2). The petitioner urges that the Board did no more than is authorized. He would have fulfilled the statutory period of three consecutive years on January 14, 1987. Instead, the Board granted him tenure on September 29, 1986, a period of two years, eight months and two weeks.

The Board was under no obligation to grant the petitioner early tenure, but once it did so, it could not rescind that action. Once the petitioner was granted tenure, he could be dismissed from his position only in accordance with N.J.S.A. 18A:6-10 et seq. The Board's action of October 31 rescinding its actions of September 29 contravenes the statutes and case law.

To destroy the petitioner's tenure because the proper form of resolution was not adopted would be to exalt form over substance. On September 29, 1986, the Board passed a resolution granting the petitioner early tenure. One month later, on October 31, the Board passed another resolution rescinding the petitioner's tenure. The Board argues it had a right to rescind the first resolution because it contravened the holding in Rall v. Bd. of Ed. of the City of Bayonne, 54 N.J. 373 (1969). However, the Board's argument rests on the decision of the Appellate Division in that case, which was specifically overruled and reversed by the Supreme Court.

Examination of the Supreme Court's decision in Rall and other decisions and statutes, shows it is clear that the Board conferred tenure upon the petitioner on September 29 and could not dismiss him after that without following the procedures set forth in N.J.S.A. 18A:6-10 et seq. The Supreme Court states the basis for granting early tenure at 54 N.J. 377:

> We agree that there must be some reasonable probationary period of service as a basis for granting tenure. Such is clearly the intention of the statute in specifying three years as a

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> general qualifying term but authorizing the Board in its discretion to fix "a shorter period." The legislative purpose is not to authorize elimination of the probationary period - simply to sanction a reasonable shortening of it.
>
> As noted above, no one suggests that the Board acted arbitrarily or failed to act honestly or in good faith in this case in shortening the period for tenure to six and one-half months. Undoubtedly it intended to act in consonance with the statutory grant of power, and it believed the form of resolution its attorney drafted was a proper legal method of accomplishing the purpose. Under the circumstances we think the legislative act of the Board - the resolution - should be construed broadly to do what it was intended to do, i.e. meet and satisfy the requirement of the statute. Therefore we hold that the resolution shortened the period for acquisition of tenure for superintendents of schools generally - not just for Dr. Rall - to six and one-half months of service. That rule now prevails and will continue to do so unless and until a board of education adopts another rule of general application fixing a different tenure qualifying period.

In the present case, the Board granted the petitioner early tenure in accordance with Rall. The Board established a reasonable probationary period of two years, eight months and two weeks. The probationary period for Dr. Rall was six and one-half months. As in Rall, no one suggests that the North Plainfield Board of Education in granting the petitioner tenure on September 29, 1986, acted arbitrarily or failed to act honestly and in good faith. There is a presumption in New Jersey law that a board of education acts in good faith and there is nothing in this case to suggest otherwise. The Board spent three hours in executive session discussing this matter before acting on the resolutions (J-2). As the Court stated in Rall, the resolution should be construed broadly to do what it was intended to do.

Assuming, but not conceding, that the last phrase of the resolution, "with the understanding that this motion shall not set a precedent" is improper, the substantive part of the resolution is not affected and therefore is valid. A general rule of statutory construction is that in the event any provision is held to be invalid, the remaining provisions shall not be affected thereby, but shall continue in full force and effect. This rule of severability is consistent with the Court's holding in Rall, above, and is applicable in the present case. The Rall Court held that the Bayonne Board of Education resolution will apply to the acquisition of tenure for all future superintendents in that district. In effect, the North Plainfield Board of Education resolution of September 29, 1986, shortened the time for attainment of tenure for all principals in the district to two years, eight months and two weeks, until such time as a future board by resolution changes it.

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Any argument by the Board that Rall is distinguishable because it dealt with a superintendent, which is always a category of one, as opposed to this case, which deals with principals totalling more than one, is grasping at straws in an attempt to circumvent the clear holding of the Supreme Court. The Court plainly said that in the absence of a showing of bad faith, a board of education has the statutory authority to shorten the period for attainment of tenure. The circumstances of the resolution should be construed broadly to meet and satisfy the requirement of the statute. The broad interpretation would be to extend the shortened period to all persons in a particular employment class, here, principals. Only the narrowist of interpretations would indicate that Rall is applicable only to superintendents. The only consistent interpretation with Rall is that the North Plainfield Board of Education shortened the probationary period for all principals. Since arguably, the last phrase of the resolution may not be the proper form, that phrase can be severed and the remainder of the resolution is valid.

Alternatively, the Board is obliged to pay the petitioner his contractual salary for the period January 1 - June 30, 1987. Even if the resolution of September 29, 1986 is void, the Board still msut pay to the petitioner his contractual salary for January 1 - June 30, 1987. On April 16, 1986, the Board and the respondent executed an employment contract for July 1 - December 31, 1986, at an annual salary of $49,659, prorated (J-1). The agreement included a provision that permitted either to give the other 60 days' written notice to terminate the contract.

On September 29, 1986, the Board passed a resolution employing the petitioner for the period January 1 - June 30, 1987, at the same annual salary (J-2). This resolution was separate and apart from the resolution granting the petitioner tenure. Even if the tenure resolution is determined to be void, that determination does not nullify the resolution extending the petitioner's contract. As a result of the resolution extending the petitioner's contract, the petitioner and the Board executed a salary agreement which superseded exhibit J-1. The new salary agreement (J-3) provides for the same annual rate of $49,659; however, there is no provision to allow the Board to terminate. There is a provision to allow the petitioner to resign, given the Board 60 days' written notice. In the absence of a termination clause, a board of education is responsible for monetary compensation for the duration of the agreement. Therefore, even it is determined that the resolution granting tenure is invalid, the Board still is obliged to compensate the petitioner in the amount of $24,829.50 for the unpaid balance of the contract term.

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The petitioner last asserts that, alternatively, the actions taken by the Board on October 31, 1986, should be declared null and void because they violate the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq. On October 30, 1986, at 12:10 p.m., the Board secretary notified petitioner that the Board was to have an emergency meeting the next day for sole purpose of rescinding its actions of September 28 (J-4).

N.J.S.A. 10:4-9 allows a public body to hold an emergency meeting. An emergency meeting is defined as one required to be held in order to deal with matters of such urgency and importance that delay, even for the good purpose of providing adequate notice, would be likely to result in substantial harm to the public interest. In this matter, there was no substantial harm to the public necessitating an emergency meeting. The Board argues that its reason for the emergency meeting was that, pursuant to its original contact with the petitioner (J-1), it had to give 60 days' written notice to terminate and October 31, 1986 was 60 calendar days prior to December 31, 1986. Therefore, the Board had to act by that date. The petitioner argues that the contract (J-10) was no longer applicable in that it had been superseded by exhibit J-3, which has no 60-day provision.

However, assuming for the sake of argument that J-1 was in effect on October 31, there still is no showing that potential substantial harm to the public made an emergency meeting necessary. At best, the Board would be responsible for 60 days' pay to petitioner from the date of its regular scheduled monthly meeting in November. At worst, the Board would be responsible for 60 days' pay to the petitioner from January 1, 1987. N.J.S.A. 18A:27-10 and -11. Payment to the petitioner of 60 days' salary is not substantial harm to the public and absent a showing of such, the actions of the emergency meeting of October 31, 1986, should be declared null and void and the petitioner should be awarded 60 days' pay.

BOARD'S ARGUMENTS

The Board states that it lawfully chose not to rehire the petitioner and, accordingly, the petitioner's employment terminated on December 31, 1986. The Board now says its action attempting to confer tenure on the petitioner only was a nullity and void ab initio. On September 29, 1986, there were four principals, including the petitioner, employed by the Board. Two enjoyed a tenure status and two, including the petitioner, did not.

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At a special meeting on September 29, 1986, the Board by a vote of four to three, and contrary to the recommendation of its administrators, passed a motion to grant tenure to the petitioner immediately, "with the understanding that this motion shall not set a precedent" (J-2). At that time, the petitioner had been employed for two years, eight months and two weeks, having commenced work on January 16, 1984.

In Spadoro v. Coyle and Jersey City Bd. of Ed., 1965 S.L.D. 134, 138, the Commissioner stated a rule, originally enunciated in Rinaldi v. North Bergen Bd. of Ed., 1959-60 S.L.D. 109, that he and the courts have followed ever since:

> The public policy of this State is not served when a board of education may arbitrarily and capriciously select an individual to be given tenure. It is the opinion of the Commissioner that it was the intention of the Legislature to delegate to boards of education the power to shorten the period for acquistion of tenure for school employees according to classifications properly established. (Rinaldi, supra. at p. 111)
>
> At the same time that tenure was proportedly granted to petitioner, two other principals were appointed who were not given outright tenure. It was testified that the Board of Education has no policy of giving such tenure to the classification of principal. [Citation to transcript omitted]
>
> The Commissioner holds that the granting of outright tenure to petitioner contravenes the intent of the Legislature as expressed in R.S., 18:13-16 [see now, N.J.S.A. 18A:28-5] by conferring upon petitioner a personal benefit not available to others in his employment category. Respondent Board, therefore, was not bound by any condition of tenure of petitioner as a principal in determining to assign as a classroom teacher.

In Rall, above, the Commissioner held, in applying Spadoro to the position of superintendent, that because there was only one superintendent, therefore it was an exclusive category. The State Board ruled that even if it is a one-person category, the intent of the Board must be to apply it to all who subsequently hold the position. Accordingly, the action of the Board in attempting to confer tenure was held to be invalid and contrary to public policy. The Appellate Division then sustained the holding of the State Board at 104 N.J. Super. 236, 243 (App. Div. 1969) stating, among other things:

> We regard the foregoing construction of the statute as so obvious from its language and apparent purpose as to defy the contention that it authorizes a local board to simply select an individual member of an employment category who has served

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> less than three years and confer tenure upon him alone, by name, ad hoc, without in any way undertaking to fix a specific, generally applicable, shorter-than-three-years term of service for achievement of tenure by members of that individual's staff category or of any category inclusive of his.

The Supreme Court reversed the Appellate Division, 54 N.J. 373 (1969), by holding that the resolution adopted by the board shortened the period for acquisition of tenure for superintendents of schools generally, and not just for Rall. The Court also stated that the rule, as it applies to subsequent superintendents in Bayonne, shall continue until the board adopts another rule of general application fixing a different tenure qualifying period.

In North Plainfield, not only was tenure not conferred upon the other nontenured principal, the Board expressly stated in its motion "that this motion shall not set a precedent" (J-2). The rule set forth in Spadoro was followed in Rall. The difference is that in the case of a superintendent, the Supreme Court held that it must have been the intent of the board to confer tenure on future superintendents under future similar circumstances in Bayonne. North Plainfield specifically limited its attempt solely to the petitioner and by expression did not include other principals in its motion.

The grant of tenure to an individual as a personal benefit before the expiration of the statutory probationary period is unlawful. Spadoro, above, and Rall, above. In the present case, it is stated specifically that the motion attempting to confer tenure on the petitioner shall not set a precedent. In Spadoro, a similar attempt by a principal to reverse a recission of an attempt to confer tenure upon him only was dismissed. Both the form and substance of the motion to grant tenure was to petitioner only and no other principal similarly situated. This the Board could not do and made its attempt void.

Based on the belief that the Board had conferred tenure upon the petitioner on September 29, 1986, the Board secretary sent to the petitioner on September 30, 1986, a document entitled "Notice To Professional Employees Having Tenure of Service Under the Provisions of 18:13-16" (J-3). The contract in existence between the parties on September 30 (J-1), provided that either party could terminate it upon 60 days' notice. That contract was in effect, by its terms, from July 6 - December 31, 1986, at an annual salary rate of $49,659.

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Because the contract in effect on September 30 covered the petitioner's employment through December 31, the notice effect of exhibit J-3 was to advise the petitioner that he was rehired for the balance of the school year commencing January 1, 1987.

On October 31, 1986, the Board sent a telegram to the petitioner advising him that the Board had terminated his employment effective December 31, 1986 (J-7, J-8), by rescinding its attempt to grant tenure to him and to rehire him. Thus, when the petitioner signed exhibit J-3 on October 8, it was based on the erroneous premise that the Board lawfully conferred tenure on him on September 29, 1986. It follows that a so-called tenure contract (J-3) sent the next day and at the same compensation as the existing contract (J-1) was based on the mistaken belief, mutually held, that tenure had been lawfully conferred.

The tenure contract (J-3) being void and based on a mutual mistake, the contract then in existence was exhibit J-1. As such, there was a 60-day notice of termination clause which was exercised by the Board on October 31. The action taken by the Board to rescind its offer of reemployment and rescind its offer of tenure to the petitioner was reaffirmed by the Board at its regular meeting of January 7, 1987 (J-16), following the appearance of the petitioner before the Board on January 5.

The Board's actions of October 31, 1986 conformed with the Open Public Meetings Act, or in the alternative, the Board's action of January 7, 1987, rectified any violation of the act. At a special public meeting of the Board attended by all of its members on October 29, 1986, the Board adopted a resolution setting a continued meeting for October 31, 1986, to consider the petitioner's employment. The petitioner was given written notice at noon, October 30, of the meeting (J-5). Notice of the meeting had been sent to two newspapers designated by the Board, posted at the municipal building where such notices are posted, filed with the municipal clerk, and posted in other public places (J-6).

At the meeting of October 31, following two hours of closed deliberation, the petitioner not having requested a public hearing, the Board reconvened in public session and passed the motions by the votes set forth in exhibit J-6. The Board took action at its regular meeting of January 7, 1987, reaffirming its motions of October 31.

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The petitioner now seeks 60 days' pay based on an allegation of violation of the Open Public Meetings Act in obvious recognition that, in any event, the action taken by the Board on January 7, 1987, constituted corrective or remedial action pursuant to N.J.S.A. 10:4-15a.

The meeting of October 31 was, in substance and form, a continuation of the Board meeting of October 29. It continued the subject matter of October 29 (J-4, J-6), with the added feature of personal service of notice on the petitioner (J-5). The Board did more than the Open Public Meetings Act required. It cannot be reasonably argued that the Board could not have acted at its meeting of October 29 to take the same action it did take on October 31. As set forth in exhibit J-4, there were approximately 260 members of the public present at the meeting of October 29 and the petitioner was not present. Fairness dictated that he be given an opportunity to be present when actions affecting his future were being considered. Accordingly, the Board made sure that the petitioner had an opportunity to be present before it acted and further that he have the choice of whether the deliberations and considerations of the Board would be conducted in public or private. N.J.S.A. 10:4-12b(8).

The petitioner chose not to have the considerations take place in public. Accordingly, the Board continued its deliberations in private for two hours. Then, in a public session, the Board took official action (J-6) by rescinding its rehiring of the petitioner on 60 days' notice and officially rescinded its attempt to grant tenure. The action of continuing the hearing on October 31, not only conformed with the spirit of the Sunshine Law, but exceeded it. Even if the October 31 meeting in some manner did not comply with the Open Public Meetings Act, then the action taken on July 7, 1987, corrected any deficiency and must be accepted as a remedial action.

DISCUSSION AND DETERMINATION

The petitioner believes the Board's reliance on Spadoro, above, is misplaced. However, I think Spadoro, is both apposite and instructive. In the present case, the Board on September 29, 1986, acted to grant early tenure to the petitioner. It is uncontroverted that the petitioner was not the only untenured elementary school principal in the district at the time. A local board of education may promulgate a period of less than three years wherein members of any category designated by the Board may achieve tenure. Rall,

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above. Rall also teaches that a board is not entitled to select an individual member of an employment category who has served less than three years and confer tenure upon him alone, by name, ad hoc. A similar situation obtained in Spadoro. At the same time, the board purportedly granted tenure to Spadoro, two other principals were appointed - and hence in the same category - who were not given tenure similarly.

The direction of these cases is quite clear and I **FIND** that the grant of tenure to Wayne E. Pickering by resolution of September 29, 1986 (J-2) was void ab initio.

A fortiori, the inclusion of the language, "This motion shall not set a precedent," in the motion of Septmber 29, 1986, points to violation of the clear rule that all members of an employment category must be affected when the Board chooses a probationary term of less than three years for any member of that category. The rule is clear, the rule applies to this case and the rule admits no semantic twists.

I **CONCLUDE** that the resolution of the North Plainfield Board of Education of September 29, 1986, conferring tenure, effective immediately upon the petitioner was void ab initio. This being the determination, the matters of contractual salary and alleged violations of the Open Public Meetings Act must be addressed. At its meeting of October 31, 1986, the Board acted to rescind its offer of a contract to the petitioner (J-6). The Board attempted to notify petitioner of its action by telegram. As set forth in the stipulations, delivery of the telegram was delayed by circumstances beyond the control of either party. On November 3, the Board secretary sent a letter to the petitioner indicating the text of the undelivered telegram (J-8). Sixty days from October 31 is December 30. It appears the petitioner was paid through December 31, 1986, and ceased employment in the North Plainfield School District at the close of business on that day.

Having reviewed the stipulations and exhibits and having considered the clear instruction of the cases cited above, I **FIND** that the contract of April 16, 1986 (J-1) was the contract in effect on October 31, 1986. Therefore, the 60-day clause, which is the fourth paragraph in the contract, was in force and effect on October 31, 1986. I **TAKE OFFICIAL NOTICE** that October 31, 1986, was a Friday. Although it is likely that the petitioner learned informally of the Board's actions of October 31, the record provides no support for such a finding. On the basis of what is in the record, I **FIND** that the petitioner received his 60-day notice on November 3, 1986. Sixty days after November 3 of any year is January 2 of the next year. I **FIND** and **CONCLUDE** that the 60-day notice

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period in this matter ran from November 3, 1986 - January 2, 1987." This in no way disturbs the tenure question that has been decided against the petitioner but does make the Board liable for two days' pay, at the appropriate prorated rate, for January 1 and 2, 1987.

As to alleged violations of the Open Public Meetings Act, even if the meeting of October 31, 1986 was improperly convened, the resolution of the Board of January 7, 1987, ratifying its acts of October 31, 1986 cured any defect. The Commissioner has ruled similarly in other cases. See, Orlando v. Mercer County Vocational - Technical Bd. of Ed., OAL DKT. EDU 4550-83 (July 23, 1984), aff'd, Comm'r of Ed. (Sep. 6, 1984). The jurisdiction of the Commissioner to rule on such questions is established in Sukin v. North Field Bd. of Ed., 171 N.J. Super. 184 (App. Div. 1979). See also, N.J.S.A. 10:4-15a.

In view of the foregoing determinations, the other arguments urged by the petitioner need not be addressed. It is **ORDERED** that the North Plainfield Board of Education pay to Wayne E. Pickering the appropriate salary for January 1 and 2, 1987, and it is further **ORDERED** that the balance of the petition of appeal be and is hereby **DISMISSED.**

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

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

15 MAY 1987
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

MAY 18 1987
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

May 20, 1987
DATE

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

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

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed pursuant to N.J.A.C. 1:1-16.4a, b and c. However, the Board's reply exceptions were untimely.

Petitioner posits three exceptions which are summarized in pertinent part below.

EXCEPTION I

THE FINDING BY THE ALJ THAT THE RESOLUTION CONFERRING TENURE UPON PETITIONER WAS IMPROPER EXALTS FORM OVER SUBSTANCE

Petitioner challenged the ALJ's reliance on Spadoro v. Coyle and Jersey City Board of Education, 1965 S.L.D. 134, "[i]n the instant matter, unlike in Spadoro, the same board of education was involved. There is not any indication whatsoever that respondent's action conferring tenure upon petitioner was politically motivated or made in bad faith.***" (Exceptions, at p. 2) As to the ALJ's finding that the last phrase of the resolution, "with the understanding that this motion shall not set a precedent," is improper, petitioner argues that "the substantive part of the resolution is not effected (sic) and therefore valid.***" (Id., at p. 3) He cites the general rule of statutory construction that "in the event that any provision is held to be invalid, the remaining provisions shall not be affected thereby, but shall continue in full force and effect. See N.J.S.A. 1:1-10." (Id., at p. 3)

Petitioner cites N.J. Chapter, American Institute of Planners v. State Board of Professional Planners, 48 N.J. 581, 593 (1967), cert. den. 389 U.S. 8 (1967) and Inganamort v. Borough of Fort Lee, 72 N.J. 412, 423 (1977) on the doctrine of severability, and suggests that the rule of severability is consistent with the court's holding in Rall v. Bd. of Ed. of the City of Bayonne, 54 N.J. 373 (1969) and the instant matter. "The Rall Court held that the resolution of the Bayonne Board of Education will apply to the acquisition of tenure for all future superintendents. In effect, the North Plainfield board's resolution of September 29, 1986

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shortened the time period for attaining tenure for all principals in the district to 2 years, 8 months and 2 weeks, until such time as a future board by resolution changes it." (Id., at p. 3)

Petitioner suggests:

> Since there is no contention of bad faith, the only consistent interpretation with Rall, supra, is that the North Plainfield Board of Education shortened the period of tenure for all principals. Since arguably the last phrase of the resolution may not be the proper form, the last phrase can be severed and the remainder of the resolution is valid as to shortening the period of tenure for all principals in the district. Any other interpretation would be exalting form over substance. (Id., at p. 3)

EXCEPTION II

ALTERNATIVELY, RESPONDENT IS OBLIGED TO PAY PETITIONER HIS CONTRACTUAL SALARY FOR THE PERIOD JANUARY 1, 1987 TO JUNE 30, 1987

Petitioner argues that

> the resolution extending petitioner's contract was separate and apart from any other resolution. It is clear from established case law that in the event that the Commissioner rules that the resolution granting petitioner tenure is invalid, respondent is still obliged to compensate petitioner in the amount of $24,829.50 for the unpaid duration of the contract.
> (Id., at p. 5)

Petitioner cites Martin v. Board of Education of the City of South Amboy, 1973 S.L.D. 496, 499, aff'd State Board of Education, 1974 S.L.D. 1412, and Moore et al. v. Board of Education of the Borough of Roselle, 1973 S.L.D. 526, 537-538 for the proposition that in the absence of a termination clause, a board of education is responsible for monetary compensation for the duration of the agreement. Petitioner contends that on April 16, 1986, he and the Board executed an employment contract for the period July 1, 1986 to December 31, 1986 at an annual salary of $49,659, prorated, which included a provision which permitted either party to give the other 60 days' written notice to terminate the contract. Yet, petitioner argues, on September 29, 1986 the Board passed a resolution employing him for the period of January 1, 1987 to June 30, 1987 at the same annual salary of $49,659, and that "[t]his resolution was separate and apart from the resolution granting petitioner tenure. There was no termination clause in this

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resolution. Thus, in the event that the Commissioner determines that the tenure resolution is void, that determination does not nullify the resolution extending petitioner's contract." (Id., at p. 4)

EXCEPTION III

THE ALJ ERRED WHEN HE STATED THAT PETITIONER WAS NOT THE ONLY UNTENURED ELEMENTARY PRINCIPAL

Petitioner wishes the Commissioner to take note that he was the only nontenured elementary principal in the district at the time the Board conferred tenure upon him by resolution of September 29, 1986. The other nontenured principal in the district, petitioner avows is "the newly hired high school principal." (Id., at p. 5) Petitioner suggests:

> To be consistent with the Supreme Court's holding in Rall, supra, the time for attaining tenure in the North Plainfield school district was shortened to 2 years, 8 months, and 2 weeks by respondent's resolution of September 29, 1986. Therefore, the newly hired high school principal would not have tenure conferred upon him by the same resolution, which conferred tenure upon petitioner, but would have the time necessary for attaining tenure shortened to the time that petitioner served as a principal. (Id., at p. 5)

Petitioner requests that the Commissioner reject the initial decision and find and determine that the Board conferred tenure upon petitioner on September 29, 1986, and grant the relief sought in the pleadings and brief. In the alternative, petitioner requests that the Commissioner find and determine that he is entitled to his prorated salary for the period from January 1, 1987 to June 30, 1987.

Upon careful review of the instant matter, which, it is noted, does not include transcripts of the hearing below, the Commissioner must remand the matter for a determination as to whether petitioner was in fact the only nontenured principal in the district on September 29, 1986. The Commissioner notes petitioner's exception which challenges the statement of the ALJ at page 8 and again at page 12 of the initial decision that "it is uncontroverted that the petitioner was not the only untenured elementary school principal in the district at the time." The Commissioner requires clarification of this fact and directs that the ALJ consider what implication this fact has relative to the intent of the Board in passing its two resolutions on September 29, 1986 in

1. shortening the period required to obtain tenure in the position of principal in the district, and

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2. bestowing the benefits of tenure solely to petitioner or all other similarly situated principals in the district at that time and in the future.

Accordingly, the Commissioner remands the instant matter for further action in conformity with this decision and the holdings of Spadoro, supra, and Rall, supra.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

June 25, 1987

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

PARTIAL INITIAL DECISION
OAL DKT. NO. EDU 5779-86
AGENCY DKT. NO. 272-8/86

GERARD P. WILLIAMS,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,
Respondent.

Harold N. Springstead, Esq., for petitioner (Aronsohn & Springstead, attorneys)

Suzanne E. Raymond, Esq., for respondent (Gutfleish & Davis, attorneys)

Record Closed: April 1, 1987 Decided: May 18, 1987

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

Are the the duties of an educational broker in an adult high school the same as those of a day school guidance counselor or are they as different as night and day? That is the issue posed by petitioner, Gerard Williams, whose evening educational broker position was abolished in May 1986, and who now seeks a position as a guidance counselor in the day program on the basis of his tenure and seniority in his abolished broker position. Respondent Board argues that teachers in the adult evening school are not entitled to employment in day programs on the basis of tenure or seniority claims, and, even if they were, petitioner's position as educational broker is not sufficiently similar to that of guidance counselor so that he would have no seniority claim. For the reasons set forth below, I agree with petitioner and reverse the action of the Board in denying petitioner's claim.

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The procedural history of this matter is as follows. Petitioner was notified on May 28, 1986 that the Board voted to eliminate his position as a full time educational broker in the adult high school for the 1986-87 year. He responded by letter on June 20, 1986, inquiring as to his seniority rights for any and all positions for which he was qualified. The Board replied on July 11, 1986 and advised that his seniority was limited to the position of educational broker with the adult school, and he was offered a part time position in that capacity. He declined that and on August 1, 1986 filed an appeal with the Commissioner of Education, seeking seniority in one of two guidance counselor positions which existed for the 1986-87 year. On September 2, 1986 the Commissioner transferred this matter for hearing as a contested case to the Office of Administrative Law, where a prehearing conference was held on October 7. A full hearing was scheduled for December 4, but adjourned because the parties wished to proceed by cross motions for summary decision, which respondent Board filed on December 15, 1986 and petitioner submitted on January 5, 1987. Petitioner's and respondent's reply briefs were filed on January 20 and 22, respectively. The parties requested oral argument, which could not be scheduled until March 4, 1987. Additional briefs were requested at the hearing and filed by respondent on March 16 and petitioner on March 27, accompanied by affidavits. After a five day response period was allowed, the record was closed on April 1, 1987.

The substantive facts needed to decide the motions are not in dispute. Petitioner was employed by the Englewood Board of Education as a full time Educational Broker on August 25, 1980 in the Englewood Adult Evening School and held that position until it was abolished in May 1986. Because no other full time educational broker positions existed at that time, petitioner was advised by the Board that he was entitled to a position as part time broker in the evening school and that he had seniority rights over all other part time brokers. As indicated, petitioner declined to accept this offer and filed a petition. There is also no dispute that the respondent Board has employed two guidance counselors in its high school day program without offering either of those positions to the petitioner.

The key facts go to the duties of night school educational brokers and day school guidance counselors. The qualifications for both jobs require certification in the area student personnel services under N.J.A.C. 6:11-12.13, with the educational broker position specifically requiring a master's degree in guidance from an accredited college or university and five years experience. The counselor job does not specifically require a master's degree, although the certification calls for completion of an approved graduate

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curriculum or 30 semester hours of post baccalaureate work in a number of areas. See, N.J.A.C. 6:11-12.13(b)(4)(ii). According to the job description, the counselor reports to the principal, and director of guidance and career awareness, while the broker reports to the director of adult education and community resources. The performance responsibilities of the two positions are as follows:

Educational Broker:

1. Set up procedures for and conduct registration conferences with all prospective enrollees in the Adult High School.

2. Gather information required for, or about, all enrollees in the Adult High School and to maintain records of and for each on appropriate forms.

3. Explain the procedures and requirements necessary to complete the program in order to receive a high school diploma, local and/or State, through the Adult High School to each enrollee in the Adult High School.

4. Work with each student, as required, by assisting each student to set up appropriate goals for his/her learning, establishing and scheduling an appropriate program to facilitate meeting those goals, and evaluates the accomplishments of the enrollees prior to awarding credit toward the high school diploma.

5. Seek out and engage secondary facilitators in the field to assist enrollees and certify their accomplishment of either academic or other assessment programs.

6. Evaluate for credit all credentials, academic or otherwise, offered for the enrollees toward awarding credit toward the high school diploma.

7. Seek out and engage competent personnel to prepare assessment programs academic or otherwise to be utilized by enrollees.

8. Maintain transcripts of record for each enrollee in the Adult High School, and issue same to responsible agencies or appropriate and authorized requests.

9. Recruit enrollees for the Adult High School.

10. Act as counselor to all enrollees in the Adult High School as appropriate, especially concerning career guidance.

11. Conduct testing and other assessment programs individually or collectively, for enrollees in the Adult High School as may be necessary or useful by State or local mandate.

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12. Certify program completion of requirements for graduation for all enrollees to the Principal of the Adult High School prior to graduation.

13. Act as liaison between the regular day high school and the Adult High School, as necessary or useful, concerning enrollees and their benefits relative to services available through the day program especially concerning career guidance programs.

14. Make recommendations to the Principal of the Adult High School concerning program needs, staffing, and operations of the Adult High School.

15. To undertake positive public relations as useful or necessary in the community in explaining the role of broker and/or the purpose and function of the Adult High School.

16. Coordinate and direct the training, function, and performance of other educational brokers as employed by the school district.

17. Become acquainted with the role and function of other educational brokers within the State of New Jersey and represent the district at appropriate meetings of adult educators as may be necessary or useful.

18. Perform such other duties as might be required by the Director of Adult Education and Community Resources or as are necessary to fulfill the responsibilities of such position.

Guidance Counselor, Secondary:

1. Provide counseling to students for the purpose of aiding them in:

   a. assessing, understanding and expanding their abilities, aptitudes and interests

   b. increasing their understanding and acceptance of self

   c. formulating short and long range educational, social and career goals

   d. developing tentative educational plans to meet their various established goals

   e. understanding the advantages and disadvantages of the various potential choices

2. Provide information and prepare reports about students for parents, teachers, administrators, Special Service personnel and properly authorized outside agencies.

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3. Aid students in their social growth and adjustment.

4. Maintain an accurate permanent record of each assigned student's academic progress and selected standardized test scores, in accordance with state law and Board of Education policy.

5. Help in identifying and counseling exceptional children, arranging meetings with parents and appropriate professional personnel, and aiding in providing for their special needs.

6. Implement the technical/clerical aspects of academic decisions promptly and accurately.

7. Plan, prepare and conduct group counseling sessions to foster academic, personal, social and vocational adjustment.

8. Provide opportunities via printed and multimedia resources, guest speakers, and field trips to increase students' knowledge of academic and career opportunities.

9. Demonstrate knowledge and understanding of counseling theory, tests and measurement and related subjects.

10. Facilitiate a postivie mental health climate in the school.

11. Communicate with parents and encourage active parental involvement when needed.

12. Provide encouragement and assistance to students in a supportive, non-punitive climate.

13. Work actively to reduce stereotyping and prejudice wherever possible.

14. Perform any and all such other duties as may be required in order to fulfill the position.

(See petitioner's Exhibit B; respondent's Exhibit A)

In addition to the job descriptions, the parties submitted affidavits as to the duties of educational brokers. Respondent relies upon the affidavits of Vincent Cantwell, Director of Adult Education and Principal of the Adult High School in Englewood. Cantwell confirms that the job description is accurate and further states that students in the adult school range in age from late teens to the mid-80s and, it is unusual for students attending the regular daytime program to be enrolled in adult high school or vice versa. Cantwell also claims that none of the employees of the adult evening school are on any salary guide. Further, Mr. Cantwell states that the performance responsibilities set forth in the job description of educational broker do not include any duties involving contact

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with parents, as the typical student in night school is an adult. Although he concedes that five or six students in that school are under the age of 18, he concludes that contact between brokers and parents is minimal and unusual. Petitioner's certification sets forth his experience in dealing with parents of students stating that he would consult on "many occasions with the parents of students between the ages of 16 and 21 who are often concerned with the child's progress." (See Certificate of March 19, 1987).

There is no dispute as to the above facts and I so **FIND**.

The issues settled by the prehearing order are as follows:

A. Is petitioner entitled to the guidance counselor position at the respondent's high school?

B. If so, on what salary guide?[1]

C. Is petitioner entitled to retroactive salary and, if so, on the basis of what salary guide?

D. Is an individual employed in the Adult Evening School entitled as a matter of law to employed in the day program on the basis of seniority or tenure rights?

E. Is the petitioner's request for retroactive pay barred by the 90 day time limit for the following petitions set forth in N.J.A.C. 6:24-1.2(b).

F. Is the petitioner's claim barred by laches?

G. Has the petitioner failed to mitigate damages by his refusal to accept the position of part time educational broker at the Adult Evening School?

[1]At the prehearing conference on October 7, 1986, petitioner was directed to file an amended petition within 20 days clarifying the specific position and salary guide placement being sought. To date, no amended petition has been received. Although it is clear from the original petition that Gerard Williams is seeking a position as secondary guidance counselor in the day program, the specific salary guide placement has not been made clear and resolution of that issue has been reserved pending filing of an amended petition and any further proceedings that may be necessary.

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At oral argument on March 4, an additional issue was raised as to whether teaching staff members holding full time positions in the Adult Evening School have seniority rights to any positions in the regular day school program (Issue H). As this is a threshhold issue which will determine whether the petition will see any daylight, it will be dealt with first.

Williams argues (memo of March 25) that the tenure statute, N.J.S.A. 18A:28-5, makes no distinction between day and evening classes but provides that teaching staff members required to hold appropriate certificates shall be under tenure during good behavior after serving specified periods in positions requiring certification. Petitioner relies on Linfante v. Bd. of Ed. of Essex County Vocational Schools, 1986 S.L.D. ____ (Comm. Dec. May 5, 1986) which is discussed more fully below and stands (petitioner claims) for the proposition that tenure and seniority rights obtained in evening and day schools are interchangeable for the same certified positions. Petitioner cites the tenure statute and seniority provisions, N.J.S.A. 18A:28-11.12, as allowing the night to day seniority claim because it does not expressly exclude it. Respondent argues that there is an absence of expressed language as well as clear legislative intent that the tenure and seniority rights of adult evening school teachers are transferable to day programs. Without any explicit statutorty grant of tenure rights and in light of the possible financial burden of such a decision, respondent argues that tenure by night is not tantamount to seniority by day. The Board also notes the differences between the nature and purpose of adult evening school and "regular davtime" school in such matters as age of students, part time basis, curriculum, parental involvement, compulsory attendance, and overall mission and philosophy.

Respondent further argues that the positions of secondary guidance counselor and senior educational broker contain some overlap duties but are not substantially the same, particularly with regard to contact with parents which it claims to be less likely in the adult evening setting. Petitioner perceives the positions as the same and argues that he is entitled to seniority under N.J.A.C. 6:3-1.10(i), providing that "[W]henever any person's particular employment shall be abolished in the category, he or she should be given that employment in the same category in which he or she is entitled by seniority." Petitioner's reply brief of January 20 particularly argues that the positions are substantially the same, as they involve counseling students and providing various guidance services. Because the positions are substantially similar, petitioner argues that he should be entitled to the high school guidance position retroactive to his dismissal. (Reply brief at 7.)

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The Board's reply brief, sees no substantial identity between the duties of the two positions, and further argues that all claims for retroactive salary and guide placement are barred by N.J.A.C. 6:24-1.2(b) and the doctrine of laches.

The parties do not dispute that teaching staff members of adult evening schools holding appropriate certificates and working in positions requiring them are entitled to tenure under N.J.S.A. 18A:28-5, so long as the other requirements (e.g., good behavior) of that section are satisfied. As tenured employees, educational brokers are entitled by seniority to be placed in the same category when any particular employment in that category is abolished. Having concluded that adult high school teachers may be eligible for tenure, the question becomes

Tenure by Night; Seniority by Day?

The New Jersey Supreme Court in Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982) expressly disapproved the Appellate Division's earlier conclusion that tenure was not available to adult evening school teachers. 90 N.J. at 79-80. In doing so, the court made clear that courts may not carve out exceptions to the tenure statute based on perceived policy considerations. Since teaching staff members in adult education programs can, under circumstances complying with the statute, acquire tenure it follows that they are entitled to the ancillary right of seniority and reemployment in a position for which they are qualified upon dismissal because of a reduction in force. Statutory sections governing tenure, seniority and reemployment make no distinction between night or day programs, provided that the teaching staff member is qualified for the position for which reemployment is sought. See, N.J.S.A. 18A:28-11 and 12, (which provides:

> 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 the length of service for reemployment, full recognition shall be given to previous years of service. . . .) (emphasis added)

Nor does the regulation governing seniority make a distinction between day and night programs in providing that teachers whose employment is abolished in a given category shall be given employment in the same category. See, N.J.A.C. 6:3-1.10(i). The

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Commissioner of Education recognized that a transfer between day and night program did not violate tenure or seniority rights so long as within the same area of certificate endorsement in the case of Linfante, cited above. Although Linfante involved a transfer and not a reduction in force triggering seniority rights, that case also stands for the proposition that tenure and seniority rights may be transferred intact within the same subject area. Although Linfante involves a transfer and not a RIF, and is therefore distinguishable, it does recognize that adult evening schools are "tenurable" and that seniority rights attach to it. (See, Commissioner decision at 16). The cases cited by respondent do not compel the conclusion that tenure rights secured in adult evening schools do not gurantee seniority rights in equivalent day program positions. The Supreme Court in Lukas v. State Department of Human Services, 103 N.J. 126 (1986) held only that teachers in state noncorrectional facilities such as Marlboro and New Lisbon were not eligible for tenure under the provisions of N.J.S.A. 18A:7B-11, which is not relevant to this case. Nor does the Appellate Division's decision in O'Toole v. Forestal, 211 N.J. Super. 394 (App. Div. 1986) shed any light on the situation of a night school broker seeking daytime seniority because it is confined to the facts of the tenure rights of teachers in state schools for the handicapped under N.J.S.A. 18A:60-1 et seq., which has nothing to do with this case. Accordingly, because the express language of the tenure statute and seniority provisions, as well as regulations, do not limit the tenure rights of evening employees to evening programs, such a limitation should not be inferred. Spiewak recognizes the tenure rights of all teaching staff members who qualify, whether in adult program or not, and the statute does not state or suggest that the seniority rights flowing from tenure are to be confined or cut off merely on the basis of the time of day a teaching staff member works. I CONCLUDE on that basis that full time tenured teaching staff members in adult evening schools have seniority rights upon reduction in force to the same positions in regular day school programs.

Are the Positions the Same?

A review of the job descriptions submitted reveals that the qualifications are virtually identical, with a certification for student personnel services being required for both. Indeed, qualifications for educational broker are more stringent in that they require at least five years experience in counseling (not required for a counselor) and also specify that the applicant must hold a master's degree in guidance. In reviewing the positions, we are required to look beyond titles to the duties actually performed. See, N.J.A.C. 6:3-1.10(g). An educational broker and guidance counselor both provide a myriad of guidance

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services to students. They both must conduct testing and other assessment programs, and gather information and maintain records on students. In short, they both function (by any other name) as guidance counselors. The differences between the functions of assessment, counseling and providing information to students are largely semantic and not based on the essential functions performed by both the guidance counselor and educational broker.

There are, of course, slight differences in duties, based on the different student populations being served. Primary among these is the fact that the night counselor, due to the greater age of students on the whole, may not deal to any great extent with parents. The guidance counselor's job description at several points mentions duties with respect to parents, while the broker's description is silent on this point. Nonetheless, evening adult education is available to and, indeed, often indispensable to youths between the ages of 16 and 21 who have dropped out of school and whose parents may (or may not) be actively interested in their academic fate. Petitioner's affidavit indicates that he has had dealings as a counselor with such concerned parents. Nor is there any automatic cutoff point of parental interest and involvement at the age of 21, although it may become somewhat less likely as years and events put distance between them and their children. It is also clear from the certification for student personnel services that the heart of the function is the study, assessment and counseling of students as to their abilities, interests and needs. See, N.J.A.C. 6:11-12.13(a). A parent, if available and interested, can become involved in a counseling process but the focus of the counselor is the student whether in night school or day school. I do not find the other differences between evening and "regular" school cited by the Board sufficient to distinguish or diminish the educational broker's function as compared with that of the guidance counselor. The job descriptions reveal plainly that the positions are substantially similar. For that reason, I **CONCLUDE** that the seniority rights secured to petitioner as a tenured educational broker in the adult evening program would apply to employment in the same cagetory as a guidance counselor in the day program pursuant to N.J.S.A. 18A:28-12 and N.J.A.C. 6:3-1.10 and that petitioner is therefore entitled to one of the guidance counselor positions which he was not offered.[2]

[2]In light of this conclusion, there is no reason to reach Issue (G) as to mitigation of damages based on failure to accept the part time educational broker position because petitioner was entitled to one of the full time guidance counselor positions.

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Is the Claim Barred?

Respondent raises the time bar of N.J.A.C. 6:24-1.12(b) (90 days for filing petitions) as well as the doctrine of laches and argues that the petitioner is precluded from seeking retroactive pay. There is no dispute that Williams filed a petition within 90 days of receiving notice that his position as an educational broker was to be eliminated. Respondent claims, however, that petitioner cannot receive seniority credit for his service prior to May 1986 because his appeal is out of time in that regard.

The Appellate Division recently held in the case of Polaha v. Buena Regional School District, 212 N.J. Super. 628 (App. Div. 1986), that the 90 day limitation of N.J.A.C. 6:24-1.2 is applicable to claims arising out of alleged violations of statutory tenure rights. 212 N.J. Super. at 633-34. There, the Appellate Division remanded to the Commissioner of Education so that he might consider his authority to relax the 90 day rule as allowed by N.J.A.C. 6:24-1.19. Petitioner here asserts a statutory right of seniority deriving from tenure. In that the right being asserted derives directly from tenure, the Appellate Division's conclusion in Polaha would apply in this instance. As for relaxation of the rule, petitioner has made no argument as to why circumstances presented would result in injustice or be otherwise inappropriate or unnecessary. He has long been on notice of the respondent Board's claim of a time bar, through the rule and through laches, and has offered no facts or argument as to why his claim should not be barred for failure to assert it in a timely fashion. On that grounds, I **CONCLUDE** that petitioner is barred from seeking retroactive pay or credit for previous years of service beyond May 1, 1986, 90 days prior to the filing of his petition. He may receive retroactive salary for the period subsequent to May 1, 1986 but there is still an issue pending as to the appropriate salary guide.

On the basis of the above findings of fact and conclusions of law, it is **ORDERED** that petitioner's motion for summary decision is **GRANTED** as limited by this decision and respondent's cross motion for summary decision is **DENIED** except as it pertains to petitioner's claim for retroactive pay or credit beyond May 1, 1986 which is **GRANTED**. Because this decision decides all of the issues, with exception of that of the appropriate salary guide, it is being submitted to the agency head under N.J.A.C. 1:1-13.3(b) for immediate review as an initial decision.

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

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

May 18, 1987
DATE

RICHARD J. MURPHY, ALJ

MAY 18 1987
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 21 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

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GERARD P. WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN 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 were timely filed pursuant to N.J.A.C. 1:1-16.4a, b and c.

The Board contends that the ALJ erred by confusing the concepts of tenure and seniority and by failing to correctly apply the Jablonski standard which requires that the job duties of the position held and the position sought be substantially the same. It also alleges that the ALJ improperly placed the burden of proof on it rather than on petitioner and that he utilized the wrong legal criteria for determining seniority because he mistakenly focused on qualifications and certification rather than on category and actual job duties. With respect to this latter point, the Board states:

> Throughout the decision the ALJ mistakenly focused on qualifications and certification rather than on category and actual job duties, the proper criteria for seniority entitlement. For example, the decision stated that "the qualifications are virtually identical" and are, "indeed, *** more stringent" for the Educational Broker position. ALJ Slip Opinion at 9. The ALJ further found that "[i]t is also clear from the certification for student personnel services that the heart of the function is the study, assessment and counseling of students as to their abilities, interests and needs." ALJ Slip Opinion at 10. Although this observation may be correct, it has no relevance whatsoever to the issue of category which is the determiner of seniority rights in this case.
>
> (Board's Exceptions, at p. 5)

The Board reiterates its position that there are key differences between day school and evening school programs and cites the recently enacted N.J.A.C. 6:30-2.18(a)[1] as additional support. This regulation reads:

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1 N.J.A.C. 6:30-2.18(a) became effective August 4, 1986

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> The adult high school shall have an adequate number of professional staff, properly certified for their respective assignments; however, those persons involved in adult advisement shall be certified as principal, supervisor, counselor or teacher.

With respect to this the Board argues:

> This regulation requires any one of the four enumerated certifications for an individual serving as advisor in an adult evening school, but does not necessarily require that such an individual be certified in counseling. Thus, it follows that an advisor to adult students, a duty included in the position of Educational Broker, does not involve the quantity or quality of counseling as is required in a guidance counselor position in a regular day program where an educational services certificate with an endorsement in Student Personnel Services is mandated. See N.J.A.C. 6:11-11.1 and 6:11-12.13. Clearly, the Department of Education views the position of Adult Evening School Advisor as one which does not necessarily require training in counseling while it perceives the role of a regular daytime guidance counselor as one whose activities are concentrated solely in the guidance area.

In addition to the above, the Board contends that the ALJ erred in determining that all adult evening school teachers have seniority rights to regular day school program positions. Moreover, it alleges the ALJ erroneously has undertaken to determine petitioner's salary guide placement as he has no jurisdiction to determine salary guide placement and he erroneously interpreted the 90 day time bar rule as permitting retroactive salary for the 90 day period prior to the filing of the Petition of Appeal.

Petitioner rejects the Board's exceptions avowing that (1) the ALJ correctly concluded that the position of educational broker and guidance counselor are substantially the same; (2) he sustained his burden of proof; (3) adult evening school teachers have seniority rights to regular day school programs; (4) salary guide placement is a collateral issue to be decided upon affirmance of the initial decision; and (5) he is entitled to retroactive salary and guide placement for the 90 day period prior to the filing of the Petition of Appeal.

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Upon review of the record and the exceptions in this matter, the Commissioner determines that the ALJ correctly found that petitioner was entitled by virtue of his tenure and seniority rights to a guidance position in the regular high school. He is in full agreement with the ALJ that

> Since teaching staff members in adult education programs can, under circumstances complying with the statute, acquire tenure it follows that they are entitled to the ancillary right of seniority and reemployment in a position for which they are qualified upon dismissal because of a reduction in force.*** (Initial Decision, ante)

N.J.S.A. 18A:28-12 reads in pertinent part:

> 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 supplied)

N.J.A.C. 6:3-1.10(i) 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. 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. (emphasis supplied)

The ALJ is correct in stating that statutes governing tenure, seniority and reemployment make no distinction between night and day programs, provided the teaching staff member is qualified for the position for which reemployment is sought. Likewise he is correct in stating that the seniority regulations do not make a distinction between day and night programs in providing that teachers whose employment is abolished in a given category shall be given employment in the same category. Thus, it is clear that petitioner is entitled to any position in the category to which his seniority has accrued.

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"Educational broker" is an unrecognized title. There is nothing in the record to demonstrate that the Board in the instant matter complied with the mandate of N.J.A.C. 6:11-3.6(b) which reads:

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

Moreover, N.J.A.C. 6:3-1.10(g) requires that:

> Where the title of any employment is not properly descriptive of the duties performed, the holder thereof shall be placed in a category in accordance with the duties performed and not by title. Whenever the title of any employment shall not be found in the certification rules or in these rules, the holder of the employment shall be classified as nearly as may be according to the duties performed, pursuant to the provisions of N.J.A.C. 6:11-3.6.

The Board's failure to comply with the above-cited regulations does not, however, serve to abrogate petitioner's seniority rights in this matter. As was found in such cases as Michael Furst v. Bd. of Ed. of Rockaway, decided by the Commissioner May 18, 1984, aff'd State Board October 24, 1984 and Lori Boehm v. Bd. of Ed. of Pennsauken, decided by Commissioner June 19, 1984, petitioner's service as an educational broker attaches to his educational services certificate in student personnel services, the certificate required by the Board for the position in which petitioner has acquired tenure. See Exhibits A, B and C attached to petitioner's brief.

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Having determined that petitioner's service attaches to the educational services certificate in student personnel services, it is now necessary to determine which specific category such service falls under as delineated by the seniority regulations. N.J.A.C. 6:3-1.10 A review of those regulations reveals that adult high school is not specified as a seniority category. Therefore, it is determined that his service in the adult high school would fall under the "secondary" seniority category, given the fact that the curriculum and educational programming provided by adult high schools are designed for and lead to the granting of a high school diploma. N.J.A.C. 6:30-2.1 et seq. More specifically, petitioner's service falls under N.J.A.C. 6:3-1.10(1)(15)(iii) which reads:

> Any person employed at the secondary level in a position requiring an educational services certificate or a special subject field endorsement shall acquire seniority only in the secondary category and only for the period of actual service under such educational services certificate or special subject field endorsement.
>
> (emphasis supplied)

Consequently, it is determined that petitioner is entitled to any position in the secondary category for which his student personnel services certificate qualifies him. Thus, the Board's failure to offer him a secondary guidance counselor position held by a nontenured individual or one with less seniority than he constitutes a violation of petitioner's tenure and seniority rights.

Accordingly, petitioner is entitled to placement in a full-time secondary guidance counselor position along with such salary, benefits and emoluments attached to that position, less mitigation, effective as of the date the 1986-87 school year guidance counselor position became available,[2] not May 1, 1986 as determined by the ALJ.

It is this issue of salary entitlement which gives rise to the Board's allegations of 90 day time bar and laches. Because petitioner's salary was never based on a salary guide but was individually negotiated by him or the adult high school principal, the Board argues that he cannot now claim retroactive pay on guide placement for his prior years of service.

The Board is correct in arguing that retroactive pay, except as determined above, is time barred in this matter. However, because petitioner prevailed in his claim of wrongful denial of employment as a secondary guidance counselor for the 1986-87 school year and because he has been ordered into such position along with back pay, less mitigation, the issues of salary and salary guide

---

[2] It is unclear in the record whether the guidance counselor position in dispute is a 10 month, 11 month or 12 month position.

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placement emerge as collateral issues that must be addressed in order to ascertain petitioner's proper monetary entitlement. The Petition of Appeal, which was timely filed, contains a specific prayer "for the grant of back pay, with interest, and seniority credit for all periods of time in which [he] was wrongfully denied employment." (emphasis supplied) (at p. 3) The ALJ cannot reach a determination on the amount of back pay entitlement in this matter without first hearing argument on the salary issue which he has reserved for further proceeding.

The Commissioner finds nothing in Hyman, supra, to preclude his review of and jurisdiction over the salary issue. He does agree with the Board's exception, however, that amendment of the Petition of Appeal is not warranted. The position petitioner was entitled to has been determined. All that remains is the salary determination.

To recapitulate the time bar issue, it has been determined that retroactive salary is strictly limited to the date upon which the secondary guidance position for the 1986-87 school year became available, not May 1, 1986 as determined by the ALJ. Previous years' service and salary guide placement come into play only insofar as it is necessary to determine petitioner's back pay entitlement for the full period of wrongful denial of employment as a secondary guidance counselor. Any claim to back salary and retroactive salary guide placement prior to the date of wrongful denial of employment is time barred by N.J.A.C. 6:24-1.2.

Accordingly, partial summary decision is granted to petitioner as delineated herein. The remaining salary issue is to be subject to further hearing and reviewed by the Commissioner upon the issuance of the ALJ's initial decision. Moreover, the Board is ordered to comply immediately with the mandate of N.J.A.C. 6:11-3.6(b) by submitting to the county superintendent the unrecognized title disputed herein and all other unrecognized titles in use in the district which have not been reviewed and approved by him pursuant to that regulation.

COMMISSIONER OF EDUCATION

June 29, 1987

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GERARD P. WILLIAMS,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, June 29, 1987

Decision on Motion by the Commissioner of Education, August 31, 1987

For the Petitioner-Respondent, Aronsohn and Springstead (Harold N. Springstead, Esq., of Counsel)

For the Respondent-Appellant, Gutfleish and Davis (Suzanne E. Raymond, Esq., of Counsel)

The State Board of Education denies the Respondent-Appellant's request for oral argument, concluding that oral argument is not necessary in order to arrive at a fair determination in this case. See N.J.A.C. 6:2-1.15.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. Respondent-Appellant's motion for a stay of the Commissioner's Decision is therefore also denied.

James Jones abstained.

November 4, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 289-87
AGENCY DKT. NO. 418-12/86

JOHN DOWLING,
Petitioner,
v.
MIDDLETOWN TOWNSHIP BOARD OF EDUCATION,
Respondent.

Wayne J. Oppito, Esq., for petitioner

Peter P. Kalac, Esq., for respondent (Kalac, Newman & Lavender, attorneys)

Record Closed: April 7, 1987 Decided: May 22, 1987

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

John Dowling, petitioner, alleges and the Middletown Township Board of Education (Board), respondent, denies that the Board has improperly fixed petitioner's salary for the 1986-87 school year.

The matter was opened before the Commissioner of Education and, when joined, 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. After notice, a prehearing conference was held on March 5, 1987. The parties agreed that the issue to be determined is whether the Board has improperly fixed the petitioner's salary for 1986-87 and, if so, to what relief he is entitled. The parties also agreed that there were no essential facts in dispute and that the matter was ripe for summary judgment. All papers were filed by April 7, 1987.

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FACTS

The petitioner is a tenured assistant principal in the Middletown Township School District and is currently assigned in that position to Middletown High School South. The petitioner has been employed by the Board for 24 years, the first nine years as a teacher and the remainder as a vice principal.

During the 1983-84 and 1984-85 school years, the petitioner was at the maximum pay step of the administrative salary guide. On January 24, 1985, the Board acted to withhold his increment for the 1985-86 school year and his salary was the same for 1985-86 as it was in 1984-85.

Within the resolution of June 24, 1985, was the following language:

> BE IT RESOLVED that the withholding of said increment shall continue in future years unless the Board of Education shall restore same as an adjustment increment pursuant to N.J.S.A. 18A:29-14.

During the 1985-86 school year, the petitioner was evaluated by the then high school principal and his performance was determined to warrant receipt of an increment for the 1986-87 school year. The Board did not withhold the petitioner's increment for the 1986-87 school year.

The Middletown Township Administrators and Supervisors Association, of which the petitioner is a member, negotiated a collective bargaining agreement with the Board for a two-year term, 1984-86. The salary guide contained in that agreement consists of four parts: a base guide consisting of five steps, a ratio that is applied to the base depending on the position held by the individual, a provision for additional salaries based on degrees and credits, and a longevity provision. Board's exhibit B.

The petitioner, in 1984-85 and continuing to the present, has been a 12-month assistant principal with a master's degree plus 10 credits. Additionally, his years of service placed him at the top of the base salary guide for the years 1984-85 and 1985-86.

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The Association and Board negotiated a new salary guide for 1986-87. Board's exhibit C. It consists of the same four parts as the prior salary guide. However, the five steps have been increased to 10 and the ratios applicable to the various positions within the unit have been renegotiated. The petitioner's years of service in the district qualified him for placement at the top of the 10-step guide for 1986-87. The maximum step of that guide is $51,775. The petitioner is receiving $48,275 for 1986-87.

PETITIONER'S ARGUMENTS

Because the petitioner was at the maximum of the salary guide prior to the withholding of his increment in 1985-86, he is entitled to continue at the maximum of the guide in 1986-87. The Board took no action to withhold his increment in 1986-87. Because he does not contend that his 1986-87 salary, which is below his appropriate step on the guide, is the result of a continuing violation, the Supreme Court decision in North Plainfield Ed. Ass'n v. North Plainfield Bd. of Ed., 96 N.J. 587 (1984) does not control. The petitioner contends he earned his increment for 1986-87 by satisfactory performance during the 1985-86 school year and the Board has improperly refused to place him on the top of the salary guide.

In Masone v. Rutherford Bd. of Ed., OAL DKT. EDU 10723-83 (May 10, 1984), Comm'r of Ed. (June 28, 1984), the Commissioner determined that a petitioner who was at the top of a salary guide must be returned to the top of the guide following a one-year withholding. Among other things, the Commissioner stated at 25-26:

> The Commissioner is in agreement with petitioner's position that he is entitled to be placed at Step 18 of the 1983-84 salary guide by virtue of the fact that, prior to the withholding of his increment in 1982-83, he had been at the maximum step of the guide for several years (Step 16) and that all staff members with 20+ years' service in the district at that time moved to the new maximum, Step 18 of the new guide, in 1983-84. . . .
>
> The Commissioner is constrained to point out, however, that . . . a board [is] not required to pay any denied increment in any future year as an adjustment increment pursuant to N.J.S.A. 18A:29-14. Indeed, it is possible for a teacher to lag behind a step on the salary guide once an increment is withheld if a future board of education does not make an affirmative determination to advance the individual to the step he or she

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> would have been at had the increment not been withheld. However, in the instant matter, the Commissioner finds merit in petitioner's argument that, having been at the maximum prior to the withholding action, there is no step for him to lag behind, in that Step 17 represents 17 years of service in the district. [Emphasis supplied.]

In Chirico v. Belleville Bd. of Ed., OAL DKT. EDU 8994-84 (July 3, 1985), Comm'r of Ed. (Aug. 23, 1985), the Commissioner again addressed a teaching staff member's proper salary in the year subsequent to an increment withholding. In Chirico, the Commissioner interpreted Masone, above, slip opinion at 19

> However, the Commissioner disagrees with the ALJ that Masone, supra, is inapposite. Masone holds that unless a board acts affirmatively to restore an increment previously withheld, a board may permanently withhold the increment. It also stands for the proposition that in the year subsequent to the withholding, the board must place an individual back on the maximum step if that person has been on the maximum step of the guide prior to the withholding. In the instant case, petitioner, like the other three directors, was at the "top" of the no-step salary schedule before the increment withholding. Thereafter, there were no higher steps from which he could be held nor any lower steps from the previous year at which he could be retained since the entire no-step salary schedule was renegotiated each year.

As in Masone and Chirico, the petitioner here was at the maximum step of a guide prior to the withholding of his increment. The Board is required to place him at the maximum step in 1986-87, the year subsequent to the withholding.

BOARD'S ARGUMENTS

In Chirico, above, the board had agreed that each of its administrators would receive the same salary. Consequently, when one of them had an increment withheld, the issue arose as to what the latter's salary should be in the year subsequent to the withholding. The Commissioner, after comparing the facts in Chirico with the facts in Masone, stated the passage cited above. The Board contends the Commissioner concluded that the petitioner in Chirico was at the top of a "no step" salary guide. But if it were a "no step" salary schedule, would not the petitioner also be at the center and the bottom as well as any other point in between.

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It now appears that a board of education cannot take action to withhold an increment permanently. See, e.g, Black v. Bridgeton City Bd. of Ed., 1982 S.L.D. 1423. This case and others stand for the proposition that any attempt to permanently withhold an increment is contrary to the long established principle that a sitting board cannot bind a future board absent statutory authority.

Conversely, a board cannot withhold an increment for one year and provide in its resolution that the increment will be restored the year after it is withheld. The reason for this is obvious. This also would be an attempt to bind a future board and there is no statutory authority that permits.

The pertinent paragraph of the withholding resolution cited above is not only reasonable, it reflects the state of the law. The withholding of the increment shall continue in future years unless a future board shall restore it as an adjustment increment pursuant to N.J.S.A. 18A:29-14. Whether the increment remains withheld for 1986-87 or any ensuing school year will depend on whether a subsequent board takes affirmative action to restore it. Here, the newly organized board in 1986-87 did not take such action. Therefore, the increment remains withheld. But the petitioner protests that he is, or should be, at the top of the salary guide. He was there when his increment was withheld and he should be there now. In effect he says, "I should be paid what my colleagues are being paid who have the same number of service years to their credit."

In support, the petitioner would rely on Masone and Chirico. However, the reliance is misplaced. The New Jersey Supreme Court decision in North Plainfield, above, controls this matter. That decision was rendered by the Supreme Court on the same date that the Commissioner of Education decided Masone. Chirico, on the other hand, cites North Plainfield, but Chirico and its analysis of a "no-step" guide is an aberration.

If Masone and Chirico are read in pari materia with Cordasco v. East Orange Bd. of Ed., OAL DKT. EDU 7690-83 (May 10, 1984), Comm'r of Ed. (June 28, 1984), aff'd State Board of Ed. (Dec. 5, 1984), it would appear that there is now a double standard established in withholding of increment cases; to wit, if an increment is withheld while an employee is working his or her chronological way through a salary schedule, not having reached the top of the ladder, the increment remains withheld until a subsequent board restores. The same does not hold if an employee is at the top of a salary guide when the

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increment is withheld. In that instance, after a one-year loss of the increment, and even absent affirmative action by the sitting board to restore the withheld increment, the Commissioner will enforce his judgment on the local board and restore the increment that the Board did not restore.

Certainly, this flies in face of the long-established principle that the Commissioner will not substitute his judgment with that of a local board. Further, this is not what the Supreme Court intended by its decision in North Plainfield. There, the Court clearly said that the annual increment is in the nature of a reward for meritorious service to the district. Implicit in the foregoing is the fact that the meritorious service was given by the employee in the year prior to the reward. In the present case, the petitioner did not provide meritorious service in the school year 1984-85. The Board so decided and further concluded that he should not be rewarded with an increment of his 1985-86 salary. The Commissioner of Education agreed when he affirmed the Board's action.

The petitioner did not provide his employer meritorious service in 1984-85 and that year can never again be recaptured. Any reward for 1984-85 can only be granted gratuitously by the Board. The last sentence of N.J.S.A. 18A:29-14 grants local boards of education this discretion. It reads, "It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment."

The statute does not compel a board to restore a withheld increment when the staff member from whom it was withheld reaches the top of the salary schedule. If the Legislature intended that result, it could simply have so stated. It did not. In fact, it did the contrary by using the word "any" to modify "future year."

Further, when North Plainfield is viewed in its entirety, it is obvious that the Supreme Court stated and intended that a staff member whose increment is withheld can conceivably lag behind for the balance of his career should each successive board refuse to act affirmatively to reinstate the withheld increment. This is not attributable to a new or continuing violation, but rather due to the effect of an earlier employment decision which was within management's discretion to make.

N.J.S.A. 18A:29-14 clearly states that it is not mandatory that a board restore a denied increment in any future year. The Supreme Court has cleary enunciated the

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principle that once an increment is withheld, the individual from whom it is withheld can always lag behind. If a board exercises its option pursuant to N.J.S.A. 18A:29-14 not to restore a withheld increment, as in this case, the Commissioner, should he restore it, substitutes his judgment for that of the local board. This, the Commissioner has consistently held in numerous other situations, should not be done.

The Board asserts that the reason the Commissioner held in Chirico that Masone "stands for the proposition that in the year subsequent to the withholding, the Board must place an individual back on the maximum step of the salary guide if that person had been on the maximum step of the guide prior to the withholding" is that the Commissioner has concluded that all teaching staff members are entitled to be placed somewhere on a salary guide. However, we know that this cannot be the law. When an increment is withheld pursuant to the statute, as it was in this case, the petitioner's salary did not correspond to any step of any guide that could have been extrapolated from the salary arrangement between the Association and Board. The same circumstances have obtained in scores of other cases. The Commissioner has heretofore ruled that it is permissible to freeze a salary at the same rate that an individual received the year prior. This can only mean that when an indivudual does not provide meritorious service, that individual waives his right to a salary guide placement.

In view of the foregoing, it is respectfully submitted that the Commissioner, in his holding in Masone and his subsequent explanation of that holding in Chirico, has misinterpreted the intent of N.J.S.A. 18A:29-14 as well as the Supreme Court's holding in North Plainfield.

Chirico and Masone effectively stand for the proposition that, if a board does not restore a withheld increment when the teacher reaches the top of a salary guide, then the board's nonaction is arbitrary. This proposition must follow; otherwise, there can be no explanation for the Commissioner's action restoring withheld increments. This can lead to stange results.

Assume for instance that a teacher is on a 15-step salary guide and has his increment withheld in his second year. The existing decisions would indicate that the increment can remain withheld for the next 14 years. This would be true because the Commissioner has heretofore concluded that the individual would be lagging behind one

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"step." However, another individual in the same district who had his increment withheld in the 14 year would have to have it restored in the 15 year, according to the Commissioner's most recent decision, because that individual had reached the top of the guide. In the latter situation, the Board would be arbitrary, capricious and unreasonable in withholding the increment for two years while, in the former situation, it would not be arbitrary, capricious and unreasonable in withholding the increment for 14 years.

Based on the foregoing, it is obvious that the lagging behind has to do with dollars and not "steps" or "maximums." Here, the Board has identified the year in which the petitioner did not provide meritorious service. Here the Board identified the amount of increment that would be paid to individuals who did provide meritorious service in that year. There is no reason why the petitioner, absent future Board action, should not continue to lag behind his colleagues by the amount of the withheld increment inasmuch as they provided meritorious service for the year in question and he did not.

DISCUSSION AND DETERMINATION

Despite an erratic history, many of the questions surrounding increment withholding are now answered. Both the Commissioner and the courts have determined that a withholding is permanent unless a future board acts to restore the withheld increment. In the Matter of the Tenure of Burns, OAL DKT. EDU 3128-83 (Jan. 23, 1984), Comm'r of Ed. (Mar. 8, 1984), aff'd, St. Bd. of Ed. (Oct. 24, 1984); North Plainfield, above.

In Burns, the State Board acknowledged North Plainfield and stated that "North Plainfield therefore mandates our holding that denial of increment for the 1983-84 school is permanent for subsequent years unless a future board affirmatively acts to reinstate it." Id. at 3.

North Plainfield is particularly instructive because it brings together and restates several important holdings. First, a salary increment is in the nature of a reward for meritorious service to the school district. 96 N.J. at 594. Second, an annual increment is not a matter of statutory right, but is subject to "denial for inefficiency or other good cause." Ibid. Third, evaluation of teacher service is a management

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prerogative essential to the district and the duties of a school board. Id. at 593. See also, Board of Educ. of Bernards Tp. v. Bernards Tp. Educ. Ass'n, 79 N.J. 311, 321 (1979); Clifton Teachers v. Clifton Bd. of Educ., 136 N.J. Super. 366, 339 (App. Div. 1975). Fourth, withholding a salary increment does not constitute a continuing violation. 96 N.J. at 595. Fifth, "the fact that the teachers will always lag one step behind is not attributable to a new violation each year, but to the effect of an earlier employment decision." Ibid.

Common experience shows many instances in which an increment was withheld contemporaneously with the adoption of a new salary guide. Thus, the affected person was paid at the prior year's salary even though that salary appeared nowhere on the new guide. The petitioner here is in an analogous position. As set forth the factual summary, above, the salary agreement between the Association and the Board changed as a result of the normal negotiations process between the two parties. The petitioner's present salary is $3,500 less than it would have been had an increment not been withheld. Nevertheless, it is $3,750 more than it was in 1985-86. The petitioner was paid $44,500 in 1984-85. The Board withheld the petitioner's increment for 1985-86 and he was paid $44,500 for that year. He is now $3,500 behind the salary of a person with similar service, educational attainments and assignment.

Under North Plainfield, I **FIND** that the denial of increment for the 1985-86 school year is permanent until and unless a future board affirmatively acts to reinstate it. To hold otherwise would be to create an entitlement that does not exist in statute.

When the Legislature enacted the Teacher Quality Employment Act, N.J.S.A. 18A:29-5.1 et seq., it repealed N.J.S.A. 18A:29-8, which had provided for annual employment increments for teaching staff members until they reached the maximum salaries provided in N.J.S.A. 18A:29-7, also repealed.

In the absence of any arguable statutory right to either an increment or a maximum salary, I must be guided by North Plainfield and the consonant decisions of the Commissioner.

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I **CONCLUDE** that the increment withholding in this matter is permanent for subsequent years. I further **CONCLUDE** that nothing in this decision can preclude a future board from reinstating the increment.

Accordingly, the petition of appeal is hereby **DISMISSED.**

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

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

22 MAY 1987
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

MAY 2 2 1987
DATE

Receipt Acknowledged:
Seymour Wells
DEPARTMENT OF EDUCATION

May 28, 1987
DATE

Mailed To Parties:
Ronald L. Parker /ss
OFFICE OF ADMINISTRATIVE LAW

ds

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JOHN DOWLING,	:	
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's exceptions and the Board's reply were timely filed pursuant to N.J.A.C. 1:1-16.4a, b and c.

Petitioner argues that the ALJ is without authority to overrule the Commissioner's decisions in Masone, supra, and Chirico, supra. He also argues that the ALJ's reliance on North Plainfield, supra, is misplaced since the issue before the New Jersey Supreme Court in that matter was the applicability of the 90 day rule embodied in N.J.A.C. 6:24-1.2. Further, he avers that the reference in North Plainfield to future salary is irrelevant and immaterial given the facts in this matter.

Petitioner also alleges that the ALJ erred in determining he had no statutory right to proper placement on the salary guide. More specifically he objects to the ALJ's conclusion that:

> In the absence of any arguable statutory right to either an increment or a maximum salary, I must be guided by North Plainfield and the consonant decisions of the Commissioner.
>
> (Initial Decision, ante)

In support of this position, petitioner cites N.J.S.A. 18A:29-4.1 and 4.3 which read in pertinent part:

> N.J.S.A. 18A:29-4.1
>
> A board of education of any district may adopt a salary policy, including salary schedules for all full-time teaching staff members which shall not be less than those required by law. Such policy and schedules shall be binding upon the adopting board and upon all future boards in the same district for a period of three years from the effective date of such policy but shall not prohibit the payment of salaries higher than those required by such policy or schedules nor the subsequent adoption of policies or schedules providing for higher salaries, increments or adjustments.***

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N.J.S.A. 18A:29-4.3

> The board of education of every school district employing one or more teaching staff members having full-time supervisory or administrative responsibilities shall adopt salary schedules for each school year that begins after the effective date of this act for all such members, except that for a superintendent of schools the board may adopt a salary schedule. Such salary schedules shall be subject to the provisions of N.J.S. 18A:29-4.1. Nothing contained in this section of the act shall authorize a board to pay an amount of salary less that the amount such member would be entitled to under any other law.***

With respect to the above statutes, petitioner contends that it is well established in New Jersey school law that a board of education is bound by its adopted policies, thus, once the Board adopted its salary policy herein it was bound by it. As such, petitioner avers that he is not seeking payment of his denied increment in a subsequent year. On the contrary he agrees that N.J.S.A. 18A:29-14 allows a board of education discretion to return a denied increment. Rather, he seeks appropriate guide placement.

The Board argues in its reply that petitioner's exceptions are without merit. It contends, inter alia, that the ALJ did not overrule the Commissioner's decisions in Masone, supra, and Chirico, supra, he merely harmonized those decisions with the State Board's decision in In re Burns, supra, and the Supreme Court's decision in North Plainfield, supra. The Board also urges that petitioner's exception with respect to North Plainfield should not be seriously considered. With respect to this, it contends that even if it is accepted that the decision was addressing the applicability of "the 90 day rule," as pointed out by the ALJ, North Plainfield is particularly instructive because it brings together and restates several important holdings on the issue of increments.

Moreover, the Board urges that the ALJ was correct that petitioner had no statutory right to either an increment or a maximum salary given the Supreme Court holding North Plainfield, supra, and the subsequent repeal of N.J.S.A. 18A:29-8 which had provided for annual employment increments for teaching staff members until reaching the maximum salary and the concomitant repeal of N.J.S.A. 18A:29-7 when the Legislature enacted the Teacher Quality Employment Act in 1985. N.J.S.A. 18A:29-5.1

Upon a thorough examination of the record in this matter and careful consideration of the legal arguments advanced by the parties, the Commissioner concurs with the recommended decision of the Administrative Law Judge for the reasons expressed in the initial decision and as explained below.

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The importance of the New Jersey Supreme Court's decision in North Plainfield, supra, goes well beyond its holding on the applicability of the 90 day rule embodied in N.J.A.C. 6:24-1.2. It is a key decision which brings together and expands upon a number of critical elements of the continuing and evolving body of case law which had been handed down for several decades on increments and increment withholding and which, at times, was admittedly conflicting and inconsistent as pointed out by the Board in its brief.

The ALJ was quite correct in reiterating a number of the critical holdings expressed by the Supreme Court in North Plainfield. Some of these holdings bear restating here.

1. A salary increment is in the nature of a reward for meritorious service. (at 593)

2. Evaluation of teacher service is a management prerogative essential to the district and the duties of a school board. (at 593)

3. A salary increment is not a statutory entitlement unrelated to the teachers' qualifications, performance or quality of teaching services rendered. (at 593)

4. Increments are subject to annual evaluation of teacher performance. (at 594)

5. Because the award of an annual increment is not a matter of statutory right but subject to denial pursuant to N.J.S.A. 18A:29-14, it is subject to the time bar contained in N.J.A.C. 6:24-1.2. (at 594)

6. The withholding of an increment does not constitute a continuing violation. (at 595)

and very importantly;

7. [T]he fact that teachers will always lag one step behind is not attributable to a new violation each year, but to the effect of an earlier employment decision. (at 595)

North Plainfield, supra, specifically at 593 addressed annual employment increments by the then N.J.S.A. 18A:29-8 which read:

> Any member holding office, position or employment in any school district of this state, shall be entitled annually to an employment increment until he shall have reached the maximum salary provided in the appropriate training level column in the preceding section. (emphasis supplied)

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Employment increment was defined in the then effective N.J.S.A. 18A:29-6 as:

> "Employment increment" shall mean an annual increase of $250.00 granted to a member for one "year of employment"***.

Notwithstanding this factor, North Plainfield, supra,[1] has importance and relevance to cases such as the instant matter and Masone, supra, which deal with teaching staff members who were no longer eligible to receive "employment increments" because each had already reached the maximum salary step on the district's guide prior to their withholdings and had no new "steps" to achieve given their years of service. Hence, they were eligible to receive only adjustment increments[2] and not employment increments given the salary guides in question.

The relevance and importance of North Plainfield, supra, is, of course, its explicit statement that the withholding of an increment does not constitute a continuing violation and that a teacher may "always lag behind a step" because of the effect of the earlier employment decision to withhold.

Masone, supra, stands for the proposition that a board may not in the year subsequent to an increment withholding remove an individual who for years (26 years' service) had been at the maximum step on the salary guide to a lower step bearing no relation to his years of service (a step representing 17 years' service). While this remains true, the recommended decision in the instant matter better harmonizes this concept with North Plainfield, supra, and In re Burns, supra, than either Masone, supra, or Chirico, supra, as explained below.

In the instant matter, the Middletown Board of Education did not remove Petitioner from the maximum salary step on the guide and place him at a lower step. Rather, it calculated his salary based on what he would have received at the maximum salary step given his years of service and level of training in 1985-86, absent an increment withholding the prior year, and then it subtracted the "effect" of (the amount equal to) the withheld increment for 1984-85, namely $3,500 as shown below.

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1 North Plainfield, supra, was decided by the New Jersey Supreme Court the same day (June 28, 1984) that the Commissioner's decision in Masone, supra, was issued.

2 Adjustment increment was defined in the then effective N.J.S.A. 18A:29-6 as: " 'Adjustment increment' shall mean, in addition to an 'employment increment,' an increase of $150.00 granted annually as long as shall be necessary to bring a member, lawfully below his place on the salary schedule according to years of employment, to his place on the salary schedule according to years of employment; provided, that a fraction of an 'adjustment increment' may be granted when such amount is sufficient to bring such member to his place on the schedule according to years of employment***."

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ASSISTANT PRINCIPAL
M + 10

1984-85

5 step guide - Maximum $37,275

$37,275 x 1.18041 = $43,999.78 - $44,000.00
+ 500.00 (graduate credits)
$44,500.00 1984-85 salary

1985-86

5 step guide - Maximum $40,285

$40,285 x 1.18041 = $47,552.81 - $47,553.00
53.00 (salary adjustments per negotiations)

$47,500.00
500.00 (graduate credits)
$48,000.00
3,500.00 (increment withheld)
$44,500.00 1985-86 salary

1986-87

10 step guide - Maximum $43,350

$43,350 x 1.1828 = $51,275.00
500.00 (graduate credits)
$51,775.00
3,500.00 (increment not earned in 1984-85)
$48,275.00 1986-87 salary

(Board's Brief, Exhibit 4)

The same result could have been achieved had the amount of the "adjustment" increment ($3,775) being granted to him in 1985-86 by virtue of the negotiated contract been added to the salary received for 1984-85 as shown below:

$44,500 (Salary 1984-85)
+ 3,775 (Total for negotiated adjustment increment for 1985-86 at maximum for assistant principal with M + 10)
$48,275 Salary for 1985-86

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Either of the above methods of calculation would be in keeping with North Plainfield, supra, and In re Burns, supra. Otherwise, to do as petitioner requests, i.e., paying him the full $51,775, would serve to do precisely what the Board suggests, namely, compel restoration of the $3,500 withheld in 1984-85 because the sum total of his increment from 1984-85 to 1985-86 would be $7,275. This clearly would fly in the face of N.J.S.A. 18A:29-14 which explicitly states, "It shall not be mandatory upon the board of education to pay...[a] denied increment in any future year as an adjustment increment."

Hence, petitioner is entitled to receive the difference between what he would have received in 1986-87 had his increment not been withheld ($51,775) and the amount equal to the increment withholding he experienced ($3,500).

Thus, unless a future board takes affirmative action to restore the denied increment, the effect of the withholding is permanent. In re Burns, supra

Unlike the Board in Chirico, supra, the Middletown Board has fulfilled its obligation to adopt a salary guide for full-time supervisory and administrative staff. N.J.S.A. 18A:29-4.3 Moreover, the method of calculating the "continuing effect" of the increment withholding does not represent an amount greater than the sum certain of the increment withheld ($3,500) which was not true in Chirico. In that case, the net effect of the board's action was that in each year subsequent to the withholding, petitioner therein had progressively more than the original $2,707 increment withheld, i.e., $2,842 in the first year following the withholding, $3,128 the second year. See Chart, ante.

Accordingly, the initial decision of the Office of Administrative Law is adopted as the final decision in this matter. The Petition of Appeal is hereby dismissed.

To what extent, if any, this decision may conflict with Masone, supra, and Chirico, supra, the instant matter controls.

COMMISSIONER OF EDUCATION

June 30, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6758-86
AGENCY DKT. NO. 304-9/86

BOARD OF EDUCATION OF THE BOROUGH OF NATIONAL PARK, GLOUCESTER COUNTY,
Petitioner,
v.
RICHARD WOLF,
Respondent.

Alan R. Schmoll, Esq., for petitioner (Capehart & Scatchard, attorneys)

Steven R. Cohen, Esq., for respondent (Selikoff & Cohen, attorneys)

Record Closed: April 7, 1987 Decided: May 15, 1987

BEFORE **NAOMI DOWER-LA BASTILLE**, ALJ:

The Board of Education of the Borough of National Park (Board) brought charges of conduct unbecoming a teaching staff member pursuant to N.J.S.A. 18A:6-11 against Richard Wolf, a tenured elementary school teacher. The conduct alleged was that respondent improperly touched the buttocks and backs of girl pupils, exhibited a pattern of riducule of pupils and threatened pupils for reporting his conduct. 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.

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PROCEDURAL HISTORY

On September 3, 1986, the board filed its certified charge with the Commissioner, who transmitted the case to the Office of Administrative Law on October 8, 1986. After a prehearing on November 7, 1986, respondent filed a motion to dismiss on procedural grounds, which was denied in a written opinion issued December 29, 1986. Hearings on the merits were scheduled to be held the first weeks in February and March 1987, in Mantua, Gloucester County.

A number of sixth grade children were scheduled to testify. After hearing the matter in Mantua on February 2, and 3, 1987, the Board moved to sequester respondent during the children's testimony on grounds that one allegation was that the children were threatened, thus they would be fearful of testifying that their teacher had done something improper while he sat directly in front of him. Respondent objected on due process grounds and argued his presence was necessary to assist in the defense. Based on the allegations and my observations at hearing, I ruled that truth would more likely emerge in cloistered circumstances and that respondent's needs could be served by placing him in an adjoining room with full video and audio monitoring of the proceedings. Thus the hearings were moved to the Office of Administrative Law in Mercerville where audio-video facilities were available. Hearings were held on nine days, concluding on March 5, 1987. A list of exhibits and the transcript designations are appended to this decision. The record closed with receipt of responsive briefs on April 7, 1987.

Credibility is the central issue in this case. In fact, it is virtually the only issue. The testimonial story may, at times, contain few operative facts, but is necessary because of the defense theory. A principal defense argument is that the teacher witnesses influenced children to make complaints which had no basis in fact. Respondent attacked the credibility of each adverse witness: one hated Wolf, another was supporting her friend's story; one child resented Wolf because he punished her for misbehavior, another told stories because she was dependent and easily influenced by her best friend. Others allegedly fantasized or were confused. Thus it is important to consider exactly how these charges came to be filed and when and how certain witnesses made themselves known.

Superintendent Peter Oteri and Principal Raymond Bider related the events which led to certification of charges against respondent. Bider, building principal of the

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school where Wolf served as fifth grade teacher, met with Oteri on May 28, 1985, and showed him a note which had been placed in his mail box. Some students complained that Wolf had favorites, ridiculed pupils with name calling and patted them on the back. No sexual implications were revealed. Oteri and Bider agreed that Bider would talk to Wolf the next day, which he did. Bider and Wolf agreed that Wolf could handle the matter with the children, by speaking to them at the end of the school day on May 29, 1985. Bider gave Wolf the children's note. Wolf was absent on Friday, May 30, 1985, the day after he met with the children.

On Monday, June 2, 1985, Wolf had severe back pains and left soon after he reported to school. Neither Bider nor Oteri had an opportunity to talk to Wolf about his meeting with the children.

On Wednesday, June 4, 1985, Cathleen Allison, another fifth grade teacher as well as elementary coordinator, told principal Bider that some of her students expressed concerns about some things in Wolf's classes. Bider told her to have the children put it in writing, which she did. She gave the children's notes and her cover note to Bider on Friday, June 6, 1985 (P - 1B, C, E, F; P - 2) Oteri talked to Allison and another teacher, Susan Slawter, on June 9, 1985, and asked them both to write down what they were aware of. Allison immediately wrote out all she knew about the children's complaints from the first day they spoke to her, June 4, 1985 to June 9, 1985. On June 10, 1985, Slawter wrote down what two fifth grade girls had told her on June 3, and June 9, 1985 (P - 3A and B), but her notes did not reach Oteri until the following week.

Oteri saw the children's notes (P - 1 series, P - 2) on June 6, 1985, and Bider told him the children requested a meeting with him as a group and wanted Mrs. Truett there (the school nurse). Bider had the meeting and reported back to Oteri that the children did have the concerns which they had written about. Bider told him it related to name calling, touching the girls' backs and bra straps and patting children on the buttocks. That same day, Monday June 9, 1985, Oteri spoke with Allison and Slawter. He then discussed the matter with Bider. As a result, Oteri called the County Superintendent, who advised him to call the Division of Youth and Family Services (DYFS) and also the Board solicitor. After further conferences with all the above, several Board members and Wolf, who denied all allegations, Oteri felt he had no alternative but to recommend Wolf's

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immediate suspension with pay for the last week of school. A DYFS investigation followed. The DYFS report was unfavorable to respondent. Upon its receipt, the Board took action.

It is true that the witness Cathleen Allison, to whom the children came with complaints, disliked Wolf intensely on professional grounds. She "hated him," apparently due to long standing differences of opinion about what was an appropriate style of teaching and handling elementary school pupils. She taught at National Park School for 16 years, and knew Wolf over that period. Susan Slawter, another teacher witness, is Allison's close friend and taught with her for 19 years. Slawter was a Dominican nun prior to becoming a teacher in the National Park School. Although respondent argues that both these women were so clearly biased against Wolf that they, in effect, placed the charges in the mouths of the children, after hearing the children's testimony (as distinquished from their initial complaints), I do not credit this theory. There is no question that Allison did not like Wolf because of strong differences in professional opinion. Both Allison and Slawter admitted that the dislike existed. I have no doubt that the girl pupils knew or sensed that these women disliked Wolf and that this was precisely the reason that the girls chose to confide in them;because they were women and because they were not friendly to Wolf. Thus, it was not Allison who influenced or instigated the girls' complaints. Rather, it was to be expected that the complaints would be revealed to her at which point she had no choice other than referring the matter to her superiors and following their directions.

None of the school staff who testified had seen or heard any of the allegedly improper conduct of Wolf. Only one adult witness claimed to have seen such conduct. This witness was Joan Wentzel, mother of four children in the National Park School. One day near the end of the school year, 1986, one of her children told her their was some trouble at school concerning Mr. Wolf. Wentzel then remembered seeing Wolf pull at a girl's bra strap and snap it. At the time, Wentzel discussed the incident with her neighbor, then forgot it. Upon hearing of the controversy concerning Wolf, Wentzel felt ashamed that she had remained silent so long. She came forward and reported the incident to Principal Bider.

Wentzel's memory was specific. She was highly credible. Her story was this. In 1984-85 school year, her child was in the fourth grade and she was scheduled for conferences with several teachers, including the resource room teacher Ms. Anders. While sitting in the hallway waiting, she noticed Wolf down the hall. Soon one girl asked

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him to get her a soda, presumably from a soda machine in the nearly teachers' lounge. Two other girls then joined him, asking for soda. He said, "I already got you one. One is your limit." They said, "Oh, please, Mr. Wolf. Please, Mr. Wolf." Wolf stood to one girl's right, rubbing her back while the girls pleaded with him. He said, "No, I'll be getting into trouble." As Wentzel was called into her conference, one girl went back to the reception desk area, Wolf followed, pulled at her bra and it snapped. When Wentzel went home, she spoke to a neighbor and to her older son about what she observed, but she did not speak to school authorities until two years later when questions arose about Wolf's conduct.

Since only one adult testified to an incident of improper conduct, the focus of inquiry is the children's testimony. It became clear that the inconsistences between prior statements and testimony had several sources. Foremost was the fact that prior statements were not made under controlled conditions where each child was carefully directed to tell only "what you saw with your own eyes and heard with your own ears" as they were admonished to do prior to testifying. Several believed that they had been directed to tell "what they heard" (hearsay) in writing the initial complaints. To others, it may have seemed like a class exercise in writing in which a little embellishment was acceptable. I do not feel that use of the prior statements is helpful in testing credibility. Inconsistencies in testimony are common to all people, and especially so with testimony of child witnesses: there are personal differences in ability to recall, length of time needed for recall, impressionability, imagination and ability to discriminate in processing and understanding auditory and visual observations. Respondent attributes to certain child witnesses various motivations which affected their testimony: friendship or dislike, retribution for "bad" grades or disciplinary actions of Wolf, or a desire for approbation from pupils or adults. It is not possible to accept respondent's theories that all the children were either telling lies as a part of all diabolic conspiracy to attack Wolf or that each was fantasizing. Except on a subconscious level and to a minor degree, I found almost no such motivations operative in the children's testimony.

One of the reasons very young children's testimony must be examined with "great caution" is that the black letter law "false in one, false in all" is not readily applicable. I do not believe any of these children deliberately lied, but some of the facts they related were not true. For example, Wolf gave A.E. a hippopotamas (a candle in that form), but two witnesses believed the hippopotamas was on a poster. A.E. and Wolf testified it would have been very difficult for others to see Wolf's action. Clearly, those who insisted the hippo was on a poster never saw the transfer of the gift, but may have

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been close enough to the doorway of the classroom to know that it occurred and filled in the missing fact by means of their imagination and limited experience. Perhaps they could only visualize a picture of a hippo being transferred from hand to hand and thus a poster or picture became fixed in their recollection at the time. They were not lying. That was what they recalled. Such an error of recollection does not necessarily vitiate their testimony.

The great caution which must be applied should include placement of the questioned testimony in a matrix of other testimony (viewing it from the outside) and testing its subjectivity and origin by studying what is revealed by and about the child (reviewing its internal sources). The testimony concerning the incident wherein Wolf disciplined C.K. for running around the classroom is a good subject for illustrating this treatment. Wolf admitted that he grabbed C.K.'s wrist when she ran past him. C.K. was the most difficult witness. She cried while testifying and it was almost impossible to get her to continue. She is small for her age, emotionally fragile and had some problems at home (as the school nurse, Mrs. Truitt, revealed). Her reactions are excessive. Her impulses are not well controlled. She tended to believe people would try to hurt her. What the other children saw depended on when, how long and how well they observed.

C.K. herself said, "I went up and asked him a question and he came over and he grabbed my arm and he put me over his knee and he was going to hit me, but I moved before he hit me" (3T 99). At the time, Wolf's credible testimony was that he was sitting in his chair" (9T 21). I find that when this small girl ran past Wolf's chair and he grabbed her arm, the torque from their combined movements caused C.K. to half fall over his knees creating an unusual sound, and she believed Wolf intended to hit her so that she jumped away fast and cried or laughed. A child who saw the whole incident and properly processed the information would testify that Wolf never took C.K. over his knee and spanked her. A child who was engrossed in school work would look up at the sound, see C.K. "down" for a moment with Wolf's hand on her and see her jump away as if struck. Some children's vision of the incident would be impeded by intervening desks and chairs. So it was that M.D., A.E. and C.Y. testified that they saw Wolf put C.K. over his knee and hit her (3T 22, 23; 3T 117; 3T 172).

Some children had a good recollection of a specific incident if their perception was from visual observation of an action. The same children might have an inaccurate recollection of precisely who said what words or may have filled in portions of an incident

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which they did not observe so that their recollection of the whole was inaccurate. Some rememberd better if action or words were aimed at them, but the girls sometimes had difficulty remembering such incidents because of embarrassment. Name calling was particularly difficult to credit. Wolf admitted he called students whose conduct was irritating to him "royal pains." He once used the term dumbo. A number of witnesses attributed name calling to Wolf which was out of character and which appeared to originate with other students, not with their teacher. I did not find testimony that Wolf called students the following names fully credible: dummy, french fry, goof ball, fats, overgrown cows, (M.D.). On the other hand, the specific circumstances recalled by M.D. and the type of statement lead me to credit the comment of "fairy of the year" and "dumbo" (A.D. 3T 26 and 30). These names refer to a boy with prominent ears (R.G.) and one who wore colorful pastel clothing. M.D. and J.Y. (3T 63) testified to Wolf's use of "dumbo." J.Y. heard Wolf call F.Z. pothead, but only once (3T 65). He also heard Wolf call M.F. a smurf (3T 75). In the latter instance, he was in the hallway outside the classroom and could not see the scene thus I believe he may have been mistaken.

J.Y. was a credible witness. He was the third of the witnesses who testified to seeing and hearing Wolf pull and snap A.E.'s bra strap. The incident M.D. and J.Y. described was during a social studies test (3T 23; 3T 45 and 47; 3T 66-67). On cross examination, counsel attacked J.Y.'s credibility by showing he was not even in that class, but J.Y. responded that he was in A.E.'s class because he had to make up a test that day (3T 73-75). R.S. described a different incident when A.E. was walking into class. His description of the way Wolf manipulated his hands to undo the bra while rubbing a back was remarkably graphic and believable (3T 45 to 47). R.S. liked Wolf (3T 49). R.S. distinguished what he had heard (in his prior statements) from what he actually observed. He was credible.

A.E. confirmed that Wolf rubbed her shoulders and down her back during a social studies test (3T 115) but she was not asked by either party whether her bra came unhooked. It is highly unlikely that she invented the incident in which Wolf zipped her sweat shirt up and down. She testified Wolf would often tease her about her clothes (3T 116, 135-136) She said, "He would go around to everybody and ask them what I looked like. I only wore them one time in school because he got me so embarrassed." A.E. was the most tall, attractive girl and quite talkative. She told her mother about an incident when Wolf lay on the floor because his back hurt and told the class they could do likewise (3T 117). After Wolf heard about the letter of complaint at school, he told A.E. "that

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looked like her" [sic] (3T 120) and gave her a hippopotamas (a candle in that form) to show how big her mouth was (3T 121, 134). A.E.'s recall was not as specific as that of some of the others. She did describe the "game" which involved eliciting opinions about various students.

Twelve year old L.T. was best friends with C.K. whom Wolf called small fry or shrimp (3T 147). L.T. was unjustifiably concerned about her weight. Wolf would have her read about food or ice cream, urging her in a laughing way to do so (3T 147-148). He gave L.T. a gift of a spoon with a hole in it and said, "Don't lose your corn," or "don't lose your mashed potatoes" (3T 149). L.T. admitted that she had invented some prior statements, but she pointed out which were true observences in a very certain manner. L.T. testified that when she was at the end of the line of pupils, Wolf occasionally rubbed her back and shoulders (3T 150). Respondent argues L.T. imagined incidents because of her report to school authorities that a car once followed her and C.K. to school. Another student's grandfather saw the driver behaving suspiciously and told the girls to report it. They did so, but they themselves had not noticed anything wrong. There was absolutely no proof that the incident did not occur and parents or school authorities would be ill advised to assume so just because the child reporting it had previously reported that a man once followed her or because she was fearful of men following her. Both C.K. and L.T. reported this incident and I am convinced they did not fantasize it.

C.Y., an eleven year old girl, recalled Wolf calling R.G. dumbo, and his use of the terms "royal pain" and "borderline", which he did in a ritualistic way, labeling the trouble makers or those who irritated him (3T 171). C.Y. saw the "spanking" of C.K. incident and recalled Wolf made fun of C.K.'s short stature.

E.D., a twelve year old girl, testified that Wolf felt her back and pulled her bra strap two times (4T 8). He was rubbing her back saying "good job" about the work she was doing. When he pulled the strap, she told him to stop. Several months later, he did it again (4T 9-10). She saw Wolf feel A.E.'s back in the same way: he pulled her strap and rubbed her back (4T 11). She heard it when he let go. He did the same to another girl, J.M. two times. E.D. testified that Wolf called R.G. "dumbo ears," and C.K. "shrimp" and J.M.2 "fat" (4T 10). J.M.2 was E.D.'s best friend. One day Wolf called E.D. and her friend J. to the back of the class and asked E. why she was J's friend. He told J. he "don't under-

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stand why she has any friends." E.D. responded, "you don't have to hang around with her if you don't like her" (4T 31-32). E.D. did not like Wolf, but averred she did not make these things up. I believe her.

O.T., an eleven year old girl testified that Wolf rubbed her back when she was standing in line getting ready to leave his classroom. O.T. also remembered a specific occasion at the end of a social studies class when Wolf called R. "dumbo" because of his ears and said if he were held out a window he would fly away. O.T. said she thought Wolf meant it because he was hollering at R. O.T. also said she "saw" Wolf call A.E. a hippo, big mouth and slob. She also was of the belief that A.E. showed her the hippo on a poster. She stated if the class ordered 3 or more books from Troll Company they would get a free poster. O.T. also said she heard Wolf call C.K. small fry and tell her she lived in a shoe and that he called R.B. and B.E. a fairy.

O.T. claimed that when Wolf called the girls in after school for an explanation of complaints against him, they were upset and excited and Wolf asked, "Who did it? I want to know now and why" (4T 53 to 63). O.T. was able to distinguish promptly between what she herself saw and prior incidents which she wrote down upon direction to state "what she heard." She was credible; her reference to a hippo poster in addition to references in somewhat more diffuse testimony of others, led me to believe that there might have been a hippo poster somewhere that the children saw in addition to the hippo shaped candle. A.E. did not know of a poster, however, so I cannot find that it existed. O.T. did not like Wolf but insisted she was not making anything up in her testimony. I found O.T. particularly credible despite the testimonial anomaly concerning a hippo poster.

D.D. testified that two times when she was leaning over getting a drink at the water fountain, Wolf lightly slapped her on the butt (5T 8). The first time was right before Christmas, the second time was right after. He sometimes slapped at A.E. the same way when she walked past his desk (5T 10, 11). D.D. once saw Wolf pull at A.E.'s bra strap while she was taking a test. Outside his classroom one day, Wolf saw T.O., S.H. and D.D. coming to class. He said, "Here come the three little pigs." Cross examination established once again, that some children would attend classes not their assigned ones so as to make up tests.

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S.H., a twelve year old girl, testified that Wolf, "felt her butt," while she was walking down the hallway. She was very shy, and would only nod "yes" when asked to tell this to Ms. Slawter. She left the class meeting on the subject of Wolf's conduct and went to the school nurse, Mrs. Truitt. S.H. said Wolf called her "snob" and "fat lard." S.H. is a friend of A.E. and especially T.D. as well as C.K. She said he also called A.E. a fat lard (5T 27 to 30).

Respondent produced five children as witnesses. None of these students of Wolf had heard him call names or saw him touch students. J.M., a boy, stated that C.Y. and J.M.2 did not like Wolf because he disciplined them. He also testified that other children called their classmates names such as fatso, dumbo, and fairy. J.K. entered Wolf's class January 20. He also testified he never heard Wolf call students names or saw him touch them improperly. J.P., M.B. and D.W. gave similar testimony. D.W. did relate that Wolf would rate pupils "royal pain" or "pain" if they were not well behaved (7T 108). Of course, the fact that these students reported no ontoward conduct on the part of Wolf does not contradict the Board's witnesses. Not all children were present at all times with each other and the conduct occurred in the hall, at the back of the classroom, at the water fountain, in homeroom, and in social studies class, so that some children might never have been present when an incident occurred, or might have been assigned to the class in which it occurred, but were absent that day.

One of Wolf's most important witnesses was Ronald DeNafo, who formerly worked closely with Wolf and is now Superintendent in another district. He related an incident when he and Wolf took children on a class trip overnight to Stokes State Forest. In the group was a "very sophisticated young lady" from the sixth grade class who had made off color remarks and called the male teacher at home. This girl made a comment to Wolf who immediately came to DeNafo and distanced himself from the girl like "a frightened jack rabbit" (8T 107). In my view this witness confirmed the impression I received from all the testimony: that respondent's motives were at no time prurient and that sexual abuse as we commonly understand the term is not descriptive of Wolf's conduct. Wolf's adult witnesses all felt that he was a sensitive, caring, imaginative teacher. Throughout this 17 years, he had received excellent evaluation comments.

Wolf himself categorically denied all improper conduct. He did explain that he often bought amusing items at garage sales and gave them to students or put them on display to provoke thought and creativity or as learning aids. He showed a model of a

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giant sneaker two feet long. He joked with the students about these objects. He stated M.D. told C.K. she was so small she could fit into that shoe. He told about a new student who came into the class early in 1986. This student began a rash of name calling. J.D. called R.G. dumbo. Wolf asked why. J.D. said it was because R.G. had big ears. Wolf chastized the boys. Wolf said it was J.D. who called C.K. "shrimp" and "french fry." J.D. had a name for everybody and the other children picked it up. Wolf finally asked the child's mother to come in for a conference.

Wolf also described the need to discipline certain children, such as J.M.2, who said she hated him. Wolf admitted that at the end of the day sometimes when the children had misbehaved excessively he would tell certain pupils they were a "royal pain" or "on the borderline." The behavior of most would improve, but not the behavior of A.E. and C.Y., who never stopped talking. Constant offenders also included M.D., S.W., N.E., L.M., C.K., and J.M.2. He described the incident wherein he grabbed C.K.'s wrist as she ran past. He stated that his intent was to keep her from harming herself. He admitted he would sometimes tap or pat children on the shoulder, but never in an offensive way. He would do it to say, "good job" or when escorting them in and out of the room. He admitted giving A.E. the hippo candle to get across to her that her mouth was always open. The other children were lined up outside the classroom when he called A.E. inside and gave her the hippo. They could have overheard the conversation.

Respondent sought to show the children's growing sexual awareness by showing cards each child had filled in about himself or herself. For example, students would say their hobby was girlwatching or boy watching. Among those who had made such comments were M.D. (boy), R.S., J.Y., C.K., A.E., L.T., and D.W. Wolf also described the meeting he had with the children after complaints were made about him. He denied making any threats or even raising his voice. (A.E. testified that he did not use his normal voice, but a strong, deep voice.)

Although one of the boys testified there was a Playboy magazine under some papers on Wolf's desk one day, I considered the evidence on that factual issue inadequate for a finding. While Wolf denied buying or subscribing to Playboy (9T 70) that testimony did not fully dispose of the question since the magazine could have been given to him. Wolf did not testify that he never brought such a magazine to school and placed it on his desk. In any event, I do not consider the issue significant since the boy who testified stated that another boy went through the papers on the teacher's desk to obtain the

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magazine. I know of no rule or sound, educational policy which would label the private reading of such a magazine as conduct unbecoming a teacher, although it might be poor judgment to place such an item among papers on a desk in the classroom.

Since I find that Wolf did rub girls' backs and snap their bra straps, the fact that Wolf categorically denied it raises serious questions about some of his other testimony. With a lifetime career at stake, he surely had good reason to deny the most serious charges, the spanking of C.K. and snapping of bra straps. Wolf appeared to be very intelligent; it is possible that he was able to rationalize his denials. The denial of any and all bra-snapping or back rubbing incidents lessened his credibility.

FINDINGS OF FACT

1. C.K. Had a habit of running around the classroom. One day when she did not heed Wolf's order to stop, he grabbed her arm so quickly, that she almost fell, was frightened and cried or laughed nervously. Wolf did not spank her, although some pupils viewing part of the incident thought he did.

2. Wolf occasionally touched the shoulders or backs of girl pupils standing in line while escorting them in or out of the classroom, but these touchings were not harmful or improper.

3. Wolf spoke in an unusually deep voice but did not threaten the children in meeting with them to discuss their complaints. Some of the children perceived the mere fact of Wolf's calling them to an after school meeting and asking them about the complaints to be threatening. Since he was asked to do this by his principal, his doing so cannot evidence threatening intent.

4. Wolf occasionally gave a light tap on the behind to a girl pupil who was bending over getting a drink at the water fountain, going down the hall, or walking past him in the classroom.

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5. On a number of known occasions, Wolf rubbed the backs of girl pupils and picked at or snapped their bra straps through their clothes. He did this to E.D., M.Z. and A.E. and two years earlier to one child whose name is not of record.

6. Wolf did occasionally make use of derogatory names for pupils such as dumbo (at least once), three little pigs (once), pothead (once), small fry (for C.K. at least once) and big mouth (for A.E.) but he did not invent and promote this form of address; it almost always derrived from the pupils themselves and what they called each other.

7. Wolf sometimes used a mode of "discipline" which involved name calling when he became irritated at the children's misbehavior: he would categorize children as "a royal pain," "a pain," "on the borderline," or "OK." While wolf believed such "discipline" to be effective, he apparently gave no thought to the connotation which could have been and probably was perceived by some pupils to be "royal pain in the ass." Chastizing students in front of the whole class in this manner was clearly inappropriate.

8. Wolf did, on one occasion, lie down on the floor because his back hurt, and invited the children to work on the floor if they so desired, but it was not for the purpose of looking up girls skirts.

9. Wolf encouraged or permitted an informal classroom; the degree of informality may have been too great for some pupils at that age level on some occasions, but that fact is stated only because it is relevant to a consideration of the mode of "discipline" Wolf applied to curtail misbehavior.

10. A.E. was the most mature in stature, manner and feminine interests of the girls. She talked too much in class and was fond of dressing a modish feminine way. Wolf commented on her clothes thus embarrassing her, on one occasion pulled a decorative zipper at her neckline up and down, gave her a hippo with a wide open mouth to reinforce his observation that she had "a big mouth", and rubbed her back pulling at her bra strap.

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11. L.T. was not fat but liked to eat and was sensitive about her weight. She was a close friend of C.K., whose classroom behavior irritated Wolf. Thus, Wolf handed L.T. a spoon with a hole in it, had her read about food or ice cream and "joked" about her eating.

12. C.K. was an extremely sensitive, tiny girl with poorly controlled classroom behavior. She was especially sensitive about being of small stature and was easily frightened. Wolf grabbed her arm threateningly and teased her about her small stature, calling her small fry. He indirectly reminded her of her size by the kind of oral reading assignments he gave (very short paragraphs).

13. One or more of the children called B.E. fairy and Wolf used the term for him once. He called F.Z. pothead once which disturbed him and caused him to leave the room. Both of these terms described characteristics the children perceived in these boys.

14. E.D.'s best friend was J.M.2. J.M.2 had completely covered her desk with pencil marks for which Wolf disciplined her severely, sending her to the office. Wolf also took a toy away from her. Wolf took the two girls to the back of the room and asked E.D. why J.M.2 was her friend, stating he didn't know why J.M. had any friends.

15. S.H. was such a shy little girl that she rarely talked except to her friends. Wolf patted her on the behind while she was walking down the hallway. She could only nod when asked about it.

16. S.H. believed that Wolf called her and A.E. a fat lard. She was sensitive about her weight and was one of those Wolf once referred to as the three little pigs.

17. C.Y., a close friend of A.E., was also extremely talkative and liked to have the last word, thus Wolf sometimes designated her as a "pain" or "royal pain."

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CONCLUSORY FINDINGS

18. All of Wolf's touching of the girls was without prurient or lascivious intent.

19. Wolf's conduct in patting girls' behinds, feeling their backs for bra straps and pulling at the straps was a form of harassment and physical indignity, aimed only at the female pupils which subjected them to embarrassment and was accurately perceived as partaking of hostility rather than fondness.

20. Wolf's conduct in reminding certain children of their particular sensitivities, whether about size, shape, clothes, appetite, talkativeness, or their friendships was not for the purpose of putting the children at ease by joking but was actually a subtle form of mental cruelty with an overcast of disciplinary purpose.

21. Grabbing C.K.'s wrist was an inappropriate form of discipline and was not intended to keep her from hurting herself. He knew she was easily frightened.

22. Wolf occasionally used specific name calling with a disciplinary purpose and his admitted use of "royal pain" or "pain" as a disciplinary device, in a ritualistic way with the whole classroom present, was a form of ridicule accurately perceived as hostile and belittling.

23. A number of the events that the children related, such as Wolf's chastizing D.D. for her friendship, the dumbo incident, the hippo gift, and one or more bra snap incidents took place at the back of the classroom, in the halls, or while the children were engaged in test taking so that they were not within full view or hearing of the whole classroom. This pattern of conduct shows that Wolf realized that his motivations were not educationally sound.

24. Because the children lacked the ability to describe and communicate the true nature of what they were observing and feeling, their testimony was

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not always factually accurate, but the volume of testimony about the same or very similar events compels and supports the findings.

DISCUSSION AND CONCLUSION

Based on the findings above, I **CONCLUDE** that the charge of threatening pupils for reporting respondent's conduct has not been proved.

Respondent did touch the buttocks and backs of girl pupils but there was no lascivious or prurient intent. The findings show that no sexual abuse was intended. Notwithstanding that conclusion, the conduct is serious and unbecoming of a teaching staff member. The Commissioner has found that the gesture of a male teacher in placing a hand on a fifth grade girl's buttocks is indefensible, even if intended as a form of punishment. In re Tenure hearing of George McCelland, 130-4/82A, EDU 5284-82 (March 25, 1983). The Commissioner considers that the statute prohibiting corporal punishment has an underlying philosophy that an individual has a right not only to freedom from bodily harm but also to freedom from offensive bodily touching even though there be no actual physical harm.

The charge of touching buttocks included the allegation of spanking C.K. while the findings show she was not actually spanked: she was grabbed by the wrist with an intention to discipline. Thus the incident is of the same character as charged even though the touching was of the wrist. The cited precedent aptly fits Wolf's conduct with C.K. as well as the back rubbing, light pats on the buttocks, and bra snapping incidents. The bra snapping incidents were solidly proved. I have no doubt in my mind that respondent did these acts and had been doing them for several years. I have been unable to find any precedent discussing this conduct, but I am constrained to believe, because of the McClellan case, that the Commissioner would regard even one incident as indefensible, let alone a pattern of such conduct. I **CONCLUDE** that the charge of improper touching has been proved and that it was conduct unbecoming a teaching staff member.

The third charge of unbecoming conduct was that respondent exhibited a pattern of ridicule of some students in which name calling played a role. The name calling was proved but the pattern of ridicule was much more subtle and went beyond name calling. In McClelland, supra, the administrative law judge cited a Commissioner's

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prior determination that parents have a right to be assured that their children will not suffer physical indignities at the hands of teachers. The administrative law judge then added, "similarly parents have the right to be assured that their children will not, in the public schools, be subjected to psychological indignities." That statement is very much applicable here.

I **CONCLUDE** that the pattern of ridicule, with its subtle undercurrent of hostility masked by disciplinary intent, was conduct unbecoming a teaching staff member.

Respondent may actually have been unaware of his underlying motivations, and rationalized his conduct as joking or a mode of discipline. If this were the sole unbecoming conduct, in consideration of Wolf's lengthy and exemplary career, I would find one year's suspension and a mandate to participate in psychological counseling to be an appropriate disposition. The incidents of improper touching of girls buttocks, backs and bra straps combined with ridicule compels me to recommend removal. In light of the Commissioner's strong position against improper touching as expressed in McClelland case, I believe I have no alternative.

It is therefore **ORDERED** that Richard Wolf be removed from his position as a tenured teaching staff member as of the date of his suspension by the Board of Education.

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

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

May 15, 1987
DATE

Naomi Dower-La Bastille
NAOMI DOWER-LA BASTILLE, ALJ

MAY 18 1987
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

May 20, 1987
DATE

Mailed To Parties:
OFFICE OF ADMINISTRATIVE LAW

bc

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IN THE MATTER OF THE TENURE	:	
HEARING OF RICHARD WOLF, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE BOROUGH OF	:	DECISION
NATIONAL PARK, GLOUCESTER COUNTY.	:	
_____	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Respondent filed exceptions within the time prescribed by N.J.A.C. 1:1-16.4a, b, and c. The Board filed timely reply exceptions thereto.

Respondent's exceptions to the initial decision are extensive. They are summarized in pertinent part below. Essentially, Mr. Wolf argues that there is no sufficient credible evidence of any misconduct warranting dismissal from his teaching position, wherein he has enjoyed seventeen years of unblemished performance. He addresses the first three exceptions together "because they apply generally to the ALJ's entire analysis and Initial Decision, and their application to the Initial Decision in this case is virtually inseparable." (Exceptions, at p. 6)

> EXCEPTION 1. THE ALJ'S OVERALL ANALYSIS OF THESE CHARGES AMOUNTS TO A FAILURE TO WEIGH THE EVIDENCE AGAINST THE APPLICABLE STANDARD OF PROOF AND HER FINDINGS AND CONCLUSIONS ARE UNSUPPORTED BY A PREPONDERANCE OF COMPETENT, CREDIBLE RECORD EVIDENCE.
>
> EXCEPTION 2. THE ALJ'S CREDIBILITY DETERMINATIONS ARE CONTRARY TO THE COMMISSIONER'S LONG-STANDING ADMONITION REGARDING THE EXERCISE OF CAUTION IN THE WEIGHING OF STUDENT TESTIMONY, ARE UNSUPPORTED BY ANY SUFFICIENTLY CLEAR OR SPECIFIC REASONS ARTICULATED IN THE DECISION, AND ARE CONTRARY TO THE RECORD.
>
> EXCEPTION 3. THE INITIAL DECISION FAILS TO SATISFY THE MINIMUM STANDARDS OF AN ADMINISTRATIVE DECISION AS THE ALJ'S ANALYSIS, FINDINGS AND CONCLUSIONS ARE NOT SUPPORTED BY SUFFICIENTLY CLEAR, SPECIFIC OR LOGICALLY CONSISTENT REASONS ARTICULATED IN THE DECISION, AND THEREFORE CANNOT BE ADOPTED BY THE COMMISSIONER AS A FINAL DECISION.

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Respondent argues strenuously that the Board has failed to meet its burden of proof. He charges that the ALJ was more influenced by the "numerosity of student allegations against Mr. Wolf than by what actual, credible evidence there was to support them." (Exceptions, at p. 8) Respondent suggests that the ALJ "virtually reversed the burden of proof in this matter, groping to explain discrepancies in student testimony, ignoring serious questions of credibility and inconsistencies in their stories, drawing inferences against Respondent and, in effect, requiring Mr. Wolf to bear the almost impossible burden of disproving the allegations against him." (emphasis in text) (Id.) Respondent cites In the Matter of the Tenure Hearing of Barry F. Deetz, School District of the Township of Ridgewood, Bergen County, 1983 S.L.D. 544, rev'd State Board November 7, 1984, aff'd N.J. Superior Court, Appellate Division, May 5, 1985 for the proposition that student testimony calls for the exercise of more than ordinary caution by the trier of fact, and claims that the ALJ failed "to address the general credibility of each witness as borne out by their testimony as a whole." (Id., at p. 10) He submits that

> Particularly in light of the ALJ's novel approach to the exercise of caution in assessing student testimony adverse to Mr. Wolf, there must be a more thorough explanation of what specific evidence she relied upon, from the mouth of what witness, as to each incident underlying the charges. A review of Respondent's Post-Hearing Brief and the specific exceptions that follow will reveal numerous examples of serious issues of credibility never addressed in the Initial Decision. The exceptions that follow also demonstrate apparent inconsistencies and gaps in the ALJ's findings that are not explained. Such a decision cannot be adopted under the applicable legal standards for final administrative decisions. (Id., at p. 14)

He reiterates his argument addressed at the hearing that two teachers, Ms. Slawter and Ms. Allison, influenced the child witnesses herein to make specious complaints against him.

Thereafter, respondent's Exception No. 4, (a) through (u), challenges the ALJ's Findings of Fact, specifically relating to Nos. 1, 3-7, 10-16 and 19-24. Such exceptions are incorporated herein by reference. Further, respondent challenges the discussion and conclusion section of the initial decision at subsection (u) as follows:

> u. Exception to Discussion and Conclusion
>
> 1) The ALJ's conclusion that C.K. was "grabbed by the wrist with an intention to discipline" (Initial Decision at 16) is not supported by a preponderance of credible evidence. (See Exceptions to Findings of Fact 1 and 12).

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2) The ALJ concludes that the "bra snapping incidents were solidly proved." (Initial Decision at 16). However, the majority of statements given in regards to these incidents were made to Mrs. Allison or in the DYFS report. As the ALJ acknowledges, these statements themselves were unreliable. (See, Initial Decision at 5).

Only one student, E.D., actually testified that Mr. Wolf had done this to her. As shown by the respondent, E.D.'s testimony was not credible (See Respondent's Post-Hearing Brief at 14-15; Exception to Findings of Fact 5), an issue that the ALJ failed to address. (See Initial Decision at 9). Other students testified that Mr. Wolf had done this to A.E., but (again) A.E. herself failed to support this testimony! (See Initial Decision at 7; Exception to Finding of Fact 5). More generally, the ALJ concludes that these incidents were "solidly proved", despite her findings that the testimony of the students was "not always factually accurate". (See, Initial Decision, Findings of Fact No. 24). This apparent inconsistency is nowhere resolved by the ALJ, certainly not to the extent to justify her conclusion that these allegations were "solidly proved".

3) The ALJ compares this case with that of McClelland (In re Tenure Hearing of George McClelland) [1983 S.L.D. 225] and concludes that "because of the McClelland case...the Commissioner would regard even one incident [of bra-snapping] as indefensible." (See, Initial Decision at 16). Thus, the ALJ has based her recommendation that Mr. Wolf be dismissed on the McClelland decision.

However, a reading of McClelland reveals that the Commissioner's removal decision in that case was based on the teacher's "admitted inability to keep his hands off female pupils, even after the...direct order from his superiors." McClelland, [at 246] (emphasis added). Thus, McClelland's dismissal was actually based on his insubordination. A careful reading of the Commissioner's decision in that case shows this was clearly the basis of dismissal.

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In Mr. Wolf's case, he has been teaching in the National Park School District for seventeen years, and never before has it ever been suggested that he was engaging in improper conduct. All these allegations arose suddenly, without precedent, in Mr. Wolf's 17th year, and on the background of an unblemished professional record. There was no history of improper touching, warnings, or insubordinate attitude in this case, as there was in McClelland.

4) The ALJ's conclusion that Mr. Wolf's conduct was intended to ridicule his students (See Initial Decision at 16-17) is not supported by a preponderance of credible evidence. As the ALJ acknowledges, there is no evidence that Mr. Wolf was aware that his conduct was perceived by his students as ridiculing of them. (See, Initial Decision at 17). Also, this conclusion is not supported by the ALJ's own findings of fact (See Initial Decision, Findings of Fact 6, 7, 11, 12, 13, 16). The basis of the charge that Mr. Wolf ridiculed his students was that he engaged in name-calling. Yet the ALJ herself states the allegations of name-calling are "particularly difficult to credit". (See Initial Decision at 7). Thus, this charge has not been proven by a preponderance of credible evidence or any consistent findings of fact in the Initial Decision. (emphasis in text) (Exceptions, at pp. 28-31)

EXCEPTION 5. THE ALJ'S RECOMMENDATION OF THE PENALTY OF DISMISSAL IS NOT SUPPORTED BY THE RECORD.

Citing In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967) among other cases, respondent avers the ALJ's recommendation of dismissal "is fatally flawed because it fails to consider, as required by the Commissioner, Mr. Wolf's prior teaching record and the prognosis that he will continue to be an effective teacher in the future." (Id., at p. 31) Respondent reiterates that the preponderance of credible evidence reveals that these alleged incidents never occurred and there is absolutely no evidence to suggest that such incidents will occur in the future.

Respondent counters the ALJ's reliance upon In the Matter of the Tenure Hearing of George McClelland, School District of the Township of Washington, Mercer County, 1983 S.L.D. 225, aff'd with mod. State Board 247, aff'd N.J. Superior Court, Appellate Division, July 20, 1984. He suggests, "The Commissioner's decision to remove McClelland from his teaching position was based on this inability***

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'to keep his hands off female pupils' and on his 'continued refusal to accept [the] admonitions from his superiors to refrain from touching his pupils.'***" (Exceptions, at p. 32, quoting McClelland at 246) Thus, respondent contends, McClelland was dismissed for insubordination whereas in the instant matter, "it had never even been suggested in his seventeen years of teaching that he was improperly touching his students. Thus, Mr. Wolf is not guilty of insubordination, nor has he indicated a prepensity (sic) for improper conduct which will continue in the future." (Id.) Thus, respondent avers, the initial decision must be rejected.

Respondent urges the Commissioner to review the record in its entirety and to afford his tenure the legal protection to which it is entitled.

The Board's reply exceptions request that the initial decision be upheld in all respects and in that regard it relies on the arguments raised in its post-hearing brief, which is incorporated herein by reference. The Board comments further on some of the points raised by respondent in his exceptions, which comments are summarized below.

In reply to respondent's assertion that the testimony of the children herein has an aura of unreliability and should only be 'credited with caution' (Board's Reply Exceptions, quoting Respondent's Exceptions at p. 11), the Board avers "the Commissioner has never held that the testimony of children has a presumption of unreliability and will only be believed under an extreme test of credibility. Rather, the Commissioner has accepted such testimony in numerous instances with the condition that 'such testimony must, of course, be examined with extreme caution and with meticulous care.'***" (Reply Exceptions, at p. 2) The Board cites In re McClelland, supra, at 243 for this proposition and suggests that the ALJ was most meticulous in this regard in the instant matter:

> The natural bias that each student may have had against their (sic) former teacher was closely examined by the ALJ, from a general dislike to specific reasons such as bad grades or disciplinary actions. The ALJ, the one who conducted the hearing and had the chance to view each student at close range, particularly found that the children were not motivated by any inner prejudice toward Wolf and that their testimony was forthright***. (Reply Exceptions, at p. 2)

It cites the ALJ's conclusion in the initial decision, ante, wherein she stated in support of the Board's position on the children's credibility:

> It is not possible to accept respondent's theories that all the children were either telling lies as a part of [a] diabolic conspiracy to attack Wolf or that each was fantasizing.

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As to the allegations posited by respondent regarding taint because of the animosity between himself and fellow teachers Allison and Slawter, the Board suggests the ALJ was particularly mindful of this issue, "which again illustrated the degree of caution exhibited." (Reply Exceptions, at p. 2) The Board references the initial decision, ante, for the ALJ's discussion of the professional dislike among these Board employees. The Board claims, "Merely because Respondent does not accept that finding (or other specific findings of credibility, for that matter) is no basis for the Commissioner to upset the Initial Decision." (Id., at p. 3) The Board cites McClelland, supra, for this proposition, as well as Parker v. Dornbierer, 140 N.J. Super. 185, 188-189 (App. Div. 1976) and Shirley McKnight v. Mercer County Vocational-Technical School, decided by the Commissioner January 27, 1986. The Board suggests that such a careful determination by the ALJ should not be overturned where such a finding could reasonably have been reached on sufficient credible evidence. The Board further claims that "[a]s the entire record indicates, there was a panoply of credible evidence showing name calling, wrongful touching, pulling of bra straps, touching of buttocks and ridiculing of students that was of such a degree as to require removal." (Id., at p. 3) The Board submits that for the above reasons, as well as the arguments raised in its post-hearing brief, the initial decision should be adopted in all respects.

The Commissioner has given attentive consideration to the findings of fact of the ALJ herein and to the exceptions taken thereto by respondent, which are incorporated herein by reference. Based upon his own independent review of the record, including the transcripts and the videotape, the Commissioner determines the findings of fact established by the ALJ to be amply supported by a preponderance of credible evidence in the record. The Commissioner concurs with the ALJ that "[c]redibility is the central issue in this case". (Initial Decision, ante) Illustrations follow of the Commissioner's accord with the ALJ's twenty-four proposed Findings of Fact, Nos. 1, 3-7, 10-16 and 19-24, which respondent challenges without specific transcript references in support thereof, it is noted.

The Commissioner observes that respondent excepts to the ALJ's conclusion that the "bra snapping incidents were solidly proved." (Initial Decision, ante) Respondent contends that "the majority of statements given in regards to these incidents were made to Mrs. Allison or in the DYFS report. As the ALJ acknowledges, these statements were themselves unreliable. (Respondent's Exceptions, at p. 28, citing the Initial Decision, ante) He goes on to challenge each student witness' testimony, stating none was credible. Further, respondent avers that student A.E., who was proportedly one to whom this had happened, "failed to support this [the bra snapping] testimony." (emphasis in text) (Id., at p. 29)

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The Commissioner finds that A.E. was never asked by either counsel if Mr. Wolf snapped her bra straps. (See Tr. III-11-138) Neither is such testimony necessary to prove the allegation, since there was eye witness testimony from other reliable witnesses stating that such incidents did, in fact, occur. The testimony of R.S. (Tr. III-40-49) is particularly persuasive. His cogent and explicit testimony is set forth below regarding this incident. It is noted that R.S.'s credibility is heightened by the fact that he also stated he "liked him [Mr. Wolf] as a teacher." (Tr. III-49) and he got an A in social studies.

Q. Did you ever see anything else occur in the classroom that you want to tell us about?

A. Yes. I saw him unsnap A.E.'s bra.

***

Q. You have to tell us what you saw. And if necessary, you can use your hands to show us and the judge will describe how you used you hands.

A. Well, he would act like he's rubbing her back and then he'd like unsnap the bra with his fingers.

Q. What happened after that occurred? What did A. do?

A. She just went like that (indicating) and walked forward.

***

BY MR. SCHMOLL:

***

Q. You said it was unsnapped. How do you know it was unsnapped?

A. Just the way she went and then asked to go to the bathroom, and you could see him do it with his fingers (indicating).

JUDGE LABASTILLE: I would note the unusual motion he made with his fingers. He had his hand out -- he had his hand out with his palm down and it was as though the fingers were on either side with a space in the middle.

THE WITNESS: He went like that (indicating).

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JUDGE LABASTILLE: He had two fingers up in the air showing an unusual manipulation of the fingers.

THE WITNESS: And you could see something back here fall down. ***

BY MR. SCHMOLL:

***

Q. What kind of grades did you get from Mr. Wolf?

***

Q. What did you get by the end of the year?

A. I got an A for social studies.

Q. Did you?

A. Yes.

Q. Okay. R., are you making any of this up?

A. No.

Q. Is this the truth?

A. Yes.

Q. Are you out to get Mr. Wolf for any reason?

A. No. I liked him as a teacher.

(emphasis supplied) (Tr. III-45-49)

Two other students testified about bra-snapping episodes concerning A.E. and S.B. First J.Y., who stated as follows:

***

Q. Did you ever see him do anything else?

A. Yes. He pulled A.E.'s bra strap.

Q. You saw that yourself?

A. Yes.

Q. Where were you when you saw that?

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A. In -- across -- she was sitting over here and I was over this way right across.

Q. Did you sit next to each other?

A. Yes.

Q. How many feet away from her were you?

A. Just an aisle away.

Q. Do you remember about when this happened? I don't mean the exact date, but beginning of the year? End of the year?

A. In the middle of the year.

Q. What did A. do?

A. She jumped up and said, "ow," really loud.

Q. You're sure you saw that?

A. Yes.

Q. No doubt about it?

A. No doubt about it. (Tr. III-66-67)

M.D., on direct and on cross-examination, corroborated the testimony of J.Y. concerning the bra-snapping episode in social studies class. On direct he stated:

Q. Did you see him do anything else to anybody else, anything else to anybody else?

A. Yes. A.E.

Q. We'll call her A.E., okay?

A. Um-hum.

Q. What did you see him do to A.E.?

A. During a social studies test he walked up behind her and pulled her bra strap and I heard it snap.

Q. Where was she when that happened?

A. In a social studies test. (Tr. III-23)

***

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On cross-examination the same child stated:

***

Q. Now, you remember that you had social studies class sometime in May?

A. Um-hum.

Q. What do you remember about it?

A. About when she got pulled by the bra strap?

Q. Um-hum. Tell me what you remember about that last period?

A. He walked up behind her and put his hand on her shoulder and went like that and I heard it snap.

MR. COHEN: Your Honor, could you indicate what his hand motion was?

JUDGE LABASTILLE: Well, he reached -- the witness reached towards his back over his right shoulder. And made a motion as though he were pulling a strap up and snapping it. (Tr. III-35)

The Commissioner finds such testimony entirely persuasive on the issue of whether respondent did improperly touch the backs and clothing of female pupils, constituting conduct unbecoming a teaching staff member. Respondent's attempt to discredit the credibility of these pupils, as suggested in his post-hearing submission at pages 4-5 concerning M.D., page 5 concerning R.S., and at page 6 concerning J.Y. are dismissed as being without merit. Once again, the Commissioner emphasizes that the testimony of eye witnesses is not negated by an allegation that the student whose bra strap was allegedly snapped did not address the matter at the hearing. Further, it is clear from the testimony of A.E. that respondent rubbed her shoulders and down her back during a social studies test. (Tr. III-115) From A.E.'s testimony concerning the allegation that respondent pulled up and down the zipper on her sweat shirt, further evidence is provided of respondent's improper touching of female students. To wit:

Q. In the statement that Mrs. Atchinson wrote, if you would look at that, you mentioned something about a zipper. Could you tell us about that?

A. Yes. I had a sweat shirt on and like I came up -- I don't know what I was doing. I came up to give him something or something like

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that and he kept -- he wanted to see what my shirt looked like, so he pulled down the zipper and he pulled it down and pulled it up again.

Q. What did you do?

A. I just walked away?

Q. Did you say anything to him?

A. No. (Tr. III-116)

E.D. is admitted by respondent as having testified to having had her bra-straps snapped by Mr. Wolf. Her testimony follows:

***

Q. Was there anything that Mr. Wolf ever did to you that you want to tell us about?

A. Yes.

Q. Can you tell us? Let's take one at a time, and I may interrupt you to ask some questions as you tell us, okay. So why don't you tell us what, if anything, Mr. Wolf did involving you?

A. He felt my back and pulled my bra strap a couple times.

Q. Let's talk about that a little bit. When you say, "a couple times," do you mean two times?

A. Um-hum.

Q. Can you remember the circumstances of the first time? And if so, would you tell the judge where you were, what you were doing, and what happened?

A. I was sitting down doing my social studies report and he said, good job, and started rubbing my back, and he pulled my bra strap.

Q. Now, L., did he actually pull the strap?

A. Um-hum.

Q. What, if anything, did you do when he did that?

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A. Told him to stop.

Q. How did you feel about that?

A. Not too good.

Q. Why didn't you feel good about it?

A. Because I didn't feel comfortable.

***

Q. Now, you said he touched you a couple times. When was the second time, the best you can recall?

A. In the spring.

Q. And what happened that time?

A. He pulled it again, and then a couple times after that he stopped. When I told him to stop he finally stopped.

Q. Where were you that time?

A. It was my homeroom.

Q. Was this during homeroom period?

A. Um-hum.

Q. Were you seated or standing?

A. Seated.

Q. In you desk or somewhere else?

A. In my desk.

Q. Tell the judge what happened.' Did he walk up to you or, you know, tell her what happened. You just look at the judge.

A. He walked up to me and he said, good job, again, but I don't know why, and he just rubbed my back, and pulled my strap again.

Q. Are you sure that he pulled your strap?

A. Yes.

Q. You could feel it being pulled?

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A. Yes.

Q. Did you say anything to him?

A. Yes. I told him to stop.

Q. How did you feel about it that time?

A. Not too comfortable. (Tr. IV-8-10)

The Commissioner agrees with the ALJ that the incidents concerning the bra-snappings and improper contact with female students' persons were solidly proved. He rejects respondent's contention that the ALJ was less than thorough in evaluating the credibility of each of the students and his/her testimony. To the contrary, he finds, as the Board suggests in its reply exceptions, that "the ALJ examined the testimony of the Board's witnesses with extreme caution and meticulous care as required by the Commissioner. The ALJ considered all inferences of bias and hostility that Respondent raised and found no evidence that these factors motivated the students who testified.***" (Reply Exceptions, at p. 3) Any inconsistencies in the children's prior statements were carefully considered and accounted for at the hearing or thereafter by the ALJ in her initial decision. The Commissioner so finds.

The Commissioner further finds unpersuasive respondent's citing McClelland for the proposition that the testimony of children is inherently unreliable. He does agree with respondent that such testimony, "while to be allowed, is to be credited with caution". (emphasis in text)(Respondent's Exceptions, at p. 11) The Commissioner's independent review reveals nothing in the record to convince him to reject the testimony of the children herein, and he adopts as his own the credibility determination of the ALJ as embodied in the initial decision for the reasons stated therein as concerns the children's testimony of record. See In re Masiello, 25 N.J. 590, 605-606 (1958). See also In the Matter of Raymond Morrison, 216 N.J. Super. 143 (App. Div. 1987).

Similarly, the Commissioner rejects respondent's contention that the teacher witnesses herein, Ms. Allison and Ms. Slawter, influenced the children to make complaints which had no basis in fact because of their professional animosity toward respondent. Here too, the Commissioner's review of the matter comports with the ALJ's conclusion as found in the initial decision, ante. He adds only that both women are on record as having stated that they did not witness any of the alleged incidents in question. He further finds, based on his review of their testimony and that of the students in question that in no way did these teachers attempt to convince anyone of the merits of the charges brought against respondent, but rather were mere conduits through whom the children's concerns were voiced to the proper authorities.

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The Commissioner, though, does question the ALJ's characterizing of respondent's touching of the girls as being "without prurient or lascivious intent" and instead characterizing the incidents as subjecting them "to embarrassment" and "hostility rather than fondness". (Initial Decision, ante) The Commissioner finds it unnecessary, however, to determine whether respondent's motives were governed by one or the other or both. He relies instead upon his clear perception from the record before him that such actions did indeed occur and were entirely inappropriate. See In the Matter of the Tenure Hearing of George McClelland, supra, citing In the Matter of the Tenure Hearing of Frederick L. Ostergren, School District of Franklin Township, 1966 S.L.D. 185 as follows:

> It is the Commissioner's judgment that parents have a right to be assured that their children will not suffer physical indignities at the hands of teachers, and teachers who resort to unnecessary and inappropriate physical contact with those in their charge must expect to face dismissal or other severe penalty. (at 187)

As to respondent's argument that McClelland, supra, is distinguishable from the instant matter because therein the respondent was dismissed for insubordination, not for improper touching, the Commissioner finds such argument to be without merit. The Commissioner wishes there to be no doubt whatsoever that the McClelland case stands for the proposition as stated in many other similar cases, that improper touching of students will not be tolerated. McClelland was found to be guilty of conduct unbecoming a teaching staff member and of insubordination. The Commissioner stated in McClelland:

> Further, the Commissioner has difficulty with the concept of the "father figure" advanced under the present circumstances. Surely each child, boy or girl, should be treated with the warmth and friendliness to be exercised by any good teacher without engaging in questionable bodily contact. The Commissioner is fully cognizant that good teachers often use a quick hug or a pat on the head as a tactile reinforcement of a healthy relationship, always, however, in full cognizance of the age, maturity and sex of the recipient. In the Commissioner's view, the exercise of judgment and restraint is an essential ingredient to successful teaching. Respondent's proclivities herein far exceed the bounds of good judgment and restraint. The Commissioner so holds.

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> The Commissioner finds nothing in the record by way of explanation of respondent's philosophy to include the need for him to have his back scratched by female pupils. Respondent admitted that on frequent occasions he scratched pupils' backs and the pupils scratched his. The Commissioner finds this behavior of respondent, along with other questionable physical contact, to constitute unbecoming conduct. Such conduct, particularly in light of his having been advised and then ordered by his administrator to cease and desist, constitutes insubordination.
>
> (at 245-246)

Based not only upon the bra-snapping incidents alone, but also for the additional reasons set forth in the initial decision, the Commissioner finds and determines, in accord with McClelland, supra; Redcay v. State Board of Education, 130 N.J.L. 369-371 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E. & A. 1944) (unfitness shown by a series of incidents); and In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967) (unfitness shown by a single incident) that respondent herein is guilty of conduct unbecoming a teaching staff member warranting his dismissal from his tenured position. In addition to the incidents involving bra-snapping, the Commissioner's review of the record convinces him to adopt as his own the findings and determinations of the ALJ in this matter. Accordingly, the Commissioner directs that Richard Wolf be removed from his position as a tenured teaching staff member as of the date of this decision, pursuant to N.J.S.A. 18A:6-10 et seq.

It is further directed that the instant matter be forwarded forthwith to the State Board of Examiners for possible suspension or revocation of respondent's teaching certificate(s) pursuant to N.J.S.A. 18A:6-38 and N.J.A.C. 6:11-3.7.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

July 1, 1987

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IN THE MATTER OF THE TENURE :
HEARING OF RICHARD WOLF, SCHOOL : STATE BOARD OF EDUCATION
DISTRICT OF THE BOROUGH OF : DECISION
NATIONAL PARK, GLOUCESTER COUNTY. :
:

Decided by the Commissioner of Education, July 1, 1987

For the Petitioner-Respondent, Capehart and Scatchard
(Alan R. Schmoll, Esq., of Counsel)

For the Respondent-Appellant, Selikoff and Cohen
(Steven R. Cohen, Esq., of Counsel)

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

Regan Kenyon abstained.
December 2, 1987

Pending N.J. Superior Court

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6022-86
AGENCY DKT. NO. 283-8/86

PETER MELILLO,
Petitioner,
v.
BOARD OF EDUCATION OF THE ESSEX COUNTY VOCATIONAL SCHOOL DISTRICT, ESSEX COUNTY,
Respondent.

Nancy Iris Oxfeld, Esq., for petitioner
(Klausner, Hunter & Oxfeld, attorneys)

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

Record Closed: April 13, 1987 Decided: May 20, 1987

BEFORE PHILIP B. CUMMIS, ALJ:

Petitioner Melillo (petitioner), a certified learning disability consultant (LTDC), appeals from the action of the Board of Education of the Essex County Vocational School District (respondent), assigning him for the school year 1986-1987 to the job of

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"Vocational Evaluator." Petitioner contends this is not an LTDC position and the assignment is in violation of his tenure and seniority rights under N.J.S.A. 18A:28-6; N.J.S.A. 18A:6-10 et seq. and N.J.S.A. 18A:28-5, 6 and 9 et seq. and N.J.A.C. 6:3-1.10 et seq. Petitioner suffers nor seeks no monitory loss as he is being paid the full salary and benefits of an LDTC. He seeks immediate reinstatement to his former work activity as a member of the child study team as opposed to the job of vocational evaluator which he performed from September to April 1987, at which time he returned to his former duties.

Petitioner's appeal was filed on August 18, 1986, with the Bureau of Controversy and Disputes of the Department of Education. The respondent's answer to the petitioner was filed on September 7, 1986. Thereafter, the Commissioner of Education transmitted the matter to the Office of Administrative Law on September 4, 1986, for hearing and determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held at the Office of Administrative Law on October 29, 1986 and an order was entered establishing inter alia hearing dates of January 26, 27, and 28, 1987. The hearing was held on January 26 and 27, and the record was held open for additional evidence and arguments to be submitted on February 27, 1987. On February 27, 1987, the parties were given until March 30, 1987 to complete all stipulations, proposed findings of fact and legal argument in written form. Respondent's brief was received on March 30, 1987, and petitioner's brief was received on April 7, 1987. The respondent was granted leave to file an additional memo which was received on April 13, 1987, and at that time the record was closed.

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

The parties have stipulated to the following:

1. The petitioner was initially employed by the respondent as an English and Library instructor at the respondent's Sussex Avenue Center in 1962 and remained in that position until 1975.

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2. In 1975, petitioner was assigned to the position as learning disability teacher/consultant at respondent's North 13th Center and became tenured in that position.

3. Petitioner holds the following certificates: English, Physical Education, Teacher/Librarian and LTDC.

4. Sheila Schaefer, a member of the child study team in the respondent's school, was initially employed by the respondent as an LTDC in 1980. She has continued in that position through the present date and possesses the following certificates: elementary, teacher of the handicapped and LTDC.

5. There is no monetary dispute in this present petition as the petitioner has continued to receive all salary, stipends and benefits as an LTDC based upon his years in seniority.

All of the above having been stipulated as true by both parties, I accept the veracity of the statements and I FIND them to be factual.

FACTS

The facts in this case for all intents and purposes are not in dispute. Respondent operates a grade nine to twelve, public, vocational educational school. This school provides full- and shared-time services within Essex County to approximately 2,800 students. All full-time students partake in an academic and vocational curriculum at respondent's school while part-time students receive their academic training in their sending district and only take vocational training in respondent's school. Approximately ten percent of the students within the school are classified as handicapped. In prior years, respondent had operated a vocational assessment center to evaluate the skills and needs of the incoming students. The center, originally staffed by a guidance counselor, was

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closed in approximately 1981. In 1984, Dr. William Harvey, the new superintendent of schools, in a discussion with Robert Fishbind, the director of support services, expressed the need to have such a center and thereafter reopened the center. Ms. Minnie McAlester, a teacher in the district, was assigned the responsibility of conducting vocational assessments at the newly reopened center.

In March 1986, Ms. McAlester was reassigned to the English Department due to concerns about her stability and lack of communication with the child study team. At this time, the respondent was also having financial difficulty, its budget having been reduced by $300,000 and, therefore, respondent wanted to make the best available use of its personnel resources.

Dr. Harvey at first considered assigning the vocational evaluation job to the school psychologist but eventually decided to use one of the two LDT-Cs, since there was only one psychologist in the district. Dr. Harvey contacted the county superintendent of schools and requested permission to use an unrecognized title, pursuant to N.J.A.C. 6:11-3.6. The county superintendent agreed and informed Dr. Harvey that a standard teaching certificate would be the only requirement for the individual assigned as a vocational evalutor.

Petitioner was advised by Ms. McAlester during Easter vacation in April 1986 that he was about to be transferred to the position of a vocational evaluator. Petitioner asked Ralph Calderone, his immediate supervisor, whether this was true. Mr. Calderone denied having knowledge of that fact at that time but petitioner subsequently received a call from Robert Fishbind, the director of support services, advising him that a change in his assignment was being considered. Petitioner informed Fishbind that he did not want the new assignment and Fishbind responded by informing petitioner he would still be an LDT-C and would continue to function as a member of the child study team. Petitioner was advised he would still conduct assessments and work with classified students.

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Petitioner received a letter from Dr. Harvey, respondent's superintendent, on July 18, 1986, notifying him that he was continued for employment during the 1986-1987 school year. The letter further informed him that "the Board reserves the right to assign or reassign the learning disability teaching consultants during the term as in its judgment may be advisable."

During July 1986, petitioner protested his assignment to Dr. Harvey. Petitioner was advised that he was not being removed as an LDT-C to become a vocational evaluator. Only petitioner's duties would change, not his position, seniority, tenure or department.

On September 12 and 15, petitioner attended workshops and he participated in training sessions concerned with various vocational assessment techniques and, thereafter, assumed the duties of vocational evaluator.

Since his assignment as vocational evaluator, petitioner has been giving objective tests to students who are all classified as handicapped and who are applying for admission to respondent's school district. The petitioner tests one group in the morning consisting of six to nine students and another group of the same size in the afternoon. The testing goes on over a period of a few weeks. The tests are inclusive of various hands-on tasks designed to assess hand and eye coordination and the ability to read and follow directions. The tests measure skills, motor capabilities, cutting and soldering, etc. Upon completion of the tests, the petitioner prepares an evaluation report which is inclusive of socializing skills and technical abilities, and he recommends placement within the receiving district. The reports are then sent to the other members of the child study team who serve on the admissions committee, which then makes a placement recommendation. At the end of March, the testing phase as vocational evaluator ceases, and petitioner then conducts annual reviews of classified students as he had done in past years.

The district plans to have petitioner, as vocational evaluator, follow-up the tested students with the assistance of teachers and have continued involvement with

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parents. Petitioner would also have in-service training responsibilities which would include planning and the prescription of instructional strategies for the students he has tested as the vocational evaluator.

As the vocational evaluator, the petitioner is not involved in the classification of the students he is testing as they have already been classified as handicapped by their home districts. He does not meet with the other members of the child study team concerning their placement, nor does he perform any further comprehensive evaluation after the testing. The petitioner does not make any observation of these pupils in any setting other than his own classroom. Petitioner does not go to the pupils' home districts to observe them in their home classrooms. Neither does he review their educational histories nor confer with their teachers. He no longer performs any of the tests which he had conducted prior to becoming a vocational evaluator. Petitioner must do the above-described vocational evaluation between September and the end of March. He does not do any of the functions that he had previously performed as an LDTC with the child study team until April.

I FIND the above to be the facts in this case together with J-1 through J-8 and R-1.

ARGUMENTS

Petitioner argues that the vocational evaluator position is an inappropriate position for a tenured LTDC and that respondent acted illegally in placing him in that position.

Petitioner contends and respondent agrees that there are specific categories of employment set forth in the New Jersey Administrative Code, specifically in N.J.A.C. 6:3.1.10, and that an LDTC falls within one of those categories.

Petitioner further avers that he has both tenure and seniority as an LDTC and to place him in a category of vocational evaluator where the only requirement is a general teaching certificate is violative of both his tenure and seniority rights. He cites Michael

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Furst v. Bd. of Ed. of the Twp. of Rockaway, OAL DKT. EDU 6617-83 (April 2, 1984), Commr's Decision (May 18, 1984), aff'd, State Board of Education (Oct. 24, 1984), Sharon Rogan v. Edison Twp. Bd. of Ed., Middlesex County, OAL DKT. EDU 807-84 (April 3, 1985), Commr's Decision (May 17, 1985), In the Matter of the Seniority Rights of Certain Teaching Staff Members Employed by the Edison Twp. Bd. of Ed., Commr's Decision (June 2, 1986), Phillp Capodilupo v. Bd. of Ed. of the Twp. of West Orange, OAL DKT. EDU 3814-84 (March 19, 1985), Commr's Decision (May 3, 1985), aff'd, State Board (Sept. 3, 1986), Edna Kessler v. Bd. of Ed. of the Twp. of Middletwon, OAL DKT. EDU 1891-79 (Nov. 27, 1979), Commr's Decision (Jan. 14, 1980), rev'd, State Board (Aug. 6, 1980).

In Furst, the petitioner was assigned to the position of science teacher while a full-time nontenured LDTC was employed by the Board of Education. In that case, the State Board decided, notwithstanding the fact that Furst was assigned to the position as science teacher (a position for which he was appropriately certified), that he was still entitled to the position of LDTC in that he had also achieved tenure in that position and had a right to be appointed to that position. Petitioner points out that Furst was no longer serving as an LDTC and an LDTC who was not tenured performed that function. In our case, a tenured LDTC with less seniority than petitioner fills the LDTC's position which petitioner contends he is entitled to fill.

In the Rogan case, the Commissioner placed a teacher who had been RIFed (reduction-in-force), who had more seniority, into the position of in-school suspension teacher which was held by a nontenured teacher. Petitioner contends that this is analogous to his situation and that he should, by virtue of his tenure and seniority as an LDTC, continue to perform the duties he was performing prior to September 1986. The less senior tenured LDTC, Sheila Schaefer, should be assigned as vocational evaluator. Petitioner further states that In the Matter of the Seniority Rights of Certain Teaching Staff Members Employed by the Edison Township Board of Education stands for the same position.

Both respondent and petitioner admit that there are three types of certificates: 1) an instructional certificate, 2)an educational service certificate and 3)a supervisory certificate. N.J.S.A. 18A:28-6. N.J.A.C. 6:11-12.13. Capodilopo. Petitioner contends

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that the duties he was assigned properly fall within the category of instructional certificate as certified by the county superintendent of schools (J-6). Therefore, petitioner would be "teaching out of his area as an LDTC and since he did not consent to this a person with less tenure and seniority, should be given the position of vocational evaluator."

Respondent argues that in fact petitioner is still an LTDC with all the rights, entitlements and interests, tenure and seniority accruing to that position. Respondent contends that it has the inherent managerial authority to assign or transfer teachers anywhere within the scope of their certification. Ridgefield Park Ed. Assn. v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978); Reeves v. Bd. of Ed. of the Westwood Regional High School District, Bergen County, 1981 S.L.D. 1051, 1061. Respondent further admits that the Board of Education may not transfer a teaching staff member, without his consent, from one tenurable position to another. N.J.S.A. 18A:28-6; Capodilupo, Childs v. Union Twp. Bd. of Ed, 1982 S.L.D. 1456. Respondent further admits that the petitioner has acquired both tenure and seniority in his position as an LDTC but emphatically denies that petitioner was removed from his position as an LDTC, and he therefore contends that neither petitioner's tenure nor seniority rights have been abridged.

Respondent alleges that the duties of a vocational evaluator constitute a proper assignment within the scope of petitioner's LDTC certificate and within respondent's legitimate authority. Kessler v. Bd. of Ed. of the Twp. of Middletown, James Boylan v. Bd. of Ed. of the City of Jersey City, OAL DKT. EDU 7642-85 (May 13, 1986), Commr's Decision (June 25, 1986). Respondent further contends that there are only limited exceptions to the rule permitting a board to make assignments within its district. Reeves v. Bd. of Ed. of the Westwood Reg. Sch. Dist. A sham position is cited as one of the prohibited exceptions. Respondent gives as an example a tenured principal who was transferred to a position as an adult high school principal "a position requiring no supervision of teaching staff members, few students and only minor duties severed from another administrator's position. . . ." The Commissioner in this instance found a constructive dismissal and ordered the principal reinstated to his fomer job. Donald Ruby v. Bd. of Ed. of Hudson County Area Vocational-Technical Schools, OAL DKT. EDU

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337-83 (Aug. 11, 1983), Commr's Decision (Sept. 26, 1983).

Respondent further contends in this case that the petitioner was assigned a legitimate, functioning position which in no way was a sham nor does petitioner allege that it was a sham. Respondent additionally points to the fact that petitioner continues to work the same hours as an LDTC, holds the same title and salary and still functions as a member of the child study team and continues to work with classified handicapped students.

It is the respondent's position that petitioner remains in his position as an LDTC and the job he does as a vocational evaluator is within the scope of his LDTC certificate and duties. Respondent also contends that the job transfer is intended to further the educational goals and objective of the school district.

Respondent next contends that it is the petitioner's burden under N.J.S.A. 18A:6-9 when challenging the action of the respondent, to overcome a presumption of correctness by demonstrating that the action is unreasonable. Absent such a showing, the Commissioner should not substitute his judgment for the board's. Thomas v. Morris Bd. of Ed., 89 N.J. Super. 327, 332 (App. Div. 1965), 46 N.J. 581 (1966). See, also, Long Branch Ed. Assn. v. Bd. of Ed. of Long Branch, 150 N.J. Super. 262, 264 (App. Div. 1976) aff'd, 73 N.J. 461 (1977). Dunnellen Bd. of Ed. v. Dunnellen Ed. Assn., 64 N.J. 17, 29-30 (1973).

The respondent lastly argues that there is no evidence that the delivery of special educational services has suffered by virtue of the action of the school district. There is no allegation that respondent's decision was arbitrary and not made in consideration of the welfare of the students.

DISCUSSION

The question presented here specifically deals with whether or not a tenured and senior LDTC may be given duties outside his previously experienced duties as an LDTC when these new duties can be performed by one holding only a valid teaching certificate.

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N.J.A.C. 6:3-1.10(1)15 states:

> Any person employed at the secondary level in a position requiring an education service certificate or a special subject field endorsement shall acquire seniority only in the secondary category and only for a period of actual service under such education service certificate or special field endorsement [emphasis added].

LDTC is one of the categories mentioned in this regulation. All parties so admit. I therefore FIND that the petitioner, Peter Melillo, has both tenure and seniority in the position of LDTC for the Board of Education of the Essex County Vocational Schools.

Any reduction in force or alteration in petitioner's status as an LDTC would have to be done pursuant to the standards established by the legislature and found at N.J.S.A. 18A:29-9 et seq. For the seven-month period from September to March of the 1986-87 school year, performed has done the work of a vocational evaluator. From April through June 1987, he has been and would be performing the duties which he had been performing for many years within his classification as an LDTC. Both the Furst and Rogan decisions deal with situations in which the tenured teachers were assigned to entirely different positions as opposed to being given additional duties within their respective positions. Petitioner in the instant matter was assigned new duties which, while taking the majority of his time during the school years, did not preclude him from interacting with the child study teams when necessary.

It is well-settled that school boards have inherent managerial authority to assign new duties to teachers within the scope of their certification. See, Ridgefield Park Ed. Assn. v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978) and Reeves. It is important that the education of our children run as smoothly as possible with the most competent personnel that we have at hand. Although teachers are to be protected to the extent allowed by the law, management must be given as much flexibility as possible in order to achieve the best use of its personnel. Here, the petitioner has not lost his job title, salary, departmental status as to tenure or seniority or any other prerogatives to which he is entitled. The respondent has simply given him new duties which petitioner finds to be

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nontraditional within his job title of LDTC. The petitioner admits that these duties only last until the beginning of April and that from that point on, he assumes essentially the normal pattern of duties that he has been accustomed to. It should be noted that this testing as an vocational evaluator is done with only handicapped students who are to be received within the petitioner's school district and that the evaluation of these students plays an important role in their placement. It is not been alleged that the district has operated arbitrarily and the decision to place the petitioner into the job of vocational evaluator from September through April, I **FIND** to be a reasonable use of respondent's human resources.

I further **FIND** that petitioner is still a member of the child study team and is still an LDTC working the hours of an LTDC, receiving the salary of an LDTC and his tenure and seniority in that position is continuing. I cannot see how the petitioner is harmed in being asked to do nontraditional testing functions within his department.

I therefore **FIND** that the respondent properly placed petitioner into the area of vocational evaluator for part of the year as a proper exercise of its managerial authority.

I therefore **CONDLUDE** that petitioner is still a member of the respondent's child study team and continues to be an LDTC in that position with the additional function of vocational evaluator. I further **CONCLUDE** that the Board acted properly in this assignment.

I therefore **ORDER** that the action of the Board of Education of the Essex County Vocational School District be **SUSTAINED** and the complaint of petitioner, Peter Melillo, be **DISMISSED.**

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

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

5/26/87
DATE

PHILIP B. CUMMIS, ALJ

MAY 21 1987

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 26 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

par/e

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PETER MELILLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ESSEX COUNTY VOCATIONAL SCHOOL DISTRICT, ESSEX 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 N.J.A.C. 1:1-16.4a, b and c.

Petitioner objects to the ALJ's finding that the Board acted correctly in this matter when assigning him new non-traditional testing duties within his department and that he is still an LDTC and a member of the child study team. With respect to this, Petitioner avows that the ALJ failed to properly apply the law concerning appropriate assignment within categories of employment and within certificates. The legal arguments presented are virtually identical to those advanced in petitioner's post-hearing brief which were considered by the ALJ. They are incorporated herein by reference.

The Board in its response urges that the analysis and conclusions reached by the ALJ are fully supported in the record and are in full compliance with case law, statute and regulation. It reiterates its argument that petitioner remained at all times in the position of LDTC with the same hours, rate of pay and title.

Upon a thorough review of the record in this matter including the exceptions and transcripts, the Commissioner does not accept the ALJ's determination that the Board acted properly when assigning the duties of a vocational evaluator position to petitioner, a tenured LDTC, as explained below.

First, it is emphasized that the facts in this matter clearly demonstrate that petitioner's seniority rights are not at issue. The record is devoid of any information to document that any abolishment of positions or reduction in force occurred. Thus, petitioner's seniority rights remain inchoate until such time as he is subject to a reduction of force. What the facts demonstrate is that petitioner was subject to an impermissible transfer from his

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tenure position as an LDTC to a separately tenurable position of teacher. See Madeline Childs v. Bd. of Ed. of Township of Union, 1980 S.L.D. 1134, aff'd State Board 1981 S.L.D. 1404, aff'd N.J. Superior Court, Appellate Division 1982 S.L.D. 1456.

In Childs it was determined that an individual tenured in a position requiring an educational services certificate could not be transferred without his or her consent to a teacher position which requires an instructional certificate.

As explained by the State Board in Capodilupo, supra, tenure is achieved in a particular position and the scope of the position to which tenure protection attaches is limited by the scope of the certificate that the teaching staff member must hold. (Id., at p. 7) Relying on Childs, supra, it goes on to state that N.J.S.A. 18A:28-6 limits the rights of a board of education to transfer a teaching staff member from one tenurable position to another without his consent. (at p. 9)

Thus an LDTC position which requires an educational services certificate is a separately tenurable position from that of teacher, a position which requires an instructional certificate. Since the county superintendent of schools when reviewing the unrecognized title and job description of vocational evaluation pursuant to N.J.A.C. 6:11-3.6(b) determined that an instructional certificate was required, the vocational education position thus became a tenurable position as teacher.

Notwithstanding the fact that the Board believes that it is beneficial for an LDTC to perform the duties of vocational evaluator and it sees the duties of vocational evaluator as compatible with those of an LDTC, the record demonstrates that from September 1986 to April 1987 petitioner was assigned on a full-time basis to the duties of a position separately tenurable from the tenured LDTC position he held. This is tantamount to an impermissible transfer notwithstanding the fact that his title did not change, nor his pay or hours and notwithstanding the fact he continued to work with classified pupils. Such a change of assignment does not constitute a mere adding on of "non-traditional" LDTC duties as determined by the ALJ, it constitutes a transfer from one tenurable position to another without petitioner's consent for the period in question because the vocational evaluator duties are those of a separately tenurable position.

Further, the factual circumstances of the instant matter differed markedly from those in Kessler, supra. In that decision, the tenure and transfer statutes were not examined. Rather, N.J.S.A. 18A:46-1 et seq. and N.J.A.C. 6:28-1.1 et seq., the statutes and regulations for special education, were argued and examined. Based upon its examination of N.J.A.C. 6:28, the State Board reversed the Commissioner's determination that a board may not combine with duties of an LDTC and a reading resource teacher since

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it found no inherent incompatibility between the two roles. Whether this holding would stand today given the case law which has evolved since 1980 on issues related to tenure remains to be seen.

Nonetheless, assuming that Kessler, supra, remains viable, the instant matter differs in that petitioner's full-time assumption of vocational evaluator duties September to April cannot be deemed "some direct instruction by a consultant from time to time." (Kessler, 1980 S.L.D. 34, 48) On the contrary, as previously stated, assigning petitioner to a position designated as a teacher position full-time from September 1986 to April 1987 must be deemed a transfer notwithstanding the fact that no reduction in salary, hours or change of job title occurred.

Accordingly, the recommended initial decision in this matter is hereby set aside and it is determined that the Board's action in this matter constituted an impermissible transfer within the meaning of N.J.S.A. 18A:28-6. Childs, supra; Capodilupo, supra The Board is ordered to refrain from assigning to petitioner the duties of vocational evaluator.

COMMISSIONER OF EDUCATION

July 2, 1987

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PETER MELILLO,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE ESSEX COUNTY VOCATIONAL SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, July 2, 1987

For the Petitioner-Respondent, Klausner, Hunter & Oxfeld (Nancy I. Oxfeld, Esq., of Counsel)

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

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

Regan Kenyon abstained.
December 2, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1428-87
(On Remand EDU 9605-82)
AGENCY DKT. NO. 379-9/82A

BERGEN COUNTY VOCATIONAL-TECHNICAL EDUCATION ASSOCIATION,

Petitioner

v.

BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL SCHOOLS,

Respondent

Bruce D. Leder, Esq., for petitioner
(Schneider, Cohen, Solomon, Leder & Montalbano, attorneys)

Philip Scalo, Esq., for respondent
(Smith, Don, Alampi & Scalo, attorneys)

Record Closed: May 18, 1987 Decided: May 27, 1987

BEFORE WARD R. YOUNG, ALJ:

This matter was remanded by the Superior Court (App. Div.) to the Commissioner of Education for consideration of increment withholding on education law, and was transmitted to the Office of Administrative Law on March 4, 1987 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

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A prehearing conference was held on April 15, 1987, at which the parties agreed to submit the matter for summary decision on the following issue:

> Was the failure of the Board to adhere to its policy of offering an employee the right to a hearing before the Board, prior to its action to withhold the employee's salary increments, sufficient reason in this instance to require that petitioner's withheld increments be restored?

The record in this matter closed on May 18, 1987, the date established for the final filing of papers.

The remand resulted from an appeal by the Bergen County Vocational Technical Education Association (Association) from a decision and order of the Public Employment Relations Commission (PERC), dismissing the complaint filed as a result of an unfair practice charge levied by the Association against the Bergen County Board of Education Vocational Schools (Board), and dismissing a petition filed by Henry S. Cummings (Cummings) before the Commissioner of Education (Commissioner) which had been consolidated for hearing by PERC. The appeal, A-3608-85T8, was decided on February 5, 1987 and is incorporated herein by reference.

The Appellate Division affirmed the determination of PERC in dismissing the complaint alleging an unfair labor practice, but reversed the PERC determination that the Commissioner could sustain the withholding of increments on Cummings and remanded that issue to the Commissioner for his consideration in view of the latter's decision in Shifrinson v. Marlboro Bd. of Ed., 1984 S.L.D. _____ (decided June 4, 1984).

The Appellate Division and PERC made reference to Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960), wherein it was held that the action of a local board which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by illegal motives. Reference was also made to Burns v. Newark School Dist. decided by the State Bd. of Ed. on October 26, 1984, wherein it was determined that persistent tardiness or absenteeism is a reasonable basis for withholding an increment. (Slip opinion at 8, 9).

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It cannot be disputed that the Board in this matter had a rational basis for its action in withholding the increments of Cummings pursuant to N.J.S.A. 18A:29-14. The gravamen of this remand is therefore whether the Board's action should be set aside as patently arbitrary or induced by illegal motives due to its failure to adhere to its own policy that requires an offer to the employee of a hearing before the Board prior to voting on the resolution to withhold increments.

Cummings seeks restoration of his withheld increments due solely to the failure of the Board to comply with its own policy in reliance on Shifrinson, wherein the Commissioner set the withholding action aside on the conclusion of the administrative law judge (ALJ) that the Board arbitarily bypassed its own policy.

Although the procedural defect herein is on point with Shifrinson, the facts found in each are not. The ALJ in Shifrinson found the record to be barren of any explanation for the failure of the Board to follow the requirements of its own policy. It has been clearly established in the instant matter that the Board and its agent were unaware of its own hearing policy which was contained in a new policy manual prepared by a consultant.

Cummings argues that ignorance is no excuse in law, contending that decisional law as espoused in Shifrinson must be followed.

Petitioner overlooks the fact that Shifrinson was decided on a finding of arbitrariness by the Board. I cannot make the same finding herein.

The Kopera court incorporated the language "patently arbitrary" to set aside the Board's action. When used as an adjective, patent clearly implies openess and evident. The silence of the Marlboro Board concerning its failure to follow its own policy appeared to lead the ALJ to a determination of arbitrariness. In the instant matter, the record has established the Board's failure to have resulted from inadvertence as hearings were not afforded to any teachers whose increments were withheld.

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The obvious remedy to the dispute herein would be to order the Board to reconsider its withholding action after affording Cummings the opportunity to be heard. I believe, however, this would be a fruitless exercise due to the clear findings by PERC and the Appellate Division that a rational basis existed for its action.

I FIND the failure of the Board to afford Cummings a hearing prior to its vote to withhold his increments, although in violation of its own policy, is not fatal to its action. I CONCLUDE, therefore, that the Board's withholding action is AFFIRMED and the Petition of Appeal is DISMISSED.

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

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

27 May 1987
DATE

WARD R. YOUNG, ALJ

MAY 29 1987
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

JUN 1 1987
DATE

Mailed To Parties:

FOR OFFICE OF ADMINISTRATIVE LAW

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BERGEN COUNTY VOCATIONAL-TECHNICAL EDUCATION ASSOCIATION,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON REMAND
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL SCHOOLS, BERGEN COUNTY,	:	
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 thereto within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

Petitioner avers the ALJ incorrectly drew a distinction between the instant matter and Shifrinson, supra, in finding that the Board's failure to adhere to its policy of offering an employee a hearing before its vote to withhold that employee's salary increments did not constitute arbitrariness. Petitioner avers, relying on Shifrinson, that there should have been a finding of arbitrariness in this matter where the Bergen County Board also failed to follow its own policy. In addition, petitioner claims "***the ALJ erred in not finding that the Board's arbitrariness was fatal to its action. Accordingly, the Judge should have adhered to Shifrinson, and should have ordered Cummings' increment restored." (Exceptions, at p. 2)

In the alternative, petitioner excepts to the Board's explanation for failing to comply with its own policy. Petitioner avers that the Board's lack of knowledge of its own hearing policy does not excuse the Board's failure to follow it. "***[I]f the ALJ wants to make the argument that an absence of an explanation amounts to arbitrariness (Shifrinson) then it logically follows that respondent's explanation of ignorance of the policy also amounts to arbitrariness." (Exceptions, at p. 2) Petitioner further contends that pursuant to N.J.S.A. 18A:11-1(c) the Board has the power to "[m]ake, amend and repeal rules *** for the employment, regulation of conduct and discharge of its employees***." "Thus," petitioner argues, "the Board had the power to create Policy No. 319, and once adopted, it becomes part of the rules by which the Board of Education is bound." (Exceptions, at p. 2) Petitioner submits that Policy No. 319 reads, in part, "'the Board shall offer the employee the right to a hearing ***.'" (Id., at p. 2) Petitioner further

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avers that "the word 'shall' implies that a hearing is mandatory; the language leaves no room for discretion." (Id., at p. 2) (emphasis in text)

Further, petitioner submits that contrary to the ALJ's opinion, the rational basis requirement for withholding an increment does not obviate the need for a hearing. Petitioner objects to the ALJ's characterizing Petitioner Cummings' due process rights as "fruitless." Petitioner argues Cummings is entitled to a hearing notwithstanding the fact that the Board's denial of increments was rational, and it cites Fitzpatrick v. Montvale Board of Education, 1969 S.L.D. 4, 7 in support of this proposition. Petitioner avers that Cummings was never given notice that the Board would consider a recommendation to withhold his increments, and that "[t]he Board further violated Cummings' rights by denying his request to be heard before the vote on the recommendation." (Exceptions, at p. 3) (emphasis in text)

Finally, petitioner argues that the ALJ supports its decision by showing that the Board also failed to afford hearings to other teachers whose increments were withheld. "It would contravene all principles of legal reasoning to agree that two wrongs make a right. Moreover, the Board's failure to offer hearings in other instances only serves to prove the petitioner's point: the Board has violated and continues to violate its own policy." (Id., at p. 3)

Thus, petitioner contends the Board's violation of its policy is fatal to its action. "The Board acted arbitrarily in failing to afford petitioner a hearing," petitioner argues, "and as such, the increment should be restored." (Id., at p. 3) In addition, petitioner seeks pre-judgment interest pursuant to N.J.A.C. 6:24-1.18(c)1. It avers the Board acted in bad faith.

In reply to petitioner's contention that the Board's failure to follow its own policy was an arbitrary act, the Board argues that it was under no legal compulsion, other than its own policy, to afford petitioner a hearing.

> Through complete ignorance of a recently enacted policy contained in a policy manual holding hundreds of policies, the Board failed to afford petitioner a hearing. Petitioner, also ignorant of the Board's new policy, did not request such a hearing. The Board did not willfully contravene the rights of the petitioner over the petitioner's objection, but made an honest mistake to which no objection was voiced at the time. (Reply Exceptions, at p. 1)

The Board submits that its failing to provide Petitioner Cummings a hearing, which it states, he is not entitled to by law, "should not invalidate the admittedly valid action taken by the Board after due consideration of the facts before it." (Id., at p. 2)

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Further, the Board argues that all those withholding of increment cases considered at the time in question were treated equally, and thus, the Board did not arbitrarily deny Petitioner Cummings a hearing.

> The fact is that although the policy was formally adopted, the Board did not begin application of Policy No. 319 until some time after the petitioner's case was considered. Since the Board has the power under law to change its rules at any time, it is reasonable that the Board has the power to delay implementation of changes in the rules, as long as the changes are not applied discriminatively to some employees and not to others considered at the same time. (Id., at p. 2)

Finally, the Board submits that pre-judgment interest is unwarranted in the instant matter because, "[t]his is a case of mistake, not willful infringement of the petitioner's rights. The Board has not acted in bad faith in violating its own policy. It acted out of ignorance of this policy." (Id., at p. 2) The Board requests that the initial decision be adopted by the Commissioner in its entirety.

The issue before the Commissioner in this matter, on remand from the Superior Court, Appellate Division "is whether failure to afford Cummings a hearing, not required by law, but established by the Board as its own policy, requires reversal of PERC's decision and an order that Cummings receive his withheld increment." (Bergen County Board of Education of Vocational Schools v. Bergen County Vocational-Technical Education Association, N.J. Superior Court, Appellate Division, February 5, 1987, A-3608-85T8) (Slip Opinion, at p. 10) For the reasons that follow, the Commissioner rejects the initial decision and finds that Petitioner Cummings' increments shall be restored.

N.J.S.A. 18A:29-14 sets forth the following procedural and substantive requirements in a board's considering the withholding of an employee's increments:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid.

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> The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment.

Clearly, no hearing before withholding is required by statute. However, it is well-established in case law that the Board, by virtue of the power vested in it pursuant to N.J.S.A. 18A:11-1, may make, amend, and repeal rules for its own government. See Greenway v. Camden Bd. of Ed., 129 N.J.L. 46 (Sup. Ct. 1942), aff'd 129 N.J.L. 461 (E.&A. 1943). See also Gerald F. Blessing v. Board of Education of the Borough of Palisades Park and Frank Pollotta, 1974 S.L.D. 1133, 1136. Further, it is also clear that a board is not absolutely bound by its own policies. Greenway, supra As stated in Blessing, supra,

> ***To the contrary, it has been consistently held that a local board of education is not bound by its policies and rules when no vested rights are involved. Polonsky [v. Board of Education of the Borough of Red Bank, 1967 S.L.D. 93]; Noonan and Arnot v. Paterson City Board of Education, 1938 S.L.D. 331 (1925), affirmed State Board of Education, 1938 S.L.D. 336 (1925); Silvestris v. Bayonne Board of Education, 1959-60 S.L.D. 184. (at 1136-37)

In the instant matter, however, by adopting a policy requiring the Board herein to provide a hearing to employees whose increment may be withheld, the Board created an additional procedural right that bespeaks a guarantee of the Board's own integrity. It may not readily set aside such a right as though it were a mere rule of order wherein no one stands to be injured. In the Commissioner's opinion, once a Board commits itself to affording a due process entitlement to an employee at the local level not required by statute, it may not lightly ignore or disavow that entitlement, notwithstanding the fact that such procedure is not final or binding on the employee's right to appeal the matter to the Commissioner. The Commissioner would emphasize that this intermediary hearing step is not unlike the right of a board to go to non-binding arbitration, as determined in Board of Education of Bernards Tp. v. Bernards Tp. Ed. Assn. and American Arbitration Association et al., 79 N.J. 311-325 (1979) so long as "the Commissioner's review powers are neither aborted nor circumscribed." (at 325) In the instant matter, such hearing before the Board promotes the welfare of the public employee and preserves his right of appeal before the Commissioner pursuant to N.J.S.A. 18A:29-14.

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Moreover, the Board herein stipulates that it freely and properly adopted an operations manual prepared by a consulting firm which made apparent to all concerned - administration, Board members, teachers, public alike - what its clearly defined operating procedures would be. To argue that Policy No. 319 was newly adopted and therefore that the Board was excused from its responsibility to implement said policies, is patently absurd. To do so, in effect, is to accord to a paid consultant the Board's legal responsibility for developing and implementing policy and procedures for the governance of Board matters within the school district. Such an interpretation freely admits that the Board adopted a set of policies for meeting its obligations without consideration of their content, in derogation of its exclusive legal responsibility.

Consequently for the reason set forth above, the ALJ's determination is set aside. Notwithstanding any determination by PERC as to the fact that a reasonable basis may have existed for the withholding of Petitioner Cummings' increments, pursuant to Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960), the Commissioner must overturn the action of the Board herein in light of its patent failure to follow its own properly adopted policy. See Shifrinson, supra, ("Having adopted that policy it is bound by it.") (Slip Opinion, at p. 12). See also Greenway, supra; Polonsky, supra; Noonan, supra; Silvestris, supra. Accordingly, the Commissioner directs that Petitioner Cummings' increments for the 1982-83 school year be restored forthwith.

Notwithstanding the above finding, the Commissioner is in accord with the Board that pre-judgment interest is inappropriate in the instant circumstances. The Commissioner finds no evidence of bad faith in the Board's failure to apply its own policy to the increment review it conducted on June 28, 1982. See Board of Education of the City of Newark v. Levitt, 197 N.J. Super. 239, 484 A. 2d 723 (App. Div. 1984). Instead, he finds that while the Board's failure to follow its own policy was fatal to the action taken, its procedural omission was inadvertent, not a deliberate manifestation of bad faith. Pre-judgment interest is accordingly denied.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

July 8, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6384-86
AGENCY DKT. NO. 300-9/86

RICHARD L. MANN,
Petitioner,
v.
CHERRY HILL TOWNSHIP BOARD OF EDUCATION,
Respondent.

Allen S. Zeller, Esq., for petitioner (Freeman, Zeller & Bryant, attorneys)

William C. Davis, Esq., for respondent (Davis, Reberkenny & Abramowitz, attorneys)

Brian M. Cige, Esq., for intervenor (Klausner, Hunter & Oxfeld, attorneys)

Record Closed: April 8, 1987 Decided: May 26, 1987

BEFORE BRUCE R. CAMPBELL, ALJ:

Action for an order directing that Richard L. Mann, petitioner, be placed in the position of elementary physical education teacher in the Cherry Hill Public Schools, retroactive to September 1, 1986.

This matter was joined before the Commissioner of Education who determined the matter to be a contested case and transmitted it on September 26, 1986, 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. After notice, a prehearing conference was held on November 26, 1986 and, among other things, it was settled that the issue to be determined is whether the petitioner has a greater claim to the controverted position than the person selected. The matter was set down for hearing on February 11, 1987. Because of the illness of an essential witness, the

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matter was adjourned to March 4. Unfortunately, the witness did not recover. The matter was heard on March 4 at the Merchantville Municipal Court.

STIPULATIONS

(a) The Board determined on or about June 3, 1985 that, in the event teachers' times of service were equal, seniority considerations would include prior teaching service in Cherry Hill and, if necessary, prior service under contract in other districts and, if necessary, total graduate credits in education.

(b) On April 22, 1986, an agent of the Board met with the petitioner to discuss an impending reduction in force (RIF) and indicated a tie in length of service among four personnel.

(c) Because of the RIF, only three positions would be available in elementary physical education for 1986-87.

(d) Because two of the four persons involved held master's degrees, they were retained.

(e) The petitioner and one other person apparently were tied in length of service.

(f) The petitioner represented that he would have two graduate credits before the end of the 1985-86 school year.

(g) The Board issued RIF letters to the petitioner and the other involved teaching staff member pending further investigation of graduate credits held by each.

(h) The petitioner caused verification of his enrollment in a two-credit graduate course at Trenton State College to be sent to the Board's personnel officer on or about May 1, 1986.

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(i) The Board's personnel officer contacted the petitioner on or about June 5, 1986, and requested that an immediate date be set to break the tie by lottery.

(j) The petitioner again represented that he would have two graduate credits before the end of the contract year.

(k) The personnel officer stated he would not count the course.

(l) The lottery date was set at June 9, 1986.

(m) The lottery was conducted on June 9, 1986, and the petitioner was unsuccessful.

(n) The petitioner caused verification of his successful completion of the graduate course at Trenton State College to be sent to the Board on or about June 20, 1986.

(o) The petitioner filed a grievance that was denied by the Deputy Superintendent of Schools under date of June 23, 1986, on the basis that coursework had not been completed prior to April 30, 1986.

(p) The negotiated labor agreement in effect between the Board and the Cherry Hill Education Association provides at Article XI, A.1.g. that: "The Board will issue teacher contracts or letters of intent on or before June 10th of the school year."

(q) The petitioner was rehired effective November 25, 1986 to serve, at full salary appropriate to his place on guide and with all emoluments through March 8, 1987.

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RELEVANT TESTIMONY

Richard L. Mann testified that he did meet on April 22, 1986, with the Board's personnel officer to discuss an impending RIF. They discussed exhibit J-1 concerning reduction in force and seniority determination. The personnel officer indicated he would use exhibit J-1, which had been adopted the year before (see stipulation (a)). The petitioner stated he had taken graduate courses while an undergraduate Kansas State College. The personnel officer said he would look into those credits. The petitioner also stated he was going to take more graduate work at either Glassboro State College or Trenton State College.

The petitioner testified he had originally planned to take additional graduate courses in the fall of 1986 but did not. However, because of the impending RIF, he now made contacts with the schools and got as much information as possible concerning their graduate offerings.

The witness was active in a professional association in September 1985 and stated that he could not go to school in the fall semester that year because of his association activities. The petitioner told the personnel officer that he was going to enroll in a short graduate course. He did so and wrote to the Board announcing his enrollment (J-4). He enclosed a statement from Trenton State College certifying his enrollment (J-6). There was no discussion between the petitioner and any Board agent at that time as to whether the course the petitioner was going to take, which would be completed in late June, would or would not count for seniority determination purposes. Upon completion of the course, the petitioner caused a letter from the college to be sent to the Board on June 20, 1986 (J-9). The witness recalled no further meetings on the subject.

Soon after submitting his letter of May 31 (J-4) to the personnel officer, the petitioner received a telephone call from the personnel officer. The petitioner was told that his Kansas State College hours would not be accepted because they had been taken while he was undergraduate. The petitioner also was told that the course he was taking at Trenton State College would not be counted because the credits, if the petitioner completed the course successfully, would not be awarded until after the date by which the Board had to make its determination.

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The lottery was held on June 8, 1986. The petitioner participated under protest (J-7). He, the other affected teacher, a teachers' union vice president and the personnel officer were present. The personnel officer informed the others that the petitioner was participating under protest. The personnel officer showed the persons assembled two cards, one bearing the petitioner's name and one bearing the intervenor's name. The personnel officer put the two cards in a box and shook the box. The teachers' union vice president drew the card containing the intervenor's name.

The petitioner stated he was upset when he left the meeting. He had not had an opportunity to examine the box from which the cards were drawn and he had lost his career by chance.

It was stipulated by and among the parties that the observations and evaluations of the petitioner and of the intervenor were satisfactory at all times. Under the evaluation system in the Cherry Hill School District, satisfactory is the highest rating.

The petitioner also testified concerning his summer employment in a recreational capacity in another school district. The employment does not require teacher certification. The petitioner also testified as to his understanding that credits for salary guide adjustment purposes must be earned by September 1 of each academic year.

The petitioner received a RIF notice in April 1985, as did two other teaching staff members. He and one other member were recalled in August 1985. A lottery was not mentioned, to the petitioner's knowledge, at any time during the 1985 RIF.

The petitioner took a course entitled Traffic Safety Workshop in late spring 1986. Although he does not have experience in driver education, if he had stayed in a health position, he would have taught driver education this year. All of his prior service was in elementary physical education.

The witness acknowledged that the reduction in force and seniority determination document (J-1) states that: "Graduate course credits are those that are a part of graduate degree program in the educational field offered by a college or university where matriculation and graduation take place at the graduate level." The witness also

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acknowleged that the courses taken at Kansas State College were taken to satisfy undergraduate requirements.

Janet Mann testified that she was present at the April 22, 1986 meeting between the petitioner and the Board's personnel officer. The question of graduate credits was raised. The personnel officer stated that there appeared to be a four-way tie for three positions. Because two persons held master's degrees, they would be retained. A tie remained between the petitioner and the intervenor.

The Board's personnel officer asked the petitioner if he had any graduate credits. He replied that he had taken graduate credits while an undergraduate and would undertake a course in late spring. The Board's agent asked the petitioner where he would take the course and petitioner replied he was collecting information from Glassboro State College and Trenton State College. The two men also discussed graduate credit criteria. The Board's personnel officer asked the petitioner if he was matriculated. The petitioner answered that he was not matriculated but could transfer six or eight credits to a graduate program in which he would become matriculated.

The Board sent RIF letters to both the petitioner and the intervenor in order to fulfill its responsibilities under law and the labor agreement. The witness recalls that the Board's personnel officer stated there was time to work on the tie and did mention the possibility of a lottery. The witness also recalls that the use of lotteries as tie breakers was brought up at meetings of the Cherry Hill Education Association in 1985. A committee of the Association suggested tie breaking criteria. That committee had input into the formation of exhibit J-1.

The Board called its deputy superintendent. The late administrative assistant for personnel reported to the deputy superintendent and superintendent. They often consulted on seniority questions and they did discuss the situation of the petitioner and intervenor here.

The district maintains a computer bank on all certificated personnel, which is updated annually. Personnel decisions must be made by April 30, at which time the law requires the Board to give notice to all teachers of their status for the coming school year. Exhibit J-3 is a typical RIF letter.

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The policy in question here (J-1) came about through discussions between and among the Board, administrators and the teachers' union. All recognized that the possibility of ties exists in a district as big as Cherry Hill. The absence of procedures to handle these situations was a problem, at least potentially. Lotteries had been used in the early 1980's to break ties.

The Board charged the administration to develop and implement procedures to handle just such situations. Exhibit J-1 is that product.

From his notes, the witness testified concerning a special meeting of the Board on May 28, 1985, the minutes of which are exhibit J-12. His notes show five factors to be considered as a procedure to break a seniority tie:

1. All prior service in Cherry Hill.
2. All prior teaching in other districts under contract (not student teaching or substitute teaching).
3. Educational credits, advanced degrees and courses.
4. Military time (required by law).
5. Lottery.

The Board did not adopt this policy by resolution. It was understood between the Board and administrators that this was an administrative procedure, developed by administrators and to be implemented by administrators. The Board thoroughly discussed the plan and approved it. As to the use of a box to hold the names of the person in the lottery, the witness testified that the box used was the same box used by the Board secretary for drawing ballot positions in connection with the annual school election.

Executive session minutes of May 28, 1985 make brief mention of guidelines to break seniority ties (J-14). The minutes do not expressly refer to military service or use of a lottery.

Adjustments to salary based on graduate credits earned occurs, if the Board receives notice within 60 days, on February 1 and September 1, in accordance with Article IX, A.1. of the agreement between the Board and Association (J-15). Adjustments would

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be made at February 1 or September 1 but never retroactively. If a staff member notifies the Board before February 1 or September 1 of credits earned, the staff member's salary would be adjusted on February 1 or September 1.

The procedure set out in exhibit J-1 does not speak to when graduate credits must be earned; however, if courses are not completed by April 30, they are not part of the teacher's record. April 30 is also the mandatory date for notification of teaching staff members of their status for the coming school year. The administration cannot speculate as to whether a teacher will have certain credits at some point after April 30. This matter was discussed with the Cherry Hill Education Association in 1985 and 1986. The Association knew that the April 30 date would be used. This witness knew and he believes the Association knew that if all factors were equal on April 30, a lottery would be used as the tie breaker.

DISCUSSION AND DETERMINATION

The respondent makes five separate arguments. The first deals with arbitrary and capricious conduct. Use of a lottery to break a tie when there is a RIF is, in the petitioner's view, arbitrary and capricious. It does not bear a sufficient rational relationship toward the Board's aim of best serving the educational goals of the Cherry Hill School District. Further, the selection of April 30 for the completion of graduate credits for the purpose of considering those credits in breaking a tie, as applied in this matter, is arbitrary and capricious. So was the decision not to consider the petitioner's graduate credits taken and earned while an undergraduate. Second, the manner in which the RIF policy was implemented was arbitrary and capricious because the policy fails to mention the use of a lottery. Third, the delegation of authority to the administration for the formulation and implementation of the RIF procedure was improper. Therefore, all acts performed pursuant to the policy were ultra vires. Fourth, the petitioner had a vested right in his employment and any action affecting that right should have been acomplished by formal Board action with full notice to the petitioner. The manner in which the Board did act violated the petitioner's due process rights. Last, the Board violated the Open Public Meetings Act in that it took private and final action when it directed the administration to formulate a RIF policy and when it directed and allowed the administration to conduct a RIF on June 9, 1986.

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I FIND nothing arbitrary in the Board's use of the dates April 30 and June 10 in making its determinations concerning seniority. The former date is prescribed by statute as the time by which a Board must give to each nontenured teaching staff member, continuously employed by it since the preceding September 30, either a written offer of a contract for employment for the next school year or a written notice that such employment will not be offered. Traditionally, tenured teaching staff members have, by April 30, been asked if they intend to remain in the system in the coming year and have been officially notified of what their salary would be for the coming year if they remain in the district's employ.

The June 10 date arises from language in the collective bargaining Agreement between the union and Board. In Article XI, it is specified that the Board will issue teaching contracts or letters of intent on or before June 10th of the school year. In Bd. of Ed. Tp. N. Bergen v. N. Bergen Fed. Teachers, 141 N.J. Super. 97 (App. Div. 1976), promotional policy was under consideration. However, the court discussed notice to staff in terms applicable to the present matter. The Board's right to select candidates for promotion from either within or without the local district involved a major educational policy and as such was considered a managerial prerogative. The issue of whether notice of vacancies should be provided to all teachers, however, was not part of educational policy. It affected the terms and conditions of employment and, therefore, should have been negotiated between the parties. The court stressed that the ultimate criteria must be left to the school board as a matter of major educational policy. But it could not act arbitrarily in any area that bore no reasonable relationship to educational goals.

In the present case, the only purpose of the lottery was to break a tie. Although the petitioner contends that the Board's personnel administrator drew the name of the successful person, the record indicates that the union vice president actually picked the name from the box used for the drawing.

The Board's witness did state that other criteria could have been incorporated in the tie breaking process. Of course, this is policy. The witness also agreed that prior teaching service, both within and without the district, and graduate level credits in education were clearly related criteria. The question that occurs to this judge is, how far must a board go? In Village of Belle Terre v. Boraas, 461 U.S. 1, 8 (1974), the United States Supreme Court said, "But every line drawn by a legislature leaves out what might

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well have been included. That exercise of discretion, however, is a legislative, not a judicial, function." It is no more than a normal human reaction to protest criteria when one has been disadvantaged by them. And, of course, it is common experience that the closer one comes to a line, the more keenly one urges that he should have been inside the compass of the line.

I FIND that the criteria applied to the tie breaking process in this matter are not patently unfair or unreasonable. As the Board points out, lotteries are used to determine ballot positions and our Selective Service System was originally a lottery system. The federal government has used lotteries in connection with land sales in which demand exceeded supply.

The petitioner also argues that because the deputy superintendent stated that a teacher who received a RIF notice before April 30 would not receive a letter of intent by June 10 "irrespective of the contract requirement" and that even without a letter of intent the teacher might still be hired for the next year, it follows that the decision as to breaking ties need not be made by June 10. This must be rejected as a non sequitur. The Board has no choice but to take the actions discussed by those dates because statutes in the first instance and the labor contract in the second instance require those acts. The mere fact that positions may open up after RIF notices have been issued is irrelevant to the statutory and contractual requirements.

I also must uphold the Board's decision not to consider graduate credits taken by the petitioner that were used to satisfy the requirements for his bachelor's degree. To do otherwise would be to count the credits twice. This is not merely unfair, it is proscribed. Siebold v. Oakland Bd. of Ed., 1980 S.L.D. 520.

The petitioner also urges that the implementation of the policy is arbitrary and capricious because its express language fails to state that a lottery will be used. The petitioner states that the deputy superintendent admitted in his testimony that the policy is ambiguous and unclear (transcript at 46-47). Having having heard and observed the witness as he testified, I am not convinced that his testimony was as the petitioner urges. The witness did not say that the lottery provision bore no educational purpose. In fact, he stated, "It has an educational purpose if we can resolve who can get the job and they can go back to work" (transcript at 46).

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The petitioner's third, fourth and fifth contentions will be considered together. The petitioner urges that the delegation of authority to administrators in this case was improper, that because he had a vested property right in his job, any action affecting his job should have been done by formal Board action with full notice to him and that the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., was violated when the Board took private and final action directing the administration to formulate and implement a RIF policy and further violated the act when it directed or permitted the administration to conduct a RIF under the policy on June 9, 1986.

The petitioner cites In re North Jersey Dist. Water Supply Comm'n, 175 N.J. Super. 167, 206 (App. Div. 1980) as support for his improper delegation argument. The Appellate Division in that matter stated:

> Under our law "a power or duty delegated by statute to an administrative agency cannot be subdelegated in the absence of any indication that the Legislature so intends." Mercer Council #4 N.J. Civ. Serv. v. Alloway, 119 N.J. 94, 99 (App. Div. 1972), aff'd 61 N.J. 516 (1972). This is especially true when the agency attempts to subdelegate to a private person or entity, since such person or entity is not subject to public accountability. N.J. Dept. of Transp. v. Brzoska, 139 N.J. Super. 510 (App. Div. 1976).

Of course, in the present case the persons to whom development of the policy was delegated were not private; that is, they were employees and agents of the Board. And of course, I am aware that only when the determination of an agency so departs from the record as to become arbitrary, capricious and unreasonable should a reviewing body step in to make its own determinations. In re Application of Hackensack Water Co., 88 N.J. Super. 362, 369 (App. Div. 1965).

In Bally Mfg. Corp. v. N.J. Casino Control Comm'n, 85 N.J. 325 (1981), Mr. Justice Handler, concurring, stated at 345, "When specific parties are particularly affected by a proposed rule, fair play and administrative due process dictate that an agency must conscientiously concern itself with and make reasonable efforts to accommodate the rights and interests of the affected individual and genuinely account for the individualized effect of its proposed action [citations omitted]."

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The petitioner urges that Feigen v. Livingston Tp. Bd. of Ed., 1976 S.L.D. 886, is apposite. I disagree. That case dealt, not with delegation of authority, but rather with failure of the board to make a decision concerning the merger of two elementary schools in public. That case does, however, apply to the petitioner's argument that the Board violated the Open Public Meetings Act in that it directed the administration, in the course of an executive session, to formulate a RIF procedure.

The public has the right to witness in full detail all phases of the deliberation process of public bodies. Accardi v. Mayor and Council of City of North Wildwood, 145 N.J. Super. 532 (App. Div. 1976).

The short answer is that a policy that affects the employment, or not, of a tenured teaching staff member is a matter of serious concern and should be adopted by the Board in public session. The policy establishes an action of a political subdivision of the State. The Board's final determination as well as its discussion of the subject must be open to the public. Woodbury Times v. Gloucester Sewer Authority, 151 N.J. Super. 160 (App. Div. 1977). Although I do not believe that the Board attempted here secretly to violate the letter and spirit of the Open Public Meetings Act, I **FIND** and **CONCLUDE** that the gravity and reach of the subject policy require that it be adopted by the Board in open session.

I expressly refrain from a finding that the procedure is improper. The limit of this ruling is that the procedure was not properly adopted by the Cherry Hill Board of Education and, therefore, was improperly applied to the petitioner herein.

Accordingly, it is **ORDERED** that the Cherry Hill Township Board of Education shall pay to Richard Mann the salary he would have earned from September 1, 1986 until his recall in November 1986. It is further **ORDERED** that the Board shall treat his service in the 1986-87 school year as continuous from his previous service in the district for seniority purposes and Teachers Pension and Annuity Fund purposes. Nothing in this decision shall be construed as barring the Cherry Hill Board of Education from adopting, in accordance with the Open Public Meetings Act, a policy for determining how to break a tie when two or more teaching staff members, subject to RIF, have the same length of service in the affected category and the same educational attainments.

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

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

26 MAY 1987
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

5/26/87
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 1 1987
DATE

Ronald L. Burke
OFFICE OF ADMINISTRATIVE LAW

ds

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RICHARD L. MANN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the initial decision filed by the Office of Administrative Law.

It is observed that those exceptions to the initial decision filed by the respective parties as well as petitioner's replies to the Board's exceptions were filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c. Additionally, it is further noted that petitioner, in support of his exceptions to the initial decision, relies on the excerpt of the testimony of Roland C. Hill, Deputy Superintendent, by way of a transcript provided to the Commissioner's review.

Upon review of the exceptions filed by the parties, the Commissioner finds that those arguments related to the guidelines to break seniority ties adopted by the Board in closed session meeting of May 28, 1985 (J-14) are irrelevant by reason of the fact that such guidelines were developed in violation of the Open Public Meetings Act. In this regard the Commissioner adopts as his own that portion of those findings and conclusions set forth in the initial decision which read as follows:

> The public has the right to witness in full detail all phases of the deliberation process of public bodies. Accardi v. Mayor and Council of City of North Wildwood, 145 N.J. Super. 532 (App. Div. 1976).
>
> The short answer is that a policy that affects the employment, or not, of a tenured teaching staff member is a matter of serious concern and should be adopted by the Board in public session. The policy establishes an action of a political subdivision of the State. The Board's final determination as well as its discussion of the subject must be open to the public. Woodbury

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> Times v. Gloucester Sewer Authority, 151 N.J. Super. 160 (App. Div. 1977). Although I do not believe that the Board attempted here secretly to violate the letter and spirit of the Open Public Meetings Act, I FIND and CONCLUDE that the gravity and reach of the subject policy require that it be adopted by the Board in open session.
> (Initial Decision, ante)

In view of the foregoing determination, the Commissioner hereby directs the Board to establish a formal policy to be approved in open public session in accordance with the Open Public Meetings Act which sets forth those criteria to be employed in the event of a reduction in force whereby a tie in seniority exists between two or more tenured teaching staff members.

What remains to be decided by the Commissioner herein is whether the Board's action under the specific circumstances recited herein was arbitrary or capricious, in relying upon the use of a lottery devised and implemented by its administration to break the seniority tie between petitioner and another tenured teacher for the filling of the one remaining position of elementary physical education teacher for the 1986-87 school year.

The Commissioner observes that there are no provisions in N.J.A.C. 6:3-1.10 as amended which regulate those procedures to be followed by local boards of education when, as a result of a reduction in force, a tie in seniority exists between two or more tenured teachers for a teaching position required to be filled by the Board. Therefore, local boards of education have the discretionary authority to establish appropriate criteria as a matter of policy in effectuating a resolution between two or more tenured teachers involved in seniority ties. However, those policies promulgated by local boards of education affecting seniority ties must be adopted pursuant to the Open Public Meetings Act. It is clear from the evidence presented in this matter that the Board did not have such a policy in place at the time it was required to determine the seniority tie that existed between petitioner and Suzanne Godfrey. Given the specific factual circumstances in this case, however, the Commissioner does not find the use of the lottery by the Board's administrators to break the seniority tie to be fatally defective with respect to the Board's action in filling the position of elementary physical education teacher for the 1986-87 school year.

The use of the lottery in this instance did not serve to give either petitioner or Ms. Godfrey an unfair advantage in being selected as the person who would be recommended by the administration to the Board to fill the teaching position in question. It is further noted that while petitioner did in fact remain on a

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seniority list for the months of September and October, a vacancy for which he was qualified did occur in November 1986. He was then returned to active employment.

Therefore, insofar as those findings and conclusions set forth in the initial decision lend support to petitioner's contention that the Board's reliance upon the lottery to break the seniority tie was arbitrary or capricious, they are hereby set aside. Having so determined, the Commissioner also sets aside the relief granted to petitioner by the ALJ which holds that he be compensated for the salary he would have earned from September 1, 1986 until he was reemployed in November 1986, together with the reinstatement of his employment service for seniority purposes and for Teachers Pension and Annuity Fund purposes for the same period of time cited above.

In conclusion and for the reasons expressed in the findings and determinations set forth above, the Commissioner adopts in part and reverses in part those findings and conclusions in the initial decision.

Accordingly, the instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

July 10, 1987

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RICHARD L. MANN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, July 10, 1987

For the Petitioner-Appellant, Freeman, Zeller and Bryant (Allen S. Zeller, Esq., of Counsel)

For the Respondent-Respondent, Davis, Reberkenny and Abramowitz (William C. Davis, Esq., of Counsel)

For the Intervenor-Respondent, Klausner, Hunter and Oxfeld (Brian M. Cige, Esq., of Counsel)

The State Board of Education affirms the decision of the Commissioner for the reasons expressed therein. In affirming that decision, we emphasize that, as found by the Commissioner, policies followed by the Board in situations where two teachers are equal in seniority must be adopted by the Board in conformity with the requirements of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq. However, in this instance, Petitioner did not establish any entitlement to be selected for the position at issue in preference to Intervenor, who had equal seniority. Accordingly, we find that the Commissioner's directive that the Board must establish a formal policy to be approved in open public session in accordance with the Open Public Meetings Act is the proper remedy in this case.

Regan Kenyon abstained.
December 2, 1987

Pending N.J. Superior Court

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6761-86
AGENCY DKT. NO. 314-9/86

WILLIAM L. CADE, JR.,
Petitioner,
v.
EWING TOWNSHIP BOARD OF EDUCATION,
Respondent.

Brian J. Sexton, Esq., for petitioner (Sterns, Herbert, Weinroth & Petrino, attorneys)

David W. Carroll, Esq., for respondent

Record Closed: April 20, 1987 Decided: June 4, 1987

BEFORE DANIEL B. MC KEOWN, ALJ:

William L. Cade, Jr., (petitioner) claims the Ewing Township Board of Education (Board) violated his seniority rights when it refused to appoint him to the position assistant superintendent which it created during June 1986. The Board denies petitioner's seniority rights were violated. It asserts the controverted assistant superintendent position is not substantially identical to the position of assistant superintendent which had been held by petitioner and in which he acquired seniority. After the Commissioner transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a prehearing conference was conducted by Administrative Law Judge William B. Palleria during which the issue was defined and other procedural matters were addressed. While the case was subsequently transferred to

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the undersigned, the issue remains as stated in Judge Palleria's order. A hearing on the matter was conducted March 9 and 10, 1987 at the Office of Administrative Law, Mercerville. The record closed April 20, 1987 upon receipt of the Board's letter memorandum.

ISSUES

The nature of the proceeding and issue identification as stated in Judge Palleria's prehearing order is reproduced here in full:

> 1. NATURE OF THE PROCEEDING AND IDENTIFICATION OF ISSUES:
>
> Petitioner was formally tenured in a position of Assistant Superintendent. That position was abolished in 1981. A position of Assistant Superintendent was created in June 1986. Petitioner claims seniority rights in the position and wishes placement on preferred eligibility list and an order reemploying him as Assistant Superintendent. Petitioner is seeking to be awarded back pay from June 19, 1986 to date of judgment.
>
> Issue:
>
> (a) Whether the present Assistant Superintendent position is substantially identical to the one abolished in 1981.

PETITIONER'S EMPLOYMENT HISTORY WITH THE BOARD

The parties stipulate that petitioner was employed by the Board as a distributive education teacher/coordinator from 1967-68 through the 1969-70 school year. Thereafter, the Board appointed him to be a community relations intern, a director of a federally funded program, and as a director of community relations. Between 1974-75 and 1977-78, petitioner was appointed by the Board to be an assistant to the superintendent, a position title not recognized for purposes of tenure. During August 1978 petitioner was employed as assistant superintendent for personnel, affirmative action, community relations and residency. Thereafter, the Board abolished this position as of September 30, 1981. Petitioner holds certification as a teacher of distributive occupations since March 1967; as a supervisor and as a principal since April 1974; as a school administrator since May 1977; as a teacher coordinator of cooperative vocational technical since February 1982; and, as an assistant superintendent for business since April 1982.

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Petitioner was on a leave of absence from the Board's employ for 1981-82. Upon his return to active employment, petitioner was reassigned the position distributive education teacher/coordinator and has been assigned this position since.

The Board created the controverted position of assistant superintendent during June 1986. Petitioner claims his acquired seniority in the former position he held as assistant superintendent gives him a superior claim to the present assistant superintendent position than the person, John Gusz, whom the Board appointed.

BACKGROUND FACTS

The background facts of the matter as established by a preponderance of credible evidence are as follows.

When Dr. Edith V. Francis assumed the superintendency of Ewing Township public schools on July 1, 1977 petitioner was and had been employed as an assistant to the superintendent. Dr. Francis, in an effort to determine duties performed, requested petitioner to list the duties he had been performing as assistant to the superintendent. During December 1977 petitioner submitted a list of 51 specific performance responsibilities comprising four typewritten pages under the title "Assistant to the Superintendent for Personnel/Affirmative Action/Community Relations." (P-1). I infer based on the evidence of record that petitioner created this title based on assignments given him by the former superintendent. There is no evidence to show the Board created and approved this title for petitioner.

It is fair to say that each of the 51 performance responsibilities address the coordination typical personnel office functions of recruitment, screening, interviewing, and selection for recommendation of applicants for employment, each of which function must be inherently addressed by affirmative action policies of the district. Petitioner coordinated these functions; other personnel were more directly involved in the interviewing and selection functions than was petitioner. Little, if anything, is said in the 51 performance responsibilities regarding community relations.

Petitioner testified regarding the duties he performed beyond the 51 written performance responsibilities as follows:

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> [Y]ou can't list each and everything that you do in the job, so there are probably some things that — well, for an example, I served a subpoena, climbed across the Yardville Supply Company to serve a subpoena on an employee that was cited. That's not listed. I also attended all the hearings of the unemployment, and I don't believe that's listed, so there are some things like that that can't be identified. But, basically, this [P-1] is reflective of my job.
>
> (1T:24)

Having received similar lists of duties from other central staff personnel who were in tenure eligible positions, Dr. Francis recommended to the Board a reorganization of the central administrative office in order to eliminate overlapping responsibilities, confusion, and to more clearly state the roles of her top assistants. One of Dr. Francis' major concerns was in the area of personnel. Dr. Francis explained that one applicant or employee would be reporting to as many as seven or eight different individuals regarding employment. In her view, these overlapping responsibilities had to be corrected and the personnel function had to be centralized in order to have one voice on personnel matters. I infer the superintendent selected petitioner to perform this personnel task because of his prior assignments given him by her predecessor.

Petitioner was appointed by the Board on August 18, 1978 to be an assistant superintendent. According to a job description (P-2) petitioner prepared at the time for this position and which shall be addressed later, he was assistant superintendent for personnel, affirmative action, community relations and residency. But, according to an organization chart (R-1) dated October 1978 of the Ewing Township schools the position is entitled assistant superintendent/community relations. There is no evidence, however, to show that either document was formally approved by the Board.

Through his promotion, petitioner became the third assistant superintendent to Dr. Francis. Donald Lawton was the assistant superintendent for curriculum and instruction while John Gusz was the assistant superintendent for non-instruction. According to the organization chart (R-1) petitioner, as assistant superintendent for personnel/community relations, was in charge of a personnel specialist, an attendance officer who had indirect responsibility to the director of special services, a public information officer, and a receptionist. The assistant superintendent for curriculum and instruction, Lawton, was in charge of secondary principals and vice principals, elementary principals, elementary and secondary teachers, consultants, subject coordinators, district coordinator, helping teacher, director of special services, medical staff, nurses, adult

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education, Title I coordinator, and the purchase and property officer. The assistant superintendent for non-instruction, Gusz, was in charge of custodial and maintenance services, warehouse and grounds, custodians, maintenance staff, transportation, bus drivers, office personnel, food service workers, including the dietician and cafeteria workers.

Upon petitioner's promotion Dr. Francis directed him and the two other assistant superintendents to submit a concise job description of their duties and responsibilities. Petitioner resubmitted the listing of performance responsibilities (P-1) as an assistant to the superintendent he prepared in December 1977 because, in his view, his job duties were not substantially changed by his promotion to assistant superintendent. Petitioner claims the only real change by his promotion was that the Board, by acknowledging him as an assistant superintendent, gave him more direct line authority to carry out his responsibilities in personnel. Dr. Francis rejected the listing of performance responsibilities (P-1) as a job description for his title assistant superintendent because it was too lengthy. Accordingly, petitioner prepared another job description (P-2) for his new position of assistant superintendent for personnel/affirmative action/community relations and residency. This job description is one and one-quarter pages in length as compared to the four pages in length of the former listing of performance responsibilities.

Petitioner's job description (P-2) as assistant superintendent states the job goal to be:

> To plan, coordinate, and supervise the operation of the Personnel Office, Community Relations Department and other areas of responsibility in such a way as to comply with the law, enhance the morale of school district personnel, promote the overall efficiency of the school system, and maximize the educational opportunities and benefits available to each individual child.

The stated qualifications for the position are a New Jersey administrator's or principal's certificate, a master's degree or equivalent, experience in personnel, affirmative action, community relations and administration, and such alternatives as the Board may find appropriate and acceptable. Petitioner as assistant superintendent reported directly to the superintendent and he supervised personnel office staff, office assistant for community relations and an attendance officer. As assistant superintendent, petitioner had six major performance responsibilities:

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1. Coordinates all personnel activities for the Superintendent of Schools, which includes the total employment process as outlined in the Affirmative Action Employment Practices Plan.

   Under this responsibility, petitioner was obligated to report periodically to the superintendent regarding problems, needs, conditions as they relate to personnel; he was to monitor district personnel needs as they relate to Affirmative Action and related laws; he was to assist principals and department heads on difficult or sensitive personnel matters; he was to recommend in-service programs as they relate to personnel needs; and, he was to prepare an annual personnel office budget.

2. Coordinates the activities of the Community Relations Department designed to provide an open line of communication between the public and schools.

   As part of this responsibility petitioner was obligated to periodically report to the superintendent regarding the concerns of the district and community as they relate to the schools and he was to provide information about the district on a regular basis through newsletters, press releases and other means of communication.

3. As district Affirmative Action Officer, administers and monitors the Board's policy on affirmative action in the areas of employment practices and school/classroom practices.

   This responsibility obligated petitioner to work closely with the district coordinator who was the responsible person for monitoring classroom practices regarding affirmative action.

4. Investigates and processes, through the Attendance Office, questionable cases of residency as established by law (Title 18A:38-1) and by the Board of Education.

   Here, petitioner was obligated to rely upon the attendance officer for actual field investigations to ensure Ewing Township residency of all

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enrolled pupils and was to maintain all documents regarding residency and guardianship as required by law.

5. Supervises and evaluates all staff under his/her area(s) of responsibility.

6. Attends such conferences, meetings and conventions as necessary to keep abreast of the latest education trends.

(P-2)

In addition to the need to coordinate the personnel function in one office, Dr. Francis also saw the need for a continued active affirmative action program to be part of the personnel function. She perceived a need for community relations to be part of the duties for the assistant superintendent in charge of personnel and she saw a need for an attendance officer to report directly to petitioner. Petitioner, as assistant superintendent, was in charge of a newly hired personnel specialist, Ruth Tantum, who had been the secretary to the superintendent, a public information officer, an attendance officer, and a secretary. Petitioner spent approximately 40 hours a week on personnel duties and 20 hours a week on affirmative action and community relations duties. The communities relations duties included the arrangement of meetings by petitioner or by the public information officer under petitioner's supervision for the superintendent or for petitioner himself. Obviously, petitioner did work more than 60 hours per week as he so testified.

The following coloquy between Board counsel and petitioner is illuminating with regard to the responsibility of the personnel office under petitioner's supervision between 1978 through 1981.

Q. And let me see if I understand the process. The responsibility of the personnel office when a vacancy occurred was to post an advertised notice of the vacancy, correct?

A. True.

Q. And your office carried that out, is that correct, as assistant superintendent?

A. After it was approved by the superintendent first. The first process was they had to have approval but, yes, after that, yes.

Q. And your office would take care of that advertising and posting?

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A. Yes.

Q. And your office would have the employees fill out the application form?

A. Yes.

Q. And those applications would come into the personnel office?

A. Yes.

Q. And if it were a teaching position, what would then happen to the applications once they were in?

A. After I took over?

Q. All these questions relate to when you were assistant superintendent.

A. The first thing was that we did was to establish an interview team.

Q. What would happen to those applications once they came in, once they had come in your office?

A. We would categorize them, keep them together, for an example, if it was an English teaching position, all the applications that came in response to the advertisement we would keep together.

Q. In a folder?

A. In a folder, right.

Q. And where would they be sent?

A. They weren't sent, they were kept in the office.

Q. And who was involved in the interview process?

A. First thing we would do is go through and make sure they were certified and the applications were actually valid applications. The personnel specialist and I used to do that. After that was established and the applications that were valid were kept, if additional information was required one of the other people would send out notices and say you were missing whatever the missing material and then the next step was to establish an interview team. If the job existed at the high school, for an example, then one of the team members would, obviously, be either the principal or vice principal, the department head of the English department, another administrator that I would pick and chose and myself, that constituted the interview team.

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We established a set of questions that we were going to ask every applicant so every applicant was asked exactly the same questions. The only thing we did differently each time is different people would ask different questions -- we would ask the same question but different people would be asking the question. After that was over with we came to a consensous as to who was the best applicant. I took the name of the applicant to the superintendent for her approval after assuring her the affirmative action needs were met and so forth, and if she approved it would be put on the board minutes. I would call back the personnel specialist and they would put it on the board minutes for approval.

Q. For the teachers?

A. Well, basically for all --

Q. For the teachers, did you sit in on all the interviews?

A. I won't say every one, but most of them.

Q. Most of them you did?

A. Yes.

Q. And for the [support] staff, did you sit in on the interview?

A. Well, Mr. Cleaver, who was in charge of custodians, since there was such a high turnover, he elected to do basically is his own hiring, so he did his own interviewing, so I did not sit in on --

Q. Your answer is no, then?

A. Yes, the answer is no.

Q. But on the teachers no' interviews it's your position that your recollection is that you sat in on nearly all of the [interviews]?

A. Yes.

Q. And you would be a member of the team?

A. Yes.

(1T:69-73)

Assistant superintendent Lawton interviewed all teacher applicants and made recommendations to the superintendent through the personnel office. In addition Lawton, according to his job description (R-8), was the liaison and a resource person with the administration, the Board, and the Ewing Teachers Association; he acted as hearing officer for grievances filed by the Association; and, he was first in line to the

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superintendent in her absence. Assistant superintendent Gusz was responsible for the entire support services in the school district including buildings and grounds, food services, transportation, custodians and maintenance. Gusz was responsible to the superintendent for recommendations regarding the hiring or dismissal of employees in buildings and grounds, food services, office personnel and transportation. At that time, Gusz relied upon the recommendations of his head custodian, Mr. Cleaver, for staff employment recommendations and assignments. Gusz, in turn, would forward those recommendations to the superintendent through the personnel office. According to his then existing job description (R-7) Gusz represented the administration in all negotiations between the Board and employee groups representing office personnel, custodians, maintenance personnel, confidential employees, transportation, food service, buildings and grounds, and aides.

Upon the abolition of petitioner's position as assistant superintendent as of September 30, 1981 his duties regarding the coordination of personnel policies for the employment of professional personnel were allocated to assistant superintendent Lawton, his nonprofessional personnel coordinating duties were allocated to assistant superintendent Gusz, recordkeeping duties were allocated to business administrator/Board secretary Dr. Bruce M. Morgan, and his community relations and affirmative action duties were allocated to the superintendent. Petitioner does not challenge here the propriety of the Board's abolition of his position on September 30, 1981 nor does he contend that that abolition was taken in bad faith.

Assistant Superintendent Lawton retired at the close of the 1985-86 school year and the Board had determined not to replace him. Accordingly, the superintendent recommended to the Board on April 10, 1986 a reorganization regarding the central administrative staff which now consisted of herself, assistant superintendent Gusz, business administrator Dr. Morgan, and district curriculum coordinator who assumed some duties of assistant superintendent Lawton. (Compare R-2B and R-8). The superintendent proposed that assistant superintendent Gusz be put in charge of personnel and all attendant obligations regarding personnel records, overtime requests, affirmative action, overseeing the interviewing and hiring procedures of all employees, submission of personnel reports, and being responsible for the Board's personnel policies. In addition, the superintendent proposed that assistant superintendent Gusz be in charge of negotiations, the administration of all contracts, serving as hearing officer, ensuring equity between and among all employee agreements, and she recommended Gusz be in charge of transportation.

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The Board generally accepted the superintendent's recommendation of assistant superintendent Gusz's reorganized responsibilities but made the following changes. The Board determined that Gusz should be in charge of the "Right to Know Law" and that he should continue to be responsible for food services. The transportation duty was removed from Gusz by the Board and given to the Board secretary/business administrator. (R-2B). The Board approved the superintendent's proposed reorganization plan for central administration on or about June 9, 1986.

When Gusz received the appointment to the controverted position of assistant superintendent on or about June 19, 1986 he prepared and filed with the superintendent a job description (P-3) regarding that position. The filed job description which is consistent with the Board's changes to the superintendent's proposal for reorganization is reproduced here in full:

Title: Assistant Superintendent

Qualifications:

1. New Jersey Administrator's Certificate
2. General knowledge of personnel procedures, Affirmative Action, grievance and employee relations.
3. Experience in the administration of a school Food Service Department.
4. Minimum of three (3) years experience in the above stated areas.

Reports to: Superintendent of Schools

Job goal: To coordinate and supervise the total operation of the personnel office, Food Services Department, and promote an atmosphere among all district personnel for the purpose of maintaining a high level of morale.

Performance responsibilities:

1. Plan and direct program for the selection and assignment of the best qualified personnel.
2. Arrange interviews of interested applicants.
3. Make recommendations to the Superintendent for all assignments, hirings, transfers, disimissals and promotions.
4. Certifies salaries to the Business Office.

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5. Maintains adequate records of personnel.

6. Negotiates all contracts with personnel as determined by the Board of Education and the Superintendent.

7. Prepares and distributed recruiting materials concerning all personnel.

8. Attends regular Central Staff meetings.

9. Maintains records such as vacations, preferred eligibility lists, etc., of all personnel.

10. Reviews all staff evaluations and brings to the Superintendent's attention any so specified.

11. Administration of all contracts.

12. Serve as hearing officer for grievances as designated by the Superintendent.

13. Monitor all requests for overtime.

14. Serve as Affirmative Action Office for personnel.

15. Develop all Federal, county, and State reports from the Personnel Office.

16. Review all employee agreements for equity.

17. Be responsible for all Board policies in the 4000 series [the 4000 series is agreed by the parties to represent personnel policies]

18. Administer Right to Know Law.

19. Direct the total Food Services operation of the district.

20. Serve as Acting Superintendent in the absence of the Superintendent.

21. Attend local, State, and National meetings associated with the above responsibilities.

22. Perform other duties as assigned by the superintendent.

Recall that when the Board abolished petitioner's position of assistant superintendent on September 30, 1981 the superintendent was assigned the responsibility of affirmative action. Despite the job description (P-3) for the present assistant superintendency held by Gusz, the superintendent continues to be responsible for affirmative action. The superintendent expects, however, that the Board will reassign affirmative action to Gusz in the near future.

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This concludes a recitation of background facts as established by a preponderance of credible evidence.

PETITIONER'S PROOFS

Petitioner testified in support of his entitlement claim by seniority to the assistant superintendent position created on June 19, 1986 that the latter position is substantially identical to the position of assistant superintendent he held between August 1978 through September 1981. Petitioner urges in this regard that his job description (P-1) as an assistant to the superintendent is the document to be compared to the job description (P-3) of the newly created assistant superintendency because it is that document (P-1) which more specifically articulates his former duties and responsibilities as an assistant superintendent than does the actual job description (P-2) for that position. Petitioner testified regarding the job description (P-3) for the newly created assistant superintendency that the stated job goal "To coordinate and supervise the total operation of the personnel office * * *" is substantially identical to the stated job goal on the four page job description (P-1) he submitted in 1977 upon the superintendent's arrival. That job goal states in full as follows:

> To plan, coordinate and supervise the operation of the personnel services office in such a way as to enhance the moral of school district personnel, promote the overall efficiency of the school system, and maximize the educational opportunities and benefits available to each individual child.

Petitioner testified that the 21 stated performance responsibilities on the job description for the newly created assistant superintendency are near identical to the 51 performance responsibilities he listed on the job description as an assistant to the superintendent upon the superintendent's arrival in 1977.

A comparison of the present assistant superintendent's 21 listed performance responsibilities with the 51 performance responsibilities listed by petitioner as an assistant to the superintendent (P-1) shows that the incumbent assistant superintendent's performance responsibilities 1, 2, 3, 4, 5, 7, 8, 9, 15, and 21, each of which address some function of personnel, are near identical to the stated performance responsibilities of petitioner as an assistant to the superintendent (P-1). The incumbent's performance

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responsibility 6, "Negotiates all contracts with personnel as determined by the Board of Education and the Superintendent", was not a stated responsibility of petitioner, nor was performance responsibility 10 "Reviews all staff evaluation and brings to the superintendent's attention any so specified," nor performance responsibility 11 "Administration of all contracts", nor performance responsibility 12, "Serve as hearing officer for grievances as designated by the superintendent," nor performance responsibility 13, "Monitor all requests for overtime", nor performance responsibility 16, "Review all employee agreements for equity", nor performance responsibility 17, "Be responsible for all Board policies in the 4000 series", nor performance responsibility 18, "Administer Right-to-Know Law", nor performance responsibility 19, "Direct the total Food Services operation of the district."

Nevertheless, petitioner testified consistent with his earlier testimony everything he did as an assistant superintendent could not be listed that he did negotiate for the Board with "singletons", or employees who do not belong to any negotiating unit. Petitioner's testimony in this regard is as follows:

> I used to negotiate with individuals such as the medical staff, our school doctors, our school psychologists, child psychologist who is on a case-by-case basis, our attendance officer, our personnel specialist, our custodian of school monies. These people were individual employees, but after all the negotiations was done (sic) by the board of education, then we negotiated or I negotiated with these people individually after the board told me basically to try to get them to settle for x amount of dollars or x percentage.
>
> (1T:47)

Petitioner also testified with respect to his negotiating responsibility that he was called upon numerous times to work with the professional negotiator to gather research data for the negotiator. The negotiator is Herbert Rogin, who has been the Board's professional negotiator since 1975. Mr. Rogin testified that in the years he has been the Board's professional negotiator he never worked with petitioner in connection with any negotiations and he never requested information or data from petitioner in connection with negotiations. (2T:75). Petitioner testified regarding the incumbent assistant superintendent's responsibility 10 that as an assistant superintendent between 1978 through 1981 and predicated upon the specific performance responsibilities listed in his job description (P-1) as an assisant to the superintendent, he was responsible to process recommendations for termination of employees, assemblying substantiating information

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for dismissal of employees, and arranging necessary conferences and hearings on such employees. Petitioner also relies upon his then stated responsibilities of conferring with principals to determine teacher needs, the maintenance of personnel records, and being involved with principals on sensitive personnel matters to show that the incumbent assistant superintendent's responsibility 10 is exactly the responsibilities he had earlier performed.

Petitioner testified that the incumbent's performance responsibility 11, the administration of contracts, was a responsibility he performed in the past when he was obligated by performance responsibility 6 on his job description (P-1) as an assistant to the superintendent to

> Administers provisions of N.J. Title 18A and the N.J. Administrative Code, various employee contracts as they apply to personnel, practice teacher agreements between the district and participating colleges and universities and leave of absence policies.

Petitioner testified that the incumbent assistant superintendent's performance responsibility 12 is similar to his former obligation (P-1, No. 48) to devise and initiate new procedures and controls regarding job classifications, grievance processing, job descriptions, and similar areas.

Petitioner testified that present performance responsibility 13, monitoring overtime requests, is a duty (P-1, No. 17, 23) he performed because he was obligated to provide necessary research for successful wage and salary administration and to perform routine duties of the personnel office. Present performance responsibility 16, reviewing employment agreements for equity, is similar petitioner says to his former obligation of maintaining a file of all personnel contracts including individually negotiated contracts. Petitioner testified that he too was responsible for all Board policies in the 4000 series because he was obligated to plan, develop and revise personnel management policies for submission to the Board.

Petitioner concedes that the incumbent assistant superintendent's performance responsibilities 18 through 22 are different than his responsibilities when he was an assistant superintendent. The Right-to-Know Law, which it is noted is more properly the Worker And Community Right-To-Know Act codified at N.J.S.A. 34:5A-1 et seq., did not

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exist until 1984; his responsibility with food services was limited to related personnel matters; and, he did not ever have the assigned responsibility of serving as acting superintendent in the absence of the superintendent although he says he may have performed that responsibility in the past.

Petitioner testified that he attended local, State and national meetings regarding personnel and that he performed other duties as assigned by the superintendent.

Ruth Tantum testified that during October 1978 she was appointed as personnel specialist in petitioner's personnel office. Prior to that time, however, she had been the superintendent's secretary and was "in charge" of professional personnel. She prepared personnel reports to the Board, maintained applications and records of professional applicants, and she prepared all county, state and federal reports on personnel. She worked with petitioner on a daily basis while he was an assistant to the superintendent. Ms. Tantum testified that the only difference between petitioner's duties and responsibilities as an assistant superintendent compared to the duties and responsibilities performed as an assistant to the superintendent was that as an assistant superintendent he had the additional responsibility of pupil residency.

Ms. Tantum testified that petitioner was responsible for the entire personnel office function and that he did, in fact, negotiate with "singletons" including her and the attendance officer. Ms. Tantum testified that petitioner interviewed all administrative and teaching staff member applicants while custodial interviews were conducted by the head custodian, Mr. Cleaver. According to Ms. Tantum, petitioner also interviewed personnel in the food service department. When petitioner's assistant superintendency was abolished, she then began reporting to the superintendent, to the business administrator/board secretary, and to assistant superintendent Lawton. Ms. Tantum testified that petitioner's coordination of personnel duties were then divided among the three administrators, together with personnel functions for support staff being given to Gusz.

Since June 1986 Ms. Tantum testified she reports to Mr. Gusz. Her duties remain the same today as they were when she reported to petitioner. Nevertheless, Ms. Tantum did testify that Mr. Gusz has charge of full negotiations and has full responsibility for food services. In her view, Mr. Gusz will be spending 50 percent of his time with negotiations once they begin. It is noted that at the time of hearing no agreements

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between the Board and any of its ten negotiating units had formally began. Nevertheless, it is Ms. Tantum's view that Mr. Gusz presently spends about 85 to 90 percent of his time on personnel including negotiations which is, in her view, the amount of time spent also by petitioner. According to Ms. Tantum, Mr. Gusz spends approximately 15 percent of his time on food services while petitioner spent about 10 percent of his time on the same area.

BOARD'S DEFENSE

John Gusz, the incumbent assistant superintendent, acknowledges that petitioner's primary responsibility as an assistant superintendent between 1978 through 1981 was for the personnel office. Nevertheless, assistant superintendent Lawton had charge of the professional staff while he, Gusz, was responsible for staff in support services. Mr. Gusz explained that Lawton was first in line to be acting superintendent in the superintendent's absence followed by him and then petitioner.

Mr. Gusz explained that the Board does in fact use a professional negotiator for the four professional units and six support staff negotiating units. The negotiator deals with the Board on negotiating positions to be maintained either through him or through assistant superintendent Lawton. Gusz testified that he has in the past attended Board meetings regarding negotiating positions, proposals, and the status of agreements for both professional and support units. He explained that both he and Lawton sat at the negotiating table with the professional negotiator and that he in fact did speak at the table. He explained that he would secure the proposal from the negotiating unit, analyze changes if any, meet with supervisors of the various departments to be affected, and then meet with negotiator Rogin. Mr. Gusz testified that he has drafted contract language with Rogin's guidance. Once a contract is settled, Gusz testified he then administered the contract in the support area by answering questions from supervisors regarding personal leave, grievances, and research grievances.

Mr. Gusz estimates that he presently spends approximately 40 percent of his time on negotiations and related matters, answering questions on the contracts, and grievances. Another 40 percent of his time is spent acting for the superintendent on district problems regarding budgets, long rang planing, redistricting, and racial balance. Mr. Gusz estimates that he spends no more than 10 percent of his time on typical personnel functions.

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Mr. Gusz is of the view that petitioner did not ever negotiate with singletons or with anyone else. Singletons, according to Gusz, did not have contracts between 1978 through 1981; consequently, he says petitioner could not have negotiated with them in the sense of representing the Board in a give and take atmosphere. Presently, singletons now are engaged by written contracts which require negotiations carried out by him on behalf of the Board. Nevertheless, Mr. Gusz also admitted he is not certain if petitioner negotiated a contract with attendance officers.

Regarding the present job description (P-3) for the controverted assistant superintendency, Mr. Gusz testified that performance responsibility 1 regarding the planning and directing a program for the selection and assignment of personnel was done by petitioner. Nevertheless, Gusz testified that the actual hiring was done either by him or assistant superintendent Lawton to the superintendent by way of the personnel office. Mr. Gusz says that performance responsibility 2, arranging interviews of applicants, was done by petitioner. Performance responsibility 3, employment recommendations, has historically be done only by him, Mr. Gusz, and by assistant superintendent Lawton but by way of the personnel office. Performance responsibility 4 and 5, salary certification and recordkeeping, are duties which had been performed by petitioner. Regarding performance responsibility 6, the negotiation of contracts, this area according to Gusz was only done by him regarding support staff and by assistant superintendent Lawton with the professional staff. Performance responsibility 7 of recruiting materials was a responsibility performed by petitioner while all three assistant superintendents attended regular central staff meetings. Performance responsibility 9, records, was maintained by petitioner and in regard to performance responsibility 10, Gusz says he reviews support staff evaluations. Mr. Gusz testified that historically he has administered all contracts regarding support staff while acknowledging that the personnel office did have copies of contracts. Mr. Gusz explained that performance responsibility 12, serving as hearing officer for grievances, was carried out by him in suport staff and by Lawton in professional staff. Mr. Gusz testified regarding performance responsibility 13 that he historically monitored overtime for support staff and approved overtime requests. Records of overtime, however, were maintained in the personnel office. Mr. Gusz admits that petitioner was the affirmative officer for personnel and that Ms. Tantum prepared all county, state and federal personnel reports as she does now.

Mr. Gusz testified that prior to his present assistant superintendency, no one reviewed employee agreements for equity although he and assistant superintendent

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Lawton attempted to have equity between professional agreements and support staff agreements. The personnel 4000 series is new as is the responsibility for the Right-to-Know Law. Regarding performance responsibility 19, Mr. Gusz testified that that responsibility was his and his alone and that petitioner had no involvement in the food service operation.

During the preparation of the job description for the controverted assistant superintendency, Mr. Gusz admits copying parts of petitioner's original detailed job description (P-1).

Herbert Rogin testified that during the years he has been the Board's professional negotiator, he worked solely with the superintendent and with assistant superintendents Gusz and Lawton. Rogin confirms that Gusz and Lawton assisted in the drafting of contract language, prepared research for his use, reported the status on lesser issues of negotiations to the Board, and that he worked only with Gusz and Lawton at hearings convened by the Public Employment Relations Commission and at grievance hearings.

Superintendent Dr. Edith Francis testified that petitioner's primary duties as an assistant superitnendent between 1978 through 1981 were the personnel duty and the affirmative action officer duty. While she admits that petitioner's personnel duty is substantially similar to the present personnel duty of Mr. Gusz, Dr. Francis explained that petitioner's assistant superintendent position is not identical to the present position. Petitioner had to organize the personnel office while Mr. Gusz obviously does not have to do so. Consequently, Mr. Gusz has time available to perform other duties in the area of negotiations, food services and the administration of all contracts. In the superintendent's view, it is important for one person to work with the Board in negotiations for purposes of continuity. Furthermore, Dr. Francis believes that negotiations belong in personnel and because Mr. Gusz has some experience in negotiations he is better able to perform the negotiating function which includes assisting the professional negotiator with research, attendance at Board meetings, negotiating sessions, contract development and subsequent administration, interpretation and application.

This concludes a recitation of the respective proofs of the parties.

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LAW AND DISCUSSION

It is basic Education Law that seniority follows the acquisition of tenure. The legislative status of tenure is acquired by one who meets the precise conditions articulated at N.J.S.A. 18A:28-5 or, upon transfer or promotion, by meeting the precise conditions at N.J.S.A. 18A:28-6. This latter statute provides in part as follows:

> Any such teaching staff member under tenure * * * who is * * * 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 * * * 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 * * *

The acquisition of a tenure status does not bar boards of education from abolishing positions of employment for reasons of economy, reduction in the number of pupils, a change in the administrative or supervisory organization of its district, or for other good cause. N.J.S.A. 18A:28-9. Nevertheless, a person who has acquired a tenure status whose position of employment is abolished shall remain upon a preferred eligible list for reemployment whenever a vacancy occurs in a position for which such person shall be qualified.

N.J.A.C. 6:3-1.10 sets forth the standards for determining seniority and are applicable in this case. Paragraph (b) of the cited rule provides in part that "Seniority * * * shall be determined according to the number of academic or calendar years of employment * * * in the school district in specific categories as hereinafter provided * * * ". Paragraph (1) provides in part that "The following shall be deemed to be specific categories * * * 4. Assistant superintendent (each [assistant] superintendency shall be a separate category) * * *".

In this case, petitioner asserts the newly created position of assistant superintendent is substantially identical to the position assistant superintendent he held between 1978 through 1981. In order to determine whether the positions are substantially identical which is the standard articulated in Jablonski v. Emerson Bd. of Ed., OAL DKT. EDU 6812-82 (Mar. 2, 1983) and as affirmed by the agency and by the Appellate

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Division, petitioner must demonstrate that the duties to be performed by the incumbent assistant superintendent are substantially identical to the duties he performed "not so much by a comparison of the number of duties" which are similar between the two positions but by the "nature and scope" of newly established responsibilities. Sandri v. Bergen County Vo-Tech., 1986 S.L.D. - (Jun. 11, 1986). In a prior action, the Commissioner stated that "[m]ere overlays of duties between the two positions does not make them identical." Santarsiero v. Parsippany-Troy Hills Bd. of Ed., 1984 S.L.D. - (May 14, 1984), aff'd St. Bd. of Ed. (Oct. 3, 1984).

Consequently, the significant issue to be addressed here is whether the nature and scope of duties to be performed by the incumbent assistant superintendent are substantially identical to the duties performed by petitioner as an assistant superintendent between 1978-1981.

FINDINGS AND CONCLUSIONS

Initially, there is no dispute that petitioner did in fact acquire the legislative status of tenure as an assistant superintendent by way of his service to the Board as an assistant superintendent between 1978 through 1981. Having acquired the legislative status of tenure, petitioner consequently acquired seniority in that separate category of assistant superintendent for personnel, affirmative action, community relations and residency. If the incumbent assistant superintendent's duties are substantially identical to the duties petitioner performed, petitioner must prevail.

However, the evidence in this record establishes that there is indeed an overlay of duties performed between the two positions particularly in the area of personnel procedure coordination. Petitioner's efforts between 1978-1981 to bring together under the personnel office personnel policies which were then implemented by various district officials is established as fact in this record. Mr. Gusz, the incumbent assistant superintendent, presently carries on those very same coordinating functions but with the added responsibility of coordinating the general personnel functions of recruitment, screening, interviewing, and selection for recommendation of applicants in support staff, professional staff, and all other employees to be engaged by the Board. Mr. Gusz, the evidence shows, has absorbed the personnel function held by assistant superintendent Lawton in addition to the personnel function earlier held by petitioner.

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More significantly, however, I am not persuaded by petitioner's testimony, nor the testimony of Ms. Tantum, that petitioner ever engaged in formal negotiations with any employee of the Board, "singletons", or otherwise. That petitioner may have "negotiated" Ms. Tantum's unwritten contract, or written contract, based on what the Board told petitioner to in turn tell Ms. Tantum does not in my mind constitute "negotiations". Rather, the evidence of record shows Mr. Gusz was more actively involved in the process of negotiations throughout his tenure as an assistant superintendent particularly with support staff and through his assistance provided Mr. Rogin. Mr. Gusz participated in negotiation sessions by providing assistance to Mr. Rogin; he provided research material to Mr. Rogin; he in fact administered contracts agreed to by the Board with various negotiating units in the support staff area by answering questions regarding the contract, interpreting the contract, and applying its provisions; he was charged with the responsibility of acting as a hearing officer, although there is no evidence in the record to show that that function was ever implemented. Nevertheless, Mr. Gusz did have that performance responsibility. Petitioner did not have that performance responsibility under either job description he relies upon (P-1 or P-2).

Petitioner was at best tangentially involved in the food service operation of the district and his involvement was tangential at best in the entire support staff area. Mr. Gusz was intimately involved in the support staff area for, in fact, his title was assistant superintendent - nonacademic areas. Clearly, Mr. Gusz's role as an assistant superintendent - nonacademic areas assigned to him the responsibility for the smooth operation of support staff. Petitioner did not, in fact, have such a responsibility. Petitioner's role as an assistant superintendent between 1978-1981 was limited solely to the area of personnel policy coordination, community relations, and residency.

The present controverted position of assistant superintendent emphasises in large measure the responsibility of the incumbent working heavily in negotiations as negotiations involve personnel. Mr. Rogin's testimony is clear and convincing that at no time in his experience as the Board's professional negotiator since 1975 did he ever work with petitioner on negotiations nor did he ever request assistance from petitioner regarding negotiations. Mr. Rogin's testimony is equally as clear that he relied heavily upon Mr. Gusz's developing expertise in the area of negotiations by way of research material, contract language development, and Mr. Gusz's ability to report to the Board of Education the status of negotiations on lesser negotiating issues. It is this negotiating function which I find to be the bright line which separates the present position of assistant superintendent from the position held by petitioner.

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Clearly there are other differences between the present controverted position and petitioner's former position. Petitioner was not obligated to review all statff evaluations. Mr. Gusz in his present position is so obligated. Petitioner was not obligated to administer all contracts, nor to serve as a hearing officer for grievances, nor to monitor requests for overtime, nor to review employee agreements for equity, nor to direct the total food service operation of the district, nor to be responsible for all Board policies in the 4000 series. These differences between Mr. Gusz's present position as assistant superintendent compared with petitioner's responsibilities as assistant superintendent, when added to the significant responsibility of negotiations and all that that term implies, are more than sufficient to find as fact that the two positions are not substantially identical to one another.

CONCLUSION

Applying the principles of law articulated above, together with the facts established by a preponderance of credible evidence, I must **CONCLUDE** that petitioner William L. Cade, Jr., failed to establish that the controverted position of assistant superintendent created by the Board on June 9, 1986 is substantially identical to the position of assistant superintendent he held between 1978-1981. Consequently, I **CONCLUDE** that the position assistant superintendent created by the Board on June 9, 1986 is not a recreation of the position of assistant superintendent held by petitioner between 1978 through 1981. Finally, I must **CONCLUDE** petitioner has failed to carry his burden of proof to establish the validity of his seniority claim for appointment to the position of assistant superintendent created by the Board June 9, 1986.

The petition of appeal must be and is hereby **DISMISSED.**

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

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

June 4, 1987
DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

June 4, 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 9 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. EDU 6761-86

WILLIAM L. CADE, JR.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	
RESPONDENT.	:	

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

Upon review of the record in this matter, the Commissioner concurs with the findings and conclusions reached by the ALJ and adopts the recommended decision as the final decision in the case. The record is fully supportive of the ALJ's conclusion that petitioner has failed to meet the Jablonski standard supra, namely, that the disputed assistant superintendent position created by the Board on June 9, 1986 is substantially identical to the assistant superintendent position he held between 1978-81.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

July 14, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7429-86
AGENCY DKT. NO. 333-9/86

MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION, DIANE SWAIM, FRANK D'ALESSANDRO, JUDITH STANSKY, JEANETTE SWAIM, EDWARD SIRCHIO, PATRICIA GIORDANO, JOSEPH MAIDA,
Petitioners,
v.
MIDDLETOWN TOWNSHIP BOARD OF EDUCATION, MONMOUTH COUNTY,
Respondent.

Mark J. Blunda, Esq., for the petitioners (Oxfeld, Cohen & Blunda, attorneys)

Peter P. Kalac, for the respondent (Kalac & Newman, attorneys)

Record Closed: April 29, 1987 Decided: May 13, 1987

BEFORE BEATRICE S. TYLUTKI, ALJ:

PROCEDURAL HISTORY

This matter concerns the procedure established by the Middletown Township Board of Education (Board) for handling the absences of several teaching staff members on certain legal holidays which were considered to be working days on the school calendar for the 1985-86 school year. The matter was transmitted to the Office of Administrative Law for a determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

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During the prehearing conference held by way of a telephone conference call on January 5, 1987, the parties agreed that the issues in this matter are:

(a) Whether the Board violated the law by requiring that teaching staff members who were absent on certain legal holidays elect in the alternative to: (1) have their salaries docked for said holidays; (2) have the absences counted as personal days, or (3) work additional days after the close of the school year to make up for said legal holidays.

(b) Whether the Board's action in this matter is consistent with the decision of the Commissioner of Education (Commissioner) in Dohm v. West Milford Board of Education, OAL DKT. EDU 5286-82 (Nov. 19, 1982), adopted by Comm. (Jan. 6, 1983).

Also, at the prehearing conference, the parties agreed that there were no factual disputes and that a hearing was not necessary. The signed joint stipulation of facts and documents (J-1 to J-10, B-2 to B-14) was received by my office on February 13, 1987.

In addition, at the prehearing conference, the parties indicated that a similar case had been filed with the Public Employees' Relations Commission (PERC) and that the PERC matter had been submitted to arbitration. At that time the arbitrator had already ruled that the Commissioner has exclusive jurisdiction to decide whether the Board's action was in violation of the statutes and that PERC has the exclusive jurisdiction to decide whether the Board's action violated the collective bargaining agreement (P-1), and the arbitrator had completed an evidentiary hearing in the PERC matter.

During the time allowed for the submission of briefs, Mark J. Blunda, Esq., on behalf of the petitioners, submitted a motion to supplement the record to include the opinion and the award rendered in the PERC matter by the arbitrator, Scott E. Buchheit, dated March 31, 1987. Peter P. Kalac, Esq., on behalf of the respondent, opposed the motion and argued that the arbitrator's award was not a material fact in this matter. After hearing the oral arguments of the parties during a telephone conference call on April 21, 1987, I granted Mr. Blunda's request and I received copies of the arbitrator's opinions (P-1) on April 22, 1987. At the request of Mr. Kalac, I allowed the respondent to

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submit a supplemental brief which I received on April 29, 1987. The record in this matter closed on April 29, 1987.

FACTUAL FINDINGS

The parties have stipulated that:

1. Petitioner, Middletown Township Education Association, is an employee representative organization recognized as the exclusive representative concerning negotiations and grievance of terms and conditions of employment for a bargaining unit which includes teaching staff members employed by the respondent, Middletown Township Board of Education.

2. Petitioner Diane Swaim is a teaching staff member employed by the respondent Middletown Township Board of Education, and is a member of the petitioner Association.

3. Petitioner Frank D'Alessandro is a teaching staff member employed by the respondent Board of Education, and is a member of the petitioner Association.

4. Petitioner Judith Stansky is a teaching staff member employed by the respondent Board of Education, and is a member of the petitioner Association.

5. Petitioner Jeanette Swaim is a teaching staff member employed by the respondent Board of Education, and is a member of the petitioner Association.

6. Petitioner Edward Sirchio is a teaching staff member employed by the respondent Board of Education, and is a member of the petitioner Association.

7. Petitioner Patricia Giordano is a teaching staff member employed by the respondent Board of Education, and is a member of the petitioner Association.

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8. Petitioner Joseph Maida is a teaching staff member employed by the respondent Board of Education, and is a member of the petitioner Association.

9. Respondent Middletown Township Board of Education is a corporate body charged with the statutory duty of conducting and supervising the Middletown Township School District consistent with the laws of the State of New Jersey and the rules of the State Board of Education.

10. Respondent Board of Education set a school calendar for the 1985-86 school year which included, as working days for teaching staff members, Columbus Day, Election Day and Lincoln's Birthday (Exhibits J-1 and J-2).

11. Columbus, Day, Election Day and Lincoln's Birthday were and are recognized public holidays in the State of New Jersey.

12. N.J.S.A. 18A:25-3 provides that:

> No teaching staff member shall be required to perform his duties on any day declared by law to be a public holiday and no deductions shall be made from such member's salary by reason of the fact that such a public holiday happens to be a school day and any term of any contract made with any such member which is in violation of this section shall be void.

13. Each of the named petitioners exercised her or his legal right not to be required to work on one or more of the above-mentioned legal holidays.

14. Petitioners who exercised their right not to be required to work on legal holidays received a letter from the Superintendent of Schools advising in pertinent part that their absence would have to be made up "by working at the end of the school year or losing pay for the days they are lacking toward their contractual commitment" (J-3).

15. On May 20, 1986, the respondent Board of Education transmitted another letter to each petitioner who had been absent from school on a public

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holiday during 1985-86. Petitioners who were absent one public holiday were directed to report for duty on June 25, 1986 (J-4). Petitioners who were absent on three public holidays were directed to report for duty on June 25, 26 and 27, 1986 (J-5). The letter further advised each petitioner that if he or she chose not to report for duty, the Board of Education would reduce the employee's salary by the appropriate number of days (J-4 and J-5).

16. The officially adopted 1985-86 school calendar provided that the school year for students concluded on June 20, 1986 and the school year for teachers concluded on June 24, 1986 (J-2).

17. Certain petitioners protested the Board's May 20, 1986 letter, but requested that the absence on public holidays be deducted from personal days (J-6). The respondent approved the deduction of personal days for those petitioners (J-7).

18. Certain petitioners protested the Board's May 20, 1986 letter and challenged the Board's right to require them either to work after June 24, 1986, or dock their pay (J-8). The Board docked the pay of those petitioners (J-9).

19. The Board-adopted school calendar for 1985-86 contained a maximum of 183 student days.

20. State statute requires that each local board of education calendar contain a minimum of 180 student days per academic year.

21. The Board-adopted school calendar for 1985-86 contained a maximum of 187 teacher days.

22. Prior to the Board's adoption of the 1985-86 calendar, a school calendar committee was established. The committee was comprised of a representative from each staff organization: i.e., administrators, teachers, support staff, one representative from a parent organization and one representative from each school's Student Council. The committee was

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chaired by William F. Hybbeneth, Jr., director of labor relations for the Middletown Township School District, who acted as a non-voting member. The exchange of information on the development of the calendar by the calendar committee members is attached hereto as Exhibits B-2 through B-14. The teacher representative on the calendar committee was Ray McLoughlin.

23. Due to inclement weather, no teaching staff member in the Middletown School District worked as many as 187 days during 1985-86.

24. The respondent Board of Education neither docked nor required extra days of work from other teaching staff members who worked fewer than 187 days during the 1985-86 school year.

25. Many teaching staff members, including petitioners, were absent additional days during the 1985-86 school year due to personal days, sick days, court days, etc.

26. The petitioners' absences on the aforementioned holidays did not cause the respondent Board to provide fewer than 180 student days during the 1985-86 school year.

27. The Middletown Township Education Association and respondent Board of Education are parties to a collective bargaining agreement effective from July 1, 1984 to June 30, 1987 (J-10). The contract provides at Article XVIII(A), "Teacher Work Year," that:

> 18.3 a. The in-school work year for professional employees employed on a ten-month basis (other than new personnel who may be required to attend an additional day for orientation) shall not exceed one hundred eighty-seven (187) days.
>
> 18.4 a. Days lost due to emergency conditions which reduce the number of school days below one hundred eighty (180) days shall be added to the school calendar to the extent of meeting a minimum of one hundred eighty (180) days.

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28. The respondent Board has set and implemented a 1986-87 school calendar which includes workdays for teaching staff members on recognized public holidays.

29. Teaching staff members have exercised their legal right not to be required to work on public holidays.

30. Respondent Board has notified the teaching staff members that they will either be docked or required to work additional days as a result of their absences on public holidays.

31. Petitioners have protested and challenged the Board's action.

32. No teaching staff member in Middletown will work 187 days during the 1986-87 school year.

33. Each teaching staff member who has exercised the legal right not to be required to work on a public holiday has been required to work additional days beyond what was initially scheduled as the teacher work year in the adopted school calendar, has been docked, or has lost personal days.

The exhibits that are attached to the stipulation of facts show that the committee which made recommendations to the Board regarding the school calendar for the 1985-86 school year considered closing the school on all legal holidays which would delay the closing date of the school year (B-8, B-9, B-10, B-11, B-12, B-12a). The committee recognized that if the schools were not closed on all legal holidays, some teachers would choose to take off in order to observe the holidays, and the committee was aware of the decision in the Dohm matter (B-10, B-11, B-12a). In addition, the committee was on notice that if teachers elected to be absent on certain legal or religious holidays which were not school holidays, personal days could be used for this purpose (B-10).

In addition, on March 31, 1987, the arbitrator, Scott E. Buchheit, decided that the Board violated the collective bargaining agreement and that the agreement prohibits the Board from compelling teaching staff members to work beyond the end of the school year, June 24, 1986 (P-1). The arbitrator ordered that the Board pay the petitioners, in accordance with the appropriate salary schedule, for each day they worked in the 1985-86

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school year beyond June 24, 1986, and reimbursed those petitioners who were docked for any period of time or used a personal day in order to avoid working beyond June 24, 1986 (P-1).

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

CONCLUSIONS OF LAW

Mr. Blunda argued that the Board's requirement that teaching staff members make up for their absences on legal holidays which are not school holidays is a violation of N.J.S.A. 18A:25-3. In addition, Mr. Blunda argued that since one of the alternatives given to the teacher who observed the public holidays in question was to dock his/her salary for that date, such a result would be in violation of the teaching staff member's tenure rights pursuant to N.J.S.A. 18A:6-10, which provides that a tenured teacher's salary shall not be reduced unless tenure charges are filed and proven.

Mr. Kalac argued that in a similar case, the Commissioner has held that a Board can require a teacher to make up for taking off on a public holiday which is not also a school holiday, Dohm.

In that case, Mr. Dohm wanted to but did not take off on Lincoln's birthday, February 12, 1982, a state holiday which was not a school holiday, and he filed a petition for a declaratory judgment as to whether N.J.S.A. 18A:25-3 applied to his request to be absent on February 12, 1982. Mr. Dohm wanted to receive one day's pay or a compensatory day off since he had worked on Lincoln's Birthday. In addition, Mr. Dohm requested that the Commissioner order the local board to refrain from preventing him from being absent from school on future state holidays without a penalty. In her initial decision, Administrative Law Judge Sybil R. Moses concluded that the "Enforcement of the contract provision requiring a specific number of reporting days for teaching staff members in a school district, by requiring teachers, who exercise their conceded right to be absent on a public holiday when school is scheduled to be in session on that holiday to meet the specific number of reporting days by working at the end of the school year or losing pay for the days they are lacking toward the contractual committment, does not violate the spirit or letter of N.J.S.A. 18A:25-3." (Id. at p. 10.) However, she also concluded that the Board cannot require a teaching staff member to work on a public

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holiday or automatically dock a teacher for not working on said holiday. The Commissioner issued a final decision which adopted the initial decision of Judge Moses on January 6, 1983.

Mr. Kalac argued that the decision in the Dohm case is dispositive of the issues in this matter.

In his brief, Mr. Blunda disagreed and argued that there are important factual differences between this matter and the Dohm case as to the language contained in the respective collective bargaining agreements. In the Dohm case, Mr. Blunda stated that the agreement mandated 185 reporting days and that all teachers were required to make up for absences if they were short of their contractual obligation of 185 days. In this matter, Mr. Blunda stated that the collective bargaining agreement does not contain a maximum requirement of 187 days and that no teacher was required to work 187 days during the 1985-86 school year. The agreement in this matter also provides that additional days could be added to the school year if because of emergency conditions, the number of school days fell below 180 days, and that the Board had by resolution and pursuant to the agreement, established the school calendar for the 1985-86 school year which provided that the last school day for teachers would be June 24, 1986 (J-2).

Although I agree with Mr. Blunda's argument that there are substantive differences regarding the provisions of the collective bargaining agreement that existed in the Dohm case as compared to the matter before me, I **CONCLUDE** that the Dohm decision is controlling in this matter in that it recognizes that all teachers should be treated alike and that teachers who elect to take an extra day off for a legal holiday on which the schools are not closed are not to be penalized by an automatic docking of their salaries but are to be given a reasonable opportunity to make up for that day off by either using a personal day or by working after the close of the school year. Even though the agreement in this matter does not establish a minimum amount of working days for teachers, the school calendar does set forth the number of days that teachers are expected to teach during the school year, excluding personal and sick days as well as the days on which the schools are closed for snow and other emergencies.

Therefore, I **CONCLUDE** that even though N.J.S.A. 18A:25-3 provides that a teacher's salary should not be automatically docked if the teacher elects not to work on a legal holiday which is not also a school holiday, it does not prohibit a board from requiring

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that the teacher use a personal day for such an absence or work a substitute day at the end of the school year. Therefore, I **CONCLUDE** that the procedure established by the Board for handling absences on legal holidays on which the schools are not closed is not in violation of the statute, N.J.S.A. 18A:25-3.

Also, I **CONCLUDE** that there cannot be a final resolution of this matter without looking at both the provisions of N.J.S.A. 18A:25-3 as well as the collective bargaining agreement as was done in the Dohm matter, and I agree with Mr. Kalac's argument that the issues should not have been bifurcated.

Based on both the provisions of the collective bargaining agreement and the provisions of N.J.S.A. 18A:25-3, the Board could have required teachers electing to take off on legal holidays that were not school holidays to use a personal day or to be docked for the day. The Board accommodated the teachers by giving them the option, if they wanted to avoid having their salary docked, of either using a personal day or working a day after the school year to make up for the holiday they had taken off. Although such an option is not clearly consistent with the resolution establishing a closing date for the school year, I **CONCLUDE** that it does not violate the collective bargaining agreement when read in context with the provisions of N.J.S.A. 18A:25-3.

As to Mr. Blunda's position that the Board's action was in violation of N.J.S.A. 18A:6-10, I **CONCLUDE** that his argument is not persuasive. Although the statute clearly provides that certain procedures must be followed prior to the removal or the reduction of salary of a tenure employee for disciplinary purposes, the statute is not applicable to a situation where a teacher's salary is docked for taking a day off for personal reasons beyond the designated number of sick and personal days.

Therefore, I **ORDER** that petitions in this matter be **DISMISSED**, and that the procedure established by the Board for handling the matter be **AFFIRMED**.

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

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

May 13, 1987
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

MAY 14 1987
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 15 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

ml/EE

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MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
MIDDLETOWN TOWNSHIP BOARD OF EDUCATION, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioners filed exceptions and the Board filed reply exceptions thereto within the time prescribed by N.J.A.C. 1:1-16.4a, b and c. Because the Board in its exceptions requested and was granted permission by the Commissioner to supplement the record herein with the transcript and Order to Show Cause in a related matter heard before the Honorable Patrick J. McGann of the Superior Court of New Jersey, Chancery Division, the Commissioner of Education requested and was granted an Order of Extension until July 14, 1987 for filing his decision in this matter. Said transcript and Order to Show Cause are incorporated herein by reference.

Petitioner posits six exceptions to the initial decision, which are summarized in pertinent part below.

EXCEPTION ONE

THE ALJ USURPED THE AUTHORITY OF THE SUPERIOR COURT BY VACATING THE BINDING AWARD OF THE PERC APPOINTED ARBITRATOR.

Petitioners suggest that the ALJ had no authority to render a decision that the Board of Education did not violate its Collective Bargaining Agreement when it either docked, reduced personal days or compelled additional workdays from petitioners who exercised their legal right to be absent on legal holidays. Petitioners aver such authority is vested solely in the Superior Court, and they rely on N.J.S.A. 2A:24-8 and Hudik-Ross, Inc. v. 1530 Palisades Ave., Corp., 131 N.J. Super. 159 (App. Div. 1974) Local Union 560, IBT v. Eazor Express Inc., 95 N.J. Super. 219 (App. Div. 1967), and Held v. Comfort Bus Line Inc., 136 N.J.L. 640 (Sup. Ct. 1948) in support of their proposition that strong public policy favors the award of arbitrators, and that "such an Award is subject to impeachment only in a clear case for reasons enumerated in the statute." (Petitioners' Exceptions, at p. 2)

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EXCEPTION TWO

THE ALJ USURPED THE AUTHORITY OF THE ARBITRATOR APPOINTED BY PERC AND THE PARTIES TO THE COLLECTIVE BARGAINING AGREEMENT.

Petitioners aver that N.J.S.A. 34:13A-5.3 and the Supreme Court of New Jersey in Township of West Windsor v. PERC, 78 N.J. 98 (1978) support the resolution of disputes through the contractual grievance mechanism. The petitioners contend that the ALJ herein had no authority to 'undermine and usurp the action of Arbitrator Scott Buchheit's Order in his finding that the Board of Education's conduct did not violate the Collective Bargaining Agreement.

EXCEPTION THREE

THE ALJ HAD NO AUTHORITY TO RULE THAT THE ISSUE SHOULD NOT HAVE BEEN BIFURCATED BETWEEN THE COMMISSIONER OF EDUCATION AND THE CONTRACT ARBITRATOR.

Petitioners contend the ALJ had no authority to find that the issues of contract violation and violation of N.J.S.A. 18A:25-3 should not have been bifurcated between the Commissioner of Education and the Arbitrator, citing Ridgefield Park Ed. Assn. v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978) and State v. State Supervisory Employees Assn., 78 N.J. 54 (1978) for the proposition that PERC has exclusive jurisdiction to determine whether arbitration or negotiation of a particular subject matter is preempted by law. Petitioners argue that the Board herein

> moved neither before the Public Employment Relations Commission nor the Superior Court of New Jersey to restrain or limit the arbitration of the grievance. Consequently, the Arbitrator was empowered by contract and law to determine the dispute presented to him within the confines of his contractual authority. Ohio Cas. Ins. Co. v. Benson, 87 N.J. 191 (1981); Communication Workers of America, Local 1087 v. Monmouth County Board of Social Services, 96 N.J. 442 (1984).
> (Petitioners' Exceptions, at p. 6)

Petitioners claim the ALJ has no legal authority to determine issues of negotiability, arbitrability or bifurcation, and that her conclusion in this area is without legal authority.

EXCEPTION FOUR

THE ALJ ERRED IN RULING THAT ALTHOUGH THE BOARD CANNOT AUTOMATICALLY DOCK TEACHERS, IT MAY FORCE THEM TO CHOOSE BETWEEN DOCKING, DEDUCTION OF PERSONAL DAYS OR ADDITIONAL WORKDAYS FOR THEIR ABSENCE ON LEGAL HOLIDAYS.

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Petitioners aver that the ALJ's conclusion above is mere sophistry. Citing N.J.S.A. 18A:25-3, petitioners maintain that

> Reduction of a paid personal day, vacation day or sick day is just as much a 'deduction in salary' as is a direct docking of a paycheck. By the same token, forcing an employee to work additional days without any pay is tantamount to a deduction of that employee's salary. The employee is being forced to work longer for less money. (Id., at p. 9)

Petitioners add that it is equally meritless to conclude that compelling an employee to choose one of these three evils does not equate to automatic deduction of salary, which it is agreed is proscribed by the statute.

EXCEPTION FIVE

> THE ALJ MISREADS AND MISAPPLIES THE RULING IN DOHM.

Petitioners distinguish Dohm from the instant matter, suggesting that the instant contract does not mandate a specific number of workdays or reporting days, other than the 180-day minimum, and that it was stipulated that none of petitioners worked fewer than 180 days. Moreover, petitioners argue that the Middletown contract states

> that the in-school work year for professional employees shall not exceed 187 days. Moreover, *** that no teacher in the district worked that many days during the 1985-86 academic year. Furthermore, teaching staff members who were absent for reasons other than legal holidays were not docked, forced to utilize personal days or to work beyond the contractual work year. Only those teaching staff members who observed legal holidays were compelled to suffer this penalty. (Id., at pp. 11-12)

Petitioners argue that the ALJ misread and misapplied the Dohm decision to the facts of this case.

EXCEPTION SIX

> THE ALJ ERRED IN RULING THAT THE BOARD'S ACTIONS DID NOT VIOLATE N.J.S.A. 18A:6-10.

Finally, petitioners reiterate their argument made at hearing that it is stipulated that no written charges or complaints were lodged against any of the petitioners, nor were hearings held pursuant to the Tenure Employees Hearing Act prior to the reduction of their pay by the Board of Education for observance of legal

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holidays. Petitioners submit thereby that the ALJ's conclusion that the Board did not violate N.J.S.A. 18A:6-10 by its actions is in error. Petitioners submit that the Commissioner must reject the ALJ's conclusions.

The Board's reply exceptions are two. They are summarized, in pertinent part below.

> PETITIONERS' EXCEPTIONS ONE, TWO AND THREE ADDRESS THE ADMINISTRATIVE LAW JUDGE'S PURPORTED LACK OF AUTHORITY OR ALLEGED USURPATION OF AUTHORITY AND WILL BE ADDRESSED COLLECTIVELY.

The Board notes that "it was the petitioners who elected to resolve the issue in questions in two forums--the contract interpretation forum--arbitration; and the statutory interpretation forum--the Commissioner of Education's office." (Reply Exceptions, at p. 1) The Board maintains its argument that the issue should not be bifurcated, but rather heard solely by the Commissioner of Education. It posits that petitioners proffer no explanation for why they argue the ALJ usurped the authority of the Superior Court. It further submits that the arbitration opinion was appealed before the Honorable Patrick J. McGann of the Superior Court on an Order to Show Cause filed by the Board. The Board asks that the parties be permitted to supplement the record with the Judge's decision on the issue of whether the judge "has the statutory jurisdiction to set the arbitration aside or whether Judge Tylutki has played the usurper's role and deprived him of same." (Id., at p. 2) The hearing date in this regard was scheduled for June 11, 1987, and the Commissioner permitted the parties to so supplement the record with Judge McGann's decision on this issue. The parties were so apprised by letter dated June 8, 1987.

The Board further argues that petitioners' contention that the ALJ usurped the Arbitrator's authority and exceeded her own authority in addressing the bifurcation issue "are no more firmly premised than the argument on the usurption of the Superior Court's authority." (Id., at p. 3) The Board contends in reply exceptions:

> In effect, the petitioners are arguing that the Administrative Law Judge should review the collective bargaining agreement language and render a decision which coincides with the arbitrator's. Such a decision would be within the Administrative Law Judge's scope of review. However, should the decision of the Administrative Law Judge differ from that of the arbitrator, the result is a usurption of the arbitrator's authority and exceeds the Administrative Law Judge's scope of review. Arguments like these will always be a source of wonder. (Id., at p. 4)

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PETITIONER'S EXCEPTIONS FOUR, FIVE AND SIX ADDRESS THE ADMINISTRATIVE LAW JUDGE'S PURPORTED ERRORS WHEN RULING ON THE SUBSTANTIVE ISSUE AND WILL BE ADDRESSED COLLECTIVELY.

The Board avows that "[n]o teacher was forced 'to work additional days without any pay.'" (Id., at p. 5, quoting Petitioners' Exceptions, at p. 9) Rather, it claims that "all the Board ever wanted here was that all teachers work the number of days established by the calendar and agreed upon by their Association during collective bargaining." (Id., at p. 5) It claims that the calendar scheduled 187 days for teachers, and that said number could not be exceeded. The Board claims that if teachers worked fewer than the calendared days, that those employees owed the Board those days beyond the close of the established school year. The Board urges that this is not forcing employees to work additional days without pay, as petitioners argue, but on the contrary, it is establishing that all teachers should be treated alike, as the ALJ noted. The Board urges that the employees who aver they received less money "visited that situation upon themselves inasmuch as they elected to work fewer days than those established by the school calendar." (Id., at p. 6)

As to petitioners' Exception Five, which avers that the ALJ misread Carl W. Dohm v. Board of Education of West Milford, 1983 S.L.D. 13, the Board avers the differences in the collective bargaining agreement language in Dohm, as opposed to the collective bargaining language in the instant matter, are differences which do not warrant a different holding. The Board cites its post-hearing submission for its position on the two cases, which is incorporated herein by reference. The Board urges that the ALJ's decision herein be upheld, that Dohm is controlling, and it refers the Commissioner also to the Freehold Regional High School Ed. Ass'n and Walter Holcombe v. Bd. of Ed. of the Freehold Regional High School District, 1977 S.L.D. 1057 as being controlling in the instant matter even if it is found that Dohm contains distinguishable contract language. The Board notes in particular the identical language in the contract of Freehold and Middletown concerning the calendar, which states as follows:

Middletown	Freehold
The in-school work year for professional employees employed on a ten month basis (other than new personnel who may be required to attend an additional one for orientation) shall not exceed one hundred eighty-seven (187) days.	The in-school work year for teachers employed on a ten month basis (other than new personnel who may be required to attend an additional two (2) days of orientation) shall not exceed one hundred eighty-seven (187) days.

(Reply Exceptions, at p. 8)

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Finally, the Board posits that Petitioners' sixth Exception, which alleges a violation of the tenure statute is "fanciful, but nothing more. This issue was raised below and rejected as non-persuasive. It does not rise to the level of an argument which needs refutation." (Id., at p. 8)

Having reviewed the record before him, including the transcript of the proceedings conducted before the Honorable Patrick J. McGann on June 11, 1987, the Commissioner affirms the statutory interpretation of N.J.S.A. 18A:25-3 established in Dohm, supra. Therein the Commissioner held that there is nothing in law prohibiting a board of education from requiring that teachers who absent themselves from school on state holidays not observed as holidays within their school district make up such absences provided that said days be made up in manner that is not inconsistent with any law or contractual agreement between the parties. Yet, while the Commissioner affirms the right of a board to require that said holiday absences be made up, as a principle, he specifically declines to interpret whether the Board in the instant matter has acted appropriately if making such a determination would require him to interpret a collective bargaining agreement, which is not within his jurisdiction.

The Commissioner does note the following argument raised by Mr. Mark Blunda, counsel for the Association, before Judge McGann on June 11, 1987:

> MR. BLUNDA: Your Honor, if I may, in terms of the money. *** The people that worked were paid for 187 days. The Board had them work beyond the school year and I believe we're left with four or five individuals between one and three days of pay. (Tr. 36-37)

The Association argues that petitioners' compensation for the year reflected a correspondingly lesser amount because the Board required them to make up the holidays they chose to observe in addition to those on the school calendar or, as an alternative, to take a personal day or be docked for failure to make up said days. In this regard, the Commissioner finds and determines that the employees in the instant matter are merely being asked to be present, to be available, to provide services to the district for the same number of days for which all other teaching staff members are required to provide their services, less those days for which they might legitimately absent themselves, such as illness, personal days, leaves of absence, etc. Moreover, notwithstanding whether the Board herein acted contrary to its contract with the Association herein, the teachers in question were indeed not being required to render services for which they were not compensated since by law N.J.S.A. 18A:30-6 mandates that "*** A day's salary is defined as 1/200 of the annual salary" (emphasis supplied) and not on the basis of 187 or 185 or any other lesser number of days.

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Further, in conformity with N.J.S.A. 18A:27-6, practice in New Jersey is that teachers are compensated from September 1 to June 30. Thus, no teacher herein worked beyond the point for which they were compensated. Neither, in this matter, was any one teacher required to present himself or herself for work for any greater number of days than any other teacher was required to attend.

Therefore, the relief requested by the Association of the Commissioner, including that the teachers in question be awarded compensatory damages for the additional days they chose to absent themselves, is denied, and the Petition of Appeal is dismissed. The Commissioner affirms the initial decision to the degree that the ALJ made her determination based on education law as modified herein. Those portions of the ALJ's determination which rely upon contract interpretation and exposition are rejected as not being within the Commissioner's jurisdiction.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

July 14, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6386-86
AGENCY DKT. NO. 277-8/86

JOSEPH A. CAPIZOLA,
Petitioner,
v.
BOARD OF EDUCATION OF THE BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,
Respondent.

Roy E. Mahony, Esq., for petitioner

Robert J. Pryor, Esq., for respondent (Capizola, Fineman & Kutner, attorneys)

Record Closed: May 18, 1987 Decided: June 1, 1987

BEFORE **JEFF S. MASIN,** ALJ:

This matter comes before the Office of Administrative Law following the filing of a petition by Joseph A. Capizola with the Commissioner of Education seeking review of a controversy between himself and his employer, the Buena Regional Board of Education, pursuant to N.J.S.A. 18A:6-9. The matter was transferred to the OAL for hearing on September 26, 1986. A prehearing conference was held before Administrative Law Judge Jeff S. Masin on December 5, 1986 and a prehearing order was issued on December 11, 1986. Pursuant to the order, the issue for determination between the parties was established as whether the petitioner, who had been transferred from principal of a middle school to principal of an elementary school, had suffered an improper reduction in his pay and/or a freezing of his salary in violation of applicable laws governing school employees. Mr. Capizola contends that he has not received the increases

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in salary to which he is legally entitled and that the Board's action in connection with his salary has been arbitrary, capricious and unreasonable. However, he does not challenge the propriety of the transfer itself.

Mr. Capizola's petition with the Commissioner was filed on August 13, 1986. This date is significant because the Board argues that Mr. Capizola failed to file his petition within 90 days as required by N.J.A.C. 6:24-1.2, which precludes an appeal unless it was brought within 90 days after receipt of a notice of an order, ruling or other action concerning which a hearing is requested. For the reasons expressed below, I FIND that Mr. Capizola did have notice of the action of the Board from which he is appealing more than 90 days before August 13, 1986 and therefore, in the absence of any compelling circumstances, his action is barred by the application of the 90-day rule.

A hearing on the petition was held before Administrative Law Judge Jeff S. Masin on April 23, 1987, at the Hammonton Municipal Court. Post-hearing briefs were filed by the petitioner on May 4, 1987 and by the respondent on May 18, 1987 on which date the record closed.

EVIDENCE

Joseph A. Capizola testified that he has been an employee of the Buena Regional School District for 23 years and has served as an elementary school principal for 8 years. In 1983-84 he was principal at the middle school which served sixth, seventh and eight graders. On August 15, 1984, just prior to the opening of the school year in September he was advised by Superintendent James Field that he was transferred, effective August 14, 1984, to the Collings Lake Elementary School, which was a K-5 building. He asked Field the reason for the transfer and was told that the Board of Education had decided that it wished to "flip-flop" principals between Collings Lake Elementary and the middle school as part of a rotational plan. The district contained four "elementary schools," two which were K through 5, one which was K through 3 and one which was the middle school. However, in August 1984 only two of the principals were rotated.

When Mr. Capizola heard about his transfer he asked Field how it might affect his salary. At the middle school he was considered a 12-month employee, but the principalship at Collings Lake Elementary was a ten-month position. Field explained that

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since the school's fiscal year had already begun and since Capizola was not to start at Collings Lake until August 28, his salary would not be affected by the transfer. According to Capizola, he was told that his future year's salaries would be established at the discretion of the school board.

In 1983-84 Capizola received a salary of $37,475 as a 12-month elementary principal. In 1984-85 he received $40,098, again paid on a 12-month basis. He spoke to Superintendent Field several times about his salary concerns. On August 27, 1984 he wrote a memorandum to Mr. Field requesting a job description for his new assignment and asking what his salary would be and how he would be paid for the 84-85 school year. He also posited the question as to how his transfer from a 12-month position to a 10-month position might affect his salary for the 1985-86 school. He requested a response "within the next week."

On September 6, 1984, John Zucal, the Board president, received a memo from Superintendent Field attaching Capizola's memo of August 27, 1984 and mentioning that, "The matter of salary is a possible negotiated and managerial item between the administrator and Board of Education."

Mr. Capizola testified that he understood that any future salary question might be negotiated between himself and the Board. Significantly, the appellant served as president of the Administrator's union and negotiated their contract with the Board for 1983-85.

Capizola testified that it was his belief after the beginning of school in 1984 that his transfer would not cause him any future detriment with respect to his salary. The day after his transfer in August 1984 Mr. Zucal called him, explained the desire to rotate and according to Capizola, said that his salary would "not be affected." He worked the remainder of the 1984 school year with no negotiations taking place between himself and the Board or any representative thereof concerning his salary.

On April 25, 1985, Field forwarded to Capizola a letter indicating that on April 23, 1985 the Board had reappointed tenured administrators for the 85-86 school year. The letter noted that, "Once negotiations are completed, the business office will send them an indication of their salary." Since the 1983-85 contract was to expire, negotiations were under way to determine the new contract and salary. Mr. Capizola was

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not directly involved in those negotiations. However, the negotiating unit voted on an offer made by the Board in September 1985 which proposed a salary guide which would pay all elementary principals, including Capizola, $40,098, the same salary which Capizola had received for the 84-85 school year. Capizola voted against the proposal, but was outvoted eight to one after heated discussion. The salary guide was adopted by the Board of Education at a Board meeting of September 3, 1985, P-6 in evidence.

According to Capizola, prior to the Board meeting on September 3 he saw Mr. Zucal and Board member Anderson on the opening day of school and they told him that he would get the same salary as he had received the year before, with no raise. He was the only principal not receiving a raise. He spoke to Dr. Caton, the school superintendent, who confirmed this information. He also confirmed that the position would now be considered a 12-month position.

For the 1986-87 school year, Capizola has received a salary of $43,800. He believes that he has been adversely affected in that the failure of the Board to give him a salary increase for the 1985-86 school year was illegal and violated his legitimate expectancy concerning his salary based on his salary level when he was principal of the middle school and receiving more money than the elementary school principals.

With respect to his understanding of the salary which he would receive, the witness testified that it was not unusual for Board employees to make "separate deals" with the Board concerning salary. Since he had been told by Superintendent Field that future salary might be subject to negotiations between himself and the Board, he believed that it was possible that he might receive some extra money for work during the summer, such as running the summer school, or that the Board might find other work for him which would give him an increase above the $40,098 level received by all elementary principals, including himself, under the 1985-86 salary schedule negotiated between the union and the Board and approved September 3, 1985. He never received any formal written notification as to what his salary would be, but he did begin to receive pay checks for the 85-86 school year at the $40,098 level. He acknowledged that he knew since September of 1985 that he was going to receive no increase above his previous year's pay although he insisted that he still believed that he might get additional compensation as a result of the comments by Board President Zucal in August 84 that Zucal would call him about "other work". Zucal never did call.

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In September 1985 Capizola "formally" protested to the Board concerning the lack of a pay increase through his attorney. In December 85 he, his attorney, the Board president and Board Attorney Michael Capizola (apparently no relation) had a meeting at which he obtained no satisfaction. According to the witness, it was his understanding after that meeting that the Board would be getting back to them in January. He heard nothing and took no action until he filed his petition in August 1986. On June 25, 1986 he received a memo advising that his contract settlement for the 1986-87 school year had been approved by the Board at a salary of $43,800 for 12 months beginning July 1, 1986.

John Zucal, Board president and a member of the Board for 16 years, testified that he spoke to Mr. Capizola the day after the principal was informed of his transfer. Capizola was concerned about his salary and Zucal told him it was not to be reduced. He made no promises beyond the 1984-85 school year. To his recollection, Capizola made no specific request at that time concerning his future salary. There was some slight conversation concerning summer work, which was sometimes a possibility, but no promises were made. The next conversations which occurred regarding salary were in September of 1985 as the Board was finishing its negotiations with the union. Zucal told Capizola that the figure being negotiated for him in connection with the contract negotiation was the same as he had received the past year, $40,098. This conversation occurred between Zucal, Board Member Anderson and Capizola near the office at the high school. No promises or assurances were made concerning any further negotiations regarding Capizola's pay. The witness was aware that Capizola had worked for ten days during the summer of 1985 in order to prepare his school, which was five days more than the normal preparation period, the additional time having been requested by Capizola. Zucal could recall no specific request by Capizola to work for the entire summer of 1985.

Zucal attended the December 1985 meeting between the attorneys and parties. No promises were made regarding a change of salary and in fact Michael Capizola pointed out to the principal and his attorney that if they had an argument it was really with the union which had negotiated the contract including Capizola's salary.

During cross-examination, the witness specifically denied that he had told Capizola that the Board would "work something for the summer."

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DISCUSSION

As noted, the Board argues that this petition should be dismissed because of the failure of Mr. Capizola to file the petition within 90 days of notice of the order, ruling or other action concerning which the hearing is requested. In the Board's view, Capizola was certainly aware that he was not going to receive any increase in his salary on or about September 3, 1985 when he was so informed by Board President Zucal and Board Member Anderson. In fact, Capizola knew even before that date that his union had negotiated a salary arrangement which would pay him the same salary as he had received the year before and he had specifically voted against that arrangement and knew that he had been outvoted. When the Board adopted the salary schedule at its special meeting of September 3, the resolution, P-6 in evidence, did not contain the specifics of the agreement. However, Capizola acknowledged in his testimony that he was aware that he was not getting an increase and that when he began to receive his pay checks shortly after the resolution was adopted he knew that the pay checks were for a salary of $40,098. In the Board's view, N.J.A.C. 6:24-1.2, which requires that the petition be filed within 90 days "after receipt of notice by petitioner" of the action concerning which the hearing is requested, demands dismissal of this proceeding since the 90-day period began on or about September 3 and the petition was not filed for almost 11 months thereafter.

Mr. Capizola contends that the Board never sent him any formal notice of what his salary would be for the 1985-86 school year, having only advised him that he had been reappointed in the April 25, 1985 notice, which did not refer to a salary since it was still being negotiated. Capizola argues that the Board was required to provide him with a contract pursuant to N.J.S.A. 18A:27-5 and 27-6 which provide that all contracts between the Board shall be in writing and contain, among other items, both the date when employment shall begin and the salary. Since the Board never did provide this formal notification as per the statute, in Capizola's view the 90-day period did not begin to run until at least June 25, 1986, when he received notice that his salary for the 86-87 school year would be $43,800. The Board counters that the reference to N.J.S.A. 18A:27-5 is inappropriate since in fact the petitioner's complaint refers not to his not having been advised of his salary in accordance with the statutory requirement but instead that, the Board did not pay him what he was entitled to.

An examination of relevant case law on the issue of the 90-day rule demonstrates that the petitioner's position is without merit. In Williams v. Plainfield Bd.

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of Ed., 176 N.J. Super. 154 (App. Div. 1980), the Appellate Division rejected the argument that a claim could be made that a teacher had been deprived of a future salary increase or adjustment or salary expectancy. Where there is no statutory right to an increase, and where increases for tenured employees are in fact not a constituent right under tenure but something wholly separate therefrom, no claim can lie for "future increases" or "salary expectancy." See also North Plainfield Educ. Ass'n v. Bd. of Ed., 96 N.J. 587 (1984).

In Charles R. Stockton v. Bd. of Ed. of the City of Trenton, Mercer Cty., EDU 3492-84, Initial Decision decided October 4, 1984, reversed by Commissioner, November 19, 1984, reversed and initial decision reinstated by State Board of Education, April 3, 1985, the State Board upheld a decision of Administrative Law Judge Joseph Lavery in which Judge Lavery concluded that a tenured employee of the Trenton School Board, whose salary had been reduced from Step 15 to Step 14 on the salary guide for the remainder of the 1983-84 school year, had failed to file his petition in a timely fashion when he received his first pay check calculated within Step 14 on November 9, 1983 and failed to file his verified petition until April 23, 1984. In reversing the Commissioner's reversal of the administrative law judge's decision, the State Board noted that

> Pursuant to N.J.A.C. 6:24-1.2, the cause of action acrues and the 90-day period begins "after receipt of notice by petitioner" of the action concerning which the hearing is requested. In the instant case, Mr. Stockton was aware of the challenged action when he received his first pay check at the adjusted salary on November 9, 1983. . . . His petition was not filed until April 23, 1984, more than five months after the expiration of the 90-day period of limitations. His request to the assistant superintendent to reinstate his salary does not excuse his failure to comply with the requirements of N.J.A.C. 6:24-1.2. . . . We emphasize that this is not a case involving a violation of a statutory entitlement unrelated to service as a teacher.

In the present action, it is clear that following receipt of oral information from the Board president and from his union concerning the salary which had been negotiated for him and which did not contain an increase over his previous year's salary, and following receipt of pay checks indicating a salary the same as he had previously received, Mr. Capizola did formally advise the Board of his protest against the failure to grant him an increase and, through counsel, engaged in discussions with the Board in December of 1985. However, he did not file a verified petition until August 1986. Under the Stockton principles, having once received notice and pay indicating no increase, Mr. Capizola could hardly claim that he did not know that he had a dispute with the Board and

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that the Board was not acting in compliance with his position. The fact that he chose to enter into some discussions with the Board, through counsel, is no different in reality than the request made by Mr. Stockton to the assistant superintendent to reinstate the previous salary in the Stockton matter. As the State Board noted in Stocton, the 90-day time limit of N.J.A.C. 6:24-1.2

> has been strictly construed to mean that the 90-day period runs from the time the initial cause of action accrued. . . . Thus, even a teacher who proceeds to advisory arbitration is not relieved from compliance with the 90-day filing requirement. . . Although N.J.A.C. 6:24-1.19 confers on the Commissioner the authority to relax the 90-day rule, such authority is invoked only where there are compelling reasons justifying relaxation or where circumstances are such that strict adherence would be inappropriate, unnecessary or where injustice would occur.

In the present case, I can see no circumstances which would justify relieving Mr. Capizola from the strictures of the 90-day rule. He clearly was aware that he had a serious dispute with the Board over his salary as of September 1985. As a member, and former president of his union, he was well aware of the significance of the negotiations which occurred, the adoption by his bargaining unit of the salary scale and the adoption of the Resolution by the Board on September 3. It cannot be said that he did not know that he had a cause of action against the Board as of that time.

For the reasons expressed, I **CONCLUDE** that the petition was untimely filed and must therefore be **DISMISSED**. It is so **ORDERED**.

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

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

June 1, 1987
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

JUN 3 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

June 4 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

bc

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JOSEPH A. CAPIZOLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were untimely filed pursuant to N.J.A.C. 1:1-16.4a and b.

Upon review of the record in this matter, the Commissioner is in full agreement with the ALJ that the Petition of Appeal is time-barred pursuant to N.J.A.C. 6:24-1.2. Contrary to petitioner's arguments, Williams v. Plainfield Board of Education, 176 N.J. Super. 154 (App. Div. 1980) and North Plainfield Educ. Ass'n v. Bd. of Ed. of North Plainfield, 96 N.J. 587 (1984) are applicable in this matter. In the former case, the Appellate Court determined that tenured school employees have no vested right in any future increases in salary and that the transfer of a tenured high school principal to a position of elementary principal was proper because it did not result in a reduction in salary or rank even though it did result in a reduction in her salary expectancy. In the latter decision, the New Jersey Supreme Court made it unequivocably clear that no statutory right to salary increases exists and disputes related to salary increases are subject to the 90-day rule contained in N.J.A.C. 6:24-1.2.

The Commissioner must, however, point out that the ALJ's reliance on Stockton v. Bd. of Ed. of the City of Trenton, decided by the Commissioner November 19, 1984, rev'd State Board April 3, 1985, rev'd and remanded 210 N.J. Super. 150 (App. Div. 1986) is incorrect given that the State Board's decision that receipt of a paycheck at a lesser salary then anticipated constituted notice under N.J.A.C. 6:24-1.2 was reversed by the Appellate Court. However, this does not mean that the ALJ's conclusion that the time bar applies in the instant matter was erroneous for the circumstances in this matter are clearly and markedly distinguishable from those in Stockton.

In Stockton, supra, the petitioner received a paycheck in November 1983 which was at a lower step on the salary guide than he had been previously paid. He complained immediately to the personnel and business office and was informed an error in guide placement had been allegedly made three years prior. In December 1983 and January 1984 letters were sent by petitioner to the board

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requesting reinstatement to his prior salary step. On February 8, 1984, the assistant superintendent denied the request. Regarding this the Appellate Court determined:

> ***the language of N.J.A.C. 6:24-1.2 speaks of notice by the petitioner of the order, ruling, or other action concerning which the hearing is requested. The issuance of a paycheck for the wrong amount***is of course neither an order nor a ruling and must therefore fall within the category of "other action." We do not believe the incipient action of a school board employee to unilaterally attempt correction of a three year old error can be categorized as a "controversy or dispute" within the meaning of N.J.A.C. 6:24-1.2. Perhaps upon discussion after the parties "reason together," one of the parties may accede to the position of the other and a controversy or dispute may never arise. Obviously, in North Plainfield, a dispute or controversy had arisen which became the subject matter of a grievance and an arbitration proceeding. In the instant case, only petitioner's views were expressed by his oral complaint in November, his letter in December and his letter in January. It was not until the response from the assistant superintendent of February 8 rejecting petitioner's position that a dispute or controversy came into being***. (at 158)

In the instant matter, petitioner was clearly aware in September 1985 that he had a dispute with the Board over his salary. Prior to September 3, 1985, petitioner knew about and voted against the proposed salary guide for administrators that would pay all elementary principals, including himself, $40,098, the same salary received by him the previous year. On September 3, 1985, the Board approved the salary guide. Prior to the Board meeting of September 3, petitioner was told by Board Members Zucal and Anderson that he would get the same salary he received the year before. He was also told the same by the superintendent. Further, he was paid for the entire 1985-86 school year at the same amount as 1984-85. The Petition of Appeal indicates that even prior to the 1985-86 school year, petitioner had a concern about his salary for the 1985-86 school year and that he and his attorney had contacted the superintendent and Board President Zucal about this concern. Moreover, on September 24, 1985 petitioner's attorney wrote to the superintendent and Board about the lack of a salary increase and a meeting was held December 4, 1985 which did not resolve the dispute. Yet, the Petition of Appeal was not filed until August 13, 1986.

Given the above, it is abundantly clear that the Petition of Appeal is time-barred pursuant to the 90-day filing requirement of N.J.A.C. 6:24-1.2. See Bertisch et al. v. Bd. of Ed. of Bergenfield v. Bergenfield Ed. Assoc., decided by the Commissioner

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April 10, 1986, aff'd State Board September 3, 1986, aff'd New Jersey Superior Court June 15, 1987, A-2467-86T8. Further, the Commissioner finds as totally meritless petitioner's argument that because he did not receive a formal notification of his salary for the 1985-86 school year, pursuant to N.J.S.A. 18A:27-5 and 6, the 90-day period did not begin to run until June 25, 1986 when he received notice about his 1986-87 salary.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

July 14, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8077-86

AGENCY DKT. NO. 364-11/86

NANCY BALCZUN,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF MEDFORD LAKES, BURLINGTON COUNTY,

Respondent.

Mary L. Crangle, Esq., for petitioner (Tomar, Seliger, Simonoff, Adourian & O'Brien, P.A., attorneys)

Denis C. Germano, Esq., for respondent (Hulse & Germano, attorneys)

Record Closed: April 22, 1987 Decided: June 1, 1987

BEFORE NAOMI DOWER-LA BASTILLE, ALJ:

Nancy Balczun claims that the Board of Education of Medford Lakes (Board) violated her seniority and tenure rights when it reduced her to half-time employment and subsequently hired a nontenured teaching staff member. The Commissioner transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on January 21, 1987, and a hearing scheduled for March 30, 1987, was completed on that date. The record was held open for filing of briefs and closed with receipt of the last responsive brief on April 22, 1987. A list of exhibits entered into evidence at the hearing is appended to this decision.

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Balczun contends that the Board did not act in good faith when it RIFed her, transferred others and subsequently, when the District agreed to sponsor consortium special education classes, hired a nontenured teacher. She contends that the Board acted against her as a result of union pressures because she was the only nonunion teacher in the district. She believes that the Board knew when it RIFed her that it would be sponsor for additional special education classes and that by retaining one tenured teacher in special education instead of transferring her to a regular elementary position, the Board could have continued petitioner in a full-time regular elementary position.

Balczun testified on her own behalf and called Susan Rath, Board secretary, to testify. Joseph Butcher, the Superintendent of Schools, Dr. Kolman Kleinbord, coordinator of the special education consortium, and Estrella Wells, LDTC, testified for the Board. Wells and Kleinbord were highly credible. Butcher's memory was not entirely clear on some facts, but I felt he was entirely truthful and there was no testimony that led me to believe otherwise.

Susan Rath had casual conversation with petitioner when she came into the office and recalls she did ask Balczun if she felt the union would have supported her if she were a member and Balczun replied they would not have. Rath recalled Balczun's questioning why she was let go. Rath also recalled telling her she worked with Joe Butcher for seven years and never knew him to be influenced by anyone. Rath admitted she personally thought that if Balczun had been a union employee she would not have lost the position. Rath recalled nothing specific about the events which led to the RIF. Rath worked part-time as secretary to the Board secretary until July 1986, when she began full-time work. She prepares personnel forms and other routine documents and has no input on policy matters. It is clear that Rath simply engaged in normal, pleasant, social conversation with those who came in on business and I found her comments to be no viable basis for an inference that the Board acted in a way inimical to Balczun as a result of union influence.

Balczun herself stated facts from which she believed inferences could be drawn concerning her theory that the Board's action was pro-union. She related the repeated efforts of union representatives to get her to join and the fact that they knew she would not participate in any kind of job actions. She noted that the teacher who was transferred from special education to a regular elementary assignment (Laurie Oakes) was the best friend of the Association president (Debbie Salamon). Balczun believed that the

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union had "lobbied" on behalf of Oakes' transfer. Her information was based on uncorroborated hearsay. Were it not for the transfer, there would have been one elementary position for petitioner.

Balczun pointed to several Board actions from which she believed inferences could be drawn. For example, Balczun and another teacher, Claire Greenberg, were told they were being RIFed on the same day but Greenberg's salary was listed on an attachment to the minutes of April 21, 1987. Greenberg was on the RIF list, however. Balczun also pointed to the seniority list issued on June 23, which listed Oakes in a grade 1 assignment and Davis in a consortium special education position in order to show both actions occurred at the same time. Balczun had been told prior to her RIF that Davis, whose special education class "aged out" in 1985-86 school year, would be bumping Oakes from her PI special education class assignment and Oakes, in turn, would return to an elementary grade position which would result in eliminating a position available for Balczun. In fact, new special education positions arose through decisions of the area special education consortium, and there was known to be another position for Davis by late June 1986. Indeed there were several positions available by July and a nontenured teacher (Carter) was hired to fill Oakes' PI class assignment.

All the inferences Balczun sought to draw were insufficient to support a finding of bad faith. Balczun was simply not aware of the full explanation of staffing changes until the testimony in this case revealed it. Subsequent to the RIF, it developed that Davis would not need to bump Oakes from her position. Oakes was transferred. Oakes could bump petitioner, however, since she was senior. The documents from which petitioner hoped to raise inferences were explained by the superintendent. He noted that the seniority list is as of June 30, but it is always prepared prior to the end of the school year and the listing of Greenberg's salary in Board minutes was simply a clerical oversight.

Butcher testified there was no pressure whatsoever from the union or any other source to transfer Oakes from a special education to an elementary assignment. The building principal and the LTDC in charge of special education, Estrella Wells, both felt Oakes was the most suitable person for the elementary assignment, in addition to which, Oakes had made a request to be considered for transfer. Butcher had proposed to the Board three plans for 1986-87 classes. In March, the Board chose the plan requiring a RIF of one elementary and one special education position. Oakes was the least senior

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special education teacher, but she had more seniority in the elementary category than Greenberg and Balczun, who were the two elementary teachers lowest in seniority and were, therefore, RIFed. Balczun was slightly lower in seniority than Greenberg. Davis' position in special education was eliminated because his class "aged out." He thus had to be given some other special education assignment. Oakes had the advantage of dual certification and more seniority. When Oakes was assigned to an elementary position, there was one less position available for Greenberg and petitioner. Greenberg was rehired as soon as the Board found out that Barr, the resource room teacher, was taking maternity leave. Although Barr was a special education teacher, a number of the students she served were not, so an elementary position was substituted for the special education resource room position.

Butcher explained that the Board's sponsorship of additional consortium special education classes was not known until well after RIFs had to be announced. The consortium had first to decide supervisory changes, classroom needs for special education and the locations available. It was not until May that all the changes were recommended and in June, the consortium and districts concluded the approval process, which resulted in five consortium classes. Dr. Kleinborg, the consortium coordinator, confirmed that the districts did not know the consortium assignments until almost the end of the school year because planning forecasts are made in April, but reviewed later after all Child Study Team information is in, in addition to which the proposed change in supervision had to be decided first in 1986. It was known in March that Davis' class would be abolished, but planning for the new classes was not completed until much later.

Estrella Wells was especially persuasive. She confirmed Butcher's explanation of why Oakes was transferred to an elementary assignment. Oakes had PI class experience and was very good at handling children with mild problems, whereas the consortium children were more severely handicapped. Wells recommends classroom placements based on matching children's style with a specific teacher. Oakes asked for transfer out of special education around January 1986, but it was not until Wells considered the assessments of the kindergarten pupils that year that she recommended a switch for Oakes. Wells found that a substantial number of audio special needs children would be moving into grade one. Wells realized that Oakes would be good at helping these children, so she restructured the grade one classes to fit the special capabilities of three

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teachers, including Oakes. Wells also gave a detailed and very rational explanation of the special education class planning and teacher assignments which evolved in late spring of 1986.

STIPULATED FACTS

1. Nancy Balczun was the regular elementary tenured teacher with the least amount of seniority as of June 30, 1986.

2. Medford Lakes Board of Education offered a Primary PI class in 1985-86, which was taught by Laurie Oakes. The district offers a Primary PI class in 1986-1987 which is taught by Patricia Carter. This class was [not] and is not a consortium class.

3. Nancy Balczun is certified only as a regular elementary teacher. Laurie Oakes holds dual certifications as a regular elementary and special education teacher.

4. Robyn Barr is certified only in special education.

5. Teachers of consortium classes are the employees of the school district which is providing the consortium class.

6. The following districts comprise the consortium during the 1985-86 and 1986-87 school years: Evesham Township, Lenape Regional High School District, Medford Lakes Borough, Medford Township, Shamong Township, Southampton Township and Tabernacle Township.

7. During 1985-86 and 1986-87, Medford Lakes was the "lead agency" for the Southern Burlington County Council for Special Education (the consortium). By virtue of Medford Lakes' status as "lead agency," [it was] at all times relevant to this action the employing district of the coordinator, Kolman Kleinbord.

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FINDINGS OF FACT

8. At no time did the teachers' association lobby or put pressure upon the administration to transfer Oakes, thus requiring a RIF of Balczun.

9. The RIF of Balczun and other staff members in April 1986, as well as two other options, was duly considered and acted upon by the Board in the interest of sound educational and financial policy.

10. The Board was not sure until late June 1986 that it would be housing additional consortium special education classes and would, therefore, have openings in that specialty.

11. The assignment to a regular elementary classroom requested by Oakes, who was more senior than Balczun, was made after full consideration to match the teacher to the needs of the children in that class.

12. Much later than the RIFs, Barr, a resource room teacher, notified the Board she would take a maternity leave. Since a number of her students were not classified, the Board eliminated a resource room and instead added a regular teaching position to which Greenberg was assigned because she was senior to petitioner.

13. Balczun, as the least senior elementary teacher, was offered the next elementary opening, a part-time kindergarten class, which developed when more kindergarten children than anticipated registered.

DISCUSSION AND CONCLUSION

N.J.A.C. 6:3-1.10(i) provides:

> 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.

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It is undisputed that Balczun's category was and is elementary teacher, that she possesses no certification for special education, that one elementary position was abolished in April, and that she was the least senior in the category.

Balczun argues that her RIF and the Board's transfer of Oakes to an elementary position resulting in part-time placement of petitioner was a bad faith action to favor Oakes' preference for a transfer as against a full-time position for petitioner.

N.J.S.A. 18A:28-5 provides that a reduction in force must be based on reasons of economy, reduction of number of pupils, change in organization or other good cause. I **CONCLUDE** that the abolishment of one elementary position and RIF of Balczun was in good faith and for good cause.

N.J.S.A. 18A:25-1 provides that a Board has authority to transfer within the scope of a teacher's certification. A teacher transfer is an inherent managerial responsibility of a board. Ridgefield Park Ed. Assn. v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978). The board's authority must be reasonably and properly exercised in good faith for the best interest of the school district and the board must not seek to evade the plain intention of the tenure statute. Bigart v. Paramus Bd. of Ed., 1979 S.L.D. 123, 132. Retaliatory transfers are arbitrary. Ivan and Murray v. Bd. of Ed., Princeton Reg. Sch. Dist. (N.J. App. Div., March 12, 1984, A-4873-82T3) (unreported).

Balczun's theory of a bad faith transfer action has no facts to support it. We are asked to consider inferences based on hearsay and clerical error which was either directly controverted or fully explained by Board witnesses. I **CONCLUDE** there was no bad faith in the transfer of Oakes to an elementary position and that, on the contrary, the administration went to admirable lengths to match the teacher to the needs of specific children. It is most unfortunate that in the interest of sound educational policy, Balczun, a tenured teacher, had her full-time employment reduced to part-time. It should not be forgotten that Oakes was more senior than Balczun and could bump her in the event the two contended for one position. Greenberg could also bump petitioner and at the time Oakes was transferred, it was to a position to which Greenberg had superior rights over petitioner.

The filling of various special education positions is not relevant to these conclusions unless one takes the position that a Board must make assignments and

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transfers, in derogation of sound educational policy and the specific needs of children, for the sole purpose of providing positions for tenured teachers. I can find no legal precedent which mandates such a limitation on the Board's authority to transfer. I **CONCLUDE** there was no violation of the seniority rights of petitioner.

It is therefore **ORDERED** that the petition of Nancy Balczun be **DISMISSED.**

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

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

June 1, 1987
DATE

Naomi Dower La Bastille
NAOMI DOWER-LA BASTILLE, ALJ

JUN 2 1987
DATE

Receipt Acknowledged:
Seymour Ellis
DEPARTMENT OF EDUCATION

June 4, 1987
DATE

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

ml/EE

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NANCY BALCZUN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MEDFORD LAKES, BURLINGTON 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 thereto within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

Petitioner posits lengthy exceptions, which are summarized in pertinent part below. Essentially, they reiterate the arguments presented to the ALJ at hearing and in petitioner's post-hearing submissions. The thrust of her objections focuses upon her conviction that the Board acted in bad faith in riffing her and in transferring others. She contends the Board was motivated to act against her in violation of N.J.S.A. 34:13A-5.3 as a result of union pressure because she was the only non-union teacher in the district. She strongly argues, in addition, that "[i]n this case there was no reduction in force but rather merely an acquiescence to a teacher's transfer request and that therefore the reduction of Nancy Balczun from a full-time to a part-time position was in violation of her tenure rights." (Exceptions, at pp. 13-14)

Petitioner proposes the following findings of fact in support of her contentions:

FINDINGS OF FACT

1. Nancy Balczun was the only teacher in the Medford Lakes School District who was not a member of the Medford Lakes Education Association during all relevant time periods.

2. Laurie Oakes requested a transfer from a special education teaching position into a regular classroom teaching position sometime prior to March of 1986. Ms. Oakes and Deborah Salamon, President of the Medford Lakes Education Association, were the very best of friends.

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3. While the Board of Education of the Borough of Medford Lakes informed Nancy Balczun in April of 1986 that there would be a reduction in force, subsequent actions of the Board negated the original intentions and there was no reduction in the number of teaching staff members during the 1986-87 school year from that [of] the prior year. No elementary teaching position was eliminated.

4. Special education consortium teacher Ed Davis was transferred from one consortium special education class to another consortium special education class in June of 1986 and did not bump Laurie Oakes.

5. In March of 1986, the Board of Education of Medford Lakes eliminated the resource room which eliminated a special education teaching position which was held at that time by Robyn Barr. Ms. Barr subsequently requested maternity leave which was granted and when she returned from that leave she was placed in a consortium special education teaching position in the district.

6. Nancy Balczun, as the least senior elementary teacher, was reduced from a full-time position to a part-time position when Laurie Oakes' transfer request was granted by the Board of Education. Ms. Oakes was transferred solely at her own request and there were no independent reasons advanced by the Board of Education requiring that such a transfer be made in the interests of sound educational policy.

7. Patricia Carter, a non-tenured teacher, was hired to teach the Primary PI class which had been taught by Laurie Oakes prior to her transfer.

8. There is sufficient evidence on the record to establish that Ms. Balczun's nonunion affiliation played a role in the Board's determination to acquiesce to Ms. Oakes' transfer request. (Exceptions, at pp. 11-13)

In addition to the above, petitioner objects, inter alia, "to the Administrative Law Judge's finding that Petitioner 'called Susan (sic) [Suzanne] Rath, Board Secretary, to testify' ***" (Id., at pp. 2-3) She avers instead that Ms. Rath was a Board witness.

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She further excepts to the ALJ's finding that "Ms. Rath's testimony provided no basis for an inference that Ms. Balczun's lack of union affiliation played a role in their actions in Petitioner's regard." (Id., at p. 3, citing Initial Decision, ante)

Further, petitioner excepts to the ALJ's conclusion that "Balczun was simply not aware of the full explanation of staffing changes until the testimony in this case revealed it." She cites to page 3 of the Initial Decision in this regard. Petitioner contends it is "presumptuous for the Administrative Law Judge to make such a statement when there is no basis in the record for such a conclusion and particularly where Petitioner was well aware of the various explanations that had been given in an attempt to justify the Board of Education's various actions which affected Petitioner." (Exceptions, at p. 4)

Petitioner excepts to the ALJ's "apparent conclusion that Ms. Oakes' request for a transfer from special education into a regular elementary education position came after there had been some independent decision made by Respondent to place Ms. Oakes in an elementary position. (Page 3, Paragraph 4)." (Exceptions, at p. 4) Rather, petitioner avers:

> The record testimony in this case establishes beyond contradiction that Ms. Oakes' transfer request came early in 1986 and at least by early March of 1986 (Respondent's Exhibit 1) and predated any consideration by Respondent with respect to her suitability for an elementary school teaching assignment. The record evidence again is replete with testimony that in considering Ms. Oakes' transfer request, the administration felt she would be a suitable teacher for a newly created First Grade position. The record establishes unequivocally, however, that it was Ms. Oakes' request for a transfer that generated this consideration and not to the contrary. In addition, Ms. Balczun was also suitable for the newly-created First Grade position. (Id., at pp. 4-5)

Relying on her post-hearing submissions, which are incorporated herein by reference, petitioner also excepts to the ALJ's findings that there was a RIF of one elementary and one special education position in March 1986. "[W]e believe the record evidence overwhelmingly demonstrates that there was no elementary position RIFFED in March of 1986 or thereafter and that the special education position which was RIFFED was the position held by Robyn Barr which in fact was not a special education position at all." (Id., at p. 5) She further excepts to the ALJ's determination that Ms. Barr's maternity leave played some role in the scenario, citing page 4 of the Initial Decision for the ALJ's position. She avers that Ms. Barr's position as the resource room teacher, which was

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eliminated, would not in and of itself generate the need for an additional elementary teaching position since the children "who utilized the resource room were also assigned to regular classrooms and sent to the resource room during the school day to receive specialized help." (Id., at p. 6)

Petitioner also excepts to the ALJ's determination with respect to the issue of the consortium and the knowledge on the part of the Board with respect to consortium classes during the 1986-87 school year. She suggests, inter alia,

> ***the Administrative Law Judge ignored the fact that the Minutes of the Board of Education of Medford Lakes, in evidence in this case as Joint Exhibits 4(a) through 4(h), unequivocally draw a distinction between determinations and decisions made with respect to regular special education classes conducted by the district and consortium classes. The Administrative Law Judge ignored the fact that the special education class which the Board of Education abolished allegedly in March of 1986 could not have been a consortium class because the Minutes do not identify it as such and because no action had been taken by the consortium as of that time to actually abolish that particular class. *** Such an argument would justify RIFFING Eighth Grade teachers each year solely on the basis that their students would be graduating. (Id., at pp. 7-8)

Petitioner also excepts to the ALJ's "discussion and conclusion" which, she avers, "appears to be conclusions of law." (Id., at p. 9) Petitioner notes, inter alia, that the ALJ relies on Ridgefield Park Education Association v. Ridgefield Park Board of Education, 78 N.J. 144 (1978) for "her apparent conclusion that a transfer of a teacher is an absolute prerogative of a Board of Education which always takes precedence over any consideration of the tenure rights of other teachers which may be adversely affected." Petitioner claims that Ridgefield Park establishes that "in a labor relations context, transfers of teachers are a managerial prerogative and may not be negotiated with the teachers' collective bargaining representative." (Id., at p. 10) Petitioner further excepts to the ALJ's relying upon Ivan and Murray v. Board of Education of Princeton Regional School District, N.J. Superior Court, Appellate Division, March 12, 1984, A-4873-82T3 (unreported), citing New Jersey Court Rule 1:36-3 with respect to the citing of unreported cases.

Petitioner submits that the initial decision should be reversed and her petition be sustained.

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The Board's reply exceptions counter, point by point, those exceptions raised by petitioner. In summary, the Board reiterates its contention that:

> With the exception of some totally unsubstantiated hearsay testified by the Petitioner, there is not a shred of evidence in this record to suggest that the Respondent made its choices for anything other than sound educational and financial reasons. The Petitioner's complaint is that the Administrative Law Judge saw that the district had to choose between the best interests of the children and the Petitioner's job. The initial decision found that the district's choice was motivated by a desire to serve the best interest of those children and nothing else. There is ample evidence to support that finding and it should not be disturbed.
>
> (Reply Exceptions, at p. 11)

The Board concedes two points. First, in response to the exception raised by petitioner, the Board admits that Ms. Rath was called as a Board witness. Further, the Board agrees that Mrs. Barr's maternity leave is largely irrelevant to the facts in dispute. The Board goes on to state in reply exceptions that "the petitioner, however, has strenuously maintained that there never was a RIF in the case and relies most heavily on the fact that the Respondent district employs the same number of regular elementary teachers in '86-'87 as it did in '85-'86. The Barr maternity leave and the district's response to it provides an explanation." (Id., at p. 11)

Additionally, the Board takes exception to petitioner's allegation that at all times relevant to these proceedings, the Respondent School District has provided consortium special education classes. The Board asserts that

> through the testimony of Kolman Kleinbord, the Coordinator of the Southern Burlington County Council for Special Education (hereafter the Consortium) and Joseph Butcher, the Superintendent of the Respondent School District, that the Consortium on June 5th, 1986, voted to change the Coordinator's job description to give him direct supervisory authority over five special education classes which were to be housed in a school building owned, but not occupied by the Respondent. Dr. Kleinbord testified that this arrangement was a drastic departure from past practice, that it was implemented only after considerable debate (See Exhibit J-2), and that he was by no means certain that this new arrangement would be approved until the actual

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> vote was taken at the June 5th, 1986 meeting of the Consortium's Policy Board. (Id., at pp. 1-2)

The Board strongly urges that petitioner did not and cannot dispute that this action occurred well after the Board's decision in April 1986 to RIF the petitioner. It was, therefore,"'subsequently' that 'the district agreed to sponsor consortium education classes' and 'hired a non-tenured teacher.'" (Id., at p. 2, quoting Exceptions at pp. 1-2)

Further, the Board concedes that during the 1986-87 school year, a nontenured teacher taught the primary PI class, which had formerly been taught by Ms. Oakes. The Board adds, though:

> The non-tenured teacher, however, merely filled one of five special education job openings that were created in June, when the Respondent agreed to offer five new special education classes. The Respondent had a right to use some of its tenured special education teachers in some of those new classes and put some newly hired teachers in some of its "old" classes. That is all respondent did. (Reply Exceptions, at p. 2)

The Board proposes that for the reasons expressed in its reply exceptions, as well as those set forth in its post-hearing brief, which is incorporated herein by reference, the Commissioner adopt the holding of the ALJ.

Upon a careful review of the record before him, which, it is noted, does not include transcripts of the hearing below, the Commissioner rejects the initial decision for the reasons that follow.

Initially, the Commissioner notes Stipulated Finding of Fact No. 5, which states:

> Teachers of consortium classes are the employees of the school district which is providing the consortium class. (Initial Decision, ante)

This uncontested fact establishes unequivocally that the Board of Education herein was the sole employer of all the employees in question, both regular teaching staff members of the district and "Consortium" employees. That the Board would distinguish the later-created special education positions as consortium positions from any other teaching staff position in the district is an attempt to becloud the facts. The Commissioner finds any such attempts to so distinguish said positions does nothing more than introduce confusion into the record. All special education positions that resulted from an arrangement among the member districts of the Southern Burlington County Council for Special Education (hereinafter, "the Consortium") that were paid for by the Medford

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Lakes Board of Education were and are subject to the Board's authority and to the educational needs of the children in that district. In consideration of this uncontested fact and by virtue of N.J.S.A. 18A:28-5, the Board was precluded from dismissing or reducing in compensation any of its tenured staff members except for "inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title, after employment in such district or by such board***." The one exception to the Tenure Law is N.J.S.A. 18A:28-9, the Effect of Reduction of Force upon Persons Under Tenure, which 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.

In the instant matter, the Commissioner finds and determines that a RIF did, in fact, occur in the district herein, by virtue of a Board Resolution dated April 21, 1986, wherein one elementary position and one special education position were abolished. "Once a board has properly acted to abolish a position, the reduction in force has been accomplished and seniority rights are triggered. Seniority determinations then properly must be made in accord with the regulations in effect at that time. Those determinations may not be set aside at some later date." See Thomas S. Marshall v. Board of Education of the Township of Neptune, Monmouth County, decided by the Commissioner April 8, 1985, rev'd State Board, January 8, 1986, aff'd N.J. Super. Ct. (App. Div.) March 10, 1987. See also Edison Township Ed. Ass'n. v. Bd. of Ed. of the Township of Edison, decided by the Commissioner, June 18, 1984, aff'd State Board December 7, 1984.

Regardless of what the perceived needs of the district may have been in the months following April 21, 1986, and notwithstanding the fact that the Board later recognized and acted upon the realization made by the Consortium that additional positions in special education would be available in the Medford Lakes District, the Board's obligation at the time of the April 21, 1986 RIF was to develop a preferred eligibility list for each area affected by the RIF. Said list was timely prepared and is incorporated into this decision as follows:

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Elementary Teachers Full-time	Years of Seniority
* * *	
Laurie Oakes	6
Claire Greenberg	5.6
Nancy Balczun	5.5

Teacher of the Handicapped	Years of Seniority
Suzanne Hennessey	5.5
Nina Smith	4
Laurie Oakes	3
Cathy Moffitt	4
Eugene Davis	4
Robyn Barr	5

Said eligibility list makes entirely clear the fact that Laurie Oakes enjoyed seniority in the position of elementary teacher over both Claire Greenberg and Nancy Balczun. Thus, it is the Commissioner's finding that there was no transfer involved in Ms. Oakes assuming the newly created position of elementary teacher that was made available in June of 1986. Rather, by virtue of her having been properly placed on the two preferred eligibility lists that her service in both categories required, when the position of elementary education teacher was created, she rightfully became entitled to it before either Claire Greenberg or Nancy Balczun. No issue of Board discretion was in play. N.J.A.C. 6:3-1.10(i) and (j) required she be placed in that position. Said regulations state:

> (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 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

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> next preceeding 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.

From this finding all else follows. When the Consortium positions in special education became available in June 1986, pursuant to N.J.A.C. 6:3-1.10(k), a vacancy occurred in a teacher of the handicapped category, setting into play a recall.

> (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.

Once that opening occurred, Ms. Oakes should have bumped back to the teacher of the handicapped position, pursuant to her rights under the seniority regulations, thereby creating a vacancy in the elementary category to which petitioner was eligible by virtue of her tenure and seniority. 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.

In Janet D. Miles v. Board of Education of the Borough of Watchung, decided by the Commissioner June 14, 1984, aff'd St. Bd. December 5, 1984, aff'd N.J. Super. Ct. (App. Div.) December 5, 1985, a case involving facts comparable to those in the instant matter, the Commissioner's decision stated the following, quoting Elizabeth Miller v. Board of Education of the Township of Mendham, decided by the Commissioner May 17, 1982, rev'd and remanded St. Bd. February 1, 1983, Decision on Remand, November 7, 1983:

> The only question, in the Board's view, is whether it is obligated to change its earlier action abolishing the two full-time positions and alter its administrative reorganization of the related arts program to protect the petitioner's alleged entitlement to a full-time salary. The Board maintains that a full-time position cannot be insisted upon when such insistence will, in the opinion of the superintendent, substantially interfere with district goals.

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The petitioner's reliance on Miller, above, is misplaced. In order to understand Miller, it is necessary to look at Klinger v. Cranbury Bd. of Ed., OAL DKT. EDU 5679-79 (Nov. 19, 1980), modf'd Comm'r of Ed. (Jan. 8, 1981). The court notes, however, in its decision in Miller, the State Board of Education specifically addressed Klinger, stating

> As in Klinger, supra, this Board had the right to reorganize and abolish full-time positions. As in Klinger, we find that such action was taken in good faith and was the result of a legitimate reorganization. However, in this case, there appear to be other positions which Miller was qualified to fill. We find the board retained two full-time tenured teachers, at least one of whom was teaching English courses which petitioner was qualified to teach. Petitioner holds certification as an English teacher and taught those courses on a part-time basis in the district for five years....
>
> We cannot determine from the record whether an attempt was made by the Board to acknowledge petitioner's tenure in the district by eliminating one of the non-tenured teachers or reducing one of the non-tenured teachers to a half time position. Before reducing petitioner to a half-time position, while retaining two full-time non-tenured teachers, the Board was obligated to make a good faith attempt to acknowledge petitioner's tenure rights and assign her to teach the courses which the Board had assigned to a[t] least one of the nontenured teachers.... [Slip op. at 5]

The State Board also stated, "If the full-time employment of petitioner would have been accomplished without realignment of class schedules or without impairment of the Board's flexibility to reorganize its school program, it was bound to honor petitioner's tenure rights, giving due regard to her qualifications, prior service and abilities." (emphasis supplied) (Miles, N.J. Super. Ct. decision, Slip Opinion, at p. 8)

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In the instant matter, the Commissioner determines that the Board has not demonstrated that "there was a sound educational reason for the respondent's decision" to place Ms. Oakes in its newly-created, first grade regular elementary position instead of permitting her to bump back to the position from which she was riffed and recalling petitioner. (Board's Post-Hearing Submission, at p. 7) The Commissioner specifically rejects the Board's argument that:

> *** the respondent's learning consultant and child study team member, Estrella Wells, testified that just as Mr. Davis' teaching strengths were best suited to a newly created class now supervised by Dr. Kleinbord, there was a group of kindergartners moving into the first grade in the 1986-87 school year that Ms. Oakes (Charnowsky) was particularly well equipped to teach. This group had auditory problems that Ms. Oakes (Charnowsky) was well equipped to deal with. (Id., at p. 7)

The Commissioner finds this argument lacking in support notwithstanding the ALJ's conclusion at page 4 of the initial decision as to the persuasiveness of the testimony of Estrella Wells, a member of the child study team, because the Board freely admits that the class was a regular elementary position, not one of classified students. As such, there can be no basis for averring that a teaching staff member with teacher of the handicapped certification would be better equipped to deal with such children than one certified as a regular elementary teacher, particularly in light of the Board's vague reference to "auditory problems." It is to be noted that at no time does the Board elaborate upon the nature of such problems nor does it contend that the children with these alleged problems were classified as educationally handicapped.

Further, since it is not at all clear from the record at what point the Board of Education herein became aware that such a condition among this group of children existed, if it existed at all, it might well be suggested that the explanation proffered by the Board as to why it denied petitioner her lawful tenure right to teach the regular elementary position was a mere pretext for justifying its preference for Ms. Oakes over petitioner as a teacher in the first grade regular elementary class. Had such children been classified as auditorily handicapped, then, perhaps, the Board might argue it had a sound educational basis for requiring the teacher of that class to hold teacher of the handicapped certification in addition to or instead of regular elementary certification.

It is further noted that the record before the Commissioner does not include transcripts of the hearing below. In this regard, the Commissioner observes the following statement in petitioner's exceptions:

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> We regret the inability to specifically designate references to the transcript in this case but given the Administrative Law Judge's ruling at the end of the hearing that post-hearing briefs would be due prior to any reasonable expectation that a transcript would be received, no transcript was ordered by Petitioner in this case. (Exceptions, at p. 14)

Notwithstanding that post-hearing briefs may have been directed within a time frame which would have made it difficult to cite transcript excerpts, the Commissioner notes that had petitioner deemed transcript citations essential, they could have been ordered on an expedited basis. In the alternative, if petitioner deemed actual testimony essential to demonstrate her point, transcripts could have been ordered so that they were available for filing with her exceptions before the Commissioner. Failure to do so must be attributed to petitioner and not to any other cause.

Accordingly, the Commissioner finds and determines that the tenure and seniority rights of petitioner require that she be made whole as a result of the Board's having failed to recall her from the preferred eligibility list at the time it became aware of the five additional openings in Special Education, one position of which was rightfully Ms. Oakes. Notwithstanding this determination, the Commissioner finds petitioner has failed to meet her burden of persuasion that the Board's actions were made in bad faith or that they were a result of pro-union bias because she was the only non-union teacher in the district. Notwithstanding any determination as to whether the Board's actions were well-intentioned, they were taken in derogation of petitioner's tenure and seniority rights, which the Commissioner cannot sanction.

Accordingly, the initial decision is hereby rejected. The Board is directed to reinstate petitioner to the full-time elementary position to which she was entitled by virtue of her tenure and seniority at the time the Board acted to create the five special education positions that should have resulted in a recall from the April 1986 reduction in force in the Medford Lakes School District. The Board is further directed to compensate petitioner forthwith for any lost salary or emoluments of her tenured position suffered as a result of her being reduced to a part-time employee.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

July 16, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7796-85
AGENCY DKT. NO. 361-10/85

VIOLET NEALY
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY, DEPARTMENT OF EDUCATION OF THE STATE OF NEW JERSEY, AND THE UNION COUNTY SUPERINTENDENT OF SCHOOLS,
Respondents.

Mary Jane Cullen, Esq., for petitioner
(Ruhlman, Butrym and Friedman, P.A., attorneys)

Allan P. Dzwilewski, Esq., for respondent, Board of Education of the Borough of Roselle
(Green and Dzwilewski, P.A., attorneys)

Arlene G. Lutz, Deputy Attorney General, for respondents, Department of Education of the State of New Jersey and the Union County Superintendent of Schools
(W. Cary Edwards, Attorney General of New Jersey, attorney)

Record Closed: April 30, 1987 Decided: June 4, 1987

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BEFORE STEPHEN G. WEISS, ALJ:

On October 18, 1985, Violet Nealy filed a verified petition of appeal with the Commissioner of Education. The petition alleged that she had been a teaching staff member in the employ of the respondent Board of Education of Roselle since March 1982 and that although she became eligible for permanent certification as a teacher of science in 1984 when she completed certain required courses, nevertheless she was advised in May 1985 that she would not be certified (and thereby entitled to be employed) unless she took a National Teacher Examination (hereinafter "NTE") test of subject matter knowledge pursuant to N.J.A.C. 6:11-5.1(a). According to Nealy, since she previously had completed all of the requirements for certification, it was improper for the Board to compel her to take the test, and her discharge from employment in September 1985 because she had failed it and was not certified was illegal.

Nealy also alleged that both the Board and the Union County Superintendent of Schools had "misprocessed" her credentials and application, and as a consequence she had improperly been denied issuance of her permanent certification. Moreover, she claimed that since she was, in fact, a tenured teaching staff member, her discharge from employment without a hearing was in violation of her due process rights under N.J.S.A. 18A:6-10 et seq.

Named as respondents were the Board, the Union County Superintendent of Schools and the Department of Education, and answers were filed by those parties. According to the Board, it was advised in May 1985 by State officials that since Nealy's application for a standard certificate was not timely filed, she would have to pass the appropriate NTE test to be certified and thus employable. When she failed to do so, her discharge from employment was mandated. The answer filed by the Attorney General on behalf of the Department of Education and the Union County Superintendent of Schools maintained that in view of the 1984 amendment to the certification regulations, and given the late filing of her application, Nealy was required to pass the NTE test in her subject area in order to be certified, which she failed to do. In addition, these respondents raised as a separate defense the 90-day period of limitations now set forth in N.J.A.C. 6:24-1.2(b).

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Following the filing of the answers, the matter was transmitted by the Commissioner of Education to the Office of Administrative Law as a contested case in December 1985 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 on February 21, 1986, by Administrative Law Judge Leon S. Wilson and hearings were scheduled to begin in late April 1986. However, since motions relating to the 90-day rule were to be filed by the parties, it was recognized that the hearings might have to be adjourned. Thereafter, in March 1986, motions for summary decision were filed by both respondents. In the interim, the matter was reassigned to the undersigned administrative law judge and oral argument on the motions was heard on April 11, 1986. I then issued a letter opinion on April 17, 1986, in which I denied the motions in view of the existence of factual disputes touching upon the 90-day rule question.

Thereafter, due to a variety of circumstances, new hearing dates also had to be adjourned. Efforts to reschedule the hearings were further delayed by virtue of the serious illness of Mr. Leonard Moore, the Board's assistant superintendent of schools and a potential major witness. Ultimately, Moore passed away, and hearings were conducted on February 4 and 5, 1987. The record was closed on April 30, 1987, following my receipt of the State's reply brief.

TESTIMONY

A. Joint Exhibits

At the outset of the hearing, with the cooperation of counsel, several joint exhibits were marked into evidence by consent (Exhibits J-1 through J-40). Each will be referred to, as needed, hereafter. Suffice it to say that these joint exhibits included pertinent documents which tracked the employment and certification status of petitioner.

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B. Petitioner's Testimony

Petitioner was the sole witness on her behalf. She graduated from Alabama State College in 1968 with a B. S. degree in biology and was certified to teach in Alabama (Exhibit J-1). In 1970, after petitioner moved to New Jersey, she began to look for a teaching position. However, since she did not hold New Jersey certification she requested information from the Hudson County Superintendent of Schools regarding the same. Following an analysis of her credentials, the County advised Nealy that she satisfied the requirements for a secondary certificate in science (Exhibit J-2). Nevertheless, she decided not to pursue a teaching career at that point and obtained other employment in New York City. In July 1975, Nealy became employed in a nutritional education program conducted by Rutgers University and she taught there until 1981.

In 1980, petitioner applied for New Jersey certification. In a letter dated July 9, 1980 from the State Board of Examiners to the County, it was noted that the certification regulations had changed since Nealy's last evaluation. To qualify for a regular certification to teach science, she would now have to complete two courses in methods of teaching reading and one course in human and intercultural relations. The letter further noted that Nealy was eligible for a one-year temporary certificate as a teacher of science (Exhibits J-3, J-4).

In early 1982 Nealy applied for a teaching position in Roselle and was hired as a high school biology teacher, effective March 9, 1982, pending receipt of her transcripts (Exhibits J-5, J-6, J-7). In the meantime, the Board processed requests for the issuance of both emergency and provisional science certificates for her (Exhibits J-8, J-9). A temporary certificate as a teacher of science was issued covering the period April 1982 to July 1982 (Exhibit J-10). A note to Nealy from Mary Ocskay, the secretary to the superintendent of schools, dated May 10, 1982, advised her that she should, "be sure to have the transcript of the necessary credits sent to our office when you have completed the credits" (Exhibit J-11).

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In June 1982 the Board rehired Nealy for the 1982-83 school year, effective September 1, 1982 (Exhibit J-12). According to petitioner, no mention was made concerning renewal of her temporary certification which expired on June 30. However, since she had become pregnant, Nealy was granted a maternity leave of absence beginning September 10, 1982 (Exhibit J-13). It was her intention to remain on maternity leave until January 1983.

Nealy's child was born in September 1982, and although she had expected to remain on leave longer, she returned to work in November 1982 because the assistant superintendent, Moore, asked her to do so (Exhibit J-14). Although petitioner's temporary certificate had expired on June 30, 1982, she never reapplied for certification, and she taught for the balance of the 1982-83 year without one. During the Spring of 1983, Nealy completed a three-credit course at Jersey City State College in human and intercultural relations (Exhibit J-16); and in May 1983, she was reappointed to teach for the 1983-84 school year (Exhibits J-17, J-18). In July 1983, Ocskay sent a note to petitioner asking her to forward the transcripts of the courses she took for the renewal of her substandard certificate. Nealy supplied Ocskay the following month with a Jersey City State College transcript related to the human relations course (Exhibits J-15, J-16).

In September 1983, Nealy again began work without a certificate, and following an exchange of correspondence among Ocskay, the Union County Superintendent of Schools and the State about her status (Exhibits J-19 through J-27) an emergency science certificate was issued covering the period December 1983 through June 30, 1984 (Exhibit J-28).* During the 1983-84 school year petitioner successfully completed the other two required reading courses at Jersey City State. In the interim, in January 1984, Ocskay sent a note to Nealy reminding her to, "be certain that your transcripts of the necessary courses arrive in this office in time for the next renewal which will be July 1984." (Exhibit J-29). In April 1984, the Board voted to rehire petitioner for the 1984-85 school year (Exhibit J-30). As far as Nealy was concerned, since she successfully had completed

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*Thus, Nealy taught without benefit of any certificate from November 1982 through June 1983, and from September 1983 to December 1983.

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the other two required courses by May 1984 (Exhibit J-31), she had done all she had to do in order to be certified, and the necessary administrative activities surrounding issuance of her permanent certificate would be taken care of for her by the Board. Thus, petitioner took no steps independently to comply with Ocskay's January 1984 reminder, and she began work in September 1984 again without benefit of any certificate to teach.

Nealy taught through the entire 1984-85 school year. At some time during January 1985, she became aware through reading a newspaper that a test would be required of teachers in order to be employed in New Jersey. However, she did not think the requirement applied to her since she knew she had completed the courses needed to satisfy the State's requirements. On January 28, 1985, Ocskay asked Nealy to provide the transcripts of her two other courses and Nealy personally delivered a written request to the Jersey City State College Registrar's Office asking them to send the data to the Board (Exhibit P-3). However, it was not until February 25, 1985, that the official copy was received by Ocskay from Jersey City State (Exhibit J-32). On March 1, 1985, Nealy filled out an application for issuance of a permanent certificate (Exhibit J-33). According to petitioner, as of this point she still had not been told by anyone, nor was she aware, that she would have any problem obtaining her permanent certification to teach science. However, sometime in late April 1985, Nealy received through interoffice mail a packet from the State Board of Examiners advising that her credentials had been evaluated and that her certificate would be issued only upon completion of a test requirement (Exhibit J-34e).* Petitioner said she viewed the requirement as "just aggravation they kept putting me through."

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*Exhibit J-34 consists of five separate copies of the same printed form, each containing different handwritten notations (Exhibits J-34a, b, c, d and e). Suffice it to say that Nealy identified J-34(e) as the communication she received in which she was advised that her comprehensive science certificate would be issued after she completed an NTE test requirement. Attached to the form was a list of the cutoff scores for each subject area, times and locations of the test, and an information sheet which mentioned February 1, 1985, as the cutoff date for applications from persons who sought certification without having to take a test.

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In a letter to Nealy dated May 7, 1985 Moore asked her to make an appointment to see him "regarding your teacher certification for the forthcoming school year." (Exhibit J-35). Nealy met with Moore, who informed her that since her application for permanent certification had been received by the State beyond the deadline date (February 1, 1985), she would have to take the NTE test in order to be certified. Nealy said she called the Department of Education herself that same day and spoke to a Mr. Epstein, who also told her that her papers had been filed too late.*

On June 15, 1985, Nealy took the NTE test for a comprehensive science certificate and was advised in July 1985 that she failed to obtain a passing grade (Exhibit J-39). She claimed that given the lack of prior notice to her concerning the need to take a test, she did not have adequate time to prepare and that is why she failed.

At some point during June 1985, Nealy had received a communication from the board secretary, Mr. Quirk, entitled "Statement of Employment" which advised her that, "As a tenure teacher you are employed by the Roselle Board of Education for the school year 1985-86 at the salary of $19,749" (Exhibit J-36). In addition, Nealy was employed in the Roselle summer school. In a letter dated August 26, 1985, from the superintendent of schools, she was informed that she should report to work on September 3, 1985, and that she would receive a schedule of her professional commitments (Exhibit J-37).

However, just three days later, in a letter from Moore dated August 29, 1985, petitioner was advised that since she had scored only 470 on the NTE test in biology and general science, she was ineligible to receive teacher certification and could not be reemployed as a teacher for the 1985-86 school year (Exhibit J-38). According to Moore's letter, the Board had been instructed by both the State and the County Superintendent that it "can no longer employ teachers with sub-standard certificates for the School Year 1985-86, unless they pass the NTE in their area of specialty before September 1, 1985."

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*The exact date of petitioner's meeting with Moore was never specifically ascertained. It probably took place soon after Nealy received the letter, but it could have been anytime in May.

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This letter, said Nealy, was the first notice she ever received that she would not be employed. On September 3, 1985, Nealy met with the superintendent of schools, Moore and Roselle Education Association representatives concerning her status. When it turned out to be both a short and an unsuccessful meeting, Nealy decided to bring legal action. A petition of appeal, verified by Nealy on October 11, 1985, was mailed on October 16, 1985, and received by the Office of the Commissioner on October 18, 1985.*

On cross-examination, Nealy insisted that when she met with Moore in May 1985, the subject of her tenure also came up, and his secretary (not Ocskay) looked at her file and told her she was tenured. Nealy also maintained that although she was aware prior to that meeting that she had to take an NTE test in order to be certified, she did not understand nor was she told that she could not teach unless she possessed a certificate. Nealy reached this conclusion because she had taught before in Roselle without having satisfied all of the necessary criteria for certification and did not distinguish among permanent, temporary, provisional or other types of certificates.

Nealy also revealed that at the same May 1985 meeting with Moore, he asked her to step out of his office while he called Dr. Celeste Rorro, Director of Teacher Certification in the State Department of Education. After making the call, he asked Nealy to come back into his office, where he again told her that in order to be certified she had to take the NTE test. Earlier that same day Nealy had called Epstein who, she said, also told her she had to take the test.**

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*Nealy did not testify as to these three dates, nor was her petition of appeal marked as an exhibit. However, these dates are relevant to the 90-day rule issue and reference to them has been inserted at this point. The State's original brief, filed in March 1986, identifies October 18, 1985, as the filing date of the petition of appeal.

*According to petitioner, Epstein was the person in charge of her file. He told her that "I have your papers, but they were filed too late, Miss Nealy. You have to take the test." When she told him it was the Board's fault, not hers, he purportedly then told her she did not have to take it. However, when she then told him the Board insisted, he replied, "well, then you will have to take the test. . . ."

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With respect to the specifics surrounding her attempts in late January 1985 to obtain the transcript from Jersey City State College, Nealy offered the following additional details. According to petitioner, when Ocskay spoke to her, the secretary seemed to be under the impression that Nealy had not, in fact, completed the courses. Nealy said she told Ocskay that she certainly had successfully completed the courses and she went personally to Jersey City State to request that the transcript be sent to Roselle. According to Nealy, at no time was she made aware by Ocskay or anyone else that unless the transcript and her application were received by the State by February 1, 1985, she would have to take the NTE test to be certified.

Nealy also revealed during cross-examination that she took the biology and general science NTE test a second time in October 1985, and although she received a higher numerical score than the one she received in June, she again failed it. She presently is employed by a local bank in its wire transfer department.

Following the conclusion of petitioner's testimony on direct and cross-examination, I then briefly questioned her with respect to certain aspects of her case. She related that she went personally to the Registrar's Office at Jersey City State College to deliver the transcript request, but she could not identify who wrote on the document the words "resent 2/22/85." (Exhibit P-3) She assumed it was someone in the Registrar's Office and it meant the college had sent the information previously and was sending it again on February 22.

Also, with respect to the meeting she had with Moore in May 1985, and the question of her tenure, Nealy further described it as follows. Moore's secretary looked at a file and told Moore that ". . . yes, she's been here this amount of time. . . . And I said do I have tenure and he said you're [sic] satisfied tenure." Petitioner insisted that it was not until she received the August 29, 1985, letter from Moore (Exhibit J-38) that she was made aware for the first time that Roselle did not intend to employ her as a teacher. She was adamant that at no time prior to that point did Moore or anyone else tell her otherwise. As far as Nealy was concerned, she had to take a test because she was told to do so, but there was no consequence as far as her tenure or employment was concerned.

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C. Respondents' Motions to Dismiss or for Summary Decision

Prior to presentation of testimony on behalf of the respondents, I granted a motion to dismiss the Union County Superintendent of Schools as a respondent.* In addition, since petitioner's proofs now were completed, I again entertained oral argument with respect to respondents' motions to dismiss on the basis of the "90-day rule." Although those motions were denied, I reserved the opportunity to address the issue again in my Initial Decision following the submission of final briefs.

D. Testimony for the Roselle Board

The only witness called by the Board, in view of Moore's death, was Mary Ocskay, secretary to the superintendent of schools, who has been employed by the Board for 25 years. It was she who prepared the letter of May 7, 1985, in which Nealy was asked to make an appointment to see Moore regarding her certification (Exhibit J-35). When Nealy met with Moore, Ocskay was present part of the time. As she put it, "I heard some of the conversation with Mrs. Nealy. But I wasn't present throughout the whole meeting."

Ocskay recalled that the only subject discussed at the part of the meeting she attended was the question of Nealy's need to take the NTE test. She insisted that contrary to petitioner's version, Moore told Nealy that since petitioner did not have her permanent certificate, in order to continue to be employed in Roselle in September 1985 she would have to take the test because "without it, she couldn't come back." As Ocskay specifically recalled, Moore said, "Mrs. Nealy, you won't have a job in September. You must have the proper certificate." According to Ocskay, Nealy became quite concerned and asked Moore to explain why she now had to take the test since she had finished her certification requirements in 1984. Moore replied that he had spoken to the State and that "this was the only way to go."

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*Petitioner did not oppose the motion. However, it was granted "without prejudice" as a technical matter in the event petitioner was found to be entitled to relief requiring the County's participation.

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With respect to any direct communication she had with Nealy concerning the obtaining of transcripts for submission to the State, Ocskay identified the letter from the superintendent dated January 17, 1984, in which petitioner was advised that it was necessary that the transcripts of her courses "arrive in time for the next renewal." (Exhibit J-29). At that point, according to Ocskay, neither she nor her superiors had any way of knowing whether Nealy had satisfied the course requirements. Ocskay fully expected promptly to receive the transcripts from Jersey City State so that a provisional certificate could be issued for the 1984- 85 school year. Nevertheless, Ocskay did not hear from Nealy until early September 1984 when the teachers reported for work. Nealy told Ocskay she had completed all of the required courses, and Ocskay then told petitioner:

> I said that's wonderful, Mrs. Nealy. Have your transcipt sent to us so we can get processing for permanent certificate. I was delighted for her. She said okay. Then the next that I remember was Mr. Moore saying to me, Mary, you know some of these people that are on emergency certificate must have their requirements completed by a certain date. He said so do we have anybody that does not have a permanent certificate, and [I] said, well, Mrs. Nealy. And he said, well, how do we stand, and I said I called her. She was going to have the transcripts sent and we haven't received them as of yet. He said call her. I called her and I remember her saying to me haven't they arrived yet and I said no, they haven't, Mrs. Nealy. She said okay, I'll get them to you. That was it.

It is Ocskay's belief that it is the responsibility of a candidate to obtain course transcripts, and it was Ocskay's duty only to remind employees of that obligation. As Ocskay put it, "the teacher must know this herself or himself. They are responsible for getting me the transcripts. That's not my job. Really, I just remind them that its due." Eventually, on February 25, 1985, the transcripts of Nealy's course completion were received from Jersey City State and Ocskay sent petitioner a note confirming they had arrived that date and asking her to complete an enclosed form and return it to Ocskay with a check or money order made payable to the Commissioner (Exhibit J-32).

On cross-examination, Ocskay testified further about the May 1985 meeting which petitioner had with Moore. He was, she said, concerned about the status of Nealy's

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certification. Although Ocskay was not present during the entire meeting, she insisted that she distinctly heard Moore tell petitioner that unless she took the NTE test she could not work in Roselle. Petitioner, she said, was expressly told by Moore that "you have to do it, otherwise you can't go in the classroom in September. The state is standing very firm on that point."

E. State Department of Education Testimony

The only witness for the State was Dr. Celeste Rorro, Director of Teacher Certification and secretary to the State Board of Examiners. Her responsibilities include enforcement of regulations dealing with evaluation of credentials for teacher certification. Under the revised regulations implemented in 1984, to obtain a permanent certificate (except for limited instances not here pertinent), one must hold a Bachelor's degree with a major in the subject teaching field and must obtain a passing score on the appropriate National Teachers Examination.

Rorro explained that the major initiative relative to teacher preparation which led to adoption of the revised regulations was the desire to enhance the quality of teaching in the public schools. The requirement regarding the NTE was delayed to February 1, 1985, so that anyone applying for certification after that particular date had to complete the test requirements.*

Rorro further noted that previously, in addition to permanent certification, one could hold an emergency, provisional or temporary certificate. All were "substandard" in nature and had to be renewed each year. Under the current regulations, as amended, such certificates have been abolished, except for the limited area where persons who lack

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*Although N.J.A.C. 6:11-5.1(a) became operative as of October 15, 1984, the deadline date of February 1, 1985, was established administratively for reasons to be described infra. Included in the packet received by Nealy was an information sheet which expressly noted that "the tests are required for all applicants including those for whom evaluations were completed prior to February 1, 1985 [but who applied after that date] (Exhibit J-34(e)).

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professional education requirements are eligible to take the so-called "alternative route" for certification. In any event, Rorro stressed that no one, even those on the "alternative" path, can be certified unless they satisfactorily pass a test of subject matter or general knowledge.*

According to Rorro, the critical date for determining when an application is timely filed is when it is received at the Office of Teacher Certification, not when it is dated by the applicant. Following receipt of the application, the teacher's credentials are evaluated, including the transcripts of college course work. Where it is determined that an individual has not met all of the requirements for certification, notice to that effect is sent to the person through the appropriate county office. New Jersey, she said, chose the NTE as the subject matter test instrument for certification purposes since it had been in use elsewhere for 20 years and had a high reliability rate. The first year the tests were used was 1985, and the State established what Rorro described as a "conservative" passing score. Indeed, in view of an analysis of the first year's experience, the minimum passing score for the second year of the test was raised. In any case, said Rorro, the failure rate was not high with respect to either the 1985 or 1986 tests.

Rorro also pointed out that an individual could not really study for a subject matter NTE test because it is an "achievement" test which measures the knowledge one has obtained from his or her college preparatory work. With respect to the comprehensive science certificate sought by Nealy, an applicant can take either the "biology and general science" part or a specialty area covering chemistry, physics and general science. A person who holds this certificate can teach in grades K through 12, and it covers teaching general science in the elementary grades up to advanced placement college preparatory courses in high school.

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*Moore's May 7, 1985, letter to Nealy (Exhibit J-35) made reference to "the alternative route for certification." However, as Rorro explained, this applies only to persons who, unlike Nealy, had not completed the professional education requirements. Nevertheless, they, too, must pass an NTE test to be certified. See, N.J.A.C. 6:11-5.1(a)2, 5.3(a)2.

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Rorro then reviewed petitioner's history as contained in the files of the Office of Teacher Certification. Nealy first made contact in the early 1970's when she sought an evaluation. She was advised at that time that she was eligible under existing regulations for a science certificate. However, she never applied. In 1980, Nealy made inquiry through the Hudson County Superintendent of Schools. She was notified that the certification regulations had changed and in order to be eligible for certification she would have to complete two courses in reading and one course in human and intercultural relations.

The next time Nealy came to the attention of Rorro's office was in April 1982 when a request was received from Roselle for issuance of a temporary certificate. A similar request was received in November 1983. Thus, Nealy held substandard certificates from April 1982 to June 30, 1982 and from December 1983 to June 30, 1984.* It was not until late March 1985 that Rorro's office received Nealy's application for a standard certificate through the Union County Superintendent of Schools (Exhibit J-33). Upon review, it was determined that because the application was received after February 1, 1985, a standard certificate could not be issued because petitioner had not completed the NTE test requirement.

Rorro was unaware of any instance whereby a certificate ever was issued to an individual who was required to, but did not, take a test and whose application was received after February 1, 1985. Rorro also was unaware of any situation whereby one required to take the NTE obtained a waiver of that requirement since the regulations prohibit it. See, N.J.A.C. 6:11-3.23(b)1.

On cross-examination, Rorro explained that February 1, 1985, was chosen as the deadline date for receipt of applications in order to accommodate seniors then in college who were completing their preparatory course work, especially in December 1984. However, seniors who would not complete all of their teacher preparation courses until after February 1, 1985, were not covered. They, too, had to take a test to be certified.

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*Nealy therefore taught without benefit of any certificate in March 1982, for the entire 1982-83 school year, from November 1983 to December 1983, and for the entire 1984-85 school year.

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With respect to public dissemination of information pertaining to the test requirement, Rorro explained that major efforts were taken to inform all persons who had a need to know. While no information was sent from Rorro's office directly to individual teachers, data was made available to individuals through the county superintendents and the local employing boards.

Finally, Rorro again addressed herself to whether one could study for an NTE test since Nealy claimed in her petition and during the course of her testimony that she was not given advance notice sufficient to allow her adequate time to study for the test she took. According to Rorro, the NTE tests are "end-of-program" tests intended to measure the extent of the knowledge that a teacher is expected already to have in the subject field. Furthermore, the knowledge which is tested is very basic to the particular field. The fact that Nealy had not done well on the chemistry portion of the general science part since she had not taught chemistry or had a course in it since she was in college nearly 20 years earlier would not, in Rorro's opinion, have had any significant impact. The witness pointed out that the particular test which Nealy took essentially was a biology test, and if some chemistry knowledge also was tested, this is perfectly appropriate since chemistry is a relevant cross-discipline. Thus, the State expects that one seeking a comprehensive science certificate ought to be knowledgeable with respect to chemistry as well as biology, at least on a basic level. Rorro stressed that even if one took a refresher course in chemistry, it should not have any significant effect since the particular test that Nealy took was heavily weighted in the area of biology and there were not many questions in the chemistry or physics areas. In particular, there certainly were not enough chemistry questions to have made the difference between the score Nealy received when she took the test in June 1985 (470) and the score then needed to pass (530).

DISCUSSION

Applicability of N.J.A.C. 6:24-1.2(b), the "90-day rule."

Pursuant to N.J.A.C. 6:24-1.2(b), as amended May 5, 1986, a petition may not be filed "later than the 90th day from the date of receipt of the notice of a final order,

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ruling or other action by the district board of education which is the subject of the requested contested case hearing." Thus, the threshold issue to be determined is whether the filing by petitioner of her petition of appeal on October 18, 1985, was in violation of that regulation and, if so, whether the rule should nevertheless be relaxed in her case pursuant to N.J.A.C. 6:24-1.17, because "strict adherence thereto may be . . . inappropriate or unnecessary or may result in injustice."

According to respondents, although there are various dates from which the 90 days might be considered to have started in this case, none aid petitioner. These include:

(a) January 1985, when petitioner admitted she became aware from reading a newspaper that there would be a test requirement;

(b) May 1, 1985, the latest date she would have received the packet put out by the State Board of Examiners telling petitioner she would have to take an NTE test; or

(c) at the very latest, the date in May 1985 when Nealy met with Moore, who told her she would have to pass the test in order to be entitled to teach in the school district in September.

On the other hand, it is petitioner's position that the 90 days did not begin to run, if at all, until the end of August 1985, since that was the first time she officially was notified in specific terms by anyone that she would not be employed because she failed the test and was not certified. If petitioner is right, the 90-day rule does not apply. If respondents are right and the time was not tolled or the rule relaxed, her petition should be dismissed.

All parties agree that in order for the 90 days to begin to run, it is necessary that the action from which the appeal is taken be "definite and conclusive" so that the individual adequately is informed of the action and knows or should have known that he or she is affected by it. See, e.g., Stockton v. Board of Ed. of City of Trenton, 210 N.J.

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Super. 150, 157-58 (App. Div. 1986); Parisi v. Bd. of Ed. of Asbury Park, OAL DKT. 4233-85 (Jan. 17, 1986), adopted, Comm'r of Ed. (Feb. 25, 1986), aff'd, State Board (July 2, 1986).

Thus, petitioner argues that the triggering event in her case could not have taken place prior to the end of August 1985, since merely reading about a test in a newspaper hardly qualifies as an "other action" by the employing board or by the State and the receipt of a form through interoffice mail constitutes nothing more than an "informal" indication and cannot be cloaked with the sort of conclusiveness that the rule plainly anticipates. As to her conversation with Moore sometime in May 1985, Nealy, of course, claims she was given no firm indication by him that unless she took the test she would not be able to be further employed in the school district. In support of her version of the conversation which took place at the meeting, Nealy points to the telephone call that she placed to Epstein who, she said, told her that since the Board was late in processing her application, it was not her fault and she should not have to take a test. However, he then told her that since the Board insisted upon it, she should do so. Furthermore, Nealy maintained that during the May 1985 meeting she was told she had tenure, and at the end of her meeting Moore also told her that the issue would be subject to further discussion at a later date.

The Board takes the position that petitioner's version of some of the critical events is distinctly at variance with the true facts, and that the 90 days began to run, at the very latest, from her meeting with Moore. As far as the Board is concerned, petitioner was told in no uncertain terms by Moore, who also told her it was Rorro's same view, that she had to take the test to be certified and unless she was certified she would not be reemployed in the school district. The Board also points to Nealy's own version of her telephone conversation with Epstein, who confirmed what Moore told her about the need to take a test.

The State argues that the evidence reveals that by May 1, 1985, at the latest, petitioner was fully aware from the information packet that she had, as the State puts it, "a cognizable dispute." It also points to Nealy's failure to call Epstein as a witness to corroborate her version of the conversation they allegedly had.

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Based upon my review and consideration of the evidence in this case, I agree with respondents that the triggering event for commencement of the running of time under the 90-day rule should be deemed to be, at the latest, the date in May 1985, when Nealy met with Moore. Unfortunately, Moore's potential testimony was lost by virtue of his having passed away. However, having had the opportunity to hear at first hand the testimony of Ocskay and Nealy, I am firmly of the conviction, as Ocskay testified, that Moore did tell Nealy in unequivocal terms not only that she had to take a test, but that she could not teach in Roselle unless she did so. Ocskay, who was present for part of that meeting, flatly stated that Moore told this to Nealy in her presence, and I believe her. Furthermore, all agree that on that same day Moore also spoke to Rorro and then advised Nealy that Rorro also said she had to take the test to be certified. These circumstances compel the conclusion that Nealy received the sort of specific, definite and conclusive "other action" which the regulation anticipates in order for the 90-day period to begin to run. By the close of that meeting, Nealy knew that both the State and the Board required her to take and pass an NTE test in order to be certified and to continue to be allowed to teach in Roselle. I find Nealy's claim that she did not connect certification to employment to be incredible. Thus, assuming the meeting occurred as late as May 31, 1985 (even though it probably took place earlier), 140 days passed before Nealy filed her action; and unless the running of the time was tolled or the 90-day rule is relaxed, Nealy's petition should be dismissed.*

I agree, of course, that decisions such as those in Stockton and Parisi, and others, hold that the beginning of the running of the 90 days must attach to some unambiguous and definitive act and that where an individual is led reasonably to believe that he or she would be permitted to continue informally to seek certain relief and that he or she need not be concerned about the time limit, or is legitimately confused, the interests of justice would be disserved by applying the 90-day rule. See also, Brown v. Board of Education of Sussex Vocational School, (N.J. App. Div., April 4, 1985, A-4854-83T4) (unreported).

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*It is also quite arguable that May 1, 1985, the assumed day that Nealy received the information packet, should be the trigger date as the State suggests. However, the extra 30 days makes no real difference to the result I have reached.

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However, I do not believe that the record in this case contains anything like the confusion, ambiguity or other deficiencies noted in the cases relied upon by petitioner. While the absence of testimony from Moore was an impediment, I found the testimony of Ocskay to be an inherently credible. I do not believe she had any ax to grind against Nealy, and she impressed me as a witness who honestly and sincerely related her firm recollection of what had occurred at the May 1985 meeting. Given the credibility of that testimony, together with the admissions of Nealy herself as to the events which took place at that meeting, I am led inexorably to the conclusion that when petitioner left that meeting with Moore, she well knew that: (1) the State would not certify her unless she took and passed an NTE test; and (2) the Board would not continue her in employment in September 1985 until she accomplished the same. Nealy was not free then to pursue one course of action (take the test) and then wait to see what happened before starting the instant litigation. See, e.g., Bernards Tp. Bd. of Educ. v. Bernards Tp. Educ. Assoc., 79 N.J. 311 (1979); Riely v. Hunterdon Central High School Bd. of Ed., 173 N.J. Super. 109 (App. Div. 1980). Clearly, the 90 days began to run on May 31, 1985, at the latest.

Petitioner, recognizing the possibility that either May 1, 1985, as the State suggests, or the date of her meeting with Moore might be considered the trigger date for the running of the 90 days, argues that the time should be "tolled" for the following reasons. First, sometime during June 1985, before the 1984-85 school year even ended, she received the "Statement of Employment" from the Board secretary which informed her that she had tenure and that she would be earning a particular salary for the upcoming school year. Then, she was hired to teach in the summer school. Accordingly, as of late June 1985, despite what Moore told her about the consequences of not holding any certificate, and not having passed any NTE test, she was hired to teach, was told she was tenured, and received notice of her salary for the next school year. This combination of factors, she contends, clearly acted to put her mind at ease, if not to lull her into a false sense of security with regard to the 90-day rule, so that the running of the time stopped at some point in June and did not start again, if at all, until August 29, 1985.

I disagree. First, although it was "sloppy," to say the least, for the Board secretary to notify Nealy in June 1985 that she was tenured, for her to be hired to teach summer

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school, and then for the superintendent of schools to send her the August 26, 1985 letter, I do not believe that these events, alone or in combination, constitute enough of a predicate for a tolling of the running of the 90 days. Having been advised by the State by May 1, and then later told in unequivocal terms by Moore, that she had to take the test, and having herself confirmed that obligation in her telephone call with Epstein, Nealy knew she was required to take the test in order to be certified. The fact that she was hired to teach summer school is of no great moment since it had no connection with the certification requirement, and she knew it. Neither the letter of August 26, 1985, nor the Statement of Employment related to the test, so neither can provide a basis for her to claim that she was lulled into any false sense of security by them. Petitioner knew at all times that she was under a mandate both from the Board, through Moore, and from the State to take and pass the NTE test. Nothing relieved her of that known obligation in any regard. Furthermore, even if the August 26, 1985, letter can be treated as a tolling event, it adds only three or four days to the running of time and therefore would not be sufficient to provide her with relief from the application of the 90-day rule in any case. In short, Nealy's petition of appeal was filed well beyond the 90th day following her receipt of definite and conclusive notice that in order to be employed in September 1985, she had to take a test to be certified. No intervening events were significant enough to toll the running of this time.

The other aspect of the 90-day rule which has to be addressed is whether it should be relaxed pursuant to N.J.A.C. 6:24-1.17. Even though the events which took place in the interval between Nealy's meeting with Moore in May 1985, and the filing of her petition on October 18, 1985, do not provide an adequate basis to consider that any tolling took place, nevertheless it may be that in view of all the circumstances in this particular case the rule should be relaxed.

There are, of course, decisions wherein the 90-day rule has been relaxed, either by the Commissioner, the State Board, or by the Appellate Division. In the Brown case, for example, the Appellate Division ordered relaxation because petitioner had reasonable grounds to believe that he could continue to try to work informally to seek relief and not worry about the 90-day time limit. See also, Polaha v. Buena Regional School Dist., 212

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N.J. Super. 628 (App. Div. 1986). In Delk v. Bd. of Ed. of Pemberton, OAL DKT. EDU 8067-85 (July 6, 1986), rev'd by Comm'r (August 19, 1986), the Commissioner relaxed the rule because of the inadequacy of the record and the lateness in raising the untimeliness defense. So, too, in Parisi, the State Board in reversing the Commissioner held that the 90-day rule should be relaxed in the circumstances of that case because to hold otherwise would require petitioner and other teachers similarly situated to have to interpret the tenure and seniority laws and would give rise to potential litigation every time there was some suspicion that a position was going to be abolished, even where it might never occur. See also, Mele v. Bd. of Ed. of Ramapo-Indian Hills Reg., OAL DKT. EDU 2994-84 (Oct. 4, 1984) aff'd Comm'r. of Ed. (Nov. 19, 1984), (rule relaxed where seniority rules had to be interpreted); Bergenfield Ed. Assoc. v. Bd. of Ed. of Bergenfield, 1980 S.L.D. 1407, aff'd 1981 S.L.D. 1390 (issue raised was of statewide importance).

On the other hand, even though relaxation has been applied in some of the cases and is expressly memorialized in N.J.A.C. 6:24-1.17, the Appellate Division in Riely expressly cautioned that strict interpretation and sparing application is to be expected, and the Commissioner and the State Board have consistently been following that directive. See, e.g., Miller v. Morris School Dist., Comm'r. of Ed. (February 25, 1980); Baley v. Board of Ed. of Mansfield, Comm'r of Ed. (June 19, 1980), affirmed, State Board of Education (February 4, 1981); Pfeifer v. Bd. of Ed. of Willingboro, Comm'r. of Ed. (Sep. 17, 1980), aff'd State Board (June 4, 1981); Scotch Plains-Fanwood Assoc. v. Scotch Plains-Fanwood Bd. of Ed., 5 N.J.A.R. 175; Kallimanis v. Board of Ed. of Carlstadt, OAL DKT. EDU 868-80 (Aug. 9, 1980), affirmed Comm'r. of Ed., (September 26, 1980), affirmed State Board (March 4, 1981); Wright and Sobanko v. Board of Education of Belleville, OAL DKT. EDU 5299-80 (Dec. 5, 1980), affirmed Comm'r. of Ed. (January 23, 1981); Contardo v. Bd. of Ed. of Trenton, OAL DKT. EDU 6247-80 (May 12, 1981), affirmed Comm'r. of Ed. (June 26, 1981); Hall v. Board of Education of Englewood, OAL DKT. EDU 6399-80 (Dec. 11, 1981), affirmed Comm'r. of Ed. (January 26, 1982); Hyman v. Bd. of Ed. of Princeton Reg. H.S. Dist., OAL DKT. EDU 797-82 (April 26, 1982), affirmed Comm'r. of Ed. (June 11, 1982); Weir v. Board of Education of Northern Valley Regional High School District, OAL DKT. EDU 8609-83 (June 7, 1984), affirmed Comm'r of Ed. (July 20, 1984), affirmed State Board (March 6, 1985), affirmed, New Jersey Superior Court, Appellate Division, Dkt. No. A3520-84T6 (April 9, 1986) (unreported).

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Nevertheless, despite the abundance of cases which dictate that relaxation of the 90-day rule should be granted only sparingly and reserved for the most compelling situations, I have made a determined effort to give close attention to the question of whether the rule should be relaxed in this case because of the particular circumstances. Indeed, the possibility of such relaxation was foremost in my consideration of the summary decision motions heard in April 1986. When I issued my letter determination on April 17, 1986, in which I rejected the respondents' motions to dismiss under the 90-day rule, I noted that there might be facts touching upon the possibility of relaxation which ultimately might mandate such an equitable approach to this case. Now, however, having heard all of the evidence, and having had more time to consider the disputed facts, I reject the notion that relaxation is appropriate here.

While the Board legitimately may be the subject of severe criticism insofar as it permitted Nealy to teach more often than not without any certificate, the ultimate burden for her failure timely to obtain certification should fall squarely upon Nealy alone. It is unfortunate that Nealy labored under the self-imposed impression that she had accomplished all she had to do with regard to obtaining her certificate and that the logistical follow-up needed to obtain her transcript was the duty of the Board. However, as Ocskay made clear, it is the candidate who is responsible primarily to obtain the course transcripts—it is not the obligation of the Board. See, e.g., Sydnor v. Bd. of Ed. of Englewood, 1976 S.L.D. 113. Nealy was more than naive about her duty in this regard, she was, in fact, inexcusably lax and dilatory. Although petitioner completed the necessary courses in May 1984 and previously had been reminded in January 1984, and again in September 1984, to follow up, she did absolutely nothing about obtaining her official transcripts from Jersey City State until she was again reminded at the end of January 1985. Thus, this is not a case in which the untimely filing was caused by a delay not of the applicant's own making, as occurred, for example, in Givens v. Bd. of Ed. of Newark, 1974 S.L.D. 906. To the contrary, petitioner is a mature person who has been teaching in the public school system since 1982. She should have known that it was her duty to follow up in timely fashion.

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I am entirely convinced from all of the evidence that petitioner brought her predicament entirely upon herself, and no reasons exist to determine that adherence to the 90-day rule in her case would be "inappropriate," "unnecessary" or "lacking in essential justice." Nealy knew or should have known exactly what was required of her, and she was not misadvised, misled or deceived, deliberately or unintentionally. None of the cases which have been cited to me, or which I have read, in which relaxation occurred provide any ground to hold in Nealy's favor. There was not in this case any ambiguity, confusion or lack of certainty. There was, to the contrary, express notice to her on several occasions as to what she had to do, and she must suffer the inevitable consequences of her self-inflicted failure. The kinds of fact patterns which led to relaxation in other cases simply do not exist here.

Finally, I note that in her original reply to the motions to dismiss filed in March 1986, petitioner observed that the claim in her case was "analogous" to a statutory directive and the 90-day rule therefore might not apply to her at all. See, No. Plainfield Ed. Assoc. v. Bd. of Ed. of No. Plainfield, 96 N.J. 587 (1984). This argument was not further pursued. Suffice it to say I do not believe that the certification question in this case involves the sort of statutory entitlement that the Supreme Court had in mind in North Plainfield. Compare, Lavin v. Hackensack Bd. of Ed., 90 N.J. 145 (1982).

FINDINGS OF FACT

Accordingly, based upon my review of the evidence and testimony in this case, I make the following findings of fact:

1. Petitioner, Violet Nealy, was a teacher in the Roselle public schools during the period from March 1982 through the end of the 1984-85 school year.

2. Although employed by the Board for more than three consecutive school years, Nealy did not hold any certificate, substandard, standard or otherwise, during most of the time that she taught. In particular, she was not certified during March 1982, from July 1982 through November 1983 and from July 1984

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through the end of the summer school session in July or August 1985. Accordingly, for the 40-month period between March 1, 1982, and June 30, 1985, petitioner was certified for only 10 of those months.

3. In 1984, the State Board rules and regulations pertaining to teacher certification were amended and became operative on October 15, 1984, except that effective February 1, 1985, no person could receive a standard teaching certificate unless he or she passed a National Teacher Exam content area test. The February 1, 1985, cutoff date was adopted to accommodate seniors in college who would be completing their professional preparation course work in December 1984.

4. As of May 1984, prior to amendment of the regulations, Nealy had completed all of her required course work at Jersey City State College and was eligible for a standard certificate to teach science. Had she applied to the State for that certificate and filed her application with her official transcript prior to February 1, 1985, she would have been the recipient of such a certificate without any need to take an NTE test.

5. In January 1984, Nealy had been advised, in writing, by the superintendent of schools that she should be sure to provide her course transcripts with respect to her certification status. Nealy took no action in response to that notice. In September 1984 she was orally reminded to do so by the superintendent's secretary, Mary Ocskay.

6. By late January 1985, Nealy still had not provided the Board with a transcript. On January 28, 1985, she was advised by Ocskay that this was required of her. Accordingly, Nealy promptly went to the Registrar's Office at Jersey City State College to arrange to have the College send her official transcript to Roselle.

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7. The official transcript from Jersey City State reflecting Nealy's successful completion of the required course work was not received by Ocskay until February 25, 1985. A notation on the transcript indicates it was sent on January 31, 1985, and "resent" on February 22, 1985.

8. After her official transcript was received by the Board from Jersey City State on February 25, 1985, Nealy filled out an application for standard certification. That application, together with her transcript, was forwarded through the Union County Superintendent of Schools to the Office of Teacher Certification. The documents were received by the State sometime in late March 1985.

9. Sometime during January 1985 Nealy had read in a newspaper that a test requirement was now imposed with respect to obtaining standard certification to teach in New Jersey. She did not at that time understand it might apply to her.

10. By May 1, 1985, at the latest, Nealy received a packet of information in her interoffice mail promulgated by the State Board of Examiners which set forth that anyone who failed to submit an application for standard certification prior to February 1, 1985, would have to take an NTE test in order to be certified to teach in this state. The same packet advised Nealy that her credentials had been evaluated and that she would have to take a test to be certified.

11. Under date of May 7, 1985, Nealy received a communication from the assistant superintendent of schools, Leonard Moore, advising Nealy that she should make arrangements to meet with him by May 13, 1985, to discuss her certification status.

12. As a result of that communication, Nealy met with Moore sometime during May 1985. Mary Ocskay was present during a portion of that meeting. It is

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assumed for purposes of this case that the meeting was held on May 31, 1985, although it likely took place earlier.

13. At that May 1985 meeting, in Ocskay's presence, Moore expressly advised Nealy that in order to be certified she would have to take an NTE test, and that unless she passed the test she could not teach in Roselle begining the following September. At that same meeting, Moore told Nealy that he had called Dr. Celeste Rorro, Director of the Office of Teacher Certification, who confirmed that Nealy was not certified, that she could not be certified until she took and passed the appropriate NTE test, and that unless this occurred she could not teach.

14. On the same day she met with Moore, Nealy also called a Mr. Epstein, whom she understood to be in charge of her file at the Office of Teacher Certification. Epstein, too, told Nealy that she would not be certified unless she took the appropriate NTE test.

15. As of the conclusion of her meeting with Moore in May 1985, Nealy was completely aware that despite having completed her course work approximately one year earlier, in view of the new regulations she would be required to take and pass the appropriate NTE test if she expected to be certified to teach science and to continue in the employment of the Roselle Board for the 1985-86 school year. Moore said nothing to her which led her to believe the subject was open for further discussion.

16. Nealy took the NTE test in biology and general science on June 15, 1986, and obtained a score of 470. The cutoff score for a passing grade was 530. Thus, having failed the test, she was not eligible to be certified.

17. Prior to the end of the 1984-85 school year, sometime in June 1985, Nealy received a "Statement of Employment" from the Roselle Board secretary

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advising her that as a tenured employee she would be paid a certain salary for the upcoming school year.

18. In June 1985, as well, Nealy was engaged to teach in the Roselle summer school.

19. In a letter dated August 26, 1985, from the superintendent of schools, Nealy was advised that she should report for work on September 3, 1985, and that she would be given a schedule at that time.

20. In a letter from Moore dated August 29, 1985, Nealy was advised that because she had not successfully passed an NTE test, she was not eligible for certification and could not be reemployed by the Board for the 1985-86 school year.

21. On or about September 3, 1986, Nealy met with Moore and others in order to discuss her certification and employment status. The meeting was unsuccessful.

22. On October 18, 1985, Nealy filed her verified petition of appeal with the Commissioner of Education.

23. Pursuant to N.J.A.C. 6:24-1.2(b), Nealy was obliged to file her petition of appeal challenging the directive that she take and pass the appropriate NTE test to be certified no later than 90 days after she learned at the May 1985 meeting with Moore that she had to take such a test to be employed for the 1985-86 school year. Nealy failed to meet that 90-day requirement since her petition of appeal was not filed until October 18, 1985.

24. None of the events which took place in the interim between Nealy's meeting with Moore in May 1985, and the filing of her petition in October 18, 1985, constituted an appropriate basis to toll the running of the 90-day time period

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including, in particular, any conversation Nealy had with Moore or anyone else employed by the Board, her receipt of the Statement of Employment in June 1985, her engagement to teach summer school and her receipt of the letter of August 26, 1985.

In view of my findings with regard to Nealy's failure to comply with N.J.A.C. 6:24-1.2(b), and the absence of any basis to toll that time or to relax the rule, it is arguably unnecessary for me to address the other issues in this case which would be reached only if the 90-day rule did not apply or was to be relaxed. Nevertheless, in view of the time and attention devoted by counsel in their briefs to the "merits" of the case, and given the possibility that my decision as to the 90-day rule might be rejected by the Commissioner, a brief discussion of the other issues, while perhaps unnecessary, is appropriate.

It is clear that tenure cannot be bestowed other than in strict conformance with statutory requirements, including the necessity that the teacher hold an appropriate certificate. N.J.S.A. 18A:28-4. At no time during her entire career at Roselle did Nealy hold anything other than a substandard certificate. At no time did she ever possess a valid, permanent certificate. Accordingly, Nealy simply was never tenured and no gratuitous statements made to her, either oral or written, can confer it. See, e.g., Sydnor.

Petitioner contends, however, that she should be deemed to have been certified because she was eligible as of May 1984. This argument, too, must be rejected. None of the cases cited by Nealy to support this proposition are applicable. As respondents observed, many of the decisions involved situations wherein the staff member either had tenure and/or seniority and was certified, or where the delay in issuance of a certificate was the fault of others. See, K'Burg v. Bd. of Ed. of Lower Alloways Creek, 1973 S.L.D. 636; Givens; Kane v. Bd. of Ed. of Hoboken, 1975 S.L.D. 12; Fulton v. Bd. of Ed. of Long Branch, Comm'r. of Ed. (Oct. 20, 1980); Saad v. Bd. of Ed. of Dumont, 1982 S.L.D. 440; Hausser v. Bd. of Ed. of Ewing, OAL DKT. EDU 7715-82 (May 16, 1983), affirmed Comm'r. of Ed. (June 30, 1983); Fischbach v. Bd. of Ed. of North Bergen, OAL DKT. EDU 311-82 (Nov. 15, 1983), affirmed Comm'r. of Ed. (December 29, 1983), affirmed State Board

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(July 11, 1984); Amato v. Bd. of Ed. of Hudson Cty. Vo-Tech, OAL DKT. EDU 3904-85 (Dec. 5, 1985), reversed Comm'r. of Ed. (Nov. 8, 1984); Smith v. Bd. of Ed. of Atlantic Cty. Vo.-Tech., OAL DKT. EDU 6245-84 (April 12, 1985), affirmed Comm'r. of Ed. (May 30, 1985); and Nangle v. Board of Education of Cherry Hill, 1986 OAL DKT. EDU 7907-84 (Nov. 22, 1985), affirmed Comm'r of Ed. (Jan. 2, 1986). As the State observed in its post-hearing brief, the issue in many of those cases was whether the holder could "relate back" to an earlier date, and in none of them was the petitioner held entitled to a certificate for which he or she was eligible but for which he or she failed to apply in timely fashion due to his or her own fault. Furthermore, since the change in the regulations took place before Nealy actually applied in March 1985, it is arguable that in any case her status must be evaluated in light of the regulations then in effect, and not earlier. Cf., Walker v. N.J. Dept. of Inst. & Agencies, 147 N.J. Super. 485, 489 (App. Div. 1977).

Accordingly, to uphold petitioner's claim in the face of her known lack of certification for any teaching position would be inimical to both the spirit and the letter of the tenure and certification statutes and of the regulations. To find that her uncertified service in Roselle provides an adequate basis now to declare she has tenure would be directly contrary to the public interest which those statutes and regulations are intended to foster. While I agree that the Board is not entirely free of guilt with respect to the omissions of its senior administrators properly to assure that only certified teachers be employed, see, N.J.S.A. 18A:27-2, the underlying facts reveal it was Nealy's fault that she was not certified and she has no ground to claim that she should have been certified but for the fault of others.

Nor does the languge of N.J.S.A. 18A:6-38 support petitioner's claim that she was entitled to standard certification as a matter of right prior to the effective date of the amended regulations. The statute anticipates that appropriate certificates are to be issued based upon certified scholastic records or upon examinations, or both. Until the State Board of Examiners has had the opportunity to receive and review these records and to determine whether eligibility exists, there can be no right to claim eligibility at all.

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The first opportunity the State had in this case was in late March 1985, beyond the February 1, 1985 deadline. See, Walker.

In essence, then, it was petitioner's obligation, not that of the Board or its agents, to take the steps necessary to see to it that the requirements for certification were met in timely fashion, and the requirements were not met due to her own inaction, not that of the Board or its employees. See, Sydnor; Fischbach.

Finally, petitioner's claim that she was deprived of an opportunity to study for the NTE is so devoid of merit as not to warrant any further discussion. The briefness of time left for her to study was her fault and, as Rorro testified, the NTE tests are not the kind for which one has to study in any case.

CONCLUSIONS OF LAW

For the reasons set forth above, I **CONCLUDE** that the allegations of the verified petition of appeal are without merit. I **FURTHER CONCLUDE** that petitioner failed to comply with the 90-day requirement contained in N.J.A.C. 6:24-1.2, and this requirement should not be relaxed. Accordingly, the verified petition of appeal should be **DISMISSED.**

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

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

June 4, 1987
DATE

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

JUN - 5 1987
DATE

Receipt Acknowledged:
Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 9 1987
DATE

Ronald L. Parks /ss
FOR OFFICE OF ADMINISTRATIVE LAW

amn/e

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VIOLET NEALY,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, DEPARTMENT OF EDUCATION OF THE STATE OF NEW JERSEY AND THE UNION COUNTY SUPERINTENDENT OF SCHOOLS, UNION COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions and respondents' replies thereto were timely filed pursuant to N.J.A.C. 1:1-16.4a, b and c, a summary of which is provided below.

Petitioner reiterates her position that the 90-day rule, N.J.A.C. 6:24-1.2, does not bar her petition because her cause of action did not accrue until August 29, 1985. In the alternative, she again avows that if the rule does apply, it should be relaxed given the factual circumstances of the matter. Her arguments in support thereof are the same as those set forth in her post-hearing brief, which was considered by the ALJ.

Petitioner also avers that the facts of the case do not support the ALJ's conclusion that after her May 1985 conference with the assistant superintendent "***she well knew that: (1) the State would not certify her unless she took and passed an NTE test; and (2) the Board would not continue her in employment in September 1985 until she accomplished the same." (emphasis supplied) (Initial Decision, ante)

With respect to this, petitioner reiterates that there were sufficient facts to support her belief that she could become certified without taking the NTE such as:

> Mr. Epstein's suggestion to her *** that if the Board recognized its error she would not have to take the NTE; and Mr. Moore's reference to "an alternate route" for certification and his statement that the issue would be discussed at a later date. As to Petitioner's reemployment for the 1985-1986 school year, petitioner reiterates that there was no indication that the April 1985 notice to take the NTE would have any bearing on her reemployment. As the facts demonstrate, Petitioner received two notices from the Roselle

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> Board (J36 and J37) (after receipt of the NTE form notice) which undisputedly indicated that she would be reemployed for the 1985-1986 school year. Additionally, Petitioner disputes the ALJ's factual finding that he found it incredible that Petitioner did not connect certification to employment. Again the facts clearly demonstrate that Petitioner, for a significant period of her employment with the Roselle Board, taught while working toward certification and while having no certification in her possession. There was no reason for petitioner to believe the situation would be any different for the 1985-1986 [school year]. (Petitioner's Exceptions, at p. 2)

In addition to the above, petitioner also excepts, inter alia, to (1) the ALJ's harsh conclusion that, despite the Board's "sloppy" forwarding of inaccurate notices to her (J-36 and J-37) and despite the fact it permitted her to teach more often than not without any certificate, there was insufficient just cause to warrant a relaxation of the 90-day rule and (2) his unjustified finding that she brought the predicament entirely upon herself. She suggests that it was inappropriate for the ALJ to select and state in his findings only those portions of communications which support his conclusion without considering them within the total context of the communications.

Finally, as to the merits of the case, petitioner contends that only a cursory examination of existing law was undertaken by the ALJ for him to conclude that she never acquired tenure and that she was not entitled as a matter of right to standard certification prior to the effective date of the amended regulations. She relies on her post-hearing brief in support thereof.

Respondents urge that the Office of Administrative Law's recommended decision be affirmed.

Upon a thorough examination of the entire record in this matter, the Commissioner is in full agreement with and adopts as his own the findings and conclusions of the ALJ that the Petition of Appeal is time-barred pursuant to N.J.A.C. 6:24-1.2 and that there has been no demonstration that the circumstances in the matter warrant relaxation of that rule. Firstly, petitioner provides nothing whatsoever in her exceptions to convince the Commissioner that he should reverse the ALJ's credibility determination with respect to Mary Ocskay's testimony which he was firmly convinced supported the fact that the assistant superintendent "did tell [petitioner] in unequivocal terms not only that she had to take a test, but that she could not teach in Roselle unless she did so." (emphasis in text) (Initial Decision, ante) Nor is there anything in the Commissioner's own independent review of the transcripts to convince him that the credibility determination was erroneous.

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Thus, the Commissioner agrees that May 31, 1985 should be deemed the latest date petitioner received notice that not only her certification but her employment status was in jeopardy if she did not fulfill the NTE requirement.

It is emphasized for the record at this juncture that even if petitioner sought a provisional certificate for the 1985-86 school year, this could only have been accomplished through the state's alternate teacher training provisions and only if she had first successfully met the NTE requirement. See N.J.A.C. 6:11-4.2 and 6:11-5.1.

Secondly, the Commissioner finds as meritless petitioner's arguments that the ALJ erred in determining that the factual circumstances in the matter do not warrant relaxation of the 90-day rule. N.J.A.C. 6:24-1.17 Notwithstanding petitioner's protests to the contrary, it is she and she alone who must bear responsibility for the failure to gain appropriate certification. As early as May 1982, petitioner was noticed in writing of her responsibility to forward her transcripts to Ms. Ocskay for purposes of certification renewal. The record clearly indicates that rather than having her transcript sent each year upon completion of any course(s) she took, she waited until being reminded by Ms. Ocskay. Despite both written notice in January 1984 (J-29) and verbal reminding in the fall of 1984 by Ms. Ocskay, petitioner failed to provide the transcript to document completion of course work until again reminded in January 1985. As early as 1971, petitioner received an evaluation of her credentials by the State Board of Examiners which warned that certification requirements are subject to change without notice and that it is to the individual's advantage to obtain certification as soon as possible. (J-2) The fact that she failed to provide a transcript to the district before the regulations changed which would have enabled her to receive a standard certificate based on her credential review of 1980 rests solely with petitioner as only she can accomplish release of her college transcript to the district. Moreover, the district could not apply for renewal of her provisional certificate or the granting of the standard certificate until she first provided the transcript.

The fact that the Board itself was grievously lax in its statutorily mandated responsibility to assure no one taught in its district unless one possessed an appropriate certificate does not serve to absolve petitioner of her responsibility in this matter. In being inexcusably dilatory herself, she acted at her own peril. Petitioner likewise acted at her own peril when she chose to "shop" for another response from the State Board of Examiners after being clearly and unequivocably told by the assistant superintendent that the Director of Teacher Certification/Secretary of the State Board of Examiners had, upon a lengthy discussion of petitioner's situation, indicated she must take the examination. The fact that she then proceeded to contact a subordinate of Dr. Rorro's is of no moment whatsoever as she already had been emphatically told what the Director had determined regarding petitioner's status.

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Nor does the Commissioner believe that the two notices (J-36 and J-37) she received during the summer serve to warrant relaxation of the 90-day rule.

Accordingly, the Petition of Appeal is hereby dismissed for failure to meet the filing requirements of N.J.A.C. 6:24-1.2 and for failure to demonstrate that the circumstances of the matter warrant relaxation of that rule. Having so found, there is no need to consider the merits of the matter. Thus, the Commissioner declines to render a determination on the ALJ's findings and conclusions on the merits of the matter.

COMMISSIONER OF EDUCATION

July 16, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY JUDGMENT
OAL DKT. NO. EDU 6220-86
AGENCY DKT. NO. 275-8/86

ARLENE P. SPIZZIRRI,
Petitioner,
v.
BOARD OF EDUCATION OF THE
CITY OF SALEM, SALEM COUNTY,
Respondent.

Arlene P. Spizzirri, petitioner, pro se

Robert M. Tosti, Esq., for respondent (Rand, Algeier, Tosti, Woodruff & Frieze, attorneys) (John E. Croot, Jr., Esq., on the Brief)

Record Closed: May 29, 1987 Decided: June 8, 1987

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE

Petitioner alleges that the nonrenewal of her nontenure contract with the Board of Education of the City of Salem (Board) was arbitrary and unreasonable. The Board denies petitioner's allegations asserting, among other things, that petitioner did not perform her duties and requests that the Petition of Appeal be dismissed.

PROCEDURAL HISTORY

Petitioner filed her Petition of Appeal before the Commissioner of Education dated August 7, 1986, without proof of service. On August 14, 1986, petitioner amended her Petition which was acknowledged by the Commissioner's representatives on August 20, 1986. On September 17, 1986, the Commissioner was in receipt of the Board's Answer to

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the petition. On September 19, 1986, the Commissioner 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. The Commissioner noted on the transmittal that some of the relief requested by the petitioner is beyond the Commissioner's jurisdiction.

A prehearing conference was held on November 7, 1986, with John T. Barbour, Esq., appearing for the Board (Barbour and Costa, attorneys). On November 22, 1986, petitioner moved to amend her petition wherein she alleges, among other things: violations of her constitutional First Amendment rights with regards to freedom of expression and freedom of religious beliefs; discrimination because of her physical handicap; and discrimination based upon her race. On January 27, 1987, the undersigned was in receipt of a notice of substitution of attorney for the Board, Robert M. Tosti, Esq., appearing for withdrawing attorney John T. Barbour, Esq. Thereafter, on February 20, 1987, a second prehearing conference was held with petitioner, Mr. Tosti and the undersigned.

MOTIONS

The Board, pursuant to N.J.A.C. 1:1-13.2(a), now moves for summary decision in its favor. Petitioner objects and opposes the Board's motion.

The arguments of the parties are set forth hereinbelow as follows.

The Board, by way of brief, affidavit, and exhibits, sets forth the following STATEMENT OF FACTS.

The following are the undisputed facts in this matter. In April 1986, the Salem City Board of Education (Board) was faced with an immediate need for a Special Education teacher when one of their teachers was unable to complete the school year. Seeking a temporary replacement to finish one year, the Board interviewed and reviewed the qualifications of petitioner. The Board determined that petitioner would be capable of filling the temporary position. In his employment memorandum of April 8, 1986, Dr. Johnson states: "I have verified her employment at Cherry Hill and was informed that she did work there those years and would not be a problem in finishing out a school year." (Croot Affidavit, Exhibit A.) Thereafter, petitioner commenced work on April 14, 1986,

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and remained through the end of the term on June 30, 1986. On June 11, 1986, the petitioner was observed and evaluated in the classroom by her principal, J. Sherwood Brown. (The Observation and Evaluation sheet are contained in the Croot Affidavit, Exhibit A.) On the basis of this evaluation, it was determined not to offer petitioner further employment. On or about June 18, 1986, petitioner was informed of the decision in a conference with Mr. Brown. At all times, the Board dealt with petitioner in a fair and reasonable manner. However, on or about August 11, 1986, a petition was filed commencing this appeal.

THE BOARD'S LEGAL ARGUMENT

POINT I

RESPONDENT IS ENTITLED TO SUMMARY JUDGMENT OF THE ISSUES RAISED BY THE PETITIONER

Pursuant to N.J.A.C. 1:1-13.2(a), an order granting summary decision is appropriate:

> . . . if the papers in 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.

The record, as developed in discovery, reveals no genuine issue as to any material fact. Accordingly, summary judgment should be granted in favor of the respondent.

The policy behind summary judgment is the just, expeditious, inexpensive and final disposition of a cause of action where there is an absence of a genuine issue of material fact. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954). The court in Judson indicated that "if the opposing party offers no affidavits or matter in opposition, or facts which are immaterial or of an insubstantial nature, a mere scintilla . . . fanciful, frivolous, gauzy or merely suspicious . . . he will not be heard to complain if the court grants summary judgment . . ." Id. at 75. [Citations omitted.] In the instant case, petitioner has made a series of frivolous, baseless and unsupportable allegations

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against the respondent. There are no objective facts to support these allegations, and the policies behind summary judgment compel the dismissal of this action.

A. The Record Is Bare Of Any Objective Facts Which Tend To Show That Respondent Arbitrarily Or Capriciously Nonrenewed Petitioner's Teaching Contract.

Petitioner has alleged that the Board's determination not to offer further employment was arbitrary and capricious. Petitioner's answers to interrogatories reveal no objective facts to support these allegations, however.

Petitioner was hired in April to fill temporarily a position until the end of the school year. Petitioner was evaluated by her principal. On the basis of this objective factor, the Board exercised its discretion not to renew petitioner's contract for the following year. The Commissioner stated in Nettles v. Bd. of Ed. of the City of Bridgeton, 1976 S.L.D. 555, that "Boards of education are invested with broad discretionary powers. N.J.S.A. 18A:11-1. One of the most essential of these is the power to determine who shall be employed and reemployed to teach in the public schools in each successive year." Id. at 560. Absent a showing of abuse of the discretionary powers, the Board's determination is entitled to a presumption of correctness. Quinlan v. Bd. of Ed. of North Bergen Twp., 73 N.J. Super. 40 (App. Div. 1962). The breadth of the Board's discretionary authority not to rehire is confirmed by the fact that petitioner had no vested right to continued employment. Not only did petitioner lack tenure, she had not even completed three months on the job. She has absolutely no liberty or property interest which would justify an expectation of continued employment. See, Board of Regents v. Roth, 408 U.S. 564 (1972). Petitioner has failed to demonstrate any facts that would support an allegation of arbitrary and capricious conduct on the part of the Board.

Any claim that the Board did not comply with N.J.S.A. 18A:27-10 is clearly without merit. N.J.S.A. 18A:27-10 provides that:

> On or before April 20 in each year, every board of education in this state shall give each nontenured teaching staff employed by it since the preceding September 30 either:
>
> (a) A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or

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(b) A written notice that such employment will not be offered.

It is uncontradicted that petitioner was not hired until April 14, 1986. She plainly fails to meet the requirements of continuous employment since September 30, which would trigger the statute. Petitioner had no expectation of continued employment and the Board fully complied with the law in its dealings with petitioner.

B. The Record Is Bare Of Any Objective Facts Which Tend To Show That The Respondent Violated Petitioner's First Amendment Rights By Not Renewing Her Contract.

Petitioner has alleged violations of her freedom of speech and freedom of religion. Yet, she has offered absolutely no facts to demonstrate that she was not renewed because of her religious opinions or beliefs. The Supreme Court of New Jersey in Tidewater Oil Co. v. Mayor and Council of the Borough of Carteret, 44 N.J. 338 (1965) has stated that:

> It is clearly not enough if the asserted question is only remotely or speciously connected to the constitution by the loose or contrived use of broad constitutional terminology. Shibboleth mouthing of constitutional phrases like 'due process of law' and 'equal protection of the laws' does not ipso facto assure absolute appealability. [Id. at 342.]

The Commissioner has held that bare assertions or generalized allegations of violations of constitutional rights do not create claims of constitutional dimensions. Whiting v. Bd. of Ed. of the Township of Bedminister, 1980 S.L.D. 980, aff'd, State Board (January 22, 1981), aff'd (N.J. App. Div., April 7, 1982, A-2741-80T1) (unreported). See also, John C. Roy II v. Bd. of Ed. of the Twp. of Middle, 1976 S.L.D. 569, quoting Winston et al. v. Bd. of Ed. of Borough of South Plainfield, 125 N.J. Super. 131, 144 (App. Div. 1973); Kathryn Fox v. Bd. of Ed. of the Watchung Hills Reg. High School Dist., 1977 S.L.D. 1107.

When asked in interrogatories to set forth the actual facts upon which petitioner will rely to establish that she was subjected to religious indoctrination, she stated:

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> The teacher who tried to indoctrinate me into his religion was a nice gentlemen. I cannot afford to call him as a witness, and even if I could I would not, as I do not wish him any trouble. I was, however, extremely upset that he should attempt this. I felt, and still feel, that religious beliefs or non-beliefs are private. Thus, this was also an invasion of privacy. I went to the teacher's lounge to get a short break, after one month of never doing anything but school work. I also wanted to meet the teachers. After a time, I dreaded going to the lounge. (Answer to Interrogatory number 20(a), p. 12, Croot Affidavit, Exhibit B.)

This answer, apart from being vague, clearly fails to demonstrate any objective facts of improper conduct on the part of the respondent Board. Summary judgment on behalf of respondent should be granted with respect to petitioner's claims of First Amendment violations.

C. The Record Is Bare Of Any Objective Facts Which Tend To Show That The Respondent Discriminated Against Petitioner On the Basis of Race.

Petitioner's allegations that the Board discriminated against her on the basis of race are frivolous and totally unsupported by the facts as developed in discovery. Furthermore, the undisputed facts establish that plaintiff was not renewed for legitimate nondiscriminatory reasons. Accordingly, summary judgment should be entered in favor of respondent as to petitioner's claim of racial discrimination.

Actions based upon 42 U.S.C. §1981 and 1983 require proof of purposeful discrimination. General Building Contractors Assoc. v. Pennsylvania, 458 U.S. 375 (1982); Crocker v. Bowing Co., 662 F.2d 1975 (3rd Cir. 1981) (en banc); Taylor v. City of St. Louis, 702 F.2d 695 (8th Cir. 1983); See also, Griffin v. Breckenridge, 403 U.S. 88 (1971). Summary judgment may be entered in an employment discrimination case where a plaintiff fails to raise any objective facts indicative of racial discriminatory conduct by a defendant. Beard v. Annis, 730 F.2d 741 (11th Cir. 1984); Aquamina v. Eastern Airlines, 644 F.2d 506 (5th Cir. 1981). When an employer makes a convincing showing that it discharged an employee for nondiscriminatory reasons, and the discharged employee introduces no evidence that the nondiscriminatory reasons presented by the employer were pretextual, and no evidence is presented from which an inference of pretext can rationally be drawn, summary judgment for the employer is appropriate. Mack v. W.R. Grace Co., 578 F. Supp. 626, 631 (N.D. Ga. 1983), cert. denied, 469 U.S. 805 (1984).

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The Board contends that petitioner has utterly failed to produce anything more than mere speculation and conclusory allegations to support her claims of racial discrimination.

The only allegations of racial discrimination in the record are contained in the amended petition. In discussing the removal of the classroom bulletin board, petitioner states that:

> Petitioner knows for a fact that two other teachers (black) also took down the display. Petitioner asks if these individuals were rehired. [Page 1 of Amended Petition.]

These two sentences can hardly even be considered allegations. They clearly do not represent objective facts.

Later in her amended petition, the petitioner describes the events of "Fun Day." She claims:

> The teacher in charge (black) treated petitioner as if she were a nonentity. Petitioner later used her First Amendment rights to speak plainly about the situation to both the teacher and the principal (also black). It is this petitioner's opinion that principal was biased. [Page 2 of Amended Petition.]

Once again, petitioner has made bare allegations with no objective facts to support them. Furthermore, there is no allegation anywhere in the record that petitioner's race was a factor in the nonrenewal of her contract. Petitioner's claims of racial discrimination are frivolous and summary judgment should be granted as to these claims.

D. The Record Is Bare Of Any Objective Facts Which Tend To Show That The Respondent Discriminated Against Petitioner On The Basis Of A Physical Handicap.

The Rehabilitation Act of 1973, 29 U.S.C. §791, 793-794, was designed to eliminate discrimination against handicapped individuals whenever there is a federal nexus. 29 U.S.C. §794 provides in pertinent part:

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> No otherwise qualified handicapped individual in the United States, as defined in [29 U.S.C. Section 706(7)], shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity . . . conducted by any executive agency or by the United States Postal Service.

A "handicapped individual" is defined in 29 U.S.C. Section 706(7)(B) as:

> [A]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment.

Petitioner has failed to show any objective facts which demonstrate that she is a "handicapped individual" as defined by the statute. Nor has she demonstrated any facts to show that she was discriminated against.

The only facts offered by petitioner to support her claim of discrimination because of her hearing impairment are allegations that her coworkers were insensitive in using the intercom system. However, neither the Board nor any of its agents or employees were aware that the petitioner had a hearing impairment at the time she was hired. Petitioner supplied the Board with a doctor's certification of good health and completed a health questionnaire. Neither of these documents (Croot Affidavit, Exhibit A) discloses any hearing impairment or other physical handicap.

Petitioner was not renewed on the basis of her evaluation and other objective factors. There is absolutely no basis on which to conclude that this decision was pretextual. Consequently, summary judgment on behalf of respondent on the claim of discrimination on the basis of handicap is appropriate.

POINT II

THE PETITIONER'S AMENDED PETITION OF APPEAL SHOULD BE DISMISSED AS UNTIMELY UNDER N.J.A.C. 6:24-1.2

The amended petition was filed on or about November 25, 1986, nearly five months after the Board acted on June 30, 1986, by not renewing petitioner's contract. N.J.A.C. 6:24-1.2 provides in relevant part:

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> . . . a petition to the Commissioner to determine a controversy or dispute arising under the school laws must be filed within ninety (90) days after the receipt of the notice by the petitioner of the action concerning which the hearing is requested. . . .

Petitioner has plainly failed to comply with this requirement.

The Commissioner of Education and the courts have held that a petitioner's failure to comply with the requirements of N.J.A.C. 6:24-1.2 must result in a dismissal of the appeal. Hall v. Bd. of Ed. of the City of Englewood, OAL DKT. EDU 6399-80, decided by Comm'r (January 26, 1982) at 5. Riely v. Bd. of Ed. of Hunterdon Central High School Bd. of Ed., 173 N.J. Super. 109 (App. Div. 1980); Hyman v. Bd. of Ed. of the Princeton Reg. School Districts, OAL DKT. EDU 797-82, decided by Comm'r (June 11, 1982) at 3; Newman et al. v. Bd. of Ed. of the Borough of Spring Lake, OAL DKT. EDU 4548-83, decided by Comm'r (January 17, 1984) at 5; Wright & Sobanko v. Bd. of Ed. of Belleville, OAL DKT. EDU 5299-80, decided by Comm'r (January 23, 1981). The Commissioner and the Courts read N.J.A.C. 6:24-1.2 very strictly and apply it almost without exception. Hall v. Englewood Bd. of Ed., at p. 6. While N.J.A.C. 6:24-1.19 provides for relaxation of the rule, it should be applied only in the most unusual and compelling of circumstances, and in no event unless a clear showing is made by the party seeking to assert a stale claim that his delay was justifiable. Miller v. Morris School District, decided by Comm'r (February 25, 1980); Hyman at 5.

The time of filing of the amended petition should not relate back to the filing of the original petition. The Administrative Code does not contain a provision on when amended petitions should relate back for purposes of timeliness. However, New Jersey Court Rule 4:9-3 and the case law interpreting it provide guidance on this issue.[1] Rule 4:9-3 provides that:

> [W]henever the claim or defense asserted in the amended pleadings arose out of the conduct transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading; but the court, in addition to its power to allow amendments may, upon terms, permit the statement of a new or different claim or defense in the pleading. . . .

---

[1]It has been held that court fashioned doctrines may be appropriately applied in administrative hearings. Hackensack v. Winner, 82 N.J. 1 (1980).

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In interpreting this rule, the courts have held that a completely new cause of action does relate back to the date of the original complaint for statute of limitation purposes. Lawlor v. Cloverleaf Memorial Park Inc., 101 N.J. Super. 134 (Law Div. 1968), rev'd, 106 N.J. Super. 374 (App. Div. 1969), rev'd, 56 N.J. 326 (1970). See also, Harr v. Allstate Insurance Co., 54 N.J. 287 (1969).

The policy behind not allowing relating back for new causes of action is stated in Welsh v. Bd. of Ed. of Tewksbury Twp., 7 N.J. Super. 141, 146 (App. Div. 1950):

> The existing liberality in permitting amendments is bestowed to prevent legalistic technicalities from impeding, or obstructing, the paramount aspiration to promote substantial justice in all litigious controversies. The present progressive judicial policy is not, however, intended to afford a refuge to languid and dilatory litigants . . . where a statute of limitations is involved, unwarranted graciousness might well constitute an unjustifiable judicial trespass upon the legislative field.

Clearly, petitioner has included several completely new causes of action in her amended petition. These include claims of racial discrimination, First Amendment violations and discrimination against the handicapped. These new causes of action should be barred as untimely under N.J.A.C. 6:24-1.2.

For timeliness purposes, the deadline for filing is not relaxed for pro se litigants. Mucci v. Moonachie Bd. of Ed., OAL DKT. EDU 4713-80, decided by Comm'r (February 23, 1981), aff'd State Board (August 5, 1981); Foster v. Plainfield Bd. of Ed., OAL DKT. EDU 6170-80, decided by Comm'r (May 4, 1981).

Petitioner's amended petition was filed after the running of the period of limitations. Therefore, it is untimely under N.J.A.C. 6:24-1.2 and should be barred. The amended petition states completely new causes of action against the respondent, and therefore, it should not relate back to the date of filing of the original petition.

In conclusion, and based upon the foregoing, the Board urges this tribunal to dismiss the petition and amended petition in their entirety. The Board asserts that there is no genuine issue as to any material fact, and in addition, the amended petition is untimely under N.J.A.C. 6:24-1.2.

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PETITIONER'S RESPONSE AND ARGUMENT

Petitioner responds to the Board's motion for summary decision by way of letter dated May 6, 1987, and letter brief dated May 17, 1987.

In her May 6, 1987 letter to this tribunal, petitioner stated the following:

> Dear Judge Law:
>
> By Mr. Croot (what happened to Mr. Tosti?) submitting a Summary Decision Order, I understand that he is saying there are not facts to support my complaint. This is preposterous.
>
> I maintain that Mr. Croot does not wish this case to be heard, because he knows quite well that the decision not to rehire a teacher with proven educational qualifications, as well as proven performance in the classroom, poses a serious question to the Board: Is the Board conscientiously, and ethically seeking to provide quality educators to all youngsters, or is the Board seeking to retain, and hire, only those teachers whose personality conforms to what the Board deems suitable? (Would Woody Allen have a place in the Salem City Schools, or Mozart?) What type of education is being provided youngsters, especially minorities, if a person, such as myself, is so abruptly terminated? Though unfortunately, I am no Woody Allen or Mozart, I consider myself a creative, inspiring educator. Mr. Croot has yet to reveal what was in the references received by the Board and or administration. (I have recently filed a complaint of character defamation against the Cherry Hill Board of Education and some administrators; it was filed in the USDC. I now have some proof that untrue remarks about my being isolated in the classroom have prevented a school district from hiring me for a permanent position. Though my teaching performance has always been above question, though I successfully helped many special youngsters, I have found, through arduous research, that I have been solely judged on subjective, unfounded accusations. I mention this, because, until it is proven otherwise, I believe the Salem Board never had any intention of keeping me on as an educator beyond June. If this is true, then fraud was committed.) Mr. Croot also does not want this case heard because he does not want it revealed that the Board failed to provide me with appropriate texts, audio-visual equipment, and written directives.
>
> All those I interacted with at this particular school knew of my hearing impairment, because I told them. They knew of this physical impairment (not a health problem), yet did nothing to accommodate me. I never deliberately did anything against school policy; I repeatedly asked questions in order to avoid any mistakes. As an equal opportunity employer, the Board should have seen to it that I was provided with written information, etc.

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Why wasn't I told that I would not be rehired until the very last day of school for teachers? Surely, I had some right, as a human being, if not as a professional, to learn of my fate in a timely manner. The administrators, and the Board, knew I would not be rehired - why, then, did they wait until the last minute to tell me? In my opinion, this was cruel and unethical treatment. For not only was I kept in the dark about reemployment until the last day, and my remarks on my evaluation show this, but I was detained until almost every teacher had left the building.

When does Mr. Croot expect the Board and some of its administrators to be held accountable for certain actions? (If this were a corporation, and I were fired even though I brought in business-performance was good-, what would the stockholders say?)

I was never given a chance to show just how much I could contribute to this school. To hear repeatedly of how the state and entire country want better teachers, and they are doing much in the way to show that they mean what they say, how then can my dismissal be justified? The Board's decision not to rehire me was a slap in the face of the public. (I am not represented by the good-will of this Board, but neither is the public.)

In conclusion, I was not given timely notice; I was not given written explanations etc., to ensure that I did not miss anything because of my hearing impairment; I was not given appropriate texts (I managed to provide the necessary knowledge of basic skills only because of my past knowledge and experience); I was not given the right to express my own views or opinions without suffering reprisal, and I was not given sufficient time to correct any perceived weaknessess. In summation: I was used. The Board paid me much less than I rightfully should have gotten if my education and work experience had been considered. I was given no medical insurance. I was provided with no aide to help me with these disruptive students. Had I known that the Board only intended to employ me for two months, so that their needs would be met, I would have never accepted a position there.

I ask that you please hear this complaint, and thus that the Summary Motion and Order be dismissed.

Respectfully yours,

Arlene Spizzirri

cc: Mr. Tosti

P.S. Your Honor, I am in the process of obtaining Mr. Morrison's address so that I can deliver the supoena [sic] to him.

In her letter brief, dated May 17, 1987, petitioner sets forth her arguments as follows:

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First, the petitioner finds it necessary to once again state that because she could not find an attorney willing to take her case on a contingency basis fee, she has been forced to take action on her own, thus she is serving pro se. (The law firm which specializes in such cases, Selikoff, et al., charges $75 [per] hour. Petitioner decided not to sacrifice her rights under the law, simply because she is too poor to afford to retain an attorney who can quote legal points.) By serving pro se, petitioner has realized all along that she is not knowledgeable of researching legal precedents, etc., but the USDC, where she has now two complaints filed, understood her predicament and did not expect the same type of brief from her as from an attorney. Petition is hopeful that the same compassion will be granted her from the administrative law judge. (Incidentally, legal services claimed they do not assist persons such as myself. Their main reason being, that they did not have sufficient funds to help everyone. Petitioner was not even given an interview.)

For petitioner, who is unfortunately having to serve pro se, her written arguments have already been sent to those involved in this case. (She attempted to cite as many cases as she could find in the library at Rutgers.) Facts of this case, as petitioner finds it are as follows:

1. Untimely notice that petitioner would not be rehired.

2. Failure to accomodate petitioner as soon as awareness of petitioner's hearing impairment became evident, whether it was from her stating such a fact or/and through daily conversation.

3. Failure to grant petitioner time to correct, let alone become knowledgeable of, her supposed weaknesses.

4. Failure to provide petitioner with adequate texts, audio-visual equipment to ensure that she would definitely meet the needs of her students.

5. Failure to give written directives concerning such things considered important by administration. These matters concern everything from bulletin board removal, and responsibilities for "Fun Day."

6. Failure of Board, and administrators, to ensure separation of state of [sic] religion. Petitioner's rights to privacy, and freedom to hold her own religious or nonreligious beliefs were violated. (She should have had the right to access of teachers' lounge without fear.)

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7. Failure of Board to immediately convey to petitioner that they had no intention of rehiring her, this according to defendants. (She was never told that she was only being hired for two months; this amounts to misrepresentation of facts, as well as, contract.)

8. Defendants suppressed petitioner's freedom of speech.

In essence, what was done to petitioner shows utter contempt and disregard for petitioner. The refusal to admit wrong-doing, as well as, the motion for dismissal show an arrogance toward any human being who has no power. The petitioner was reared to believe that fairness, decency, and justice were for all, and that was what made this country so much better for citizens than any other country. The right to opportunity; the right to be judged innocent until proven guilty; the right to live and work without harassment or intimidation; the right to be an 'individual' (something this country once found admirable); the right to justice-not based on sex, race, religion, handicap, etc. - lack of money or a power base. The laborer, the employee, the indigent, and the ill, have as much a right to dignity as anyone else. The also should have the right to believe in their innocence or complaints of injustice-as anyone. Incompetence, dishonesty, etc., are known to have resided in the mightest [sic] of men. [Petitioner's brief of May 17, 1987.]

DISCUSSION

Our Supreme Court has defined the applicable summary judgment procedure and standards of decisions governing the grant or denial of summary judgment in Judson. Therein, the Court approved of the procedures to provide a prompt, businesslike and inexpensive method of disposing of a case where it is clearly shown that no genuine issue of material fact exists. The role of the judge in the summary judgment procedure is to determine whether there is a genuine issue of fact grounded upon a discriminating search of the merits in the pleadings, depositions, admissions on file, and affidavits submitted on the motion which clearly demonstrates not to present any genuine issue of material fact requiring disposition at trial. The Judson Court admonishes the trial courts to grant summary judgment only very cautiously and that it is the movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact with all inferences of doubt drawn against the movant in favor of the opponent. Only when it is palpably disclosed that there is no genuine issue of fact and the movant is entitled to a judgment as a matter of law should such a motion be granted. Moreover:

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> If the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature, a mere scintilla, . . . 'fanciful, frivolous, gauzy or merely suspicious,' . . . he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts in the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact. [Id. at 75.] [Citations omitted.]

FINDINGS OF FACT

Applying these standards as set forth in Judson, I have closely scrutinized the pleadings, the affidavit, brief and interrogatories submitted by the Board, the moving party, and respondent's letter of May 6, 1987, together with her letter brief, to ascertain as to whether any genuine issue of material fact exists which will require disposition at hearing. Having carefully reviewed these and other documents in the record with discriminating care, I **FIND** the following facts in this matter.

Petitioner did not submit an affidavit with her brief in opposition to the Board's Motion for Summary Decision. However, it is uncontroverted that petitioner was employed by the Board on April 14, 1986, for the remainder of the 1985-86 school year or until June 30, 1986. Petitioner was compensated by the Board on a pro rata basis at a rate above the first step of its salary guide, i.e., at the sixth step of its Master's Degree range on its salary guide (Croot Affidavit, Exhibit A). Petitioner is certified as a teacher of the handicapped and was assigned to instruct handicapped pupils by the Board in April 1986.

Petitioner asserts she is handicapped with a hearing impairment and that the Board failed to accommodate her handicapping condition in the employment setting, thus alleging the Board discriminated against her. Petitioner offers no proof to this tribunal of her handicapping condition nor any proof as to when she advised and noticed the Board or its agents of her handicap. The only proof of petitioner's physical condition is found in a statement by Dr. James D'Amore, Jr., dated April 14, 1986, to the effect that petitioner was found to be in good health (Croot Affidavit, Exhibit A).

On June 11, 1986, petitioner was observed for a full class period by J. Sherwood Brown. On June 18, 1986, a post-observation conference was held with J. Sherwood Brown and petitioner, at which petitioner executed a handwritten rebuttal to

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Brown's observation and evaluation of petitioner's performance on June 11, 1986. In her rebuttal petitioner stated, among other things, that:

> . . . Finally, I felt, and now it is proven, that I was being used for 2 months. No one in his right mind could expect to walk into a classroom and evaluate someone who has been on the job such a short time-and is nearing the end of school-and expect to see that person objectively.
>
> This was a case of exploitation.-Thanks for the experience. (Croot Affidavit) (Emphasis in the original.)

Petitioner did not allege any statutory and/or regulatory violation by the Board in her rebuttal to Brown's June 11, 1986 observation and evaluation. Nor did petitioner allege any constitutional violations as set forth in her amended petition of appeal.

A careful reading of petitioner's answers to the Board's Interrogatories discloses that where petitioner does state facts, those facts are immaterial or of an insubstantial nature. Petitioner admits in her answers that she lacks the proof to sustain her allegations against the Board (Croot Affidavit, Exhibit B). Petitioner's responses to the Board's Interrogatories are evasive, unclear and fail to provide the sought-for discovery to which the Board is duly entitled.

In summary, I **FIND** that:

1. Petitioner was employed by the Board commencing April 14, 1986, for the remainder of the 1985-86 school year, or until June 30, 1986, and no longer. The termination term of her employment contract was self-executing.

2. The Board compensated petitioner, and she agreed to accept, the amount of $19,237 per annum, pro rated, which represented the Board's salary guide at step six on the Master's Degree level.

3. Petitioner was assigned to teach a class of handicapped pupils classified as perceptually impaired (P.I.) for which petitioner was certified.

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4. Petitioner has failed to present any proof that she advised the Board or its agents of her alleged handicapping hearing impairment either prior to or subsequent to her employment.

5. In her rebuttal to Brown's observation report, petitioner has failed to allege any violation of state statutes and/or regulations.

6. In her rebuttal to Brown's observation and evaluation of her performance on June 11, 1986, petitioner neither suggests nor alleges any basis of a claim of constitutional violations by the Board.

7. In her sworn statement and answers to the Board's interrogatories, petitioner admits that she lacks sufficient proof to sustain her allegations against the Board.

CONCLUSIONS

Petitioner opposes the Board's motion for summary decision; however, she offers no affidavits or other sworn statements to demonstrate the existence of any genuine issue of material fact requiring disposition at a hearing. Rather, I **CONCLUDE** that petitioner's admission that she lacks sufficient proofs to sustain her charges against the Board demonstrates that her allegations are a series of "fanciful, frivolous, gauzy" and "merely suspicious" unsupportable allegations. Judson at 75.

The Board's statement of facts and legal arguments have neither been rebutted nor contradicted by petitioner. Therefore, I **CONCLUDE** that the contents of the Board's legal brief and affidavit executed by Mr. Croot are true in fact, and show there is no issue of material fact in existence. Accordingly, the Board has sustained its burden by clearly showing the absence any genuine issue of material fact, and I so **CONCLUDE.**

ORDER

For the reasons expressed hereinbefore, it is hereby **ORDERED** that the Board's motion for summary decision be and is hereby **GRANTED.**

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Accordingly, it is hereby **ORDERED** that the herein Petition of Appeal and Amended Petition of Appeal be and are hereby **DISMISSED WITH PREJUDICE.**

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

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

June 8, 1987
DATE

Lillard E. Law RWS
LILLARD E. LAW, ALJ

Receipt Acknowledged:
Seymour Weiss
DEPARTMENT OF EDUCATION

JUN - 9 1987
DATE

Mailed To Parties:
Ronald M. Parker
OFFICE OF ADMINISTRATIVE LAW

JUN 11 1987
DATE

ml/EE

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ARLENE P. SPIZZIRRI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF SALEM, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were untimely filed pursuant to N.J.A.C. 1:1-16.4a, b and c. The Commissioner notes that, additionally, petitioner has submitted a number of letters since the initial decision was rendered which are without indication that they were shared with the appropriate representative of the Board. The allegations therein set forth substantially the same arguments raised in the instant Petition of Appeal and they too, like the allegations posited in the Petition of Appeal remain unsupported by any substantive material evidence. Said documents do not in any way alter or influence the Commissioner's decision herein to grant Summary Decision for the reasons expressed in the initial decision.

Accordingly, the decision of the Office of Administrative Law is adopted. Summary Decision is granted. The Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

July 17, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6473-86
AGENCY DKT. NO. 315-9/86

RUMSON-FAIR HAVEN SCHOOL EMPLOYEES ASSOCIATION,
Petitioner,
v.
BOARD OF EDUCATION OF THE RUMSON-FAIR HAVEN REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,
Respondent.

Mark J. Blunda, Esq., for the petitioner (Oxfeld, Cohen & Blunda, attorneys)

Martin M. Barger, Esq., for the respondent (Reussille, Mausner, Carotenuto, Bruno & Barger, attorneys)

Record Closed: April 23, 1986 Decided: June 8, 1987

BEFORE BEATRICE S. TYLUTKI, ALJ:

PROCEDURAL HISTORY

This matter concerns the allegation of the Rumson-Fair Haven School Employees' Association (Association) that the Board of Education of the Rumson-Fair Haven Regional High School District (Board) unlawfully appointed Betsy McCarty Carr as a guidance counsellor. The Board denied the allegation and the matter was transmitted by the Commissioner of Education (Commissioner) to the Office of Administrative Law for a determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

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The prehearing conference took place on December 8, 1986, and at that time, the parties agreed that the issue in this matter is whether the Board violated any school laws or regulations when it appointed Ms. Carr to a guidance counsellor position without the proper standard guidance counsellor certificate.

The hearing took place on February 9, 1987, at the Fair Haven Borough Municipal Building in Fair Haven, New Jersey. After receipt of briefs, the record in this matter initially closed on March 16, 1987. After receipt of letters from both parties and a telephone conference call on April 23, 1987, I allowed the record to reopen and accepted an additional exhibit into evidence (R-1). The record in the matter closed on April 23, 1987.

FACTUAL FINDINGS

At the hearing, the Association presented the testimony of Susan F. Ryscavage, an unsuccessful candidate for a guidance counsellor position and the president of the Association, and certain exhibits, which consisted of the Board's answers to its interrogatories and the exhibits attached thereto (P-1 to P-76). These exhibits were admitted into evidence at the hearing and, thereafter, by letter dated February 26, 1987, Martin M. Barger, Esq., on behalf of the respondent, stated that the Board would rely on the same exhibits and that they should be considered to be joint exhibits.

I **FIND** that the facts as set forth hereinafter are the pertinent and undisputed facts in this matter.

The Board's job specification for the position of guidance counsellor requires that the person hold or be eligible for a secondary teaching and guidance certificate, pursuant to N.J.S.A. 18A:26-2 and N.J.A.C. 6:11-12.13 (P-58).

During the 1984-85 school year, the Board employed four guidance counsellors at the high school (P-1). Three of these guidance counsellors retired at the end of the 1984-85 school year (P-1, P-4, P-7, P-14, P-15).

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On June 3, 1985, the Board posted a vacancy notice for the guidance counsellor positions, which indicated that applicants were required to hold a pupil personnel services certificate (P-12). In addition, on June 16, 1985, a classified advertisement regarding the positions was published in the Newark Star Ledger (P-13).

By memorandum dated July 9, 1985, John J. Ward, the Board's Superintendent of Education, informed the Board members that nearly 100 persons had applied for the guidance counsellor vacancies. Among the applicants were Ms. Ryscavage and Debra S. Connolly, who are teachers employed by the Board (P-5, P-6), and who have pupil personnel services certificates.

A number of people were interviewed for the guidance counsellor positions (P-1) and during the summer of 1985, the Board hired William C. Coyle, Barbara Kane and Gerald Dalessio as guidance counsellors, and at that time, Mr. Coyle and Mr. Dalessio were experienced guidance counsellors who held pupil personnel services certificates (P-16, P-17, P-19, P-20, P-22, P-23, P-24, P-24a, P-24b, P-70, P-71, P-72, P-73). In addition, after posting the position (P-21), the Board hired Benita C. Weber, for the new position of director of pupil personnel services starting on September 1, 1985 (P-18). At that time, Ms. Weber was an experienced guidance counsellor and held a pupil personnel services certificate (P-8, P-9, P-10, P-11).

By letter dated August 26, 1985, the fourth member of the Board's 1984-85 high school guidance department requested a leave of absence for the 1985-86 school year and early retirement as of June 30, 1986 (P-1, P-25), and the Board approved the request (P-24).

This additional guidance counsellor vacancy was posted by the Board and the announcement indicated that a New Jersey Certification was required (P-26). The vacancy was also advertised in the Trenton Times and the Red Bank Daily Register (P-29, P-30). Ms. Ryscavage and Ms. Connolly both submitted written applications for the position (P-27, P-28), and a number of persons were interviewed (P-1).

At the hearing, Ms. Ryscavage testified that Janice Brant was hired to fill the remaining guidance counsellor vacancy and was present on the first day of school in September 1985; however, her employment was not continued and there was no evidence presented to show that the Board took any formal action to employ Ms. Brant.

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On October 8, 1985, the Board hired Ms. Carr as a guidance counsellor for the 1985-86 school year (P-38-39). Ms. Carr, who had experience as a guidance counsellor in Connecticut (P-36, P-37), was one of the persons interviewed for the guidance counsellor positions during the summer of 1985 (P-1); however, at the time she did not hold a standard pupil personnel services certificate.

Before Ms. Carr was hired, Mr. Ward wrote Milton Hughes, the county superintendent of schools, and asked that an emergency certificate be issued to Ms. Carr for the balance of the 1985-86 school year (P-31). In this letter, Mr. Ward stated:

> On August 27, 1985, the Rumson-Fair Haven Board of Education accepted the resignation of a guidance counsellor. Prior to that date, three other counsellors retired at the end of the 1984-85 school year. In addition, a new position of Director of Pupil Personnel Services was created and filled with a certified person this summer. In short, the entire guidance department of Rumson-Fair Haven left and was replaced except for the late August resignation.
>
> Advertisements were placed in five New Jersey newspapers on September 8 in which applicants for a certified guidance counsellor position was solicited. Two applications were received from people under contract. In addition, two in-house staff members with pupil personnel services certificates applied for the vacancy. However, neither insider has experience and placing either in the counsellor position would, obviously, create another vacancy which would have the effect of interrupting the flow of instruction elsewhere [P-31].

An emergency certificate application was submitted by Ms. Carr (P-32, P-33, P-34, P-35, P-36, P-37), and an emergency certification was issued to her (P-43). Ms. Carr also applied for a standard pupil personnel services certificate (P-40, P-41, P-49, P-50, P-51, P-52, P-76, P-48), and during the 1985-86 school year, Ms. Carr received excellent evaluations from her supervisors (P-42, P-74, P-75).

At the end of the 1985-86 school year, the Board offered a contract to Ms. Kane, a guidance counsellor, (P-45); however, she resigned (P-1). The Board did not offer contracts to Mr. Dalessio, a guidance counsellor, and Ms. Weber, the director of pupil personnel services (P-1). No evidence was presented as to whether the Board filled the vacancy in the position of director of pupil personnel services for the 1986-87 school year.

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As to the guidance counsellor vacancies, on April 15, 1986, the Board posted a vacancy notice which indicated that a New Jersey certification was required (P-44), and the positions were advertised in the Asbury Park Press (P-3). Several people applied for the guidance counsellor positions including Ms. Ryscavage and Ms. Connolly (P-46, P-47).

During the summer of 1986, the Board hired Holly Schwoebel and Joanne Nagy Glembocki, both of who had counselling experience and held pupil personnel services certificates (P-59, P-60, P-61, P-62, P-63, P-64, P-65, P-66, P-67, P-68, P-68).

In addition, the Board decided to continue the employment of Ms. Carr, who at the time, still held an emergency pupil personnel services certificate.

By letter dated June 3, 1986, Mr. Ward wrote a letter to the State Board of Examiners in support of Ms. Carr's application for a standard pupil personnel services certificate (P-48), and by letter dated June 13, 1986, Mr. Ward asked Mr. Hughes to extend Ms. Carr's emergency certificate (P-53). Ms. Carr's emergency certificate was extended until July 1, 1987 (P-54).

By letter dated July 23, 1986, Ms. Carr was informed by Celeste M. Rorro, Secretary to the State Board of Examiners that her application for the standard personnel services certificate was denied and that Ms. Carr had the right to appeal this determination (P-55). By letter dated October 21, 1986, Ms. Carr requested a reconsideration of her application for certification (P-56), and Mr. Ward wrote a letter in support of her request (P-57).

In March 1987, the State Board of Examiners approved the issuance of a standard personnel services certificate to Ms. Carr (R-1).

CONCLUSIONS OF LAW

There is a threshold issue in this matter which was not addressed by the Board, namely, the timeliness of the petitioner's appeal. The petition in this matter was filed with the Commissioner on September 15, 1986. Ms. Carr was hired for the 1985-86 school year on October 8, 1985 (P-38). There was no evidence presented to show when she was

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rehired for the 1986-87 school year; however, it is reasonable to assume this occurred in April 1986. At the hearing, Ms. Ryscavage testified that the Association was not aware of the fact that Ms. Carr did not have a standard certificate until June 1986. Since her testimony was not disputed by the Board, I **CONCLUDE** that the petition was filed within the 90-day period provided by N.J.A.C. 6:24-1.2.

In addition, although Mark J. Blunda, Esq., in his brief on behalf of the Association, questioned the type and amount of information given to Mr. Hughes in support of the request to issue the initial emergency certificate to Ms. Carr (P-31), the validity of the emergency certificate was not raised as an issue in this matter.

Pursuant to law, a person must hold a student personnel services certificate in order to be employed as a guidance counsellor by a local board of education, N.J.S.A. 18A:26-2; N.J.A.C. 6:11-12.13. The law also allows for the issuance of an emergency certificate upon application of the local board of education if it is shown that there is an "inability due to unforeseen shortages or other extenuating circumstances to locate a suitable certified teacher," N.J.A.C. 6:11-4.2.

In this matter, Mr. Blunda argued that the Board's actions in hiring Ms. Carr for the 1985-86 and the 1986-87 school years were ultra vires since the Board had received applications for the guidance counsellor positions from candidates who held standard certificates. In support of his argument, Mr. Blunda cited the Commissioner's decisions in Hanneman v. Bd. of Ed. of Willingboro Twp., 1979 S.L.D. 712, modf'd., State Bd. of Ed., 1980 S.L.D. 1498, and Mesics v. Bd. of Ed. of East Windsor Regional School District, 1977 S.L.D. 153. In both of these cases, the Commissioner held that the appointments of persons holding emergency certificates were improper since there were other employees of the local boards of education who were properly certified for the positions in issue.

In response to this argument, Mr. Barger argued that the employment of Ms. Carr was appropriate based on the circumstances, and that the Commissioner's decision in Hanneman and Mesics are distinguishable on the facts. Mr. Barger argued that since all of the guidance counsellors at the high school had to be replaced for the 1985-86 school year and since there was a 50 percent turnover in the guidance counsellor positions for the 1986-87 school year, the Board properly determined that it had to hire guidance counsellors with experience. Therefore, Mr. Barger asserted, the Board properly selected

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Ms. Carr, who had such experience, in preference to candidates such as Ms. Rsycavage and Ms. Connolly, who possessed the appropriate standard certificate but had no experience as guidance counsellors.

In response, Mr. Blunda argued that the Board had presented no witnesses in support of its position and that the hearsay contained in the documents admitted into evidence cannot legally support a finding in favor of the Board. In support of his position, Mr. Blunda cited the decisions in Mesics, and Colavita v. Hillsborough Bd. of Ed., (N.J. App. Div., March 28, 1985, A-4342-83T6) (unreported).

Mr. Barger did not respond to the petitioner's argument that there was no substantive evidence to support the Board's position in this matter.

In reviewing this matter, I recognize that it has been established that there is a presumption that a local board of education acted properly and that a local board's decision will not be overturned unless there is an affirmative showing that it acted improperly, unreasonably or arbitrarily, Schinck v. Bd. of Ed. of Westwood Consolidated School District, 60 N.J. Super. 448 (App. Div. 1960); Thomas v. Bd. of Ed. of Morris Twp., 89 N.J. Super. 327 (App. Div. 1965), aff'd., 46 N.J. 581 (1966).

It has also been established that a local board may establish requirements or qualifications for positions in addition to the proper certification, South River Ed. Assn. v. Bd. of Ed. of the Borough of South River, OAL DKT. EDU 8990-84 (July 26, 1985), adopted by Commissioner, Sept. 9, 1985; Van Os v. Bd. of Ed. of the Tp. of Cinnaminson, 1977 S.L.D. 1040; however, it has also been determined that such additional requirements or qualifications cannot be imposed unless they are formally adopted by the local board, Tirico v. Bd. of Ed. of Little Ferry, OAL DKT. EDU 213-83 (Dec. 5, 1983), reversed by Commissioner, Jan. 19, 1984.

In this matter there was no showing that the Board had formally adopted a requirement of experience in addition to the proper certificate for the guidance counsellor positions, and the job specification for the position that was introduced into evidence does not require any experience (P-58).

In addition, I recognize that the decisions in cases such as South River Education Association, Van Os, Tirico, do not suggest that the additional requirements or qualifications for a position which are required by a local board should outweigh the need

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for a standard certificate. There is no question that an emergency certificate is a sub-standard certificate and that the holder of such a certificate has not fully satisfied the statutory requirements for the standard certificate, Kubas v. Bd. of Ed. of the City of Linden, 1980 S.L.D. 172; N.J.A.C. 6:11-4.2. Therefore, to allow certified and uncertified teachers to be weighed against each other on the basis of comparative merit would render the certification requirement meaningless.

Having reviewed the facts and arguments presented by the parties, I **CONCLUDE** that the petitioner has shown that the Board acted improperly in this matter and that it should not have hired Ms. Carr as a guidance counsellor for the 1985-86 or 1986-87 school years. Further, I **CONCLUDE** that there can be no determination as to who should have been hired for the guidance counsellor position for either school year since the Board has the exclusive right to make such an appointment from among the properly certified applicants. See, Hanneman at 1980 S.L.D. 1499.

In addition, I recognize that the Board acted in good faith in this matter and the county superintendent of schools did issue an emergency certificate to Ms. Carr. Therefore, I **CONCLUDE** that Ms. Carr's appointments were not ultra vires and that she is entitled to both tenure and seniority credit for her employment during the 1985-86 and 1986-87 school years and that she is eligible to be rehired by the Board for the 1987-88 school year since she now has the required standard certificate (R-1).

It should also be noted that a substantial amount of hearsay is contained in the testimony of Ms. Rsycavage and in the documents admitted into evidence, which was relied on by both parties. However, I **CONCLUDE** that there was sufficient competent evidence presented by the testimony and by the documents, which are admissible pursuant to the rules of evidence, on which to base this initial decision. See, Colavita; In re Scioscia, (N.J. App. Div., March 23, 1987, A-1240-85) (unreported).

DISPOSITION

In its petition, the Association requested that the Commissioner declare that the conduct of the Board was unlawful, that the Board be restrained from employing guidance counsellors who do not possess a standard pupil personnel services certificate, and that the Association be awarded compensatory and punitive damages and reasonable attorney fees and costs of litigation.

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Based on my conclusions in this matter, I **ORDER** that the Board is not to employ for the 1987-88 school year or any school year thereafter any person as a guidance counsellor who does not hold a standard pupil personnel services certificate unless there are no candidates with such a certificate and an appropriate emergency certificate is issued by the county superintendent of schools. Also, I **ORDER** that no administrator employed by the Board shall establish additional requirements or qualifications for the position of guidance counsellor which have not been properly adopted by the Board. Further, I **ORDER** that there shall be no remedial action regarding Ms. Carr's employment during the 1985-86 and 1986-87 school years. Lastly, I **ORDER** that the petitioner is not entitled to any compensatory and punitive damages nor to any attorney fees and costs of litigation.

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

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

June 8, 1987
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

JUN 8 1987
DATE

Seymour Ellis
DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 11 1987
DATE

Ronald L. Parker /s
OFFICE OF ADMINISTRATIVE LAW

ij/ee

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RUMSON-FAIR HAVEN SCHOOL EMPLOYEES ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RUMSON-FAIR HAVEN REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Association filed exceptions within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

Petitioner's exceptions are summarized in pertinent part below.

> THE ADMINISTRATIVE LAW JUDGE IMPROPERLY CONCLUDED THAT THE BOARD ACTED IN GOOD FAITH AND THEREFORE ITS APPOINTMENT OF AN INDIVIDUAL WITH SUBSTANDARD CERTIFICATION WAS NOT ULTRA VIRES.

The Association agrees with the ALJ that the Board herein "acted improperly when it appointed as a guidance counsellor an individual without standard certification knowing there were candidates with proper certification who were available to the School District." (Exceptions, at p. 1) However, the Association excepts to the ALJ's determination that said action of the Board was not ultra vires because it acted in good faith. It relies on the State Board's decision in Hanneman v. Board of Education of the Township of Willingboro, 1980 S.L.D. 1498 for its contention that not only did the Board act in bad faith, but also it was without legal authority to employ an individual without proper certification when properly certified individuals were available for and interested in the position. "Consequently, the Board's actions are not only improper, but also ultra vires." (Exceptions, at p. 3) The Association requests that the Commissioner of Education modify the ALJ's recommended initial decision to so conclude.

Upon a careful review of the record in this matter, the Commissioner affirms the determination of the Office of Administrative Law, with the following modification.

Because fully certified candidates were available to fill the position of guidance counselor at Rumson-Fair Haven High School during the 1985-86 school year and again during the 1986-87 school

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year, the Commissioner is in accord with the ALJ that it was inappropriate that an emergency certificate be issued to Ms. Carr, notwithstanding the Board's rationale that they preferred an experienced guidance counselor in the position. See Hanneman v. Board of Education of the Township of Willingboro, 1979 S.L.D. 712, mod. State Board 1980 S.L.D. 1498 and Mesics v. Board of Education of East Windsor Regional School District, 1977 S.L.D. 153. Both of these cases hold that appointments of persons holding emergency certificates were improper since there were persons available who were appropriately certified including employees of the local boards of education.

Further, the Commissioner is in accord with the ALJ that it would be inappropriate that he judge from among the eligible pool of persons certified in Student Personnel Services who should hold the position, since that is exclusively a matter of Board discretion. See Hanneman, supra.

However, the Commissioner must agree with the exception noted by the Association that in accord with the language of the State Board in Hanneman, the action of the Board herein was not only improper, but also ultra vires. Notwithstanding this determination, Ms. Carr has now achieved standard certification in pupil personnel services. Accordingly, the matter is moot as to the Association's prayer for relief wherein it asks for an Order compelling the Board to fill the position of guidance counselor with an individual who possesses a standard student personnel services.

As to the Association's request for compensatory, punitive damage, reasonable attorney's fees and costs of suit, the Commissioner finds that, notwithstanding the fact that the Board erred in its decision to hire a person with an emergency certification when there were eligible persons both within and without the district with standard certification in the area of pupil personnel services, there is no single individual who can demonstrate that he had a right to be so appointed to the position. Those candidates only had a right to be considered, not to be hired for the position. Consequently no deprivation can be demonstrated to have befallen any named individual and, therefore, no relief can be offered. Further, the Commissioner is not empowered to grant punitive damages other than pre-judgment interest.

Moreover, inasmuch as the Commissioner has determined that no specific individual has demonstrated entitlement to the position in question, the Commissioner deems that no interest might be awarded, even were there to be a determination that the Board's action was taken in bad faith.

Further, the Commissioner finds, as did the ALJ, no deliberate bad faith in the Board's actions, albeit recognizing that the Board's actions were not consistent with regulation. The Commissioner would suggest, contrary to the Association's

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exceptions, that the intent of the Board in its actions is indeed relevant to the instant matter, for only with deliberate intent to act in bad faith might the Commissioner grant pre-judgment interest. He finds no such malicious intent on the Board's part herein.

Accordingly, the initial decision is adopted, as modified herein.

COMMISSIONER OF EDUCATION

July 17, 1987

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IN THE MATTER OF THE TENURE	:	
HEARING OF PATRICK CAPORASO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION ON REMAND
OF BELLEVILLE, ESSEX COUNTY.	:	

This matter has been reversed and remanded to the Commissioner of Education by virtue of the Appellate Court's ruling of March 19, 1987 which held that the Commissioner and the State Board of Education erred in applying that standard of review of contested cases enunciated by the Court in Mayflower Securities v. Bureau of Securities, 64 N.J. 85 (1973).

Consequently, the Commissioner has undertaken a further review of this matter in conformity with the remand. In doing so the Commissioner relies on the standard for review of contested cases set down by the New Jersey Supreme Court in In re Masiello, 25 N.J. 590 (1958) which reads in pertinent part as follows:

> [The Commissioner] "[i]n reaching his determination *** must *** give due weight to the nature of the findings below, although his primary responsibility is to make certain that the terms and policies of the School Laws are being faithfully effectuated." Laba v. Board of Education of Newark, supra, 23 N.J. at page 382. More definitively, this means that the burden of the Commissioner is to weigh the evidence and to make an independent finding of fact on the record presented; and in the process of reaching that

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> finding, he should give due regard to the opportunity of the hearer below to observe the witnesses and to evaluate their credibility. Cf. R.R. 1:5-4(b). (at 606)

For the purpose of this review of the record of this contested matter the Commissioner also relies on the specific provisions of N.J.S.A. 52:14B-10(d) which states in pertinent part:

> *** The final decision may incorporate by reference any or all of the recommendations of the administrative law judge.***

In reviewing respondent's exceptions to the initial decisions, it is noted that he contests each of those findings of fact which lend credence to the testimony of John Sileo especially as those findings relate to his having been found guilty of six incidents of sexual misconduct with his former pupil. The Commissioner has carefully reviewed all of the transcripts of the testimony of the witnesses as they relate to each of the exceptions to the initial decision filed by respondent, as well as the replies to those exceptions filed by the Board. Essentially, respondent contends that the ALJ improperly ignored much of his own testimony as well as the testimony of those witnesses who testified on his behalf with respect to the incidents of sexual misconduct as they relate to the Board's tenure charges against him. He further relies on Mr. Sileo's testimony as well as the testimony of other witnesses contained in the transcripts of these proceedings in an effort to impeach the credibility of Mr. Sileo's testimony especially as it relates to the sequence of events describing his relationship with respondent within the period of time between the spring and summer months of 1975. Respondent maintains that the transcript of the

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testimony of the witnesses clearly establishes that Mr. Sileo's account and descriptions of the times and places that each of these alleged incidents of sexual abuse were committed are contradictory, inconsistent, unsupportable and without a basis in truth or in fact.

Further, issue is taken by respondent with the findings in the initial decision which hold that John Sileo's ability to testify as a credible witness was not impeached by his membership in the "Fourth Satanic Church of the United States" of which he has been pastor from January until November 30, 1983 and, further, that John Sileo was determined to be a competent witness despite those findings set forth in a psychiatric evaluation of him which, respondent maintains, attests to his mental incompetency.

The Commissioner upon careful and thorough review of the transcripts of these proceedings finds and determines that respondent's exceptions to the findings and conclusions are his own inferences with regard to the findings of fact. Nothing within respondent's exceptions which are incorporated herein by reference serves to convince the Commissioner that the incidents of unbecoming conduct with which respondent is charged did not take place nor that the credibility determinations of the ALJ should be overturned. Despite respondent's protestations to the contrary, the transcripts do not substantiate his contention that Mr. Sileo's testimony was contradictory and unsupported by fact.

Cognizant of his responsibility to conduct an independent review of the entire record before him, the Commissioner has weighed the evidence related to the findings of fact and conclusions of law

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set forth in the initial decision. In the process of reaching an independent determination with respect to the findings of fact in the record before him, the Commissioner has given due regard to the opportunity of the ALJ who conducted the plenary hearing in this matter to observe the witnesses and evaluate their credibility. In re Masiello, supra

Accordingly, the Commissioner finds and determines that the Board has met its burden of proof of demonstrating conduct unbecoming a teacher as recommended by the ALJ in the initial decision and he therefore affirms that initial decision and hereby adopts those findings of fact and conclusions of law as his own. N.J.S.A. 52:14B-10(d) Accordingly, it is found and determined that by virtue of respondent having been found by a preponderance of credible evidence to have committed the acts of sexual misconduct against a former pupil and that such behavior by respondent constitutes conduct unbecoming a tenured teaching staff member, the Commissioner hereby directs the Board to remove respondent from his tenured position of employment as of the date of this decision.

It is further directed that pursuant to N.J.A.C. 6:11-3.7 this matter be forwarded to the State Board of Examiners for determination of possible revocation or suspension of respondent's teaching certificate(s).

COMMISSIONER OF EDUCATION

JULY 17, 1987

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PATRICK CAPORASO,	:	
RESPONDENT-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
PETITIONER-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, October 15, 1985

Decided by the State Board of Education, May 7, 1986

Remanded by the Appellate Division, March 19, 1987

Decision on remand by the Commissioner of Education, July 17, 1987

For the Respondent-Appellant, Oxfeld, Cohen and Blunda (Sanford R. Oxfeld, Esq., of Counsel)

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

The State Board of Education affirms the decision of the Commissioner for the reasons expressed therein. In affirming that decision, we reject Appellant's contention that he has been denied due process in that the Commissioner rendered his decision following the Appellate Division's remand without additional briefs from the parties. In this regard, we emphasize that the case was remanded in order that the Commissioner review the findings of the Administrative Law Judge under the appropriate standard of review. Appellant's exceptions to those findings were considered by the Commissioner when he rendered his decision pursuant to the remand. Furthermore, in exercising his right of appeal to the State Board, Appellant has submitted additional briefs.

S. David Brandt opposed. Regan Kenyon abstained.
December 2, 1987

Pending N.J. Superior Court

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8138-86
AGENCY DKT. NO. 317-9/86

V. J. H.,

Petitioner

v.

ORANGE BOARD OF EDUCATION

and

WOODROW ZAROS,

Respondents

Melvin Randall, Esq., for petitioner
(Love & Randall, attorneys)

Irving Evers, Esq., for respondents
(Schwartz, Pisano, Simon & Edelstein, attorneys)

Record Closed: June 4, 1987 Decided: June 9, 1987

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

V.J.H., a senior student at Orange High School during the 1985-86 school year, alleged the Orange Board of Education (Board) and/or its agents acted arbitrarily, capriciously, and/or abused its discretionary authority when her high school diploma was denied.

The Board and its agents deny the allegation and aver its action was proper because V.J.H. failed Physical Education IV, a requirement for graduation. Respondents sought dismissal of the Petition on Motion because of an alleged untimely filing. The Motion was

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denied in an Order entered on April 24, 1987 and transmitted to the Commissioner of Education for review either interlocutorily pursuant to N.J.A.C. 1:1-9.7 or at the end of the contested case pursuant to N.J.A.C. 1:1-16.5.

The matter was transmitted to the Office of Administrative Law as a contested case on November 26, 1986 pursuant to N.J.S.A. 52:14F-1 et seq., and was preheard on January 12, 1987. Subsequent to the denial of respondent's Motion, the matter proceeded to plenary hearing at the Office of Administrative Law, Newark, on June 3 and 4, 1987. The record closed at the termination of hearing on June 4 with no post-hearing memoranda or briefs requested or ordered.

The following facts, relevant to the substantive issue, were stipulated at prehearing and are adopted herein as **FINDINGS OF FACT:**

1. V.J.H. received a failing grade in Physical Education IV.

2. Successful completion of Physical Education IV is required for V.J.H. to be eligible to receive the high school dipoloma.

TESTIMONIAL EVIDENCE

Extensive testimonial evidence was adduced during the hearing. The recitation that follows shall incorporate only that deemed to be relevant to the substantive issue of whether a rational basis existed for the failing grade received by V.J.H. in Physical Education IV.

The mother of V.J.H. testified she became aware of her daughter's problems in P.E. IV when she received a note from guidance counselor Johnson under date of March 18, 1986. She responded by seeking a conference held on April 7 at which an accommodation was made to provide her daughter with an opportunity to pass the course. Absenteeism

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and unpreparedness accumulated to date in the fourth quarter were "wiped clean," and her daughter would pass if her attendance and preparedness were perfect for the remainder of the year, with absences excepted for valid excuses. The mother further testified that her daughter's blemished record in P.E. IV was caused by an asthmatic condition in addition to the tragic death of her daughter's boyfriend on Christmas eve. She also stated she had no recall of any required written reports being discussed at the April 7 conference nor did she receive any progress report on P.E. IV at the midpoint of the fourth quarter from daughter's P.E. IV teacher, one Ms. Shafer. She did state her recall of her grades of 40 and 50 her daughter received for P.E. IV. in the second and third quarters, respectively. She also stated she did not become aware of diploma denial until after graduation exercises.

V.J.H. testified that she was taking P.E. III in period four and P.E. IV in period seven during her senior year because she failed P.E. III the previous year, and her difficulties arose in P.E. IV because of her asthma and the tragic death of her boyfriend on Christmas eve. She further stated that no requirement of written reports were mentioned at the April 7 conference, but she was aware of attendance and preparation requirements. She also stated that Shafer did send a progress report to her mother in mid-fourth quarter; she told the school nurse of her asthmatic program; never indicated nausea as a reason for requesting an excuse from P.E. IV on April 11, and that her guidance counselor, Ms. Johnson, tried to help her. She also said that Systems Coordinator Lewis, Nurse Burney, and teacher Shafer all lied when they testified under oath.

Shafer testified that V.J.H. failed the second quarter because she was absent 13 times and unprepared 5 times, with 8 absences and 3 unprepared occurring before Christmas, the approximate mid-point of the quarter. The grade of 40 was recorded automatically by policy. The third quarter grade of 50 resulted from 5 absences and 9 unpreparedes, with excuses having been provided for 3 of each. Shafer further stated the extra credit opportunity was provided for V.J.H. at the April 7 conference in accordance with policy as a perfect grade of 100 was insufficient for V.J.H. to attain a passing grade of 65 when averaged with her second and third quarter grades of 40 and 50. Shafer also stated she repeatedly advised V.J.H. of her extra credit requirement of five written reports, but no reports were ever submitted. She finally stated she granted a

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grade of 75 to V.J.H. in P.E. IV for the fourth quarter, and added eight points to her final average for improved attendance and preparation subsequent to the April 7 conference.

Social Worker Shelton testified that she was present at the April 7 conference and recalled the discussion of written reports for extra credit.

Vice-principal Baskerville testified that she met with the mother of V.J.H. and Shafer on the day following graduation; verified that an excuse from P.E. III in period four was for nausea and was not valid for P.E. IV in period seven; and that she corrected the handwritten grade of 50 on the grade transcript for the second quarter in the presence of V.J.H.'s mother with the explanation that computer programming did not permit a numerical grade less than 50 and the recorded X was the equivalent of a grade of 40 by policy; and that the policy of X=40 was distributed to students with their reports cards at the end of the first and second quarter. She upheld the failing grade of 63.

Systems Coordinator Lewis stated that he met with and explained grading in physical education as well as course requirements to all students at the beginning of the school year, and posted same for public review. He stated he attended the April 7 conference and approved the accommodations made for V.J.H., noting that some were extra special because V.J.H. could choose her own sports topics for her written reports. He emphasized that extra credit through written reports was the only possible way the student could pass P.E. IV as an average of 65 for passing could not otherwise be attained due to her previous grades of 40 and 50, and that he did the calculations in the presence of V.J.H. and her mother at the April 7 conference.

Nurse Burney testified that she issued the excuse to V.J.H. from P.E. III on April 11 for the reason of nausea indicated by the student; no mention of asthma was made; and that the excuse issued was for P.E. III only.

Nurse Smith verified the medical log indicated the excuse issued to V.J.H. by Burney on April 11 was because of nausea and was for P.E. III only.

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Guidance counselor Johnson testified that she received a copy of the progress report mailed to the mother of V.J.H. at the mid-point of the fourth quarter, and promptly wrote to the mother of her concern which resulted in the April 7 conference. She also stated she tried to help the student on many occasions, which corroborated the testimony of V.J.H., but that V.J.H. should have failed P.E. IV outright, and that the special accommodation made was a great opportunity for the student to make-up.

DOCUMENTARY EVIDENCE

The Course Prospectus for Health and Physical Education, which was explained to students and posted for review, incorporates penalties for unpreparedness and tardiness, as well as extra credit opportunities through special written reports. See, R-2.

The Medical Log under date of April 11, 1986 indicates that V.J.H. appeared at 10:55 a.m. [5 minutes before period 4] with the comment recorded as "nauseated." See, R-3.

The testimony that X=40 and is recorded for an attendance failure is corroborated by "Instructions For Recording Grades . . ." and "Guide For Grading Students," the latter having been distributed to students, See, R-4 and R-5.

FINDING OF FACTS

A review of all testimonial and documentary evidence and the observation of the demeanor of all witnesses results in the adopting of the following **FINDING OF FACT:**

1. The grade for successful course completion is 65.

2. V.J.H. was scheduled for P.E. III and P.E. IV in her senior year because of her failure in P.E. III the previous year and the successful completion of both courses is required for diploma eligibility.

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3. V.J.H. received a final failing grade of 63 in P.E. IV, which was determined by averaging the grades of 40, 50 and 75 she received for the second, third and fourth quarters, respectively, with eight points added gratuitously by teacher Shafer for improved attendance and preparedness subsequent to the April 7 conference.

4. V.J.H. was provided as extraordinary opportunity to successfully complete P.E. IV through her attendance and preparedness subsequent to April 7 and the fulfillment of a requirement of five written reprots for extra credit.

5. V.J.H. improved her attendance and preparedness subsequent to April 7.

6. V.J.H. did not submit any written reports.

7. It was arithmetically impossible for V.J.H. to attain a passing grade of 65 without extra credit.

8. The excuse from P.E. III in period 4 on April 11 for nausea was not valid for P.E. IV in period 7.

9. The issue of the validity of the April 11 excuse for P.E. IV is irrelevant as a passing grade could not be attained without extra credit for written reports.

10. Forty is the proper grade received by V.J.H. for the second quarter as an attendance failure.

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DISCUSSION

The first quarter of P.E. IV consisted of a curriculum in first aid which was taught by a teacher other than Shafer. The method of determining the final grade in P.E. IV was not disputed, but consisted of averaging grades received for the second, third and fourth quarters with any extra credits added thereto. It must be noted that the inclusion of the first quarter grade in first aid would yield a failing average of 62.25, exclusive of extra credits.

It is not disputed that the burden of proof by a preponderance of credible evidence rests with V.J.H. It is essential that petitioner establish a reasonable probability of the fact. Jaeger v. Elizabeth Town Consolidate Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940). Additionally "[A] Trier of the facts in contested or uncontested cases has a right and a duty to consider the attitude and demeanor of the witnesses as it affects the credibility of their testimony." Rains v. Rains, 127 N.J. 328, 332 (E.& A. 1940).

The testimony of V.J.H. and her mother is deemed herein to have been self-serving and suspect. The reasons put forth for excessive absenteeism and unpreparedness due to asthma and the tragic loss of the boy friend of V.J.H. does not stand muster upon review of the record herein. The absenteeism of V.J.H. in P.E. IV during the second quarter was greater prior to Christmas eve. I further believe the testimony of nurses that asthma was not given to them by V.J.H. as a cause for a requested excuse from Physical Education. Nevertheless, a valid excuse is not detrimental to a student's grade. Furthermore, the rational given by V.J.H. for excessive absenteeism and unpreparedness in P.E. IV somehow had no impact on her successful completion of P.E. III.

There was no communication gap between the agents of the Board with either V.J.H. or her mother. A serious gap must exist between daughter and mother, however. This is evident by their own testimony that V.J.H. was advised of diploma denial prior to the day of graduation but her mother did not become aware of same until after graduation. V.J.H. testified that Shafer sent a progress report home at the mid-point of the fourth quarter, but her mother testified she never received it.

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SUMMARY OF FINDINGS AND CONCLUSION

Shafer may have indeed been arbitrary when she gratuitously awarded V.J.H. eight points for improved attendance and preparedness subsequent to April 7. Since this was to the questionable benefit of V.J.H. it was not contested.

I FIND that V.J.H. has failed to meet her burden of proof by a preponderance of credible evidence that the failing grade received in P.E. IV was arbitrary, capricious or without justification and therefore neither was the denial of her diploma.

I CONCLUDE, therefore, that the Petition of Appeal shall be and is hereby DISMISSED.

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

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

9 June 1987
DATE

Ward R. Young
WARD R. YOUNG, ALJ

JUN 11 1987
DATE

Receipt Acknowledged:
Seymour Ellis
DEPARTMENT OF EDUCATION

Mailed To Parties:
June 12, 1987
DATE

Ronald L. Parks /KS
FOR OFFICE OF ADMINISTRATIVE LAW

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V.J.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP AND WOODROW ZAROS, SUPERINTENDENT OF SCHOOLS, ESSEX 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 were timely filed pursuant to N.J.A.C. 1:1-16.4a, b and c.

Petitioner excepts to the findings of fact reached by the ALJ that (1) she was provided extraordinary opportunity to successfully complete P.E. IV through her attendance and preparedness subsequent to April 7 and the fulfillment of a requirement of five written reports for extra credit and (2) she did not submit any written reports. Both petitioner and her mother categorically deny that as a result of an April 7, 1986 meeting she was required to complete five written reports to successfully complete P.E. IV. Although they admit to being present at a meeting on that date with school personnel, they maintain that they knew nothing of the requirement until the hearing. In support of this, petitioner cites the following as the reasons why they were surprised:

> First, nothing was ever put in writing to them relative to the requirement to submit five written reports. Second, Ms. Shelton kept notes of the April 7, 1986 meeting and admitted putting them in file(s) of V.J.H. but the notes could not be presented at the hearing because they could not be found. Third, a comprehensive Memorandum dated October 30, 1986 from Mrs. Baskerville, Vice Principal to Mr. Reinoso, Acting Principal never mentions the five report requirement and failure to complete same by V.J.H.*** Finally, at the hearing, Ms. Shafer never testified either on direct examination or cross examination of a five report requirement. The testimony concerning same was subsequently adduced by questions put by the Administrative Law Judge.
> (Petitioner's Exceptions, at p. 3)

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Petitioner seeks reversal of the recommended decision to dismiss the Petition of Appeal or, in the alternative, to merely require that she be allowed now to complete the five written reports. The Board in urging affirmance of the initial decision contends, inter alia, that simply because petitioner and her mother deny any knowledge of the requirement of five written reports does not make it so. It also avers that the ALJ's findings make their arguments specious. Moreover, it contends that the ALJ's findings make it crystal clear that the school staff bent over backwards to afford her "a golden opportunity" for her to earn her diploma (Board's Reply Exceptions, at p. 2) and it points to the fact that the ALJ described the testimony of petitioner and her mother as "self-serving" and "suspect." (Initial Decision, ante)

Upon review of the record and the exceptions, the Commissioner is unpersuaded that the ALJ erred in finding that five written reports were required of petitioner in order for her to earn the extra credit needed to attain a passing grade in P.E. IV for the 1985-86 school year. The arguments presented are insufficient to disturb the credibility determination reached by the ALJ as to whether such a requirement existed, a determination which derived from his consideration of the testimony of the various witnesses in this matter.

Upon his own independent examination of the record provided him, the Commissioner agrees with and adopts as his own the findings of fact reached by the ALJ (Initial Decision, ante) with the clarification to Finding No. 10 that the grade of 40 was proper, based on the district's policy. However, the Commissioner does not accept the ALJ's determination that petitioner failed to meet her burden of proof by a preponderance of credible evidence that the failing grade in P.E. IV was arbitrary, capricious or without justification as explained below.

It has long been recognized in case law that excessive absences and truancy from class/school may justifiably lead to the withholding of credit and denial of graduation. As articulated in Wheatley et al. v. Board of Education of the City of Burlington, 1974 S.L.D. 851, frequent absences of pupils from regular classroom learning experiences disrupt the continuity of the instructional process with the benefits of such instruction being lost to the degree that they cannot entirely be regained by extra instruction (at 864). More specifically, it states, "***The entire process of education requires a regular continuity of instruction, classroom participation, learning experiences, and study in order to reach the goal of maximum educational benefits for each individual child.***" (at 864) See also G.G. v. Board of Education of New Providence, 1975 S.L.D. 75; Donna Eckert v. Board of Education of Bayonne, decided by the Commissioner April 25, 1985; Connolly and Connolly v. Board of Education of Passaic County Regional High School District No. 1, decided by the Commissioner June 17, 1985; L.J. and G.J. for S.J. v. Board of Education of Lacey Township, decided by the

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Commissioner July 18, 1985; Monro v. Board of Education of Ramapo Indian Hills Regional High School District, decided by the Commissioner July 30, 1984, aff'd in part/rem'd State Board June 4, 1986.

Such cases have determined that so long as a board's policy with respect to attendance is not arbitrary and unreasonable, it will be upheld. As stated in Wetherell and Carnivale v. Board of Education of the Township of Burlington, 1978 S.L.D. 794:

> It is reasonable to expect the imposition of penalties for unjustifiable tardiness, improper absences from classes, truancy, and absences considered to be inexcusable due to the nature of the cause. Such penalties may in effect reduce the final grade in a course of study for which a determination of subject matter mastery must be made for the awarding of credit.*** (at 800)

For example, in Wetherell, supra, the Commissioner upheld a policy which imposed a 75 percentage reduction in a student's classroom participation grade (one of the criteria considered in calculating an overall grade) for excessive absenteeism. In Debra Rubertone v. Board of Education of the Township of Lyndhurst, decided by the Commissioner July 11, 1979, he upheld a policy wherein each unexcused tardiness to class equated to be 1/3 of a cut and 9 tardies caused a student to be removed from class with no credit granted.

Notwithstanding the above, the Commissioner has consistently refused to uphold policies which call for an automatic imposition of a grade penalty for unexcused absence or absences resulting from suspensions. Wermuth v. Board of Education of Livingston, 1965 S.L.D. 121 states:

> ***The use of marks and grades as deterrents or as punishment is likewise usually ineffective in producing the desired result and is educationally not defensible. Whatever system of marks and grades a school may devise will have serious inherent limitations at best, and it must not be further handicapped by attempting to serve disciplinary purposes also.*** (at 128-129)

Thus, while the Commissioner upheld a percentage reduction in a pupil's class participation grade, he struck down in Wetherell, supra, the portion of the Board's policy which incorporated an upward sliding scale of grades a student was required to receive in order to pass a course, i.e., a student absent 31-39 days for whatever reason had to attain a final average of 90 to receive course credit.

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In Dawn Minorics v. Board of Education of the Town of Phillipsburg, 1972 S.L.D. 86 the Commissioner found as improper, and ordered termination of, a grading policy which automatically and arbitrarily assigned a zero for each day of truancy or suspension, thus weighting downward the term grade.

Given the factual circumstances in this matter, the Commissioner finds to be reasonable the penalty imposed on petitioner for her "unpreparedS" (R-2) since being prepared for class is essential to the learning process and is justifiably considered in arriving at a course grade for a pupil, be it for the marking period or final grade. He would likewise have upheld a reduction in a class participation grade or denial of course credit for failure to meet attendance requirements (Wetherell, supra; Monro, supra; Wheatley, supra) but he cannot find as proper a district policy which arbitrarily imposes an automatic grade of 40 based on an attendance violation. (Wetherell, supra; Minorics, supra; Wermuth, supra)

Consequently, it is ordered that petitioner's grade for P.E. IV be recalculated excluding the imposition of an automatic grade reduction for attendance with the exception of the class prepared component of the grade.

If, in so doing, petitioner achieves a grade sufficient to pass the course, a diploma is to be granted. If she does not achieve a passing grade, she will have to complete course requirements anew. The Commissioner is unpersuaded with petitioner's argument that she only be required to complete the five reports. On the contrary, he finds that the school personnel offered her assistance and more than sufficient opportunity to achieve a passing grade which she chose to ignore.

Further, the Board is directed to terminate forthwith its policy requiring that an automatic grade of F/40 be given for "attendance failures". It is emphasized that this decision does not serve to prohibit the Board from revising its policy to call for denial of credit or withdrawal from a course based on excessive absenteeism or truancy or other sanction not using grades as a disciplinary measure. Monro, supra; Eckert, supra; Rubertone, supra

COMMISSIONER OF EDUCATION

July 23, 1987

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consequences of failure to correct the alleged inefficiencies, it can hardly be argued that upon the Board's citing the appropriate statutes in its letter of October 22, 1986 respondent could have been unaware of the consequences which would flow from failure to correct the alleged inefficiencies.

Similarly, the Board's failure to apprise respondent in the formal certificate of determination of the exact time and place of the Board's meeting at which it voted to certify said charges to the Commissioner, pursuant to N.J.A.C. 6:24-5.2(a)2 did not materially impair or alter Respondent's ability to defend himself against the charges. The Commissioner concurs that this omission on the part of the Board, if sustained, would place form over substance. The Commissioner so finds.

Notwithstanding the above conclusions, this Board and all other boards are admonished to avoid the complications inherent in failure to abide strictly in the process set forth in regulation for the certification of tenure charges concerning inefficiency.

Consequently, despite the determination that two of the three violations of the strict language of the regulation do not rise to the level of constituting a basis for dismissal, the Commissioner does find that the Board's failure to have provided respondent in this matter with a revised professional improvement plan, as required by N.J.A.C. 6:24-5.1(c)4, does rise to the level of seriousness of significantly disadvantaging respondent in meeting the requirements for improvement necessary to protect himself from possible certification of charges of inefficiency.

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Accordingly, the Commissioner grants Summary Decision to respondent and directs that the charges of inefficiency be dismissed without prejudice to the right of the Board to properly recertify in a manner totally consistent with statute and regulations.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 23, 1987

DATE OF MAILING - JULY 23, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION and ORDER
OAL DKT. NO. EDU 2537-87
AGENCY DKT. NO. 54-3/87

EAST ORANGE BOARD OF EDUCATION,

Petitioner

v.

JULIO TRIANA,

Respondent

Melvin Randall, Esq., for petitioner
(Love & Randall, attorneys)

Paul L. Kleinbaum, Esq., for respondent
(Zazzali, Zazzali & Kroll, attorneys)

Record Closed: June 24, 1987 Decided: June 25, 1987

BEFORE WARD R. YOUNG, ALJ:

Respondent seeks the dismissal of certified tenure charges of inefficiency because of alleged procedural deficiencies pursuant to N.J.A.C. 6:24-5.1(c) and/or alleged non-compliance with N.J.A.C. 6:24-5.2, and alternatively seeks the dismissal of any charges not incorporated in filings prior to the 90-day period or created after the expiration of the 90-day period.

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The matter was transmitted to the Office of Administrative Law as a contested case on April 14, 1987, pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on May 18, 1987, at which it was agreed that the substantive issue concerning the truth of the charges proceed to plenary hearing, and the issues indicated above be submitted for summary decision. The latter were briefed and the record closed on June 24, 1987, the date established for filing optional responses.

Respondent seeks dismissal of the certified charges because of the alleged violation by the Board of N.J.A.C. 6:24-5.1(c)3 and 4, which states:

> (c) In the event that the tenure charges are charges of inefficiency, the following procedures and timelines shall be observed:
>
> . . .
>
> 3. The district board of education, through its board secretary, shall direct that the employee be informed in writing that, unless such inefficiencies are corrected within the minimal 90 day period, or any longer period provided by the board, it intends to certify those charges of inefficiency to the commissioner pursuant to N.J.S.A. 18A:6-11.
>
> 4. 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. 6:3-1.2(f) to assure that such plan addresses the specific charges of inefficiency and comports with the timelines established for correction.

Respondent also seeks dismissal because of the alleged violation of N.J.A.C. 6:24-5.2 which states:

> (a) The certificate of determination which accompanies the written charges shall contain a certification by the district board of education secretary:
>
> 1. That the district board of education has determined that the charges and the evidence in support of the charges are sufficient, if true in fact, to warrant dismissal or a reduction in salary;

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2. Of the date, place and time of the meeting at which such determination was made and whether or not the employee was suspended and if so whether such suspension was with or without pay;

3. That such determination was made by a majority vote of the whole number of members of the district board of education;

4. In the case of a charge of inefficiency, that the employee was given at least 90 days' prior written notice of the nature and particulars of the alleged inefficiency.

A copy of the charges was transmitted to respondent by the Board secretary in a letter of notification dated October 22, 1986, which is reproduced here in full:

> This is to advise and notify you that pursuant to New Jersey Statutes 18A:6-10 and 18A:6-11, you are hereby notified that charges of inefficiency have been made against you. In accordance with said law, I am enclosing a copy of the charges made against you as well as a copy of the written statements of evidence.
>
> You are further notified that you have ninety (90) days in which to correct and overcome the inefficiencies outlined in the charges. In each case of inefficiency cited, you have been provided with suggestions for improvement.

Respondent argues that he was not advised by the Board of the consequences of a failure to correct the inefficiencies by indicating its intention to certify the charges if said inefficiencies were not corrected as is required by (c)3.

The Board concedes there was no modification of respondent's individual professional improvement plan pursuant to N.J.A.C. 5:1(c)4.

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The certificate of determination pursuant to N.J.A.C. 6:24-5.2 was transmitted to respondent by the Board secretary under date of March 13, 1987, and is reproduced in full:

> Dear Mr. Triana:
>
> The East Orange Board of Education met in executive session on Thursday, March 12, 1987 to consider charges of inefficiency made against you. The Board also considered the evidence to support the charges as well as your statement of position. After considering the charges, the evidence, and your statement, a majority of the full membership of the Board did vote to certify the charges against you and to prefer said charges to the New Jersey Commissioner of Education. A majority of the East Orange Board of Education also voted to suspend you without pay, effective immediately.
>
> This letter will serve as your notice of the detemrination made by the East Orange Board of Education. Attached are copies of all documents considered by the East Orange Board of Education in making its determination:
>
> 1. A charge made by Kenneth D. King, dated February 17, 1987, accompanied by evidence to support the charge.
> 2. A charge made by Irene Nichols, dated February 17, 1987, accompanied by evidence to support the charge.
> 3. A charge made by Sandra DeProspo, dated February 17, 1987, accompanied by evidence to support the charge.
> 4. Your response to the charges, dated March 6, 1987.

FINDING OF FACTS

1. The Board secretary did not notice respondent of the Board's intent to certify the charges of inefficiency if not corrected within the minimal 90-day period pursuant to N.J.A.C. 6:24-5.1(c)3.

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2. The Board did not direct that there be a modification of the individual professional improvement plan, nor was there any such modification by any agent of the Board, pursuant to N.J.A.C. 6:24-5.1(c)4.

3. The certificate of determination did not incorporate the time and place of the Board's determination pursuant to N.J.A.C. 6:24-5.2(a)2.

ARGUMENTS OF COUNSEL

Respondent argues that the language of cited rules is mandatory and the regulatory scheme must be given content if they are to have meaning. Case citations in support of his contention are In re Matter of the Tenure Hearing of Gerealdine Ferenczi, 1987 S.L.D. _____ (Jan. 29, 1987); In re Tenure Hearing of Lillian Levine, 1977 S.L.D. 1129, aff'd State 1978 S.L.D. 1026, aff'd N. J. App. Div., 1979 S.L.D. 846; and In re Tenure Hearing of Marilyn Feitel, 1977 S.L.D. 451, aff'd State Board of Ed., at 458.

The Board argues that the alleged violation of N.J.A.C. 6:24-5.1(c)3 is nothing more than "form over substance", and that respondent knew or should have known of the consequences of uncorrected inefficiencies by reference to N.J.S.A. 18A:6-10 and N.J.S.A. 18A:6-11, which were incorporated in the October 22, 1986 notice.

Concerning the conceded violation of N.J.A.C. 6:24-5.1(c)4, the Board argues that no modification of respondent's professional improvement plan was made because respondent's performance did not change, and that no claim of prejudice was made by him.

The Board expressed no position relative to its alleged violation of N.J.A.C. 6:24-5.2(a)2.

The Board cites In re the Tenure Hearing of Stanley Slovney, 1984 S.L.D. _____ (Nov. 19, 1984) for the proposition that a professional improvement plan lacking the quality and depth intended by N.J.A.C. 6:3-1.21 is not a total flaw requiring the dismissal of inefficiency charges.

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Respondent counters that Slovney is no longer valid in light of the amendment to N.J.A.C. 6:24-5.1, which was effective on May 5, 1986.

The Board further cites In re Tenure Hearing of Inez McRae, 1977 S.L.D. 572 and In re Tenure Hearing of David Herbst, 1980 S.L.D. 930 for the proposition that the grossness of inefficencies are to be construed as incompetence with a dismissal of respondent's tenured positions warranted with no applicability of the 90-day rule.

DISCUSSION

The finding of facts herein support the respondent's allegations of procedural deficiencies by the Board. Merit must also be given to respondent's contention that the regulatory scheme must be applied if it is to have meaning. Merit must also be given to the fact that the amendment to N.J.A.C. 6:24-5.1 supercedes Slovney.

McRae and Herbst are not on point as the Board did not certify any charge of incompetence, nor has the matter been fully heard to permit a finding that respondent is indeed incompetent.

The responsibilities of the administrative law judge (ALJ) require a finding of facts and the application of law. The Legislature has not nor ever should clothe the ALJ with discretionary authority to amend or create a statutory or regulatory scheme.

Although there are issues of material fact related to the substantive matter of whether the certified charges of inefficiencies are true, there are no material facts at issue concerning the alleged procedural deficiencies. Hence, summary decision is appropriate in the latter. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954).

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The substantive issue of the truth of the certified charges of inefficiencies has been scheduled for plenary hearing on June 23 and July 13, 14, 15 and 16. The first day of hearing has been completed.

The thought that a grant of summary decision to respondent herein shall reinstate a teacher who may provide a disservice to children, if he is in fact as ineffective as claimed, is troublesome and frustrating. The adjudicatory process, however, was never designed to provide relief for the ALJ. In the absence of a grant of discretionary authority to amend or ignore the regulatory scheme duly promulgated and adopted by the State Board of Education's aid scheme must serve as the basis for conclusions of law related to the findings of fact.

The Board in the instant matter has indeed violated the mandates of the regulatory scheme. I **CONCLUDE**, therefore, that summary decision shall be and is hereby **GRANTED** to respondent. **IT IS ORDERED** that the certified charges of inefficiencies shall be **DISMISSED**.

The remaining hearing dates shall be adjourned unless the Commissioner of Education reverses the determination herein prior to July 13. It is noted that a covering letter is being forwarded to the Commissioner requesting an expedited review of this Order.

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

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

25 June 1987
DATE

WARD R. YOUNG, ALJ

JUN 25 1987
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

JUN 26 1987
DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

g/e

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IN THE MATTER OF THE TENURE HEARING OF JULIO TRIANA, SCHOOL DISTRICT OF THE CITY OF EAST ORANGE, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

Petitioner, the Board of Education of the City of East Orange, hereinafter "Board," certified charges of inefficiency against respondent, a tenured teacher in the Board's employ on March 12, 1987. The matter was transmitted to the Office of Administrative Law as a contested case on April 14, 1987, and a prehearing conference was held on May 18, 1987. At that time respondent moved for dismissal of the charges because of alleged procedural deficiencies pursuant to N.J.A.C. 6:24-5.1(c) and/or alleged noncompliance with N.J.A.C. 6:24-5.2 and, alternatively, seeking the dismissal of any charges not incorporated in the filings prior to the 90-day period or created after the expiration of the 90-day period.

The ALJ submitted his Summary Decision and Order on June 25, 1987, dismissing the tenure charges for procedural violations and by cover letter of the same date he requested that the Commissioner expedite his review of the matter. The Board's exceptions to the initial decision were timely received in the

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Bureau of Controversies and Disputes on July 7, 1987, and respondent's reply exceptions thereto were also timely submitted on July 9, 1987, pursuant to N.J.A.C. 1:1-18.4. Hearings on the substantive issue were scheduled for July 13, 14, 15 and 16.

The Board's exceptions advance four arguments in objection to the initial decision. They are summarized below.

ARGUMENT I

THE BOARD OF EDUCATION DID NOT VIOLATE N.J.A.C. 6:24-5.1(c)3 IN THIS CASE

Relying on its brief, which is incorporated herein by reference, the Board contends that

> by virtue of the references to N.J.S.A. 18A:6-11 [contained in its letter dated October 22, 1987] the Respondent knew or should have known of the consequences of uncorrected inefficiencies. It is urged that the October 22, 1987 [letter] from the Board's secretary to Respondent comes clearly within the spirit and intent of N.J.A.C. 6:24-5.1(c)3. In addition, Irene Nichols, Principal of Clifford Scott High School testified on June 23, 1987 that when the charges were delivered to Respondent he was advised of the "90 day corrective period" and the consequences of not overcoming the inefficiencies.
>
> (Exceptions, at p. 2)

Thus, the Board argues, there was no procedural violation. Assuming arguendo that it is found that a technical violation occurred in this regard, the Board claims that there was no prejudice to respondent due to this "mere technical violation." (Id., at p. 2) Neither, the Board claims, did this specific inclusion of consequences or the lack thereof alter respondent's teaching performance.

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ARGUMENT II

THE BOARD OF EDUCATION DID NOT VIOLATE N.J.A.C. 6:24-5.1(c)4 IN THIS CASE

On the issue of whether respondent's Professional Improvement Plan (PIP) was modified as a consequence of the certification of tenure charges of inefficiency, the Board states:

> In the instant case, there was no specific modification of Respondent's professional plan because the deficient areas of Respondent's performance did not change. *** However, it is submitted that the plan of improvement was included in the charges given to Respondent. In addition, Respondent had actual knowledge of his inefficiencies and how to improve them, but never did. Respondent's employment increment and adjustment increase had been withheld for two consecutive years, i.e., 1985-86 and 1986-87. The final performance evaluation in each year contained a Professional Improvement Plan which included specific recommendations to serve as guidelines for Respondent to remediate his deficiencies. (Id., at p. 3)

Further, the Board notes that respondent was put on notice of the specific charges of inefficiency at a meeting held on or about October 20, 1986. The Board claims respondent was also given observations and evaluations which included a professional improvement plan. It cites the recommendation of inefficiency charges of Sandra DeProspo in support of this position. Moreover, the Board states:

> Irene Nichols testified on June 23, 1987 that when Respondent was given the charges of inefficiency, he was also advised what he had to do to improve his performance. Hence, Respondent was provided with a professional improvement plan on an ongoing basis and was well aware of his deficiencies and how to improve his performance. See In the Matter of Tenure of Donald Rowley, School District of Manalapan-Englishtown, 1983 S.L.D. _____, St. Bd. aff'd, May 2, 1984. (Id., at p. 3)

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Thus, the Board claims, both the spirit and intent of N.J.A.C. 6:24-5.1(c) were satisfied in the instant case.

ARGUMENT III

THE ALLEGED VIOLATION OF N.J.A.C. 6:24-5.2(a)2 IS TRIVIAL AND INCONSEQUENTIAL

As to the issue of whether the Board's letter to respondent dated March 13, 1987 did not comply with the above-stated regulation, the Board avers, "the omission of where the Board met, and when the Board met to make its determination should not be considered a critical procedural flaw. At best, the omission is picayune." (emphasis in text) (Id., at p. 4)

ARGUMENT IV

SUMMARY JUDGMENT IS INAPPROPRIATE IN THIS MATTER

The Board submits summary decision is inappropriate because there is a genuine issue of material fact as to Finding of Fact No. 2 in the initial decision, namely, "to what extent, if any, and the reasons therefor did the Board's agents modify Respondent's Professional Improvement Plan." (Id., at p. 4) The Board avers this determination can only be made after testimony on the issue is adduced at hearing. Further, the Board argues that "Summary Decision is also inappropriate herein because given the 'totality of the circumstances' it exalts form over substance." (Id., at p. 5) Further, the Board argues that "Respondent has not demonstrated or even alleged that he was harmed or prejudiced by the technical violations of the Board." (Id., at p. 5)

Moreover, citing Jackson v. Muhlenberg Hospital, 53 N.J. 138 (1969), the Board contends that cases with far-reaching consequences should not be dismissed on Summary Judgment. "In the

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instant case the Administrative Law Judge was troubled and frustrated about his decision to grant Summary Decision in that it may result in reinstating an ineffective teacher who may provide a disservice to children." (Id., at p. 4)

Thus, the Board submits in exceptions that the failure to strictly adhere to the rules of the State Board of Education is a mere technical violation and does not warrant the relief granted respondent which is reinstatement.

In reply exceptions, respondent requests that the Commissioner accept the initial decision in its entirety. He suggests that the Board's failure to comply with its obligations under the regulations concerning tenure charges for inefficiency "went to the very heart of the process with the respect to charges of inefficiency. N.J.A.C. 6:24-5.1(c)(4) placed an affirmative obligation on the Board to modify a teacher's professional improvement plan to address the specific charges. The Board did not do so." (Reply Exceptions, at p. 1) The respondent contends that the Board's failure to specifically address the inefficiency charges in a modified professional improvement plan undercuts a teacher's ability to correct the alleged problems, and constitutes a substantial, not a mere technical violation of the regulations.

Respondent claims that the Board's failure to comply with N.J.A.C. 6:24-5.1(c)3 and N.J.A.C. 6:24-5.1(c)4, are "not insubstantial". (Id., at p. 2) As to N.J.A.C. 6:24-5.1(c)3, respondent claims that it is important "for the Board to insure that a teacher understand the consequences of the action which is about to be taken by the Board." (at p. 2) He asserts:

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> The Board's claim that it did not violate this rule because of its reference to N.J.S.A. 18A:6-11 in the October 22, 1986 letter is meritless. Second, the Board failed to include the required information in the certificate of determination pursuant to N.J.A.C. 6:24-5.2(a)(2). It did not include the time and place of the Board meeting.
>
> (Reply Exceptions, at p. 2)

Respondent avers there is no dispute that the Board did not comply with the above rules and regulation. Respondent suggests "that the Commissioner should not countenance the Board's failure to comply with its obligations under these rules and regulations, particularly N.J.A.C. 6:24-5.1(c)(4) which goes to the heart of the process itself. The ALJ's decision did not place 'form over substance' as the Board agrees." (Id., at p. 2) Respondent asks the initial decision be affirmed in its entirety.

For the reasons that follow, the Commissioner modifies the initial decision, and dismisses the tenure charges for violation of N.J.A.C. 6:24-5.1(c)(4).

Upon his careful review of the record before him, the Commissioner is in accord with the ALJ that the Board herein failed to direct an agent of the Board to develop a modified professional improvement plan for respondent at the time of notifying respondent of the charges, a flaw fatal to the tenure charges of inefficiency certified by the Board against respondent upon conclusion of the 90-day period as prescribed in statute. N.J.A.C. 6:24-5.1(c)4 states plainly:

> 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)

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to assure that such plan addresses the specific charges of inefficiency and comports with the timelines established for correction.
(emphasis supplied)

The Commissioner agrees with respondent that the Board's failure to so direct a modified PIP and the district's failure to implement said modified PIP goes to the very heart of the regulatory scheme supplementing N.J.S.A. 18A:6-10 et seq. concerning inefficiency charges. 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.

Indeed, when said regulations were recently revised, the language relative to modification of the teacher's PIP was added to the regulations at the express direction of the State Board of Education emphasizing the importance that it placed upon the exact procedure required of local boards prior to final certification of tenure charges of inefficiency. The Board herein has admitted in its exceptions its failure to so direct a modified PIP. No documents contained in the record before him can stand as a substitute for the requirements of N.J.A.C. 6:24-5.1(c)4. The Commissioner so finds.

However, the Commissioner finds that the Board's admitted failure to apprise respondent of the consequences of the charges of inefficiency levied against him is inconsequential in light of the Board's citing N.J.S.A. 18A:6-10 and 6-11 in its letter to respondent dated October 22, 1986. While it may have been preferable that the Board be absolutely explicit as to the

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R.A.S., on behalf of his minor child, R.S.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
New Jersey State Interscholastic Athletic Association,	:	
RESPONDENT.	:	

Petitioner, appearing Pro Se

For the Respondent, Sterns, Herbert, Weinroth & Petrino
(Michael J. Herbert, Esq., of Counsel)

This matter was opened before the Commissioner upon filing of a letter of appeal seeking an order of the Commissioner to set aside the determination of the New Jersey State Interscholastic Athletic Association's Eligibility Appeals Committee (NJSIAA) denying petitioner a waiver of the eight semester rule set forth in Article V, Section 4J of the Association's bylaws. By letter dated July 1, 1987 the Commissioner granted the parties permission to file briefs or memoranda to supplement the record before the Executive Committee of NJSIAA. Both parties did so file timely. Petitioner's supplemental letter was received on July 8, 1987. NJSIAA's letter brief was filed on July 13, 1987.

The aforesaid Article V, Section 4J provides that:

> Semester of Eligibility - No student shall be eligible for high school athletics after the expiration of eight consecutive semesters following his/her entrance into the 9th grade. A student becomes ineligible for high school athletics when the class in which he/she was originally enrolled has graduated. This rule shall not apply to an honorably discharged serviceman/servicewoman, in which case the Executive Committee may make any adjustments of this rule as it may deem equitable.

Petitioner seeks reversal of the NJSIAA Eligibility Appeals Committee's decision letter dated March 23, 1987 denying a waiver of the eight semester rule averring that the NJSIAA decision not to allow R.S. to play sports during his senior year, 1987-88, at Mahwah

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High School is "grossly unfair *** when he had to sit out two seasons due to injuries in his junior year." (Petitioner's Letter Appeal, at p. 2) Petitioner's position is stated as follows:

1. [R.]'s placement as a Sophomore at Mahwah was based on curriculum reasons.

2. We understand that [R.] has had four full years of eligibility for tennis, but because of two broken wrists he lost two semesters of eligibility for other sports.

3. Therefore, we request that [R.S.] be allowed to participate in sports other than tennis during two seasons of his senior year. (Letter Appeal, at p. 1)

FINDINGS OF FACT

1. R.S., born on August 30, 1969, attended Laurence Central High School in Indianapolis during his freshman and sophomore years (1983-1985).

2. At that school R.S. was a member of the interscholastic tennis team for 2 years.

3. In the Summer of 1985, R.S. and his family moved to Mahwah, New Jersey, where he was enrolled in Mahwah High School in September 1985.

4. R.S. has maintained a commendable scholastic record at both high schools. He achieved three "A"s, four "B"s, four "C"s and one "D" at Laurence Central High School, and was in the Honors English and History programs at both high schools. See Tr. 60-61.

5. R.S. repeated his sophomore year at Mahwah H.S. voluntarily. See Tr. 54

6. There is no evidence on record to suggest an intention on the part of R.S.'s parents or the school to advance R.S.'s sports career by keeping him back a year.

7. At Mahwah H.S., R.S. participated in the Fall of 1985 in the cross-country program and played his third year of interscholastic tennis in the Spring of 1986.

8. In the Summer of 1986, R.S. broke both wrists at a tennis camp, which did not interrupt his academic schedule but did prevent him from participating in cross-country during the Fall of 1986.

9. R.S. did not participate in athletics during the Winter of 1986-87.

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10. As of March 11, 1987, R.S. was expected to participate on the Mahwah tennis team in the Spring of 1987, which would constitute his fourth year of interscholastic tennis competition. See Tr. 55-56.

11. On February 24, 1987, Bruce A. Segall, Principal of Mahwah H.S., wrote to NJSIAA asking for a waiver of the eight semester rule so that R.S. could have a "fifth year of eligibility".

12. In a letter dated March 4, 1987, the NJSIAA eligibility committee informed Mr. Segall that it found R.S. to be ineligible to participate in interscholastic athletics as provided in the NJSIAA bylaws, Article V, Section 4J. The committee noted in that letter that "the information presented in support of your request for waiver of the aforementioned regulation does not meet the test of 'truly extraordinary circumstances'.***" See letter to Bruce A. Segall from NJSIAA Executive Director Robert F. Kanaby, dated March 4, 1987.

13. On March 9, 1987, R.A.S. wrote NJSIAA asking that R.S. be permitted to participate in cross-country in the Fall of 1987 and in outdoor track in April of 1988.

14. On March 11, 1987, a full hearing, the transcript of which is incorporated herein by reference, before the NJSIAA Eligibility Appeals Committee was held, at which both R.S. and R.A.S. appeared and testified.

15. On March 23, 1987, the Eligibility Appeals Committee rendered its decision, unanimously denying the waiver of the eight semester rule requested by R.A.S. citing, inter alia, page 62 of the NJSIAA Interpretive Guidelines for Student-Athlete Eligibility wherein it is stated in pertinent part:

> ***Member schools must be aware of the fact that waivers are only intended to equalize opportunities among otherwise eligible students who cannot strictly comply with the eligibility rules because of circumstances beyond their control, and is not intended to provide such students with an actual advantage over the great majority of students who maintain appropriate academic standards over the normal eight semester secondary program. Accordingly, waivers of these rules are never granted where it would allow a student to participate in more than four seasons in any one sport or where a student has repeated an academic semester or year of secondary school for academic reasons. (NJSIAA Handbook, at p. 62)

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16. On June 18, 1987, R.A.S. filed his letter appeal seeking a reversal of the NJSIAA decision denying the waiver. (N.J.S.A. 18A:11-3)

17. On June 30, 1987, the NJSIAA filed both its Answer and the accompanying relevant records of the matter.

POSITIONS OF THE PARTIES

Petitioner argues that "[u]nderlying our appeal is the conviction *** that the NJSIAA rule cited to deny [R.S.]'s eligibility to participate in sports during his senior year is arbitrary, without rationale, and unconstitutional.***" (Petitioner's Supplemental Letter, dated July 6, 1987) Petitioner avers that

> the rule itself is flawed because it gives no reason for denying [R.] the opportunity to participate on an interscholastic team during a fifth year of high school (a) when the fifth year was elected as part of a curriculum plan resulting from a transfer to New Jersey from out-of-state, (b) when he was unable to participate during most of academic year 1986-87 due to injury, and (c) when he has not participated in the proposed sport for more than one year during his high school career.*** (Id.)

Petitioner denies that R.S. would have any kind of advantage, by virtue of his age or experience, over others if permitted to participate, nor does petitioner feel that to rule in favor of his son would give an advantage to any other person similarly situated. Petitioner claims that "[t]here is simply no rational nexus between the rules and [R.]'s situation." (Id.)

Finally, petitioner argues that it is "not sufficient for an association to cite its own rules as authority for a decision when those rules are arbitrary and the decision is unsupported by reason.***" (Id.)

Petitioner requests that the Commissioner find in favor of R.S.'s request for eligibility to participate in sports other than tennis during his senior year.

Respondent NJSIAA argues the Commissioner should affirm the decision of the NJSIAA denying eligibility on the basis of the eight semester rule.

Citing Burnside v. NJSIAA (unpublished decision of Appellate Division, Docket No. A-625-84T7, decided November 15, 1984; cert. den. 101 N.J. 236 (1985)), at page 5 for the dual propositions that students do not have a right to participate in interscholastic athletics and, further, that participation is

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subject to eligibility requirements as established by NJSIAA, subject to review and approval by the Commissioner of Education, Article V, Section 4J of the NJSIAA bylaws, and NJSIAA Interpretive Guidelines for Student-Athlete Eligibility, Section 3c, Handbook, at pp. 59-62, the Association argues that

> waivers [of the eight semester rule] are contemplated only in the situation where a student is absent from school because of medical or psychological reasons or for reasons beyond the control of the student or his parents; not as is the case here, where a totally voluntary decision was made by the parents of a student to have him repeat a year of schooling because of the "sequence of courses". (emphasis in text) (NJSIAA Letter Brief dated July 13, 1987, at p. 8)

Stating that R.S. is an honors student, the Association contends that R.S. had four full years' (eight semesters) participation in interscholastic tennis.

NJSIAA further argues that "the parent's decision to have R.S. repeat his Sophomore year was also based on a desire to have him mature, given his young age for his class and his slight stature. (Tr. 54:7-19)." (Id., at p. 9) It avers that the purpose of the rule would be undermined if a waiver was granted solely because a student chose to obtain a year more of maturity, thereby providing R.S. with an advantage, contrary to the express terms of the Guidelines.

In support of its position, NJSIAA cites R.S.R. et al. v. NJSIAA, decided by the Commissioner November 13, 1986 as standing for the proposition that the Commissioner will not substitute his judgment for the Association's so long as it operates within reasonable bounds and absent a clear showing of arbitrary or capricious action. It also cites the Commissioner's most recent decision upholding NJSIAA's eight semester rule, D.S. v. NJSIAA, decided by the Commissioner January 30, 1987. In that case, NJSIAA argues that "the Commissioner upheld the denial of a waiver of the eight semester rule, finding no 'compelling reason' to grant such a waiver. In that case, the student had encountered certain medical problems at the time he was repeating a school year." (Id., at p. 9) It further cites T.S., Jr., et al. v. NJSIAA, decided by the Commissioner November 7, 1983; Kirk Snyder v. NJSIAA, 1983 S.L.D. ____; and Gordon Van Note v. NJSIAA, 1983 S.L.D. ____ as supportive of its denial of the waiver request in the instant matter.

In addition, NJSIAA relies on S.S., on behalf of his son, M.S. v. NJSIAA, decided by the Commissioner September 19, 1986 and Burnside, supra, for the proposition that unless the Commissioner finds that the action of the NJSIAA in applying its eligibility rules is clearly arbitrary, then whether a particular case

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represents extraordinary circumstances for granting a waiver, as contemplated within the NJSIAA rules and Interpretive Guidelines, is a matter best left to the judgment of the NJSIAA.

NJSIAA contends that the letter appeal of R.S. does not allege that the NJSIAA or its Eligibility Appeals Committee acted arbitrarily or unreasonably in any manner. The Association relies on the transcript and its letter decision issued by the Eligibility Appeals Committee for its contention that there was no academic incompatibility between the high school programs of R.S.'s former and present high school and, further, that the parental decision for R.S. to repeat his sophomore year was "made for academic and other reasons, such as gaining of a year of 'maturity' for R.S." (Id., at p. 12) NJSIAA points out that R.S. played tennis in both of his sophomore years and that, further, even assuming that there was academic incompatibility in the academic courses at the two schools, "the Interpretative (sic) Guidelines clearly state that waivers shall not be granted to provide an actual advantage for one student over another, but only to equalize opportunities among otherwise eligible students. (Handbook, p. 62).***" (Id., at p. 12) NJSIAA bolsters its position by stating: "Those Guidelines further state that waivers should never be issued to allow a student to participate in a sport when he or she 'has repeated an academic semester or year of secondary school for academic reasons.'***" (Id., at p. 12, quoting NJSIAA Handbook, at p. 62) To permit such a waiver would permit students to compete when older and stronger, after their peers have graduated from secondary school, the Association avers.

Finally, NJSIAA contends that the Eligibility Appeals Committee could not be faulted for denying an additional year of eligibility merely because the student suffered an injury in the Summer of 1986.

> His injury did not prevent him from participating in the Spring of 1987 in tennis or continuing his normal academic program. It is not difficult to imagine abuses of the eligibility rules occurring by student-athletes seeking additional periods of eligibility because of sports injuries, which involve hundreds of student-athletes each year.
> (Id., at p. 14)

NJSIAA urges that the Commissioner of Education not substitute his judgment for that of the NJSIAA Eligibility Appeals Committee, which, it claims, acted properly denying the eligibility waiver to R.S.

The Commissioner, upon a careful review of the record, including the transcript of the hearing before the NJSIAA Eligibility Appeals Committee and the arguments advanced by the parties, finds that there is no compelling reason advanced by petitioner to reverse the decision reached by NJSIAA denying him a waiver of the eight semester rule, Article V, Section 4J.

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Initially, the Commissioner notes that the Interpretive Guidelines for waiver plainly state that the eight semester rule applies to eight semesters of attendance in a secondary school, not on semesters of participation in a sport. Said Guidelines read in pertinent part:

> Unfortunately, despite its explicit terms and its obvious objectives, some member schools have interpreted this rule as applying to eight semesters of competition rather than eight semesters of attendance in a secondary school.*** The fact that a student has not participated for four seasons will not in itself justify allowing such a student to participate in interscholastic sports beyond the eighth semester after his or her entrance into the ninth grade. ***
> (emphasis supplied) (Handbook, at p. 59)

As noted in respondent's Letter Brief, the Guidelines further provide for waivers of the eligibility rules only in strictly limited circumstances. The Commissioner notes the following excerpt from the transcript of the hearing held on March 23, 1987. Counsel for NJSIAA is speaking:

> I'll just paraphrase where they are and we'll be happy to provide you with a copy of the handbook. Specifically, at page 59 and 60, the handbook -- generally, what we've done is we have granted waivers of the eight-semester rule only in those instances where a youngster has been prevented from continuing his normal academic program because of circumstances beyond his control.
>
> Case in point. A youngster's parents are sick. A youngster goes home to help the parents out, has to leave the school. The youngster is in an automobile accident, has to be removed from school. So, therefore, his academic programs through no fault of his own are interrupted. Therefore, the running of a clock so to speak is affected thereby.
>
> We have not to now granted an exception where a youngster has been attending school consecutively as in the case of [R.], and in addition to that, in this case, it would appear to the Committee that [R.] is a truly outstanding young man. His grades are exemplary. It appears the only reason why you are seeking a waiver of the eight-semester rule is that there was a decision

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made when you transferred [from] Indiana to have him repeat because of -- I think the terminology was some curricular continuity.
(emphasis supplied) (Tr. 52-53)

The Commissioner agrees with counsel for NJSIAA, that an injury to a student-athlete does not constitute grounds under the Guidelines for granting a waiver of the eight semester rule, unless it is shown that the student's academic career was interrupted as a result of said injury. See Todd Lauster v. NJSIAA and Board of Education of the Town of Westfield, 1983 S.L.D. ____; see also Smith, supra; Van Note, supra; and Board of Education of the Sterling Regional High School District and Michael J. McKinney, 1983 S.L.D. ____. It is NJSIAA's position in the instant matter that R.S.'s academic program was not interrupted as a result of the two fractured wrists he sustained in the Summer of 1986. On the contrary, it is admitted on the record that repetition of R.S.'s sophomore year was entirely voluntary and based primarily on academic reasons. (See Tr. 54.)

While it is regrettable that R.S.'s injuries did prevent him from participating in the Fall and Winter sports seasons at Mahwah High School, the fact remains that he was in attendance continuously. Thus, a waiver of the eight semester rule under these circumstances is not warranted. See also D.S., supra, Slip opinion, at p. 9 (Commissioner upheld the denial of a waiver of the eight-semester rule, finding no "compelling reason" to grant such a waiver).

As NJSIAA correctly points out, the standard of review in this matter prevents the Commissioner from substituting his judgment for that of the Association's, absent a showing by petitioner that it acted in an arbitrary or capricious manner. R.S.R., supra After thorough consideration of the record, the Commissioner concludes that petitioner has failed to demonstrate arbitrariness. Thus, he affirms the decision of NJSIAA in denying petitioner's waiver request.

Accordingly, the Petition of Appeal is hereby dismissed. Pursuant to N.J.S.A. 18A:11-3, any appeal taken from this final decision of the Commissioner is to the Superior Court pursuant to N.J.S.A. 18A:11-3.

COMMISSIONER OF EDUCATION

July 24, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5306-85
AGENCY DKT. NO. 392-11/78

MICHAEL DREHER,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Michael P. Dreher, petitioner, pro se

Clifford A. Herrington, Esq., for respondent
(Margulies, Wind, Herrington & Katz, attorneys)

Record Closed: April 19, 1987 Decided: June 16, 1987

BEFORE ELINOR R. REINER, ALJ:

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STATEMENT OF THE CASE

This case requires a determination as to whether petitioner, Michael Dreher, held tenure as a principal with respondent. Petitioner, a tenured assistant principal, was appointed to the position of principal effective September 1, 1976. On April 28, 1978, Superintendent of Schools Michael Ross sent a letter to petitioner informing him that he would not receive tenure as a principal. On May 11, 1978, respondent board determined not to renew petitioner's contract as principal and, shortly thereafter, petitioner was so notified. At the August 28, 1978 board meeting, the board reassigned petitioner to the position of assistant principal, effective September 5, 1978. Two specific issues are raised. First, whether petitioner held a ten- or twelve-month position as principal. Second, whether petitioner accepted an offer of employment from respondent as principal for the 1978-79 school year pursuant to N.J.S.A. 18:27-12.

For the reasons which follow, petitioner must be considered to have held a ten-month position as principal and not to have accepted an offer of employment as principal for the 1978-79 school year.

PROCEDURAL HISTORY

The appellate division remanded this matter to the State Board of Education, which remanded it to the Commissioner of Education for further proceedings. It was transmitted to the Office of Administrative Law by the Department of Education, Bureau of Controversies and Disputes, on August 21, 1985.

The appellate division remanded the instant matter as to the two issues noted above. It concluded that since there appeared to be a bona fide dispute as to whether the parties' attorneys operated under a mutual mistake of fact, petitioner should be permitted to challenge the effect of a stipulation of fact entered into by his attorney that petitioner's employment was on a ten-month basis. Second, the appellate division determined that petitioner should be given the right to prove that he accepted a contract as principal in writing prior to June 1. While the prior opinions of the hearing examiner,

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Commissioner of Education and the State Board of Education reveal the full scope of the issues previously litigated and discussed, the scope of the instant case has been defined by the appellate division.

A prehearing conference was held on September 24, 1985, at the Office of Administrative Law and the following issues were isolated:

(a) Did the appellate division decision determine that petitioner could prove that his contract of employment was for a twelve-month period (despite his attorney having entered into a stipulation which indicated that it was for a ten-month period) or did the appellate division require petitioner to demonstrate that the stipulation entered into by petitioner's attorney was a mistake?

(b) Was petitioner's contract with respondent for a ten- month or a twelve-month period?

(c) If petitioner had a ten-month contract of employment with respondent, did petitioner accept employment with respondent for the 1978-79 school year?

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

A hearing was scheduled for January 8, 9 and 10 at the Office of Administrative Law. Inasmuch as it appeared that a settlement had been reached in this matter on January 10, 1986, the hearing was adjourned to April 1, 1986. The hearing was then held on April 1, April 2, April 4, April 8, May 7, May 9, May 13, August 22, September 22 and completed on September 19, 1986. It is to be noted that the hearing was adjourned from May 13 to June 23 due to the unavailability of James Jencarelli as a witness. The hearing was adjourned on June 23 because petitioner, a principal, had to attend the last day of school. It was then adjourned to August 22 due to this judge's illness. Several extensions of time for the filing of briefs were granted because the transcripts had not

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been received. Due to an additional reply having been submitted by petitioner, the record was held open in order to give respondent the same opportunity to submit an additional reply that was given to petitioner. The record closed on April 16, 1987, subsequent to the receipt of the last brief filed in this matter.

It is to be noted that prior to the hearing in this matter, this judge determined that the issues in this matter would be limited to issues B, C and D as stated in the prehearing order. This tribunal determined that the appellate division's decision gave petitioner the right to prove that his contract of employment was for a twelve-month period and did not simply give him the opportunity to demonstrate that the stipulation entered into by his attorney was a mistake. Therefore, issue A above was determined after oral argument by the parties and in reliance on this tribunal's interpretation of the appellate division's decision. The hearing therefore proceeded on the issues outlined above.

UNDISPUTED FACTS

It became apparent upon review of the testimony and evidence submitted that many of the underlying facts are undisputed. They may be summarized as follows:

1. Petitioner was first employed by respondent on May 24, 1963 as a teacher in training (P-147 and P-148). He was employed by respondent as a full-time teacher for the 1963-64 school year. He signed a contract which ran from September 1, 1963 to August 31, 1964 (P-3), agreeing to payment in 12 monthly installments. A board resolution identified a starting date of September 1, 1963, but did not provide any termination date (P-34).

2. Petitioner signed a second written contract with respondent for the period July 1, 1964 to June 30, 1965 (P-4). The corresponding board resolution reiterated the contract period of July 1, 1964 to June 30, 1965 (P-35 and P-36). Petitioner did not sign any other contract with the board during his employment.

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3. Petitioner subsequently gained tenure as a teacher.

4. In August 1971, petitioner was appointed by the board to the position of acting assistant principal (P-22). Petitioner subsequently became tenured in the position of assistant principal.

5. On June 8, 1976, petitioner was appointed by the board to the position of prinicipal of School No. 34. The appointment was to "take effect September 1, 1976 and to be subject to such further action as the board may direct." (P-23, P-58).

6. Petitioner was principal for the 1976-77 and 1977-78 school years.

7. Petitioner never signed a principal's contract or an assistant principal's contract, since administrators do not sign contracts. Petitioner was also not required to sign a teaching contract after he was tenured. This is consistent with board practice requiring that only nontenured teachers are required to sign employment contracts.

8. Dr. Michael Ross was the superintendent of schools for respondent from 1974 to 1984. He is now superintendent of schools of South Orange-Maplewood.

9. By letter dated April 28, 1978, Dr. Ross advised petitioner that he would not be offered a "tenure contract" as a principal (R-5).

10. By letter dated May 12, 1978, Dr. Ross notified petitioner that the board had adopted a resolution on May 11, 1978, which did not grant tenure to petitioner (R-19, R-20).

11. On August 28, 1978, the board passed a resolution reassigning petitioner from the position of principal to the position of assistant

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principal. The reassignment was dated September 5, 1978 (P-24, P-39). John Phillips replaced petitioner as principal of Public School 34 effective September 5, 1978 (P-27, P-40).

12. Petitioner has served as an assistant principal and then as an acting principal from September 5, 1978, until the present.

13. In May 1978, petitioner met with Dr. Ross to discuss the decision to deny him tenure as a principal.

14. All personnel records are routinely filed in the personnel file.

15. In May or June 1978, petitioner was permitted to examine his personnel file. He did not notify anyone that the acceptance letter was missing from his file.

16. No copy of a letter accepting reemployment as a principal for the upcoming school year (1978-79), has been found in petitioner's personnel file.

17. Petitioner cannot testify as to having seen a copy of the letter in his personnel file when he examined it in May or June 1978, or on any other subsequent examinations of his personnel file.

18. Petitioner was represented by counsel in May 1978. His attorney was Philip Feintuch, Esq. Petitioner never informed Mr. Feintuch, who was present at the meeting with Dr. Ross, that he had sent such an acceptance letter.

19. Petitioner was represented by Barry Aisenstock, Esq., in the instant action before the hearing examiner and the Commissioner. Petitioner never informed Mr. Aisenstock that he sent an acceptance letter.

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20. The record reveals that the validity of Dr. Ross's letter of April 28, 1978, was considered by Hearing Examiner Arbo. The issue of the acceptance letter was never raised by petitioner or his attorney before the Commissioner, nor was it raised by petitioner in his initial submission to the state board.

21. In 1980, petitioner filed a lawsuit in U.S. District Court alleging reverse discrimination, which lawsuit is still pending. Until September 1985, the lawsuit included the issue of wrongful denial of tenure. Petitioner was represented for short periods of time by two different attorneys. Petitioner never told either attorney about sending the acceptance letter.

22. Petitioner has represented himself throughout most of the federal litigation. He never raised the issue of the acceptance letter in the federal litigation.

23. After he claimed that the letter existed, he did not ask Dr. Ross (the alleged recipient of the letter) during his deposition of Dr. Ross on January 14, 1984, if he had a copy.

24. The board does not have any such acceptance letter from petitioner.

25. Petitioner found two evaluations of William Dreenan dated June 15, 1983, in his personnel file when he reviewed it during the present hearings.

26. During petitioner's service as a principal, prior to the denial of tenure as such, the terms and conditions of his employment were governed by the 1976-78 collective bargaining agreement between the board and the association of administrators and supervisors of the Jersey City School System (hereinafter the association).

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27. The association negotiated the collective bargaining agreement (hereinafter the agreement) on behalf of the following administrators: directors, assistant directors, supervisors, primary principals, assistant supervisors, high school principals, grammar school principals, high school vice-principals, assistant principals and chief school psychologist.

28. The agreement provided in Schedule B that "all administrative and supervisory personnel shall be compensated one-tenth (1/10) of their yearly salary for every extra month's service mandated during the summer months. This shall not include services performed in programs wherein special rates are budgeted for positions open to voluntary applicants." (P-63).

29. Article III of the agreement specified that responsibilities and duties of administrators continued in accordance with past practices of the board.

30. Article XXIII stated that the board agrees that any statements in its rules and regulations adopted July 1, 1976, which conflict with any of the provisions of its collective bargaining agreement shall be modified to the extent necessary to conform with said collective bargaining agreement. It further limited the board from modifying or altering the terms of employment without negotiation with the association.

31. Board policy at the time specifically provided that statements contained in its policies, bylaws and regulations "are not intended to stand in conflict with existing collective bargaining agreements, and in the event that any statement of the board's policies or administrative rules and regulations should conflict with such collective bargaining agreements, then such a statement shall be modified to the extent necessary to conform to such collective bargaining agreement." (R-24).

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32. The 1978-80 agreement, signed on April 10, 1979, specifically provided that all positions covered by that agreement, including the position of principal, were ten-month positions, with the exception of the position of director, which was an eleven-month position (R-21).

33. The 1980-82 agreement included a provision that supervisors and administrators were to work 185 days per year (R-22). This constituted an increase of five days over the previous practice and the length of employment contractually required of administrators and supervisors. An eight percent raise was given to the persons covered by that agreement.

34. Teachers are required to work no more than 180 days per year. This was true under the 1976-78 collective bargaining agreement between the Jersey City Board of Education and the Jersey City Education Association (P-62).

35. Administrators, supervisors and teachers were paid over a twelve-month period in 24 equal, twice-monthly installments pursuant to the 1976-78 collective bargaining agreement.

36. Payment of supervisors, administrators and teachers was made several years prior to 1976 and all years subsequent, by deducting the payment to be made for the summer from the salary payments made to employees for September through June.

37. Beginning in 1972, the deductions that were taken over the ten-month period from September to June were actually shown on the paycheck as deductions for the summer months.

38. During the 1960's, instructional personnel were given the option of receiving their salary over a ten-month period, September to June, or

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over a twelve-month period. They elected to be paid over a twelve-month period.

39. Unemployment compensation cannot be collected by supervisors and administrators or teachers during the months of July and August if there is a reasonable expectation that the employee will be reemployed for the next academic year.

40. Teachers, supervisors and administrators who are not reemployed in September are entitled to collect unemployment compensation benefits retroactively for the months of July and August. This was true for the period 1976-78.

41. Board policy and reuglation, in effect at least from 1976, requires a principal to be present in his school at all times while school is in session and at such other times as the board directs.

42. Many teachers, administrators and supervisors work on days that they are not required to work by contract.

43. The board does not have the contractual authority to order supervisors and administrators to work during the summer vacation period without additional compensation.

44. In order for an employee holding a ten-month position to obtain tenure in a promotional position, that employee must work two academic years plus one day.

DISPUTED TESTIMONY

Testimony was adduced by the parties in regard to the two issues to be decided by this tribunal. More particularly, testimony was adduced as to whether petitioner's

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principal's position was a ten-month position or a twelve-month position. In addition, testimony was offered as to whether petitioner had accepted employment in writing pursuant to N.J.S.A. 18A:27-12, for the 1978-79 school year. The testimony in regard to each issue will be reviewed separately for the purposes of clarity.

I. TESTIMONY ON TEN-MONTH VERSUS TWELVE-MONTH POSITION

First to testify on behalf of petitioner was Beverly Ann Simpson, who has been employed by respondent for 14 years. Employed in the personnel department as a personnel assistant, handling salaries, board resolutions, transfers and statistical reports, she was able to identify various teacher contracts which specified the time frame of the contract to be for one year. Thus, she identified teacher contracts for September 1, 1963 through August 1964, July 1, 1964 through June 30, 1965, and September 1, 1976 through August 31, 1977 (P-4 through P-6). In fact, she indicated that those documents revealed the form used for all teachers at that time. Noting that board resolutions were copied and sent to teachers who were awarded a contract, she stated that the resolution also specified a twelve-month contract (P-7, P-11, P-12, P13).

Next to testify was Dr. Michael Ross, whose testimony centered on the length of employment of a principal during 1976-78. Ross, who did not know exactly when principals were required to work during that time frame, stated that principals worked from the beginning of September until the end of June. Referring to a school calendar, he indicated that administrators reported on September 7, 1976, while teachers reported on September 8, 1976. Noting that the ability to require administrators to work was limited to the contract, Ross explained that administrators are now required to work a greater number of days. He admitted, however, that many teachers and administrators work on days that are not established by contract. A principal could come to school to complete work at the end of the year or prior to September. Moreover, if there was a problem with a purchase order submitted by a principal, or an inaccurate register, the principal could be asked back to school to complete the work not done properly in June. He further admitted that if a serious building problem (vandalism) occurred after the close of school (or at night during the school year), he would have asked the principal to

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get the work done. He was not sure whether he had the right to do so under the contract. He admitted, however, that he is certain that principals are asked back to complete work.

When he was questioned as to whether a principal who spent a day in school correcting purchase orders or registers or one of the budgets, would receive additional salary, Ross stated that if the principal would not come back because of contract limitations and they needed that principal badly enough, he would be paid. He believed the amount was 1/200ths of that person's salary. He noted that payment was not automatic. Further, he did not know of any principal who had come back to correct purchase orders and had demanded 1/200ths of his salary. He indicated that if they were ordered to come in they could ask for payment and would have been paid.

On further questioning, Ross admitted that correspondence would often go to principals' homes in the summertime, which he expected them to read, interpret, study and take action on. He could not force them to respond to that mail nor could it be required reading pursuant to the contract. According to Ross, although principals and teachers were paid over a 24-pay-period arrangement and during the summer, it was for ten months' work. In fact, because at that time he wanted the contract changed to require administrators to be eleven- or twelve-month employees, he clearly recalled that during the period from 1976 to 1978, the administrative staff referred to principals as ten-month employees. Since summer work for administrators was important, he wanted to extend the work year. Questioned as to how he had determined that principals were ten-month employees, he pointed to the contract which indicated that they were to be compensated one-tenth of their yearly salary for every extra month's service mandated during the summer months (P-63).

Jack Snyder, who served as principal of P.S. 23 for 16 years, recalled that during his early years at P.S. 23, he received a directive which stated that administrators would be recalled to school if materials or purchase orders needed to be corrected. He recalled that on a few occasions during the summer he received a purchase order which needed to be corrected and had to be returned to the board; he had to return to the school to make the corrections. He recalled that he received a purchase order which needed his

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signature. In order to get it to the school by a certain date, he had to deliver it. On cross-examination, he indicated that he received the memo regarding recall sometime in the early 70's. However, he could not find a directive referring to recall for the period 1976-78. Although he has not received the memo in the last number of years, he contended that the requirements of the directive were still in effect.

The next person to testify was Elizabeth Wnek who has been employed by respondent since September 1959. She served as a principal from 1978 to 1981 but is presently an assistant principal. She testified that she took leaves of absence from 1971 to 1976 and for one year from 1985 to 1986. Apparently, her first leave was actually two consecutive maternity leaves, which ran for two years, based on a twelve-month period. She further recalled that in the 1970's she received a directive (she was not sure who had sent it), which referred to end-of-year reports and the fact that she would be recalled to school if there were inadequacies in the recordkeeping. She acknowledged that a principal would be called back for a break-in, flood or fire during the summer. Although she has never been called back during the summer for a problem, she has returned as a matter of course to get purchase orders typed and signed. On cross-examination, Wnek explained that although administrators are under a contract for one year, they work full-time for the academic year, September to June, and are paid over twelve months. Although she considers her employment to be from September to September, she admitted that she is not unemployed and is on vacation during July and August. Noting that she must work 185 days, she was not sure if the days ran into July whether she would have to come to school to fulfill those days. Although she comes in when she is asked to do so, she believes administrators have not been required since 1976 to come in during July and August to work without compensation. She did not know, however, whether an administrator could apply for additional compensation if respondent requested the administrator to work during July and August.

On redirect examination, Wnek indicated that summer work is additional work for which an administrator would receive additional wages (she believed the pay to be hourly). She did not believe that an administrator would be required to work all summer or for a full month for no extra money. However, she stated that if she were asked to correct

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purchase orders she would not receive additional compensation.

On further questioning, Wnek indicated that a request to return to school is considered an order. She indicated that an administrator is contractually required to return as needed. Wnek was not sure if an administrator could be ordered back for ten days, but she believed that since she is a twelve-month employee, she could be ordered back in July. She admitted, however, that she has not read the contract recently.

When she was questioned as to the contract in effect from September 1978 to August 31, 1980, Wnek noted that there was compensation for one-tenth of the yearly salary for each month's work during the summer, but indicated that contracts come and go; she follows regulations. She believed that she is required to work as the board may direct, but she could not say whether that was with or without compensation. Moreover, since the contract does not refer to a portion of a month, she believed that respondent might be able to bring an administrator back for less than one month without compensation. She stated that she would work for 15 days without compensation. Noting her desire to keep her job, she doubted that she would file a grievance.

Referring to the period from 1976 to 1978, she did not know if the board could require an individual to come in during the summer. Noting that it was not a regular action to come in over the summer, she recalled meeting with Jencarelli on one occasion in the summer about her assignment and with Dr. Ross on another occasion to resolve a problem. She admitted that she would receive additional compensation for an after-school program or if she worked on a summer program (see P-93 through P-96).

The next person to testify was Marie Rizzo who has been employed by respondent since 1965. She has been an administrator since 1975. She is presently an assistant principal of Public School 38. She recalled a directive from the secretary of the board, Arsenio Silvestri, regarding end-of-year reports. The directive indicated that all end-of-year reports were to be sent to his office. If inaccuracies were present, the administrator would have to be available to come to the central office during the summer. It made no mention of compensation. On cross-examination, Rizzo indicated that she has never been

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directed by the board of education to work during July and August without compensation. Since she has worked for respondent, she has worked ten months a year. She has received a vacation in July and August but has been paid over a twelve-month period. Noting that she could be called in during the summer to correct errors, as per the directive, which work would last for more than one day, she did not think she would receive compensation for that time since the work should have been completed prior to June. Contending that she has never been called back for one month during the summer without compensation, she did not believe that it could be done. She knows of nothing in the contract which indicated that she is required to return without compensation. In 1976, 1977 and 1978, there were no extra days worked at the end of the year.

The next person to testify on behalf of petitioner was Dante B. DiDomenico. He was assigned as a supervisor of health, physical education and swimming in 1974. He recalled that in 1976 he received a letter from Michael Ross while at home during the summer vacation directing him to Public School 34 in the event of a teachers' strike. Although his regular assignment was not Public School 34, he worked with petitioner at Public School 34 on September 8, 9, 10 and 13, 1976, during the teachers' strike.

On cross-examination, he indicated that he works the academic year, also known as the school year (September to the end of June), or for ten months. The summer vacation period is the first day after the last day of school until the day before the administrators are required to return. He opined that respondent cannot require him to work during July and August without compensation, which was also the case from 1976 to 1978. He testified that as a member of the association, it is his understanding that the board does not have the right under the contract to require him to work even one day in July and August. Thus, if he was called back for one or two days, he believed he would be entitled to compensation.

Testifying with more specificity, he recalled a discrepancy in bidding specifications during the summer of 1975. He was called in to work for ten days to solve a problem. He noted that he had been called back in July to correct a problem that respondent believed could have been solved in June. Although he did not ask for compensation, he was paid by

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respondent. He opined that since this work was beyond his regular employment, he received additional compensation. Referring to the administrator's contract, he stated that during the period from 1976 to 1978 he would have been entitled to additional compensation for work during July and August. Schedule B refers to additional compensation for additional work being paid on a one-tenth basis or at a special rate for positions open to voluntary applicants. He opined that the additional compensation during July and August is for time that the board requires an administrator to work at his or her job. Whether an administrator were to receive one-tenth of his or her salary or an hourly wage (the vast majority are paid an hourly wage), an individual would usually have applied for the job.

Ralph DelPiano has worked for respondent since 1968 and has been an administrator since 1973. He served as a principal from September 1976 to September 4, 1978. He was appointed as an assistant principal as of September 5, 1978. He recalled with certainty a directive in the early to mid-70's which required that if end-of-year reports were not completed, the administrator would be called back to school to make necessary corrections. DelPiano was not certain who issued the directive. He recalled that in the summer of 1974 or 1975, Superintendent Franklin L. Williams called him and told him that since he could not reach the principal he would have to return to school to correct certain purchase orders which had not been correctly submitted. DelPiano, who worked for two days, did not receive additional compensation.

On cross-examination, DelPiano contended that his vacation period was from the last day of the school year to the first day of the next year; it encompassed July and August. DelPiano was aware of the provision in the board's rules and regulations regarding the board's right to call him back to work. Referring to the situation in 1974-75 when he was called back to the board office, DelPiano indicated that although he worked approximately two days, he did not seek compensation. Although he was aware that if he was directed to work during the summer he could receive additional compensation, he was not sure if he could have received it if he only worked one day. He further stated that although certain people are employed during the summer, the vast majority of summer positions appear to be offered at an hourly wage. Prior to 1979 he was not aware of

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anyone employed on a ten percent basis.

The next person to testify was Robert DiTursi. A principal since September 1976, he has served as principal of Public School 31 for 10 years. DiTursi considers himself to be a twelve-month employee. He takes work home, works at home on the weekends and in the summer he prepares for the fall. DiTursi noted that it was standard practice for the board to require administrators to present end-of-year reports. The annual report had to be turned in after the end of school. In 1974 administrators were required to bring in the report on July 1, 1974 (P-103); the annual report for 1972-73 was due at the board on July 2, 1973. Noting that administrators were responsible for the accuracy of end-of-year reports, he recalled that the principal of Public School 9, Hallahan, told him that if the reports at the end of the year were inconclusive, he would have to return to complete them. In school year 1972-73, under Hallahan's administration, he had to return in July because of inaccuracies in the school registers. Dreher also returned after the end of school.

He further remembered that in the late 70's (in mid-July), he was summoned to report to the local police to identify materials stolen from Public School 31. Recalling that the board had requested his summer address (P-101 and P-102), he stated that the police had contacted the board for his address. He received no additional pay for this time.

On cross-examination, DiTursi, who served as a principal and assistant principal from 1972-76 and as a teacher, noted that he has always been paid over a twelve-month period. He has always been required to come to school the day before it opened and several days after the end of the school year. Prior to the contractual agreement, two days could be added to the end of the school year. Although he stated that in 1977 or 1978 he came back to school for two days as requested by Superintendent Franklin L. Williams because of difficulty with the school registers, on further questioning in regard to the period of 1976 through the summer of 1978, he stated that he had completed his work and had not come in after school had ended. Although he alleged that he could be required to return to work without additional compensation, he actually contended that he

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could get additional compensation depending upon the amount of time he was required to work during the summer. Contending that the agreement allowed for five additional days without compensation (he was not sure if this was so in 1976), he recalled that a project he was working on had been postponed from prior to July 4 to July 9 because of work that had to be completed during the normal school year. When he was questioned as to whether the board could require him to come to work in addition to the five days he referred to, DiTursi indicated that he would have "to report." He believed that if the board required him to work an additional 19 or 20 days, he would have the right to receive additional compensation. Referring to the 1976 through 1978 contract, he admitted that he had been compensated for ten months of work and was a ten-month employee.

On redirect examination, DiTursi alleged that he was a twelve-month employee in 1976-78. His responsibilities extended beyond the ten-month period into the summer vacation (the last day of work in June to the first day of work in September). He admitted, however, that if he worked an additional month he would have been paid an additional sum. DiTursi further indicated that despite the one-tenth provision in the 1978-80 contract, he never considered himself to be anything less than a twelve-month employee. Referring to P-63, he explained that the one-tenth provision is used for each extra month's compensation during the summer months. The second sentence also refers to additional compensation for extra summer work. The two sentences do not relate to ten- versus twelve-month employment. Rather, the one-tenth salary provision relates to a basis by which salary may be drawn for each supervisor or administrator. He believed that if he had been a ten-month employee he could have applied for public assistance or unemployment compensation. He noted that a leave of absence is for one calendar year.

On recross-examination, he indicated that he reported to work in July 1977 for two or three days, in August 1977 for one day, in July 1978 for two days, and in August 1978 for one day. He admitted that in actuality he was not required to report to school on those days but was on call. He agreed that he could not be brought back to school for all of those days without being compensated. In fact, he stated that he would expect compensation for returning to work for one week. More to the point, he claimed that in April 1965, he was told by the secretary to Assistant Superintendent McCarthy that he

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was a twelve-month employee. Further, during contractual negotiations several years ago, he was told by members of the association that he was a twelve-month employee. More particularly, he recalled that Terence Matthews, assistant principal and a member of the negotiating commmittee in the 70's, advised the negotiating body during his report in the spring of 1976 that they were twelve-month employees. Matthews reiterated that the initial teacher's contract indicated that a teacher was a twelve-month or calendar year employee.

Next to testify was Anthony Vincent Strangia. Employed by respondent for 17 years, he served as a high school teacher, a school social worker, a coordinator of special education, assistant principal for a year and supervisor of social studies for two years. He stated that he considered himself a twelve-month employee, because he signed a contract to work. As a teacher, he signed a twelve-month teaching contract. Further, when he tried to collect unemployment compensation the board informed him that he was a twelve-month employee, and denied him the compensation. He assumed that the information that he was a twelve-month employee came from Mr. Jencarelli. He recalled that he was advised that he might have to return during the summer to complete state registers and closing reports. He noted that he would not have received extra compensation. He explained that if a reasonable amount of time is requested, the employee would go back to school as a professional courtesy. However, if a project lasted three or four days, the board would provide extra compensation. Referring to the contract (P-63), he believed Section B referred to a special project or if an administrator had been asked to work a week or two weeks. He opined that it was a guide for extra compensation over and above the normal work year and had nothing to do with the issue of ten- or twelve-month employment.

More specifically, Strangia recalled that he went back during the summer as an administrator on a number of occasions. As a supervisor of social studies, he was asked to attend a meeting by the State Department of Education in July in regard to developing grants. In 1981, he was asked by Dr. Ross to be a judge of a Columbus essay contest; the committee met every two years through July and August. He did not receive any additional pay and believed it was not voluntary considering the climate of the board.

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Noting that the board expects administrators to return to school during the months of July and August when asked, he recalled that Mr. DiTursi returned to his school during the months of July and August as did Mr. Olgen when his school building caught on fire.

On cross-examination, he focused on the contract he signed as a business education teacher. Although he could not recall any specific words in the contract which indicated he was a twelve-month employee, he believed he had been given the impression from Dr. McCarthy and his secretary, Miss Burrell, that it was an annual contract. More specifically, he recalled that Dr. McCarthy had advised him that he was a twelve-month employee when he congratulated him on signing the contract and, in addition, when he was promoted in September 1972 to school social worker. On further questioning, he indicated that he spoke to Dr. McCarthy about receiving tenure. When McCarthy advised him that his promotion to social worker would give him the necessary three years and one day for tenure as a teacher, he had the impression that he was an annual employee.

When he was questioned as to the contract in effect at the present time, he believed that a teacher had to work 185 days. He believed that the board could require two or three additional days to be worked without compensation pursuant to the past practice clause of the contract.

In further testimony, he admitted that he presently has a lawsuit pending in the appellate division against the board claiming tenure as a school supervisor. Noting that he worked from October 1, 1980 to October 2, 1982 as a supervisor, he alleged that he deserved credit for the time that he worked in August since he had not been serving as a supervisor.

Jack Koval, who has served as a teacher with respondent for nine years, as an assistant principal for six years, and as an elementary school principal for ten years, alleged that he is a twelve-month employee. He noted that he always goes to school in the latter part of August to prepare for the new term. When he does so, he is fulfilling the responsibilities of his job. Referring to summer employment, he recalled a directive from the superintendent of schools and the secretary which indicated that if end-of-year

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reports are inaccurate, a building principal would have to come in during the summer to correct the error. More particularly, he recalled that he returned to school during the summer after being notified by the police of a break-in. (He assumed that the police obtained his address from the central roster at the board.)

On cross-examination, Koval indicated that he is contractually required to work twelve months. The school year begins July 1 and ends August 31. Summer vacation begins the end of June or the first week of July and runs until the end of August. Thus, he opined that the board can request an employee to work an additional day or two as a professional courtesy without compensation. (He considered a request to be a directive.) However, the board could not require a teacher to work the entire summer vacation or half of a summer vacation without additional compensation. If the employment was to be over a certain period of time (four, five or six days, or a week or more), then the board would have to compensate the individual. He indicated, however, that he expects to return to school without being asked as professionally necessary.

Michael P. Dreher assumed the stand on his own behalf and testified as to his twelve-month employment. He indicated that no one ever told him that he was a ten-month employee. He considered himself to be a twelve-month employee with a vacation period. He testified that during the 1960's, 1970's and up to the present time, teachers receive a contract specifying a 365-day employment period, i.e., from September 1 to August 31. In the 70's, an administrator was appointed for a full year and received a letter of appointment which referred to a yearly or annual salary. Although there was a starting date, there was no completion date because in the 70's an administrator stayed in the position permanently.

Dreher further indicated that a principal cannot comply with the directives if limited to a ten-month period of employment. The work of a principal is voluminous. He often took work home, and worked at home during Christmas and Easter. He completed several hundred hours of work during each summer. Although he admitted that he was not ordered to do so, it was the same as an order to him. Noting that he was responsible for the building 365 days a year (he checked it and the work of the custodial workers during

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the summer), he explained that he came in during the summer vacation in order to redo a purchase order submitted by an assistant principal. Further, if the school funds did not tally after an audit, the principal would be contacted. Although he was unable to locate the directive from Secretary of the Board Silvestri, he indicated that that document advised that a principal could be called back to school during the summer vacation in regard to end-of-year reports. Noting that end-of-years reports had been due by July 1 or 2, and for three or four years he had worked at least two days beyond the close of school, he recalled that in one year between 1972 and 1976, he returned each day after school closed, and on July 3 and 5, until the work was completed. The summer vacation began when business ended. Business could end on June 27 or in July. If days had to be made up to amount to 180 days, he could serve into July. On no occasion did he receive additional pay for additional work. Further, he noted that board regulations 4112.7(a) and (b), which required the first orientation to be given by principals for new teachers prior to the opening of school, was in effect at the time that he was principal. He made a deposit for the school by mail on September 6, 1977.

On cross-examination, Dreher indicated that although it is not its usual practice the board has the capacity to direct a teacher to return to school without compensation; the board could require an administrator to work for the entire summer vacation without compensation. If the teacher returned for one or two months of work or if significant vacation time was taken away, additional compensation would probably be received. Noting that the board did not require administrators to come in on certain dates, he could not think of any administrators who were required to come in for 5, 10 or 20 days without compensation during the summer vacation. In the early 70's all administrators had to come in for a couple of additional days in regard to their job. Moreover, he stated that during the early 70's Mrs. Burke came in after school had closed for three, four or five days. Further, Ms. Halloran, Marilyn Donovan, Mr. DiTursi and Dreher were also asked to report, apparently for no compensation. He stated, however, that if individuals were asked to come in for additional work which was not in regard to their job, additional compensation would be paid. Thus, he noted that he applied for and functioned as a principal of the summer school and received additional compensation. He noted that he could have gotten additional employment in the summer inasmuch as he was on vacation.

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He admitted that he does not evaluate personnel at the school during summer vacation; the normal evaluations are done during the school sessions. In fact, he has never been evaluated during the summer. On redirect examination, he noted that most people were paid during the summer on an hourly wage. A small percentage received ten percent of their yearly salary. He stated, however, that prior to 1979 jobs were not paid on a ten-percent basis.

In response, respondent offered the testimony of James Joseph Jencarelli. Employed for 36 years by respondent, he now serves as deputy superintendent of schools. He was assistant superintendent of personnel from September 1973 to December 1977 when he became assistant superintendent for elementary education. He served as assistant superintendent of personnel from July 1979 until July 1984. As assistant superintendent of personnel he was responsible for the staffing of the schools, the recruitment of instructional and non-instructional personnel, the day-to-day operations of personnel, and negotiating the collective bargaining agreement.

Jencarelli, who explained that instructional employees are categorized in two groups, teachers and administrators, believed both groups to be ten-month employees, with the exception of the title "director," who holds an eleven-month position. He stated that administrators are and have always been ten-month employees. Principals were paid required to work only when school was in session. Both associations asked for payment over a twelve-month period. Although the manner of payment has been the same for 36 years, he explained that payment over 24 pay periods was not typical; most districts pay over the course of ten months.

Referring to P-63 in evidence, he explained that he was the resource person who was available during the negotiations for the agreement. He was asked the meanings of terms by the negotiator. His signature on the agreement indicated that he had participated. Referring to the salary schedule B at issue, he explained that if a principal was required to work during July or August, the principal would receive one-tenth of his annual salary. A principal could not be required to work in the summer without compensation.

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Referring to the agreement of September 1, 1978 through August 31, 1980 (R-21), he explained that this contract governed his activity in personnel. He explained that schedule B, section C (P-17), refers to the time period of work as did section B of the prior contract. Clarifying that this section indicates that all positions are ten-month positions, he opined that this was not a change from the 1976 to 1978 contract except that it was more clearly stated. He did not know the reason for it.

Similarly, the agreement from September 1, 1980 to August 31, 1982, for which he served as a resource person during the negotiations, recognized all positions as ten-month positions. There was an increase in the number of work days to 185 days for the 1981-82 school year. He noted that the additional one-tenth compensation of yearly salary was included in this contract. Although it had been proposed that administrators be eleven-month employees, administrators did not work eleven months. Referring to board policy which indicated that a principal shall be present at such other times as the board of education may direct (P-90), he stated that this regulation was not in effect from 1976 to 1978. Contending that any of the rules subsequently adopted are null and void if they are in conflict with the contract, he alleged that the board has never ordered a principal to school when school was not in session without compensation; no one ever did this to Dreher.

Further testimony was offered by Mr. Jencarelli in regard to certain documents which were offered by petitioner to indicate that he was a twelve-month employee. Referring to a letter from Mr. Carpenter from James Jencarelli which indicated Dreher's service to be from September 1 to August 31, Jencarelli explained that it was not intended to convey that Dreher is a twelve-month employee. Although personnel always had the academic year coincide with the bargaining agreement, the actual dates served were the dates school was in session (see also, P-44). Similarly, in regard to appointments of teachers to positions (P-5, 6 and 7), he explained that these are form notices which were sent by the superintendent. They indicated the dates of the contract to be from September to August in order to be consistent with the teachers' contract which runs from September to August. The contract period ran from September to August and payments were made over that period; however, teachers were only on duty when

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school was in session. (See also, P-8 through 18 for the same rationale). Referring to P-25, he indicated that it was a form letter sent to individuals. Unsure why the termination date was not indicated, he contended that the individuals were hired as ten-month employees. (See also, P-49.) (He explained that P-50 has no termination date because it is a promotional position. See also, P-54.) He stated further that although many of the board letters use the term "year," that refers to the academic year, the work year. In order to prove his point, he explained that nontenured principals are evaluated three times a year. A principal is not evaluated during the summer. The summer vacation begins the day schools close in June until the opening of school in September. He admitted that employees do receive letters during the summer which could be in the nature of information.

On cross-examination, he admitted that the board policy (P-90), which indicated that the principal shall be present in his school whenever his school is in session and at such other times as the board of education may direct, was in effect when Dreher was principal and has been the rule of the board for all of the time he has been there. He did not know why the union contract ran from September until August and alleged that the date of employment is not always September 1, but the date the individual began employment (P-179). Upon further questioning, he could not recall a directive issued in the early 70's. He stated that principals had not been required from 1973 to work at the beginning of July or to bring in end-of-year reports in July. He admitted, however, that principals might be recalled if the end-of-year reports were inaccurate. He was not aware of Dr. Ross asking someone to come in during the summer months or Williams having an individual return to review purchase orders. Although he served as a principal for two and one-half years, he did not know if a principal could write a check in July. He opined that no one ever told him when he served as principal that he was unemployed in July and August.

On redirect examination, he explained that instructional employees who were nontenured signed contracts until they were tenured. Teachers who became administrators were hired by an examination procedure and did not sign contracts.

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Next to testify was Lewis Lanzillo, who has been employed as assistant superintendent of schools for personnel for over a year. A teacher from 1965 to 1985, he served from 1977 to 1985 as one of the chief negotiators on the teachers' negotiating team. He also served as the contract enforcer for the Jersey City Teachers' Association from 1979 to 1985 and, prior to this, as a representative of the association for six or seven years.

With this background, he explained that the collective bargaining unit for supervisors began around 1974. For as long as he can remember, both principals and teachers have been ten-month employees. Thus, he pointed to the teacher's contract in effect from September 1976 to August 1978, pursuant to which teachers were to work 180 days. In regard to administrators, he pointed to the clause in the administrators' contract providing an administrator with one-tenth of his salary for each additional month employed. He also alleged that the past practice clause in the contract under Artice III would encompass the issue of ten- or twelve-month employment. The past practice of the board was to consider an administrator to be a ten-month employee. Moreover, the board cannot adopt policies in conflict with the contract.

In further testimony, he stated that he was aware of a desire to change administrators to eleven-month employees. Referring to a notice of impasse which was filed during the negotiations in effect at the time of the hearing (R-25), he explained that the impasse revolved around the board's attempt to extend the work year from ten to eleven months. The supervisors and administrators indicated that they had always been ten-month employees and wished to remain ten-month employees.

Referring to a board resolution for the appointment of certain probationary teachers (P-194, No. 15), he stated that it is typical to hire teachers from August 31. This does not mean that teachers are twelve-month employees, nor do these resolutions give the board the authority to call in teachers to work during the summer without compensation. In fact, to his knowledge no administrator has been required to work over the summer without compensation. (Some prinicipals come into the building when they are not required to.) He opined that they cannot be obligated to work during July and August

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without compensation. Although they sign contracts from September 1, it has no relationship to the actual period they work. Administrators were required to work 180 days. Leaves of absence are tied to the beginning of the school year in order not to interrupt the academic year.

On cross-examination, Lanzillo admitted that he had not been involved with the administrators' negotiating team. He alleged, however, that he was familiar with the administrators' contract because he had negotiated the teachers' contract. The administrators' and supervisors' contract is dependent on the teachers' contract. (See, Schedule B, Section D.) Referring to the contract at issue (P-63), he stated that although both Sections A and B of Schedule B referred to salary, he does not know to what Section A refers nor does anyone else. He had asked for that section to be removed. He indicated that Schedule B, Section B, refers to methods of paying people for additional work: payment of additional money beyond the ten-month period. The second sentence limits the first sentence. Although he could not name an individual in 1976 who was paid one-tenth of his salary for additional work, he did not believe that the vast majority of administrators were hired on an hourly or daily basis for additional work. In fact, on cross-examination, he opined that all administrators are paid one-tenth of their salary for each month of summer employment, unless they were on a federal grant. On redirect examination, the witness recalled that Mr. Wally, the principal assigned to his office, received an additional one-tenth of his salary for the month he had voluntarily worked during the summer.

Terence Sweeney Matthews, employed by respondent for the last 25 or 26 years, is presently serving his second year as principal of Ferris High School. He has served as chief of administrative personnel, high school principal (from 1976 to 1980), as an assistant superintendent, vice-principal, assistant principal and as a teacher. Matthews, president of the administrators' and supervisors' union during its first two years, served as the chief negotiator for the administrators for six years. In fact, he was the chief negotiator from 1974 to 1976 and 1976 to 1978.

He testified that all administrators and supervisors covered under the contract are

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ten-month employees. The director is an eleven-month employee, and the superintendent and assistant superintendent, not covered by the bargaining unit, are twelve-month employees. He noted that this distinction has been in effect since the 50's. Administrators and supervisors are paid over 24 payments because they voted in the 60's to be paid in that manner.

He further revealed that the pension fund treats principals as ten-month employees. Moreover, an individual who is an eleven-month employee receives a different pension than a ten-month employee. A ten-month employee who works an additional month receives extra pay which is not counted in the pension. In further testimony, he claimed that he had never told Bob DiTursi that principals and administrators are twelve-month employees. Opining that DiTursi does not lie, he alleged that he would have to know specifically how the question was asked to explain DiTursi's statement. He noted that they may have had a discussion regarding the pay period being twelve months instead of ten months.

He knew of no instance where the board required administrators and supervisors to report beyond the ten-month period without extra compensation. Noting that the contract now requires administrators to work 185 days, he stated that employment is from Labor Day to the last day in June. Prior to the last four years, principals worked 180 days. As part of the last contract, or the one before it, an additional five days were added to the administrators' calendar in exchange for the salary increase.

On cross-examination, he recalled a meeting with Franklin Williams on June 30, 1986, when the principals were asked for their summer telephone numbers. Williams indicated that the principals might have to revise the staff and reorganize during the summer if certain budget cuts were adopted. He did not recall anyone asking why the numbers were needed. The witness did not give his telephone number, but recalled that others did so.

Although not sure if he was on vacation during July and August, or if he was unemployed (he had never thought of himself as being unemployed but believed the

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summer not to be any different than Christmas), Matthews did not believe that he is employed during July and August. Referring to P-62, Article 19-2, he interpreted the requirement that textbooks be ordered in time for "August 15th delivery" to mean that principals would order the books and formulate the paperwork during the school year so that the books were in by September. He admitted that he came in to school during the summers of 1976 and 1978 (he knew of other principals who came in during the summer). He checked out the building, the vandalism (he would write a report during the summer if it had occurred), and talked to the custodial staff and secretaries. Noting that he lived around the corner, he contended that although not required, he maintained a certain rapport with the staff. He was not sure whether the administration was aware that he returned to the building. He stated, however, that most summers he was employed by the board of education and received extra compensation for extra services. In further testimony, he stated that from 1976 to 1979, principals would not be required to be in the school building unless the school calendar called for teachers and students to come in. He did not know if a principal could be ordered to come back during the summer to do something without compensation, or what would occur if end-of-year reports were inadequate. He was called back to change the location of Academic High School but was compensated.

Henry Przystup, who has been employed by respondent for 23 years, testified on rebuttal for petitioner. Although he is now a principal of the elementary school, he has also served as a teacher, assistant principal, principal, supervisor of special education, chief of administrative pupil services, superintendent and as principal of the regional school for one year. When he served as superintendent he was involved in the bargaining process. Noting that principals return to school to organize supplies and accomplish the necessary work, he considered himself to be a twelve-month employee. He recalled that in the late 70's Ross indicated that if the paperwork was not finished, they would have to come back after school had closed. Further, he received a phone call regarding a break-in at school and was asked to go to the school and write a report. Noting that he did not have to go, he recalled he was requested to do so; he received no additional compensation. He was never told that he was unemployed during July and August.

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Regarding additional compensation, he stated that some adminstrators get ten percent of their salary for services. For an administrative position, an administrator receives one-tenth of his salary. Noting that the individuals receiving ten-percent payments are a small minority, he did not believe that this means that administrators are ten-month employees. Moreover, both teachers and principals receive "x" amount of dollars for summer school.

Referring to R-21, the contract in effect from 1978 through 1980, he indicated that the provision of ten-month employment was added to protect administrators from working during July and August, their vacation. Prior to the collective bargaining agreement, the board required an administrator to work during July and August. Although he did not know whether prior to 1979 a principal was required to report to school, he opined that if the superintendent called him or her, a principal would come in.

On cross-examination, he explained that principals were not historically ten-month employees and that he always considered himself a to be a twelve-month employee even when he was chief administrator. He contended that when he is eligible to receive unemployment, he will then be a ten-month employee. He stated that directors are eleven-month employees but principals are twelve-month employees.

He admitted that he is involved in a case against the Jersey City Board of Education, apparently contending that he is tenured as an assistant superintendent. Having lost his case before the Office of Administrative Law, it is now before the state board. He maintained that his contention in regard to being a twelve-month employee did not begin with that suit.

Referring to a transcript dated March 27, 1984, in In the Matter of Figurelli v. Jersey City Bd. of Ed., OAL DKT. NO. EDU 9411-83 (June 6, 1984), he admitted that he had testified that in 1983-84 when he served as chief administrator of the Bureau of Pupil Personnel Services (his title was principal/chief administrator), it was a ten-month position, the same as an elementary school principal. When asked who was going to staff or perform his duties when he was not there, he explained that he was going to petition

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the board to work a month or six weeks during the summer for extra money.

Of note, he admitted that when a principal is required to work additional time during the summer, he has the right to petition the board for additional compensation at a rate of one-tenth of his annual salary. The board cannot require a principal to work without additional compensation during the months of July and August, the summer vacation. When a principal comes in during the months of July and August, it is not pursuant to contract; he is really functioning as a professional. He admitted that that has always been the case.

On redirect examination, Przystup contended the organization imposed contractual obligations on people and determined how the organization functions. He believed its structure to be dysfunctional. He contended that ten-month principals are unheard of everywhere except in Jersey City. "Its Byzantine here, so, what can I tell you?".

II. TESTIMONY ON ACCEPTANCE OF EMPLOYMENT

Testifying for petitioner, Ralph DelPiano stated that in May 1987, Jack Koval, principal of Public School 38, petitioner, principal of Public School 34, and himself, principal of Public School 29, had a conference in the principal's office of Public School 38. Since each had received a notice of termination as a principal they got together to formulate a defense. He recalled that copies of the New Jersey statutes had been brought to the meeting. (See P-98, copies of statutes that were brought to the meeting on that date). He recalled that the discussion centered on the fact that he had received only two evaluations instead of three, as well as the failure to notify in a timely manner. Further, petitioner stated that he had submitted a letter to Dr. Ross accepting employment for the upcoming school year. DelPiano believed that Koval might have said that he sent a similar letter; DelPiano wished he had sent one.

On cross-examination, he admitted that he had not known which section of the tenure statutes applied to him, but was hoping to find anything that would help him. He admitted that he had not seen Dreher's letter to Dr. Ross.

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Koval, testifying for petitioner, recalled attending a meeting in May 1978 with petitioner and Ralph DelPiano, subsequent to receiving a letter of non-reemployment. They discussed the tenure statutes and reemployment for the following year. He testified that he sent Dr. Ross a letter questioning why he had been denied tenure and indicating that he was filing a grievance. He vaguely recalled having sent a letter pursuant to N.J.S.A. 18A:27-12, as well as indicating that he had done so. Koval vaguely recalled petitioner indicating that he had sent such a letter.

In regard to the issue of the acceptance letter, Dreher contended that his personnel file was unreliable. Having reviewed his file three times in 1978, one more time a few years later, and then more recently (he was not sure how many times he had reviewed it), his impression was that some documents were added after the initial viewing and as a result of the litigation. There were inconsistencies in the file and in the legal documents. He noted that letters that should have been there originally were attached to some of his more recent letters. He stated that it was a haphazard mix.

He explained that in May 1978 he met with Koval and DelPiano to discuss what could be done about the termination notices they had received. Koval had a copy of the statutes, and Dreher brought several pages of the statutes. Dreher indicated that he had gone through Title 18A at the library and at that time became aware of the acceptance section. He recalled that they discussed the acceptance letter. He was also excited because he had only received two evaluations.

On cross-examination, he testified that he wrote and sent four different certified letters to Dr. Ross. He had no idea whether the acceptance letter was one of them. He could not explain why two pieces of certified mail were sent to Dr. Ross on the same day (P-176), and agreed that the certified mail dated May 20, 1978 (P-177) could not be the acceptance letter. His recollection was that the acceptance letter was sent around the first week of May and prior to May 19. Although he was unsure when he met with DelPiano and Koval (he believed it was during the first week of May), he recalled that he sent the letter the night before the meeting and had so indicated this to Koval. More specifically, Dreher explained that he sent the letter subsequent to May 2 and one or two days after he read an educational article on the issue.

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Although he recalled that the meeting with Koval and DelPiano took place around the time of the meeting he had with Dr. Ross, which he believed was during the first week of May, he did not know which meeting came first. Although he did not recall discussing the acceptance letter with Dr. Ross or James Jencarelli, he stated that he discussed the letter with his wife and children. He noted that he probably reviewed his personnel file for the first time after his meeting with Koval and DelPiano. He could only recall going through his personnel file and not the school file. He admitted that as a result of the federal litigation he may have seen the school file. He contended that he never thought of the letter when he looked at the file. After he mailed the letter, he never saw the original again. He could not figure out what had happened to a copy of the letter which he saw subsequent to the time he had typed it. Although he should have retained the carbon, he could not recall seeing the copy after the first year. He noted that he did not show the acceptance letter to Koval; his wife may have seen the letter.

Testifying on behalf of respondent, Beverly Simpson, the custodian of personnel files at the board, identified R-1 as petitioner's personnel file. According to Simpson, everything pertaining to an employee, including correspondence, documents relating to the acceptance of a contract and employment would go into the folder. It is the only place for personnel records. On a routine basis, documents are given to her to file from the superintendent's office, assistant superintendent and/or deputies. When she was asked to look for the Dreher letter of May 1978 to the board or to Dr. Ross accepting employment for the school year 1978-79, Simpson indicated that she had gone through the file and it was not there. She found a letter from petitioner to Ross in May 1978, which was not an acceptance letter. Referring to the attendance records for the school years 1976-77 and 1977-78, which are completed by the clerk, and record absences for September to June (R-2 and R-3), she stated that there are no records that show the absences for July and August.

On cross-examination, Simpson admitted that petitioner's certification (P-69) was not in the file which it should have been if it had been presented to the board. Simpson also noted that the payroll card (P-19), payroll's own record, was not in the file, but this document might not be. Simpson, who revealed that no one has access to the file without

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asking her, did not know why certain documents would be missing. Simpson indicated that a school could have its own file. However, neither a letter of acceptance nor a certification would go into a school file.

Testifying on behalf of respondent, Dr. Michael Ross indicated that after he sent a letter to Dreher on or about April 28, 1978, advising him that he would not be offered a tenure contract, Dreher did not send a response letter accepting employment. Ross stated that he would have recalled such a letter because it would have been at odds with his letter. Although he admitted that a staff person opens his mail, if a letter had been addressed to him concerning tenure he would have received it. Further, Dreher never told him he had sent such a letter. He noted that he had not gotten any letter such as this from the other principals, Koval and DelPiano.

On cross-examination, Ross stated that he permitted Dreher to review all the files that Dreher had asked to review, and which pertained to him, i.e., the personnel file and those relating to Public School 34. Although he did not know the number of files that were reviewed, Ross stated that he reviewed the files with Dreher's name on them (the personnel file) as well as the Public School 34 files. Ross specifically recalled the secretary bringing in the file because they had cooperated to such an extent in providing Dreher with documentation.

DISCUSSION

I. TEN-MONTH VERSUS TWELVE-MONTH POSITION

Petitioner asserts that when he served as principal he was a twelve-month employee. He bases his contention on the testimony and evidence adduced at the hearing. More particularly, he pointed to a number of contracts which indicated that employment ran from July 1 through June 30 or September 1 through August 31. As further support for his position, he pointed to the fact that administrators and supervisors, as well as teachers, were paid over twelve months. He pointed out that unemployment compensation cannot be collected by supervisors, administrators or teachers during the

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months of July and August, if there is a reasonable expectation that the employee will be reemployed for the next academic year. He further attempted to show that in actuality a principal could be required to come in to complete work at the end of the year or prior to September without additional compensation. He opined that end-of-year reports often had to be completed during a summer vacation and that a principal could be asked to make corrections. He relied on several witnesses' knowledge of a directive which apparently indicated that an administrator could be called back during the summer to correct errors. He further alleged that administrators actually put in time during the summer vacation and are in fact responsible for their buildings. He offered evidence of administrators who believed that they were in fact twelve-month employees. He questioned them as to whether they believed they could be called back to school during the summer, whether they had in fact been called back during the summer, or whether they had worked during the summer vacation.

In response, respondent contended that administrators have always been ten-month employees. Respondent alleged that administrators were only required to work until the end of school. Although they were paid over 24 pay periods, this was simply done because it was desired by the administrators and not as a demonstration that they were in fact twelve-month employees. As support for its position, respondent relied on the contract in effect for 1974-76, as well as the subsequent contracts entered into by the parties.

I have reviewed the arguments of counsel, as well as the testimony and evidence adduced, and must agree with the position espoused by respondent. In reaching this determination I am particularly persuaded by the collective bargaining agreement in effect at the time between the supervisors' and administrators' unit and the board. It is clear that, during the 1976-78 time period and in the years preceding and following that period, petitioner was a public employee covered by the New Jersey Employer-Employee Relations Act. N.J.S.A. 34:13A-1 et seq. That act empowers the majority representative of a public employees' bargaining unit to negotiate agreements covering all members of that unit. N.J.S.A. 34:13A-5.3. Here, the administrators' and supervisors' association (the association) was the bargaining unit that negotiated the 1976-78 collective bargaining agreement (agreement) with the board that governed the terms and conditions of petitioner's employment with respondent.

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In determining whether petitioner, a principal, was a ten-month employee, the language of that agreement must be considered. The 1976-78 agreement did not specify the number of days that principals and other supervisors and administrators were required to work. However, the contract was reviewed in order to determine the length of the work year and amount of compensation. The applicable statement in the agreement, the salary schedule (paragraph B on page 17 of P-63) reads as follows:

> All administrative and supervisory personnel shall be compensated one-tenth (1/10th) of their salary for every extra month's service mandated during the summer months.

Clearly, pursuant to that provision, work performed during the summer months must be considered extra work or service for which an administrator will be compensated. This conclusion is consistent with the fact that the school calendar ran from September to June. Further, the measure of compensation for an extra month of service, one-tenth of the yearly salary, supports this conclusion because one-tenth of the salary for an employee holding a ten-month position is for one month of work. Obviously, if an administrator held a twelve-month position, it would be illogical to provide additional compensation for an extra month's work during the summer.

This conclusion is buttressed by several additional factors. First, nothing in the agreement indicates or in any way suggests that a principalship is a twelve-month position. Second, the agreement does include information about the position of supervisor which is for eleven months. This raises the strong inference that only the supervisor holds an eleven-month position, while the other positions are for a different period of time. The other positions would either be for ten months or for twelve months. Based on the other information contained in the contract, it seems reasonable to draw the inference that the position of principal is for ten months. This is especially so in light of the fact that the 1978-80 contract (P-92) clarifies that, "All positions represented by this bargaining agent shall be ten month positions except for the title of 'Director' which shall be an eleven month position." Since the supervisor's position was differentiated as an eleven-month position in the 1976-78 agreement, the inference is clear that principals held a ten-month position at that time. In this context, it must to be observed that the

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fact that the 1978-80 agreement more clearly specified that administrators (principals) were ten-month employees as explained by Mr. Jencarelli, did not constitute a change. It was a clearer statement of what had previously existed and was understood to exist by the parties. Similarly, the agreement from September 1, 1980 to August 31, 1982, recognized all positions as ten-month positions.

More to the point, the ten-month conclusion was supported by the testimony of respondent's witnesses. James Jencarelli, who participated in the negotiations of the agreement, stated that if a principal were required to work during July or August, the principal would receive one-tenth of his annual salary. A principal could not be required to work without compensation for the summer. He explained that this provision of the contract referred to the time period of the employment. He noted that the documents offered by petitioner to show he was a twelve-month employee were only intended to coincide with the dates of the bargaining agreement. The period of employment was from the date school opened until the date school closed (the school session). Jencarelli's view was supported by the testimony of Terence Matthews, who served as chief negotiator for the administrators for six years. He, too, did not believe that administrators were employed during July and August. He opined that an individual who is an eleven-month employee receives a different pension than a ten-month employee. Further support was offered by Dr. Ross, who served as superintendent of schools from 1974 to 1984. According to Ross, administrative staff referred to principals as ten-month employees. He contended that he recalled this because he wanted the contract changed to allow them to be eleven- or twelve-month employees because summer work for administrators is important. When asked how he determined that principals were ten-month employees, he pointed to the contract provision noted above.

Similar testimony was elicited from Lewis Lanzillo. Employed as assistant superintendent of schools for personnel for over a year, he has been involved in the association as the chief negotiator for approximately eight years. Pointing to the administrators' contract, he too alleged that an administrator would receive one-tenth of his salary, if employed, for each additional month of service. He also alleged that the past practice clause in the contract encompassed the issue of ten- or twelve-month

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employment; as long as he remembers the past practice of the board was to consider an administrator to be a ten-month employee. Of import, he recalled that during the hearing in the instant matter a notice of impasse was filed during the negotiations in progress at the time. The impasse involved the extension of the work year from ten to eleven months. He thus contended that there is a desire on the part of respondent to change administrators to eleven-month employees. In sum, a review of the language in the contracts, and the testimony in regard to those contracts, demonstrates to this tribunal that the 1976-78 contract meant to convey that administrators (principals) were ten-month employees.

I am also not persuaded by petitioner's argument that payment of instructional personnel during the summer vacation months constitutes employment during those months under the tenure statutes. Petitioner would have this tribunal compare the teachers' contract (P-62) to the administrators' contract (P-63) and to find by comparison that administrators were twelve-month employees. Clearly, the teachers' contract does set forth that no teacher shall be required to work more than 180 days per school year. While petitioner would have this tribunal find that since no such statement exists in the administrators' contract, administrators are twelve-month employees, I cannot reach that conclusion. Rather, I am persuaded by the fact that Section 24-1 allows two salary checks every month for twelve months for teachers. Teachers were, thus, paid over a twelve-month period although they performed their contract over 180 days, an academic year. This lends support to respondent's argument that administrators as well were not paid for twelve months of work. Clearly, therefore, payment over a summer vacation does not convert a position into a twelve-month position. It is essentially undisputed (and confirmed by the testimony of Mr. Matthews), that there was a vote on whether the board would pay instructional personnel over twelve months or ten months. The employees elected to be paid in 24 installments over twelve months. Thus, for the convenience of the employee, a certain amount was deducted from each paycheck from September through June and that amount was paid back in the months of July and August, equalizing the installment payments. Since there is no contention that this payment plan was not authorized, it would take one far afield to determine from this payment plan that the employee is actually being paid for work done in July and August.

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Although the uemployment compensation practices and law could certainly be seen to support petitioner's argument that he is a twelve-month employee, that result is not so clear. Instructional personnel do not collect unemployment compensation benefits during the months of July and August if there is a reasonable assurance of reemployment for the next academic year. However, if the employee is not reemployed in September, that employee is entitled to retroactive unemployment compensation for the months of July and August. The fact that an employee may be able to receive unemployment compensation for July and August is obviously consistent with respondent's position that supervisors and adminstrators are not employed in July and August and hold ten-month positions.

In addition to the above, I feel compelled to consider petitioner's argument that he, as well as other administrators, engaged in work during the summer vacation period, which requires that his position be considered a twelve-month position. First, it must be pointed out that the documents submitted by petitioner, which to some extent offer evidence of a calendar year of employment, only offer evidence of work at most through July 2. Apparently, administrative year-end reports were due by July 1 or 2. Although it was alleged that improperly completed forms could require the administrator to correct the problem during the summer vacation, there was little evidence submitted to show that this emergency ever really occurred and what the result would be if an administrator actually had to work for a substantial period of time during the summer vacation in order to correct the error. In fact, at most what was demonstrated was that an administrator might have to return to school past the end of June or July 1 to correct the error and would probably not receive extra compensation for it. To argue that that makes an administator a twelve-month employee seems to be stretching the nature of summer employment. Actually, the bulk of the testimony was to the effect that administrators worked occasionally on a voluntary basis which was not mandated by respondent. Second, the contention that petitioner and others received mail during the summer months, thereby resulting in petitioner having a twelve-month position, must be dismissed. It seems clear that the mail received by petitioner was simply informative as to when school would open and when meetings would begin in September. Just because petitioner received mail during the summer months, as did teachers, his employment is not raised to

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the level of a twelve-month employee. Further, although principals are, pursuant to regulation, required to "be present in their school at all times while school is in session and at such other times as the board of education may direct" and are required "to see that the school building, the furniture and equipment are in all respects in proper condition before the opening of the school year" (P-89, P-90, P-91), there was no evidence adduced to show that principals were required to work during the summer months to accomplish this. Apparently, principals could take care of such matters in late June or early September, or as needed.

The point simply is that the services rendered on occasion during the summer by administrators such as petitioner and others were essentially of a voluntary nature. They performed services to prepare for the upcoming school year. Thus, petitioner may have gone into the school to plan and get ready for the upcoming school year. Apparently, and as stated by several administrators, they did this as part of their professional responsibilities and not because they were required to perform services for the board during the summer vacation period without additional compensation. This feeling of responsibility, however, is not equivalent to the requirement that an administrator (principal) is employed for a twelve-month period.

I am further persuaded in my conclusion by the fact that summer school was held in some of the school buildings during the summer months, for which respondent advertised and paid principals, in addition to their pay for the September to June school term (see P-93, P-94, P-95, P-55 and P-67). It should be noted that the collective bargaining agreement which was in force during the period in question also indicates the manner in which summer school openings for principals were determined. The opening was first offered to the principal of the school in which the summer school program is operating. As may be gleaned from this, whoever took the position received compensation in addition to his/her annual salary. Also, one might infer that the summer school principal was in charge of the building during summer school. Otherwise, there would be two principals in charge of the same building during the same time period. Moreover, if petitioner's job was for twelve months how could he, as the evidence indicated, receive compensation by the same employer for working during the summer months? ". . . (W)hen summer services

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are required by the board of education as a condition of regular employment and when the employee does not receive any additional compensation beyond his annual salary on the negotiated guide, such time is countable toward tenure." Flood v. Jersey City Bd. of Ed., OAL DKT. NO. EDU 4453-83 (Dec. 1, 1983), adopted, Comm'r of Ed. (Jan. 17, 1984). Accord, Reeves v. Westwood Regional School District Bd. of Ed., 81 S.L.D. 1051, adopted, Comm'r of Ed., 81 S.L.D. 1068. "It is well settled by prior commissioner's rulings that a teacher may not gain credit for summer school teaching . . . for purposes of tenure." Id. at 1058; Mihatov v. Woodcliff Lake Bd. of Ed., 77 S.L.D. 1, 5. See also, Mihatov v. Woodcliff in which it was stated that "while such work as petitioner performed during the workshops and in developing and improving the curriculum during the summer periods was undoubtedly of value to the instructional program, it was voluntarily engaged in and not such that petitioner demanded or that the board offered a regular salary with attendant emoluments." It is thus clear that in the instant case petitioner was not required to work during the summer months and was paid when he in fact did so.

In view of the above discussion, this tribunal **FINDS AS FACT** that petitioner held a ten-month position for the time period 1976-78 and, as such, only worked two academic years as a principal.

II. PETITIONER'S ACCEPTANCE OF EMPLOYMENT FOR THE 1978-79 SCHOOL YEAR

Next to be considered is whether petitioner accepted employment with respondent for the 1978-79 school year pursuant to N.J.S.A. 18A:27-12. As stated by the appellate division, evidence concerning the acceptance of the mandated third year's contract was to be received and analyzed. In so doing, petitioner had the burden of proof to show such acceptance. In resolving this issue, I **FIND** that petitioner has not met his burden of proof. Petitioner has failed to establish that the board received an acceptance letter pursuant to N.J.S.A. 18A:27-12. That statute provides as follows:

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> If the teaching staff member desires to accept such employment he shall notify the board of education of such acceptance, in writing, on or before June 1 in which event such employment shall continue as provided for herein . . ..

The contract that the teaching staff member is accepting is specified in N.J.S.A. 18A:27-11:

> . . . then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education.

It is clear that pursuant to this statutory scheme the board must be notified in writing. In reviewing the evidence to determine whether in fact the board was notified in writing, I am persuaded by the fact that the board never received the acceptance letter petitioner claims to have sent. I am in agreement with the board's contention that even if petitioner sent such an acceptance letter, the failure of the board to receive the letter totally defeats petitioner's claim. Mailing a letter creates a presumption that the letter was received. However, this is a rebuttal presumption that may be overcome by proof that the letter was never received. Szczesny v. Vasquez, 71 N.J. Super. 347, 354 (App. Div. 1962). There is no evidence in the record that shows receipt of the letter.

Petitioner has maintained that he sent the letter to Dr. Ross. Dr. Ross specifically recalls never receiving the letter, and he further testified that if any such letter dealing with personnel and tenure had been sent to his office it would have come to him. He stated that he would have recalled such a letter because it would have been at odds with the letter he sent to Dreher indicating that Dreher would not be offered a tenure contract. In reaching the conclusion that respondent did not receive such a letter, I am also persuaded by the fact that petitioner examined his personnel file and various school files on a number of occasions and has been unable to locate a letter accepting reemployment as a principal for the coming school year in all the reviews of his files. He could not testify as to seeing a copy of the letter in his personnel file when he examined it

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in May or June of 1978 or on any other subsequent occasions when he examined his personnel file. Further, he never notified anyone that the acceptance letter was missing from his personnel file. He never informed his attorney in May 1978 that he sent such an acceptance letter. He further never informed a second attorney who handled this matter before the hearing examiner and the Commissioner, that he sent such an acceptance letter. In fact, the issuance of the acceptance letter was never raised by petitioner or his attorney before the Commissioner nor was it raised by him in his initial submission to the state board. Petitioner further filed a lawsuit in United States District Court alleging reverse discrimination in April 1980 and similarly, although represented by two different attorneys during that lawsuit, never told either attorney about sending the acceptance letter. He cannot recall discussing the acceptance letter with anyone other than Mr. Koval, Mr. DelPiano and his wife.

The only evidence adduced to refute the above testimony by petitioner was his own testimony, as well as the testimony of DelPiano and Koval. Petitioner alleged that his file was haphazard and unreliable. He contended that he sent the acceptance letter prior to May 19. He admitted that after he mailed the letter he never saw the original again nor did he have a copy of the letter. DelPiano indicated that in May he, Dreher and Koval had a meeting regarding the termination notices they had received. He stated that it was discussed that petitioner had submitted a letter to Dr. Ross accepting employment for the upcoming school year. He recalled that Koval might have said that he sent a letter, and DelPiano wished he had sent one himself. On cross-examination, he admitted that he had not seen Dreher's letter to Dr. Ross accepting employment. Further testimony was offered by Jack Koval who vaguely recalled sending a letter pursuant to N.J.S.A. 18A:27-12 and vaguely recalled petitioner indicating that he had sent such a letter.

In light of the above, I must agree with respondent that the testimony is overwhelming that respondent did not receive the letter. Although a letter may have been sent, receipt of the letter is essential under the statute. Moreover, I cannot find from the evidence adduced that an adequate letter was sent. While it may be that a letter "accepting employment" was sent, I must agree with respondent that without

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specific testimony about the contents of the letter, I cannot find that the letter was adequate to accept employment under the statute. I therefore **FIND** and **CONCLUDE** that petitioner has failed to establish that the board received an acceptance letter pursuant to N.J.S.A. 18A:27-12 or that he adequately notified the board of education of acceptance of employment in writing on or before June 1 in conformity with N.J.S.A. 18A:27-12.

CONCLUSION

Based on the testimony and evidence adduced at the hearing, **I CONCLUDE** that petitioner held a ten-month position as principal for the 1976-77 and 1977-78 school years, and that he is not entitled to tenure in that position. **I FURTHER CONCLUDE** that petitioner did not accept employment pursuant to N.J.S.A. 18A:27-12 as a principal for the 1978-79 school year. It is therefore **ORDERED** that petitioner's appeal be **DISMISSED.**

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

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

June 16, 1987
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

JUN 18 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

June 19, 1987
DATE

Ronald L. Parker/as
FOR OFFICE OF ADMINISTRATIVE LAW

jrp/ed

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MICHAEL DREHER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter remanded by the Appellate Court including the initial decision on remand from the Office of Administrative Law.

It is observed that petitioner's exceptions to the initial decision, as well as the Board's reply to those exceptions, were filed with the Commissioner in accordance with the applicable provisions of N.J.A.C. 1:1-18.4.

Recited below are two of the four issues which directly relate to petitioner's tenure claim to the position of principal, as they appear in the initial decision on remand, ante:

> (b) Was petitioner's contract with respondent for a ten-month or a twelve-month period?
>
> (c) If petitioner had a ten-month contract of employment with respondent, did petitioner accept employment with respondent for the 1978-79 school year?

Issue (b) set forth above requires that the Commissioner review the relevant findings of fact contained in the record of this matter as they relate to the controlling provisions of N.J.S.A. 18A:28-6 set forth below:

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

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

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

As petitioner correctly argues in his exceptions

> Tenure is a statutory right which inures to all teaching staff members who meet the conditions of the statute. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 77 (1982); Zimmerman v. Newark Bd. of Ed., 38 N.J. 65, 72 (1962), cert. den. 371 U.S. 956 (1963). (emphasis supplied)
>
> (Petitioner's Exceptions, at p. 2)

Initially, the Commissioner's attention is focused upon sections (b) and (c) of the provisions of N.J.S.A. 18A:28-6 as they relate to the undisputed facts in this matter set forth in the initial decision, ante:

> 5. On June 8, 1976, petitioner was appointed by the board to the position of principal of School No. 34. The appointment was to "take effect September 1, 1976 and to be subject to such further action as the board may direct." (P-23, P-58).
>
> 6. Petitioner was principal for the 1976-77 and 1977-78 school years.
>
> 11. On August 28, 1978, the board passed a resolution reassigning petitioner from the position of principal to the position of assistant principal. The reassignment was dated September 5, 1978 (P-24, P-39). John Phillips replaced petitioner as principal of Public School 34 effective September 5, 1978 (P-27, P-40). (emphasis supplied)

It is evident that the periods of time controverted herein with respect to petitioner's actual employment service as principal are limited to the following: September 1, 1976 through August 31, 1977 and again from September 1, 1977 through August 31, 1978. In other words, petitioner was required to establish that he was either employed on a ten-month academic year basis or on a twelve-month calendar year basis during the relevant time parameters cited above. It must be noted that those periods of time extending from September 1, 1976 through August 31, 1978 embrace periods of two

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academic years in accordance with the definition set forth in N.J.S.A. 18A:1-1. The definition of an "academic year" was further clarified by the Commissioner in Jan Braverman v. Board of Education of the Township of Franklin, 1971 S.L.D. 460 wherein the Commissioner held that

> N.J.S.A. 18A:1-1 defines "academic year" as follows:
>
> "Academic year" means 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***.
>
> It is not logically possible, therefore, for a person employed on an academic-year basis to serve more than three academic years in a period of time shorter than three calendar years. To hold that petitioner served the equivalent of more than three academic years within a period of thirty-five months would suggest an anomaly. Such is not the legislative intent of the statute. The Commissioner held in Lawrence M. Davidson v. Newark State College and Eugene C. Wilkins, 1968 S.L.D. 12 that:
>
> > "***A statute will not be construed to reach an absurd or anomalous result. Robson v. Rodriquez, 26 N.J. 517 (1958); Slocum v. Krupy, 11 N.J. Super. 81 (App. Div. 1951) See also Schumacher v. Board of Education of Manchester Township, 1961-62 S.L.D. 175, affirmed as Board of Education of Manchester Township v. Raubinger, 78 N.J. Super. 90 (App. Div. 1963). In the Commissioner's judgment, petitioner's argument enlarges the statute far beyond any intent of the Legislature and would produce untenable and unreasonable results.***" (at p. 16)***
> >
> > (at 462)

Similarly, given the undisputed facts herein it would not be possible according to the provisions of N.J.S.A. 18A:28-6(b) or (c) for petitioner to have been employed during the 1976-77 and 1977-78 school years and to have served as principal more than two academic years in a period of time within two calendar years (1976-77, 1977-78). It must be noted that the third academic year of service which satisfies the provisions of either N.J.S.A. 18A:28-6(b) or (c) would have been triggered if petitioner had

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served as principal at any time during the 1978-79 academic year which commenced on September 5, 1978. The undisputed facts of this matter establish that this was not the case.

Alternatively, petitioner, in order to satisfy the tenure provisions of N.J.S.A. 18A:28-6(a), was required to prove that his employment service as principal during the 1976-77 and 1977-78 school years was established by the Board on a twelve month/calendar year basis.

The Commissioner has considered and appraised all the evidence in the record of this matter and has given attentive consideration to the testimony of the witnesses contained in the transcripts of the hearing conducted by the ALJ with regard to petitioner's claim that he acquired tenure as a principal either on an academic or calendar year basis during the 1976-77 and 1977-78 school years.

In the Commissioner's judgment there is nothing contained in the testimony or evidence in this record which supports petitioner's claim to tenure as principal on either an academic or calendar year basis in accordance with the provisions of N.J.S.A. 18A:28-6(a), (b) or (c).

To the contrary, a review of the record clearly supports those findings by the ALJ in the initial decision that petitioner was employed on an academic year (ten-month) basis rather than a calendar year (twelve-month) basis. The relevant findings of fact which support this conclusion are set forth in the initial decision, ante. More specifically, those findings and conclusion of the ALJ read in pertinent part:

> In determining whether petitioner, a principal, was a ten-month employee, the language of that agreement must be considered. The 1976-78 agreement did not specify the number of days that principals and other supervisors and administrators were required to work. However, the contract was reviewed in order to determine the length of the work year and amount of compensation. The applicable statement in the agreement, the salary schedule (paragraph B on page 17 of P-63) reads as follows:
>
> > All administrative and supervisory personnel shall be compensated one-tenth (1/10th) of their salary for every extra month's service mandated during the summer months.
>
> Clearly, pursuant to that provision, work performed during the summer months must be considered extra work or service for which an administrator will be compensated. This conclu-

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> sion is consistent with the fact that the school calendar ran from September to June. Further, the measure of compensation for an extra month of service, one-tenth of the yearly salary, supports this conclusion because one-tenth of the salary for an employee holding a ten-month position is for one month of work. Obviously, if an administrator held a twelve-month position, it would be illogical to provide additional compensation for an extra month's work during the summer. (Initial Decision, ante)

In the initial decision the ALJ further found and concluded in part as follows:

> I am also not persuaded by petitioner's argument that payment of instructional personnel during the summer vacation months constitutes employment during those months under the tenure statutes. Petitioner would have this tribunal compare the teachers' contract (P-62) to the administrators' contract (P-63) and to find by comparison that administrators were twelve-month employees. Clearly, the teachers' contract does set forth that no teacher shall be required to work more than 180 days per school year. While petitioner would have this tribunal find that since no such statement exists in the administrators' contract, administrators are twelve-month employees, I cannot reach that conclusion. Rather, I am persuaded by the fact that Section 24-1 allows two salary checks every month for twelve months for teachers. Teachers were, thus, paid over a twelve-month period although they performed their contract over 180 days, an academic year. This lends support to respondent's argument that administrators as well were not paid for twelve months of work. Clearly, therefore, payment over a summer vacation does not convert a position into a twelve-month position. It is essentially undisputed (and confirmed by the testimony of Mr. Matthews), that there was a vote on whether the board would pay instructional personnel over twelve months or ten months. The employees elected to be paid in 24 installments over twelve months. Thus, for the convenience of the employee, a certain amount was deducted from each paycheck from September through June and that amount was paid back in the months of July and August, equalizing the installment payments. Since there is no contention that this payment plan was not authorized, it would take one far

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afield to determine from this payment plan that the employee is actually being paid for work done in July and August. (Initial Decision, ante)

Finally, the Commissioner has reviewed the transcript testimony of the witnesses including petitioner with respect to his claim that he filed a letter of acceptance with the Board accepting employment as a principal for the 1978-79 school year in accordance with the provisions of N.J.S.A. 18A:27-12. It is clear from a review of relevant testimony of the witnesses including petitioner's testimony that petitioner has failed to establish that the Board received his letter of acceptance or that he adequately notified the Board of his acceptance of employment in writing on or before June 1, 1978 in conformity with N.J.S.A. 18A:27-12.

In conclusion, the Commissioner finds and determines that petitioner's exceptions to the initial decision which are incorporated herein by reference are without merit specifically for the reasons contained in the findings and conclusions set forth in the initial decision.

Accordingly, attentive consideration has been given by the Commissioner to the testimony and evidence produced in the transcripts of these proceedings as they relate to petitioner's exceptions and the findings of fact contained in the initial decision. The Commissioner has independently weighed the evidence giving due regard to the opportunity of the ALJ to observe the witnesses and to evaluate their credibility and finds and determines that petitioner has failed to carry his burden of proving that he acquired a tenure status as principal in the Board's employ pursuant to the provisions of N.J.S.A. 18A:28-6(a), (b) or c. It is further found and determined that petitioner has not met his burden of proving that he complied with the provisions of N.J.S.A. 18A:27-12 in filing with the Board his letter of acceptance of employment as principal for the 1978-79 school year. See In re Morrison, 216 N.J. Super. 143 (App. Div. 1987); In re Masiello, 25 N.J. 590, 606 (1958).

While the Commissioner recognizes that the tenure acquisition of teaching staff members is a legislative status rather than defined by contract, nevertheless he cannot ignore the undisputed fact that the Board has violated the provisions of N.J.S.A. 18A:27-5 by failing to issue individual contracts of employment to its nontenured administrators and supervisors.

In this regard, had the Board done so in the instant matter, it is evident that the controversy which has arisen with respect to petitioner's employment as a nontenured principal during the 1976-77 and 1977-78 school years would not have occurred. The individual contract of employment would have clearly set forth the terms of petitioner's employment service for each of the years in question without having to litigate such issues regarding whether his employment as a nontenured principal was to be rendered on an academic or calendar year basis.

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In view of such finding and determination, the Board is hereby directed to comply with the provisions of N.J.S.A. 18A:27-5 and 6 with regard to the issuance of individual contracts of employment to its nontenured administrators and supervisors commencing with the 1987-88 calendar year or academic year as the case may be. It is so ordered.

For all of the foregoing reasons, the Commissioner hereby adopts those findings and conclusions set forth in the initial decision as his own. The instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

July 29, 1987

Pending State Board

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NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

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

Petitioner posits four exceptions which are summarized in pertinent part below.

EXCEPTION I

> THE ADMINISTRATIVE LAW JUDGE ERRED IN HIS CONCLUSION THAT THE COMMISSIONER OF EDUCATION'S TWO REPORTED DECISIONS IN PARALLEL PROCEEDINGS REGARDING THE ASSIGNMENT OF NURSING FUNCTIONS TO ELEMENTARY SCHOOL SECRETARIES WITHIN THE LONG BRANCH SCHOOL DISTRICT MAY NOT BE RELIED UPON IN THE INSTANT MATTER.

Petitioner reiterates the argument raised in its post-hearing brief, which is incorporated herein by reference, that Barbara Creed et al. v. Board of Education of the City of Long Branch, decided by the Commissioner November 10, 1986, decision on remand February 24, 1987, remanded again to OAL February 27, 1987, can be considered as supporting its position. It relies on the following language taken from the remand of November 10, 1986:

> ***Were the Commissioner to base his determination solely upon those facts as alleged by petitioners, he could not reach the conclusion arrived at by the ALJ in the initial decision submitted herein. (emphasis in Exceptions) (Petitioner's Exceptions, at p. 2, quoting Slip Opinion, at p. 18)

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Noting that the Commissioner remanded the matter a second time for a full hearing on the facts, petitioner suggests that

> the Commissioner's decision in the Creed matter clearly reveals the Commissioner of Education's considerable concerns with regard to the regular, daily utilization of non-certificated personnel, such as school secretaries, to perform nursing functions traditionally performed by school nurses, especially in instances when, as in the case at bar, said secretaries have received little or no training that would qualify them to perform duties that are usually performed by Health Aides in the absence of school nurses, in accordance with State regulations. (N.J.A.C. 6:11-4.9) (Exceptions, at p. 2)

Petitioner contends the instant matter is even more compelling than the fact situation in Creed, supra. It claims the two affected school secretaries in the case sub judice were provided no first aid training and, further, that they had never been given any documentation concerning recommended treatments for illnesses and injuries affecting school children. In addition, the school secretary job description did not refer to the performance of any school nursing duties, petitioner claims. Further, petitioner submits:

> In light of the testimony of Jane Kelly and Karla Zimmerman, as corroborated by the two building principals called by the Board of Education, it is questionable as to whether the Neptune Township School District has complied with any of the prescriptions of N.J.A.C. 6:29-2, N.J.A.C. 6:29-7, N.J.A.C. 6:29-15, N.J.A.C. 6:29-16, N.J.A.C. 6:29-5 and N.J.A.C. 6:29-6. (Exceptions, at p. 3)[1]

Petitioner submits that there is substantial support in the record for the Commissioner to conclude that the Neptune Township Board of Education has

> acted in an inappropriate and illegal manner by assigning nursing functions to school secretaries, absent any appropriate training and absent any compliance with the aforementioned educational regulations with regard to student safety concerns. (Id.)

---

[1] The Commissioner notes for the record that N.J.A.C. 6:29-15 and N.J.A.C. 6:29-16 are obsolete and are no longer a part of the State Board regulations.

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EXCEPTION 2

THE COMMISSIONER OF EDUCATION TOTALLY IGNORED THE SIGNIFICANCE OF THE EARLIER COMMISSIONER OF EDUCATION DECISION IN SMITH VS. CALDWELL/WEST CALDWELL BOARD OF EDUCATION, 1972 S.L.D. 232.

Petitioner avers that in the Smith case, the situation where certificated school personnel other than school nurses were performing nursing related functions was "temporary and occasional." (Id., at p. 4) By contrast, petitioner asserts that the practices engaged in by the Neptune Township School District "established specific schedules which result in lengthy and continual absences of on-premises school nurses throughout the district and the regular assignment of nursing functions to secretaries" who are not trained and who spend "fifty percent of the time during the normal work week *** assigned responsibilities to function in the capacity of a 'school nurse surrogate' with regard to the care and treatment of numerous childhood illnesses and injuries." (Id., at p. 4) Petitioner submits that such practices cannot be condoned by the Commissioner.

EXCEPTION 3

THE ADMINISTRATIVE LAW JUDGE CLEARLY ERRED IN CONCLUDING THAT THE TWO SECRETARIES AT ISSUE WERE NOT RESPONSIBLE FOR PERFORMING "NURSING RELATED FUNCTIONS".

Petitioner seeks to persuade the Commissioner that the ALJ

> acknowledges that totally untrained individuals who are hired as school secretaries, not as school nurses, are involved in formulating opinions through some type of laymen's intuition concerning which illnesses and injuries are serious enough so as to warrant the initiation of emergency procedures which would result in a phone call to a school nurse in another building or to a first aid unit.*** (emphasis in text)
> (Id., at p. 5)

Petitioner avers that "it is clear that Karla Zimmerman and Jane Kelly have performed nursing functions on numerous occasions on a regular basis, without having received even basic training with regard to the care and treatment of childhood injuries and illnesses." (Id., at p. 6) It is submitted that "to insure the health and safety of the Neptune Township school children" the Commissioner "must strike down" the practices engaged in by the Neptune Township Board concerning the regular use of secretaries to perform nursing functions. (Id.)

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EXCEPTION 4

THE ADMINISTRATIVE LAW JUDGE ERRED IN CONCLUDING THAT THE ASSOCIATION HAD NOT MET ITS BURDEN OF PROOF WITH REGARD TO ITS CONTENTIONS THAT THE SECRETARIES SPENT BETWEEN TEN AND TWENTY PERCENT OF THEIR WORK TIME ON NURSING RELATED FUNCTIONS WHEN THE SCHOOL NURSE WAS NOT PRESENT.

Petitioner concedes that one portion of a log maintained by one of the two secretaries did not support the contention that the two school secretaries at issue were required to spend ten to twenty percent of their time every day on nursing related functions.

> Regardless of the percentages, the record clearly established that the two secretaries at issue did not perform only occasional "band-aid" related functions. They were faced with virtually the whole gamut of childhood illnesses and injuries to deal with on a regular basis, without being provided with any training whatsoever concerning the handling of these matters. (Id., at p. 6)

Additionally, petitioner queries

> [W]hy so many districts have opted for the use of health aides to supplement certificated school nurses and why the majority of the litigation concerning health care services has related to the appropriate usage of health aides within local school districts, if local boards of education are free to select anyone on staff to function as surrogate school nurses on a long-term recurrent basis in the absence of certificated school nurses. (emphasis in text) (Id., at p. 7)

Petitioner requests that the Commissioner reverse the initial decision and conclude that the Board has acted in an arbitrary, capricious and unreasonable manner and has violated the local Board's statutory and regulatory responsibilities in its use of "non-certificated school district employees to perform nursing functions on a regular basis, without providing any training whatsoever to [said] school district employees." (Id., at p. 7) Petitioner further submits that the Board should be barred from continuing to use school secretaries to perform nursing functions on a regular basis, and that "the Board of Education should be directed to comply with the para-professional regulations in effect within the State regarding the use of health aides, if it is the intention of the Board in the future not to assign, on a full-time basis, school nurses to each building within the Neptune Township School District." (Id.)

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Upon a careful review of the record which, it is noted, does not include the transcript of the hearing below, the Commissioner affirms the findings and determination of the ALJ for the reasons that follow.

Initially, the Commissioner notes his accord with the ALJ that Creed, supra, is still in litigation after two remands by the Commissioner and it is inappropriate, therefore, that the matter be referred to for any proposition, "due to the plain fact that a final decision has yet to be rendered." (Initial Decision, ante)

That petitioner raises the argument that the two secretaries in question must formulate opinions "through some type of laymen's intuition concerning which illnesses and injuries are serious enough so as to warrant the initiation of emergency procedures which would result in a phone call to a school nurse in another building or to a first aid unit" (Exceptions, at p. 5) belies the simple fact that any member of the staff is expected to administer first aid when necessary and to contact the proper personnel whenever there is any kind of question as to whether an emergency exists or not. N.J.A.C. 6:29-2.3 See also Smith et al., supra. Here, as in any other school setting, if such a staff member is even the least bit concerned about the physical well-being of one of the district's children, he or she need only contact the school nurse on duty or other administrator in order to solicit direction on how to deal with the matter. As the ALJ stated:

> Neither Ms. Kelly nor Ms. Zimmerman hold themselves out as a nurse or health aide or medical assistant nor are they expected to do so when from time to time in the absence of Nurse Porter they are called upon to assist pupils who incur nosebleeds, cuts, scrapes, bruises, rashes, upset stomachs, minor wounds and abrations (sic), insect bites, headaches, bumps or bruises. There is no evidence to show that either Ms. Kelly or Ms. Zimmerman ever engaged, or attempted to engage, or was expected by the Board or school principal or by Nurse Porter to engage in "*** diagnosing and treating human responses to actual or potential physical and emotional health problems, through such services as casefinding, health teaching, health counseling, and provision of care supportive to or restorative of life and well-being, and executing medical regimen as prescribed by a licensed or otherwise legally authorized physician or dentist.***" N.J.S.A. 45:11-23.
>
> The facts in this case do show that Ms. Kelly and Ms. Zimmerman, along with the respective school principals, do engage and have engaged in the absence of Nurse Porter in immediately assisting

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> pupils who become ill or injured during the school day. The immediate assistance provided includes comforting kindergarten through grade five elementary school pupils by having them lie down on a couch in the nurse's office, applying ice to a bump, bruise or scrape, placing as (sic) band-aid over a minor cut, stopping a nosebleed, or contacting Nurse Porter if uncertain what to do. Neither secretary administers medication to any pupil under any circumstance.
>
> The evidence also shows that both Ms. Kelly and Ms. Zimmerman, as well as principals Marshall and Napolitano, exercise prudent caution in sensing and recognizing injuries or illnesses which need the professional services of the trained nurse. If Nurse Porter is not readily available, another one of the remaining six certificated nurses is available through a telephone call, as is the parent, or local first aid emergency squads. The alternative, of course, would be to require the Board to provide a professional school nurse or a licensed physician full time in each of its eight schoolhouses in order to meet each and every situation presented by a sick or injured pupil. Given the facts of this case in which the Board already employs seven full time professional school nurses for its eight schools, such alternative is indeed a distortion of the Board's actual obligation to provide such professional services. Neither Ms. Kelly nor Ms. Zimmerman provide professional nursing services in any sense of the word when they provide assistance to pupils in the absence of Nurse Porter. (emphasis supplied)(Initial Decision, ante)

Nothing in the record before him persuades the Commissioner to adopt a conclusion contrary to the above findings of the ALJ. Moreover, nothing in the circumstances in the Neptune Township school district, nor in education law, requires that the duties described in the instant matter must be delegated or assigned to a health aide in the absence of a school nurse and in light of the fact that there are seven full-time school nurses in the district for the eight schools. Under such circumstance, it is appropriate for the Board to balance the needs of the students with the economics of the school budget and the community at large. Neither is it inappropriate that the Board chose to assign to school secretaries such "low risk assistance to the pupils by way of comforting." (Initial Decision, ante) Schinck v. Board of Education of Westwood Consol. School District, 60 N.J. Super. 448 (1960) However, the Commissioner observes, as did the ALJ, that said duties

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are not reflected in the job description for school secretaries and that said omission is not fatal to the Board's action in so assigning the school secretaries said functions. Smith et al., supra

Finally, the Commissioner shares the concern of the ALJ that the Board herein has no written policy regarding the care of injured pupils or how to proceed in emergency situations. While failing to clearly demonstrate that the Board's omission is a basis for granting the relief requested by petitioner, the Commissioner directs the Board to adopt rules to govern the supervision of pupil safety in compliance with N.J.A.C. 6:29-5.1.

Consequently, the Commissioner affirms the initial decision for the reasons stated therein. Accordingly, the instant Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

July 29, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3393-86
AGENCY DKT. NO. 104-4/86

IN THE MATTER OF THE TENURE HEARING OF HELEN YORKE, SCHOOL DISTRICT OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY

David B. Rubin, Esq., for the petitioner Board of Education (Rubin, Rubin & Malgran, attorneys)

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

Record Closed: March 9, 1987 Decided: June 19, 1987

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE

On April 10, 1986, the Board of Education of the Township of Piscataway (Board), by a majority vote of its full membership, certified a charge of conduct unbecoming a teaching staff member against respondent Helen Yorke to the Commissioner of Education (Commissioner), in accordance with N.J.S.A. 18A:6-11. In the same action, the Board suspended respondent from her teaching position, without pay, pursuant to the provisions of N.J.S.A. 18A:6-11. The Board seeks respondent's dismissal from her tenured teaching position. Respondent denies the charge and seeks dismissal of the herein matter by way of five separate defenses.

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PROCEDURAL ASPECTS

The Board certified its tenure charge against respondent to the Commissioner on or about April 15, 1986. Respondent filed her Answer to the charge on or about May 15, 1986. Thereafter, on May 21, 1986, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on June 27, 1986 at which, among other things, it was established that a hearing was to be conducted on October 20 through October 28, 1986. The hearing was held on October 21 through October 24, 1986, at the Dunellen, New Jersey Municipal Court. The parties requested and were granted leave to submit post-hearing memoranda, the last of which was received on March 9, 1987. The closing date of this matter was extended as a consequence of the undersigned's illness, hospitalization and recuperation period.

MOTIONS

Prior to the Board's certification of the herein charge against her, respondent had initiated a cause of action against the Board by way of a Petition of Appeal before the Commissioner wherein she challenged the Board's action to withhold her salary and/or adjustment increment for the 1985-86 school year. Helen Yorke v. Board of Education of the Township of Piscataway, Middlesex County, OAL DKT. EDU 7794-85, Agency Dkt. 398-11/85. The parties agreed to consolidate the increment withholding matter with the herein case. Subsequently, the Board acted, pursuant to N.J.S.A. 18A:29-14, to withhold respondent's salary and/or adjustment increment for the 1986-87 school year. Consequently, respondent filed a second Petition of Appeal to challenge the Board's action which has been docketed by OAL as EDU 7426-86. It was further agreed to sever the former case and consolidate it with the latter. Thereafter, upon cross-motions by the parties, which were granted, the two increment withholding cases were placed on the inactive list pending the outcome of the herein tenure charges.

ISSUES

The issues to be determined by this administrative tribunal, as agreed to by the parties at the prehearing conference, are set forth below as follows:

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1. Whether respondent is guilty of unbecoming conduct as charged, by willfully and knowingly falsifying pupil grades for the purpose of misleading her supervisor and securing a favorable evaluation and to the detriment of the pupils.

2. Whether petitioner or its agents so tainted and/or corrupted the proceedings by intimidation of a member of its mathematics department, by losing or destroying evidence and/or suppressing evidence.

3. Whether the Board has discriminated against respondent in violation of N.J.S.A. 10:5-1 et seq. and 29 U.S.C. §§701-794, which prohibit discrimination based upon physical handicap.

4. Whether the Board failed to comply with the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq., through its failure to serve the herein charges against her, subsequent to Certification to the Commissioner.

Issue Number 4 was abandoned and withdrawn by respondent on the first day of hearing, October 21, 1986. Issue Number 3 was neither addressed nor argued by respondent, who had the affirmative burden of going forward and the burden of persuasion with regards to this separate defense. Accordingly, Issues Numbers 3 and 4 will not be considered in this decision, and therefore, the only Issues which remain for consideration are Issues Numbers 1 and 2.

BACKGROUND FACTS AND TESTIMONIAL EVIDENCE

Respondent has been employed by the Board since September 1971, as a teacher of mathematics assigned to its high school. During the 1985-86 school year, respondent was assigned to teach one section of fundamentals of mathematics, two sections of general mathematics and two sections of Algebra II. Two other teaching staff members in the Board's employ taught sections of Algebra II during the 1985-86 school year: Judith Schimmel and Carol Molchan.

Carl Anthony, supervisor of the Board's middle school and high school mathematics department, evaluated respondent each of the 10 years he had occupied the position. In his evaluation of respondent for the 1983-84 school year, Anthony alleged, among other things, that there was a pupil failure rate of 80% during the first semester courses which respondent taught (P-3). The supervisor recommended respondent for reemployment and for her full salary and/or adjustment increment for the 1984-85 school year (P-3).

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The supervisor evaluated respondent for the 1984-85 school year wherein he alleged, among other things, that during the first semester courses which she taught, 66% of the pupils received either D's or F's (P-4). Anthony recommended respondent for reemployment; however, he also recommended that her salary and/or adjustment increment be withheld during the 1985-86 school year (P-4). The Board adopted the supervisor's recommendation to withhold respondent's salary increment, which is the subject of litigation presently before this administrative tribunal.

In September 1985, Carl Anthony appointed Judith Schimmel as the chairperson of the Algebra II Mathematics Examination Committee, the purpose of which was to design the mathematics department semester examinations to be administered to the pupils for the 1985-86 school year. Respondent and Ms. Carol Molchan made up the remainder of the committee by virtue of their assignment to teach Algebra II during the 1985-86 school year. The committee members did not meet to discuss the design of the first semester departmental examination to be administered on January 28, 1986. Rather, Ms. Schimmel referred prior examinations used by the mathematics department to respondent and Ms. Molchan and sought their advice as to the type and number of problems to include on the first semester examination. Thereafter, Schimmel designed the examination and submitted it for typing and duplication.

On January 27, 1986, Schimmel prepared the teacher's answer key (P-5, R-8) for the Algebra II departmental first semester examination and transmitted copies to respondent and Molchan (P-5). The Algebra II first semester departmental examination was administered to all pupils so assigned on January 28, 1986. Proctors administered the examination whereby they distributed to the pupils the problems to be solved, worksheets and answer sheets, all of which were collected at the end of the examination period and delivered to the mathematics department office or the teacher assigned.

In the afternoon of January 28, 1986, subsequent to the conclusion of Algebra II examinations, Ms. Schimmel commenced to grade the examination answer sheets of her pupils by using the answer key she had prepared for herself, respondent and Ms. Molchan (P-5, R-8). After Schimmel had graded several pupil answer sheets, it became apparent to her that the answer key was in error, with several answers to the problems incorrectly stated on the answer key. Schimmel then proceeded to correct her answer key by striking out the incorrect answers and inserting what she believed to be the correct answers on the

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answer key. Thereafter, Schimmel attempted to telephone respondent and Ms. Molchan to advise them both of the errors on the answer key. She was unsuccessful in her attempts to make immediate contact with her two colleagues by telephone. Schimmel telephoned respondent's home in the afternoon of January 28, 1986; however, respondent had not arrived home from school at the time. Schimmel thereupon left a message with a child who answered respondent's telephone, advising the child to deliver the message to respondent concerning the errors on the answer key together with the correct answers. Schimmel contacted Ms. Molchan and was able to speak directly with her concerning the errors on the answer key. Subsequently, Molchan telephoned Schimmel to report that Molchan had detected an error on the answer key that had not been discovered by Schimmel.

Subsequent telephone contact was made between Schimmel and respondent on January 28, 1986. However, the originator and time of these telephone contacts are in dispute. Schimmel testified that she telephoned respondent sometime after the dinner hour to clarify that Schimmel's earlier message concerning the answer key errors had been received by respondent. Schimmel also contended that respondent telephoned Schimmel sometime around 10:00 p.m. on January 28, 1986.

Respondent testified that she did not arrive home from school on January 28, 1986 until approximately 6:30 p.m., due to severe inclement weather and the necessity for her to complete some errands. Respondent received Schimmel's message left with respondent's daughter concerning the errors on the answer key; however, respondent was not in receipt of a telephone call from Schimmel around the dinner hour on January 28, 1986. The evidence shows that respondent telephoned Ms. Molchan at 7:12 p.m. and carried on a conversation with Molchan for seven minutes (R-12). Respondent contends that Schimmel, who lives in Bridgewater, New Jersey, telephoned respondent's residence in Mantoloking, New Jersey, between 10:30 p.m. and 11:00 p.m. on January 28, 1986. The evidence clearly demonstrates that respondent did not telephone Schimmel, as Schimmel contends, by the absence of a record of a toll call from respondent's residence telephone on January 28, 1986 to Schimmel's known telephone number identified as 201-526-5829, and as detailed in the itemized calls billed to respondent by New Jersey Bell (R-12).

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Schimmel testified that during a telephone conversation with respondent on the night of January 28, 1986, respondent advised Schimmel of an error on the answer key which Schimmel had failed to detect. Respondent testified that she advised Schimmel of two undetected errors.

Ms. Schimmel admitted on the record she had "botched" the answer key for the 1985-86 first semester Algebra II departmental examination. Schimmel believed that she subsequently discussed the problem of the answer key with Carl Anthony in March 1986,[1] as a consequence of respondent raising the issue with Schimmel. Schimmel contends she did not discuss the answer key issue with any member of the school's administration between January and March 1986.

Subsequent to the completion of the first semester examinations, Carl Anthony regarded the examinations of all of the pupils assigned to respondent's mathematics classes for the first semester of the 1985-86 school year. Anthony asserted he found 280 items graded incorrectly by respondent on the Algebra II examination; however, the examination grades were correct for the other subject matter areas taught by respondent. In his analysis of the incorrect grades given to the pupils, Anthony contended that no error went against a pupil, but rather, the incorrect grade was in the pupil's favor.

Respondent contends that for the majority of the 280 test items Anthony found to be incorrect, respondent had given the pupils partial credit for using the correct procedure but resulting in the incorrect answer. Anthony testified, among other things, that he brought the tenure charges and charged respondent with conduct unbecoming a teaching staff member, in part, because respondent awarded partial credit to pupils on the first semester 1985-86 departmental Algebra II examination. Consequently, a crucial issue in the instant matter is the proposition as to whether mathematics teaching staff members are permitted and/or allowed to give pupils partial credit for responses to problems appearing on the departmental semester examinations.

---

[1]The basis of the tenure charges certified by the Board is the sworn statement and allegations against respondent, dated March 12, 1986. Therein, Carl Anthony alleged, among other things, and opined that respondent ". . . willfully and knowingly falsified student grades on the Algebra II semester examination for the purpose of misleading her supervisor and securing a favorable evaluation and to the detriment of the pupils subject to her charge and the school district."

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It is noted here now for the record that the Board has not adopted a policy which precludes any teaching staff member from awarding partial credit to pupils for a pupil's partial correct answer on an examination. Nor has the mathematics department adopted or executed a written policy articulating any position with respect to the award of partial credit to pupils on teacher-made tests or departmental examinations.

Carl Anthony asserted, among other things, he had observed that respondent had granted pupils partial credit on examinations administered in January 1985 and June 1985, and that Anthony had advised respondent that the awarding of partial credit was contrary to the mathematics department procedures. Anthony asserted that the granting of partial credit on departmental examinations disrupted the departmental examination curve. Anthony contended he was greatly concerned about respondent's granting of partial examination credit to her pupils. There was no evidence presented to this tribunal, however, that Anthony reduced his concern to writing. Moreover, Anthony did not address this concern with or to respondent in his annual evaluations of respondent's performance (R-4 through R-7).

Patricia Bischoff, a former teaching staff member in the Board's employ, testified she had taught a variety of mathematics courses at the Board's senior high school for eight years prior to submitting her resignation in May 1986. Bischoff is presently employed in La Jolla, California, and voluntarily returned to New Jersey to appear at the herein proceeding on respondent's behalf. Bischoff testified there was no mathematics department policy with respect to teachers awarding partial credit to pupils on teacher-made tests or departmental examinations. She asserted the issue was raised prior to the 1985-86 school year when Algebra II teachers in the grades 11-12 building wanted to arrive at a consensus with the Algebra I teachers assigned to the grades 9-10 building as to whether or not partial credit should be given to pupils during the school year. Bischoff and Schimmel were against the award of partial credit. However, no consensus was reached by the algebra teachers because some felt strongly that they should have the right to give partial credit if they wished to do so. Bischoff was aware that other mathematics teachers gave partial credit, although she did not.

Patricia Bischoff testified that the issue was again raised after respondent's tenure case was filed in March 1986. It was at a mathematics departmental meeting, where it was common knowledge that respondent had been suspended from her teaching duties for alleged conduct unbecoming a teacher, at which Bischoff asked, "What is

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conduct unbecoming a teacher? I don't understand." (TR IV, p. 67.) She testified that "Dr. Anthony said she gave partial credit on a final exam. And I said I didn't think that that's conduct unbecoming a teacher. And he said, 'Yes'." Bischoff asserted further that another teacher spoke up and said she was new to the system; however, she had never been told that she was not allowed to give partial credit. Bischoff asserted that this departmental meeting was heated.

Bischoff characterized the relationship between Anthony and respondent as unprofessional. She asserted that Anthony would make comments about respondent in front of other teaching staff members indicating that Anthony was not happy with respondent's performance.

Following the January 28, 1986 first semester Algebra II examination, Carl Anthony had a meeting in his office with respondent. The specific date of the meeting was uncertain to Anthony; however, he believed it was held prior to February 13, 1986. The asserted purpose of the meeting was to provide respondent with the opportunity to explain to Anthony the discrepancies between respondent's grades and Anthony's regrading of the 280 items Anthony believed were incorrectly marked on the Algebra II examination. Anthony admitted that he was upset; however, he asserted he was not aware or could not recall whether or not he was screaming, shouting or that he demonstrated hysterical behavior in respondent's presence. Respondent testified that Anthony manifested all of these behaviors at this private meeting.

Anthony testified that respondent explained to him that she had given pupils partial credit on the examination because some of the test problems were not clear and that, in one instance, the pupil answer sheet was incorrect. Respondent testified that Anthony did not give her the opportunity to explain how she graded and evaluated the pupils' work on the examination. She asserted that Anthony was hysterical, shouting and throwing papers during the meeting. Anthony interrupted respondent when respondent attempted to talk. Respondent testified she left the meeting with Anthony upset and crying when she was intercepted by Patricia Walsh, vice principal, who advised respondent to go to the ladies' room to refresh herself before attempting to return to her classroom. Walsh testified that she had witnessed the aftermath of dealings between Anthony and respondent where, following such meetings, respondent had come to Walsh crying as a consequence of encounters with Anthony. Walsh testified, among other things, that she had always found respondent to be truthful and honest.

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On January 29, 1986, respondent passed out the examination answer sheets and work product to the pupils of her Algebra II class to demonstrate to the pupils where they had made errors and mistakes on the examination. Respondent testified that she did so to make the examination a positive experience for the pupils. Respondent asserted that subsequently she requested of Anthony that he retain her pupil answer sheets and work product for at least one semester. Respondent then turned over the test material to Anthony's assistant, Nora Plaganis, instructing her not to discard the examination materials. Neither Anthony nor Plaganis recalled respondent making such a request to retain her test materials, and therefore, the examination materials were discarded as a normal operating procedure.

After the meeting with Anthony and respondent, Anthony reported his preliminary concerns and conclusions to the principal, James Koch. Thereafter, Koch sent respondent a memorandum, dated February 13, 1986, advising respondent of a meeting scheduled for February 20, 1986, concerning respondent's grading of the recent semester examinations. Koch advised respondent of the serious nature of the meeting and that she could be accompanied by a representative of her choice inasmuch as Anthony would also be present (Exhibit P-2).

The February 20, 1986 meeting was held as scheduled with Koch, Anthony, respondent and Donna Jean Campbell, respondent's representative, in attendance. Koch testified, among other things, that at the beginning of the meeting Koch indicated to respondent that there were very serious allegations pending against her and that if the charges were true, serious consequences would flow therefrom. Koch did not testify as to what, if anything, respondent and/or Campbell stated at the meeting. Koch asserted that respondent gave him a copy of a note from Eyexam 21, dated February 15, 1986, during the meeting (Exhibit P-8) with typewriting at the bottom of page which reads:

> Note reads: patient respondent requires reading Rx in the form of a bifocal. Due to aging changes in lenses of both eyes. Reading errors as well as marking errors were due to lack of proper near vision. To verify this note call eyexam 21 at 238-9220. (Exhibit P-8.)

Koch testified that subsequent to the February 20, 1986 meeting, he telephoned the number on P-8 and spoke with a Doctor Marvin Caruk on March 3, 1986. Koch informed Dr. Caruk that he had the permission of respondent to make inquiry as to

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her eyesight problem, the treatment and prescription. Koch told the doctor that respondent had made 280 mistakes in grading pupil examination papers and that all of the errors were made in favor of the pupils, giving the pupils higher grades than they would have normally received on the examination. Koch asserted the doctor stated to him that that was not the type of eye problem respondent had and if there were to be errors, the errors would be somewhat equal between a higher and lower grade for the pupils.

Donna Jean Campbell, president of the Piscataway Township Education Association, testified that at the February 20, 1986 meeting, Koch made some brief introductory statements concerning the seriousness of the matter of respondent's grading of the first semester mathematics examination. Koch provided respondent a brief opportunity to respond, at which time respondent produced the note from her optometrist (Exhibit P-8) and handed it to Koch. Campbell could not recall any specific discussion of the examinations or as to what method respondent used to arrive at the pupil's grades. Campbell asserted that Koch set forth two options to respondent and her representative: respondent could submit her resignation effective at the end of the 1985-86 school year to provide respondent with the opportunity "to resign with grace" or, if she failed to choose that option, Anthony and Koch would proceed with tenure charges against respondent. Koch wanted respondent's resignation within one week from the date of the February 20, 1986 meeting. Campbell advised Koch and Anthony that respondent would not respond within one week, but rather, given the seriousness of the allegations, respondent needed time to consult with legal counsel and she would respond within a two-week period.

Koch testified, among other things, that Anthony did not inform Koch that there had been a problem with the Algebra II teacher's answer key for the examination administered on January 28, 1986. Nor did Anthony advise or inform Koch that the three Algebra II teachers were in telephone communication to correct the errors on the teacher's answer key on the night of January 28, 1986.

Koch testified that Anthony had advised the principal that respondent had given pupils partial credit on the first semester Algebra II examination on January 28, 1986, which formed a part of Anthony's basis for the February 20, 1986 meeting with Koch, Campbell, Anthony and respondent. Koch testified, however, that he was not aware of the existence of a written or oral policy with respect to the granting or forbiddance of granting of partial credit in the Piscataway High School mathematics department.

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Respondent testified extensively on her own behalf admitting, among other things, that she had in fact granted partial credit to pupils who took the Algebra II first semester examination on January 28, 1986. She denied, however, that Anthony had advised her in 1985, or at any other time, that the granting of partial credit was contrary to the mathematics department policies as Anthony had so testified. Moreover, respondent testified that no instructions were given to her for the grading of the Algebra II examination or any other examinations administered by the mathematics department.

The parties stipulated that respondent would testify on her direct examination as to the sworn statements she set forth in her affidavit dated April 10, 1986, and marked into evidence as R-14, with the exception of respondent's reference as to any alleged impact or side effects of medication she may have taken on January 28, 1986.

With respect to the granting of partial credit to pupils, respondent asserted that it is her educational philosophy that the methodology or procedures used by the pupil are more important than the "bottom line" answer to mathematics problems. She contends that a pupil's ability to grasp the mathematical concept and to actually apply that knowledge has always been her goal as a teacher. Respondent firmly believes that a pupil should be awarded partial credit for using the correct computation skills in resolving a problem even where the ultimate answer to that problem is incorrect. Respondent asserts that based upon this philosophy of education and in the absence of any instructions to the contrary from Anthony, she gave partial credit to pupils in 161 instances on the Algebra II examination administered on January 28, 1986.

Respondent also asserts she gave credit on the Algebra II examination to her pupils for a confusing question (no. 66) and a question which was illegible (no. 17) on the examination. She contends that the pupils should not be penalized or suffer for the errors of adults when the adults pose bad questions on an examination.

Respondent's educational philosophy was supported and corroborated by Dr. Carolyn A. Maher, associate professor of mathematics and member of the Rutgers Center for Mathematic Science and Computer Education, Rutgers University, New Brunswick, New Jersey. Professor Maher was qualified as an expert witness in the field of mathematic education (R-15) asserting, among other things, that an understanding of mathematical functions and concepts is essential to problem solving because it brings into play the thinking, reasoning and learning processes of the problem solver. She asserted

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that the focus should be on the process, not the product, and specifically, not upon rote memorization. She agreed that partial credit should be awarded to pupils and it was far more important than full credit for the right answer.

Considerable testimony was elicited as to respondent's grading of the Algebra II examination and her granting partial credit to answers to problems which Anthony found to be incorrect. Respondent testified that without the pupils' examination work product before her at hearing, which had been destroyed, she could not testify with certainty as to how she awarded the partial credit. She asserted, however, that the grade she recorded for each pupil on the examination was the correct grade, given the fact that she had awarded partial credit for pupils who used the correct process and/or full credit for problems nos. 17 and 66.

Respondent asserts that she attempted since March 1986, to have Anthony provide respondent with her teacher's answer key for the Algebra II examination. Anthony indicated that respondent's teacher's answer key could not be located; however, on or about April 8, 1986, Anthony provided respondent with another teacher's answer key. On the third day of hearing in the instant matter, Anthony produced respondent's teacher's answer key (P-9). The Board asserts that the sought-for document (P-9) was among a variety of documents produced by the Board during the discovery process prior to hearing and was available to respondent at that time.

FINDINGS OF FACT

Having reviewed and considered the entire record in this matter and having given fair weight thereto, and having observed the witnesses and assessed their credibility as they each testified before me, the following is a summary of my **FINDINGS OF FACT** in this matter:

Carl Anthony, the Board's supervisor of mathematics, performed periodic observations of respondent during the 1984-85 school year (R-4, R-5, R-6). As a consequence of these observations, Anthony evaluated respondent's performance as unsatisfactory (R-4, R-5, R-6). In his summary evaluation of respondent's performance at the end of the 1984-85 school year, Anthony recommended to the Board that respondent's 1985-86 salary increase and salary increment be withheld (R-7). The Board adopted

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Anthony's recommendation to withhold respondent's 1985-86 salary and/or adjustment increment, to which respondent has duly appealed to the Commissioner for a reversal.

Subsequent to the first semester 1985-86 school year Algebra II examinations, Anthony brought tenure charges against respondent. The bases of the tenure charges were, in major part, grounded upon Anthony's allegation that respondent had violated mathematics department policy against the awarding of partial credit to pupils on the first semester examination.

Anthony testified before this tribunal that he had advised respondent, prior to the 1985-86 school year, that it was a violation of the mathematics department's policy to award pupils partial credit on semester mathematics examinations. Anthony testified that respondent's practice of granting partial credit on examinations was of great concern to him. Anthony failed, however, to express this concern for partial credit to respondent in his periodic assessment and evaluation of respondent (R-4, R-5, R-6). Moreover, Anthony failed to mention his concern to respondent in his summary evaluation, where he recommended the withholding of respondent's annual salary increment (R-7).

There is nothing in this record to demonstrate that the Board or its mathematics department has executed a written policy with respect to partial credit for departmental examinations. There is certainly confusion as to whether there is an oral policy within the mathematics department as to whether partial credit may or may not be awarded to pupils on departmental examinations. The high school principal, James Koch, knows of neither a written nor oral policy with respect to partial credit in the mathematics department.

The 1985-86 first semester Algebra II examination was "botched" as Judith Schimmel admitted. The examination was put together in haste and without a thorough review by the Algebra II test committee. Anthony, the supervisor of the mathematics department and the one who should have examined and reviewed the Algebra II examination, failed to do so prior to its execution. The examination contained errors which should have been detected prior to its administration (P-1, P-5, R-8). In addition, Anthony failed or neglected to inform principal Koch of the "botched" examination prior to or subsequent to the meeting with respondent and her representative held on

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February 20, 1986. Koch advanced an ultimatum to respondent that she either submit her resignation or be subjected to tenure charges without the full benefit of all the facts in Anthony's possession.

DISCUSSION AND CONCLUSIONS

The party who has the burden of proof in an administrative hearing must prove the case by a preponderance of the evidence. The court, therefore, must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of the truth." Jackson v. D., L. & W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). The evidence is found to preponderate if it "establishes 'the reasonable probability of the fact.' " Jaeger v. Elizabethtown Consolidated Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Where the standard is reasonable probability (preponderance of the evidence), the evidence must be such as to "generate [the] belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), certif. den. 31 N.J. 75 (1959), overruled on other grounds, Dwyer v. Ford Motor Co., 36 N.J. 487 (1962). A factor to be considered in a determination as to which party's version of an incident has the "reasonable probability of the truth" concerns the fact that "[t]he interest, motive, bias or prejudice of a witness may affect his credibility and justify the jury, whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div. 1952) (citation omitted), certif. den. 10 N.J. 316 (1952). Further, "A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony." Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). See also, In re Perrone, 5 N.J. 514 (1950).

I **CONCLUDE** that the Board has failed to carry its burden of proof that respondent's actions constitute behavior unbecoming a teaching staff member, based upon Anthony's allegations and assertions. Anthony's testimony that he was concerned with respondent's conduct of awarding partial credit to pupils on departmental examinations and that he so advised respondent of this concern is not supported by the evidence. Anthony's testimony and assertions with respect to the issue of partial credit are inconsistent and in conflict with other credible evidence. The thrust of the Board's case against respondent and the basis of Anthony's tenure charges focus upon the Algebra II examination administered on January 28, 1986, by respondent and her teaching colleagues.

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Anthony contends that a policy exists within the mathematics department that no partial examination credit will be given to pupils on semester departmental examinations. Anthony subsequently modified his position to allege that partial credit may be given on semester departmental examinations where the committee which delegated the responsibility to design the examination agrees that partial credit may be awarded. There was no competent or credible evidence presented to this tribunal to support either of these positions.

Anthony testified, under oath, that he had advised respondent in the 1984-85 school year that she was not to grant partial credit on the mathematics departmental examinations. Anthony testified that this was of great concern to him, yet he fails to mention, even remotely, this concern to respondent in his observation reports and evaluations of respondent (R-4 through R-7). If this concern of awarding partial credit was of such magnitude and import that an alleged violation thereof would be grounds for the certification of tenure charges against a mathematics department teaching staff member, where then is Anthony's concern expressed in writing? For the purposes of this matter, it is nowhere to be found. I **CONCLUDE**, therefore, that Anthony's testimony is incredible and not to be believed with respect to his testimony concerning respondent's violation of the alleged departmental policy forbidding the granting of partial credit to pupils' grades on mathematics departmental examinations.

I further **CONCLUDE** that the Board has failed in its proofs to demonstrate that respondent ". . . willfully and knowingly falsified student grades on the Algebra II semester examination for the purpose of misleading her supervisor and securing a favorable evaluation and to the detriment of the pupils subject to her charge and the school district." First, the Board failed to show any detrimental effect upon the pupils under respondent's direction and care, a significant element of the tenure charge. No proofs of any dimension were produced to support this allegation.

The Board further failed to produce evidence that respondent "willfully and knowingly falsified student grades." The words "willfully" and "knowingly" are terms of art in the legal context. It has been said that the word "willful" is a word of many meanings depending on the context in which it is used. Zimberg v. United States (C.C.A. Mass.), 142 F.2d 132, 137. The word "knowingly" generally connotes "With knowledge; consciously; intelligently; willfully; intentionally." (Black's Law Dictionary, Rev. 5th Ed. at p. 784.) Although the Board has shown that respondent granted certain of her pupils

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with partial credit on the Algebra II examination, and it has shown that respondent applied the Algebra II teacher's answer key by awarding credit for illegible and erroneous problems, it has failed to demonstrate, by a preponderance of the reliable and credible evidence, that respondent willfully and knowingly falsified any pupil's grade on the 1985-86 Algebra II first semester examination.

This tribunal observed the tension between Anthony and respondent at the hearing and as demonstrated by Anthony's observations and evaluations of respondent (R-4 through R-7). While Anthony characterizes his relationship with respondent as "professional," respondent and others view the relationship as less than professional or even less than cordial. Given the testimony of assistant principal Patricia Walsh and former staff member Patricia Bischoff, as well as that of respondent, I **CONCLUDE** that Anthony's testimony on this point is incredible and not to be believed.

The Commissioner has repeatedly stated his position with respect to the protection of tenure. In In the Matter of the Tenure Hearing of Joseph A. Maratea, Township of Riverside, Burlington County, 1966 S.L.D. 77, he said:

> The Commissioner is assiduous to protect school personnel in their employment when they are subjected to unfair or improper attacks or when they are unable to perform effectively because of conditions not of their own making or beyond their control. [Id. at 106.]

Here, respondent has been improperly and unjustly accused of violating an alleged policy which did not or does not exist, either in fact or by implication. Such impropriety by Anthony may neither be permitted nor condoned. It is evident from this record that Anthony misled the high school principal Koch and the Board by his omissions of relevant facts which were disclosed at the hearings: i.e., the "botched" teacher's answer key together with the absence of a written or oral policy with regards to partial credit. Anthony's assertions and charges against respondent amount to "unfair and improper" attacks. Maratea.

Accordingly, I **CONCLUDE** that the Board of Education of the Township of Piscataway has failed to sustain its burden of proof to support its tenure charges against respondent.

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ORDER

It is therefore **ORDERED** that the tenure charges of conduct unbecoming a teaching staff member against respondent be and are hereby **DISMISSED WITH PREJUDICE.**

It is further **ORDERED** that Helen Yorke be immediately reinstated to her rightful tenured teaching position together with all back pay, benefits and other emoluments withheld, in part or in full, and that she be made whole.

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

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

June 19, 1987
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

JUN 22 1987
DATE

Received Acknowledged:
Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:
JUN 24 1987
DATE

Ronald L. Parker
OFFICE OF ADMINISTRATIVE LAW

ml/EE

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IN THE MATTER OF THE TENURE	:	
HEARING OF HELEN YORKE, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
PISCATAWAY, MIDDLESEX COUNTY.	:	
	:	

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

The Board argues that the ALJ, swayed by sympathy for respondent and obvious annoyance with her supervisor, dismissed the tenure charges despite overwhelming evidence of guilt. It alleges that the ALJ focused on the award of partial credit which accounts for only 161 of the 280 answers in dispute and he does not attempt to address respondent's utter failure to account for the remaining 119 answers. The Board calls into question the ALJ's reference to the "botched" answer key since respondent acknowledged that all the answers were rectified prior to her grading the exams. (Tr. III-41-42)

Further, the Board contends that even if respondent were granted credit for all 280 answers, she still falsified the test results because she awarded exam grades to 17 students based on her own calculations (R-13) that were inconsistent with the departmental curve. (P-6) With respect to this, it states:

> ***The incorrect assignment of letter grades by Yorke was not even mentioned by Judge Law. Nor is it a matter that rests on the credibility of her supervisor, Dr. Anthony. The evidence on this point was generated by Yorke and Yorke alone. These errors, standing alone, would justify the charges against respondent.
> (emphasis in text) (Board's Exceptions, at p. 6)

Moreover, the Board contends that the ALJ's analysis of the math supervisor's credibility was not supported by the record. Although it acknowledges that the supervisor's credibility may have been pertinent to the partial credit issue, the Board stresses that his credibility played no part in the remaining 119 answers. With respect to this, it contends that the ALJ failed to give the documentary evidence the detailed consideration it deserved. It also avers that regardless of the ultimate holding by the Commissioner, the ALJ's gratuitous remarks concerning the supervisor's credibility should be stricken. It contends among

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other things that even if the Commissioner is not inclined to accept the Board's position in this matter, it must be said that the supervisor was justified in bringing the evidence to the Commissioner's attention as would be anyone else in the supervisor's position.

Respondent urges that the Commissioner reject the Board's arguments, characterizing as simply false the Board's assertion that the ALJ dismissed the charges despite overwhelming evidence of her guilt. More specifically, she argues that the record does not support the Board's allegation that the ALJ made no attempt to address the 119 answers wherein partial credit was not at issue. She points to her detailed position on each question contained in R-14 which the ALJ had before him and which he references on page 11 of the initial decision. That analysis indicates that out of the 280 answers in dispute, the supervisor appears to be correct in his assertion about 49 answers out of a total of over 3000 answers.

As to the botched answer key, respondent contends that the Board ignores the fact that the answer key set the tenor for the exam and it highlights the supervisor's high-handedness or arbitrariness toward her by showing how he himself abrogated his responsibility in reviewing the examination prior to it being administered and how he treats ineptitude by his favorites.

With regard to the 17 student papers where a discrepancy existed between her grade and the supervisor's grade, respondent points to the fact that substantial cross-examination relative to this occurred (Tr. IV-14-33) and that upon redirect examination the ALJ stated and the Board's attorney agreed to the following:

> If you are willing to make a representation that Ms. Yorke would testify to those 17 that you had the opportunity to go on cross-examination, that she would testify that she believed *** she gave a certain grade and she believes that the grade that she gave is a true grade based upon her review of the pupil's work product and her review of the original answer sheets, I think that representation would stand. (Tr. IV-46)

Moreover, respondent argues that credibility was certainly in question for the 119 answers not involving partial credit. She avers that substantial dispute existed over question 17 and 66 (for which she gave credit to all students because of flaws in the test) and to all but 49 of the remaining questions. (R-14)

Lastly, respondent rejects the Board's argument that the ALJ's gratuitous remarks concerning the supervisor's credibility should be stricken, averring, inter alia, that all the credibility findings were and are necessary to resolve this matter and that each is supported by the record.

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Upon a thorough, detailed examination of the record, including the transcripts and all evidence, the Commissioner is in full agreement with the findings of fact determined by the ALJ in the initial decision, ante, and adopts them as his own. He is also in full agreement with the ALJ's conclusions regarding the partial credit issue and adopts as his own the credibility determination reached in the initial decision which finds the supervisor's testimony incredible concerning violation of an alleged departmental policy forbidding the granting of partial credit to pupils on departmental examinations.

Thus, it evolves that a determination of conduct unbecoming a teacher essentially hinges on the conclusions to be drawn from the record on the 119 answers out of approximately 3,500 answers (50 exams, 73 answers) involved in this dispute, in particular, the 49 answers marked as correct which respondent cannot justify except for being her margin of error (R-14, No. 11) and the disparity between the grades awarded to 17 pupils based on her review of photocopies of their answer sheets (R-13) and the document containing the departmental curve. (P-6)

Upon review of the initial decision, the Commissioner concurs with the Board that the ALJ focuses on the award of partial credit. Nonetheless, he is unpersuaded by its arguments that the evidence in this matter "cries out for reversal" of the ALJ's determination that the Board failed in its burden to prove that petitioner "***willfully and knowingly falsified student grades on the Algebra II semester examination for the purpose of misleading her supervisor and securing a favorable evaluation***." (Initial Decision, ante)

The partial credit issue was a very significant one in this matter and therefore it should appropriately be given due weight. As to the remaining 119 answers, it is noted after exhaustive review of the record that approximately one half of those are accounted for by respondent awarding credit for correct answers to all students for two questions (items 17 and 66) which were flawed on the exam copies distributed to the students (R-14, Nos. 9 and 10) and 12 answers marked as wrong by the supervisor upon his scrutiny and "recorrection" of the answer sheets which, in fact, were correct. (Tr. III-219-225; R-13) With respect to the awarding of credit for item 66, such action appears reasonable notwithstanding the "corrective direction" scribbled on the answer key which was provided to the Algebra II teachers, at the earliest, the day prior to the exam. (P-5; P-9; R-8)

Of the remaining 62 controverted answers,* even accepting that none could be justified by respondent, such answers would account for less than 2% of the full complement of answers on the

* 49 answers respondent acknowledges are incorrect; 9 answers she believed the supervisor incorrectly marked wrong which were, in fact, wrong; 4 answers she believed were unreadable (R-14, Nos. 9 and 10; Tr. III-225)

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more than 50 exams graded by respondent. It is on this point that the "botched" answer sheet developed by the chairperson of the Algebra II exam takes on particular meaning. While a nearly 2% error rate in correcting exams is inexcusably careless and inept, it does not necessarily provide proof of knowing and willful falsification of test results, particularly when one compares respondent's percentage of error to the chairperson's 10+ percentage of error in the answer sheet distributed to the staff. (P-5; P-9; R-8)

As to the discrepancy between the grades awarded to 17 students based on respondent's analysis of the photocopied answer sheets (R-13), respondent testified that the calculations listed on R-13 were arrived at without the benefit of the pupils' examination sheets and their work products. If these were available, respondent believes she could state with greater specificity how she arrived at the grade awarded since she could review how the pupils worked through the test items. She also testified that the grade awarded was true, based on the totality of the information before her at the time she actually graded the exams. (Tr. IV-46).

A review of the 50 answer sheets (P-1) submitted to the record reveals that only three have a numerical score arrived at by respondent. (Tests 31, 48, 46) Although the Board disputes the accuracy of the numerical score she awarded on tests 31 and 46, the letter grades given by respondent on each of the 3 tests is consistent with the so-called "departmental curve" (P-6). Since the 47 other exams do not have the numerical scores listed and R-14 was an analysis done without all the information used on January 28, 1986 to grade the exams, a credibility determination must be reached on whether respondent is to be believed when she testified that the letter grades awarded were true based upon her review of the pupils' work product and original answer sheets.

Upon review of the record, the Commissioner finds nothing to demonstrate that respondent knowingly and willfully falsified the grades awarded for these 17 pupils.

Given the above, the Commissioner, after a thorough and detailed review of the entire record, is unpersuaded that the ALJ erred when determining that the Board failed to bear its burden of proof with respect to respondent's willful and knowing falsification of student grades. (Initial Decision, ante) However, he is not in agreement with the ALJ that the charges of unbecoming conduct be dismissed.

The Commissioner and State Board of Education dealt with the charge of unbecoming conduct for falsifying test results in the case In the Matter of Ramona Hodgkiss, School District of Bridgewater-Raritan Regional, 1975 S.L.D. 978, aff'd State Board 1976 S.L.D. 1147. While there are factual differences between the two cases (in the instant matter the test was used to establish a grade, there is an issue of personal gain, and errors were all in

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favor of students), In re Hodgkiss is applicable to the instant matter because it stands for the proposition that inefficiency and carelessness/lack of diligence in assessing pupils' performance on an examination constitute falsification of test results, albeit in the limited meaning of the word. In Hodgkiss the term "falsify" was interpreted as follows:

> This finding that respondent did in fact "falsify" test results is grounded in the following interpretation of falsify as cited in Black's Law Dictionary 726 (rev. 4th ed. 1968):
>
> > "The word 'falsify' may be used to convey two distinct meanings - either that of being intentionally or knowingly untrue, made with intent to defraud, or mistakenly and accidentally untrue."
>
> In the context of this definition the hearing examiner finds that respondent did in fact "falsify" test results and that she did admit such falsification to the Superintendent in her meeting with him on December 3, 1974.***
>
> This finding, however, is one which is limited to the latter defined meaning of the word falsify and does not encompass the prior definition of the word which connotes fraud, a connotation which the Board appears to advocate as also applicable. (emphasis in text) (1975 S.L.D. at 981-82)

While respondent in this matter has (1) prevailed on the issue of partial credit, (2) has been able to "explain" nearly half of the 119 non-partial credit answers and (3) was deemed credible on the issue of the 17 exams such that willful and knowing falsification of test results is not supported, the record overwhelmingly supports grossly careless and inefficient grading of the departmental exams. The supervisor is correct in asserting that it was almost impossible to ascertain from the answer sheets how respondent arrived at the grade she awarded. (Tr. I-16-20) Virtually one half of the errors on the 119 non-partial credit answers cannot be explained despite every benefit of the doubt having been extended to respondent in this matter.

As stated in Hodgkiss, supra, it is respondent who bears the final responsibility for inaccuracies and careless grading of test results. Thus, the Commissioner determines that respondent did, within the limited meaning of the word, falsify test results on the January 1986 Algebra II examinations and that such falsification was attributable to gross carelessness and inefficiency rather than intentional, willful or fraudulent behavior.

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Accordingly, the Commissioner determines that respondent is guilty of conduct unbecoming a teacher and levies the following penalties:

1. Loss of salary for the first 120 days of her suspension; and

2. Withholding of any and all salary increments for the 1986-87 school year.

As such, the second penalty renders moot the matter pending before the Office of Administrative Law which pertains to the withholding of respondent's 1986-87 increments.

COMMISSIONER OF EDUCATION

August 3, 1987

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IN THE MATTER OF THE TENURE	:	
HEARING OF HELEN YORKE, SCHOOL	:	STATE BOARD OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
PISCATAWAY, MIDDLESEX COUNTY.	:	
	:	

Decided by the Commissioner of Education, August 3, 1987

For the Petitioner-Respondent, Rubin, Rubin and Malgran
(David B. Rubin, Esq., of Counsel)

For the Respondent-Appellant, Klausner, Hunter and Oxfeld
(Steven Klausner, Esq., of Counsel)

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

Regan Kenyon abstained.
December 2, 1987

Pending Superior Court

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9002-86
AGENCY DKT. NO. 353-10/86

MARY HART,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,
Respondent.

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

Dennis G. Harraka, Esq., for respondent
(Gallo, Geffner, Fenster, Farrell, Turitz & Harraka, attorneys)

Record Closed: May 17, 1987 Decided: June 25, 1987

BEFORE EDITH KLINGER, ALJ:

This matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. After notice, a prehearing conference was held on February 3, 1987 at which it was agreed, among other things, that the issues to be heard

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were whether the Board violated petitioner's seniority or tenure rights for the 1986-1987 school year as a teacher of home economics, family life and career education; and, if so, the appropriate remedy for such violations.

The parties agreed to stipulate the facts and proceed to judgment on the papers. The following facts were stipulated by the parties.

1. Petitioner was a tenured teaching staff member in respondent's employ until her termination.

2. Petitioner has been employed by respondent as follows:

1966-67	Home Economics Grades 6,7,8	Full Time
1967-68	Home Economics Grades 6,7,8	Full Time
1968-69	Home Economics Grades 6,7,8	Full Time
1969-70	Home Economics Grades 6,7,8	Full Time
1970-71	Home Economics Grades 6,7,8	Full Time
1971-72	Home Economics Grades 6,7,8	Full Time
1972-73	Home Economics Grades 6,7,8	Full Time
1973-74	Home Economics Grades 6,7,8	Full Time
1974-75	Home Economics Grades 6,7,8	Full Time
1975-76	Home Economics Grades 6,7,8	Full Time
1976-77	Home Economics Grades 6,7,8	Full Time
1977-78	Home Economics Grades 6,7,8	Full Time
1978-79	Home Economics Grades 6,7,8	Full Time
1979-80	Home Economics Grades 6,7,8	Full Time
1980-81	Home Economics Grades 6,7,8	Full Time
1981-82	Home Economics Grades 6,7,8	Full Time
1982-83	Home Economics Grades 6,7 and High School	Full Time
1983-84	Home Economics Grades 6,7 and High School	Full Time
9/1/84-12/31/84	Home Economics Grades 6 and 7 and Family Life Grade 6	Part-Time (2/5)
1/1/85-6/30/85	Home Economics Grades 6 and 7 and Family Life Grade 6 and High School	Part-Time (3/5)

3. By letter of April 18, 1985, petitioner was advised that her employment was terminated effective for the 1985-86 school year.

4. Respondent's seventh and eighth grades are departmentalized and have been so organized throughout all

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periods relevant hereto.

5. Petitioner has possessed certification as a Home Economics teacher (K-12) throughout her employment in Ridgefield.

6. A normal full time teaching load in Ridgefield is 25 periods per week (five periods per day, five days per week).

7. The Board initiated its Family Life education program, as currently constituted, in the 1983-84 school year.

8. Prior to 1983-84, petitioner taught aspects of family living (exclusive of sex education) in such areas as "getting along with family and friends" and "understanding one's self" as part of her sixth, seventh and eighth grade Home Economics curriculum. That began in 1978.

9. Petitioner's 1984-85 Family Life assignment included all aspects, including sex education.

10. Family Life is currently offered by respondent as a separate course offered during specified class periods devoted strictly to Family Life instruction. It has been so organized since its inception in 1983-84.

11. Jay Levine was initially hired by the Board in September, 1970 as a teacher of Physical Education, Driver Education, First Aid and Health and served in that capacity full time through June 30, 1983.

12. For 1983-84, 1984-85 and 1985-86, Levine taught high school Family Life for one period per day, five days per week, in addition to subjects previously taught. Levine was a full time employee for 1983-84, 1984-85 and 1985-86.

13. Levine has been certified as a teacher of Physical Education (K-12) and as a teacher of Health (K-12) since his career in Ridgefield began. He is also certified as a teacher of Driver Education and as a principal and supervisor.

14. Levine's 1986-87 teaching schedule includes one period per day, five days per week of high school Family Life instruction, in addition to other subjects. (See Exhibit A) Levine is a full time employee for 1986-87.

15. Mrs. Ladislava Krawiec was employed by respondent as a part-time school nurse from September, 1967 through June, 1977.

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From September, 1977 through June, 1985, Krawiec was a full time school nurse. For 1985-86, Krawiec taught three periods of sixth grade Family Life per week, with the balance of her full time schedule dedicated to school nurse services. Mrs. Krawiec served the K-6 grade levels from 1967 to 1977; K-8 grade levels from 1977 to 1983; and K-7 grade levels from 1983 to 1985. Krawiec holds a certificate as a school nurse.

16. For 1986-87 Mrs. Krawiec teaches four (4) periods per week of Family Life to students in grade six. This occurs between 1:37 p.m. and 2:17 p.m. Monday through Thursday. The balance of Mrs. Krawiec's full time 1986-87 schedule is devoted to nursing duties. See Exhibit 'B'.

17. Donald Celidonio was initially employed by respondent, full time, under a contract effective July 1, 1977, with actual teaching duties beginning in September, 1977 at the opening of school for that year. He has been continuously employed since that time. He has been a Cooperative Industrial Education (C.I.E.) coordinator and has taught C.I.E. related subjects, as well as Career Education, all at the high school level. He has also taught Industrial Arts at the elementary level. For 1985-86, Celidonio taught one period of Career Education per day, five days per week, with the balance of his full time schedule dedicated to C.I.E. and Industrial Arts work. Celidonio is certified in Industrial Arts and as a C.I.E. teacher/coordinator.

18. For 1986-87 Celidonio teaches one period per day, five (5) days per week of Career Education. The balance of his full time 1986-87 schedule is devoted to C.I.E. Coordinator work in school and "on the job". See Exhibit 'C'.

19. Respondent has not designated, by resolution or job description, which particular educational certificate or endorsement is required to teach Career Education, nor has any such specification been obtained in writing from the County Superintendent of Schools or the State Department of Education.

20. Roslyn Fernhoff has been employed, full time, by respondent since September, 1965. Fernhoff taught Home Economics solely at the high school level from September, 1965 through June, 1982. She taught Home Economics at the eighth grade level and the high school level from September, 1982 through June, 1985. For 1985-86, Fernhoff taught seven classes per week of fifth and sixth grade Home Economics with the balance of her full time schedule dedicated to seventh grade and high school Home Economics. Fernhoff is certified as a Home Economics teacher (K-12). Fernhoff taught aspects of family living as part of

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her Home Economics curriculum starting in 1985 until family living became a separate, formally organized course.

21. For 1986-87 Ms. Fernhoff teaches Home Economics at the high school level three (3) periods per day, five (5) days per week (Exhibit 'C'), and Home Economics at the fourth, fifth, sixth and seventh grade level in the afternoons, five (5) days per week as set forth in Exhibit 'D'.

PROCEDURAL HISTORY

In 1985, Hart appealed her reduction to part-time status to the Office of Administrative Law. Hart v. Ridgefield Bd. of Education, OAL DKT. NO. EDU 5113-84 (April 10, 1985), Commissioner's Decision, June 7, 1985, aff'd State Board of Education (December 6, 1985), aff'd. N.J. App. Div. Nov. 7, 1986, A-2176-85T6 (unreported) ("Hart I"). She claimed teachers who had less seniority were assigned to teach family life courses and she was not. In an initial opinion, the administrative law judge determined that petitioner had no claim to the family life position, since she had accrued no family life seniority under her home economics certificate. The Commissioner sustained this finding of the ALJ but reversed his determination that Hart was entitled by virtue of her seniority in home economics to teach classes assigned to Roslyn Fernhoff and career education course classes taught by Celidonio. The Commissioner's decision was affirmed by the State Board of Education and the Appellate Division of the Superior Court. At the time the present appeal was filed, a petition for certification was pending with the Supreme Court of the State of New Jersey. Since that time, the court has refused to grant certification and therefore petitioner has withdrawn the present appeal as it relates to the teaching of family life.

In 1986, petitioner appealed the abolition of her home economics teaching staff position for 1985-86 and the employment of persons in her categories of seniority who had less seniority than she for 1985-86. Hart v. Ridgefield Bd. of Education, OAL DKT. EDU 5301-85 (July 18, 1986) reversed, Commissioner of Education (September 8, 1986) ("Hart II"). The matter is presently pending with the State Board of Education. She claimed that this violated her tenure and seniority rights under N.J.S.A. 18A:28-5 and N.J.A.C. 6:3-1.10 et seq. She sought judgment directing the Board to reinstate her to a full-time

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teaching staff position for 1985-86 and retroactively compensate her for all salary and benefits lost as a result of Board action. The administrative law judge supported Hart's claim to the position of teacher of fifth and sixth grade home economics and ordered her compensated in salary and benefits for the Board's failure to recognize her seniority for the position of teacher of career education.

The Commissioner of Education reversed the administrative law judge with respect to petitioner's seniority claims to career education classes because the career education course classes are not a special subject field category pursuant to N.J.A.C. 6:3-1.10, nor is career education an endorsement on any certificate issued by the State Board of Examiners. The Commissioner further determined that Donald Celidonio, the teacher assigned to teach career education, was properly assigned since career education is vocationally oriented and more closely aligned to those "certificated endorsements which he possesses in Industrial Arts and Teacher-Coordinator of Cooperative Vocational-Technical Education Programs."

In regard to the home economics classes, the Commissioner disapproved the administrative law judge's finding that Hart was entitled by virtue of seniority to the fifth and sixth grade home economics classes assigned to Roslyn Fernhoff for the 1985-86 school year. The Commissioner based his decision on the fact that there was no vacant position in home economics for the 1985-1986 school year under which petitioner could exercise her seniority rights pursuant to N.J.S.A. 18A:28-12. He determined that the assignment of the fifth and sixth grade home economics classes to Fernhoff was the proper exercise of the Board's discretion "to efficiently operate its school program by assigning those classes to her in order to retain one full-time teacher of home economics on a district-wide basis." In the Commissioner's judgment, petitioner could not seek to create a new part-time position of employment for herself by attempting to fragment those classes assigned to Ms. Fernhoff on a full-time basis.

Hart filed her petition in the present appeal on October 21, 1986 with the Department of Education. The Board filed its answer on November 10, 1986. Accordingly,

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the Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law on December 26, 1986.

On February 3, 1987, a prehearing conference was conducted at the Office of Administrative Law and an order was entered. The record closed upon the receipt of briefs.

THE CLAIM AGAINST DONALD CELIDONIO

Hart's claim against Celidonio is to the five periods per week of high school instruction in career education to which he is presently assigned. Petitioner claims 18 years of secondary seniority in the subject as opposed to a maximum of nine years for Celidonio. I must agree with the Commissioner's determination in Hart II that the career education course classes taught by Celidonio are not a special subject field category pursuant to N.J.A.C. 6:3-1.10 nor is career education an endorsement on any certificate issued by the State Board of Examiners. N.J.A.C. 6:11-6.2. Career education, like family life, is a multi-disciplinary course which may be taught by teachers holding various endorsements. Like family life, no tenure or seniority rights attach to such courses, and I therefore must CONCLUDE that Hart has no greater claim to teach career education than Celidonio. In Hart II, the Commissioner determined that the Board properly assigned Celidonio to teach career education because of his background in teaching vocationally oriented subjects. The only thing that has changed since the Commissioner's prior determination is that Celidonio has more experience in teaching career education. I therefore CONCLUDE that he is more qualified to teach career education in 1986-1987 than in the 1985-1986 school year.

THE CLAIM AGAINST ROSLYN FERNHOFF

Petitioner has asserted a claim to the 11 periods of elementary home economics presently taught by Fernhoff. She argues that the present appeal is different from the 1985-1986 appeal in that Fernhoff is now teaching 11 elementary home economics classes instead of the seven to which she was assigned in the prior school year.

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In Hart II, the Commissioner determined that it was reasonable for the district to appoint Fernhoff as the one district-wide home economics teacher. I disagree with petitioner that the increased number of elementary home economics classes comprising Fernhoff's present schedule significantly distinguishes the facts of this appeal from Hart II. In fact, if, as the Commissioner found, the choice of Fernhoff as district-wide teacher was reasonable given her prior experience in elementary and high school home economics courses, the fact that she has had additional experience in teaching elementary home economics courses makes that choice all the more reasonable in 1986-87. I therefore CONCLUDE that petitioner has no claim to the 11 periods of elementary home economics presently taught by Fernhoff.

CONCLUSION

N.J.S.A. 18A:28-12 provides that any teaching staff member who is dismissed as a result of a reduction in force shall be placed and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which he is qualified. This is the extent of the relief to which petitioner is entitled. There is nothing in the record to indicate that a vacant position exists in which to place Hart at the present time and no requirement that a position be created for her.

Hart is seeking to create a position for herself by taking courses from Celidonio and Fernhoff. She is in effect asking respondent to rearrange the scheduling to make three part-time teaching positions from two full-time ones. This matter has already been addressed in the courts.

> . . .[P]etitioners urge that, upon a reduction in work force, respondent board of education was obligated to protect seniority rights by working out all the possible permutations in assignments for which available teaching personell (sic) had credentials and, thus, to restructure, if necessary, its entire teaching staff....
>
> ....
>
> We reject petitioners' argument. We are of the view that...any requirement of working out the possible permutations in assignments...would infringe unduly on respondent board of

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education's predominant responsibility to maintain a thorough and efficient system of education (citation omitted).

Fitzpatrick v. Weehawken Tp. BOE (N.J. App. Div., June 16, 1982, A-3278-80T3) (unreported), at 3-4. In Davis v. Board of Education of Ewing Twp., OAL DKT. EDU 6539-84 (March 14, 1985) adopted, Comm'r of Ed. (April 29, 1985) adopted, State Bd. of Ed. (Sept. 4, 1985), the Commissioner observes that the effect of petitioner's argument is to require that the Board rearrange its schedule to suit petitioner's "desires and maximize its scheduled course offerings to coincide with her areas of certification." This, he notes, is not the intent of the legislature in N.J.S.A. 18A:28-9 and "could negate the power of the Board to achieve a reduction in force."

I **CONCLUDE** that there is no remedy to which petitioner is entitled and, therefore, I further **CONCLUDE** that she is not entitled to back salary, seniority credit and reimbursement for medical insurance costs incurred by her.

Accordingly, it is **ORDERED** that the action of respondent in denying reinstatement, back salary, seniority and reimbursement for medical insurance costs to petitioner was correct and should be and hereby is **AFFIRMED**.

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

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OAL DKT. NO. EDU 9002-86

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

June 25, 1987
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

JUN 29 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 30 1987
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

PAR/e

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MARY HART,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

It is observed that petitioner has filed exceptions to the initial decision with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Petitioner in her exceptions to the initial decision continues as she did in Hart II, supra, now pending on appeal before the State Board of Education, to claim greater seniority in those 11 elementary level home economics classes taught by Roslyn Fernhoff and the career education courses taught by Donald Celidonio during the 1986-87 academic year.

It must be noted herein as it was in Hart II that the 11 elementary level home economics classes taught by Fernhoff on a weekly basis represent less than half of her full-time weekly class schedule. Fernhoff teaches 25 class periods of home economics per week, 14 of which are at the secondary level. In 1985-86 Fernhoff taught 7 classes of home economics at the elementary level and 18 classes of home economics at the secondary level. (Hart II) Celidonio, on the other hand, taught career education five periods per week in 1985-86 (Hart II) and in 1986-87. The balance of his full-time schedule (25 periods per week) is devoted to performing his duties as C.I.E. Coordinator at the high school and "on the job" supervision of pupils.

In reviewing petitioner's exceptions to the findings and conclusions of the ALJ in the initial decision, the Commissioner finds and determines such exceptions to be without merit specifically for those reasons which constitute part of his determination rendered in Hart II, now on appeal before the State Board. In Hart II the Commissioner held that petitioner's claims to seniority in elementary level home economics and career education classes were without merit inasmuch as no vacant position existed during the 1985-86 academic year in her special subject field of home economics. He further held that the Board was not obligated to

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create a new part-time position of employment by fragmenting those classes assigned to Roslyn Fernhoff or Donald Celidonio on a full-time basis.

However, it is observed that petitioner in her exceptions now makes an additional claim to district-wide seniority over Roslyn Fernhoff and now asserts that by virtue of such seniority she is entitled to teach all of the home economics classes assigned to Ms. Fernhoff during the 1985-86 and 1986-87 academic years.

Petitioner's additional claim to district-wide seniority is set forth below:

> However, in addition to the claim to elementary home economics, petitioner now asserts an additional basis for her claim, arising directly out of the State Board of Education's decision of June 3, 1987 in Erica Cohen v. Bd. of Ed., Emerson (copy attached).
>
> This decision was not received by counsel until after receipt of the Initial Decision and so, was not before the administrative judge.
>
> In particular, the Cohen decision supra at page 14 through 16, establishes the existence of a district-wide category of seniority for those individuals simultaneously employed at both the secondary and elementary level. Seniority in such a district-wide category for teachers in special subject fields (such as home economics) controls "entitlement to assignments made on a district-wide basis, ..." (Cohen at 16).
>
> The stipulated facts (para. 2) establish that petitioner Hart was employed beginning in 1966-67 to teach home economics in grades 6, 7 and 8. In 1982-83 she was employed to teach that subject in grades 6, 7 and in the high school.
>
> It was also stipulated that grades 7 and 8 have been departmentalized during all relevant periods. (Stip. at para. 4) Thus, throughout her career petitioner has been accruing seniority at both the elementary and secondary levels, simultaneously. As such she has 18.52 years of district-wide home economics seniority.
>
> Roslyn Fernhoff, by contrast, worked exclusively at the secondary level from 1965-66 through 1984-85. (Stip. at para. 20) Only in 1985-86 did Fernhoff begin teaching at both the elementary (5th and 6th) grade level and at the secondary level. (Stip. at para. 20)

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> Thus Fernhoff had only one (1) year of simultaneous elementary and secondary home economics service as of June, 1986.***
>
> Under Cohen, supra, petitioner Hart has a far superior claim to any position in district-wide home economics. Thus she should have had all of Fernhoff's 1986-87 full time district-wide home economics position. No splitting into part-time jobs was required. Rather Hart should have been employed full-time and Fernhoff should have been riffed. This result is mandated by the holding in Cohen, supra, and the Commissioner is asked to so rule. (Petitioner's Exceptions, at pp. 1-3)

In order to place the additional argument now raised by petitioner's claim to district-wide seniority in home economics in its proper perspective, it is necessary for the Commissioner to rely upon the factual circumstances which formulated the basis for his prior determinations in Hart I, supra, and Hart II, supra.

In Hart I, it must be noted that the Board was confronted with declining pupil enrollment and was therefore required to effect a reduction in force in one of its two full-time home economics teaching positions at the high school/secondary level for the 1984-85 academic year. It is stipulated by the parties that as of the end of the 1983-84 school year, petitioner had acquired 18 years of district-wide seniority in home economics. Roslyn Fernhoff, on the other hand, served 19 years as a full-time teacher of home economics at the high school/secondary level at the conclusion of the 1983-84 academic year. (See Hart I, Stip. 2; Hart II, Stip. 2, 4 and 17.)

Consequently, in view of the fact that the initial reduction in force occurred at the high school/secondary level, the Board's seniority determination for the purposes of causing a reduction in force was required to be made in the "secondary" category between the two full-time positions held by Hart and Fernhoff. The applicable provisions of N.J.A.C. 6:3-1.10(k)(15) affecting reductions in force in the "secondary" category read as follows:

> Secondary. The word "secondary" shall include grades 9-12 in all high schools, grades 7-8 in junior high schools, and grades 7-8 in elementary schools having departmental instruction.

Thus, as of the beginning of the 1984-85 academic year, because petitioner had less seniority than did Ms. Fernhoff in the "secondary" category, petitioner's full-time position in home economics was abolished by the Board and she was reassigned to a 2/5 part-time position of three periods per week of 6th grade family life instruction, three periods of 6th grade home economics and four periods of 7th grade home economics.

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In Hart I, petitioner did not challenge her reduction to a 2/5 position on the grounds that she was improperly denied a seniority claim to Fernhoff's full-time home economics position. Instead, she contested the Board's action on the grounds that she was entitled to teach those additional courses in family life which had been assigned to persons with less seniority than she for the 1984-85 school year. In deciding Hart I, the Commissioner held that the Board did not violate petitioner's seniority rights when it assigned a less senior health and physical education teacher to its family life program. The Commissioner further held that no family life seniority accrued under petitioner's home economics endorsement and, in doing so, he ruled that while the intent of the State Board in authorizing individuals with nine different types of endorsements to teach family life programs was to allow flexibility and an interdisciplinary approach in implementation, local district boards' assignment of teaching staff members need not be controlled by seniority claims on the part of tenured teaching staff members. The Commissioner's decision in Hart I was affirmed by the State Board on December 4, 1985 and the State Board's decision was subsequently affirmed by the Appellate Court on September 8, 1986.

In Hart II, the Commissioner affirmed the Board's action in terminating petitioner from her 2/5 teaching position as of the 1985-86 academic year and he upheld the Board's right to assign Fernhoff 7 periods of 5th and 7th grade home economics classes in order to provide her with a full-time position in home economics. The Commissioner also sustained the Board's action in assigning Donald Celidonio 5 classes per week in career education in providing him with a full-time position as C.I.E. Coordinator. In arriving at this determination, the Commissioner held that no vacant position existed as of the 1985-86 school year in home economics to which petitioner could lay claim by virtue of her seniority. Moreover, the Commissioner relied on Godwin Davis v. Board of Education of Ewing Township, Mercer County, decided by the Commissioner April 29, 1985, aff. State Board September 4, 1985 in holding that the Board was not required to adjust or modify its curriculum schedule for the sole purpose of creating a part-time position for petitioner or to provide her with a maximum possible class load.

As stated above, the Commissioner in the instant matter (Hart III) has rejected petitioner's seniority claim to the 11 periods of elementary home economics classes taught by Fernhoff during the 1986-87 academic year, as well as her claim for the 5 periods of career education courses taught by Donald Celidonio during the 1986-87 academic year. The reason for the denial of petitioner's seniority claims to these positions are identical herein to those enunciated in Hart II.

Finally, the Commissioner does not agree that petitioner may now assert district-wide seniority over Roslyn Fernhoff in order to claim entitlement to the full-time position in home economics assigned to her by the Board during the 1985-86 and 1986-87 academic years. This is so because the full-time position in home economics

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from which petitioner was originally removed at the conclusion of the 1983-84 school year existed at the high school or secondary level. The Board in causing a reduction in force at that time properly determined that the home economics position to be abolished was in the "secondary" category pursuant to N.J.A.C. 6:3-1.10(k)(15) and therefore accorded the full-time position to Roslyn Fernhoff by virtue of her greater home economics seniority in the "secondary" category. The Commissioner finds and determines that no vacant position has existed since the 1984-85 academic year for which petitioner is qualified by virtue of her seniority in home economics.

Consequently, while petitioner relies on Cohen, supra, to assert her seniority claim to the full-time home economics position held by Fernhoff during the 1985-86 and 1986-87 academic years, the Commissioner finds and determines that such argument is without merit. In the Commissioner's view petitioner's claim to district-wide seniority has never been disputed. However, such claim cannot be made to overcome the fact that when the Board abolished petitioner's full-time position in home economics at the conclusion of the 1983-84 academic year, the full-time position existed in the "secondary" category. The record of this matter clearly establishes that Roslyn Fernhoff had greater seniority in the "secondary" category when the Board abolished petitioner's full-time position at the conclusion of the 1983-84 academic year.

The record further establishes that at the conclusion of the 1983-84 academic year, when the Board originally determined to abolish petitioner's full-time home economics position in the "secondary" category, it appropriately placed petitioner on a preferred eligibility list pursuant to N.J.A.C. 6:3-1.10(i) until a vacancy in home economics occurred to which her seniority entitled her to lay claim to a greater part-time or full-time position in that subject field. The fact of the matter is that no such vacant position has existed in home economics since the conclusion of the 1983-84 academic year. Therefore, the Board was not required, as petitioner claims, to bifurcate Fernhoff's full-time position in home economics or to create new part-time positions to accommodate her claims to seniority in other subject areas. Godwin Davis, supra

Accordingly, the Commissioner adopts as his own the findings and conclusions in the initial decision as supplemented above.

The instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

August 4, 1987

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 468-87
AGENCY DKT. NO. 9-1/87

IN THE MATTER OF
THE ISSUANCE OF A TEACHING
CERTIFICATE TO PAULA GRISKEY.

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

Arlene G. Lutz, Deputy Attorney General, for respondent (W. Cary Edwards, Attorney General of New Jersey, attorney)

Record Closed: May 21, 1987 Decided: June 19, 1987

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

Paula Griskey, petitioner, appeals the determination of the Board of Examiners (Board) not to issue to her a standard instructional certificate to teach biology following her one-year participation in the Provisional Teacher Program pursuant to N.J.A.C. 6:11-5.3 et seq.

BACKGROUND OF THE CASE

Paula Griskey, the petitioner in this case, was hired by the Cliffside Park Board of Education to teach Biology and Introduction to Physical Science. She was employed for the 1985-86 school year pursuant to N.J.A.C. 6:11-5.3 et seq., known as the alternate route to certification. Under the alternate route procedure, candidates who have not taken required education courses in order to become certified teachers are, under certain conditions, permitted to receive a one-year probational certificate and a temporary

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appointment to the teaching staff in a school approved by the Commissioner of Education. These teachers receive intensive instruction, supervision and evaluation from a Professional Support Team (PST) at the participating school.

At the end of the one-year period, the provisional certificate lapses. Those who successfully complete the program are granted a standard teacher certificate by the State Board of Examiners. Those evaluated "insufficient" are permitted an additional year of training and supervision. Those evaluated "disapproved" may not continue in the program.

N.J.A.C. 6:11-5.5(a)2 requires a period of on-the-job supervision for at least the first ten weeks. The provisional teacher is visited and criticized at least once per week by members of the PST. The provisional teacher is observed and formally evaluated at the end of five weeks and at the end of ten weeks by appropriately certified members of the PST. Formal instruction continues in essential areas and, at the end of the ten-week period, the provisional teacher receives a formal written progress report from the chairperson of the PST.

N.J.A.C. 6:11-5.5(a)3 requires an additional period of continued supervision and evaluation of not less than 20 weeks' duration. The provisional teacher is visited and criticized at least one per month and, again, is formally evaluated at least twice.

N.J.A.C. 6:11-5.6 requires that evaluation of provisional teachers shall be shared by at least two but no more than three members of the PST. The evaluators must be appropriately certified. The State Department of Education provides standardized criteria and forms for a final comprehensive evaluation of each provisional teacher.

N.J.A.C. 6:11-5.7, Recommendation for certification of provisional teachers, provides

> (a) At the conclusion of the alternative training program, the chairperson of the Support Team shall prepare a comprehensive evaluation report on the provisional teacher's performance. This report shall be submitted by the Chairperson directly to the Bureau of Teacher Preparation and Certification and shall contain a recommendation as to whether or not a standard certificate should be issued to the provisional teacher.
>
> (b) The final comprehensive evaluation report on each provisional teacher shall be made on standard forms developed by the State Department of Education.

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(c) The final report on each provisional teacher shall include one of the following recommendations.

1. Approved: recommends issuance of a standard certificate.

2. Insufficient: recommends that a standard certificate not be issued but that the candidate be allowed to seek entry on one more occasion in the future into a State-approved training program.

3. Disapproved: recommends that a standard certificate not be issued and that the candidate not be allowed to enter into a state-approved training program.

(d) All certification recommendations must be either accepted or rejected by the State Board of Examiners in accordance with the same procedures used for graduates of New Jersey college preparation programs.

The petitioner's evaluations at the end of the tenth week and the 20th week contained predominately "needs improvement" and "unsatisfactory" ratings. The evaluators rated her performance as insufficient on a summative evaluation.

The State Board of Examiners reviewed the documented summative evaluation by the PST and voted to accept the PST's recommendation of "insufficient." Thus, the petitioner was denied a standard certificate but allowed to remain in the probational teacher program for one more year while receiving additional support, supervision and training. She chose instead to appeal the Board's decision to the State Board of Education.

The State Board of Education concluded that the matter was not properly before it and remanded to the Commissioner. The Commissioner transmitted the matter to the Office of Administrative Law. The Board moved to dismiss the matter because it is not a contested case but the motion was denied.

I held a prehearing conference on April 8, 1987 and directed the petitioner to submit a letter in lieu of petition, setting forth the petitioner's allegations in this matter. The Board was directed to reply to the allegations. Upon receipt of the petitioner's letter stating her position, the Board seeks summary decision maintaining that none of the petitioner's allegations are directed against the Board.

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POSITIONS OF THE PARTIES

The Board contends this tribunal allowed the petitioner to set forth the issues, which she has done, but none of the allegations touch the Board. The Board has done at all times what is required by regulations. The petitioner has not demonstrated or even alleged that the Board was in any way implicated in her failure to achieve certification.

N.J.A.C. 6:11-5.7 requires the PST to prepare a summative evaluation of the provisional teacher's performance and submit it to the Bureau of Teacher Preparation and Certification, including a recommendation as to whether the applicant should be issued standard certification. The Board is required either to accept or reject the recommendation. The Board at all times complied with its regulatory directive either to accept or reject the recommendation. The recommendation form was properly completed. The Board would have no cause to reject it. Accordingly, the Board voted to accept the recommendation of the PST. Thus, there can be no claim that the Board failed to operate within appropriate procedures.

The summative report, which is the comprehensive evaluation report of the provisional teacher's performance, documented the need for further training. It contains sufficient evidence on which to base the Board's denial of standard certification. Thus, the Board's decision concerning the petitioner was reasonable and based on sufficient evidence. In this case, the ten-week, and 20-week evaluations, along with the summative evaluation, were submitted to the Board although the regulation requires only that the summative evaluation be provided. There was sufficient evidence for the Board to accept the recommendation of the PST.

If the petitioner views the regulations at issue, N.J.A.C. 6:11-5.5 et seq., as deficient for failure to provide her with the opportunity to respond to the evaluation, then her complaint may not be heard by this tribunal. Her allegations are a challenge to the regulation, properly heard only by the Appellate Division. R. 2:2-3.

The Board may not be required to appear in this matter merely because the case concerns a teaching credential. Even if, arguendo, the petitioner's allegations concerning the evaluations are true, this tribunal cannot order the Board to issue the standard certificate by way of remedy. Even if the petitioner were to prove that the evaluations were in some way deficient, she still is not entitled to standard certification. The

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petitioner could, conceivably, show that the PST's evaluations were defective but she still would not have demonstrated that she is a competent teacher, entitled to standard certification in accordance with regulations. The applicable regulation provides that the standard certificate be issued only upon successful completion of the program, as evidenced by a positive recommendation. Absent that summative report and recommendation of approval, this tribunal cannot order the Board to issue a standard certificate.

The petitioner argues, first, that summary judgment should not be granted in the absence of discovery. The law of summary judgment is clear that, when evidence is primarily within the control of the moving party and no opportunity for discovery has been provided, summary judgment should be denied. See, Muniz v. United Hsps. Med. Ctr. Pres. Hsp., 153 N.J. Super. 79 (App. Div. 1977).

Further, the Board of Examiners is a proper party to this action. Despite its disclaimers, the Board is essential because the petitioner is challenging a decision it made to deny her a permanent teaching certificate. Although the Board tries to shift responsibility to local school district employees, the fact remains that the actual decision complained of is the legal obligation of the Board. N.J.A.C. 6:11-5.7. Local district personnel may issue recommendations but it is the statutory responsibility of the Board to make decisions. If the Board's claim that it merely follows the recommendations of local PSTs is true, it is an illegal de facto subdelegation of its statutory responsibilities. In In re North Jersey Dist. Water Supply Comm'n, 175 N.J. Super. 167, 206 (App. Div. 1980), the Appellate Division said

> Under our law "a power or duty delegated by statute to an administrative agency cannot be subdelegated in the absence of any indication that the Legislature so intends." Mercer Council #4, N.J. Civ. Serv. v. Alloway, 119 N.J. Super. 94, 99 (App. Div. 1972), aff'd 61 N.J. 516 (1972). This is especially true when the agency attempts to subdelegate to a private person or entity, since such person or entity is not subject to public accountability. N.J. Dept. of Transp. v. Brzoska, 139 N.J. Super. 510 (App. Div. 1976).

The Board claims it has the ability to rely completely on the evaluations and recommendations it receives. These form the sole basis for granting or denying a certificate. But if a challenge is made that the decision was wrong because of improper factual claims, then the Board claims that it cannot be responsible for defending the

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information provided to it. The respondent must be held accountable for its decision and the information upon which it relied in reaching that decision.

Despite the existence of an unappealed decision of the State Board of Education determining the petitioner's right to a full hearing, the Board continues to claim that the petitioner has received all that she deserves. In this respect, the Board provides an affidavit of its secretary and relies upon it to state

> The procedures used for graduates of teacher prepartory programs direct the Board to merely accept the recommendation of the local college. . . . There is no discussion of the recommendation, nor it [sic] there extensive review of the factual basis underpinning the recommendation. Additionally, if an aggrieved candidate for certification through this route contacts the Office of Teacher Certification to complain about failure to obtain certification, the individual is informed that the Office of Teacher Certification does not hear such complaints.

In addition to ignoring the State Board of Education in this case, the respondent also ignores the impact of In re Masiello, 25 N.J. 590 (1958). In that case, an application for a school administrator certificate was rejected by the Board of Examiners. An action was brought against the Board alleging that it improperly denied the application because of an alleged lack of experience. The Court stated at 603-604

> These observations bring us to the consideration of the present matter. The record indicates that the proceeding before the Board of Examiners was an informal one. A hearing in the constitutional sense was not accorded there. Although the Commissioner is chairman of the board, he did not - and, we assume, usually does not - participate in its decision. The statute does not in express terms direct that appeal from such decision be taken to the commissioner. However, N.J.S.A. 18:3-14 says that he "shall decide without cost to the parties all controversies and disputes arising under the school laws, or under the rules and regulations of the state board or of the commissioner." [see now, N.J.S.A. 18A:6-9.]
>
> This enactment provides the basis for his review of the action of local boards of education. [citations omitted.] And it is reasonable to suppose that the same avenue was meant to be followed in challenging an order of the Board of Examiners. [citation omitted.]

Masiello also establishes the scope of review in the present case. At 607, the Court states

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> However, a word of caution seems advisable. In his opinion the Commissioner took the view that "It is not within the province of the Commissioner to order the State Board of Examiners to alter its interpretation of the rules" of the State Board of Education. Such self-imposed limitation does not appear to be proper upon a study of the broad statutory authority granted to him. As has already been indicated, he is required to enforce "all rules and regulations prescribed by the State Board" and to decide all disputes arising under the rules and regulations of the State Board. And as Laba notes, "his primary responsibility is to make certain that the terms and policies of the School Laws are being faithfully effectuated." Consequently if, on appeal to him, it appears on the exercise of his independent judgment that an interpretation by the Board of Examiners of any rule of the Board of Education is violative of the letter or spirit of such rule, the proper discharge of his duty requires corrective action.

The petitioner asserts that this standard amounts to a de novo examination of the decision and its underlying basis. This standard is similar to the scope of the Commissioner's review in an increment withholding case. Kopera v. West Orange Bd. of Education, 60 N.J. Super. 288 (App. Div. 1960). Relying on Masiello, the Appellate Division established that the Commissioner should determine whether the underlying facts were as claimed in evaluations and whether the conclusions made were reasonable. Here, the petitioner's claim that denial of her permanent certificate was improper because of the incorrect facts set forth in her evaluations, should accord her a similar form of review.

Last, the petitioner contends she has every right to pursue this action before the Commissioner of Education and is not required to bring this action before the Appellate Division. She is involved in litigation before the Commissioner involving her claims against the respondent. If this litigation includes a challenge to the regulations, she is free to raise that claim in the present forum. This is authorized by McKenna v. N.J. Highway Authority, 19 N.J. 270, 276 (1955).

DISCUSSION AND CONCLUSIONS

A probationary teacher, whether employed under traditional circumstances or through the alternate route to certification, enjoys no guarantee or affirmative right of continued employment from one academic year to the next. The Appellate Division has held that "absent constitutional constraints or legislation affecting the tenure rights of

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teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure." Dore v. Bedminister Twp. Bd. of Ed., 185 N.J. Super. 447, 456 (App. Div. 1982). In Guerriero v. Glen Rock Bd. of Ed., OAL DKT. EDU 6240-84 (Jan. 14, 1985), aff'd Comm'r of Ed. (Mar. 4, 1985), aff'd, St. Bd. of Ed. (Feb. 7, 1986), aff'd N.J. App. Div., Dec. 17, 1986, A-3316-85T6 (unreported), the State Board, relying on Dore, held that a nontenured teacher is entitled to litigate a nonreemployment decision only if the facts he alleges, if true, would constitute a violation of constitutionally or legislatively conferred rights.

On or before April 30 in each year, every board of education must give to each nontenured teaching staff member, other than those coming via the alternate route, continuously employed since the preceding September 30 either:

1. A written offer of contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education; or

2. A written notice that such employment will not be offered.

If a board fails to give to any nontenured teaching staff member either an offer of contract for employment or a notice that employment will not be offered, the board will be deemed to have offered continued employment to that teaching staff member for the next school year on the same terms and conditions but with any increases in salary as may be required by law or policies of the board of education. If the teaching staff member desires to accept the employment, he must notify the board of education of his acceptance in writing on or before June 1. N.J.S.A. 18A:27-10 et seq. Any teaching staff member who receives notice that a contract for the succeeding school year will not be offered may, within 15 days, request in writing a statement of the reasons for non-reemployment. The statement of reasons must be given to the teaching staff member in writing within 30 days after the receipt of the request. N.J.S.A. 18A:27-3.2; Donaldson v. North Wildwood Bd. of Ed., 65 N.J. 236 (1974).

When a nontenured teaching staff member has requested in writing and received a statement of reasons for non-reemployment pursuant to N.J.S.A. 18A:27-3.3, he may request, in writing, an informal appearance before the district board of education. This

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request must be submitted within ten calendar days of receipt of the board's statement of reasons. N.J.A.C. 6:3-1.20. See also, Donaldson, above.

I can see no reason why a nontenured teacher coming via the alternate route to certification would enjoy lesser rights than a nontenured teacher hired under traditional circumstances. By the same token, the rights of the alternate route person may not rise above those traditionally accorded to nontenured teachers. The New Jersey Constitution promises procedural due process. N.J. Const., (1947), Art. I, par. 1. The concept of procedural due process implies that official action must meet minimum standards of fairness to the individual, which generally includes the right of adequate notice and a meaningful opportunity to be heard before the decision is made. However, it is often difficult to determine what process is due in the administrative context.

N.J.S.A. 18A:29-14 provides that a board of education may withhold, for inefficiency or other good cause the employment increment or the adjustment increment, or both, of any teaching staff member by a majority vote of all the members of the board. Within ten days thereafter, it is the board's duty to give written notice of the action, together with the reasons therefor, to the teaching staff member. The normal right of appeal to the Commissioner under N.J.S.A. 18A:6-9 then comes into play. Although a board has the power to withhold an increment, a teacher has a basic right to know if and when his superiors and the board are less than satisfied with his performance and the reasons for this judgment. Without that knowledge, the teacher would have no opportunity either to overcome his deficiencies or to convince his superiors that their judgment is wrong.

It must be noted that in both instances, the nonrenewal of a nontenured teacher and the withholding of an increment, the action is of great import to the affected teaching staff member. Yet, the Legislature and the courts have seen fit in both cases to allow boards of education to take these actions, provided the teaching staff member has actual or constructive knowledge of them, and then allow appeal to one extent or another. But cf., Rice v. Union Cty. Regional High School Bd. of Ed., 155 N.J. Super. 64 (App. Div. 1977). The Legislature and the courts have balanced the needs of a governing body, here a board of education, against the rights of an individual, here a nontenured teacher. In the light of these clear prescriptions, neither the Commissioner of Education nor this judge can inject some standard that he might prefer.

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There are some differences, particulary of timing, between the situation of a nontenured teacher hired under traditional circumstances and a nontenured teacher coming via the alternate certification route. But these should provide no great obstacle to providing each with substantially the same rights. N.J.S.A. 18A:27-3.1 et seq. provides procedures for observing and evaluating nontenured teachers. For those taking the alternate route to certification, N.J.A.C. 6:11-5.5 imposes further requirements. In either case, evaluations and evaluation conferences take place throughout the academic year. Barring a lapse on the part of the responsible administrators, the probationary teacher in either situation is aware of his or her progress, strengths and needs. The recommendation for the following school year cannot come as a surprise.

Another difference is that all facets of the decision concerning reemployment, or not, of regularly employed nontenured teachers are controlled and carried out at the local level. N.J.A.C. 6:11-5.7 introduces the State Board of Examiners into the process for teachers coming via the alternate route to certification. This is a distinction with a difference. Although local personnel perform the evaluations in either instance, the local board may offer continued employment to an alternate approach probationary teacher if and only if the Board accepts a recommendation of approved or insufficient for the particular candidate. N.J.A.C. 6:11-5.7(d) provides "All certification recommendations must be either accepted or rejected by the State Board of Examiners in accordance with the same procedures used for graduates of New Jersey college preparation programs." This reference is to N.J.A.C. 6:11-7.1 et seq., standards for state approval of teacher preparation.

In sum, the rights of a probationary teacher under the alternate approach to certification are neither greater nor lesser than those of a probationary teacher employed under traditional circumstances. Unless constitutional or legislative constraints exist bearing on the tenure rights of these teachers, local boards of education have a nearly unfettered right to terminate their services. Dore, above. The Legislature and courts have prescribed the level of due process to be accorded to probationary teachers. In the instance of what I have called traditional probationary teachers, it is clear that they must be offered employment, or not, for the next succeeding year by April 30. If employment will not be offered, the probationary teacher may request a statement of the reasons for nonreemployment. The board must provide the statement, in writing, within 30 days after receipt of the request. Further, the probationary teacher may request, in writing, an informal appearance before the district board of education, pursuant to N.J.S.A. 18A:27-

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3.3, in an effort to convince the board that it erred in its decision. The matter may then be appealed to the Commissioner of Education and, if it can be shown that a constitutionally or legislatively created right is involved, and if the appellant teacher can survive a motion to dismiss, the appellant can have the opportunity to try to show that the local board erred and that he or she should be reappointed.

In order to provide similar protections to probationary teachers who come via the alternate route to certification, the preferable course is rulemaking to that effect by the State Board of Education or statutory enactment by the Legislature. However, N.J.S.A. 52:14B-10(c) requires that this decision be filed with the Commissioner of Education "in such form that it may be adopted as the decision in the case." Even if the Board's assertion that the petitioner's challenge to the subject regulation may be heard only by the Appellate Division pursuant to R. 2:2-3 is correct, some time and efficiency may be gained by as full treatment as possible here.

In consideration of the foregoing arguments and analysis, I FIND:

1. The petitioner participated in the alternate route to certification procedure, as provided in N.J.A.C. 6:11-5.3 et seq., in the employ of the Cliffside Park Board of Education in the 1985-86 school year.

2. The petitioner was evaluated according to the schedule and procedures provided in N.J.A.C. 6:11-5.5(a).

3. Required evaluations, submitted with the Board's papers supporting its motion for summary judgment, show more "unsatisfactory" and "insufficient" ratings, clearly negative, than positive ratings.

4. The evaluations and other supporting data were sent by school district officials to the Bureau of Teacher Preparation and Certification in the Department of Education as required by N.J.A.C. 6:11-5.7.

5. Based upon the information submitted to the Bureau, the Board of Examiners adopted the recommended assessment of "insufficient."

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6. As provided in N.J.A.C. 6:11-5.7(c), a determination that the probationary teacher's performance has been insufficient is a recommendation that a standard teacher certificate not issue, "but that the candidate be allowed to seek entry on one more occasion in the future into a State-approved training program."

7. The petitioner attempted an appeal of the Board's decision to the Board.

8. Upon being informed that there is no provision for such an appeal, the petitioner appealed to the State Board of Education.

9. The State Board of Education on January 9, 1987 found the matter to involve a controversy under the school laws and, hence, under the jurisdiction of the Commissioner of Education.

10. Notwithstanding the absence of a formal petition of appeal, 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., on January 21, 1987.

11. On March 9, 1987 I conducted a conference of counsel. Among other things, it was agreed that the parties would first seek a determination of whether the matter constitutes a contested case, the Board maintaining it did not.

12. On March 17, 1987 I issued an order determining the matter to be a contested case.

13. That order has not be appealed interlocutorily by either party.

14. I further ordered a second conference of counsel and directed the petitioner to submit a statement of position in lieu of formal petition of appeal.

15. In response, the Board of Examiners moved for summary decision, asserting the arguments set forth above.

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16. The petitioner timely filed responsive papers, asserting the arguments set forth above.

I **CONCLUDE** that the petitioner has been denied any meaningful appeal of the Board of Examiners' decision to accept the PST recommendation that a standard teacher certificate not be issued to her, but that she be allowed one more chance in an approved training program; that the petitioner is entitled to substantially the same level of process traditionally accorded to probationary teachers, and that, unless and until the State Board of Education or the Legislature establishes some other standard, that process shall be limited to the right to request and to receive in writing the reasons of the State Board of Examiners for its decision and to request an informal appearance before the Board.

It is **ORDERED** that, provided the petitioner so requests in writing within 15 days of the date of final decision in this matter, the State Board of Examiners shall within 30 days of receipt of the petitioner's request provide to her, in writing, the reasons for its decision in this matter.

It is further **ORDERED** that after the petitioner receives such written reasons, she may request in writing and shall be granted an informal appearance before the State Board of Examiners, this appearance to be governed by the provisions of N.J.A.C. 6:3-1.20(b) - (j).

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

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

19 JUNE 1987
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

JUN 22 1987
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 24 1987
DATE

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE ISSUANCE OF :
A TEACHING CERTIFICATE TO PAULA :
GRISKEY. :

COMMISSIONER OF EDUCATION

DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed exceptions within the time prescribed by N.J.A.C. 1:1-18.4. The State Board of Examiners' cross exceptions and reply exceptions were also timely received pursuant to the above regulations.

Petitioner avers the ALJ erred in that "the initial decision all but ignores the State Board of Education decision previously entered in this case. The State Board submitted this matter to the Commissioner to review the actions of the State Board of Examiners and, if necessary, to take corrective action." (Exceptions, at p. 1) Petitioner claims said responsibility is not met if all that is required is an informal hearing before the State Board of Examiners and she avers that In re Masiello, 25 N.J. 590 (1958), the case the State Board of Education cited in its remand to the Commissioner, requires that she is entitled to a formal hearing at some point in the process.

Petitioner further submits in exceptions that:

> The initial decision fails to take into account the simple fact that, under the circumstances of this case, the conduct of any informal hearing before the State Board of Examiners will be a completely futile gesture. The State Board of Examiners has already rubber stamped the conclusion of the local support team.***
> (Exceptions, at p. 2)

Petitioner claims that the State Board of Examiners has taken the position that In re Masiello, supra, "does not exist and that it is omnipotent when determining whether to grant a certificate." (Exceptions, at p. 2) She suggests that a hearing before the Commissioner will avoid a "sham" informal hearing before the State Board of Examiners. "If, however, a determination is made that all procedural steps (such as the informal hearing) are to be complied with prior to a formal hearing before the Commissioner, then these procedures will be followed and Griskey will vigorously present her case before the State Board of Examiners." (Id., at p. 2)

Further, petitioner disputes the ALJ's analogizing her situation to that of a nontenured teacher to the extent that he concludes that she is entitled only to a statement of reasons for the denial of a certificate and an informal hearing. She avers that

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"[i]f the reasons given for non-renewal lack a factual basis, the action is improper. Moore v. Bd. of Ed., Township of Plumsted, [decided by the Commissioner May 26, 1981]." (Exceptions, at p. 2)

> If the local board's actions are arbitrary or the reasons given are false, the Commissioner has the ability to step in and reverse the board's decision. Deal Education Association v. Bd. of Ed., Borough of Deal, 1977 S.L.D. 919, aff'd. in part, rev'd. in part, State Board of Education 1978 S.L.D. 589; North Bergen Federation of Teachers, et al. v. Bd. of Ed., Township of North Bergen, 1978 S.L.D. 218, aff'd. in part, rev'd. in part State Board of Education 1978 S.L.D. 250, aff'd. Superior Court, Appellate Division, 1980 S.L.D. 1522, certif. den. 84 N.J. 444 (1980).***
> (Exceptions, at p. 2)

Relying also on Ruch v. Bd. of Ed., Greater Egg Harbor Regional High School Dist., 1968 S.L.D. 7, petitioner claims she is entitled to challenge the reasons given for the finding of the Professional Support Team (PST) of the local district before the Commissioner, because, she alleges, "the evaluators were biased in issuing recommendations and conclusions that were not factually correct." (Exceptions, at p. 3) She submits that "[i]f the scope of Griskey's rights and protections is the same as any nontenured teacher (Initial Decision at 10), then she must also have the right to challenge the determination of the State Board of Examiners after the informal hearing. Following the analogy and In re Masiello, supra, this hearing should be held before the Commissioner of Education." (Exceptions, at p. 3) Petitioner requests that in the event the informal hearing is required, her rights be deemed to include those set forth in her exceptions. In the event the Commissioner recognizes the futility of proceedings before the State Board of Examiners, petitioner requests that the matter be remanded for a hearing on the merits.

The State Board of Examiners (Board of Examiners), in its reply exceptions, agrees with the ALJ that petitioner has no entitlement to a formal administrative hearing, but it claims the ALJ erred in his conclusion that she was entitled to an informal hearing before that body.

> The error in his conclusion was predicated on his incorrectly equating the rights accorded a candidate for licensure, as was the petitioner, with the rights accorded those who are licensed. Petitioner has no right to the hearing before the Board because, as she was merely a candidate for certification in the alternate route for certification, she possessed no rights equal to those of nontenured but certified teachers.***
> (emphasis in text) (Reply Exceptions, at pp. 1-2)

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The Board of Examiners avers petitioner was granted more due process than she was entitled to under the circumstances.

Further, the Board of Examiners suggests that the proper place for the informal hearing is with the local board of education because the alternate route to certification parallels the college training route to certification, as set forth in N.J.A.C. 6:11-5.7(d). The Board of Examiners avers the evaluations performed by the PST in the alternate route

> are not different from the grades assigned by college professors in the traditional training programs. ***If a licensure candidate fails to receive passing grades or the recommendation of the college, thus not receiving certification, he or she appeals that matter to the college, not to the Board of Examiners.***
>
> (Reply Exceptions, at p. 3)

The Board of Examiners claims that the informal hearing process for alternate route candidates should also parallel that hearing process, with the local board of education, not the Board of Examiners, considering the matter.

The Board of Examiners argues that if it were to hold the informal hearing absent a positive recommendation from the PST, it could not provide the relief of issuing a certificate. "Petitioner's best hope of gaining that recommendation is to have the hearing before the Board of Education. However, in accordance with Dore v. Bedminster Twp. Bd. of Ed., 185 N.J. Super. 447 (App. Div. 1982), petitioner, having received all due process which is due her, may not appeal the matter further." (Reply Exceptions, at p. 3) The Board of Examiners avers that the ALJ rightfully concluded petitioner's only recourse was an informal hearing, albeit the Board of Examiners maintains the ALJ assigned that informal hearing to the wrong administrative agency. "Thus, petitioner has had her contested case formally adjudicated. She is simply unhappy with the results." (Id., at p. 3)

The Board of Examiners posits that petitioner's exceptions cite cases that were all decided before the Appellate Division decided Dore, supra, which, it avers, holds that the nontenured teacher may not litigate a nonrenewal of employment. Thus, claims the Board, "Dore is dispositive of the matter. Accord, Guerriero v. Glen Rock Board of Education, App. Div. Dkt. No. A-3316-85T6 (December 17, 1986)***." (Reply Exceptions, at p. 3) It further argues that the cases cited by petitioner are inapposite also because they involve certified teachers, whereas petitioner is not.

> Thus, she was merely seeking a license, with the expectation of possible employment. This expectancy, however, is not a constitutionally protected interest, nor does it require a full

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> trial-type hearing upon denial. See, In the Matter of Patrick Pizzata, Battalion Fire Chief, Weehawken Township, App. Div. Dkt. No. A-5474-83T7 (March 6, 1985)***. Hence, when petitioner seeks a full administrative hearing on the merits of her allegations, she is asking for a right not accorded non-certified individuals seeking a position." (Reply Exceptions, at p. 4)

The Board of Examiners summarizes its position stating that the only issue in the instant matter is whether petitioner received the due process due her. It avers she is due only an informal hearing, because she is a non-certified individual. The Board submits, however, that said informal hearing should have been held before the local district board of education. As with any non-licensed person, the Board of Examiners argues, after the informal hearing before the local board, petitioner has no right to litigate the matter further.

> If, however, the Commissioner instead accepts the recommendation of the ALJ that the petitioner must be granted an informal hearing before the Board of Examiners, then the Board requests that there be included in his decision a clarification of the Initial Decision to emphasize that petitioner, just as any individual who is neither tenured nor certified, has no right to litigate the merits. (Reply Exceptions, at p. 4)

Upon a careful review of the record before him, the Commissioner rejects the initial decision for the reasons that follow.

Initially, the Commissioner finds no merit in the argument posited by the Board of Examiners that, as an alternate route teacher, petitioner "possessed no certification." (Reply Exceptions, at p. 2) While the Commissioner agrees with the Board of Examiners' statement that no one is permitted to teach without a teaching certificate in the State of New Jersey, petitioner herein was indeed provisionally certified by virtue of her participation in the alternate program. In this regard, petitioner enjoyed a status analogous to any other nontenured teacher in the local district board's employ and thereby was entitled to the same due process rights as any other nontenured teachers in its employ. See Dore, supra. Accord, Guerriero, supra Consequently, the Commissioner does not agree with the Board of Examiners' argument that a nontenured teacher may not litigate a nonrenewal of employment because Dore, supra, does not stand for that proposition. Rather, it stands for the proposition that "boards of education in the State of New Jersey have unlimited discretion to decide in a non-tenure context who will be retained and who will not be retrained as teaching staff members, in non-tenure context so long as that decision does not violate a teacher's constitutional or

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legislatively conferred rights." (emphasis supplied) (Guerriero, Commissioner's Decision, at p. 4) See also N.J.A.C. 6:11-4.1, but cf., N.J.A.C. 6:11-4.2:

6:11-4.1 Standard certificate

Certificates with lifetime validity are issued to candidates who meet New Jersey Standards for standard certification.

6:11-4.2 Provisional certificate

(a) A provisional certificate is a substandard one-year certificate issued to an applicant who is not eligible for a standard certificate. It may be issued under certain circumstances to an applicant whose preparation does not meet completely the New Jersey requirements for standard certification.

(b) To be eligible for the provisional certificate the applicant shall:

1. Hold a bachelor's degree from an accredited college or university (except in certain technical fields as noted in N.J.A.C. 6:11-6.3(c)) and;

2. Pass a subject matter test for teaching field(s) or a test of general knowledge for the elementary and nursery endorsements. In order to be eligible to take a subject field test, the applicant must have completed at least 30 semester hours in a coherent major or five years of experience in the subject fields; and

3. Have been offered employment in a New Jersey public school district approved by the Commissioner at the recommendation of the Board of Examiners to offer a certification training program; and

4. Persons who pass the appropriate test shall be granted a formal document which will enable them to seek employment as provisional teachers in the public schools.

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However, at this early juncture in the matter, it is inappropriate to carry the analogy of petitioner's employment status as a nontenured teacher in the local district board's employ any further. Petitioner's reemployment in the district for the fall of 1987-88 is not at issue at this point in the proceedings. Rather, her permanent certification, a prerequisite to continued employment in the district, is. Properly framed, the matter before the Commissioner currently is the extent of the due process owed petitioner, if at all, in challenging her entitlement to a standard teacher's certificate and, if due process is owing, in what forum. To this extent, the matter is one of first impression before the Commissioner of Education and warrants a review of the pertinent regulations concerning the alternate route to certification as compared with the traditional college preparatory programs in the State of New Jersey for teacher preparation and certification.

In the traditional college teacher preparation route, candidates are required to complete, satisfactorily, certain prescribed courses of study and a practicum before being confirmed as candidates for certification. Thereafter, candidates for certification are assigned to student teaching. At that juncture, N.J.A.C. 6:11-7.2(d), (e), (f) and (g) require:

> (d) Colleges shall recommend for certification to the Department of Education only those students who have completed the certification program and have:
>
> 1. Maintained a cumulative grade point average of 2.5 (4 equals A);
>
> 2. Demonstrated continued competence, aptitude, motivation, and potential for outstanding success in teaching as indicated by assessments of student teaching performance by college and school supervisors. Such assessments shall be communicated to the student and shall be a part of the student's file.
>
> (e) All standards are to be applied equitably to all students, including transfer students, and without discrimination based upon legally prohibited critieria (sic). All admissions and retention processes are to be consistent with State and institutional affirmative action policies and goals.
>
> (f) Colleges shall develop appropriate procedures for placing on probation and dismissing from the program students who

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fall below minimum requirements before graduation, and shall incorporate into these procedures methods for appeals by students.

(g) Students completing an approved program must be recommended for a certificate by their college or university before one will be issued by the State Board of Examiners.
(emphasis supplied)

Thus, via the traditional route to teacher certification, if a student is not satisfied with the assessments of his or her student teaching performance made by the college and/or school supervisors, N.J.A.C. 6:11-7.2(f) requires that the college shall incorporate into these procedures methods for appeals by students. Thus, it is apparent that had petitioner herein been a part of a college teacher certification program, she might have availed herself of the appeal procedure at her college if she felt that the evaluation of her professors and/or teacher supervisors was questionable. Thus, due process in the form of some type of review is available to candidates for teacher certification in the college training route.

The situation in the alternate route to certification similarly accepts the local school district as the training institution, as described below.

N.J.A.C. 6:11-5.7 states:

(a) At the conclusion of the alternative training program, the chairperson of the Support Team shall prepare a comprehensive evaluation report on the provisional teacher's performance. This report shall be submitted by the Chairperson directly to the Bureau of Teacher Preparation and Certification and shall contain a recommendation as to whether or not a standard certificate should be issued to the provisional teacher.

(b) The final comprehensive evaluation report on each provisional teacher shall be made on standard forms developed by the State Department of Education.

(c) The final report on each provisional teacher shall include one of the following recommendations:

1. Approved: recommends issuance of a standard certificate.

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2. Insufficient: recommends that a standard certificate not be issued but that the candidate be allowed to seek entry on one more occasion in the future into a State-approved training program.

3. Disapproved: recommends that a standard certificate not be issued and that the candidate not be allowed to enter into a state-approved training program.

(d) All certification recommendations must be either accepted or rejected by the State Board of Examiners in accordance with the same procedures used for graduates of New Jersey college preparation programs.
(emphasis supplied)

In the alternate route to teacher certification, the recommendation of a candidate for certification that is forwarded to the Board of Examiners is the consequence of the observations, evaluations and comprehensive evaluation report compiled by the PST, an agent of the local district board. Consequently, any failure to be recommended for standard certification before the Board of Examiners must be based upon a challenge of the evaluation process that took place within the local district.

If petitioner in this case seeks redress in averring that the evaluation of her performance not recommending her for standard certification was discriminatory, biased or inaccurate, then that redress must be sought through the Commissioner by challenging the alleged improprieties or impermissible actions made by the local district board through its PST. In naming only the Board of Examiners, not the local district board, as respondent in her Petition of Appeal, petitioner herein challenges a body to defend evaluations and recommendations which it did not make and, therefore, could not possibly defend against.

Thus, the Commissioner finds that a hearing before him on the issue of whether the recommendation issued by the PST herein was appropriate is the proper forum sought by petitioner herein. However, since petitioner did not join the local district board as a party to the instant matter but, rather, only the Board of Examiners, the Commissioner finds the matter is not properly before him at this time. Hence, it must be dismissed without prejudice to petitioner to refile a properly drafted Petition of Appeal naming the proper party, that is the local district board of education, should she feel that her due process rights have been violated on the issue of whether the recommendation of the PST was fatally flawed by improper motives, discrimination or bias under the circumstances of her case. Dore, supra; Guerriero, supra

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Accordingly, the initial decision is rejected for the reasons stated herein. The Petition of Appeal is dismissed without prejudice.

COMMISSIONER OF EDUCATION

August 4, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8569-86
AGENCY DKT. NO. 395-12/86

MATAWAN REGIONAL TEACHERS' ASSOCIATION AND MARIE PANOS,
Petitioners,
v.
MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION,
Respondent.

Mark J. Blunda, Esq., for petitioners (Oxfeld, Cohen, Blunda, Friedman, Levine & Brooks, attorneys)

Vincent C. DeMaio, Esq., for respondent (DeMaio & DeMaio, attorneys)

Record Closed: May 28, 1987 Decided: July 13, 1987

BEFORE DANIEL B. MC KEOWN, ALJ:

The issue presented in this case is whether the Matawn-Aberdeen Regional School District Board of Education (Board), through acquiescence in allowing its superintendent of schools to change the final grade of a pupil from the grade assigned her by her teacher, Marie Panos (petitioner), acted arbitrary or capricous, in violation of Education Law, N.J.S.A. 18A:1-1 et seq., State Board rules and regulations, N.J.A.C. 6:1-1 et seq., or in violation of the Board's own policies. After the Commissioner transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a hearing was scheduled and conducted May 4, 1987 at the Aberdeen Township Municipal Building, Aberdeen. The record closed May 28, 1987 upon receipt of post hearing briefs filed by the parties.

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BACKGROUND FACTS

The relevant background facts of the matter which are not in dispute between the parties and as established by a preponderance of credible evidence in the record are these. Petitioner has been employed by the Board as a teaching staff member for 25 years. Petitioner also presently serves as president of the Matawan Regional Teachers' Association. During the 1985-86 academic year, petitioner was assigned to teach, among other courses, tenth grade honors in United States History. The course lasted the complete academic year and had a maximum enrollment of 25 pupils. Grades were issued to pupils four times a year. Pupils assigned honors classes are held to higher levels of achievement than pupils in non-honors classes. Petitioner evaluates her honors class pupils on thoroughness, creativity, insight, and application. While petitioner testified that there are no Board standards regarding the evaluation of honors pupils and that such evaluation is left exclusively to the judgment and discretion of the assigned teacher, the Board does have a grading policy (P-5) which provides standards for teachers to follow.

J.K., one of the pupils enrolled in petitioner's tenth grade honors class for history, was absent for eight days during May 1986 because of chicken pox. During the course of J.K.'s absence, petitioner assigned each pupil to prepare and submit an essay on the strengths and weaknesses of the Articles of Confederation. J.K.'s parents advised the guidance department of the reasons for J.K.'s absence during this period of time and requested work for her to do at home. Petitioner did not list the essay on the assignment she sent home to J.K. which assignment did include a make-up test and some reading.

Upon J.K.'s return to class on or about May 14, 1986, petitioner did not volunteer that the essay on the Articles of Confederation was due nor did J.K. ask petitioner if she missed other assignments during her absence.

On June 24, 1986, the day before final examinations, petitioner returned the Articles of Confederation essays to the pupils who had submitted them prior to May 14, 1986. The following day, J.K. achieved grades of 100 and 99 on the final examination which was administered in two parts. The day following final examinations petitioner distributed to her pupils their third and fourth marking period grades. J.K., who was given an 85 for the fourth marking period, was advised by petitioner that the 85 was a result of her failure to hand in the Articles of Confederation essay. J.K. had no prior knowledge she was obligated to submit the easay. When petitioner returned the essays to the other

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pupils on June 24, J.K. was absorbed in studying for the final and paid no attention to the distribution. J.K. was then advised by petitioner she may not now hand in the essay. Petitioner takes the position that it is J.K.'s responsibility for obtaining and completing all assignments and that J.K. had had enough time from early May to late June to complete and submit the essay.

Petitioner arrived at a grade of 85 as J.K.'s fourth marking period grade by dividing three into the sum of 100 and 99. Obviously, petitioner assigned J.K. a zero for her asserted failure to submit the essay. It is noted that J.K.'s final grade for the honors course in United States History was a 93 according to petitioner's calculations.

Nevertheless, J.K. and her parents were upset that J.K. was assigned a grade of 85 for the fourth marking period on the grounds that she failed to submit an essay which was assigned during a period of her absence because of illness from school. Their position is that because the essay assignment had been announced by petitioner prior to the time petitioner sent home assignments for J.K. to work on during her convalescence, petitioner was obligated to advise J.K. of the essay assignment. Petitioner is of the view that J.K. had the obligation of seeking out from her "buddy" assignments that she, petitioner, did not bring to J.K.'s attention. Petitioner explained that the buddy system is instituted by her at the beginning of each and every academic year which obligates all pupils to select a "buddy" from their classmates. Pupils who are absent from school for whatever reason during the course of the academic year are then obligated to communicate with their buddy to discover assignments they may have missed, work covered during their absence, and other matters which may have been addressed during their absence.

J.K.'s father telephoned petitioner seeking to secure permission for his daugther to submit the essay. Petitioner refused the father's request but when he persisted petitioner advised she would return his telephone call. Petitioner talked with the vice principal about the matter and the vice principal, having petitioner's explanation and then having reviewed the Board's homework policy contained within its Student-Parent Handbook (P-3 at pp. 7-9), concluded that petitioner was correct. The principal then entered the conversation and based on the vice principal's conclusion, he concluded that petitioner was correct and that the grade assigned J.K. for the fourth marking period must stand. Petitioner thereafter advised J.K.'s father that she had reviewed the Board's policy regarding homework and discussed the matter with administrators with the result that she, petitioner, was correct in her judgment and that J.K.'s grade for the fourth marking period would not be changed because of J.K.'s failure to submit the essay.

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The father then complained to the superintendent about the matter and on the following day, June 27, 1986, submitted a letter (R-2) to the superintendent. The high school principal was advised by the assistant superintendent to review the letter submitted to the superintendent by J.K.'s father. The principal first testified at hearing the assistant superintendent told him he hopes he, the principal, changes J.K.'s grade but, within moments, the prinicipal testified the assistant superintendent merely asked him to investigate the matter. A meeting followed among J.K., her father, and the high school principal.

In the meantime petitioner, who had begun the summer recess and was no longer obligated to report to school daily, had no knowledge of the receipt by the superintendent of the letter from J.K.'s father nor was petitioner invited to attend the meeting among the principal, J.K. and J.K.'s father. Nevertheless, petitioner was advised by the high school principal that he had reviewed her gradebook and was concerned about asserted inconsistencies in her assigned grades for the honors United Stated History class.

The principal, having met and discussed the matter with J.K. and her father, concluded in early July 1986 that J.K. should be given the opportunity to make up the assignment regarding the Articles of Confederation based on the fact J.K.'s parents requested work be sent home to J.K. during her illness with chicken pox during early May and that it was during her illness with chicken pox that the essay assignment was given to pupils in J.K.'s class. The principal imposed no deadlines upon J.K. to submit the essay although it was submitted July 17, 1986.

Prior to the principal arriving at that conclusion, he had telephoned petitioner on two occasions to inquiry if she would reconsider her refusal to allow J.K. to make up the essay. On both occasions, petitioner refused to reconsider her decision because, in her view, she was correct and because J.K. herself was obliged to know class assignments. When the principal received the assignment from J.K. he assigned two vice principals to review and grade the essay. One vice principal, Thomas Stachura, possesses certification as a Social Studies teacher, teacher of English, guidance, Director of Guidance, and as a secondary school principal. The other vice principal, Mrs. Rebarick, possesses certification as a teacher of English and she possesses the appropriate certificate for her employment as a vice principal. Mr. Stachura evaluated the paper on its content while Ms. Rebarick evaluated the paper on its grammar. Their joint evaluation resulted in a grade which when averaged into J.K.'s grades on her final examinations resulted in a 94 as

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a grade for the fourth marking period. Consequently, the principal went about the business of changing J.K.'s grade from the 85 assigned her by petitioner for the fourth marking period to a 94 for the fourth marking period. J.K.'s final grade was increased from 93, or "A", or a 94, or "A".

Petitioner was advised in writing on or about August 28, 1986 by the high school principal that he changed J.K.'s grade for the honors course in United States History from the grades she assigned J.K.

The foregoing relevant background facts constitute the relevant facts of the matter. It is recognized that at the hearing testimony and evidence was elicited regarding whether the high school principal was directed by the assistant superintendent to "change" J.K.'s grade and whether the essay finally submitted by J.K. was graded by individuals not properly certificated to teach History and thereby not qualified to grade the controverted essay. This testimony and evidence is not relevant to the central issue in this case which is whether J.K. had or should have had requisite knowledge of the essay requirement.

DISCUSSION AND FINDINGS

In her brief filed, petitioner poses certain questions which she claims must be decided in this case. These questions, it is noted, are posed after the statement is made that "A student, and parent, who challenge the grade of a student who receives an "'A'" for the year evidences a consuming concern for grades." (Petitioner's brief, at p. 18). Petitioner queries whether a board is permitted to alter the grade of a student without the knowledge of a teaching staff member who evaluated the student's performance; is a board permitted to alter the grade of a student without the consent of the teaching staff member who evaluated the student's performance; is a board permitted to vary from its policy on grading and student responsibility for make-up work; is a board permitted to alter a student's grade by giving the student make-up work different than was assigned by the teacher in charge; is a board permitted to alter a student's grade in a particular subject matter by having work evaluated by an individual who is not certified in that discipline; may a board allow its administrators to ursurp the grading evaluation and grading performed by the certified and teaching staff member; and, whether administrators are permitted to testify falsely in a hearing conducted by an administrative law judge.

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Initially, it must be noted that the final grade assigned J.K. by petitioner was not significantly changed as the result of the essay J.K. was ultimately allowed to submit by the high school principal. That is, petitioner assigned her a final grade of 93, or an "A" for the year, while her final grade for the year was increased to a 94, or an "A" following her submission of the essay. This case is not so much a matter where a student and her parents evidence a consuming concern for grades as it is a case where a student and parents feel they have been subjected to such unfair and arbitrary treatment by a teacher that they had to seek legal redress in order to correct the unfairness.

If petitioner truly believed J.K. had the obligation of securing the essay assignment from her buddy, petitioner fails to explain in this record why it is she took the time to send home any assignments to J.K. while J.K. was recuperating from chicken pox. The very fact petitioner sent home assignments at J.K.'s request during the time she was recuperating led J.K. to rely upon petitioner's statement as to her assignments to be performed while recuperating. Furthermore, J.K. relied upon petitioner's silence upon her return to school when petitioner failed to advise J.K. of her obligation to submit an essay on the Articles of Confederation. It is of no comfort to petitioner to take the position that J.K. had the obligation to seek out from her buddy what the assignment was during her absence particularly in light of the affirmative communication to J.K. by petitioner of what assignments she should do while at home.

As noted by the Board in its brief, a prior Commissioner's decision, Talarsky v. Edison Twp. Bd. of Ed., 1977 S.L.D. 862, teaches that

> It is essential that local board must retain such authority of review to present assignment of unreasonable or arbitrary grades. The acts of teachers may neither be insulated from administrative review of their supervisors nor from quasi-judicial review by the Commissioner or judicial review by the courts.
>
> at 870.

In this case, the basic facts are that J.K. was absent from school eight days during May 1986 for the legitimate reason she contracted chicken pox. The parents of J.K. requested J.K.'s teachers, through the Board's guidance office, to advise J.K. of the work she should be doing at home during her period of recouperation. Petitioner responded to the parents' request for such work and thereby led J.K. and her parents into truly a false sense of security. Petitioner eventually penalized J.K., and unfairly so, by

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assigning her a zero for the failure to submit the essay when petitioner falsely lead J.K. into believing she, petitioner, advised J.K. of assignments and readings she missed during her illness.

Petitioner placed J.K. and her parents in the position of seeking redress through school administrators. There is no persuasive evidence before me that any administrator testified falsely before me. That the principal seemingly changed his testimony between direct and cross examination is insufficient, standing by itself, to import to him the offense of perjury. The principal had a legitimate basis, having listened to J.K. and to her father, to allow J.K. to submit an essay on the Articles of Confederation. There is nothing improper or inappropriate for two vice principals to grade the essay, one for content and one for grammar. Obviously, petitioner had taken a strong position against allowing J.K. to submit a make-up essay. The appearance of bias or prejudice on her part to grade the make-up essay would be so strong and overwhelming that the principal clearly acted reasonably in having the vice principals grade the make-up essay.

In short, there is absolutely no basis in the evidence presented by petitioner to arrive at a finding that the Board, its agents, officers, or employees acted in any way arbitrary, capricious or unreasonable by allowing J.K. to submit a make-up essay nor is there any evidence to show the principal acted arbitrary, capricious or unreasonable, beyond the scope of Education Law, State Board rules and regulations or in violation of the Board's own policies in assigning two vice principals to grade the essay and on the result of that grading to change the grade of J.K. for the fourth marking period from an 85 to a 93 and J.K.'s final grade from a 93 to a 94. Petitioner has failed in her proofs to demonstrate by a preponderance of credible evidence that the Board of Education, through acquiescence, acted in any way arbitrary or capricous.

Finally, in response to the questions posed by petitioner, a board of education is permitted, depending upon the circumstances such as here, to alter the grade of students without the knowledge of the teaching staff member who was in charge of that particular class; a board is permitted to alter the grade of a student without the consent of the teaching staff member in circumstances such as herein; a board is permitted to vary from its only policy on grading and student responsibility for make-up work in circumstances

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such as herein; a board is permitted to alter a student's grade by giving the student make-up work different than that which was assigned by the teacher in charge in circumstances such as herein; a board is permitted to alter a student's grade in a particular subject matter by having work evaluated by an individual who is not specifically certified in that discipline in circumstances such as herein; and, a board may allow its administrators to assign grades other than the grades assigned by a teaching staff member otherwise assigned to grade that pupil's performance in circumstances such as herein.

The Petition of Appeal is **DISMISSED.**

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

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

July 13, 1987
DATE

DANIEL B. MC KEOWN, ALJ

JUL 13 1987
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 16 1987
DATE

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MATAWAN REGIONAL TEACHERS ASSOCIATION AND MARIE PANOS,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties within the time prescribed by N.J.A.C. 1:1-18.4.

Upon review of the record, the Commissioner is in agreement with the findings, conclusions and recommendation of the Office of Administrative Law to dismiss the Petition of Appeal. Accordingly, the initial decision is adopted as the final decision in this matter for the reasons expressed therein. The record amply supports that neither the Board nor any of its designees acted in an illegal, arbitrary, capricious or unreasonable manner. Rather, the record demonstrates that petitioner herself acted in an arbitrary and unreasonable manner when giving a zero and denying the pupil the opportunity to submit an essay assigned during the pupil's prolonged illness but not included in the assignments sent to the pupil's home by petitioner.

COMMISSIONER OF EDUCATION

August 12, 1987

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