NEW JERSEY

SCHOOL LAW

DECISIONS

January 1, 1989 to December 31, 1989

VOLUME 4

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Saul Cooperman
Commissioner of Education

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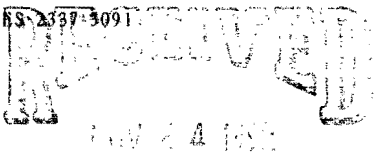

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3871-88
AGENCY DKT. NO. 141-5/88

WALTER J. McCARROLL,
ASSISTANT COMMISSIONER,
DIVISION OF COUNTY AND
REGIONAL SERVICES, NEW JERSEY
DEPARTMENT OF EDUCATION,
Petitioner,
v.
BOARD OF EDUCATION OF
JERSEY CITY, ITS OFFICERS,
EMPLOYEES, APPOINTEES AND AGENTS,
Respondent.

Sally Ann Fields, Deputy Attorney General; **H. Edward Gabler III**, Deputy Attorney General; **Timothy J. Rice**, Deputy Attorney General; **Vincent J. Rizzo, Jr.**, Deputy Attorney General; and **Marlene Zuberman**, Deputy Attorney General, for petitioner (Peter N. Perretti, Jr., Attorney General of New Jersey, attorney)

David H. Pikus, Esq., member of the New Jersey Bar, and **Helene M. Freeman**, Esq., member of the New York Bar, admitted *pro hac vice* for respondent (Shea & Gould, attorneys). Attorney of Record: **William A. Massa**, Esq. (Law Department, Board of Education of Jersey City); **Michael S. Rubin**, Esq., of counsel.

Record Closed: May 22, 1989 Decided: July 26, 1989

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

I. Statement of the Case

This case is about the quality of education for children in the State of New Jersey. Alarmed that a few local school districts are failing to provide the thorough and efficient system of free public schools mandated under the state constitution, *N.J. Const.* (1947), Art. VIII, §IV, ¶1, the Legislature recently enacted legislation authorizing the State Department of Education ("State") to take over operation of a local district unable or unwilling to correct deficiencies identified during an elaborate State monitoring process. *P.L.* 1987, c. 398 (effective Jan. 13, 1988). Companion legislation provides for creation of a State-appointed school board to run such district for at least five years and for replacement of the superintendent of schools and other key central office administrators. *P.L.* 1987, c. 399.[1] Only a small number of school districts are potentially subject to takeover, since the statutory scheme applies only to districts which cannot reasonably be expected to achieve State certification on their own. The present proceeding is the first and only time the State has sought to invoke the powers conferred by the new law.[2]

State officials charge the Jersey City school district with a recurring pattern of gross deficiencies in the areas of governance and management, educational programs and fiscal practices. Allegedly these problems have produced dire consequences which the State contends have brought the district to the brink of "managerial bankruptcy." Among the more serious charges levied against the

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[1]Adopted as amendments to the Public School Education Act of 1975, *N.J.S.A.* 18A:7A-1 *et seq.*, the statutory authority for the establishment of a State-operated school district is codified at *N.J.S.A.* 18A:7A-14 and -7A:15, and the procedure for governance of State-operated school districts is codified at *N.J.S.A.* 18A:7A-34 to 52, *N.J.S.A.* 18A:9-1 and *N.J.S.A.* 18A:10-1.

[2] New Jersey has 583 local and regional school districts, 463 or 80% of which passed Level I and obtained certification immediately. Of the 120 school districts which originally failed, 102 have since obtained certification, seven are still in Level II and eleven are in or about to enter Level III.

present managers are consistent inability of the district to meet minimum certification requirements and academic standards; lack of an adequate policy framework to guide district activities; widespread political intrusion into the school system; personnel decisions made on the basis of patronage, nepotism or union pressure; inadequate evaluation of staff; failure to hold employees accountable for poor performance; use of outmoded curricula and instructional materials; unacceptably low student attendance and unacceptably high dropout rates; disregard of the legal rights of handicapped children and their parents; sloppy financial record-keeping and ineffective controls over expenditure of public money; violations of the public bidding laws and imprudent business practices; misappropriation of federal and state funds earmarked for specific purposes; and failure to maintain a safe and wholesome environment in which children can successfully learn.

Defense of the local board against the State's charges takes two tacks. As its first line of defense, respondent Jersey City Board of Education ("Jersey City" or the "board") denies the accuracy of the State's description of current conditions and challenges the objectivity of State monitors.[3] Jersey City maintains that it has already instituted significant reforms and improvements, and that it is fully capable of solving any remaining problems without outside intervention. Indeed, Jersey City points to recent developments which it says show that the district has made remarkable progress and is currently on an "upswing." Cental to this part of Jersey City's defense is its contention that the State placed excessive reliance on hearsay evidence from biased sources and that the actual record provides little support for the State's purported findings. As its second line of defense, Jersey City seeks to shift responsibility away from itself and onto persons or circumstances beyond its control. Insofar as some deficiencies may still exist, Jersey City blames them on the aftermath of mismanagement under a different school board and mayor, on the claimed failure of the State to act sooner to stop dissipation of resources, and on social and economic conditions prevalent in many large urban settings. Further, Jersey City

[3] "Jersey City" refers to the local educational district and its school board, as distinguished from the municipality itself and its governing body, which will be referred to as the "City."

criticizes the State for making unrealistic demands which do not sufficiently take into account its unique history, socioeconomic character and fiscal constraints.

Both sides agree that the basic issue underlying this litigation is relatively simple, although each accuses the other of distorting the facts, burdening the record and clouding the issues. Despite their differing perspectives, the parties are in fundamental agreement on what this case is all about. Petitioner defines the major issue in terms of whether the local district "has failed to take or is unable to take the corrective actions necessary to provide a thorough and efficient educational system." Similarly, respondent emphasizes the statutory focus on "corrective action" and the extent to which the district is or is not capable of solving its own problems. The takeover statute itself supplies the standard of review applicable at this stage of the proceedings. At the administrative hearing, the State has the burden of proving that the proposed takeover order "is not arbitrary, unreasonable or capricious."[4] Stated in this way, the scope of the inquiry is extremely narrow and limited. It is not whether the Commissioner of Education ("Commissioner") and his staff are necessarily correct in their analysis, but merely whether there is enough evidence for a reasonable person to reach the same conclusion.

For reasons discussed in detail below, the State has easily satisfied its limited burden. Even under separate weighing of the evidence and independent fact-finding, however, the record strongly supports the need for State takeover to address long-standing problems which the local district has been unable to cure. Ample proofs establish that the children attending public school in the district are

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[4] *N.J.S.A.* 18A:7A-14(e). Such limited scope of review at the administrative level is a common feature of education law, although normally it applies to state agency review of local board action. Illustratively, a school board's withholding of a teacher's salary increment may not be upset unless the teacher can show that the action was "patently arbitrary, without rational basis or induced by improper motives." *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294-295 (App. Div. 1960). A school board's discretion to grant or deny tenure must be upheld unless "based on frivolous, capricious, or arbitrary considerations which have no relationship to the purpose to be served." *Ruch v. Greater Egg Harbor Reg. High Sch. Dist*, 1968 *S.L.D.* 7, cited with approval in *Donaldson v. N. Wildwood Bd. of Educ.*, 65 *N.J.* 236, 247 (1974). But see *In re Masiello*, 25 *N.J.* 590 (1958), recognizing that the Commissioner of Education may be required to exercise independent judgment if necessary to assure that the terms and policies of the school law are being faithfully effectuated.

not receiving the thorough and efficient education to which they are entitled, that political interference originating in earlier school administrations has continued, that public money allotted to education in the district is being misspent, and that district problems chronicled in so many State reports are deep-rooted and endemic. Social and economic conditions do not excuse shortchanging the children, and in fact provide additional reasons why capable management of the district is so important to the future of the next generation. Children from impoverished backgrounds must not also be condemned to poor schools.

II. Procedural History

A. Results of State Monitoring

Issuance of a takeover order is the last step in a lengthy monitoring process. Regulations prescribe a three-tier procedure for monitoring local school districts. [5]

Level I, conducted by the County Superintendent's Office ("County Office"), involves evaluating performance against a set of ten "elements" subdivided into a total of 51 "indicators."[6] The County Office is an arm of the State and the county superintendent is the agent of the Commissioner on the local scene. If a district passes the first phase of monitoring, it receives certification valid for five years. If not, it must go on to the next level. From March 27 to June 7, 1984, the staff of the Hudson County Office, under the supervision of County Superintendent Louis C. Acocella, conducted an evaluation of the Jersey City district. On June 15, 1984, the county superintendent rated Jersey City "unacceptable" in nine of the ten elements (all but school/community relations) and in 32 of the 51 indicators.

Level II, also under the auspices of the county superintendent, offers an opportunity for the local district to prepare and implement its own self-study and improvement plan. Although the plan is developed by committees of educators and citizens from the local district, the County Office stands ready to provide technical assistance and must approve the plan before it is put into effect. Again, if the district passes the second phase, it obtains certification without entering the next level. Jersey City took almost the entire 1984-85 school year to write its self-improvement plan, which eventually gained county superintendent approval in April 1985.[7] Throughout the 1985-86 school year, Jersey City implemented its self-improvement plan. Next year, between September 15 and November 17,1986, County Office staff

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[5] *N.J.A.C.* 6:8-4.1 *et seq.* and -5.1 *et seq.*

[6] These ten elements are planning, school/community relations, curriculum/instruction, student attendance, facilities, professional staff, mandated programs, basic skills, equal educational opportunity/affirmative action, and financial. In turn, each element has from two to six indicators.

reevaluated the district to see if the prior deficiencies had been corrected. In a report dated December 17, 1986, the county superintendent rated eight elements and 28 indicators as still unacceptable. Dissatisfied with the rating on five indicators, Jersey City pursued its right of appeal to an assistant commissioner, who changed one indicator and confirmed the others, leaving 27 negative ratings.

Level III represents a marked shift in emphasis. While the earlier levels focused on identifying problems, the third level explores the causes of any continuing deficiencies. There are two distinct components: (1) the preliminary review and, under certain circumstances, (2) a comprehensive compliance investigation (abbreviated "CCI"). The preliminary review has two main features. An external team of educational experts, carefully selected from outside the district, examines those areas previously found to have been deficient. Team members look at documents, visit school buildings and talk with local administrators and teachers before arriving at a consensus . In addition, the Office [now Division] of Compliance, comprised of State auditors and interviewers, undertakes a thorough investigation into management and business functions.

Once the preliminary review is complete, the State must choose between alternate courses of action. Either the State directs the district to establish a corrective action plan and assures that sufficient funds are available to implement such plan; or, in the event that conditions within the district preclude internal reform, the State initiates a more intensive inquiry known as the CCI. To assist in this endeavor, the State may retain the services of independent accounting or management firms. At the conclusion of the CCI, the State issues a final report documenting the district's irregularities and may issue an order to show cause why the district should not be taken over.

In the case of Jersey City, the State conducted its Level III preliminary review from January through May 1987. During March and April, an external team, chaired by urban educator Greta Shepherd, made extensive visits to district schools.

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[7]Understandably, because Jersey City was already seven months late in submitting its plan, the State denied the incoming school administration's request for more time to make last-minute revisions.

Meanwhile, investigators from the compliance unit, under the leadership of director Richard Kaplan, examined records and interviewed persons knowledgeable about district affairs. Both the compliance unit and the external team gave unfavorable reports about Jersey City and recommended further action. Assistant commissioner Walter J. McCarroll, in charge of all county offices, determined that a CCI was necessary. On June 5, 1987, McCarroll announced the start of the CCI, which continued for nearly a year and culminated in the preparation of a three-volume report of over 3,000 pages. Highlights of the CCI Report include a management audit performed by the consulting firm of Cresap, McCormick & Paget and an investigation into certain fiscal practices performed by the accounting firm of Peat Marwick Main & Co.

B. Proceedings Before the Office of Administrative Law

By order to show cause entered on May 24, 1988, Commissioner Saul Cooperman directed Jersey City to appear before the Office of Administrative Law ("OAL") to show why a State-operated school district should not be created. Accompanying the order were a verified complaint filed by assistant commissioner McCarroll and a motion for emergent relief with supporting affidavits. Commissioner Cooperman transmitted the matter to the OAL on May 26, 1988, but originally retained jurisdiction over the emergent relief motion. Jersey City filed its answer with the OAL on June 1, 1988.

On the return date of the order to show cause, June 3, 1988, counsel for the parties delivered opening statements and participated in a prehearing conference. After a short discovery period, the OAL held 103 days of hearings, commencing on July 11, 1988 and ending on March 3, 1989.[8] These hearings generated a massive record consisting of more than 21,000 pages of transcript and more than 800 separately identified documents. Witnesses and exhibits are listed in the appendices.

[8]A large part of the first week of hearings was devoted to evidentiary problems relating to the State's claim of executive privilege for certain documents.

While the hearing was in progress, Commissioner Cooperman granted Jersey City's motion that he recuse himself from further involvement in the decision-making process, and he designated assistant commissioner Lloyd J. Newbaker to act in his place.[9] Additionally, Commissioner Cooperman authorized the OAL to rule on the pending emergent relief motion. The OAL heard oral argument on July 25, 1988. That same date, the OAL granted the State's request for immediate veto power over the district's personnel changes and over expenditures exceeding $5,000, but denied the State's request for access to the district's internal communications system.[10]

Counsel filed proposed findings of fact and conclusions of law on May 1, 1989. The record closed on May 22, 1989, on which date counsel made oral closing statements. Time for preparation of the initial decision has been extended to July 26, 1989.

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[9]The Commissioner's decision on motion for recusal was entered on July 21, 1988 and a supplemental order on July 26, 1988.

[10]Emergent relief is intended to preserve the status quo until the outcome of a full hearing. Assistant commissioner Newbaker on August 9, 1988 affirmed the emergent relief order and on September 6, 1988 declined Jersey City's request for a stay of his ruling. Subsequently, on December 1, 1988, the State Board of Education also affirmed the emergent relief order, with only minor modifications.

III. Findings of Fact

A. Background Characteristics of the Community

Located in Hudson County across from Manhattan, the municipality of Jersey City ("City"), covering an area of 13 square miles, has a population of roughly 220,000, making it the second largest city in New Jersey. A rich diversity of ethnic and cultural heritages is represented. Half of the community at large belong to one or another minority group, including large numbers of African American, Hispanic, Indian, Asian and Arab residents. Over the last two decades, there has been an influx of immigrants into the City, particularly from Latin American and Asian countries. Correspondingly, the white population in the City has been dwindling. Often the newcomers speak native languages other than English or come from poor and underdeveloped countries.

Neither side disputes that the City has its share of social and economic ills, which beset many large metropolitan areas. Surprisingly, for a case so vigorously litigated, the record contains little solid information which might be useful in measuring the actual magnitude of these problems, such as census data, unemployment figures, crime and drug arrest reports, teenage pregnancy rates, or welfare statistics. Rather, the evidence consists mainly of anecdotal accounts by local school leaders of the daily problems they confront.

Illustratively, Franklin Williams, the district's superintendent of schools and life-long City resident, spoke movingly of squalid living conditions in housing projects and high-rise apartments, of children from broken families or single parent households, of racial unrest, of high unemployment, and of youngsters exposed to derelicts and drug dealers on the way to school. Similarly, Daniel Cupo, born and raised in the City and the principal of School 23, talked about homelessness, about neighborhood fear of crime, and about police occupying the roof of his school building as an observation post. Elementary school principal Claudette Searchwell, called by the State as a witness, also referred in general terms to the adverse effects of hunger, inadequate shelter, inferior city services and substance abuse.

No one, least of all the State, doubts the existence of poverty in the City or its negative impact on quality of life. Expert testimony indicates that, on average,

children from lower income families have greater absences from school and receive less encouragement at home for academic achievement. Socioeconomic factors may help to explain why, as a group, students from poor families do less well on standardized tests than students from wealthy families.[11]

What must be rejected outright, however, is any notion that the undeniable realities of inner-city life constitute a valid reason for mismanagement, political interference, waste and inefficiency, or failure to teach children the minimum basic skills needed to function in modern society. If at all relevant, the underlying social and economic conditions make it all the more imperative that the school system supply the missing advantages which children from more privileged surroundings receive automatically. Greta Shepherd, chosen to head the Level III external team because of her extensive urban school experience, places the fault for failing to educate urban children squarely on those responsible for delivery of instruction and not on the children themselves. Along the same lines, Jersey City's expert in urban education, Dr. Kenneth Tewel, an assistant professor at Queens College of the City University of New York, has suggested that urban districts should be held to higher standards than their nonurban counterparts because city students live in a more complex and demanding world. Accordingly, to the extent that Jersey City has demonstrated that its children must overcome the destructive influences of poor environment, the quality of education in the district becomes an even more critical issue.

B.Characteristics of the School District

Jersey City is a Type I school district, which means that it has an appointed rather than elected school board and that its budget is set by a board of school estimate rather than the voters.[12] Comprised of nine members, the school board is entrusted with oversight of the far-flung operations of a kindergarten-to-12th-

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[11]The existing record provides little basis for making such connection, but the literature on effective schools recognizes that standardized test results correlate positively with higher socioeconomic status.

[12]Classification into types of school districts is by statute, *N.J.S.A.* 18A:9-1, *et seq.*

grade system. Every year the mayor of the City names three members to three-year terms on the school board.[13] The five-member board of school estimate, responsible for certifying the district's appropriations, consists of the mayor, two City council members, and two school board members.

As of May 1988, the district operated 29 elementary schools and 5 high schools.[14] Most of the elementary schools have kindergarten through eighth grade programs and two (Schools 31 and 32) are special schools for handicapped or gifted children. Besides its own schools, Jersey City also has a contract to run the state-sponsored Regional Day School for classified students, serving all of Hudson County. District-wide enrollment for the 1987-88 school year totaled about 30,000 students, out of a pool of 52,000 school-aged children residing in the City. Enrollment may be further broken down into 22,300 students at the elementary level and 7,500 at the secondary level. Almost all public schools in the district have non-white enrollments in excess of 50%, with more than half having a non-white enrollment as high as 90 to 100%. However, proofs are insufficient to make any meaningful comparison between the proportion of minorities living in the City and the proportion enrolled in the public schools. Public schools must compete for talented City students against a well-established network of parochial and private schools.

In 1987-88 the district's total school budget was $172.6 million, up considerably from two years earlier in 1985-86 when the budget was $140 million. The bulk of that money goes to salary accounts. Jersey City employs about 140 administrators, 2,800 teachers or other professionals, and 1,400 custodians, security guards, lunch aides or other non-instructional staff. Revenues to pay for the Jersey City school system come primarily from taxpayers outside the district. More than two-thirds of

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[13]Upon taking office in July of an election year, the mayor appoints three board members. A year later in July, the mayor appoints three more members and his appointees effectively gain control over the board. In July of the second year, the mayor has an opportunity to rid the board of all holdovers appointed by his predecessor. Appointees of the incumbent, Mayor Anthony R. Cucci, who took office in July 1985, constituted a majority of the board by July 1986 and the full board by July 1987.

[14]These five high schools are Dickenson, Snyder, Ferris, Lincoln and Academic.

the 1987-88 budget (67.4%) came from federal and state aid and less than one-third (32.6%) from local taxes and other sources.

C. Historical Overview

One point on which both parties are fully in agreement is the existence of serious irregularities and flagrant political interference in school affairs at the time of former Mayor Gerald McCann, who was mayor of the City from 1981 to 1985.[15] Chief state investigator Richard Kaplan described the McCann era as one of unparalleled control of the school system by City Hall, while, more colorfully, Jersey City's lawyer described it as a "reign of terror." The record abounds with troubling stories of misdoings by individuals associated with the McCann regime.

Shortly after his inauguration on July 1, 1981, Mayor McCann brought in John Sheeran as president of the school board. Current superintendent of schools Franklin Williams recalled that Sheeran promptly demanded his own room and secretary in the district's central office, where he personally interviewed people for jobs with the district. Williams himself was deputy superintendent throughout the McCann years and, nominally at least, second in command of the district.

Under Sheeran, the board in 1981 abolished the positions of six assistant superintendents and later replaced them with nineteen less qualified principals "assigned to central office." In 1981 as well, the board terminated 41 untenured teachers who had supported the "wrong" candidates in the mayoral election. Custodial and maintenance people who fell into political disfavor also lost their jobs or were demoted. As Williams memorably put it, "if your father supported the opposition during the election, the child was to suffer." Ensuing lawsuits embroiled the district in litigation and, ultimately, State education officials restored to their jobs many of the district's employees who had been purged for political reasons.

In late 1981 a Hudson County Grand Jury handed down a presentment condemning the "widespread and bold-faced injection of political considerations

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[15]The City is governed by an elected mayor and nine-member council, who serve four-year terms of office.

into the selection and assignment of instructional personnel" and recommending that the board's hiring practices be "based upon sound principles of personnel management." Sheeran resigned in 1982 under pressure resulting from the Grand Jury investigation.

But Sheeran's successor as board president, Nicholas Introcasso, deputy mayor of the City and a McCann ally, "marched in with his bodyguard and . . . wanted a larger room," according to the eyewitness account of then deputy superintendent Franklin Williams. Introcasso arranged to soundproof his new room and "held audience there . . . [for] people who were looking for his support in obtaining a job or getting something done." Dr. Pablo Clausell, an assistant superintendent demoted at the time of McCann, portrayed Introcasso in much the same way. Clausell related how Introcasso ejected him from his office and left him sitting in the hallway, how Williams moved Clausell's desk into the hallway, and how Introcasso "had a wall built right next to the desk" so as not to impede the flow of visitors to Introcasso's nearby room.

Initially, Introcasso had been loyal to Mayor McCann and his administration. Soon, however, Mayor McCann perceived Introcasso as getting "out of [his] control" and developing other loyalties, so he appointed his campaign manager Aaron Schulman to the school board to keep track of Introcasso's activities. When Introcasso's term expired in 1983, Schulman succeeded him as board president.

Campaigning as a reform candidate pledged to improve school conditions, Anthony R. Cucci, a former teacher, was a top vote-getter in the May 1985 preliminary election and won the runoff contest for mayor against McCann in June 1985. Mayor Cucci took office on July 1, 1985, and immediately thereafter appointed three new board members, including Dolores Eccleston, a zone leader in his successful campaign who was promptly selected board president. Aaron Schulman, McCann's handpicked choice to replace Introcasso, remained on the board as a continuing irritant to the new administration until his term ended in 1987.

Ironically, the two top administrators presently in charge of the district are the same people who held key administrative posts during the McCann period. Superintendent Williams survived the virtual dismantling of the central office in

1981, and, as deputy superintendent while others around him were losing their jobs, assumed greater responsibility for tasks previously performed by the displaced assistant superintendents. Although Williams insists he was powerless to stop the excesses which admittedly occurred between 1981 and 1985, the fact remains that for most of that time he was the administrator directly responsible for curriculum and facilities. James Jencarelli, another of the few survivors in central office, today occupies the second highest post of deputy superintendent. At the time of McCann, Jencarelli was first assistant superintendent for personnel and, in that capacity, was involved in the wholesale dismissal of disfavored employees.

After Cucci became mayor in July 1985, Jencarelli served as "interim" superintendent for about six months, until forced to resign due to poor health. He still remains, however, in the important role of deputy superintendent. Franklin Williams took over as superintendent on August 16, 1985, under circumstances to be explored in a later section (Section III, Part E). Summing up his experience in the McCann years, Williams called it "one big complete mess, legally and morally, and financially."[16] When Mayor McCann left office, the district had failed Level I

[16]Administrative law judge Steven Lefelt, in the landmark school financing case, made factual findings that "the pervasive nature of the political intrusion into Jersey City's school system [was] shocking and harmful to the school children of Jersey City and qualitatively and quantitatively different from the pressures present in most other property poor districts." *Abbott v. Burke*, OAL Dkt. No. EDU 5581-85 (Aug. 24, 1988), rev'd on other grounds (Comm'r Feb. 22, 1989), aff'd (St. Bd. April 13, 1989), *appeal docketed*, No. A3802-88-T1 (N.J. App. Div. April 19, 1989), certif. granted while pending unheard in the Appellate Division, No. 30433 (N.J. April 28, 1989), (at 333).

monitoring and was facing a *projected* $4.4 million budget deficit.[17]

D. Alleged Bias and Negligence of State Education Officials

Before reaching the merits of the controversy, this decision will address two of Jersey City's major themes: namely, its claim that the State itself, through inaction and neglect, contributed to the district's current predicament; and its claim that State investigators did not conduct a fair and objective study of existing conditions.

Because the State was aware as early as 1982 of the enormity of the district's problems, Jersey City lambasts the State for not moving more quickly to correct the situation. There are several responses to Jersey City's transparent effort to divert attention from where it rightfully belongs. Direct State intervention is a last resort available only when local management has shown itself incapable of correcting its own problems. State officials can, and here did, provide the local district with technical assistance and support, but accountability for performance rests with the local educational authority. Far from being the basis for valid criticism, it is commendable that State officials sought to exhaust all reasonable possibility for local self-improvement before taking the drastic step of imposing an outside solution. Monitoring of all local districts in New Jersey started in 1984, and for the first few years the State was engaged in collecting information about which districts were failing and why. Legislative proposals to empower the State to take over operation of failing school districts did not become law until January 1988, and within four months the State had moved to take over Jersey City.

Assuming for sake of argument that the State should have done something sooner to save the district from itself (as will be subsequently seen, State officials

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[17]Since budget cuts were made, the anticipated deficit never materialized. Local school districts are always required to make tough choices on how best to spend finite public funds to maximize educational benefits. Jersey City must certify to the State each year that the amount of money it spends is adequate to satisfy the requirements of a thorough and efficient education. If Jersey City believed that the amount appropriated in 1985-86 was inadequate for this purpose, it was obligated to appeal to the Commissioner for more funds. *Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick*, 48 *N.J.* 94 (1966). In point of fact, the amount of money Jersey City spent on education rose steadily during the Cucci years.

believe that any remedy short of takeover would be inadequate to cure the district's entrenched problems), certainly the State is not thereafter barred from doing whatever is necessary to protect the children of Jersey City from continuing educational damage. It is pointless to speculate on missed opportunity, when the pressing question is what needs to be done now.

Jersey City's attack on the impartiality of State investigators is equally undeserved.[18] Much of this claim depends on the theory that Commissioner Cooperman had prejudged the outcome of the investigation and that his known predisposition unduly influenced the views of his subordinates. Quite the opposite is true. Instead of trickling down from the top, the initial investigatory work and making of tentative conclusions were done by low-rung State employees, and their negative findings about Jersey City filtered up from the bottom to Kaplan, Dr. McCarroll, and eventually to Commissioner Cooperman. Jersey City itself makes a point of the fact that Dr. McCarroll never personally visited the district, but relied exclusively on the reports of his staff. Commissioner Cooperman did not appear on national television until after the final version of the report had been publicly released, and he has since removed himself from further participation in the proceeding.[19]

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[18]Jersey City's criticisms reveal its fundamental misunderstanding of the administrative process. An administrative agency "is not simply a neutral forum whose function is solely to decide the controversy presented to it." *Hackensack v. Winner*, 82 *N.J.* 1, 28 (1980). Agencies are an arm of the executive branch of government, "specially created by the Legislature to administer laws in accordance with the statutory duties that have been selectively delegated to them." *In re Uniform Admin. Procedure Rules*, 90 *N.J.* 85, 91-95 (1982). Their adjudicative functions "are actually an aspect of their regulatory powers[.]" *Uniform Rules*, at 93. Agency staff are not supposed to approach their tasks with completely empty minds, but are chosen for special knowledge and expertise in highly technical fields. "We neither expect nor desire the 'total absence of preconceptions.' " *Sheeran v. Progressive Life Ins. Co.*, 182 *N.J. Super.* 237, 244 (App. Div. 1981).

[19]An agency head is not automatically disqualified merely because he has become familiar with the facts of the case through the performance of statutory or administrative duties or even because he has announced an opinion on a disputed issue; but he must step aside if he is tainted by actual bias. *In re Gen. Disciplinary Hearing of Trp. Carberry*, 114 *N.J.* 574, 585-586 (1989).

An incident on which Jersey City relies to show lack of balance and objectivity is the much ballyhooed statement by Sherilyn Poole, assistant director of the compliance unit, that her job was "to investigate the district's deficiencies and verify the systemic rotten-ness of it." In the course of discovery, Jersey City gained access to literally dozens of pages of internal State documents, and it is hardly surprising that some of them would reflect the evolution of the State's thinking at any particular time. By the time of Poole's statement in July 1987, Jersey City had been previously identified as a district in extreme difficulty and the thrust of the investigation had shifted to an examination into the causes. Recognition that something was rotten in Jersey City and needed fixing is a far cry from suggesting, as Jersey City tries to do, that Poole or any other State official refused to give the district credit for genuine improvements. Surely Poole herself does not fit into that category, since she is quoted approvingly by Jersey City for her complimentary observations about the district's revised curriculum documents. Other State witnesses also had some positive things to say about Jersey City, including praise for the many dedicated and fine teachers in the district.

Aspersions cast by Jersey City on the personal competence and integrity of State monitors are another obvious attempt to sidetrack the inquiry and deflect attention from the district's own inadequacies. Worst was Jersey City's denigration of external team leader Greta Shepherd as an "older, tired educator" who had difficulty staying awake. Contrary to the impression sought to be conveyed, at the hearing Ms. Shepherd appeared alert and feisty. Jersey City also issued an unusually harsh denunciation of county superintendent Acocella, whom it accused of not doing enough to stop Mayor McCann. Neither side saw fit to offer Acocella's testimony, although Jersey City had named him as a witness and decided at the last minute not to call him. On the existing record, the most that can be confidently said about Acocella's job performance is that the Level III investigation confirmed many of the deficiencies which Acocella or his staff had previously noted at Levels I and II.

Carping by Jersey City about relatively insignificant items, including complaints about the timing of the State's investigation or excessive paperwork requirements, does little to enhance its image. Prior to Level II monitoring in September 1986, superintendent Williams and his associates had enjoyed the advantage of a full year (1985-86) to make necessary changes in practices and procedures. State monitors are entitled to check conditions as they actually are and not only under ideal

circumstances. Regardless of the desirability of reducing unwanted paperwork, the State must still have a method of assuring that local districts are adhering to applicable statutes and regulations. Unless the State were to assign a cop to every classroom, the State must rely on record-keeping by local districts as a valuable source of information. Similarly, the fact that the State exercised editorial control over its own investigative report did not compromise the professional independence of its outside experts, all of whom testified that the ideas they expressed were their own.

In sum the evidence does not lend support to Jersey City's contentions that the State wanted the district to fail monitoring all along or is overly eager to arrogate for itself the burdensome responsibility of running the district.

E. Governance and Management

1. Abdication of the Proper Board of Education Role

Above all, State officials pinpoint Jersey City's greatest weakness as the absence of effective leadership, direction and vision at the very top of its management structure. Evaluation of this diagnosis must start with the role of the board of education. Each party has a markedly different conception of what a board of education should do and whether the Jersey City board is fulfilling its proper role.

State officials hired the national consulting firm of Cresap, McCormick and Paget ("Cresap McCormick") to conduct a management study of Jersey City and make recommendations. Supervised by Dr. Eugene Smoley, a team of Cresap McCormick researchers spent two months visiting seven Jersey City schools and interviewing 85 people from board members on down. Dr. Smoley, whose qualifications include a doctorate from Johns Hopkins University, administrative experience in a large Maryland school system and a wide range of consulting work for urban as well as nonurban districts, testified at length regarding his expert opinion and stood up well under blistering cross-examination which lasted several days. Dr. Smoley envisions the board's primary role as formulating overall policy for the district, setting clear goals and objectives, engaging in planning, picking key administrators responsible for day-to-day management and overseeing the performance of those administrators.

While not completely disagreeing with this approach, Jersey City's expert, Professor Kenneth Tewel of Queens College, puts much greater emphasis on the board's role as repository of local community sentiment and values, and on the necessity for lay board members in large urban districts to delegate decision-making authority to trained professional educators. Dr. Tewel's background is much less varied than that of Dr. Smoley and is concentrated on reform of hard-to-manage schools in Queens and Brooklyn. Perhaps because of his personal exposure to some of New York City's most violent and troubled schools, Dr. Tewel seemed somewhat complacent or jaded, and less inclined to measure a school system against rigorous standards of excellence.

In Dr. Smoley's view, the Jersey City board has failed adequately to carry out any of its main responsibilities. With respect to establishment of a policy framework, at one time in 1984 the board itself recognized that its policy manual was more than ten years out-of-date and required extensive revision to accommodate many recent changes in law and educational theory. Consequently, in December 1985 the board entered into a contract with the New Jersey School Board Association for assistance in rewriting its policy manual. Two and one-half years later, in May 1988, the board still did not have an updated policy manual, notwithstanding what the Association said were "numerous attempts to schedule the start of the project[.]"

Jersey City's excuse for assigning such low priority to such an important task raises more questions than it answers. The board attributes part of the delay to the illness of deputy superintendent Jencarelli, the person designated to coordinate preparation of the new manual. Solicitude to the health of an employee is an admirable trait, but not at the expense of the welfare of an entire district. This attitude on the part of the board points up a disturbing tendency to elevate personal loyalties and friendships over the needs of the children. Simply put, if Mr. Jencarelli was too sick to work on the manual, the board should have found someone able to do the job. On other occasions, Jersey City sought to downplay the importance of a new policy manual, referring to updated policy statements supposedly kept in mysterious loose-leaf binders at the central office but never produced at the hearing.

Insofar as planning is concerned, Dr. Smoley commented on the unambitiousness of the district's short-range objectives which dealt with little more

than satisfying minimum certification standards, on the lack of fixed timetables for achieving acceptable results, and on the utter absence of any long-range planning. Essentially, Jersey City's response was that its annual objectives must be good because the State had approved them. Apart from immediate steps to acquire greater building space and to phase in new curriculum, Jersey City did not come forward with any coherent long-range planning efforts.

Moreover, Dr. Smoley criticized the board for what he regarded as insufficient attention to educational issues and overemphasis on the details of business and personnel matters. Combing through transcripts of the 1987 board meetings, Dr. Smoley cited specific examples where the board made important educational decisions without advance review of materials furnished by the school administration. For instance, at the meeting on August 19, 1987, no one on the board, not even the chairwoman of the curriculum committee, had actually read the revised curriculum documents which the board approved that very night. Similarly, at a meeting on April 22, 1987, the board hastily approved a textbook list, despite a complaint by one member that she did not have enough time to review voluminous materials received by her the night before the vote. At other times, the administration failed to provide the board with an explanation sufficient to make an intelligent decision or failed to follow through on legitimate requests by board members for additional information. Examples cited by Dr. Smoley include the meeting on August 27, 1987, at which the board authorized large price increases in food service and bus transportation contracts without any clear understanding of the reasons for the extra costs.

According to Dr. Smoley, the cumulative effect of such behavior is to cede the board's policy-making authority over to school administrators and relegate the board to a perfunctory role. His opinion is disputed by Dr. Tewel and board president Michael Marino, who maintain that volunteer part-time board members cannot possibly manage a large urban school district by themselves and appropriately must defer to recommendations of educational specialists or distribute work among subcommittees of the whole board. President Marino, an experienced business executive, considers it good management practice to rely on the professional judgment of educators in whom he has confidence. Mr. Marino mentioned several policy changes which originated with the board, including

abolition of a grading policy that had allowed students to advance from grade to grade without achieving a minimum level of proficiency.

Dr. Smoley's further criticism that the board wastes a lot of time bickering and squabbling over petty matters was corroborated by the first-hand observations of other State witnesses. Compliance director Richard Kaplan personally attended several board sessions in 1987 through March 1988 and reported an atmosphere of confusion, characterized by an undercurrent of noise, people milling about the room, board members yelling and screaming at one another or leaving their seats to engage in private conversations, the board secretary making faces at the crowd, and a chorus of hoots and catcalls from the audience. Director Kaplan remembered one especially heated exchange in which superintendent Williams entered into a shouting match with a board member whose term was about to expire. Delores Eccleston, the board member who preceded Mr. Marino as president, recalled a separate meeting at which Mr. Williams accused her of being ignorant and told her to shut up.

Jersey City seeks to minimize these events by ascribing them to obstructionism by the holdover McCann appointees, particularly Aaron Schulman, described by Mr. Marino as "extremely disruptive" and "very argumentative." Mr. Marino testified that the board meetings became much more businesslike and productive as soon as Mr. Schulman was no longer a member. Carried to its logical extreme, Dr. Tewel conceives of the board not as a single corporate entity, but as a series of different "boards" controlled by whichever faction happens to be dominant at any given time. As Dr. Tewel sees it, the board under Mr. Marino's leadership has became more purposeful and more interested in education.

Dr. Tewel's analysis has several serious flaws and, even if accurate, bodes ill for future progress in the district. In the first place, the Cucci faction constituted a majority of the board by 1986 and cannot continue to blame the other guy for its own mistakes. In addition, it is overly simplistic to split the board neatly into pro-Cucci and pro-McCann forces. The real situation is far more fluid, and involves a shifting pattern of personal allegiances and local alliances. One day Mrs. Eccleston would be Mayor Cucci's preference for board president and the next she would be aligned with the Schulman block of votes. One day Aaron Schulman would nominate Franklin Williams to be superintendent of schools and the next he would

be leading the fight against Mr. Williams' appointment. It is not just control by one or another group, but rather the constant infighting and jockeying for power which immobilize the board. More fundamentally, Dr. Tewel's analysis overlooks the importance of continuity and consistency in correcting the district's deficiencies. Inevitably, as Dr. Tewel recognizes, the group in control will change with the tides of political fortune, along with a radical switch of personalities and policies. Instead of illuminating the cause of the problem, Dr. Tewel's description of the board's inner dynamics is symptomatic of the bitter factionalism which permeates the board's activities and frustrates any concerted action to bring about enduring reforms.

As a case study of the board's ineffectiveness, this decision will now examine the decision-making process behind Jersey City's most important decision, that of selecting its chief school administrator. Given the current board's condemnation of the McCann administration and the significance of the superintendent's job, it might be expected that the incoming board would want to conduct an exhaustive search for fresh talent and new ideas. Nothing of that sort actually occurred. A short while before the board was scheduled to vote, Mrs. Eccleston got together at City Hall with Mayor Cucci and two council members and the four of them mutually "agreed" (in Eccleston's words) to elevate insider Franklin Williams to the vacant superintendent's post. When it came time to make the actual choice, the board considered only Mr. Williams and no one else.

Improbable as it may sound, it is at least plausible that the exigency of the circumstances prevented the board from embarking on a lengthy recruitment process. After all, appointment of a new superintendent had to be made in August to take charge of the district in September. Interestingly, however, the board never adequately explained why it simply did not appoint another interim superintendent while it continued to look for the best person for the job. Testimony by the major players was strangely inconsistent. Mrs. Eccleston understood that the board had appointed Mr. Williams to a probationary one-year term. On the other hand, Mr. Williams was sure he had struck a deal that his appointment would be permanent and not temporary.

Even granting Jersey City the benefit of the doubt on Mr. Williams' appointment, the conditions under which he ultimately acquired tenure as superintendent, without the board's knowledge or consent, are totally indefensible.

Although school districts normally conduct annual job evaluations, the board did not perform its first formal evaluation of Mr. Williams until January 1987, by which date he had already held the superintendent's office for nearly one and a half years.[20] Much time at the hearing was devoted by both parties to interpreting Williams' ratings on his evaluations, with the State emphasizing his below-average scores in certain areas and Jersey City emphasizing his above-average scores in other areas. Suffice it to say that the board as a body gave its superintendent a mediocre overall rating, not especially impressive for an individual under consideration for tenure.

Less than two years after Mr. Williams' appointment, the board in June 1987 unsuccessfully attempted, by five-to-four vote, to remove him from office and deny him tenure as superintendent. It was then that the board discovered for the first time that Mr. Williams had already attained tenure and could be removed only through a tenure proceeding. Astoundingly, the board had been unaware when its superintendent was about to obtain tenure. Thus, the board was deprived of any opportunity to exercise its collective wisdom on whether to confer tenure status on the individual serving as its chief school administrator.[21]

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[20]School boards are required by regulation to evaluate all nontenured chief school administrators annually no later than April 30th of each year. *N.J.A.C.* 6:3-1.22.

[21]A school board's duty requires more than mere appointment of properly certified personnel, but "demands that permanent appointments be made only if the teachers are found suitable for the positions after a qualifying trial period." *Zimmerman v. Newark Bd. of Ed.*, 38 *N.J.* 65, 72-73 (1962), *cert.* den. 371 *U.S.* 956 (1962). Courts treat this test period as so important that they do not allow school districts to be "trapped into tenure" by the unintended consequences of contractual language. *Canfield v. Bd. of Ed. of Pine Hill*, 97 *N.J. Super.* 483,493 (App. Div. 1967) (dissenting op.), *rev'd for reasons expressed in dissent*, 51 *N.J.* 400 (1968). Ordinarily, a person promoted within a district does not attain tenure until the expiration of two years. *N.J.S.A.* 18A:28-6. An exception to the general rule exists if the board of education shortens the period of eligibility for all members of a defined class. *Rall v. Bd. of Ed. of Bayonne*, 54 *N.J.* 373 (1969); *Spadoro v. Coyle*, 1965 *S.L.D.* 134 (Comm'r 1965). Because in May 1976 Jersey City had shortened the eligibility period to 18 months for former superintendent Dr. Ross, it was obligated to do the same for Mr. Williams. Jersey City was ignorant of this complication, so Mr. Williams was able to achieve tenure by default.

I FIND that the Jersey City board has abdicated its responsibilities as a board of education. Undoubtedly, as the expert testimony confirms, the line between policy-making by the board and improper interference in the daily operations of a school district can be fuzzy. The distinction is always a question of degree. Board members invariably must entrust many operating details of a large district to the professional skill and judgment of qualified school administrators. But here the board failed to perform even its rudimentary role. What emerges from the welter of evidence is a board of education without clear-cut policies and without adequate planning capability; a board which allows City Hall to dictate its choice for chief school administrator and then neglects to evaluate him for tenure; a board which is hopelessly divided among warring factions and self-interested cliques; a board which is incapable of providing continuity or any coherent sense of purpose; a board which reacts to State prodding, but is unable to take the initiative to solve its problems. In short, this is a board which has so lost its own way that it cannot be counted on to lead the children to educational quality.

2. Personnel Function

Another matter of considerable controversy is the issue of political intrusion into the district's personnel department. State officials allege that a person's political contacts, familial relationships and friendships rather than competence unduly influenced district decisions about hiring, job assignments, transfers and promotions. Jersey City vacillates between arguing that political patronage in the school system never occurred during Mayor Cucci's term in office and arguing, in the alternative, that political patronage is a natural or even healthy incidence of urban school districts. Both of Jersey City's arguments are unconvincing.

Relatives of the mayor advanced rapidly in their school careers after the new administration took over in July 1985. Anne Pollara, the mayor's sister, had been working as a librarian in a school library long before her brother was elected. Assigned to a school facility, she was on the City payroll and technically a City employee. Her continuation in that job was threatened, however, because she lacked the teaching certification required by the State. About a month after her brother became mayor, Ms. Pollara submitted a job application to the board of education. Louis Lanzillo, first assistant superintendent for personnel (who, incidentally, had just been recommended for that position by Mayor Cucci),

approved her application. Four days later, the board created a new position with the imaginative title "audio-visual liaison/graphic arts specialist" at an annual starting salary of $23,000. Superintendent Williams recommended Ms. Pollara on the spot and the board immediately hired her. According to Jersey City, Ms. Pollara was hired solely because of her qualifications as a graphic artist.

Diane Silvestri, the mayor's stepdaughter, also had a sudden change in fortune which coincided with the mayor's rise to power. Ms. Silvestri had been employed by the board in various clerical positions for nine years before the mayor married her mother. Apparently Ms. Silvestri had suffered retaliation by the McCann administration in September 1984, when she was demoted to a menial job and her salary reduced by $6,000. Two months after her mother's husband became mayor, however, Diane Silvestri received a new assignment with the title "special education awareness specialist." Created by the board on the same day as her appointment, this new title involved public relations more than it did special education (as the result of a Civil Service job audit, the title was subsequently changed to "public information assistant.") She received an increase of $5,000, raising her salary to $22,000. Despite an eight-month leave from work in 1985, Ms. Silvestri also continued to enjoy regular salary increases. In September 1987, she obtained a new assignment as an audiometrist, a bona fide job but one for which she lacked the proper qualifications. Forced to resign, she was immediately rehired by the board in December 1987 as an "administrative analyst" at a salary just under $24,000. Jersey City defended the seeming favoritism shown Ms. Silvestri as simply putting her at the salary level she otherwise would have been if not wrongfully demoted.

Friends and supporters of Mayor Cucci also rose quickly in the ranks of school employees. Councilwoman Bernadette O'Reilly-Lando, elected to office on the Cucci ticket and a close friend of the mayor, coveted a transfer to central office from her assignment as school nurse. Mrs. O'Reilly-Lando expressed her interest in the new assignment to Mr. Louis Lanzillo, as well as to the mayor. At that time, however, the position of "nurse coordinator" at central office was occupied by Jeanette Lewin, who had served the district for 22 years. Prior to the start of the 1986-87 school year, Mrs. Lewin was notified of her transfer to school nurse at one of the elementary schools. The only reason for the transfer given by her supervisor was "for the good of the district." In spite of the fact that Mrs. Lewin forfeited a $1,500 stipend and no longer has any supervisory responsibility (whereas before she had coordinated the

activities of 48 other nurses), Jersey City insists that the move was merely a "lateral transfer" and not a demotion. Mrs. Lewin was replaced as coordinator by Bernadette O'Reilly-Lando. School nurse Joan Reidy, another campaign supporter of Mayor Cucci, also helped do some of the work previously done by Mrs. Lewin alone.

Mayor Cucci confessed that he told Mrs. Lewin in or about October 1986 that Mrs. O'Reilly-Lando "had wanted . . . Lewin's position for over a year" and that he "was unable to put off her request any longer." The mayor added, however, that he said it to be kind, because he didn't have the heart to tell the recently-widowed Mrs. Lewin that she was not properly performing her job. Medical director Dr. Eugenia Crincoli, who was dissatisfied with Lewin's work and claimed to have brought particular problems to Mrs. Lewin's attention on several occasions, never gave her a negative written evaluation. Dr. Skrypski, the medical director until April 1986, had consistently given Mrs. Lewin favorable evaluations. First assistant superintendent Lanzillo claimed that he checked with Dr. Crincoli before bringing Mrs. O'Reilly-Lando to the central office, but Dr. Crincoli denied ever having been consulted about whom she wanted as her nursing assistant.

Kevin O'Reilly, the councilwoman's son, began working for the district as an "electronics repairer helper" in September 1985. He had been on the job for only about a month when, in October 1985, his title was changed to "electrician" and his salary almost doubled. In connection with this substantial increase, Mr. Lanzillo mistakenly advised the board that Mr. O'Reilly possessed an electrician's license. None of these jobs actually required the holder to be licensed as an electrician, and Mr. Lanzillo testified he was personally aware at the time that a license was unnecessary. As the result of a Civil Service survey, Mr. O'Reilly was reclassified as an "electronics repairer" in December 1985 because he was not performing the duties of an electrician. But his salary stayed at the higher amount. While not challenging these facts, Jersey City argues the district faced a shortage of skilled workers and that young O'Reilly was treated no differently than several other employees in similar circumstances.

On the witness stand, Mayor Cucci came across as a warm and compassionate human being. Nonetheless, his personal sense of values puts too much emphasis on loyalty to family and friends. Although Mayor Cucci recognized that it would be wrong for a political leader to interfere directly in a school district's selection of

employees, he had no compunction about recommending people for employment, provided that he felt they were qualified for the job. His definition of being qualified was extremely narrow, equating the holding of minimum State certification with necessarily being competent to do a good job. With unbefitting modesty, he professed to believe that the board of education, whose members are appointed by the mayor, would not give any greater weight to his recommendations than to anyone else's.

Board member Timothy Dowd testified that Jersey City has had a reputation for political appointments as far back as he could remember. By his own admission, Mayor Cucci did recommend four individuals for employment by the board. All four got jobs, although superintendent Williams testified that he had no idea of the mayor's involvement and that their names were first mentioned to him by Mrs. Eccleston or other board members. Mr. Williams' testimony differed substantially from a prior statement attributed to him by Cresap McCormick researchers, in which he had said that he interviewed persons suggested to him as prospective position holders "to see if there was any reason not to appoint them" (emphasis added). Management expert Dr. Smoley makes the point that the test should be whether there is good reason to appoint someone to a particular job.

Most controversial of Mayor Cucci's recommendations was Louis Lanzillo to be assistant superintendent for personnel. Mr. Lanzillo, a gym teacher for 20 years who had never held any administrative post, was approved by the board on August 16,1985 (moments after Franklin Williams became superintendent) as the chief personnel officer for the entire district. In August 1987 his title became "first" assistant superintendent. Unperturbed about Mr. Lanzillo's lack of administrative experience, Mayor Cucci joked, "A gym teacher should be able to make a big jump." Lanzillo's main qualification for the job was his extensive experience as grievance chairman for the negotiating unit representing the district's teachers; or, as Williams expressed it, Mr. Lanzillo "sat on the other side of the [bargaining] table."

Many people regard such intimate identification with the opposing party in any future contract negotiations as a definite liability rather than an asset. Deputy superintendent Jencarelli, for one, advised Mayor Cucci that Mr. Lanzillo's status as a teacher representative was "incongruous" with the responsibilities of assistant superintendent for personnel. Former mayor McCann, in his sworn affidavit, stated

that in 1981 he had rejected an offer of support for his candidacy from the teachers' association in exchange for a promise to appoint Mr. Lanzillo to the same job. (Incidentally, the president of the teachers' association supported Mr. Cucci in his 1985 bid for mayor.) Last, but not least, board member Aaron Schulman, hardly a disinterested observer but in an excellent position to know, publicly denounced the Lanzillo appointment as "a political deal."

It is bootstrapping for Jersey City to rely on whatever success Mr. Lanzillo arguably achieved as head of the personnel department to justify his original appointment to that job. In any event, Mr. Lanzillo's accomplishments are greatly exaggerated by Jersey City. Credit for eliminating uncertified and improperly certified teachers belongs to the State rather than to Mr. Lanzillo, since the State uncovered the problem and demanded immediate correction. Dramatic reduction in the number of employee grievances going to arbitration is not necessarily an encouraging sign. Instead, it suggests that management may have become overly accommodating to the interests of the teachers' organization or that teachers may be reluctant to bring legitimate grievances now that their chief negotiator has switched sides.

Within a few days after his own appointment, Mr. Lanzillo submitted a resolution for the board to approve Mayor Cucci's second recommendation, councilman Chester Kaminski, as a business "administrative intern" at a hefty $36,000 annual salary. Mr. Kaminski had successfully run for City council as Mayor Cucci's running mate and had received a $1,700 contribution from the mayor's campaign committee. Employed by the board since 1968, Mr. Kaminski took a leave of absence between 1977 and 1981 to serve as director of the City's department of human resources, an agency which administers programs totaling $40 million. Immediately prior to his appointment as administrative intern in August 1985, however, Mr. Kaminski was a Spanish teacher and he had no administrative experience in any school system.

Candidly, Mr. Kaminski admitted that he regarded the internship as a "learning experience," and that he really wanted to be school business administrator but had not yet acquired the proper license. In or about November 1986, the board appointed Mr. Kaminski to an unclassified position known as business manager. Subsequently, State officials disapproved the board's request for establishment of a

separate position known as school business administrator, in part because existing positions in the business department appeared to have overlapping responsibilities.[22]

Mayor Cucci's third and fourth recommendations were his neighbor, Frank Falcicchio, and another campaign supporter, Edward Fauerbach. Mr. Falcicchio became the assistant superintendent in charge of Jersey City's faltering special education program, although his experience in special education was limited to a small program in a nonurban district. Before coming to Jersey City, Mr. Falcicchio had supervised a placement for 15 to 20 emotionally disturbed children and had also worked with educationally handicapped children as a guidance counselor in Freehold, New Jersey. He holds no certificate in the field of special education, has never been a district-wide director of special services for any school system, nor has he ever served as a member of a child study team. During his testimony, Mr. Falcicchio could not recall the name of a single special education course he had ever taken. Superintendent Williams turned a blind eye to what was going on around him. Asked whether during his job interview Mr. Falcicchio had informed him of the mayor's backing, Mr. Williams first emphatically said no and then hedged, "I try not to remember unpleasant things unless they are severely unpleasant."

Louis Lanzillo displayed a surprising lack of sensitivity about City officeholders interfering with the district's internal affairs. Drawing a distinction between professional and nonprofessional staff, he openly condoned obtaining jobs for "noninstructional or low entry" employees such as those "who sweep corridors and wax floors." Thus, he acknowledged accepting job recommendations from community representatives, including the mayor, City council members, and ward leaders. In addition to a person's ability to do the work, one of the factors considered at the job interview is how much an individual needs a job.

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[22]Both "business manager" and "school business administrator" are authorized by statute. Duties of business managers include having "charge and care of the public school buildings and other property belonging to the district" *N.J.S.A.* 18A:17-28. School business administrators have duties defined by majority vote of a local school board and can only be appointed if "agreed to by the county superintendent of schools . . . and approved by the commissioner and state board." *N.J.S.A.* 18A:17-14.1. *See also N.J.A.C.* 6:3-1.18. No statutory authorization exists for "administrative intern."

Clerical workers in Mr. Lanzillo's own office told a Cresap McCormick interviewer about a two-track system for processing applications for unskilled labor. Some job applicants are put on a fast track and, at Mr. Lanzillo's instruction, they get "all the paperwork" to be filled out on the same day. These applicants are generally hired. Other applicants are given the job application only, and usually do not receive a job offer. Random sampling of Jersey City personnel records corroborated the information provided by the clerks in the personnel department. Nine out of fourteen noninstructional employees hired by the board in August or September 1987 had completed all of the paperwork in a single day.

Beyond proof of overt political intervention, the record also discloses a lackadaisical approach to recruitment of new employees. Upon becoming superintendent in July 1985, Franklin Williams did not even go through the ordinary motions of trying to find the person most suited for the job. To fill the many vacancies in central office, he failed to conduct any search outside the district for talent, but instead made his selection on the basis of which insider was sufficiently savvy and "school system-wise." Amazingly, he invited board members to send him suggestions on whom to recommend for appointments, reversing the proper procedure whereby the superintendent makes his recommendations to the school board for final approval. Mr. Williams could recall no more than four people whom he interviewed other than those who actually got the jobs. Moreover, he freely admitted that he had interviewed only one person for the job of assistant superintendent for personnel.

Standard practices to ensure hiring of only the most qualified applicants were not routinely followed by the district. School administrators did not have a system in place for always checking references of job applicants. In one verifiable instance, Mr. Falcicchio's prior supervisor in Freehold testified that no one from Jersey City, except board member Schulman, had contacted him to inquire about Mr. Falcicchio's qualifications. In another episode, Mr. Lanzillo, evidently through carelessness rather than by design, supplied the Jersey City board with an inaccurate resume for John Scarfo, the successful applicant for the job of internal auditor. When it was discovered that Mr. Scarfo did not possess the previously advertised requirements for the job, the board expediently revised the job requirements to conform to the qualifications which Mr. Scarfo did possess. In other instances, Mr. Williams was

authorized to modify job descriptions as he saw fit, without obtaining approval from the board. [23]

Aside from inadequate recruitment practices, the State also accuses Jersey City of improper procedures pertaining to assignments, transfers and promotions. A few of the examples raise implications of outright attempts to retaliate against employees regarded as hostile to the current school administration, such as a conversation overheard by Mrs. Eccleston in which Mr. Lanzillo complained to Mayor Cucci about the "cream puff" assignment given to Dr. Henry Przystup, a former superintendent and outspoken critic of the board; [24]or the reassignment of special education teacher Carol Giannasio from a supervisory post to a less desirable job in the record room, after she had been seen conversing with State investigators; or the fact that central office examined telephone bills to determine if employees had made calls to education officials in Trenton.

But most of the State's examples simply involve poor planning or abuse of power, such as unwarranted transfers for no valid educational purpose. The paramount example of the latter type of transfer was the musical chair-like rearrangement of 20 or more principals and other building-level administrators just prior to the opening of school in September 1986. Claudette Searchwell, principal of School 41 at the time, learned of her impending transfer to School 22 literally days

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[23]The parties engaged in a spirited debate about whether board approval of all job descriptions is a legal requirement. The Attorney General's Office takes the position that *N.J.A.C.* 6:3-1.21(c)(2), which requires that boards of education adopt certain policies and procedures including "development of job descriptions," must be read to mandate board approval of all job descriptions. Jersey City responds that the cited regulation, dealing with evaluation of tenured teaching staff members, permits job descriptions to be developed "under the direction of the district's chief school administrator." Irrespective of which side has the better legal argument, advance approval of all job descriptions by the board is clearly the preferable business practice, and Jersey City's delegation of that authority to its superintendent is yet another example of its abdication of responsibility.

[24]At that time, Dr. Przystup was the principal of the Regional Day School, a placement for special education students. Testifying as an expert for Jersey City, Dr. Tewel was "struck by the extent to which [Dr. Przystup] knows Special Ed and cares for those children." Yet, the board transferred Dr. Przystup to another building, School 41, which has more mainstream than special education classes.

before it actually happened, not directly from her employer but through gossip and rumor. Nobody from central office had bothered to consult with her before the decision was made. Instead, Mr. Williams "seized the opportunity" to make plans while the persons most directly affected were away on summer vacation. Although Dr. Tewel, Jersey City's educational expert, lauded the surprise move as a way to prevent stagnation and "get the system moving again," more likely Mr. Williams' real motivation for waiting until the last moment was to minimize anticipated public opposition to his plan.

Speaking from experience, Dr. Tewel conceded that an unexpected transfer is one of the "most personally hurtful things" which can happen in an educator's career. Certainly Ms.Searchwell, who spent her own time during her summer vacation preparing for the reopening of School 41, did not feel "rejuvenated" by the abrupt change in her assignment. Dr. Smoley was correct in decrying the district's eleventh-hour transfers, in the absence of any genuine emergency, as irrational and indicative of a lack of planning. Nor were such last-minute shake-ups an isolated occurrence. A year later, in September 1987, Ollie Culbreth found out on only two weeks' notice that he was being assigned as principal of School 14. Like Ms. Searchwell, Mr. Culbreth first became aware of his new assignment not through regular channels, but from a "leak to the newspapers."

One of Jersey City's much-vaunted reforms is its new promotion policy, designed to allay past fears about the fairness of the selection process. Adopted by board resolution in March 1987, the policy establishes a convoluted screening process used that year to winnow down a field of 168 candidates to 22 for actual promotion. Steps in this process include: screening of applicants for minimum requirements; completing of a biographical questionnaire; numerical rating of applicants on a nine-point scale; interviewing of candidates by evaluation committees of administrators, parents and board members; ranking of top candidates by the superintendent; and final selection by the board of education.

While the new promotion policy has an appearance of greater impartiality, management expert Dr. Smoley was critical of its fragmented, disjointed and subjective nature. Each step is intended to stand alone, so that members of the evaluation committee do their work independently and are unaware of each other's evaluations. Likewise, the superintendent of schools is insulated from the numerical

ratings made at a preceding stage of the process, does not know the evaluation committee results, and does not personally have a chance to interview any of the applicants. In Dr. Smoley's estimation, each step is so "decoupled" from each succeeding step that useful information collected at an earlier stage is discarded at a later stage.

Furthermore, Dr. Smoley described various weaknesses which make the promotion system susceptible of manipulation and control by the administration. Criteria for screening applicants were not published in advance, so applicants had no clear idea why they were not chosen to advance to the next step. Participants in the process believed that some candidates were given special help in completing the biographical questionnaire. Extensive prescreening of credentials gave the administration an opportunity to bar access to the interview. At least one individual complained of having been unfairly excluded from any interview, while others complained that their interviews had been short or perfunctory. As an indication that the promotion process may be biased in favor of certain candidates, Dr. Smoley noted that over 60% of the successful candidates were already serving in an acting capacity at the time of their promotions to permanent positions.

In the personnel area, the State also presented evidence of Jersey City's deficiencies in staff evaluation and its inability to hold employees accountable for poor performance. Jersey City's laxity about tenure- eligibility for its chief school administrator has already been covered in detail. No one ever formally evaluated the district's top echelon of financial officers, including the board secretary, business manager, and internal auditor, with disastrous consequences to the district's control over its purse strings. Responsibility for effective oversight of these key personnel fell between the cracks, apparently because of confusion over whether they should report to the superintendent of schools or directly to the board of education.

Cresap McCormick researchers examined written teacher evaluations and reported many instances in which superficial or stereotypic statements were mechanically "copied from year to year and from teacher to teacher." Confidence in this finding is strengthened by superintendent Williams' acknowledgment of "a lot of likeness" in his own evaluations of central office administrators. Testimony of Jersey City witnesses revealed a blurring of the distinction between evaluation of an individual's performance and the unfinished tasks within an individual's area of

responsibility, making it hard for an employee to arrive at any clear understanding of what he must do to improve personal work habits.[25] Mr. Lanzillo boasted of new forms he introduced to improve the evaluation process, but was forced to admit that they were revised versions of forms already in existence for "a long time."

State monitors identified 58 teachers who were not evaluated at all by the April 30th cutoff date of the 1985-86 school year. Jersey City denied that 15 to 20 of those people needed to be evaluated, tacitly admitting that at least 38 teachers were never evaluated during that year. At Snyder High School, no one evaluated the guidance counselors in 1986-87. Similarly, Dr. Przystup purposely refused to evaluate 16 teachers at School 41 to dramatize the need for additional supervisory staff, yet there is no evidence that any disciplinary action was ever taken against him for dereliction of duty or that the alleged staff shortage at his building was ever alleviated. These 16 teachers simply did not get evaluated.

In another, particularly egregious, situation, compliance director Kaplan, who was touring School 31, observed a classroom where not much instructional activity was occurring. Consequently, Mr. Kaplan asked to see the written evaluations of the classroom teacher. Responding to Kaplan's request, the building principal, Mr. DiTursi, after a fruitless search of the files in his desk drawer, divulged that he didn't have any evaluations for that particular teacher because she was "a friend of the superintendent." During a subsequent conversation with Kaplan, Mr. Williams indicated that he had known the teacher for a long time and was a member of the same church. At the hearing, Jersey City put into evidence what purport to be written evaluations of the teacher in question, but never explained why they were not shown to Mr. Kaplan at the time of his visit, nor offered the testimony of Mr. DiTursi to deny the substance of Kaplan's testimony.

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[25]Regulations for evaluation of tenured staff require preparation of a "professional improvement plan," a written statement developed jointly by supervisor and staff member "to correct deficiencies or to continue professional growth." *N.J.A.C.* 6:3-1.21(f) and (h). See also, *N.J.A.C.* 6:3-1.22(c)(4). This requirement was honored in the breach. Superintendent Williams never received a professional improvement plan from the board. Assistant superintendent Horace Smith also did not get such a professional improvement plan in his two years of evaluations (1985-86 and 1986-87).

Teacher evaluation problems are further compounded by the district's dual system, in which evaluations were sometimes done by principals, aided by assistant or vice principals, and sometimes by subject supervisors under a totally separate jurisdiction. Predictably, as documented by the Cresap McCormick study, such division of responsibility produced conflicting evaluations by different evaluators, generated unnecessary disagreements which would then have to be resolved at a higher level, and undermined the building principal's authority over teachers in his or her building. Lack of accountability is even more aggravated for nonprofessional staff, where responsibility is further diffused among a director of custodians, a director of maintenance and the building principal. Building principal Claudette Searchwell stated that no one listened to her complaints about poor performance by school janitors and that workers assigned to her school report to someone else in the organizational structure. Her supervisor, Horace Smith, assistant superintendent for elementary schools, confirmed there are two sets of evaluations for maintenance or custodial workers, formally by central office department heads and informally by building principals.

I FIND that political interference, nepotism, and patronage in the Jersey City school system continued after the advent of Mayor Cucci. Board members and school administrators misused their public office to reward friends and punish enemies of the Cucci administration. Notwithstanding Mayor Cucci's disingenuous denial, it would be naive to believe that the rapid advancement of the mayor's relatives and political allies was unrelated to his ascension to power or that appointment of four school administrators recommended by him was simply a matter of coincidence. Close relatives like the mayor's sister and stepdaughter were given jobs especially created for them. Where a longtime employee like Mrs. Lewin stood in the way, she was demoted to make room for promotion of a campaign supporter like councilwoman O'Reilly-Lando. Meanwhile, Mr. Williams was either guilty of active complicity or simply incapable of preventing what he must have known was going on.

Particularly disturbing was the district's eagerness to hire people with minimum qualifications for top jobs, without even the pretense of conducting a search for candidates of proven talent and ability. The hiring of Mr. Falcicchio to manage the important special education program and of Mr. Kaminski to receive on-the-job training as a school business administrator are but two examples in the

record. Franklin Williams' method of selection for his central office staff of insiders, without bothering to interview other applicants for the job, is another example.

Putting labor negotiator Louis Lanzillo in charge of personnel was analogous to putting the fox in charge of the chicken coop. In a district so highly politicized and already under suspicion, it is difficult to think of an appointment more calculated to engender doubts and destroy faith in the fairness of the the personnel department. Unabashedly and almost brazenly, Mr. Lanzillo described the dispensing of patronage to fill vacancies in the custodial and maintenance staff. Under Mr. Lanzillo's direction, transfers were used to punish dissidents or were so poorly planned that they hurt staff morale. Promotions were made under a new policy too fragmented to be useful and too easily rigged by the administration. Staff evaluations were performed not at all or performed in a meaningless and perfunctory manner. Control of the school by the building principal was weakened by a cumbersome dual evaluation system, which undercut the principal's authority to evaluate staff assigned to his building.

Jersey City has the temerity to argue that preferential treatment is tolerable so long as it involves only a few people occupying low-level positions in a large school district. Unintentionally, this argument reveals much about the culture of the Jersey City school system and the extent to which a tradition of politics is deeply ingrained as an acceptable way of life.[26] Of course, it is no justification whatsoever that the current administration was merely righting old political wrongs or that political interference under Mayor Cucci occurred on a less grand scale than in the past.

From an educational perspective, the damage caused to the district far exceeds the sheer number of patronage jobs. Dr. Smoley described the demoralizing effect in any school system when employees come to believe that career success depends not on competence or hard work but on political machinations and influential friends. Unfortunately, Dr. Smoley found a paralyzing cynicism among Jersey City

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[26]Tracing the City's history back to the infamous days of Mayor Frank Hague, federal district judge Harold Ackerman declared that political interference by the Cucci administration into the operation of the police department was "a reflection of 'business as usual' and . . . part of a historical political continuum." *Perez v. Cucci*, No. 86-3595, slip op. at 6 (D.N.J. May 2, 1989).

school employees, which pervasive attitude destroys individual incentive for improvement and robs the district of the strength needed to reform itself. By contrast, Dr. Tewel, whose point of reference is the reality of conditions as they exist in the New York City, seemed overly willing to tolerate a "symbiotic relationship" between political leadership and the school authorities.

F. Quality of Educational Programs

At the heart of any school system lies the quality of its educational programs. Again the outcome of the factual dispute turns decisively on which of the party's respective experts is more persuasive. Efforts by Jersey City to disparage Dr. Smoley's credibility on the ground that he relied too heavily on information supplied by alleged "malcontents" were unavailing. As in any thorough investigation, Dr. Smoley and his associates contacted a wide variety of informants, some who were favorably disposed to the present school administration and others who were not. Clearly it would have been unscientific for Dr. Smoley to seek out only those satisfied with the status quo. Cresap McCormick researchers kept careful notes of these interviews, and based the final report on a composite of all information collected and the exercise of balanced judgment as to what was significant. Such careful attention to detail contrasts with the methodology of Dr. Tewel, who lost or misplaced his interview notes and did not try to learn all the names or titles of those from whom he solicited data.

Descriptions of the general atmosphere at the school-building level diverge so greatly that it is difficult to believe the experts were talking about the same school system. Dr. Smoley, who personally spent a week visiting schools in the district (talking with principals and teachers, roaming the hallways, attending classes, and generally getting a "feel" for the type of activity taking place), described a wide range of conditions.

School 22, one of the worst elementary schools in the district, was "badly run down," with "extensive graffiti on the walls," cracked blackboards, broken tables and chairs, and an overwhelming sense of "shabbiness." Trash was accumulating on the premises of a number of schools, including School 22. Noise levels were unusually high, with "kids wandering the halls," teachers talking to students in "very loud and directive" tones of voice, and constant disruptions over the public

address system. Regarded as "a dumping ground for teachers who were not performing well," School 22 was plagued by disciplinary problems, low test scores and high teacher turnover. Some classes had only "small numbers of students in the rooms." Textbooks were in short supply, and five classes had to share a number of textbooks sufficient for only two classes. In one classroom, Dr. Smoley saw "no enthusiasm among teacher or students." In another classroom, "a teacher was sarcastic with students." In a third, the teacher's style was "cold and harsh," and he refused to answer students' questions. Even in School 25, known as Nicholas Copernicus School and considered a "top" school, control was "fairly lax" and students were "wandering around at will." In Dr. Smoley's view, the principal of School 25 was resigned to things as they were and "lacked the spark of leadership."

Dr. Smoley's strongest words of condemnation were reserved for conditions at Dickenson High School, which he portrayed as sitting on a hilltop "almost like a fortress." Continuing his figure of speech, Dr. Smoley's first impression as he entered the school yard was "concern for [his] safety" and a feeling that the building was "under siege." Size and layout of the building, which houses 2,500 or more students, made surveillance very difficult. Students were milling around all the time, "both outside and within the building." Unsolicited, a security guard approached Dr. Smoley to say that the building "needed reinforcements." Dickenson has a big auditorium used as a "holding area" for unattended students, many of whom got "lost" in the shuffle. Physical conditions were deplorable, and included "lots of graffiti," "dingy facilities" and "facilities in poor repair." Peering into classrooms, Dr. Smoley witnessed a number of situations "where students were not being taught" and no learning was going on. A substitute teacher in one room was sitting at a desk while some students were talking, a few were doing homework and others were playing. Blackboards in another room had not been washed and could hardly be read. Teachers griped that the administration cared more about paperwork than about quality of teaching, that the building was not kept clean, and that the back gate was left open at night.

Conditions were less dire at Snyder High School, but it too had graffiti, broken windows, damaged doors, peeling paint and other signs of neglect. Pace of life in the school was slow, and students "meandered" to classes which started late and ended early. As at the other schools Dr. Smoley visited, Snyder had extensive class

cutting, students congregating in the halls, and a high level of noise caused by the banging of lockers and loud talking.

Several common threads run through Dr. Smoley's testimony about his visits to the schools and his conversations with school personnel at the scene. First is that Jersey City schools are "ineffectively managed" at the building level, not necessarily because of incompetency (some individual principals are very competent) but because principals lack the opportunity to manage their own affairs. Despite much lip service paid by the district to the effective schools movement, with its emphasis on the importance of the building principal, Dr. Smoley found that many principals were not in control of their own buildings. Second is the lack of support from the central office, manifested not only by inadequate assistance to building staff, but also by obstacles put in the path of effective leadership. Third is inadequate planning for improvements and a crisis mentality. Jersey City needs an infusion of vitality and dynamic leadership at the school level to overcome its problems. But what Dr. Smoley encountered was exhaustion, burnout and lack of energy.

Dr. Tewel, who toured the district's schools after this litigation had already commenced, painted a much more sanguine picture. Except for Snyder High School, there was no overlap with the schools that Dr. Smoley had personally seen, so Dr. Tewel could not directly refute his testimony. In particular, Dr. Tewel never observed actual conditions at Dickenson High School. Compared to what he was familiar with in New York and other large urban districts, Dr. Tewel was impressed with the orderliness and lack of disruption at Snyder, Ferris and Lincoln high schools. Security guards patrolled the halls or watched doorways while he was there, and "kids knew where they were supposed to be." He did not see students loitering in the hallways or hanging around outside the school. Acknowledging that children did come late to class, Dr. Tewel viewed it as "a fact of life in an urban area." Regarding noise interruptions, he thought that urban children crowded into old buildings will necessarily be noisy. Confirming the State's criticism that classes often do not start on time, he felt the matter was a minor point unworthy of inclusion in the Cresap McCormick report. All in all, the thrust of Dr. Tewel's opinion testimony is that conditions in Jersey City are better than the State contends and that whatever problems do exist are the natural outgrowth of urban living.

Curriculum is a very important aspect of the educational program, since it determines what material the children will learn. Both sides concur that the district's curriculum was woefully inadequate and obsolete at the time of the change of administrations in 1985. Franklin Williams, who as deputy superintendent had been responsible for updating the district's curriculum, conceded that much of the curriculum had not been revised in 18 years and was a reason for the district's failure of the first level of monitoring in 1984.

Changes have been slow in coming since the current administration took charge. State curriculum specialists examined the district's curriculum documents in use during the 1986-87 school year. Their report concluded that the contents of the documents had a low level of expectation for student achievement, did not identify entry or mastery skill levels for students, and "were,for the most part, of limited value as guides for instruction." A majority of the documents were 15 to 20 years old, and few substantive revisions had been made in any of the curriculum above the third grade level. As recently as January 1986, the board readopted many of the same outdated curriculum documents with only insignificant cosmetic revisions, such as replacing the cover sheet to reflect a new date or superintendent's name.

In January 1988, State monitors undertook a more intensive curriculum review. By that time, the district had completed rewriting its curriculum for 4th to 6th grades. In addition to reviewing documents, State and County experts visited 165 elementary and eighth-grade classrooms to look at lesson plans and verify what materials were available. Although the new curriculum documents had been distributed to the elementary teachers, the lessons plans did not disclose whether or not the teachers were actually utilizing the new materials in the classroom. Topics covered were not fully aligned with the skills being tested by standardized tests. Curricula geared to preparing students to pass the high school proficiency test

("HSPT") omitted many of the basic skills in reading, writing and mathematics.[27] Expectations for student achievement remained minimal, and concentrated on lower cognitive skills, such as recognition and recall, as opposed to higher cognitive skills, such as comprehension and abstract reasoning.

Since July 1985, Rosemarie Viciconti, assistant superintendent for curriculum and instruction, has had responsibility for coordinating the district's efforts to improve its curriculum. Ms. Viciconti impressed this fact finder as being a well-meaning and sincere individual, but someone who is overwhelmed by the enormity of her task. Evidence that the Commissioner sent her a congratulatory letter on the occasion of her thirtieth anniversary in the teaching profession and that State officials once invited her to apply for a job in Trenton indicates that she enjoys an excellent professional reputation, but does not constitute official endorsement of her job performance in the last three years.

Early in her planning, Ms. Viciconti made several dubious decisions which guaranteed that the current crop of high school students would graduate long before receiving any benefit from a revised curriculum. Despite the unmistakable urgency of the situation, Ms. Viciconti rejected any notion of a "quick fix" to update the outmoded curriculum. Instead, she opted for a leisurely "bottoms-up" approach, starting with the lower grades and slowly phasing in the new material over a three-year period extending through May 1988. Also, she decided to reinvent the new curriculum "in-house," rather than purchase one of the ready-made curriculum packages available for immediate use in urban districts. She admitted that she had not given much thought to alternatives, and that she chose the time-consuming "traditional method used in Jersey City" essentially because her immediate predecessor had begun the work. Afterwards, Dr. Tewel justified her

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[27]Achievement of a minimum level of proficiency on the HSPT is a state requirement for graduation and award of a high school diploma. *N.J.A.C.* 6:8-7.1(b). The test is administered in ninth grade and, to those students who fail, in tenth and eleventh grades. Districts are obligated to provide remedial services to students who perform below state minimum levels. Basic communications and computational skills tested by the HSPT must be "reasonably related to those levels of proficiency ultimately necessary as part of the preparations of individuals to function politically, economically and socially in a democratic society." *N.J.S.A.* 18A:7A-6.

choice as giving the district's teachers a feeling of participation in the process and pride of ownership in the new curriculum. Whatever the rationale, the result was clearly to sacrifice the educational needs of the older children who missed out on any changes and will never again have the opportunity to attend high school.

Beyond grade six, the curriculum documents were still shamefully out-of-date as of the 1987-88 school year. Much of the material used to teach children in Jersey City contained incorrect or incomplete information. Deficiencies were most glaring in the social studies department where, for example: the curriculum for ethnic studies refers to African countries which no longer exist and neglects to mention others in existence since the 1960s; the curriculum for Afro-American history stops with the Nixon era in 1974; the curriculum for United States history has as its last entry the Voting Rights Act of 1965; and the curriculum for Puerto Rican culture misidentifies the Spanish surnames of various persons and fails to include recent historical figures who made important cultural contributions. Jersey City sought to explain these deficiencies away with the lame excuse that there had been a prolonged vacancy in the position of social studies supervisor.

Classes at the same grade level in Jersey City use different textbooks in science and math, a matter of great concern in a district of high student mobility. Science books from as many as eleven different publishers were in use in 1988 during the State inspection. Not only was this contrary to board-mandated use of a uniform science textbook series throughout the district, but also it made the transition more difficult for students transferring to another class within the district. Use of a variety of different textbooks also impedes articulation as a student moves from grade to grade, since each volume in a planned series of textbooks builds on learning mastered in preceding volumes. Part of the problem in providing a uniform set of books may be the high cost (evidence suggests that it costs about $1 million to purchase a new textbook series for the entire district), although that is largely a question of priorities and of wise expenditure of existing funds. However, the problem is more directly traceable to the attitude of the school administration, which defended the current patchwork of textbooks as if it were a strength rather than a weakness.

Due to the presence of large numbers of children with serious academic difficulties, Jersey City has great need for support services designed to remediate

specific educational deficiencies. Approximately 36% of total enrollment, or one out of every three students, qualify for compensatory education because they fail to achieve the minimum basic skills in reading, writing or mathematics.[28] Another 13% are eligible for special programs to assist non-English speaking students in overcoming the language barrier.[29] Investigation revealed that many students in Jersey City were not receiving services to which they are entitled and also that money allocated for these services was being misspent on unauthorized items.

Dr. Sylvia Roberts, director of the State's division of compensatory and bilingual education, testified that her staff visited the district in March 1987 to review the basic skills program and found numerous violations of applicable code requirements occurring during the 1986-87 fiscal year. Many of them involved failures in delivery of services, such as not testing new entrants to determine eligibility for remedial help, not providing basic skills instruction to non-English speaking students, not communicating with parents, and not disseminating information necessary to plan for individual student needs.

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[28]Funding for basic skills improvement programs in New Jersey derives from two complementary pieces of legislation, Chapter I of the federal Education Consolidation and Improvement Act of 1981 ("ECIA"), 20 *U.S.C.A.* §3801 *et seq.*, and state compensatory education aid, *N.J.S.A.* 18A:7A-20(a). ECIA has been repealed by Pub. L. 100-297, effective July 1, 1988, and large parts were readopted as part of amendments to Title I of the Elementary and Secondary Education Act of 1965, 20 *U.S.C.A.* §2701 *et seq.* Federal and state statutes each have their own set of accompanying regulations, to which local districts must adhere as a condition of receipt of subsidized funds. 34 *C.F.R.* §200 *et seq.*; *N.J.A.C.* 6:8-6.1 *et seq.*

[29]Two related programs in New Jersey are tailored to the needs of "limited English proficient" or "LEP" students. Under the Bilingual Eduction Act, *N.J.S.A.* 18A:35-15 *et seq.*, and the pertinent regulations, *N.J.A.C.* 6:31-1.1 *et seq.*, school districts which have 20 or more pupils of limited English speaking ability in any one language classification must establish a bilingual education program of courses taught in the particular native language. The purpose of the bilingual education program is to facilitate integration of these children into the regular public school curriculum. *N.J.S.A.* 18A:35-15. *Fuentes v. Cooperman*, No. A-2565-87T1 & A-2567-87TIF, slip op. at 3 (N.J. App. Div. Feb. 17, 1989). School districts with 10 or more children of limited English speaking ability must provide an English as a Second Language ("ESL") program, which teaches vocabulary and language structures in English using appropriate teaching techniques. *N.J.A.C.* 6:31-1.4.

Other violations contravened the fundamental principle that federal and state assistance money must be used to "supplement, not supplant" the regular education program, which the district is obligated to provide anyway. Included among the latter were assignment of basic skills teachers to do work for regular reading and math classes, to perform routine chores such as hall patrol, study hall or cafeteria duty, and to substitute for absent teachers of regular classrooms. Some ninth graders receiving supplemental instruction in mathematics were not enrolled in regular math classes as well, jeopardizing their chances of accumulating the required courses for graduation. While some eligible students did not get basic skills instruction, other students, who scored above the minimum state standards, received such help even though they did not qualify.

One particular bone of contention between the parties was Jersey City's policy of "split-funding" or prorating salaries of teachers paid in part out of local funds and in part out of aid money. Couched misleadingly in terms of whether such practice was legally permissible, the real problem was faulty record-keeping by Jersey City, which was unable to document the amount of time these teachers actually devoted to their supplemental as distinguished from their regular duties. Absent a satisfactory explanation of how the money was allocated, State auditors had no choice but to disallow the entire expenditure, resulting in a demand for reimbursement of almost $528,000 of Chapter I money for 1986-87 alone. Jersey City's failure to verify that basic skills money was being properly spent continued right up to the eve of this litigation. Correspondence in April 1988 shows that the State partially withheld approval of Jersey City's application for compensatory education aid for fiscal year 1988 because the district could not sufficiently verify the supplemental nature of expenditures for grades 9 to 12. Ultimately, the district discontinued its split-funding practice in order to avoid loss of funds.

Bilingual and ESL education, on the other hand, is an area wherein Jersey City faces unique conditions, which genuinely make strict compliance with the letter of the law an elusive goal to attain. Uncontradicted evidence establishes that Jersey City has 32 distinct language classifications, that target populations are widely dispersed geographically throughout the City and at different grade levels in the

school system, and that student mobility is high among recent immigrants.[30] Qualified bilingual teachers are in short supply in Hudson County and elsewhere in New Jersey, especially for more exotic languages like Gujarati or Tagalog.[31] Naturally, these conditions do not absolve the district of responsibility to provide children with the full range of needed services, but they do mitigate against unreasonable demands for perfection.

Jersey City has devised strategies to alleviate some of the problems caused by these conditions. To minimize scheduling difficulties, the district has established a multilingual intake center for initial assessment and has attempted to cluster bilingual programs at those schools with the highest concentrations of eligible students. To find certified bilingual teachers, the district has advertised for them at home and abroad. A proposal by Jersey City to bring bilingual services to students' neighborhoods through the use of mobile vans had to be scrapped when the State would not approve it.

Nevertheless, many of Jersey City's deficiencies in bilingual and ESL education are simply the inexcusable product of poor management. In an unguarded moment, Dr. Clausell, assistant superintendent for funded programs, conceded that the district's organizational structure creates unnecessary division and fragmentation, "which inhibit communication, efficiency and proper implementation of district wide programs." Specifically, he questioned the duplicate lines of authority

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[30]Jersey City's 1987-88 bilingual program plan lists the following 28 languages: Amharic, Arabic, Armenian, Bengali, Cantonese, Farsi, French Creole, Greek, Gujarati, Hindi, Hungarian, Italian, Korean, Laotian, Malayalam, Mandarin, Pampango, Polish, Portuguese, Punjabi, Russian, Serbo-Croatian, Spanish, Tagalog, Thai, Urdu and Vietnamese.

[31]State requirements for permanent certification as a bilingual teacher are exacting, and include course work, practical classroom experience, and demonstration of proficiency in both English and a foreign language. *N.J.A.C.* 6:11-8.4. Assistant superintendent Pablo Clausell estimated that the entire process from start to finish can take from one-and-a-half to two-and-a-half years. Although the alternate route to certification is unavailable to bilingual teachers, an emergency certificate can be issued if a district is unable to locate a suitable certified teacher "due to unforeseen shortages or other extenuating circumstances." *N.J.A.C.* 6:11-4.3.

between his own job "in charge of federal and state programs" and that of a coequal assistant superintendent "in charge of supportive services." Similarly, Dr. Roberts alluded to the lack of coordination between school administrators responsible for delivery of bilingual services and those responsible for special education.

Deficiencies due to such poor management include wasteful overtesting of some students, failure to use multiple measures for determining eligibility, exclusion of students living in the district for less than one year, and lengthy delays in referral of Spanish-speaking students for child study team evaluations. Easily correctable deficiencies persisted long after the district had been made aware of them. For example, the district was still using ESL teachers as regular classroom substitutes in February 1988, a problem previously brought to its attention in September 1987. Notwithstanding the State's willingness to relax standards in order to assure that bilingual students would receive at least minimum services, 42 bilingual students in April 1988 did not receive even the reduced level of services which the district had promised to deliver. The district's insistence that this number is down from a high of 302 students in 1987 is little comfort to those non-English speaking children who are not getting the help they need.

Special education is another area of high priority in a district with so many handicapped children. District records for 1987-88 provide a count of 5,343 handicapped children, or about 18% of total enrollment. Classifications given to these children's disabilities run the gamut, from perceptual impairment to mental retardation to emotional disturbance. Jersey City's share of federal "flow-thru" funds earmarked for special education in 1987-88 amounted to $1.4 million. By law, the district must provide specially designed instruction to meet the unique needs of each handicapped child, together with such related services as may be required to

assist the child in benefiting from special education.32

State officials are responsible for assuring that the district complies with the conditions attached to receipt of federal funds. Failure to abide by these conditions could have severe repercussions beyond Jersey City, since the State of New Jersey stands to lose its entire federal grant, totaling $55 million in 1988-89, if local districts do not comply. Jeffrey Osowski, a doctor of psychology and the State's director of special education, summarized results of a six-day on-site review conducted by a nine-member team in fall of 1987.

Major areas of noncompliance by the district include: lack of sufficient textbooks and teaching materials to carry out promised programs and services; absence of curriculum documents or use of outdated or inappropriate curriculum; deficiencies in specialist evaluations required for proper evaluation; nonexistent or seriously deficient individualized educational programs (abbreviated "IEPs") and instructional guides; shorter hours for handicapped children than for children in regular classes; class sizes which exceed the maximum permitted by regulation; lack of classroom coverage in the absence of the teacher; inadequate notice to parents; failure to obtain parental consent; failure to provide sufficient speech therapy to autistic children; and failure to comply with time deadlines. Pupils were placed in special education classes before evaluation and, in one case, before referral to the child study team for evaluation.

These are not mere technical insufficiencies, but violations of important substantive and procedural safeguards intended to protect the rights of

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32New Jersey is a recipient of federal funds made available by the Education for All Handicapped Children Act of 1975, 20 *U.S.C.A.* §1401 *et seq.*, to assist states in the educaiton of handicapped children. Pursuant to the provisions of 20 *U.S.C.A.* §1412(1), any state qualifying for federal financial assistance must adopt "a policy that assures all handicapped children the right to a free appropriate public education." *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 *U.S.* 176 (1982). Separate state legislation also requires boards of education "to provide suitable facilities and programs of education for all the children who are classified as handicapped[.]" *N.J.S.A.* 18A:46-13. Implementing federal and state regulations are at 45 *C.F.R.* §300.01 *et seq.*, *N.J.A.C.* 6:28-1.1 *et seq.* and *N.J.A.C.* 6:28-2.1(h).

handicapped children and their parents. For instance, the IEP, developed jointly by the school and parents, is the written plan which identifies the child's particular learning problem, what services are necessary, when and where they will be provided, and how progress will be measured. Notice to parents and an opportunity for them to participate actively in planning for their handicapped child's program is a key ingredient of special education.[33] Disparities in length of the school day thwart the main purpose of the law, which is to give handicapped children equal access to the educational opportunities provided to nonhandicapped children

Jersey City's pretext that communication with parents is more difficult in an urban setting because families lack telephones, or do not receive their mail, or for a myriad of other excuses, is belied by its own proofs. Principal Daniel Cupo of School 23 believes that urban parents are just as concerned as suburban parents about what is best for their children. He reaches parents by sending notes home with the child, by stopping parents as they drop their child off at school, by word of mouth, or by sending a school social worker to the house. In two decades of urban experience, Mr. Cupo has "never had any problems getting the parent to come" for a conference.

Handicapped students in Jersey City attend school for 45 minutes less than their nonhandicapped peers. Article 22-2 of the teachers' contract memorializes this difference. Teaching hours end at 2:30 p.m. for special education schools and at 3:15 p.m. for other elementary schools. Ostensibly, the reason is to facilitate busing of handicapped children to their homes. Jersey City argues that handicapped children do not lose any instructional time because the savings is achieved by cutting 30 minutes from the normal one-hour lunch period. Even if that explanation (which fails to account for an extra 15 minutes) is true, handicapped children are deprived of the chance to participate in after-school activities and tutoring. Dr. Osowski, who,

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[33] Parents and guardians are given "a large measure of participation at every stage of the administrative process." *Rowley*, 458 *U.S.* at 205. Accord, *Burlington Sch. Comm. v. Mass. Dept. of Ed.*, 471 *U.S.* 359, 394 (1985). New Jersey regulations recognize the right of parents to participate in the evaluation of their child, the decision to determine eligibility for special education and related services, and the development of an IEP. *N.J.A.C.* 6:28-2.3(c). Change of placement of a child cannot be made without either parental consent or notice and opportunity for a due process hearing. *N.J.A.C.* 6:28-2.3(b).

as head of the State's division of special education, is well acquainted with the practical side of administration, recoiled at the idea of subordinating the needs of handicapped children "for the purposes of transportation ease or administrative convenience."

Because Jersey City represented that it had made substantial progress in bringing its special education program into compliance, the State paid a follow-up visit to the district in late April 1988 to check out this claim. Dr. Osowski participated personally in this phase of the investigation. On their face, the class lists he obtained from the district's central office appeared to comply with mandated limits on class size. Entering into classrooms, however, Dr. Osowski observed that the names of students on teachers' rosters did not match those on the official class lists. A guidance counselor from whom he sought clarification did not have an accurate class list in her possession and told him that she needed his help "to move mountains" to get one. This exchange led Dr. Osowski to conclude that "nobody really knows where the kids are in the Jersey City school district." Both sides agree that it is important for a school district to know where its students are at all times. In a similar context, Jersey City's own expert, Dr. Tewel, quipped, "Listen, if Macy's can count underwear, a school should be able to count kids. It's a basic process before you begin the process of education."

In response to the State's prior criticisms, Jersey City gave assurances that it had begun to implement new forms which would cure any deficiencies in its IEP documents and instructional guides. On their return visit in April 1988, State investigators found new forms used only in nine of 5,343 pupil records. Delving more deeply, Dr. Osowski found "incredibly" outdated IEPs dating as far back as 1983. Instructional guides, which by definition should be "fitted to the pupil's learning style," were written word-for-word in identical language, except for students' names. Special education teachers confided to Dr. Osowski that, in anticipation of the State's arrival, they had been given one week to concoct instructional guides, where none had previously existed. Many teachers were resentful because they lacked sufficient input from child study teams to do a meaningful job, and one resource room teacher at Ferris High School declined to cooperate in the charade.

Significant differences were evident in the quality of expert opinion offered by the parties. The State's expert, Dr. Osowski, spoke not only as a recognized expert in the field of special education, but also as the person charged with enforcing the law and disbursing grant monies. Jersey City's special education expert, Dr. Jay Gottlieb, is an academic at New York University and author of many published papers and research studies. While his theories are stimulating and thought-provoking, Dr. Gottlieb's personal outlook colored much of his thinking about Jersey City's special education program.

Since he has no responsibility to monitor compliance with existing law, it was easy and cost-free for him to dismiss lightly the lack of an individualized plan for every handicapped child or that such plans as do exist in Jersey City are not tailored to the particular child's unique needs. While extolling certain changes which the district had implemented in September 1987, Dr. Gottlieb nonetheless acknowledged that improvement had thus far been "limited" and that he must "come back in a couple of years" to see whether or not the changes had worked. One of these changes involved adding an extra layer of bureaucracy to the referral process, which the State's management consultants saw simply as a device to circumvent the time frames for delivery of services to handicapped children. Jersey City also claimed credit for opening 105 new special education classes since 1985. It turned out, however, that at least a dozen of these new classes were not yet in operation, but were projections of future increases. More important, the opening of additional special education classes, in itself, does not automatically mean that children are receiving appropriate educational services. Illustratively, the central office had issued a wholesale directive to place all emotionally disturbed or perceptually impaired children in resource rooms, a "misdirected solution," which, according to Dr. Osowski, "showed no attention to the needs of handicapped pupils."

Overall, the parties differ in their interpretation of various "outcome measures" used as indicators of the district's success or failure in educating its children. Standardized tests, such as the HSPT, are one such measure. Assistant commissioner McCarroll cautioned, however, that they are not the only component of monitoring, and that takeover would not be suggested for any district solely because of poor test results. The HSPT consists of three parts, reading, mathematics and writing, and is designed to test essential skills which all students should have

acquired by the end of their entry year into high school. Although Jersey City derives some satisfaction from recent increases in its passing rate on this test, there is little about which to be genuinely proud.

Scores on the HSPT administered to the district's youngsters in April 1988 are abysmally low.[34] Practically two-thirds of Jersey City ninth graders who took the test, 64% to be exact, could not pass all three subtests as required in order to graduate. By comparison, the failure rate for all districts statewide is only 23.3%. Jersey City also fares poorly when compared to 27 other districts in the same "district factor grouping," a category controlled for income, education level and socioeconomic status. Neighboring Hoboken has a more respectable failure rate of 46.7%. Only Camden and Newark have worse failure rates than Jersey City.

Breakdown of Jersey City's scores on the subtests is equally distressing. Reading test failure rates are 30.1% for Jersey City, compared to 6.6% statewide and 15.6% for urban districts alone. Writing test failures are 37.4% for Jersey City, compared to 9.3% statewide and 18.9% for urban districts. Mathematics test failures are 51.4% for Jersey City, compared to 18.2% statewide and 34% for urban districts. Moreover, Jersey City's success rates are probably inflated in relation to other districts, because it has the largest number of classified children who are exempt from taking the test. Dr. McCarroll was understating the case when he remarked that Jersey City has "nothing to cheer about."

Putting its best foot forward, Jersey City emphasizes the substantial percentage increases in its HSPT scores between 1986 and 1988. While any improvement is laudable, the impressiveness of this accomplishment is tarnished by the low starting point for the calculations and by the distance that Jersey City has yet to go. Comparisons among results on achievement tests administered in the lower grades are rendered meaningless by the fact that different local districts in New Jersey use

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[34]At the time the issue first arose, the best available data were preliminary results for the 1987-88 HSPT, which carried its own disclaimer that the information was accurate only to the extent that it had been reviewed as of July 8, 1988, that certain sections may contain errors and misprints, and that all numbers were subject to continuing verification. Neither side has sought to supplement the record with the final summary report containing more accurate data.

different test instruments and that Jersey City itself switched tests within the relevant period.

By other conventional measures, Jersey City also lags behind the rest of the state. Student absenteeism consistently exceeds the districtwide rate of 10% or less required by the state for certification. At three of the five high schools, absenteeism exceeds the State standard of no more than 15% per school. Snyder High School had an absenteeism rate of 25% in 1986-87, while Dickenson and Lincoln were above 20%. Almost as significant as what Jersey City said is what it chose not to say. Most districts in New Jersey measure success in terms of college admission test scores, acceptances to more selective colleges, number of national merit scholars, outside recognition of student achievement, or parent satisfaction. Jersey City was resoundingly silent on these matters. Numerous administrators whose jobs are at stake made self-serving statements, but not even one parent or student vouched for the quality of education in Jersey City. There was, however, one area in which Jersey City did claim to excel. Professor Tewel brought up the low incidence of "missing marks" on student report cards, apparently considering it to be remarkable that teachers in the district gave grades to their students.

I FIND that Jersey City is not providing a thorough and efficient education to its children and is unable to take necessary corrective measures on its own. Culture and climate in several schools are not conducive to learning, as typified by depressing surroundings, inadequate discipline, chaotic hallways, shortages of teaching materials, toleration of tardiness, and disruptive noise levels.

Serious defects occur in virtually every type of program. In the regular classroom, the secondary curriculum is outdated and incomplete. High school curriculum has remained substantially unchanged for 15 to 20 years, except for superficial alterations. Administrators have concentrated on revising the curriculum in the lower grades, neglecting the educational needs of older children. Lack of uniformity in textbooks creates hardships for students moving between classes. Public funds dedicated for supplemental programs are misspent for other purposes. Mismanagement by the district deprives eligible children of basic skills or bilingual/ ESL instruction necessary to help them become productive members of society. Programs for handicapped children are not sufficiently individualized to meet special needs. District managers have failed in planning for delivery of special

education services, in protecting the rights of handicapped children and their parents, and in developing appropriate policies and procedures for implementing the relevant law.

Conditions are so extreme that the district is unable to keep track of where its students are in the system. Large numbers of children in the Jersey City public schools cannot demonstrate proficiency in basic reading, writing or mathematics skills by ninth grade. Absenteeism is unacceptably high. The learning environment is polluted with the insidious message that school officials lack confidence in the children's abilities. That message is conveyed in many subtle ways, including a curriculum designed for low cognitive functioning, acceptance of poor performance on basic skills tests, and the defeatist attitude, implicit in the testimony of some defense witnesses, that urban children are inherently unruly or disinterested in education.

G. Fiscal Practices

Attempts by State investigators to probe the complicated financial dealings of Jersey City were hampered by a complete lack of cooperation from the person described by superintendent Franklin Williams as the district's chief fiscal officer, responsible for "all the financial matters and accounting, and auditing." Board secretary Arsenio Silvestri, who has held that post for many years, invoked his Fifth Amendment privilege against self-incrimination more than 40 times, refusing to answer highly relevant questions about his performance of official duties, his knowledge of employee dental and prescription plans, actions taken in response to independent audits, practices regarding retention of bid documents and contracts, and salary increases awarded to his wife.[34]

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[34] In his capacity as board secretary, Mr. Silvestri is "the general accountant of the board." *N.J.S.A.* 18A:17-8. He is required by statute to "collect tuition fees and other moneys due to the board not payable directly to the custodian of school moneys," *id.* at (a), "examine and audit all accounts and demands against the board and present same to the board for its approval in open meeting," *id* at (b), and "keep and maintain such accounts of the financial transactions as shall be prescribed by the state board," *id* at (c).

Coupled with extrinsic evidence from other State witnesses about irregularities and fraudulent activities in the financial area, Mr. Silvestri's silence compels an adverse inference that the board and its employees were extremely careless in their handling of public trust funds, and that Mr. Silvestri remained mute to avoid admitting his personal complicity in possibly criminal wrongdoing.[35]

Abundant proof of impropriety exists, even without the aid of Mr. Silvestri's testimony. Nowhere is Jersey City's managerial ineptitude more readily apparent than in connection with its employee dental and prescription benefits, where several red flags ought to have put an alert leadership on notice that something was seriously amiss. Actually, Jersey City's dental and prescription plans were self-insurance arrangements rather than traditional insurance plans.[36] Started in 1984, and thereafter renewed in 1985 and 1986, the plans were embodied in a series of contracts between the board and a bewildering succession of interrelated business

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[35]Unlike a criminal case, in a civil or administrative case the trier-of-fact is free to draw an adverse inference from a party's refusal to testify, provided that, as here, "there is other evidence supporting an adverse finding." *Dept. of Law & Pub. Safety v. Merlino*, 216 *N.J. Super.* 579, 587 (App. Div. 1987), aff'd 109 *N.J.* 134 (1988). See *Mahne v. Mahne*, 66 *N.J.* 53, 60 (1974); *Bastas v. Bd. of Review, Dept. of Labor & Ind.*, 155 *N.J. Super.* 312, 315 (App. Div. 1978); *Duratron Corp. v. Republic Stuyvesant Corp.*, 95 *N.J. Super*, 527, 531 (App. Div. 1967), certif. den. 50 *N.J.* 404 (1967). Since Mr. Silvestri was an employee of the board, both at the time of the events in question and on the date of hearing, and the State sought to ask him about matters arising in the course of his employment relationship, his conduct can be imputed to his employer. A further caveat is that an adverse inference may not be drawn "if the penalty imposed at the conclusion of the proceeding is so severe as to effectively destroy the privilege, such as disbarment or the loss of professional reputation." *Merlino*, at 587. Removal of various central administrative and supervisory staff, Mr. Silvestri among them, may be an incidental effect of this proceeding, but that decision is left to the discretion of any State-appointed board of education and is not within the province of this forum. *N.J.S.A.* 18A:7A-44. The sole relief requested in the present proceeding is dissolution of the local board of education and its replacement by a State-operated school district.

[36]No statutory authority permits local school boards to self-insure for health benefits, and thus it was outside Jersey City's powers to act as its own insurer. At the time, however, the law was less clear than now after issuance of an Attorney General's legal opinion on the subject. Due to the prior ambiguity in the law and the board's reasonable reliance on the erroneous advice of its legal counsel, the board cannot reasonably be expected to have known that the arrangements were illegal from the inception.

entities, most recently New Age Administrators, Inc. ("New Age"). Basically, the contracts obligated the board to assume primary responsibility for payment of dental and prescription benefits for its full-time employees and their families, in accordance with incorporated rate schedules, and to pay fees to a third party administrator responsible for administering the program. Also, the board was to pay a 5% "broker's fee" to one Ronald Gasalberti for services which are not clearly defined by the agreement. Board employees had no idea why the broker's fee was being paid.

State audits of payments made under the latest version of the contract, covering a one-and-a-half year period commencing February 1, 1986, disclosed a vast number of overcharges or improper payments, conservatively estimated at $1.22 million. Estimates by Jersey City's independent accounting firm of Touche Ross & Co. ("Touche Ross"), performed in connection with contract litigation currently pending in the Superior Court, put the total loss much higher at $1.47 million. What is most damning about the New Age transactions is that the overcharges would have been easily detectable by anyone making a cursory review of the invoices and that several school officials clearly knew about the overcharges all along.

Bernardo Giuliana, a State investigator with an accounting background, recounted the various types of irregularities which he and his colleagues had ferreted out by subpoenaing records. Prices charged by New Age were greatly in excess of contract rates, but Jersey City kept paying the bills as submitted, without any indication that the improper charges were ever questioned. New Age unilaterally began charging extra for prosthetic benefits included within existing coverage, again with no objections from the board.

Amounts payable to New Age varied with the number of covered employees and dependents at any given time. Under the contract, the board was required to notify the administrator of any additions or deletions within ten days. Nonetheless, the board supplied monthly census reports which remained constant over time, failing to reflect changes for recently terminated or newly hired employees. In one instance, New Age paid a claim for dental services for a former employee who had been terminated half a year earlier. In another, New Age paid a dental claim for a former employee who had resigned two months before any services were rendered. Similarly, billings for prescriptions were governed by the constant number of

outstanding prescription cards, rather than by an actual count of eligible employees and dependents. When it finally did report census changes, the district's business office committed frequent errors, such as adding the names of ineligible persons who had not satisfied the waiting period or who worked only part-time.

Additional irregularities involved Jersey City's failure to insist on performance of terms inserted into the contract for its own protection. Thus, the contract obligated New Age to procure reinsurance policies for amounts above the Board's maximum risk exposure. However, New Age allowed a lapse to occur in reinsurance coverage for the dental plan and obtained no coverage whatsoever for the prescription plan, thereby exposing Jersey City to unnecessary liability.

In early 1986, Theresa Gordon, a clerk in the health benefits section, informed her supervisors of the suspicious nature of the New Age billings and asked for guidance. Ms. Gordon had been given her assignment in December 1985, without any training or instruction on how to do the job. She quickly noticed that nobody seemed to be checking the New Age bills, and she promptly brought her concerns to the attention of others in the organization. Her immediate superior, payroll supervisor Dominick Amari, directed Gordon to "just pay the bill" and not worry about checking its accuracy. Continuing up the chain of command, Gordon next contacted assistant board secretary John Yeager, who also instructed her to "go ahead and process the bill for payment." Gordon did not stop there, but went on to board secretary Arsenio Silvestri. After listening to her story, Mr. Silvestri offered no advice of his own and said nothing to indicate disagreement with what the others had already told her. Both Amari and Yeager have since left the board's employ, and neither appeared as a witness to refute Gorden's sworn testimony.

Jersey City's assertion that it initiated its own New Age investigation in November 1987 "independently" of any State investigation is patently false. State investigators had earlier questioned the legality of the self-insurance arrangements in June 1987 and had served subpoenas on the board for New Age records in August 1987. It was only after the State sent a letter in October 1987, advising the board that its dental and prescription plans were not authorized by law, that Jersey City reluctantly canceled its contract with New Age. And it was not until January 1988, when Hudson County assignment judge Burrell Ives Humphreys ordered it to do so,

that Jersey City finally took legal action to recover whatever sums had been improperly paid to New Age.

Extravagant claims by Jersey City about the organization of its business department and its system of internal control bore little resemblance to actual practice. Despite fine-sounding phrases about "checks and balances" and "segregation of duties," the board's financial witnesses had only vague notions of what each other does, who reports to whom, or how the separate pieces fit together. Lines of responsibility are splintered among seven or more people, including the board secretary, business manager, office manager, controller, internal auditor, budget officer and payroll supervisor. Budget officer Joanne Gilman did not know what the internal auditor does or whether his duties were similar to her own. Mrs. Gilman said that she reports directly to the board secretary, but business manager Chester Kaminski said that she reports to the controller. Some financial officers, notably the controller and internal auditor, have dual reporting responsibilities to both the superintendent of schools and the board of education. No one seemed to know to whom the board secretary is answerable. Financial records pertaining to public bidding or payroll are scattered about in the custody of different financial officers in different offices, rather than centralized in one accessible location. As a result, responsibility in the district is so attenuated that no one is really in charge and no one can be exactly sure of where to go to obtain the full financial picture.

KMG Peat Marwick Main & Co. ("Peat Marwick" or "Peat"), the world's largest accounting firm, was hired by the State to investigate Jersey City's practices and procedures in the two areas of greatest public expense, payments to contract vendors and payroll. Marvin Katz, a certified public accountant and partner in the firm, supervised the collection of data and was responsible for the contents of the final report. Trained staff from Peat Marwick examined 61 contracts from the 1985-86 and 1986-87 fiscal years, of which 56 were selected at random and 5 selected by the State.

Summarizing his findings, Mr. Katz testified that there were errors or deficiencies in nearly half the cases chosen for review. Sometimes files were missing altogether (M & F Meats, The Maramount Corp., Massa Sound Services). More often, the contract was missing from a file and could not be located (B & G Grocery and Nut

Co., Effinger Sporting Goods Co., Harrison Baking, Cooperative Education, etc.), or the contract in a file was unsigned by one or both parties (Bellewood Dairy, Broadhead Garrett Co., Duncan Hardware, Jewel Electric, etc.). State contract numbers were used to purchase goods not under state contract (Jewel Electric, Xerox, Duncan Hardware), which Jersey City blamed on clerical errors by its purchasing agent, who continued to review documents even though his "eyesight was failing due to a progressive disease."

Payments to one vendor (Aritech Corp.) exceeded the contract price, while another vendor (Scientia Corp.) received double payments. Change orders authorizing payment in excess of the original contract price were missing (Quality Roofing). Items in several contracts were not purchased from the lowest bidder (Effinger Sporting Goods, Guardian Supply, Industrial Luncheon), although the amount of money involved was negligible. Supporting documentation was absent for purchases where the district claimed exemption from requirements of the bidding laws, either as an emergency purchase (A Space Station) or as an extraordinary service (Educational In-Road). Jersey City furnished a list of 70 employees who could, subject to board review, "authorize" contracts, a practice which creates control problems and which Mr. Katz said is "unheard of" anywhere else. Signatures of the board's finance chairperson on purchase orders did not match a specimen of her handwriting on her oath of office, and she did not come forward to explain the apparent discrepancy.

Original bids were replaced by copies in nearly every file examined. Office manager Paul Tyskewicz informed Peat Marwick that the district routinely returned original bids to the bidders, rather than retaining originals as part of the file for possible future use. In a few instances, bid documents had been physically cut up and repasted together out-of-order, an event so bizarre that Mr. Katz had never seen anything like it in almost 40 years as an expert in municipal finance. Charles Cuccia, Mr. Katz's senior associate, confirmed most of the report's findings from his personal observations at the site. Mr. Cuccia surmised that the most likely motive for defacing a bid document would be to obscure the fact that an unsuccessful bidder had submitted the lowest bid. Bid advertisements were also frequently missing.

According to Mr. Katz, the significance of Peat's findings is that Jersey City lacks a basic system for safeguarding public assets. Loose controls over purchases and an ineffective method for retrieval of vital contract information expose the board to unauthorized contract obligations and increase the likelihood of misappropriation of funds, contrary to the board's duty to operate economically and efficiently. Similar findings of incomplete bid files and unsigned contracts were noted in Touche Ross audits for the fiscal years ending in 1985, 1986 and 1987 and in a prior study by Cresap McCormick in 1984, prompting Mr. Katz to conclude that Jersey City either "wouldn't or couldn't" correct the problem. State investigators reviewed Touche Ross audits dating back to 1981 and found a continuing pattern of uncorrected citations.

The fact that Jersey City produced some of the missing documents at the hearing does not detract from the strength of proofs that they had been unavailable one year earlier, when investigators requested them. Documents can be too easily fabricated or altered. An outside accounting firm has no way of independently knowing about the existence of missing documents and must rely on whatever documents the district chooses to supply. It was the district's obligation to make all its public records available for Peat's inspection, not the examiner's obligation to hunt for them.

In fairness to Jersey City, it should be noted that Peat Marwick failed to substantiate a few of the alleged contract deficiencies. Peat criticized the bus ticket purchase (Lafayette & Greenvale) because there was no written contract. However, no written contract was necessary because the vendor is a regulated public utility. Other situations involved gray areas, where honest opinions might reasonably differ. Whether or not to aggregate expenses for bidding purposes (Broadhead Garrett Co.)

is a subjective judgment call, although Peat clearly appeared to have the better side of the argument.[37]

It is unnecessary to accept Peat's word alone about chaotic conditions in the district's file room, because the facts were corroborated out of the mouths of Jersey City's own witnesses. Paul Tyskewicz, the clerical employee with custody of the bid files, admitted that for years the district lacked any sign-out system for keeping track of which documents were removed, who removed them, or when and where they were taken. Files were not under lock and key, so an unlimited number of people had potential access to them. At a much later date, business manager Chester Kaminski started to lock the door to the file room and instituted a card system to control access to files, but he could not say exactly when that practice began. Mr. Tyskewicz thought the card system had not begun before May of 1988. Neither Kaminski nor Tyskewicz could establish the chain of custody or adequately explain how various documents had come into his possession. Kaminski suggested that certain unspecified documents might have been delivered to the district's legal department or even seized by the FBI, but no one knew when or how they had suddenly reappeared.

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[37]The Public School Contracts Law, *N.J.S.A.* 18A:18A-1 *et seq.*, establishes a threshold amount, above which most purchases by school boards must be advertised for public bid. *N.J.S.A.* 18A:18A-8 prohibits circumvention of the threshold by subdividing any purchase "which is single in character" or which necessarily includes "buying materials or supplies or the doing of additional work" for completion of any project. *Guidelines on Public School Contracts* (Oct. 1986), an official state publication, suggest that materials and supplies should be grouped together if they "are commonly made, stocked, or sold by the same sources," "are all used on the same project" and "are normally needed over the course of a fiscal year." (at 10). See *S.H. Roemer Co., Inc. v. Camden Cty. Bd. of Freeh's*, 91 *N.J. Super.* 336 (Law Div. 1966). Elsewhere, the *Guidelines* indicate that for amounts under the threshold "a purchase order may serve as a contract[.]" (at 15). *N.J.S.A.* 18A:18A-40. The Broadhead Garrett transaction involved separate purchases of various items, including paints, oils and varnishes, machine tools, hardware and small tools, non-precious metals, and art supplies. Since Jersey City actually did go to bid for these items, avoidance of the bidding requirement was not involved. Instead, the issue was whether Jersey City needed a formal written contract for the purchases. Mr. Katz took the logical position that since the purchases were in fact bid, there should also have been a contract. Mr. Cuccia was even more emphatic, arguing cogently, "when in doubt, write a contract."

Peat Marwick's investigation into the payroll area failed to uncover any evidence of either "no show" jobs or employees continuing to receive salary after termination of employment. Nonetheless, Jersey City spent a disproportionate amount of time attempting to disprove that which the State had never successfully proven in the first instance. In so doing, Jersey City missed the nub of Peat's criticism that payroll records do not contain sufficient information, even if the same information might be found in other district records.

Federal and state audits of funded programs in the district have resulted in disallowed amounts totaling almost $7 million. As Jersey City points out, several of the audits date back before July 1985. Under the State's watchful eye, the district has reduced its losses in some programs, such as child nutrition where losses are down substantially from $165,000 in 1984-85 to $929 in 1986-87. Meanwhile, losses in other programs continue to mount, such as adult education where Jersey City's losses in 1986-87 were $199,000, or basic skills where losses were $528,000.

Jersey City also engaged in imprudent business practices. Only a few salient examples need be discussed here. While the board allows many employees to bring district-owned or leased vehicles home at night and on weekends, it has no written policies prohibiting personal or pleasure use, does not require employees to keep trip logs, and has no other way of monitoring vehicle usage. Over the years, school employees driving district vehicles have accumulated thousands of dollars worth of unpaid parking tickets, which the City has asked the district to help collect.

Until late 1987, the district kept large sums of public money in non-interest bearing bank accounts, forfeiting substantial earnings and paying unnecessary service fees. District employees have taken money from petty cash or school accounts to pay for purely personal items, such as parking tickets or newspapers. As recently as February 1988, the district's own internal auditor, John Scarfo, conducted a review of petty cash accounts at the central office and wrote that" [f]unds are not always deposited into checking accounts on a timely basis," that "checks are not always issued in sequential order," and that "numerous errors in addition and subtraction were noted." Controller Donald Sylvester acknowledged one particular incident in which an employee had "inadvertently" deposited money from a school account into his personal bank account by "mix[ing] up his deposit slips."

I FIND that the board has failed to exercise proper managerial oversight in the financial area, has failed to adopt a prudent policy of cash management, and has tolerated practices which do not conform to the requirements of public school contract law or sound business judgment. Mismanagement and the lack of adequate internal controls have resulted in the increased likelihood of waste of public trust funds dedicated for the education of children. Top school officials, including the board secretary, knew as early as 1986 about fraudulent billings and questionable fees with respect to the district's dental and prescription plans, but did nothing to stop the plundering of at least $1.22 million.

Record-keeping operations are in shambles. Bid files and contracts are missing, contracts are unsigned, original bid documents have been returned to bidders, and documents have been physically altered. Clerks in charge of the file room could not locate important public records for review by Peat Marwick examiners. Touche Ross audits in 1985, 1986 and 1987 identified many of the same areas of deficiency which continued to exist at the time of the Peat investigation. Cresap McCormick had brought similar problems to the district's attention in 1984. Jersey City had a pattern of uncorrected audit citations dating back to 1981. Federal and state agencies conducting audits of funded programs have disallowed millions of dollars for noncompliance with program requirements. Substantial sums of aid money were disallowed after 1985. Business administrators have breached their fiduciary duties by failing to take simple steps to protect public property, such as forbidding the personal use of district vehicles or preventing abuse of discretionary cash accounts.

H. Facilities

Both parties agree that the school buildings in Jersey City are old and difficult to maintain. Many were constructed around the turn of the century, and even the newer buildings are 12 to 20 years old.[38] Repair and maintenance problems normally associated with older buildings are aggravated in Jersey City by years of neglect prior to 1985. Most of the district's capital improvement projects are only in the early planning stages. Construction work has started on a new building to replace School 28, but the district is still searching for replacement sites for three other schools. Bonding has been approved for a $17 million renovation of Dickenson High School. The district is justifiably proud of its extensive asbestos removal program.

Claudette Searchwell, principal of School 22, testified that custodial workers assigned to her building were not "self-motivated" or "prideful enough" in performing their jobs. When she complained about her head custodian, "nothing happened." She had great difficulty arranging for his transfer to another school. Ms. Searchwell gave a vivid account of conditions on her arrival as principal of School 22 in September 1986. As she entered, the front corridor was "mottled, spotted [and] dirty" and her shoes stuck to some unknown substance. Children were sitting on "mismatched furniture" of different shapes and sizes. Secretaries were working at "broken down desks." Panes of glass in doorways had fingerprint smudges all over them. Rotten drapes hung from windows by threads. Rugs were dirty and not stapled to the floor. Wooden floors in the basement were rotted and raised. Outside in the courtyard were discarded furniture, some rags, and "copious numbers of dead pigeons spread among this debris."

Even though the district knew the State was monitoring its performance, it was unable to conceal evidence of its extreme negligence. One of the most dramatic moments during the hearing came when Greta Shepherd described her observations of a teacher valiantly attempting to teach young children with "water pouring down the wall" of her classroom. Jersey City's excuse for this inexcusable situation was that it was planning to build a new school building. In the meantime, however, the district clearly owed a duty to both students and teachers to provide minimally adequate shelter. Ms. Shepherd gave other examples of unsafe or unhealthy conditions observed by members of the external team which she chaired. Water seeped dangerously close to high voltage equipment in a room used for physical education. At one school, the custodian responsible for swimming pool maintenance mixed together volatile cleaning chemicals.

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[38]Antiquated and dilapidated school facilities are a statewide problem, although Jersey City is particularly hard-hit. In recognition of the intractable nature of the problem, the Legislature has provided, "No order for the creation of a State-operated school district shall issue solely on the basis of a district's failure to correct substandard facilities." *N.J.S.A.* 18A:7A-15. Commissioner Cooperman has acknowledged that the problem "can only be addressed by a specific, concerted, coordinated effort at the State level" and that the amount of revenue required is "beyond that which may be reasonably expected to be raised by the existent funding mechanisms." *Abbott v. Burke, supra* at 783.

I **FIND** that Jersey City does not ensure that all its students have a safe, clean and healthy place in which to learn. The shocking and unappetizing conditions described by highly credible witnesses are intolerable in a school setting. At the very least, they interfere with students' abilities to concentrate on their studies. At worst, they pose an imminent threat to the children's physical safety. Building principals do not have adequate control over janitorial services in their own buildings. Incompetent workers are not properly disciplined. Any school district which would allow youngsters to remain in a classroom while water pours down the walls does not have an adequate sense of educational priorities.

IV. Conclusions of Law

Based on the foregoing facts, I **FIND** that Jersey City has failed to take or is unable to take the corrective actions necessary to establish a thorough and efficient system of education. Further, I **CONCLUDE** that the State has satisfied its statutory burden of showing that issuance of an administrative order creating a State-operated school district is not arbitrary, unreasonable or capricious.

As noted at the outset, this case is about the quality of education for children. Recent efforts to promote greater educational equality and a more equitable sharing of financial burdens are meaningful only if there is also some assurance of quality education. Art. VIII, § IV, ¶ 1 of the New Jersey Constitution (1947) mandates that the Legislature provide for a thorough and efficient system of free public schools for all New Jersey children between the ages of five and eighteen. Pursuant to this constitutional grant of authority, the Legislature has conferred broad powers on the Executive Branch to ensure the thoroughness and efficiency of local public school systems.

General supervision and control of public education in New Jersey is vested in a State Board of Education, *N.J.S.A.* 18A:4-10, and in a Commissioner who is chief executive and administrative officer of the Department of Education, *N.J.S. A.* 18A:4-22. In the exercise of his statutory powers, the Commissioner has supervision of all schools receiving support or aid from state appropriations, *N.J.S.A.* 18A:4-23, must enforce all rules of the State Board, *N.J.S.A.* 18A:4-23, and may inquire into the thoroughness and efficiency of operation of any public school system of the state, *N.J.S.A.* 18A:4-24. New Jersey's highest court has uniformly taken an expansive view of these powers, and has consistently upheld the Commissioner's authority to do whatever may be reasonably necessary to carry out the constitutional directive. See, *e.g., Bd. of Ed., Plainfield v. Cooperman,* 105 *N.J.* 587 (1987) (power to override local exclusion of student allegedly due to health reasons); *In re Upper Freehold Reg'l Sch. Dist.*, 86 *N.J.* 265 (1981) (power to order local district to issue bonds to fix leaking roof); *Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick*, 48 *N.J.* 94 (1966) (power to order local districts to restore cuts in school budgets); and *Jenkins v. Tp. of Morris Sch. Dist.*, 58 *N.J.* 483 (1971) (power to order redistricting across local lines to achieve racial balance.)

Home rule and local control of the public schools are strong and venerable traditions in this state. Case law supports the concept of shared responsibility between the state and the local districts, *Robinson v. Cahill*, 69 *N.J.* 449, 45[illegible] (1976), and of entrusting the supervision and management of school systems to local boards in the first instance, "subject to the supervisory control" of the State Board and the Commissioner. *Dunellen Bd. of Ed. v. Dunellen Ed. Ass'n*, 64 *N.J.* 17, 23 (1973). Legally, however, a local school district is nothing more than "an instrumentality of the State itself," and the Legislature could, if it chose to do so, abolish the existence of a local district with the stroke of a pen. *Durgin v. Brown*, 37 *N.J.* 189, 199 (1962). Even the most ardent proponents of local autonomy are forced to admit that home rule in the sense of exclusive control at the local level is "an unwarranted myth" and that local school districts "are not sovereign entities." S. Galante, R. Weiss, C. Jahn & T. Scully, *Basic School Law*, at 2-3 (1984).

Before passage of the school takeover legislation, the Commissioner already possessed the legal authority to appoint a monitor general to act as general supervisor of all activities undertaken by a local school district, *In re Trenton Bd. of Ed.*, 86 *N.J.* 327 (1981), or to appoint a fiscal monitor to manage a school district's financial affairs, *McCarroll v. East Orange Bd. of Ed.*, OAL Dkt. No. EDU 7777-84 (Oct. 31, 1984), adopted No. 346-84 (Comm'r Nov. 7, 1984). In the *Trenton* case, the Court held that such authority "emanates from the entire statutory fabric" of the Public School Education Act of 1975. 86 *N.J.* at 330. Both the plain language of the takeover law and its legislative history evince a clear intent on the part of the Legislature to enlarge rather than diminish the already far-reaching powers of the Commissioner to intercede in failing school districts.

Statutes which, like the takeover law, are remedial in nature must be construed generously to effectuate the legislative purpose. *Sabella v. Lacey Tp.*, 204 *N.J. Super.* 55, 59 (App. Div. 1985); *Carianni v. Schwenker*, 38 *N.J. Super.* 350, 361 (App. Div. 1955). *N.J.S.A.* 18A:7A-15, as amended, provides,

> If the [C]ommissioner determines that the district has failed to take or is unable to take the corrective actions necessary to establish a thorough and efficient system of education, the [C]ommissioner shall recommend to the State board that it issue an administrative order creating a State-operated school district.

Use of the disjunctive "or" suggests alternate triggers for State action, that the Commissioner has a duty to intervene if the local district either won't or can't make reasonable progress on its own. Later on, the statutory language concentrates more on the educational needs of children than on the reasonableness of efforts put forth by the local district. Thus, the State Board may direct removal of the local board and creation of a State-operated school district "upon its determining that the school district is not providing a thorough and efficient system of education." *Id.* Similarly, the State Board may issue an administrative order for takeover "[w]henever the Commissioner of Education shall determine . . . that a local school district has failed to assure a thorough and efficient system of education[.]" *N.J. S.A.* 18A:7A-34. Read together, the statutory language shows that the Legislature was attentive to the problems of local districts but more concerned about education for children.

Indicative of the clear legislative intent to broaden the Commissioner's powers is the relatively light burden of proof imposed on the State at the hearing before a judge of the Office of Administrative Law. *N.J.S.A.* 18A:7A-14 specifies that "In the proceeding, the State shall have the burden of showing that the recommended administrative order is not arbitrary, unreasonable or capricious." Construing a similar standard, the New Jersey Supreme Court has stated, "The test is essentially one of rational basis." *Worthington v. Fauver*, 88 *N.J.* 183, 204 (1982). Oft-quoted language in *Bayshore Sewerage Co. v. Dept. Environ. Protection*, 122 *N.J. Super.* 184, 199 (Ch. Div. 1973), aff'd 131 *N.J. Super.* 37 (App. Div. 1974) elaborates on how little the State must show to sustain its case:

> Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where 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.

Statutory provisions for the governance of State-operated school districts also reflect the legislative design to strengthen the powers of the Commissioner and the State Board. Upon issuance of an administrative order by the State Board, the State-operated district "becomes effective immediately." *N.J.S.A.* 18A:7A-34. The statutes contemplate appointment of a State district superintendent of schools to serve for five years, with the power to do all things "necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district." *N.J.S.A.*

18A:7A-38. There is automatically established an internal audit team to "monitor the business functions of the district and report its findings to the State district superintendent and the commissioner." *N.J.S.A.* 18A:7A-41. Existing positions of chief school administrator and other central office administrators "shall be abolished upon creation of the State-operated school district," and within six months the new State superintendent shall prepare and implement a reorganization of the district's central office staff. *N.J.S.A.* 18A:7A-44. Such measures are temporary, and the statutory scheme anticipates gradual restoration of local control after the district achieves certification. *N.J.S.A.* 18A:7A -49.

Legislative intent may be further gleaned from the surrounding legislative history, even where no ambiguity appears on the face of the statutory language. *Data Access Systems, Inc. v. State*, 63 *N.J.* 158, 166 (1973). Enactment of the school takeover law has a long and tortuous history. The push for passage began with earlier versions of legislation, introduced in June 1986 as Senate Bills 2355, 2356 and Assembly Bills 2926, 2927, which passed both Houses in amended form but died after being conditionally vetoed by the Governor in June 1987. Similar proposals were reintroduced in November 1987 as Assembly Bills 4643 and 4644. These bills managed to survive hard-fought battles over many controversial issues, including tenure rights of school principals and funding for corrective action plans. Ultimately, the Governor signed compromise versions of the bills into law on January 13, 1988.

Public hearings before a joint session of the Senate and Assembly Education Committees on September 16, 1986 provide useful insights into what the Legislature was hoping to accomplish. Testifying in favor of the proposed legislation, Dr. Michael Ross, superintendent of schools in Jersey City for ten years prior to 1984 and superintendent in South Orange-Maplewood since then, informed legislators that "the children are still not achieving as well as they should." *Public Hearings Before Senate and Assembly Education Comm's* (Sept. 16, 1986), at 58. He reminded lawmakers that the Legislature has an obligation to assure all taxpayers "that the money allocated under the T & E law is spent properly for the education of the children of the cities." *Public Hearings*, at 59. Moreover, he predicted that if the bills passed "city parents can actually have a more significant voice in the quality of the education their children receive," since in his experience "too often the board has been the politicians' voice, not the people's voice." (*id.*) At the bill signing

ceremony, Governor Thomas Kean declared that New Jersey had become "the very first state to make the moral statement that when schools fail, adults should pay the price, and not children." *Remarks of Gov. Kean (*Jan. 13, 1987*)*, at 1.

Jersey City urges that the requested relief is too drastic, relying on legislative findings that the State must be empowered to take over local districts in "extreme cases." *P. L.* 1987, c. 398, § 1(d). In addition, Jersey City refers to that portion of *N.J.S.A.* 18A:7A-15 which gives the Commissioner the power, short of a takeover, "to order necessary budgetary changes within the district or other measures the [C]ommissioner deems appropriate to establish a thorough and efficient system[.]" While opposing relief of any type, Jersey City contends that, if some corrective action is necessary, the Commissioner must first exhaust the least intrusive remedy.

Like Jersey City, the State also regards takeover "[a]s a last resort mechanism designed to address only the worst-performing school districts." *Finally-Intervention Becomes Law*, New Jersey Education Bulletin, Vol. 6, No. 7 (Jan. 1988), at 1. It is, of course, true that the Commissioner retains the option to order lesser remedies in appropriate situations. But that is a moot point here, where the circumstances are so calamitous that the Commissioner or his designee may reasonably conclude that takeover is the only viable remedy. Indeed, it would be difficult for any impartial observer to conclude otherwise. Truly the "extraordinary" nature of the remedy is justified here by the "equally extraordinary" nature of the problem. *Trenton*, 86 *N.J.* at 329.

As set forth in the factual findings, Jersey City has serious deficiencies, not just in one area, but in *all* major areas of monitoring. Therefore, the problems are not susceptible to limited solution. If the problem were only in finance, appointment of a fiscal monitor might arguably be enough. If the problem were only in special education, a new person for special education might be enough. If the problem were only in personnel, a new person for personnel might be enough. But Jersey City's problems are systemic. They run across the various administrative departments and across changes in membership of the local board of education. Whoever happens to be in control, the district has shown an institutionalized resistance to long-overdue reforms. This is not an indictment of everyone associated with the district but of the leadership, whose job it is to set the tone and provide direction to the organization. School managers cannot be allowed to blame general social

conditions, or the State, or the children who are the victims, for their own inadequacies. They must themselves be held accountable.

Proofs convincingly demonstrate that Jersey City's problems are so pervasive that they require outside intervention. State expert witnesses approached the question from different fields of speciality, but each arrived at essentially the same conclusion. Dr. McCarroll, an educational administrator, testified that the district is unable to "identify its problems, let alone, to solve them." Dr. Smoley, a management expert, recommended that the district must be "completely restructured" and that "the State as the governmental entity with ultimate constitutional responsibility for education must establish a structure and a process for providing the effective governance and leadership." Greta Shepherd, an urban education expert, believed that the district's present leaders lack the capacity "to think of alternative strategies, to correct their problems." Vincent Calabreze, an expert in school finance, did not think that the local district had the ability to "reverse a long-standing trend" and saw a need for dramatic change "to break the cycle" of failure. The Commissioner or his designee may reasonably rely on the well-founded advice of these reputable experts.

Next, Jersey City contends that the State acted arbitrarily by excessive reliance on hearsay evidence to prove its charges. Although formal rules of evidence are relaxed in administrative hearings and hearsay is admissible, most state administrative agencies are nevertheless bound by the "residuum rule." The classic statement of that rule appears in *Weston v. State*, 60 *N.J.* 36, 51 (1972):

> Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it.

There are several reasons why the residuum rule does not preclude reliance on the credible evidence in this case. First, the residuum rule does not apply here to the State's investigative report. Legal scholars have expressed "near universal criticism" of the residuum rule. Pierce, *Use of the Federal Rules of Evidence in Federal Agency Adjudications,* 39 Admin. Law Rev. 1, 9 (1987). In response, the United States Supreme Court, in *Richardson v. Perales*, 402 *U.S.* 389 (1971), abolished the rule for

federal agencies. Since then, federal agencies have substituted the more practical standard of whether the evidence "is of a type relied upon by a reasonably prudent person in conducting his affairs." 39 Admin. Law Rev. at 9. New Jersey has not gone that far yet, but is moving in that direction. Appellate courts have adopted a federal-like standard for Casino Control Commission cases because of that agency's unique statutory authority, *Dept. of Law & Pub. Safety v. Merlino*, 216 *N.J. Super.* 579 (App. Div. 1987), aff'd 109 *N.J.* 134 (1988), and have declined to extend the residuum rule to prison disciplinary cases, *Negron v. Dept. of Corrections*, 220 *N.J. Super.* 425 (App. Div. 1987) or parole rescission proceedings, *Gerardo v. N.J. State Parole Bd.*, 221 *N.J.Super.* 442 (App. Div. 1987).

Title 18A does not have any express provision analogous to the federal standard. However, *N.J.S.A.* 18A:6-24 permits the Commissioner to receive testimony "in the form of written statements verified by oath and accompanied by certified copies of all official documents, and the original or verified copies of all other documents, necessary to a full understanding of the questions involved." That provision, expressly made applicable to hearings in school takeover cases by *N.J.S.A.* 18A:7A-14(e), is ample authority for the Commissioner to rely on the contents of the CCI report verified under oath by witnesses at the hearing. Investigative reports of government agencies are normally regarded as sufficiently trustworthy so that the United State Supreme Court does not exclude them from a jury's consideration in civil litigation, even if they contain "opinions" rather than "facts." *Beech Aircraft Corp. v. Rainey*, 109 *S.Ct.* 439 (1988).

Second, insofar as the residuum rule does apply, its purpose has been fully served by the opportunity for extensive cross-examination of the witnesses whose testimony forms the basis of findings adverse to Jersey City. Dr. Smoley, as only one of many examples, was cross-examined more than five days and divulged all his sources of information. This is not a case where a party is expected to overcome "faceless opposition" or where the identity of those whose views formed the foundation of the adverse judgment was not disclosed. See *In re Application of Howard Sav. Bank*, 143 *N.J. Super.* 1 (App. Div. 1976).

Third, and most important, there is more than enough legally competent evidence to support the ultimate findings. *In re Cowan*, 224 *N.J. Super.* 737, 750 (App. Div. 1988). See also, S. Lefelt, *Administrative Law & Practice*, 37 *N.J. Practice*

Series § 209 (1988). Many of the proofs involved testimony of direct observations by witnesses who visited the scene, such as Dr. Smoley, Greta Shepherd, Dr. Osowski and Mr. Cuccia. Much of the remaining proof would have been admissible even in a judicial proceeding under various exceptions to the hearsay rule. *Negron*, 220 *N.J. Super.* at 433-434. Jersey City instructed all its employees to cooperate fully with the State's investigation. Statements by district employees about matters within their scope of employment are admissible as vicarious admissions under *Evid. R.* 63(9). Records prepared by either party in the ordinary course of business are admissible as business records under *Evid. R.* 63(13) or as reports and findings of public officials under *Evid. R.* 63(15). Court rules on expert testimony are reminiscent of the evidentiary standard in federal administrative agencies. Opinion testimony need not be based on admissible evidence, provided it is based on facts or data "of a type reasonably relied upon by experts in the particular field." *Evid. R.* 56. Accordingly, it was proper for chairperson Greta Shepherd to utilize data collected by her fellow team members or for accountant Katz to utilize data collected by his specially trained staff. By extension, it is reasonable for an agency head to rely on information which his trusted subordinates have gathered for his review.

At the end, Jersey City raises two makeweight arguments. First, Jersey City argues that the takeover statute would impair the "contract rights" of tenured employees and is "an ill-disguised attempt" to circumvent the tenure laws. Tenure is a statutory status, and not a contractual term. *Spiewak v. Rutherford Bd. of Ed.*, 90 *N.J.* 63, 72 (1982). *Zimmerman v. Newark Bd. of Ed.*, 38 *N.J.* 65, 72 (1962), *cert.* den. 371 *U.S.* 956 (1963). The Legislature created tenure and can modify or abolish it. Cf. *Bednar v. Westwood Bd. of Ed.*, 221 *N.J. Super.* 239, 243 (App. Div. 1987) (State Board cannot erode tenure rights, "which can be removed only by the Legislature.") If the genuine contract rights of any school employee are in the future threatened, the affected individual may seek redress in the proper forum. To the extent that Jersey City is making a constitutional attack on the facial validity of the statute, that issue must be pursued at a higher level. *Brunetti v. Borough of New Milford*, 68 *N.J.* 576, 588-591 (1975).

Finally, Jersey City asserts that the takeover law may not be applied retroactively against it, because Level III monitoring was in progress at the time of enactment. Generally, the law favors prospective application of statutes to avoid unfairness to people who have acted in reliance on the old rules. *Gibbons v.*

Gibbons, 86 *N.J.* 515, 521-525 (1981). Exceptions are made, however, when the Legislature has expressed a contrary intent, "either express, that is, stated in the language of the statute or in the pertinent legislative history [citation omitted], or implied, that is, retroactive application may be necessary to make the statute workable or to give it the most sensible interpretation [.]" *Gibbons*, at 522. Other exceptions exist for cases where the statute is "ameliorative or curative," or where special conditions such as the expectations of the parties may warrant retroactive application of the statute. *Gibbons*, at 523. In no case will a statute be given retroactive effect if to do so would result in "manifest injustice" to a party. *Id.* See also, *Dept. of Environmental Protection v. Ventron Corp.*, 94 *N.J.* 473, 498-499 (1983).

The right to a thorough and efficient education is not something new, but has been in the current state Constitution since 1947 and the prior Constitution since 1844. *N.J. Constit.* (1844) Art. IV, § VII ¶ 6. Legislative history makes clear that the Legislature wanted the takeover law "to take effect immediately," but to remain inoperative until the mechanism for a State-operated school district could be erected. *P. L.* 1987, c. 398, § 6. It makes no sense for the Commissioner to know that the Constitution is being violated, yet be powerless to act. But what is most unsettling about Jersey City's stand is the implication that district managers would have done something more or better, if only they had known that administrators' jobs, rather than the education of children, were on the line. State experts did not expect a panacea, but they did expect to see tangible signs of progress in nearly three years' time. Instead, they saw a floundering district, unable after years of trying to meet minimum certification requirements. Even today Jersey City's leadership fails to appreciate the urgency of the situation. They seek new State studies, new State reports, and further delay. Jersey City's children have already waited long enough for the thorough and efficient education to which they are legally entitled.

V. Order

It is hereby **ORDERED** that the local board of education in the Jersey City school district be removed and that a State-operated school district be created whose functions, funding and authority are defined in *N.J.S.A.* 18A:7A-34.

This recommended decision may be adopted, modified or rejected by **ASSISTANT COMMISSIONER OF EDUCATION, LLOYD J. NEWBAKER, JR.**, who by law is empowered to make a final decision in this matter. However, if **Lloyd J. Newbaker, Jr.** 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 **LLOYD J. NEWBAKER, JR.**, for consideration.

July 26, 1989
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

July 26, 1989
DATE

Receipt:
DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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WALTER J. MC CARROLL, ASSISTANT COMMISSIONER, DIVISION OF COUNTY AND REGIONAL SERVICES, NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, ITS OFFICERS, EMPLOYEES, APPOINTEES AND AGENTS, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

This matter comes before Assistant Commissioner Lloyd J. Newbaker, Jr. by virtue of the voluntary recusal of Commissioner Saul Cooperman. Assistant Commissioner Newbaker has reviewed the extensive record in this matter. It is noted that the Jersey City Board of Education (Board) informed the Assistant Commissioner by letter dated August 2, 1989 that it intended to file no exceptions to the initial decision. Petitioner Walter McCarroll, Assistant Commissioner for County and Regional Services, (State) likewise through letter from counsel dated August 4, 1989 indicated his waiving of exceptions and requesting that the decision herein be rendered as expeditiously as possible.

Based upon his independent review of the record, the Assistant Commissioner, like the ALJ, finds that the Jersey City School District has failed grievously to meet its responsibility to provide a thorough and efficient system of education to the children of that community. The record in this matter more than amply supports the State's contentions that the Board has manifested gross and flagrant deficiencies in its governance practices, its management procedures, educational programs and fiscal practices. Not only has the State in this matter met the statutory burden imposed by N.J.A.C. 18A:7A-14(e) of demonstrating that its actions in seeking to impose an administrative order establishing a state-operated school district are not arbitrary, capricious and unreasonable, it has conclusively proven its charges that the managers of the district have demonstrated a consistent inability to meet minimum certification requirements and academic standards; failed to provide an adequate policy framework to guide district operations; permitted widespread political intrusion into school operations through the awarding of positions on the basis of patronage and nepotism; failed to adequately evaluate the performance of staff and hold employees accountable; failed in its responsibility to upgrade its curriculum and provide sufficient current instructional materials; failed to adequately raise student performance levels, lower dropout rates, and ensure the legal rights

of the handicapped children; failed to maintain appropriate financial records and provide effective control over the expenditure of public monies; violated public bidding laws, engaged in imprudent business practices and used federal and state funds for unauthorized purposes; and failed to maintain a safe, clean and appropriate learning environment for the children of the district.

GOVERNANCE AND MANAGEMENT

Even the most cursory review of evidence in the record inevitably leads to the conclusion that the Jersey City Board of Education totally failed in its obligation to formulate clearly defined policy to provide well-defined goals and objectives; to appoint highly qualified and accountable administrative personnel to ensure its implementation; and to ensure that the public's monies are utilized in the most productive and cost effective manner.

The picture of Board operations which emerges from the record is one of a board of education almost wholly indifferent to the vital needs and educational concerns of the district. While almost totally preoccupied with the minutia of relatively minor personnel and business matters, the same Board was capable of virtual total indifference to the vital personnel matter of appointing a new superintendent acquiescing in this regard to a determination made by the City's political power structure outside the confines of the Board's own deliberations. (Initial Decision, ante) In the Assistant Commissioner's view, it is inconceivable that the Board of Education of a district so beset by educational, management and fiscal problems could limit its consideration for the vital position of chief school officer to a single individual. As the ALJ points out, the Board further compounded its negligence and indifference to important detail by seeking the same superintendent's removal after only a year and one half, without recognizing the fact that he had already acquired tenure as a result of Board action granting tenure to the previous superintendent after only 18 months.

In reviewing the efficacy of the charge against the Board relative to its failure to provide clear and unambiguous policy direction to guide its administrative staff, the Assistant Commissioner, like the ALJ, finds the failure of the Jersey City Board of Education to even schedule the start of a projected policy manual update under the auspices of the New Jersey School Boards Association between December 1985 and May 1988 to be characteristic of the Board's indifference to providing leadership, direction, and purpose in meeting its responsibilities for providing a thorough and efficient school system. In support of the foregoing conclusion, the Assistant Commissioner particularly notes that even Dr. Kenneth J. Tewel, the Board's expert witness, acknowledged the serious nature of the failure to carry this project to fruition. (Tewel 3/1/89 A.M.88:9-15)

While the Board seeks throughout to characterize its failure to more promptly address the issues of governance and management confronting the district to obstructionism from McCann

holdovers, the ALJ correctly points out that the Cucci appointees constituted a majority of the Board's composition by 1986. The ALJ points out in reliance on the record that:

> ***it is overly simplistic to split the board neatly into pro-Cucci and pro-McCann forces. The real situation is far more fluid and involves a shifting pattern of personal allegiances and local alliances. One day Mrs. Eccleston would be Mayor Cucci's preference for board president and the next she would be aligned with the Schulman block of votes. One day Aaron Schulman would nominate Franklin Williams to be superintendent of schools and the next would be leading the fight against Mr. Williams' appointment. It is not just control by one or another group, but rather the constant infighting and jockeying for power which immobilize the board.***
>
> (Initial Decision, ante)

PERSONNEL FUNCTION

No function is more important to the successful operation of any organization than that of the manner in which it recruits, hires, assigns, evaluates, promotes and dismisses its employees. In this regard, therefore, the allegation that the personnel function of the Jersey City Board of Education is dominated by political interference, nepotism and outright political patronage is perhaps the most serious of all because it bespeaks an indifference to the primary personnel function, namely, the recruitment and employment of the most highly qualified and able people to carry on the functions of the organization.

The record in this matter as ably elaborated upon by the ALJ presents a sorry panoply of employment, promotion and monetary reward for reasons of political affiliation, nepotism, and personal affiliation. It is unnecessary for the Assistant Commissioner to elaborate further upon the specific circumstances established in the record and chronicled by the ALJ of the employment or rewarding of the mayor's sister, stepdaughter, neighbor and political allies upon his assumption of his office. However, the Assistant Commissioner does feel constrained to take strong exception to the testimony of Dr. Tewel in speaking to the issue of what in his view constituted or did not constitute political intrusion. In discussing the rapid advancement and salary increases of Diane Silvestri, Mayor Cucci's stepdaughter, Dr. Tewel stated:

> I don't know about her qualifications and can't speak to them. I don't know about that. I can only speak to the fact that she's not a high level employee, she's a very low level functionary, and she's not in any policy making position. I would be concerned regarding the issue of political intrusion, which you are focusing on if the superintendent, or if you were

> giving me a name, the president of the board, or the superintendent, or such as I kept reading about with previous administration, but this is a low level functionary, and I think that needs to be reiterated. (Tewel 3/1/89 A.M.70:23-25 and 71:1-10)

Not only does the Assistant Commissioner find such logic to be appalling in its failure to recognize that political intrusion accepted at any level of the organizational structure must be symptomatic of a more pervasive influence, it totally flies in the face of the overwhelming evidence in the record and elicited in testimony that nepotism, patronage and political influence were the prime factors in the process of selecting high level administrators including the superintendent of schools. Therefore, even were one forced to accept the somewhat tainted definition of what constitutes political interference and influence in the personnel function, evidence of a broader more comprehensive system of political patronage is rife throughout the record.

Nor does the Assistant Commissioner find any merit whatsoever in Dr. Tewel's justification for why all four of Mayor Anthony Cucci's acknowledged "recommendations" for high level administrative positions within the district were ultimately recommended by the superintendent and accepted by the Jersey City Board of Education. His allusion to the existence in urban areas of a so-called "***symbiotic relationship between a civic entity, and the agency that spends most of its money***" (Tewel 2/23/89 A.M. 172:3-5) contradicts the clear legislative intent that boards of education, whether popularly elected or appointed by the chief executive officer of the municipality, are independent entities not properly subject to the direction of the municipal authority. Even in the fiscal area where municipalities can legally exercise some degree of influence over board prerogatives by virtue of setting the tax levy upon defeat of a budget in a Type II district and by participation in the budget process through the Board of School Estimate in a Type I district, the board of education enjoys the right of appeal to the Commissioner should it deem the action of the local governing body or the Board of School Estimate in setting the tax levy has failed to certify a tax levy sufficient to ensure the provision of a thorough and efficient education. See N.J.S.A. 18A:22-14 and N.J.S.A. 18A:22-37. In the Assistant Commissioner's view, Dr. Tewel's attempt to justify the "symbiotic relationship" by illustrating the degree of influence exercised by the municipal political power structure in New York, Chicago and other urban areas bespeaks more of what represents a major obstacle to progress in many urban areas than it does to serve as a rationale for accepting the kind of political intrusion demonstrated herein as being rampant in the Jersey City Public Schools.

The Assistant Commissioner is likewise unmoved by Dr. Tewel's testimony as it relates to his perception of the manner in which central office personnel are selected in large urban areas when he states as follows:

> Yes, and I can say it without comment, you know, but in the larger the urban district, the more the tendency is of the district to promote and look within for leadership.
>
> Example, in New York City, the last time anybody became principal of a high school, from any place other than New York City, I think it was 1946, the same seems to be true in the largest of -- in the other of the eight or ten largest urban districts.
>
> I'm not saying I think this is terrific, but it is the way life is. And urban districts tend to separate themselves from other types of districts because -- maybe because of, I don't know why, the uniqueness of their population. Their populations tend to be different than suburbs, complexion of the folks who live in urban areas is different from the suburbs and other areas, in many cases.
>
> But the larger the urban area, the greater the tendency to find leadership from within, and in fact the leadership is there.
>
> You go to a place like Greenwich, or a place like Darien Connecticut, and you find a couple of hundred teachers in the system, and maybe one principal, and very often there isn't the home grown leadership that there is in urban areas.
> (Tewel 2/23/89 A.M.170:6-25, 171:2-7)

While Dr. Tewel may well be correct that urban centers, by virtue of their size, have a considerable pool of talent from which to choose in order to make administrative appointments, that argument can hardly be considered valid in this case, however, given the fact that the record in this matter is clear that the superintendent of schools and the other four persons "recommended" by Mayor Cucci for important administrative posts were the only persons interviewed and considered by the Jersey City Board of Education. There is absolutely no evidence in the record that the Jersey City Board of Education in any manner attempted to determine whether the persons whom they appointed were the best possible candidates available to fill the positions involved.

It is clear from Mayor Cucci's testimony, despite his protestations to the contrary, that his sole justification for making his recommendations to fill the four high level positions to which Mr. Lanzillo, Mr. Falcicchio, Mr. Kaminski and Mr. Fauerbach were promptly appointed was the fact that these individuals were certified by the State of New Jersey. Despite his attempts in testimony to qualify his position to the extent of adding the ability to do the job as a necessary ingredient, there is absolutely no evidence in the record that there was any attempt whatsoever to determine whether the nominees indeed did demonstrate the ability to

perform the tasks of the administrative positions within the school district to which they were assigned.

In the Assistant Commissioner's judgment, it strains all credibility to accept the Mayor's assertion of coincidence of the fact that all four persons whom he acknowledged recommending for administrative positions were duly recommended by the superintendent to the Board and subsequently appointed. The fact that all four appointees to high administrative positions within the school district, whom the Mayor acknowledged recommending, were political supporters makes a mockery of both the Mayor's and the Board's contentions that the political interference, nepotism and patronage of which the Jersey City School District stands accused in this matter were solely the product of past administrations and Boards. (See Testimony of Cucci 1/23/89 A.M.136-188)

In light of the foregoing, the Assistant Commissioner finds that political interference, nepotism and patronage continued with the advent of the Cucci administration.

QUALITY OF EDUCATIONAL PROGRAMS

The Assistant Commissioner has carefully reviewed the initial decision in this area, as well as the submissions of the parties, as they relate to quality of educational programs. Based upon that review, the Assistant Commissioner, like the ALJ, is struck by the extreme variance which exists between the expert testimony of Dr. Smoley, the State's expert, and Dr. Tewel, the Board's expert witness.

In assessing these differences, the Assistant Commissioner, as he did in that portion of the decision relating to personnel practices, finds Dr. Tewel's attempt to apply a relative standard unconvincing. As he did when assessing the personnel practices prevalent in Jersey City, Dr. Tewel seems to believe that physical conditions, noise levels and class attendance in urban schools must be measured by standards different from those which could be applied in suburban areas. While recognizing the enormity of the problems confronted by urban school districts in coping with the culture of poverty, the Assistant Commissioner rejects those conclusions emphatically and finds instead that poor urban children are no less entitled to clean, safe learning environments and have an absolute right to be measured by standards of attendance and promptness as all other students in the State. To concede and accept that lesser standards are a fact of life in urban schools, as does Dr. Tewel, is to doom all such students to an educational system which is constitutionally impermissible.

Further, the Assistant Commissioner firmly believes that the acceptance of such a posture by the leadership of the Jersey City Public Schools represents convincing evidence of its lack of will to undertake those necessary steps to provide an environment conducive to learning and the achievement of eventual certification. A willingness to accept levels of performance and conduct less than those which would normally prevail in a school

environment must inevitably be translated by the student population into perceptions of unworthiness and, ultimately, result in widespread defeatism on the part of both students and staff.

Like the ALJ, the Assistant Commissioner finds the nature, content and level of implementation of the curriculum to be central to the determination in this matter. Despite the Board's protestations to the contrary, the Assistant Commissioner affirms the finding of the ALJ that Jersey City is failing in its efforts to provide a thorough and efficient system of education to its children and is unable to take those corrective actions necessary to remedy its failures.

The Jersey City Board offers the defense that it has made significant strides since 1985 in revising its curriculum and establishing an effective delivery system. (See the Board's Post-hearing Brief, at pp. 53-55.) Despite said claims asserted by the Board, the ALJ concluded that only in grades K-6 could the curriculum developed since the advent of Superintendent Williams in 1985 be considered as having been revised. Even in those grades, however, review of lesson plans by State monitors failed to reveal evidence that the revised curricula were in fact being implemented, nor were the State monitors able to detect that the skills contained within the curricula were in any way aligned with the district's standardized testing program. Further, review of the social studies curricula for the grades beyond grade six by the Assistant Commissioner confirms the ALJ's conclusion that:

> ***Much of the material used to teach children in Jersey City contained incorrect or incomplete information. Deficiencies were most glaring in the social studies department where, for example: the curriculum for ethnic studies refers to African countries which no longer exist and neglects to mention others in existence since the 1960s; the curriculum for Afro-American history stops with the Nixon era in 1974; the curriculum for United States history has as its last entry the Voting Rights Acts of 1965; and the curriculum for Puerto Rican culture misidentifies the Spanish surnames of various persons and fails to include recent historical figures who made important cultural contributions. (Initial Decision, ante)

(See also Exhibits P-82, P-83, P-85, P-86 and Report to Board of Education by Rosemarie Viciconti in P-217-21: 19-28)

Given the high degree of mobility which exists within the Jersey City School System, the Assistant Commissioner, as does the ALJ, finds the failure on the part of the Board to provide uniform textbook series both across grade levels and within each grade level and for specific secondary subjects on a districtwide basis to be thoroughly inconsistent with the Board's contentions of wide-ranging curricular improvement. Permitting the use of science books from

eleven different publishers as late as 1988 does not, in the Assistant Commissioner's view, constitute evidence that the Jersey City Board of Education has made significant progress in turning the district around. (Exhibit P-217-21: 4-18)

Nor do the very serious deficiencies revealed in the management of the district's bilingual education, compensatory education and special education programs provide testimony to a district on the rise. Notwithstanding the elaborate defense of the district's practices in the above-cited areas, the testimony of Dr. Sylvia Roberts and of Dr. Jeffrey Osowski clearly sets forth numerous violations of state requirements in the areas of bilingual, basic skills improvement, and special education. Symbolic of the Board's defense is its attempt to characterize these deficiencies as problems which are either generic to the programs or merely the result of a picayune bureaucracy seeking to satisfy "***complex and ever changing web of LEPS and basic skills regulations***" (Board's Post-hearing Brief, at p. 57) Equally characteristic of the defense's attempt to minimize deficiencies is its failure to concede that the problem of so-called "split-funding" of teachers involved in basic skills programs arose, not from an innovative practice designed to promote "instructional continuity," but from the district's inability to precisely verify how much time these basic skills improvement teachers actually spent in the state and federal remedial programs and how much time they spent in activities which were compensable under local funds. (Initial Decision, ante)

The ultimate in the Board's attempts to "trivialize" serious deficiencies is its boast that by 1987 only 302 students in the Limited English Proficiency (LEP) program were being denied the services to which they were legally entitled under law. (Board's Post-hearing Brief, at p. 58)

Of such dubious cloth is the defense woven that it seeks to minimize its inefficient and illegal practices by alleging that the number of persons deprived of their rights represent only a fraction of those who are being serviced.

In the area of special education, the Board paints a glowing picture of improvements introduced by Assistant Superintendent Falcicchio including the reorganization of the special education program, increasing the program budget, opening and staffing 93 new classrooms, revising the supervisory structure, and the referral process. (See the Board's Post-hearing Brief, at pp. 59-66.)

Despite such glowing claims, the record as developed by the ALJ demonstrates that newly developed Individualized Educational Plan (IEP) forms were used on a pilot basis in only nine of 5,343 pupil records, many individual folders contained outdated IEPs and the IEPs themselves, when examined, were not individualized in their content. (See also Osowski 10/27/88 A.M.14:20-22, 17:7-25, 18:2-22 and 20:11-24.) Further and most revealing, the record demonstrates that Dr. Osowski was informed by special education teachers that they had begun preparing instructional guides at the direction of

the administrative staff shortly before the State visitation. (Initial Decision, ante, and Osowski 10/27/88 A.M.33:16-25, 34:2-10)

Of particular interest to the Assistant Commissioner is the fact that despite its elaborate defense and glowing accounts of improvement, the Board was unable to rebut through intensive cross-examinations the conclusions set forth by Dr. Osowski relative to the deficiencies in the special education program uncovered by the Department of Education's monitoring and as testified to by him.

The Assistant Commissioner has also examined in detail the transcripts of the testimony of Assistant Superintendent Falcicchio, who is responsible for overall administering and supervising of the district's special education programs. Based upon the aforesaid independent review, the Assistant Commissioner in conjunction with the ALJ concludes that the State in this matter has conclusively demonstrated:

> Major areas of noncompliance by the district include: lack of sufficient textbooks and teaching materials to carry out promised programs and services; absence of curriculum documents or use of outdated or inappropriate curriculum; deficiencies in specialist evaluations required for proper evaluation; nonexistent or seriously deficient individualized educational programs (abbreviated "IEPs") and instructional guides; shorter hours for handicapped children than for children in regular classes; class sizes which exceed the maximum permitted by regulation; lack of classroom coverage in the absence of the teacher; inadequate notice to parents; failure to obtain parental consent; failure to provide sufficient speech therapy to autistic children; and failure to comply with time deadlines. Pupils were placed in special education classes before evaluation and, in one case, before referral to the child study team for evaluation.
> (Initial Decision, ante)

Having so concluded, the Assistant Commissioner is constrained to cite from the record an incident which is, in his view, illustrative of the degree of callous indifference which exists on the part of the Jersey City Board and its agents to the letter and spirit of the law and to both the appearance and reality of conflict of interest. The State by way of cross-examination of Assistant Superintendent Falcicchio elicited testimony regarding a contract in existence between the Jersey City Board of Education and the Jersey City Family Health Center whose function it was to provide services to nine public school pupils pursuant to P.L. 192 and P.L. 193. Despite the acknowledgement by the witness that N.J.A.C. 6:28-5.2 requires annual approval by the New Jersey State Department of Education of any clinic or agency providing services for pupils and despite the fact that no documentation could be provided that specific approval had been applied for or granted, the

witnesses continued to assert the legality of the Jersey City Board's actions by citing the fact that the relationship had been ongoing for 12 years and by asserting a claim, without proof, that the county office was aware of the arrangement. (See Falcicchio 2/21/89 A.M. 191:12-193:25.) Further compounding the indifference illustrated in these proceedings as to what the Board has frequently characterized as "technical violations" is Falcicchio's admission that at least five special services employees of the Jersey City Board of Education are employed by the Jersey City Family Health Center, notwithstanding the fact that N.J.A.C. 6:28-5.2(a)(3)iv provides that:

> An employee of the district board of education shall not provide service as an employee of a clinic or agency to a pupil who is the responsibility of his or her employing district board of education.

Mr. Falcicchio's response to the aforesaid provision was as follows:

> During the time that they are employed by the district. In other words, there are people employed by the district from 8:30 to three o'clock. So if they did work for a clinic or an agency after that time, that's not a violation of what you just read.
> (Falcicchio 2/21/89 A.M. 194:8-13)

In the final analysis, the Assistant Commissioner finds said response on the part of a high level official, whose responsibilities require him to not only be familiar with, but to ensure compliance with, all rules and regulations in the area of special education, to be either absolutely insensitive to matters of conflict of interest or cynical to the extreme.

The final issue to be addressed within the confines of this decision as it relates to quality of educational programs is the contention of the Board that its improving High School Proficiency Test (HSPT) scores conclusively demonstrate that educational progress is being made and the district is on the upswing. The Board in this regard has enjoyed the highest or second highest increase in passing rates in the State. In response to the aforesaid contention, the Assistant Commissioner is in total agreement with the ALJ's assessment when he concluded as follows:

> ***Although Jersey City derives some satisfaction from recent increases in its passing rate on this test, there is little about which to be genuinely proud.
>
> Scores on the HSPT administered to the district's youngsters in April 1988 are abysmally low.*** Practically two-thirds of Jersey City ninth graders who took the test, 64% to be exact, could

not pass all three subtests as required in order to graduate. By comparison, the failure rate for all districts statewide is only 23.3%. Jersey City also fares poorly when compared to 27 other districts in the same "district factor grouping," a category controlled for income, education level and socioeconomic status. Neighboring Hoboken has a more respectable failure rate of 46.7%. Only Camden and Newark have worse failure rates than Jersey City.

Breakdown of Jersey City's scores on the subtests is equally distressing. Reading test failure rates are 30.1% for Jersey City, compared to 6.6% statewide and 15.6% for urban districts alone. Writing test failures are 37.4% for Jersey City, compared to 9.3% statewide and 18.9% for urban districts. Mathematics test failures are 51.4% for Jersey City, compared to 18.2% statewide and 34% for urban districts. Moreover, Jersey City's success rates are probably inflated in relation to other districts, because it has the largest number of classified children who are exempt from taking the test. Dr. McCarroll was understating the case when he remarked that Jersey City has "nothing to cheer about."

Putting its best foot forward, Jersey City emphasizes the substantial percentage increases in its HSPT scores between 1986 and 1988. While any improvement is laudable, the impressiveness of this accomplishment is tarnished by the low starting point for the calculations and by the distance that Jersey City has yet to go. Comparisons among results on achievement tests administered in the lower grades are rendered meaningless by the fact that different local districts in New Jersey use different test instruments and that Jersey City itself switched tests within the relevant period.

By other conventional measures, Jersey City also lags behind the rest of the state. student absenteeism consistently exceeds the districtwide rate of 10% or less required by the state for certification. At three of the five high schools, absenteeism exceeds the State standard of no more than 15% per school. Snyder High School had an absenteeism rate of 25% in 1986-87, while Dickinson and Lincoln were above 20%. Almost as significant as what Jersey City said is what it chose not to say. Most districts in New Jersey measure success in terms of college admission test scores, acceptances to more selective colleges, number of national merit scholars, outside recognition of student achievement, or parent satisfaction. Jersey City

> was resoundingly silent on these matters. Numerous administrators whose jobs are at stake made self-serving statements, but not even one parent or student vouched for the quality of education in Jersey City. There was, however, one area in which Jersey City did claim to excel. Professor Tewel brought up the low incidence of "missing marks" on student report cards, apparently considering it to be remarkable that teachers in the district gave grades to their students. (Initial Decision, ante)

In summary, therefore, the Assistant Commissioner adopts as his own the findings of the ALJ relative to "Quality of Educational Programs" as they are set forth in the initial decision, ante, and incorporates them herein by reference.

FISCAL PRACTICES

Throughout the proceedings, the Board has frequently alluded to the need for greater availability of monetary resources allegedly in order to overcome the obstacles imposed by the poverty stricken environment from which so many of its students come. Despite such protestations, the Board's performance in the area of the management of the fiscal resources which it does have at its disposal represents one of the most flagrant examples of its ineptitude and mismanagement. As pointed out by the ALJ, the fact of the unwillingness of Board Secretary Arsenio Silvestri to testify and his resort to the protection of the Fifth Amendment more than 40 times, compiled with other evidence in these proceedings, permits an inference "***that the board and its employees were extremely careless in their handling of public trust funds***" (Id., at p. 55)

In reviewing the positions propounded by the parties in this area, the Assistant Commissioner notes that what the State characterizes as a lack of clearly defined organizational structure as to overall responsibility for fiscal operations with resultant confusion and the myriad deficiencies found in this area by the State, the Board seeks to characterize as "segregation of duties" in order to maintain "***independent review and verification of the propriety of the work of those who handled the transaction in the preceding stage." (Board's Post-hearing Brief, at p. 69)

Based upon his own independent review of the record, the Assistant Commissioner concludes that the position as excerpted from the State's Post-hearing Brief accurately describes the degree of confusion which reigns in the fiscal operations of the Board of Education of the City of Jersey City:

> The search for the truth regarding fiscal practices leads to a conundrum as to actually who is in charge of financial operations. While we have charts prepared by Dr. Duva and testimony from a myriad of employees, we have no clear answer as to the identity of the person solely

> responsible even though statutorily it must be the Board secretary. Not only is there confusion as to overall responsibility, there is also a quandary among the employees as to duties and reporting responsibilities. Williams, after initially testifying that Silvestri reported to him, changed his answer two questions later and attempted to explain that Silvestri also reported to the Board since he had a dual reporting responsibility. (FW, 12/14/88, 62:6-63:11). Kaminski stated that there had been an initial disagreement between Williams and the Board regarding the reporting responsibilities of the internal auditor and the controller. Gilman, the budget officer, was not sure to whom Sylvester, the controller, reported but believed that it was either to the superintendent or to the Board. She was also unsure as to Scarfo's duties and whether his function was similar to her own. Kaminski was equally unsure about Sylvester's duties. While Gilman was sure that she did not report to Sylvester, Kaminski thought that she did. Even though she was not sure to whom Kaminski reported, Willaims maintained that Kaminski had a dual reporting responsibility. (FW, 12/14/88, 68:4-70:21; JCG, 12/21/88, 184:4-187-15; 12/22/88, 103:13-18, 106:13-22, 112:13-113:7; CK, 1/25/89, 80:14-81:8, 87:23-102:15; P271; R325).
>
> Gilman stated that the purpose of separating all of the accounting functions into different departments was to create a system of checks and balances; but the vast factual record demonstrates conclusively that the notion of any system of controls is only theoretical and is not being implemented in practice. (JCG, 12/22/88, 127:24-128:2).
>
> (State's Post-hearing Brief, at p. 49)

Perhaps most illustrative of what may at best be described as ineptitude and at most may result in further legal action are the circumstances surrounding the employee prescription and dental plan with New Age Administration. It is clear from the record that the Jersey City Board of Education engaged in a self insurance health benefits plan for which no legal authority exists. Further, as pointed out by the ALJ and verified in the record, state audits revealed significant numbers of overcharges and improper payments to the amount of at least $1.22 million. The full details of the irregularities involved in this transaction, as well as the failure to correct the overpayment by key personnel when confronted with knowledge of the overcharges, are chronicled in detail in the initial decision at pages 55-58 and are incorporated herein. Most revealing, however, of the obfuscation of the Board's defense is the following excerpt from the ALJ's conclusions:

> Jersey City's assertion that it initiated its own New Age investigation in November 1987 "independently" of any State investigation is patently false. State investigators had earlier questioned the legality of the self-insurance arrangements in June 1987 and had served subpoenas on the board for New Age records in August 1987. It was only after the State sent a letter in October 1987, advising the board that its dental and prescription plans were not authorized by law, that Jersey City reluctantly canceled its contract with New Age. And it was not until January 1988, when Hudson County assignment judge Burrell Ives Humphreys ordered it to do so, that Jersey City finally took legal action to recover whatever sums had been improperly paid to New Age.
>
> (Initial Decision, ante)

Finally, despite the efforts of the Board to dismiss the seriousness of the irregularities in the financial operation of the Jersey City School District by characterizing them as "***inconsequential human error***" or minimizing their significance, the Assistant Commissioner adopts as his own the ALJ's conclusion that "***the board has failed to exercise proper managerial oversight in the financial area, has failed to adopt a prudent policy of cash management, and has tolerated practices which do not conform to the requirements of public school contract law or sound business judgment." (Initial Decision, ante)

FACILITIES

In the area of facilities, as in other areas of district operations, the parties present widely disparate pictures of the circumstances which prevail. The Board consistently uses as a rationale the age of the facilities for what is clearly documented in the record as an extremely poor state of repair and maintenance in the district. While both parties agree as to the age of the Jersey City school buildings and their difficulty to maintain, the ALJ concludes and the Assistant Commissioner affirms that "***Jersey City does not ensure that all its students have a safe, clean and healthy place in which to learn." (Id., at p. 65) That conclusion is best described from the following excerpt from the ALJ's decision:

> Even though the district knew the State was monitoring its performance, it was unable to conceal evidence of its extreme negligence. One of the most dramatic moments during the hearing came when Greta Shepherd described her observations of a teacher valiantly attempting to teach young children with "water pouring down the wall" of her classroom. Jersey City's excuse for this inexcusable situation was that it was planning to build a new school building. In the meantime, however, the district clearly owed a duty to both students and teachers to provide

minimally adequate shelter. Ms. Shepherd gave other examples of unsafe or unhealthy conditions observed by members of the external team which she chaired. Water seeped dangerously close to high voltage equipment in a room used for physical education. At one school, the custodian responsible for swimming pool maintenance mixed together volatile cleaning chemicals.

(Id., at p. 64)

CONCLUSIONS OF LAW

Having reviewed the record of the administrative proceedings and the recommendations of the Administrative Law Judge relative to the State's action seeking an administrative order from the State Board of Education directing the creation of a State-operated school district pursuant to the provisions of N.J.S.A. 18A:7A-14 and 15, it remains only to set forth the conclusions of law requisite to the determination in this matter. It is unchallenged as a matter of law that Article VIII, Sec. IV, Para. 1 of the New Jersey Constitution (1947) requires that the Legislature provide for the maintenance of a thorough and efficient system of education for all children between the ages of five and eighteen. In furtherance of that goal, the Legislature has created a statutory scheme which vests supervision and control of public education in a State Board of Education and a Commissioner of Education. The general authority and statutory powers with which the Commissioner and State Board of Education are clothed as set forth in the initial decision, ante, are incorporated herein by reference and therefore require no further elaboration.

As the ALJ has ably pointed out, while local control of education is a long-standing and respected institution in this State, it is abundantly clear that home rule is clearly subject to the supervisory control of the State Board of Education and the Commissioner and to the ability and willingness of the district board of education to fulfill the constitutional mandate of ensuring the provision of a thorough and efficient system of education. As the ALJ further pointed out, the right of the State through the authority of the Commissioner and the State Board of Education to intervene and limit the local autonomy of a district board of education when that entity strayed from its constitutional responsibility was well established prior to the enactment of the Legislature in 1987 of N.J.S.A. 18A:7A-14 et seq. authorizing the State Board of Education to issue an administrative order establishing a State-operated school district. (Trenton, supra; East Orange, supra)

The statutory provisions under which the herein action has commenced were, again as clearly pointed out by the ALJ, enacted as remedial legislation designed to broaden the authority of the Commissioner and the State Board of Education to establish a State-operated school district whenever, after three levels of monitoring, a school district "***has failed to take or is unable to take the corrective actions necessary to establish a thorough and efficient system of education***." N.J.S.A. 18A:7A-15. Pursuant to

N.J.S.A. 18A:7A-14, the Legislature placed the burden of proof upon the State; however, in so doing, it required that the State demonstrate that its action in issuing an administrative order was not arbitrary, capricious or unreasonable. As has been indicated at the outset of this decision, the State has, by virtue of its clear showing in the record of the wide-ranging deficiencies and ineptitude which prevail in the Jersey City Public Schools, more than met that limited burden placed upon it by the Legislature. (See Bayshore Sewage Co. v. Department of Environmental Protection, 122 N.J. Super. 184, 199 (Ch. Div. 1973), aff'd 131 N.J. Super. 37 (App. Div. 1974), also, Initial Decision, ante)

As did the ALJ, the Assistant Commissioner notes that the Board argues that the statutory remedy directed by N.J.S.A. 18A:7A-14-16 and as implemented pursuant to N.J.S.A. 18A:7A-34 et seq. was designed to be a drastic remedy only applicable in the most extreme cases when a district board of education "***has failed to take or is unable to take the corrective actions necessary to establish a thorough and efficient system of education***." The Board argues that it has demonstrated "***that [it] has taken and is continuing to take corrective action. Hence, takeover should be out of the question and the issue becomes whether any other remedies are needed." (Board's Post-hearing Brief, at p. 92)

In response to the aforesaid argument, the Assistant Commissioner adopts in toto the conclusions of the ALJ as follows:

> As set forth in the factual findings, Jersey City has serious deficiencies, not just in one area, but in all major areas of monitoring. Therefore, the problems are not susceptible to limited solution. If the problem were only in finance, appointment of a fiscal monitor might arguably be enough. If the problem were only in special education, a new person for special education might be enough. If the problem were only in personnel, a new person for personnel might be enough. But Jersey City's problems are systemic. They run across the various administrative departments and across changes in membership of the local board of education. Whoever happens to be in control, the district has shown an institutionalized resistance to long-overdue reforms. This is not an indictment of everyone associated with the district but of the leadership, whose job it is to set the tone and provide direction to the organization. School managers cannot be allowed to blame general social conditions, or the State, or the children who are the victims, for their own inadequacies. They must themselves be held accountable.
>
> Proofs convincingly demonstrate that Jersey City's problems are so pervasive that they

> require outside intervention. State expert witnesses approached the question from different fields of speciality, but each arrived at essentially the same conclusion. Dr. McCarroll, an educational administrator, testified that the district is unable to "identify its problems, let alone, to solve them." Dr. Smoley, a management expert, recommended that the district must be "completely restructured" and that "the State as the governmental entity with ultimate constitutional responsibility for education must establish a structure and a process for providing the effective governance and leadership." Greta Shepherd, an urban education expert, believed that the district's present leaders lack the capacity "to think of alternative strategies, to correct their problems." Vincent Calabrese, an expert in school finance, did not think that the local district had the ability to "reverse a long-standing trend" and saw a need for dramatic change "to break the cycle" of failure. The Commissioner or his designee may reasonably rely on the well-founded advice of these reputable experts. (Initial Decision, ante)

In response to the Board's contention that the ALJ's findings in this matter rely overwhelmingly on hearsay evidence and conclusionary reports and interview notes, the Assistant Commissioner notes that the ALJ very ably addressed these contentions, setting forth at length his legal reasoning as to the rationale for his conclusions in the initial decision (ante). The Assistant Commissioner adopts the ALJ's legal arguments as set forth in the aforesaid pages and makes them his own.

The Assistant Commissioner likewise adopts the finding of the ALJ as it relates to the Board's attack upon the constitutionality of the takeover statute in that the statute allegedly impairs the "contract rights" of tenured employees and is an attempt to circumvent the tenure laws. In response to the aforesaid contention, the Assistant Commissioner also notes that the Legislature as the conferrer of the tenure rights was fully cognizant of the statute's effect, and, therefore, the issues of contractual impairment and/or tenure rights are matters which can only be decided by the Courts.

The Board's final argument that the takeover law may not be applied retroactively because Level III monitoring was in progress at the time of its passage must likewise be uneqivocally rejected. In this regard, the Assistant Commissioner notes with approval the ALJ's rejection of that argument in citing Gibbons, supra, for the proposition that the Legislature in passing the amendatory language in this matter had expressed a contrary intent and that the immediate application of its provisions were necessary to meet its corrective and ameliorative purpose. (Initial Decision, ante)

The Assistant Commissioner would add to the aforesaid reasoning of the ALJ that the monitoring process with all of its 52 indicators upon which the determination of Jersey City's certification status was based was well in place since 1983. The Jersey City Board of Education was not by virtue of this amending legislation confronted with a set of standards which were new or foreign to it. It was fully aware throughout the monitoring process of both the criteria to be utilized and the steps through which that process would proceed. Further, the Jersey City Board of Education was, through the plenary hearing process, provided with more than ample opportunity to show cause why the recommendation for an administrative order establishing a State-operated school district should not issue. In the Assistant Commissioner's view, the State in this matter has well met the burden of demonstrating that its action in seeking an administrative order from the State Board of Education creating a State-operated school district was not arbitrary, capricious or unreasonable.

Consequently, in light of the foregoing, the Assistant Commissioner acting as the assigned representative of the Commissioner of Education pursuant to N.J.S.A. 18A:4-34 adopts the findings of fact and conclusions of law of the ALJ as amplified herein and makes them his own. Further, in conformity with the provisions of N.J.S.A. 18A:7A-15, the Assistant Commissioner finds that the Board of Education of the City of Jersey City has failed to take or is unable to take the corrective actions necessary to establish a thorough and efficient system of education and he, therefore, recommends that the State Board of Education issue an administrative order creating a State-operated school district whose functions, funding and authority are defined in N.J.S.A. 18A:7A-34 et seq.

IT IS SO ORDERED this 31 St. day of August 1989.

COMMISSIONER OF EDUCATION

August 31, 1989

WALTER J. MC CARROLL, ASSISTANT COMMISSIONER, DIVISION OF COUNTY AND REGIONAL SERVICES, NEW JERSEY STATE DEPARTMENT OF EDUCATION,	
PETITIONER,	
V.	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, ITS OFFICERS, EMPLOYEES, APPOINTEES AND AGENTS, HUDSON COUNTY,	DECISION
RESPONDENT.	

Decided by Assistant Commissioner Lloyd Newbaker, August 31, 1989

For Assistant Commissioner Walter J. McCarroll, Sally Ann Fields, H. Edward Gabler III, Timothy J. Rice, Vincent J. Rizzo, Jr., and Marlene Zuberman, Deputies Attorneys General (Peter N. Perretti, Jr., Attorney General)

For the Board of Education of the City of Jersey City, Shea and Gould (David H. Pikus, Esq. and Helene M. Freeman, Esq.), William A. Massa, Esq., and Michael S. Rubin, Esq.

This matter is before us today on recommendation of Assistant Commissioner Lloyd Newbaker made pursuant to N.J.S.A. 18A:7A-15.[1] As set forth in his decision of August 31, 1989, based upon his review of the record in this matter, Assistant Commissioner Newbaker determined that the school district of the City of Jersey City has failed to take or is unable to take the corrective actions necessary to establish a thorough and efficient system of education. Therefore, as mandated by N.J.S.A. 18A:7A-15, Assistant Commissioner Newbaker is recommending that the State Board of Education exercise the authority conferred on us by that statute to issue an administrative order directing the removal of the district board and the creation of a State-operated school district whose functions, funding and authority are defined in N.J.S.A. 18A:7A-34 et seq.

[1] We note that by decision of July 21, 1988, the Commissioner of Education recused himself from acting as the decision-maker in this matter and assigned Assistant Commissioner Newbaker to decide the controversy. See N.J.S.A. 18A:4-34.

This recommendation results from proceedings initiated by a show cause order issued by the Commissioner of Education pursuant to N.J.S.A. 18A:7A-14(e) following a comprehensive compliance investigation commenced after the district had failed Levels I and II of the monitoring process. As provided by N.J.S.A. 18A:7A-14(e), plenary hearing was held before an Administrative Law Judge (ALJ).

Based upon the evidence presented by the parties, the ALJ found that the State had satisfied its statutory burden to show that the issuance of an administrative order as provided by N.J.S.A. 18A:7A-15 was not arbitrary, unreasonable or capricious.

As detailed in his Initial Decision, the ALJ further found that the proofs presented in this matter established that the children attending public school in Jersey City were not receiving a thorough and efficient education, that political interference originating in earlier administrations had continued, that financial resources allotted to education were being misspent, and that the district's problems were deep-rooted and endemic.

No exceptions were filed with Assistant Commissioner Newbaker to the findings and conclusions set forth in the Initial Decision. Based upon his independent review of the record, Assistant Commissioner Newbaker concluded that the evidence showed that the Jersey City Board of Education had totally failed to meet its obligations with respect to its policy making and personnel functions and that the Board's performance in the area of the management of its fiscal resources represented "one of the most flagrant examples of its ineptitude and mismanagement." Assistant Commissioner's decision, at 100.

As detailed in his decision, Assistant Commissioner Newbaker, like the ALJ, found that the evidence supported the specific charges against the district, including specifically those relating to the consistent inability of the district's managers to meet certification requirements and academic standards; failure to provide an adequate policy framework; political intrusion; failure to hold employees accountable; deficiencies in curriculum and instructional materials; failure to raise student performance levels, lower dropout rates, and ensure the legal rights of handicapped children; failure to maintain appropriate financial records; violations of the bidding laws; imprudent business practices and use of federal and state funds for unauthorized purposes; and failure to maintain a safe, clean and appropriate learning environment for its students.

On the basis of the record and his findings thereon, Assistant Commissioner Newbaker adopted in toto the ALJ's conclusions that the deficiencies of the district extended to all major areas of monitoring and, therefore, were not susceptible to a limited solution. He further concluded that the district's problems were so pervasive as to require outside intervention and that the proofs with respect to the specific charges showed a failure or unwillingness to take the corrective actions necessary to establish a thorough and efficient system of education.

Assistant Commissioner Newbaker's determination and the record upon which it was based were transmitted to the State Board as required by N.J.A.C. 6:2-2.6(b). By letter dated September 8, 1989, special counsel for the Board of Education of the City of Jersey City provided us with a resolution adopted by the Board on September 6 resolving not to "contest, file exceptions or appeal" Assistant Commissioner Newbaker's decision. Our decision today, therefore, will be based solely on the record that has been certified to us. N.J.A.C. 6:2-2.6(h).

That record, as found by the ALJ and Assistant Commissioner Newbaker, demonstrates severe, longstanding, deep-rooted deficiencies permeating virtually all aspects of the district's operations. The evidence leaves no doubt that these deficiencies are directly related to the Board's failures with respect to its functions in the areas of policy making, personnel and financial management, for which the Board, as governing body for the district, had both primary and ultimate responsibility. The record further shows a clear and unambiguous picture of the attending failure of the district's top level administrators to provide the operational and educational leadership required to provide a thorough and efficient education to the district's students.

The record demonstrates that the scope and depth of the district's failure and the resulting deficiencies are of such nature and dimension that the students attending the public schools of this district have been deprived of a thorough and efficient education. Nor has the district even suggested at any time during these proceedings that it is now providing such education to its students.

Based on our own review of the record, we find that, as expressed by the ALJ,

> ...Jersey City has serious deficiencies, not just in one area, but in all areas of monitoring. Therefore, the problems are not susceptible to limited solution. If the problem were only in finance, appointment of a fiscal monitor might arguably be enough. If the problem were only in special education, a new person for special education might be enough. If the problem were only in personnel, a new person for personnel might be enough. But Jersey City's problems are systemic. They run across the various administrative departments and across changes in membership of the local board of education. Whoever happens to be in control, the district has shown an institutionalized resistence to long-overdue reforms. This is not an indictment of everyone associated with the district but of the leadership, whose job it is to set the tone and provide direction to the organization. School managers cannot be allowed to blame general social conditions, or the State, or the children who are the victims, for their own inadequacies. They must themselves be held accountable.

Initial Decision, at 70-71.

In this respect, we emphasize that, as found by the ALJ and Assistant Commissioner Newbaker and as set forth in statute and regulation, the standards for judging the sufficiency of the education provided to urban children are no less than those for any other children in this state. Like the ALJ and Assistant Commissioner Newbaker, we find that the general social conditions present in this urban district in no way excused the Board from providing to its students a thorough and efficient system of education as measured by those standards. Rather, it is our firm belief that the existence of such conditions heightened the responsibility of the Board and its administrators to provide sound and effective governance and strong educational leadership in order that the district could provide its students with an education that would effectuate the constitutional right of these children to a thorough and efficient education.

The record leaves no doubt that the district is either unwilling or unable to meet that responsibility. Given the nature and gravity of its deficiencies over a prolonged period of time, assessment of the district's efforts at "improvement" leads inevitably to the conclusion that they have been woefully inadequate. Not only have the fundamental deficiencies of this district persisted, but the record shows that the district's leadership has failed to approach its problems comprehensively or structurally so as to even attempt to provide the managerial structure and educational leadership required to correct the deficiencies established in this record and to provide a thorough and efficient system of education to the district's students. To the contrary, the "improvements" to which the district pointed in the proceedings below are so limited in scope as to show that, as testified by Assistant Commissioner McCarroll, the district is unable to "identify its problems, let alone solve them."

In summary, the record produced by these proceedings clearly and unambigously shows an educational failure in the extreme and demonstrates that this district has not only failed to meet its obligations in the past, but has failed to recognize the nature of the responsibility delegated to it by the Legislature. We find it deplorable that by virtue of the persistent and ongoing failure of this district to properly fulfill its delegated responsibilities, its students have so long been deprived of their constitutional due.

We recognize fully that it is our responsibility to insure that this situation is rectified. Robinson v. Cahill, 62 N.J. 473 (1973); Robinson v. Cahill, 69 N.J. 479 (1976). Given the total educational failure evidenced here, we conclude that it is imperative that we exercise the authority conferred on us by N.J.S.A. 18A:7A-15 and N.J.S.A. 18A:7A-15.1 to insure that the constitutional right of the children of the school district of Jersey City to a thorough and efficient education is effectuated. We therefore direct that the President of the State Board of

Education immediately execute the administrative order appended to this decision, by which we direct the removal of the district Board of Education of the City of Jersey City and the creation of a State-operated school district whose functions, funding and authority are defined in N.J.S.A. 18A:7A-34 et seq.

October 4, 1989

WALTER J. MC CARROLL, ASSISTANT COMMISSIONER, DIVISION OF COUNTY AND REGIONAL SERVICES, NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
PETITIONER,	:	
V.	:	ADMINISTRATIVE ORDER
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, ITS OFFICERS, EMPLOYEES, APPOINTEES AND AGENTS, HUDSON COUNTY,	:	
RESPONDENT.	:	
	:	

This matter having been opened before the Commissioner of Education by the filing of an Order to Show Cause and a Verified Petition by the Attorney General of New Jersey, attorney for petitioner, Walter J. McCarroll, Assistant Commissioner, Division of County and Regional Services, by Sally Ann Fields, Deputy Attorney General; and said Petition having been answered by Shea and Gould, Esqs., by David H. Pikus, and William A. Massa, Esq., attorneys for respondent Board of Education of the City of Jersey City; and an Order to Show Cause having been entered by the Commissioner of Education on May 24, 1988; and the Office of Administrative Law having heard and considered the testimony and evidence and arguments of counsel and having issued an Initial Decision on July 26, 1989 recommending that a State-operated school district be created; and the Commissioner of Education having recused himself from the matter and having assigned Assistant Commissioner Lloyd Newbaker to decide the matter; and Assistant Commissioner Newbaker having adopted the Initial Decision on August 31, 1989 and having recommended the issuance of an Administrative Order; and the State Board of Education having considered same and having determined that the school district of the City of Jersey City is not providing a thorough and efficient education, and that determination having been embodied in a written decision issued on October 4, 1989, and the basis of that decision not being solely the district's failure to correct substandard facilities,

It is on this fourth day of October, 1989,

ORDERED that pursuant to N.J.S.A. 18A:7A-15, N.J.S.A. 18A:7A-15.1 and N.J.S.A. 18A:7A-34, the Board of Education of the City of Jersey City be removed; and it is further

ORDERED that pursuant to N.J.S.A. 18A:7A-15, N.J.S.A. 18A:7A-15.1 and N.J.S.A. 18A:7A-34, a State-operated school district be created whose functions, funding and authority are defined in N.J.S.A. 18A:7A-34 et seq.; and it is further

ORDERED that pursuant to N.J.S.A. 18A:7A-35, the Commissioner of Education recommend an individual qualified by training and experience for appointment by the State Board of Education pursuant to N.J.S.A. 18A:7A-15.1 as State district superintendent of schools to direct all operations of the district; and it is further

ORDERED that the Commissioner of Education take all other actions as are necessary to implement the provisions of N.J.S.A. 18A:7A-34 et seq.; and it is further

ORDERED that this Administrative Order shall remain in effect until lifted by the State Board of Education upon application and recommendation of the Commissioner of Education made pursuant to N.J.S.A. 18A:7A-49(b).

SECRETARY
STATE BOARD OF EDUCATION

PRESIDENT
STATE BOARD OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3475-89
AGENCY DKT. NO. 134-5/89

H.A. DEHART AND SON,
Petitioner,
v.
BOARD OF EDUCATION OF KINGSWAY
REGIONAL HIGH SCHOOL DISTRICT
AND JERSEY BUS SALES, INC.,
Respondents.

Thomas H. Ward, Esq., for petitioner (Albertson, Ward & McCaffrey, attorneys)

Robert J. Hagerty, Esq., for respondent Board of Education of Kingsway (Capehart and Scatchard, attorneys)

Milton H. Gelzer, Esq., for respondent Jersey Bus Sales, Inc (Gelzer, Kelaher, Shea, Novy & Carr, attorneys)

Record Closed: July 12, 1989 Decided: August 9, 1989

BEFORE NAOMI DOWER-LABASTILLE, ALJ:

H.A. DeHart & Son, a New Jersey Corporation (DeHart), the lowest bidder on a bus purchase contract, filed this petition against the Board of Education of Kingsway Regional High School District (Board), the winning bidder, Jersey Bus Sales, Inc. (Jersey Bus) and three other bidders seeking to be declared the lowest responsible bidder and to void an alleged penalty provision in the specifications. The only respondent bidder which answered to the petition was Jersey Bus. On May 11, 1989, 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.

DeHart initially filed a complaint in the Superior Court Law Division, Gloucester County and sought a temporary restraining order against the Board. On May 11, 1989, Robert E. Francis, J.S.C. signed an order restraining the Board from taking any action on the contract award until further order of the court or the Commissioner of Education and transferring the action to the Commissioner under N.J.S.A. 18A:6-9 et seq. DeHart's petition claimed that Jersey Bus was not a responsible bidder because it allegedly did not have a valid New Jersey Motor Vehicle dealer license as required by N.J.S.A. 39:10-19 and was not authorized to do business in New Jersey. Jersey Bus denied the allegation and attached a copy of its current dealer license to its filed response. Petitioner abandoned or conceded that issue and did not address it at hearing or in post-hearing briefs.

The Office of Administrative Law scheduled a hearing for June 6, 1989, but petitioner sought and received an adjournment because the Board had not granted discovery in time. In fact, Board counsel did not submit the last document, the "non-instructional addendum," which it intended to use at trial until two days before the hearing date. The case was heard on June 30 and July 5, 1989. Post hearing supplementary briefs were filed on July 12, 1989, when the record closed. A list of exhibits entered into evidence is appended to this decision.

DeHart argues that the Board's procedure in awarding the bids to Jersey Bus was contrary to N.J.S.A. 18A:-18A-37 and based on information not before the Board and not considered by it and that the bid specifications do not comply with N.J.S.A. 18A:18A-15 in that they were not drafted in a manner to encourage free, open and competitive bidding. DeHart claims that the specs are proprietary and restrictive in that only a Blue Bird bus seller can meet them, and that one specification is an invalid penalty clause. Petitioner further claims that its buses are functionally equivalent to Jersey Bus Sales' Blue Bird buses and that it therefore met the specifications and should be awarded the contract on its low bid. The Board maintains that DeHart cannot challenge the specifications after award of bids and therefore has no standing to raise any claim except a procedural claim, which must fail. Jersey Bus, as the winning bidder, supports the Board's position.

PROCEDURES LEADING TO AWARD TO BIDDER

Since the Board may be forced to rebid if its procedures were substantially flawed regardless of the merits of any bid, I will first address procedural questions. The only witnesses who had knowledge of all the facts relating to the period prior to award of the bids were those employed by or associated with the Board. They were all credible. What occurred at the public meeting and at a subsequent meeting at which minutes were approved is not in dispute. Rather, the dispute is in characterization of these facts and their legal import.

FINDINGS OF FACT

1. Philip Nicastro, assistant superintendent for business and secretary of the Board, as part of his duties, works on specifications, evaluation of bids and recommendations of bus bids to the Board. He did this for prior boards which employed him. The Board relied on his recommendations since he worked closely with the transportation committee of the Board and was aware of its concerns.

2. The specifications at issue for 54 passenger buses preexisted Nicastro's employment in 1986-87 school year, but he had used the same specs in another district and he had occasion to study them in 1988 because Wolfington was the lowest bidder that year and threatened to sue because a bid on the same specs was awarded to DeHart, who was then the distributor for Blue Bird buses. DeHart had, in fact, assisted the Board's agents in drafting the Blue Bird specifications.

3. Nicastro supported the use of the specs because he felt they met the Board's safety priorities in that they required a four piece windshield, which the drivers felt offered better peripheral visibility of exiting children; one piece roof bars and thicker (lower guage steel) construction elements at several important points. These elements were important to him because Kingsway buses traverse very few city streets; they cross high speed intersections and rural roads.

4. Neither Nicastro nor the Board knew or believed that the specifications limited the bidding to one bidder because in past years, two parties had bid offering Blue Bird bodies (Gallo and DeHart). Nicastro and, at the least, the Board members who were on the transportation committee adopted the specifications knowing that they described Blue Bird body elements, but did so because of their safety features as described by Nicastro, and were unaware some features were only referable to Blue Bird models. In fact, an important feature, the four-piece windshield, was once offered by Superior buses.

5. The bids were advertized on April 6, 1989 and received and opened by Nicastro at 10 a.m. at the business office at the high school on April 21, 1989; on April 24, Nicastro forwarded them to Mrs Fish, the Board's transportation director. On April 26, Mrs. Fish orally related her analysis to Nicastro. She had looked over the Ward body diagrams sent in by DeHart in the company of one of Kingsway's bus mechanics. Mr. Fish reported the drivers preferred a Blue Bird body, especially the four piece windshield. The Ward body has a two-piece windshield.

6. Nicastro then reviewed the bids himself. The DeHart-Ward net bid for over 54 passenger buses was $4,816 lower than the Jersey Bus-Blue Bird bid, but DeHart had noted "exceptions" and referred to its drawing (J-1A) to illustrate construction elements. The first item he noticed was the exception to the $50 per day price reduction provision for late delivery.

7. Nicastro took note that the ward body appeared to use thinner steel than the specs on roof bows and rear construction, that the floor construction was not the same, that the insulation was thinner, that it lacked the four piece windshield and that it included an 85,000 BTU heater instead of a 90,000 BTU one.

8. Nicastro was not greatly concerned about the difference in switches and rain visors; his greatest concern was with the windshield, roof bows and floor construction. The County Superitnendent had, several years previously, sent

an article to the boards about an accident in which children had fallen through the floor of a bus.

9. Nicastro also found a problem with DeHart's statement, "At this time we see no problem with the delivery date." The specs required delivery by August 15, 1989, provision of a comparable bus until delivery and reduction of price by $50 for each day after Setpember 15 that the delivery was late. This concern stemmed from Gallo's 1987 delivery of buses in January when they were promised for August.

10. Offer of a comparable bus until delivery was not satisfactory to Nicastro, because he had no confidence in the maintenance and condition of a bus maintained by persons other than Board mechanics.

11. Nicastro determined that DeHart and all the other bidders did not meet the specs and that only Jersey Bus, one of the high bidders, met them. Although Jersey Bus was the only bidder offering a Blue Bird body, in past years both Gallo and DeHart had met the specs with Blue Bird bodies and in 1987 Gallo was awarded the contract whereas in 1988 DeHart obtained it.

12. As was his usual course of business, Nicastro had a "non-instructional addendum" prepared for the Board's consideration when awarding bids. He recommended Jersey Bus at $102,216 and noted that DeHart, at $97,400 bid, took exception to the $50/day penalty for delivery after September 15 and Gallo, at $99,300 bid took exception to the delivery date. He did not note on his addendum to the Board for May 1 all the items on each non-recommended bid which did not comply with the specs. The addendum contained all the dollar amounts of the bids. Two bids for 54 passengers buses were higher than that of Jersey Bus (Wolfington and Wills), and two were lower (Gallo and DeHart).

13. The non-instructional addendum was passed out to the Board on May 1 just before the vote, which was to award the bid to Jersey Bus, the current exclusive dealer for Blue Bird buses.

14. There was no discussion of the bid, the amounts of each bid were not read aloud, and the Board members did not orally articulate reasons for their vote.

15. A few days after the May 1 meeting, the Board's attorney, Alan Schmoll, called Nicastro saying DeHart was going to contest the bid. Schmoll asked why it was not awarded to the lower bidders and Nicastro related that the bids were not in compliance with the specs. Schmoll also told Nicastro that the specs provide for a $50 price reduction and that his use of the term "penalty" on his non-instructional addendum was not acceptable.

16. Nicastro's secretary, Betty Crate, types the minutes of each Board meeting which are then presented to the members at the next regular meeting for addition or correction and approval by official vote.

17. Nicastro revised the non-instructional addendum to use the words, "price reduction" instead of "penalty," and added the notes that bidder Wills could not guarantee delivery by August 15 and that all unsuccessful bidders did not meet specifications.

18. The addendum information was then incorporated in the official minutes, which were given to the Board members with their agenda, and at the next meeting on June 1, 1989, they voted to approve these minutes (P-3).

CONCLUSION ON PROCEDURE

N.J.S.A. 18A:18A-37 provides that all purchases requiring public advertisement shall be awarded to the lowest responsible bidder. N.J.S.A. 18A:18A-3 sets the bid threshold: since the cost of a bus exceeds the threshold, an invitation to bid must be advertised. The second paragraph of N.J.S.A. 18A:18A-37 deals with "other" contracts, ie., those for which advertisement is not required, for which a board must seek quotations. If the Board does not contract with the quoter of the lowest price, it must prepare a statement of explanation or reasons for its purchase which must be filed with the contract. **I CONCLUDE** that the Board was not obligated to file a statement of reasons for awarding the contract to Jersey Bus.

N.J.S.A. 18A:18A-22 prohibits award of a contract to a bidder who does not meet the specifications. He is not even considered to be the lowest bidder absent substantial compliance with specifications:

> The law is clear that bids must meet the terms of the notice. The significance of the expression 'lowest bidder" is not restricted to the amount of the bid; it means also that the bid conforms with the specifications. * * * Minor or inconsequential variances and technical omissions may be the subject of waiver. * * * But any material departure stands in the way of a valid contract, and the defaulting person cannot be classed as a bidder at all. * * * This is because the requirements are generally considered to be mandatory or jurisdictional. * * * Substantial noncompliance cannot be waived by the municipality. * * * The reason for this bar is obvious. When the waiver occurs, the bidders no longer stand on a basis of equality and the advantages of competition are lost.
> [Hillside Twp. v. Sternin 25 N.J. 317, 322 (1957)]

When a contract is not awarded to the lowest bidder, it can therefore be assumed that it did not meet the specifications. The exception is if the bid is rejected because the bidder is not "responsible" but in such case, the Board must allow the bidder to be heard on the issue.

Given the prohibition of the statute, it is not necessary to state the obvious: that failure to meet the specifications is the reason for rejection. Nicastro acted upon the assumption that the Board knew that his recommendation was in compliance with the statute, i.e., that the lower bidders did not meet the specs. I CONCLUDE that Nicastro's recommendation and the Board's acceptance and vote to award the bid were legally proper.

The fact that Nicastro subsequently amended his addendum by adding the fact that only Jersey Bus met the specs is not legally significant because the statement was surplusage. Even if it were not, the adoption of minutes in the normal course of business which incorporate additional reasons for the award is not improper, for in making the adoption, the Board merely ratified a clarification of reasons for its actions. N.J.S.A.

18A:18A-21 requires that "a proper record of the prices and terms shall be made in the minutes of the board." This was done. The fact that the Legislature did not include the language "and the reasons for the award" in that section supports the Board's position that there is an assumption that lower bidders whose bids are rejected do not meet the specs. DeHart argues that the Board was required to have all the bids read at the meeting when it voted to award the contract to Jersey Bus. The statute does not require such action. Rather, the statute says that the bids must be publicly announced before the bidders when the Board's agent opens them at a stated time and place. N.J.S.A. 18A:18A-21 is quite specific: if the Legislature had wanted the bids to be read at the Board's public meeting, it could have required that procedure. Since it did not, I **CONCLUDE** that the Board's procedure was proper. As a practical matter, it would not make sense to burden the public hearing with a recitation of all bids, because boards of large districts would be forced to spend a good part of their meeting time reading bids yet the subject is of interest principally to only the bidders themselves. The public is afforded the information, if interested, via the minutes, which are required to contain it.

I note also that rules exist which set forth procedures for transportation contracts (N.J.A.C. 6:21-15.1 et seq). Although these rules specifically relate to bidding of bus routes, the general procedures in N.J.A.C. 6:21-15.5 and 16.5 provide guidance in all bidding situations, because they reiterate the statutory and case law bidding requirements. I **CONCLUDE** that there were no procedural infirmities which justify setting aside the award to Jersey Bus, which was in full compliance with the specifications.

The Board argues that DeHart is barred from raising the issue of whether or not the specifications were illegal because DeHart bid under them. The alleged illegality is two fold. DeHart claims the specifications are contrary to N.J.S.A. 18A:18A-15 because they are proprietary to Blue Bird, and thus limit the bidder to one alone, since Jersey Bus is the exclusive New Jersey agent for Blue Bird. The second alleged illegality in the specifications is in a condition of delivery, whereby the price is reduced by $50 per day if delivery is not made by September 15. In support of its argument that DeHart is too late to attack the specifications, the Board cites Consumers Ice Cream v. Bd. of Ed. of Camden, 1960-61 S.L.D. 212 (May 25, 1961), and Andrews and Shearer's Dairies, Inc., v.

Bd. of Ed. of Camden, 1966 S.L.D. 147 (August 19, 1966). In Consumers, the issue of setting aside the contract or specifications was moot, because the contract had already been performed. The Commissioner commented that the objector should make timely protest and not wait until bids were awarded. In the Andrews case, the winning bidder did not supply the brand name milk carton called for in the specs and had not noted in its bid an exception with notation of equivalent it would supply. The Commissioner held that an "or equal" proposal must be stated in the bid or the winning bidder must supply the specified item. Thus the award winning petitioner had no "standing" to complain about the specs. Both of these cases can be distinguished on their facts.

We need not rely on cases which antedate the Public Schools Contracts Law, L. 1977, c. 114, however. Although Waszen v. City of Atlantic City, 1 N.J. 272, 276 (1949) remains the seminal case holding that an unsuccessful bidder does not have standing to challenge the award of the contract to a rival bidder or to attack allegedly illegal specifications, our Supreme Court addressed the issue in 1981, subsequent to the 1971 adoption of the Local Public Contracts Law, which contains a specifications section, N.J.S.A. 40A:11-13, most of which is identical to the later adopted school contracts law. In Autotote Ltd. v. N.J. Sports and Expo Auth., 85 N.J. 363, 369 (1981), the court restated the relevant holding: a party is estopped from challenging the award of a contract which it actively sought through the same procedures it now attacks. The Court did not discuss another aspect of the standing issue: prior cases hold that a bidder has no standing to attack the specifications at any time, holding that such challenge requires the presence of a taxpayer as plaintiff. J. Turco Paving Con., Inc. v. City Council of Orange, 89 N.J. Super. 93, 97 (App. Div. 1965). Notwithstanding its adherence to the Waszen principle, the Autotote court determined that an issue of statutory interpretation raised required determination on the merits because it was of substantial public importance. Shortly after Autotote was decided, the Appellate Division addressed the estoppel issue and a variant which is relevant here in Saturn Constr. Co. v. Middlesex City Freeholders, 181 N.J. Super. 403, 407 (App. Div. 1981).

After reiterating the rule that an unsuccessful bidder cannot challenge the specifications after the opening of the bids, the Saturn court addressed the issue of whether the challenge was actually a challenge involving the specifications, or a challenge

on the basis that the challenger was entitled to the award as the lowest responsible bidder, as Saturn claimed. An entitlement challenge is permitted. The court noted that such challenges typically involve the lowest bidders' responsibility, defects in the bid of the winning bidder or defects in the procedures. In the instant case, I have already determined that the procedures were proper.

DeHart argues that it did challenge the specifications before the bids were opened by stating "exceptions" in its bid. While the exceptions to the body specifications are clear, the form of the exception to the delivery date specification requires examination. I **FIND** that DeHart's bid form (J-1) reads as follows:

> COMPLETE BUSES AS BID TO BE DELIVERED WITHIN FIVE (5) DAYS AFTER RECEIPT OF PURCHASE ORDER.
>
> DELIVERY TO BE ON OR BEFORE AUGUST 15, 1989
>
> IN THE EVENT DELIVERY IS NOT BY AUGUST 15, 1989 THE SUCCESSFUL BIDDER WILL PROVIDE A COMPARABLE VEHICLE UNTIL THE SCHOOL BUS IS DELIVERED. THIS WILL BE AT NO CHARGE TO THE SCHOOL DISTRICT. IN THE EVENT DELIVERY IS NOT MADE BY SEPTEMBER 15, 1989 THE SUCCESSFUL BIDDER WILL PROVIDE A COMPARABLE VEHICLE AS STATED ABOVE AND REDUCE THE PRICE OF EACH SCHOOL BUS $50.00 PER CALENDAR DAY.
> *EXCEPTION: TO REDUCE PRICE $50.00 PER DAY
> INDIVIDUAL CERTIFIED CHECK FOR 5% OF EACH BID IS TO ACCOMPANY PROPOSAL.
> *AT THIS TIME, WE SEE NO PROBLEM WITH DELIVERY DATE

The lines with asterisks were filled in by DeHart. It is plain to see that DeHart gave no indication that it challenged the legality of the $50 per day reduction in price provision. Absent such an indication, even an experienced reader could only conclude that DeHart did not meet the specification. Additionally, the statement, "at this time, we see no problem with delivery date," taken in context with the refusal to meet the late delivery price reduction term renders DeHart's response to the delivery date specification too uncertain to be considered conforming. Had the bid been awarded to DeHart, other bidders would have had a sound basis to claim that the bid was defective and did not meet specifications.

Before addressing whether or not DeHart's noting of exceptions in its bid precludes application of estoppel and standing holdings, the penultimate paragraph of N.J.S.A. 18A:18A-15 should be reviewed because the application of estoppel has not been addressed by our Supreme Court in relation to that section, which was adopted in 1977.

> Any specification adopted by the board of education which knowingly excludes prospective bidders by reason of the impossibility of performance, bidding or qualification by any but one bidder, except as provided herein, shall be null and void and of no effect and such purchase, contract or agreement shall be readvertised, and the original purchase, contract or agreement shall be set aside by the board of education. [emphasis added]

It is clear from the last clause that if a board advertises for bids with specifications which restrict bidding and knows (or its employee who drafts the specs knows) that only one bidder can meet them, if the Board awards a contract, the contract can be set aside. In these specific circumstances, the Legislature does not restrict a challenge to the specifications to the time frame before the bids are opened. The rest of the specifications statute gives no indication of when or by whom a challenge to the specifications can or cannot be made. I **CONCLUDE** the Legislature did not intend to affect the long standing case law on estoppel and standing by this section. I have found that the Board did not knowingly use specifications limiting bidding to one party, even if one assumes the specifications did exclude bidders other than Jersey Bus, so the contract cannot be set aside on that basis.

The holdings in Waszen and Autotote explain that the reason for application of estoppel is that "one cannot endeavor to take advantage of a contract to be awarded under illegal specifications and then, when unsuccessful, seek to have the contract set aside." Autotote at 369. There is no question that DeHart sought award of the contract. Its argument that it met the body specifications by offer of an equivalent to Blue Bird Model SBCV-2909 is a cognizable challenge after bids were opened, since it was the lowest bidder. There is no way that the stating of exceptions on a bid can be considered a challenge to their legality before bid opening because no one could know about such a challenge until the opening. Thus even if a board agreed with a bidder that a specification was illegal, it would have no opportunity to correct the specifications before opening the bids.

A conclusion that a bidder challenges specs by exceptions in its bid would vitiate the estoppel holdings and be contrary to the public policy it promotes. Such challenge would open boards and public bidders to harassment and uncertainly in their business relations by delaying performance of awards. Permitting such late challenges would discourage bidding. The principle that only a taxpayer has standing to challenge specifications also has relevance to this dispute. The principle is supported by a recognition that the intention of the Legislature in adopting bidding laws was to protect the taxpayers, not the bidders. The small reduction in price of buses belatedly delivered is not likely to be challenged by taxpayers. In any event, N.J.S.A. 18A:18A-41 expressly permits liquidated damages.

The Kingsway Board needs to have new buses by the start of school in September. The Board advertised for bids April 6 and opened them on April 21. Thus a valid challenge to the specifications could have been made four months before the delivery date specified. The dispute could have been litigated or settled at least a month earlier and the bids readvertized. This procedure would also eliminate business uncertainty for the successful bidder. On the facts of this case, not only did DeHart endeavor to take advantage of the contract to be awarded under specs it claims to be illegal, but it helped to draft these very specifications four years earlier when it, rather than Jersey Bus, was a successful bidder offering Blue Bird buses. The mischief in permitting a challenge after bids are opened is particularly apparent in this case. By 1989, Jersey Bus had become the exclusive dealer for Blue Bird buses. In 1988, both DeHart and Gallo sold them. The reason for this change in dealerships is not of record but it can be inferred that all these entities sought their own financial advantage, because maximization of profit is the general purpose of business entities.

I **CONCLUDE** that DeHart is estopped from challenging the specifications. No challenge to the legality of the specifications can be raised, including the specification for a $50 per day price reduction for late delivery. The only remaining issue is whether or not DeHart met the specifications.

I have found above that DeHart did not meet the delivery specifications, not only because of its exception to the alleged illegal $50 per day reduction but also because its

response to the requirement of an August 15, 1989 delivery date was ambiguous and uncertain. The statement, "At this time, we see no problem with delivery date" (emphasis added) is not a clear agreement to deliver on the date certain stated in the specifications. I **CONCLUDE** DeHart's bid was nonconforming on this ground alone. Nevertheless, in the event the Commissioner does not agree that this issue is dispositive and, since a complete record has been made, I will make findings concerning the alleged equivalency of DeHart's buses to the specifications.

There was no engineering or safety engineering testimony to support findings that the Blue Bird body is "safer" than the Ward Volunteer body offered by DeHart. Nor were any studies offered concerning safety, the results of accidents or maintenance. Blue Bird's witness was the only engineering expert, but his testimony was largely that DeHart's bid did not meet the specs. He did note that heavier steel (lower guage) is generally stronger. Some of the witnesses had driven or maintained boths kinds of buses and other brands. The Board witnesses were the most credible because they had no proprietary interest in the products. The Board's transportation directors, past and present, gave the most pertinent testimony, had driven buses and had strong opinions concerning the superiority of a four piece windshield for visibility and hence, safety. Nicastro brought out additional safety concerns provided by the specs which called for stronger roof bows, and specific floor construction. He felt that heavier guage steel in these areas and in the rear construction were safer.

I **FIND:**

19. Both Ward and Blue Bird bodies meet State and Federal requirements.

20. DeHart excepted to specifications for numbers: 15. (a) for push-pull type switches versus rocker-types, 14. for individual rain visors versus a one piece visor and 4. for a 104 amp battery and 65 gallon fuel tank, versus a 60 gallon tank offered but none of these items were materially and substantially noncomforming. They were in the waivable class. The difference between 2" insulation required and 1 1/2" insulation offered is significant as an element of comfort in heating and cooling needs, but is not a dispositive feature of the bid.

21. The following differences in the specifications and DeHart's bid were significant and material because they related to safety concerns which are the Board's first priority in purchasing school buses:

Specifications		DeHart's Bid:
14a.	A windshield to be a four-piece constructional unit	two piece windshield
3.	Bus Body Construction (b) The following guages of metal and type of construction are the required minimum.	
(c)	Floor: To be of 14 guage steel, made up of formed 28" and/or 35" sections flanged on each side. Each main floor joint to be strengthened by 3/16 steel angle bar on one side, and 1/8 steel bar on the other side, making each main floor joint 1/2" thickness. Joint to be riveted under pressure for a dust fume, and weather seal. This main floor joint shall also have 1" welds with a 1" space between welds along its full length. Auxiliary cross-members between these main floor joints to be spaced on a minimum of 9" centers, and are to be hat shaped. Wheel-housings to be one piece and constructed of 16 gauge steel, sealed and securely attached to floor.	DeHart Bid says "See prints attached "Print shows 14 guage floor and tie down channel and 3/16" huck bolts. One main body sill at each side post and two intermediate body sills spaced on 9" centers. Does not show steel angle bars and steel bars making each joint 1/2" thick. Does not state riveting of joint or specific welds. No hat shaped auxiliary cross-members.

(d). Side Protection

19 3/8 wide formed 16 g. steel armor gussets to extend full length of body above and below floor line. That part of the gusset below the floor shall extend downward 7 1/4, and shall not be used as the lower outside panel of the body.

DeHart bid says "See prints attached."

Print contains no description of side protection and shows that either the skirt is the lower part of the seat rail or the gusset stops at the floor. Thus the response was ambiguous and compliance with the specification could not be determined.

Specification:

> e. Roof Bows
>
> One Piece 14 g. Hat shaped bows to extend in one piece from floor line on one side to the floor line on the other side. Bows not to extend below floor line.

DeHart Bid says "See prints attached."

The printed description says "body bows" are 16 gauge steel, die formed and spaced on 27" centers. This is thinner steel than the Board's specifications.

Specification:

> i. Rear Construction
>
> Emergency door post - 11 gauge, door header 14 guage, belt rail, 14 guage, belt rail supports post 14 gauge.

DeHart Bid says "No exception," but the print shows its door post is 12 guage and frame members are 16 guage. Thus the rear construction is also of thinner steel than the specifications.

22. The four piece windshield is important because it more closely approximates a wrap-around, curved visual field of 180 degrees. The two piece construction has a column in the visual field, results in a blind spot, and is less safe, particularly at an intersection where other vehicles are entering at the right of the visual field. The peripheral visual loss also interferes with the driver's ability to perceive a child leaving the bus who may have stopped to pick something up.

23. The four-piece windshield is not new; it was standard on Superior buses, but they are no longer available.

24. The strength of steel and type of construction specified for floor, side, roof and back of the buses are reasonably viewed as safety features which offer more protection in the case of a roll over accident (roof bows) or one in which the magnitude of the impact could endanger the body integrity, resulting in the possibility of children falling through an unattached floor.

CONCLUSION AND DISPOSITION

The findings above show that DeHart did not meet the specifications and that its noncompliance was substantial and material. DeHart argues that there is no "functional difference" in the Ward Volunteer buses offered. I agree with respondents that the term "no functional difference" is not the compliance standard, since both a Cadillac and Volkswagen are functionally the same if the function at issue is simply transportation. The safety, comfort and prices differ, however. I **CONCLUDE** that DeHart was not the lowest responsible bidder because it did not meet the specifications. Hillside Twp. v. Sternin, 324.

It is therefore **ORDERED** that the petition be **DISMISSED** and that the **STAY** of the contract award be **DISSOLVED.**

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.

August 9, 1989
DATE

Naomi Dower-LaBastille
NAOMI DOWER-LABASTILLE, ALJ

Receipt Acknowledged:

August 10, 1989
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

AUG 11 1989
DATE

James LaVecchia/KS
OFFICE OF ADMINISTRATIVE LAW

ct

H.A. DE HART AND SON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE KINGSWAY REGIONAL HIGH SCHOOL DISTRICT AND JERSEY BUS SALES, INC., GLOUCESTER COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and initial decision of the Office of Administrative Law have been reviewed according to the expedited schedule established by the Commissioner at request of the parties. Timely exceptions, similarly expedited, were filed by petitioner pursuant to N.J.A.C. 1:1-18.4.

Petitioner takes exception to both the findings and the methods of the initial decision. Petitioner challenges the ALJ's finding that the successful bidder's buses ("Blue Bird" bodies) were safer than those offered by petitioner ("Ward Volunteer" bodies), particularly in view of the ALJ's admission that no expert testimony on this matter was offered. (Initial Decision, ante) Instead, petitioner argues that both buses meet State and Federal standards and are thus substantively similar. (Exceptions 1 and 1A)

Petitioner asserts that the ALJ improperly addressed petitioner's charge that the Board's action was arbitrary, unreasonable and capricious by 1) failing to confine her record and determinations to the actual events and documents pertaining to the Board's awarding of the bid, 2) relying on after-the-fact expression of the "secret or undisclosed" thoughts of staff members who recommended rejection of petitioner's bid, and 3) confusing the actions and thoughts of a staff member, which petitioner does not challenge, with those of the Board itself, which he does. (Exceptions 2, 6 and 6A) Petitioner further asserts that the ALJ relied on several assumptions supported by neither evidence nor law, most notably that 1) the Board did not need to make specific findings about bidder failure to meet specifications since unsuccessful bidders, by definition, are those who do not meet specifications, and 2) official minutes can be altered after the fact to explain the thinking behind actions rather than simply memorializing those actions and the stated reasons for them. (Exceptions 4 and 4A)

Petitioner also contests the ALJ's conclusion that petitioner has no standing to challenge bid specifications once having bidded under them. Instead, petitioner contends that his standing is based on entitlement to the contract as low bidder absent a finding that his product did not meet the "or equal"

standard of the Board's bid specifications, construed according to N.J.A.C. 6:21-15.2's stipulation that brand names be used for identification purposes only. (Exceptions 3A and 3B) Petitioner further contends that he did protest the specifications' illegal penalty provision by clearly taking exception to it in his bid submission, so that he should not be barred from pursuing that matter in the present context. (Exception 5)

Petitioner initially argues for the assumption that the Board knew its application of specifications could only result in one possible successful bidder, thereby empowering the Commissioner to act in the public interest and set aside the contract award as an intentional violation of the Public School Contracts Law pursuant to N.J.A.C. 6:21-15.2(d). He then presents a variation on this argument by observing that, if the Board is granted its contention that subsequent modification of May 1 minutes was legitimate and that the revised minutes truly reflect the Board's unspoken thinking, then those minutes show the Board to have reviewed bids from every dealer in South Jersey and to have known thereby that only one dealer could possibly have met the advertised specifications--thus establishing intentional violation. Petitioner contends that the Commissioner's allowing an award under these circumstances to stand would establish an injurious precedent and undermine the integrity of the Public School Contracts Law. (Exceptions 3C, 7 and Conclusion)

Upon careful review, the Commissioner makes the following determinations:

First, petitioner has standing to challenge application of specifications. Although he knew from his prior role in assisting with the drafting of these specifications that they were tailored to Blue Bird buses, petitioner clearly submitted his bid in the good faith belief that the "or equal" provision stated in the overall body specification and the provision for exceptions to specific body requirements (Exhibit J-1, bid form) meant that the Board was willing (indeed, obligated) to consider buses other than Blue Bird. He therefore would have had no reason to challenge the specifications themselves prior to the awarding of the contract and, in essence, his major arguments do not challenge them now except to the extent that the Board, in the context of these proceedings, is relying on the narrowest possible reading of the advertised specifications to demonstrate petitioner's noncompliance with them. Petitioner therefore cannot legitimately be accused of bringing an unlawfully belated challenge to the same specifications he sought to take advantage of as a bidder.

Second, the Board's public action in awarding the bid to Jersey Bus must be judged solely on the basis of information it can be shown to have used in taking such action. In this matter the Commissioner concurs with petitioner that the sole information on which the Board can be deemed to have acted, given that the complete tape recording of the meeting in question reveals no further discussion or oral presentations (P-1), was the administration's document recommending award of contract to Jersey Bus Sales (P-2).

That document is reproduced in full below to demonstrate that, as far as the Board can be shown to have known, five bids were received; the lowest was unacceptable because of exception to a penalty clause; the second lowest was unacceptable because of exception to delivery date; the third lowest was recommended; and the remaining two were high bids and thus in need of no comment.

KINGSWAY REGIONAL HIGH SCHOOL DISTRICT
BOARD OF EDUCATION

NON-INSTRUCTIONAL ADDENDUM
Monday, May 1, 1989

1. NEW SCHOOL BUSES

It is recommended the Board of Education accept and award a bid for the 1989 school buses as follows:

Recommended Award:

Jersey Bus Sales	
4 Blue Bird/GMC 54-Passenger School Buses	$102,216.00
1 Blue Bird/GMC 20-Passenger School Bus	20,494.00

Unsuccessful Bidders:

Wills Equipment	
4 Thomas/GMC 54-Passenger School Buses	102,900.00
DeHart Body Company	
4 Ward/GMC 54-Passenger School Buses	97,400.00
1 Ward/GMC 20-Passenger School Bus	22,640.00
Wolfington Body Company	
4 Wayne/GMC 54-Passenger School Buses	102,756.00
1 Wayne/GMC 20-Passenger School Bus	21,725.00
Gallo GMC Truck Sales, Inc.	
4 Ward/GMC 54-Passenger School Buses	99,300.00
1 Ward/GMC 20-Passenger School Bus	23,453.00

Notes:

1. All bids include trading in two 54-passenger school buses and one Buick station wagon.

2. DeHart took exception to a $50.00/day penalty for delivery after September 15, 1989.

3. Gallo GMC took exception to delivery date. *** (P-2)

Respondents maintained throughout testimony and in briefs filed with the ALJ that this memorandum did not reflect the extensive discussions and comparisons of specifications that took place among district administrative staff and on which the Board was tacitly relying in accepting a long-standing and trusted administrator's recommendation. Indeed, much of the substance of respondents' testimony was devoted to a justification for preferring the Blue Bird buses to Ward Volunteers. However, even granting that all such discussions took place (and the Commissioner finds no reason to believe that they did not) and that the administration had reasons other than the stated penalty clause exception for preferring the Jersey Bus bid, the fact remains that it is the board which awards contracts and, in this case, so far as any admissible record of Board action shows, the Board rejected petitioner's bid solely on the grounds of its exception to the advertised penalty clause. The Board need not have filed a statement of reasons, as claimed by petitioner, under N.J.S.A. 18A:18A-37, which applies only to purchases not requiring advertisement; however, there must be some tangible basis upon which the Board can be shown to have acted. The Commissioner concurs with petitioner that the subsequent amendment of meeting minutes to reflect what Board members were ostensibly thinking, but never once actually expressed, is unacceptable in this context.

Third, the Commissioner concurs with the ALJ that the Board did not knowingly draft specifications limiting performance to only one possible bidder in violation of N.J.S.A. 18A:18A-15, so the contract cannot be fairly set aside on that basis. Indeed, the Board had past experiences with multiple bidders for Blue Bird buses under the very same specifications used in this instance, and nowhere except in petitioner's exceptions was it held that the Board knew about the new development of an exclusive distributor for Blue Bird buses when advertising for bids. Moreover, petitioner's argument to this effect is more a rhetorical trap vis-a-vis the Board's claim to have premised its decision on extensive prior discussion and knowledge of bus bids rather than simply on the informational memo of record.

Where the contract does fail, however, is that as far as any acceptable evidence shows, it was awarded solely on the basis of petitioner's legitimate exception to an illegal specification. It is well settled in New Jersey contract law that penalty clauses, as opposed to those specifying liquidated damages, are unacceptable. The distinction between the two was well described by the Superior Court in Westmount Country Club v. Kameny, 82 N.J. Super. 200 (App. Div. 1964):

> ***Liquidated damages is the sum a party to a contract agrees to pay if he breaks some promise, and which, having been arrived at by a good faith

> effort to estimate in advance the actual damages that will probably ensue from the breach, is legally recoverable as agreed damages if the breach occurs. A penalty is the sum a party agrees to pay in the event of a breach, but which is fixed, not as a pre-estimate of probable actual damages, but as a punishment, the threat of which is designed to prevent the breach.
>
> Parties to a contract may not fix a penalty for its breach. The settled rule in this state is that such a contract is unlawful.***
> (emphasis in text) (at 205)

The $50-a-day charge specified by the Board for delivery past a certain date clearly falls into the latter category and, indeed, the record shows the Board to have construed it as such until advised by its attorney--upon commencement of petitioner's legal challenge--to call it a "damages" clause instead. The Commissioner is entirely unpersuaded by the Board's after-the-fact attempts to portray what is clearly a punitive fine as liquidated damages (specifically permissible under N.J.S.A. 18A:18A-41) based on the Board's potential to lose the benefit of new buses while "loaner" buses are being provided free of charge.

On this basis alone, the Commissioner must in good conscience set aside the Board's contract award. However, because the Board has a right to make its own demonstrable determination as to petitioner's ability to satisfy legitimate specifications, the Commissioner determines not to award the disputed contract to petitioner outright. Instead, he determines that the Board must act to readvertise for bids on its 1989 school bus contract. In making this determination, the Commissioner is mindful of the Board's September 1989 need for buses and regrets the inconvenience his determination will cause; indeed, it is for this reason that expedited consideration has been given the matter. He is further mindful that there has been no indication that the Board acted in bad faith or knowingly violated the law. The Commissioner is constrained to observe, however, that the Board was responsible for a significant delay in granting discovery, thereby delaying hearing dates and the initial decision of the ALJ by nearly a month, and that the Commissioner cannot be expected to condone a contract clearly awarded in contravention of the spirit of public school bidding laws simply by reason of lack of mischief on the part of the Board or the inconvenience caused by rebidding.

The Board is hereby advised that several of its existing specifications have been shown by these proceedings to be proprietary in effect absent a clearly stated and sincerely meant intention to entertain consideration of equivalent offerings. The Board is further cautioned that, if subsequently challenged by an unsuccessful bidder on its application of specifications, it will bear the burden of showing that its decision was based upon a careful and legitimate determination of non-equivalency (not merely difference, as this is an unacceptable distinction within the

context of public bidding laws) that is clearly reflected in Board discussion and/or materials presented to the Board as a basis for action.

Accordingly, the order of the ALJ is hereupon reversed. The contract award to Jersey Bus Sales, Inc. is declared invalid and the Board of Education of the Kingsway Regional High School District is directed to readvertise for bids after removing the illegal penalty clause from its specifications. By this order, the question of a stay on the present contract award is rendered moot.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

August 31, 1989

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 5689-88
and EDU 5690-88
AGENCY DKT. NOS. 251-7/88
and 252-7/88
(CONSOLIDATED)

JAMES PARKER AND
JOSEPH PELLEGRINO,
Petitioners,
v.
BOARD OF EDUCATION OF THE
MATAWAN-ABERDEEN REGIONAL
SCHOOL DISTRICT, MONMOUTH COUNTY,
Respondent.

Mark J. Blunda, Esq., for petitioners (Oxfeld, Cohen, Blunda, Friedman, LeVine and Brooks, attorneys)

Vincent C. DeMaio, Esq., for respondent (DeMaio & DeMaio)

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

Record Closed: May 1, 1989 Decided: July 17, 1989

BEFORE DANIEL B. MC KEOWN, ALJ:

INTRODUCTION

James Parker and Joseph Pellegrino (petitioners), both of whom are teachers with a tenure status in the employ of the Matawan-Aberdeen Regional School District Board of Education (Board) and who are presently on a preferred eligilbility list for recall

to such employment having been subject to a reduction-in-force, allege in separate Petitions of Appeal filed before the Commissioner of Education that their tenure and seniority rights were violated by the Board because other teachers with lesser seniority than they in one of two distinct categories encompassing two distinct subject areas were retained in employment.[1] Each petitioner demands reinstatement to employment in the category and subject area assignment in which they assert greater seniority.

After the Commissioner of Education transferred the matters on August 1, 1988 to the Office of Administrative Law as contested cases under N.J.S.A. 52:14F-1 et seq., a telephone prehearing conference was conducted October 3, 1988 during which it was agreed, among other things, that the matters would be consolidated for purposes of adjudication. Thereafter, Shirley Orlans, Frederick Nolte, Gail Verner Pinkus, and Frances Guadagnino Geroni (Participants), each of whom is a teacher with a tenure status in the Board's employ and whose interest may be affected by the outcome of this litigation, were granted Participant status, N.J.A.C. 1:1-16.6. A hearing was conducted at the Matawan Municipal Court on February 2, 1989. Letter and reply memoranda were submitted by the parties. The record closed May 1, 1989. An extension of time was sought and granted for this initial decision to issue.

The conclusion is reached in this initial decision that petitioners failed to show by a preponderance of credible evidence that their tenure or seniority rights were violated by the Board in continuing the employment of any teacher with less legally enforceable seniority than they possess.

FACTS

Except as otherwise noted the facts of the matter as established by a preponderance of credible evidence in the form of testimony at hearing and documents submitted are these. During the spring months of 1988 the Board determined to cause a reduction-in-force due to declining enrollments. Petitioners Parker and Pellegrino were deemed by the Board to have lesser seniority than the teachers it retained, including Participants. Therefore, Parker and Pellegrino lost their employment by way of the reduction-in-force.

---

[1] At hearing petitioners withdrew Count 1 of their respective Petitions of Appeal which alleged that the reduction-in-force was not for bona fide reasons.

Petitioners' uncontroverted statement regarding individual assignments of Participants for 1988-89, effective as of September 1988, is as follows:

James Parker	No assignments/riffed
Joseph Pellegrino	No assignments/riffed
Shirley Orlans	1.25 Health; Matawan Avenue Middle School (Gr. 7 & 8)
	3.75 Phys. Ed: Matawan Avenue Middle School (Gr. 7 & 8) (J-10)
Frederick Nolte	1.25 Health: Matawan Avenue Middle School (Gr. 7 & 8)
	3.75 Phys. Ed: Matawan Avenue Middle School (Gr. 7 & 8) (J-11)
Frances Geroni	1.25 Health: Matawan Avenue Middle School (Gr. 7 & 8)
	3.75 Phys. Ed: Matawan Avenue Middle School (Gr. 7 & 8) (J-12)
Gail Pinkus	.9 Phys. Ed: Lloyd Road Elementary School (Gr. K-6)
	.1 Phys. Ed: Cliffwood Ave. Elementary School (Gr. K-6) (J-13)

The Board subsequently adjusted the specific assignments because of knowledge that Participant Frederick Nolte did not possess certification in health education. On January 9, 1989 teaching assignments of the four Participants was as follows:

	FROM ASSIGNMENT	TO ASSIGNMENT
Geroni, F.	3.75 Phys. Ed. 1.25 Health	3.25 Phys. Ed. 1.75 Health
Nolte, F.	3.75 Phys. Ed. 1.25 Health	5.0 Phys. Ed. No Health
Orlans, S.	3.75 Phys. Ed. 1.25 Health	3.25 Phys. Ed. 1.75 Health
Pinkus, G.	(No Change)	

While petitioners Parker and Pellegrino accumulated a certain number of years seniority as of June 30, 1988 by virtue of prior service and under existing seniority rules at N.J.A.C. 6:3-1.10 in specific categories of teacher of physical education-elementary, teacher of physical education-secondary, teacher of health-elementary, and teacher of health-secondary, N.J.A.C. 6:3-1.10(L)(19) and (20)(ii), this dispute calls into question only seniority in physical education-secondary and health-secondary. According to the Board's answer to interrogatory 12 (J-7), Parker was credited as he claims here with 13 years seniority as a teacher of physical education-secondary and with 8 years seniority as a teacher of health-secondary. Subsequently, the Board repudiated that answer as error and now contends Parker has only 12 years seniority as a teacher of physical education-secondary. Parker's 8 years seniority as a teacher of health-secondary is undisputed. The one year difference in physical education is significant as between Parker and Participant Shirley Orlans whose employment continues as a teacher of physical education-secondary and health-secondary for she, too, claims 13 years or more seniority in both subject areas. Petitioners contend Orlans only has 9 years seniority in the teaching of physical education and health in the secondary category.

Parker's claim for reinstatement rises or falls on a comparison of his seniority with the seniority of Orlans for each of the other Participants whose employment in physical education-secondary and health-secondary continues has greater seniority as shall be seen than does Parker. Parker presents another claim of greater seniority than Participant Frederick Nolte in the teaching of health-secondary because Nolte, despite having taught health, does not possess an endorsement to teach health. It must be quickly noted, however, that Nolte is not presently teaching health. While Nolte was assigned in September 1988 to teach health beginning in January 1989 that assignment was changed by the Board in January 1989 so that Nolte did not teach health in 1988-89.

Petitioner Pellegrino also had accumulated a certain number of years seniority as of June 30, 1988. He claims without dispute 11 years seniority in the teaching of physical education-secondary and 10 years seniority in the teaching of health-secondary. Pellegrino presents a separate claim of greater seniority in physical education-secondary than that of Participant Orlans and a separate claim as against Participant Nolte in the teaching of health-secondary.

EMPLOYMENT HISTORYS

The evidence in this record reveals the following employment historys for petitioners Parker and Pellegrino, along with Participants Orlans, Nolte, Pinkus, and Geroni.

Petitioner Parker

Petitioner Parker possesses an instructional certificate with an endorsement as a teacher of health and physical education since 1973. He began employment with the Board September 1973. Parker was assigned to teach physical education at the Board's Broad Street Elementary School. (See J-1). He continued that assignment until he says September 1975, while the Board says September 1976, to teach not only at the Broad Street Elementary School but one physical education class at the Board's Matawan Avenue Middle School which consisted of grades 6, 7 and 8. There is no dispute that Parker was assigned to teach health in September 1980 at the Board's Lloyd Road Middle School, grades 6 and 7, departmentalized. Based on this evidence Parker's seniority as a teacher of physical education in the category of secondary is either 13 years as he claims, or 12 years as the Board contends. Parker testified at hearing that he recalls teaching one class sometime in 1975-76 at the Matawan Avenue Middle School, grades 6, 7 and 8, departmentalized, but that he cannot recollect which grade level or class assignment he had.

The Board's records are of little assistance in the resolution of whether Parker did or did not commence teaching physical education-secondary in September 1975 at the Board's Matawan Avenue Middle School. Moreover, the Board's records such as they are contribute to the creation of this dispute. Nevertheless Parker, who carries the burden of proof in this matter, is not persuasive in his testimony that he taught one class of physical education-secondary at the Middle School in September 1975. This is so for it is reasonable to expect one who is assigned to teach physical education in the secondary category, a major departure from the elementary category, would presently recall which grade level, if not which specific class, he did in fact teach. There is no documentary evidence either from Parker or from the Board which would tend to support Parker's claim that he taught one class of physical education-secondary at the Middle School in September 1975. Therefore, I FIND Parker's seniority in the teaching of physical

education-secondary began September 1976. Thus, as of June 30, 1988 Parker has 12 years seniority in the teaching of physical education-secondary and 8 years seniority, undisputed, in the teaching of health-secondary.

Petitioner Pellegrino

Petitioner Pellegrino, who possesses an instructional certificate with endorsements in physical education and health (J-9) since 1973, began his employment with the Board during March 1974. At that time he was assigned to teach physical education at the Board's Cambridge Park Elementary School. There is no dispute that he continued in that assignment until September 1977 when Pellegrino was assigned to teach physical education at the Board's Lloyd Road Middle School, grades 6, 7 and 8 departmentalized. Finally, there is no dispute that Pellegrino was assigned to teach health during September 1978 at the Lloyd Road Middle School. Based on the foregoing undisputed evidence, Pellegrino has acquired 11 years as a teacher of physical education in the secondary category, and 10 years seniority as a teacher of health in the secondary category.

Participant Orlans

Participant Orlans is credited by the Board with either 10 years seniority as a teacher of physical education-secondary (J-10, p. 18) or 14 years seniority in the same category (J-10, p. 19; J-14) and 10 years seniority as a teacher of health-secondary (J-10, pp. 18-19; J-14, p. 2). However, there is documentary evidence from the Board which shows that with respect to the teaching of health-secondary, Orlans was assigned one of those 10 years, 1978-79, to teach physical education at the Board's Ravine Drive Elementary School (J-10, p. 3; J-10, p. 8). If Orlans did teach physical education at the Board's Ravine Drive Elementary School during 1978-79 then her 10 years seniority as a teacher of health-secondary would be decreased to 9 years.

Upon initial employment by the Board, Orlans was assigned to teach physical education at the Board's Broad Street Elementary School. The Board's records (J-10, at p. 3) show Orlans continued her assignment to teach physical education-elementary at the Broad Street Elementary School through June 1977 when she was then granted a sabbatical leave for 1977-78 to acquire a masters degree. The Board assumed from that point forward, without any documentation from Orlans, that she acquired the degree and

as a result the Board continued to grant her seniority credit for 1977-78. However, Orlans testified at this hearing that she did not acquire a masters degree nor did she commence study for it. Instead, Orlans used the leave for personal business while doing substitute teaching for the Board. Accordingly, Orlans is not eligible to receive seniority credit for 1977-78.

As noted earlier, when Participant Orlans returned for the 1978-79 academic year she was according to the Board's records (J-10, at pp. 3 and 8) assigned to the Ravine Drive Elementary School. Nevertheless, Orlans testified at hearing that not only was she assigned to the Board's Lloyd Road Middle School[2] during 1978-79, she also testified that as of September 1974 she was involved in Project Me, a federally-funded program, which required her to teach physical education-secondary. Project Me, according to the evidence of record, was to provide motor education program for all special education students, K-12. (J-10, p. 14) According to the documents in evidence, pre-school, elementary, and high school students participated in Project Me two times a week, while middle school students met once a week. The document (J-10, p. 14) is dated January-1978 during which year Orlans was on the non-seniority eligible leave of absence. There is an unsigned memorandum (J-10, p. 10) in evidence from a person, a Mr. Tuccillo, dated June 9, 1987, wherein Tuccillo says he was principal at the Lloyd Road Middle School during 1974-75 and that Middle School special education students in grades 6, 7, and 8 were taught in Project Me by Participant Orlans.

Orlans testified that her involvement in Project Me began during April 1974 when she began testing pupils in special education for potential involvement in the program for 1974-75.

Orlans presented a document (P-1) dated March 28, 1974 over the signature of one Leon A. Sweeney which reflects an evaluation of sorts of petitioner regarding her involvement in Project Me and her involvement in special education olympics. Sweeney asserts in the evaluation that Orlans was involved in the planning and the implementation of Project Me and that she played a major role in the preparation of the application,

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[2] This testimony is as recorded in my personal notes taken at hearing. Petitioners assert in their brief that Orlans testified she was assigned for 1978-79 to the Ravine Drive Elementary School. A verbatim transcript of testimony is not available. My personal note is more persuasive than the assertion of petitioners.

budget, and other activities necessary to develop curriculum and improve the perceptual-motor program. Sweeney asserts in the evaluation that Orlans worked from the Board's child study team office while screening pupils and revising curriculum for Project Me and that she ran parent and teacher workshops in the area of perception.

Based on the evidence in this record, including joint exhibits and Participant Orlans' testimony, as well as the evaluation document (P-1) I must **FIND** that Participant Orlans began the teaching of physical education-secondary in 1974-75. There is insufficient evidence in this record to arrive at any finding regarding the involvement of Participant Orlans in the Special Olympics for purposes of granting seniority. Thus, according to the evidence in this record Participant Orlans has, as of June 30, 1988, acquired 13 years seniority as a teacher of physical education-secondary and 10 years seniority as a teacher of health-secondary. (J-14, p. 2)

Participant Nolte

Participant Frederick Nolte, who possesses an instructional certificate with an endorsement in elementary education since June 1972 and an endorsement in physical education since December 1974 (J-11), began his employment with the Board in September 1971 as a teacher of the sixth grade at the Matawan Avenue School, grades 6, 7 and 8. He continued in that assignment until September 1974 when he was assigned to teach physical education, grades 6, 7 and 8. Nolte, having received his certificate during December 1974 had to have applied for it, I infer, at least on or about September 1974 in order for the administrative handling and approval of his application to have been made in order for the Bureau of Teacher Certification to issue the endorsement by December 1974. There is evidence that Nolte was assigned to teach health at least from September 1988 through January 1989, despite the fact he does not possess the appropriate endorsement to teach health. Contrary to petitioners' assertions in their filed brief at page 12, I **FIND** Nolte has acquired 14 years seniority as a teacher of physical education-secondary, not the 13 years, 6 months, 2 weeks as asserted.

Nolte has acquired no seniority as a teacher of health as a result of his not being legally qualified to teach health. Nolte's suggestion that he be considered qualified by reason of academic training to have taught health, despite the absence of possession of the proper endorsement, is rejected. Nolte was not coerced by the Board to accept such

assignment and Nolte is in the first instance obligated to be appropriately certificated to accept proffered assignments. Moreover, Nolte has not filed an application with relevant credentials to be granted an endorsement to teach health. Finally, the Commissioner's decision in Jennings v. Highland Park Borough Bd. of Ed., 1989 S.L.D. _____ (Feb. 27, 1989) does not command the acceptance of such suggestion. Nolte does not lose seniority as a teacher in the Board's employ as was threatened in Jennings.

Participant Pinkus

Petitioners do not dispute Participant Pinkus, who possesses an instructional certificate to teach physical education with separate endorsements to teach physical education and health, has acquired 14 years seniority in the teaching of physical education-secondary and 14 years seniority in the teaching of health education-secondary. Accordingly, neither petitioner Parker nor Pellegrino has a seniority claim as against Participant Pinkus.

Participant Geroni

Petitioners do not dispute that Participant Geroni, who holds an instructional certificate with the endorsement to teach physical education and health, has acquired 13 years, 5 months, 1 week in the teaching of physical education-secondary and 13 years, 5 months, 1 week in the teaching of health education-secondary. Accordingly, neither petitioner Parker nor Pellegrino has a seniority claim as against Participant Geroni.

SENIORITY SUMMARY

Based on the evidence in the record before me, the seniority of petitioners Parker and Pellegrino and Participants Orlans, Nolte, Pinkus, and Geroni is as follows:

PHYSICAL EDUCATION-SECONDARY

Petitioner Parker	12 years
Petitioner Pellegrino	11 years
Participant Orlans	13 years
Participant Nolte	14 years
Participant Pinkus	14 years
Participant Geroni	13 years, 5 months, 1 week

HEALTH EDUCATION-SECONDARY

Petitioner Parker	8 years seniority
Petitioner Pellegrino	10 years seniority
Participant Orlans	10 years seniority
Participant Nolte	0 years seniority
Participant Pinkus	14 years seniority
Participant Geroni	13 years, 5 months, 1 week seniority

Based on the foregoing, and in light of the undisputed fact that petitioner Pellegrino and Participant Orlans have the equivalent amount of seniority regarding the teaching of health-secondary and Participant Orlans continues to teach health, Michael Klavon, the deputy superintendent of schools, testified that the Board's policy regarding seniority tie-breakers gave the preference to Participant Orlans to continue in employment as against petitioner Pellegrino because of the involvement of Participant Orlans in adaptive physical education through Project Me.

CONCLUSION

Insofar as the evidence in this record shows that Participants Orlans, Nolte, Pinkus, and Geroni have greater seniority in the teaching of physical education-secondary than either petitioner Parker or Pellegrino, the claims of greater seniority by petitioner Parker and petitioner Pellegrino as aginst each Participant must fall. Simply stated, petitioners Parker and Pellegrino failed in their proofs to establish greater seniority in the teaching of physical education-secondary.

Insofar as the teaching of health-secondary, petitioner Parker's claim as against each Participant must fall because the evidence in this record shows that he has lesser seniority in this categroy than any named Participant. Petitioner Pellegrino has equal seniority with Participant Orlans but the Board policy regarding tie-breaking for seniority purposes gives the preference to Participant Orlans. While Participant Nolte has no seniority in the teaching of health-secondary because of the lack of proper authorization, there is no evidence in this record to show Participant Nolte taught health-secondary at any time during 1988-89. Consequently, petitioner Pellegrino has shown no harm through prior improper assignments to Nolte to teach health-secondary because petitioner Pellegrino had been employed in prior years.

Based on all the foregoing, I must **CONCLUDE** that petitioners Parker and Pellegrino failed in their proofs to show the Board of Education of the Matawan-Aberdeen Regional School District has in any way violated their tenure or their seniority rights. While tenure protects one in employment, the Board of Education in this instance caused a reduction-in-force for bona fide reasons to occur. Tenure does not protect one's employment in a reduction-in-force unless, of course, the affected person has greater seniority than individuals who continue in employment. In this instance, the Board has continued no one in employment with lesser seniority than attaches to petitioners Parker and Pellegrino. Accordingly, 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 17, 1989
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

July 17, 1989
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 20 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

ij

JAMES PARKER,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
RESPONDENT.	:	
- - - - - - - - - - - - - - - - - -	:	COMMISSIONER OF EDUCATION
JOSEPH PELLEGRINO,	:	DECISION
PETITIONER,	:	
V.	:	
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. Petitioners' exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4 as were the replies submitted by the Board and Intervenors (Participants).

Petitioners aver that the ALJ overlooked the undisputed fact that Participant Nolte, who was not certified to teach health, taught that subject from September 1988 until January 10, 1989. In support of this it cites Exhibits J-11, at p. 5 and J-12, at p. 4 and the Board's Post-hearing Brief, each of which references his assignment to teach 1.25 periods of health per day during that period. Upon review of the record and, in particular, the April 5, 1989 letter from Mr. DeMaio, Board Attorney, to the ALJ correcting the erroneous statement in the Post-hearing Brief, it is clear that while he had been assigned to teach health during the 1988-89 school year, that assignment never was effectuated. See also Exhibit J-11, at p. 5. By virtue of the method health is taught in the district he would not have actually commenced teaching until January 1989 but, in the interim, the Board discovered its error. Thus, it is clear Nolte never taught health during the time span cited above.

Petitioners' second exception avers that the ALJ erroneously credited Participant Orlans with 10 years of secondary seniority in health rather than 9 years established in the record. (Initial Decision, ante) They point to various exhibits in the record which attest to the fact Orlans first taught secondary health

in September 1979 at the Lloyd Road Middle School (Exhibits J-1, J-10, at pp. 3, 7, 8) and that the ALJ based his conclusion on handwritten notes from Orlans' testimony at the hearing as stated by him in the initial decision, ante, footnote 2. As to this, petitioners aver that the ALJ's personal notes cannot overcome the official Board records.

Upon review of the record, the Commissioner agrees with petitioners' exception that Participant Orlans was erroneously credited with 10 years seniority in the secondary category for health rather than nine years. Exhibits J-10, at pp. 3, 7 and 8 and J-1 establish that Orlans' assignment for the 1978-79 school year was in the Ravine Drive Elementary School which housed grades K-5.

Petitioners' third exception alleges that the ALJ failed to accept the unrebutted testimonial and documentary evidence that Petitioner Parker began secondary physical education teaching in September 1975 at the Matawan Avenue Middle School. The Commissioner finds petitioners' arguments unpersuasive that the ALJ erred on his determination that Parker's secondary service for physical education commenced in September 1976. The ALJ is correct in stating that Parker bears the burden of proving that he commenced service at the Matawan Avenue Middle School in 1975 and that there be documentary evidence provided to support his claim. The Board's draft-discussion level seniority lists are not convincing evidence. They were in error and not accepted for documenting 10 years of seniority for secondary health with Orlans; nor shall they be accepted with Petitioner Parker in his claim.

Further, the letter from the assistant superintendent of schools dated August 18, 1976 (J-14, at p. 7) simply does not convey what Petitioner Parker contends, i.e., that it seems to convey he had taught at the Matawan Avenue Middle School during the 1975-76 school year. Its contents do not state that there was to be an increase in assignment to the Matawan Avenue School over the previous school year, 1975-76. Rather, the letter is merely amending a prior notification sent at the end of the 1975-76 school year that Parker would be assigned one instructional period at the Matawan Avenue Middle School for 1976-77 school year.

The ALJ as the trier of fact in this matter was unpersuaded by Petitioner Parker's testimony as to his claim of assignment to the Matawan Avenue Middle School for 1975-76. Petitioners' exceptions and a careful review of the record provide no grounds on which to reverse the determination of the ALJ who had the opportunity to make a judgment as to Parker's credibility. That testimony was not found credible given the absence of any supportive documentation or recall by Parker as to what grade or class he taught. (Initial Decision, ante)

Petitioners also except to the ALJ's conclusion that Participant Orlans' involvement in Project Me at the Broad Street Elementary School entitled her to secondary physical education seniority, asserting the Board's personnel files make no reference to secondary experience prior to 1978, nor are there any officials'

evaluations corroborating that she taught at the secondary level 1974-75. They also argue, inter alia, that the nature of the project itself is questionable, averring that:

> ***Apparently, some special education children of all age levels had use of the school's only swimming pool, which was in the Broad Street Elementary School. Furthermore, according to Participant Orlans, the children were taken to the roller skating rink and bowling alley. The motor skills of each child were evaluated before and after the project.
> (Petitioners' Exceptions, at p. 14)

Upon review of the record, the Commissioner agrees with the finding and conclusion of the ALJ that Participant Orlans' service with Project Me affords her seniority in the secondary category. Contrary to petitioners' assertion, the nature of the project is not questionable. Project Me was a K-12 adaptive physical education program which was conducted in an elementary building with a pool. The physical location of the program does not preclude acquisition of seniority in the secondary category. It is the grade level of the students and departmentalized instruction which are the determining factors. Exhibits J-10, at pp. 10 and 14 document that students at the secondary level as defined by N.J.A.C. 6:3-1.10(1)19 received instruction in the physical education program Participant Orlans taught. Thus, she accrued seniority in the secondary category from 1974.

Lastly, petitioners except to the ALJ's conclusion on page 10 of the initial decision that Petitioner Pellegrino and Participant Orlans had equal health seniority but that the Board's tie-breaking policy gave preference to Orlans. As to this, they aver, inter alia, that the Board did not utilize the policy in the disputed RIF action because its seniority calculations did not give equal seniority to any of the litigants. Further, they assert that the ALJ's conclusion was not based on any evidence that Orlans past evaluations, experience and training were superior to theirs.

Having determined that Participant Orlans does not have 10 years secondary seniority in health, the ALJ's conclusion is moot. However, the Commissioner agrees with petitioners that Board Policy No. 401 was not used as a tie-breaker in this matter. Thus, the assistant superintendent's testimony as to what may have been the outcome of the situation if Policy No. 401 had been utilized is immaterial.

Having determined that Participant Nolte was improperly assigned to, but did not teach, health 1988-89 and that Participant Orlans had only 9 years of seniority in the secondary category for health while Petitioner Pellegrino had 10 years, the question remains as to what relief, if any, he is entitled. The Board urges that Pellegrino is not entitled to any relief since (1) at most he would have had entitlement to teach approximately 25 class periods a year related to health and (2) he did not have sufficient seniority

in physical education to accompany the health portion and would, thus, have been a part-time teacher. As to this, the Board urges that:

> The question then arises as to whether Pellegrino's seniority over one or more health teachers would require the Board to create a part-time position to accommodate him, when it had available other teachers with greater seniority than his. That is essentially what happened here. As noted in the previous point, Nolte was reassigned and his health position was taken away from him and given to another staff member with greater seniority than Pellegrino's.
> (Board's Exceptions, at p. 4)

Upon consideration of the circumstances of the reduction in force in this matter, it is determined that Petitioner Pellegrino's seniority rights were abridged at the time the Board acted on the RIF by assigning a 1.25 health position to a non-certificated staff member, Participant Nolte, and a 1.25 health position to a teacher with less seniority in secondary health, Participant Orlans. That the Board revised those assignments in January 1989 (J-11, at p. 5) subsequent to the filing of the petitions in this matter does not alter the impropriety of the Board's action in the spring of 1988 when the reduction in force actually occurred.

Therefore, it is determined that Petitioner Pellegrino is entitled to be compensated for the salary, less mitigation of any monies earned, the benefits and emoluments, including seniority credit, that would have been owing to him for the 1988-89 school year had he actually taught the two health assignments. That the Board could have assigned the classes to more senior staff so as to avoid creating a part-time position as argued by the Board is immaterial. They did not take that step until January 1989, well after litigation had commenced in this matter.

Accordingly, having found that Petitioner Parker's tenure and seniority rights were violated, his petition was dismissed as recommended by the ALJ. However, the initial decision as it relates to Petitioner Pellegrino's petition is concerned is modified as set forth above.

COMMISSIONER OF EDUCATION

August 31, 1989

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1098-89
REMAND OF EDU 2330-87
AGENCY DKT. NO. 2-88

AUGUSTUS C. AND COLETTE GERDING,
Petitioners,
v.
BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT,
Respondent.

Augustus C. Gerding, pro se

Vincent C. DeMaio, Esq., for the respondent (DeMaio and DeMaio, attorneys)

Record Closed: June 22, 1989 Decided: August 7, 1989

BEFORE BEATRICE S. TYLUTKI, ALJ:

This matter concerns the allegation of the petitioners, Augustus C. and Colette Gerding that the Board of Education of the Matawan-Aberdeen Regional School District (Board) should pay the tuition for the education of their daughter, Gayle Gerding, at the Red Bank Regional High School (Red Bank) for the 1984-85, 1985-86 and 1986-87 school years.

After the matter was initially transmitted by the Commissioner of Education (Commissioner) 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., I held a hearing on August 20, 1987. After receipt of briefs, the record in the matter closed on September 29, 1987. By an initial decision dated November 13, 1987, I decided that the petitioners' claim for reimbursement for the 1984-85 school year was barred by the 90-day rule contained in N.J.A.C. 6:24-1.2(b). As to the 1985-86 and 1986-87 school years, I concluded that the tuition issue was not barred by the 90-day rule since there appeared to be a continous discussion regarding the tuition payments for those school years until just before the filing of the petition. In the alternative, I concluded that the facts in the matter warranted the relaxation of the 90-day rule pursuant to N.J.A.C. 6:24-1.17. However, I also concluded that the petitioners were not entitled to any tuition payments for these two school years since the Board had not acted unreasonably and since the petitioners decided to sent their daughter to Red Bank without any prior assurance of financial assistance.

In his final decision, the Commissioner concurred with my determination that the 90-day rule barred any recovery for the 1984-85 school year and further determined that the 90-day rule also barred any recovery by the petitioners for the 1985-86 and 1986-87 school years. In view of this decision, the Commissioner made no determination regarding the merits of the petitioners' claim for tuition payments for the latter two school years.

After the Commissioner's decision was affirmed by the State Board of Education (State Board), the petitioners filed an appeal with the Appellate Division of the Superior Court. In its decision, the court concurred that the tuition payment for the 1984-85 school year was barred by the 90-day rule. The court affirmed the State Board's decision regarding the denial of full tuition payments for the 1985-86 and 1986-87 school years; however, it remanded the matter as to whether the petitioners were entitled to a reimbursement of the amount of the partial tuition that the respondent would have paid Red Bank for the two school years if the petitioners' daughter had attended Red Bank on a part-time basis. The court took this action since the Board had never responded to the petitioners' October 13, 1986 letter asking for partial assistance for the high school education of their daughter. Specifically the court stated:

> Since Gayle actually attended Red Bank, since the respondent did not have the obligation of educating her at all, and since respondent did have the obligation to pay for her dance training at Red Bank under a share-time program, the substantive question is whether it is fair, under all the circumstances, to relieve respondent from that part of the financial obligation it was required and prepared to accept and of which it had the benefit. We see no reason which compels or even justifies petitioners' forfeiture of that portion of their claim to which they are entitled simply because they claim more than that to which they may have been entitled. Nor do we see a time bar to the grant of that relief since at the time they filed their petition, their request of respondent for part payment had not yet been responded to. Petitioners are, in our view, entitled to be heard on that issue.
>
> We affirm the dismissal of the petition to the extent the petitioners sought full reimbursement on the alternative theories of denial of the right to a special education evaluation and improper conditioning of vocational training on acceptance of a share-time program. We remand, however, to the State Board of Education for reconsideration, in such manner as it shall prescribe, of the question of whether petitioners have a right to recover from respondent that sum which respondent would have paid Red Bank for school years 1985-86 and 86-87 had it share-time offer been accepted. [N.J. App. Div., Dec. 6, 1988, A 4761-87T2) (unreported at 9-10]

After the matter was remanded to the Office of Administrative Law on February 15, 1989, I gave the parties a period of time to determine whether the matter could be settled. Upon being informed by Vincent C. DeMaio, Esq., the respondent's attorney, that a settlement was not forth coming, the hearing was scheduled for June 22, 1989, at the Matawan Municipal Building in Matawan, New Jersey. The hearing took place on June 22, 1989, and the record in the matter closed on that date.

At the hearing, Mr. DeMaio indicated that during the 1985-86 and 1986-87 school years, the Board had a policy of only paying part-time tuition to Red Bank for students who wished to attend that school on a share-time basis. Recently, the Board has received several inquiries by parents, who wish to have their children attend Red Bank on a full-time basis, as to whether the Board would be willing to pay the share-time tuition if the parents agreed to pay the balance of the tuition. Mr. DeMaio stated that the Board has adopted a new policy to allow for such an arrangement and will apply to the State Department of Education for state aid for such pupils. Although this new policy is now in effect, the Board indicated that it might reconsider the matter if it receives an unfavorable ruling as to state aid. In adopting this new policy, the Board determined that in order to settle the matter before me, it was willing to apply this new policy

retroactively to the petitioners and would pay them $3,960.00, which represents the share-time tuitions for the 1985-86 and 1986-87 school years.

Bruce M. Quinn, the Board's secretary and assistant to the superintendent for supportive services, testified at the hearing and confirmed that the Board had adopted the new policy as outlined by Mr. DeMaio. Further, he stated that he had contacted Kenneth Sommerhalter, the business administrator for Red Bank Board of Education, and was informed that the share-time tuition for the 1985-86 and 1986-87 school years was $1,983.00 for each school year and that the total for the two years was $3,966.00.

Mr. Gerding did not testify; however, he argued that in addition to the payment for the two school years, the Board should pay all or a part of his expenses for this litigation which he indicated was between $5,000.00 and $8,000.00, including attorney's fees. According to Mr. Gerding, although he appeared pro se throughout the proceeding, he did consult with an attorney and he argued that the petitioners should be reimbursed for these attorney's fees. It is Mr. Gerding's position that the Board could have concluded the matter initially by offering to pay the amount of the share-time tuition and thereby saving the petitioners and the Board a substantial amount of time and money.

On behalf of the Board, Mr. DeMaio argued that the hearing in this matter should be limited to the issue identified by the Appellate Division in its remand. He argued that the Board could have taken the position that the petitioners were not entitled to any compensation for the two school years in issue and that the Board had generously acquiesced and offered to pay the petitioners the amount of the share-time tuition for the two years, which is the maximum amount that the petitioners could receive from the Board pursuant to the remand. Further, Mr. DeMaio argued that the petitioners had no recognizable attorney's fees since they appeared pro se throughout the proceeding. Lastly, he argued that there is no precedent for allowing attorney's fees in education cases and cited the decision in Balsley v. North Hunterdon Reg. High School, 225 N.J. Super. 221 (App. Div. 1988).

I agree with Mr. DeMaio, and I **CONCLUDE** that there is not statutory authority to award attorney's fees or to compensate the petitioners for any other expenses realized by them during the course of this litigation.

Therefore, I **ORDER** that the Board pay the petitioners the amount of $3,966.00 within thirty days after the final decision in this matter.

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.

August 7, 1989
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

August 7, 1989
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

AUG 10 1989
DATE

Mailed To Parties:
OFFICE OF ADMINISTRATIVE LAW

caj

AUGUSTUS C. AND COLETTE GERDING,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

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

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that the Board shall pay petitioners the amount of $3,966, which represents the share-time tuitions for the 1985-86 and the 1986-87 school years for petitioners' daughter to attend Red Bank High School on a share-time basis with respondent's district. The Commissioner further agrees with the ALJ that there is no statutory authority to award attorney's fees or to compensate petitioners for any other expenses realized by them during the course of the instant proceedings. Balsley v. North Hunterdon Regional High School, 225 N.J. Super. 221 (App. Div. 1988)

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law directing such payment as stated above be paid petitioners within thirty days of the date of this decision and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

In so concluding, the Commissioner would add that inasmuch as no testimony was elicited, nor discussion held, as to the right of the Board to receive state aid, his affirmance of the agreement as to tuition payments to the petitioners mentioned herein does not in any way represent a determination on his part that such amount is reimbursable through state aid. This is a matter to be determined upon application.

IT IS SO ORDERED.

Septemeber 12, 1989

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7218-88
AGENCY DKT. NO. 286-9/88

MIDDLETOWN TOWNSHIP
BOARD OF EDUCATION,
Petitioner,
v.
ROBERT LEO,
Respondent.

Howard M. Newman, Esq., for petitioner (Kalac, Newman & Lavender)

Mark J. Blunda, Esq., for respondent (Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks)

Record Closed: June 15, 1989 Decided: July 31, 1989

BEFORE DANIEL B. MC KEOWN, ALJ:

On September 6, 1988 the Middletown Township Board of Education (Board) certified to the Commissioner of Education for determination under the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq., charges of incapacity, insubordination and unbecoming conduct against Robert Leo (respondent), a teacher with a tenure status in its employ. The Board suspended respondent from his teaching duties but elected to continue his salary during the suspension which continues at least until the Commissioner issues a final decision.[1] Respondent denies the truth of the charges and seeks their dismissal. The Commissioner of Education transferred the matter to the Office of

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[1] An Order was entered June 9, 1989 by which respondent is obligated to provide the Board verification under oath of all substituted employment between September 1988 through June 1989, Monday through Friday, 8 a.m. through 3 p.m., for purposes of salary mitigation.

Administrative Law on September 30, 1988. A telephone prehearing conference was conducted November 22, 1988 during which a hearing was scheduled to commence March 6, 1989. After six days of actual hearing which concluded April 20, 1989, the parties filed briefs in support of their respective positions. The record closed June 15, 1989 upon receipt of the Board's reply letter memorandum. This initial decision is prepared without benefit of stenographic transcripts of testimony taken at hearing.

Findings are reached in this initial decision that the charges certified against respondent are true in fact and that such charges rise to the level of incapacity, insubordination, and unbecoming conduct under N.J.S.A. 18A:6-10 and the conclusion is reached that termination of respondent's employment as a teacher in the Middletown Township public schools is a proper and an appropriate discipline to be imposed.

BACKGROUND

Respondent has been a teacher in the Board's employ for the past 25 years. During that entire time respondent was assigned to the Board's Thompson School which is now classified as a middle school-secondary. Respondent was awarded a baccalaureate degree in 1964 and he then earned a masters degree, plus an additional 40 credits. Respondent possesses an instructional certificate with endorsements for the teaching of physical education, English, and driver education. During his teaching career with the Board, respondent coached interscholastic basketball, baseball, and soccer. He also coached intermural activities along with his teaching duties. Between 1967 through 1986 respondent was the coordinator for the department of physical education. This position was subject to annual applications from interested parties although respondent was never interviewed for the position on an annual basis. Nevertheless, during the 1987 spring semester the position was awarded by the Thompson School principal, Patrick C. Houston, to a different teacher, Jennifer Giguere Humann, for 1987-88. Humann remains in that position today.

Until the time of these charges respondent had no other discipline imposed upon him by the Board. In fact, until the 1987-88 academic year respondent was perceived by principal Houston as being an asset to the professional staff at the Thompson School (R-1, p. 1), very organized and a teacher with excellent rapport with students. In fact, Houston wrote in the annual evaluation in June 1986 that respondent demonstrated

expertise in the entire physical education curriculum (R-1, p. 3). Houston, who at the conclusion of the 1987-88 year recommended the withholding of respondent's 1988-89 salary and adjustment increments which act signals the first step taken to certify these charges, admits that prior to 1987-88 he and respondent had had a good relationship. Ronald Pietkewicz, one of two assistant principals at the Thompson School, explained that prior to 1987-88 he and respondent as teaching colleagues were "good friends" for ten years. Pietkewicz recalled that he and respondent played golf together every weekend and generally went out together. Suddenly, and without explanation, at or about the time Pietkewicz was appointed assistant principal in May 1987, respondent simply severed the relationship. Pietkewicz relates that the golfing ceased as did the social events and to this day Pietkewicz does not know why.

During 1987-88 respondent taught physical education to pupils in 6th, 7th, and 8th grades (P-36). There is evidence in this record to show parental complaints were filed against respondent, respondent's colleagues began to voice complaints to principal Houston regarding his conduct, principal Houston received complaints from the school nurse regarding respondent's asserted refusal to allow sick and injured pupils to report to her office and, finally, complaints from respondent's pupils regarding the asserted chaos in their classes resulting from respondent's lack of teaching and his indifference to pupil misconduct.

On or about February 16, 1988 Houston prepared an annual report (P-7) on respondent's teaching performance as required for tenure teachers. That report shows that Houston evaluated respondent's performance as needing improvement in planning and organizational skills, student-teacher interaction, staff relationships, and relationships with parents and the community. Houston found respondent's performance unsatisfactory with respect to environmental management and classroom control and pupil relationship. In an accompanying narrative, Houston noted that a particular observed activity went very slowly and that respondent made numerous repeated statements. Houston also noted that there was minimal participation by pupils and that there was an absence of repport between teacher and students. Houston declared that what he observed was a poor lesson. Respodent prepared a rebuttal to the evaluation and he declares everything to the contrary as observed by Houston. Respondent claims that the lesson observed by Houston was successful. Finally, respondent declares that all categories should reflect a satisfactory rating and that he needs improvement in no category and that no category is unsatisfactory.

It is noted that in addition to respondent's general and specific denial of all facts which would tend to show incapacity, insubordination, or conduct unbecoming respondent's defense to the charges also rest upon his belief that all who testified against him—principal Houston, assistant principal Pietkewicz, the superintendent of school, four teaching colleagues including physical education coordinator Humann, and nine of his pupils— are engaged in a massive conspiracy to tarnish his reputation as a teacher and to discredit him in the Middletown Township community. Respondent proffered no rational motive for the asserted conspiracy and he produced no evidence other than his own perception that such an agreement, by words or conduct, was entered by any two or more of the adverse witnesses. Thus, respondent's contention regarding an improper conspiracy against him is rejected.

Respondent also contends that principal Houston is improperly biased against him which, he asserts, colored Houston's objective and subjective evaluation of his performance as a teacher during 1987-88. In this regard, respondent points to the fact that after 10 years as department coordinator for physical education, Houston replaced him for 1987-88. In addition, respondent claims that during the 1987 fall semester he was improperly assigned by principal Houston to teach an additional class without his prior consultation in order to benefit another teacher, Steven Baglivio, who respondent notes testified against him in this proceeding. Respondent grieved this assignment and the grievance proceeded all the way to binding arbitration. Respondent notes principal Houston testified that he, respondent, is the only teacher to have filed a grievance against him and that he, respondent, is the only teacher against whom Houston ever recommended formal discipline. Thus, respondent concludes Houston is improperly biased against him.

The evidence before me does not support respondent's allegation of improper bias against him by principal Houston. The evidence does show, to the contrary, that during the 1987 fall semester it was determined one class of special education pupils was in need of physical education to be taught by a physical education teacher during the last period of the day. The vacancy was posted. One application from the 6 or 7 physical education teachers assigned the Thompson school was received from Baglivio who was then given that last period assignment. Baglivio, though, already had a physical education class assigned him the last period which then had to be reassigned another physical education teacher. Respondent, because of his then existing schedule which had him assigned a duty period the last period, was assigned Baglivio's class of seventh grade pupils and his duty period was then the next to last period (P-1). Baglivio then could be assigned

the class of special education pupils who were determined to be in need of physical education. The net effect of the schedule change upon respondent was that he went from a duty period for period 8 to period 7 and a teaching period from period 7 to period 8.

Recall that Baglivio was the only physical education teacher to volunteer to take the class. There is no evidence before me to show, as alleged by respondent, that Baglivio received a personal benefit from the schedule change other than the personal satisfaction felt by those who contribute to the solution of a problem. Accordingly, respondent's claim of bias against him by principal Houston as a defense to the charges is rejected. The charges rise and fall upon the evidence produced by the Board regarding the factual allegations surrounding each charge.

Moving on with the background of the matter, near the end of the 1987-88 academic year principal Houston recommended to the superintendent that respondent's 1988-89 salary and adjustment increments be withheld because of three unsatisfactory performance observations and numerous parental complaints. Houston attached to his written recommendation supporting documents which included written complaints against respondent from teachers, parents, his pupils, and the school nurse. The superintendent forwarded Houston's recommendation and the supporting documents to the Board which arranged for a meeting with respondent and respondent's counsel on June 27, 1988. According to the minutes of that meeting (P-31), the Board President acknowledged respondent had been an excellent teacher and expressed puzzlement over his apparent declining performance in 1987-88. The Board President then suggested a medical basis may exist with respondent to explain his declining 1987-88 performance. The minutes reveal that the Board agreed to hold the recommended salary and adjustment increments withholding action in abeyance pending receipt of a medical examination the Board directed respondent to undergo.

Thereafter the Board secretary notified respondent by letter dated July 5, 1988 to respondent's counsel that an appointment had been made with the school physician to examine respondent on July 13, 1988. Respondent did not attend the appointment and at the time offered no explanation to the Board why he had failed to do so. The Board secretary advised respondent personally by letter dated July 27, 1988 that unless he submits to a medical examination by the school physician at a time and date convenient to respondent but no later than August 5, 1988 the Board would then infer he had no intention of complying with its directive to him.

By letter (P-34) dated August 4, 1988 respondent's counsel advised Board counsel that the scheduled appointment with the school physician, presumably the one on July 13, 1988, was not convenient; instead, respondent reported he underwent a physical examination by his own physician and, thus, satisfied the Board's directive to him. Board counsel, in turn, reminded respondent's counsel by letter (P-35) dated August 9, 1988 that the Board directed a physical examination by the school physician, not a physician of respondent's own choosing; that the examination was to be conducted by August 5, 1988 and, that the school physician had flexible office hours including evening hours to accommodate respondent. Respondent did not report to the school physician to be physically examined.

According to an affidavit filed by the superintendent annexed to the charges, when it became clear respondent refused a physical examination by the school physician he interviewed principal Houston and assistant principal Pietkewicz regarding respondent's 1987-88 teaching performance. He then reviewed written complaints against respondent from parents and he interviewed several colleagues of respondent who taught with him at the Thompson School in 1987-88. On August 16, 1988 the superintendent filed charges against respondent with the Board pursuant to N.J.S.A. 18A:6-10 et seq., and on September 6, 1988 the Board certified the charges, reproduced here in full, to the Commissioner:

Charge 1

During the 1987-88 school year, Robert Leo had demonstrated a continuing incapacity to control and effectively discipline students assigned him in Physical Education classes. This incapacity has created an atmosphere that is physically dangerous for both students and teacher.

Charge 2

During the 1987-88 school year, seventeen letters were received from parents complaining of Mr. Leo's performance. Twelve parents requested that their children be transferred out of Mr. Leo's Physical Education classes.

Charge 3

During the 1987-88 school year, Robert Leo had received several letters and telephone calls from parents requesting to discuss their children's progress. Robert Leo refused to communicate with the parents. He had to receive two directives from his Principal before making contact with the parents.

Charge 4

On February 5, 1988, as a result of Robert Leo's incapacity to control the students assigned him, a student in one of his Physical Education classes, struck another student in the head with a sneaker. The blow was of such severity that the struck student was knocked to the floor, had subsequent dizziness, headaches and blurred vision.

Charge 5

On January 28, 1988, a male student in Mr. Leo's Physical Education class pulled down the shorts of a female student. Mr. Leo failed to respond to this incident. The female student in question found it necessary to go to another Physical Education teacher to seek help.

Charge 6

On several occasions during the 1987-88 school year, Robert Leo refused students in need of nursing attention, permission to visit the nurse. After receiving a directive from his Principal to refrain from refusing such permission, he failed to comply with the directive.

Charge 7

During the 1987-88 school year, Robert Leo has been the target of stone-throwing by several of his students during what should have been a supervised instructional period. Robert Leo failed to discipline the students or report the incident in question to his superiors. When Robert Leo's superiors did learn of the incident, the students involved were suspended.

Charge 8

During the 1987-88 school year, Robert Leo has permitted students certain excesses which go beyond the bounds of propriety. Students have, before the entire class, flaunted his authority by throwing objects at him, called him deprecatory names, used obscenities, obstructed the learning process by repetitively chanting Mr. Leo's name, and gone so far as to pat his stomach while accusing him of being "worthless".

Charge 9

Robert Leo has been insubordinate in that he has refused, despite two written requests, to attend for a physical examination by the school physician, pursuant to the provisions of N.J.S.A. 18A:16-2.

The issue to be decided is even if any or all charges are proven true against respondent whether the underlying conduct rises to the level of incapacity, insubordination, or conduct unbecoming a teacher and, if so, what discipline, if any, should be imposed upon him.

It is noted that respondent's Motion to Dismiss the charges for various reasons was denied by letter ruling dated February 28, 1989. It is also noted that the Board's Motion to Compel the Deposition of respondent was denied by letter dated January 12, 1989.

This concludes a recitation of the background of the matter which, of course, includes the rejection of respondent's defenses of improper conspiracy by adverse witnesses and improper bias of principal Houston grounded in the 1987 fall change of assignments. But respondent claims that the schedule change, when seen in the context of the administration's proofs against him, show that they, the administrators, predetermined to create a paper case against him and thus manifest complete, though improper, bias against him. This claim shall be discussed after a presentation of the Board's factual proofs and respondent's factual defense regarding each charge certified against him.

RESPECTIVE PROOFS OF THE PARTIES ON THE CHARGES

Charge 1

A review of the charges discloses that 7 of the 9 charges allege discrete conduct by respondent which the Board asserts constitutes either or both incapacity or unbecoming conduct. One charge, Charge 9, alleges discrete conduct which the Board asserts constitutes insubordination. Charge 1, however, does not allege discrete conduct; rather, the charge is conclusory, predicated upon the assumption that Charges 2 through 8 are proven true in fact. Accordingly, this charge against respondent shall be discussed only after findings are entered on the proofs for charges 2 through 8.

Charge 2

The proofs in support of this charge show principal Houston did receive 17 separate letters (P-9, P-10, P-11, P-12, P-15, P-18, P-19, P-20, P-22, P-23, P-24, P-25) between February 8, 1988 and May 25, 1988 from different parents of pupils assigned

respondent's physical education classes. Twelve of the parents requested their son or daughter be transferred for various reasons from respondent's physical education classes to another teacher of physical education (SC P-9, P-10, P-11, P-12, P-15, P-18, P-19, P-24). Generally, the letters relate concerns pupils in respondent's classes expressed to their parents regarding other physical education classes being engaged in positive activities while respondent's classes sat on bleachers the entire period, a lack of discipline among some of respondent's pupils, respondent's alleged refusal to allow pupils to go to the school nurse, the wasting of time by respondent during class and the feeling by pupils that they learn nothing from respondent, physical altercations between pupils and respondent, respondent's asserted refusal to contact parents when requested, and a general unhappiness being assigned respondent for physical education.

While no one of the letter-writing parents testified at hearing which, of course, renders the substance of the letters hearsay for purposes of establishing the truth of their contents, the letters are competent evidence to establish as fact that principal Houston did receive 17 letters between February 8 and May 25, 1988 from parents of pupils assigned respondent's classes and that 12 of the writers asked that their children be reassigned from respondent's classes.

Principal Houston testified that of the 12 parents who requested their children be reassigned he recalls transferring some though he cannot presently recall if he transferred all. Houston does recall, however, deciding whether to transfer pupils without prior discussion with respondent. Houston did eventually provide respondent with copies of perhaps all 17 letters, though he is not certain. Houston cannot now recall if he provided respondent with copies of P-23, P-24, or P-25. Houston directed respondent to meet with him to discuss the letters but without regard to the issue of whether to transfer the pupils (See, P-9, P-10, P-11, P-12, P-15, P-18, P-19). Each directive from Houston to respondent for respondent to arrange a meeting with Houston was accompanied by the advice that respondent was entitled to have a representative of his choosing at the meeting.

Respondent's defense to this charge is that no one of the 17 letter-writing parents were referred to him prior to Houston's receipt of any or all such letters; that the pupils of the complaining parents were all from the last period class he was assigned in November 1987 from Baglivio; that all pupil reassignments from him to others were pupils

in that last period class; that principal Houston did not discuss with him whether any pupils should be transferred; and, that the pupils in that last period class set out to present him daily problems because they liked Baglivio better than him.

The evidence is not clear whether all letter writers had children in respondent's last period class which was formerly Baglivio's class but that distinction, if it in fact exists, is of little relevance to this charge. The fact is established from the evidence before me that principal Houston received 17 letters between February and May 1988 from the parents of pupils assigned respondent who expressed concern, rightly or wrongly, regarding their children's lack of progress under respondent's tutelage, 12 of whom requested reassignment to another teacher of physical education.

Accordingly, I **FIND** this charge is true in fact.

Charge 3

This charge addresses respondent's alleged "refusal" to communicate with parents presumably, according to the wording of the charge, those parents who sent respondent letters and placed telephone calls to him. Principal Houston testified that at one of several meetings he had with respondent to discuss the 17 parent letter complaints, specifically at a meeting held February 22, 1988, he directed respondent to contact the parents whose letters then were under discussion. Houston did not testify that respondent failed to carry out that directive.

There is in evidence a memorandum (P-19) dated May 4, 1988, with two of the 17 letter complaints attached, from Houston to respondent in which Houston directs respondent as follows:

> *** At out last meeting of Friday, April 29, 1988, I directed you to contact any parents that wished to discuss with you any concerns they have regarding their child's progress. I am now directing you to contact both of these parents by Monday, May 9th.***

On May 6, 1988 principal Houston sent respondent a copy of a letter (see P-20) he received from a Ms. M. who complained that despite her efforts to communicate with respondent, respondent refused to return her telephone call. Houston then directed

respondent to contact Ms. M. at either her work telephone number or at her home telephone number, both of which provided respondent by Houston. Houston placed a deadline upon respondent of May 10. Houston acknowledged at hearing that respondent did contact Ms. M. by May 10 as directed.

On May 26, 1988 Houston sent respondent a copy of a letter (P-22) he received from parent Mrs. A. regarding her son's grade in physical education which went from a "B" to a "D" for the third marking period. Mrs. A. asserts in her letter of May 25, 1988 that she had attempted to talk with respondent since on or about April 4, 1988 when the third marking period ended and has been unsuccessful. Houston, after reminding respondent on May 4, 1988 to contact any parents wishing to discuss their children, directed respondent to contact Mrs. A. no later than May 27, 1988.

Houston, who has no independent recollection of Mrs. A.'s complaint other than her letter, acknowledges that respondent did contact her and that he, Houston, heard nothing further from Mrs. A.

Finally, an undated letter (-23) from Mr. M., no relation to Ms. M. above, complains not that respondent would not meet with him but that respondent failed to provide documentation for his daughter's grade of "B". Houston testified that he personally met with Mr. M.; there is no evidence respondent refused to meet with Mr. M.

Respondent denies ever refusing to communicate with parents. He notes that Houston directed him to contact the parents of S.G., S.M., J.G., and E.V. Respondent produced typed noted (R-6) of dates and times he attempted to contact these parents. Respondent notes that he successfully contacted all parents but those of J.G. Respodent notes that he unsuccessfully telephoned the G.'s residence at 4 p.m. on May 9, 10, and 11. Finally, respondent notes that he "*** left a message at school for a convenient time when I can contact you." (R-8, p. 2) Why respondent would leave a message at school to arrange a meeting with the G.'s is not made clear in this record. What is clear is that respondent's notes (R-6) were prepared by him as documentation in defense of this charge. Respondent did not produce similar notes for attempted contacts with those parents Houston directed him to contact on May 4, May 6, and May 26, 1988.

The evidence on this charge creates circumstances, I **FIND**, to establish that the charge of refusing to contact parents, despite their expressed desire to respondent for

communication, is true against respondent on at least the occasions regarding the two parents on May 4, 1988, and Ms. M. on May 6, 1988, and Ms. A. on May 26, 1988. Respondent's presentation of notes regarding three other sets of parents he contacted does not negate the fact that on at least these three occasions respondent, through his inaction which I **FIND** constitutes a constructive refusal, did in fact refuse to contact the parents until directed by the school principal. While the Board did not call any parents to testify on this charge, neither did respondent call parents for their testimony to negate the strong inference of his failure to contact parents created by Houston's memoranda to him.

Charge 4

The female pupil, M.W., who is alleged in this charge to have been hit in her head with a sneaker thrown by another pupil otherwise not identified in this record but both of whom were in class under the control and supervision of respondent at the time, did not testify at hearing. Nevertheless, there is testimony from another pupil from the class, A.T., who witnessed the event.

A.T. testified that during this particular seventh grade physical education class, respondent had all pupils sitting on the gymnasium floor while he took attendance. According to A.T., someone started to throw sneakers about the area where the pupils were seated. She testified she saw a "big sneaker" hit M.W. on the head. M.W. crumpled to the floor and her eyes were closed. A.T. testified she was at the time not certain whether M.W. was conscious. Respondent, who was present with the class taking attendance while the sneakers were being thrown about and M.W. was hit by the sneaker, did not see M.W. being hit.

A.T. assisted M.W. to the bleachers to sit down. A.T. testified she observed M.W. become pale and she observed a "big bump" near the back of her head. A.T. asked respondent for permission to take M.W. to the school nurse which he denied and, furthermore, respondent did not inquire as to the reason for the request nor did he inquire as to what had occurred. A.T. explained that because of her concern for M.W. she assisted her from the bleachers where she was seated and escorted her to the nurse, despite respondent's rejection of her request for permission to do so.

The school nurse, Carol Hertgen, testified that on February 5, 1988 at about 11:30 a.m., A.T. did accompany M.W. to her office. Both pupils told nurse Hertgen that M.W. was hit in the back of her head with a sneaker; that M.W. fell to the floor; and, that each explained M.W. may have been unconscious one or two seconds. It is noted that Hertgen also testified her nursing records do not reveal whether ice was applied to M.W.'s head or that a bump existed. Nurse Hertgen testified that both pupils explained at that time respondent refused A.T. permission to bring M.W. to her office and that he never inquired what had occurred.

Nurse Hertgen testified she attempted to discuss the matter with respondent later in the day in a gymnasium corridor but that her efforts were futile because of the pandemonium created by respondent's pupils pushing, shoving, and shouting. The pupils were waiting for the school bus. Consequently, Hertgen reported the incident to assistant principal Pietkewicz that day.

Pietkewicz directed that M.W.'s guidance counsellor secure a written statement (P-26i) from M.W. Pietkewicz directed respondent to meet with him on February 8, 1988, the Monday following the Friday when the incident occurred (See P-8). According to Pietkewicz, respondent stated he noticed M.W. on the gymnasium floor; that she appeared "woozy"; that M.W. said she was alright; and, that he then allowed to go to the nurse.

Hertgen acknowledges that several days later respondent appeared at her office, angry and upset, about the incident. He told Hertgen that when the incident occurred he told M.W. to set on the bleachers for a while and then go to the nurse's office.

Respondent testified that while he did not see the actual striking of M.W.'s head with the sneaker, he did observe that M.W. was injured. He explained M.W. told him she was alright and that she could move her limbs. Respondent testified he directed M.W. and her friend, A.T., to the bleachers and after awhile told both pupils to go to the nurse. In respondent's view, M.W. was just "shook". Respondent acknowledges that when nurse Hertgen attempted to discuss the matter with him later in the day in the gymnasium corridor they could not communicate with each other due to a "little confusion" created by his pupils.

Based on the foregoing evidence, there is no doubt that on February 5, 1988 while respondent was taking attendance in his class someone began throwing sneakers about and there is no doubt that one of the thrown sneakers hit M.W. on her head. That M.W. was not seriously injured is of little consequence to the underlying allegation that respondent simply did not control pupils assigned to him. For a teacher of 25 years experience to continue to take attendance, a ministerial task at best though necessary, while sneakers are flying about the control area where pupils are seated without taking decisive action and to halt such conduct, is wholly unacceptable.

While there is no evidence to show, as alleged, that M.W. suffered dizziness, headaches, or blurred vision as the result of the incident, the fact is proven that M.W. was struck in the head by a sneaker thrown in respondent's physical education class as the result not only of the sneaker thrower but as a result of respondent's failure to take action immediately upon the throwing of the first sneaker. Respondent's explanation that he did not observe sneakers being thrown about is rejected. A.T.'s testimony, despite her tender years, is simply more persuasive than that of respondent's regarding sneakers being thrown about. It is inconceivable that an experienced teacher, even an inexperienced teacher, can be in charge of a class of pupils and not observe sneakers being thrown about while the ministerial task of attendance is underway.

The evidence therefore, I **FIND**, establishes the truth of Charge 4. It is further noted that while not part of this discrete charge, the evidence here also establishes that respondent refused permission to M.W., through A.T., to report to the school nurse despite the circumstances creating the obvious necessity for respondent either to have immediately called the nurse to report to the gymnasium or to have immediately granted permission for M.W. to report to the nurse's office. Charge 6 addresses the discrete conduct of respondent allegedly refusing pupils to report to the school nurse when necessary and this finding shall be incorporated there.

Charge 5

On January 28, 1988, a date earlier than the sneaker throwing incident in Charge 4, the Board alleges a male pupil in respondent's physical education class pulled down the shorts of a female pupil, C.R., and that respondent failed to respond to the incident.

C.R. testified at hearing. She explained that on January 28, 1988 she was in physical education class being taught by respondent in the weight room adjacent to the gymnasium. According to C.R. the location of the physical education class in the weight room was not unusual because along with a universal, a device used to build and tone muscles, other weights were available for pupils to use. It is noted that the evidence tends to show the weight room measures approximately 50 feet by 50 feet.

C.R. testified that during this class respondent was attempting to teach the use of the universal. According to C.R., half the class was paying attention while the other half was "fooling around". C.R. was of the former group. She testified that while she was standing near the universal and respondent was in front of her with his back to her, J., the male pupil, sneaked behind her and pulled her shorts down. She testified she yelled "J."' ". Respondent turned around and could not help but see what had occurred. C.R. testified she asked respondent if she could leave the room because she was embarrassed by all the pupils, except her, laughing at what J. had done. Respondent told her she could not leave the room and to sit down. C.R. testified respondent did not say one word to J. Finally, after 10 or 20 minutes the class was over and she then left and reported the matter to a female physical education teacher, Margaret Carle.

Carle testified that on January 28, 1988 C.R., who had just left respondent's physical education class, did complain to her that a boy in the weight room pulled her shorts down and that respondent did nothing at all. In Carle's view, C.R. was upset and embarrassed because of the incident and that her friends saw the incident occur. Carle then escorted C.R. to the office where the matter was reported to F. Vezzosi, identified in this record by principal Houston as a part-time administrator.

Vezzosi reported the matter to principal Houston (P-6). Vezzosi also suspended J., the offending pupil, from regular school and assigned him the alternative school for one day. Houston did not discuss the matter with respondent because, he explained, C.R. was embarrassed and fearful that other pupils would learn what had occurred. It is noted that such explanation is inexplicable in light of the fact the entire class of pupils knew what occurred at the time it occurred.

Respondent acknowledges only that C.R. was a pupil in his class on January 28, 1988. He testified he did not see the incident occur; C.R. said nothing to him regarding the incident; no one of the pupils in the weight room said anything to him regarding the

incident; Margaret Carle, the physical education teacher to whom C.R. complained, did not tell him of the incident; Vezzosi said nothing to him; nor did principal Houston say anything to him about the incident. In fact, respondent testified he had no knowledge that the incident was to have occurred until approximately one or two months later.

The weight of the credible evidence before me establishes, I **FIND**, that C.R. did have her shorts pulled down by J. during the physical education class held January 28, 1988 under the control and supervision of respondent. Respondent's asserted lack of knowledge of the occurrence is rejected as not believable. The evidence also establishes that C.R. was thus subjected to embarrassment and humiliation which was exacerbated by respondent's refusal to excuse C.R. from class and by his absolute failure to admonish J. for his conduct or the other pupils for laughing at the embarrassment and humiliation of C.R. While Houston's explanation of his failure to confront respondent when he, Houston, learned of the incident cannot be reconciled with the fact all pupils in the class at the time of the incident knew it occurred, the absence of such confrontation in no way comforts respondent for his failure to take action against J. and the class, and his failure to comfort C.R. by excusing her from the class.

Respondent's simple declaration that he had no knowledge the incident occurred until one or two months later is rejected in light of the convincing testimony of C.R., together with the testimony of Margaret Carle which corroborates the testimony of C.R. as to her actions upon the end of physical education on January 28, 1988.

Accordingly, I **FIND** the evidence establishes the conduct alleged against respondent in Charge 5 to be true in fact.

Charge 6

This charge alleges that on several occasions during 1987-88, respondent refused to allow students in need of nursing attention to visit the school nurse even after being directed by principal Houston to grant such permission.

It is already established by the competent evidence in Charge 4 that respondent did, in fact, refuse M.W. permission to report to the school nurse despite the obvious and her admitted need of nursing attention by respondent through his testimony

that he observed M.W. was injured. Moreover, nurse Hertgen testified from her records which reveal explanations from pupils who report to her regarding their symptoms. She also testified to conversations with principal Houston regarding respondent's failure to allow pupils to report to her. Principal Houston also testified regarding conversations he had with respondent regarding respondent's denial of permission to pupils to report to the nurse's office and he testified regarding memoranda he sent respondent regarding the matter.

Nurse Hertgen testified that her notes reveal the first incident wherein respondent denied pupils permission to report to her was on October 9, 1987 at mid-day. Nurse Hertgen testified from her notes that S.S., a pupil in respondent's class, bumped her head during physical education. Respondent, according to Hertgen and her notes, was to have told S.S. to report to the nurse only at the end of the period. Next, Hertgen revealed that her notes show sometime during October 1987 C.M., another pupils in respondent's class who happened to be asthmatic, reported to her near the end of the day from respondent's physical education class. C.M., as a standing practice, reported to her for daily medication for his asthma before leaving for home. C.M. was to have explained to Hertgen that he was reluctant to ask respondent permission to report to her for his medication because of respondent's prior refusals to grant him such permission. Nurse Hertgen testified that her notes reveal that on October 26, 1987 D.M., who wore contact lenses, had one of her contact lenses fall out during outside physical education. D.M. retrieved the lens and wanted to report to the nurse's office for a saline solution in order to return the lens to her eye. She requested permission of respondent to report to the nurse and, according to Hertgen, respondent denied her such permission despite the fact D.M. was supposed to be holding the now dried lens in her hand.

Jennifer Giguere Humann, as noted in the background facts above as the teacher who replaced respondent as coordinator of physical education, testified that D.M. complained to her at the end of physical education while on the way to the nurse's office, that respondent refused her permission to report to the nurse to replace her contact lens which she was holding in her hand. Humann testified D.M. was very upset, near hysteria, because she believed the lens was destroyed from being held in her hand for such a long while.

There is in evidence a memorandum (P-2) dated December 5, 1987 from principal Houston to respondent in which Houston directs respondent to allow pupils to report to the nurse's office when such a request is made. Nurse Hertgen testified that thereafter on January 14, 1988 C.P., another pupils in respondent's class, became ill showing symptoms of glassy eyes, a sore throat, headache, and a fever. Nurse Hertgen testified respondent refused to allow C.P. to report to her despite her symptoms. In the meantime, however, C.P.'s mother was in school on unrelated business at about the same time her daughter became ill during respondent's class. Having finished the unrelated business, C.P.'s mother returned home only to be called to return to school in order to take her ill daughter home. The very same day, Houston directed respondent meet with him January 15, 1988 because of respondent's "*** continued refusal to send students to the nurse's office ***" (P-3).

Next, nurse Hertgen testified from her recollection that another pupil in respondent's class, S.P., received a bloody nose while playing volleyball under respondent's control and supervision. S.P. requested permission to go to the nurse's office which, according to Hertgen, was refused. S.P. was directed by respondent to report to the nurse's office only at the end of class. A memorandum (P-12) in evidence dated March 24, 1988 from Houston to respondent is reproduced here in full:

> Please make an appointment with me for your continued refusal to send students to the nurse's office.
>
> On March 22, 1988 [S.P.], who was bleeding from the nose, was refused permission to go to the nurse's office.
>
> On March 23, 1988 [S.S., different than the S.S. already mentioned in this charge] was also refused to go to our nurse ***

Nurse Hertgen acknowledges that she personally did not ever hear respondent refuse to allow pupils to report to her office and she acknowledges respondent did not ever admit to her he refused pupils permission to report to her. Nevertheless, nurse Hertgen did testify that at many times during 1987-88 pupils, whom she cannot now otherwise identify, reported to her respondent refused them permission to report to her office despite their perceived need to do so. Nurse Hertgen did mention another pupil, M.G., who had something of a physical altercation with respondent during February 1988. It is not clear from the evidence before me that nurse Hertgen intended to testify that M.G. was also denied permission by respondent to report to her despite his having a puffy lip from the altercation. The altercation shall be discussed in Charge 8, post.

Principal Houston testified that he began sending memoranda (P-2, P-3, P-5, P-12) because of reports from nurse Hertgen that respondent would not allow pupils to report to her office when necessary. Houston was concerned that a pupil, S.S., received a bump on her head without receiving nursing attention; that C.M., who suffered asthma, was reluctant to request permission from respondent to report to the nurse's office to secure medication because of respondent's prior refusals; and, he was concerned regarding D.M., having a contact lens fall out, not being allowed permission to report to the nurse's office to secure assistance to restore the contact lens. Houston and respondent met January 15, 1988 at which, Houston explained, respondent denied refusing any pupil permission to report to the nurse's office.

Houston testified that another meeting was conducted February 1, 1988 with respondent and respondent's representative in order to discuss now growing concerns from faculty members regarding respondent's performance and the continuing concern of respondent's perceived refusal to allow pupils to report to the nurse. Houston testified that during this meeting respondent denied that anything was wrong with his performance and, in fact, suggested he, Houston, needed help.

Recall that it has been established from the competent evidence in support of Charge 4 that on February 5, 1988 respondent denied M.W. permission to report to the nurse's office despite having observed M.W. being injured.

Subsequent to principal Houston sending respondent the memorandum (P-12) dated March 24, 1988 and directing him to make an appointing to discuss S.P. and S.S., Houston sent respondent another memorandum (P-13) dated April 8, 1988 which directs as follows:

> On March 24, 1988 I sent you a letter asking you to meet with me regarding your continuing refusal to send students to the nurse's office. Since I have not heard from you, I am now directing you to meet with me on Wednesday, April 13, 1988, third period ***

Houston did conduct a meeting April 14, 1988 with respondent. Houston acknowledges he became upset with respondent's refusal to send pupils to the nurse when necessary. Moreover, Houston became upset with respondent's refusal to recognize the fact that he was indeed refusing to send pupils to the nurse when necessary. On that basis, Houston testified that his fears for the physical safety of respondent and for the pupils was increasing.

In addition to the expectation, which is found here to be reasonable, that teachers allow pupils to report to the nurse's office when requested absent evidence which does not exist in this record that pupils are abusing such a privilege, all teachers at the Thompson Middle School are expected to issue "passes" to all pupils granted permission to leave classrooms. All teachers knew of such requirement, although respondent tends to suggest that the requirement was less than fully enforced. In any case, respondent was reminded by Houston in writing (P-16) on April 22, 1988 that while he did allow a pupil to report to the nurse's office on April 22, the student was released without respondent providing the students with a pass. Houston writes "What problem is there in giving a student who requests a pass to the Nurse's Office? Please made an appointment to discuss this matter." (P-16) Thereafter, Houston reminded respondent in writing (P-17) on April 26, 1988 and again (P-18) that he, respondent, is directed to issue passes to any pupil who requests to see the school nurse.

Respondent denies generally the allegation he denied pupils permission to report to the school nurse when necessary. Specifically, respondent points out that C.M., the pupil who was asthmatic, was not in his class until November 18, 1987. Accordingly, respondent asserts nurse Hertgen is mistaken when she testified the incident with C.M. happened during October 1987.

In regard to D.M. with her contact lens, respondent acknowledges D.M. reported her difficulty regarding the contact lens to him and that the lens was in her hand. Respondent says D.M. agreed to stay with the class until its completion and that she and her contact lens were all right. In regard to C.P., respondent testified she did not ask to go to the nurse and that he did not know she was ill. In regard to S.P., respondent denied refusing her permission to report to the nurse. Respondent explains S.P. did not request permission to report to the nurse. While S.P. may have been struck with a volley ball, respondent testified she reported to him that she was all right.

Respondent testified that he did in fact issue hall passes to all pupils permitted to go to the nurse's office during 1987-88. Respondent claims that there is no school-wide policy for all students to get a pass, particularly when teachers are outside in physical education activities. He contends that those teachers let pupils inside to go to the school nurse without hall passes and they, the teachers, are not disciplined.

I am persuaded by a preponderance of the credible evidence in support of this charge that the charge against respondent is true. That is, during 1987-88 respondent did, in fact, refuse students in need of nursing attention to report to the nurse as is evidence particularly by the evidence respondent did not allow M.W. to report to the nurse after being struck with a sneaker. Moreover, respondent's own testimony that while D.M. explained her problem to him regarding her contact lens and that she had the lens in her hand but agreed to stay with the class until the end of the period is simply not believable. Respondent offers no explanation why a pupil whose contact lens fell out and who could not reset the lens by herself would agree to stay in class with the lens in her hand and take the risk of destroying the contact lens. Such a version of events as proferred by respondent is unbelievable. Respondent's explanation the S.P. may have been hit with a volleyball but did not ask to go to the school nurse is similarly rejected. A teacher is expected to be observant regarding the physical safety of all pupils in his class. The pupils under respondent's control and supervision were sixth, seventh, and eighth graders. It is no defense for respondent to merely say pupils did not ask to go to see the nurse when respondent himself observes either potentially injurious actions or in fact injuries which pupils receive. Respondent has the obligation to take decisive action to insure that pupils receive proper nursing care immediately.

Even after having been told by Houston in December 1987, January, February, and April 1988 to allow pupils to report to the school nurse when necessary, the evidence is clear respondent continued to refuse such permission. The evidence is persuasive that all of Charge 6 is true against respondent. I so **FIND**.

Charge 7

Charge 7 alleges that during 1987-88 respondent was the target of stone-throwing by several pupils under his control and supervision during a regularly assigned physical education period and that respondent failed to discipline such pupils and he failed to report such stone-throwing to his supervisors. The Board offered eyewitness testimony to such incidents from Robert Welsh and Margaret Carle, both of whom were teaching colleagues of respondent during 1987-88, and four pupils who were in respondent's physical education class at the time the stone-throwing was to have occurred. In addition, the Board offered the testimony of assistant principal Pietkewicz and principal Houston who, while not eyewitnesses to the incidents, were involved in the aftermath of a key stone-throwing event which was to have occurred during May 1988.

Robert Welsh, who has been employed by the Board as a teacher of physical education for 19 years and the last 3 of which he has been assigned as respondent's colleague at the Thompson Middle School, testified that on May 10, 1988 he witnessed 3 pupils in respondent's physical education class, which was being conducted on the upper athletic field adjacent to the school building, throw stones at respondent as respondent was leading his class to the upper field. While Welsh is not certain whether any of the rocks hit respondent, he is certain in his knowledge that the stones were being whizzed right by him. Respondent did nothing to the pupils nor did he react to the stones being thrown at him. Walsh took no specific action at that time. Margaret Carle, a teaching colleague of respondent whose testimony has already been reported regarding Charge 5, testified that while she had her physical education class outside the building playing frisbee, she observed at least 2 pupils throwing rocks at respondent. Respondent was standing near the pupils. While she cannot presently recall the names of those pupils, she told both pupils to stop.

In the meantime, Robert Welsh told the assistant principal Pietkewicz that he "had had it" with respondent. Welsh proceeded to tell Pietkewicz that he observed 3 boys throwing rocks at respondent. Pietkewicz told Welsh to prepare disciplinary slips upon the boys and then he, Pietkewicz, proceeded to talk to the boys one at a time. One boy admitted "lobbing" rocks at respondent; he denied "throwing" rocks at respondent. Another boy explained to Pietkewicz that he was only holding rocks. The third boy told Pietkewicz that while he was not throwing rocks at respondent, he was throwing dandelions in respondent's direction.

Pietkewicz had earlier reported the rock-throwing incident to principal Houston who directed Pietkewicz to investigate the matter. After having talked with the three boys Pietkewicz, according to principal Houston, suspended them from regular school attendance. Houston sent the following memorandum (P-21) to respondent on May 11, 1988:

> We have documentation that clearly states that students in your Physical Education class threw rocks at you. Needless to say, not only am I concerned about your safety, but the safety as well of other students who could have been struck by these objects.
>
> I am directing you that you must use our "disciplinary referral" procedures if any serious disciplinary problem arises again in any of your classes ***.

In addition to foregoing witnesses, the Board also produced the testimony of J.G., S.G., and N.A., all of whom were sixth grade pupils under the control and supervision of respondent. J.G. testified that she saw most boys in respondent's class throw "things" at him. Nevertheless, within this discrete charge, J.G. testified she saw respondent hit with rocks thrown at him by pupils. According to J.G., respondent would tell them to stop or to retorically ask whether they wanted to go to the office or to detention. S.G. testified he saw pupils throw "pebbles" at respondent. According to S.G., respondent would chase the pupils but do nothing else. S.G., it is acknowledged, admits being disrespectful to respondent and he acknowledges that respondent did assign him detention on two or three occasions for insubordination. N.A. testified she saw pupils throw rocks and sticks at respondent.

Respondent testified that he was never hit by rocks nor, is he aware that any pupil ever threw rocks at him. Neither Welsh nor Pietkewicz, nor Houston discussed the matter of rock-throwing with him. Despite Houston's memorandum (P-21) to him on May 11, 1988, respondent testified at hearing that to this day he had no knowledge of the identity of the pupils who were suspended for throwing rocks at him. Respondent produced two letters (R-8, R-9) from pupils dated May 11 and May 16, 1988, respectively, in which the pupils, J.S. and B.H., denied having thrown rocks at him. J.S., in his mostly typed, with some handwriting note, states as follows:

> I didn't throw rocks at you like people are accusing me of. I wouldn't jeopardize my grades, and I would not try to deliberately hurt anyone. I really was not part of any rock-throwing at you. I'm sorry I even threw rocks.
>
> (R-8)

The mother of B.H., on behalf of her son B. writes as follows:

> Please excuse B.H. from gym last Thursday and Friday, May 12 and 13. He was suspended from school. We are sorry for any disrespect shown you. B. maintains he had a rock in his hand, but did not throw any at you.

The substantive charge here against respondent that during 1987-88 he was the target of stone-throwing by several of his students during what should have been a supervised instructional period and respondent's failure to discipline the students or to report the matter to his supervisors is found to be true. While respondent denies having knowledge that pupils threw rocks at him, the eyewitness observations of Robert Welsh

and Margaret Carle, both of whom were teaching colleagues of respondent, offered testimony that they did observe pupils throwing rocks at respondent and they observed respondent's failure to take immediate action against those pupils. Furthermore, the testimony of J.G., S.G., and N.A. is persuasive that respondent's control was so lacking over his pupils that pupils did in fact throw items at respondent including rocks or pebbles. Furthermore, respondent's denial of having knowledge of such rock-throwing or of the identity of the pupils who were involved is rejected in light of his own 2 documents from J.S. (R-8) and from the mother of B.H. (R-9). In light of the eyewitness testimony from the teachers and the testimony of assistant principal Pietkewicz, it is unlikely that respondent is as ignorant of the identity of the pupils who were involved in the rock-throwing on this particular occasion as he claims.

Therefore, I **FIND** a preponderance of credible evidence supports the truth of Charge 7.

Charge 8

This charge recites a litany of asserted incidents in which, if true, reveals respondent's absolute loss of control of his pupils and of the pupils' lack of respect for respondent as their teacher.

Assistant principal Pietkewicz testified that near the end of February 1988 while walking through respondent's physical education classes he saw and he heard pupils yell "you are a waste, Leo [respondent]". Pietkewicz observed the other pupils laughed at such remarks and respondent, who was standing right there, had no reaction. During early March 1988, Pietkewicz testified that while he was in the corridor he met another teacher who complained to him regarding respondent and his lack of control over his pupils. This particular teacher complained of respondent's pupils being on the stage in the gymnasium area destroying scenery for an up-coming play. The teacher happened also to be the drama coach. Pietkewicz also related observing respondent having his entire physical education class sit on the gymnasium floor while he yelled at them and other classes of physical education were actively involved in their activities in an adjoining area of the gymnasium.

Robert Welsh, the teaching colleague of respondent who already testified regarding Charge 7 - the rock-throwing incident - testified in support of this charge that he observed G.A., a sixth grade pupil under the control and supervision of respondent for physical education in 1987-88, taunt respondent by rubbing respondent's stomach, messing his hair, and literally pushing respondent around. Welsh also testified he observed and heard G.A. yell "F— you" to respondent. While Welsh did not discuss these observations with respondent, he did send G.A. to the office. On another occasion, March 31, 1988, Welsh testified he was near the weight room when he heard respondent's class of mostly seventh grade girls being unruly and pins from the weights being thrown around. Welsh entered the weight room, and observed respondent holding the door while the pupils were trying to leave. One girl, D.F., was heard by respondent to exclaim the same vulgarily to respondent as did G.A. In the meantime, Welsh testified respondent simply stood there and remained silent.

On other occasions during the 1988 spring semester Welsh testified he saw pupils deliberately slap at a basketball respondent was holding in an apparent effort to provoke him. Welsh observed and heard pupils in the boys' locker room engage in a rhythmic chant of "Fire Leo". During outside physical education, Welsh testified he saw pupils throw sticks at respondent who retrieved them only to have the pupils throw more sticks at him.

Steven Baglivio, already introduced as a teaching colleague of respondent's in the background facts above, testified that several of respondent's pupils would plead to allow them in his, Baglivio's, physical education class; that the pupils in respondent's class were so unruly in the locker room that he began to remain in the locker room with respondent; that he observed respondent's pupils on many occasions just sit or stand around the entire period instead of being engaged in active instruction by respondent; and, respondent simply adopted a stance of non-cooperation with his fellow teachers.

Jennifer Giguere Humann testified that she had pupils come to her asking not to be placed in respondent's class; she observed pupils put their chest against respondent's chest and their face one inch from respondent's face; she heard and observed pupils from respondent's class pound on the floor in unison and in a rhythmic chant exclaim "fire Leo' fire Leo' fire Leo' ". Such activity ceased when Humann walked into the gymnasium. A requirement for physical education is that pupils be properly dressed with sneakers and physical education clothing. Two pupils, both of whom were sixth graders assigned

respondent, were observed by Humann never being properly dressed for physical education. Nevertheless, these two pupils received passing grades. Despite the fact Humann is not a supervisor of respondent's performance, as a colleague she inquired of respondent how these two pupils could pass in light of the fact they were never properly dressed. Respondent's reaction to the inquiry was to shrug his shoulders, shake his head, and walk away.

J.S., a sixth grade pupil of respondent's during 1987-88, testified she saw specifically G.A. throw dog feces at respondent; she observed another pupil set firecrackers off while under the control and supervision of respondent who just stood there and told that pupil to put the firecrackers away; that she observed doing absolutely nothing in respondent's class other than sitting on bleachers while the boys in the class went wild; and, she observed certain boys "curse" at respondent. During all such negative activities, J.S. testified that respondent would do absolutely nothing to the troublemakers.

N.A., another sixth grade pupil of respondent's during 1987-88, testified she too saw boys particularly throw items at respondent; she testified that generally respondent would line pupils up outside the building for outside physical education but then the entire class would just stand there and do nothing; she testified that from time to time respondent would use her and another pupils to demonstrate skills while the entire class sat on the bleachers watching. According to N.A. the pupils sitting on the bleachers would get bored and get angry with respondent for not doing anything and they would then begin to throw things. N.A. has already testified that she observed pupils throwing rocks at respondent, but she also observed them throwing sticks at him or whatever else they could find.

S.G., another sixth grade pupil in respondent's class during 1987-88, testified that he heard pupils chant in the boys' locker room "Fire Leo"; he observed pupils speak disrespectfully to respondent almost every day; he observed pupils who would pay absolutely no attention to respondent to the point where another teacher would lead them in calisthentics. S.G., who has already testified regarding Charge 7 and the rock-throwing, also testified that he observed pupils throw sand, grass, dandelions, and sticks almost every day at respondent. On one occasion, S.G. testified that while he was assigned detention by respondent in the gymnasium, another pupil, G.A., came in merely to annoy respondent. S.G. observed G.A. pull at respondent's hair and throw things at him.

G.A., identified by J.S. as having thrown dog feces at respondent and by Robert Welsh earlier in this charge, testified that he did "fool around" with respondent after physical education. G.A. acknowledges running around the gymnasium, taunting respondent, and saying "Leo wears a toupee". G.A. testified that he did in fact light firecrackers outside the school building while part of respondent's physical education class. G.A. also testified that while playing frisbee baseball outside the building as part of respondent's physical education class, other pupils would pick up the bases and walk away and say "I'm stealing second base". G.A. acknowledged that he and other pupils would run towards respondent and the girls with sticks held high saying "Charge". G.A. admits participating in the locker room chant of "Fire Leo" and "Leo the lion". G.A. testified respondent never assigned him detention although he was required by respondent to "sit out" physical education for periods of time. G.A. testified that on one occasion the whole class went to the guidance office to get respondent fired because he had no control over pupils and he was "not a good teacher."

J.G. along with her testimony regarding Charge 7, testified that she observed not only pupils throw rocks at respondent but she also observed pupils throw grass, dirt, and sticks. Furthermore, J.G. testified that she observed respondent get hit with sticks, dirt, grass, rocks, flowers, and she also observed pupils swing sticks at respondent's legs. J.G. testified that in the weight room, boys would run around and pull pins from the weights on various lifting devices. Respondent would tell the pupils to stop but no one would listen to him. She also observed pupils turn the lights off and on in the weight room during class and play the radio. Occasionally, J.G. observed Robert Welsh, respondent's teaching colleague, come into the weight room to try to quiet the class down.

E.B., a sixth grade pupil in respondent's class during 1987-88, testified that she observed boys throw sticks, rocks, and dandelions at respondent all the time outside; she observed boys in the weight room pull pins out of the lifting devices; she observed the boys climb around weights like monkeys in the weight room; she observed boys throw pingpong balls at respondent during physical education class; she observed and heard pupils chant "Fire Leo"; and, she observed pupils as soon as they get outside for outside physical education hide behind automobiles in the parking lot and proceed to throw things at respondent.

M.G., a seventh grade pupils under the control and supervision of respondent during 1987-88, testified that at the end of a particular physical education class in October

after the whole class had been "rowdy", respondent had all pupils line up in a straight line near the locker room door prior to their departure to board school buses for home. M.G. was first in the line and respondent was in front of him facing the line. Those pupils towards the rear of the line began pushing towards the front. M.G. testified he was pushed into respondent who, in turn, was pushed against the locker room wall. According to M.G., respondent reacted to his being pushed into him by pushing back and saying to him "Get your damn hands off me." M.G. testified his response was to tell respondent "Get the hell out of my way" as he proceeded to bolt through the exit door to report the matter to principal Houston. Nevertheless, M.G. acknowledges he did not advise Houston of respondent's reaction to the shoving incident because, according to M.G., nothing would have happened to respondent because as he explained nothing ever did happen to respondent despite prior pupil complaints.

During the 1988 spring semester, assistant principal Pietkewicz observed and evaluated the performance of respondent on two separate occasions. On both occasions, April 26, 1988 (P-28) and May 24, 1988 (P-29), Pietkewicz found respondent's performance unsatisfactory regarding pupil relationships and his interaction with students and he found respondent's performance needing improvement in environmental management in classroom and classroom control, staff relationships, and relationships with parents and with the community at large. Respondent on both occasions defended his performance and insisted that all areas of his performance were at least satisfactory and none needed improvement.

Respondent testified in defense to this charge that despite the disciplinary measures he imposed upon those who misbehaved, including holding detention classes for such pupils, assigning them loss of credit and conferring with such pupils, the pupil misbehavior continued. Respondent explains that he believes the reassignment of Baglivio's class to him in November 1987 impacted adversely on his performance for the rest of the 1987-88 year. Respondent implies that the class of seventh grade pupils who were assigned from Baglivio set out, in a collective mind-set, to misbehave while under his control and supervision because they "liked" Baglivio more than him.

Specifically, respondent testified in regard to G.A. that he did impose discipline by assigning him detention, prohibiting him from actively participating in class, imposing upon him loss of credit, and by talking with him. Respondent testified that he

imposed similar discipline upon S.G., in addition to talking with his parents. In regard to M.G. and the shoving incident in the locker room during October 1987, respondent testified that when the shoving began from the rear of the line that day he asked all pupils to move back. Respondent acknowledges that M.G. tried to move back but those in the rear continued to push forward. According to respondent, M.G. then voiced an "obscenity" which he, respondent, "refused to accept". Respondent testified M.G. was excited and that he told him to settle down. Respondent testified he neither touched M.G. nor did he tell M.G. to 'Get his damn hands off me'. Respondent took no disciplinary measure against M.G. because, as he claims, M.G. was disturbed in the sense of needing special education. Nevertheless, respondent acknowledges at no time did he ever refer M.G. to the child study team.

The evidence on this charge is overwhelming that during 1987-88 respondent permitted students to go beyond the bounds of propriety with respect to an appropriate teacher-pupil relationship. Pupils did, in fact, flaunt respondent's authority by throwing sand, grass, dandelions, sticks, and rocks at him, used obscenities at him, obstructed any teaching-learning process that respondent may have attempted to engage in, and did in fact rub respondent's stomach. That G.A. may be a difficult pupil to work with and may present difficulty to all teachers, those qualities on his part do not justify respondent's behavior in his role as a professional teacher with G.A. and all other pupils who abused his authority. For respondent to accept such misbehavior, thereby condoning pupil misbehavior, is wholly unacceptable in the teaching-learning process. While respondent is not expected to be dispenser of magical disciplinary solutions, neither is respondent expected to tolerate the kind of behavior in which, through his inaction, his pupils were allowed to engage. Such misbehavior by pupils, and the tolerance of such misbehavior by a teacher, destroys the unity of the entire school facility.

Therefore, I **FIND** the evidence supports as true Charge 8 against respondent.

Charge 9

Charge 9 alleges respondent was insubordinate in that he refused to be physically examined by the school physician despite being directed to do so. The background recited above are incorporated here for this charge. In addition, the parties

entered a joint stipulation of facts (J-1) which while being duplicative of some background facts already reported are nevertheless repeated here as stipulated:

1. On June 27, 1988, the Middletown Township Board of Education held in abeyance the recommendation of the administration to withhold Robert Leo's increment for 1988-89, until such time as he could have a medical examination to determine if there was a medical basis for the change in his performance.

2. Pursuant to the Board's direction, on July 5, 1988 the Board Secretary wrote a letter to Robert Leo's attorney, with a copy to Robert Leo, scheduling an appointment for Robert Leo with Dr. Commentucci, the school physician, for July 13, 1988 at 2 p.m.

3. On July 13, 1988, Robert Leo did not report for the appointing with Dr. Commentucci. Robert Leo cancelled the appointment and did not reschedule one.

4. On July 27, 1988, the Board Secretary wrote to Robert Leo advising him to be examined by Dr. Commentucci by August 5, 1988.

5. On August 2, 1988 Robert Leo was examined by his own physician, Dr. John P. Swidryk, and a copy of Dr. Swidryk's report was furnished to the Board subsequent to the filing of tenure hearing charges on September 1, 1988.

* * *

8. Robert Leo was never examined by Dr. Commentucci and never made any new appointment with him.

9. Robert Leo was suspended with pay effective September 6, 1988.

Respondent's defense to this charge is three-pronged. One, respondent contends that the 2 p.m. appointment arranged for him with the school physician on July 13, 1988 was inconvenient for him because that time conflicted with his summer employment. Respondent does not answer why he then did not make and keep an appointment with the school physician at some other time not in conflict with his summer employment. Two, respondent contends he substantially complied with the Board's directive by submitting to a physical examination from his own personal physician and having a report (R-13) of that examination submitted to the Board. Three, respondent defends against having a physical examination performed by the school physician on the grounds that he believes the Board really intended to have him undergo a psychiatric examination.

The act of insubordination according to Black's Law Dictionary, fifth edition, 1979, is defined at page 720, as follows:

> State of being insubordinate; disobedience to constituted authority, refusal to obey some order which a superior officer is entitled to give and have obeyed, term imports a wilful or intentional disregard of the lawful and reasonable instructions of the employer.

Boards of education have authority at N.J.S.A. 18A:16-2 to require a physical examination whenever in its judgment an employee shows evidence of deviation from normal, physical health. Any such examination may be made by a physician designated by the board in which case the board bears the cost thereof or, at the option of the employee, the examination may be made by a physician of his own choosing but approved by the board.

In this case, the Board had a reasonable basis to direct respondent to undergo a physical examination by the school physician because of respondent's significant decline in his performance during 1987-88 as against his prior employment history. Respondent did not advise the Board nor did he seek its approval to be examined by his own personal physician. There is no evidence here that the Board so directed respondent for improper motives or for arbitrary or capricious reasons. The evidence does show the Board intended to offer respondent all possible avenues to justify his performance decline before deciding whether to withhold his salary increments.

The evidence in record clearly discloses respondent refused to obey a lawful directive of his employer, the Board of Education. Such refusal, I **CONCLUDE**, constitutes an act of insubordination.

Respondent's defense that the first appointment of 2 p.m. on July 13 was inconvenient for him because that time conflicted with his summer employment, even if such a defense is valid, does not answer why respondent refused to arrange another more convenient time with the school physician. Respondent's position that he substantially complied with the Board's directive by having a physical examination performed by his personal physician is rejected. There is no evidence in this record that the Board agreed to have the physical examination performed by his personal physician. Finally, the evidence in this record together with the stipulated facts show clearly and unequivocally

that the Board directed respondent to undergo a physical examination, not a psychiatric examination.

For all the foregoing reasons, I **FIND** that respondent did in fact refuse to submit to a physical examination as directed by the Board and I **CONCLUDE** that such refusal constitutes an act of insubordination.

CONCLUSORY CHARGE 1

It was noted earlier that because Charge 1 did not allege discrete conduct as opposed to presenting a conclusory charge dependent upon the proofs entered on Charges 2 through 8, Charge 1 shall now be addressed. It is apparent through the proofs entered on Charges 1 through 8 and the findings entered based on those proofs that during 1987-88 respondent demonstrated a continuing incapacity to control and effectively discipline pupils assigned him in physical education classes. It is further established by the evidence in all the charges that respondent's incapacity did create an atmosphere which was physically dangerous for both the pupils and for respondent. On February 5, 1988 M.W. was struck by a sneaker thrown in respondent's class; on January 28, 1988 C.R., a female pupil in respondent's class, had her shorts pulled down by a male student while respondent remained silent; on several occasions throughout 1987-88 respondent, for whatever reason, refused pupils permission to report to the nurse's office despite being in need of nursing attention; during 1987-88 respondent was the target of stone-throwing and he was the target of other objects thrown at him; and, during 1987-88 the evidence shows respondent had little if any control over his students regardless of whether the class was conducted inside or outside the school facility.

Accordingly, and based on all the evidence in this case, I **CONCLUDE** that respondent did demonstrate incapacity to control and discipline students assigned him in physical education class during 1987-88 and that both students and teachers were placed in a situation dangerous to their physical health because of such incapacity. Therefore, I **CONCLUDE** Charge 1 is true.

ARGUMENTS

The Board contends the proofs it submitted in this case show respondent to be incompacitated as a teacher, that he is incompetent, and that he was insubordinate with

respect to his refusal to submit to a physical examination. For these reasons, the Board contends the termination of respondent's employment is proper and appropriate. Respondent argues that the proofs for Charges 1 through 8, if they show anything at all, show that he may have been inefficient and that, as such, he was entitled to a 90-day opportunity to improve such inefficiencies under N.J.S.A. 18A:6-11. Respondent points out that because the Board did not provide him 90 days in which to improve his asserted inefficiencies, the charges must be dismissed. Respondent contends Charge 2 must be dismissed in its entirety because no parent testified regarding his asserted failure of parental contact and therefore, the letters constitue uncorroborated hearsay. Nest, respondent contends that Charge 3 must be dismissed because there is no proof he ever refused to communicate with parents or to comply with a directive. Respondent also argues that Charge 6 must be dismissed because the Board failed to establish he refused to permit students to visit the school nurse and he contends Charge 7 must be dismissed because the Board failed to establish he knew he was the target of stone throwing. Respondent maintains that the Board's proofs in support of Charges 4 and 5 are insufficient to cause his termination of employment. Respondent contends with respect to Charge 9 that he "tried" to comply with the Board's directive for a physical examination and that he supplied the report to the Board as requested. Respondent maintains Charges 1 through 8 should be dismissed since such charges are the result of administrative failure, not his failure, and that the conduct underlying those charges should be addressed through a professional improvement plan. Finally, respondent contends he was not insubordinate in light of the fact that the Board's intent for an examination was for him to undergo a psychiatrric, not a physical, examination. Accordingly, respondent pleads that the most appropriate remedy in this case is to order him to undergo a psychiatric examination.

With respect to respondent's last argument that he believed the Board directed him to undergo a psychiatric examination, such an argument is specious. The clear words of the Board, and respondent's understanding of such words, was that he was to undergo a physical examination. At no time prior to the institution of the tenure proceedings did respondent ever contend he understood the expectation of the Board to be his submitting to a psychiatric examination. Therefore, respondent's argument in this regard is wholly rejected.

With respect to the other arguments raised by respondent, these charges do not constitute inefficiency in the sense that the underlying conduct could be corrected within a 90-day period. See, School District of East Brunswick v. Sokolow, 1982 S.L.D. 1358, aff'd State Board of Education 1983 S.L.D. 1645. The proofs submitted by the Board in support of all these charges show without doubt that respondent took a position, voluntarily or otherwise, to simply refuse to communicate with parents, to refuse to send pupils to the school nurse who needed nursing attention, he refused to discipline pupils despite their misconduct, and he refused, voluntarily or otherwise, to create a teaching-learning environment in his classes in order to avoid pupil misbehavior. Such conduct demonstrates incompetency and an incompacity to actively involve himself with his pupils in a positive manner in order to create a harmonious teacher-pupil relationship for the effective acquisition of learning. Such failure on respondent's part cannot be classified as inefficient; rather, the proofs clearly demonstrate incompacity as is contemplated under the Tenure Employees' Hearing Law, N.J.S.A. 18A:6-10. Therefore, respondent's argument that the charges are of inefficiency is wholly rejected.

With respect to respondent's argument that Charges 2 and 3 must fall because of uncorroborated hearsay and a failure of proofs, such argument is rejected. N.J.A.C. 1:1-15.5(b) provides as follows:

> Notwithstanding the admissability of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.

In In the Tenure Hearing of M. William Cowan, 224 N.J. Super. 737, 750 (App. Div. 1988) the court held that application of this residuum rule requires identifying the "ultimate finding of fact" that must be supported by a residuum of competent evidence. In this case, the ultimate finding of fact is that appellant engaged in one or more acts during 1987-88 which shows he is incapacitated or that he engaged in unbecoming conduct. As the Cowan court noted at pg. 750:

> Whether each of the acts charged is viewed as unbecoming conduct, as corroborative evidence that one or more of the other acts charged were unbecoming conduct, or only as examples of a course of unbecoming conduct, there need not be a residuum of competent evidence to prove each act considered by the

> Commissioner so long as 'the combined probative course of the relevant hearsay and the relevant competent evidence' sustained the Commissioner's finding of unbecoming conduct [citation omitted].

So, too, in this case the combined probative force of all the proofs, competent and hearsay, submitted by the Board show respondent to have engaged in a course of conduct during 1987-88 which shows he is incapacitated, that he engaged in conduct unbecoming a teacher, and that he was insubordinate. The nine charges are not to be viewed in isolation to each other; rather, the conduct manifested by the proofs in support of each charge are to be viewed as a whole course of conduct adopted by respondent.

In light of the foregoing, the discipline to be imposed remains to be considered in light of respondent's past employment history. There is no doubt that until 1987-88 respondent was at the very least a satisfactory teacher who apparently dedicated himself for twenty-five years to the pupils of Middletown. Principal Houston commended respondent for his performance on many prior occasions regarding his leadership, his ability, and his knowledge of physical education. Respondent himself was not an armchair participant in the physical education structure of the Middletown Township Thompson Middle School in prior years; rather, he was an active and eager participant.

Nevertheless, respondent's conduct, established as true here, during 1987-88 is so eggregious and so fraught with the risk of damage to the pupils' academic progress and risk to their physical well being that the Board simply cannot continue to place Middletown Township pupils at such risk. Moreover, the risk of danger to the physical well being of respondent is real. While it is true that respondent may have had some pupils who were more difficult to control than other pupils, such a responsibility is not unique to respondent. Most of if not all teachers at any level of formal instruction have pupils who for whatever reason are difficult to control. That respondent manifested during 1987-88 his total and complete incapacity to control such students is sufficient warning to the Board to take decisive action to remove such a risk from its schools. The Board did so by certifying tenure charges against respondent to the Commissioner for determination and by seeking his removal from his employment as a teacher in its employ.

In Redcay v. State Board of Education, 130 N.J.L. 365, 371 (Sup. Ct. 1943), aff'd 131 N.J.L. 327 (E.&A. 1944), it was held that unfitness for a task is best shown by

numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by by one incident, if sufficiently flagrant, but might also be shown by many incidents. In this case, there are numerous incidents shown to have occurred during 1987-88 which reflect respondent's incapacity, unbecoming conduct, and insubordinate conduct which demonstrate his unfitness to hold the post of teacher. Those incidents include his refusal to communicate with parents, his refusal to send injured pupils to the nurses, his tolerance of pupils expressing vulgarities to him, throwing rocks at him, degrading him by rubbing his stomach and messing his hair, becoming involved in an altercation with a pupil, and ignoring all misbehavior that went on about him. Respondent's insubordinate conduct with respect to the Board's directive to him to secure a physical examination is another manifestation of the attitude respondent adopted during 1987-88, voluntarily or otherwise, which shows his incapacity and unbecoming conduct.

For all the foregoing reasons, and despite respondent's satisfactory teaching performance in the past, the 1987-88 school year and the incidents as proven true herein which reveal respondent's present incapacity are such that termination of employment is the proper discipline to be imposed. Accordingly, the employment of Robert Leo as a teacher with a tenure status in the employ of the Board of Education shall be and is hereby **TERMINATED** effective as of the date specified in the final decision. If no date is specified in the final decision, then the date of termination shall be the 45th day from the date this initial decision issues.

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 31, 1989
DATE

Daniel B McKeown
DANIEL B. MC KEOWN, ALJ

July 31, 1989
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

AUG 3 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

ij

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT LEO, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
MIDDLETOWN, MONMOUTH COUNTY.	:	
	:	

The Commissioner has reviewed the record of this matter, including the initial decision of the Office of Administrative Law. Respondent's exceptions and reply thereto were timely filed pursuant to N.J.A.C. 1:1-18.4 and have been considered accordingly.

The exceptions submitted by respondent are substantive repetitions of arguments already made before the ALJ. Those arguments are summarized in the initial decision, ante, and need not be repeated here. The reply submitted by petitioner (hereinafter "Board") essentially argues that the ALJ's conclusions and handling of evidence are well grounded in both fact and law and should therefore be affirmed by the Commissioner.

Upon review, the Commissioner concurs with the ALJ that the charges brought against respondent have been shown to be true in fact as the Board has framed them. The Commissioner is fully satisfied that the ALJ appropriately applied the residuum standards established in N.J.A.C. 1:1-15.5(b) and Cowan, supra, and that no good reason has been advanced to challenge the ALJ's judgments of credibility or his resolutions of conflicting testimony. Further, the Commissioner concurs with the ALJ's assessment that the totality of the charges against respondent rises well above the level of inefficiency contemplated in N.J.S.A. 18A:6-10 et seq. and that the general tenor of respondent's responses to both previous admonitions and the charges themselves argue for his inability or unwillingness to correct shortcomings in his present state. The picture that emerges from a full consideration of the record is exactly that depicted by the ALJ: a capable teacher of long-standing has, for reasons unknown and within the space of a single year, virtually ceased to function in meeting his most fundamental responsibilities.

The Commissioner disagrees, however, that termination of employment is the appropriate remedy in this case, at least at the present time. Robert Leo was incapacitated in 1987-88; of that there is no doubt. However, after 25 years of otherwise exemplary service, the question becomes why this happened, and specifically,

if there was a medical reason that would entitle respondent to sick leave and opportunity for recovery pursuant to N.J.S.A. 18A:16-4 or to disability retirement pursuant to N.J.S.A. 18A:66-39 rather than to outright dismissal.

To its credit, the Board attempted to give respondent such an opportunity by requesting a "medical" examination by the school physician pursuant to N.J.S.A. 18A:16-2 (Exhibits P-31 and P-32). This request was subsequently construed by the Board's legal representatives and the ALJ as a physical examination and by respondent as a veiled attempt at a psychiatric examination. In fact, the minutes of the Board meeting where this action was taken (P-31) and the subsequent confirming letter to respondent's attorney (P-32) seem to tell a different story. Faced with an inexplicable drop in performance by a well-regarded staff member, the Board President inquired of the Board attorney as to whether boards had a legal right to have a staff member "medically examined," to which the attorney responded that there was a statute allowing for this; the Board then voted to have respondent "medically examined." This same terminology was used in the confirming letter to respondent, where the Board was said to be inquiring as to whether his recent performance might be due to an "adverse medical condition." Nothing in these exchanges indicates that the Board intended to limit the school physician's examination to physical conditions; "physician" in the context of Title 18A is a generic term for any medical doctor. What appears to have happened is that the Board thought it was asking for a general assessment of respondent's condition, with the intention of awaiting results before dealing with the matter further. There is no indication that the Board understood, or was even aware, that the statute on which it was relying distinguishes between physical and psychiatric exams, so that it would have been wise to more explicitly state a specific intent. This is particularly sensitive in that established case law (Gish v. Bd. of Ed. of Borough of Paramus, 145 N.J. Super. 96 (App. Div. 1976), Cert. denied 74 N.J. 251 (1977), Cert. denied 434 U.S. 879 (1977)) requires a statement of reasons and a hearing upon request when psychiatric exams are ordered.

The Board's apparent good intentions were thwarted, however, when respondent--for whatever reasons--attempted to substitute a "routine physical examination" (Exhibit R-13) by his own doctor for the exam requested by the Board without obtaining the Board's approval for the substitution as clearly and unequivocally required by N.J.S.A. 18A:16-3. Thus, arose the notion of insubordination and the decision to file tenure charges.

Given the nature of respondent's problems during 1987-88, it is abundantly clear that more than a routine physical, especially one conducted by a physician with no apparent knowledge of the Board's reasons for requesting the exams, is needed to determine whether or not respondent's incapacity is medical in origin and susceptible to cure. Indeed, respondent's very handling of the Board's request appears to be more an extension of the obvious malaise underlying his recent conduct than an act of conscious insubordination.

Accordingly, even though the charges as framed by the Board have been shown to be true, the Commissioner determines to take no action to dismiss a teacher of 25 years' service, based on one inexplicable year of incapacitation, without a clear finding as to whether the collective events of that year were an unfortunate but short-term aberration or an indication of permanent unfitness to teach, and without a finding as to whether respondent's incapacity was (or is) the result of an as yet unidentified medical problem, physical or mental. Rather than set aside charges without prejudice pending the Board's ordering of the necessary exams, however, the Commissioner prefers to order the exams himself, as he did in In the Matter of the Tenure Hearing of Jude Martin, School District of Union Beach Township, Monmouth County, decided by the Commissioner December 20, 1985, motion for stay denied June 11, 1986, denial affirmed by State Board August 6, 1986, thus, obviating the necessity for statement and appeal procedures which, in view of the present proceedings, would only be repetitive in substance and outcome. Further, such a dismissal could return respondent to the classroom before a determination has been made that he is able to function in his present state.

The Commissioner therefore remands this matter to the Office of Administrative Law for a determination of the origin and extent of respondent's incapacity. He further directs Robert Leo to submit to complete physical and psychiatric examinations by a physician or physicians designated by the Board (or of his own choosing with approval of the Board), the results of which are to be made part of the record herein.

The Commissioner retains jurisdiction pending further disposition before the ALJ.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 13, 1989

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1124-89
AGENCY DKT. NO. 6-1/89

WILLIAM L. CADE, JR.,
Petitioner,
v.
EWING TOWNSHIP BOARD OF EDUCATION, MERCER COUNTY,
Respondent.

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

Russell Weiss, Jr., Esq., for respondent (Carroll and Weiss, attorneys)

J. Bruce Morgan, Assistant Superintendent for Business/Board Secretary, **Jane VanAlst**, Assistant Superintendent for Curriculum and Instruction, and **Dennis P. Schmidt**, Director of Personnel/Labor Relations, intervenors, pro se

Record Closed: July 21, 1989 Decided: August 9, 1989

BEFORE JEFF S. MASIN, ALJ:

This matter involves an appeal by William L. Cade, Jr., who seeks by way of petition to the Commissioner of Education relief from the action of the respondent Board of Education which he contends has improperly employed non-tenured individuals in the positions of Director of Personnel/Labor Relations and two Assistant Superintendentships. Mr. Cade asserts that he is the individual who, by reason of tenure, seniority and preferred eligibility rights, is qualified for these positions, pursuant to *N.J.S.A.* 18A:28-5, *N.J.S.A.* 18A:28-6, *N.J.S.A.* 18A:28-9 and *N.J.A.C.* 6:3-1.0. Cade seeks reinstatement to the position of Assistant Superintendent for Director of Personnel/Labor Relations, back pay, interest and other appropriate benefits.

The Board of Education denies any violation of any rights held by Mr. Cade. In addition, it claims that this petition is barred by the provisions of *N.J.A.C.* 6:24-1.2b, in that it was not filed in a timely fashion, that is, pursuant to the regulation, within 90 days of the "date of receipt of a final order, ruling or other action by the District Board of Education, which is the subject of the requested case hearing."

Following transmittal to the OAL, the matter was the subject of a prehearing held by telephone on April 25, 1989. A prehearing order was issued on May 1, 1989 by Administrative Law Judge Jeff S. Masin. Intervention was permitted by Order of June 26, 1989, at which time a supplemental prehearing order was entered. Thereafter, respondent filed a motion for summary dismissal for failure to comply with *N.J.A.C.* 6:24-1.2. Respondent/movant filed the motion on July 14, 1989. The petitioner/respondent on motion filed his response on July 14 and the movant responded on July 21, 1989. Intervenors relied on the Board's position. The record for purposes of the motion closed on that date.

As part of the submission with respect to the motion, the parties entered into a stipulation of facts. That stipulation supports a conclusion that there are no material issues of fact in dispute which are relevant to the determination of whether or not the petition was filed within the 90 days permitted by *N.J.A.C.* 6:24-1.2(b) or whether, if the petition was not filed in a timely fashion, there is a basis for permitting waiver of the 90-day rule pursuant to *N.J.A.C.* 6:24-1.17.

Having considered the stipulation of facts, the arguments of counsel, and the applicable statutes, regulations and case law, I **FIND** that the petition was filed more than 90 days from the date when the petitioner had notice, or reason to know, of action by the District Board of Education, which is the subject of this hearing. As such, I **CONCLUDE** that pursuant to *N.J.A.C.* 6:24-1.2(b) this contested case must be dismissed. In making this finding, I **CONCLUDE** as well that there is no basis for relaxation of the 90-day rule under *N.J.A.C.* 6:24-1.17.

STIPULATIONS OF FACT

The present motion deals with the question of whether or not the petition for relief was filed by the petitioner within allowable time limit under the applicable regulation. In order to make this determination, it is necessary to identify certain facts, especially certain dates, which are crucial to the determination. Essentially, the matter revolves around Mr. Cade's allegation that three individuals have been

named to positions by the Board of Education, which positions he, Cade, believes that he has a right to based upon either tenure status, and/or seniority, and/or statutory authorization. The three individuals and the positions to which they are appointed were Dr. J. Bruce Morgan, Assistant Superintendent for Business/Board Secretary, Dr. Jane VanAlst, Assistant Superintendent for Curriculum and Instruction and Mr. Dennis P. Schmidt, Director of Personnel/Labor Relations. According to the Stipulation of Facts, J-1 in evidence:

1. The petition in this matter was filed with the Commissioner of Education of January 13, 1989.

2. The Board action naming Dr. J. Bruce Morgan, Assistant Superintendent for Business/Board Secretary, took place at a public meeting on October 13, 1987.

3. The Board action naming Dr. VanAlst, Assistant Superintendent for Curriculum and Instruction, took place at a public meeting on October 13, 1987.

4. Petitioner was aware of the actions referred to in paragraphs 2 and 3 on or about March 1, 1988.

5. The Board action appointing Dennis P. Schmidt as Director of Personnel/Labor Relations took place a public meeting on July 25, 1988.

6. Petitioner was aware of the action referred to in paragraph 5 on or about September 1, 1988.

As a matter of historical background relevant to the petitioner's claim to one or more of the above-named positions, the parties have stipulated the facts with respect to his employment and certifications. This exhibit relates that Cade was originally a distributed education teacher/coordinator, but by 1972-73 he had risen to the position of Director of Community Relations and ultimately between 1974-75 and 77-78 he was assistant to the Superintendent. On August 28, 1978, he was appointed as Assistant Superintendent and held that position until it was abolished as part of a Reduction In Force (RIF), effective September 30, 1981. Thereafter, Cade was on leave of absence in 1981-82 and returned to work for the District as a Distributive Education Teacher/Coordinator beginning in 1982-83 on through 1986-87. He is certified as a Principal and as a School Administrator, as well as an Assistant Superintendent for Business.

REGULATIONS RELEVANT TO THE MOTION

For purposes of this motion, the applicable regulations are *N.J.A.C.* 6:24-1.2, which provides in part:

> (b) 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 case hearing,

and *N.J.A.C.* 6:24-1.17, which reads:

> The rules herein contained shall be considered general rules of practice to govern, expedite and effectuate the procedure before, and the actions of, the Commissioner in connection with the determination of controversies and disputes under the school laws. They may be relaxed or dispensed with by the Commissioner, in his or her direct discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.

In addition, the regulation upon which petitioner asserts his right to the position of Assistant Superintendent and/or Director, and which statute he asserts the Board has disregarded in connection with the appointment of the individuals listed in the stipulation, is *N.J.S.A.* 18A:28-12,

> If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligibility list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and shall be reemployed by the body causing dismissal, . . .

DISCUSSION AS TO TIMELINESS

There is no question but that the stipulated dates set forth above show that the appointment of Dr. Morgan as Assistant Superintendent, of Dr. VanAlst as Assistant Superintendent and Mr. Schmidt as Director of Personnel each took place more than 90 days prior to January 13, 1989, the date upon which the petition in this matter was filed by Mr. Cade. In fact, the appointment of Morgan and VanAlst occurred exactly 15 months prior to Cade's filing and Schmidt's appointment occurred six and a half months prior to the filing. Based upon the dates alone, Cade obviously failed to file within 90 days of the appointments. Further, according to the stipulation, Cade was aware of the appointments of Morgan and VanAlst as of March 1, 1988. It

then took nine and one-half months from the date of his acquiring knowledge of these appointments to the date when he filed his petition. As for Schmidt's appointment, he learned of this as of September 1, 1988 and yet his petition was not filed for four and one-half months following that date. Again, looking purely at the dates upon which he agrees to having obtained knowledge of the appointments, Cade's filing was beyond 90 days from the date of his acquiring that knowledge. In defense of the timeliness of his filing, Case asserts that the applicable consideration as to when he was required to act is neither the date when the appointments occurred nor the date upon which he acquired knowledge of the appointments, but instead the date when he purports to have first become aware that he had some legal argument to make in support of his belief that he was entitled to these positions in preference to those actually appointed. This date is pegged at some undisclosed time during the fall of 1988. According to his brief, prior to that time Mr. Cade was operating under the assumption that he had no claim to these positions based upon a decision rendered by the Commissioner of Education in a matter previously litigated between Cade and the Board of Education, *Cade v. Bd. of Ed., Tp. of Ewing*, 1987 *S.L.D.* ___ (July 14, 1987) (Cade I). That decision adopted the initial decision of Honorable Daniel B. McKeown, rendered June 4, 1987. Judge McKeown determined that Mr. Cade had failed to establish that he was deprived of a controverted position of Assistant Superintendent which had been created by the Board on June 9, 1986. The basis for the determination was that the position of Assistant Superintendent which he held in 1978-81 was not "substantially identical" to the position created by the Board in 1986. Judge McKeown concluded that:

> . . . 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.

Cade contends that following the issuance of the above decision, he learned in the fall of 1988 of a decision rendered by the Appellate Division of Superior Court in *Bednar v. Westwood Bd. of Ed.*, 221 *N.J. Super.* 239 (App. Div. 1987). In *Bednar*, the court determined in connection with a claim by a tenured teacher holding an instructional certificate with a comprehensive subject field endorsement in art that the State Board of Education had improperly interpreted *N.J.S.A.* 18A:28-10, in that its interpretation had permitted the statutory rights of tenured individuals to be diluted by affording non-tenured teachers "seniority" in connection with the

determination of which employees would be retained or dismissed in connection with reductions in force. The Court concluded that seniority was a statutory concept created by Chapter 28 of Title 18A and was a right which only related to tenured employees and created no employment rights for non-tenured employees. Thus,

> Chapter 28 surely does not contemplate use of the concept of seniority to justify retaining a non-tenured teacher in a position within the certificate of a dismissed tenured teacher. *Capodilupo v. West Orange Tp. Ed. Bd.*, 218 *N.J. Super.* 510, 514 (App. Div. 1987).

Cade asserts the *Bednar* decision changed legal interpretation of the rights of tenured employees under *N.J.S.A.* 18A:28-10, 12. It was only when he learned of *Bednar* in the fall of 1988 that he became aware that there was some "new" basis to bring an action against the Board for its appointment of Morgan, VanAlst and/or Schmidt in preference to himself. Thus, according to the petitioner, the date upon which the 90 days should be determined is neither the date of the appointment of the individuals, nor the date that he learned of those appointments, but instead the date when he first learned of *Bednar*. As stated by the petitioner,

> . . . At the time he learned of the intervenors' assignment to the positions in question, he had no knowledge of the decision in *Bednar*. . . . As a result, any claim made by him prior to learning of its decision would have been contrary to his understanding of existing law, particularly as a result of the decision involving him, *Cade*. . . . Being a layman, the petitioner would have no way of knowing that the tenure laws had been re-interpreted in some way. He did not discover the situation until the Fall of 1988 and thereafter filed his action. Prior to that time, his only information was that he had no legal basis to commence proceeding to obtain the positions held by the intervenors.

Respondent, movant on this motion, contends that there is no basis whatsoever in case law for permitting the respondent's date of acquisition of the state of the law, as opposed to his acquisition of facts, to serve as the commencement date for the running of the 90 days. In its view, such a interpretation of the 90-day rule would run contrary to existing case law.

In seeking the benefit of using the date of acquisition of *Bednar* as the starting date for the running of the 90 days, the petitioner relies greatly upon those cases in which the New Jersey Supreme Court has identified the "discovery rule," cases such as *Rosenau v. City of the City of New Brunswick* and *Gamon Meter Co.*, 51 *N.J.* 130, 137 (1968) and *Burd v. New Jersey Telephone Company*, 76 *N.J.* 284 (1978). These

cases do stand for the proposition that in certain types of legal proceedings affected by Statutes of Limitation, the significant date for determining whether or not the period of the Statute has run, thus barring the suit, is the date when the claimant first learned, or should have learned, of the factual situation giving rise to the legal right. Thus, many cases which arise under the "discovery rule" are similar to *Rosenau*, where a latent defect, one not reasonably or readily discoverable in the normal course, is first discovered sometime after the condition was created." In such circumstances, the courts have often held that fairness and equity require that the statutory period not begin to run until such time as the facts become reasonably known to the claimant. In cases of this sort, which often have arisen in the products liability/tort area, the affect of the "discovery rule" is to toll the running of the statutory period until such time as the situation becomes sufficiently obvious or ascertainable, such as to put upon an eventual claimant some responsibility of knowledge, some reason to have been aware of the facts, such as to alert the claimant of a possible legal right. These cases have all turned upon some factual situation which the court deemed to be such as to warrant a tolling of the statute. In none of these cases, nor in any case specifically cited by petitioner, has the tolling of the statute been based upon a lack of knowledge by the claimant not of some underlying factual situation or circumstance which would give him/her a right to assert a claim, but instead upon a lack of knowledge of the legal situation, that is of the body of law and legal interpretation which might give to the claimant some legal basis for recovery based upon already known facts. It is precisely that situation which is presented by Mr. Cade's current case and by his assertion that the date for running the 90-day period in which the petition must be filed should not be until the date when he first learned of the Appellate Division's interpretation of the tenure statute in *Bednar*.

Of course, there is a readily recognizable and honored legal proposition that ignorance of the law is no excuse. In this case, Mr. Cade concedes, as he must, that the *Bednar* decision was issued by the Appellate Division in 1987. His knowledge of *Bednar* did not occur until an unspecified date in the fall of 1988, which, if read with some degree of liberality, presumably means sometime from approximately September 21, although perhaps sometime slightly before that, until presumably late in December 1988. No matter how the "fall of 1988" is defined, it is clear that Cade's knowledge of this case and its possible legal affect upon his situation was not acquired until somewhere in excess of nine months following the end of 1987. *Bednar* was in fact decided by the Appellate Division on November 24, 1987. Giving some leeway for the publication of that decision in the advance sheets, it is fair to

say that the decision was published by the end of 1987 or at latest the very beginning of 1988. Thus, there is a substantial time lag, well in excess of 90 days, between the time when *Bednar* was announced by the court in written form and the time when Cade claims to have acquired knowledge of it. That delay may have been as much as one year, if the "fall of 1988, means sometime in November or early December 1988. In addition, as noted by the Board, the court's decision in *Bednar* relied substantially on its decision in *Capodilupo, supra,* a decision rendered by the Appellate Division on July 2, 1987. The *Capodilupo* decision affirmed a decision of the State Board of Education which had been announced on September 3, 1986. Thus, if one considers *Capodilupo* and *Bednar* as being the legal ground work for Cade's asserted legal position at this time, it could be argued that his claimed ignorance of the state of the law must be considered to have existed from the time of the announcement of *Capodilupo,* a period even more in excess of 90 days than the date of the issuance of *Bednar.*

The petitioner further supports his claim that the running of the 90 days should not begin until the "fall of 1988" by contending that the petitioner's notice of the "order, ruling or other action" of the Board giving rise to his claim did not occur until he learned of the "full meaning of the decision in *Bednar*. . . ." It was only at that time that he had a basis for making a claim. Consequently, *N.J.A.C.* 6:24-1.2 cannot be deemed to run from any other date as there is no other true notice within the meaning of the regulation to which his claim could possibly attach.

Petitioner apparently believes that "notice," as used in the regulation and as applicable to this case, means not some sort of public action which is, in the legal sense, "known" to the public (as opposed to some internal or discussion never announced at public meeting). He believes that his position is supported by *Stockton v. Bd. of Ed. of the Cty. of Trenton,* 210 *N.J. Super.* 150 (App. Div. 1986). The Appellate Division ruled that the date of receipt of a salary check based upon placement on an improper step of the salary guide was not the date of "notice" under the regulation and therefore not the date when the 90 days began to run as opposed to the date upon which the school administration denied petitioner's request for correction of the error in writing. That decision notes a concern that the Board's reasoning would "open the flood gates" for petitions being filed prior to the actual devolution of a dispute into a "controversy." The court concluded that the issuance of the paycheck for the wrong amount was neither an "order nor a ruling" and that it was also not the kind of "other action" by the Board which would trigger the running of the 90-day period.

Of course, in the present case, the factual situation is considerably different. The action of the school board in appointing Morgan, VanAlst and Schmidt to their various positions was public action by the Board, taken not by some Board employee in the course of normal operations where a mistake might occur and a need for correction of a clerical error might be necessary, as in *Stockton*, but was instead action by the governing body itself, taken at public session, action which specifically and directly filled the positions which Cade ultimately claims he should have received. There is a world of difference between the issuance of the incorrect paycheck in *Stockton* and the appointive action of the Board in the instant case. The *Stockton* decision is not supportive of the petitioner's position.

Interestingly enough, in his discussion of the affect of *Stockton*, counsel for petitioner asserts that:

> Once Cade knew allegedly non-tenured individuals were in positions within the scope of his tenure protections, he had a basis for instituting suit. This did not occur until he had also had knowledge of the change in the law.

Of course, Cade did have knowledge of the appointment of Morgan, VanAlst and Schmidt well before he knew of *Bednar*. Further, he does not assert that he did not know that they were non-tenured individuals. The only thing he did not know, according to his argument, is that their appointment could be challenged legally, that is, he did not know the state of the law. Once again, *Stockton* is not supportive of petitioner's position.

Petitioner also relies on *Panarotto v. Bd. of Ed., Borough of Emerson*, 199 S.L.D. ___ State Board of Education, April 6, 1988), aff'd Superior Court, Appellate Division, Dkt. No. A-4369-87T2 (May 22, 1989). Once again, reliance upon this case is misplaced. According to the petitioner's statement of the conclusion reached therein, and the quote from the decision set forth in his brief, the court held that the petitioner's cross-claim was filed properly within 90 days of the date on which she was notified that her rights may be affected by a petition that was filed. The quote reveals that she had no notice of the reductions she was challenging until she was notified by counsel for the petitioner in that case of the pendency of the action nor did the record indicate that she knew about the reductions prior to the commencement of the 1985-86 school year. Contrary to the position of the cross-claimant in *Panarotto*, in this case Mr. Cade clearly knew of the appointment of the

intervenors to their positions well in advance of the 90 days. It is again not a factual lack of knowledge, but a lack of knowledge of the law, which Cade pleads here.

In addition to arguing that he did not violate the 90-day filing requirement, petitioner also argues that because this action is brought to protect his tenure rights that the 90-day rule may not be applicable, or perhaps that it should not be enforced. Apparently, petitioner suggests that the significance of tenure rights is so supreme that they should be protected even where the petition has been filed in an untimely fashion. This is not so much a waiver argument under the Commissioner's *N.J.A.C.* 6:24-1.17 authority but instead apparently an argument that the 90-day rule was not meant to interfere with determinations on the merits where tenure rights are at stake. However, there is no merit to this argument.

That there are a certain class of rights which may be considered such that their protection is not to be subject to interference on the basis of untimeliness claims under the 90-day rule is supportable by a review of *Lavin v. Hackensack Bd. of Ed.*, 90 *N.J.* 145 (1982). In that case, the court concluded that a military service credit in a form of a salary increment under *N.J.S.A.* 18A:29-11 was "distinctly different" from salary increments awarded under *N.J.S.A.* 18A:29-8, which are increments awarded based upon an annual evaluation of a teacher's performance. The annual increment for time spent in military service granted under *N.J.S.A.* 18A:29-11 is "without regard to performance as a teacher." As such, the military credit, and disputes concerning it, were not subject to the 90-day rule under *N.J.A.C.* 6:24-1.2. However, in decisions such as *Gordon v. Passaic Bd. of Ed.*, A-3294-84T7 (App. Div. May 27, 1986) and *Joyce Weir v. Bd. of Ed. of the Northern Valley Regional HIgh School District*, A-3520-84T6 (App. Div. April 9, 1986), the Appellant Division has clearly distinguished *Lavin* situations from those involving tenure and reduction in benefits which "hav(e) relationship to the services to be rendered (by petitioner) as an employee," *Lavin v. Hackensack Bd. of Ed.*, 90 *N.J.* 145, 150, as opposed to those statutory entitlements which have no "functional relationship" with experience as a teacher, *Lavin*, at 151. *See also, North Plainfield Education Association v. North Plainfield Bd. of Ed.*, 96 N.J. 587 (1984), at 593-594.

Based upon the above, I **CONCLUDE** that Mr. Cade's failure to be aware of the current state of the law following the issuance of the *Capodilupo* and *Bednar* decisions is an insufficient and legally significant basis for a tolling of the 90-day rule. There is no doubt but that he was fully aware of the facts which established the basis for any legal claim well in advance of 90 days prior to the filing of his petition. The

only missing element in his equation was his understanding of the legal significance of the known facts. There was no "latent defect." There were no unknown "facts." In fact, there was no unknown law, since both *Cadodilupo* and *Bednar* were published opinions of the courts. Thus, unless Mr. Cade's lack of knowledge of those decisions is viewed as legally significant, that is, unless his lack of knowledge of the state of the law and/or of legal decisions which might support his view on what the law should be is deemed to be a relevant legal factor, than his petition must be deemed out of time. I **CONCLUDE** that such lack of knowledge is not legally significant and therefore **CONCLUDE** that the petition was untimely. In addition, I **CONCLUDE** that the sort of right which he seeks to protect, that is seniority and tenure rights asserted to exist in preference to other employed by the Board are not such "statutory entitlements unrelated to performance as to qualify for exemption from the 90-day rule under the doctrine of *Lavin, supra*.

Relaxation of the 90-Day Rule

As noted at page 6 in the discussion of the relevant regulations, *N.J.A.C.* 6:24-1.17 allows for relaxation of the rules under certain circumstances. The Commissioner of Education defined the circumstances for relaxation in connection with the 90-day rule in *Miller v. Morris School District*, *OAL DKT. EDU* 364-80 (February 25, 1980):

> Enlargement of the time period is thus warranted in only three instances: where a substantial constitutional issue is presented, where judicial review is sought of an informal administrative determination and where a matter of significant public interest is involved.

A review of the record in this case indicates that there is no merit to petitioner's contention that the 90-day rule should be relaxed. None of the bases for relaxation cited in *Miller* support such action in this matter where the failure of the petitioner to act was due to his failure to be informed of the current status of case law. The matter does not present a substantial constitutional issue, it is not an informal administrative determination and with respect to the "significant public interest" aspect, there is indeed a significant public interest in swift determination of legal issues and perhaps an even greater public interest in supporting the general doctrine that ignorance of the law is no excuse for the failure of an individual to act in accordance with it, whether it be to his benefit or to avoid detriment. If the petitioner's position were upheld, one can readily foresee many instances where individuals who have not kept themselves up with the current situation legally

would seek to litigate settled factual circumstances based upon legal interpretations which might be favorable to them, but which they were unaware of for some time, thus failing to pursue whatever rights they might have had. The public interest would not generally be served by such an unsettled state of affairs.

For the reasons set forth, I **CONCLUDE** that the petitioner has failed to establish any basis upon which the 90-day rule should be waived.

CONCLUSION

For the reasons expressed above, I **CONCLUDE** that the petitioner failed to act within 90 days of the notice which he had of the action of the District Board of Education and therefore his petition is barred by the provisions of *N.J.A.C.* 6:24-1.2. The petition is therefore **DISMISSED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five days and unless 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.

DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

August 10, 1989
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 14 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

jz

WILLIAM L. CADE, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

Petitioner disagrees with the initial decision's application of N.J.A.C. 6:24-1.2 as barring his claim that his tenure rights were violated. He attaches his brief filed below in support of his position in this regard.

Further, petitioner avers he sought and received an amendment to his claim by alleging the Board continued the employment of intervenors for the 1989-90 school year, and argues said amendment was requested within 90 days of the date of the Board's action. He argues that his claim as to the 1989-90 school year should be deemed timely based on his amendment even if his claims for the prior school year are deemed barred. Petitioner submits this issue was not addressed by the ALJ below.

For such reasons, petitioner submits the initial decision should be reversed and the matter remanded for determination on the merits of his claim.

By way of rebuttal to petitioner's exceptions, the Board excepts to petitioner's enclosing his brief in support of his position regarding the ALJ's application of the 90-day rule without further comment. The Board contends this action fails to meet the requirements of N.J.A.C. 1:1-18.4(b), which obliges a party filing exceptions to point out specific deficiencies in the initial decision.

As to petitioner's second argument averring that a new cause of action arose when the intervenors were renamed to the challenged position for the 1988-89 school year, the Board claims said argument has no merit. Referring to petitioner's post-hearing submission, the Board claims that the single decision upon which petitioner relies, Valanzola v. Wood-Ridge Board of Education, Bergen County, decided by the Commissioner June 16, 1989, does not support petitioner's argument in this regard. The Board contends

the Valanzola case had a factual situation like the instant matter, and was dismissed on summary motion as untimely. The Board suggests the dicta relied upon by petitioner in that case at page 12 of the Commissioner's decision does not mention a new cause of action and does not support petitioner's new cause of action theory.

However, the Board notes that the Valanzola decision cites an earlier Commissioner's decision entitled Paul Gordon v. Board of Education of the Township of Passaic, Morris County, (Gordon II), decided by the Commissioner March 27, 1986, decision on remand September 19, 1986. The Board claims:

> The Gordon case had a crucially different fact pattern from the one presented here and in Valanzola, and serves to illustrate conclusively that petitioner does not have a new cause of action simply because all the intervenors were retained in their positions for the 1989-90 school year. In fact, the non-applicability of the Gordon case was pointed out in respondent's initial brief to Judge Masin (Rb-18) and petitioner failed to dispute that contention in his answering brief, instead simply citing the Valanzola case as indicated above.
> (Board's Reply Exceptions, at p. 2)

The Board distinguishes the above Gordon case by stating that the petitioner in that case was not trying to assert a claim to the same position for a second time, as is the case in the instant matter. His first petition was dismissed for untimely filing. His second, the Board avers, alleged a violation of his tenure and seniority rights, but sought the right to a different position from the one he challenged in his first petition in 1983. Accordingly, the Board avers, the Commissioner held that he could assert a new cause of action in 1985 as such claim was neither res judicata nor collaterally estopped.

The Board contends that unlike the Gordon II case, petitioner herein claims to have a new cause of action to the identical position held by the identical persons which were the subject of the challenge he originally filed. The Board argues that to claim that reappointment of a person to a contested position in a subsequent year creates a new cause of action is completely contrary to the cases cited by the Board in Point I of its brief such as Caldwell-West Caldwell Ed. Assn. v. Bd. of Ed. of the Caldwell-West Caldwell School District, Essex County, decided by the Commissioner May 2, 1988; North Plainfield Ed. Assn. v. Bd. of Ed. of North Plainfield, 96 N.J. 587 (1984); Polaha v. Buena Regional School District, 212 N.J.Super. 628 (App. Div. 1986); Gordon I, Appellate Division Decision (May 27, 1986). For the above reasons, the Board avers that the decision of the ALJ should be adopted and the petition should be dismissed.

Upon a careful and independent review of the instant matter, the Commissioner affirms the decision of the ALJ for the

reasons expressed therein. Peititioner's exceptions concerning application of the 90-day rule to his petition, averring entitlement to positions in respondent's district as either a supervisor or a director, are those advanced at hearing. Said arguments were fully and aptly considered by the ALJ in his order of June 26, 1989.

As to petitioner's exception averring that a new cause of action arose when the intervenors were reappointed by the Board for the school year 1989-90, the Commissioner is in accord with the Board's position as expressed in its reply exceptions. He adopts said arguments as his own. Had a new position opened for which petitioner felt he was entitled, or had a new employee been appointed to one of the positions sought in the instant litigation, then a new cause of action could be argued to have arisen. See Gordon II, supra. See by way of contrast, Paul Gordon v. Passaic Twp. Bd. of Ed., 1983 S.L.D. 1141, aff'd in part/rev'd in part State Board March 6, 1985, aff'd N.J. Superior Court Appellate Division May 27, 1986 (Gordon I). In Gordon I, as the Board notes, the petition of appeal claiming entitlement to an instrumental/vocal music position was dismissed as being untimely. In Gordon II, the position claimed by way of petition of appeal was a different position, that of teacher of instrumental music, from the earlier position for which he claimed entitlement. Said petition was held to constitute a new cause of action, not barred by res judicata or collateral estoppel. Because petitioner herein seeks precisely the same positions held by precisely the same individuals for which his earlier petition laid claim, no claim can be asserted averring a new cause of action. The Commissioner so finds.

Accordingly, for the reasons expressed by the ALJ in his initial decision of August 9, 1989, as supplemented herein, the Petition of Appeal is hereby dismissed, with prejudice for failure to conform with the provisions of N.J.A.C. 6:24-1.2.

COMMISSIONER OF EDUCATION

September 18, 1989

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9267-88
AGENCY DKT. NO. 362-11/88

HELEN YORKE,
Petitioner,
v.
PISCATAWAY TOWNSHIP
BOARD OF EDUCATION,
Respondent.

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

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

Record Closed: June 26, 1989 Decided: August 10, 1989

BEFORE DANIEL B. MC KEOWN, ALJ:

INTRODUCTION

Helen York (petitioner), employed as a teaching staff member with a tenure status by the Piscataway Township Board of Education (Board), claims the action of the Board by which it withheld a salary increment from her for 1988-89 is arbitrary, capricious, and reasonable, and contrary to the provisions of N.J.S.A. 18A:29-14. The Board denies the allegation and contends that the contraverted withholding action is in all respects proper and lawful. The Commissioner of Education transferred the matter on December 21, 1988 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. A telephone prehearing conference was conducted February 10, 1989 at which time the hearing was scheduled to be conducted. A hearing

was conducted May 17, 1989 at the Edison Township Municipal Court, Edison Township at which time limited testimony was taken in addition to accepting into evidence petitioner's documents and documents stipulated in evidence. Thereafter, memoranda of law were filed by the parties. The record closed June 26, 1989.

The conclusion is reached in this initial decision that petitioner failed in her burden to show the controverted case was in any way arbitrary, capricious, unreasonable, or contrary to N.J.S.A. 18A:29-14.

BACKGROUND FACTS

The background facts of the matter are not in dispute between the parties and they are as follows. Petitioner has been employed by the Board since September 1971 as a teacher of mathematics assigned to its high school. During the 1985 spring, the Board determined to withhold petitioner's salary increments for 1985-86. That determination was challenged by petitioner without success. During the 1985-86 academic year, the Board certified to the Commissioner for determination a charge of unbecoming conduct against petitioner. In a decision dated August 3, 1987 the Commissioner found petitioner did engage in conduct unbecoming a teacher and imposed upon her a loss of salary for the first 120 days of her suspension following the certification of the charge by the Board and the withholding of any and all salary increments for the 1986-87 school year. Consequently, petitioner suffered a salary increment withholding in 1985-86 and again in 1986-87. Moreover, because petitioner was on suspension during 1986-87 and did not render teaching service to the Board, it denied her a salary increment for 1987-88. Petitioner was unsuccessful in her challenge to that withholding.

This action challenges the withholding of a salary increment from petitioner for the academic year 1988-89. The Board, after having granted petitioner an opportunity to be heard on August 25, 1988 regarding its tentative withholding action for 1988-89, acted on August 29, 1988 to withhold petitioner's salary increment for 1988-89. The Board's director of staff personnel notified petitioner by letter dated August 30, 1988 of the Board's action on August 29, 1988 and explained that the action was taken "* * * pursuant to the recommendation of your supervisor and principal as outlined in your 1987/88 final evaluation period." (Letter, August 30, 1988 attached to Petition of Appeal) The summary evaluation of petitioner's teaching performance for 1987-88 (J-11)

sets forth two major areas of difficulty perceived to exist in petitioner's teaching performance: 1) lesson preparation and organization; and, 2) knowledge and effective use of subject content.

This concludes a recitation of the background facts of the matter.

ISSUE AND BURDEN OF PROOF

During the prehearing telephone conference conducted February 10, 1989 the parties agreed that the issue of the case is as follows:

> Whether petitioner establishes by a preponderance of credible evidence that she is entitled to a salary increment for 1988-89 and that the Board's action to withhold that increment is arbitrary, capricious, unreasonable, or contrary to N.J.S.A. 18A:29-14.

N.J.S.A. 18A:29-14 provides in relevant part as follows:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll-call majority vote of the full membership of the board of education * * * 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 * * *

The determination of an employing board of education to withhold salary increments from a teaching staff member may not be reversed unless the action is found to be arbitrary, without rational basis or induced by improper motives. Kopera v. West Orange Board of Ed., 60 N.J. Super. 288 (App. Div. 1960). Teaching staff members are not automatically entitled to salary increments. The determination to withhold salary increments is a matter of managerial prerogative which has been delegated by the legislature to local boards of education. Bernards Twp. Board of Ed. v. Bernards Twp. Educ. Assoc., 79 N.J. 311, 312 (1971). The scope of review under the Kopera standard is to determine whether the underlying facts were as those who made the evaluation claimed and whether it was reasonable to conclude as they did based upon those facts, bearing in mind they are the experts, that the affected person did not earn a salary increment. One

who challenges the action of a board to withhold a salary increment carries the ultimate burden to demonstrate that the complained of withholding was arbitrary, capricious, or unreasonable because the board did not have a reasonable basis for its actual conclusion.

Accordingly, petitioner carries the burden of proof to show by a preponderance of credible evidence that the Board's action to withhold the controverted increment is arbitrary, capricious, unreasonable, or contrary to N.J.S.A. 18A:29-14.

FACTS

Except as otherwise noted below, the facts as established by a preponderance of credible evidence as these.

At or about the beginning of the 1987-88 academic year James Koch, the principal of the Piscataway Township High School where petitioner was assigned, created a team of five supervisors to assist petitioner in the performance of her teaching duties. Koch created the unique team approach due to the prior withholding actions by the Board of petitioner's increments and because of the then recently concluded tenure case which resulted in petitioner's reinstatement to her position by the Commissioner on August 3, 1987. The team consisted of Carl Anthony, the supervisor of the mathematics department; John MacFadyn, a supervisor of mathematics; high school vice principal Patricia Walsh; assistant high school vice principal Carol Rigney; and principal Koch. Supervisor Anthony, who has expertise in the teaching of mathematics as does MacFadyn, was an active participant in the recently concluded tenure case against petitioner by having filed a tenure charge against her and by having testified in support of that charge. In addition, petitioner was assigned during 1987-88 to teach mathematics to pupils on a lower level of mathematics achievement.

Documentary evidence submitted by the parties reveal that during 1987-88 petitioner's teaching performance was observed and evaluated by the individual team members on ten occasions. Each evaluation was discussed with petitioner by the supervisor. The written evaluation instrument used by each of the supervisors is entitled Supervisory Report which sets forth nine major categories for teacher performance ratings as being in need of improvement, competence, or as being not observed. Two categories are characterized as "most significant", while the remaining seven categories are classified as "significant". The two major categories characterized as most

significant are lesson preparation and organization, and teaching/learning atmosphere. The remaining seven categories classified as significant are knowledge and effective use of subject content, effective motivational techniques, teacher/pupil rapport, provisions for individual differences, pupil evaluation, pupil interaction, and related professional qualities. Each major category has specific teaching tasks, from a low of 5 specific tasks to a high of 11 tasks, the performance of which by the teacher may be rated by the supervisor as being an observed strength or as being a teaching task to which the teacher needs to give attention in order to strengthen. If the supervisor observes the performance of specific tasks which show neither strengths nor needing attention, then the specific tasks are not checked in either manner. The instrument also provides space for the supervisor to make written comments on areas of the observed teaching performance that need improvement and it also provides space for additional comments by the supervisor.

Ms. Patricia Walsh, the high school vice principal, observed and evaluated petitioner's performance on September 23, 1987 and prepared an evaluation on September 30, 1987. According to Walsh's evaluation (J-1) petitioner was competent in all nine major categories and showed strength in ten specific tasks in four of the major categories. Walsh noted in the comment section certain procedures used by petitioner which she felt were commendable. Walsh concluded by writing:

> Overall it was a good lesson and a well-run class. It is a tough group but your manner of dealing with them is commendable. You showed much patience with those that appeared to require it. Good luck and have a good year.
>
> (J-1)

On October 6, 1987 high school principal James Koch observed petitioner's performance. On October 14, 1987 he evaluated petitioner's performance as competent in all nine major categories and offered no check marks regarding specific teaching tasks. (J-2) Koch did provide written comments on the positive aspects of petitioner's teaching performance and he concluded in the following manner:

> Your lesson had a nice balance of review and homework, introducing a new concept, demonstrating samples of problems, checking student comprehension of the concepts being taught and assigning new homework. I left the class with a feeling that you have prepared well for this lesson and the time-on-task reflected that planning. It is my hope that you continue to demonstrate this type of positive teaching technique.
>
> (J-2)

On October 21, 1987 Carl Anthony, the mathematics department supervisor, observed petitioner's performance. On November 11, 1987 he evaluated such performance as competent in each of the nine major categories, while noting petitioner needs to give attention to the tasks of demonstrating knowledge of subject area and in pupil/pupil interaction. (J-3) Anthony then offered in the comment section of the report 12 specific recommendations, each of which begins with "Continue to". As examples, Anthony wrote "Continue to work on developing and presenting better mathematical definitions," and "Continue to maximize student on-task time; i.e. bell to bell planning and instruction." The last recommendation, however, Anthony simply wrote "Continue to . . . . .".

On November 6, 1987 administrative assistant John MacFadyn observed petitioner's performance. On November 11, 1987 he evaluated her performance as competent in eight of the nine major categories. The ninth category, Related Professional Qualities, MacFadyn reports as being not observed. MacFadyn did note that the teaching task of utilizing subject area vocabulary needed attention by petitioner (J-4). MacFadyn, in the comment section, points out the correct mathematics vocabulary to use in a proportion instead of teaching pupils to "cross-multiply". MacFadyn concluded the evaluation of petitioner's performance in the following manner:

> The class has some difficult members in that they lack motivation and the committment to work. You have organized the classroom time and presentation where, hopefully, the experience will be successful. Encouragement and involvement of these pupils could help foster their active positive classroom participation.
>
> (J-4)

Petitioner's performance was not formally observed and evaluated from November 11, 1987 to March 9, 1988 when administrative assistant MacFadyn returned to her classroom. On March 14, 1988, MacFadyn evaluated petitioner's performance as being competent in eight of the nine major categories, with the ninth category, Related Professional Qualities, being not observed. (J-5) MacFadyn did note three teaching tasks to which petitioner needed to give attention. Those teaching tasks included budgeting class time effectively, demonstrating knowledge of subject area, and relating component parts to a project for unit. In the comment section, MacFadyn offered a correction to an algebraic solution contrary to the one provided by petitioner in the class observed and he offered suggestions that petitioner review the method of mathematical solutions before

discussing actual answers with the pupils. He also recommended that in reviewing tests with pupils, those problems involving multiple steps should be placed on the chalkboard so that all pupils could see the correct method of solution. (J-5)

On March 16, 1988 high school vice principal Walsh observed and evaluated petitioner's performance as being competent in all nine major areas. Walsh went further and noted petitioner demonstrated strength in the teaching tasks of maintaining pupil control, devoting an appropriate time on task, maintaining effective records, and relations with staff. Walsh commended petitioner as follows:

> Good praise given to students for effort and enthusiam.
>
> Good use of board and student use of board.
>
> Good questioning technique-included all of the students and was patient waiting for answers and in helping them understand their errors.
>
> Emphasized proper procedure for solving problems.
>
> The classroom was pleasant and controlled.
>
> (J-6)

On March 14, 1988 principal Koch observed and on March 21, 1988 prepared an evaluation (J-7) of that observation. Koch evaluated petitioner's performance as competent in six of the nine major categories, while declaring he did not observe the other three categories. Koch did observe petitioner's strength in providing an environment conducive to learning, while also noting petitioner must give attention to employing effective questioning techniques. Koch commented that petitioner's pupil seating chart did not seem appropriate, that petitioner spoke in a "slightly monotone voice", and that petitioner answered pupils' questions directly to the inquiring pupil as opposed to the whole class.

On March 21, 1988 assistant vice principal Carol Rigney observed petitioner's performance and prepared an evaluation (J-8) of that performance on March 24, 1988. Rigney noted petitioner's performance as competent in seven categories and noted she did not observe the remaining two categories. Rigney did note that petitioner needed to give attention to devoting appropriate time on task and commented that more pupils need to be involved in questions and answers.

On March 28, 1988 Anthony observed petitioner's performance in two separate classes and on April 15, 1988 he prepared two separate evaluations (J-9, J-10) of those observations. In the first evaluation (J-9), Anthony rated petitioner's performance as competent in seven major areas and as needing improvement in the categories of lesson preparation and organization, along with the category of knowledge and effective use of subject content. In addition, Anthony noted petitioner needed to give attention to providing for continuity of subject matter, budgeting class time effectively, showing evidence of adequate pacing, planning purposeful pupil assignments, using instructional time effectively, devoting appropriate time on task, demonstrating knowledge of subject area, utilizing subject area vocabulary, pupil/pupil interaction, professional growth, and dependability. Anthony also prepared two pages of written comment identifying specific areas of weaknesses and recommendations for improvement in the major categories of lesson preparation and organization, as well as knowledge and effective use of subject content.

In the second evaluation (J-10) prepared on April 15, 1988 Anthony rated petitioner's performance as competent in eight major categories and being in need of improvement in the category of knowledge and effective use of subject content. In addition, Anthony noted petitioner needed to give attention to demonstrating knowledge of subject area, utilization of subject vocabulary, and professional growth. Finally, Anthony offered written comments regarding his criticism that petitioner needed improvement in her knowledge and effective use of subject content.

At a conference held April 21, 1988 between Anthony and petitioner, petitioner was advised by Anthony that she had shown unsatisfactory progress regarding professional growth and improvement under her individual professional improvement plan for 1987-88. (See attachment to J-9 and J-10) Shortly thereafter a meeting occurred April 28, 1988 among petitioner, Anthony, assistant vice principal Rigney, and Donna Jean Campbell, the president of the Piscataway Education Association. What was said at that meeting is somewhat in dispute between the parties.

Petitioner, who did not testify before me, presented the testimony of Ms. Campbell to show Anthony told her he would not recommend her salary increments be withheld from her for 1988-89. Ms. Campbell testified that considerable time was spent during the meeting discussing both April 15 evaluations of petitioner's performance by Anthony. The issue of petitioner's increment for 1988-89 was then discussed and Campbell

testified Anthony stated he would not recommend the withholding of petitioner's increment for 1988-89. According to Campbell, Anthony was most emphatic in this regard. She testified that assistant vice principal Rigney then turned to petitioner and stated "Now, don't you feel better' "

Rigney's recollection of Anthony's words is somewhat different. She testified that while Anthony stated he felt favorable towards petitioner receiving a 1988-89 salary increment he could not then guarantee it because that decision had to be made by the entire team of supervisors who evaluated petitioner's performance in 1987-88. Rigney does admit saying to petitioner "Now, don't you feel better' ."

Anthony, it is noted, is no longer in the Board's employ although he is employed by another New Jersey board of education. Nevertheless, neither side served Anthony with a subpoena to compel his attendance and to give sworn testimony. It is noted that along with the testimony of Rigney, principal Koch also testified under oath that the decision to recommend the withholding of petitioner's 1988-89 salary increment was made by the whole team.

In either case, after the April 28 meeting a final conference on petitioner's performance was conducted on or about June 3, 1988 during which Anthony's summary evaluation (J-11) of petitioner's performance was discussed. That evaluation heavily criticizes petitioner's performance in the major categories of lesson preparation and organization, as well as her knowledge and effective use of subject content. Anthony concludes by recommending petitioner's 1988-89 salary increment be withhold from her. Ms. Campbell testified that that was the first time she learned petitioner's increment for 1988-89 was in jeopardy. She explained that she became livid at Anthony and expressed her profound disappointment to him at that time.

As earlier noted, petitioner appeared before the Board August 25, 1988 to convince it her performance warranted a salary increment for 1988-89. Petitioner's efforts were unsuccessful in this regard for the Board acted August 29, 1988 to withhold any salary increments from her for 1988-89. Petitioner did present in evidence (P-1) a packet of materials within which she takes issue with Anthony's summary evaluation of her performance and she presents other writings intended to show that her 1987-88 performance warrants a salary increment for 1988-89.

This concludes a recitation of all relevant and material facts of the matter.

ARGUMENTS

In support of her allegation that the Board violated certain standards established in judicial and administrative rulings regarding the application of N.J.S.A. 18A:29-14 and that therefore she is entitled to the withheld increments for 1988-89, petitioner in her filed brief relies upon Kopera, supra, and upon Carney v. Freehold Reg. H.S. Board of Ed., 1984 S.L.D. ____ (July 20, 1984), aff'd N.J. Super. App. Div. (A-2190-84T7) Nov. 8, 1985 (unpub), along with Gollub v. Englewood Board of Ed., 1980 S.L.D. 1354, Basile, et al. v. Elmwood Park Board of Ed., 1980 S.L.D. ____ (July 21, 1980), Rowley v. Manalapin-Englishtown Board of Ed., 205 N.J. Super. 65 (1985), and Fitzpatrick v. Montville Board of Ed., 1969 S.L.D. 4. Petitioner contends that the certain standards violated by the Board are (1) few, if any, efforts were made by her supervisors to remediate her perceived inefficiencies and cites Rowley and that (2) her supervisors failed to give her timely notice that her perceived inefficiencies were such that a recommendation would be made to withhold her increments. Implicit, though not clearly stated, in petitioner's argument is that Anthony was biased against her because of the earlier tenure proceedings in which he was the main actor for the Board.

The Board argues to the contrary that neither Anthony nor any other supervisor was biased against her in 1987-88 and that the evaluations, taken as a whole, establish her performance was unsatisfactory in lesson preparation and organization, as well as knowledge and effective use of subject content. These two areas of deficiency, the Board concludes, establishes good cause under N.J.S.A. 18A:29-14 for it to withhold petitioner's 1988-89 salary increment.

DISCUSSION

Initially, it must be noted that Anthony's involvement in the earlier tenure proceeding against petitioner does not, standing by itself, establish bias or animous against her with respect to his evaluations of her performance. Neither side elected to call Anthony as a witness, nor did petitioner elect to call any witnesses in support of her contention that Anthony was biased against her, so that the sole evidence in support of

such implied argument is the fact of Anthony's involvement in the tenure case. Such involvement by Anthony, I **FIND**, is insufficient to establish he was biased against petitioner and deliberately set out to evaluate her performance as unsatisfactory.

Petitioner's reliance upon Rowley, supra, to show an obligation upon supervisors to assist her to remediate inefficiencies is misplaced. Rowley was a matter in which the Board certified charges of inefficiency against Rowley. The Board in that case had a statutory obligation to assist Rowley to overcome perceived inefficiencies. Such is not the case herein. This is not a tenure case, nor is petitioner charged with a tenure charge of inefficiency. Rather, what this case presents is a judgment made within the Board's managerial prerogative that petitioner's performance during 1987-88 did not warrant a salary increment for 1988-89.

In regard to petitioner's argument that she did not receive timely notice her performance was such that a recommendation would be made to withhold her increments, the facts speak otherwise. Petitioner was advised as early as November 11, 1987 that Anthony, the supervisor of the department of mathematics for the Board at that time, was less than pleased with her performance. Furthermore, administrative assistant MacFadyn as well as principal Koch pointed out some deficiencies to petitioner with respect to her performance. Finally, petitioner was advised personally by Anthony on April 15, 1988 that her performance with respect to meeting her individual improvement plan was less than satisfactory.

I am not at all persuaded by the testimony of association president Campbell that Anthony locked himself into not recommending an increment withholding at the meeting held April 28, 1988 because the evidence is convincing Anthony advised such a judgment had to be made by the entire team. The testimony of principal Koch together with assistant vice principal Rigney establish that the entire team arrived at the judgment to recommend against granting petitioner a salary increment for 1988-89.

The evidence in this case establishes that the underlying facts, petitioner's deficiencies regarding lesson preparation and organization along with knowledge and effective use of subject content, were as those who made the evaluation claimed. Given that fact, it is reasonable to **CONCLUDE** as the team did based upon those facts and

accepting the team as the experts that petitioner did not earn a salary increment for 1988-89. That vice principal Walsh evaluated petitioner's performance in a more positive manner than did Anthony does not overcome the fact that Anthony was the supervisor of the high schoold department of mathematics and the team apparently placed reliance in his judgment that petitioner's performance was deficient as did the Piscataway Township Board of Education.

That being so, the Commissioner of Education may not interfere with the discretionary authority of a board of education by setting aside this action which was properly taken within its managerial prerogative.

CONCLUSION

I **CONCLUDE** that based on the facts and the applicable law in this case that Petitioner Helen Yorke has failed in her burden to show by a preponderance of credible evidence that the Board acted arbitrary, capricious, unreasonable, or in violation of N.J.S.A. 18A:29-14 regarding the withholding of salary increments from her for 1988-89. Therefore, the Petition of Appeal is **DISMISSED.**

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

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

August 10, 1989
DATE

DANIEL B. MC KEOWN, ALJ

August 10, 1989
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

AUG 15 1989
DATE

Mailed To Parties:
OFFICE OF ADMINISTRATIVE LAW

ij

HELEN YORKE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed, as have timely exceptions filed by petitioner pursuant to N.J.A.C. 1:1-18.4.

In her exceptions, petitioner reiterates the arguments of her post-hearing brief as summarized in the initial decision, ante. She further takes issue with the ALJ's contention that Carl Anthony, petitioner's supervisor, was not biased against her by referencing statements, uncontested by the Commissioner, from the initial decision in petitioner's 1987 tenure case (In the Matter of the Tenure Hearing of Helen Yorke, School District of the Township of Piscataway, Middlesex County, decided by the Commissioner August 3, 1987, aff'd State Board December 2, 1987, aff'd New Jersey Superior Court, Appellate Division March 17, 1989) to the effect that Anthony had clearly shown animus toward petitioner during both the events leading to the hearing and the hearing itself, despite his protestations to the contrary. Petitioner also disputes the ALJ's characterization of her November 11, 1987 evaluation as an early indication of Anthony's displeasure with her performance.

Upon careful review of the record, the Commissioner determines that the facts underlying the summary evaluation upon which the Board based its decision to withhold petitioner's increment were not as claimed, so that the contested action fails to meet the Kopera standard, supra. He further determines that because the prior evaluations on which the summary evaluation was ostensibly based did not give petitioner any indication of significant dissatisfaction until late in the school year and because no further evaluations were conducted, petitioner had no meaningful opportunity for remedy in accord with Carney, supra.

The summary evaluation itself (Exhibit J-11) is dated June 3, 1988 and consists of two portions, both signed (and evidently prepared) by Carl Anthony as a summative assessment of petitioner's teaching performance in the 1987-88 school year. The first is a standardized "checklist" of the areas under evaluation; the second is a narrative explanation of the ratings given. On the checklist, petitioner was rated unsatisfactory in one of the two "Most Significant" teaching components (lesson preparation and

organization), in one of the six "Significant" teaching components (knowledge and effective use of subject content), and in one of the nine "Related Professional Qualities" (professional growth).

The narrative begins, in effect, by setting a context for what follows: "Over the past few years, Mrs. Yorke, according to supervisory reports and summative evaluations, has been deficient in many if not most of the teaching components and related professional qualities of her profession," so that her schedule for 1987-88 was modified to assign her the school's least demanding math courses. Even so, the narrative states, "according to supervisory reports," she has had "difficulty" this year in two major areas. (J-11, at p. 1)

In the area of lesson preparation and organization, the narrative notes that petitioner needs to upgrade preparation and planning so that class time will be used more efficiently and effectively. Specifically noted is the need for advance preparation of mathematically correct definitions, devotion of adequate time to new lesson material and daily review, and the need for closure after each important presentation or activity.

Knowledge and effective use of subject matter is judged petitioner's "most serious deficiency this year," attention having been drawn to the problem by "[m]ost of the observation reports done by her supervisory team." Specifically noted are the need to prepare better definitions and systems from a mathematical point of view and to make better use of instructional time "through a variety of approaches and different teaching techniques." (J-11, at p. 2)

Although "Teaching/learning atmosphere" is rated satisfactory on the checklist, the narrative notes that petitioner "has to continue to work on improving student-student and teacher-student relationships which reflect mutual respect, consistency, and impartiality." (Id.)

The narrative concludes its "TEACHING RELATED" section with the judgment that "[i]t is the summation of the above (lesson preparation and organization, teaching/learning atmosphere, and knowledge and effective use of subject content) which often times leads to a total classroom atmosphere and environment which is not very conducive to teaching, to learning, and in which teacher direction for each and every student is lacking." (Id.)

A brief section on "Related Professional Qualities," in which petitioner was rated "Unsatisfactory" on the checklist, states that she has been "more cooperative and professional by being more willing to follow suggestions and to support departmental, school, and district policies" and that "in regards to her 1987-88 PIP, it seems, on the surface at least, that Mrs. Yorke is making attempts to address most of the areas as outlined and presented above." The section then concludes that "[t]he major areas of concern for the remainder of the school year and next year" are lesson preparation/organization and knowledge/effective use of subject matter. (J-11, at p.3)

The narrative closes with the recommendation to withhold Mrs. Yorke's increment "due to the major areas of concern outlined above." (Id.)

The portrait thus presented to the Board was that of a teacher with a long history of problems, whose performance throughout 1987-88 was judged by multiple evaluators as being characterized by poor planning, inefficient use of class time, lack of subject area expertise, and a generally poor learning atmosphere for students. Even as she was credited with being more cooperative and trying to implement her PIP, Mrs. Yorke's professional growth was also judged unsatisfactory and the final impression conveyed to the Board was that her deficiencies remained so great that no increment was warranted.

The sole basis on which the Commissioner can judge the factual accuracy of this summation is the series of 10 evaluations conducted on petitioner during 1987-88 by the various members of her supervisory team. Those evaluations, all prepared according to the standard format described in the initial decision, ante, will be described herein at some length in order to demonstrate that, taken as a whole, they do not justify the summary evaluation on which the Board based its action. The Commissioner takes pains to observe that, in assessing those documents, he has not simply adopted the "good marks outnumber bad ones" approach espoused at various points by petitioner and rightly rejected by the ALJ; rather, he has carefully examined each evaluation (both "checkmarks" and narrative) for substance and overall impression, as well as for progressive effect, to determine whether the total evaluative package supports Anthony's final assessment and whether it can reasonably be construed to have afforded petitioner any timely indication that her performance was being judged significantly less than satisfactory by her evaluators.

During the fall semester, petitioner was evaluated four times. On September 23, 1987 (Exhibit J-1), she was rated "Competent" (the highest marking) by Vice Principal Walsh in all "checklist" categories. No subsidiary areas within any category were designated as "Give Attention" and several were marked as "Strengths," including continuity of subject and budgeting of class time (both under "Lesson Preparation and Organization"), appropriate time on task and adaptability to level of students (both under "Knowledge and Effective Use of Subject Content"), pupil control and learner involvement (both under "Teaching/Learning Atmosphere") and rapport with pupils. The appended narrative states that the class was conducted "effectively and efficiently," with time on task being "the focal point*** adhered to throughout the class period." Several "commendable procedures" were specifically noted, including preparation and pacing, and successful mixing of review, instruction, questioning and observation. Three recommendations were offered, two of which were to "[c]ontinue to" maintain structure and discipline needed by class; the third was to be more observant of raised hands. The narrative concluded with an assessment that "[o]verall it was a good lesson and a well run class. It is a tough group but your manner of dealing with them is commendable." (J-1, at p. 2)

On October 6, 1987 (Exhibit J-2), petitioner was again rated "Competent" in all observed areas, this time by Principal Koch. No subsidiary areas were designated as needing attention, and comments not devoted to a factual description of the lesson observed were exemplary:

> Your lesson had a nice balance of reviewing homework, introducing a new concept, demonstrating sample problems, checking student comprehension*** and assigning new homework.*** [Y]ou have prepared well for this lesson and the time-on-task reflected that planning
>
> It is my hope that you continue to demonstrate this type of positive teaching technique.
>
> (J-2, at p. 2)

On October 21 1987 (Exhibit J-3), petitioner was rated by Anthony as competent in all nine categories, with "Give Attention" noted in two of 80 possible subsidiary areas, "Demonstrates knowledge of subject area" and "Pupil/pupil interaction." In the narrative form that follows, the area designated for "Comments on Areas that Need Improvement" is left blank, and 12 recommendations are given under "Additional Comments." All of these recommendations save one begin with "Continue to***"; all but two are general statements of good practice with no indication that such practices were not being followed in the class observed. In the two exceptions, the general directive is followed by observations which would help to explain the two "Give Attention" ratings given on the subsidiary checklist (noting a handful of mathematically "questionable" examples copied from boardwork and the need to be "more forceful" in disciplinary actions); the one recommendation not framed as "Continue to" is a directive to write out all steps in solving problems at the board.

On November 6, 1987 (Exhibit J-4), petitioner was observed by Supervisor of Mathematics John MacFadyn, who rated her "Competent" in all observed areas, marking a "Give Attention" in only one subsidiary area (subject area vocabulary) based, as far as the comments indicate, on his assessment that the technical terminology used to explain one particular concept was not the best possible. MacFadyn also noted (under "Additional Comments") that it would be preferable to have students write their boardwork solutions vertically rather than horizontally and that some students who did not appear prepared to work might benefit from interim reports and school/parent conferences, as well as from encouragement and involvement. His overall assessment was that "[t]he class has some difficult members in that they lack motivation and the commitment to work. You have organized the classroom time and presentation where, hopefully, the experience will be successful.***" (J-4, at p. 2)

Petitioner was not evaluated again until March 3, 1988 (Exhibit J-6), when Vice Principal Walsh rated her "Competent" in all areas and marked several subsidiary areas as "Strengths," including pupil control, time on task and staff relations. In her comments, Walsh noted that the class was "very well organized and in good control" and listed several "Commendations" including praising students for effort and enthusiasm, good questioning and boardwork techniques, patience with students having difficulty, proper procedure for solving problems and a pleasant class atmosphere. (J-6, at p. 2)

On March 9, 1988 (Exhibit J-5), Mrs. Yorke was again observed by John MacFadyn, who once more rated her "Competent" in all observed areas, this time noting that two subsidiary areas ("Demonstrates knowledge of subject area" and "Relates component parts to project or unit") needed to be given attention. Judging from MacFadyn's comments, the first rating stems from his observation of one example where petitioner explained a solution arithmetically rather than strictly algebraically and another where a model equation was presented in short terms which were correct but judged potentially misleading by MacFadyn; the second reflects his observations that, in going over homework, solution methods should occasionally be discussed prior to going over actual answers and that, in reviewing tests, multiple step problems should be written out on the board.

On March 14, 1988 (Exhibit J-7), petitioner was again evaluated by Principal Koch, who rated her "Competent" in all observed areas, marking "Provides an environment conducive to learning" as a "Strength" and "Employs effective questioning techniques" as an area in need of attention. In his comments, Koch explicitly crossed out the form heading "Comments on Areas that Need Improvement" and noted as positive aspects a relaxed and pleasant work atmosphere and adequate work assignments. In a section under "Additional Comments" titled "COMMENTS/SUGGESTIONS," Koch noted that the class's learning situation would benefit from revising the class seating arrangement and answering questions by addressing the class as a whole rather than just the student who had asked the question. Also noted was a tendency to speak in a "slightly monotone style." (J-7, at p. 2)

On March 21, 1988 (Exhibit J-8), petitioner was again evaluated by Vice Principal Rigney, who rated her "Competent" in all observed areas but noted a "Give Attention" on "Devotes appropriate time on task," based, according to comments, on petitioner's having begun lesson review and homework too early in the period. The comment section designated for "Areas that Need Improvement" is left blank, and under "Additional Comments" Rigney explains that the class was originally scheduled for a test which was postponed "due to absences and school problems" so that an alternative lesson had to be provided. (J-8, at p. 2) She also notes that students were well prepared and well behaved, and that they were actively engaged in the lesson; she then suggests a specific technique for extending this engagement still further. The comments conclude with the time on task observation noted above.

One week later, on March 28, 1988, petitioner was observed by Carl Anthony in two separate classes resulting in two separate evaluations, both dated April 15, 1988. In the first (Exhibit J-9), petitioner was rated as "Needs Improvement" in two of the nine major categories, lesson preparation and organization and knowledge and effective use of subject content. Within each of these categories, several subsidiary areas were marked as needing attention. Also marked as needing attention were pupil/pupil interaction, professional growth and dependability. In two pages of comments, Anthony criticized the course of the lesson, noting that no review was given at the beginning of the period, that nearly the entire class was spent going over three homework dittos and no part of the planned new lesson was completed by the end of the period. Under "AREAS THAT NEED IMPROVEMENT" petitioner was directed to upgrade lessons for better use of class time, proper preparation of definitions, and more variety in approaches and styles; to devote adequate time to new lessons; to make daily review an important part of all classes and end each lesson with a summary of new material; and to establish "systems or procedures for doing tasks." She was further directed to make sure subject area vocabulary, definitions and procedures were "mathematically correct" and "[d]o more teaching of mathematics and do less doing of mathematics." (J-9, at pp. 2-3) Anthony's comments conclude with a series of seven recommendations which, in the main, reiterate concerns already raised regarding review, pacing and mathematical precision (one example is cited which was "mathematically weak" although not incorrect). Other directives were to call upon students randomly rather than in predictable sequence and to develop a systematic approach to check daily individual progress on homework assignments. Appended to this evaluation, and obviously based directly on it, was an "Unsatisfactory" PIP progress report also dated April 15, 1988.

In the second evaluation (Exhibit J-10), Anthony again rated petitioner as "Needs Improvement" in "Knowledge and Effective Use of Subject Content" while rating her "Competent" in all other areas including lesson preparation. Outside of the knowledge/effective use category, the only area marked as being in need of attention is "Professional growth." In his comments, Anthony charted the course of the class, which began with a review, moved to new lessons, boardwork and seatwork, and ended with a summary and homework assignment. Anthony took issue with petitioner's handling of boardwork, noting that she went over problems and explained mistakes individually rather than before the entire class, even when several students appeared to be making the same types of mistakes; and with her handling of seatwork, to which she did not go over the answers. Under "AREAS THAT NEED IMPROVEMENT," Anthony essentially reiterated the same generalizations about correctness of definitions and procedures found in his evaluation of the earlier class. His six recommendations are a mix of restatements of previously expressed concerns, "Continue to" statements of general good practice and two specific observations about calling on students randomly (the same observation as in the previous lesson) and "mathematically incorrect" statements (examples given). (J-10, at p. 3) In an appended PIP progress report, also dated April 15, 1988 and based

exclusively on the second evaluation, petitioner once again received a rating of "Unsatisfactory."

Following the March 28, 1988 evaluations, which were not prepared and seen by petitioner until April 15, there were no further classroom observations conducted by any staff member. A group meeting attended by petitioner, Anthony, Rigney and union representative Donna Campbell was held on April 28 to discuss petitioner's April 15 evaluations. Other than the disputed exchange about whether or not Anthony stated he would not recommend withholding of increment, the record does not show what was discussed at that meeting or what the general mood and atmosphere may have been. Sometime between April 28 and June 3, the date of petitioner's summary evaluation, the administrative team evidently met to discuss the thrust of that evaluation and the question of increment withholding; the record is likewise silent as to the course of the meeting.

Overall, the pattern that emerges is as follows. During the course of 1987-88, petitioner received 10 evaluations. The first (September 23) was nothing short of glowing; the second (October 6), while not as effusive, was completely positive. The third and fourth (October 21 by Carl Anthony and November 6 by John MacFadyn, both were dated November 11) fully satisfactory assessments with minor suggestions for improvement couched in terms and contexts that convey a clear message of "keep on as you are doing" rather than a warning of supervisory dissatisfaction. The fifth evaluation (March 3) was again exemplary, while the sixth, seventh and eighth (March 9, 14, and 21) are of the same general tenor (fully satisfactory with a few specific suggestions for improvement not judged sufficient to warrant negative ratings) as the third and fourth. The ninth and tenth (both on March 28 by Carl Anthony, both dated April 15), in contrast, identified substantive deficiencies as reflected in both negative ratings and extensive comments. April 15 PIP reports were appended to, and based entirely on, these last two evaluations. No further evaluations were conducted, and regardless of whether or not Anthony made a statement to the effect that he would not be recommending withholding of increment, there is no indication that either petitioner or her union representative left the meeting of April 28 with a sense that petitioner was in serious trouble; indeed, Rigney's undisputed "now, don't you feel better" comment would appear to support the opposite position.

In the areas identified as deficiencies in the June 3 summary evaluation, prior evaluations tell a rather different story. Anthony's strong statements about lesson preparation, efficient use of class time and time on task appear to be based in their entirety on his own report of April 15 and even then only on the first of the two classes observed on March 28; indeed, petitioner was specifically commended for her performance in these areas on September 23, October 6, November 6 and March 3, while other evaluations (including Anthony's of October 21 and March 28 for the second class observed) rate her competent in this area without further comment. The only modicum of support for these

statements other than Anthony's first April 15 report is a comment on the March 21 evaluation to the effect that lesson review might better have been started a bit later than 15 minutes before the end of the period. The remark about failure to bring activities to closure is based solely and exclusively on Anthony's April 15 comments on March 28's second class observation, is supported by no other observations and indeed would seem to be belied by comments from other evaluators.

In knowledge and use of subject area, it is true that, on three occasions prior to Anthony's evaluations of March 28, Anthony and MacFadyn cited in their comments one or more instances of demonstration problems, formulas or definitions that were mathematically "questionable" though not necessarily incorrect. Even so, however, these citations were presented as isolated occurrences, often in otherwise positive contexts, and did not result in negative ratings or other indications that the problem was generalized throughout the observed lessons. Only in the reports of April 15 were any indications given that this problem had risen to a level of deficiency serious enough to warrant negative categorical ratings, and even the summary report later states that petitioner appeared to have been making efforts to comply with Anthony and MacFadyn's standards. Likewise, a need for further variety in teaching approaches appears only in Anthony's first report of April 15. (The Commissioner notes parenthetically that petitioner appears to have used arithmetic and common sense explanations to demonstrate problems and principles to classes that by all accounts were at a low level of mathematical capability, while Anthony and MacFadyn favored more sophisticated formulations; and that, ironically, one strength for which petitioner was cited for by other evaluators was her ability to adapt material to the level of her classes.)

Anthony's summary criticisms of petitioner's handling of pupils and overall classroom atmosphere are in diametric opposition to previous evaluations which explicitly cite these aspects as particular strengths (September 23, October 6, March 3, and March 14) or judge them at least satisfactory by competent ratings in designated categories without further comment; Anthony himself consistently rated petitioner competent in these areas, with the only modicum of support for his later criticisms being his own (unexplained) October 21 comment suggesting a need for "more forceful" discipline. The summary evaluation's negative assessment of professional growth is directly related to its prior discussion of pedagogical weaknesses and must be judged in that light. Only Anthony, and only in his reports of April 15, even drew attention to this subsidiary area in prior evaluations; and on both occasions he rated petitioner competent in the overall "Related Professional Qualities" category. Finally, even the opening passage of the summary evaluation is technically inaccurate (petitioner had not been teaching during much of the "past few years" other than the period covered by the present evaluation) and certainly helps to set an unfairly negative context for what follows.

Thus, the Commissioner holds that the evaluation presented to the Board for action in withholding Helen Yorke's increment was

both misleading in tone and a general misrepresentation of the facts on which it was obstensibly based. To the extent that certain specific statements within it could be supported by Anthony's evaluation and PIP reports of April 15, or even by a handful of isolated comments scattered through earlier, fully satisfactory reports, the Commissioner holds, in keeping with Carney, supra, that petitioner had no meaningful opportunity to correct her alleged deficiencies because she was only apprised of their seriousness relatively late in the year and was not observed subsequently to determine if she had remedied them or made improvements prior to her summary evaluation. (The Commissioner notes in passing his concurrence with the ALJ that Rowley, supra, is inapposite in this case and he does not rely on it here. He further notes that it is unnecessary to address the question of Anthony's motivation or credibility in preparing so negative a summary evaluation, as its inaccuracy speaks for itself regardless of the presence or absence of good faith belief and intention.)

As he was in Salvatore D'Amico v. Board of Education of the Township of East Brunswick, Middlesex County, decided by the Commissioner July 31, 1984, the Commissioner is here constrained to note that in his judgment the Board believed it had a reasonable basis upon which to withhold petitioner's increment. However, because the facts presented to the Board were not as claimed in the summary evaluation and petitioner was given no meaningful notice of serious deficiency or opportunity for remedy, it must be concluded that the Board did not have a fair and reasonable basis upon which to act. Thus, the Commissioner must hold that petitioner has met her burden of proof that the Board's action in withholding her increment was arbitrary and unreasonable.

Accordingly, the decision of the Administrative Law Judge upholding the Board's action is hereby reversed and the Board of Education of Piscataway Township is hereby directed to restore Helen Yorke's 1988-89 increment.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 18, 1989

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ON MOTION TO DISMISS
OAL DKT. NO. EDU 6368-88
AGENCY DKT. NO. 223-7/88

BARBARA CARNEY,
Petitioner,
v.
BOARD OF EDUCATION OF
THE TOWNSHIP OF MONTCLAIR,
ESSEX COUNTY,
Respondent.

Anna M. Liuzzo, Esq., for petitioner (Dennis M. Di Venuta, attorney)

Patti E. Russell, Esq., for respondent (McCarter & English, attorneys)

Record Closed: July 20, 1989 Decided: August 10, 1989

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

Petitioner was a teacher in the school system of the Board of Education of the Township of Montclair ("Board") during the school years from April 1985 until June 1988. She alleges that the Board's decision not to offer her a contract for the 1988-89 school year was based upon (1) factual mistakes, given the records of her performance and (2) an evaluation by a department chairwoman, with whom petitioner had a "philisophical dispute" relative to petitioner's methods for teaching minority students. On these bases, petitioner claims that the Board's decision not to offer her a contract was arbitrary, capricious and unreasonable and she demands relief, including an order compelling the Board to offer her the contract.

The Board submits that petitioner has failed to state a claim upon which relief can be granted and moves for dismissal of her petition. See, N.J.A.C. 1:1-12.5, N.J.A.C. 1:1-1.3 and R. 4:6-2(e).

PROCEDURAL HISTORY

On July 11, 1988, petitioner's petition was filed with the Commissioner of Education and, on August 23, 1988, the Board's answer was so filed. See, N.J.S.A. 18A:6-9.

The matter was forwarded to the Office of Administrative Law where, on August 26, 1988, it was filed as a contested case. N.J.S.A. 52:14B-1, et seq.; N.J.S.A. 52:14F-1, et seq. and N.J.A.C. 1:1-3.1.

The matter was the subject of a prehearing conference and, on October 4, 1988, a prehearing order was entered.

A February 1, 1989 hearing date was adjourned at the Board's attorney's request.

On May 31, 1989, the Board's papers in support of a motion to dismiss were filed. I notified petitioner that any responding papers should be filed by June 28, 1989. See, N.J.A.C. 1:1-1.3(a), R. 4:6-2(c) and R. 4:46-1. On June 30, 1989, petitioner's brief in opposition to the motion was filed. Despite their lateness, I will consider the petitioner's papers. On July 19 and 20, 1989, the motion was argued in taped telephone conferences.

FACTUAL DISCUSSION

The following FACTS are not in dispute:

In April 1985, petitioner, who is white, began employment by the Board in the position of "supplemental" teacher in the Special Education Department of Montclair High School. (See, P-3.)

On June 12, 1986, Board "observer" James Bender found petitioner to be "clearly effective" in motivating students in her supplemental instruction class. (See, P-16.)

On June 20, 1986, Mr. Bender's "Summative Evaluation" showed petitioner to be rated "commendable" (the highest rating) in 13 of the 38 areas measured and, merely "competent" in 25 of the 38 areas. She received no "unacceptable" rating. (See, P-20) Mr. Bender's "Annual Written Performance Report" on petitioner stated that, "in spite of arriving mid-year," she was "able to initiate an effective program of support and learning for her students in a short time. (See, P-19.)

On January 6, 1987, Board observer Terry Trigg-Scales found petitioner to have an "excellent" class calendar of assignments and due dates; a "warm atmosphere, resulting from the display of student work and other visual aids; a "heartwarming" rapport with her students; and "varied and appropriate" instructional techniques. (See, P-15.)

On February 4, 1987, the Board's Director of Special Projects, Barbara Strobert, wrote to petitioner relative to her application for a grant, expressing appreciation for the "time and effort (she had) devoted..." on behalf of Montclair students. (See, P-4.)

On February 4, 1987, Mr. Bender observed petitioner to have a "relaxed and professional" class atmosphere in which an "informative and valued" lesson was presented to the students, who "worked well" with petitioner. (See, P-17.)

On February 12, 1987, Ms. Terry Trigg-Scales found petitioner to have presented a "very interesting and worthwhile" (Black History month) lesson to students in her Supplemental Instruction class. (See, P-18.)

On February 26, 1987, Ms. Trigg-Scales' "Summative Evaluation" showed petitioner to be "commendable" (the highest rating) in 12 of the 39 areas measured and merely "satisfactory" in 27 of the 39 areas. (I note that the "Summative Evaluation" form substituted the term "satisfactory" for "competent" as the next highest rating.) She received no "unacceptable" ratings. (See, P-21.)

On May 8, 1987, Faith Spitz, Director of Pupil Services, wrote to petitioner advising her of her transfer to the "Resource Room" at the Board's George Inners School and complimenting petitioner on her "effort and energy" and "continued commitment" to her students. (See, P-6 and P-11.)

For the 1987-1988 school year, petitioner worked in the position of resource room teacher. (See, P-3.)

On September 29, 1987, Shirlene Powell-Sanders, who is black, petitioner's department chairwoman, wrote to petitioner, expressing thanks and appreciation for her "workshop in strategies" for new staff members. (See, P-2.)

On November 20, 1987, Ms. Powell-Sanders observed petitioner using the story The Pearl as a vehicle to introduce and define words. Ms. Powell-Sanders described petitioner's room as "bright, cheerful, warm and nurturing" and demonstrating "much effort" by petitioner, however, she also commented that "vocabulary should directly precede the chapter being read." (See, J-3.)

On January 20, 1988, petitioner was observed by Ms. Trigg-Scales while teaching Haiku writing to her "very eager" students. She found that petitioner's enthusiasm and high energy level "were contagious" and benefited her students greatly. Her room was "most attractive" and "suggested much care and concern" for her students. (See, J-4.)

On March 8, 1988, petitioner was observed by Ms. Powell-Sanders while teaching fractions with the use of "dittos," blackboard and individualized assistance. She found that the display of student work and visual aids created a "warm" atmosphere and petitioner's "constant positive encouragement" "motivated her students," however, she also commented that petitioner's students were functioning at different skill levels. (See, J-5.)

On March 15, 1988, Ms. Powell-Sanders' "Summative Evaluation," on petitioner showed her to be rated "commendable" (the highest rating) in four of the 38 areas measured and merely "satisfactory" in 34 of the 38 areas. She received no "unacceptable" ratings. (See, J-7.)

On March 15, 1988, Ms. Powell-Sanders' "Annual Written Performance Report," described petitioner as having the following "areas of strength": Communicates with parents and teachers, provides support, encouragement and motivation, employs a variety of instructional materials, genuine interest in individual student needs and described petitioner's students as "progressing satisfactorily." (See, J-6.)

On April 6, 1988, the Board forwarded to petitioner a notice of an April 11, 1988 Board hearing during which it would be decided whether "notification of no contract" would be given to a number of employees, including petitioner. (See, R-2.)

On April 12 and 15, 1988, "as a direct result of (her) performance review and recommendation from her principal," the Board forwarded to petitioner a letter notifying her that it had decided not to offer her a contract for 1988-1989 and enclosing a copy of the "Non-tenured Teacher Evaluation Regulations." (See, J-1 and P-1.)

On April 25, 1988, Kurt L. Weinheimer, principal of Montclair High School, forwarded to petitioner a memorandum listing the following "reasons for (his) recommending the non-renewal of (her) contract for 1988-89":

1. An overall assessment of your classroom observations and summative evaluation for three years has resulted in the opinion you are not performing at a level that is expected for a teacher in Montclair. Teachers deemed commendable are recommended for continued renewal not those deemed satisfactory or less.

2. Having students become more personally responsible for their learning and more independent is not at the expected level.

3. Sequencing and organization of instructional methods and materials in a manner to better assist student learning could be better, i.e. - reading vocabulary should occur prior to the reading assignment.

4. Individualization of instruction is not evidenced as it could be, i.e. - general math instruction. (See, J-2.) [Emphasis added.]

On April 26, 1988, petitioner wrote to the Board, requesting a hearing relative to its decision not to offer a contract for 1988-1989. (See, R-3.)

On April 28, 1988, the Board's Superintendent of Schools, Mary L. Fitzgerald, wrote to petitioner declining petitioner's request for a recommendation that the Board offer her a contract for 1988-1989. (See, R-4.)

On April 29, 1988, Superintendent Fitzgerald wrote to petitioner notifying her that in response to her request an "informal appearance...before the Board..." had been scheduled for May 9, 1988. (See, R-5.)

On May 6, 1988, "Learning Disabilities Teacher-Consultant" Donna Karanja, wrote to the Board, citing her experience working with petitioner as a Child Study Team Case Manager and recommending petitioner for reemployment, as an "outstanding" teacher. (See, P-5.)

On May 8, 1988, a Board Science Department Teacher Warren Marchioni, wrote to Superintendent Fitzgerald, complimenting petitioner for her "sincere and dedicated" work resulting in academic progress for a troublesome student. (See, P-8.)

On May 9, 1988, the Board met regarding the matter of a contract for petitioner for 1988-89, among other things. The Board was presented with a number of documents in that regard and decided to continue the matter at a later meeting. (See, R-6.)

On May 12, 1988, "a concerned parent," "Mrs. Bader," wrote to the Board, citing petitioner's having done a "great deal for her students," and recommending her for re-employment. (See, P-12.)

On May 13, 1988, Linda Gallmon wrote to Superintendent Fitzgerald, citing petitioner's "expertise" and "caring support," given and its "positive" result on Mrs. Gallmon's son. (See, P-14.)

On May 23, 1988, the Board held an "informal" meeting, during which petitioner was given the opportunity to persuade the Board that another contract should be offered. Petitioner described her performance and took issue with Principal Weinheimer's "reasons for recommending the nonrenewal of (her) contract for 1988-89." 1. Petitioner pointed

out that she never received a "less than satisfactory evaluation, that she had been observed to be an excellent teacher by Ms. Trigg-Scales" and that she had received no prior notice that her performance and ratings were not sufficient to obtain tenure. 2. Petitioner submitted letters of Director of Pupil Services Spitz, wherein petitioner was complimented for her performance. Petitioner also submitted a statement from Al Wallace, a Science Teacher in the Board's system, wherein she was described as a "strong, effective and commendable" teacher whose "time and effort" "often get[s] the students (in Mr. Wallace's class) to do more work than [he] can." (See, P-6, P-7 and P-10.) 3. Petitioner denied the allegation that her methods were not well organized and alleged that new words were presented before a reading assignment. 4. Petitioner denied responsibility for the absence of individualized instruction materials for certain of her students. She pointed out that, despite her requests, it was not made available to her. Petitioner also stated that she did provide individualized instruction to her students. See, P-3. Finally, petitioner described her "philosophical" difference from Ms. Powell-Sanders as relating to what vocabulary was "appropriate" for her minority students. The Board discussed petitioner's "performance, personnel file and the administration's recommendation" and "reaffirmed its earlier decision" not to offer petitioner a contract for 1988-1989. (See, R-7 and R-8.)

LEGAL DISCUSSION AND CONCLUSIONS

Absent constitutional constraints or legislatively conferred rights, a local board of education has almost complete discretion in determining whether to offer another contract to a nontenured teacher. See, Dore v. Bedminster Twp. Bd. of Ed., 185 N.J. Super. 447 (App. Div. 1982). See also, Guerriero v. Bd. of Ed. of Borough of Glen Rock, 1986 S.L.D. ____, State Bd. Dkt. No. 26-85 (February 7, 1986); aff'd (N.J. App. Div. Dec. 17, 1986, A-3316-85T6) (unreported), wherein a Board's reasons for refusal to renew the teacher's contract included parental complaints regarding his methodology, presentation of course materials and parental desire for transfer of their children from his class and wherein the teacher argued that the complaints were from a small group of parents solicited by board members who were opposed to him.

A nontenured teacher whose employment is not continued is statutorily entitled to a

statement of reasons for the board's determination. N.J.S.A. 18A:27-3.2. The teacher is also entitled to an informal hearing during which she may attempt to persuade the board to offer another contract. N.J.A.C. 6:3-1.20(a) and (b). Where the board is not so persuaded, an appeal may be made to the Commissioner, pursuant to N.J.S.A. 18A:6-9; however, his scope of review is "very limited," i.e., the question is whether there is a constitutional or statutory violation and not whether the petitioner "is a good teacher by objective criteria." See, Guerriero, supra.

The Board has moved for dismissal of the petition, submitting that it fails to state a claim upon which relief can be granted. N.J.A.C. 1:1-1.3 and R. 4:6-2(e).

Since the parties have submitted exhibits, i.e., matters outside the pleadings, the motion is treated as a motion for summary decision. N.J.A.C. 1:1-12.5, N.J.A.C. 1:1-1.3 and R. 4:6-2(e).

The motion to dismiss or for summary disposition is an efficient means of disposing of litigation, available when the petition fails to state a claim or where there are no genuine issues of material fact. However, such a motion must be carefully considered. The burden of proof is upon the movant and all reasonable inferences must be drawn in favor of the opponent of the motion, whose papers must be indulgently treated. See, R. 4:46-2 and Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954).

(1) THE ALLEGED FACTUAL MISTAKES RELATIVE TO THE BOARD'S DETERMINATION NOT TO OFFER PETITIONER ANOTHER CONTRACT.

Principal Weinheimer determined that, "overall," petitioner's performance was not up to the "commendable" (highest) standard required for (his recommendation of) renewal of her contract and, therefore, he recommended "nonrenewal." (See, J-2.)

Given the petitioner's "Summative Evaluations," Principal Weinheimer's determination appears to be reasonable: petitioner's June 20, 1986 (first) Summative Evaluation, showed her to be "commendable" in only 13 of the 38 areas rated and merely "competent" in 25 of the 38 areas rated (see, P-19); petitioner's February 26, 1987

(second) Summative Evaluation showed her to be "commendable" in only 12 of the 39 areas rated and merely "satisfactory" in 27 of the 39 areas (see, P-21) and petitioner's March 15, 1988 (third) Summative Evaluation showed petitioner to be "commendable" in only 4 of the 38 areas rated and merely "satisfactory" in 34 of the areas. (See, J-7.)

That is, in the summative evaluations, the petitioner's total of 29 "commendables" out of a possible 115, is far below a majority on which principal Weinheimers might base a recommendation for another contract, consistent with his position described in his April 25, 1988 memorandum. (See, J-2.) (I also note that the observation records were highly complimentary of the petitioner, but they do not contain the useful quantified ratings which the summative evaluations have.)

It must be noted further that Principal Weinheimer provided only a recommendation to the Board. Petitioner was afforded an opportunity to make the Board aware of the evidence such as the "excellent" ratings she had received from certain observers.

The Board presumably balanced the recommendations, factors, etc. from Principal Weinheimer and the petitioner and then determined not to offer another contract.

(2) THE ALLEGED EFFECT OF THE CONDUCT OF MS. POWELL-SANDERS, WITH WHOM PETITIONER HAD "PHILOSOPHICAL DIFFERENCES"

The petition refers to a "philosophical dispute" and to the white/black racial difference between petitioner and Ms. Powell-Sanders ("the reviewing party"). The petition also alleges that the "philosophical differences were the primary reasons for the evaluation results and the decision to deny reemployment to petitioner." See, Petition, paragraph 4(b).

Petitioner offers no reliable evidence in this regard, other other than an allusion to a conversation, during which Ms. Powell-Sanders allegedly stated to petitioner that vocabulary from The Pearl was not "appropriate" for petitioner's class of minority students. (See, J-3 and P-3.)

I also note that, although (the allegedly prejudiced) Ms. Powell-Sanders' summative evaluation rated petitioner "commendable" in fewer areas (in 1988) than Ms. Trigg-Scales did (in 1986 and 1987), even in Ms. Trigg-Scales' Summative Evaluations, petitioner received "commendable" ratings in far less than a majority of the areas rated. Reasonably, then even discounting the ratings given by Ms. Powell-Sanders, petitioner still falls below the "commendable" level required for contract renewal. See in this regard, N.J.S.A. 18A:27-3.1, et seq. and J-2, paragraph 1.

As described above, at the May 23, 1988 meeting, petitioner was allowed an opportunity to persuade the Board to offer her another contract. See, N.J.S.A. 18A:27-3.3 and N.J.A.C. 6:3-1.20. Presumedly, the petitioner made the Board aware of all the facts and allegations she has presented here. (Petitioner did not supply to me the record of the Board's meeting.) Still, the Board determined not to offer petitioner another contract and there is no allegation that the Board acted in bad faith. It is also noteworthy that it was Principal Weinheimer, who is not alleged to be prejudiced or unfair, who made the recommendation to the Board not to offer a contract to petitioner.

Even viewing the petitioner's papers indulgently and drawing all reasonable inferences in favor of petitioner, given the very narrow issue to be decided here, I must **FIND** and **CONCLUDE** that (1) the petitioner has failed in her petition to state a cause upon which relief can be granted and/or (2) relative to this motion, the petitioner has failed to show that there are genuine material issues of fact. I **CONCLUDE** therefore that the Board's motion must be granted.

ORDER

I **ORDER** that the petition be **DISMISSED** with prejudice. I **ORDER** and grant summary disposition in favor of the Board.

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

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

8/11/89
DATE

John R. Tassini
JOHN R. TASSINI, ALJ

8/15/89
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

AUG 15 1989
DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

ro/e

EDWARD PIGUT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that petitioner lacks standing to bring the instant action; that if he has standing, the Petition of Appeal has been untimely filed; and, also, that if petitioner has standing and if the Petition of Appeal had been timely filed, the evidence presented by petitioner at hearing is insufficient to find and conclude that the Board is violating or has violated any of the cited administrative regulations. On the issue of standing, the Commissioner would add that in the matter encaptioned Concerned Parents of Wall Township v. Board of Education of the Township of Wall and Dr. Mark Franceschini, Superintendent, the matter of standing was resolved in favor of petitioners by way of Decision on Motion dated September 7, 1989. However, as noted by the ALJ, the interest advanced by the parents in Concerned Parents, supra, is not comparable to the remote or non-existent interest suggested by the instant petitioner, and therefore is deemed distinguishable from this matter.

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

December 20, 1989

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

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

November 8, 1989
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

November 9, 1989
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

NOV 14 1989
DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW /K.S.

ml

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Nathanya G. Simon, Esq., for BERNARDSVILLE Board of Education
(Schwartz, Pisano, Simon, Edelstein & Ben-Asher, attorneys)

Record Closed: July 18, 1989 Decided: August 10, 1989

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

Petitioner, (Mount Pleasant-Blythdale Union Free School District) a New York State private school for the handicapped, challenges the maximum tuition rate approved by the New Jersey Department of Education (State), and seeks to recover the difference between that tuition and the rate approved by the New York State Department of Education for each New Jersey pupil in attendance at its school beginning with the 1983-84 school year.

The State denies any entitlement of tuition above the approved rate(s), and filed a Motion to Dismiss because of the alleged untimely filing of the petition pursuant to N.J.A.C. 6:24-1.2. The respondent local school boards assert they are prohibited from transmitting tuition payments above the rate approved by the State, and join with the State in its Motion to Dismiss.

The Petition of Appeal was filed with the Commissioner of Education on August 8, 1988, and transmitted to the Office of Administrative Law as a contested matter on October 12, 1988 pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on December 15, 1988, at which all parties agreed to the issues as follows:

1. Is petitioner entitled to receive a tuition greater than that established by the New Jersey State Department of Education?

2. Shall the Petition of Appeal be dismissed due to laches, estoppel, untimeliness, lack of jurisdiction, absence of valid contract, waiver, Statute of Frauds, or lack of standing?

Counsel for petitioner and the ten respondents jointly requested a supplemental prehearing conference after the parties complied with discovery requests in order to facilitate factual stipulations and establish orderly procedures to resolve the controversy, which was granted.

A second prehearing conference was held on June 5, 1989, at which the issues remain unchanged; and counsel agreed to submit the substantive issue [No. 1] for summary decision [the briefing calendar was suspended pending this decision on the instant motion];

The State filed its Motion to Dismiss, due to the alleged untimely filing by petitioner, under date of June 13, 1989, and the record closed on July 18, 1989 upon receipt of the State's reply brief to petitioner's responsive papers.

BACKGROUND

Mount Pleasant-Blythedale Union Free School District (MP-B) is a public school district in New York State. It educates pupils who are admitted to the Childrens' Hospital, which occurs only on recommendation of the pupil's physician. Neither the pupils' child study team or the local district are involved in either programming or placement.

MP-B is treated by the New Jersey Department of Education as a private school because the program is approved by New York State under Article 89, the regulatory scheme governing private schools.

MP-B was required to make application to secure eligibility status from the New Jersey Department of Education to enable New Jersey districts to make tuition payments. It did so, and MP-B was noticed under date of March 3, 1987 of its eligibility to receive New Jersey classified pupils, retroactive to the 1983-84 school year. That notice also granted maximum rates for multiply handicapped pupils for school years 1983-1987. No appeal of the tuition rates was filed at that time.

The application for New Jersey approval required the MP-B Superintendent of Schools to sign the following statement, which was signed:

> To be eligible as an out-of-state private school to receive New Jersey students, the school must be approved by the education department of the state in which it is located and abide by the New Jersey regulations for private schools for the handicapped (N.J.A.C. 6:28, 6-20, 6-3), P.L. 94-142 and Section 514, P.L. 93-112. In submitting this application you agree to accept the New Jersey maximum tuition rate or the lower rate set by your state's department of education if that rate is lower than the New Jersey maximum rate.

MP-B filed a consolidated Complaint in New Jersey Superior Court, Law Division, on August 8, 1987. The Attorney General's Office was served on March 2, 1988. The Honorable N. Peter Conforti, J.S.C., entered an Order on April 29, 1988 which transferred the matter to the New Jersey Commmissioner of Education pursuant to N.J.S.A. 18A:6-9.

MP-B filed its Petition of Appeal with the New Jersey Commissioner of Education on October 7, 1987.

It is noted that all respondent local school districts, excepting North Arlington and Freehold, represented a willingness to make tuition payments up to that established by the New Jersey State Department, which is incorporated in the supplemental Prehearing Order entered on June 5, 1989.

PREFACE

Notwithstanding multiple concerns expressed by counsel for local district respondents, particularly no involvement by their child study teams in classification or individual education plan development, or local district role in the placement process, the sole issue addressed herein shall be the alleged untimely filing by MP-B as incorporated in the Motion to Dismiss.

ARGUMENTS OF COUNSEL

Respondents rely on the duly promulgated and adopted regulation codified as N.J.A.C. 6:24-1.2(b), which 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.

Respondents also rely on case law in support of its Motion to Dismiss.

Respondents argue strenuously for the application of the 90-day rule based on the purposes for which it was promulgated and adopted, which need not be detailed herein. Housing Authority of Union City v. Commonwealth Trust Co., 25 N.J. 330 (1958); Ochs v. Federal Insurance Company, 90 N.J. 108 (1982); Kyle v. Green Acres of Verona, 44 N.J. 100 (1965); Kaczmarek v. N.J. Turnpike Authority, 77 N.J. 329 (1987); Leake v. Bullock, 104 N.J. Super. 309 (App. Div. 1975).

Respondents also argue that the Commissioner's right to dismiss petitions filed after expiration of the 90-day period following a cause of action has been well established by the courts in New Jersey. North Plainfield Educ. Ass'n. v. Bd. of Educ. of the Borough of North Plainfield, 96 N.J. 587 (1984); Riely v. Bd. of Educ. of North Hunterdon Central High School, 173 N.J. Super. 109 (App. Div. 1980).

Petitioner argues that N.J.A.C. 6:24-1.2 is inapplicable as it is circumscribed by N.J.A.C. 6:24-4.1(c) since the appeal concerns the maximum tuition rate approved by the New Jersey Department of Education.

Petitioner also argues the contested matter herein does not fall within the jurisdiction of the Commissioner of Education as it is a dispute between two sovereigns, the New Jersey Department of Education and the New York State Board of Regents, concerning disparate tuition rates.

Petitioner persists in its argument that its action was pursued in accordance with N.J.A.C. 6:24-4.1(c), and should not be barred as it was transferred to the Commissioner by the New Jersey Superior Court.

Petitioner finally argues, in the event N.J.A.C. 6:24-1.2 is deemed to be applicable, that relaxation of the 90-day rule should be granted as it did not sleep on its rights; pursued this action in good faith; and failure to do so would impose a hardship on it.

Respondents, in reply, point out that N.J.A.C. 6:20-4.1(c) [erroneously referred to by petitioner as N.J.A.C. 6:24-4.1(c)] provided for an in-house tuition rate review, which was deleted from the regulatory scheme in May 1987, some three months before petitioner filed its action in Superior Court.

DISCUSSION

It must first be noted that petitioner's jurisdictional issue is one it may have appealed to the New Jersey Appellate Division upon receipt of Judge Conforti's Order under date of April 29, 1988, which transferred the matter to the Commissioner pursuant to N.J.S.A. 18A:6-9. I am not clothed with the authority to sit in appellate review of a determination made in Superior Court and it shall not be further addressed here.

Petitioner's reliance on N.J.A.C. 6:20-4.1(c) merits no consideration here as the regulation did not exist when the action was filed in Superior Court on August 8, 1987.

Petitioner's argument that Judge Conforti's Order tolls the 90-day filing requirement must also be rejected. Petitioners in Vogel Bus Company, Inc., et al. v. Bd. of Educ. of the Union County Regional High School District, 1987 S.L.D. _____ (decided December 2, 1987) appealed the Commissioner's decision directly to the Appellate Division, which then transferred the matter to the appropriate forum, the State Board of Education, on February 11, 1988. The State Board dismissed the appeal as untimely

pursuant to N.J.S.A. 18A:6-28. The Appellate Division affirmed the State Board on further appeal as the petitioner's initial appeal to the Appellate Division did not toll the time for filing its appeal to the State Board. (App. Div. Dkt. No. A-46-45-87T1 decided April 27, 1989).

N.J.A.C. 6:24-1.17 states:

> The rules herein contained shall be considered general rules of practice to govern, expedite and effectuate the procedure before, and the actions of, the commissioner in connection with the determination of controversies and dissputes under the school laws. They may be relaxed or dispensed with by the commissioner, in his or her discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.

The limited circumstances under which the 90-day rule may be relaxed were addressed by the Commissioner in Miller v. Morris School District, 1980 S.L.D. ____ (decided February 25, 1989). He said:

> Enlargement of the time period is thus warranted in only three instances: where a substantial constitutional issue is presented, where judicial review is sought of an informal administrative determination and where a matter of significant public interest is involved. Brunetti v. New Milford, 68 N.J. 576, 586 (1975); Schack v. Trimple, 28 N.J. 40, 48, 50-51 (1958); Reahl v. Randolph Township Municipal Utilities Authority, 163 N.J. Super. 501, 509 (App. Div. 1978), cert den. 81 N.J. 45 (1979).

Concerning petitioner's argument of hardship, the Honorable Stephen G. Weiss, ALJ in Weir v. Bd. of Educ. of the Northern Valley Regional High School District, 1984 S.L.D. ____ (decided July 20, 1984), referred to Bogart v. Bd. of Educ. of the City of East Orange, 1983 S.L.D. ____ (decided March 14, 1983) wherein he said at 5:

> The point to be made is that there will always be an arguably harsh result when the 90-day rule is applied. But the cases which have interpreted and applied the rule teach that this is no reason not to use it. Indeed, if the rule was relaxed simply because the result would be harsh if applied, then the rule might as well be ignored in its entirety on nearly every occasion.

FINDINGS OF FACT

1. The cause of action in this matter occurred on March 3, 1987 when the New Jersey Department of Education noticed the Mount Pleasant-Blythedale Union Free School District of its approval and eligibility to receive New Jersey pupils classified as multiply handicapped and incorporated maximum tuition rates for the school years 1983-1987 retroactive to the 1983-84 school year.

2. MP-B filed its action in New Jersey Superior Court, Law Division, on August 8, 1987, which was 150-plus days after the cause of action.

3. The Honorable N. Peter Conforti, J.S.C. entered an Order on April 29, 1988 transferring the matter to the New Jersey Commissioner of Education pursuant to N.J.S.A. 18A:6-9.

4. MP-B filed its Petition of Appeal with the Commissioner of Education on October 7, 1988, which was over one-year and seven-months after the cause of action, one-year and two-months after the filing of its action in Superior Court, and almost six months after the transfer of the matter by Judge Conforti.

5. The Petition of Appeal was untimely filed.

6. There is no substantial constitutional issue to be addressed.

7. Judicial review of an informal administration determination is not sought herein.

8. A matter of significant public interest is not involved.

9. There is no compelling reason to relax the 90-day rule pursuant to N.J.A.C. 6:24-1.17.

CONCLUSIONS OF LAW

Respondent's Motion to Dismiss is **GRANTED. IT IS ORDERED** that the Petition of Appeal shall be and is hereby **DISMISSED.**

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

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

10 August 1989
DATE

WARD R. YOUNG, ALJ

Aug. 14, 1989
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

AUG 14 1989
DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

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MT. PLEASANT-BLYTHEDALE UNION FREE SCHOOL DISTRICT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION ET AL.,	:	DECISION
RESPONDENTS.	:	
	:	

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

Petitioner raises two exceptions. First, it claims N.J.A.C. 6:24-1.2 is inapplicable to this action. It distinguishes the language of that regulation by suggesting that the Commissioner of Education, not a district board of education, made the determination that it was not entitled to the full tuition granted it by the New York Board of Regents and, thus, this case is not an appeal of "***a final order, ruling or other action by the district board of education***" as provided for by N.J.A.C. 6:24-1.2. (emphasis added)

Further, petitioner argues that, contrary to the finding of the ALJ below, there is a substantial constitutional issue to be addressed. "Namely, the issue is whether or not the New Jersey State Department of Education can impose its maximum tuition rate on school's (sic) under the jurisdiction of New York State Board of Regents." (Exceptions, at p. 2) Because it believes there is a substantial constitutional issue present, petitioner claims that if N.J.A.C. 6:24-1.2 applies, it should be relaxed pursuant to N.J.A.C. 6:24-1.17. It cites Miller v. Morris School District decided by the Commissioner February 25, 1980 in support of this contention.

Petitioners seeks either a modification or a reversal permitting it to proceed on the merits of the matter.

By way of reply exceptions, the State contends that while N.J.A.C. 6:24-1.2 does refer to acts of a board of education, such case law as Nealy v. Board of Education of the Borough of Roselle, et al., decided by the Commissioner July 16, 1987 speaks to the fact that the State agency has viewed that regulation to have broader meaning. In that case, the State argues, a teacher challenged the decision of the State Board of Examiners which denied her certification, claiming it had misprocessed her application for certification. The State Board filed a motion to dismiss the

petition for failure to file within 90 days of the date Ms. Nealy received the letter from the State Board of Examiners advising her that she would not be granted certification without a passing score on the test. The Commissioner affirmed the ALJ's dismissal based on the 90-day rule. Thus, the State contends, the agency interprets N.J.A.C. 6:24-1.2 to include any disputed activity which falls within the aegis of N.J.S.A. 18A:6-9. To conclude otherwise, the State argues, would preclude application of the 90-day rule in actions undertaken by a state education official, county educational official, a teacher, an education association or other party not a board of education. It cites Board of Education of the City of Asbury Park v. Mayor and Council of the City of Asbury Park and the Monmouth County Clerk of Elections, Appellate Division Docket No. A-3123-86T1 unpublished opinion (October 5, 1987) among others as an example of actions undertaken by other than a board of education that were cognizable before the Commissioner. The State suggests that the result petitioner seeks would mean that the 90-day time bar would apply to actions of a board of education, but no limits would apply to litigation against other parties. (Exceptions, at pp. 3-4)

In response to petitioner's argument that the time bar should be relaxed because it claims a substantial constitutional question is at issue, the State argues that petitioner fails to identify the constitutional question at issue required for relaxation. The State claims no such issue exists and, thus, there are no grounds for relaxing the time limitations of N.J.A.C. 6:24-1.17.

For these reasons and in reliance upon its brief in support of the Department of Education's Motion to dismiss the Petition, as well as its reply brief in support of said motion, the State contends the initial decision should be affirmed.

The Bernardsville Board's reply exceptions also support the initial decision. It further notes that the timeliness question was raised in the original prehearing conference. It adds that the ALJ issued correspondence dated July 25, 1989 to all counsel involved stating his cancellation of the briefing schedule set up at the second prehearing conference of June 5, 1989 on the State Motion to Dismiss which included argument on the untimeliness issue. The ALJ stated in his correspondence that he cancelled the briefing calendar "due to my desire to avoid unnecessary work in the event Petitioner does not prevail on the State Department's Motion. "***In the event the Motion is denied, I will advise of a revised briefing schedule on Issue No. 1." (Bernardsville's Reply Exceptions, at p. 2, quoting ALJ Ward Young's Letter dated July 25, 1989)

Bernardsville argues that as a result of this letter, that the ultimate disposition of the motion by granting dismissal based on untimely filing was warranted. Bernardsville avers petitioner's exceptions with respect to this point are without basis in fact or law, therefore.

Further, Bernardsville contends N.J.A.C. 6:24-1.2 is applicable

> ***regardless of the designated respondent named in the Petition of Appeal. With specific respect to Respondent, Bernardsville Board of Education, the student attended school for which tuition was billed in April, May and June 1987. The instant Petition of Appeal against the Bernardsville Board of Education was not filed until October, 1988. Thus, the Petition of Appeal was clearly untimely filed. Further, as indicated by the Administrative Law Judge in this matter, there is no compelling reason to relax the 90-day rule.
> (Bernardsville's Reply Exceptions, at p. 2)

For the above reasons, the Bernardsville Board of Education would affirm the initial decision and asks that the Petition of Appeal be dismissed.

Upon a careful and independent review of the record, the Commissioner concurs with the conclusion of the ALJ below that the instant matter is time-barred, and that no substantial constitutional issue has been raised herein cognizable before the Commissioner of Education.

Initially, the Commissioner expressed his accord with the ALJ's conclusions concerning application of the 90-day rule, notwithstanding the fact that the instant matter was first filed in Superior Court and then transferred by the Honorable N. Peter Conforti, J.S.C., on April 29, 1988. He rejects petitioner's argument that Judge Conforti's Order of transfer tolls the 90-day filing requirement for the reasons expressed by the ALJ at pages 7-8 of the initial decision. Moreover, for the reasons expressed by the ALJ, the Commissioner finds no basis to relax the requirements of N.J.A.C. 6:24-1.2 in this regard. See Initial Decision, ante.

Similarly, the Commissioner rejects petitioner's assertion that the 90-day rule is inapplicable because the express language of the regulation refers to actions taken by boards of education. The Commissioner concurs with the State's reply exception in this regard. The Commissioner has broadly construed the language of said regulation to apply to actions taken by State education officials, teachers or other groups or individual actors subject to the Commissioner's jurisdiction pursuant to N.J.S.A. 18A:6-9. As observed by the State, to act otherwise would be to limit petitions of appeal to those actions taken exclusively by boards of education, thus, setting no time limitations for actions against other parties. This would indeed lead to absurd results.

As to petitioner's claim that the time lines should be relaxed because there is a substantial constitutional question raised, the Commissioner is without sufficient information in the record before him to conclude such an issue exists. The issue to be decided as set forth in the initial decision is:

1. Is petitioner entitled to receive a tuition greater than that established by the New Jersey State Department of Education?

Petitioner's exception in claiming this action constitutes a dispute between two sovereigns offers scant information and that, therefore, a substantial constitutional question exists. Neither does petitioner elaborate on what the parameters for such a claim might be. Its Letter Memorandum in opposition to the State's Motion to Dismiss offers little enlightenment either. Even if such claim were more clearly defined and developed by petitioner, the question would then arise as to the Commissioner's jurisdiction to hear such a constitutional matter without express direction from the Court. In this regard, the Commissioner adopts as his own those arguments advanced by the State in its Letter Reply Brief in Support of the Motion to Dismiss dated July 17, 1989 at pages 3-5. Accordingly, the Commissioner rejects such argument as being without merit.

Accordingly, for the reasons expressed in the initial decision, as supplemented herein, the Commissioner adopts the initial decision as his own. Consequently, the instant Petition of Appeal is dismissed with prejudice for failure to conform with the dictates of N.J.A.C. 6:24-1.2.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 20, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION ON MOTION
OAL DKT. NO. EDU 2981-89
AGENCY DKT. NO. 55-3/89

BOARD OF EDUCATION OF THE CITY OF PATERSON,

Petitioner,

v.

BUREAU OF PUPIL TRANSPORTATION, DIVISION OF FINANCE, NEW JERSEY STATE DEPARTMENT OF EDUCATION,
and
PASSAIC COUNTY SUPERINTENDENT OF SCHOOLS,

Respondents.

Anat Gordon, Esq., for petitioner
(Podvey, Sachs, Meanor & Catenacci, attorney)

Arlene Goldfus-Lutz, Deputy Attorney General, for respondents
(Peter N. Perretti, Jr., Attorney General of New Jersey, attorney)

Record Closed: July 27, 1989 Decided: August 9, 1989

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

Petitioner (Board) filed a Petition of Appeal with the Commissioner of Education on March 22, 1989, contending that the actions of the State Department of Education (State) and the Passaic County Superintendent of Schools (County) in reducing its school transportation aid for 1989-90 due to the Board's improprieties of previous years was improper.

Respondents disavow petitioner's contention and assert its actions were consistent with law.

The matter was transmitted to the Office of Administrative Law as a contested case on April 21, 1989 pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on June 12, 1989 at which, inter alia, agreement was reached on the sole substantive issue as follows:

> **HAS THE NEW JERSEY STATE DEPARTMENT OF EDUCATION IMPROPERLY REDUCED TRANSPORTATION AID FOR 1989-90 TO THE PATERSON BOARD OF EDUCATION DUE TO THE LATTERS' ALLEGED IMPROPRIETIES IN PREVIOUS YEARS?**

The Prehearing Order entered on June 12, 1989 also incorporated a plenary hearing schedule to begin on September 25, 1989 and established the procedure that "the affirmative defense of an untimely filing shall proceed to a decision on respondent's Motion to Dismiss". The Motion was briefed and the record closed with the filing of respondents' reply brief on July 27, 1989.

BACKGROUND

This controversy arose when the State's Division of Compliance reviewed petitioner's operating procedures upon the latters' entry into Level III monitoring pursuant to N.J.S.A. 18A:7A-14, which states:

> When a district enters Level III monitoring the commissioner shall establish procedures . . . and the commissioner shall designate the county superintendent to appoint an external review team whose members shall be qualified by training and experience to examine the conditions in the specific district. In conjunction with the Department of Education, the team shall examine all aspects of the district's operations including but not limited to education, governance, management and finance. . . .

Pursuant to the above, an auditor from the State's Division of Compliance reviewed the bus transportation contracts entered into by the district beginning with the 1983-84 school year through the 1985-86 school year, which resulted in a determination of disallowances of contracted costs of $2,530,629.54; a potential disallowance of $710,955.35; and disallowances of $51,818.27 for payroll costs and fringe benefits and $24,729.59 for common carriers (fares).

The County reviewed transportation contracts beyond the 1985-86 school year and reported improprieties to both the Board and State which impacted on the Board's transportation aid entitlement.

The sole issues to be addressed herein are whether the filing of the Board's petition of Appeal on March 22, 1989 was timely pursuant to N.J.A.C. 6:24-1.2, and whether, if the filing is deemed to be untimely, there are sufficient grounds for relaxation of the 90-day rule pursuant to N.J.A.C. 6:24-1.17.

FINDINGS OF FACT

The following admissions incorporated in briefs by both parties, and verified by affidavits and discovery documents attached to the briefs, are adopted herein as **FINDINGS OF FACT:**

1. A post-audit conference was held on May 19, 1988. In attendance were Conrad Cachola, State Auditor from the Division of Compliance; Richard Ensminger, Chief Auditor from the Division of Compliance; Robert Ortley, Auditor from the Division of Compliance; Edward Migliaccio, Board secretary; Claire Salviano, Board transportation coordinator; and Anthonty Tudda, the Board's internal auditor.

2. State auditors advised the Board's representatives of the audit results and findings of transportation contract irregularities, and further advised that the State would recoup transportation aid deemed to be warranted. Migliaccio signed the conference report on May 19, 1988 with the following notation: "Since there seems to be many questions where responsibility should be placed, I feel the board will be appealing some of these audit report documents."

3. The county advised Migliaccio in a letter under date of July 7, 1988 of its findings of irregularities related to 1986-87, 1987-88 and 1988-89 transportation contracts with detailed specificity, and with copies transmitted to the Board's chief school administrator and each individual Board member.

4. The State's Assistant Commissioner advised the Board President in a letter under date of November 2, 1988 of exception taken to state aid payments and the recoupment process through reduced state aid in the 1989-90 school year. Nine copies of an examination report of the audit for the period ending on June 30, 1986 were enclosed.

5. The State's Assistant Commissioner transmitted to all Board Secretaries/School Business Administrators (including petitioner) under date of November 10, 1988, its Transportation District Cost Report School Year 1987-88 (WPT 34000) which is the basis for a determination of 1989-90 state aid entitlement for transportation. The Board's 1989-90 state transportation aid entitlement was incorporated therein. The covering memo incorporated adjustment procedures in the event of the discovery of inadvertent error or omissions.

6. Migliaccio responded to the Assistant Commissioner's November 2, 1988 letter to the Board president and November 10, 1988 memo with enclosure under date of November 30, 1988 and attached a corrective action plan to be submitted for Board approval.

7. The Division of Finance transmitted total 1989-90 State school aid under date of December 29, 1988.

8. The County advised Migliaccio in a letter under date of February 2, 1989 of clarification concerning questions raised relative to the reduction in transportation aid for the 1989-90 school year.

9. An internal memo from the Division of Compliance to the Division of Finance under date of March 7, 1989 incorporated recommendations for state aid adjustments resulting from a review of the Board's response to the November 2, 1988 letter and audit from the Assistant Commissioner.

PREFACE

The extensive briefs filed by counsel are incorporated herein by reference, and the full text of their arguments and case law references will not be repeated.

It must be noted that the substantive issue of alleged improprieties as well as the amount of transportation aid being recouped shall not be addressed. A finding of whether the Board's petition was filed in a timely fashion must be based on a determination of when the cause of action arose.

ARGUMENTS OF COUNSEL

The State argues that the 90 days started to run with notification by the auditors to the Board's representatives of the disputed action at its post-audit conference on May

19, 1988 and cites Riely v. Board of Education of Hunterdon Central High School, 173 N.J. Super. 109 (App. Div. 1980) for support. The State also cites Board of Eduction of Bernards Township v. Bernards Township Education Association, 79 N.J. 311 (1979) for the proposition that a petitioner is not relieved from compliance with the 90-day rule while proceeding to arbitration. D'Alonzo v. Board of Education of West Orange, (App. Div. Dkt. No. A-780-85T1 decided November 13, 1986) was cited for the similar proposition that the pursuit of a grievance process does not toll the 90 days.

Although the State argues there is no requirement that the notice of the disputed action must be in writing, it further argues that a written report of its audit and intent to recoup unwarranted state aid was transmitted to the Board on November 2, 1988 and its Transportation District Cost Report and incorporated 1989-90 school transportation aid was transmitted on November 10, 1988.

The State also argues that notice of unapproved contracts after June 30, 1986 was provided to the Board and State under date of July 7, 1988 by the County and must be deemed the date the cause of action arose for appealing any recoupment resulting therefrom.

The Board argues that the cause of action did not occur until on or after December 29, 1988 upon receipt of the State's final calculation of 1989-90 state aid, notwithstanding its argument that N.J.A.C. 6:24-1.2 is inapplicable as the 90-day time limit applies only to cases challenging a ruling of a district board of education and not to rulings of other authorities challenged by a district board.

The Board further argues that, in the event N.J.A.C. 6:24-1.2 is deemed to be applicable the 90-day rule should be relaxed pursuant to N.J.A.C. 6:24-1.17 since it exhausted its informal administrative remedies through on-going negotiations and discussions within 90 days of its filing; sound policy reasons, constitutional issues, and the interests of justice support relaxation; it questions the validity of administrative policies since the State suffer no prejudice; and the entire controversy doctrine and judicial economy support suspension of the 90-day rule.

THE REGULATORY SCHEME AT ISSUE

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.

N.J.A.C. 6:24-1.17 states:

> The rules herein contained shall be considered general rules of practice to govern, expedite and effectuate the procedure before, and the actions of, the commissioner in connection with the determination of controversies and disputes under the school laws. They may be relaxed or dispensed with by the commissioner, in his or her discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.

DISCUSSION

The first issue to be addressed is whether N.J.A.C. 6:24-1.2 is inapplicable because the contested matter did not result from the action of a district board of education, but rather by the State. It is true that the instant matter was instituted by a local board againt the State because of the latter's intent to recoup transportation aid deemed to have been unwarranted, notwithstanding that the State's action was triggered by petitioner's prior actions in awarding transportation contracts contrary to the regulatory scheme which, on review, were disallowed for state aid purposes.

The State contends it has consistently applied the 90-day rule in contested matters brought under school laws and cites In re Appeal of Lembo, 151 N.J. Super. 242 (App. Div. 1977) and Presinzano v. Hoffman-LaRoche, Inc., 726 F. 2d 105 (1984) for the proposition that the judiciary accords substantial deference to an agency's interpretation of its own duly promulgated and adopted rules.

In Nealy v. Roselle Board of Education, State Dept. of Education, and the Union County Superintendent of Schools, 1987 S.L.D. _____ (decided July 16, 1987), the Commissioner dismissed the matter because of an untimely filing. In Board of Education of the Township of Florence v. Pelle, (App. Div. Dkt. No. A-4415-87T1, March 1, 1989) a per curiam decision of the Court affirmed the State Board dismissal of the petition because the district board "had not filed its petition within the 90-day limitation embodied in N.J.A.C. 6:24-1.2". See also, Rutherford Bd. of Ed. v. Karabaic, 1987 S.L.D. _____ (decided September 18, 1987); Deron School, Inc., et al. v. State Dept. of Ed., and the Commissioner of Education, 1987 S.L.D. _____ (decided October 14, 1987).

N.J.A.C. 6:24-1.2 was amended in 1986, at which time the language of the regulation which stated "other action concerning which the hearing is requested" was replaced by "other action by the district board of education." The Board's argument that a change in language signifies a purposeful alteration in the substance of the law is not taken lightly or overlooked here, notwithstanding that the absence of time limitations for filing actions against respondents other than a local district board could indeed lead to limitless litigation and absurd results. Pelle, however, was decided March 1, 1989. It is deemed to be the law of the case, which would be inappropriate for the undersigned to ignore.

We now turn to the Board's argument that its petition was timely filed. In order to support the Board's contention, it is necessary to determine that the cause of action occurred on or after December 22, 1988. See, New Jersey Lawyers Diary and Manual, (1989).

The Board's arguments are based chiefly on its contention that a written final calculation of 1989-90 state aid was under date of December 29, 1988 and not received until a later date. It contends that its awareness of alleged contract improprieties and the State's intent to recoup unwarranted state aid was followed by months of negotiations, and seeks the application of Bergen Center for Child Development v. Division of Special Education, N. J. Dept. of Educ., 1987 S.L.D. ____ (decided October 9, 1987) to toll the running of the 90-day filing period.

The Board concedes it received the written communication under date of November 2, 1988 from Calabrese with nine copies of the extensive examination report, which incorporated notice of recoupment through reduced 1989-90 state aid. Time limitations were also incorporated for corrective action to be addressed by the board. The notation in this communication that the report will be filed for final action with the Division of Finance and the County buttresses the Board's contention that the cause of action did not occur until on or after December 29, 1988.

The Board misperceives the process of checking the WPT 34000 for errors or omissions, which was transmitted under date of November 10, 1988, with the process of appealing the substantive issue incorporated in both the WPT 34000 and finality of the examination report. The tolling of filing time did not occur in Riely, Bernards Township, or D'Alonzo, and should not occur here. Bergen Center is easily distinguished.

An awareness of the Board's knowledge of the substantive issues related to its transportation contracts cannot be disputed when the response and corrective action following the Calabrese November 2, 1988 notice were incorporated in a November 18, 1988, memo from Salviano to Migliaccio and presented to the Board at its December 15, meeting.

The process of seeking any changes in the amount of state aid reduction for recoupment in 1989-90 must be deemed to be akin to the processes utilized in Riely, Bernards Township, and D'Alonzo. The Board must be held responsible for filing an appeal with the Commissioner within the 90 days of the cause of action, deemed herein to be no later than November 2, 1988.

The Board argues strenuously for relaxation of the 90-day filing requirement pursuant to N.J.A.C. 6:24-1.17.

Upon notice of the assignment of this matter, the undersigned requested that the prehearing conference be scheduled as in-person, rather than by telephone, in order to enable counsel to fully explore the substantive issues and arrive at a determination by agreement. This occurred. The substantive issue of reduced 1989-90 transportation aid and the procedural issue of an untimely filing were incorporated in the Prehearing Order entered on June 12, 1989.

Petitioner did not raise issues of constitutionality, the entire controversy doctrine, or the validity of either the statutory or regulatory scheme. Notice was incorporated in the Prehearing Order, pursuant to N.J.A.C. 1:1-13.2(b), of the process for amending and correcting any errors in the Order. Petitioner remained silent. The issues raised in petitioner's responsive brief to the State's Motions to Dismiss must be construed to be a desperate attempt to salvage a due process hearing on a substantive issue upon recognition of its own failure to comply with the filing requirements of the regulatory scheme. It is ironic that the substantive issue was created by petitioner's alleged failure to comply with bidding and contact requirements of the regulatory scheme.

It is recognized that the State's action and the application of N.J.A.C. 6:24-1.2 yields a harsh result. Nevertheless, this is an insufficient reason to ignore the purpose of the 90-day rule. Weir v. Northern Valley Regional Bd. of Ed., 1984 S.L.D. _____ (decided July 20, 1984), aff'd State Board, 1985 S.L.D. _____ (decided March 6, 1985), aff'd App. Div. Dkt. No. A-3520-84T6 (April 9, 1986); Bogart v. East Orange Bd. of Ed., 1983 S.L.D. _____ (decided March 14, 1983).

SUMMARY OF FINDINGS AND CONCLUSIONS OF LAW

I **FIND** the cause of action in the instant matter occurred no later than November 2, 1988, and the Petition of Appeal filed on March 22, 1989 was untimely filed pursuant to N.J.S.A. 6:24-1.2.

BOARD OF EDUCATION OF THE CITY OF PATERSON, PASSAIC COUNTY, PETITIONER, V. BUREAU OF PUPIL TRANSPORTATION, DIVISION OF FINANCE, NEW JERSEY STATE DEPARTMENT OF EDUCATION, AND PASSAIC COUNTY SUPERINTENDENT OF SCHOOLS, RESPONDENTS.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed, as have the Board's exceptions and respondents' replies thereto, both timely filed pursuant to N.J.A.C. 1:1-18.4 and 1:1-1.4.

The Board first excepts to the ALJ's findings of fact, claiming that, while these findings are correct as far as they go, several pieces of correspondence, and statements within cited documents, favorable to the Board were omitted. The Board asks the Commissioner to adopt these additional facts and construe them as contributing to the ambiguity that led to its belief that two of the disputed actions were not final until December 29, 1988.

The Board further challenges the ALJ's conclusion regarding the applicability of N.J.A.C. 6:24-1.2 to actions by public bodies other than district boards of education, asserting that both the clear language of the regulation and its legislative history support a strictly limited interpretation. The Board also challenges the ALJ's reliance on unpublished decisions to support his conclusion that the matter of applicability to a State agency has already been settled, contending that this question in fact remains to be litigated.

With respect to the crucial issue of timeliness, the Board argues that the ALJ wrongly focused on the cause of action rather than the final notice of its occurrence as the determinative factor in calculating the 90-day limitation, assuming arguendo that such limitation applies in this case. The Board claims that final action was in fact, or at the very least was perceived by the Board in good faith to be, in suspension pending internal agency review until such time as final notice of agency action was received by the district.

Finally, the Board excepts to the ALJ's dismissal of arguments on constitutionality, validity of the regulatory scheme and the entire controversy doctrine, claiming that the ALJ confused issues to be decided at trial (defined at the Pre-Hearing Conference) with arguments to be presented in reply to a Motion to Dismiss. The Board also asserts that these issues are in fact

broached in its Verified Petition and that they were explicity retained in the wake of the Pre-Hearing Conference by a subsequent letter to the ALJ reading in pertinent part:

> Although we agree that the issue as presented in "Issue #1" [in the Pre-Hearing Order] is a succinct general statement of the major issues involved, we do not waive any of the particular causes of action as enumerated in our verified petition. (Board's Exceptions, Exhibit A)

In reply, respondents assert that the additional findings of fact proposed by the Board were properly omitted by the ALJ as immaterial to deciding the case. An analysis of the proposed findings is offered to demonstrate that, even if accepted, these findings would not alter the decision's outcome. Accordingly, the Commissioner is urged to reject them.

With respect to the applicability of N.J.A.C. 6:24-1.2, respondents challenge the correctness of the Board's case readings and note that while unpublished education decisions may not constitute precedent for other courts, they do constitute precedent for the agency which issued them and are appropriately brought to the Commissioner's attention in this matter.

On the question of timeliness, respondents seek to clarify precisely when each of the three actions contested by the Board became final for purposes of challenge under N.J.S.A. 18A:6-9, as the accrual of a cause of action for purposes of a statute of limitations occurs on the date on which the right to institute and maintain a suit first arises, Burd v. New Jersey Telephone Company, 149 N.J. Super. 20 (App. Div. 1977), aff'd 76 N.J. 284 (1978). According to respondents, the audit which resulted in disallowance of 1983-86 costs was final November 2, 1988, the disallowance of 1987-88 transportation contracts on July 7, 1988, and the potential disallowance of additional 1983-86 costs pending full review on March 30, 1989. Accordingly, the Board's challenges to all three actions are out of time since the instant Petition of Appeal (filed on March 22, 1989) was not filed within the next 90 days following any of the above dates.

Finally, respondents claim that the Board never raised issues of constitutionality, validity of regulatory scheme or entire controversy doctrine in its verified petition and should not be permitted to invoke such issues in support of relaxing the 90-day rule. Respondents further note that, even if these issues had been so raised, the Board would have waived its constitutional and regulatory validity causes by choosing to proceed in the administrative, rather than the judicial forum, and its application of the entire controversy doctrine by filing its challenge to the totality of the contested actions before one of those actions (the potential audit exception) was final.

The first matter to be resolved herein is the question of applicability of N.J.A.C. 6:24-1.2 to actions brought against a State agency. The Commissioner concurs with the ALJ and respondents that the 90-day rule has consistently been construed by the Department of Education to apply to any respondent against whom (or which) actions are brought, including boards of education, individuals, State agencies and other entities. While the rule's applicability to a State agency may not have been previously litigated as an issue per se, the mere fact that cases brought against State agencies have been dismissed by the Commissioner as untimely pursuant to it, and that there have been no actions to the contrary, should be sufficient to establish clear agency interpretation and intent. Particularly noteworthy is Deron, supra, which was decided subsequent to the 1986 amendment on which the Board's arguments for inapplicability rely, and which, contrary to the Board's assertions, explicitly concurred with the ALJ's determination of untimeliness despite being ultimately decided on another basis. (Deron Slip Opinion, at p. 9)

Having established that N.J.A.C. 6:24-1.2 is controlling, the Commissioner turns to the question of whether or not the instant petition is timely with respect to the actions it challenges. The Board essentially resorts to two lines of argumentation: first, that action on the greater substance of the disputed matter was not final until the Board received, on December 29, 1988, its standard notification of 1989-90 state aid entitlements; and second, that even if the audit and county superintendent disallowances were found to be final prior to December 29, the entire controversy doctrine justified (indeed, required) the Board's awaiting a decision on all related matters before filing its challenge.

Both of these arguments require the Commissioner to hold that the central matter of the Board's challenge is the total and specific dollar amount resulting from disallowance of certain transportation expenditures. In fact, however, as the instant Petition of Appeal abundantly demonstrates, it is the disallowance itself that is being challenged in this case. As a matter of clear and established procedure and law, once an expenditure is so disallowed, its subsequent impact on state aid is merely a matter of arithmetic. Accordingly, any determination of final action for purposes of the 90-day limit must look to the date of notice of disallowance rather than to the date of the state aid notification in which the disallowance is first reflected.

This being the case, respondents correctly focus on the three separate actions that gave rise to the instant appeal in order to establish when they became final. The first, disallowance of expenditures resulting from the Board's Level III audit, was clearly and unequivocally final on November 2, 1988, when the Board received formal written notice of the results of the audit and its subsequent

impact on state aid. (Document 11*) Nothing in this notice suggests any opportunity for further review or willingness to entertain discussion of results except for the clearly identified potential disallowance based on the assumption that errors found in the disallowed expenditures would be repeated in a certain portion of additional expenditures not yet fully audited. The language of intent to file "for final action" with the Division of Finance and the County Superintendent of Schools (Document 11, at p. 2), relied upon by the Board to demonstrate lack of finality, in fact, indicates nothing more than the normal course of procedural follow-up, as the Division of Finance would effectuate distribution of state aid and the county superintendent would be responsible for overseeing implementation of the corrective action plan required of the Board as a result of the audit.

The determination of the county superintendent to disallow certain 1987-88 costs for reimbursement was clearly final upon notification to the Board on July 7, 1988 (Document 11), and as with the November 2 audit report, there is no indication either in that notice or in subsequent correspondence that the county superintendent's actions were subject to further review or deliberation. This determination was likewise translated into impact on state aid dollars in the December 29, 1988 aid notice.

The sole remaining action being challenged is the result of the potential disallowance audit which was concluded, according to internal documentation (Document 19), on March 7, 1989, but of which formal notice was not made to the Board until March 30. By the Board's own standards for notice this action did not become final until eight days after the petition was filed.

This sequence of events and the substantive issues that gave rise to it render unpersuasive the Board's reliance on the entire controversy doctrine. Simply put, there was no reason for the Board to await the outcome of the potential disallowance in order to take action on either the original disallowance or the county superintendent's contract disapproval. Not only did the potential disallowance bear no direct relation to the county superintendent's action, it would actually have been rendered moot had the Board successfully challenged the bases for the original disallowance, inasmuch as the potential disallowance arose from projection of a rate and pattern of error in unaudited expenditures similar to that found in expenditures already audited.

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*This and subsequent references refer to the collection of "true and genuine copies of documents which have been produced by the parties in the course of this litigation," as prepared under affidavit by the Board and entered into the record on June 30, 1989.

What appears to have happened in reality is that the Board believed it was appealing both the original audit results and the county superintendent's disallowance through a series of letters written to the Division of Finance and the county superintendent under the mistaken belief that the letters had initiated, or were contributing to, internal review of respective actions that were in fact already final. In particular, the Board mistook the November 2 formal audit report's requirement for Board review and submission of a corrective action plan as an invitation to respond to the results of the audit, as evidenced by the Board's preparatory document for this response (Document 12), the Board's letter of November 30, 1988 to Assistant Commissioner Calabrese (Document 15), and the Board's November 22, 1988 response (Document 14) to the county superintendent's audit follow-up letter of November 16 (Document 13). In the latter, the Board explicitly states that it is "in the process of answering this adjustment of State aid" [a statement which evidently served as the basis for the County Superintendent's later remark to the Board to the effect that he understood the audit disallowance to be] "under appeal." (Board's Exceptions, at p. 3) The Board further misunderstood the routine WPT 34000 process as yet another opportunity to appeal transportation aid figures (Documents 21, 22 and 23), when in reality this process is directed at identifying and correcting technical errors of reporting and calculation rather than at the underlying substantive questions of allowed and disallowed expenditures (Document 20). At no time did the State respond to any of these "appeals," and the Board evidently mistook respondents' silence as an indication of ongoing review ending only with the final state aid printout of December 29. (As noted above, the Board mischaracterized this document as a final order, when, in fact, it is merely a comprehensive state aid report sent to all districts to assist them in budget preparation.) Further, the March 7, 1989 internal memorandum (Document 19) cited by the Board as evidence of ongoing review within the Division of Finance clearly and unequivocally speaks only to the potential disallowance raised in the November 2 final audit report, while prior internal documents produced in discovery neither demonstrate internal review, nor serve to have caused the Board confusion, as the Board became aware of them only after initiating the present appeal. (Respondents' Reply Exceptions, at p. 7)

Thus, the Commissioner must turn to the question of whether or not the Board's misunderstanding is sufficient reason to relax the 90-day rule in this case. On its own behalf, the Board raises questions of constitutionality, equal protection and facial validity of the operative regulations. Contrary to the claims of the ALJ and respondents, the Commissioner finds that these matters were at least touched upon in paragraphs 57 through 63 of the Petition of Appeal, so that the Board may fairly dispute the ALJ's unwillingness to speak to them on the basis of their not having been raised in pre-trial proceedings. However, the Board is reminded that such questions are outside of the Commissioner's jurisdiction and that any challenges framed in these terms must be placed before the proper judicial forum. The Board's argument to the effect that respondents' application of current law and regulation to the Board

is justiciable by the Commissioner as a violation of T&E and other education statutes is rejected as a convoluted formulation of what is in fact a challenge to the facial validity of the Level III monitoring process.

More appropriately, given that the underlying problem in the present case appears to have been the Board's genuine confusion and misunderstanding, the Board also raises concerns of elemental fair play and the negative impact of so great a loss in aid. The Commissioner regrets the harsh result that strict application of the 90-day rule can cause; however, he cannot in good conscience excuse so complete a lack of understanding of the transportation aid, State audit and agency appeal processes on the part of public officials specifically charged with administering contracts and funds for school districts, particularly when it can be fairly stated that respondents' actions were in no way confusing to anyone with even the most basic knowledge of pertinent procedures and that respondents in no way abetted or encouraged the Board's misunderstanding. Indeed, to condone this state of affairs by giving the Board a "second chance" would render meaningless both the underlying intent of the 90-day rule to encourage diligence and vigilance in public matters and the Commissioner's efforts to ensure accountability and sound administrative practices in school district handling of public funds. Further, even if the Board had been pursuing informal remedy through contact with the Division of Finance, it is well established that such pursuit does not relieve aggrieved parties of their obligation to timely file in the appropriate judicial forum.

In addition, the Commissioner sees no reason to alter the ALJ's findings of fact, as the Board's proposed additional findings are fully reflected in documents which are a part of the record and which have been reviewed in conjunction with this decision. While these documents do much to demonstrate the Board's confusion, they do not materially alter the sequence of events or the underlying facts upon which determinations of timeliness must properly be made.

Accordingly, the Commissioner determines that the Board's appeal of the first two causes of action, the November 2, 1988 final audit report and the July 7, 1988 disapproval of transportation contracts, is untimely filed and was properly dismissed by the ALJ. With respect to the potential disallowance of which the Board was formally notified on March 30, 1989, however, the letter of the law would be elevated above its spirit by denying the Board's right of appeal because it initiated proceedings a few days prior to formal notice of action that was clearly final at the time of filing. Of greater concern to the Commissioner is the fact that, technically, the cause of action in this matter is the original audit report of November 2, 1988 in which the bases for the potential disallowance were clearly established and therefore challengeable. However, in the interest of giving the Board a reasonable benefit of doubt, the Commissioner determines that prior error in not making timely challenge to the original audit report should not be held against the Board in seeking to appeal that portion of the audit which did not become final until March 30, 1989.

Therefore, with respect to the disallowances prescribed in the original audit report and by the county superintendent, the initial decision of the ALJ is affirmed and the Petition of Appeal dismissed with prejudice. With respect to the disallowances resulting from audit projections that were potential in nature until March 30, 1989, however, the initial decision is reversed and remanded for a full hearing on the merits.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 25, 1989

Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2014-88
AGENCY DKT. NO. 40-3/88

LEONARD MAYO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, ESSEX COUNTY,
Respondent.

Charles P. Daglian, Esq., for petitioner (Miller & Galdieri, attorneys)

William C. Gerrity, Esq., for respondent

Record Closed: June 16, 1989 Decided: July 31, 1989

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

PROCEDURAL HISTORY

On March 4, 1988, petitioner, Leonard Mayo, filed a petition of appeal with the Commissioner of Education alleging that respondent had improperly refused to pay him his accrued vacation and credit days at his final rate of pay upon retirement. Respondent filed an answer on March 23, 1988 alleging that petitioner waived any claim to accrued vacation time by virtue of the terms of the settlement in *Silvestri, et al. v. Bd. of Ed. of the City of Jersey City*, OAL DKT. EDU 8823-86, Agency Dkt. No. 383-11/86 (May 19, 1987), aff'd Comm'r of Ed. (July 1, 1987). On March 28, 1988, 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.*

A telephone prehearing conference was held before Judge Ward Young on May 5, 1988. At that time, the issues were clarified. It was determined that the parties would execute a stipulation of facts and that the matter would be decided on summary decision. By letter dated June 23, 1988, Mr. Daglian advised that he was encountering difficulty in conferring with counsel for respondent and was, therefore, unable to comply with the pretrial briefing schedule. He suggested that the briefing schedule be amended. By letter dated June 24, 1988, Mr. Massa indicated that he could not stipulate to any essential facts and requested that the due date for briefs be extended to July 14, 1988.

An amendment to the prehearing order was signed by Judge Young on June 28, 1988 requiring a stipulation of facts by July 10, 1988 and amending the briefing schedule. By letter dated July 8, 1988, Mr. Daglian indicated that he was having difficulty contacting Mr. Gerrity in order to comply with the court directive and requested that a plenary hearing be scheduled. By letter dated July 11, 1988, counsel for respondent wrote to Judge Young also requesting that a plenary hearing be scheduled. By letter dated July 12, 1988, Judge Young scheduled a plenary hearing for September 8 and 9, 1988 at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey.

As a result of settlement conferences held on September 8, 1988 before the undersigned judge, it appeared that a settlement was reached. The settlement was subject to ratification by respondent. By letter from Charles Daglian dated September 26, 1988 and by letter from Mr. Gerrity dated September 27, 1988 , this tribunal was informed that respondent had not ratified the settlement. A conference call was held on October 7, 1988, and the hearing was rescheduled to December 7 and December 28, 1988. During the hearing an issue arose as to the admissibility of certain evidence. This issue was briefed and decided, and the hearing continued on April 13, 1989. Posthearing briefs were received and the record closed on June 16, 1989 after a conference call to counsel to clarify certain issues. Witnesses who testified and documents considered in deciding this case are listed in the attached appendix.

UNDISPUTED FACTS

At issue in the instant case is whether petitioner is entitled to compensation for 330 vacation days and 40 and one- half credit days.

It became apparent at the hearing that a number of facts are essentially undisputed.

1. Leonard Mayo was hired by the Jersey City Board of Education (the Board) in 1962 as a staff architect. He was a full-time civil service employee as of 1963 and acquired all the rights and benefits of any other full-time employee of the Board, including but not limited to vacation, credit days, terminal pay, and other fringe benefits.

2. On or about November 10, 1986, petitioner, along with Arsenio Silvestri, Lucille Nuber, Mack Ivory, Helen Horan and William Fisher, filed a petition of appeal with the Commissioner of Education (P-1A, "the *Silvestri* petition")

3. The *Silvestri* petition made no claim for accumulated vacation time. It alleged:

    a) Since July 1979 and for prior years, the Board had no set guidelines for establishing administrative job titles, salaries and salary increments for petitioners and employees similarly situated.

    b) The Board used a *de facto* salary adjustment policy based on a proportion of the salary adjustments instructional employees received pursuant to their union's periodic collective negotiation agreements. Administration of the policy was not uniform; raises were based most often on political considerations rather than on individual merit.

c) Dissatisfied with the Board's refusal to formally set titles and salaries with concomitant guidelines in writing and also with the Board's failure to pay to or grant accumulated compensatory time, petitioners threatened the Board with legal action.

d) Directly in response to this threat, the Board devised and finalized Policy 4140, a salary guide applicable to petitioners. Increments were to be paid over a period of seven years pursuant to a fixed formula: annual raises were to be based upon the negotiated raises received by the Board's instructional employees. The Board formally adopted Policy 4140 by Resolution VII-A#29 at its meeting of March 19, 1980 (P-1A, Exhibits A-1 to A-10).

e) The Board offered Policy 4140 to petitioners with one proviso. All affected employees were required to unanimously execute a release which, by its terms, absolved the Board from all past and future monetary claims involving compensatory time, credit time and overtime. The release also required said employees to discontinue and dismiss all pending litigation involving said claims and systematic salary adjustments. The employees executed the release on or about April 23, 1980 (P-1A, Exhibit B).

f) Petitioners thus entered into a contractual relationship (the "agreement") with the Board by unanimously negotiating away individual legal rights as a group in consideration of the Board's offer to adopt specific salary guidelines and grant systematic raises.

g) On or about July 11, 1980, the Board formulated raises in accordance with the agreement. On January 21, 1981, the Board granted petitioners incremental raises on a slightly more

generous basis than called for by the agreement, such raises to be retroactive to July 1, 1980.

h) That was the only raise granted to petitioners under the agreement. In June of 1981, a new city administration was elected in Jersey City which immediately gained control of the Board of Education. From July 1981 onward, the Board unilaterally abrogated the agreement and refused to grant raises, although unionized Board employees received raises and although funds were available for such raises.

i) In December 1983, petitioners instituted suit in Federal District Court. Petitioners alleged essentially that the Board refused to honor the agreement to punish them for supporting opposing political candidates, in violation of their constitutional rights to political association and expression.

j) During the course of this suit, in response to representations made by the Board, petitioners decided it was still feasible to enforce the agreement without resorting to legal action. Thus, in or about January 1985, petitioners dropped the federal suit. The Board never honored its promises and has never returned to the terms of the agreement.

k) The Board adopted Resolution 8.1 at its meeting of September 17, 1986, verifying the essential allegations of the petition and indicating its desire to correct this inequity (P-1A, Exhibit C).

l) Specifically, Resolution 8.1 admitted that (a) petitioners had not been granted an increase in salary since July 1, 1981, and (b) a salary guide was adopted for petitioners but increments under that guide were never implemented after the sole raise of January 21, 1981.

m) The statement by the Board within Resolution 8.1 that the Board was "desirous of correcting this inequity" actually

further perpetuated the "cruel hoax" to which petitioners had been subjected. Two of the petitioners, Helen Horan and Mack Ivory, were not included at all in the resolution. As for the other petitioners, the resolution failed to adopt any regular system of increments as required by the agreement. Also, the increments, both retroactive and prospective, granted to petitioners by Resolution 8.1 were only a fraction of the increments which were to be granted over a seven-year period.

n) Petitioners requested the Commissioner of Education to find that by refusing to set salaries, salary guidelines and systematic increases for petitioners since July 1981, the Board had breached its contractual relationship with the petitioners. Petitioners further requested an order that the terms of the agreement be enforced retroactively for all the monies due and not paid to petitioners and prospectively for all raises scheduled for the remainder of the contract, including interest and any further relief as the Commissioner deemed appropriate.

4. The salary guide adopted by the Board on March 19, 1980 (Policy 4140, attached to Resolution VII-A#29) indicated that vacation time and compensatory time are separate classifications (P-1A, Exhibits A-3, A-5 and A-8).

(a) Policy 4140 specifically indicated that, "vacation days may be accrued up to but no more than 50 days. Staff who have more than 50 days will have 36 months from the adoption of this policy to take the vacation days and will submit a schedule to the Superintendent of Schools for the reduction to 50 days." (P-1A, Exhibit A-5.)

(b) Regarding compensatory time, Policy 4140 indicated that, "documented and approved compensatory time will be voluntarily released by each person concurrent with the passage of the submitted salary guides." (P-1A, Exhibit A-5.)

(c) Policy 4140 set the following vacation schedules for all employees covered under the agreement, with the exception of security guards and bus attendants: a) one day per month for the first year of employment; (b) 22 days for two through 14 years of employment; and (c) 25 days for 15 years or more, two days for each month and three in June (P-1A, Exhibit A-8).

5. The release referred to in the *Silvestri* petition (P-1A, Exhibit B) released the Board of Education from any and all past and future monetary claims involving compensation time, credit time and overtime due and owing. The release also provided that all vacation time in excess of fifty (50) days would be utilized within three (3) years from the date of the release or be disallowed. It further provided that any and all pending litigation involving the aforementioned claims and salary adjustments would be discontinued and dismissed.

6. The parties in the *Silvestri* case agreed to a settlement and the hearing was not held. The terms of the settlement were placed on the record before the undersigned judge on March 31, 1987. Petitioners were represented by Frances Schiller and respondent was represented by Jeffrey Lester.

7. Of import, the transcript of the settlement dated March 31, 1987, indicates the following: Mr Lester stated that the underlying basis of the lawsuit dealt with the alleged inequities in the salaries petitioners had received over a period of years. He indicated that the settlement was basically in two parts: It set present salaries and provided that $150,000 would be paid to Mr. Schiller's trust account for distribution among the petitioners in the manner which they as a group saw fit. He indicated that Mayo would receive a salary of $60,000 retroactive to one year from the date granted and that he would submit his application for retirement from the system. Mr. Lester further revealed that releases would be given by all petitioners to the Board. The Board would also receive "releases from [Yeager and Busby] who are former employees of the Board who have alleged claims for retroactive sums due to them, only

the payments coming out of the lump sum settlement of the account of any and all claims of compensation of any type whatsoever, which may be claimed by any of the petitioners, including comp time, sick time or any other compensation which may be due." (R-9, at p 4.)

8. At the time the settlement was placed on the record, Silvestri was sworn. He agreed to the terms of the settlement and had no question about it. Similarly, Mayo was asked if he had heard the terms of the settlement outlined by Mr. Lester and agreed to by his attorney, Mr. Schiller. He was asked if he had any questions about the terms of the settlement and indicated that he did not. He stated that he had not been forced into signing the settlement agreement and was satisfied with it under all the circumstances involved. Similar questions were asked of Nuber, Horan and Ivory. None of those individuals had any questions about the terms of the settlement and accepted the settlement voluntarily.

9. On April 29, 1987, Frances Schiller, attorney for petitioners, and Jeffrey Lester, attorney for respondent, signed a stipulation of dismissal which reads in pertinent part, as follows:

> Petitioners will give up all pending claims for back pay and/or salary adjustments for consideration of their receipt of a lump sum payment for damages in the amount of $150,000 and respondent's agreement to pay the following designated salary increases, to be effective immediately (unless otherwise specified below), the petitioners additionally waiving all their rights to Compensation time and overtime accumulated before January 1, 1987, and they will receive the following new salary: Leonard Mayo - $60,000 (P-1).

10. In April 1987, the parties in the *Silvestri* matter signed a release. Of import, the release provided that petitioners "release and give up any and all claims and rights they may have against respondent. It indicated that, "[t]his releases all claims including those of which I am not aware and those not mentioned in this release. This release applies to claims resulting from anything which has happened up to now." The release indicated that the petitioners specifically released the following claims:

> All relating to incidents between the parties which began on or about July 1, 1981, continuing to the present day and were the subject matter of a suit started in the New Jersey Administrative Law Court and designated as OAL DKT. NO. EDU 8823-86 and Agency Dkt. No. 383-11/86. In addition, in consideration for a share of the designated lump sum payment mentioned below, as well as the designated salary increases to be effective immediately, unless otherwise specified below, the releasors additionally waive all their rights to Compensation time and overtime accumulated before January 1, 1987, and will receive the following new salary: Leonard Mayo - $60,000.
>
> The release further indicated that petitioners were paid a total of $150,000 in full payment for making the release (P-3).

11. On April 22, 1987, respondent resolved to dismiss the suit with prejudice and without costs. More particularly, the board resolution approving the settlement stated that:

> WHEREAS, a suit was instituted by certain employees ... seeking salary adjustment and back pay in accordance with Board Resolution VII-A#29 adopted by the Board at its meeting of March 19, 1980, for nonrepresented staff, and . . . WHEREAS the Board recognizes that there are certain inequities in its salary structure between its bargaining units and nonrepresented staff, and WHEREAS the back pay claims herein approximate $309,435 in addition to compensatory and credit time .

The resolution indicated that the petitioners would give up all pending claims for back pay in consideration of the receipt of a lump sum payment for damages in the amount of $150,000. In addition, the petitioners would waive all their rights to compensatory time and overtime accumulated before January 1, 1987. Leonard Mayo would receive a salary of $60,000 retroactive to one year and a day and would retire effective immediately and without guarantee of pension approval at the new salary (P-3a).

12. On May 19, 1987, the undersigned judge signed an Initial Decision in the *Silvestri* case, incorporating the stipulation of dismissal dated April 29, 1987 and the Board Resolution adopted April 22, 1987 (P-1).

13. On July 1, 1987, the Commissioner of Education dismissed the matter with prejudice (P-2).

14. It is clear that as a result of the *Silvestri* settlement Mayo received $20,000 as his portion of a retroactive lump sum payment to petitioners. In addition, he received a salary increase to $60,000 retroactive to one year and a day and was to retire effective immediately. As part of the agreed settlement, Mayo also waived certain claims to compensatory time and overtime accumulated prior to January 1, 1987.

15. In Mayo's letter of retirement dated July 10, 1987 (P-10), he stated that his retirement was effective August 1, 1987, and that he would apply to the Board for all other fringe benefits to which he was entitled and which were not part of the *Silvestri* settlement.

16. Mayo requested from the superintendent of the Board payment for accumulated vacation time and credit days. The Board refused payment and this litigation ensued.

17. William Fisher, John Yeager, and Willfred Busby are all former employees of the Board. Each one was a party to the *Silvestri* litigation and each one signed and agreed to the settlement.

18. William Fisher, John Yeager and Wilfred Busby were paid accumulated vacation days, current vacation days, and credit days at their salary on retirement (P-4).

    (a) More particularly, William Fisher received accumulated vacation of 85 and one-half days and 20.80 days of vacation for 1986 and 1987 (P-4).

(b) John Yeager received accumulated vacation of 70 and one-half days and 25 vacation days. He received three and one-half credit days (P-4).

(c) Wilfred Busby received accumulated vacation of 59 days and 16 and one-half vacation days for 1985 and 1986. He received one and one-half credit days (P-4).

19. Arsenio Silvestri and Lucille Nuber were both parties to the *Silvestri* litigation and release. On February 1, 1988, Silvestri received compensation for 39 accumulated vacation days and Lucille Nuber received compensation for 42 accumulated vacation days. These individuals were paid vacation at the rate earned in accordance with a resolution dated September 16, 1987 (P-8).

20. The resolution dated September 16, 1987, provides that:

> WHEREAS this Board of Education may from time to time not grant vacation or any part thereof by reason of heavy workload,
>
> NOW THEREFORE BE IT RESOLVED that said vacation or part thereof shall accumulate and shall be granted during the next calendar year only,
>
> AND BE IT FURTHER RESOLVED that such accumulated vacation or part thereof be paid to the employee in the form of cash payout by June 30 of the next succeeding year,
>
> AND BE IT FURTHER RESOLVED that such cash payment be at the same rate as the vacation or part thereof was earned (P-8).

21. Previous boards had also allowed employees to accumulate vacation days which they were unable to take in prior years due to the pressures of work. By resolution of the Board dated July 10, 1985 (P-5), the Board indicated that,

> WHEREAS it was necessary because of the pressure of business/shortage of help for the following named

> persons to be on duty during part of their earned vacation, and
>
> WHEREAS in accordance with Civil Service Rules and Regulations and with *N.J.S.A.* 11:24A-1, such unused vacation period shall accumulate and be granted during the next succeeding year,
>
> NOW THEREFORE BE IT RESOLVED that the Board of Education does hereby authorize and grant permission for the unused vacation period to be taken by these employees during the period July 1, 1985 to June 30, 1986. . . .

The resolution indicates that Mayo had 253 unused vacation days.

22. A Board resolution of February 1, 1988, authorized payment of $401,312.01 to a number of noninstructional employees for their accumulated vacation time.

23. Petitioner accumulated 330 vacation days during his employment with respondent, ending 1987, as reflected in the employment records.

24. The accumulated vacation days were accrued as follows: 1974/75 - 22 days; 1975/76 - 22 days; 1976/77 - 22 days; 1977/78 - 22 days; 1978/79 - 25 days; 1979/80 - 25 days; 1980/81 - 15 days; 1981/82 - 25 days; 1982/83 - 25 days; 1983/84 - 25 days; 1984/85 - 25 days; 1985/86 - 25 days; 1986/87 - 25 days; 1987/88 - 25 days; August 1987 - two days.

25. Petitioner accumulated 40 and one-half credit days from 1981 to August 1987.

26. Petitioner's rate of pay at retirement was $243.30 per day.

27. By memorandum to the personnel department, dated May 14, 1987, Mayo requested permission to hold 303 vacation days over into the next school year (R-1).

28. By memorandum dated January 12, 1988, Franklin Williams, superintendent of schools, advised all central office personnel that they would be paid for accumulated vacation days granted prior to July 1, 1987. Compensation would be at the rate of pay received at the time the days were granted (R-3). Employees could maintain current vacation days (those granted on July 1, 1987) or elect to receive compensation for all or part of those days (R-3).

29. The evidence presented to this tribunal of certain individuals who had retired or resigned revealed that employees who retired prior to September 1, 1987, *i.e.*, Maryann Vlkovic, Helen Butler, Dorothy Stallard, Louis Franov and Rose Caruso, received accumulated vacation pay at their current rate of pay (J-10, 11, 12). Employees who retired after September 1, 1987, *i.e.*, Tony Wallace, Stephen Kirsch, Alphonse Capone and Margaret Boitano, received accumulated vacation pay at the salary they received when the vacation was earned (J-1, 5, 7, 9).

TESTIMONY

Jeffrey Lester, attorney for respondent at the time of the settlement in *Silvestri*, indicated that the April 1987 release supports and memorializes the parties' understanding on the day of the hearing. He had no knowledge that the term "vacation time" was used in the release and agreed that the words "vacation time" were not used during the settlement proceedings as evidenced by the transcript. He testified that at the time of the settlement he did not know how many vacation days Mayo had accumulated.

Mayo testified as to his understanding of the settlement agreement in *Silvestri*. He stated that the underlying petition concerned salary adjustment and back pay and that the lump sum of $20,000 he received was for back pay. The settlement agreement increased his salary and compensated him for the lack of salary increases from 1981 to 1986. He testified that when the settlement was reached, he had accumulated vacation time of approximately $60,000. When asked whether anyone told him he was giving up his accumulated vacation pay when he settled the case, he responded, "Positively not." When he waived his right to compensation time and

overtime accumulated before January 1, 1987 and to any other payment from respondent, he did not believe he was waiving his vacation time. He testified that his understanding of "compensatory time" is time that would be accumulated over and above the ordinary work day. He believed it is the same as compensation time.

He stated that in his July 10, 1987 letter to the Board retiring effective August 1, 1987, he requested "all other fringe benefits to which he was entitled and not part of the settlement of the administrative law proceeding, OAL DKT. NO. EDU 8823-86." Admitting that in that letter he did not use the words "vacation pay," he believed the phrase "other fringe benefits" referred to his accumulated vacation time. He admitted that that letter was the first time after the suit that he had suggested the receipt of any benefits. He further revealed that the 1980 settlement did not go through; it was abrogated by the Board, which resulted in the filing of the petition. In regard to the school year from July 1980 to June 1981, Mayo's attendance record indicated "no credit days" (P-6). Mayo testified that the statement "no credit days in agreement with the Board, May 1980," was completely false, since "the agreement was never promulgated."

Next to testify was Arsenio Silvestri. He admitted that he was present during the settlement discussions held with his attorney and was in court when the settlement was placed on the record. Questioned as to whether he gave up accumulated vacation time by virtue of the release, he testified that when they settled the case, vacation was not brought up. He testified that he did not give up his accumulated vacation time because it was never discussed.

On cross-examination, he testified that he did not believe the 1980 settlement was ever implemented. Although he revealed that he took the stand on March 31, 1987, he could not recall that the words "compensation," "accrued overtime" and "compensation of any kind" were used. He indicated that "it did not phase him" because, unlike Mayo, he had not accumulated much. He opined, however, that vacation is a fringe benefit and is not compensation. He testified that when he was out ill, they reduced his vacation days, and he got paid for approximately 30 vacation days.

Rossie Best, who has been employed by respondent for seven years and who presently serves as assistant payroll supervisor, reviewed certain employee records.

Noting that he was not involved in the dispute over the payment of accumulated vacation time, Best advised that none of the employees whose records he reviewed had accumulated vacation time exceeding 50 days. He indicated that "credit days" were not accumulated upon retirement except for the year of retirement. One would receive five credit days per year. He testified that compensatory time was "the hours that you and your employer work out"; it is time spent over and above the normal work week.

I have reviewed the testimony and **FIND** that at the time the settlement agreement was entered into, the term "accumulated vacation time" was not referred to on the record. Neither Mayo nor Silvestri believed they were waiving their rights to accumulated vacation time; they believed that vacation time was not included in the terms "compensation" or "compensatory time."

ARGUMENTS OF COUNSEL

Noting that all Board employees were allowed to accumulate vacation days from year to year if they were unable to use them based upon the pressures of the job, petitioner points out that Leonard Mayo accumulated 330 vacation days and 40-1/2 credit days. Petitioner asserts that pursuant to the *Silvestri* settlement, Mayo did not waive his accumulated vacation time and credit days. In support, petitioner contends that a claim for accumulated vacation time or credit days was never made in the *Silvestri* petition; in the terms of the settlement as stated on the record on March 31, 1987; in the April 1987 release; in the stipulation of dismissal filed with the court on April 29, 1987; or in the April 22, 1987 resolution approving the settlement. He notes that this is consistent with the testimony of Mayo and Silvestri. Noting that Mayo waived all rights to compensation time, he asserts that compensation time is totally separate and distinct from vacation time or credit days and points to the testimony of Rossie Best, Arsenio Silvestri and Leonard Mayo in support of that.

With this backdrop, petitioner argues that Mayo did not consciously and deliberately waive a known right. Citing *Bistricer v. Bistricer*, 231 *N.J. Super.* 143 (Ch. Div. 1987), petitioner argues that if the Board had wanted Mayo to waive his accumulated vacation time, surely someone would have raised the issue directly and Mayo would have intentionally and clearly relinquished his right to accumulated

vacation time on the record. He notes that Mayo would have been foolish to agree to a settlement in which he waived a $60,000 claim. He asserts that compensatory time is a specific type of compensation and is one and the same as compensation time, the time spent over and above the normal working day. Moreover, petitioner alleges that the action of the Board clearly contradicts the Board's position that the petitioners in *Silvestri* waived accumulated vacation time. He notes that of the seven petitioners, excluding Mayo, five had accumulated vacation time at the time of the settlement. Of those five, all were paid by the Board for their accumulated vacation time and credit days. He asserts that the Board should be barred, based upon its actions with the other petitioners, from claiming that Mayo is not entitled to accumulated vacation time.

In further argument, petitioner addresses the issue of whether Mayo should be paid his accumulated vacation time and credit days at his final rate of pay or at the rate at which it was accumulated. Petitioner points out that prior to Mayo's retirement all board employees entitled to accumulated vacation time or credit days were paid at their final rate of pay. This policy was changed by a board resolution on September 16, 1987. Since Mayo retired on July 31, 1987, petitioner asserts that the Board is attempting to retroactively apply the new Board policy to Mayo. Petitioner contends that the Board is estopped from denying Mayo his accumulated vacation pay and credit days at his final rate of pay. Petitioner opines that it would be inequitable and unjust to allow respondent to repudiate its position to the detriment of Mr. Mayo who relied, as did all the employees, on the fact that the benefits he was accruing would be paid as was done in the past. If the Board were allowed to retroactively change its policy, Mayo would suffer disastrous consequences.

In response, respondent asserts that petitioner, by his release, gave up any claim to compensation for accumulated vacation time. Pointing to the terms of the release, respondent asserts that Mayo gave up any and all claims and rights which he might have against respondent. Citing *Atlantic Northern Airlines, Inc. v. Schwimmer,* 12 *N.J.* 293 (1953), respondent points out that the court there held that although the release did not expressly cover a claim for the value of use, the claim was covered in the release when considered in the context of the circumstances. The court held that "the words of coverage, however they may be viewed in the abstract or in context, are yet made plain when considered in the setting of the surrounding circumstances." *Schwimmer at* 306. With this backdrop, respondent contends that a

number of facts support its position that petitioner gave up any and all claims for accumulated vacation time. Respondent points in particular to the release, the stipulation of dismissal, the statement by Jeffrey Lester at the time of the settlement that the Board would receive individual releases from the petitioners "of any and all claims of compensation of any kind whatsoever which may be claimed by the petitioners, including comp time, sick time or any other compensation which may be due" (R-9). Respondent further argues that by virtue of the release dated April 23, 1980, Mayo gave up in excess of 50 vacation days.

In response, petitioner asserts that the release signed by Mayo in 1980 was executed with the understanding that Policy 4140 would be implemented. When that policy was abrogated in 1981, it led to the lawsuit of *Silvestri, et als. v. the Jersey City Board of Education.* Petitioner points out that there was no testimony or evidence adduced at the hearing that the release executed in 1980 is binding on Mr. Mayo. Rather, the proofs reveal that the release was voided by the actions of the Jersey City Board of Education. Petitioner questions why if Mayo waived accumulated vacation of over 50 days, the Board granted him permission in 1985 to carry 253 vacation days to 1986. Further, petitioner questions why Fisher, Yeager and Busby were paid for accumulated vacation time in excess of 50 days and why the Board allowed others to accumulate more than 50 days in vacation time.

Respondent argues in response that the Board did not knowingly give up the benefits of its settlement with petitioner simply because other parties to the settlement, by mistake or by unauthorized acts of administrative oversight, received from Board payroll employees payment of accumulated vacation time which they gave up under the settlement. According to respondent, Busby and Yeager retired in 1986, prior to the March 31, 1987 settlement, and payroll employees without knowledge of the terms of the settlement handled the payments of accumulated vacation time to Fisher, Silvestri and Nuber. Noting that the Board resolution dated August 27, 1987, included both Silvestri and Nuber as entitled to accumulated unused vacation days, according to respondent the Board never consented to petitioner's request to carry unused vacation days into the 1987-88 school year and therefore he was not eligible to redeem those vacation days.

In further argument, respondent asserts that at the time of settlement, petitioner knew that the July 10, 1985 Board resolution had authorized his carryover of unused vacation days to 1986-87. Since he had not used those vacation

days by the date of settlement and was subject to losing them, he voluntarily and consciously gave up his claim to them. He points out that in addition to Mayo's substantial share of the $150,000 settlement, Mayo received something of great value for giving up his accumulated vacation days: a $12,000 retroactive salary increase resulting in a substantially greater yearly pension.

DISCUSSION

I have considered the arguments of counsel and must agree with petitioner's position.

In interpreting contracts, the judicial function is "to consider what was written, in the entire context of the circumstances under which it was written, and to accord the language a rational meaning in keeping with the expressed general purpose." *Jacobs v. Great Pacific Century Corp.*, 104 *N.J.* 580 (1986), citing *Casriel v. King*, 2 *N.J.* 45, 51 (1949).

A review of the facts presented here does not point to a waiver of vacation time, *i.e.*, a "voluntary and intentional relinquishment of a known right." *Bertrand v. Jones*, 58 *N.J. Super.* 273, 284 (1959). At the outset, it is to be observed that the stipulation of dismissal, the releases and the Board resolution make specific reference to a waiver of a claim for compensatory/compensation time and overtime accumulated before January 1, 1987. No mention is made of vacation time in these documents.

Although respondent asserts that the release (P-3) voluntarily signed by petitioner "waiving future claims regarding the issues raised in the suit" resulted in a waiver of any claim to compensation for accumulated vacation time, this does not seem the requisite conclusion. The release makes specific reference only to compensatory/compensation time[1] and overtime. No mention is made of vacation time in that document.

[1]The terms compensatory and compensation time appear to be interchangeable.

The testimony adduced at the hearing supports the conclusion that compensation time is totally separate and distinct from vacation time and credit days. In addition, a review of Policy 4140 (P-IA, Exhibits A-3 and A-5) indicates that vacation time and compensatory time are categorized by the Board as separate classifications. Vacation time is not automatically included within the compensatory time classification. Furthermore, *N.J.A.C.* 4A:3-5.2 defines "compensatory time off" as "the granting of time off in lieu of cash payment where permitted for excess or unusual work time."

This definition indicates that compensatory time is a separate category from vacation time and encompasses excess work comparable to overtime. There is no proof that compensation time and vacation time are meant to be used interchangeably or that the two categories overlap to any extent. That being so, the fact that the parties gave up claims for compensatory/compensation time does not help respondent.

Moreover, and of import, the release was prepared to release claims on the issues which formed the basis of the *Silvestri* petition, *i.e.*, salary, compensatory time and overtime, and to prevent further claims by the petitioners on those matters. It is undisputed that the basis of the petitioners' suit was the alleged inequities in salaries received by the petitioners over a number of years. The evidence and testimony does not support the conclusion that the controversy involved benefits. It would be unreasonable to read the release as a forfeiture of benefits unrelated to the action brought. Such a policy would permit an employer, once a release is signed, to be free to deny an employee benefits to which the employee is entitled.

In fact, the courts have determined that the scope of a release is to be determined by the intent of the parties as reflected by the terms of the particular instrument involved. *Bilotti v. Accurate Forming Corp.*, 39 *N.J.* 184, 203 (1963). *Bilotti* involved the effect of a release after a former stockholder learned that he had received an inadequate price for stock as a result of fraud by the defendant. The reasoning applied by the court is instructive here. In *Bilotti*, the court stated that a general release, not restricted by its terms to particular claims and demands, "covers all claims and demands due at the time of its execution and within the

contemplation of the parties." *Id.* at 204. In support, the court cited a number of cases holding that a claim or obligation which did not preexist a release was not covered by it. *Id.* There is no indication in the present case that the petitioner intended to waive vacation time in the release since the issue of vacation time was never raised. In fact, both petitioner and Arsenio Silvestri testified that the issue of vacation time was not discussed at the time of the settlement. Although the transcript of the settlement proceedings (R-9) refers to releases from petitioners of "all claims for compensation of any kind whatsoever which may be claimed by petitioner including comp time, sick time or any other compensation which may be due," the testimony and evidence supports petitioner's contention that petitioners waived their rights to any "compensation" due and not to accrued vacation time.

It must also be observed that the above discussion comports with the manner and meaning the parties have given to the settlement agreement. Equity would dictate that the parties to a settlement should be treated similarly. Clearly, the other parties to the settlement at issue were paid for accumulated vacation time. While perhaps not binding on this tribunal, it surely indicates that a waiver of accumulated days was not contemplated by petitioner or respondent. For respondent to argue for the first time that payment to the other petitioners was a mistake is of no help. In fact, it must be observed that there was not a scintilla of evidence adduced at the hearing to confirm this contention. The same result ensues if one looks at respondent's apparent contention that the release Mayo executed in 1980 served as a waiver of any accrued vacation days over 50. Petitioner correctly points out the difficulty with this conclusion. Not only was no testimony adduced at the hearing to prove that the 1980 release was binding on Mayo, but the testimony of Mayo and Silvestri indicated that they believed it to be voided by the actions of the Board. Moreover, as noted by petitioner, he was allowed to carry over 253 vacation days to 1986 and other employees who also signed the release were paid in excess of 50 days' accumulated vacation time.

Next to be addressed is petitioner's claim that based on the doctrine of equitable estoppel the Board is estopped from denying payment for accumulated vacation and credit days at the final rate of pay. Equitable estoppel has been defined as:

> Conduct amounting to a misrepresentation or concealment of material facts, known to the party allegedly estopped and unknown to the party claiming estoppel, done with the intention or expectation that it will be acted upon by the other party and on which the other party does in fact rely in such a manner as to change his position for the worse. . . *Carlsen v. Masters, Mates & Pilots Plan Trust*, 80 *N.J.* 334 (1979).

Petitioner's reliance on the doctrine of equitable estoppel in this matter is misplaced. Petitioner has failed to show that respondent misrepresented or concealed material facts, that such an act was done with intent, or that the petitioner has relied on such a misrepresentation and changed his position for the worse as a result. Actually, although equitable estoppel has little or nothing to do with the issue of retroactive implementation of policy changes, general equity militates against the retroactive denial of earned benefits. This is particularly so here, where petitioner retired prior to the September 1, 1987 resolution which lowered the rate of pay to that rate in existence at the time vacation was accumulated. That being so, petitioner should receive the accumulated vacation pay and credit days at the final rate of pay in effect at the time of his retirement.

CONCLUSION

I have considered the undisputed facts, the testimony and the arguments of counsel and for the foregoing reasons **CONCLUDE** that petitioner did not waive his rights to accumulated vacation time or credit days by virtue of the settlement in *Silvestri*.

ORDER

It is hereby **ORDERED** that petitioner's appeal is granted. Petitioner is to be paid for 330 vacation days and 40-1/2 credit days at his current rate of pay.

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

July 31, 1989
DATE

ELINOR R. REINER, ALJ

Receipt Acknowledged

July 31, 1989
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 4 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

md/ms/tw/e

LEONARD MAYO,	:	
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 filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

The Board first excepts to the ALJ's conclusion ordering 40 1/2 credit days be paid petitioner. Claiming credit days are paid holidays which do not accumulate and are lost if they are not used in the year allowed, the Board avers the only testimony offered on the subject was that of Mr. Best, a Board payroll employee, who indicated that credit days were not accumulated upon retirement except for the year of retirement. It cites the Tr. I, December 28, 1988, at pp. 39, 40, 41 in support of this position.

Concerning the ALJ's conclusion that petitioner be paid for 330 accumulated vacation days by virtue of the Silvestri settlement, the Board submits "it is not whether the petitioner makes a claim in his petition and the other documents, for accumulated vacation time; it is whether the accumulated vacation time and other give-backs were in the petitioner's settlements in 1980 and 1987." (Exceptions, at pp. 1-2)

More specifically, the Board claims said vacation time was considered a "give-back" among the petitioners in the Silvestri Petition, citing P-1a, Exhibits A-1 to A-10 and P-1a, Exhibit B in support of this contention. It claims the ALJ at page 6 of the initial decision made the Silvestri Petition part of the record of this matter, which document evidenced give-backs by petitioner in 1980, and included Policy 4140 as a document in evidence as well. The Board further argues that the April 23, 1980 release in the Silvestri Petition (P-1a, Exhibit B) was made part of the record, and in that release, "compensatory time [not compensation time, as cited by the ALJ] is waived separately from the disallowed accumulated vacation time provision." (Exceptions, at p. 3)

Further, the Board avers the ALJ is in error in finding that "[N]either Mayo nor Silvestri believed they were waiving their rights to accumulated vacation time." (Id., quoting Initial Decision, ante) Claiming that said individuals believed that vacation time was not included in the terms "compensation time" or "compensatory time," the Board argues the ALJ's findings in this regard are contrary to the following:

(a) Payroll employee Best's testimony was that compensatory time was for hours an employee could take for time spent over and above the normal work week. (Initial Decision, ante, and 1T:42, 6-19)

(b) The release of April 1987 states:

> I. Release. I release and give up any and all claims and rights which I may have against you. This releases all claims including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. I specifically release the following claims:
>
> ...Releasors additionally waive all their rights to Compensation time and overtime accumulated before January 1st, 1987,...
>
> 2. Payment. I have been paid... I agree that I will not seek anything further including any other payment from you. (Exhibit P3)

(d) The testimony of Attorney Lester who represented the Board in the Silvestri matter was to the effect that the April 1987 Release supports and memorializes the parties understanding of the settlement hearing (Initial Decision, ante), and "any other compensation that may be due" covers accumulated vacation time as a give-back by the petitioners for the settlement. (R9 Transcript, 3/31/87, p. 17); the giving up of accumulated vacation rights was not the cause of action of the petition but was the subject of the settlement in the Silvestri matter. (R9, pp 21, 22), that the settlement covers accumulated vacation even if it is never mentioned (R9, p23)

(e) Arsenio Silvestri was the only witness the petitioner produced from all the parties in the case. Although his testimony is suspect he was made to admit, on cross examination, that the 1980 settlement was implemented, contrary to Mayo's testimony, by salary increases in 1980 and salary increments granted in 1981. (2T:64, 14-25) His testimony suggests that he understood compensation time to mean accumulated vacation time (2T:65, 13-19); he did not recall the

subject of give-backs but he did not care about waiving accumulated vacation because he was not involved in compensation time like petitioner Mayo (2T:65, 8-25 and 2T:66,1-2)

(f) Petitioner Mayo's testimony that no one told him, and he did not believe he was giving up accumulated vacation pay contradicts his own testimony and acknowledges he did make give-backs "when he waived his right to compensation time and overtime accumulated before January 1, 1987 and to any other payment from the respondents, he did not believe he was waiving his vacation time." His belief is not true because compensation time is vacation time and further he waived "any other payment from the respondent."

(g) At p. 2 of the Mayo petition, paragraph 6, he acknowledges as part of the Silvestri case settlement he waived any claims to past compensatory salary. (Initial Decision, ante)

(h) Mayo's attendance record (Exhibit P6) indicates the he gave up in the school year 1980-81 all credit days, "no credit days in agreement with the Board, May 1980." (Initial Decision, ante)

(i) Mayo received increased salary of $60,000 for years 1986 and 1987, and $20,000 as part of the lump sum settlement. (Initial Decision, ante). (Exceptions, at pp. 4-5)

The Board submits that if the Commissioner adopts the ALJ's finding that petitioner did not give back accumulated vacation time by virtue of the settlements of 1980-1987, it argues in the alternative that payment of the 330 days accumulated vacation days is not proper for the following reasons:

> If the Commissioner adopts the FINDINGS of the Initial decision that petitioner Leonard Mayo did not give back accumulated vacation time by virtue of settlements of 1980-1987, the Order for payment of 330 days accumulated vacation days is not proper for the following reasons:
>
> 1. There is not Board approval for payment by Board resolution. The ordered payment is not authorized by the Board. It is immaterial that his department records show 330 vacation days not used. This is not a Board record.

> 2. The only Board resolution approving carry over of 252 days into the 1985-86 year was adopted by the Board July 10, 1985.
>
> 3. There was no Board resolution in 1986 for carry over of accumulated vacation days.
>
> 4. The petitioner Mayo in May 1987, before his retirement August 1987, made a request for carry over of his vacation time and the Board did not include it in its carry over resolution dated August 27, 1987.
>
> 5. As to Order that the petitioner be paid at his current rate of pay, this is contrary to Board resolution dated September 16, 1987, (Exhibit P8), that resolved payment for accumulated vacation pay be at the same rate as the vacation was earned. (Id., at p. 5)

Further, the Board contends that even assuming arguendo that petitioner has not given up any accumulated vacation days, he "***still fails to prove the Board had authorized accumulated unused vacation time, and a written Board agreement to pay Mayo for accumulated unused vacation days upon retirement. A condition precedent to making a payment to retired employee, Mayo, is an authorizing Board Resolution which did not exist on his retirement." (Id.)

The Board affixes its post-hearing submission to its exceptions and seeks reversal of the initial decision.

Petitioner's reply exceptions first set forth his accord with the initial decision. Further, petitioner rejects the Board's position that the 1980 settlement, including Policy 4140, is controlling in this matter. He claims the Board in 1981 unilaterally abrogated Policy 4140 and, therefore, according to the Silvestri Petition, rendered all the conditions set forth in that Policy null and void. "The Jersey City Board of Education can not on one hand for political reasons abrigate (sic) a policy, and on the other hand attempt to hold the Petitioner's (sic) to its requirements." (Reply Exceptions, at p. 2)

Moreover, petitioner claims Policy 4140 is clearly not a current policy of the Board.

> The other Petitioners in this matter were paid more than the 50 vacation days that under Policy 4140 they were allowed to accumulate, and in fact in February of 1988 numerous Jersey City Board of Education employees, ***were paid in excess of over their 50 accumulated vacation days. Therefore, it is clear Policy 4140 is not in existence and does not control this decision. (Id., at p. 2)

Petitioner further argues that the Board's exceptions reiterate the arguments previously made before the ALJ, and he refers the Commissioner to the Brief previously filed as rebuttal to said arguments. Petitioner makes one further point in rebuttal to the Board's argument relative to the Board Resolution of allowing employees to accumulate their vacation from year to year, and that the Board indicated that the last resolution concerning Mr. Mayo allowed 253 days. "However, what Mr. Gerrity [Board attorney] fails to point out was that the Board negligently failed to pass any further Resolution until after Mr. Mayo had retired. So, therefore, Mr. Mayo would be entitled to the continuation of his accumulated vacation." (Id.)

In summary, petitioner states:

> While [the Board has] attempted to forbid Mr. Mayo from being paid for his accumulated vacation and/or credit days, they have paid all other Petitioners in the original Petition their accumulated vacation and credit days. In addition, they paid the sum of over $400,000 to other school employees similarly situated, in order, if one takes a cynical view, possibly to prevent the Commissioner from denying their accumulated vacation upon the takeover of Jersey City Board of Education. (Id., at p. 3)

Petitioner seeks that he be treated like all of the other Jersey City Board of Education employees, including those in the Silvestri Petition. Petitioner would urge the Commissioner to adopt the decision of the ALJ below.

Upon a careful and independent review of the instant matter, the Commissioner affirms in part and rejects in part the initial decision for the reasons which follow.

Initially, the Commissioner notes that the Board's exceptions are, as observed by petitioner, a reiteration of those arguments advanced at the hearing below. Said arguments, in the Commissioner's opinion, were in substantial part aptly analyzed by the ALJ, particularly those pertaining to the Board's rebuttal to petitioner's claim that 330 accumulated vacation days are due and owing him. The Commissioner's review of the earlier Silvestri settlement, and the events that have transpired since, lead him to the same conclusion arrived at by the ALJ concerning Petitioner's entitlement to said vacation days.

Although it might be argued that vacation time is a form of "compensation" and therefore might conceivably have been among those "give-backs" to which the Silvestri petitioners agreed in settling their controversy, no evidence has been submitted that persuades the Commissioner that this was the intent of the parties herein. First, as noted by the ALJ, neither the Silvestri settlement nor the Release (P-3) speaks to accumulated vacation days. (Initial

Decision, ante) See also Tr. II, April 13, 1989, at pp. 16-17, 26. Moreover, the testimony adduced at hearing bolsters the conclusion that vacation time was a benefit conferred by the district distinct from compensation time and credit time. See Tr. I, December 28, 1988, testimony of Mr. Best, pp. 39-42, Tr. II at pp. 35-37, 65. See also P-1a, Exhibits A-3 and A-5, Policy 4140. See also Initial Decision, ante.

Further, the Commissioner's review of the record comports with the ALJ's conclusion that the intent of the petitioners in settling the Silvestri matter was that accumulated vacation pay was not among the forms of compensation or compensatory time resolved in their settlement with the Board. Tr. II, testimony of Silvestri at p. 62. See also Tr. II, testimony of Mayo at pp. 33, 35, 36. See also Initial Decision, ante.

Accordingly, for the reasons expressed by the ALJ, the Commissioner adopts as his own the ALJ's conclusion that Petitioner Mayo did not waive his rights to accumulated vacation time by virtue of the settlement in Silvestri, or by signing any waivers related to that settlement, or pursuant to any Board policy in the district whether before or after his retirement.

However, the Commissioner cannot agree with the ALJ that petitioner is also entitled to 40 1/2 credit days. P-3a in evidence is the Board Resolution affixed to the stipulation of settlement and Release signed by petitioners in the Silvestri matter. The Board ratified said resolution on April 22, 1987, some 39 days before the effective date of petitioner's retirement. Therein, plainly stated is the Board's understanding of what the lump sum settlement figure which it agreed to pay the petitioners in the Silvestri matter in settlement of their claims represented. Among the language of said Resolution are the following two sentences:

> Whereas, the Board recognizes that there are certain inequities in its salary structure between its bargaining units and non-represented staff, and
>
> Whereas, the back pay claims herein approximate $309,435.00 in addition to compensatory and credit time.*** (emphasis supplied) (P-3a)

By formal resolution such information as contained in P-3a became public information, which provided petitioner notice that credit time was among those forms of remuneration for which petitioners in the Silvestri matter bargained in exchange for the lump sum settlement. It is not contested in this matter that petitioner willingly agreed to the Silvestri settlement nor that he accepted the lump sum payment of $60,000 in settling the claims represented by said settlement. Unlike the accumulated vacation days involved in this case, credit time is clearly addressed in the documentation generated by the settlement to which petitioner

agreed. Thus, the Commissioner finds no basis for according to petitioner that which he willingly relinquished in settling the claims involved in the Silvestri matter. In so finding, he thus rejects the initial decision determination that Mr. Mayo is entitled to 40 1/2 credit days.

Accordingly, for the reasons expressed in the initial decision, petitioner's request for payment for 330 accumulated vacation days is granted. As found by the ALJ, and for the reasons expressed by her, petitioner shall receive the accumulated vacation pay at the final rate of pay in effect at the time of his retirement. However, the initial decision is reversed in that it also granted 40 1/2 credit days along with the 330 accumulated vacation days.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 25, 1989

Pending State Board

BOARD OF EDUCATION OF THE CITY OF UNION CITY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND COMMISSIONERS OF THE CITY OF UNION CITY, HUDSON COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed by the Board of Education of the City of Union City (Board) by way of a Petition of Appeal filed on May 8, 1989 appealing a reduction of $4,003,458 in the current expense tax levy for the 1989-90 school year and contending such reduction prevented the district from providing a thorough and efficient system of education. The aforesaid reduction of the proposed tax levy was imposed by the Mayor and Commissioners of the City of Union City (City) after consultation with the Board pursuant to N.J.S.A. 18A:22-37 and after the proposed tax levy for current expense of $14,738,544 was rejected by the voters of the district on April 4, 1989. On June 1, 1989 an Answer to the aforesaid Petition of Appeal was filed by the City and the pleadings were thus joined.

On June 30, 1989 the Commissioner of Education determined pursuant to N.J.S.A. 52:14F-8 and N.J.A.C. 6:24-7.7(b) to retain the matter for hearing within the Department of Education. The Commissioner further designated Dr. Richard DiPatri, Assistant Commissioner for School Programs, to hear and decide this matter in his stead pursuant to N.J.S.A. 18A:4-34. A pre-hearing telephone conference established timelines for the filing of submissions pursuant to N.J.A.C. 1:6-10.1 and two hearings were held in the State Department of Education on August 17 and August 29, 1989. The record closed as of August 29, 1989 upon conclusion of the second day of hearings.

Initially, the Assistant Commissioner notes that the Board argues that the reductions made by the City were arbitrary and capricious and therefore the Board asks that the entire amount in controversy herein be restored. The Board bases its argument upon its assertion that the City did not make known to the Board the supporting reasons for the line item reductions in the tax levy effectuated by it by way of its certifying resolution of April 27, 1989. The Board further argues not only did the City fail to detail its supporting reasons for the reduction at the time of the certification, but also failed to do so upon filing of its Answer to the Petition of Appeal. In fact, the Board argues that the written testimony detailing supporting reasons for its reductions submitted

pursuant to N.J.A.C. 1:6-10.1 was not formally adopted by the City until August 24, 1989 after its submission to the jurisdiction of the Commissioner and after the conclusion of the first day of hearing on August 17, 1989. In support of its position, the Board cites the Supreme Court's decision in Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, Gloucester County, A-97-88, August 7, 1989 wherein the Court held that while the Commissioner's remedy of granting summary judgment in favor of the Board in the Deptford case for the failure of the governing body to submit its statement of supporting reasons contemporaneously with its certification of the tax levy was too severe, it did nevertheless hold as follows:

> At the same time, we want to stress that if the municipality fails to submit reasons contemporaneously with its certification of budget cuts, the Commissioner of Education in the course of an ensuing appeal is entitled to invoke a heavy presumption against the educational validity of the proposed budget cuts. Hence, the greater the delay in the submission of detailed reasons in support of such cuts, the stronger will be the presumption against their validity and the heavier will be the municipality's burden on appeal to establish the validity of the reduced budget. (Slip Opinion, at pp. 18 and 19)

In assessing the argument raised by the Board, the Assistant Commissioner agrees that the City's resolution certifying the tax levy is devoid of substantial supporting reasons and that the Answer to the Petition of Appeal is likewise so flawed. While the deficiencies so noted do impose a heavy burden on the validity of the City's actions, the Assistant Commissioner is likewise mindful of the Court's admonition of the Commissioner's responsibility to review the cuts and the reasons presented even if presented belatedly "***to determine whether the municipality was mindful of the appropriate educational considerations at the time they were made and whether educational goals were jeopardized." (Id., at p. 19)

In light of the foregoing, the Assistant Commissioner will consider individually each of the line item reductions and the arguments of the parties. Before doing so, however, the Assistant Commissioner takes note of the fact that the 1989-90 budget as originally presented to the Hudson County Superintendent of Schools for approval was rejected as being inadequate to provide a thorough and efficient system of education. (See letter from County Superintendent Acocella Exhibit P-3.) In response to the aforesaid rejection of the County Superintendent, the Union City Board of Education increased its current expense budget by $843,790 primarily in the areas of instruction and instructional support line items. It is further to be noted that Union City is in Level III of the State monitoring process having failed to achieve certification after two previous levels of monitoring.

MAINTENANCE

Line Item	Budget 1988-89	Proposed 1989-90	Reduction By Governing Body
720 - Contracted Services			
Repair to Buildings	$150,000	$ 165,000	$ 15,000
Additional Repairs	-0-	851,930	742,730
Repair to Equipment	50,000	60,000	10,000
740 - Other Expenses Maintenance	$ 70,000	$ 77,000	$ 5,000*
TOTAL	$270,000	$1,153,930	$772,730

The Board argues that it must have the restoration of the entire $772,730 reduction in the maintenance area in order to ensure the health and safety of students. The Board argues that all of the additional repairs in the amount of $851,930 enumerated under the 720 account are repairs which have been specifically cited by the Level III monitoring report which are part of the record as Exhibit P-2.

The City argues that the dramatic increases in the maintenance area are not immediately necessary and that such repairs as those to the clock system can be phased in to eliminate the severe impact upon the taxpayers in a single year.

In assessing the validity of the arguments presented by the parties, the Assistant Commissioner notes that the Board has succeeded in demonstrating through the means of the Level III report that it requires extensive repair and maintenance expenditure to deal with the myriad items listed in the Level III monitoring report. Although the City correctly argues that the Level III report was not available to the Board when its budget was in the preparation stage, that argument bears little weight since the district was already in possession of earlier facilities assessments

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*While in many instances the reduction imposed by the governing body represents the difference between what was budgeted in 1988-89 and what was proposed for 1989-90, in those instances where the governing body permitted some increase over the previous year's budget, the reduction column is less than the difference between the two columns.

which were the result of Level I and Level II monitoring reports. Based upon his review of the specific areas in which additional repairs are projected under line item 720, the Assistant Commissioner believes that the Level III monitoring report more than justifies on the grounds of health and safety the necessity for such repairs as boiler room doors, sidewalk repairs, floor and stair repair, kiln venting and fire escape repair, which even the City concedes. The Assistant Commissioner does, however, find merit in the City's contention relative to the phasing in of the clock repairs. He further finds that the repair and or replacement of chalk boards may likewise be phased in since in neither instance do the aforesaid items represent the same impact upon the immediate health and safety of students. In light of the foregoing, the Assistant Commissioner determines that the clock repair project and the chalk board project be phased in over a two-year period and therefore one half of the reduction in those two areas amounting to $234,000 be sustained. By way of summary, the Assistant Commissioner has determined that the following amounts budgeted under the 720 account as additional repairs and reduced by the City be restored:

Line Item 720	Restoration
Boiler room doors	$ 18,730
Sidewalk Repairs	137,000
Floor and stair repairs	104,000
Kiln venting	15,000
Clock system repairs	91,500
Chalk Boards	142,500
Total Restoration Additional Repairs	$508,730

As for those reductions in ongoing 720 contracted services for repairs to roof, windows, doors, boilers, locks and supplies for repairs to buildings done by district personnel in 740 account, the Assistant Commissioner finds sufficient justification for their restoration in the myriad maintenance needs catalogued in the Level III monitoring report. Further, the Assistant Commissioner finds that the reasons advanced by the City represent no other consideration than keeping expenditures to the previous year's level. Therefore, the Assistant Commissioner directs that an additional $20,000 be restored to that portion of the 720 account for ongoing contractual repairs to the buildings and for supplies and materials for maintenance activities carried out by district personnel under the 740 account.

Finally, upon consideration of the fact that the amounts budgeted for repairs to equipment under the 720 account proved insufficient for such purpose in the 1988-89 budget and the City advances no reason for its reduction other than maintaining this line item at last year's budgetary level, the Assistant Commissioner determines to restore the $10,000 reduction effectuated by the City. Thus by way of summary, the total restoration for the 720 and 740 maintenance accounts is as follows:

Maintenance	Restoration
720 - Additional Repairs	$508,730
720 - Ongoing Contracted Services	15,000
740 - Supplies and Materials	5,000
720 - Repair to Equipment	10,000
Total Maintenance Restoration	$538,730

TEACHING EXPENSES AND SUPPLIES

Line Item	Budget 1988-89	Proposed 1989-90	Reduction
220 - Textbooks	$190,000	$ 335,337	$120,337
230 - School Library and Audio Visual Materials	$ 50,000	$ 76,590	$ 26,590
240 - Teaching Supplies	$228,667	$ 306,360	$ 77,693
250 - Other Expenses Instructional	$168,000	$ 200,885	$ 32,885
730 - Replacement of Equipment	$ 60,000	$ 102,821	$ 42,821
730C - Purchase of New Equipment	-0-	22,000	22,000
TOTAL	$696,667	$1,043,993	$322,326

The Board argues for the full restoration of all monies budgeted in that portion of the budget for Teaching Expenses and Supplies including replacement and purchase of new equipment. In support of its position the Board notes that its original budget as proposed was rejected by the Hudson County Superintendent as being insufficient to provide a thorough and efficient system of education specifically for reasons of deficiencies in instructional and instructional support appropriations. (See Exhibit P-3.) The Board further contends that the increases in this area are justified in that per pupil expenditures by Union City in the areas of textbook, audio visual materials and teaching supplies were far below those for the county, state and region, a position supported by the County Superintendent's letter rejecting the original budget submission of the Union City Board. (See also Cost of Education Index in P-1, at p. 7.)

As for the position of the City, the Assistant Commissioner notes that the sole justification offered for the reduction in this portion of the budget was to bring proposed expenditures to the level budgeted for 1988-89 in all areas except textbooks.

Therefore, in light of the requirements imposed by the Hudson County Superintendent of Schools on the Union City Board of Education to raise its expenditures in the instructional areas and the failure of the governing body to provide adequate educational reasons beyond holding down expenditures, the Assistant Commissioner directs that the entire amount of $257,505 reduced by the City in line items 220, 230, 240 and 250 be restored. However, inasmuch as the Board has failed to demonstrate that the increases in the 730 line item of $42,821 for replacement of equipment and the $22,000 for the purchase of new equipment under line item 730C, the reductions of $64,821 imposed by the City are sustained.

FIXED CHARGES

Line Item 820	Budget 1988-89	Proposed 1989-90	Reduction
Property Insurance	$ 78,701	$ 55,000	$ -0-
Employee Insurance	1,699,000	3,155,402	1,286,979
Liability Insurance	213,299	250,000	-0-
Fidelity Bond	2,000	2,000	-0-
Judgments	7,000	210,000	135,000
Total 820	$2,000,000	$3,672,402	$1,421,979
Line Item 840			
Interest on Loans	$ -0-	$ 47,000	$ 47,000

The Board argues that the increase in employee insurance is necessitated by the increase in staff projected in this budget, as well as a projected increase in its Blue Cross/Blue Shield contract which expires on February 1, 1990. In response to a recommendation from the City that the Board seek new less expensive carriers for this medical coverage, the Board argues that such a change requires negotiations with the employees' bargaining agent since Blue Cross/Blue Shield is designated as the primary medical insurance carrier in the negotiated agreement between the parties.

The sole reason presented by the City for the reduction directed in the employee insurance account is the desirability of finding a less expensive carrier.

Since the actual expenditures for employee health benefits as acknowledged in the governing body's written testimony at page 4 was $2,494,164.80 and since the 1989-90 budget not only provides for additional employees it is not unreasonable to project that a significant increase in rates as projected by the Board would require expenditures very close to the $3,155,402 projected in the original budget. Consequently, the Assistant Commissioner directs that the $1,286,979 by which the governing body reduced the 820 Employee Insurance account be restored.

By way of its resolution directing the reductions in specific line item accounts, the City reduced the budgeted amount set aside by the Board to satisfy possible legal judgments arising

from existing suits from $210,000 to $75,000, a reduction of $135,000. The Board's written testimony argues for restoration of the aforesaid amount based upon the fact that it has a significant number of unresolved legal challenges which could leave the Board without resources to satisfy those claims should the decisions be adverse. (See written testimony of Board, at pp. 8-9.)

While the City did not specifically address this issue in its written testimony, testimony elicited in the hearing revealed that one of the outstanding cases for which the Board had allocated $100,000 for a possible judgment was settled for $75,000 at $25,000 per year. Additionally the Assistant Commissioner notes that among the matters in litigation are 26 increment withholdings and one tenure prosecution. Given the highly unlikely occurrence that all 26 withholding cases could go against the Board and the fact that one of the major matters in litigation for which the Board had set aside funds was already settled at a much lower impact upon the Board's 1989-90 budget than anticipated, the Assistant Commissioner sustains the reduction of $135,000 imposed by the City in the 820 account set aside for judgments.

Finally, the Assistant Commissioner determines that the $47,000 set aside by the Board for payment of interest on loans be restored. In so doing, the Assistant Commissioner notes that the Board's reasoning is supported by the fact that monies restored by this decision may well have to be borrowed until the striking of a new tax rate and the Board's budgeting for that contingency is altogether reasonable. Further, the Assistant Commissioner notes that the City offers no reasons for its reduction in this area.

By way of summary, therefore, the Assistant Commissioner directs that a total of $1,333,979 be restored under line items 820 and 840.

Evening Division/Summer School

Line Item	Budget 88-89	Proposed 1989-90	Reduction
J-3 Accredited Evening High School	$ 95,000	$102,409	$12,000
J-4 Adult Education	163,929	171,477	14,000
J-5 Regular Evening School	20,450	20,500	-0-
J-6 Summer School	30,000	70,000	9,500
	$309,379	$364,386	$35,500

The Board argues that the reduction imposed by the City under the J-4 Adult Education account places the Board below the anticipated state aid award to Union City for Adult Basic Skills, thus, actually resulting in a loss of revenue to the district. The

Board further argues that the reduction in line item J-6 Summer School must be restored because failure to do so would result in a reduction of service which would limit summer school to seniors.

In assessing the validity of the reduction imposed in the aforesaid accounts, the Assistant Commissioner initially notes that the reduction imposed by the City under the J-6 Summer School account in this portion of the budget was $9,500 for supplies and not the $39,500 as indicated in the Board's written testimony at page 10. The Assistant Commissioner shall consider the additional $30,000 reduction under salaries. Further, the Assistant Commissioner notes that the Board offers no evidence that the reduction of $12,000 in supplies for the accredited evening high school under account J-3 would in any way prevent the Board from providing a thorough and efficient education. Therefore, the reduction of $12,000 in the J-4 account is sustained. Inasmuch as the Summer School program has already taken place at the reduced level of services indicated by the Board, the $9,500 reduction in the J-6 account for supplies imposed by the City is likewise sustained. However, the Assistant Commissioner finds the argument of the Board persuasive that the $14,000 reduction in the J-4 Adult Education would result in an actual loss in revenue from state aid for adult education and he, therefore, directs that the $14,000 reduction under the J-4 Adult Education account be restored.

CONTRACTED SERVICES

Line Item	Budget 1988-89	Proposed 1989-90	Reduction
120	$195,000	$221,000	$26,000
130	100,279	127,375	27,096
	Subtotal 120-130 Accounts		$53,096

The Board argues that the monies budgeted in the aforesaid 120 and 130 accounts represent reasonable amounts for meeting of obligations for contracted services which include among them payments for services rendered by accountants, legal advice and representation, various consultants, board expenses, expenses of the board secretary's and superintendent's offices, etc. The City's resolution and written testimony offers no specific reasons for such reductions other than reducing expenditures to the level of the previous year's budget.

In assessing the arguments of the parties, the Assistant Commissioner concludes that neither party has been particularly persuasive in establishing its position in regard to the contracted services under line items 110 and 130. Therefore, inasmuch as the burden of proof to justify restoration rests with the Board and it has not successfully made its case that it cannot operate in this area with its expenditures at the same level as in the 1988-89 school year, the $53,096 reduction is sustained.

Line Item	Budget 1988-89	Proposed 1989-90	Reduction
320 - Attendance (Travel)	$ 1,000	$ 1,250	$ 250
420 - Health	10,000	11,100	1,100
520, 530, 540 550 - Transportation	195,080	218,000	22,919
630 - Heat	150,000	176,000	26,000
650 - Supplies	80,000	88,000	8,000
640 - Utilities	650,000	672,157	22,157
	$1,086,080	$1,166,507	$80,426

The Board's reasoning in this area is set forth in its written testimony on pages 11 through 12 and is incorporated by reference herein. The City's sole rationale relative to justifying its reductions is to reduce expenditures to the previous year's budgeted amounts. In light of the paucity of specific testimony from either side upon which to base a determination and given the burden of proof which prevails in budgetary appeals, as well as an examination of Exhibit R-1 relative to unexpended balances for the fiscal year ending June 30, 1989 the Assistant Commissioner sustains the entire amounts of the reductions made by the City in line item accounts 320, 420, 520, 530, 540, 550, 630, 650 and 640 bringing the entire total of sustained reductions to $133,522 for contracted services ($53,096 for line items 120 and 130 and $80,426 for line items 320-640).

SALARY INCREASES AND NEW POSITIONS

Line Item	Budget 88-89	Proposed 1989-90	Reduction
110	$ 665,736	$ 678,518	$ 12,782
211	978,050	991,854	13,804
212	356,934	385,425	28,491
213	14,090,653	15,042,954	875,968*
215	750,766	785,604	34,838
310	77,178	105,314	28,136
410	390,269	400,938	10,669
510	215,116	253,931	38,815
1010	150,000	160,000	10,000
1137	358,902	499,369	186,898*
J-6-240 &250	30,000	60,000	30,000
TOTAL	$18,063,604	$19,363,907	$1,270,401

* The Assistant Commissioner notes that the items marked by an asterisk show reductions inconsistent with the difference between the amount budgeted for 1988-89 and proposed for 1989-90. The information provided by the parties in written testimony and documentation does not permit the pinpointing of the exact areas of discrepancy.

The Board argues for the full restoration of all reductions effectuated by the City in the area of salaries. It is the Board's contention that the salary increases reflected in the current budget represent increases mandated for increments in the current negotiated agreement with the district's bargaining agent. The Board contends that failure to budget for such incremental increases would constitute bargaining in bad faith and be entirely unrealistic. The Board further argues for full restoration of funds for 12 new special subject teachers in art, music and industrial arts, to restore programs reduced in previous years, as well as adding four additional special education teachers and aides.

Finally, the Board argues that a thorough and efficient system of education requires provision for adequate support personnel and, therefore, seeks restoration of seven new custodial positions, two attendance officers and a clerical position reduced by the City's action.

The City accepts the Board's decision to add seven special education teachers and four special education aides. It recommends the elimination of 12 new teaching positions, not filling two vacancies, as well as eliminating two new attendance officers, one nurse, one doctor and a new clerical position. Finally, it urges acceptance of its position that all projected salary adjustments other than increments should be frozen.

The Assistant Commissioner has carefully considered the arguments presented by the parties, as well as reviewed the relevant portions of the budget. Based upon the aforesaid review, he determines that the Board has sustained its argument that the salary increases budgeted, as well as the new positions requested, are necessary for purposes of providing a thorough and efficient education. In so concluding, the Assistant Commissioner notes that no significant rebuttal was forthcoming from the City to the Board's contention that the increased number of instructional positions were mandated by the County Superintendent for purposes of restoring programs previously reduced in art, music and industrial arts. Further, the Assistant Commissioner finds the amounts budgeted by the Board for purposes of salary adjustments to be within the bounds of reason in order to assure its ability to bargain in good faith. The clerical and other non-instructional positions added in the areas of the attendance office, medical services and custodians are deemed by the Assistant Commissioner to be necessary to ensure the health and welfare of the district's pupils. The one salary reduction which the Assistant Commissioner finds sustainable is in the J-6 - 240 and 250 accounts since the summer school program has already been conducted at the reduced level of services.

Therefore, in light of the foregoing, the Assistant Commissioner finds and determines that the Board has met its burden of demonstrating its need for $1,240,401 in the various salary accounts and he directs the restoration of same.

SUMMARY

Having fully considered the arguments of the parties and reviewed the record, the Assistant Commissioner directs the restoration to the budget of the Board of Education of the City of Union City in the amounts in the following line item accounts:

MAINTENANCE	
720 - Additional Repairs	$508,730
720 - Ongoing Contractual Services	15,000
740 - Supplies and Materials	5,000
720 - Repair to Equipment	10,000
Total Maintenance Restoration	$538,730
TEACHING EXPENSES AND SUPPLIES	
220 - Textbooks	$120,337
230 - Library and AV	26,590
240 - Teaching Supplies	77,693
250 - Other Expenses	32,885
Total Teaching Expenses and Supplies	$257,505
FIXED CHARGES	
Line Item 820	$1,286,979
Line Item 840	47,000
	$1,333,979
Evening Division	
Line Item J-4	$ 14,000
SALARIES	
Line Items 110, 211, 212, 213, 215, 310, 410, 510, 1010, 1137	$1,240,401
TOTAL RESTORATION	$3,384,615

In light of the foregoing, the Assistant Commissioner determines that the Hudson County Board of Taxation be directed to strike a tax rate which shall add an additional $3,384,615 to the 1989-90 current expense tax levy for purposes of education in the City of Union City. The aforesaid increase shall therefore raise the total 1989-90 tax levy to $14,119,701.

IT IS SO ORDERED this _____ day of September 1989.

September 26, 1989

COMMISSIONER OF EDUCATION

MAYOR AND COUNCIL OF THE CITY OF IRVINGTON,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

This matter was opened before the Commissioner by way of a Verified Complaint filed by the Mayor and Council of the City of Irvington (Petitioners) seeking an Order to Show Cause from the Commissioner directing why the following relief should not be granted:

1. Appointing _____ as fiscal monitor to oversee the operations of the Irvington Board of Education; and

2. Enjoining and restraining the Irvington Board of Education from approving any resolution expending or encumbering district funds in excess of $5,000 (i) which are unnecessary for the day-to-day operation of the district and (ii) which do not have the express, written approval of the fiscal monitor; and

3. Enjoining and restraining the Irvington Board of Education from making any unbudgeted expenditure from surplus; and

4. Directing the fiscal monitor to examine the fiscal position of the Board of Education, including but not limited to the extent of any unappropriated surplus, and to report on the findings of such examination within thirty (30) days; and

5. Requiring the fiscal monitor to approve any and all line item transfers to the Board of Education; and

6. Directing the fiscal monitor to oversee the preliminary development of the 1990-1991 budget for the Irvington school district; and

7. Directing that three (3) individuals who will be appointed by the Mayor to serve as members of the Board of Education commencing on February 1, 1990 shall be permitted to participate fully in the preliminary development of the 1990-1991 budget for the Irvington school district, including but not limited to attendance and participation at public and private sessions; and

8. Directing that the relief set forth at paragraphs (1) through (7) shall expire on or about February 1, 1990, when the new Board of Education is duly constituted and seated as provided for by statute***. (at pp. 2-3)

Upon receipt of the aforesaid Order to Show Cause and supporting affidavits and Memorandum of Law, the Commissioner informed the parties by letter dated September 14, 1989 as follows:

I am in receipt of your Verified Complaint, supporting affidavits, Memorandum of Law, and a proposed Order to Show Cause in Mayor and Council of the City of Irvington et al. v. Board of Education of the City of Irvington, Essex County, Agency Docket No. 284-9/89. I likewise note that your papers include a request for emergent relief pursuant to N.J.A.C. 6:24-1.5 and N.J.A.C. 1:1-12.6. Based upon my review of the aforesaid papers, I have determined to consider directly your application for emergent relief upon receipt of an Answer from the Irvington Board of Education.

Rather than the issuance of an Order to Show Cause, I have determined to consider the aforesaid Verified Complaint as a Petition of Appeal and by copy of this letter, I am directing the respondent party in this matter to file an Answer to same within twenty (20) days of its receipt of the aforesaid papers.

Respondent is further directed to specifically address the issue of the emergent relief requested by petitioners in this matter.

On September 26, 1989 the Respondent Irvington Board of Education filed its Answer, along with responsive papers including affidavits from Barbara Carino, Board Secretary, Bernice Venable, Superintendent of Schools, and a Memorandum of Law setting forth the Board's legal position. The Board's Answer denies all allegations set forth in petitioners' Verified Complaint and seeks dismissal of the petition in its entirety.

By way of summary, the Commissioner notes that petitioners point out that in a referendum held on August 1, 1989 the electorate of the municipality overwhelmingly voted to change the form of the board of education from an elected Type II district to an appointive Type I district. Pursuant to N.J.S.A. 18A:9-8, the terms of all current board members shall therefore expire on January 31, 1990 and will be replaced by persons appointed by the mayor. It is the contention of petitioners in this matter that the current Board, being a lame duck body, has manifested animosity and lack of cooperation with the governing body characterized by

> irresponsible fiscal and personnel practices *** designed to frustrate the will of the citizens of the school district, to spend or encumber The Board's funds on noninstructional expenditures which are unnecessary to be made prior to February 1, 1990 if at all, and generally to administer the affairs of the district to the short range and long range detriment of the children whom it serves.
>
> (Verified Complaint, at p. 2)

By way of example, petitioners contend the following:

> (a) Under the guise of increasing the capacity of the Board's physical plant, it is spending and/or obligating funds on architectural and other fees in anticipation of a building program which (i) has not been approved by proper governmental authorities of the State of New Jersey and (ii) which is well known to the

Board to be program which may not be continued by the successor Board subsequent to January 31, 1990.

(b) At the same time, the Board had failed for weeks even to respond to a proposal by the Essex County Vocational Schools to lease and/or purchase an existing school owned by them and located in the City of Irvington which is vacant and which has the capacity to serve over six hundred (600) students.

(c) In or about April of 1989, the Superintendent of the district resigned and moved to another district. Thereafter, the Board, with the assistance of the New Jersey School Boards Association, began a search for a replacement. This search was designed to include the solicitation and review of written resumes followed by personal interviews. However, on or about August 23, 1989, the Board stopped the selection process even before the resume stage had been completed, and on August 30, 1989, it acted to appoint as the new superintendent an existing employee who, as of August 23rd, had not submitted a resume. As a further example of this irresponsible behavior, the appointment was made for a term which commences on September 1, 1989 and terminates on June 30, 1992, three school years later.

(d) The Board has been secretive concerning its fiscal practices, including but not limited to the amount of its surplus. It took three (3) weeks for representatives of the Mayor and Council to obtain copies of any requested documents, and on August 24, 1989, at the Board offices, the Board's outside labor consultant, to whom the board members and the administrative staff have apparently delegated virtually total authority to direct the district, interrupted a scheduled meeting, directed that public documents not be made available, and loudly threatened to "bash in the head" of the lawyer with a telephone.

(e) A review of the Report of the Custodian of School Monies for the period ended June 30, 1989 shows cash in excess of $13 million and an apparent surplus in excess of $11 million dollars. The Board's total budget for 1988-89 was approximately $53.7 million, and the apparent surplus is therefore twenty percent (20%) of budget, an amount which grossly exceeds anything reasonable. The Mayor and Council have been

> unable to persuade the Board to explain the need or proposed use for this surplus, or even its amount. (Verified Complaint, at pp. 2-4)

In support of its contentions, petitioners offer sworn affidavits of J. Walter Jonkoski, Mayor, and Anthony W. Zappulla, President of the City Council. Petitioners' Memorandum of Law reasserts the same alleged facts as do the aforesaid affidavits contending that the "lame duck" nature of the incumbent Board, as well as the lack of confidence displayed in it by the electorate, creates a necessity to limit its authority until such time as the mayor has taken steps "***to appoint to the Board individuals who have as their primary goal the best interests and education of the children of Irvington and whose fiscal philosophy is consistent with the will of the voters as expressed in the referendum." (Petitioners' Memorandum of Law, at p. 3)

By way of response, the Board relies upon affidavits of Barbara Carino, Board Secretary, and Bernice Venable, Superintendent, which essentially deny the allegations of petitioners and which aver that the expenditures undertaken by the Board are consistent with meeting the needs of the district to carry on needed maintenance and repair activities. Its expenditure, avers the Board Secretary, for architects' fees of $600,000 in connection with the building program was part of the adopted 1989-90 budget which was approved in April by the voters of the district. Further, there is denial that the Board failed to consider and act upon the possible rental of the abandoned Irvington Technical High School building, citing as proof of such consideration Exhibits B, C, D and E attached to the affidavit of Barbara Carino. In response to the allegation by petitioners of impropriety in appointing a new

superintendent, the Carino Affidavit cites the authority of N.J.S.A. 18A:17-15 for the Board to appoint a superintendent. The affidavit further denies any impropriety in its selection process alleging that the position was advertised and the resumes were reviewed and that the appointment of Dr. Venable was based upon the Board's determination that she was the most able candidate.

The Board further denies any secretive behavior in regard to its expenditures or surplus, contending that its actions relative to use of surplus have been prudent and that $3,000,000 in surplus was returned to the taxpayers through appropriation in 1988-89 and $1,000,000 in 1989-90.

The affidavit of the Superintendent, Bernice Venable, largely details the activities allegedly necessary to prepare for state monitoring scheduled for February 1990 and which, therefore, justify the Board's actions in making an appointment of a new superintendent upon the resignation of its prior chief school administrator.

The Commissioner has carefully reviewed the papers filed by the parties. Based upon the aforesaid review, the Commissioner has determined not only to deny any emergent relief for failure to meet the standards as set forth in Crowe v. De Gioia, but also to dismiss the entire matter pursuant to N.J.A.C. 6:24-1.9 in that petitioners have failed to set forth "***sufficient cause for determination***." In reading the aforesaid conclusion, the Commissioner notes that petitioners have not set forth any alleged violations of statute or regulation perpetrated by the Irvington Board of Education which would provide a basis for intervention by the Commissioner. Even placing the allegations of petitioners in

the best possible light, what they regard as examples of Board impropriety are at best disagreements as to the appropriate course of action which should be followed by the Board. Notwithstanding that the electorate of the district has chosen to change the method of selecting the district's board of education, that fact confers no special authority upon the governing body. Nor does it in any manner inhibit the right of the incumbent Board of Education from continuing to exercise its authority pursuant to N.J.S.A. 18A:11-1, until such time that its successor board is sworn in on February 1, 1990, provided such powers and duties are exercised in a manner consistent with law and regulations and do not represent an abuse of discretion. In the Commissioner's view, none of the actions about which petitioners in this matter complain constitutes an abuse of discretion on the part of the incumbent Board. The expenditure relative to architectural fees was part of the adopted 1989-90 budget which was approved by the electorate. Likewise, even a failure to consider the use of the Irvington Technical High School as an alternative to the Board's facilities construction plans, which failure has not been proven, would not constitute an action in breach of the Board's discretion. Nor, can the fact that the Board has elected to fill the position of superintendent based upon the resignation of its previous superintendent in March 1989 be so construed. Considering the fact that the district faces monitoring in February 1990, such an action may well be deemed to be a prudent necessity.

Ultimately, what petitioners base their claim for relief upon are neither violations of law nor regulations nor abuses of discretion but mere disagreement with decisions made by the Board

within its legal authority to make. The right of a board of education to make such decisions free from interference is best expressed by the following quotation:

> According to the principles established in the above-quoted decisions, it is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards.

Boult and Harris v. Board of Education of Passaic, 1939-40 S.L.D. 7, 13 aff'd State Board of Education 15, aff'd 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E.&A. 1948)

In light of the foregoing, the Petition in this matter is dismissed with prejudice.

COMMISSIONER OF EDUCATION

OCTOBER 3, 1989

DATE OF MAILING - OCTOBER 3, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1129-89
AGENCY DKT. NO. 231-7/88

PAMELA PROBST,
Petitioner,
v.
HADDONFIELD BOROUGH BOARD OF EDUCATION,
Respondent.

Joel S. Selikoff, Esq., for petitioner (Selikoff & Cohen, attorneys)

Joseph F. Betley, Esq., for respondent (Capehart & Scatchard, attorneys)

Record Closed: June 26, 1989 Decided: August 10, 1989

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

INTRODUCTION

Pamela Probst (petitioner) is a teaching staff member who has acquired a tenure status in the employ of the Haddonfield Borough Board of Education (Board). Petitioner claims that the Board improperly established her salary for the 1988-89 school year. Petitioner seeks the difference between what she received compared to the amount to which she claims entitlement, plus interest. The Board denies the validity of petitioner's salary claim and demands dismissal of the Petition of Appeal. The parties agree that the claim may be adjudicated by way of cross-motions for summary decision on the record developed thus far.

PROCEDURAL HISTORY

The record shows that petitioner filed her Petition of Appeal in the Department of Education's Division of Controversies and Disputes on July 18, 1988. Petitioner claimed in the Petition that the Board had some obligation to restore her to the step of the salary guide on which she would have been had the Board not withheld a salary increment from her for the 1987-88 school year. By letter dated August 3, 1988 the Director of Controversies and Disputes advised counsel for petitioner

> Moreover, case law has made it abundantly clear that there is no entitlement for an employee whose salary increments were withheld to advance to the step on the salary guide he or she would have been had the increment not been withheld.

Thereafter, in the same letter petitioner's counsel was directed to file a letter with the Director specifying education laws and regulations which petitioner alleges were violated by the Board with respect to her salary placement for 1988-89 and/or why the Petition should not be dismissed for failure to state a cause of action.

Counsel for petitioner did respond to the Director by letter dated August 12, 1988. By letter dated August 26, 1988 the Commissioner ruled as follows:

> Accordingly, the Petition of Appeal is dismissed because no sufficient cause for determination has been advanced. Such determination is based upon the fact that (1) no requirement exists for a board to restore a denied increment and (2) a teacher may always lag one step behind unless a board should act affirmatively to reinstate the denied increment in the future.

Nothing more happened with the case which then stood dismissed until December 13, 1988 when counsel filed before the Commissioner a Motion to Vacate the Judgment of Dismissal of August 26, 1988 or, in the alternative, for an Order allowing the filing of an Amended Petition of Appeal Nunc Pro Tunc.

By letter dated February 6, 1989 Cummings A. Piatt, Acting Commissioner, ruled as follows:

> * * * The amended petition does not aver failure to restore petitioner to the salary step she would have attained absent the withholding of her salary increments. Rather, it avers that having remained at step JK of the salary guide for 1987-88 as a result of the Board's action to withhold her increments, petitioner was entitled to move from step JK to step KL of the guide for 1988-89, the salary for which is $28,400, not $27,100 as set by the Board. As may be seen, contrary to the allegation in the original petition, $28,400 does not represent the sum petitioner would have earned for 1988-89 had her salary increments not been withheld. Rather, it represents the sum for movement of merely one step on the guide (JK to KL) from 1987-88 to 1988-89. [Emphasis in Original]
>
> Given the above, I believe that in the interest of justice and equity the matter should be allowed to go forward. Had the original petition accurately set forth the facts and the legal basis underlying the controversy, the matter would not have been dismissed pursuant to N.J.A.C. 6:24-1.9. Petitioner should not be made to suffer from counsel error discovered well after the time for appeal to the State Board had expired. The facts as laid out do indicate that petitioner has put forth a meritorious claim.
>
> Consequently, I am granting petitioner's Motion to Vacate the Commissioner's August 26, 1988 dismissal and to allow amendment of the petition. The matter shall be transmitted to the Office of Administrative Law for a hearing on the merits.

During a telephone prehearing conference conducted April 4, 1989 between counsel to the parties and the undersigned judge, the issue tentatively agreed to is as follows as reproduced here from the prehearing order:

> Whether during the year following the year in which a board of education withholds a teacher's salary increment pursuant to N.J.S.A. 18A:29-14 that teacher, absent a board resolution to continue the withholding for the following year, is entitled as a matter of right to be restored to the step on the salary guide at which she would have been had the board not withheld her increment the prior year.
>
> The board takes the position that once it withholds a salary increment it must take affirmative action during some subsequent year to restore that teacher to the place on the salary guide she would have been had the increment not been withheld.

Immediately after the prehearing order issued counsel for petitioner took exception in a letter dated April 13, 1989 regarding the framing of the issue. Petitioner places the Board on notice that she alleges her salary following a successful teaching year in 1987-88 should correspond to that amount set forth in the Board's salary policy for her years of training and experience one step below the step her salary would have been

established had the salary increment not been withheld during 1986-87. In petitioner's words, she claims "* * * she should receive the salary represented by a one-step advancement on the 1988-89 guide from the level at which she remained during 1987-88 as a result of the increment withholding." (Letter exception to prehearing order)

This concludes a recitation of the procedural history of the matter.

FACTS

The facts of the matter are not in dispute between the parties and as recited in petitioner's letter memorandum. Those facts are reproduced here:

1. Petitioner Pamela Probst is a tenured teacher in the employ of the Haddonfield Board of Education.

2. Respondent Haddonfield Board of Education is a board of education of the state of New Jersey, and subject to the jurisdiction of the Commissioner of Education, N.J.S.A. 18A:6-9 et seq.

3. For school year 1986-87, Petitioner was placed at the mid-point between steps J and K of the bachelor's column of the adopted salary guide in Respondent's school district and as a result was earning a yearly salary of $25,000.

4. By a majority vote of Repondent Board at a public meeting, Respondent Board withheld the salary increment of Petitioner for school year 1987-88.

In addition to the foregoing additional relevant facts not in dispute between the parties are that petitioner's teaching performance during 1987-88 was such that she "* * * earned her employment and adjustment increment for the 1988-89 school year." (Board's letter brief, p. 9) There is no dispute between the parties that the relevant portion of the Board's salary policy for the school years in question, 1986-87 through 1988-89, provides as follows:

STEP	MIDDLE STEP	1986-1987		1987-1988		1988-1989	
J		$24,600		$25,900		$27,200	
	J/K	25,000	[1,2]	26,300		27,600	
K		25,400		26,700		28,000	
	K/L	25,800		27,100	[3]	28,400	[4]
L		26,200		27,500		28,800	
	L/M	26,600		27,900		29,200	[5]
M		27,000		28,300		29,600	

There is no dispute that petitioner's salary during 1986-87 was $25,000 established at middle step J/K, or at [1], of the salary policy; that because the Board based on petitioner's performance in 1986-87 acted under N.J.S.A. 18A:29-14 to withhold petitioner's increments from 1987-88 her salary remained at $25,000 or at [2] of the salary policy; and, that petitioner's salary for 1988-89 was established by the Board at $27,100, an amount which is set forth in the 1987-88 salary policy above at middle step K/L, or at [3]. Petitioner claims entitlement to a salary of $28,400 for 1988-89 for the amount set forth at middle step K/L on the 1988-89 policy, or at [4] above; and, there is no dispute that had petitioner's increment not been withheld for 1987-88 her salary for 1988-89 would have been at $29,200 or the amount set forth at middle step L/M of the 1988-89 policy, or at [5] above.

The foregoing excerpt from the Board's salary policies for each of the years 1986-87 through 1988-89 were presented by the parties in an identical manner in their respective briefs. The excerpt is predicated upon the Board's bachelor's salary guides which consist of steps A through T for each year and attached to petitioner's brief as Exhibits C, D, E. The Board attached the bachelor's degree salary guide for each relevant year as one exhibit, Exhibit E. The step to the guides do not provide for middle steps as noted in the excerpt above. Nevertheless, there is agreement by the parties that a person whose salary is set at a particular middle step, as an example J/K, in one year would absent a withholding action by the Board that year have their salary established at the next highest middle step, K/L, the following year.

This concludes a recitation of all undisputed facts which I **FIND** to be all the relevant and material facts of the matter necessary to adjudicate the matter on cross-motions for summary decision.

ISSUE

Having had the opportunity to review all the relevant facts and petitioner's argument of law, I **CONCLUDE** that the issue presented is the propriety of petitioner's salary for 1988-89 according to the Board's existing salary policy, though in light of the undisputed historical facts. Petitioner does not claim entitlement to the restoration of the salary increment withheld from her for 1987-88 despite the fact the Board argues that the net effect should she prevail on her claim would be the restoration of the special adjustment increment withheld.

ARGUMENTS

The Board's justification that petitioner's 1988-89 salary of $27,100 is properly established despite the absence of that precise amount from its 1988-89 salary guide is presented initially to fully appreciate the arguments of the parties. After contending in its brief that petitioner has a basic misconception of her 1987-88 increment withholding by her failure to realize both a salary and an adjustment increment were withheld, the Board explains as follows:

> * * * In April 1987 the Board acted to withhold petitioner's experience and adjustment increment for the 1987-1988 school year, holding petitioner's 1987-1988 salary at $25,000. This meant that petitioner was denied the salary increase commensurate with one more year's experience as a teacher (normally referred to as the "employment" increment, or in the Board's parlance, the "experience" increment), as well as the negotiated salary increase resulting from the increase in the salary guide from year to year (the "adjustment" increment). [Footnote omitted] The immediate financial impact of the two-part withholding with a loss of $2,100, comprised of an $800 loss for the experience increment (the non-movement from $25,000 at Step J/K to $25,800 for Step K/L) and a $1,300 loss for the adjustment increment, since petitioner continued to be paid for the 1986-87 rate for Step J/K ($25,000) as opposed to the normal rate of $26,300 for the 1987-1988 school year.
>
> During school year 1987-1988, petitioner performed satisfactorily and thus earned her experience and adjustment increment for the 1988-1989 school year. Pursuant to the salary guide for 1988-1989, the experience increment to be awarded was $800. The adjustment increment was $1,300, for a total of $2,100. Petitioner earned both increments and thus her annual salary was increased from $25,000 to $27,100. If there had been no increment

> withholding at all, petitioner would have received $29,200 for school year 1988-1989 (Step L/M). Thus, petitioner remained $2,100 ($29,200 minus $27,100) behind on the salary scale for 1988-1989 as a result of the prior experience and adjustment increment withholding. Such a result is entirely consistent with the financial impact that a two-part increment withholding has on a teacher's future salary guide placement. Petitioner will always lag one step behind (or $2,100) unless and until the Board acts affirmatively to restore.
>
> (Board's brief, pp. 6-7)

The Board contends that because its withholding of petitioner's increment for 1987-88 included both a salary and adjustment increment, which it notes neither it nor any future Board is obliged to restore to her, she is now entitled only to the $800 employment increment for her satisfactory performance in 1987-88 and a $1,300 adjustment increment which represents the difference between the K/L middle step for 1987-88 and the same step for 1988-89. The Board reasons that N.J.S.A. 18A:29-14 and a series of judicial and administrative decisions including North Plainfield Educ. Ass'n. v. Bd. of Educ. North Plainfield, 96 N.J. 587 (1984) and Cordasco v. East Orange Board of Education, 205 N.J. Super. 407, 410-411 (App. Div. 1985); Masone v. Board of Ed. of Borough of Rutherford, 1984 S.L.D. ____ (June 28, 1984); Damon v. Board of Ed. of Bradley Beach, 1983 S.L.D. ____ (Feb. 17, 1983); and, Blake v. Board of Ed. of the City of Bridgeton, 1982 S.L.D. ____ (Dec. 30, 1982) and others authorize it to add the combined dollar amount of increments, $800 and $1,300 for $2,100, earned by petitioner during 1987-88 to her salary of $25,000 in 1987-88 for a total salary of $27,100 for 1988-89 despite the fact, it is noted, that that amount is not at all contained within its 1988-89 bachelor's degree salary guide.

Petitioner argues to the contrary that the Board's "real dollars" and withholding of both a salary and an adjustment increment analyses is improper and offers a distorted picture of the financial impact of the initial withholding upon her.

First, petitioner notes that the Board offers no authority in support of its "real dollars" analysis. Moreover, petitioner notes that the Commissioner in Chirico v. Belleville Board of Ed., 1985 S.L.D. ____ (July 3, 1985) and Masone, supra, already rejected the notion that a board of education may set a salary in the years following an increment withholding at a level outside the then current year's salary guide. Second, petitioner notes that in North Plainfield, supra, the New Jersey Supreme Court concluded that an increment withholding was not a continuing violation and that "* * * 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." 96 N.J. at 595 (emphasis added) In Cordasco, supra, petitioner notes the Appellate Division held that a teacher whose increment had been denied in a prior year would lag one step behind on the following year's salary guide. 205 N.J. Super. at 411. Three, petitioner notes that the statutory distinction, N.J.S.A. 18A:29-6, between "employment" and "adjustment" increments was revealed September 5, 1985.

In short, petitioner contends that despite the fact she was subjected to an uncontroverted increment withholding action by the Board for 1987-88 at which time her salary remained established according to middle step J/K for two years, her salary must now be established at step K/L and at the amount set forth in the Board's 1988-89 bachelor's salary guide, or $28,400.

DISCUSSION

N.J.S.A. 18A:29-4.1 authorizes the Board of Education to adopt a salary policy, including salary schedules, for all full-time teaching staff members which shall not be less that those required by law. In this case, the Board clearly exercised its statutory authority by adopting such a salary policy, including salary schedules for all full-time teaching staff members. The adopted salary policies, of course, provide for salaries not less than the minimum salary of $18,500 set forth at N.J.S.A. 18A:29-5.

That the legislature saw fit at about the time it was enacting the minimum salary law for teachers to repeal N.J.S.A. 18A:29-6 which defined "employment increment" and "adjustment increment", does not by extension modify the authority of a local board of education at N.J.S.A. 18A:29-14 to withhold for good cause the employment increment, the adjustment increment, or both of any member in a year particularly when the BJoard has a salary guide offering employment increments and adjournments from the prior year's guide as here. It is true, as the Board points out, that it is not mandatory upon a board of education to pay any such denied increment in any future year as an adjustment increment. N.J.S.A. 18A:29-14. Nevertheless, when a board of education adopts a salary schedule pursuant to its authority at N.J.S.A. 18A:29-4.1, as this Board did here, then all full-time teaching staff members must be placed on a salary guide absent a withholding action by the Board. Chirico, supra, (Slip Opinion, p. 16) The Board's salary policy here provides salary gradation in steps, according to years of employment.

Analysis of the cases cited by the parties reveal that when any board exercises its authority at N.J.S.A. 18A:29-14 to withhold salary increments, the teacher is affected in two ways. One, the teacher loses for that particular year the amount of money represented by either the salary or the adjustment increment withheld or a combination of both. Two, the teacher remains one step behind on the salary guide until and if a future board acts to restore the teacher to the proper step according to training and experience. There is no authority, however, for a board of education to use a "real dollars" analysis in subsequent years to avoid having that teacher following a successful teaching performance year advance one step on the salary guide appropriate in that specific year, not on the prior year's guide. In this case, petitioner's salary for 1988-89 should have been established according to middle step K/L on the Board's 1988-89 salary policy, not middle step K/L on its 1987-88 salary policy. To hold otherwise would, in effect, authorize the Board to withhold a portion of petitioner's rightful salary according to the 1988-89 salary guide without exercising its discretionary authority at N.J.S.A. 18A:29-14. This Board offers no authority in support of its analysis that it may set petitioner's 1988-89 salary by combining the dollar amounts of the employment and adjustment increments as between its 1987-88 salary guide and its 1988-89 salary guide and add that combined amount to petitioner's salary frozen at the 1986-87 level in order to arrive at its 1988-89 salary determination.

The Commissioner as well as the courts have consistently acknowledged that when a teaching staff members is subjected to an increment withholding that that member may always lag "one step" behind his/her rightful place on a particular salary guide. There is no authority under any analysis for any board of education which has a current salary schedule to pay a teacher according to the terms of the prior year's guide. In terms of "real dollar" loss to petitioner for her less than satisfactory performance in 1986-87, petitioner's annual salary for 1987-88 was $2,100 lower than the amount it would have been and $800 lower in 1988-89 than it would have otherwise been. Furthermore, unless some future board acts to restore petitioner to the step on a salary guide according to her training and years of experience, she will continue to receive less salary than her training and years of experience would otherwise command.

That petitioner now regains $1,300 by being placed on the 1988-89 guide is no windfall as characterized by the Board. The $1,300 gain is the result of the Board's 1988-89 salary guide structure. Moreover, the withholding of increments otherwise mandated by a salary policy is pegged to a person's retention at a particular step on the

salary guide in the year following unsatisfactory performance, without regard to actual or real dollar amount. Once that year of a retained step is served, the person moves onward to the next step, one below where he/she otherwise belongs, but on that subsequent year's guide.

CONCLUSION

I **CONCLUDE** based on the facts in this case, towgether with N.J.S.A. 18A:26-14 and the judicial and administrative cases cited herein in regard to the provisions of that statute that the 1988-89 salary of Petitioner Pamela Probst must be set according to the Board's 1988-89 salary guide at middle step K/L, or an amount of $28,400. Petitioner Probst is entitled to the difference between the salary she did receive of $27,100 and the salary she should have received, $28,400, during 1988-89 or $1,300.

In addition to the difference between the salary she received as compared to what it is she should have received, petitioner also demands interest on the $1,300.

The State Board rule, N.J.A.C. 6:24-1.18, for the awarding of interest provides that prejudgment interest shall be awarded when the Commissioner concludes the denial of the monetary claim was an action taken by the Board in bad faith and/or has been determined to have been taken in deliberate violation of statute or rule. While the action herein is found to have been in violation of N.J.S.A. 18A:29-14, it cannot be said on the facts in this record that the Board intended to deliberately violate the statute. Rather, I **CONCLUDE** that the Board established petitioner's 1988-89 salary, albeit erroneously, on a belief it had the authority to do so in the manner it did. Accordingly, petitioner's demand for pre-judgment interest is **DENIED.**

Petitioner also demands attorney's fees and costs. The Commissioner has consistently held that he has no authority to award attorney's fees unless specifically authorized by statute. Petitioner cites no specific statute in this case upon which attorney's feels could be awarded. Therefore, petitioner's demand for attorney's fees is **DENIED.** Finally, petitioner cites no "costs" involved in filing a Petition of Appeal before the Commissioner of Education. Accordingly, such demand for costs by petitioner is also **DENIED.**

The Haddonfield Borough Board of Education is hereby **ORDERED** to tender Petitioner Pamela Probst the amount of $1,300 which represents the difference between the salary she received as a teacher in its employ during 1988-89 compared to the salary she should have received during the same period of time.

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.

August 10, 1989
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

August 10, 1989
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

AUG 15 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

ij

PAMELA PROBST,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HADDONFIELD, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. Petitioner filed timely reply exceptions thereto. The Board's submission termed a letter brief in lieu of a more formal response to the reply to exceptions filed by petitioner were not considered in that there is no provision in law providing for replies to reply exceptions. Moreover, any language in such submission alluding to the ALJ's decision will likewise not be considered because even if such arguments were deemed to be exceptions, they were untimely.

The Board advances two exceptions, one factual and one legal. It first claims the ALJ misinterpreted and/or mischaracterized the method by which the Board calculated petitioner's salary for the 1988-89 school year. It avers the ALJ erred in concluding that the Board paid petitioner in 1988-89 according to the previous year's salary guide. It contends that this is untrue and, instead, reasserts the argument advanced at hearing as to the method it used in arriving at petitioner's 1988-89 salary. See Initial Decision, ante, for a synopsis of the Board's argument in this regard.

The Board further argues that the ALJ's "misunderstanding" of the way in which petitioner's salary for 1988-89 was calculated "permeates the entire Initial Decision, thereby tainting the legal conclusions reached therein." (Exceptions, at p. 2) It claims the ALJ has allowed petitioner to receive an automatic restoration of the increments withheld in 1987-88 contrary to well-established authority of the Commissioner, Appellate Division, and New Jersey Supreme Court. The Board adds to its exceptions its reliance upon its Brief in Support of Motion for Summary Decision and its June 15, 1989 letter memorandum in support of its position, which are incorporated herein by reference. It seeks reversal of the initial decision.

Petitioner would have the initial decision affirmed, and she submits that the ALJ's decision amply rebuts all the contentions set forth in the Board's exceptions. More specifically, petitioner contends that the $27,100 the Board paid her in 1988-89 appears only on the 1987-88 salary guide, thus, supporting the ALJ's contention that she was paid on the previous year's guide for the 1988-89 school year.

Moreover, although not cited by the ALJ, petitioner contends Gregg v. Bd. of Ed. of Camden County Vocational and Technical School District, 1977 S.L.D. 120, 124 is directly on point. She claims that case stands for the proposition that the Board in Gregg was not empowered to establish a salary level "outside" and "foreign" to the established salary guide for the applicable school year. (Reply Exceptions at p. 3, citing Gregg at 124) Petitioner contends the Board erred in its contention that she should be compensated for the 1988-89 school year and all subsequent school years at a level outside of the applicable salary guides.

In so claiming Petitioner distinguishes Dowling v. Bd. of Ed. of Middletown Twp., Monmouth County, decided by the Commissioner June 30, 1987, the case the Board relies on for its position. Petitioner claims Dowling was at the maximum step of the administrators' salary guide. She claims:

> In other words, if a "maximum step" employee were restored to the then current year's maximum step for the year following his/her withholding, the effects of the withholding would not be of a continuing nature; in effect, he/she would be fully restored and would suffer a loss only for the year of the withholding. Contrary to the holding of the New Jersey Supreme Court in North Plainfield Ed. Ass'n v. Board of Education of Borough of North Plainfield, 98 N.J. 587, 595 (1984), the employee would not continue to "lag one step behind." See 18A:29-14. For that reason, the special circumstances of the maximum step employee warrants a special method of computing post-withholding salary. Indeed, as the Middletown Board of Education recognized in Dowling, supra, the reason for this special formula is to equalize the effects of a withholding for both maximum step and intermediate step employees:
>
> > 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 "step." However, another individual in the same district who had his increment withheld in the 14th year would have to have it restored in the 15th year, according to the Commissioner's most recent decision, because the 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.
>
> Dowling v. Middletown Board of Education, at 7-8.
>
> Petitioner herein, Pamela Probst, was neither at the maximum salary step in the year prior to her withholding (i.e., 1987-88) nor in the post-withholding school year (i.e., 1988-89). Thus, by advancing only one step in the course of three (3) school years, (as the ALJ held to be appropriate), she will continue to suffer the financial loss of lagging one step behind on the salary guide. See Masone v. Board of Education of Borough of Rutherford, Bergen County, OAL Dkt. No. EDU 10743-82 (May 10, 1984) at 18. The Dowling decision, therefore, provides no justification for placing Ms. Probst "off guide" in the year following the withholding. The ALJ has properly noted the extent of Ms. Probst's financial loss at pg. 9 of his Initial Decision. (emphasis in text) (Reply Exceptions, at pp. 4-5)

Thus, petitioner avers, a board may not compute post-withholding salary at a level outside the established salary guide without contravening N.J.S.A. 18A:29-4.1. She seeks affirmance of the initial decision.

Upon a careful and independent review of the instant matter, the Commissioner adopts as his own the findings of the ALJ below. In so doing, he rejects the position of the Board suggesting that the ALJ erred in concluding that in essence the Board paid petitioner in 1988-89 according to step K/L of its 1987-88 salary policy. The error in the Board's calculation of what petitioner should properly be paid is predicated upon its failure to move petitioner across to the 1988-89 adjustment scale when it sought to establish her salary after her satisfactory performance in the 1987-88 school year. For ease in explaining the correct disposition of this matter, the Commissioner sets forth herein the undisputed salary guide in effect in Haddonfield for the years in question:

STEP	MIDDLE STEP	1986-1987	1987-1988	1988-1989
J		$24,600	$25,900	$27,200
	J/K	25,000 [1,2]	26,300	27,600
K		25,400	26,700	28,000
	K/L	25,800	27,100 [3]	28,400 [4]
L		26,200	27,500	28,800
	L/M	26,600	27,900	29,200 [5]
M		27,000	28,300	29,600

(Initial Decision, ante)

Unlike the situation in Steve Masone v. Board of Education of the Borough of Rutherford, 1984 S.L.D. 1167, Anthony Chirico v. Board of Education of the Town of Belleville, decided by the Commissioner August 23, 1985 and Dowling, supra, all of which were cases wherein petitioner was at the maximum step of the guide, petitioner herein is not at the top of the salary scale. The Commissioner concurs with petitioner's reply exceptions above in this regard and adopts such position as his own. Thus, following her satisfactory performance in 1987-88, the Board, in recognition of her acceptable employment or experience for that year, was obliged to move petitioner to step K/L, ($27,100) which it apparently did do, and also to move her across to the 1988-89 adjusted salary scale ($28,400) since that was the appropriate salary scale in place at the time of its establishing her salary for the 1988-89 school year. Thus, as suggested by petitioner, her salary for 1988-89 should have been set at $28,400, not $27,100 as averred by the Board. To hold otherwise would circumvent the clear state of the law. N.J.S.A. 18A:29-4.1

Accordingly, for the reasons expressed by the ALJ as supplemented herein, the Commissioner directs the Haddonfield Borough Board of Education to tender to petitioner the amount of $1,300 which represents the difference between the salary she should have received as a teaching staff member in its employ during 1988-89 compared to the salary she did receive during the same period of time.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

October 5, 1989

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9399-88
AGENCY DKT. NO. 348-11/88

ELLA SEALES BARCO,

Petitioner,

v.

NEWARK BOARD OF EDUCATION, EUGENE CAMPBELL, EXECUTIVE SUPERINTENDENT OF NEWARK PUBLIC SCHOOLS, ALEASE GRIFFITH, INDIVIDUALLY AND IN HER CAPACITY AS DIRECTOR OF CHILD GUIDANCE, ALYSON BARILLARI, INDIVIDUALLY AND IN HER SUPERVISORY CAPACITY, JOHN AND JOAN DOE, JAMES FORKHAM, IN HIS CAPACITY AS SUPERVISOR OF SUMMER SCHOOL PROGRAMS, AND DIRECTOR OF DEPARTMENT OF HUMAN RESOURCE SERVICES,

Respondents.

Arnold S. Cohen, Esq., for petitioner (Oxfeld, Cohen, Blunda, Friedman, LeVine and Brooks, attorneys)

Marvin L. Comick, Esq., for respondents

Record Closed: July 18, 1989 Decided: August 30, 1989

BEFORE **JAYNEE LaVECCHIA**, CHIEF ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter commenced upon petitioner's filing of a petition of appeal with the Commissioner of Education (Commissioner) pursuant to *N.J.S.A.* 18A:6-9 alleging that her employer, the Newark Board of Education (Board), had failed to properly remunerate her for services provided during July 1988, seeking a declaratory judgment that the Board, through its agents and employees, has harassed her and treated her unlike other employees as she went about in her daily activities as a Learning Disabilities Consultant, and seeking an order enjoining the Board, its agents and employees, from engaging in unlawful harassing practices. The Board filed its answer late. The undersigned relaxed the requirements that the answer be filed within 20 days pursuant to the authority granted by *N.J.A.C.* 6:24-1.17.

At the prehearing conference, four issues were identified as follows:

1. Whether petitioner is entitled to monetary relief for services provided during July 1988, and if so, what damages are appropriate?
2. May petitioner receive interest and counsel fees if she is successful in her claim for monetary relief?
3. Has petitioner been subject to retaliatory treatment and harassment as a result of her filing of a complaint with the Public Employment Relations Commission?
4. Has the Board acted arbitrarily, capriciously or unreasonably or in a discriminatory manner toward petitioner?

Thereafter, a plenary hearing commenced on May 22, 1989. Prior to the commencement of the hearing, counsel represented that the issue of remuneration for petitioner's work in July 1988 had been resolved, therefore, the issue first listed above is no longer in controversy.

Following several hours of testimony by petitioner, the hearing was adjourned for the purpose of allowing the parties to pursue settlement. Counsel were instructed that if settlement proved unsuccessful, legal argument was to be submitted on the issue of whether petitioner's remaining claims presented a justiciable controversy within the jurisdiction of the Commissioner. Counsel also requested resolution of the issue of whether the Commissioner may award attorneys fees to petitioner if she ultimately prevails in this matter. Settlement negotiations having failed, briefs were timely submitted and the record on these two issues closed as of July 18, 1989. These threshold issues are ripe for resolution.

LEGAL DISCUSSION

This matter has been hampered by an inartfully drafted petition of appeal. The petitioner alleges she has been mistreated, overmonitored and harassed by her supervisors and seeks a generalized Commissioner order enjoining future such action. Petitioner had been required by the Prehearing Order to:

> . . . provide respondent and the undersigned with a particularized statement of the alleged discriminatory and harassing incidents said to comprise the pattern of behavior complained of in this petition within two weeks from the date of this order. Within four weeks of receipt of this information, the respondent shall respond to petitioner and the undersigned regarding the alleged incidents.

Besides providing proper notice to respondent of the exact nature of her complaints, this particularized statement was ordered by the undersigned, in lieu of a formal more particularized pleading, to help sharpen the issues for purposes of hearing. Petitioner has never provided the Board or the undersigned with this

statement. She instead produced a typed copy of her diary relating various events and conversations with co-workers and supervisors going back to February 1987.

While I am mindful of the policy reasons compelling the liberal interpretation of pleading requirements, fairness dictates knowing what it is that aggrieves petitioner. Instead, the undersigned heard several hours of testimony from petitioner, refreshed by her diary notes, regarding a myriad of verbal slights and disagreements with her various supervisors (none I may add resulted in any disciplinary action against petitioner). It is not the function of the Commissioner or this tribunal to serve a sounding board for disagreements among professional staff of a school district absent some statutory violation of rights or negative action taken or threatened against petitioner. Giving petitioner the benefit of all doubt from her petition and testimony, such is not the case here.

The petition of appeal makes general allegations of a pattern of discriminatory treatment wherein she believes she has been treated differently than other employees. Importantly, the petition of appeal does not allege any violation of education law or the Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.* It only refers to the Commissioner's authority to hear and determine controversies under the school laws pursuant to *N.J.S.A.* 18A:6-9. Petitioner's generalized plea for relief under *N.J.S.A.* 18A:6-9 absent a particularized statement of alleged factual assertions of discrimination and harassment fail to raise this matter to the level of a controversy under the school laws or under the Law Against Discrimination.

Indeed, she seeks no specific relief other than a declaration by the Commissioner that the Board and its employees have been harassing petitioner and ordering them to cease future such actions. While the rules governing controversies and disputes under the school laws permit an application to the Commissioner for a declaratory judgment, *N.J.A.C.* 6:24-2.1, these rules require the specification of an education statute or regulation which may be violated. *See N.J.A.C.* 6:24-2.2.

Petitioner herein fails to allege the violation of any education statute or regulation which would support a declaratory ruling in this instance. She does not raise a specific wrong which she wants remedied nor does she allege any threatened action by the Board which would give rise to a justiciable controversy. In short, she has failed to state a cause of action and in such settings the Commissioner has seen fit to dismiss such petitions of appeal. *See Fazen v. Board of Education of the Borough of Manville,* 1984 *S.L.D.* _____ (decided October 24, 1984); *Hershkowitz v. Board of Education of Essex County Vocational School,* 1982 *S.L.D.* ____ (decided November 17, 1982). Dismissal is warranted here.

Petitioner's arguments to the contrary are not persuasive. She cites language from a series of cases involving disciplinary action taken by an employer against a teaching staff member wherein the scope of the Commissioner's review over teachers' disputes is broadly stated, but what petitioner does not rebut is the fact that, unlike the instant matter, in each of the cases there was a specific action taken by the employer against the teacher. *See Red Bank Bd. of Ed. v. Warrington, et al.,* 138 *N.J. Super.* 564, 569 (App. Div. 1976) (change in teacher workload affects terms and conditions of employment, hence is properly the subject of grievance pursued through arbitration); *Winston v. Board of Education of South Plainfield,* 125 *N.J. Super.* 131, 140 (App. Div. 1973), aff. 64 *N.J.* 582 (1973) (dispute over unfavorable evaluation of nontenured teacher); *In the Matter of the Tenure Hearing of Samuel C. Capalbo, School District of the Borough of Keansburg, Monmouth County,* 1983 *S.L.D.* 1151 (1983) (disciplinary action against tenured teacher).

Nor is petitioner's reliance upon *Victoria v. Board of Education of the Township of Woodbridge,* 1982 *S.L.D.* 1 (January 5, 1982) controlling on this issue. While the Commissioner dismissed that matter because it had become moot, the initial decision focused on the justiciability of petitioner's complaint that he not be

assigned more than 10 pupils to his power mechanics course. Administrative Law Judge McKeown noted:

> Petitioner's allegations, seen in the light most favorable to him, that he has been issued five engines and sufficient materials and tools for ten pupils, do not rise to the level of a controversy or dispute before the Commissioner. As noted earlier, the Commissioner has subject matter jurisdiction over disputes when an allegation is made that a board exercised its discretionary authority in a shocking fashion or in a manner which tramples the recognized rights of a complaining party. Here, the assignment of sixteen and seventeen pupils to petitioner's two classes of small engine repair, when considered in light of five available small engines and materials and tools sufficient for ten pupils, is not, in my view, a shocking exercise of the Board's discretionary authority. There is no rule or statute which requires every pupil in a skills class, such as small engine repair, to have all materials, tools and supplies individually available at all times. Petitioner seems to imply that because he considers the course, which it may well be, to be a "hands-on" course, individual instruction is required as the only method of teaching. Such is clearly not the case.
>
> The Board's action here does not trample on any recognizable right of petitioner. Petitioner, as a tenured teacher, has a right to continued employment with the Board and he has a right to be assigned within the scope of his certificate. Petitioner does not have a cognizable right to demand the Board assign him no more than ten pupils. 1982 *S.L.D.* at 5-6.

Petitioner herein has not alleged the violation of any cognizable right nor has she alleged any shocking action on the part of the Board. As indicated previously, dismissal is warranted.

Petitioner asked that the issue of attorney's fees be addressed at this juncture. I note initially that petitioner never requested attorney's fees in her petition of appeal. Nevertheless, since this issue was raised at the prehearing conference and not objected to by the Board, I will address it. Case law recognizes that the Commissioner cannot award attorney's fees under any statutory authority found in Title 18A. However, the Commissioner may award attorney's fees as part of

relief available for a violation of the Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.* *See Balsley v. North Hunterdon Regional H.S. Board of Education.*, 225 *N.J. Super.* 221 (App. Div. 1988). Because petitioner has never asserted a claim under the Law Against Discrimination in her petition, nor has she ever moved to amend her petition to include a claim under the Law Against Discrimination and to request attorney's fees under *N.J.S.A.* 10:5-27.1, I **FIND** that attorney's fees are not available to her in this action.

CONCLUSION

Based on the pleadings, documents and arguments submitted to the undersigned addressing this threshold issue of justiciability of this petition, I **CONCLUDE** that this matter should be dismissed. The only issue plead with any specificity, namely the issue of remuneration for work done by petitioner in July 1988, has been resolved through payment to petitioner. There are no other justiciable controversies in this matter

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

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

August 30, 1989
DATE

Jaynee LaVecchia
JAYNEE LaVECCHIA, CHIEF ALJ

Agency Receipt:

August 30, 1989
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 1 1989
DATE

Elizabeth Rogers
OFFICE OF ADMINISTRATIVE LAW

ELLA SEALES BARCO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY et al.,	:	DECISION
RESPONDENTS.	:	
	:	

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

Petitioner's exceptions allege that the initial decision incorrectly found that the Commissioner lacks jurisdiction in this matter and that he cannot award attorney fees. Upon review of the record including petitioner's exceptions, the Commissioner finds the ALJ's analysis and conclusions thorough, well-reasoned and legally correct. Petitioner's generalized allegations cite no violation of education law or the Law Against Discrimination, N.J.S.A. 10:5-1 et seq. If they did, the Commissioner would unequivocably have jurisdiction over both the discrimination and educational aspects. Further, if a violation of the law against discrimination were found, attorney fees could be awarded by him as correctly recited by the ALJ. But such is not the case herein.

The ALJ is quite correct in determining that

> Petitioner's generalized plea of relief under N.J.S.A. 18A:6-9 absent a particularized statement of alleged factual assertions of discrimination and harassment fail to raise this matter to the level of controversy under the school laws or under the Law Against Discrimination. (emphasis supplied)
>
> (Initial Decision, at p. 4)

Accordingly, the Commissioner adopts the recommended decision of the Office of Administrative Law dismissing the matter for failure to state a cause for action for the reasons well expressed in the initial decision. The Petition of Appeal is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

OCTOBER 10, 1989

DATE OF MAILING - OCTOBER 10, 1989

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2935-89
AGENCY DKT. NO. 116-4/89

R.V., ON BEHALF OF
L.V. AND J.V.,
Petitioners,
v.
BOARD OF EDUCATION OF
WOODSTOWN-PILESGROVE
REGIONAL SCHOOL DISTRICT,
SALEM COUNTY,
Respondent.

Edward L. Gatier, Esq., for petitioner, J.V.

Mary Cay Trace, Esq., for petitioner, L.V. (Rafferty & Trace, attorneys)

John D. Jordan, Esq., for respondent (Jordan and Jordan, attorneys)

Record Closed: August 3, 1989 Decided: August 28, 1989

BEFORE **NAOMI DOWER-LABASTILLE,** ALJ:

Petitioners charge that the Board's action in denying them participation in extracurricular activities for the remainder of the 1988-89 school year was arbitrary and unreasonable. On April 21, 1989, the Commissioner transmitted this matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

Petitioners requested a stay of the Board's action to bar J.V. and L.V. from all special school events from April 25 through the end of the school year because a hearing and decision could not be obtained prior to effectuation of the sanction imposed. On April 24, 1989, I granted a stay of the high school principal's disciplinary action but specifically directed that the Board go forward with its consideration of petitioners' appeal, since the stay was sought and granted before the Board had an opportunity to review the principal's action. Hearings were held on June 26, July 7 and August 3, 1989. The record closed on the last hearing date. A list of exhibits entered into evidence is appended to this decision.

On the first day of hearing, I learned that the petitioners had appeared before the Board, one material witness had not (she ignored a subpoena) and the Board members voted to "support the principal" being of the belief that their duty was to determine whether or not the principal's action was reasonable.

J.V. and L.V. who are sisters, were members of the Woodstown High School Mock Trial Team in the 1988-89 school year. The older sister, J.V., was a junior. The younger one, L.V., was a sophomore. On March 17, 1989, the team stayed overnight in a Toms' River motel prior to participation the next morning in a mock trial competition. On March 31, 1989, Principal Terrence J. Crowley advised the Vs' parents that he was imposing sanctions on the girls because they violated a school rule for field trips, namely, the rule "There will be no visitation of rooms between males and females at any time" (R-1). Crowley stated the alleged facts on which his action was based as follows:

> After a room check at 11:30 p.m., several males, who were not with our group, entered your daughters' room through the balcony door. The boys had beer in their possession. The boys remained in the room for a period of time. There is no evidence to suggest that your daughters were involved in any consumption of alcoholic beverages. They did not, however, report this to any responsible adult to have the boys removed from the room. [J-1]

The girls deny that boys were inside their room and deny any culpability in the incident which involved strangers climbing on to their motel balcony.

THE TESTIMONY

Principal Crowley and Gloria Mitchell, the mock trial team advisor, testified concerning the events subsequent to the night at the motel which resulted in the disciplinary action against the Vs. The next morning at breakfast in Toms River, Mitchell overheard snippets of conversation between J.V., L.V., S.W., M.P., A.N. and others. S.W. and M.P. were roommates of the V. girls at the motel. Mitchell heard the words "beer," "boys" and "hockey team." The Vs' team lost the competition. On the way back, the bus stopped at Richman's in Cherry Hill for refreshments. At an opportune time when the four roommates were not present, other students said to Mitchell she should find out what happened in their room. Since the Toms River trip took place just before a week of school vacation, Mitchell learned nothing more until school recommenced, when she heard from students in her class that there was "a wild beer party up in Toms River." Teachers asked her what happened.

Mitchell questioned several students from her mock trial team. They had been told that boys were upstairs in the motel with beer. One girl claimed she saw beer in the hands of J.V. and L.V. Two boys from the team said a lot was going on in the Vs' room, and that boys were in and out throughout the night, climbing up to the second floor by using stacked patio chairs and drainpipes. Later that day, a local attorney called to give Mitchell a list of team members who were invited to attend a local bar association meeting at the country club. J.V., L.V., and S.W., about whom the stories were circulated, were not on the list. Mitchell testified that not only was there talk all over the school, but even in the community.[1]

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1 The entire County of Salem has a population of only about 60,000 and the high school is located in a small borough surrounded by a township which is mostly farm land.

J.V. was in one of Mitchell's classes. Mitchell asked her what happened that Friday night. J.V. told her nothing went on. Mitchell indicated other students had heard boys in their room. J.V. said no one other than the four girls in the room had any knowledge of what went on in the room. Mitchell later spoke to R.M., one of the boys who made the trip. He told her there was "partying" going on, and that boys from a junior varsity hockey team, whom the Woodstown students did not know had been in the Vs' room and had tried to get into the boys' room also, but were told "we can't let you in." At this point, Mitchell reported to Principal Crowley that she had heard the Vs had boys and beer in their room, and that boys were climbing up to the motel room throughout the night. She herself never heard any voices in the Vs' room although her door was about 7 feet away from theirs and she was awake reading until 2 a.m.

Crowley testified that Mitchell spoke to him about the incident the morning of March 29. He sent for the four girls and questioned each one separately in Mitchell's presence. L.V. told him that after room check at 11:30 p.m. some boys climbed up to their balcony, came to the door and tried to get into their room but she stopped them. The incident lasted about 5 or 10 minutes. Upon questioning, she said that, at the time, M.P. was on the bed studying her script for the trial and that S.W. threatened to call security. J.V. told Crowley she was in the bathroom, heard voices and, when she came out, she saw her sister at the doorway to the balcony arguing with some boys. She stood by her sister and the boys left. She said the boys were "bothering" them 20 to 30 minutes. S.W. told Crowley she was in the bathroom with J.V., heard voices, and came out to see boys "in the room." She told the boys to get out, threatened to call security and they left. S.W. was very upset and concerned that she would get in trouble with her parents and jeopardize her chances for future trips although she had not been involved. She said she tried to call Mitchell after the boys left but there was no answer. M.P. told Crowley that she was busy studying her script and was not aware of boys or noise. Crowley asked if this was true. M.P. said it was not. Crowley concluded that something had happened, since there was a discrepancy in the time frames, so he reinterviewed the girls the next day. J.V.'s statements were the same. Crowley got into a discussion with L.V. about whether the boys were "in the room." L.V. illustrated by standing in Crowley's doorway and showing him how one boy had gotten a foot in the doorway. L.V. said the incident lasted 5 to 10 minutes, J.V. said 20 to 25 minutes and S.W. said 40 to 50 minutes. Crowley

interpreted M.P.'s statements as a refusal to tell him the truth due to her friendship with the Vs. Crowley concluded that the field trip rules were violated because of the time variations given, the failure of all four girls to report the incident immediately since Mitchell's room was right across the hallway from them and the admission of the girls that a boy had gotten his foot in the doorway. His conclusions based on these interviews resulted in his letter to the Vs and his penalizing all four girls. The Vs appealed. S.W. and M.P.'s parents did not appeal. Crowley promised them nothing about the event would be placed in their records.

The regulation for overnight trips provides: "There will be no visitation of rooms between males and females at any time." Crowley interpreted the rule to mean that even if a burglar broke in or a stranger opened the door, ran through the room and jumped out the balcony window, there was a technical violation of the rule. Even if the students did not consent to entry, in Crowley's opinion, they would have violated the rule because he read into it a requirement to report such an incident. If a boy had come to the girls' room to borrow tooth paste, and had stepped inside the door when it was handed to him, Crowley would consider this action a violation of his rule. "Visitation" as used in the rule does not connote consent, in Crowley's opinion. Crowley's view of the facts was that the girls had consented to visitation, however, and he considered the balcony to be a "room" for purposes of the rule. Although Crowley based his disciplinary action on the above described interviews, when he learned that the Vs had initiated litigation he interviewed others on the field trip. Thus the statements Crowley obtained from twelve other students on the trip (R-2 to R-13) were all obtained in aid of litigation and were not a part of his original "investigation" which resulted in the disciplinary action.

J.V. is 17 years old, in the eleventh grade and has participated in a number of mock trials. She had a leading role as attorney for the defense. In addition to mock trial activity, she participates in numerous clubs, in sports and has been named to the National Honor Society. J.V. and her roommates settled into their motel room at about 9:30 or 10 p.m. They wanted sodas but it was close to curfew time (11:30 p.m.) so they waited for Mrs. Mitchell to arrive. When she came, J.V., L.V. and M.P. went downstairs with her to get sodas. When they got back to the room after 11:30 p.m. they went out on the balcony to drink their sodas. They saw five or ten young boys walking over to the room below

them and J.V. asked if they were on a mock trial team but the boys did not know what she meant. Later, some boys climbed on their balcony and tried to get in. J.V.'s story was consistent with that told to Crowley. She was completely credible.

L.V., although only 15, is bigger and stronger looking than her older sister, She participates in hockey, softball, debating and the mock trial team, serving on this occasion as an attorney for the defense. She was the person with the most immediate contact with the boys on the balcony. The facts which I find below contain the substance of her testimony and that of her roommates. Although she was a little less articulate then her sister, her testimony was completely credible.

After L.V. and J.V. testified consistent with each other and with the basic facts they related to Crowley, and after Crowley and Mitchell testified, Board counsel offered statements of a number of students none of whom were in the room and whose statements were taken by Crowley in anticipation of litigation. Upon objection, I advised Board counsel that all these hearsay statements could not overcome live testimony of credible witnesses who were present at the time and place of the alleged infraction. I indicated that the most vital testimony would be that of S.W. and M.P., who were in the room. The Board had not subpoenaed these girls. Petitioners had not subpoenaed them because their testimony would have merely been corroborative. Both sides knew that S.W. and M.P. did not want to testify or that their parents did not want them to.

For the next hearing date, the Board subpoenaed several students who were on the trip: T.K., W.M., D.D., A.N., and J.H. Again, S.W. and M.P. did not appear. Board counsel represented that he had been unable to subpoena them in time because the forms were sent to him too late and the girls were out of town. At the end of the testimony of five students, none of whom had been in the room with petitioners, I again indicated that I considered the testimony of S.W. and M.P. vital to the Board's case; the fact that they were not presented would weigh against the Board. The Board then requested an additional date on which to present these witnesses. I granted the continuance.

T.K. is a 16-year old boy who was in the tenth grade and served as a substitute for one of the team participants in March 1989. T.K. and his three male roommates were in the third room to the right of the girls at the end of the motel unit. He testified that he observed boys with sodas in hand calling up to a second floor room but saw no one on the balcony. He said that when he made a statement to the principal he believed that what he saw was before room check (i.e. before 11:30 p.m.) and that when he tried to call D.'s room he got L.V. on the telephone and heard male voices in the background. He no longer was positive about these recollections. The voices could have been TV or radio. The time could have been later and he thinks it was L.V.'s voice on the phone but he had never spoken to her on the phone and could not be sure. Next morning at the motel, he and others teased J.V. and L.V. about having hockey players in the room and the girls replied, "You guys know us better than that."

W.M. just graduated from high school and is 18-years old. He was a roommate of T.K. His testimony was detailed and precise. He was an especially credible witness and his testimony was consistent with that of J.V. and L.V. W.M. read a magazine on the balcony most of the evening until about 2:30 a.m., except for brief periods between 11:30 and 2:30 a.m. when he watched TV. After room check, he saw four of five boys walking under the balcony. They showed an interest in the girls on the Vs' balcony. When the girls went into their room, the boys (later identified as a junior hockey team) started a conversation with W.M. and his roommates. They asked if the Woodstown group had anything to drink. They did not. Then they asked W.M. to come downstairs and let them into that wing of the motel, because the door was locked. (The hockey team was in another wing and W.M. observed them going back and forth from their rooms and wandering around all evening). The Woodstown boys refused to come down and open the door. The hockey team boys asked the names, ages and grades of the girls they had seen on the Vs' balcony and asked why the Woodstown group was there.

W.M. related that he watched this scene outside all night until about 3:30 a.m. since he had nothing else to do. After the conversation, at about 1:30, W.M. saw the boys try to climb upon the Vs' balcony. They piled up chairs and tables to make a ladder. Three climbed up. The Woodstown boys leaned far out over the balcony to see around the privacy wall between room balconies, but they could not see the door of the girls' room.

The boys were not on the Vs' balcony more than about 5 to 8 minutes before they came down again. Then a group of boys headed toward the door on the first floor below the room of the Woodstown boys. They got in somehow, although W.M. did not know how. W.M. saw the boys in the hall carryng their shoes but they had disappeared when W.M. next looked out the door about 10 seconds later. There was one access at each end of the hallway on the second floor. When the Woodstown boys went to sleep at 3:30 the hockey team boys were still outside. Next day, W.M. asked the Vs what happened. J.V. said a bunch of guys on the hockey team were on their balcony and that first a few and then more tried to come in, but the girls tried to keep them out. W.M. was pretty sure the boys had beer with them, but he did not see them bring a trash can with beer cans in it when they climbed onto the balcony.

D.D. is an 18-years old girl who graduated this year. She was in the room next to the Vs. Petitioners pointed out that she dated the principal's son and that, when the principal questioned them for the second time, one of the Vs asked why he was not questioning D.D. since she had been visited by B.R., a boy in the next room with an adjoining door. D.D. was not disciplined although it was true that B.R. entered her room. The inference was that D.D.'s testimony was the product of bias. There were other factors which incline me to find her testimony less credible than that of W.M. and the girls in the petitioners room. D.D. did not have a good specific memory and when cross-examined, she was somewhat argumentative when it was revealed that some of her responses of fact were based on assumptions. Although she was on the balcony immediately next to the Vs' at the time, she could not remember anything the boys under the balcony said to the Vs and, although she leaned out far enough to see the boys reach the door sill of the Vs' room, she could not recall anything the Vs said or whether or not they were in the room or on the balcony at the time. D.D. was worried about the competition next day and was disturbed about the voices and noise in the Vs' room (their TV was on all night) and the noise outside from the boys trying to climb the balcony. D.D. and her roommates yelled from their balcony that the girls should get the boys off their balcony. They spoke on the phone once or twice. L.V. was worried that the noise of the boys on the balcony might have waked the class adviser. D.D. said she saw beer cans in the boys' hands and that a motel trash can full of cans or bottles was lifted onto the Vs' balcony. When D.D. went to sleep at 3 a.m., the noise was still going on.

A.N., age 18, who graduated this June, was also in a room next to the Vs on the opposite side from D.D. She had arrived with her parents at about 1:30 a.m. Between the time she and her parents arrived at the motel room and about 2:15 a.m. when she fell asleep, A.M. heard nothing but talking, laughing and perhaps some music from the Vs' room. She recognized the girls' voices but was not aware of any male voices. She heard nothing in the hall on the way to her motel room. She felt that some of the voices or music she could not distinguish could have been the sound of TV. To her, it just sounded like a girls' slumber party. The next morning at breakfast, the Vs talked about having a whole lot of boys from the hockey team in their room and partying until 5 a.m. A.N. could not tell whether they were joking or telling the truth.

J.H., another 18-year old who graduated in June, was a roommate of D.D. that night. She thought the incident in which the boys first climbed to the Vs' balcony occurred before room check. She went out on the balcony for about five minutes and saw J.V. talking and laughing on the balcony "with two or three guys." J.H. claimed J.V. had a bottle of beer in her hand. She said she knew it was beer because the bottle was brown. A.N. went back in, told another roommate (C.T.) and they both went out on the balcony. They saw L.V. and a few guys coming out of the room. J.H. and C.T. went back in their room and shut the door because they were afraid Mrs. Mitchell was coming. J.H. heard more conversation and laughing until 3 a.m. and it was "obvious" to her that there were male voices in the room. J.H. did not come out on the balcony again and saw nothing after room check, according to her testimony. I note that the time frame, before room check is clearly wrong based on all the credible testimony; the facts were that J.V. was on her balcony with soda in her hand after having gotten it at room check time and was talking with the boys but all credible testimony places them under the balcony at the time. It is also clear that, leaning out as far as she could, J.H. could not have seen boys actually entering or leaving the room. She did see boys on the balcony being rebuffed after trying to enter the Vs' room. Her memory of the time frames is definitely faulty and I do not find her testimony reliable. Like that of some of the others, her memory was colored by what she heard about the events the next and following days.

The last two witnesses were roommates of J.V. and L.V. M.P. had rather an eccentric personality and tended to communicate in a highly subjective way. At age 15,

she was one of the youngest of the group. With probing questioning, and after elimination of extraneous thoughts, the basic facts she related were quite credible. M.P. was very nervous about the upcoming competition because she was required to play the role of a physician and use medical terms with which she was unfamiliar. After going to their motel room around 9:30, she and L.V. went downstairs and looked at the pool area. They could not get back into the door and R.M., who was on the balcony of the room over the doorway area, came downstairs and let them in. Then they went to see D.D.'s room. B.R., a boy from the next room, was there. Just before curfew, M.P. and two of her roommates went downstairs to get sodas. The four girls went out on the balcony to drink their sodas around 11:40 p.m. Most of the Woodstown students were on their balconies. R. (a boy) was on D.D.'s balcony. M.P. saw no sign of a group of boys until this point, when they walked under the balcony. J.V. said to them, "Are you from a mock trial team?" They did not understand. They spoke with the boys for no more than ten minutes. M.P. and her roommates went back in. M.P. lay on the bed studying her medical terms. She was very sleepy. L.V. had the MTV on. J.V. and S.W. were in the bathroom chatting. It was around midnight. M.P. heard boys on the balcony; she could not really see them from the bed. L.V. went to the door and asked what they were doing. They seemed to be trying to force their way in. They were carrying bottles of Budweiser. J.V. and S.W. came out of the bathroom. L.V. told the boys to get off the balcony but they did not leave until S.W. threatened to call security. M.P. was too nervous about the competition and engrossed in studying medical terms to be concerned about the boys. She was not upset or afraid because they were young boys and her roommates, especially L.V., were strong girls and could take care of it. The boys were there only five or at most eight minutes before they jumped off the balcony. The girls absolutely had no alcohol. M.P. had a pineapple-orange drink.

The Vs had MTV on all night because they were used to sleeping with a radio playing. M.P. was very sleepy and she is a heavy sleeper. She doesn't know if the boys tried to get back on their balcony later because she did not wake up. Next day at breakfast J. and L.V. claimed they had a big party. They and M.P. told T.K. and others they had a big party and had a hockey team in their room. They were laughing. It was all a joke. "We did not think our joke would get us in trouble," M.P. said. She resented Principal Crowley "questioning me like I was a common criminal" and stopped answering

her left. She said loudly, "Get off the balcony, we don't want you here. We have to go to sleep."

9. S.W. and J.V. rushed out of the bathroom. J.V. helped her sister close the screen. The boys did not really try to push in when they realized the girls did not want them there.

10. Although the first boys turned to leave, two more had climbed up and pushed toward the door. S.W. went to the telephone and said, "If you don't get out, I'm going to call security." The boys climbed back down. From the time that L.V. became aware boys were on the balcony to when they left it, not more than five minutes had passed.

11. The girls closed and locked both doors, pulled the drapes and got ready for bed. J.V and L.V. could not sleep at first so they turned the TV on and left it on all night.

12. L.V., J.V. and S.W. were awakened by noises later that night and S.W. tried to call the class advisor but did not dial the right number. J.V. heard what sounded like someone trying to climb onto their balcony later that night and also heard people running down the hallway at some time during the night but they did not try to get in so she went back to sleep.

13. The next morning, J.V noticed the gutter on the front of their balcony was broken and some of the students saw beer cans all over the lawn.

14. L.V., M.P., S.W. and J.V. all sat at one end of the table at breakfast. One of the boys, T.K., whom the girls regarded as very gullible asked L.V. and M.P. what happened last night because of all the beer cans on the lawn and the noise. The girls decided to tell him tall tales about the great beer party they had all night with a boys hockey team. J.V. heard Mrs. Mitchell say she had three boys climb onto her balcony and J.V. thought that was very funny. The team lost the competition and J.V. and several others were upset about it but

the others had a good time on the way home. School recessed for a week of spring vacation.

15. Rumors and gossip about "the beer party" had spread all over the school and the community by March 29, when Mitchell and Crowley began questioning students.

16. Crowley misunderstood the facts given by the girls as to the duration of the attempt to enter their room and did not believe the Vs statements; he apparently was quite disturbed by the gossip and by the fact that D.D., of whom he was protective, was accused of violating the same rule.

17. Crowley interpreted the rule to mean that if any male got his foot in a girl's room or climbed onto her balcony, even if such entry was against the girl's will, the "no visitation" rule was technically violated.

18. Crowley also interpreted the field trip rule to require immediate reporting of even an attempt at entry. The rule says, "There will be no visitation of rooms between males and females at any time (R-1)." Nowhere is it suggested that an attempt at entry by any person must be reported immediately.

19. Crowley took disciplinary action against the four girls in room 237, barring them from participation in any extra curricular activities for the rest of school year 1988-89. It is stipulated that the period of such penalty ran for 51 days, which L.V. and J.V. are to serve in the event the Board's action is sustained.

DISCUSSION AND CONCLUSION

Petitioners do not dispute the reasonableness of the penalty for a violation of the school's field trip rule. Rather, petitioners argue that the principal's interpretation of the rule is arbitrary and capricious because it imposes punishment when a student not only has no intent to break the rule but has taken all possible steps to prevent its violation.

Petitioners also argue that the evidence the principal had in hand at the time he imposed the penalty on March 31, which was only the statements of the four girls in room 237, could not reasonably support a finding of violation of the rule. The Board's position is that the principal's disciplinary action cannot be seen as arbitrary and capricious based on the information he had, which included alleged admissions of the girls after the event. The Board claims a presumption of validity in favor of its actions.

The Board is correct that it enjoys a presumption of correctness in acting to in discipline a student. Its sanction may only be set aside when it is arbitrary, capricious or unreasonable. Quinlan v. Bd. of Ed. of North Bergen Twp., 73 N.J. Super. 40 (App. Div. 1962); Ruth Ann Singer v. Bd. of Ed. of the Borough of Collingswood, 1971 S.L.D. 594; Thomas v. Morris Twp. Bd. of Ed., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd 46 N.J. 581 (1966).

On March 31, when the principal applied sanctions for violation of the field trip rule, the only cognizable evidence he had was the statements of the four girls in the motel room. No one else could see into their room. All four said the boys did not come in, except possibly to the extent of a foot placed on or over the door sill. All the girls indicated that the intrusion was against their will. Any other information he had was unreliable hearsay and gossip which he had to know was such because no one else could have seen into the room. It is clear that he misinterpreted the girls' communications with reference to time frames. For example, if the "incident" is viewed as the appearance of boys under the balcony just after room check through their climbing up and then down from the balcony, the time frame is much longer. At hearing, all four girls told almost exactly the same story. It is difficult to understand why the principal did not believe them and why he was unable to synthesize a precise picture of the circumstances from his interviews. The only explanation I can posit is that he was overly influenced by all the gossip making the rounds of the school community. The gossip was largely based on the joking instituted by the girls at breakfast and the very obvious presence on or about the motel premises of the unsupervised boys hockey team. I do not find it reasonable to base conclusions on such factors in disregard of the circumstances.

A conclusion need not be reached on the basis of whether or not the principal's view of the facts was supportable, because the overriding issue here is whether the principal's interpretation of the field trip rule was unreasonable. He considered the rule to be violated if a male put his foot inside the door, even if the male broke into the room or entered against the will of the occupants. In short, even if the girls had no intent whatsoever to violate the rule and, in fact, took immediate action to prevent intrusion, the principal would find a violation. Additionally, he grafted onto the rule a provision which existed in his own mind and which was never made a part of the rule. If a student is required to report immediately any attempt at intrusion, no matter how slight, then the rule should include that mandate. It did not.

The most appropriate analogy to use in reviewing the principal's interpretation of the rule can be found in criminal law in a concept which has been embedded in the common law from the days of its development in England. To be guilty, one must have an unlawful intent (mens rea) when committing an unlawful act. Such intent was regarded as an essential element without which punishment for an action would be patently unfair. It is true that the Legislature can make certain actions unlawful without the requirement of guilty knowledge or wrongful intent, but there are limits to this power. "It is not within the competency of the lawgiver to render that criminal which in its very nature is innocent and essentially nonculpable . . . Some act of commission or omission lies at the foundation of every crime." State v. LaBato, 7 N.J. 137, 148 (1951). Even in the case of a rule not requiring intent, the alleged violator can always protect himself by "the exercise of due care." State v. Elmwood Terrace, 85 N.J. Super. 240, 247 (App. Div. 1964).

What was the omission here? Were the girls required on penalty of punishment to keep their balcony door locked at all times? Is L.V. culpable because, having been waked out of her sleep, she jumped up and instinctively opened the screen door to yell at the boys? Are all the girls culpable because they failed to call their class advisor even through none of them saw any reason to do so at the time? The class advisor might have been sleeping; they did not know if she was still awake. In fact, who was at fault for the incident which occurred? It is clear as a bell that the culprits here were the boys who climbed on the balcony of the four girls. They were as young or younger than the girls.

They were drinking beer, which is illegal. What they attempted was a break and entry, or a trespass which is illegal, and they were grossly unsupervised. As soon as the principal was fully advised of the incident, why did he not, in righteous indignation, investigate what school these boys were from, call-up that school's principal and see that their conduct was reported? (It is possible that the hockey team was a non-school group; that fact is not of record).

My rhetorical questions are intended to point out the fact that the petitioners and their roommates were wholly without fault. Males engaged in criminal actions were responsible for the intrusion and yet the principal interpreted the girls' nonculpable conduct as violative of the rule. I **CONCLUDE** that the principal's interpretation of the rule is unreasonable and hence arbitrary. During the principal's interview with L.V., she asked why he did not chastize one of the boys who stepped into another girl's room to borrow an item. It was a good question. There was also a suggestion, in the questioning of L.V. and J.V., that they probably encouraged the boys in some way to commit their criminal acts. These concerns point to the kind of bias which has incensed women's rights groups over the years and has resulted in statutory changes in the admissibility of life style information about the victim of a sexual assault. (N.J.S.A. 2C:14-7, 1979). The parallels are not far fetched. Petitioners were punished because they were there when a group of boys engaged in illegal conduct. They were the victims of those actions. It is irrational to impose punishment on female nonculpable victims rather than focusing on the male perpetrators of illegal or improper actions. There is a strong suggestion of disparate standards with respect to this imposition of penalty. "Disparate standards by their very nature give rise to allegations of arbitrary and capricious treatment. Byrne v. Bd. of Ed. of Bernards Township, OAL Dkt. No. EDU 5750-84 (March 13, 1985) Commissioner's Dec. (April 29, 1985). I **CONCLUDE** that the petitioners have proved arbitrary and unreasonable interpretation and application of the field trip rule.

It is therefore **ORDERED** that the Board of Education's disciplinary sanctions of petitioners be set aside and that all school records of such actions be **EXPUNGED.**

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.

August 28, 1989
DATE

Naomi Dower-LaBastille
NAOMI DOWER-LABASTILLE, ALJ

August 29/1989
DATE

Receipt Acknowledged:
Seymour Weiss
DEPARTMENT OF EDUCATION

AUG 31 1989
DATE

Mailed To Parties:
Elizabeth Logan
OFFICE OF ADMINISTRATIVE LAW

ct

R.V., on behalf of his minor children, L.V. AND J.V.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF WOODSTOWN-PILESGROVE REGIONAL SCHOOL DISTRICT, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter, including the initial decision of the Office of Administrative Law. Timely exceptions and replies thereto, filed by the parties pursuant to N.J.A.C. 1:1-18.4, have also been considered.*

In its exceptions, the Board first objects to several of the ALJ's findings of fact by pointing in some detail to testimony either judged incredible or disregarded by the ALJ to demonstrate that J.V., L.V. and their roommates encouraged, or at least permitted, boys with alcohol to enter their motel room in violation of school field trip regulations. Specifically, Findings of Fact No. 4 (content of preliminary conversation), No. 7 (initial sighting of boys on balcony), No. 8 (actual entry of boys into room), No. 14

* The Board requested an extension of the filing time for its exceptions because the first volume of the hearing transcript was not available for timely review. That request was denied, as such requests routinely are, on the grounds that the Board had not ordered transcripts at the close of hearings as it should properly have done to ensure timely receipt. Consequently, timely exceptions were filed which made reference to, but did not specifically cite, the first volume of transcript; copies of the second and third volumes were included with these exceptions, along with a promise to forward the first volume upon receipt.

At a date past the lawful filing time, the Board sent the first volume of transcript along with a copy of the exceptions revised to include citations to the transcript, but no substantive changes. Petitioner, in a letter appended to reply exceptions prepared without benefit of either the first volume of transcript or the revised exceptions, strenuously objected to any consideration given these "late filings" by the Commissioner.

It is here noted for the record that the revised exceptions were deemed untimely and rejected accordingly, but that the first volume of transcript forms part of the record of this matter as provided to the Commissioner by the Office of Administrative Law and has been fully considered by him in rendering this decision.

(characterization of subsequent reports as "tall tales"), No. 15 (spread of rumors and gossip), No. 16 (erroneous conclusion of principal), and Nos. 17 and 18 (principal's understanding of field trip rule) are challenged in this manner (Exceptions 1 through 8).

The Board also objects to the ALJ's conclusions that Principal Crowley misunderstood or improperly synthesized what the girls had told him during his initial questioning; that no determination need be reached on whether or not the principal's view of the facts was supportable, since the "overriding issue" was whether his interpretation of the field trip rule was unreasonable; that the school was remiss in not investigating and chastising the party(ies) responsible for the unsupervised hockey team; that there was in the school's questioning of the girls a "suggestion" that they had invited the boys' attention; and that petitioner had successfully demonstrated an arbitrary and unreasonable interpretation of the school field trip rule (Exceptions 9 through 13).

Finally, the Board asks the Commissioner to find that the emergency relief granted by the ALJ on April 24, 1989 (a stay on further effectuation of the suspension from extracurricular activities imposed on March 31) was improvidently granted. Specifically, the Board argues that it had no opportunity to respond to petitioner's application prior to the date of determination and that the Board's obligation to maintain an orderly school environment should have superseded any perceived entitlement on the part of students to extracurricular activities which are a privilege rather than a right, Dennis v. Bd. of Ed. of the Twp. of Holmdel, Monmouth County, 1977 S.L.D. 388, aff'd St. Bd. July 6, 1977 (Exception 14).

Petitioner replies in several instances by offering citations and interpretations countering those of the Board. He also makes much of the Board's failure to include the first volume of hearing transcripts with its exceptions, relying heavily on the Board's not having "proven" its statements about testimony included in that volume, noting that these statements cannot be checked against the transcript and are, hence, incredible and implying that the transcript may have been omitted deliberately in the belief that its contents might damage the Board's case. He further asserts that no purpose can now be served by challenging an emergent relief granted in April and already past in its effect. Finally, he argues that the entire matter hinges on the credibility of witnesses and that, in such cases, "***the conscientious conclusion of the trier of fact must be given great weight and accepted by the reviewing tribunal, unless clearly lacking reasonable support, Appeal of Darcy 114 Super 454 (1971 A.D.)" given the trier's "better opportunity*** to observe the demeanor***and to adjudge the credibility of any witnesses. David vs. Strelecki, 97 NJ Super 360, reversed 51 NJ 563, cert denied 89 S Ct 291 (1967 A.D.)." (Petitioner's Reply Exceptions, at p. 26)

Upon careful review of the record, wherein he has been mindful of both the due weight owed the findings of the ALJ and his own responsibilities under In the Matter of the Tenure Hearing of

Patrick Caporaso, School District of Belleville, Essex County, Docket No. A-4558-85T6, Appellate Division decision March 19, 1987 and In the Matter of the Tenure Hearing of John Eberly, School District of the Township of Ewing, Mercer County, State Board decision August 5, 1987, the Commissioner determines that the events of the overnight trip were in fact as represented by the ALJ, definitive evidence to the contrary being sporadic at best. However, the Commissioner does not concomitantly conclude that the actions of the principal and Board were therefore arbitrary and unreasonable.

In essence, this case presents four girls suspended by a principal (Crowley) on the basis of their stories to him, told, at least in part, in the presence of a teacher witness (Mitchell). The stories of two of those girls (J.V. and L.V.) are not essentially in dispute, as their testimony on the content of their conversations and that of Mitchell and Crowley substantially agree. The stories of the other two (S.W. and M.P.), however, differ dramatically depending on whether one accepts the school's version or that of the girls' testimony before the ALJ. If these conversations were in fact as reported by Crowley and Mitchell, Crowley acted reasonably in concluding that boys were in the girls' room, quite probably with the girls' consent, even if only by their failure to do anything about removing them; after all, he had been told by one girl that the boys were well into the room and that they had beer and, by another, that her roommates had directed her not to tell what really happened. If the conversations were as reported by the girls, however, it would have been far less certain that there was any basis for suspension.

The Board attempted to prove the veracity of Crowley and Mitchell's version by bringing forth student witnesses whose testimony as to actual events was thought to be corroborative by virtue of being consistent with the stories allegedly told to the school by S.W., in particular, and with the "tall tales" told by the V's on the morning after the incident. However, because the ALJ found most of these witnesses incredible, while finding both S.W. and M.P. credible, the inevitable conclusion was that Crowley had disbelieved, misunderstood or misremembered his conversations with S.W. and M.P. and interpreted school policy too narrowly with respect to the V's. Hence, his actions, and that of the Board in upholding him, were inherently arbitrary and unreasonable.

It is here important to note that the progress of this case has included subtle shifts which affect both credibility determinations and standards of review. When their case came before the Board of Education, J.V. and L.V. specifically limited their appeal to the claim that the principal's action was arbitrary and unreasonable based on what he knew at the time he took it; consequently, they convinced the Board that the only information before it should be that which the principal actually knew at the time he imposed the suspension, namely his conversations with the four girls actually involved in the alleged incident. Appearances were made by the V's and by S.W., but M.P. ignored a subpoena and did not appear. After hearing their testimony, the Board voted to

"support the principal." Thus, by petitioner's own framing of the issue, the Board never reached an independent determination of the girls' actual innocence or guilt, only a determination that the principal had acted reasonably based on what he knew at the time. This was, technically, the matter appealed to the Commissioner. However, during the course of the hearing before the ALJ (there was no pre-hearing conference), the central matter of the case was transmuted from the reasonability of the principal's action under the circumstances to an independent factual determination of the actual events underlying the suspension. The ALJ in effect worked backwards, by first determining what had actually happened irrespective of what the girls may or may not have told Crowley, then making a judgment on Crowley's actions in view of her findings.

With respect to the actual sequence of events during the overnight trip, the Commissioner views the ALJ's findings as entirely plausible and fully supportable by the great weight of evidence. Even much of the testimony to the contrary adduced by the Board is not necessarily in conflict with these findings. By all accounts, there was nothing untoward in the girls' first encounter with the boys. Several witnesses did indeed see boys running about the building and climbing up and down the girls' balcony, but none saw the boys actually enter the girls' room; indeed, it would have been physically impossible for them to do so. The type of goings-on described by witnesses are entirely consistent with the girls' story of being awakened during the night by the sounds of intermittent commotion on the balcony. It can certainly be argued that the girls used poor judgment in not reporting the presence of possible intruders, but it is entirely plausible that a group of self-possessed and intelligent teenage girls would not be disturbed by younger boys who did not appear to be attempting a forced entry into a securely locked room, particularly since they had met the boys earlier and evidently did not find their shenanigans to be seriously threatening. That S.W. thought to do so, but decided against it the next morning when her prior concerns seemed foolish in retrospect, is entirely consistent with the type of high-strung, nervous personality described by Crowley and Mitchell and evinced in both the content and manner of her testimony before the ALJ. That the boastings of the next morning were merely playful banter in response to obvious signs of carousal in and around the building is supported by the fact that Mitchell, directly across the hall, and A.N., who arrived when the alleged party would have been in full swing, heard nothing unusual; that most witnesses who heard voices could not be sure that they were not hearing a TV; and that Mitchell's next-day check-out inspection revealed absolutely no evidence (e.g. smells of stale beer) of the type of activity alleged to have taken place in the girls' room. Moreover, the fact that the stories spreading among students and teachers were consistent with the notion that a party had taken place is not at all surprising, given that every last bit of evidence about what actually went on in the girl's room (other than the girl's own testimony) was hearsay based on the conversations of the following morning.

The Commissioner, does, however, differ with the ALJ's assessment of Crowley's actions. Because she did not specifically find him incredible, her belief in the testimony of the girls necessarily led her to find as she did in the initial decision, ante (Findings of Fact Nos. 16, 17 and 18) and to conclude that Crowley's actions were unreasonable. The Commissioner's reading of the record suggests instead that Crowley's account was both accurate and a reasonable basis for him to act as he did under the circumstances. During testimony, Crowley maintained unswervingly and convincingly that his reasons for imposing the suspension were the inconsistencies in the girls' stories to him and their failure to report the incident, not because this was required by the rule but because it was indicative that the boys were quite possibly present with the girls' tacit permission. Neither did Crowley's answers to hypothetical questions posed during examination indicate that he would actually apply what he clearly called a "technical" interpretation of the visitation rule; in fact, quite the contrary.

The Commissioner is also persuaded that Crowley neither misunderstood or misremembered his conversations with the four girls. His recollections about the V's squared very well with the girls' accounts, and the discrepancies between his recollections and the later testimony of S.W. and M.P. can be explained, in the view of the Commissioner, by other factors. During testimony, S.W. was clearly choosing her words with care and presence of mind with regard to their implications for the present proceedings. When she met with Crowley, however, she was by all accounts utterly distraught. It appears highly unlikely that she would now remember so precisely her responses in the three areas that proved to be critical in Crowley's determination (exact time frame, definitely "in" the room, and "trash can full of" beer), given her state of mind at the time and given that she offered only general recollections of what she told him otherwise. It is far more likely that, in her nervousness and haste, she made less careful statements during her interview with Crowley, statements that led him to conclusions, however reasonable, that she sincerely did not intend. The character of M.P.'s testimony, including some of her caustic responses during examination, lead the Commissioner to believe that she might very well have told Crowley that she didn't see anything and, alternatively, that she was not telling the truth, even if she said such things only as gesture of defiance. To so hold is not to say that these girls were not generally credible, but that their manner of testifying made it very plausible that they initially spoke as Crowley reported, even if, to give them the benefit of doubt, they genuinely did not remember so doing. As for the discrepancies in the various time frames reported, the Commissioner notes that no one had watches or clocks and that the transcript is riddled with indications of different perceptions of time by different people even in noncontroversial matters. It is not at all necessary to conclude, as the ALJ did, that Crowley misunderstood the girls' time references. The significant point is that they varied sufficiently for him to reasonably suspect dishonesty on someone's part.

Given the gravity of the charge and its potential for harming the orderly environment of the school and the district's reputation in the community, it was not at all unreasonable of Crowley to proceed as he did. Neither was it unreasonable of the Board to support Crowley in this matter given the way the issue was framed by the V's upon their hearing before the Board. Where the process went awry, however, is that the Board failed--albeit by petitioner's instigation--to make a determination as to the actual facts of the event leading to the suspension rather than simply focusing on the appropriateness of Crowley's actions given what he knew at the time. By so abrogating its responsibility, the Board has left that task to the administrative tribunal and must now accept the due weight owed its determinations.

The Commissioner notes for the record that he finds the ALJ's notion of sex bias somewhat misplaced, given that Mitchell testified to telling Crowley, upon her reporting of the incident to him, that she had heard that the girls may have invited the boys into their room. Any hint of "suggestiveness" in Crowley's questioning is more likely due to his attempt to verify the truth of prevalent rumor than to an insensitivity or bias of which there is no other indication on the record. There is likewise no basis in the record for the ALJ's claim that the school failed to properly investigate the identity of the boys involved in the incident.

Finally, the Commissioner declines to determine that emergent relief in this matter was improvidently granted, given the nature of the penalty imposed, the unarguable individual consequences of permitting it to be enforced during the pendency of a hearing, and the small likelihood of the stay having any significant impact on the orderliness of the school environment.

In sum, while the Commissioner finds that both Crowley and the Board acted reasonably within the specific parameters of this case as it was originally framed, the ALJ's (and the Commissioner's) ultimate findings with respect to the trip itself necessarily render these actions null and void. Accordingly, with the exceptions noted herein, the initial decision of the ALJ is affirmed and the disciplinary action of J.V. and L.V. by the Woodstown-Pilesgrove School District is set aside, with all records of such action to be expunged.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

October 13, 1989

Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1455 89
AGENCY DKT. NO. 29-2/89

HOWARD TOPLANSKY,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF KENILWORTH, UNION COUNTY,
Respondent

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

Franz J. Skok, Esq., for the Board of Education
(Johnstone, Skok, Loughlin & Lane, attorneys)

Record Closed August 3, 1989 Decided August 25, 1989

BEFORE **JAMES A. OSPENSON**, ALJ

Howard Toplansky, a tenured teaching staff member employed by the Board of Education of the Borough of Kenilworth, Union County, alleged that by letter of November 28, 1988, the Board advised him that it would retire into closed executive session to evaluate his performance as teacher and, if necessary, to consider possible disciplinary action against him The letter advised that pursuant to *N.J.S.A.* 10:4-12(b)(8), he had the right to request that the matter be discussed in public. Petitioner notified the Board by his letter of December 2, 1988 that he did not want his evaluation, with possible disciplinary overtones, to be discussed in public session. On January 9, 1989, after the Board had met in executive session at a regularly scheduled board meeting, a Board member introduced a resolution, to which a formal letter of reprimand was annexed, that the letter be included in petitioner's personnel file.

In a petition of appeal filed in the Division of Controversies and Disputes of the Department of Education on February 16, 1989, petitioner alleged publication of the resolution and letter of reprimand in public session with false, inaccurate and misleading allegations, was in contravention of his request of December 2, 1988 to the Board and in contravention of his rights under *N.J.S.A.* 10:4-12(b)(8). Petitioner sought judgment declaring that the Board had violated prescriptions of the Open Public Meetings Act by evaluating him in public notwithstanding his previously expressed wish not to have his disciplinary matter discussed in public session, that the Board be required to expunge the letter of reprimand from his personnel file and that the Board be required publicly to apologize for its illegal actions The Board admitted the sequence of events generally but denied its actions contravened petitioner's rights under the Open Public Meetings Act and alleged, rather, that its actions were in full compliance therewith. The Board's answer was filed in the Department of Education on February 27, 1989. The Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law on February 28, 1989 for hearing and determination as a contested case in accordance with *N.J.S.A.* 52:14F-1 *et seq.*

On notice to the parties, the matter came on for prehearing conference in the Office of Administrative Law on March 20, 1989 and an order was entered establishing, *inter alia*, a hearing date on August 4, 1989. The parties were directed to confer for the purpose of fashioning stipulations of all relevant and material propositions of fact in chronological and sequential order, together with

documentation as necessary, which thereafter were to be filed in the cause no later than ten days before hearing. Thereafter, the matters at issue were to be addressed and resolved as if on cross motions for summary decision based on pleadings, admissions, stipulations, documentation and memoranda of law, in accordance with *N.J.A.C.* 1:1-12.5. Before hearing on August 4, 1989, the parties advised the administrative law judge that stipulations with documentation had been agreed upon, stipulations with documentation and memoranda of law were timely filed; and the record closed. Petitioner expressly confined all issues in the case to those expressed in the prehearing conference order. Specifically, petitioner presented no claim with respect to inclusion of any alleged improper comment in his personnel folder under the theory of, for example, *Duffy v. Board of Ed., Township of Brick*, 1974 *S.L.D.* 111; and *Washington Education Association v. Board of Ed., Borough of Washington*, 1981 *S.L.D.* 705; aff'd St. Bd. 1981 *S.L.D.* 707; aff'd, App. Div., Dkt. No. A-1098-81T1, unpublished opinion, Nov. 30, 1982.

As provided in the prehearing conference order, at issue are the following:

(1) Whether the Board violated petitioner's rights under the OPMA (*N.J.S.A.* 10:4-12(b)(8)) by attaching to a resolution a copy of a letter of reprimand, and reading it in a public session, and in thereafter ordering inclusion of that letter in petitioner's personnel file, in face of the Board's prior notice to petitioner of November 28, 1988 [and January 5, 1989] and in face of petitioner's response thereto by his letter on December 2, 1988; and

(2) If so, what remedy shall issue?

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

The parties having admitted and/or so stipulated, I make the following **FINDINGS** of **FACT**:

1. Petitioner is a tenured teacher of instrumental/vocal music employed by the Board of Education of the Borough of Kenilworth, Union County. He

has been president of the Kenilworth Education Association for three years.

2. By letter of November 28, 1988, the Board advised petitioner that on December 5, 1988 it would retire into closed executive session to discuss evaluation of his performance as teacher of instrumental/vocal music. He was advised the discussion might lead to possible disciplinary action against him. He was advised that pursuant to *N.J.S.A.* 10:4-12(b)(8), he had the right to request the matter be discussed by the Board in public session (J-1; Exhibit A).

3. On November 30, 1988 petitioner replied by letter to request the Board meet in closed executive session on December 5. He requested the right to speak and said he would be represented by NJEA at that meeting (J-2).

4. By letter of November 30, 1988, the Board acknowledged his request but denied he had a right to impose the condition of being present or being represented at any closed executive session of the Board. He was advised that if he did not give unconditional approval to the closed session, the Board would discuss evaluation of his performance as teacher of instrumental/vocal music in open session (J-3, Exhibit B).

5. By letter of December 1, 1988, petitioner replied that in accordance with his rights and privileges, he would attend the closed executive session of the Board on December 5, 1988 and would have an NJEA representative with him. He informed the Board he would not then speak; he asked to be advised when the meeting would begin (J-4; Exhibit C).

6. By letter of December 2, 1988, petitioner advised the Board that after consultation with the NJEA, he had decided not to attend the closed executive session meeting. He informed the Board, however, the matter of evaluation of his performance was to be discussed by the Board "only in closed session and under no circumstance [was] to be brought into open public session" (J-5, Exhibit D).

7. By letter of December 7, 1988 the Board president on behalf of the Board wrote to petitioner reciting facts it found disturbing about his

performance as a member of the faculty. Petitioner was requested to "respond to these questions within 14 days from date of this letter." He was cautioned about failure to respond at all or failure to provide satisfactory explanation (J-6)

8. By letter of December 19, 1988, petitioner replied to the assertions made about his performance(J-7). [Inclusion of [Exhibits J-6 and 7 are for the purpose of establishing the sequence of events and are not intended to imply the assertions are true or false.]

9. By letter of January 5, 1989, the Board notified petitioner that it would retire into closed executive session at its regular meeting of January 9, 1989 in order to discuss evaluation of his performance as teacher. He was advised that pursuant to *N.J.S.A.* 10:4-12(b)(8), he had the right to request the matter be discussed in public and that any such request must be received in writing by the Board before start of the meeting (J-11; Exhibit E) No such request was made by petitioner.

10. On January 9, 1989, the Board retired into closed executive session and, *inter alia*, conducted a discussion on "placing a letter of reprimand in [petitioner's] file." It then reconvened its regular Board meeting (J 8).

11. At its regular meeting of January 9, 1989, the Board introduced and passed a motion directing a letter of reprimand be placed in petitioner's personnel file and directing that the letter of reprimand be read in public session. The letter was so read (J-9; J-10).

DISCUSSION

Petitioner argued that there would be nothing left to the concept of the privacy rights of public employees if Board action here were permitted to stand. He sought judgment finding and declaring that the Board violated prescriptions of the Open Public Meetings Act by evaluating him in public, by reading a letter of reprimand and by inserting it in his personnel file, "notwithstanding [his] previously expressed desire not to have this disciplinary matter discussed in public session" Pb

at 16-17. The argument is prompted by language of the court in *Oliveri v. Carlstadt-East Rutherford Board of Ed.*, 160 *N.J. Super.* 131 (App. Div. 1978):

> . . . *N.J.S.A.* 10:4-12(b)(8) . vouchsafes two rights to a public employee who maybe adversely affected by a personnel action or decision of his employer (1) a right to privacy, that is, to a nonpublic discussion and a closed meeting, and (2) a right to a public discussion at an open meeting upon his request in writing . . . We agree with *Rice v. Union City Reg. High Sch. Bd. of Ed.*, 155 *N.J. Super* 64 (App. Div. 1977), ***cert. den.*** 76 *N.J.* 238 (1978), that the right to request a public discussion of a personnel matter presupposes notice to an employee who may be adversely affected and that the right to privacy is personal and cannot be waived except by the employee himself [160 *N.J. Super.* at 133-4].

The argument, in my view, rests upon a fallacy. The Open Public Meetings Act with the personnel exception in *N.J.S.A.* 10:4-12(b)(8) does not primarily champion privacy rights; rather, it champions publicity rights of the public. The Legislature declared, in *N.J S A* 10:4-7, that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society It attempted to assure all citizens of opportunity through advance notice to attend all meetings of public bodies in the open. It precluded public bodies from shadow government behind closed doors away from public scrutiny It allowed closet consideration only when public bodies believe the personal privacy of individuals would otherwise be infringed. Thus, under *N.J.S.A* 10:4-12(a), all meetings of public bodies shall be open to the public at all times Under *N.J.S.A.* 10:4-12(b), public bodies may exclude the public only from that portion of a meeting at which it discusses, *inter alia*, (8) matters involving employment or disciplining of specific public employees, provided, however, such employees do not request in writing that such matters be discussed in public. The "privacy" interest protected by OPMA, then, becomes an individual employee's right (1) to avert subterfuge and to compel the public body to act only in public or (2) to let it sit in private. Nothing in the OPMA, said the Legislature in *N.J.S.A* 10:4 12(a), shall be construed to limit the discretion of a public body to permit, prohibit or regulate the active participation of the public at any meeting. See, generally, *Polillo v. Deane*, 74 *N.J.* 562, 569-77 (1977).

Petitioner's insistence, therefore, that the Board here acted improperly *in public* is without foundation. Neither the holding of the court in *Rice, supra, Oliveri, supra, or Cole v. Woodcliff Lake Bd. of Ed.*, 155 *N.J. Super.* 398 (App Div. 1978), is to the contrary; nor do holdings in those cases offend a generality that publicity rights and not privacy rights are primarily vouchsafed by the OPMA. In *Rice*, the court held the board properly acted under the OPMA to retire into executive session to discuss personnel matters but that seventeen terminated employees were entitled to reasonable prior notice of the board's intention to do so. In *Oliveri*, the court merely affirmed plaintiff's right to request of the school board a public discussion of personnel matters, upon advance notice. In *Cole*, the court judicially approved action of a school board in holding a private session to evaluate the job performance of a school secretary, where the secretary had sufficient advance notice of board intention to do so but did not act to request the public meeting and, in fact, specifically asked for a closed meeting to discuss reasons for her termination. The OPMA was thus not violated; the school secretary had waived her right to insist upon a public meeting of the board.

Here, a critical operative event is petitioner's letter to the Board of December 2, 1988 (J-5), which acknowledged prior notice of Board intention to retire into executive session at its regular meeting on December 5, 1988 in order to discuss his job performance. Petitioner not only did not request the Board meet only in public session but attempted to caution the Board that "under no circumstance is [his job performance] to be brought into open public session." The record is clear that the Board complied with the personnel exception of N.J.S.A. 10:4-12(b)(8) and *Rice*, when it acted as it did on January 9, 1989 after express notice to petitioner on January 5, 1989 (J-11), to which petitioner never responded. Board action in private and public session on January 9, 1989, therefore, is unassailable. *Cf. McGrath v. Bd. of Ed., Borough of Kenilworth*, 1989 *S.L.D.* ___ (July 21, 1989; slip op. at 12-13).

CONCLUSION

Based on the foregoing, having reviewed stipulations of the parties and their memoranda of law, I **CONCLUDE** the petition herein should be, and it is hereby, **DISMISSED**.

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

I hereby **FILE** this initial decision with **SAUL COOPERMAN** for consideration

August 25, 1989
Date

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

August 30, 1989
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 30 1989
Date

OFFICE OF ADMINISTRATIVE LAW

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HOWARD TOPLANSKY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF KENILWORTH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Petitioner excepts to the initial decision of the ALJ below and relies primarily upon the brief filed in support of his Motion for Summary Decision. Moreover, he claims the decisional precedent cited therein was ignored by the ALJ. He submits that the initial decision rendered a nullity the personnel exception of the Open Public Meetings Act (OPMA) as set forth within N.J.S.A. 10:4-12b(8), as well as all the other exceptions within N.J.S.A. 10:4-12b.

Citing Rice, supra, Oliveri, supra, and Cole, supra, petitioner claims that contrary to the ALJ's conclusion of law, "an individual's privacy rights are, in fact, paramount in instances where a school district emoloyee's job performance is at issue and furthermore establishes that these privacy rights cannot be 'waived' by Board of Education/Administrative fiat." (emphasis in text) (Exceptions, at pp. 1-2)

Petitioner further argues that a PERC decision entitled Lakewood Board of Education and Lakewood Education Association, PERC No. 77-73, decided June 23, 1977, supports his contention that public discussion of the contents of the letter of reprimand was inappropriate. Lakewood, supra, held, that it is illegal to open up collective bargaining to the public, notwithstanding the obvious impact that negotiated settlement agreements would have on the municipal tax rates, petitioner claims.

Petitioner would distinguish the ALJ's reliance upon Joann McGrath v. Board of Education of the Borough of Kenilworth, decided by the Commissioner July 21, 1989, by suggesting that McGrath was a subject of a RIF, which in no way implicated her competence or professionalism as a teaching staff member. Further, petitioner notes that McGrath had not received a Rice notice advising her that personnel matters affecting her would be reviewed in closed executive session by the Board of Education. Thus, petitioner avers, there were "effectively no privacy rights at issue in the

McGrath proceedings since the reduction in force could not conceivably be viewed as being disciplinary in nature." (Exceptions, at p. 3) Further, McGrath had not been advised that the Board would review her situation in closed executive session, as is the case in this matter, petitioner contends.

For the reasons stated above, as well as those in his brief, petitioner would have the initial decision rejected.

Upon a careful and independent review of the record, the Commissioner rejects the ALJ's conclusion finding that the Board's action in reading aloud in public session a letter of reprimand was appropriate.

The Commissioner would first note his accord with the ALJ's conclusions up to a point. He agrees with ALJ Ospenson that OPMA champions the public right to witness public business foremost. However, it cannot be gainsaid that the Legislature was mindful to protect Board employees' and prospective employees' rights of privacy in carving out the personnel exception embodied in N.J.S.A. 10.4-12b(8). As noted in Cole, supra, at pages 403-404:

> Thus, in its initial statement of purposes behind the Open Public Meetings Act, the Legislature has engrafted certain exceptions onto the idea of conducting government in the "sunshine."
>
> These exceptions are particularized in N.J.S.A. 10:4-12(b) wherein the statute enumerates instances in which public participation is not required. The pertinent part of this list dealing with personnel decisions reads as follows:
>
> > (b) A public body may exclude the public only from that portion of a meeting at which the public body discusses:
> >
> > 8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.

> The justification for permitting a governmental body to conduct a private hearing in matters concerning the employment, appointment or termination of any public officer or employee is that individual privacy might be invaded or damage to personal reputations may occur. Note, "Open Meetings Statute, the Press Fights for the 'Right to Know,'" 75 Harv. L. Rev. 1199, 1208 (1961). The safeguarding of individual privacy was also recognized by a New Jersey court as a policy justification for exempting personnel matters from the requirements of the Sunshine Law. Jones v. East Windsor Reg'l Bd. of Ed., 143 N.J. Super. 182 at 191-192 (Law Div. 1976). (emphasis supplied)

The Commissioner's review of Cole, supra, comports with the ALJ's that

> ***the court judicially approved action of a school board in holding a private session to evaluate the job performance of a school secretary, where the secretary had sufficient advance notice of a board intention to do so but did not act to request the public meeting and, in fact, specifically asked for a closed meeting to discuss reasons for her termination. (emphasis in text) (Initial Decision, at p. 7)

Likewise, in the instant matter, the Commissioner concurs with the ALJ that the Board's having adjourned into private session to discuss "possible disciplinary action" against petitioner was appropriately taken, after petitioner declined a public discussion of his status pursuant to Rice, supra. However, it is not the adjournment into private session that is at issue in the instant matter but, rather, the public recitation of the letter of reprimand following the discussion in closed session that is before the Commissioner.

The Commissioner's research uncovers no precedent dealing with the question of whether a letter of reprimand is protected by the personnel exception of the OPMA. However, the intent of the Legislature is made clear both by the plain language of the statute, as well as through the court's interpretation as noted above in Cole, supra, and Jones, supra: safeguarding individual privacy is a significant consideration in resolving personnel matters that come before a board of education. Applying such interpretation to the instant matter, one is compelled to conclude that recitation of a letter of reprimand into the public record negates the purpose of retiring into closed session to discuss petitioner's employment and possible disciplinary action.

This conclusion is bolstered in recognizing that the law does not require a board of education to pass a resolution to place a letter of reprimand in a personnel file. Having so declared its intention to include said document in petitioner's personnel file,

however, the Board effectively prevented any further discussion of the matter publicly because any such information contained in a personnel file is to be held strictly confidential pursuant to Executive Order Number 11, which states, in pertinent part:

> 2. Except as otherwise provided by law or when essential to the performance of official duties or when authorized by a person in interest, an instrumentality of government shall not disclose to anyone other than a person duly authorized by this State or United States to inspect such information in connection with his official duties, personnel or pension records of an individual, except that the following shall be public:
>
> > a. An individual's name, title, position, salary, payroll record, length of service in the instrumentality of government and in the government, date of separation from government service and the reason therefor; and the amount and type of pension he is receiving***.

The Commissioner agrees with petitioner's exception that McGrath, supra, is distinguishable from the instant matter insofar as no disciplinary matters or specific reference to her performance were at issue in that case. Thus, privacy expectations were not significantly called into question in McGrath.

Accordingly, the Commissioner rejects the initial decision. He finds that the Kenilworth Board has violated the spirit and intent of the OPMA and clearly violated Executive Order Number 11 in reading aloud an evaluation of petitioner's performance and reprimand into the public record dated January 9, 1989. However, in so finding, the Commissioner passes no judgment on the veracity of the contents of such letter; the merits of the content of the letter of January 9, 1989 were not at issue herein. Consequently, the Commissioner finds it inappropriate to grant petitioner's requested relief in the form of expungement of said letter or an apology from the Board.

COMMISSIONER OF EDUCATION

October 13, 1989

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF DELAWARE, TOWNSHIP COMMITTEE OF THE TOWNSHIP OF EAST AMWELL, MAYOR AND COMMON COUNCIL OF THE BOROUGH OF FLEMINGTON, TOWNSHIP COMMITTEE OF THE TOWNSHIP OF RARITAN, AND TOWNSHIP COMMITTEE OF THE TOWNSHIP OF READINGTON,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	
RESPONDENT.	:	

For the Petitioners, Vogel, Chait, Schwartz & Collins
(David H. Soloway, Esq., of Counsel)

For the Respondent, Broscious, Cooke & Glynn
(James W. Broscious, Esq. of Counsel)

This matter has arisen by way of Petition of Appeal and Application for Interim Relief filed by counsel for petitioners, the governing bodies of the five constituent municipalities in the Hunterdon Central Regional High School District on August 15, 1989, seeking a hearing before the Office of Administrative Law and the Commissioner as a contested case. Petitioners claim that the Board of Education of the Hunterdon Central Regional High School District (Board) has exceeded its authority in authorizing the proposed lease purchase plan now before the Commissioner pursuant to N.J.S.A. 18A:20-4.2(f), claiming, inter alia, that the proposed agreement contravenes the enabling statute, and that the Board was arbitrary, capricious and unreasonable in its actions regarding such application because less expensive alternatives exist. Said petition was accompanied by a Motion for Interim Relief seeking to stay any further proceedings by the Board pursuant to its proposed plan to enter into said lease purchase agreement with Fiscal Funding of New Jersey, Inc., the Corporation for the acquisition and improvement to the existing school facilities.

On August 23, 1989 the Board filed an Answer to the Petition and Motion for Interim Relief accompanied by an Application, pursuant to N.J.A.C. 6:24-1.9 to Dismiss the Petition and Application for Interim Relief averring that petitioners'

application "***is frivolous and without substance and should be dismissed*** in that it fails to establish a prima facie case for determination on the part of the Commissioner and for other good and sufficient reason." (Board's Answer and Application to Dismiss, at p. 5)

On September 6, 1989, petitioners submitted a Memorandum of Constituent Municipalities in Opposition to the Board's Application for Lease Purchase Agreement Approval and a Brief in Opposition to the Board's Application to Dismiss the Petition of Appeal. Also on September 6, 1989, the Bureau of Controversies and Disputes received a letter from David H. Soloway, counsel for petitioners noting that the Board's application to dismiss raised the question of whether the matter is a contested case as defined by N.J.A.C. 1:1-4.1(b). Mr. Soloway, on behalf of petitioners, sought to have a copy of the Board's brief be provided to the Attorney General and that legal advice be obtained from that office on the issue of whether the matter is a contested case. Affixed to said letter was the Memorandum of Constituent Municipalities in Opposition to Application previously submitted to the Commissioner, upon which petitioners relied in making their request.

On September 20, 1989, the Commissioner's representative from the Bureau of Controversies and Disputes informed the parties that the Commissioner would consider the Board's Motion to Dismiss as being "predicated upon failure to state a cause of action cognizable before the Commissioner of Education." (Letter signed by Dr. Seymour Weiss, Director, Bureau of Controversies and Disputes, dated September 22, 1989)

Upon a careful review of the record in this matter developed thus far, the Commissioner denies Petitioners' Motion for Interim Relief and dismisses without prejudice their Petition of Appeal as failing to set forth a cause of action for which relief can be granted at this time by the Commissioner. In so deciding the Commissioner will first elaborate on the Request for Interim Relief, which he rejects for failure to establish the standards for Pendente Lite restraints as set forth in Crowe V. De Gioia, 90 N.J. 126 (1982).

Petitioners' Motion argues that if the Board is permitted to proceed in its application for approval of the lease purchase agreement or to make further expenditures of public funds for financial and underwriting services related to said application or to solicit, negotiate or agree to accept the lease purchase proposal before adjudication pursuant to N.J.A.C. 1:1-1.2 et seq., they and the public interests they represent will suffer irreparable harm. Further, petitioners assert that issuance of a stay is essential to protect their procedural rights in compliance with the statutes and regulations pertinent to the petition. Moreover, petitioners claim that the irreparable harm which they will suffer absent a stay coupled with the need to assure compliance with applicable regulations and statutes, and the equitable interests which they have asserted all outweigh the inconvenience which may result to the Board as a result of said stay issuing. "When balanced against

statutory compliance, procedural rights and equity, additional financial cost has not been accepted as demonstrating irreparable harm by the party subject to a stay." (Petitioners' Request for Interim Relief, at p. 12)

The Board's Application for Dismissal of Petitioners' Application for Interim Relief contends that the record before the Director of Finance, before whom the application process is pending, demonstrates that the Board has received two Level II Monitoring Reports. It further claims that but for the pendency of the lease purchase plan, the district would have received a Level III classification. Testimony of the County Superintendent before the Director of the Division of Finance demonstrates that unless Petitioners' Application for Interim Relief and Stay is denied, immediate and irreparable harm will result to the Board and to the children of the district, the Board submits. Moreover, the Board strongly argues petitioners' application is frivolous and without substance and should be dismissed, pursuant to N.J.A.C. 6:24-1.9 in that it fails to establish a prima facie case for determination by the Commissioner and for other good and sufficient reason. Finally, the Board argues there is no legal basis for the relief sought by petitioners "in that petitioners seek to improperly modify New Jersey Statutes and the Administrative Regulations adopted by the Department of Education pursuant to those statutes and to substitute their judgment for the [department's] with reference to the adequacy of facilities." (Board's Answer and Application to Dismiss, at p. 5) The Board further argues that petitioners seek to have the Commissioner's judgment substituted for their own discretion regarding their decision to apply for lease purchase rather than considering other alternatives to their facilities problems.

The Commissioner finds that petitioners have failed to make a showing of irreparable harm which case law has held is, demonstrated by a showing that the harm averred cannot be redressed adequately by monetary damages or that the harm creates severe personal inconvenience. See Crowe, supra, at 132-133. Other than a blanket allegation that such irreparable harm will befall the municipalities were a stay not to issue, petitioners have presented no facts to convince the Commissioner of the merits of their claim of irreparable harm. (See Petition and Motion for Interim Relief, at p. 11.)

Likewise, petitioners have failed to demonstrate the second prong of the Crowe v. De Gioia standard, that is, a likelihood of success on the merits or that the law is unsettled in the area claimed as a legal right. The Board's application is currently before the Department of Education, Division of Finance. No claim can seriously be made at this point suggesting that petitioners will prevail as a matter of law or fact insofar as the application process has not run its course. No decision from the Division of Finance as to whether the application is acceptable before th Commissioner has yet been made. Hence, petitioners have failed demonstrate in their Request for Interim Relief and Brief Opposition to the Board's Application for Lease Purchase Approval that they will likely prevail on the merits of the arguments raised in this matter.

Finally, the Commissioner's review of the Request for Interim Relief and accompanying Memorandum in Opposition to the Board's Application for Lease Purchase Approval leads him to conclude that petitioners' argument is unconvincing as to the balance of equities inuring in their favor, particularly in light of the Board's statement that but for its Application for Lease Purchase Approval, the Hunterdon Central Regional School District would be in Level III monitoring.

Accordingly, for the reasons expressed above, Petitioners' Motion for Emergent Relief is hereby denied.

Moreover, on the merits of claims currently before him in this matter, the Commissioner finds and determines that petitioners have failed to advance a cause of action for which the Commissioner is able to grant relief at this juncture of the proceedings before the Division of Finance.

The standard of review by which the Commissioner reviews matters that arise under his jurisdiction has been set forth in such cases as Boult and Harris v. Board of Education of Passaic, 1939-49 S.L.D. 7, aff'd State Board of Education 15, aff'd 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E. & A. 1948)

In that matter, the Court held:

> Appellants contend that the Commissioner of Education erred in rejecting an offer of proof in support of an allegation that the local board's action constituted an unreasonable exercise of and an abuse of discretion. The state of case does not contain a transcript of the hearing. In the opinion of the Commissioner of Education appears the following:
>
> > Counsel for petitioners stated that the petitioners did not charge dishonesty, fraud, or illegality on the part of the board, but intended to present composite testimony to establish that the Board of Education had exercised its discretion unreasonably and had been guilty of an abuse of discretion. When the Assistant Commissioner asked what showing of unreasonable exercise of discretion the petitioners would make, counsel replied that they would show that the board's action to close the school was the result of an erroneous conclusion based upon incorrect information and that all the estimated savings and other advantages claimed in the recommendations had not been accomplished.

The offer was rejected by the Commissioner. R.S. 18:3-14 provides:

> The commissioner 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.
>
> The facts involved in any controversy or dispute shall, if required by the commissioner, be made known to him by the parties by written statements verified by oath and accompanied by certified copies of all documents necessary to a full understanding of the question.
>
> The decision shall be binding until a decision thereon is given by the state board on appeal.

R.S. 18:3-15 provides in part:

> Decisions under section 18:3-14 of this title are subject to appeal to the state board.

Neither of the quoted statutory provisions was intended to vest in the appellate officer or body the authority to exercise originally the discretionary power vested in the local board. The review authorized of the local board's action here involved is judicial in nature. Thompson v. Board of Education (Supreme Court, 1895), 57 N.J.L.628. (at 522-523)

See also, Bilotti v. Accurate Forming Corp., 39 N.J. 184 (1963) wherein the Supreme Court held:

> ***the mere existence of issues of fact does not preclude summary judgment unless a view of those facts most favorable to plaintiff adequately grounds some claim for relief.
> (emphasis supplied) (at 193)

In the Commissioner's judgment, while petitioners may have presented in their papers matters that might be subject to dispute, such facts do not rise to the level of being material facts in dispute unless, resolving all inferences in their favor, such facts establish some basis for which the Commissioner should grant relief. Petitioner's advance no basis for convincing the Commissioner. Without demonstrating evidence to convince the Commissioner that the Board's action represents a violation of law or regulation, summary judgment is appropriate. N.J.A.C. 6:24-1.9

A review of the instant matter reveals that the factual contentions asserted by petitioners and the decisions which flow from those factual contentions are matters which lie within the discretionary power of the board of education and with the State Board of Education following completion of the application process currently before the Division of Finance.

The Commissioner concurs in this regard with the Board's citing of Cardman and Millburn Ed. Assoc. v. Bd. of Ed. of the Twp. of Millburn, Essex County, 1977 S.L.D. 746 wherein it was held:

> The Commissioner will not substitute his judgment for that of a local board of education where the controverted action is within the discretionary authority of the board absent a showing that the action is arbitrary, capricious, or unreasonable. Thomas v. Morris Township Board of Education, 89 N.J. Super. 327 (App. Div. 1965), affirmed 46 N.J. 581 (1966). (Board's Rebuttal dated September 27, 1989, at p. 4)

The Commissioner agrees with the position espoused by the Board that among the 12 bases advanced by petitioners claiming factual issues requiring a plenary hearing none of those issues requires a plenary hearing before the Commissioner at this juncture, either because said issues will be reviewed through the application process currently in progress in the Division of Finance, or because the discretionary authority for resolving said issues lies with the Board.

Those assertions dealing with whether the lease purchase agreement nullifies the enabling statutes requirement that rent payment be subject to annual appropriations; whether the Board improperly seeks to bind the budgetary function of future boards and abrogates the statutory schedule for budget approval; whether the lease purchase agreement contains an illegal non-substitution clause; whether the agreement pledges equipment and personal property for more than five years to secure a payment obligation; whether the terms of the financing are unreasonable; or whether the lease purchase agreement relinquishes specific discretionary authority vested by statute in the Board are matters which will be addressed in the proceeding before the Division of Finance.

Similarly, whether the lease purchase application is complete and discloses essential lease purchase terms is a matter that will be confronted through the approval process. The same is true in deciding whether the certificate insurer indemnification clause contravenes the non-appropriation clause. The Commissioner therefore dismisses such claims as premature. Such dismissal, however, is without prejudice to petitioners to raise such matters when and if such approval is granted should they deem the approval not to be consistent with law or regulation.

The Commissioner observes, as did the Board, three allegations in petitioners' papers which bear upon the conduct of the Board regarding this discretionary authority. First,

petitioners aver that the Board has acted arbitrarily, capriciously and unreasonably in refusing to consider renovation of the existing school facilities and by seeking approval of a lease purchase agreement. Second, petitioners argue that the Board's plan does not address substandard conditions and need for repair of the existing school facilities to be used for ninth and tenth graders. Third, petitioners claim the projected need for functional capacity can be achieved by renovation, improvement and repair of existing school facilities without the need to construct additional school buildings and acquire additional land.

In the Commissioner's view, even if the facts are as petitioners claim in presenting these three questions, the decision of how to resolve their facilities problems are matters of Board discretion. As suggested by the Board, a mere claim of arbitrary action by a board of education will not preclude dismissal pursuant to N.J.A.C. 6:24-1.9 when the alleged actions are actions which lie within the ambit of the Board's discretion. That petitioners would have the Board subscribe to a different, but as yet undisclosed alternative, would, in essence, seek to have the Commissioner supplant his discretion for that of the Board. Substantial case law has previously determined that the Commissioner will not substitute his judgment for that of the Board. See Thomas, supra, Boult and Harris, supra. In the Matter of the Request of the Board of Education of the Central Regional High School District, Ocean County, To Utilize a School Site, 1974 S.L.D. 1059, 1070

As to petitioners' legal question regarding whether the Board may purchase land without a building on it, the Commissioner recognizes what might be construed as a conflict in the language of N.J.S.A. 18A:20-4.2 (f). Said provision states a board of education of any school district may, for school purposes:

> (f) Acquire by lease purchase agreement a site and school building; provided that the site and building meet guidelines and regulations of the Department of Education and that any lease purchase agreement in excess of five years shall be approved by the Commissioner of Education; and provided that for any lease purchase agreement in excess of five years the Local Finance Board in the Department of Community Affairs shall determine within 30 days that the cost of the financial terms and conditions of the agreement are reasonable. As used herein, a "lease purchase agreement" refers to any agreement which gives the board of education as lessee the option of purchasing the leased premises during or upon termination of the lease, with credit toward the purchase price of all or part of rental payments which have been made by the board of education in accordance with the lease. As part of such a transaction approved by the Commissioner of Education, the board of education may transfer or lease land or rights in land, including any building thereon, after publicly advertising for

> proposals for the transfer for nominal or fair market value, to the party selected by the board of education, by negotiation or otherwise, after determining that the proposal is in the best interest of the taxpayers of the district, to construct or to improve and to lease or to own or to have ownership interests in the site and the school building to be leased pursuant to such lease purchase agreement, notwithstanding the provisions of any other law to the contrary. The land and any building thereon, which is described in a lease purchase agreement entered into pursuant to this amendatory act, shall be deemed to be and treated as property of the school district, used for school purposes pursuant to R.S. 54:4-3.3, and shall not be considered or treated as property leased to another whose property is not exempt, and shall not be assessed as real estate pursuant to section 1 of P.L. 1949, c. 177 (C.54:4-2.3). Any lease purchase agreement authorized by this section shall contain a provision making payments thereunder subject to the annual appropriation of funds sufficient to meet the required payments or shall contain an annual cancellation clause***. (emphasis supplied)

While petitioners argue that the language "Acquire by lease purchase agreement a site and school building" must be read to mean that lease purchase agreement can only be proposed when the land to be acquired includes a building on said land to be used for school purposes, the Commissioner agrees with the Board that the 1986 amendments to the statute include a Senate Education Committee Statement which speaks against such proposition. Therein it is stated:

> Senate Education Committee Statement
>
> Assembly, No. 2858 -- L.1986, c. 183
>
> * * * * * *
>
> In 1982, school districts were authorized to acquire land and/or school buildings through a lease-purchase arrangement, provided that any such arrangement in excess of five years had the approval of the Commissioner of Education and the Local Finance Board in the Department of Community Affairs (P.L. 1981, c. 410). However, there were no provisions for the conveyance of land owned by a school district for this purpose. This bill provides an exception to present law under which a school district may only sell land at a public sale to the highest

> bidder unless the property is sold to the State or a political subdivision thereof (N.J.S. 18A:20-6). (emphasis provided)

* * * * * *

The use of "and/or" in the Committee Statement makes it clear that the Legislature fully intended to include acquisition for land without buildings as an appropriate device under lease purchase. This conclusion is bolstered by the language of the same section (f) wherein it is stated:

> As part of such a transaction approved by the Commissioner of Education, the board of education may transfer or lease land or rights in land, including any building thereon***.
> (emphasis supplied)

The word "any" would suggest that the Legislature contemplated that there might be no such building on the land to be acquired, or else it would have employed a term such as "the" to clarify that a building or buildings would have been on the land at the time of the lease purchase agreement's approval. The Commissioner so finds notwithstanding the 1982 amendments' bill statement which employs the word "facilities" in describing the lease purchase option:

STATEMENT

> This bill will give school districts additional flexibility in obtaining school facilities. It will permit a school district to construct or acquire a building with any governmental entity, individual or entity authorized to do business in the State provided certain conditions are met. School districts will also be able to acquire facilities by lease purchase agreements. In addition, the bill permits school districts to enter into joint ownership arrangements with other entities on a site contributed by the school board, subject to certain conditions. Amendments are also proposed for existing law to require that when a school district leases an unneeded portion of its facilities, the noneducational use of the facility must be compatible with operation of the school. (emphasis supplied)

In so interpreting the statute to authorize a Board to acquire land absent a building for purposes of facilities construction by way of lease purchase, the Commissioner relies on the instruction of the Court that interpretations which lead to absurd or unreasonable results are to be avoided. Division of Motor Vehicles v. Kleinert, 198 N.J. Super. 363, 368 (1985) citing Renz v. Penn Central Corp., 87 N.J. 437, 440 (1981) and Levine v. Tp. of Parsippany-Troy Hills, 82 N.J. 174, 182 (1980) Statutes must be

construed to yield reasonable results; statutory language should be given its ordinary meaning absent specific intent to the contrary. State v. Monturi, 195 N.J. Super. 317, 325 (1984) Therefore to argue that any acquistion of land by way of lease purchase agreement may only be effectuated if such land has a building already on it, whether that building has any utility or value for school purchases is to render the meaning of N.J.S.A. 18A:20-4.2(f) absurd.

Further, in so concluding, the Commissioner rejects petitioners' recitation of the New Jersey Administrative Code Comments made in response to amendatory language for N.J.A.C. 6:22-1.1 et seq. wherein they cite from page 3127 (not 3128 as suggested by petitioners,) the following comment and response for the proposition that a site may not be acquired without a building on it under the provisions of N.J.S.A. 18A:20-4.2(f):

> The Department disagrees with the suggestion, since the 1986 statutory amendment authorized the transfer of land necessary for the lease purchase transactions, but did not authorize a lease purchase agreement for land only. (New Jersey Register, December 19, 1988, at 3127)

Initially, regulations may not supersede the plain meaning of a statute. A construction which renders a statute nugatory should be avoided if at all possible. Zimmerman v. Municipal Clerk of Berkeley Tp., 201 N.J. Super. 363, 369 (1985). Moreover, on page 3128 of the same New Jersey Register, the following comment and response appear:

> COMMENT: N.J.A.C. 6:22A-1.2(a) should be amended to read: A district board of education planning to acquire a site and to construct a school building and/or to make additions, alterations, renovations and improvements to existing buildings or to acquire a site and building by lease purchase agreement shall comply with the following:
>
> RESPONSE: The Department agrees. The proposed language clarifies that it is possible to lease purchase a site with an existing building on it, and clarifies that lease purchase agreements are for the acquisition of a site and school building to be constructed or improved thereon, and not solely for the acquisition of unimproved land. (emphasis supplied)

Accordingly, the Commissioner finds and determines that N.J.S.A. 18A:20-4.2(f) does provide for lease purchase of an unimproved parcel of land when the intention of the board, as defined in its lease purchase agreement, is to construct a building suitable for its educational facilities needs thereon. Any failure on the part of the Board in its lease purchase agreement to so provide would be subject to rejection by the Commissioner through the lease purchase approval process and, thus, would not be considered within the framework of this petition.

Consequently, for the reasons stated above, the Commissioner denies Petitioners' Request for Emergent Relief and Stay, and dismisses the instant Petition of Appeal as premature.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

October 18, 1989

Pending State Board

OAL DKT. NO. EDU 4362-89

LINDA MALONEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE OCEAN COUNTY VOCATIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

For the Petitioner, Klausner, Hunter and Oxfeld
(Stephen B. Hunter, Esq., of Counsel)

For the Respondent, Gelzer, Kelaher, Shea, Novy and Carr
(Milton H. Gelzer, Esq., of Counsel)

This matter was originally opened before the Commissioner of Education as a Petition of Appeal in June 1989 which was followed by a joint request of the parties for the Commissioner to decide the matter by way of summary judgment pursuant to N.J.A.C. 6:24-1.15.

Petitioner contends that under the provisions of N.J.S.A. 18A:28-5(c) she acquired tenure in the Ocean County Technical School District having served the equivalent of more than three academic years within a period of four consecutive academic years. The Board avers that petitioner has not acquired tenure because she did not serve the requisite period of time as a consequence of a six-week unpaid leave of absence which she was granted at the beginning of the 1986-87 school year.

The following findings of uncontested facts have been reached upon review of the parties' submissions.

1. Petitioner was first employed as a properly certificated teacher of computer technology by the Board on February 19, 1986 and served as a teacher in said capacity from that date through June 30, 1986.

2. Petitioner executed an employment contract on June 17, 1986 covering the period between September 1, 1986 through June 30, 1987.

3. During the period between September 1, 1986 and October 1, 1986, petitioner was on a Board approved medical leave of absence which was extended to October 15, 1986.

4. The legitimacy of petitioner's medical disability is not contested.

5. Following the leave, petitioner was employed from October 16, 1986 to June 30, 1987.

6. Petitioner was employed as a teacher for the period between September 1, 1987 and June 30, 1988.

7. On May 7, 1988 petitioner executed an employment contract with the Board for the period between September 1, 1988 through June 30, 1989.

8. Petitioner's employment was terminated by the Board effective March 21, 1989.

9. Petitioner's employment during the 1986-87 school year was governed by the collective bargaining agreement between the Ocean County Vocational-Technical Education Association and the Board.

10. Section B of Article 17 of that contract, "[o]ther leaves of absence without pay...", states that time spent on unpaid leaves of absence shall not count toward the fulfillment of the time requirements for acquiring tenure.

PETITIONER'S POSITION

Petitioner contends that her unpaid Board approved leave of absence covering the period between September 1, 1986 through

October 15, 1986 was fully creditable for tenure acquisition purposes. She points out that it is undisputed that (1) she was under a duly executed contract for the entirety of 1986-87; (2) she was on a Board approved unpaid medical leave September 1, 1986 through October 15, 1986; and (3) she was fully covered, in pertinent part, by the Board in terms of medical insurance coverage during the entirety of the six week unpaid medical leave of absence. (Petitioner's Brief, at p. 6)

Petitioner also argues that there is Commissioner of Education precedent directly pertinent to this matter which mandates the conclusion that the unpaid leave of absence at issue during the 1986-87 academic year was fully credible for tenure acquisition purposes. In support of this, she cites Goebel v. Board of Education of the Borough of Maywood, 1984 S.L.D. 1638, aff'd with modification State Board March 6, 1985 wherein the petitioner had been granted three separate leaves of absence by the Maywood Board totaling approximately 90 days over a three-year period which were fully creditable for tenure acquisition purposes. (Id., at pp. 6-8)

Petitioner's arguments with respect to Nadler v. Board of Education of Manalapan-Englishtown, decided September 26, 1980, are simply spurious and shall, therefore, not be addressed herein. (Id., at pp. 9-10)

Lastly, petitioner avers that a review of pertinent seniority regulations and decisions relating to the employment status of individuals on unpaid medical leaves of absence, such as granted to her, also support her substantive contentions in this matter. The Appellate Court decision she relies upon, Zorfass v. Board of Education of the Township of Cherry Hill (Docket No.

A-322-84T6 decided October 30, 1985) affirmed the Commissioner's and State Board's determination that the entirety of the period of time an individual was out of school on a Board approved medical unpaid leave of absence was fully creditable for seniority purposes notwithstanding the Cherry Hill Board's contention that Zorfass' unpaid leave could not be viewed as being employment so as to warrant seniority credit.

Zorfass, supra, is inapposite to this matter, notwithstanding petitioner's arguments otherwise. Moreover, her assertion that a strong argument may be made that based on the Zorfass decision unpaid medical leaves would receive full seniority credit without the 30-day limitation currently contained within N.J.A.C. 6:3-1.10(b) is patently erroneous. N.J.A.C. 6:3-1.10(b) was adopted in 1983 precisely to clarify the ambiguity of the prior seniority regulations which were controlling in Zorfass since the cause of action arose under the pre-1983 regulations.

BOARD'S POSITION

To support its position that petitioner has not met the precise requirements of N.J.S.A. 18A:28-5 because her employment would not include the leave of absence she was granted September 1, 1986-October 15, 1986, the Board cites, inter alia, Mountain v. Board of Education of the Township of Fairfield, 1972 S.L.D. 526, aff'd State Board 1973 S.L.D. 777. That decision determined that the petitioner had not acquired tenure because two years of employment were followed by two consecutive Board approved one (1) year leaves of absence. It also cites the New Jersey Appellate Court's decision in Stachelski v. Board of Education of the Borough of Oaklyn (N.J. App. Div. April 10, 1981 A-1144-79) (unreported),

cert. denied 88 N.J. 493 (1981) which it avers reversed the Commissioner's determination that a petitioner had acquired tenure under subsection (c) of N.J.S.A. 18A:28-5 after two and one half (2½) years of employment followed by a Board approved one year leave of absence and then another year of employment. (Respondent's Brief, at pp. 3-4)

As to the cases cited above, the Board contends that the Commissioner and Court distinguished a leave of absence from employment wherein the teacher is actually working. It relies on Buxbaum v. Board of Education of Township of Lakewood, Ocean County, decided by the Commissioner May 23, 1983 as further support of its postiion. (Id., at p. 4) In Buxbaum the calculation for determining tenure acquisition under N.J.S.A. 18A:28-5(c) did not include an eight-week leave of absence. Buxbaum had acquired tenure, however, based on 31.25 months of employment over four consecutive academic years not including the leave.

As to petitioner's reliance on Goebel, supra the Board states:

> Goebel is distinguished from this case in that the dispute is over whether a non-certificated school secretary who contracted to serve on a twelve month calendar year met the employment requirements enabling her to acquire tenure under N.J.S.A. 18A:17-2 with the petitioner's starting date as the central issue in dispute and the issue of accounting for petitioner's leave in determining tenure specifically was not before the court. By contrast, in the instant case the dispute is over whether a certified teacher contracted to serve on a ten month academic year met the employment requirements under N.J.S.A. 18A:28-5 with accounting for the petitioner's leave time as the central issue before the Commissioner.
>
> Consequently, to acquire tenure, petitioner's employment by respondent must comply precisely

> with the terms of N.J.S.A. 18A:28-5 and should not include the period of time for which, upon her request, she was granted a leave of absence. (Id., at pp. 5-6)

Based on the above, the Board avers that petitioner's employment must be calculated as follows:

DATES	PERIOD OF TIME	
February 19 to February 28, 1986		10 days
March to June 1986	4 mos	
September 1 to October 14, 1986 (unpaid leave)		
October 16 to October 31, 1986		17 days
November 1986 to June 1987	8 mos	
September 1987 to June 1988	10 mos	
September 1988 to February 1989	6 mos	
March 1 to March 21, 1989		21 days
	28 mos	48 days
TOTAL TIME		29 mo 18 days

(Id., at p. 10)

Moreover, the Board contends that inclusion of petitioner's leave of absence as employment is inconsistent with the policy underlying N.J.S.A. 18A:28-5 because the Board must be provided with all the time to which it is statutorily entitled for judging the suitability of her teaching performance prior to the acquisition of tenure. (Id., at p. 8) It cites in support thereof the following passage from the New Jersey Supreme Court's decision in Zimmerman v. Bd. of Ed. of the City of Newark, 38 N.J. 65 (1962) which reads:

> The crucial test of [the employee's] fitness is how he fares on the job from day to day when suddenly confronted by situations demanding a breadth of resources and diplomacy. Many intangible qualities must be taken into account, and, since the lack of them may not constitute good cause for dismissal under a tenure statute, the [employer] * * * is entitled to a period of preliminary scrutiny, during which the protection of tenure does not apply, in order that it may

> make pragmatically informed and unrestricted decisions as to an applicant's suitability.
> (at 73)

In the instant matter, the Board urges that it cannot make judgments of suitability when petitioner is on leave and not on the job. Including her leave as employment would shorten the Board's time to decide on her suitability by one and one-half months which it asserts would detract from and dilute the statutory purpose of the tenure statute.

The Board also argues that petitioner could not have acquired tenure under the facts of this matter because the negotiated agreement governing petitioner's employment prohibits counting her leave to meet the requirements of N.J.S.A. 18A:28-5. Article 17, Section B of the negotiated contract states that petitioner's unpaid leave of absence shall not count toward the fulfillment of the time requirements for acquiring tenure. (Respondent's Exhibit F, at p. 19, also Respondent's Brief, at p. 7)

ANALYSIS AND CONCLUSIONS

Pursuant to the provisions of N.J.S.A. 18A:28-5, tenure as a teaching staff member is acquired

> ***after employment in [a] district or by [a] board for:
>
> (a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) the equivalent of more than three academic years within a period of any four consecutive academic years***.
> (emphasis supplied)

The threshold issue in this matter is whether or not petitioner's unpaid medical leave of absence from September 1, 1986 through October 15, 1986 constitutes employment within the intendment of N.J.S.A. 18A:28-5.

First, the Commissioner is constrained to point out that petitioner had a duly executed employment contract for the 1986-87 school year. The medical disability which prevented her from reporting to duty on September 1, 1986 did not alter entitlement to 10 days of statutory sick leave under N.J.S.A. 18A:30-2. As determined by the Commissioner in Marriott v. Board of Education of the Township of Hamilton, 1949-50 S.L.D. 57, aff'd State Board 1950-51 S.L.D. 69, a teacher unable to report to duty the first day of school is entitled to sick leave in toto from the outset of the school year. See also Hutchenson v. Board of Education of Totowa, 1971 S.L.D. 512, aff'd State Board 1972 S.L.D. 672; Angersbach v. Board of Education of Township of Hazlet, Monmouth County, May 27, 1986. If an employee does not return to work or is on unpaid leave the entire year no sick leave entitlement inures to the employee but such is not the case herein. Moreover, if one returns or commences employment mid-year, the sick leave is prorated. Schwartz v. Dover Board of Education, 180 N.J. Super. 222 (App. Div. 1981), 1981 S.L.D. 1478 is not at issue either in this matter.

N.J.S.A. 18A:30-2

> All persons holding any office, position, or employment in all local school districts, regional school districts or county vocational schools of the state who are steadily employed by the board of education or who are protected by tenure in their office, position, or employment under the provisions of this or any other law, except persons in the classified service of the civil service under Title 11, Civil Service, of

> the Revised Statutes, shall be allowed sick leave with full pay for a minimum of 10 school days in any school year.

Petitioner therefore was entitled to 10 school days of paid sick leave at the commencement of the 1986-87 school year which the Board appears to recognize given the statement on page one of its brief that "[t]he requested and approved unpaid leave was in addition to the ten (10) days of leave with full pay to which she was entitled by N.J.S.A. 18A:30-2." However, a review of the exhibits attached to the Board's brief fails to reveal that 10 school days of paid sick leave were accorded to her. It does appear, however, that 7 of the 10 paid sick days for 1986-87 were allowed to be "borrowed against" at the end of the 1985-86 school year. If this were done, the Board acted at its own peril because no statutory authority exists for a board to permit "borrowing" nor does such action serve to negate petitioner's statutory entitlement to 10 paid sick days for the 1986-87 school year. Consequently, the period of unpaid leave should not have commenced until September 16, 1986 as the academic year commenced on September 2, 1986. (Respondent's Brief, Exhibit C, 2)

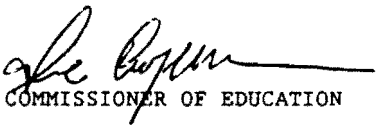
As to whether the approximate 22 school days of unpaid leave from September 16 to October 15, 1986 constitute employment within the meaning of N.J.S.A. 18A:28-5, the Commissioner finds and determines that the leave does. Contrary to the Board's arguments otherwise, Goebel, supra, is on point in this matter notwithstanding the fact that the issue of the unpaid leave and tenure acquisition arose in a post-hearing motion. The ALJ's statements that Goebel's unpaid leaves (18 days in one year and 42 in another) over a three-year period were distinguishable from the year-long unpaid

maternity leave in Stachelski and that it was doubtful he would be bound to apply Stachelski if the issue were before him, were analyzed by the Commissioner and accepted after careful review of the court's decision in Stachelski and the factual circumstances in Goebel.

In the instant matter petitioner's short-term unpaid leave is also deemed distinguishable from that of Stachelski and of Mountain, supra. Buxbaum, supra, is distinguishable as well in that neither the ALJ nor the Commissioner had to reach the issue of whether the eight-week leave in question was deemed employment because that leave in no way altered the period of time the petitioner had undisputedly been employed for tenure purposes, i.e., 37.5 months over four consecutive school years.

Having determined that petitioner's unpaid leave during the 1986-87 school year does not constitute a break in employment, the issue of the contract clause is rendered moot as no provision of a contract may contravene or supersede a state statute or regulation. State v. State Supervisory Employees Association, 78 N.J. 54 (1978)

Accordingly, petitioner's Motion for Summary Judgment is granted. It is, therefore, ordered that she be reinstated as a tenured teaching staff member retroactive to March 21, 1989 together with all the salary, benefits and emoluments owing her, including pension and seniority, less mitigation of any monies earned during the period of unlawful termination.



COMMISSIONER OF EDUCATION

OCTOBER 19, 1989

DATE OF MAILING - OCTOBER 19, 1989 - 10 -

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1819-89
AGENCY DKT. NO. 39-2/89

ANTHONY V. RICHEL,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF KENILWORTH,

Respondent.

Andrew O. Kaplan, Esq., for petitioner

Franz J. Skok, Esq., for respondent
(Johnstone, Skok, Loughlin, Lane, attorneys)

Record Closed: August 11, 1989 Decided: September 6, 1989

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

Anthony V. Richel, the tenured Superintendent of Schools, seeks to have six letters of reprimand, transmitted to him by the Board President as the result of Board actions, expunged from his personnel file. He alleged the Board's actions authorizing the letters were arbitrary, capricious, and/or unreasonable.

The Board denied the allegations and asserted its actions were at all times a lawful exercise of its discretionary authority.

The matter was transmitted to the Office of Administrative Law as a contested case on March 13, 1989 pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on May 2, 1989, and the matter proceeded to plenary hearing on July 11, 12 and August 11, 1989. The record closed at the completion of the third day of hearing on August 11, 1989.

I.

Undisputed testimonial evidence results in the adoption of the following as **FINDINGS OF FACT:**

1. The Kenilworth school district is composed of one building and serves approximately 600 pupils in grades K-8.

2. Superintendent Richel has been a teaching staff member in Kenilworth for 34 years. He was initially employed as a teacher of physical education; was promoted to principal; and has served as Superintendent for the past 10 years.

3. The administrative staff in Kenilworth consists of the superintendent, principal, a curriculum coordinator, and Board secretary.

4. Richel has not been granted a salary increase by the Board for the past three years.

II.

Eight Board member testified. They are as follows with years of service indicated: Patrick Walsh (1982-86), Fred Plummer (1986-), Thomas A. Vitale (1984 - and president 1987-89), Carmine Rossetti (1988 - and current president), Michael A. Londino (1986-89), JoAnn Dillon (1987-), Debra A. Feunes (1987-), and William N. Chango, Sr. (1986-89).

Fred Rica (principal since 1979), Phyllis Fitzpatrick (Superintendent's secretary for nine years), and Richel also testified.

Each letter of reprimand shall now be addressed, seriatim.

III.

FEBRUARY 13, 1989 - WITHOUT THE KNOWLEDGE OR CONSENT OF THE BOARD OF EDUCATION, YOU NEGOTIATED AND AWARDED HEALTH INSURANCE BENEFITS TO A PART-TIME MATHEMATICS CONSULTANT DURING THE 1986-87 and 1987-88 SCHOOL YEAR [S]. SEE, P-1.

Walsh testified he was chairman of the education committee, vice-president, and president of the Board during his term of office from 1982-1986, and stated the part-time employment of math consultant Alice Alston was discussed in executive session, which included emoluments. He stated that Rica and Richel advised the Board that some part-time employees received benefits. The Board agreed they wanted to employ Alston, and Walsh testified that he directed Richel to secure her services and provide any benefits necessary to do so. Vitale and Plumner were on the Board at that time. The cost of emoluments were not discussed by the Board. Alston was employed by the Board for the 1986-87 school year [and reappointed for 1987-88]. Neither the Board's resolution or Alston's contracts mention health benefits. See, P-2, (Resolution 14) and R-3.

Plummer testified he introduced Resolution 14 and firmly believed that Richel was authorized to offer Alston benefits necessary to secure her services. He further testified that five of the six votes for reprimand resulted from personal animosity, and that his negative vote was because of his belief that Richel was authorized by the Board to provide any benefits necessary to secure Alston's services.

Plummer also testified that Londino raised the issue of health benefits for Alston about two months prior to the Board's action to reprimand Richel.

Vitale testified he had no recall of any Board discussion of health benefits for Alston, but it became an issue when the Board discussed the employment of a part-time industrial arts teacher as the result of Richel advising the Board that some part-time employees (Alston, and one Linda Picone) did receive benefits.

Vitale was the only Board member who was present at the Board's 1986 discussion concerning the employment of Alston that voted affirmatively for this letter of reprimand. Plummer cast a negative vote. Vitale had no recall of any discussions of health benefits for Alston. Both Walsh and Plummer testified there was such a discussion and that Richel was authorized by the Board to grant Alston any benefits necessary to secure her services. I **FIND** the testimony of Walsh and Plummer to be credible and **CONCLUDE** the Board's action authorizing this letter of reprimand was arbitrary and capricious. Its expungement from Richel's personnel file is hereby **ORDERED**.

IV

AUGUST 29, 1988 - . . . RICHEL, IS OFFICIALLY REPRIMANDED FOR THE SHORT SCHEDULE OF THE TWO PHYSICAL EDUCATION TEACHERS FOR THE 1986-87 AND THE 1987-88 SCHOOL YEARS.

THE TEACHERS HAD A SCHEDULE OF TWENTY (20) AND TWENTY-TWO (22) PERIODS AS OPPOSED TO ACADEMIC TEACHERS WHICH HAVE AS MANY AS THIRTY (30) PERIODS PER WEEK.

THE SCHEDULES WERE CHANGED DURING 1987-88 AT THE REQUEST OF THE BOARD OF EDUCATION. THIS DOES NOT REPRESENT EFFECTIVE USE OF THE STAFF. SEE, P-3.

Principal Rica testified that physical education teachers provided health and safety instructions to pupils in grades seven and eight during period three prior to the 1986-87 school year. A reorganization of the school day occurred in 1986-87 which provided period three instruction in reading and computers and other periods were extended to make up for the time lost for health/safety instruction. He stated that "we" [presumably the administration] chose not to schedule pupils for certain periods of physical education, but chose to schedule the physical education teachers for other

responsibilities, such as, scheduling sports and referees, and other pupil-centered activities such as dealing with behavioral problems. Rica further testified he wanted to continue the same schedule for 1987-88 but certain modifications were made because too many pupils were missing too much time from academic classes. He also stated on direct that the Board requested and received teacher schedules in the Fall of 1988 and found the schedules of physical education teachers to be unacceptable.

Rica stated on cross-examination that the physical education instruction schedules of the teachers consisted of 20 to 22 periods per week, and the other duties included occasional substituting ordering athletic supplies, study halls, and the monitoring of unassigned new pupils during period three. He also stated the two physical education teachers were employed full time while the home economics and industrial arts teachers were employed part-time [4/5ths].

Rica also stated he recommended an extension of the school day from seven periods to eight early in 1988 which included an additional physical education teacher to increase physical education instruction in the middle grades to more than one period per week. Richel presented the recommendations to the Board, which resulted in a conference attended by Richel, Rica and Board members Londino, Dillon, and Taylor.

Rica also stated the teacher scheduling practice was six teaching periods and one preparation period daily, but some teachers scheduled for but five were assigned other duties.

Londino was chairman of the education committee and testified that the Board questioned Richel about the disparity between the schedules of the physical education teachers and others, but allegedly had no concern or explanation for it. The education committee studied the matter and the Board endorsed its recommendation to eliminate the study hall and other assignments and expanded the physical education instructional program to resolve the scheduling disparity and also satisfy the State's mandated health and physical education requirements without additional staffing.

Vitale testified that the Board was critical of Rica as he prepares teacher schedules, but held Richel responsible as he is charged with the responsibility of supervising the administrative staff. The Board did not transmit a letter of reprimand to Rica, however, as Richel's evaluations of Rica were excellent.

I **FIND** it reasonable for the Board to have expected the superintendent to have advised of the physical education programming and scheduling problem for a policy determination based on the superintendent's recommendation for either program expansion or a reduction in force. I **CONCLUDE** the Board's authorization of this letter of reprimand to be a valid exercise of its discretionary powers. It is hereby **SUSTAINED**. Duffy et al. v. Bd. of Ed. of Brick Twp., 1974 S.L.D. 111.

V.

AUGUST 28, 1988 - . . . RICHEL, IS OFFICIALLY REPRIMANDED FOR THE LACK OF SUPERVISION OF THE INSTRUMENTAL MUSIC PROGRAM.

THE INSTRUMENTAL LESSONS ARE SUPPOSED TO SERVE APPROXIMATELY TWENTY (20) STUDENTS PER DAY. DURING THE FIRST 117 SCHOOL DAYS, COMMENCING SEPTEMBER 9, 1987 AND ENDING MARCH 11, 1988, THERE WERE 76 DAYS WHERE FIVE (5) OR LESS STUDENTS WERE GIVEN LESSONS, INCLUDING 26 DAYS WHEN NO STUDENTS RECEIVED LESSONS. AFTER MARCH 11, 1988 THE BOARD OF EDUCATION HAD FORCED A CHANGE IN THE PROGRAM. THIS COMPLETE LACK OF SUPERVISION ALSO EXTENDED TO STUDENTS BEING REMOVED FROM ACADEMIC CLASSES MUCH TOO FREQUENTLY. THE WORST OF WHICH WAS A STUDENT BEING REMOVED FROM AN ENGLISH CLASS 11 TIMES IN A 21-DAY PERIOD.

THIS SITUATION WAS DISCOVERED AND CORRECTED BY THE BOARD OF EDUCATION. SEE, P-4.

Rica testified that a full schedule of instrumental music instruction was created annually, but an administrative policy of his making inhibited pupil participation. That policy provided classroom tachers the discretionary authority to withhold the release of pupils scheduled for instrumental music. The policy was in effect for five years. Complaints of the dearth of pupil participation and its impact on the band program were transmitted to him by the instrumental music and band teacher and were discussed, which were often discussed with the superintendent. Alternate policy resolutions discussed administratively were rejected beause of academic priorities.

Londino became aware of the instrumental music problem and deterioration of the band program because of his daughter's limited participation in the instructional program and complaints he had received from teachers that the instrumental music and band teacher was employed full time but did little teaching. The education committee, through Londino, requested Rica to maintain a log of teacher-pupil contacts in instrumental music, which was then provided to the committee for its analysis. This analysis was presented to the Board, which adopted a policy for mandated releases of pupils for instrumental music.

Vitale and Rica testified that the latter was not reprimanded. Vitale stated the Board's reasoning, as previously indicated herein, that Richel was held responsible for administrative supervision and that Rica had received consistent excellent evaluations from Richel.

I FIND it reasonable for the Board to have expected its Superintendent to have alerted them of the program problem and exert administrative leadership through a recommended resolution for a Board policy consideration. **I CONCLUDE** the Board's authorization of this letter of reprimand to be a valid exercise of its discretionary powers. It is hereby **SUSTAINED.** Duffy, et al.

VI.

FEBRUARY 13, 1989 - THE BOARD OF EDUCATION OF THE BOROUGH OF KENILWORTH HEREBY OFFICIALLY REPRIMANDS ANTHONY V. RICHEL, SUPERINTENDENT, FOR THE FOLLOWING ACTION WHICH THE BOARD OF EDUCATION DEEMS UNPROFESSIONAL CONDUCT:

ON MAY 27, 1988, YOU WERE REQUESTED BY THE BOARD OF EDUCATION NEGOTIATING COMMITTEE TO PROVIDE INFORMATION AS TO HOW ATTENDANCE FOR STAFF MEMBERS WAS BEING RECORDED DURING SUMMER MONTHS. YOU INFORMED THIS COMMITTEE THAT WE DO NOT TAKE ATTENDANCE DURING SUMMER MONTHS SINCE THE ATTENDANCE OFFICER IS ON VACATION. YOU INFORMED THIS COMMITTEE THAT WE ARE A SMALL DISTRICT AND WE USE THE HONOR SYSTEM DURING THIS TIME. SEE, P-5.

Rica testified that during the regular school year staff members, who will not be reporting to work, are required to call the attendance officer by 6:30 a.m. who then records the absenteeism and presumably arranges for a substitute when necessary. The procedure during summer months varies slightly. Attendance is monitored and absenteeism is recorded by a secretary. Accumulated data for the summer months is then provided to the attendance officer upon her return from vacation and staff records are updated.

Vitale testified this matter came to the attention of a Board committee and the Board's negotiator when a conference was held as the result of a request by secretaries to be recognized for bargaining purposes. He stated that Richel indicated in a letter to him under date of January 4, 1989 that records of absenteeism during the summer are available. [That letter, marked for identification is P-7, was not submitted as an evidentiary document on behalf of petitioner].

Richel also testified, but no testimony was adduced from him on direct examination concerning this letter of reprimand.

Londino, Fennes and Chango testified that Richel respondend to the Board's inquiry concerning the lack of a definitive procedure for monitoring and recording staff summer absences by stating that it was a self-monitoring process characterized as an honor system.

The evidence adduced on behalf of petitioner that staff absenteeism during the summer is duly recorded and charged (sick, vacation, or personal leave) was undisputed by the Board's witnesses and is deemed herein to be credible. The Commissioner stated in Duffy, et al. at 114 that he "does not believe that administrators should be burdened with endless, unnecessary procedural letters . . .", which, however, does not preclude the Board from policy adoption pursuant to N.J.S.A. 18A:11-1.

I **FIND** this letter of reprimand to be unreasonably harsh and **CONCLUDE** the Board's authorization for it to be an abuse of its discretionary powers and therefore arbitrary. I **ORDER** its expungement from the superintendent's personnel file.

VII.

> JANUARY 23, 1989 - THE SUPERINTENDENT . . . IS OFFICIALLY REPRIMANDED FOR THE UNPROFESSIONAL REACTION TO MRS. DILLON CONCERNING WORK GIVEN TO HIS SECRETARY REGARDING ADMINISTRATIVE EVALUATIONS ON FEBRUARY 4, 1988.
>
> IT WAS THE EDUCATION'S COMMITTEE'S DECISION TO UPDATE OUR ADMINISTRATIVE EVALUATION FORMS SO A RESOLUTION COULD BE APPROVED BY THE FULL BOARD AT ITS NEXT BOARD MEETING ON FEBRUARY 8, 1988.

YOUR BEHAVIOR WAS BROUGHT BEFORE THE ATTENTION OF THE FULL BOARD AT THE FEBRUARY 8, 1988 BOARD OF EDUCATION MEETING WHICH MET IN CLOSED SESSION. THIS CHARGE WAS NOT DENIED BY YOU AT THAT TIME AND AGAIN YOU EXHIBITED RUDE BEHAVIOR TOWARDS MRS. DILLON WHILE IT WAS BEING DISCUSSED. SEE, P-6.

Vitale testified as a witness on petitioner's case that he learned of the February 4 incident from Dillon, and that superintendent Richel took the position that Dillon should not directly approach his secretary to do work for a Board committee without going through him. Vitale stated he was not aware of any policy related to procedures for staff assistance to Board members. He also indicated that Dillon and Richel both raised their voices during discussion of the incident at the Board's closed version on February 8 and further stated that his chief concern was the call made to Dillon by the Superintendent at her work place. There was no cross-examination as counsel for respondent indicated Vitale was to testify on respondent's case.

Rica testified that Dillon's work request was given to his secretary without his knowledge; it conflicted with work he assigned to his secretary; he expressed his concern to Richel; and Richel called Dillon at her work place in his presence. Rica was not cross-examined.

Richel testified but no testimony was addduced on this letter of reprimand.

Rossetti testified he was present at the February 8 meeting and indicated his belief that Richel was rude to Dillon during their confrontation on the matter.

Londino testified the Dillon-Richel dialogue on February 8 was spirited and stated his belief that Richel's conduct during the Dillon-Richel dialogue at that meeting was rude, argumentative, boisterous, and unprofessional.

Dillon testified on petitioner's case she was and is unaware of any adopted policy or procedures related to relationships between Board members and staff. She indicated an unawareness of any secretarial work conflicts when she requested the typing to update administrative evaluation forms on behalf of the education committee. Dillon conceded she received other phone calls at her work place on Board matters and may have raised her voice during the dialogue with Richel at the February 8 meeting.

On cross-examination Dillon indicated she became very upset when she received the call from Richel at her work place as her boss was standing next to her at the time and Richel chastised her with a raised voice for not processing her work request through him. She further stated she and Richel exchanged apologies over the incident.

Fennes testified she perceives a telephone call from the superintendent to a Board member's work place to be unprofessional conduct, and, on cross-examination by respondent, stated that both Dillon and Richel were unprofessional at the February 8 meeting, and also responded to an inquiry by the undersigned that other calls made to Board members at the work place to discuss a Board matter would be unprofessional.

Chango testified that he perceives unprofessional conduct to occur when one loses his cool and doesn't have his finger on top of things. He also stated that Richel is a gentleman and a nice man but not a good superintendent.

Nothwithstanding that no testimony was adduced from Richel on petitioner's case concerning this letter, Richel did indicate in his July 6, 1988 letter to Vitale that both Rica and secretary Fitzpatrick were present when he made the phone call to Dillon, and they each will confirm that he conducted himself professionally and spoke very calmly to Dillon on the phone. See, R-2.

Fitzpatrick testified on petitioner's case and stated that Richel advised Dillon on the phone that the work she wanted done may not be completed on time and that further work requests be channeled through him. No testimony was adduced concerning the tone or volume of Richel's voice.

A careful and thorough review of all testimonial and documentary evidence related to this letter of reprimand reveals only the conflicting testimony of the principals involved in the telephone conversation as to the tone and volume of Richel's voice at that time. It is obvious that emotionalism played a significant role at the February meeting when both principals raised their voices.

I **FIND** that neither Dillon or Richel warrant commendation for their conduct related to this incident, which both seemed to recognize as the result of their exchange of apologies. **I FURTHER FIND** the root cause of this problem to be the absence of policy and procedure related to Board-related work which requires the assistance of staff. I **ALSO FIND** that the conduct of the superintendent under these circumstances did not rise to the level of unprofessionalism warranting a letter of reprimand, and **CONCLUDE** the Board's authorization of the transmittal and filing of this letter to be unreasonable. I **ORDER** its expungement, and further **ORDER** the Board to adopt a policy and procedure to deal with Board requests similar to the one at issue here. It is further suggested that the superintendent, principal, and Board members read the Initial Decision (November 14, 1986) and Commissioner's decisions (January 22, 1987 and August 31, 1987). In the Matter of the Tenure Hearing of Dr. Richard E. Onorevole, School District of the Township of Weehawken, Hudson County, (OAL DKT. NO. EDU 5576-85, Agency No. 264-8/85) to assist in the development of clarity and appreciation of their respective roles.

VIII.

JANUARY 23, 1989 - THE BOARD . . . HEREBY OFFICIALLY REPRIMANDS ANTHONY V. RICHEL, SUPERINTENDENT, FOR THE FOLLOWING ACTION WHICH THE BOARD OF EDUCATION DEEMS UNPROFESSIONAL CONDUCT:

ON TWO OCCASIONS, MAY 26TH AND JUNE 14TH, 1988 YOU DEMONSTRATED UNAWARENESS THAT JOB DESCRIPTIONS OF CERTAIN CLERICAL STAFF EMPLOYEES HAD BEEN CHANGED: THAT THESE CLERICAL STAFF EMPLOYEES HAD BEEN ALLOWED TO WRITE THEIR OWN JOB DESCRIPTIONS

WITHOUT YOUR CONSENT OR KNOWLEDGE; AND THAT SUCH JOB DESCRIPTIONS HAD NEVER BEEN APPROVED BY THE BOARD OF EDUCATION. SEE, P-8.

Vitale, testifying as petitioner's witness, stated he was unaware of any Board policy related to job descriptions, and had no recall of secretarial job descriptions. He stated this letter of reprimand was an outgrowth of a conference held concerning the request of secretaries for recognition for bargaining purposes, and was advised that Dillon and Londino discovered that job descriptions were prepared and changed by those employees impacted by them.

Londino, also testifying as petitioner's witness, stated the Finance Committee and Board's negotiator met in preparation for secretarial job descriptions. Londino testified that Richel responded by indicating he didn't have them available at that time but would get them from the secretaries. Londino further stated that Richel did produce them subsequently, and his (Londino's) review revealed the appearance of many inconsistencies of terms and conditions of employment incorporated therein.

Dillon testified as a witness in petitioner's case and stated she was unaware of any Board policy related to job descriptions. Dillon stated, on cross-examination, that modifications were incorporated in the job descriptions and made by a typewriter different than the one used to prepare the original job descriptions. She also stated there was no job description for employee Picone.

Richel testified that all employees have job descriptions which he personally prepared and presented to the Board. Modifications required for up-dating such as vandalism reporting, pursuant to the State Board's regulatory scheme, are given to the employee to do, but he reviews them when completed. Terms and conditions of employment are not incorporated in job descriptions, he said, but are attached to them.

Richel further stated there was no job description for the security position when the Board created the position, but it was discussed at a Board meeting. He and Rica prepared the job description with input from Linda Picone, who was appointed to the position by the Board, but Richel had no recall if it was ever submitted to the Board. In response to examination by the undersigned, Richel stated there is no Board policy requiring job descriptions and he received no direction from the Board to prepare any.

I **FIND:**

1. Job descriptions were initially prepared by Richel with subsequent modifications made ministerially by secretaries with the Superintendent's knowledge and approval; and

2. Job descriptions lacking Board approval are understandable in the absence of Board policy that requires such approval.

I **CONCLUDE** the Board's action in authorizing the transmittal of this letter of reprimand to be unreasonable and **ORDER** its expungement.

DISCUSSION

It is noted that a distinction exists between the Board's authorization of the transmittal of letters of reprimand and the certification of tenure charges. Although the standard of proof (a preponderance of credible evidence) is the same, the burden of proof herein rests with the petitioning superintendent, Anthony V. Richel.

It must also be noted that the extensive time delays between the causes for Board action and the transmittal of the letters of reprimand were attributed to a request by Richel while the parties were negotiating an amicable resolution of their differences through Richel's retirement, which never materialized.

The extensive testimony from former and present Board members is convincing that personal animosity between them and Richel does not exist and did not motivate the Board's reprimands, but dissatisfaction with the administration of the Kenilworth school system is apparent, for which the Board holds Richel responsible. This was demonstrated by Board member Plummer, who voted against the letters of reprimand, when he testified there are sincere concerns over the administration of the Harding school.

SUMMARY

Having found the actions of the Board authorizing letters of reprimand under dates of February 13, 1989 and January 23, 1989 relating to health insurance benefits for Alston; recording of employee absenteeism in July and August; unprofessional conduct on complaint of Dillon; and job descriptions; respectively, to be arbitrary, capricious, and/or unreasonable, the Board is **ORDERED** to expunge same from the personnel file of superintendent Richel.

Having found the actions of the Board authorizing letters of reprimand under date of August 29, 1988 relating to the schedules of physical education teachers and the instrumental music program to be free of personal animus, based on sound reasoning, and a valid exercise of the Board's discretionary powers, said action are hereby **AFFIRMED.** Duffy, et al., supra.

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

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

6 September 1989
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

September 8, 1989
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 11 1989
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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ANTHONY V. RICHEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF KENILWORTH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the findings and the conclusions of the Office of Administrative Law that the actions of the Board of Education of the Borough of Kenilworth authorizing placement in petitioner's personnel file of letters of reprimand dated February 13, 1989 and January 23, 1989 relating to health insurance benefits for a part-time employee, recording of employee absenteeism, conduct involving Board Employee Dillon and job descriptions are arbitrary, capricious and unreasonable. Thus, said letters are directed to be expunged from his personnel file. The Commissioner further finds that the actions of the Board authorizing letters of reprimand dated August 29, 1988 relating to schedules for physical education teachers and the instrumental music program are free of personal animus, are based on sound reasoning and constitute a valid exercise of the Board's discretionary powers. Thus, said Board actions are affirmed.

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

October 19, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4924-88
(Remand of EDU 3437-87)
AGENCY DKT. NO. 107-4/87

DERON SCHOOL OF NEW JERSEY, INC.
and
RONALD L. ALTER and DIANE C. ALTER,

Petitioners,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,
and
COMMISSIONER OF EDUCATION,

Respondents.

Timothy B. Middleton, Esq., for petitioners
(Apostolou & Middleton, attorneys)

David Earle Powers, D.A.G., for respondents
(Peter N. Peretti, Attorney General of New Jersey, attorney)

Record Closed: July 6, 1989 Decided: August 21, 1989

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

Petitioners, an incorporated private for-profit school for the handicapped and its two share holders, contest the validity of N.J.A.C. 6:20-4.4 and N.J.A.C. 6:20-4.5 as written and applied to them.

Respondents (State) deny the allegations and assert the regulatory scheme, duly promulgated and adopted by the State Board of Education, was a proper exercise of its authority and is valid as written and applied to petitioners.

The matter was transmitted to the office of Administrative Law on July 1 1988, pursuant to an order of the New Jersey Supreme Court filed under date of June 9, 1988, which stated:

> It is **ORDERED** that the petition for certification is granted and the matter is summarily remanded to the Commissioner of Education to the end that he shall, in turn, remand the matter to an administrative law judge for a hearing on the validity of the regulation as written and as applied. . . .

A prehearing conference was held on October 20, 1988, at which the issues were framed as follows:

> ARE N.J.A.C. 6:20-4.4 AND/OR 6:20-4.5 VALID AS WRITTEN AND APPLIED TO THE DERON SCHOOL, INC.?

Procedures were also established at the conference which determined that the valid as written portion of the issue shall proceed to summary decision relative to the jurisdiction of the administrative law judge to make such a determination, and the valid as applied portion of the issue would proceed to plenary hearing. The latter proceeded to ten days of hearing from April 3, 1989 through May 31, 1989. Post-hearing briefs were filed and the record closed with the filing of petitioners' reply brief on July 6, 1989.

BACKGROUND

An initial Petition of Appeal was filed on April 20, 1987 and docketed at the Office of Administrative Law as EDU 3437-87. The petitioners alleged that N.J.A.C. 6:20-4.5, which permits a profit-making school to include an annual surcharge up to 2.5 per cent of allowable actual costs in its tuition rate, "deprives them of a fair rate of return on their investment; constitutes a taking of their business in whole or in part for which compensation is warranted; and its application violates their Fifth and/or Fourteenth Amendment rights of Equal Protection or Substantive Due Process."

Respondents sought dismissal of the petition for failure of petitioners to state a claim upon which relief may be granted by an administrative law judge (ALJ) and/or the untimeliness of the filing pursuant to the 90-day rule, N.J.A.C. 6:24-1.2. The undersigned ALJ dismissed the petition for untimeliness, after the Deputy Attorney General representing respondents withdrew the jurisdictional issue, in an Initial Decision under date of August 31, 1987. The Commissioner agreed with the ALJ on the untimeliness issue but chose to address the jurisdictional issue. He determined "that petitioners' challenge to the regulation in question is not cognizable before him (N.J.S.A. 18A:6-9) and, consequently, he does not reach the applicability of N.J.A.C. 6:24-1.2". The Petition was "dismissed with prejudice for failure to state a claim upon which relief can be granted" in a decision dated October 14, 1987.

Petitioners appealed directly to the Superior Court, Appellate Division. The Department of Education filed a Motion to Dismiss, which was granted on February 17, 1988. Petitioners filed a Motion for Reconsideration and Clarification on February 29, 1988, which was denied on April 4, 1988. Petitioner then filed a Petition for Certification with the New Jersey Supreme Court, which was granted and the matter was remanded.

THE VALIDITY AS WRITTEN ISSUE

The validity of the regulatory scheme, N.J.A.C. 6:20-4.1 through 4.8 was challenged in Council of Private Schools v. Cooperman, 205 N.J. Super. 548 (App. Div. 1985), wherein the Appellate Division held the regulations to be facially valid, but did not "foreclose any private school from questioning the reasonableness of any of the regulations as applied to it."

The initial inclination of the undersigned was to determine Cooperman to be the law of this case and conclude that said determination would not be upset here due to the belief that ALJs have not been clothed by the Legislature to sit in appellate review of a decision by the Appellate Division of Superior Court. Petitioners' argument that the Supreme Court's Order requires the undersigned to determine the validity of N.J.A.C. 6:20-4.4 as written, and that the Appellate Division's opinion in Cooperman is irrelevant,

is persuasive. Notwithstanding that a facial attack on a regulation is generally brought in the first instance before the Appellate Division and is not appropriate in an administrative proceeding (R. 2:2-3(a)(2); Pascucci v. Vagott, 71 N.J. 40 (1976)), it is my belief that the Supreme Court was aware of Cooperman when it issued its Order. See also, Abbott v. Burke, 100 N.J. 289 (1985). This belief stems from the necessary resolution of factual issues involved in petitioners' attack on the validity of the regulation as written which can best be accomplished by the administrative agency having jurisdiction and expertise. Penta Associates et al. v. N.J. Dept. of Educ. and the Commissioner of Education, 1989 S.L.D. ____ (decided May 22, 1989).

Petitioners argue that the regulation is invalid as written as it is arbitrary and capricious and does not conform with constitutional guidelines and standards in reliance on Article 1, paragraph 1 of the New Jersey Constitution which states:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

Petitioners concede in its brief at 60 that "police power may be exercised only in areas where the regulation is needful for the common good"; "It cannot be enacted in thin air"; and "the means selected must have a real and substantial relation to the object sought to be obtained".

Calabrese, Assistant Commissioner of Education (Division of Finance), indicated the basis for the regulation at issue in his deposition at 14:

> Based on the SCI [State Commission of Investigation] report which indicated that there was widespread activity inconsistent with the welfare of the students in the schools involved they first criticized the Department for not regulatng it more and secondly, recommended that we immediately develop a comprehensive regulation for the conduct of business in the schools for the handicapped. (See, P-3)

Commission Chairman Joseph H. Rodriquez stated at the opening of two days of public hearings:

> The primary concern of this Commission is to assure that no handicapped child who is enrolled in programs of Special Education is shortchanged, and to insure that taxpayer funds are properly used for education purposes. (See, R-3, p.7)

The Commission's report concludes with extensive "Conclusions and Recommendations" incorporated in pages 184-210, including but not limited to, reforms relating to auditing, allowable and non-allowable costs, tuition-costs, and reporting.

A task force composed of six staff members from the Division of Finance and Division of Special Education within the State Department of Education proceeded to an analysis of the SCI report with input from private school representatives in order to prepare recommendations to the State Board of Education for consideration. Consideration of these recommendations then resulted in the promulgation of regulations through published rule proposals and subsequent adoptions after further consideration of comments received consistent with the Administrative Procedures Act.

Black's Law Dictonary, Fifth Edition (1979) defines arbitrary and capricious as follows:

> Characterization of a decision or action taken by an administrative agency or inferior court meaning willful and unreasonable action without consideration or in disregard of facts or without determining principle. Elwood Investors Co. v. Behme, 79 Misc. 2d 910, 361 N.Y.S. 2d 488, 492.

It cannot be disputed that the intensive and extensive report of the SCI revealed concerns of the absence of regulations governing publicly funded non-public schools for the handicapped. The deposition of Calabrese as well as a review of existing regulations prior to 1981 clearly establishes what can be characterized as a loose operation. There

were toothless guidelines which could not and apparently did not prevent abuses of the use of public funds under the guise of special education for handicapped children. There were no requirements related to reporting, audits, non-allowable costs, or a definitive process for tuition determination for each such school independent of others.

The efforts of the State Board to establish reforms strongly recommended by the SCI through the rule-making process are to be commended rather than condemned. Its subsequent amendments clearly demonstrate that adopted regulations are not etched in concrete, but are subject to review and further amendment after a careful analysis of the impact of the rule's implementation.

An agency rule is afforded a presumption of validity based on a liberal construction of the agency's grant of authority. N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562 (1978). However, the absence of express statutory authority will not preclude an administrative rule where the action can be said to promote the policies and findings which underlay the legislation. A. A. Mastrangelo, Inc. v. Environmental Protection Dept., 90 N.J. 666, 683 (1982).

The evaluation of a rule's reasonableness is more difficult since a presumption of validity and reasonableness must be accorded an agency action. Bergen Pines Hosp. v. Human Services Dept., 90 N.J. 456, 477 (1984). The burden of proof is on the challenger to overcome such a presumption. Ibid. The challenger must prove that the action "[i]s statutorily authorized and not otherwise defective because [it is] arbitrary or unreasonable".

The fact that petitioners herein disagree with the 2.5 per cent profit limit is undisputed. The disagreement cannot result in a determination that the rule is arbitrary, capricious, or unreasonable unless petitioners meet their burden to overcome the presumption. I **FIND** this burden has not been met, and that the regulatory scheme in dispute was designed to implement reforms suggested in the SCI report.

I **CONCLUDE**, therefore, that N.J.A.C. 6:20-4.4 and N.J.A.C. 6:20-4.5 are valid as written.

VALIDITY AS APPLIED TO DERON SCHOOL, INC.

PREFACE

N.J.A.C. 6:20-4.5 states:

> For profit-making school(s), the school's tuition rate may include an annual surcharge up to 2.5 per cent of the private school's allowable actual costs.

The regulatory scheme concerning Tuition for Private Schools for the Handicapped is codified in Subchapter 4 of N.J.A.C. 6:20 and was duly promulgated and adopted by the State Board of Education pursuant to N.J.S.A. 18A:4-15 and 18A:46-21.

As stated in the Historical Note preceding the regulator scheme: "This subchapter formerly contained rules concerning tuition for nonpublic schools. The subchapter was effective prior to August 19, 1969 . . .," which was followed by subsequent amendments. "The subchapter was subsequently repealed and replaced with new rules concerning tuition for private schools for the handicapped, effective September 6, 1983, . . ." Subsequent amendments occurred. The limit of a profit of 2.5 per cent of the Deron Schools allowable actual costs is the gravaman of this dispute, which requires a determination of its validity as applied to Deron.

I.

N.J.S.A. 18A:4-15 provides broad powers to the State Board of Education to make and enforce rules relevant to the carrying out of the State's educational objectives. In addition to powers specifically provided by law, the Legislature has provided the State Board with all the powers necessary to carry out the State's educational directives. N.J.S.A. 18A:4-16. The powers given to the State Board clearly encompass the power to set policy and procedures to regulate profits when the regulation of profits is related to achieving educational goals.

The State has long been concerned with improprieties in the use of public funds targeted for the benefit of the handicapped. The 1978 report of the State of New Jersey, Commission of Investigation, was a direct response to allegations of a misuse of public funds targeted for non-public schools for the handicapped. See, R-3. The investigation by the Commission revealed that funds which should have been utilized to improve educational programs for the handicapped were being misappropriated for personal gain. As a result of the investigation, the Commission requested legislative changes on rate-setting. The statutes and regulations presently in existence reflect an attempt to provide for the educational needs of the handicapped while also attempting to prevent misuse of public funds. Although little history is available on the regulations directly involved in the present case, recent changes in the regulations which apply to tuition for private schools for the handicapped also reflect these concerns. Earlier amendments to N.J.A.C. 6:20-4.4 and N.J.A.C. 6:20-4.5 were promulgated as a response to the diverson of funds intended for the education of handicapped pupils. See, 18 N.J.R. 1237, Summary. The current regulations and statutes represent an attempt to deal with the problems described. Although the petitioner objects to the regulations promulgated by the State, agency action is not precluded where it promotes or advances policies that serve as the driving force for legislation. A. A. Mastrangelo, Inc. v. Environmental Protection Department, 99 N.J. 666 (1982).

II.

The sole witness for petitioners was Dr. Douglas R. Shaller, a Certified Public Accountant and Economist, who testified as an expert in rate-setting. He testified for seven full days. His 21-page report is in evidence. See, P-1. Other documents in evidence were authored by Shaller to support the position of petitioners that the 2.5 per cent rule is illegal. See, P-6, P-8, P-10 and P-11.

Three witnesses testified on respondent's case, namely, Mr. and Mrs. Alter (petitioners), and the supervising auditor for the State Department of Education (Division of Finance), James W. Verner.

The testimony of the former Assistant Commissioner in the Division of Finance, Vincent Calabrese, adduced by deposition on December 8, 1988 by counsel for petitioners, is also in evidence. See, P-3. (Calabrese was deposed due to his retirement prior to hearing and questionable availability as a witness.)

Certified transcripts of all testimony, excepting those of April 7, 1989 and May 23, 1989 (which were not transmitted to the undersigned) are incorporated herein by reference as an integral part of this record.

III.

Shaller's testimony paralleled counsel's legal arguments, or vice versa, on behalf of petitioners. Due to the extensive record of his testimony, with a considerable segment dealing with hypotheticals, no attempt will be made to overburden this decision with a detailed recitation. The portions of his testimony deemed to be relevant to the issue will be highlighted.

Shaller qualified as an expert witness in finance, economics, and rate-setting, notwithstanding that he had no recall of any previous rate-setting involvement in education. He contended the rate-setting processes are not dissimilar whether the business is large or small or whether it is in or out of education.

As indicated in his report (P-1), Shaller's testimony focused on the likely economic consequences of the regulations' imposed 2.5 per cent limitation; whether the regulations are confiscatory as applied to Deron; and whether they are economically reasonable as applied to Deron.

A recitation of Shaller's testimony is preceded by a brief uncontroverted history of the Deron operation. Deron has been providing educational services to the handicapped since 1977 with trustees Ronald and Diane Alter and Victor and Lillian Goldblat. Deron became incorporated in August 1981 and the same trustees became equal shareholders. Deron was a non-profit private school prior to its incorporation but became a profit school

upon incorporation. An agreement between the Alters and Goldblats in early 1984 resulted in the Alters becoming Deron's sole shareholders. Ronald Alter has been and is Deron, Inc.'s salaried director. Diane Alter has been and is Deron, Inc's salaried business manager. Victor Goldblat, a Certified Public Accountant, prepared the early financial statements of Deron, Inc., but neither of the Goldblats have been associated with Deron since the severance agreement.

Shaller testified that his review of Deron financial statements revealed a growth of total assets from $180,487 in 1982 to $511,281 in 1988. He also stated there were stockholder cash loans of $86,272 in 1982; $109,694 in 1983; $140,000 in 1984; and $57,325 in 1985. Shaller stated on cross-examination that total assets are synonymous with shareholder's cash investments, but did not know the source of the investments. He also testified he did not know of any out-of-pocket investments made by shareholders. Concerning his direct testimony of stockholder cash loans, Shaller stated on cross that he did not know the source.

Shaller stated on direct that he does not question the authority of the State Board to regulate, but challenges its reduction of the 2.5 per cent profit limitation from the pre-regulation 15 per cent as he could not determine any sound rationale for such a reduction. He stated a belief that a seven per cent minimum or profit limitation would be reasonable and comparable to other businesses with similar risks. Shaller stated on cross he was unsure of how the previous 15 per cent profit was determined, but believe there was some 85 per cent rule in effect. He had no knowledge of how it was applied, but stated a belief that profit was a percentage of allowable costs, and that any erroneous perception of pre-2.5 per cent procedures would not have impacted on his report.

Shaller was critical of State's report of 1982-83 private school profits, P-5 in evidence, because of the use of total revenues and profits, and countered with his own document, P-6 in evidence, which calculated a 2.6 per cent return on revenues (ROR) and a 2.7 per cent return on costs (ROC) using the State's method of computation. Shaller's computation with the removal of negatives resulted in 7.16 per cent ROR profit and 7.71 ROC profit. His criticism stems from his belief that P-5 served as a basis for the State Board's 2.5 per cent limitation.

P-7 in evidence incorporates statistical data for Deron for the 1982-1988 period, which compares Deron's pre and post-regulation results. It includes separate documents representing the State's audit analysis, a comparison of return percentages, shareholders salary analysis, and benefits to the Alters. Shaller counters these documents with his own, P-8 in evidence, which utilizes the State's data but Shaller's process. Herein lies the diversion of opinions.

Shaller was critical of the regulation which places a limit on salaries of the Alters, as salary expenditures in excess of comparable administrative positions in the public schools of the county are deemed to be non-allowable expenses. Shaller attacks the regulation as applied since it effectively prohibits compensation of owner-entrepeneurs without consideration of the absence of tenure, job security, general risk-taking, and for entrepreneurship other than the allowable 2.5 per cent surcharge.

Ronald Alter (RA), a co-petitioner, 50 per cent shareholder, and chief school administrator (Director), also testified. He stated he is certified as a supervisor but does not possess a school administrators' certificate. All other professional staff members in Deron's two schools are properly certified (excepting Diane Alter, his wife and Deron's business manager). He stated that Deron's pupil enrollment has grown to the capacity of 255 pupils.

R.A. testified he did not know if Deron's profit after regulatory amendment was greater than prior to amendment, but believed compensation was higher.

Diane Alter (D.A.), co-petitioner, 50 per cent shareholder, and business manager, also testified. She stated she is not eligible for any certification. D.A. has worked continuously at Deron since 1976. She testified she purchased a 50 per cent interest in Deron, Inc. but did not know the cost of purchase. She also stated she had no knowledge of the asset value of Deron, Inc.

James N. Verner, the State's supervising auditor employed in the Division of Finance since January 2, 1979, also testified. He stated that tuition determinations for special education pupils during 1981-1984 resulted with a maximum set at the 85th percentile of costs for each classification based on public school in-house and receiving school data. The process is incorporated in guidelines which were never promulgated or adopted into the regulatory scheme pursuant to the Administrative Procedures Act.

Verner testified that a task force was triggered by the SCI report to review guidelines and the regulatory scheme to generate recommendations to the State Board for their consideration for rule proposals and adoptions. The task force openly discussed concerns with interested organizational representatives, presumably prior to State Board presentations. Verner stated the task force perceived the SCI report to require consideration of the prevention of the misuse of public funds, a base for budget development, and the absence of any required accountability, audits, or adjustment mechanism. He further stated the task force determined it must address the issue of economic losses by private schools for the handicapped and the need for a system for determining actual costs. He also testified the entitlement of a free and appropriate education for the handicapped pursuant to federal regulations influenced the considerations of both the task force and State Board. The task force relied on data provided by the Division of Special Education, which previously was responsible for tuition determination.

Verner indicated that all schools listed on R-1 (in evidence) are incorporated and operated by owners, except one. He also stated the source for salary analysis, allowable costs, shareholder equity, return on sales, tuition and interest revenues to be the audits which are incorporated in P-7. The return on assets, equity, and sales incorporated in P-7 were prepared for pre and post-regulation comparisons. He stated that line 24 of the analysis of audits therein included non-allowables prior to regulatory amendment. Answers to interrogatories provided data for the P-7 document entitled benefits to the Alters.

It is noted that a number of corrections were placed on the record concerning the data on the benefits to Alters' document incorporated in P-7. The errors resulted from the difference in net income in the filed audits and the dollar amounts incorporated in tax returns. The corrections have been made on the document with initials by the undersigned. Counsel for both parties stipulated that the changes are not material and do not impact on the conceptual arguments of the parties.

Verner's final testimony on direct indicated the consideration by the task force of the following relative to its recommended 2.5 per cent limit on profit: audit data, low investments, out-of-state policies; New Jersey 1982-83 cost data, a concern that higher allowable costs would yield greater profits at public expense, as well as the strong recommendations incorporated in the SCI report.

Verner indicated on cross-examination that the task force relied on shareholder equity data incorporated in audits, which was perceived to be start-up investments for the corporations. He did not recall that the task force relied on the 1982-83 profit data in P-5 to arrive at its recommended 2.5 per cent limit. Verner also stated that he perceived bonuses and/or dividends to be distributions of profit, and indicated that retained earnings were determined in the P-7 analyses of audits by substracting non-allowable costs (lines 19 and/or 20) from net income (line 17), and that net income resulted from the subtraction of expenses (line 15) from revenues (line 9). He conceded that line 20 should be labeled an expense to the corporation.

Verner finally testified that the task force did not consider if the private schools had monopolistic power or whether they were in a competitive market.

IV.

I find it incumbent on me to address the credibility of the principal witnesses in this matter, Shaller and Verner, beause of the efforts of each counsel to influence, in their briefs, a determination discrediting the adversary's witness and finding their testimony and documents authored by them to be worthless. I cannot agree with either counsel.

Verner's testimony is characterized here as a truthful effort to spread upon the record his role on the task force and to prepare documents in support of respondent's defense in this litigation. Disagreement with methods employed by the task force or contents of any of the Verner documents may arguably influence the weight given to the testimony and/or product, but not the credibility of the witness that provided both. Counsel for petitioner forcefully argues for a finding of incredibility of Verner's testimony and work products because of conceded errors, which were corrected on the record, notwithstanding that the basis for the errors were carefully explained and understood and further that counsel for petitioners stipulated they were insignificant and not material. I **FIND** Verner's testimony and work products to be credible.

The Deputy Attorney General (DAG) attacked the credibility and work products of Shaller, and argues they should be deemed worthless. Shaller was retained by petitioners as an expert witness to support the contention of petitioners that the portions of the regulatory scheme at issue here are invalid as applied to Deron. His testimony and work products are obviously expected to be self-serving in the interest of his client. The DAG's attack on Shaller's credibility in cross-examination which often resulted in vague responses beginning with "it depends" created an appearance which was somewhat detrimental to the thrust of petitioner's contentions. This is insufficient to deem his testimony and work products incredible and worthless. Shaller reached into the business world and public utilities sector to compare processes utilized in rate-setting to demonstrate that the State's process ignored what he perceived to be generally accepted principles. The lack of deference to the SCI and State Board concerns for the greater public interest and education for handicapped children does not diminish the credibility of Shaller's testimony and work products, notwithstanding that it may impact on the weight to be attached. I **FIND** Shaller's testimony and work products to be credible.

V.

A careful and thorough review of all testimonial and documentary evidence, with full consideration given to the input by counsel in extensive briefs, results in the adoption

of the following relevant **FINDINGS OF FACT:**

1. Deron began providing services for handicapped children in 1967 as a non-profit school.

2. Deron became incorporated in 1981 as a private for-profit school for handicapped children with four equal shareholders: Ronald and Diane Alter and Victor and Lillian Goldblat.

3. The Alters became the sole and equal shareholders by agreement reached with the Goldblats in early 1984.

4. Ronald Alter has been and continues to be the salaried chief school administrator for Deron, Inc., sans a school administrator's certificate, but does possess a supervisor's certificate.

5. Diane Alter has been and continues to be the salaried business manager for Deron, Inc. without qualification for any certificate.

6. The record is void of any evidence of the shareholder's investment to acquire the assets of Deron.

7. The record is void of any evidence of the value of the assets of Deron, Inc.

8. A review of Deron's income tax and financial reports indicates indebtedness for loans, but the record is void of any evidence to indicate the purposes for same. It is therefore unknown whether the loans secured were utilized for personal or business purposes.

9. Deron, Inc. is subject to the regulatory scheme codified as N.J.A.C. 6:20-4.1 et seq.

10. Tuition rates were established prior to regulatory amendments pursuant to toothless guidelines which generally determined rates by special education classifications based at the 85th percentile of public school costs with an allowable maximum of 15 per cent profit.

11. The regulatory scheme, prior to admendments effective in 1982, 1983, 1984 and 1987, did not require auditing of a private school reporting system and did not delineate non-allowable costs.

12. The regulatory scheme, effective for the 1984-85 school year by amendment, established tuition rates based on audited allowable costs with a 2.5 per cent profit surcharge.

13. Amendments to the regulatory scheme governing tuition rates for private schools for the handicapped were triggered by the SCI report which incorporated findings and recommendations, and were designed to prevent misuse of public funds and avoid economic losses for private schools operating for profit.

14. Deron, Inc., operating two school buildings, has expanded its operation and grown to the full capacity of 255 pupils.

15. Revenues fo Deron, Inc. have increased from $807,524 in 1981-82 to $3,057,479 in 1987-88.

16. Personal income to the Alters has increased from $62,855 in 1981-82 to $208,754 in 1987-88, exclusive of corollary benefits.

17. Pension plan contributions for the Alters has increased from $2,477 in 1981-82 to $17,166 in 1987-88.

18. Profit sharing plan contributions for the Alters, instituted with the regulatory amendment effective in September 1984, have increased from $4,435 in 1984-85 to $16,258 in 1987-88.

19. Life and health insurance contributions for the Alters have increased from $1,220 in 1981-82 to $2,491 in 1987-88.

VI

The thrust of petitioner's arguments attacking the validity of the regulatory scheme at issue as applied to them is simply that the non-allowable costs and 2.5 per cent limit on profit has prohibited an increase in profit dollars commensurate with the dramatic increase in revenues from $807,524 in 1981-82 to $3,057,479 in 1987-88.

Petitioners do not question the authority of the State Board to promulgate and adopt regulations. That authority, they argue, must be constrained by constitutional guidelines, and the adopted regulations must provide for a fair and just return; may not be confiscatory; must be comparable with rates of return of comparable companies; and must not be arbitrary or capricious.

Petitioners seek what they perceive to be a more reasonable profit of about seven per cent, whether it is determined by a return on revenues or a return on costs. The rate-setting process currently in place, they argue, ignores factors considered by public utilities and other businesses which include generally accepted rate-setting principles. Succinctly stated, a regulatory amendment to N.J.A.C. 6:20-4.4 and/or N.J.A.C. 6:20-4.5 which increases the profit limit to seven per cent and/or revises the rate-setting process to conform to the Shaller suggestions, will result in a fair and just return and alleviate the concerns of Deron, Inc.

The State argues that petitioners have relied solely on the Shaller testimony and documentary evidence, which it argues are not credible, and has not met their burden of proof by a preponderance of credible evidence that the regulatory scheme at issue has impacted adversely on Deron, Inc. and/or the Alters.

The State further argues that the Alters have voluntarily established a business to provide educational services to handicapped children with full knowledge it is governed by duly promulgated and adopted regulations, and completely rejects petitioners' contentions that the regulatory scheme is in any way unconstitutional.

VII

Petitioners rely heavily on Federal Power Commission v. Hope Natural Gas Company and City of Cleveland v. Hope Natural Gas Company, 320 U.S. 571, 88 L.Ed. 333 (1944), which involved the issue of the validity of rate reductions chargeable by Hope under the Natural Gas Act (15 U.S.C. §717). Reliance was based on the propositions therein that rates must provide "revenue not only for operating expenses but also for the capital costs of the business" including service on the debt and dividends on the stock; the returns must be commensurate with returns in other enterprises having corresponding risks; and allowable returns "should be sufficient to insure confidence in the financial integrity of the enterprise so as to maintain its credit and attract capital."

The Court in Hope said more which was not mentioned by petitioners:

> Under the statutory standard of "just and rasonable" it is the result reached not the method employed which is controlling... The fact that the method employed to reach that result may contain infirmities is not then important. . . . It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences. (at 345)

The Hope Court also said at 349: "The primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies."

The Fifth Amendment guarantees that private property shall not be taken for public use without just compensation. The petitioner claims that the actions of the State Board regulating allowable profits for private schools for the handicapped is confiscatory

and unconstitutional because the petitioner is being denied just compensation by the 2.5 per cent limit on profits. The current case law cited by the petitioner as supporting his position states that where a regulation deprives an owner of all use of property, the owner is entitled to compensation as a result of a "taking." First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. _____, 197 S.Ct. 2378, 96 L.Ed. 250 (1987). However, the petitioner is not being denied all use of his property, which is the standard established by case law. First English Evangelical does not support the petitioner's position that a regulation of profits alone is a taking. The petitioner must show that his business is no longer profitable.

A "taking" has been defined by the courts as a "determination that the public at large rather than a single owner, must bear the burden of an exercise of state power in the public interest." Agins v. Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138, 65 L.Ed. 2d 106 (1980). Several tests exist for determining if a taking has occurred. In Agins, the Court stated that although there is no precise rule for determinng when a taking has occurred, the issue is resolved by weighing private and public interests Agins, at 261. In addition, the court stated that a taking may also result where a regulation denies an owner economically viable use of his land. Id. at 260. The courts generally agree that the fact that a regulation deprives a property owner of the most profitable use of his property is not enough to establish a taking. Sixth Camden Corp. v. Evesham Township, 420 F. Supp. 709, 721 (D. N.J. 1976). The courts have also stated that a decrease in value of property will also not be sufficient by itself to establish a taking. The courts have, in fact, declined to find a taking where there was diminution in the value of property from $800,000 to $60,000 as a result of state actions. Hadacheck v. Sebastian, 239 U.S.. 394, 36 S. Ct. 143,60 L. Ed. 348 (1915). Furthermore, the courts recognize that a radical curtailment of a landowner's freedom to make use of or ability to derive income from this land may give rise to a taking. However, absent an interference with the owner's legal right to dispose of his land, impairment of the market value of real property incident to otherwise legitimate government action ordinarily does not result in a taking. Kirby Forest Industries, Inc. v. United States, 467 U.S. 1, 13-15, 104 S.Ct. 2187, 81 L.Ed. 2d 1, (1984).

Normally, for a regulation to be found unconstitutional its provisions must be clearly arbitrary and unreasonable. Sixth Camden Corp. at 722. Petitioners argue that the state's actions are arbitrary and unreasonable, but he fails to define these two terms. In order to be arbitrary and unreasonable, the courts have required that a regulationn must have no substantial relation to the public health, safety, morals or general welfare. Id. In the present case, the 2.5 per cent limit on profits is the direct result of the State's attempt to assure that money targeted for educational purposes is not diverted for personal use. Therefore, the 2.5 per cent profit limit is not arbitrary and capricious as the petitioners claim.

Furthermore, the State is not required to permit the petitioner the most profitable use possible of the property. The State courts have determined that a property owner is simply entitled to a just and reasonable rate of return on his investment. Hutton Park Garden v. West Orange Town Council, 68 N.J. 543 (1975). In Hutton, the court determined that,

> The term "just and reasonable" is hardly more precise than the term "confiscatory," its antonym. It is no objection that the regulation may incidentally cause the value of the property to be reduced. . . . The rate of return permitted need not be as high as prevailed in the industry prior to regulation nor as much as an investor might obtain by placing his capital elsewhere. . . . . Determination of what level of return is "just and reasonable" involves evaluation not only of the interests of the investor but also of the interests of the consumer and of the general public sought to be advanced by the regulatory legislation. . . . Whether a particular regulation of prices fails to permit a just and reasonable return is a mixed fact-law question. Id. at 569-70.

The petitioners claim that the State must justify its regulatory change affecting profitability, and argues that the State never provided supporting facts and reasons for the change in the allowable profits to private schools for the handicapped. The petitioner cites Abbotts Dairies v. Armstrong, 14 N.J. 319 (1954), as supporting its contention. However, the petitioner's reliance on Abbotts Dairies is misplaced. Abbotts Dairies deals

with the requirement of notice and a hearing prior to instituting regulatory changes. In the present case, the proposed regulations indicate that, prior to adoption of the regulations affecting tuition for private schools for the handicapped, public notice was given of the intended changes and public comment was received. See, 18 N.J.R. 1237(a), 16 N.J.R. 2358(a). There was no procedural irregularity.

Furthermore, the courts have determined that a presumption of reasonableness attaches to the actions of an administrative agency. The burden of proving unreasonableness falls upon the challenger of the validity of the action. Smith v. Ricci, 89 N.J.. 514, 525 (1982), appeal dism. 459 U.S. 962, 103 S.Ct. 286, 74 L.Ed. 2d 272 (1982). The agency is not required to present evidence that its rule is reasonable. The court in Ricci stated that assertions that there are no data to prove the effectiveness of a change will not satisfy the appellant's burden of proof. Id. In addition, the court stated that an agency need not make record findings to promulgate a reasonable rule. Id. The petitioner's assertions have, therefore, already been negated by the courts.

The petitioner's arguments that the formula applied by the State to the profits of private schools for the handicapped is unconstitutional are not new. In Hutton, a similar argument was made by the plaintiff who argued that limiting rent increases to a fixed percentage of existing rents was inherently arbitrary and irrational. The Court in Hutton stated at 473 that, "it is not for the courts to dictate the method of regulation to be employed; subject to constitutional limitation, that is a matter wholly within the discretion of the legislative body." In addition, the court stated that with regard to the validity of regulations, there is no obligation to shape regulations under the police power with "mathematical exactitude." Id. For constitutional purposes the court in Hutton determined that it is sufficient that the means adopted is rationally related to the purposes sought to be accomplished. Id.

In the present case the petitioners have voluntarily chosen to enter a regulated business which serves a public interest. The Courts have long ago determined that government price regulation does not constitute a taking of property where the regulated

group is not required to participate in the regulated industry. Whitney v. Heckler, 780 F. 2d 963 (11th Cir. 1986), citing Bowles v. Willingboro, 321 U.S. 503, 517-18, 64 S.Ct. 641, 88 L.Ed. 892 (1944).

The present system imposed by the State to regulate profits and assure that money is appropriated for the benefit of handicapped students' education allows schools to recover all allowable operation costs. The petitioner has not shown that it is being denied a fair return on its investment, but only that it would prefer a higher one. Nor has the petitioner shown that the school is no longer profitable.

The test to be applied in determining the adequacy of profits was laid down by the court in Council of Private Schools v. Cooperman, 205 N.J. Super. 544, 548 (App. Div. 1985). The court in Cooperman stated that in the final analysis the adequacy of profits cannot be weighed without knowing facts such as a particular school's capital investment, enrollment and approved costs. Id. at 548.

It is noted here that under V. in this decision at facts #6 and #7 the record is void of any evidence of the shareholder's investment to acquire the assets of Deron or the value of the assets of Deron, Inc. -- deemed herein to be a responsibility of petitioners in the process of meeting their burden of proof. Enrollment at the Deron schools is at capacity - 255 pupils. The approved costs are those not excluded by N.J.A.C. 6:20-4.4.

The petitioner in the present case has also argued that in order to be constitutional, the rate of return allowed to private schools must be commensurate with market returns in similar industries with similar risks. The petitioner further analogizes the present situation to that of utility companies and argues that rate making formulas similar to those applied to utility companies should be used to determine the allowable returns for private schools for the handicapped. A public utility is defined to include,

> . . . every individual, copartnership, association, corporation or joint stock company, their lessees,, trustees or receivers appointed by any court whatsoever, their successors, heirs or assigns, that now or hereafter may own, operate, manage or

> control within this State any railroad, street railway, traction railway, autobus, charger bus operation, special bus operation, canal express, subway, pipeline, gas, electric light, heat, power, water, oil, sewer, solid waste collection, solid waste disposal, telephone or telegraph system, plant or equipment for public use, under privileges granted or hereafter to be granted by this State or by any political subdivision thereof. N.J.S.A. 48:2-13.

A school for the handicapped does not fall within the definition of a utility. In Junction Water Co. v. Riddle, 108 N.J. Equity 523, 526 (1931), the court stated that a criterion by which to judge whether a plant is a public utility is whether or not the public may enjoy it of right or by permission only. The public must have the right to demand the service from the provider of the service in order to qualify as a utility. Id. In the case of a private school, the general public has no right to demand the services of the private school for handicapped students, and such an analogy is inappropriate. If the legislature had desired such a comparison to be made it could have included private schools for the handicapped within the definition of utilities and permitted the same formulas to be applied to these schools as are applied to utilities for the purpose of regulating rate of return and profits. The fact that the legislature implemented separate statutes to deal with tuition (N.J.S.A. 18A:46-21) and has permitted the state to establish regulations it deems appropriate with regard to providing educational services and limiting profits, (N.J.S.A. 18A:4-15 and 4-16) indicates that there was never an intent to have schools function under the same market returns as other enterprises. The problems and abuses associated with delivering educational services to the handicapped are different from those of other industries. The petitioners' assertions that allowable returns to private schools for the handicapped must be commensurate with those of industries having corresponding risks totally ignore the unique qualities and responsibilities of those schools by emphasizing only the aspect of business risks of these schools. The courts in New Jersey have determined that when private schools choose to receive handicappd public school pupils under Chapter 46, they must relinquish some of the privacy and control over their affairs that they would otherwise have under Chapter 6. Council for Private Schools.

VIII

I **FIND:**

1. The State is not required to grant owner-entrepreneurs a profit other than what is deemed a reasonable rate of return, which is subject to a balancing of private and public interests.

2. The actions of the State Board through the adoption of N.J.A.C. 6:20-4.4 and N.J.A.C. 6:20-4.5 do not rise to the level of a taking and are within the powers granted by the Legislature.

3. The adoption of N.J.A.C. 6:20-4.4 and N.J.A.C. 6:20-4.5 have not impacted adversely on Deron, Inc. or the Alters, notwithstanding that the profit dollars are less than petitioners believe they should be entitled.

4. Petitioners have not met their burden of proof that the regulations at issue are confiscatory, unconstitutional, arbitrary, or capricious.

IX.

It must be noted that petitioners also argued that the State Board has provided no mechanism for relief. Notwithstanding that the due process hearing provided in this instant matter must be deemed a mechanism pursuant to N.J.S.A. 18A:6-9, I know of no prohibition for a petition to the State Board for review and reconsideration of an adopted regulation based on accumulated data resulting from implementation of the rule. Such a review and reconsideration could result in further revision, which conceivably could be more favorable or more unfavorable to petitioners.

X.

I **CONCLUDE** this peittion shall be and is hereby **DISMISSED.**

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

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

21 August 1989
DATE

WARD R. YOUNG, ALJ

August 23, 1989
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

AUG 23 1989
DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

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DERON SCHOOL OF NEW JERSEY, INC., AND RONALD L. ALTER AND DIANE C. ALTER,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, AND SAUL COOPERMAN, COMMISSIONER OF EDUCATION,	:	DECISION ON REMAND
RESPONDENTS.	:	

The record of this matter and initial decision of the Office of Administrative Law have been reviewed. Petitioners' exceptions and respondents' replies thereto, including trial briefs incorporated by reference into both submissions, were timely filed pursuant to N.J.A.C. 1:1-18.4 and 1:1-18.8 and have been considered accordingly.

Petitioners first except to the ALJ's ruling that the Hutton Park standard, supra, is inapplicable because petitioners' involvement in regulated business is voluntary. Instead, petitioners argue for Hutton Park's recognition that the supposed freedom to abandon certain types of business in Hutton Park, a large apartment complex, is rendered illusory by practical and economical considerations, and that consequently the "just and reasonable" standard applies to all price-regulated businesses. Petitioners further assert that Deron and other schools of its type were induced to enter the business by the Legislature on the promise of earning market profits, a promise which the Department reinforced by the 15% return-on-cost rule in effect prior to adoption of the later 2.5% limitation. (Point I)

Petitioners next except to the ALJ's ruling that, in order to demonstrate an unconstitutional taking, petitioners must have shown that their business was no longer profitable and that the contested regulation denied them all viable use of their property. In contrast, petitioners cite federal precedent (Hope, supra) followed by New Jersey courts in all rate setting cases (including Hutton Park) for the proposition that rate regulations must permit the regulated party the opportunity to earn a return commensurate with returns in other enterprises having corresponding risks. (Point II)

Petitioners also except to the ALJ's characterization of language in Cooperman, supra, as a test for determining the adequacy of return on cost for any particular school. Instead, petitioners assert that the relevant passages were merely dicta, with no meaning for the present "as applied" case because they occurred in the

context of a facial validity determination. Notwithstanding the alleged inapplicability of the capital investment standard, petitioners also hold that, contrary to the finding of the ALJ, they did in fact provide information pertinent to this standard. They did so, they assert, by setting forth the corporation's assets from 1982-1987, "[s]ince assets of the corporation equal investment of a corporation***." (Point III, quote from page 9, note 2).

Petitioners further contend that the ALJ erred in construing the existence of a separate statute governing private school tuition rates as an indication that the Legislature intended to distinguish these schools from other entities such as public utilities, thereby circumventing or otherwise inappropriately limiting their constitutional rights in matters of price control. In contrast, petitioners repeat arguments of Points I and II regarding general applicability of Hope price control standards. (Point IV)

Petitioners then except to the ALJ's Findings of Fact, arguing that relevant facts were omitted and irrelevant facts relied on, and asserting that the findings as stated do not support the ALJ's legal conclusion. In particular, petitioners assert that, contrary to Finding of Fact No. 7, the record includes clear statements of the book value of Deron's assets, and that the income to Petitioners Alter described in Findings of Fact Nos. 16, 17, 18 and 19 is irrelevant because the Alters did not receive it as shareholder compensation. Further, petitioners assert that the following relevant facts were omitted: "unrebutted evidence" that comparably sized companies bearing comparable risk have much higher rates of return than 2.5%; proof that the cost plus system does not materially compensate Deron shareholders; and proof that respondents' witness James Verner was not credible. (Point V) Petitioners also except to the ALJ's finding (Initial Decision, ante) that the contested regulations have not impacted adversely on Deron, since petitioners were not permitted to put forth any proof concerning damages during the hearing. (Point VI) Finally, petitioners assert that the ALJ "completely ignored***persuasive legal arguments" (referring to appended trial briefs) establishing that the contested rule was invalid on its face. (Point VII)

Respondents reply by urging support of the ALJ's decision except insofar as it does not recognize Cooperman, supra, as binding on the question of facial validity. In response to petitioners' exceptions, respondents assert that, by failing to delineate the basis of Point VII and relying solely on an incorrectly stated, unsupported argument heading, petitioners have abandoned their appeal on the facial validity question. With respect to the "as applied" question, respondents aver that petitioners mischaracterized the ALJ's decision. The ALJ, claim respondents, did not find that petitioners were not entitled to a reasonable rate of return; rather, he found that they had failed to prove they were not in fact receiving one.

Further, respondents note that
***The evidence as to increase in asset value and wages and fringe benefits clearly establishes

> that the regulation cannot be regarded as confiscatory as to Deron, its shareholders, or the Alters. In this last regard it should be noted that there is something fundamentally anomalous in the argument that Deron's shareholders have suffered made in the context of a small closely held corporation who's (sic) shareholders are employees where the choice has been made to reinvest in the corporation increasing asset value and to pay the maximum salaries permitted. (Reply Exceptions, at p. 3)

Finally, respondents refute petitioners' Point III by asserting the relevance of Cooperman, supra, to "as applied" determinations, and by noting that

> ***As to investment the record is clear, and petitioners have not disputed, that there is no evidence as to the amount Deron School, Inc., paid to its non-profit predecessor to acquire its assets nor of any amounts invested by the Alters to acquire their interest in the corporation (it was stipulated during the course of the hearing that the amount paid by the Alters to buy out the 50% interest of the Goldblatts was not related to a valuation of their stock or of the corporation). In point of fact both Ronald and Diane Alter testified that they made no original out of pocket investment for their interest in Deron. Judge Young therefore appropriately found that as to factors identified in Council which might render the 2.5% profit limitation unreasonable as applied petitioners have failed to meet their burden of proof.*** (Id., at p. 4)

Upon a careful review of the record, the Commissioner adopts the ALJ's discussion as his own with the following additions and modifications.

With respect to facial validity, as the ALJ recognizes and the record clearly shows, the regulatory framework of which the contested rules are a part was developed carefully and deliberately in direct response to a unique situation requiring a delicate balancing of public fiscal responsibility, student welfare and private interests. That framework as a totality has, in Cooperman, supra, withstood a prior challenge of precisely the type raised by petitioners, and the Commissioner here notes that, contrary to the ALJ's agreement with petitioners' argument (Initial Decision, ante), the Appellate Division decision is in no way rendered irrelevant by the Supreme Court's directive for an administrative hearing on one discrete aspect of the regulations. Rather, the Appellate Division opinion stands as the final word (certification having been denied by the Supreme Court) on the validity of the regulatory construct in general, and it would have been neither inappropriate nor inconsistent for the administrative tribunal to rely on Cooperman for overall guidance in examining one particular component of that construct in more detail.

Indeed, as the ALJ recognizes, the instant regulation cannot even be fairly considered apart from its general context. The record in this case establishes that context as follows: in recognition of the fact that the needs and number of handicapped students frequently outstripped the ability of the public schools to provide for them, the Legislature permitted public schools, after having exhausted all other means, to place handicapped students in willing private schools at a rate of tuition to be established by the State. Prior to the adoption of the disputed regulation, the State's tuition mechanism permitted a profit of up to 15% provided that designated ceilings related to actual public school costs were not exceeded. Experience showed this mechanism to be inadequate in cases where the private school's actual costs exceeded the allowable ceiling, and contrary to public and student interest in its inherent encouragement of minimizing the proportion of tuition dollars spent on direct educational costs in the interest of earning the largest possible profit. Further, in the State Commission of Investigation (SCI) investigation that ultimately served as the catalyst for reform, serious abuses were uncovered which, while not necessarily indicative of general practice, were certainly indicative of the potential for harm in the existing administrative mechanisms (or lack thereof). As a consequence, a fully audited, cost-based system was developed and systematically implemented to ensure, on one hand, that a private school's legitimate expenditures could be fully recouped independent of any established ceiling and, on the other, that public dollars paid for students requiring private school placement would be specifically directed to demonstrable educational costs as is public support of all other public students.

Within this framework, the very notion of profit is an anomaly. Public education is not about making money; it is about educating students as well as possible within the limits of fiscal prudence. In this view, the State would have been within its rights to permit no profit at all. Indeed, although this belief was not made explicit until a 1986 amendment to the pertinent statute, there was never anything in that statute (N.J.S.A. 18A:46-21) to suggest that the Legislature's intent was to invite profit-making at public expense. When New Jersey's for-profit schools were examined for purposes of establishing an appropriate tuition, they were found to be overwhelmingly small, closely held corporations, owner operated and requiring very little in the way of initial investment or risk given that their services were in great and ever-increasing demand and that loan costs were fully recoverable through tuition. Owners' opportunities for benefit were extensive, given that they were most frequently board of directors, majority (or even sole) stockholders and highest-level salaried employees all at once. Under these conditions, an influx of public school students would permit owners to expand facilities and services, increase assets and employee benefits, and enjoy enhanced stability fully independently of profit per se. Even so, the Department determined to permit a small but guaranteed profit in recognition of the schools' service to the public sector, and to set the amount of this profit, department staff looked to policies and practices in other states.

In this context it becomes clear that petitioners' rate setting arguments, particularly those that seek to establish

prevailing market rate as the only just, reasonable and economically defensible return, are simply not applicable--not because Deron is not a utility, but because the Department's process was not rate setting and because the "comparable" entities adduced by petitioners are not at all comparable to the unique situation outlined above. It is undisputed that the State did not consider competitive rate analyses in setting the amount of permissible profit in public tuition; however, that is precisely the point. The regulations in question do not set rates for the private school industry or dictate how much private schools may charge private parties for their services; rather, they establish the amount of money the State deems it appropriate to pay private schools for accepting public school pupils, with due regard for the benefits accruing to both through this unique arrangement. Public school pupils placed in private schools for the handicapped are public pupils nonetheless. Their placement in a private school is the result of public action, supported by public funds, and directly related to the State's obligation to provide every student with a free and appropriate public education.

Private schools are neither entitled to nor obliged to accept public school students. Rather, they are permitted, if they so choose, to accept public school pupils at a State-determined rate of tuition chargeable in full against the public fisc. They do not need to abandon their business in the Hutton Park sense to decide not to accept, or to accept a limited number of, public school pupils. While the State in effect expanded the market for private schools by permitting public schools to utilize their services, this result was incidental to the primary purpose of providing for public students' unmet educational needs. That the extent of those needs virtually guaranteed the private schools a market for their services should not be construed as an inducement to enter the field by promises of market profit. Nor can the Department's prior use of a now-discredited tuition-setting mechanism be relied upon to justify perpetuation of policies and practices clearly contrary to student and public interest.

Looking at their own particular situation, as the ALJ noted (Initial Decision, ante), petitioners' complaint is essentially that under the new regulation their profit dollars have not increased at the same rate as revenues. While it may be true that petitioners are earning less in profit than they would like, it is beyond question that the 2.5% profit limitation has not prevented them, and almost certainly will not prevent them in the future, from benefitting substantially from Deron's operation. Here it is directly relevant, contrary to petitioners' assertions, to consider the totality of benefits to petitioners. Their own salaries are set at the maximum permitted by law and are far higher than their respective levels of certification would permit in public school employment. Asset values* have increased substantially as a result

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* The Commissioner concurs with petitioner that the record contains ample information on the book value of Deron's assets contrary to the apparent meaning of the ALJ's Finding of Fact No. 7 (Initial Decision, ante)

of their expansion to include larger numbers of public school students, as well as from their decision as Board of Trustees to reinvest in the corporation rather than paying dividends to themselves as stockholders. Petitioners' salaries and benefits have also increased dramatically over the past few years so that, in effect, they were able to offset losses in one form of personal compensation (stockholder profit) with gains in another (salary and benefits). (Previously, their salaries were lower while their profits were higher.) As the ALJ notes, there is no evidence in the record to indicate the cost to petitioners of acquiring Deron, Inc., so that no judgment can be made that their original investment has been compromised in a way that would rise to the level of an unconstitutional taking.** Certainly, nothing in their present mode of operation suggests anything less than the prospect of continued benefit, steady to increasing demand, correspondingly low risk and correspondingly high stability, all considerable assets in determining creditworthiness and capacity to attract capital.

Accordingly, the Commissioner upholds both the facial validity of N.J.A.C. 6:20-4.4 and 4.5 and their validity as applied to petitioners. The initial decision of the Administrative Law Judge is hereby affirmed, and the Petition of Appeal in the instant matter dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

October 20, 1989

** The Commissioner notes for the record that while he does not view the pertinent language of Cooperman as the exclusive, definitive test for determining "as applied" validity, he does regard it as establishing certain basic parameters for administrative review and fully concurs with the ALJ's assessment that relation to capital investment should be an integral part of any attempt to demonstrate unconstitutional confiscation. The general notion that assets equal investments, used by petitioners to justify exclusion of initial outlay information, is simply not sufficient in this context.

Pending State Board

D.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	
	:	

D.L., Pro Se

For the Respondent, Hannoch Weissman, Attorneys
(Michael Herbert, Esq., Of Counsel)

This matter was opened before the Commissioner upon the filing of a Petition of Appeal seeking an Order of the Commissioner to set aside the determination of the New Jersey State Interscholastic Athletic Association (NJSIAA) Eligibility Appeals Committee denying petitioner a waiver for the eight semester rule set forth in Article V, Sections 4.J and 4.E, CL4. The aforesaid rules provide:

> J. 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/servicewomen, in which case the Executive Committee may make any adjustments of this rule as it may deem equitable.
>
> CL4 An athlete, whose education is interrupted after his/her entrance into the 9th grade (4 or 6 yr. high school) or 10th grade (3 yr. high school) and who does not pass the required courses as provided for in Article V, Section 4-E 1 and 2 of the Bylaws at the end of the semester, upon being readmitted at the beginning of the next semester, is ineligible for failure to meet the requirements of this section.
>
> Exceptions to this rule are returned servicemen/servicewomen who have been honorably discharged and cases of unavoidable absence due to illness. Substance abuse is not considered as unavoidable absence due to illness. However, all such cases must be ruled upon by the Eligibility or Eligibility Appeals Committees.

The essential facts of the matter are as follows:

1. Petitioner is an 18-year-old senior at Phillipsburg High School.

2. He entered Phillipsburg High School in September, 1985 and played freshman football and basketball.

3. During his sophomore year he played football and basketball and in his junior year football only.

4. During the month of April of petitioner's junior year, he ran away from home. In May 1988 he was arrested in Florida and placed in a detention center for 30 days and then returned to his parents.

5. Upon return to his home, he resumed counseling/therapy for alcohol and drug abuse but he secretly continued use of such substances.

6. In August 1988, petitioner entered an in-patient drug and alcohol treatment facility where he remained for 42 days.

7. In the fall of 1988, petitioner returned to Phillipsburg High School as a junior. He was unable to participate in sports due to academic ineligibility.

8. On May 17, 1989 the Eligibility Committee of NJSIAA denied a waiver of the eight semester rule to participate in sports during the 1989-90 school year due to Article V, Section 4.E, CL4 of NJSIAA's Bylaws which does not recognize substance abuse as grounds for granting a waiver to the eight semester rule.

9. A hearing was held on June 14, 1989 before the Eligibility Appeals Committee which affirmed the decision denying petitioner a waiver.

The letter issued by NJSIAA's Eligibility Appeals Committee reads in pertinent part:

> Although the Committee was most impressed by the sincerity and outstanding strides that this young man has made toward rehabilitation, as well as the eloquent presentation of Robert L. Pierfry, the Substance Abuse Coordinator at your school, they determined that the extension of [D.L's] academic career beyond four years was <u>not</u> because of circumstances beyond his control. As pointed out at the hearing, the NJSIAA has specifically amended its Interpretive Guidelines to provide that a student who was involved in substance abuse is not considered to be so involved because of "circumstances beyond his or her control."

> That principle, as set forth on page 63 of the NJSIAA Handbook, was adopted to provide an inducement for students not to involve themselves in drugs or other unacceptable behavior. The evidence, in this case, also shows that the student was involved with both alcohol and hard drugs and, despite his commendable rehabilitation efforts, clearly falls within the proscription contained on page 63. (emphasis in text)

POSITIONS OF THE PARTIES

Petitioner asserts that the NJSIAA Bylaws' inclusion of substance abuse as a non-medical problem is arbitrary and inconsistent with contemporary understanding of substance abuse. He avers that between the ages of 13 and 17 he developed an addictive personality pattern for which he sought medical treatment at a drug and alcohol treatment facility during August and September 1988. Further, as a minor in his early teens, he was unaware of his potentially addictive personality and became entrapped in an alcohol addiction at some point during the period 1984 through the summer of 1988.

Petitioner also avers that since he began medical treatment at age 17 and has become engaged in a lengthy recovery and aftercare process, he has at age 18 chosen sobriety as a way of life. Further, he has continued out-patient counseling with the Warren County Family Guidance Agency of New Jersey, as well as participating in Alcoholics Anonymous meetings, and has exerted diligent scholastic effort in high school during the 1988-89 school year enabling him to complete his diploma requirements this school year.

In support of his position petitioner has submitted to the Commissioner correspondence from Rutgers University's Center of Alcohol Studies dated September 11, 1989 which provides references to the literature which supports that alcohol is a disease. The covering letter from the Chief of Research states:

> Although the disease "concept" was originally formalized by E.M. Jellinek in his classic 1960 textbook, today, the acceptance of alcoholism as a disease is embraced by the highest authority on alcohol in the United States, namely, the National Institute of Health's National Institute of Alcohol Abuse and Alcoholism, as well as as other authorities in the field.

Petitioner also submitted for the Commissioner's review a copy of N.J.S.A. 26:2B-21 which reads:

> 26:2B-21. Rights of person who received treatment at facility or alcoholic

> No person who has received treatment at a facility in accordance with the provisions of this act or person who is an alcoholic shall be denied any right or privilege under the Constitution of the United States or of the State for the reason that he has received treatment at a facility or that he is an alcoholic.

It is noted for the record that the above-cited correspondence and statute does not appear to have been submitted for NJSIAA's review.

In addition, petitioner has submitted to the Commissioner a number of letters attesting to his exemplary commitment and progress in overcoming his addictions.

NJSIAA avers that it promulgated Interpretive Guidelines for Student-Athlete Eligibility (Guidelines) in September 1983 in response to suggestions of the Commissioner of Education. Those Guidelines state that waivers of the eight semester eligibility rule will only be granted where a student has been compelled to extend his or her high school career because of circumstances beyond that student's control. In the spring of 1986 the NJSIAA Executive Committee added a provision to the Guidelines that involvement in substance abuse would not be deemed circumstances beyond a student's control.

NJSIAA maintains that at the hearing conducted before the Eligibility Committee on June 14, 1989, petitioner acknowledged that he was not only involved with alcohol abuse, but was also involved in "hard" drugs. On that basis, the Committee concluded that such activity on the part of a student was not involuntary and, therefore, the extension of his high school career was not beyond his control. Consequently, it is NJSIAA's position that a waiver cannot be granted to petitioner.

COMMISSIONER'S DETERMINATION

Upon careful consideration of the record in this matter, including the transcripts of the hearing before the NJSIAA Eligibility Appeals Committee, the Commissioner finds that no compelling basis has been advanced by petitioner to reverse the decision reached by NJSIAA denying a waiver for the eight semester rule, Article V, Section 4.J. The Committee's decision was made in accordance with NJSIAA's Constitution and Bylaws. So long as NJSIAA's actions are not shown to be arbitrary, capricious and unreasonable, the Commissioner may not substitute his judgment for that of NJSIAA. After thorough examination of the parties' positions, the Commissioner concludes that petitioner has failed to demonstrate that denial of the waiver was arbitrary, capricious or unreasonable.

NJSIAA's exclusion of substance abuse as a circumstance beyond a student's control has a rational, reasoned basis. It is intended to serve as a deterrent to students becoming involved in such abuse. That alcohol is deemed by respected members and

organizations of the medical community to be a disease does not render NJSIAA's rule arbitrary and capricious. Moreover, the exclusion of substance abuse as a grounds for waiving the eight semester rule is not found to be violative of N.J.S.A. 26:2B-21 because participation in sports is not a right or privilege guaranteed under either the federal or state constitution. D.K.P. et. al. v. Hunterdon Central Regional School District, Hunterdon County, (Palmer v. Merluzzi), 689 F. Supp. 400 (D.N.J. 1988), aff'd 868 F. 2d 90 (3rd Cir. 1989)

The record certainly conveys that petitioner has made great strides in overcoming his problems with addictive substances and that he is committed to continuing that progress. The strides he has made are a credit to him and all who have aided him to achieve the success he has experienced. This does, not, however serve to nullify the reasonableness and rational basis for the exclusion of substance abuse as a circumstance beyond a student's control warranting waiver of the eight semester rule.

Accordingly, the decision of the Eligibility Appeals Committee is sustained. The Petition of Appeal is therefore dismissed.

COMMISSIONER OF EDUCATION

October 23, 1989

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO EDU 1454-89
AGENCY DKT. NO. 16-1/89

RIDGEFIELD PARK BOARD OF EDUCATION.,

Petitioner,
v.

LITTLE FERRY BOARD OF EDUCATION,

Respondent.

Frank N. D'Ambra, Esq., for petitioner
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Stanley Turitz, Esq., for respondent,
(Gallo Geffner, Fenster, Farrell, Turitz & Harraka, attorneys)

Record Closed: August 14, 1989 Decided: September 12, 1989

BEFORE **EDITH KLINGER**, ALJ:

On January 25, 1989, petitioner, Ridgefield Park Board of Education (Ridgefield Park), filed a petition with the Commissioner of Education seeking payment of $33,680 from respondent, Board of Education of Little Ferry (Little Ferry). This amount is the tuition adjustment for the school year 1985-86, derived from the costs

per high school pupil certified by the New Jersey State Department of Education to Ridgefield Park on June 11, 1987. Respondent filed an answer on February 14, 1989, and on February 28, 1989, the Department of Education, Bureau of Controversy and Disputes transmitted this matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

After notice to all parties, a prehearing conference was held on April 19, 1989 at which time it was determined that the matter would be heard on the papers as a motion and crossmotion for summary decision, pursuant to *N.J.A.C.* 1:1-12.5.

Petitioner moved for summary decision ordering the Little Ferry Board of Education to immediately pay the adjustment based upon the certified tuition costs for the 1985-86 school year on the grounds that there has been a final decision that Little Ferry's appeal seeking an audit of those costs was filed out of time. Ridgefield Park also requested that post-judgment interest be assessed against Little Ferry for failing to make the payment.

Respondent filed a cross-motion for summary decision requesting the dismissal of the petition on the grounds that the Office of Administrative Law lacks jurisdiction over the subject matter, that there has never been a determination of the amount of the claim which Ridgefield Park asserts against Little Ferry, and that Ridgefield Park's claim is barred by the application of *N.J.A.C.* 6:24-1.2(b) because it was not made within 90 days of Little Ferry's refusal to pay the claim. Finally, Little Ferry seeks a determination that Ridgefield Park is not entitled to post-judgment interest.

PROCEDURAL HISTORY

On December 4, 1987, the Little Ferry Board of Education filed a petition with the Commissioner of Education seeking a redetermination of the pupil tuition rates charged to it by the Board of Education of the Borough of Ridgefield Park for the years 1974 through 1986, and the return of any overpayment discovered on the grounds that improper and illegal charges may have been included in the tuition costs.

Ridgefield Park moved for summary decision on the grounds that Little Ferry should have requested this audit within 90 days of June 19, 1987, the date that Ridgefield Park notified Little Ferry of the certified cost per high school pupil for the 1985-86 school year for tuition adjustment purposes. Ridgefield Park received the certified costs per pupil from the Assistant Commissioner of Education, Vincent B Calabrese, on June 11, 1987.

On the basis of the 90-day rule, *N.J.A.C.* 6:24-1.2(b), summary decision in favor of Ridgefield Park was granted by the administrative law judge on May 3, 1988, in *Board of Education of the Borough of Little Ferry v. Board of Education of the Borough of Ridgefield Park*, OAL DKT. NO. EDU 8561-87. The decision was affirmed by the Commissioner of Education on June 16, 1988, the State Board of Education on November 3, 1988, and the Superior Court of New Jersey, Appellate Division on July 10, 1989. *Little Ferry Board of Education v. Ridgefield Board of Education, N.J.* (App Div., July 10, 1989, A-1891-88 T5), (unreported). No crossclaim for payment was ever filed by Ridgefield Park against Little Ferry.

FINDINGS OF FACT

The facts in this matter are not in dispute. Some of the facts were stipulated in the previous action, OAL DKT. NO. EDU 8561-87, and are set forth in relevant part below:

1. The Little Ferry Board of Education (hereinafter referred to as Little Ferry) sends their high school students to the Ridgefield Park School District, the receiving district.

2. The Ridgefield Park Board of Education (hereinafter referred to as Ridgefield Park) charges Little Ferry tuition for each such pupil, in accordance with *N.J.S.A.* 18A-38-19 and *N.J.A.C.* 6:20-3.1.

3. Said sending-receiving relationship has existed since approximately 1974.

4. As in prior years, and pursuant to *N.J.A.C.* 6:20:3.1(d)(2), Ridgefield Park notified Little Ferry of the estimated cost per pupil for the 1985-86 school year in a timely fashion

5. Little Ferry paid tuition for its pupils sent to the Ridgefield Park High School in accordance with said estimated figure.

6. On June 11, 1987, Ridgefield Park received certified costs per high school pupil for the 1985-86 school year for tuition adjustment purposes from the Assistant Commissioner, Vincent B. Calabrese.

7. Ridgefield Park, by Joseph M. Cappello, Business Administrator, notified Mr. Arthur Hirtler of Little Ferry of said certified figures on June 19, 1987.

8. Ridgefield Park planned to credit Little Ferry for the difference between the estimated tuition cost and the actual tuition cost based on the June 1987 figures.

Based upon the cost per high school pupil for the 1985-86 school year for tuition adjustment purposes certified by the Department of Education on June 11, 1987, Little Ferry owes to Ridgefield Park $33,680 for underpayment of the 1985-86 tuition costs.

The issue appealed in OAL DKT. NO. EDU 8561-87 was whether Ridgefield Park correctly computed the tuition rates charged to Little Ferry in accord with *N.J.S.A.* 18A:38-18 and *N.J.A.C.* 6:20-3.1 *et seq.* for the years 1974 through 1986. This was the issue which Little Ferry was barred from further litigating by application of the 90-day rule.

On June 21, 1988, attorneys for the Ridgefield Park Board of Education wrote to Arthur G. Hirtler, Board Secretary/Business Administrator of the Little Ferry Board of Education, demanding immediate payment of $33,680. On July 11, 1988, attorneys for the Little Ferry Board of Education responded that the demand letter was premature since the appeal process had not been exhausted. On November 15, 1988, subsequent to the State Board of Education's affirmance of the Commissioner's ruling on OAL DKT. NO. 8561-87, Charles Juris, Superintendent of Schools of Ridgefield Park wrote to Stacey Holmes, Superintendent of Schools for Little Ferry, again requesting payment of $33,680 "reflecting costs incurred during the 1985-86 school year." In subsequent discussions, Little Ferry took the position that no money was due and owing to Ridgefield Park because Little Ferry's appeal to

the Appellate Division had not yet been decided, and therefore, Little Ferry had still not received a final judgment in the matter.

JURISDICTION OF THE OFFICE OF ADMINISTRATIVE LAW

Respondent argues that petitioner's appeal should be dismissed because (1) the Commissioner's judgment in the prior matter only dismissed Little Ferry's petition seeking an audit but did not provide that Little Ferry pay to Ridgefield Park any moneys owed for tuition costs for the 1985-86 school year, and (2) even if there was a judgment ordering Little Ferry to pay, the Office of Administrative Law is not the proper forum for enforcing that decision.

Respondent accurately asserts that no affirmative relief was sought by Ridgefield Park by way of crossclaim in the first action. Not until the present petition, did Ridgefield Park seek payment from Little Ferry of its claim for $33,680 for underpayment of tuition for the 1985-86 school year pursuant to the contract between the parties. However it was characterized by petitioner, this is not an action to enforce a prior judgment.

The Commissioner of Education clearly has the grant of authority incidental to his statutory powers to order respondent to pay tuition owing *O'Toole v. Board of Education of Borough of Ramsey*, 212 *N.J. Super.* 624, 627 (App Div. 1986). Ridgefield Park's claim for payment was transmitted to the Office of Administrative Law by the Commissioner of Education for hearing as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.* I therefore **CONCLUDE** that the Office of Administrative Law properly has jurisdiction over the present controversy pursuant to the applicable statute.

APPLICATION OF THE 90-DAY RULE

Little Ferry argues that the 90-day rule, *N.J.A.C.* 6:24-1.2 should be applied to bar the claim of Ridgefield Park against Little Ferry, because Ridgefield Park did not bring its appeal asserting its claim against Little Ferry within 90 days of Little Ferry's refusal to pay the amount demanded. The documents submitted reveal that Little Ferry did not refuse to pay Ridgefield Park until after November 15, 1988. The letter of July 11, 1988 from the attorneys for Little Ferry to the attorneys for Ridgefield

Park, is not a refusal to pay. It was Little Ferry's response to a demand for payment made by Ridgefield Park on June 21, 1988, subsequent to the Commissioner's affirmation on June 16, 1988 of the Initial Decision of May 3, 1988, and merely states that Ridgefield Park's demand was premature since the appeal process was not exhausted; at that time no final decision had been rendered by the State Board.

If Little Ferry was correct that Ridgefield Park's June request was premature, then it would follow that the appropriate time for Ridgefield Park to demand payment was subsequent to November 3, 1988, when the State Board of Education rendered its decision in the matter. On November 15, 1988, Ridgefield Park, relying on the finality of the State Board decision, again made a claim on Little Ferry for payment of the money and the refusal of Little Ferry to pay must be dated sometime subsequent to this November 15 letter. The petition of Ridgefield Park seeking payment was filed with the Commissioner on January 24, 1989, well within 90 days of the State Board decision. Little Ferry cannot argue that it was entitled to postpone payment of the obligation until after the State Board decision in the previous matter and, at the same time, claim that Ridgefield Park should have initiated its action prior to the State Board decision. I therefore **CONCLUDE** that the petition of Ridgefield Park was filed in a timely manner. It may, in fact, have been filed prematurely.

The petition in the present matter was filed on January 24, 1989 It was nowhere stated in the record what agreement exists between the parties as to the date on which the tuition adjustment payment was due. Therefore, for purposes of this decision, the time frames specified in *N.J.S.A.* 6:20-3.1(d)4 have been utilized. In accord with the regulatory deadlines, the tuition adjustment for the 1985-86 school year would have been payable in the 1988-89 school year which did not end until June 1989. At the time of this initial decision, Ridgefield Park's claim has matured and Little Ferry has refused to pay it. I, therefore, **CONCLUDE** that it is appropriate to decide the matter at this time.

COLLATERAL ESTOPPEL

In the prior matter, Little Ferry sought an audit of the tuition rates charged by the Borough of Ridgefield Park for the years 1974 through 1986 on the grounds that improper and illegal charges may have been included in the tuition costs. Little Ferry

was notified of the certified actual cost per pupil for the 1985-86 school year on June 19, 1987, when it received from Ridgefield Park the results of the Department of Education audit of Ridgefield Park's certified costs per pupil for tuition adjustment purposes. The appeal from these certified costs was not taken within 90 days, and the matter was dismissed. This dismissal was affirmed by the Commissioner of Education, the State Board of Education, and the Appellate Division of the Superior Court of New Jersey. I therefore **CONCLUDE** that in the prior matter, it was decided that the tuition cost which Little Ferry owed to Ridgefield Park for the 1985-86 school year was conclusively determined by the result of the Department of Education audit, since Little Ferry could no longer contest the amount. It is stated by Ridgefield Park, and nowhere contested by Little Ferry, that the amount of tuition owing for the 1985-86 school year based upon the result of this audit is $33, 680.

The present matter involves a different claim or cause of action between the same parties: Ridgefield Park has brought an action to collect the tuition adjustment which Little Ferry owes for the 1985-86 school year.

The principles of res judicata and collateral estoppel apply to administrative tribunals and agency hearings, as well as to parties and courts of law, *Charlie Brown of Chatham v. Board of Adjustment*, 202 *N.J. Super.* 312, 327 (App Div. 1985).

> Collateral estoppel is that branch of the broader law of res judicata which bars relitigation of any issue or fact actually determined in a prior action, generally between the same parties while involving a different claim or cause of action. [citation omitted] The terms are sometimes used interchangeably and applied broadly. *Id.* at 327.

Since the amount of the tuition for 1985-86 was fixed when it was determined in the prior action that Little Ferry was time-barred from contesting the certified cost per pupil, I **CONCLUDE** that Little Ferry is collaterally estopped from relitigating this issue in the present action. I therefore **CONCLUDE** that Little Ferry owes $33,680 to Ridgefield Park based upon the result of the Department of Education audit of Ridgefield Park's certified costs per pupil for tuition adjustment purposes.

The "entire controversy doctrine" is a "firm judicial policy which seeks to impel litigants to consolidate their claims arising from a 'single controversy' whenever possible." *Thornton v. Potamkin Chevrolet* 94 *N.J.* 1, 5 (1983) [emphasis added].

I **CONCLUDE** that the entire controversy doctrine does not apply here. The Ridgefield Park Board of Education could not have brought a crossclaim for payment in this matter at the time Little Ferry filed its verified petition on December 4, 1987, because Little Ferry was not obligated by the regulations, specifically *N.J.A.C.* 6:20-3.1(d)4, to pay the tuition adjustment until the 1988-89 school year. This school year did not begin until after May 3, 1988, when the Initial Decision was rendered in the prior matter.

POSTJUDGMENT INTEREST

Under *N.J.S.A.* 18A:6-9, the Commissioner of Education has the power to award both prejudgment and post-judgment interest, an "ancillary power which he must be deemed to have in order fully to execute his statutory responsibility to hear and determine all controversies and disputes arising out of the school laws. *Board of Education, City of Newark, Essex County v. Levitt*, 197 *N.J. Super.* 239, 245 (App Div. 1984). This jurisdiction is incidental to his power to fix money judgments. *Id.* at 246.

Even where a public body is involved, the grant of postjudgment interest is "ordinarily not an equitable matter within the court's discretion, but is, as a matter of longstanding practice, routinely allowed." *Id.* at 244, 245. *N.J.A.C.* 6:24-1.18(a) provides that the Commissioner may award postjudgment interest in any circumstance in which a petitioner has sought such relief and has successfully established a claim to a monetary award. Post-judgment interest is defined in *N.J.A.C.* 6:24-1.18(b)(2) as interest as due to a petitioning party for the period of time after the claim was successfully adjudicated but remained unsatisfied. Post-judgment interest is awarded when the precise amount of the claim has been established and the party responsible for the payment of the judgment has neither applied for nor obtained a the stay of the decision, but has failed to satisfy the claim within 60 days of its award. *N.J.A.C.* 6:24-1.18(c)2. Post-judgment interest is to be awarded based upon the prevailing rate of interest established by court rules at the time the monetary claim is determined. *N.J.A.C.* 6:24-1.18(d)2 referring to New Jersey Court Rules - R. 4:42-11(a).

I therefore **CONCLUDE** that petitioner has successfully established a claim to a monetary award in the amount of $33,680, and consequently, is entitled to post-judgment interest on that award in a manner to be determined in accord with *N.J.A.C.* 6:24-1.18, if respondent fails to pay the adjudicated amount within 60 days of the final decision in this matter.

Since no claim for affirmative relief was asserted by petitioner in the prior action, no order ever issued requiring Little Ferry to pay the tuition owed and postjudgment interest did not begin to accrue. No order could have issued prior to this time because Little Ferry was not obligated to make payment until the 1988-89 school year. See, *N.J.A.C.* 6:20-3.1(d)4.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that the Little Ferry Board of Education pay to the Ridgefield Park Board of Education $33,680 plus postjudgment interest to be computed at the rate set forth in *N.J.A.C.* 6:24-1.18(d)1 if the claim is unsatisfied within 60 days of the final decision in this matter.

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

I hereby FILE this initial decision with **SAUL COOPERMAN** for consideration.

September 12, 1989
Date

EDITH KLINGER, ALJ

Receipt Acknowledged:

September 15, 1989
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 15 1989
Date

OFFICE OF ADMINISTRATIVE LAW

le

BOARD OF EDUCATION OF THE VILLAGE OF RIDGEFIELD PARK, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LITTLE FERRY, BERGEN COUNTY, RESPONDENT.	:	DECISION

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

Respondent excepts to the ALJ's decision averring she failed to address or even make mention of its contention that it is entitled to raise the defense of recoupment to Ridgefield Park's claim. As to this, respondent urges that:

> It is our contention, based upon well-established precedent, that Little Ferry is entitled to raise recoupment as a defense to Ridgefield Park's affirmative claim seeking payment from Little Ferry for the 1985-1986 tuition costs. Thus, regardless of the Court's holding in Little Ferry Board of Education v. Ridgefield Park Board of Education, Docket No. 357, 12/87 ("Little Ferry I") which dismissed Little Ferry's petition seeking an audit based upon the ninety-day rule, for the reasons discussed herein, Little Ferry is permitted to raise the defense of the recoupment to Ridgefield Park's affirmative claim for the monies in the subject action.
>
> As a general rule, limitation statutes are not applicable to defenses, but apply only where affirmative relief is sought. See Gibbins v. Kosuga, 121 N.J. Super. 252 (App. Div. 1972); Biddle v. Biddle, 163 N.J. Super. 455 (App. Div. 1978). See also Stone v. White, 301 U.S. 532 (1937), reh'g denied 302 U.S. 777 (1937); Hart v. Church, 58 P. 910 (Cal. 1899). A cause of action may be used as a defense, even though the statutory period has run against its use as an affirmative claim. Eagle Savings & Loan Association v. West, 50 N.E. 2d 352 (Ohio Ct. App. 1942). Specifically, the rule is that statutes of limitations bar affirmative

> counterclaims, but do not affect claims offered in defense or recoupment, arising from the same transaction. Riley v. Montgomery, 46 N.E. 2d 1246 (Ohio 1984). See W.J. Kroeger Co. v. Travelers Indemnity Co., 541 P. 2d 385, 387 (Ariz. 1975); Horace Mann Inc. Co. v. DeMirza, 312 So 2d 501, 502 (Fla. Dist. Ct. App. 1975); Powers v. Sturgeon, 376 P. 2d 904, 907 (1962); Bodorsky v. Texoma Nt. Bank of Sherman, 353 P. 2d 950, 953 (Wash. 1960).
>
> It is our position that the defense asserted in Little Ferry's Answer, that the tuition charges were improperly and illegally calculated, arises out of the same transaction as Ridgefield Park's claim and is a claim of right to reduce the amount demanded in Ridgefield Park's petition. Despite the fact that Little Ferry is no longer entitled to bring an affirmative action alleging improper charges and seeking an audit due to the ruling in Little Ferry I, under a recoupment theory, Little Ferry is clearly entitled to assert the claim of improper charges as a defense. (emphasis in text)
>
> (Respondent's Exceptions, at pp. 2-3)

Respondent also takes exception to the ALJ's finding that it is collaterally estopped from relitigating the issue of the amount of the tuition due for the 1985-86 school year. It points to the passage from Charlie Brown, supra, found in the initial decision, ante, which dictates that collateral estoppel bars relitigation of any issue or fact actually determined in a prior action (emphasis supplied in exceptions) and argues that the collateral estoppel principle may not be applied in the instant matter since the issue of the accuracy of the tuition costs has never been actually determined due to dismissal of Little Ferry I on the basis of procedural time bar.

Petitioner's reply to respondent's exceptions argues that the ALJ did in fact address Little Ferry's recoupment point and dismissed it due to the doctrine of collateral estoppel when stating on page 7 of the initial decision that:

> Since the amount of the tuition for 1985-86 was fixed when it was determined in the prior action that Little Ferry was time-barred from contesting the certified cost per pupil, I CONCLUDE that Little Ferry is collaterally estopped from relitigating this issue in the present action***.

Further, petitioner asserts that respondent is now seeking to raise the audit issue under the guise of a recoupment defense and is thus trying to obtain the relief denied in Little Ferry I. More specifically, it states:

> Respondent now seeks an opportunity to obtain the exact relief denied in Little Ferry I by raising

> those same claims as a defense in this action. This attempt is particularly objectionable because the filing of the instant Petition became necessary only because Respondent has flagrantly refused to comply with Judge Klinger's initial decision in Little Ferry I. If this Court were to credit Respondent's argument, Little Ferry will have been rewarded and not punished for its unjustifiable refusal to pay the certified costs for the 1985-1986 school year. Respondent attempts to gain a benefit from its inexcusable failure to comply with an administrative decision affirmed by the Appellate Division, and this Court should not permit this subterfuge to be successful.
>
> To rule otherwise would make a mockery of the previous decision in Little Ferry I and strip N.J.A.C. 6:24-1.2(b) of any significance. A litigant who is properly foreclosed from bringing a claim cannot refuse to honor a statutory duty to pay a debt and then attempt to relitigate an issue previously lost when the aggrieved party seeks enforcements of its rights. Petitioner asserts that the principles of res judicata and collateral estoppel in addition to general equity notions preclude this Court from crediting Respondent's argument. (emphasis in text)
>
> (Petitioner's Reply Brief, at pp. 7-8)

Petitioner also asserts that Gibbins, supra, is distinguishable from the instant matter in that the defendant therein had never sought to litigate its right to monies which was the basis for the recoupment defense. It further avers that:

> The cases relied upon by Respondent are easily distinguished the Defendant (sic), in raising a recoupment defense in those cases, had never sought to enforce its rights in a previous action. Little Ferry has been afforded that prior opportunity and lost its claim. Respondent cannot obtain a "second bite at the apple" before the same court due to the fact that the issue has previously been litigated and lost. Further, it is inequitable to allow litigation over an otherwise barred claim when Respondent's refusal to abide by a prior decision necessitated the filing of this Petition. (emphasis in text)
>
> (Id., at p. 9)

As to respondent's exceptions to the ALJ's determination that collateral estoppel prevents Little Ferry from raising as a defense what it could not claim as a petitioner, the Ridgefield Park Board argues that "***it would undermine the finality of judicial determinations to allow a time bar to be defeated by a party who forces a second suit by its refusal to pay a liquidated debt." (Respondent's Reply Exceptions, at p. 2)

Upon a thorough and careful review of the record and the exceptions of the parties, the Commissioner affirms the determination of the ALJ that respondent may not relitigate the issue of the certified cost per pupil for the 1985-86 school year which it was unsuccessful in challenging previously in Little Ferry, supra. To do otherwise would, as petitioner contends, give respondent a "second bite at the apple" and strip N.J.A.C. 6:24-1.2(b) of any significance under the circumstances of this matter. Otherwise, a petitioner need only refuse to pay a debt, the amount of which is no longer legally challengeable, until the second party is compelled to seek redress with the Commissioner. This would serve to thwart the legal determinations of the prior litigation in Little Ferry and to reward the Little Ferry Board of Education by allowing it to gain an advantage for its obstinence and uncooperativeness in paying a debt (a) arrived at through a statutory formula (b) certified by the Department of Education and (c) unsuccessfully contested up through and including the New Jersey Appellate Court.

Moreover, the Commissioner agrees with the ALJ's determination that the amount of tuition due and owing to the Ridgefield Park Board by the Little Ferry Board was in effect fixed or actually determined when Little Ferry was time-barred from contesting the tuition cost certified by the Department of Education.

Since the Little Ferry Board was foreclosed from contesting the certified tuition costs it was obligated to pay the monies owing and due petitioner on June 16, 1988 because the decision of the Commissioner issued on that date was binding unless reversed on appeal (N.J.S.A. 18A:6-25) and a stay was neither requested nor granted.

The Commissioner also concurs with petitioner that the recoupment cases cited by respondent are distinguishable from the instant matter in that the defendants therein had never sought to enforce their rights in a prior action and been declared time-barred as has occurred herein. Further, Gibbins, supra, is distinguishable in that the defendant had a clearly established right to the contested amount by way of a promissory note executed between the parties. In the instant matter no such established right of recoupment exists since Little Ferry would have to demonstrate by a hearing on the merits of the matter that the amount of tuition certified by the Department of Education's audit was improperly and illegally calculated. Such a claim has been foreclosed to Little Ferry by virtue of its previous litigation.

Accordingly, the Commissioner adopts the ALJ's recommended decision as his final decision in this matter. Respondent is ordered to pay to petitioner forthwith the sum of $33,680. Moreover, if petitioner fails to tender that amount within 60 days of this decision, post-judgment interest shall be paid as directed by the ALJ.

COMMISSIONER OF EDUCATION

October 27, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2763-89
AGENCY DKT. NO. 95-4/89

IN THE MATTER OF THE
ELECTION INQUIRY IN THE
BRIDGEWATER-RARITAN
SCHOOL DISTRICT,
SOMERSET COUNTY.

Michael V. Camerino, Esq., for petitioners (Ozzard, Wharton, Rizzolo, Klein, Mauro, Savo and Hogan, attorneys)

Daniel C. Soriano, Jr., Esq., for the Board

Record Closed: August 7, 1989 Decided: September 20, 1989

BEFORE DANIEL B. MC KEOWN, ALJ:

INTRODUCTION

Enid Bloch and Jean Crabtree (petitioners), each of whom was a member of the Bridgewater-Raritan Board of Education (Board) until the annual school election held April 4, 1989 when both were defeated in their respective candidacy for reelection to three-year terms, requested by letter dated April 10, 1989 the Commissioner of Education to conduct an inquiry under authority at N.J.S.A. 18A:14-63.12 into alleged irregularities in the conduct of the election. Petitioners contend that the irregularities are of a sufficient degree and scope to conclude the will of the electorate was thwarted and they pray for an Order by which the election results would be set aside and a new election held. After the Commissioner transferred the matter to the Office of Administrative Law on April 14, 1989 as a contested case under N.J.S.A. 52:14F-1 et seq., a hearing was conducted May 15 and 16, 1989 at the Green Brook Township Municipal Building, Green Brook, Somerset County.

Findings are reached in this initial decision that certain irregularities occurred during the conduct of the annual school election. However, the conclusion is reached that such irregularities are insufficient to establish the will of the electorate was thwarted.

PROCEDURAL HISTORY

The Bridgewater-Raritan Regional School District is comprised of the constituent districts of Bridgewater Township and Raritan Township, Somerset County. This dispute calls into question the annual school election held April 4, 1989 in Bridgewater Township only. The announced results of the combined balloting from each of the Board's four polling places for all candidates are as follows:

THREE-YEAR TERM	AT POLLS	ABSENTEE	TOTAL
Albert N. Tornatore	1028	12	1040
Enid Bloch	894	8	902
Jean D. Crabtree	866	9	875
Bruce E. Kalter	815	3	818
WRITE-IN CANDIDATE			
H.A. Arthur Wiegand	986	7	993
Raymond Kovonuk	944	7	951
Sharad Tilak	921	5	926

The Board's four polling places were the Crim School, the Adamsville School, the Bradley Gardens School, and the Van Holton School. According to the evidence of record petitioners' letter complaint of April 10, 1989 was considered by the Department of Education as a request for an inquiry only, not as a request for a recount of ballots cast under N.J.S.A. 18A:14-63.2. Subsequently, petitioners filed a separate letter on April 27, 1989 requesting a recount of ballots cast which request was granted by the Commissioner. The recount was determined by the Commissioner not to be a contested case under N.J.S.A. 52:14F-7 because "a representative of the Commissioner of Education [not an administrative law judge] from the Office of the Somerset County Superintendent of School was directed to conduct a recheck of the voting machines used in the constituent district of Bridgewater Township." (Commissioner of Education decision on recount, June 1, 1989).

Certain facts relevant to the total conduct of the election are res judicata for purposes of the present inquiry because the Commissioner already determined those facts based on evidence produced at the recount and not otherwise made available during the inquiry. According to the decision on the recount, the following facts were found and considered by the Commissioner:

1. Not all of the write-in paper rolls used on the voting machines were placed in sealed packets at the conclusion of the election. Also, polling place number three (Adamsville School) did not have the paper write-in roll(s) in the sealed packet.

2. There were seven unidentified portions of write-in paper rolls that could not be identified by polling place or by machine number. Write-in paper rolls for polling districts, number one (Crim School), number four (Bradley Gardens School), and number five (Van Holten School), were in individually sealed packets and could be identified by the voting machine numbers used at those respective polling places.

3. The paper write-in roll on voting machine number 79558 at polling district number one (Crim School) was torn in several pieces. However, it was mended by the Commissioner's representative without objection of those present at the time of the recheck of the voting machines.

4. At polling district number one (Crim School) the total number on the public counters registered two more than the number of voters who signed the poll list. An unsigned note was found on the write-in paper roll of voting machine number 79730 stating "one extra vote because Steve repaired the machine". This statement was affirmed by Mr. Steven Scannell, the voting machine mechanic. See Addendum number two. Polling district number one recheck tally resulted in a one count discrepancy.

5. The total number on the public counters of voting machine used in polling district number three (Adamsville School) exceeded the number of voters on the poll lists by one.

6. A difference of an additional three counts was noted on the public counters of the voting machine used in polling district number four (Bradley Gardens School) when compared to the number of voters who signed the poll lists. This discrepancy was reduced to a count of one by the explanation given by the voting machine mechanic who stated that it was necessary to recycle the voting machine which added two to the public counter during the course of the election.

The decision also found as fact that the recount did not change the total vote cast and as announced April 4, 1989 for formally declared candidates Kalter, Bloch, Crabtree, and Tornatore.

After considering the facts found, the Commissioner held as follows:

> It is observed that the failure of the school election officials to properly identify several of the write-in sheets by the appropriate voting machine number and polling place at the conclusion of the annual school election contributed to the confusion and controversy giving rise to the request for a recheck of the voting machines. It is also evident from the report of the Commissioner's representative that there was a large write-in vote at the annual school election and that the school election officials at the Adamsville School Polling Place, district number 3, totally ignored their official responsibility to identify the write-in rolls by machine number or to place all of the contents of the election results in a sealed package properly identified for the Board Secretary. Moreover, each of the torn write-in sheets should have either been mended at the conclusion of the election or the machine number should have been written on these write-in sheets for proper identification.
>
> The Commissioner cannot condone this failure by those responsible school election officials to follow the required election procedures mandated by law. The Board Secretary is hereby directed to provide the necessary instruction to the school election workers employed at all future school elections in order to avoid such unacceptable practices which give rise to school election inquiries * * *
>
> (Commissioner's decision on recount, at p. 7)

The Commissioner declared as fact that the recount established final vote tallys for the write-in candidates as follows:

	AT POLLS	ABSENTEE	TOTAL
H.A. Arthur Wiegand	946	7	953
Raymond Kovonuk	904	7	911
Sharad Tilak	879	5	884

The Commissioner then declared that regular candidate Albert N. Tornatore with 1040 ballots, and write-in candidates H.A. Arthur Wiegand and Raymond Kovonuk with 953 and 911 ballots respectively, were duly elected by the voters to full terms of three years each on the Board from the constituent district of Bridgewater Township.

On June 19, 1989 petitioners submitted a letter application to the Commissioner requesting that the hearing on the inquiry be reopened in light of his decision on the recount. The Board opposed that application by letter dated June 21, 1989. This record remained opened for 45 days from the date of petitioners' application to the Commissioner in light of the possibility that he, the Commissioner, may order the hearing on the inquiry be reopened. Nevertheless, no communication has been received by this judge from the Department of Education regarding petitioners' application to reopen. Accordingly, this record closed August 6, 1989.

EVIDENCE IN SUPPORT OF ALLEGED IRREGULARITIES AND FINDINGS

The election irregularities petitioners allege occurred may be categorized in the following manner: (1) interference with voters by way of electioneering; (2) violations by appointed election workers of voters' rights to a secret ballot; (3) improper use of write-in pasters or stickers which allegedly result in voting machine malfunction, voter confusion, and voter influence; (4) harassment of election workers by supporters of write-in candidates; (5) efforts made by appointed election workers and supporters of write-in candidates to deliberately confuse election workers; and, (6) a wide disparity in write-in ballots cast at the Bradley Gardens School polling place as compared to ballots cast for regularly nominated candidates. These irregularities were to have occurred at one or more of the Board's four polling places.

Petitioners called 30 witnesses and offered 13 exhibits in support of their allegations. In addition, the Board in an effort to present all relevant evidence called the assistant Board secretary to testify and it introduced two exhibits. Two successful write-in candidates, their campaign manager, their campaign treasurer, two campaign workers, and one person who voted in the election testified as intervenors. Intervenors submitted two documents in evidence.

Frank Arch, who is employed by the Department of Education as the Somerset and Hunterdon County school business administrator, testified that prior to the election he instructed all election workers throughout Somerset County on the proper procedure for the conduct of the annual school election. Arch explained that he instructed all workers in the proper procedure for voters to sign in on the poll list, the checking of the signature in the poll list with the permanent signature copy register, the use of voter

authorization slips, and to keep lines as short as possible. Arch emphasized that he instructed all workers to provide no assistance unless requested by a particular voter. Arch, who was the Commissioner's representative at the recount, testified that when he recounted ballots cast on the various machines he did discover taped on two different machines handwritten instructions to voters on how to vote for write-in candidates. These instructions, introduced in evidence at the inquiry (P-1)(P-1a), state as follows:

> To voter: If you use stickers in lieu of write-ins, put them underneath slides 'not on top of slide'

Arch also produced plastic strips (P-2) from 9 of the 10 machines used during the elections which reveal in various degrees residue of what appears to be glue from pasters or stickers used for write-in candidates.

Janice Hoffner, the chief clerk and supervisor of elections for Somerset County, assisted Arch with his instruction to election workers prior to the annual school election along with insuring that a model of the voting machine was available at each polling place. Ms. Hoffner testified that she distributed written instructions to the workers on the proper procedure for casting a write-in vote on an automatic voting machine (See P-4). Hoffner also testified that she too saw the handwritten instructions (P-1)(P-1a) taped on two machines during the recount. Finally, Ms. Hoffner testified that four persons who executed affidavits as being properly registered to vote at the school election (P-5)(P-6)(P-7)(P-8) are not, in fact, properly registered to vote. Three of those persons testified at hearing which testimony shall be reported later. Hoffner testified that during election day on April 4, she did receive complaints from various citizens in Bridgewater Township asserting that individuals were promoting write-in candidates near the polling places and that stickers for use in casting write-in ballots were placed on the outside of various voting machines. Hoffner testified that subsequent to the election she received two letter complaints (P-9)(P-10) neither of which letter writer appeared at hearing to give testimony.

Steven Scannell, the Somerset County voting machine mechanic, testified that because of prior experience in the conduct of school elections in Bridgewater Township he made it his business to visit each of the four polling places several times a day to insure that no problems were developing regarding the use of the voting machines. Scannell did not see extraneous stickers lying about in any polling place, although he did observe a

paper roll in one of the machines being used at the Crim polling place was stuck because of the use of stickers and he observed that some voters were simply placing stickers with the names of write-in candidates on the outside of the slot without lifting the slot to affix the sticker to the paper roll. As Scannell pointed out, such a procedure invalidates that ballot.

Scannell testified that he removed the paper roll from one machine at the Crim School which was stuck through the use of pasters and he removed the paper roll from the other machine because it was ripped in several places. After inserting new paper rolls, Scannell placed both rolls he removed into separate sealed envelopes, gave the envelopes to election workers who deposited the sealed envelopes on the desk in the principal's office. Scannell testified that at the VanHolten polling place, he had to remove one paper roll which he replaced. The paper roll he removed was also placed in a sealed envelope and left on the principal's desk by election workers.

Scannell testified that on one machine in the Bradley Gardens polling place it was possible for a voter to cast a ballot for five candidates as opposed to the limit of four candidates. Scannell adjusted that machine to foreclose the possibility of anyone voting for more than four candidates.

The matter of the sealed packages and the ripped paper rolls are matters already decided by the Commissioner in the recount of ballots cast in this election. No separate findings not conclusions shall be made regarding the paper rolls or the sealed envelopes for the recount.

James Cardaneo, the assistant Board secretary and school business administrator, is charged by the Board with arranging the election. He testified that on election day he did receive several telephone complaints regarding asserted electioneeing occurring outside various polling places and he received complaints regarding traffic congestion caused by vehicles being stopped by campaign workers. Cardaneo's secretary, Jean Long, testified she prepared a list of telephone complaints received during election day (See P-12). The complaints as Ms. Long recorded alleged electioneering or traffic congestion being caused by campaign workers stopping voters entering the various school parking lots.

It is noted that the use of pasters or a voter's personal choice candidate is authorized at N.J.S.A. 18A:14-42 and N.J.S.A. 19:15-28. The pasters in this election which were distributed by write-in candidates and their supporters prior to and on the day of election in large measure contributed to this inquiry being requested. According to the evidence in this record, the three write-in candidates ran as a slate and the stickers they ordered were made too wide to fit into the voting machines' write-in slots to be properly affixed to the paper rolls. Albert Bareis, the campaign treasurer for write-in candidates Wiegand, Kovonuk, and Tilak, testified that 30,000 stickers had been prepared in anticipation of the election. Ten thousand stickers were mailed out to potential voters prior to the election. The stickers were all prepared according to specifications given by the Somerset County Board of Elections. However, during election day it was discovered that all 30,000 stickers were made larger than the slot into which they were to be placed on the paper roll in the machines. John Wimple testified that each of the stickers were then shaved in order to conform with the passageway through the machines' write-in candidate slot. During election day, Wimple testified that he did exchange the shaved stickers for the larger stickers then in the possession of potential voters. This exchange occurred more than 100 feet from the entrance to the respective polling places.

All evidence shall now be considered regarding alleged irregularities at each of the Board's four polling places.

Crim School

Allegations regarding improper conduct during the election at the Crim School polling place include electioneeing, voter intimidation, and election worker harassment.

Dr. Marie Simone, the principal of Crim School, testified that during the morning hours of election day it was raining. While in her office, she observed a man in the school driveway with an umbrella stopping cars making their way into the school parking lot. She explained that she too was stopped during election day and was told by an unidentified person that she "needed stickers to vote". Simone testified she was concerned about individuals stopping cars in the driveway as being a poor example to the elementary pupils in her charge. Moreover, Dr. Simone testified that unidentified individuals complained to her regarding write-in candidates and other potential voters complained to her of not knowing how to use stickers to cast ballots for write-in candidates.

Albert Bareis, who has already been referenced in this decision as the campaign treasurer for Wiegand, Kovonuk, and Tilak, testified that he was at the Crim School on behalf of the write-in candidates with two other individuals between 7 a.m. through 5 p.m. on election day. Bareis denied that either he or his campaign workers stepped in front of any car or deliberately stopped any incoming traffic. Bareis explained that the Crim School driveway has a one way lane into the parking lot with a one way lane exiting the parking lot. During the day, Bareis explained that Dr. Simone had scheduled a meeting in the morning with individuals from outside of the district. As they approached the school parking lot, the invited guests did not know where to park. Consequently, those individuals did stop their vehicles in order to ask him where to park. Bareis conjectures that Dr. Simone witnessed the guests stopping to ask him where to park and erroneously concluded that he was electioneering. Moreover, Bareis testified he was more than 100 feet away from the entrance to the polling place.

Beverly Eaton, the appointed election judge at the Crim polling place, testified that she caused instructions on how to register write-in votes to be posted on the polling place walls because of numerous inquiries received on election day. Ms. Eaton did observe individuals being stopped in the school driveway on their way to the parking lot and then observed those same individuals enter the polling place with stickers. Moreover, Eaton testified that she herself was approached, though more than 100 feet beyond the entrance to the polling place, by candidate Tilak and was told by him she needed a sticker to vote.

Ms. Eaton testified that at the Crim polling place voters were placing stickers for the write-in candidates over the formerly announced candidates' names, along with stickers being placed on the outside of the voting machines. Nevertheless, Ms. Eaton testified that she and her election workers checked every machine after each voter left in order to remove any stickers that may have been erroneously placed on the inside or outside of the voting machine. Eventually, the use of stickers did jam two machines at about 4:45 p.m. Because these two machines were inoperable for a short period of time although two other machines were in working condition, Ms. Eaton estimates that ten voters left the polling place. However, Ms. Eaton did not testify that those very same unidentified voters did not return and cast ballots. Finally, Beverly Eaton testified that Roger Copt, a campaign worker for the write-in candidates, verbally harassed her and her election workers regarding the use of stickers at the Crim polling place.

Roger Copt testified that he was indeed a campaign worker for the write-in candidates. During election day, Copt testified that a voter who left the Crim polling place told him an election worker inside told her not to use stickers. He entered the Crim polling place whereupon that election worker, ostensibly Ms. Eaton, "lectured" him. Consequently, Copt testified that he "lectured" her regarding the validity of the use of stickers in school elections.

Geraldine Geschwrendney, an appointed election worker at the Crim School polling place, testified that at about 11 a.m. on election day she saw individuals "electioneering" in the driveway to the parking lot. Geschwrendney had left the polling place for a short time and upon her return, she testified that she too was stopped but was allowed to pass. With respect to stickers in the voting machines, Ms. Geschwrendney testified that during the day she found stickers pasted over the regular candidates' names and on yes-no levers for the proposed school budget after approximately every tenth voter. She explained that some voters who entered the voting booth and who had closed the curtain, opened the curtain to ask where to put stickers for write-in candidates. Ms. Geschwrendney testified that some voters asked her whether stickers had to be used. Finally, Ms. Geschwrendney did testify that one or more paper rolls became stuck through the use of stickers.

Gay Tally, another appointed election worker at the Crim polling place, testified that during late evening she saw individuals stopping cars in the school driveway leading to the parking lot. She also observed those individuals handing out stickers while she returned to the polling place from lunch. Ms. Tally testified that stickers were used improperly by some voters and she and others checked the machine inside and out after each voter finished in order to remove any stickers that may have been left.

Ms. Tally testified that one man, presumably Mr. Copt, did appear inside the polling place on one occasion and "harassed" workers. No explanation of the asserted harassment was offered nor requested. With respect to the use of stickers, Ms. Tally is of the view that "elderly and foreign born voters" were confused by the use of stickers.

Two voters, Patricia Turbowitz and Anne Sambuicini, testified regarding their treatment by individuals in the driveway leading to the Crim School parking lot. Ms. Turbowitz testified that at about 4:30 p.m. on election day, she pulled into the

driveway where she saw two men seated off the roadway along the side at a table, one of whom was write-in candidate Sharad Tilak. Ms. Turbowitz testified that a little boy was playing in the driveway. One of the two men seated at the table attempted to give her stickers which she says he explained she needed in order to cast a ballot. Ms. Turbowitz refused the proferred stickers and proceeded to park her car. When Ms. Turbowitz reported to the election workers inside the polling place, she complained about the conduct of the two men outside and was told to call the county board of elections because those individuals outside were within "legal limits".

Anne Sambuicini testified that at about 5:30 p.m. as she was approaching the Crim School parking lot in the driveway, a man jumped in front of her car. She immediately stopped her car and a woman came to her vehicle's window. The woman was to have thrust stickers inside the vehicle. Another man, unidentified, came to the driver side window and said "Vote for me to lower taxes". Ms. Sambuicini testified she felt intimidated by such conduct altough her selection of candidates was not influenced. She complained to Dr. Simone, the Crim School principal, the election officials, the county board of elections, and to the local police department. In fact, Ms. Sambuicini testified that she filed a complaint although no action has been taken on the complaint as of this date.

It should be noted at this point that there is no evidence in this record that challengers on behalf of candidates, duly appointed pursuant to N.J.S.A. 18A:14-15, were used in the selection. It is further noted that an Election Worker's Manual (R-2) prepared by or on behalf of the Board announces in section (6), Challengers, that a list of challengers is "Not applicable for this election".

FINDINGS

Based on the evidence regarding the conduct of the election at the Crim School polling place, I **FIND** the following facts:

1. Frank Arch, a New Jersey Department of Education employee, instructed the Board's election workers on the conduct of elections prior to the Board election held April 4, 1989.

2. The election judge at the Crim School polling place did post instructions on the polling place walls regarding the casting of write-in ballots.

3. Campaign workers for write-in candidates and write-in candidate Sharad Tilak positioned themselves during election hours in the Crim School driveway. The driveway enters the parking lot in such a manner that some incoming vehicles either slowed or came to a complete stop at which time the workers and Tilak implored the potential voters to cast the ballots for the write-in candidates. Nevertheless, the workers and Tilak were positioned more than 100 feet from the polling place.

4. Pasters, both the shaved and unshaved, were improperly used by some voters. Nevertheless, the election workers did check the interior and exterior of the voting machines after each voter to remove improperly placed pasters. Furthermore, some voters did not know the proper procedure for casting ballots for personal choice candidates which resulted in the improper use of pasters and a temporary jamming of one or more machines. From time to time, election workers did instruct voters on how to cast write-in ballots with and without indication from the voters they intended to cast write-in ballots.

5. A disagreement occurred between Roger Copt, who was a campaign worker, and election workers in the Crim School polling place during election day regarding the use of pasters. Copt was not a duly appointed challenger and he was not in the polling place to cast his ballot.

6. The write-in candidates caused to be mounted an active campaign more than 100 feet from the polling place to solicit votes from those entering the Crim School parking lot.

Adamsville School

Petitioners presented the testimony of the Adamsville School polling place election judge and five voters who cast their ballots at this polling place in order to establish that improper electioneering occurred, that stickers were improperly used, that appointed election workers violated the rights of voters to a secret ballot, and that machine malfunctions caused potential voters to leave the polling place.

Julia Tosco, the Adamsville polling place election judge, testified that the instructions she and her workers gave voters who stated a desire to cast ballots for write-in candidates were for the voter to lift up the slide on the voting machine and to insert either a sticker on the paper roll or to write in the write-in candidate's name. Tosco testified she caused each voting machine to be checked after each voter left the booth in order to remove improperly placed stickers.

Kathy Madlinger, a voter at the Adamsville polling place, testified that she arrived to cast her ballot at approximately 4:20 p.m. Madlinger explained that it was raining at that time on election day. She came across two men sitting at a table located in the driveway. Madlinger did not stop. Inside the polling place, Madlinger testified she saw people asking questions. She observed and heard election workers explaining to potential voters how to vote for write-in candidates if that was their intention.

Ronald Kurdyla, another person who cast a ballot at the Adamsville polling place, testified that he arrived at approximatley 5:30 p.m. and he met a friend. Kurdyla and his friend signed the poll list together. While in line, Kurdyla testified that he observed two individuals enter one polling booth together. Kurdyla testified that his friend told the election worker that there should not be two individuals in a voting booth at the same time. According to Kurdyla, the election worker otherwise unidentified claimed that it was permissible for these two to be in the booth together because they were related and one of the two needed help. Kurdyla's friend persisted and when the election worker proceeded to open the voting booth curtain, Kurdyla testified he friend cautioned him against such conduct.

Howard Teichman, another voter at the Adamsville polling place, testified he cast his ballot at approximately 7:45 p.m. on election day. As he approached the voting machine, he saw a small sticker on the face of the machine which was partially obscuring the names of petitioner Bloch and defeated regular candidate Kalter. Teichman did acknowledge that it appeared to him that the election workers had attempted to remove the sticker which was covering Bloch's and Kalter's name but was unsuccessful in completely removing the residue.

Donna Ervannelli also cast her ballot at the Adamsville polling place. She testified that at about 4:30 p.m. when she appeared to cast her ballot there was an approximate five minute delay because the election workers had to clean stickers from the machines. While the workers were inside the voting machines removing the stickers, the curtains remained completely open. Once the stickers were removed and no residue remained, the machines were properly functioning again.

Linda Klem cast her ballot at the Adamsville polling place. She testified that as she was inside the voting machine she was unsuccessful in closing the curtain to the

machine. Then a woman otherwise unidentified was to have said to her "I guess you don't need write-in help". Klem testified she responded in the negative, she closed the curtain, and cast her ballot.

FINDINGS

The evidence submitted regarding the conduct of the election at the Adamsville School polling place establishes, I **FIND**, the following facts:

1. The Adamsville election judge and election workers gave instructions requested by voters on the method to cast write-in ballots. The Adamsville election workers checked each voting machine after the departure of each voter.

2. Voter Kathy Madlinger observed election workers giving instructions to voters who intended to cast write-in ballots.

3. Voter Ronald Kurdyla, while in the Adamsville polling place, observed two unidentified persons simultaneously in the voting booth with the approval of an unidentified election worker who explained one of the two voters needed assistance.

4. Voter Howard Teichman observed a small sticker on the face of one voting machine in the Adamsville polling place which partially obscured the names of candidate Bloch and candidate Kalter. The election workers unsuccessfully attempted to remove the entire residue from the sticker which had earlier been used which was partially obscuring the candidates' names.

5. Voter Donna Ervannelli experienced an approximate five-minute delay before casting her ballot at the Adamsville polling place because the election workers were engaged in the removal of stickers.

6. Voter Linda Klem had a female, presumably an election worker, comment that she, Klem, did not appear to need write-in assistance.

Bradley Gardens

Allegations regarding improper conduct during the election at the Bradley Gardens School polling place include pasters falling off paper rolls, improper paster instructions given by election workers, two voters being allowed in a voting booth at the same time, and an election worker being in a voting booth with a voter.

Walter Kokosinski, the election judge at the Bradley Gardens School polling place, testified that at the conclusion of the election he helped remove paper rolls from the voting machines. He explained that some stickers fell off and he observed other election workers simply affix those stickers back on to the rolls. Kokosinski explained that Steven Scannell, the Somerset County voting machine mechanic, was at the Bradley Gardens School polling place during election day in order to repair a jammed machine. He explained that as the result of that repair, Mr. Scannell had to adjust the counter and that one of the election workers put a notation on the paper roll.

The testimony of election judge Kokosinski goes directly to whether the pasters which had fallen off rolls and loose pasters which were inserted into sealed envelopes should have been counted at the recount. Because of the matter of the recount has already been decided by the Commissioner, findings regarding Kokosincki's testimony in this regard would be singularly inappropriate here.

Sebastion Kalvo, an election worker at the Bradley Gardens School voting place, testified that Mr. Scannell did appear at the polling place during election day in order to repair a jammed voting machine. David Cowden, who voted at the Bradley Gardens School polling place, testified that between 4:30 p.m. and 5:00 p.m. when he appeared to cast his ballot, there was a bustle of activity inside and outside the polling place. He observed two voting machines prepared for the election although one voting machine was out of order. Cowden signed the poll list, received his voting authority slip, and got in line. He observed an election worker enter the working voting machine before each voter. Cowden also observed and heard election workers provide instructions on how to use pasters for write-in candidates. Cowden added that the election workers made it clear that paster instructions were provided in order not to jam the voting machines again. Cowden finally observed at least one election worker peel off a paster and hand the paster back to a voter for use in the machine.

Robert Clark, a voter who cast his ballot at the Bradley Gardens School polling place at 7:08 p.m., testified he saw two individuals on the side of the single lane roadway entrance into the school parking lot. These two individuals were ostensibly election workers for the write-in candidates. Clark was not persuaded to stop by these individuals. Clark explained that he then presented himself at the election worker's desk inside the

polling place and signed the poll list. He refused assistance from the election workers on how to use pasters. He proceeded to get in line whereupon another election worker asked him "do you plan to use stickers". He then observed two individuals enter a voting booth simultaneously. An election worker asked those two individuals whether they needed assistance and when they responded in the affirmative, he entered the voting booth. There is no testimony from Clark whether the worker upon entering the voting booth closed the curtain which resulted in the two individuals together with the worker being present inside the voting booth with the curtain closed.

Linda Frisch, another person who voted at the Bradley Gardens School polling place at approximately 8 p.m., testified that the election workers had some difficulty finding her signature in the permanent signature copy registers. Finally, Frisch testified she received a voting authority slip and got into line. Upon her entrance into the voting booth, an election worker came into the booth and explained in detail how to cast ballot for a write-in candidate through the use of a pencil or a paster. When the worker exited the voting booth, she found she could not close the curtain. Ms. Frisch testified she could not recall whom she voted for.

Intervenors called Mr. Navorrete to testify that he cast his ballot at the Bradley Gardens School polling place. While he was present, approximately six individuals were in line. All six individuals requested assistance from the election workers on how to properly cast ballots for write-in candidates. Navorrete testified that election judge Kokosinski instructed the entire group at that time on how to cast ballots for write-in candidates in response to the group's request for assistance.

Recall that petitioners in this case allege an irregularity because of a wide disparity in announced write-in ballots cast at the Bradley Gardens School polling place as compared to ballots cast for regularly nominated candidates. The announced results from each of the four polling places for regular candidates Kalter, Bloch, Crabtree, Tornatore as compared with write-in candidates Kovonuk, Tilak, and Wiegand are as follows:

	Bruce Kalter	Enid Bloch	Jean Crabtree	Albert Tornatore	Raymond Kovonuk	Sharad Tilak	H.A. Arthur Weigand
Dist. 1-Crim	246	351	314	374	207	199	213
Dist. 2-Kennedy							
Dist. 3-Adamsville	205	212	233	282	200	193	209
Dist. 4-Bradley Gdns	43	30	36	38	203	202	227
Dist. 5-Van Holten	321	301	283	334	334	327	337
Dist. 6-Rar Mun Bldg							
Absentee Ballots	3	8	9	12	7	5	7
Grand Total	818	902	875	1040	951	926	993

FINDINGS OF FACT

Based on the evidence regarding the conduct of the election at the Bradley Gardens School polling place, I **FIND** the following facts:

1. Voter David Cowden observed and heard election workers provide instructions to voters on the proper method of casting ballots for write-in candidates through the use of pasters in order to avoid the improper use of pasters and voting machine malfunction.

2. Voter Robert Clark was asked by an unidentified election worker whether he planned to use stickers. Clark also observed an election worker provide assistance to two voters who were in a voting booth simultaneously. Clark did not testify that two voters were in the voting booth simultaneously, with the curtain closed, and cast ballots.

3. Voter Linda Frisch who was given instructions by an election worker on how to cast a write-in ballot. The election worker ceased the instructions when Frisch told him they were not necessary.

4. Voter Navorrete observed and heard six individuals request assistance of election workers on how to properly cast write-in ballots and he observed and heard election judge Kokosinski provide the requested assistance.

5. At the Bradley Gardens School polling place, regular candidates Kalter, Bloch, Crabtree, Tornatore received far fewer votes, 78 percent fewer on average, than the write-in candidates received. The Bradley Gardens School polling place is the only polling place where the write-in candidates received far more ballots than the regular candidates.

Van Holten School

Allegations of irregularities during the election conducted at the Van Holten School polling place include electioneering outside the polling place, improper conduct by election workers regarding paster instructions, and an illegal ballot cast by an individual otherwise not qualified to vote.

Ernest Shuba, the principal of the Van Holten School, testified that during the morning hours of the election he observed two individuals setting up "electioneering" sites outside the school. Nevertheless, Shuba also testified that the asserted electioneering sites were all beyond 100 feet from the polling place entrance. Shuba testified he observed traffic congestion near the sites later in the day and he observed write-in candidate Wiegand at the site telling potential voters that he was a candidate. On several occasions during the day, Shuba testified he requested Wiegand not to impede the flow of traffic although Shuba did not observe Wiegand physically stop any vehicle nor any potential voter.

Principal Shuba testified that at approximately 1:30 p.m. an individual told him she was stopped by campaign workers for Wiegand on the way into the school parking lot. At approximately 2:30 p.m., Shuba testified he again went out to the site where the campaign workers had set up tables and they agreed to his request that they not impede traffic flow. Nevertheless, at about 4:30 p.m. Shuba testified he observed two young persons in the same area stopping vehicles. Shuba testified that at about 6:30 p.m. he was stopped by an election worker in the driveway at the site set up by campaign workers for Wiegand.

Joseph A. Santore, the assigned election judge at the Van Holten School polling place, testified that four potential voters appeared at the polling place throughout the day whose registration he could not find in the permanent signature copy register. Accordingly, Santore accepted from these four individuals affadivits (P-5 through P-8) and on the strength of the affidavits allowed the individuals to cast ballots.

The four individuals who filed affidavits attesting to their being qualified to cast ballots at the election are Rachna Mishra (P-5), Rachna Mishra (P-6), Chester J. Grablewski (P-7) and Abdul Majid Khan (P-8). Janice Hoffner, the Somerset County chief clerk and supervisor of elections whose testimony was already presented here, testified

regarding these four individuals that no one of them were properly registered to vote. Rachna Mishra, Chester J. Grablewski, and Abdul Majid Khan testified at hearing. Rachna Mishra testified under oath that she is not a registered voter and at the time of hearing was still not permanently registered as a voter in Somerset County. Ms. Mishra cast ballots for the write-in candidates. Ms. Mishra's husband, Rachna, was away on business and he did not testify before me.

Chester J. Grablewski testified that despite the affidavit (P-7) he executed, he is not permanently registered to vote in Somerset County. He testified that he was not aware he was not registered and he complained that the error is due solely to Somerset County officials. In this regard, Grablewski testified that he told his daughter to take a completed registration form to the County and to file it. Grablewski testified that he cast ballots at this election for all write-in candidates.

Abdul Majid Khan testified that despite the affidavit (P-8) he filed, he is not a permanently registered voter in Somerset County. Moreover, Khan admits that at the time he filed the affidavit he knew he was not a registered voter. Nevertheless, Khan explains that he was told by someone so long as he was a resident for six months or more that he could lawfully vote. Khan did register with the Somerset County Board of Elections on the day of hearing. Khan testified under oath that he could not presently remember the candidates for whom he cast ballots.

Election judge Santore also testified that during the course of the election there was a significant problem with the use of pasters by voters which, he says, resulted in a complete state of confusion because voters were pasting stickers on the top of voting machine slides, over candidates' names, and they were not affixing the pasters evenly on the paper roll. Nevertheless, Santore does not recall any machine being jammed at the Van Holten School polling place through the improper use of stickers because election workers peeled off improperly affixed stickers after each voter left the voting machine. Santore testified that at approximately 6:30 p.m., there was a long line of potential voters at the Van Holten School polling place. He was concerned that the voting machines would jam if the pasters for write-in candidates were improperly used. He then announced to the gathered voters that if they were to use pasters and if they wanted instructions he would give them proper instructions on the use of pasters.

Donna Arifai cast her ballot at the Van Holten School polling place. Ms. Arifai testified when she appeared at the Van Holten polling place at approximately 7 p.m. and got in line to cast her ballot, a man to the right of her gave her instructions on how to use pasters. Ms. Arifai testified that this individual was 'very pushy' and when she told him she needed no assistance whatsoever the man left.

Intervenor Wiegand, a successful write-in candidate, testified that he had a right to be in the Van Holten School polling place roadway because he was more than 100 feet from the polling place entrance. Robert Vaucher, the campaign manager for the write-in candidates, testified that he caused campaign flyers (I-1) and campaign rules (I-2) to be distributed in order throughout the school district to insure that write-in candidates conducted themselves in a lawful manner.

FINDINGS

The evidence submitted regarding the conduct of the election at the Van Holten School polling place establishes, I **FIND**, the followings facts;

1. Principal Ernest Shuba observed write-in candidate Wiegand and his workers set up tables more than 100 feet from the polling place entrance on the entering school driveway. On several occasions during election day, principal Shuba requested Wiegand and campaign workers for Wiegand not to impede the flow of traffic.

2. At the Van Holten School polling place four individuals cast ballots who were not otherwise properly registered to vote. Rachna Mishra cast ballots for each of the write-in candidates. Chester J. Grablewski cast ballots for each of the write-in candidates. Abdul Majid Khan cannot presently recall the candidates for whom he cast ballots. Amarendra Mishra did not appear at hearing to give testimony.

3. The Van Holten School polling place election judge Santore reported that the use of pasters by voters resulted in a complete state of confusion. Voters pasted stickers on top of voting machine slides, over candidates' names, and were affixing pasters unevenly on paper rolls. Santore finally announced to voters gathered waiting to cast ballots that should they need instructions on the proper method to cast ballots for write-in candidates, he would oblige those in such need.

4. Voter Donna Arifai received unsolicited instructions on how to use pasters from an unidentified individual as she waited to cast her ballot. The individual left when she told him she needed no assistance.

5. Write-in candidate Wiegand and write-in candidates' campaign workers stationed themselves more than 100 feet outside the Van Holten School polling place.

This concludes a recitation of all relevant proofs submitted by petitioners regarding their allegations concerning irregularities occurring during the conduct of the annual school election conducted April 4, 1989. This also concludes a recitation of all relevant facts found to exist based on that evidence.

ARGUMENTS

Petitioners' attempt to re-argue here the matter of the election documents in the possession of the Commissioner of Education and who has already issued his findings and conclusions thereon. The failure to identify and secure write-in paper rolls and whatever confusion which may have existed over the number and origin of paper rolls removed from the voting machines are not proper subject matters here because of the prior decision on recount.

Petitioners do contend that election officials, particularly at the Bradley Gardens School polling place, conducted themselves unlawfully which resulted in a negative impact upon the election result. Petitioners also note that voting machines were allegedly defaced through the improper use of pasters, that voters were allegedly harassed, illegal votes were cast, and petitioners recite a litany of statutes governing the conduct of school elections as set forth in Chapter 14 of Title 18A, Eduction Law as having been violated.

SUMMARY AND DISCUSSION OF FINDINGS, LAW, CONCLUSIONS

That write-in candidates Kovonuk, Tilak, and Wiegand and their supporters engaged in an organized and intensive campaign for election to the Board prior to and on the day of election is evidenced at least by the fact 30,000 pasters or stickers were

ordered for election day use by Albert Bareis, the campaign treasurer for the write-in candidates. Moreover, 10,000 of the 30,000 pasters ordered were mailed to Bridgewater residents. The intensity of the write-in candidates' campaign is also evidenced by the fact Robert Vaucher, the campaign manager, caused campaign flyers to be distributed to residents and campaign rules to be distributed to write-in candidates and campaign workers for the proper conduct of a wrtie-in campaign. Finally, the organized and intensive write-in campaign conducted here is evidenced by the presence of individual candidates and campaign workers at each of the Board's four polling places each of whom, nevertheless, located themselves more than 100 feet from the respective polling places.

It has been recognized that the use of pasters during an election for write-in candidates create a greater risk of the election results being contested than in an election without write-in candidates. In re School Election in Hillsborough Twp. School District, 1972 S.L.D. 102. In this case, the risk created through the use of pasters did in fact result in some confusion at the four polling places because the 10,000 pasters distributed prior to the election were too large to fit through the write-in slots of the voting machines. The evidence in this record is unrefuted that the pasters were ordered to specifications provided by the Somerset County Board of Elections. The attempt by some voters to use the pasters too large for the write-in slots of the voting machines did, from time to time, cause pasters to be improperly affixed to paper rolls, to be improperly affixed to the face of the voting machines, and to be improperly affixed over the name of regular candidates. Nevertheless, there is no evidence to find specific identifiable voters were denied their right to vote at this election as the result of pasters being too large. One or more voting machines did jam from improper paster use but such machines did not prevent voters from casting ballots.

Despite the improper use of the pasters by some voters, election workers did remove pasters as best they could which were improperly affixed to the exterior of the voting machines after each voter exited the booth. Because of the improper use of pasters by some voters, election workers would from time to time offer to provide voters instructions on the proper use of pasters.

The activity engaged in outside the polling places by write-in candidates and by their campaign workers occurred in each of the various polling places more than 100 feet from the entrance to the polling place. Such activity is not unlawful. N.J.S.A. 18A:14-81 prohibits electioneering "* * * within the polling place or room or within a

distance of 100 feet of the outside entrance to such polling place or room * * *". In this case, the evidence shows that all electioneering was conducted by write-in candidates more than 100 feet from the outside entrance to the respective polling places. The only incident which gives pause is the matter of Roger Copt presenting himself inside the Crim polling place to engage an election worker in a dispute regarding the use of pasters. Neither Copt nor any other person not authorized by election officials to be inside the polling place has a right to be inside the polling place. Nevertheless, this one incident cannot be said to have interferred with the proper conduct of the election. Moreover, there is no evidence to show Copt's conduct constitutes harassment as alleged. At most Copt stated his position to election workers regarding the use of pasters.

While there is some evidence in this record that two unidentified persons were simultaneously in the voting booth at the Adamsville polling place with the approval of an unidentified election worker who explained one of the two voters needed assistance, that incident standing by itself or in conjunction with other established conduct here is insufficient to conclude that the will of the electorate was thwarted. Nevertheless, it is noted that N.J.S.A. 19:50-3 does allow assistance be provided blind, disabled or illiterate voters only if that voter declares under oath he is unable to cast his vote without assistance. Without the identity of the persons who were supposed to have been in the voting booth simultaneously or the identity of the election worker who was to have explained one of the two voters needed assistance there is no way of knowing whether the two persons were in the booth to cast a ballot or for some other reason nor is there any way to know whether one of the two voters did in fact need assistance or even to know for certain whether an election official allowed two persons to be in the booth simultaneously.

With respect to instructions being provided potential voters by the election workers, the same cited statute above provides as follows:

> For instructing the voters on any election day there shall, so far as practicable, be provided by the county board of elections * * * 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 * * *

Janice Hoffner, the chief clerk and supervisor of elections for Somerset County, did provide a mechanically operated model of a portion of the face of the voting machines used in each polling place. For whatever reason, some voters ignored the instructions election workers attempted to provide in order to properly cast particularly write-in ballots. The evidence is clear that some voters had their ballots voided through the improper casting of write-in votes. While there is no authority for election workers to have pasted to the side of voting machines the handwritten instructions (P-1) (P-1a) regarding the use of stickers in lieu of write-in votes, it is at least understandable why election workers pasted such instructions on the voting machines in light of the improper use of pasters. Despite the absence of authority for such handwritten instructions and the admonition that nothing should be pasted to voting machines during the conduct of an election, there is no evidence that the handwritten instructions which were pasted on a voting machine in this case interfered with the electorate expressing their will.

Finally, in regard to paste smears on plastic strips which were over the names of regular candidates there is no evidence to show the paste smears made it impossible to see the names and to cast their ballot for such candidate or candidates if they chose. And, the fact that write-in candidates received more ballots at the Bradley Gardens polling place is curious but certainly, absent some evidence in this regard, not unlawful.

The most significant violation of school election law occurred when four individuals claimed a right to vote, and indeed cast ballots, on the strength of affidavits filed. N.J.S.A. 18A:14-44 provides in full as follows:

> No person shall be permitted to vote at any school election unless -
>
> a. He is a citizen of the United States of the age of 21 years;
>
> b. He has been a resident of the state six months and of the county in which he claims his vote 40 days next, before the election;
>
> c. He shall be registered to vote in an election district included within the school district or the respective polling district of the school district, as the case may be, at least 40 days prior to the election, and his name shall appear upon the signature copy register furnished for such school district or polling district, respectively, or he shall make proof to the election board at such

> election that he is entitled to vote at such election, notwithstanding that his name does not appear on said signature copy register, in the manner prescribed in this chapter.

The ballots cast by Amarandra Mishra, Rachna Michra, Chester J. Grablewski, and Abdul Majid Khan are ballots cast by unregistered voters and, as such, are illegal and may not be counted. The evidence shows that Rachna Mishra and Chester J. Grablewski cast ballots for each of the write-in candidates. Accordingly, each write-in candidate should lose two ballots from the total they received following the recount. Because there is no evidence to show how the other two affidavit voters cast ballots, no change in the announced totals following the recount may be made here and the successful candidates as already announced by the Commissioner does not change. The conduct of each of the four individuals who filed false affidavits should be and is referred to the Somerset County prosecutor for whatever action he deems appropriate in the circumstance.

In sum the evidence produced by petitioners, while showing some irregularities which are minor and the significant violation of four individuals casting a ballot without being registered to do so, is insufficient even in light of the Commissioner's decision on recount to set aside the election. Irregularities must result from a degree of gross negligence or inattention to duty to set aside election results. Isolated acts of simple negligence or omission as shown here do not rise to the level necessary to set aside the will of the electorate as determined at the election. See, In re Application of Thomas Mallon, (N.J. Appl Div., A-2659-88T1F; approved for publication, N.J.L.J., May 11, 1989).

Accordingly, the matter of the requested inquiry into the conduct of the 1989 annual school election conducted April 4, 1989 from a constituent district of Bridgewater Township of the Bridgewater-Raritan School District is hereby DISMISSED.

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

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

September 20, 1989
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

September 20, 1989
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 21 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

ij

IN THE MATTER OF THE ELECTION	:	
INQUIRY IN THE BRIDGEWATER-	:	COMMISSIONER OF EDUCATION
RARITAN SCHOOL DISTRICT,	:	DECISION
SOMERSET COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner Enid Bloch, now acting pro se, filed timely exceptions to the initial decision on her behalf and that of her co-petitioner Jean Crabtree, pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.2 The Board filed timely reply exceptions.

Primarily, petitioners seek to have the hearing on the inquiry reopened in order that they may present testimony and evidence which they allege was withheld at the time of the inquiry. They aver that because a recount of the election was taking place while the inquiry hearing was in progress, the Commissioner would not release write-in sheets and other election materials they claim are vital to their case now before the Commissioner. They contend such documents are necessary for them "to demonstrate gross inattention to duty by election workers and to challenge the security and authenticity of the sheets and the legality of votes cast." (Exceptions, at p. 1) Petitioners aver they are not attempting to challenge the Commissioner's decision rendered on June 1, 1989 concerning the recount, but rather to examine the activities which took place before the recount.

They further claim the right to a day in court on such issues as whether the write-in sheets are tainted or are legitimate by reviewing the condition of the sheets when they arrived at the Board of Education office, how they were handled there, and what condition they were in when they were removed from boxes for recount.

Second, petitioners except to the ALJ's disallowing testimony and evidence, apparently reasoning that information touching upon the validity or security of the write-in sheets was subject to the recount, not the inquiry hearing before him.

Petitioners claim that during the recount they were told that questions about the origins and handling of the write-in sheets would properly be raised during the inquiry hearing, but such testimony and evidence were barred by the ALJ at the hearing below. Moreover, petitioners except to the ALJ's disallowing both their testimony made in reliance upon notes taken at the recount, as well as his disallowing the Commissioner's representative at the recount, Mr. Frank Arch, of the Somerset County Superintendent's Office, to refer to his notes made during the recount, or to admit the notes into evidence. Petitioners claim that without such testimony and

notes, they were unable to show that there were more sheets than could be matched to machines and that most of the sheets had not been secured after the election and could not be identified.

> All of this is very important information, which we believe we are entitled to put into the record. It does not matter that the Commissioner was conducting a recount, or that he eventually decided to accept even the unidentified sheets. The Commissioner did not have the benefit of testimony, and we did not have the opportunity to present it. (Id., at p. 3)

Thus, petitioners seek to reopen the hearing to admit testimony and evidence excluded by the ALJ.

Third, petitioners except to the ALJ's determination that facts adduced in the Commissioner's recount decision are res judicata for purposes of the inquiry. Relying on their understanding of the term res judicata, petitioners aver that the ALJ held that he would make no findings of fact related to any general matters about which the Commissioner also had found facts in the recount decision. "Yet the judge is aware that specific facts revealed in the courtroom had not been known to the Commissioner and that some of these are of vital significance." (Id., at p. 4) Petitioners note that the testimony taken at the inquiry of Walter Kokosinski, an election judge in the district, indicates that he allowed election workers to put stickers back onto write-in rolls after they had fallen off and that such stickers were counted in his vote tally. Petitioners challenge whether those votes should have been counted at the recount. However, petitioners claim the ALJ at the inquiry hearing indicated that because the matter of the recount has been adjudicated already at the recount hearing, findings regarding Mr. Kokosinski's testimony are inappropriate. Petitioners aver no one knew that Mr. Kokosinski allowed such votes as part of his tally until the inquiry hearing, and so this testimony must be allowed.

Similarly, petitioners except to the ALJ's finding that the matter of the sealed packages and ripped paper rolls were not cognizable before him because they were before the Commissioner in the recount decision. Petitioners submit that because their evidence and testimony on this issue were not made a part of the recount record, the Commissioner could not have known through what chain of events the packages had come to be sealed or unsealed. Finally, petitioners claim the ALJ's finding such matters to be res judicata is "strange" (id., at p. 5) in that the Commissioner's decision in the recount had not been reached at the time the inquiry hearing was held. The recount decision, they claim, was reached six weeks after the date of the inquiry hearing.

Petitioners' fourth exception submits that the ALJ should have invalidated the election based on Mr. Kokosinski's admission of putting back and counting loose stickers. Petitioner Bloch avers there is only a seven vote margin between her vote tally and that of

one of the winning write-in candidates. Claiming the votes counted by Mr. Kokosinski from loose stickers were invalid, she claims it would take only a small number of such illegal votes in the Bradley Gardens District to change the outcome of the election.

Moreover, in Exception 5 petitioners aver that the ALJ erred in dismissing Mr. Kokosinski from the first day of hearing to keep a doctor's appointment. In Exception 6, they ask to recall their witnesses in a reopened hearing, so that the witnesses from Bradley Gardens might identify Mr. Kokosinski as the election judge who allegedly gave unsolicited instructions to voters and also stepped into the voting booths to give write-in instructions, again, unsolicited.

In Exception 7, petitioners contend the ALJ erred in failing to note testimony from Ms. Eaton, an election judge at Crim School, suggesting that five, not two, write-in sheets had been identified and sealed from machines in her district. Petitioners contend that such a discrepancy goes to the heart of the election, because it raises the question of whether the sheets produced at the recount were the same ones that had left Ms. Eaton's hands.

> It is significant to note that because the judge would not allow such testimony, we have been unable to establish even the simple fact of how many sheets were in existence during the election or during the recount. The Commissioner's report also does not give this information.
>
> (Id., at p. 9)

In Exception 2, petitioners aver that the ALJ did not address testimony that illegal votes were cast, a conclusion they draw from testimony educed from Mr. Arch and Mr. Scannell, the voting machine mechanic, suggesting that there had been one extra machine advance at Crim School and two at Van Holten School, indicating three extra voters beyond those who signed the poll books. Petitioners suggest that such discrepancies go to the question of how many illegal votes were cast and, thus, how many votes have to be subtracted from the margin between winners and losers. Petitioners also cite to the Board's post-hearing submission pointing to these same inconsistencies, without reconciling them. Petitioners believe it was incumbent upon the judge to subtract three illegal votes from each of the winners.

In Exception 9, petitioners claim testimony educed at hearing concerning security of the write-in sheets was not included in the ALJ's decision. They claim such testimony is important because it bears on the vulnerability of the sheets to transferring and possible gross negligence or inattention to duty by the election officials.

Further, in Exception 10 petitioners except to the ALJ's determination that the appearance of write-on stickers and glue, as well as handwritten signs instructing voters how to place stickers in the machine, did not constitute prescribed defacement of the

voting machines. Petitioners claim the testimony of their witnesses provides evidence of such defacement, and they further contend the ALJ decided the matter on the wrong grounds. "We can never know whether some voters were unable to find the regular candidates' names under the residue." (Id., at p. 11) They further believe the ALJ should have found that such alleged defacement constitutes electioneering inside the voting booth. Further, because of the presence of supporters of the write-in candidates stopping voters outside the polls, petitioners contend their witnesses' testimony demonstrates that some voters who had been told they needed to use stickers in order to vote, were confused and believed they did need to use the stickers.

In Exception 11, petitioners broadly except to inaccuracies in the ALJ's decision, such as citing the wrong case citation, and misciting testimony of witnesses. In Exception 12, petitioners note the difficulty in pointing out inaccuracies and omissions in the decision without the aid of transcripts, which they note "are beyond our reach" (id., at p. 12), because of the cost.

By way of legal argument, petitioners distinguish the ALJ's reliance on In re Application of Thomas Mallon, supra, for the proposition that the irregularities in this matter do not rise to the level necessary to set aside the election and rely instead on Richards v. Barone, 114 N.J. Super. 243 (1971) that although a simple procedural failure was held insufficient to overturn the election, the court commented that "if the vote were significantly closer, it is possible that the procedural omission would have had the effect of imposing so vital an influence on the election that the election would have been vitiated." (Id., at p. 14, citing Richards, supra, at p. 251) Because the vote margin for Petitioner Bloch was seven, and for Petitioner Crabtree was 34, "the failure of election workers to follow procedures outlines in the law has to be regarded as serious enough to set aside the election." (Exceptions, at p. 14) Petitioners also cite In re Bonsanto's Application, 171 N.J. Super. 356 (1979) for the proposition that a correct and genuine result of the Bradley Gardens District cannot be ascertained because of their allegation that it is not known the exact number of votes that should have been counted. Applying Bonsanto, petitioners believe that the vote from Bradley Gardens has to be rejected because Mr. Kokosinski put stickers back on the write-in sheets, thus, creating a "curious" (Exceptions at p. 15, quoting Initial Decision, ante) circumstance where the write-in candidates received substantially more votes than the regular candidates. Claiming that this is unlawful, petitioners seek to have the Commissioner either invalidate the entire election, or eliminate the vote from Bradley Gardens, and declare the regular candidates winners.

Petitioners summarize their position as follows:

> There are enormous doubts as to the facts still remaining in this case. Not only is it not known from where most of the write-in sheets came, we do not even know how many of them there were. Nor do we know how many illegal votes were cast.

> The judge himself pointed to disparities between the Commissioner's findings and testimony in the court room. Yet in the face of all this, we were denied the opportunity to establish the facts.
> (Exceptions, at p. 16)

The Board's reply exceptions address petitioners' exceptions as follows:

> 1. The Commissioner, with the assistance of his representative, Frank Arch, made findings in order to determine whether or not to count in the final vote tally write-in votes from the write-in sheets. The Commissioner's final tally impliedly encompasses all general and specific challenges made to the write-in votes.
>
> 2. The Commissioner's findings and conclusions in his election recount decision, as well as the final vote tally, can only be reversed or modified by the State Board of Education. The A.L.J. could not at the original hearing, or cannot at a rehearing, make any inconsistent decisions regarding any write-in votes counted by the Commissioner or disqualified by the Commissioner.
>
> 3. The issue to be initially determined by the A.L.J. was whether or not the aggregate of election irregularities "affected the outcome of the election". N.J.S.A. 18A:14-63.12. The outcome of the election is the final tally of the Commissioner after the recount.
>
> 4. Petitioners want to reopen the hearing so that the A.L.J. may address "the security and authenticity" of the write-in sheets (Exceptions, pg. 1). But findings regarding the "security and authenticity" of the write-in sheets have already been made by the Commissioner in arriving at his final vote tally. It was the position of the A.L.J., and rightly so, that he was without authority to make findings inconsistent with the Commissioner's findings and, therefore, these findings are res judicata. Since Petitioners were parties to the recount and have in fact taken an appeal to the State Board, they are also collaterally estopped from attempting to relitigate these issues either in the original hearing or in a new hearing.
>
> 5. The A.L.J. made the correct evidentiary determination at the hearing when he sustained the Board's objection to Petitioners introducing evidence regarding the write-in sheets.

6. Because Petitioners cannot challenge the Commissioner's findings regarding the write-in sheets before the A.L.J., there is no good reason to reopen the hearing.

7. Most important, the A.L.J. has already accomplished in his Initial Decision what the Petitioners in their exceptions are requesting---that the "discrepancies" and election law violations involving the write-in sheets be considered by him in his determination of whether or not the outcome of the election was affected.
(Reply Exceptions, at pp. 4-5)

AS TO EXCEPTIONS 4, 5, 6, 7, 8, 9, 10, 11 AND 12

These exceptions can be grouped together, because they involve similar issues. Petitioners' primary complaint is that they disagree with the findings of the A.L.J. Though it is unquestioned that the Commissioner may make independent findings based upon his review of the entire record, deference must be paid to the findings of the A.L.J., if these findings are reasonably supported. Also, the credibility of witnesses is generally determined by the A.L.J. Without a transcript, Petitioners factual representations are the product of individual notes, perceptions and/or memories. Consequently, the Commissioner is not referred to portions of the hearing transcript upon which to make independent findings, but is furnished only with the myopic statements of interested parties. Also, many of Petitioners' exceptions involve the credibility of witnesses which can only be determined by the A.L.J.

Additionally, Petitioners raise objections which again address "the security and authenticity" of the write-in sheets.

Contrary to the assertion made by Petitioners regarding Board concessions "as to the number of extra votes" (Exceptions, pg. 9), it was the Board's position in its Summation Brief that these discrepancies had been reduced to two and were inconsequential. The Board said (at pg. 7):

> The report of the Commissioner's representative (Ibid.) also notes as "discrepancies" differences between the total number on the public counters of voting machines and the number of voters who signed the poll lists. Interestingly, his report is not consistent with the testimony he gave

> at the hearing in that no mention was made in the report of a facially apparent two vote difference in voting district five (Van Holten School). Also, the machine mechanic testified at the hearing that he could not recollect advancing the vote counter at Crim School (voting district one), but the report of the recount states that the mechanic confirmed a notation that he caused "one extra vote" to be recorded on the counter. Neither the Commissioner (Ibid.) nor his representative attached any significance to the unexplained three count discrepancy, which election workers' notations read into the hearing record had reduced to two.

AS TO EXCEPTION 13

The Board directs the Commissioner's attention to pages 8 through 17 of the Board's Summation Brief.

Petitioners demonstrate a misunderstanding of the applicable law. Both the Commissioner and the A.L.J. have found that violations of the election laws occurred during the annual school election. However, the Commissioner concluded that the violations which he addressed during the recount did not affect the validity of the election machine write-in sheets. Judge McKeown concluded that the election law violations, including those found by the Commissioner, did not affect the outcome of the election.

No voter testified that he or she was confused by any irregularity or was unable to cast his or her vote for the candidates of his or her choice. Except for the two illegal votes cast for winning write-in candidate Raymond Kovonuk, no evidence was presented that any violations of election laws affected the final vote tally. In the Matter of the Annual School Election Held in the School District of South Orange-Maplewood, Essex County, 1974 S.L.D. 1049, 1053, the Commissioner said:

> It is purely speculative to presume that, if conditions had been different, the results would have been different. The Commissioner has consistently declined to set aside contested elections unless there is clear proof

> that the irregularities affected the result of the election. The Commissioner has consistently and vigorously condemned any procedural faults and irregularities found in a school election, but even gross irregularities not amounting to fraud do not vitiate an election.
> (Reply Exceptions, at pp. 6-7)

The Board would ask that the Initial Decision be affirmed and the Petition of Appeal dismissed.

Upon a careful and independent review of the instant matter, the Commissioner adopts the findings and conclusions of law as established by the ALJ below.

Initially, the Commissioner finds and determines that petitioners have advanced no convincing evidence which would require the Commissioner to either "reopen" the inquiry hearing or remand the matter to the Office of Administrative Law for further findings of fact or law. As noted by the Board in its reply exceptions, the Commissioner may direct a hearing be reopened "if good and sufficient reason exists to do so and if there is a likelihood that the reason will materially affect he final decision. George McClelland v. Bd. of Ed. of the School District of the Tp. of Washington, 1987 S.L.D. (March 4, 1987)." (Reply Exceptions, at p. 2, quoting Slip Opinion, at p. 16) He also agrees with the Board citing William H. Love et al. v. Board of Education of the City of Trenton, Mercer County, decided by the Commissioner July 23, 1984, aff'd/rev'd St. Bd February 6, 1985 for the proposition that, in general, extraordinary circumstances must be shown by the moving party in order to reopen the hearing. The Commissioner finds no such extraordinary circumstances present in the instant matter.

Petitioners' primary concern in asking that the instant inquiry hearing be "reopened" is to proffer testimony regarding the "validity or security of the write-in sheets" (Exceptions, at p. 3). Yet, as found in the Commissioner's decision in the case entitled In the Matter of the Annual School Election held in the Constituent District of Bridgewater Township of the Bridgewater-Raritan Regional School District, decided by the Commissioner June 1, 1989, (hereinafter recount decision), the Commissioner's representative, Mr. Frank Arch, of the Somerset County Superintendent's office, specifically addressed questions concerning the number of write-in sheets, and other discrepancies, like the torn sheets, in his report, which was adopted by the Commissioner in this regard. (See Recount Decision, at pp. 4, 7-8.) The recount decision, while acknowledging election law violations, agreed that the seven write-in sheets were appropriately included in the vote tally, thus, assuring that such discrepancies as were present, were not sufficient to invalidate the votes on those sheets, unless he specifically disqualified a specific vote found thereon for the reasons set forth in the decision on recount at pages 6-9.

Moreover, the Commissioner is in accord with the ALJ and the Board that the Commissioner's decision represents a final decision regarding the findings of fact determined in the recount. Thus, such issues that have been fully and fairly adjudicated in a preceding action, may not be raised again by the same parties in later proceeding. See Rosanne Sallette et al. v. Board of Education of the Township of Randolph, Morris County, decided by the Commissioner January 17, 1984. See also Charlie Brown of Chatham, Inc., v. Board of Adjustment for Chatham Tp., 202 N.J. Super. 312, 327 (1985). Even if the testimony of Mr. Kokosinski or of Ms. Eaton suggests that a different number of write-in sheets were presented at the recount than were identified at the polling sites, or that such election judge's tallies did not conform with that of Mr. Arch, such matters were considered during the recount, where petitioners had an opportunity to challenge every single write-in vote. On the issue of whether Mr. Kokosinski or his election workers reaffixed to the write-in sheets pasters which had fallen to the floor, the Commissioner finds and determines that there is no evidence or testimony to the effect that the election workers took pains to place these stickers in the appropriate columns so that they could be counted for the appropriate write-in candidates. The result of any such indiscriminate pasting of stickers would more likely have resulted in those votes being discounted for those very reasons indicated in the Commissioner's decision on recount at page 5. Neither could such result operate to the detriment of petitioners since write-in votes, improperly placed, would not have been counted and, therefore, would have operated to the detriment of the write-in candidates, not to petitioners who were formally declared candidates.

Moreover, as to whether in fact the write-in rolls were the same ones as had left the Crim School, the Commissioner notes that his representative included all write-in rolls presented for consideration of the recount. To question how many such sheets were to be included in the recount is a matter directly related to the recount tally, and is a matter to be broached in appealing the recount decision, not one to be argued in the inquiry. Petitioners must be presumed to have had every opportunity to challenge such number of write-in sheets at the recount in Mr. Arch's conclusion to count all "seven unidentified write-in sheets as part of the election results." (Recount Decision, at p. 4) Should petitioners believe the number erroneous, it is theirs to so argue before the State Board on appeal of the Commissioner's recount decision.

The Commissioner further finds that the ALJ below was thorough in reviewing testimony taken concerning electioneering and any assistance provided by election officials at all of the polling sites. He adopts as his own those findings of fact made by ALJ McKeown at page 11 of the inquiry initial decision regarding the Crim School polling place, those found at page 14 of the inquiry initial decision concerning the Adamsville School polling place, at page 17 concerning the election at the Bradley Gardens School polling place, and those found on pages 20-21 concerning alleged irregularities at the Van Holten School polling place.

The Commissioner also concurs with the ALJ's conclusion as found on page 25 concerning the illegal votes cast by four individuals not properly registered voters.

Moreover, the Commissioner's review of the record before him comports with the ALJ's findings as found on pages 21-25 concerning electioneering allegations and the issue concerning more than one person being in a voting booth simultaneously at the Adamsville polling place. He also adopts as him own the ALJ's conclusion concerning the effect of past smears on plastic strips used by write-in voters.

Accordingly, for the reasons expressed in the initial decision, as supplemented herein, the Commissioner adopts the recommendation to the Office of Administrative Law dismissing the instant Petition of Appeal.

COMMISSIONER OF EDUCATION

November 1, 1989

Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 269-89
AGENCY DKT. NO. 338-12/88

BOARD OF EDUCATION OF THE DISTRICT OF SCOTCH PLAINS-FANWOOD, UNION COUNTY,
Petitioner,
v.
RAYMOND L. SCHNITZER,
Respondent.

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

Paul L. Kleinbaum, Esq., for respondent
(Zazzali, Zazzali, Fagella & Nowak, attorneys)

Record Closed: July 7, 1989 Decided: October 2, 1989

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

The Board of Education of the School District of Scotch Plains-Fanwood, Union County, filed and certified charges of unbecoming conduct in illegal gambling activity against Raymond L. Schnitzer, a tenured teaching staff member, which if proven were sufficient to warrant respondent's dismissal or reduction in salary, in accordance with the Tenure Employees Hearing Law, N.J.S.A. 18A:16-10 et seq. Charges were certified by the Board on December 15, 1988; an appropriate certificate of determination was filed with the Commissioner of the Department of Education on December 19, 1988. Respondent was suspended without pay by resolution of the Board on December 15, 1988. Respondent's answer was filed before the Commissioner on January 9, 1989. The Commissioner transmitted the

matter to the Office of Administrative Law on January 13, 1989 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

On notice to the parties, the matter came on for prehearing conference in the Office of Administrative Law on February 16, 1989. An order was entered establishing, inter alia, hearing dates beginning June 5, 1989. Hearing continued on June 5, 6 and 7, 1989, and was concluded. Thereafter, time for posthearing submissions having elapsed, and such submissions having been made, the record closed on July 7, 1989.

As provided in the prehearing conference order, at issue in the matter are whether the Board shall have established by a preponderance of the credible evidence that charges and specifications against respondent are true and, if so, whether charges and specifications are sufficient to warrant respondent's dismissal or reduction of salary under N.J.S.A. 18A:6-10 et seq. No question as to procedural regularity of tenure charges under N.J.A.C. 6:24-5.1 et seq. is presented.

The following charges and specifications against respondent were filed with and certified to the Commissioner of Education:

1. Raymond L. Schnitzer placed illegal bets for an extended period of time both while on and off school property;

2. Raymond L. Schnitzer exchanged money (paying and receiving) as a result of the illegal gambling on a weekly basis with a known bookmaker with possible criminal organization ties on school property over an extended period of time;

3. By the course of the aforesaid conduct of Raymond L. Schnitzer, Raymond L. Schnitzer exposed not only the school system of Scotch Plains-Fanwood, but his colleagues and students to an illegal activity occurring on school property over an extended period of time; and

4. The above charges constitute conduct unbecoming a school employee and other just cause pursuant to [N.J.S.A. 18A:6-10 et seq.].

EVIDENCE AT HEARING

I

Called by the Board, Carl Sicola, a detective employed by the Scotch Plains police department for 21 years, testified his department received an anonymous telephone call in December 1987 that respondent was taking bets at the high school and meeting on Wednesday mornings there between 11 a.m. and 12 p.m. a person to pick up or drop off gambling proceeds. Acting on instructions, he instituted a clandestine surveillance at the high school on Wednesdays. He was not in uniform at the time. The surveillance continued for some four or five weeks. His report of investigation is P-1 in evidence. On Wednesday, December 9, 1987, about 11:30 a.m., he observed a 1983 dark blue, two-door Lincoln sedan, New Jersey registration, operated by a white male, park at the main entrance of the high school. He saw respondent, a vice principal, leave the high school, enter the vehicle on the passenger side, where he stayed less than a minute, and then exit to return to the school. The vehicle then left. A motor vehicle check, Sicola said, revealed the vehicle was registered to one Eleanor Cocuzza, 2302 Green Hollow Drive, Iselin, New Jersey. After obtaining a photograph of one Joseph Cocuzza from the Essex County Sheriff's Office, which identified the operator of the blue Lincoln as the one he saw on December 9, 1987, Sicola repeated his surveillance on succeeding Wednesdays, January 20 and 27, 1988, March 23 and March 30, 1988. Each time in the late mornings, he said, the contact was repeated: Cocuzza arrived in a blue Lincoln, respondent left the school building, entered the vehicle, exited after a short time and re-entered the school building. Contact with investigators at the Union County Prosecutor's Office, Sicola said, developed information that Cocuzza had a history of criminal prosecution and conviction for illegal bookmaking.

After identifying Cocuzza in December 1987, Sicola received information from a confidential informant that numbers used to call in bets were 718/967/3055 and 718/948/7035. About April 15, 1988, he received information from a confidential informant that new telephone numbers to place bets through Cocuzza were 718/727/2121 and 718/727/2122.

After conferring with Union County prosecuting authorities, Sicola said he and a Union County prosecutor's detective captain visited respondent at his office in the high school, unannounced. After confronting respondent with surveillance results and a photograph of Cocuzza, respondent said at first he did not know the person in the photograph. He shortly admitted, however, that he did know him and freely told the officers what had been taking place. Respondent said he had been betting on his own account and was settling his accounts with Cocuzza on the latter's visits to the high school. Respondent agreed to cooperate with police authorities in targeting Cocuzza's illegal gambling activities. He said he would call certain numbers in Staten Island to make his bets, then settle up with Cocuzza on succeeding Wednesdays. He gave the officers the 718/967/3055 and 718/948/7037 numbers. Sicola said respondent cooperated with investigating authorities through April 1988, until the Union County prosecutor obtained a search warrant for Cocuzza's premises at 2302 Greek Hollow Drive, Iselin, and Cocuzza's vehicle. Execution of the search warrant in April 1988, Sicola said, produced physical evidence of betting slips, large amounts of currency, and records of bettors, including the name "Ray."

Ultimately, school officials were notified of respondent's involvement, specifically the school superintendent and the high school principal. They were told of respondent's cooperation in a successful investigation that culminated in Cocuzza's prosecution for illegal gambling activity. No charges against respondent were made or indictment returned by the Union County grand jury under N.J.S.A. 2C:37-2. Sicola said respondent's cooperation was helpful because even though Cocuzza ultimately could have been prosecuted without it, based on evidence already available, prosecution and investigation would have necessarily been lengthened.

The opinion was shared by the Board's next witness, Chief Robert Luce of the Scotch Plains police department.

Called next by the Board, Captain Edward Rodman testified he has been employed as chief of investigators by the Union County Prosecutor's Office since 1982. He has been commander of an economic crimes intelligence unit since then Working with Detective Sicola, he said, he obtained motor vehicle registration information and descriptions that led to identification of Joseph Cocuzza. He is

known, Rodman said, as a convicted bookmaker purportedly connected with the Genovese crime family as an "associate" and appears on a list compiled by the State Commission of Investigation. In a confrontation with respondent in company of Detective Sicola, Rodman said, respondent described his relationship with Cocuzza as that of a pick up man who came to settle gambling accounts for a bookie in Staten Island, New York, whom respondent called to make bets. Ultimately, he said, on execution of a search warrant at Cocuzza's home on April 14, 1988, there were seized betting slips including some with the name "Ray," with a figure of $420 plus, $420 minimum, balance $20. The contraband seized permitted application to the court by the prosecutor's office for an order for production of telephone records of Cocuzza's residence at 2302 Green Hollow Road, Iselin. P-2 and P-2A. A synopsis of such records (P-2) between August 19, 1987 and January 6, 1988 showed 17 telephone calls from Cocuzza's home telephone number 201/634/1373 in Iselin to Fanwood at telephone number 889/4882, an auxiliary telephone number charged to the Scotch Plains-Fanwood public schools. P-3. Main Board number is 201/889/8600.

A synopsis of telephone calls made from auxiliary or main Board numbers (889/8600) to 718/967/3055 or 718/948/7035 showed six such telephone calls originated on November 14, 1989 between 11:53 a.m. and 1:53 p.m. P-3. The listings were confirmed by the next Board witness, Barry Hibbert, an assistant manager employed in the billing office of New Jersey Bell Telephone Company.

Called by the Board, Dr. Terry Riegel, principal at the high school since 1972, a friend of respondent's for 26 years, testified to an occasion in September 1987, after a postponed football game played on a Sunday, when his attention became drawn to billed telephone calls made on that Sunday Normally, personal telephone calls are screened at a switch board and a record kept Since the high school is closed on Sunday, no authorized personal calls can be made except, perhaps, he said, for the auxiliary phones with direct outside dialing. There are four such auxiliary lines. One is his, Riegel said, one is in the guidance department, one in the attendance office and one is in the office of the assistant principal athletic director. The latter number is 889/4882 and is charged to the general district number, 889/8600. The former is available to users on some four or five desks in respondent's office. Terry said he surmised respondent had made such personal use of telephone calls on the particular Sunday in question. He cautioned him not to do so again. He said respondent neither admitted or denied making any Sunday calls.

Riegel said he was respondent's supervisor at the high school, where general opinion about his performance as assistant principal and athletic director is good. He knew of many students who have benefited from respondent's work. He felt if respondent were permitted to return to work, he could function as before; the district would benefit from his continued service. He conceded conduct such as respondent's in gambling activity on school premises is unacceptable and not an example for students.

Called by the Board, Dr. Robert J. Howlett, district superintendent for the past 11 years, recalled Detective Sicola's visit to his office on April 15, 1988. He recalled he was given details of the surveillance investigation. He described the high school property as having a semi-circular drive from Westfield Road to the front door of the high school where there are parking spaces at the front some 30 to 40 feet from the roadside curb. The front entrance is still used for egress by students and visitors, he said.

Howlett said Sicola informed him respondent admitted being involved in sports gambling for almost ten years. On occasion, he was informed, respondent admitted weekly bets of up to $400. Howlett was informed by Sicola that the identified bookmaker was a member of an organized crime family and had a record of convictions. He said that Sicola had been directed by his superiors to inform school authorities of respondent's activities and that police investigations had continued with respondent's cooperation, which resulted in an arrest the day before. It was suggested by Sicola, he said, that the information was sensitive because investigation was still continuing. Two weeks later, Howlett said, he was informed by Chief Luce that the investigation would conclude the following week. Howlett then set up a meeting with the respondent in his office on May 9, 1988. Howlett informed respondent he was disappointed in his conduct and said he found it difficult to believe respondent could continue in his position. The option of retirement was suggested. Respondent asked Howlett to consider his long service to the district and his concern for the students. Howlett suggested professional assistance for respondent. Though discussion was scheduled to be continued later, Howlett said, such discussion did take place but with no decision made. As a result, Howlett said, he reported the events to the Board in mid-October 1988. He had appointed an acting athletic director in respondent's place during the summer. He

filed a certificate of charges and specifications of evidence with the Board; charges were filed and certified; respondent was suspended without pay by the Board on December 15, 1988.

Howlett's reasons for recommending the charges against respondent were that respondent had apparently been involved in gambling for an extended period of time, that gambling activities were suffered to take place on school property, that a known bookmaker was allowed there, and that respondent's activities reflected negatively on his role model as an administrator charged with enforcing student discipline. Because public confidence of tax payers, parents and students were bound to be affected, Howlett said, he was in doubt that respondent could return to service.

II

Respondent, Raymond L. Schnitzer, whose service in the district has been of some 36 years' duration, was serving as a tenured assistant principal at the high school until certification of charges herein. He served as assistant principal since 1965 and as well in the co-curricular position of director of athletics since 1957. A graduate of Panzer College with a degree in physical education and hygiene, he has completed graduate courses in school administration at Seton Hall and Rutgers Universities. He holds a masters degree in supervision of health, physical education and athletics from Rutgers University. He has teaching certificates in health, safety and physical education 7-12, general science 7-12, supervisor and vice principal. He has had district and out-of-district coaching experience in basketball, track, soccer and swimming. He is a certified track and field official and has held chairperson positions in professional associations in the fields of health, physical education and recreation. See, R-22. He was an elected member of the Scotch Plains Township Committee from 1968 to 1970 and served as Township mayor in 1969. IIIT 22-23. A naval air force veteran of World War II, he was awarded the Air Medal with two oak leaf clusters and the Distinguished Flying Cross. IIIT-17. A Scotch Plains resident, he is married with five children between ages of 37 years and 22 years; the youngest resides at home.

Respondent admitted accuracy of the testimonial and documentary evidence concerning his use of district telephones for placing football gambling bets through

services given him by a known bookmaker, Joseph Cocuzza. He admitted meeting Cocuzza at the high school for the purpose of settling gambling accounts. He admitted specifically meeting Cocuzza there on the dates and in the manner described by the police detective in P-1. He admitted specifically receiving telephone calls from Cocuzza at his office in the high school via telephone number 889/4882 (P-2) and having utilized that number to place bets with the bookmaker at numbers 718/948/7035 and 718/967/3055 (P-3). He admitted he knew he was dealing with a known bookmaker from 1985 to 1988 but was not disturbed by the knowledge because he felt he was doing nothing wrong. IIIT 39-40. He first met the bookmaker at a local restaurant in 1985; their relationship endured for three more years. He denied ever having dealt on anyone's account except his own. He denied there was any notoriety or danger of student involvement in his betting. His betting volume reached the level at least in one week of "$420 plus and $400 minus." IIIT 85-86. He readily cooperated with investigating police and prosecuting authorities after being confronted by them.

At close of hearing, respondent was asked this question and gave these answers:

> THE COURT: Mr. Schnitzer, I have a question I think I ought to ask you. Obviously you know you've been charged with unbecoming conduct on -- conduct unbecoming a teacher or teaching staff member on three counts or three specifications. You've now heard the testimony and I presume seen the exhibits.
>
> I want to ask you looking back, do you believe that your conduct over the periods of time in question as outlined and as you've admitted in some instances was becoming or unbecoming conduct for a teaching staff member?
>
> THE WITNESS: I don't feel -- I feel that it -- I don't feel that it was unbecoming.
>
> THE COURT. You don't.
>
> THE WITNESS: I don't. Because I was very, very discreet about it in dealing with it and I've got my own personal feelings as to why it surfaced as it had. But they are, as I said, my own personal feelings.
>
> THE COURT: Well, to be short about it, you feel that nothing you did represents unbecoming or conduct unbecoming a teaching staff member.

THE WITNESS: How I dealt with it, no, your Honor, I did not.

THE COURT: Okay. That's all. thank you, sir.

MR. KLEINBAUM: Well, can I ask a follow-up question to that, your Honor?

THE COURT: What question do you want to put?

MR. KLEINBAUM: I want to ask Ray in retrospect in his judgment whether he felt -- he felt that it was appropriate to do what he did.

THE COURT: Do you understand that question?

THE WITNESS: I do.

THE COURT: Can you answer it?

THE WITNESS: Yes, I can.

THE COURT: Go ahead.

THE WITNESS: Looking back, if I had to do it all over again, I think I would have done things differently. I think there was poor judgment on my part without any question.

THE COURT: What things would you have done differently? Meet the bookie off the school grounds after school?

THE WITNESS: I wouldn't have stopped down at Sleepy Hollow for the drink I met him, I think. I wouldn't have stopped there that day. [IIIT 93(15) to 95(16).]

Exhibits R-1 through R-21 are affidavits and letters attesting to respondent's good character and reputation in the community, admitted into the record without objection under Evidence Rules 47 and 63 (28) and N.J.A.C. 1:1-15.7, 15.8.

Exhibits R-23 through R-69 represent respondent's summary evaluation reports and statements of teacher competence or effectiveness generally through the years 1961 through February 23, 1988.

DISCUSSION AND DETERMINATION

The Board argued generally that evidence was clear respondent was guilty of unbecoming teacher conduct. It declined to make recommendation whether removal or some lesser sanction was appropriate (Pb 15) but said that if reinstatement were in order, respondent should be required to submit to counseling or treatment if comprehensive evaluation showed him to be a compulsive gambler (Pb 16).

Respondent argued the Board failed to prove by a preponderance of the evidence that he had engaged in illegal conduct and, therefore, conduct unbecoming a teaching staff member (Rb at 9-14). He urged his activities involved no other district staff or students, nor did any of his activities interfere with his teaching staff duties or knowingly expose the district to disrepute. Rb at 3, 14. He urged his activities were not violative of criminal law under N.J.S.A. 2C:37-2(2), inasmuch as he gambled only on his own account and not, therefore, in illegal promotion of gambling activity, noting that the New Jersey Penal Code permits as defense to a prosecution of promoting illegal gambling activity that a defendant participated only as a player. See, N.J.S.A. 2C:37-2(b)(c) (the defense, however, imposes a proof burden the defendant must carry by clear and convincing evidence). Rb at 9. Respondent argued he fully cooperated with police authorities and noted his use of Board telephone facilities was "limited." Rb at 5, 7. Finally, urging that the Board had failed to sustain its burden of proof of unbecoming conduct, and noting respondent had become both physically and emotionally stricken by events, he urged he should be reinstated to his teaching staff position without imposition of further sanction. Rb at 7, 8. Respondent noted a sanction short of removal in the matter of The Tenure Hearing of Rumage, School District of the Township of Woodbridge, Middlesex County, 1980 S.L.D.--(Commissioner's decision, July 22, 1980; slip opinion at 9), where the Commissioner approved a decision of an administrative law judge in ordering reinstatement with forfeiture of two months' salary of a district guidance counselor found guilty of conspiracy and bookmaking, sentenced to serve three months in a correctional center, fined and placed on probation for two years. [Although the offenses were found not to be crimes involving moral turpitude, one should note, there was no evidence apparent in the record that the guidance counselor's activities were in any way connected to school property. Ibid.; slip opinion at 6.]

I have considered documentary and testimonial evidence and arguments of respondent and the Board. I hold respondent guilty of unbecoming teacher conduct within the meaning of N.J.S.A. 18A:6-10 and charges thereof as specified fully **SUSTAINED**. Despite the circumstance that respondent may have gambled only on his own account as a player, it is also clear that he gambled with more than his own money. He risked loss of the trust, respect and confidence of students, tax payers and colleagues in his profession, to say nothing of that of citizens of the district. He risked bringing himself and his scholastic environment into disrepute. I find especially inappropriate respondent's urging that what he did on school property and with school telephone instrumentalities was limited, inoffensive, non-notorious or not disruptive of school activities or his school duties. The plain circumstance is that respondent's activities did become notorious to a police confidential informant. There followed, in turn, the disturbing circumstance of police surveillance on school property that confirmed respondent's dealings with a known gambler. That respondent never himself never became a subject of criminal prosecution or that respondent when confronted by police authorities offered his "cooperation" to them does not, in my view, lessen the discreditability of his conduct. He could hardly be expected to offer less; nor, perhaps, could his sudden emotional and physical collapse remain unexpectable.

What is troublesome about the case is not whether respondent's conduct was unbecoming, but whether it requires his removal from employment. Arguably, there has been presented to the Commissioner of Education an opportunity through adjudication to voice a strong deterrent policy for protection of school districts from the social evil of promotion of gambling activity. Just as arguably, perhaps, there must in adjudication be preserved an appropriate balance of aggravating and mitigating circumstances. Although I view respondent's conduct as discreditable and fraught with potential harm of no mean consequence, I recognize respondent's education, experience and distinguished public service both civil and military. And although I have considered the opinion of the district superintendent, and have noted the position taken by the Board, I feel that respondent's continued service has value and is supportable. I decline to order his removal, therefore, and shall instead order reinstatement upon condition.

CONCLUSION

Based on the foregoing, I **CONCLUDE** tenure charges of unbecoming teacher conduct against respondent in this matter should be, and are hereby, **SUSTAINED** as specified. I **ORDER** respondent reinstated to his teaching staff position upon conditions:

1. That his salary on reinstatement shall be reduced thereafter for at least two school years by an amount equal to 20 percent of that received at suspension in 1988-89;

2. That salary during suspension is not restored; and

3. That reinstatement shall not take place unless and until there has been presented to the Board a satisfactory medical/psychological evaluation as to whether respondent is in need of counseling or treatment, which, as further condition of reinstatement, respondent shall agree thereafter to undergo.

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. 52:148-10.

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

October 2, 1989
Date

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

October 4, 1989
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 4 1989
Date

OFFICE OF ADMINISTRATIVE LAW

amr .

IN THE MATTER OF THE TENURE	:	
HEARING OF RAYMOND L. SCHNITZER,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF SCOTCH PLAINS-	:	DECISION
FANWOOD, UNION COUNTY.	:	
	:	

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

The exceptions submitted by respondent are substantive repetitions of arguments already made before the ALJ. Those arguments are summarized in the initial decision, ante, and need not be repeated here. The reply submitted by petitioner (hereinafter "Board") essentially argues that the ALJ's conclusions and handling of evidence are well grounded in both fact and law and should therefore be affirmed by the Commissioner. The Board reaffirms its stance that it takes no position as to the ultimate penalties or discipline to be meted respondent as that "***function is solely and exclusively one of the Commissioner of Education pursuant to the Tenure Statutes." (Board's Letter, October 16, 1989, at p. 1) It also reaffirms its position that if reinstatement should be ordered by the Commissioner, a satisfactory medical/psychological evaluation be undertaken consistent with the recommendations of the ALJ at Item 3 in the initial decision, ante. It further submits that it should be permitted to approve the evaluators so selected by respondent or be permitted to obtain its own evaluation in the event of any question that it might have concerning respondent's evaluation.

Upon a careful and independent review, the Commissioner concurs with the ALJ that the charges brought against respondent have been shown to be true in fact although case law has established that the bettor in a gambling situation is not subject to arrest, as is the bookmaker. See State v. Lennon, 3 N.J. 337, 344-345 (1949). However, as found by the Supreme Court of New Jersey in the Lennon case, gambling is unlawful (except in areas where it has been legalized). Moreover, Lennon clearly establishes that "[i]t is clear that bookmaking is an act which must be done in concert, that is, there must be the bookmaker who takes the bet and also the bettor who places the bet***." (at 345) As an admitted partner to gambling transactions on school premises, respondent is unquestionably guilty of conduct unbecoming a teaching staff member. See initial decision, ante, wherein the ALJ stated:

> Despite the circumstances that respondent may have gambled only on his own account as a player, it is also clear that he gambled with more than

> his own money. He risked loss of the trust, respect and confidence of students, tax payers and colleagues in his profession, to say nothing of that of citizens of the district. He risked bringing himself and his scholastic environment into disrepute. I find especially inappropriate respondent's urging that what he did on school property and with school telephone instrumentalities was limited, inoffensive, non-notorious or not disruptive of school activities or his school duties. The plain circumstance is that respondent's activities did become notorious to a police confidential informant. There followed, in turn, the disturbing circumstance of police surveillance on school property that confirmed respondent's dealings with a known gambler. That respondent never himself never became a subject of criminal prosecution or that respondent when confronted by police authorities offered his "cooperation" to them does not, in my view, lessen the discreditablity of his conduct. He could hardly be expected to offer less; nor, perhaps, could his sudden emotional and physical collapse remain unexpectable.

The Commissioner concurs with the above determinations of the ALJ and adopts such findings as his own.

In assessing a penalty for said conduct, however, the Commissioner is troubled by respondent's total lack of understanding of the negative impact which his behavior visits on the school district and students and faculty under his charge. As a result of his belief that the "discreet" manner in which he handled his gambling on and with school property absolves him of any wrongful behavior, respondent demonstrates no remorse for his unbecoming conduct. See initial decision, ante, wherein the ALJ questions respondent as to his understanding of the inappropriate- ness of his actions and his lack of remorse. Said line of questioning bears repeating here:

> THE COURT: Mr. Schnitzer, I have a question I think I ought to ask you. Obviously you know you've been charged with unbecoming conduct on -- conduct unbecoming a teacher or teaching staff member on three counts or three specifications. You've now heard the testimony and I presume seen the exhibits.
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> I want to ask you looking back, do you believe that your conduct over the periods of time in question as outlined and as you've admitted in some instances was becoming or unbecoming conduct for a teaching staff member?
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> THE COURT: You don't.

THE WITNESS: I don't. Because I was very, very discreet about it in dealing with it and I've got my own personal feelings as to why it surfaced as it had. But they are, as I said, my own personal feelings.

THE COURT: Well, to be short about it, you feel that nothing you did represents unbecoming or conduct unbecoming a teaching staff member.

THE WITNESS: How I dealt with it, no, your Honor, I did not.

THE COURT: Okay. That's all, thank you sir.

MR. KLEINBAUM: Well, can I ask a follow-up question to that, your Honor?

THE COURT: What question do you want to put?

MR. KLEINBAUM: I want to ask Ray in retrospect in his judgment whether he felt -- he felt that it was appropriate to do what he did.

THE COURT: Do you understand that question?

THE WITNESS: I do.

THE COURT: Can you answer it?

THE WITNESS: Yes, I can.

THE COURT: Go ahead.

THE WITNESS: Looking back, if I had to do it all over again, I think I would have done things differently. I think there was poor judgment on my part without any question.

THE COURT: What things would you have done differently? Meet the bookie off the school grounds after school?

THE WITNESS: I wouldn't have stopped down at Sleepy Hollow for the drink I met him, I think. I wouldn't have stopped there that day. [IIIT 93(15) to 95(16.] (Initial Decision, at p. 9)

One is left to wonder if, or in what manner, respondent's behavior can, or will, be altered if, indeed, the only regret he espouses is that he stopped on the day in question to have a drink at the Sleepy Hollow where he met his bookmaker. Moreover, one wonders from this line of questioning if respondent regrets more his having started gambling or having been caught at it.

To his merit, respondent has agreed to undergo the medical/psychological review recommended by the ALJ, as a measure of his "good faith." (Respondent's Exceptions, at p. 2) Moreover, the Commissioner is not without some recognition of the factors enuring on respondent's behalf, such as a record of service as a teaching staff member, athletic director and administrator during the past 36 years, unblemished before the events giving rise to the instant tenure charges. The Commissioner also notes his age and distinguished military and community service.

Yet, all of these demonstrations of positive attributes offered as mitigation in assessing the penalty to be imposed, in and of themselves, stand as a rebuke to respondent's behavior. At a time and place in our national development where there is virtual universal agreement that a need exists for our educational institutions to pay greater heed to imbuing in our student population a greater degree of respect for those values which remain the cornerstone of our national experience, the Commissioner is firmly convinced that those values which we wish our students to gain are not those consciously taught within the framework of a formal curriculum but, rather, are taught by way of example.

In this regard, the Commissioner, while having great compassion for the personal tragedy involved were he to dismiss respondent in this matter, nonetheless believes that Mr. Schnitzer, by reason of his total failure to recognize the serious breach of ethical and professional conduct evidenced by his undisputed meetings with and calls to a known gambler for purposes of furthering his gambling mania on and with school property has, of his own volition, placed in jeopardy his right to continue in service as a model to young people.

The Commissioner observes, however, that the remorseless attitude displayed by respondent could signal "deviation from normal*** 'mental' health" as stated in N.J.S.A. 18A:16-2. Thus, while respondent's continued service may have value and may be supportable, the Commissioner finds and determines that respondent may resume his duties only upon demonstration of his fitness to return unhampered by gambling.

Hence, the Commissioner directs that respondent undergo a psychiatric evaluation pursuant to the dictates of N.J.S.A. 18A:16-2. If such evaluation should support a conclusion that respondent suffers from deviation from normal mental health as a result of compulsive behavior, the Commissioner further directs him to undergo a course of treatment for such deviation such as Gamblers Anonymous for which he can demonstrate satisfactory completion. While the Commissioner recognizes that N.J.S.A. 18A:16-4 speaks to "proof of recovery", in matters of this sort recovery is not guaranteed. Thus, satisfactory completion of a rehabilitation program certified by the organizers of the program to the Board shall satisfy the prescriptions of the statute in this regard. Until such time as he can demonstrate to the Board's satisfaction "proof of recovery," in this manner, respondent shall not be restored to his tenured status. Further, it shall be the option of the Board, pursuant to N.J.S.A. 18A:16-4, to determine whether respondent shall be permitted to use his accumulated sick time,

pursuant to the aforesaid statute, should he enter such program. Should the Board permit respondent to use his accumulated sick days during any period of rehabilitation, the 20% salary reduction directed by the ALJ and affirmed herein by the Commissioner shall be deducted from his sick leave pay. Alternatively, should the Board exercise its option to deny sick leave pay during rehabilitation, then such penalty shall be imposed upon his restoration, when and if forthcoming.

If the psychiatric examination, on the other hand, reveals no deviation from normal mental health, the Commissioner directs the matter be returned to him for further determination as to penalty. Only under the circumstance that respondent is found not to be suffering from a deviation from normal mental health does the Commissioner retain jurisdiction of this case.

Moreover, the Commissioner directs such psychiatric examination be conducted immediately and that respondent shall remain on suspension during said examination. Choice of the psychiatrist to conduct said examination shall be selected in conformity with N.J.S.A. 18A:16-3.

Accordingly, the initial decision is affirmed as modified herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

November 15, 1989

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9106-88
AGENCY DKT. NO. 336-10/88

ROCCO J. MAGLIOZZI,
Petitioner,
v.
EAST BRUNSWICK TOWNSHIP BOARD OF EDUCATION,

Robert M. Schwartz, Esq., for petitioner

Martin R. Pachman, Esq., for respondent

Record Closed: October 13, 1989 Decided: October 13, 1989

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

PROCEDURAL HISTORY

Rocco Magliozzi (petitioner), a teaching staff member with a tenure status in the employ of the East Brunswick Board of Education (Board), challenges an action taken on July 14, 1988 by which the Board established his 12-month salary for 1988-89 at $57,500, an amount less than the amount of $61,250 it had already set as his salary on May 12, 1988. After the Commissioner of Education transferred the matter on December 15, 1988 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 to be conducted July 1, 1989 at the South River Municipal Court. Upon the opening of the record counsel to the parties represented that all material facts to their dispute regarding petitioner's 1988-89 12-month salary were agreed upon in a written, signed stipulation of fact. Consequently, the parties requested that the matter be decided on cross-motions for summary decision. The record at the time consisted of

the pleadings and the signed stipulation of fact. Counsel were granted sufficient time in which to file letter memoranda in support of their respective positions.

Subsequent to the filing of petitioner's letter memorandum on or about July 1, 1989, the Board filed its memorandum July 6, 1989 which recites asserted facts not part of the signed stipulation. In addition, the Board submitted documents beyond the scope of the filed stipulation. Petitioner filed a letter exception on July 13, 1989 to what he saw as the Board's attempt to rely upon asserted facts not agreed to in the stipulation and not otherwise established in the agreed upon record. The Board did not reply to petitioner's letter of July 13.

On or about September 5, 1989, the record was reopened when the slip opinion of the State Board of Education in *Markot v. East Brunswick Bd. of Ed.*, State Board Dkt. No. 26-88 (August 2, 1989) was received by this judge. The opinion, which addresses the establishment of a teacher's salary "***as the result of clerical error*** (Slip Opinion, at p.1), was brought to the attention of counsel on September 1989, for comment. The Board's written comments were received October 2, 1989. No comments were received from petitioner. The record closed October 13, 1989 and the matter was readied for disposition.

Findings are reached in this initial decision that the Board established petitioner's salary on May 12, 1988 for the following 1988-89 12-month school year at $61,250; that the 1988-89 12-month school year commenced July 1, 1988; and, that on July 14, 1988 the Board acted to establish petitioner's salary at $57,500 for the very same 1988-89 12-month school year which had already commenced 14 days earlier on July 1, 1988. The conclusion is reached in this initial decision that the Board's action on July 14, 1988 constitutes a reduction in petitioner's salary contrary to his lawful claim to the higher salary and in violation of his rights under the Tenure Employees' Hearing Law, *N.J.S.A.* 18A:6-10 *et seq*.

FACTS

The written Stipulation of Fact, signed by counsel of record with the approval of their respective clients, sets forth the following agreed upon facts:

1. Petitioner, Rocco J. Magliozzi, is a tenured teaching staff member in the Respondent East Brunswick School District.

2. Petitioner's employment history is as follows:

[Petitioner's following employment history was stipulated at hearing and written on the Stipulation of Fact by this judge with counsels' approval.]

Tenured supervisor, having served as supervisor and department chairperson.

3. Currently, Petitioner serves as a Department Chairperson.

4. On or about May 12, 1988, the Respondent, East Brunswick Board of Education, approved by way of Resolution Petitioner's employment for the 1988-89 school at an annual salary of $61,250. (Attached hereto as Exhibit AA).

[Exhibit A is a written memorandum dated May 13, 1988 to petitioner from the superintendent which, while acknowledging petitioner enjoys a tenure status in the Board's employ, advises him the Board "approved" his employment for 1988-89, as of July 1, 1988 and at an annual salary of $61,250. Furthermore, petitioner was advised that that amount of salary was in accordance with the provisions of the salary guide.]

5. On or about May 23, 1988, Petitioner accepted appointment to the position of Department Chairperson at an annual salary of $61,250 for the school year commencing July 1, 1988. See Exhibit BB.

[Exhibit B shows petitioner's signature representing his acceptance of the salary announced to him as of July 1, 1988.]

6. On July 14, 1988, the Respondent East Brunswick Board of Education, approved a Resolution rescinding "the Resolution of May 12, 1988 approving a salary of $61,250 for the 1988-89 school year to Rocco Magliozzi; and . . . further resolved the Board approve of $57,500, effective July 1, 1988 through June 30, 1989.

7. On or about July 15, 1988, the Respondent, through its Assistant Superintendent for Personnel, corresponded with Petitioner, advising him of the action of July 14, 1988 and enclosed a contract for the 1988-89 school year, stating an annual salary of $57,500. See Exhibit CC.

> [Exhibit C is a letter dated July 15, 1988 to petitioner from the Assistant Superintendent for Personnel which advises as follows:
>
> On Thursday evening, July 14, 1988, the East Brunswick Board of Education approved the following:
>
> > 'It is recommended that the Board of Education rescind the resolution of May 12, 1988 approving a salary of $61,250 for the 1988-89 school year to Rocco Magliozzi; and be it further resolved that the Board approve a salary $57,500 effective July 1, 1988 through June 30, 1989. This action is in accordance with a settlement of litigation between Rocco J. Magliozzi and the Board of Education.'
>
> Attached you will find two copies of your adjusted contract, please sign one copy and return it to the Personnel Office. Thank you for your cooperation.]

6. Petitioner did not accept appointment at the annual salary of $57,500.

In addition to the foregoing written stipulated facts, the parties also stipulated the following facts on June 1, 1989:

1. The first pay day for board employees on a 12 month basis for 1988-89 was scheduled for July 15, 1988.
2. On June 11, 1988, petitioner had made arrangements with the board to be issued his first pay check July 5, 1988.
3. Petitioner did in fact receive his first pay check under the originally established salary of $61,250 on July 5, 1988.

This concludes a recitation of all facts stipulated by the parties at the hearing scheduled to be conducted June 1, 1989 and on which facts the parties agreed to submit the matter for summary disposition under the provisions of *N.J.A.C.* 1:1-12.5 which provides at (b) as follows:

> The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law***

In this case, on June 1, 1989 the parties knowingly entered a complete stipulation of all relevant facts necessary for each to seek judgment by way of summary decision as a matter of law on those facts stipulated.

ARGUMENTS OF THE PARTIES

Petitioner notes that as a department chairperson which position requires a supervisor's certificate he enjoys tenure as a supervisor in the Board's employ. As such, petitioner contends that the Tenure Employees' Hearing Law, *N.J.S.A.* 18A:6-10, prohibits the Board from reducing his salary through its action on July 14, 1988 by rescinding an earlier resolution adopted May 12, 1988 to fix his salary for the 12-month 1988-89 school year. Petitioner maintains that even if the Board could be seen to have earlier acted under a mistake of law when it set his 1988-89 salary on May 12, the Commissioner held in *Anson, et al v. Bridgeton Cty. Bd. of Ed.*, 1972 *S.L.D.* 638 that when a board establishes a teacher's salary it cannot at a later date reduce that amount because of an asserted previous error. Specifically, petitioner notes that the Commissioner's own words at p. 640, are as follows:

> If there had been a mistake in the placement of Petitioners on the salary guide, it was not of their making and they cannot, as teachers, under tenure be deprived of a right they had acquired by the action of the board in fixing their salaries.

Petitioner also relies upon *Stockton v. Trenton Cty. Bd. of Ed.*, 210 *N.J. Super.* 150 (App. Div. 1986) wherein the court held that a unilateral decision by the Trenton board to correct an error in the teacher's salary by reducing the teacher to a lower step on the guide after the teacher had undertaken performance of the contract for the school year in question violated the teacher's tenure rights under *N.J.S.A.* 18A:6-10 *et seq.*

Petitioner is correct when he complains that the Board in its filed letter memorandum sets forth asserted facts and documents not otherwise stipulated nor established as true in an adversarial proceeding here. As examples, the Board asserts that in 1985-86 it withheld petitioner's salary increment; that petitioner appealed that withholding to the Commissioner; that eventually that case was settled; and, then the Board recites what it purports to be certain of the settlement terms. Next, the Board asserts as fact not otherwise agreed to nor established in this record a purported history of the manner and method of petitioner's salary establishment in 1986-87 and 1987-88, along with its recitation of certain provisions of the Agreement between it and the East Brunswick Education Association.

Nevertheless, the Board finally does state in its letter memorandum the following argument found to be relevant on this record agreed to by the parties June 1, 1989:

> As a result of a clerical error relating to the confusion surrounding the original settlement *** when the Board of Education, on May 12, 1988, approved all salaries for administrative staff for the 1988-89 school year, that resolution placed Mr. Magliozzi at $61,250 (the salary for Supervisor) instead of $57,500 (his 1987-88 salary). Thereafter, on June 11, 1988, Mr. Magliozzi requested of the East Brunswick Board of Education Payroll Department that his first pay check for the 1988-89 school year, which would have been available on July 15, be made available to him on July 5, since he would be going on vacation commencing July 6 *** In early July, the clerical error concerning Mr. Magliozzi's rate of pay was discovered and was corrected by board action on July 14, 1988***

The Board then proceeds to acknowledge that *Stiles v. Ringwood Bd. of Ed.*, 74 *S.L.D.* 1170, *Galop v. Hanover Bd. of Ed.*, 75 *S.L.D.* 358, *Honaker v. Hillsdale Bd. of Ed.*, 1980 *S.L.D.* 898, and, *Massa v. Kearny Bd. of Ed.*, 80 *S.L.D.* 972 aff'd St. Bd., 81 S.L.D. 1465, holds that a small board which commits a salary error subsequently discovered after the school year begins for which the salary error was made may "freeze" the employee on guide until such time that the affected teacher's experience and academic training would warrant that erroneously established salary. The Board contends that its attempt to correct petitioner's asserted erroneously established salary for 1988-89 does not constitute a withholding of an increment under *Conti and Cutler v. Montgomery Bd. of Ed.*, St. Bd. of Ed. (July 2, 1986).

CONCLUSIONS OF LAW

This case must be decided only on the facts voluntarily and knowingly stipulated by the parties on June 1, 1989 and as recited completely above. The Board's attempt to argue its case on facts and documents not otherwise stipulated nor established in an adversarial proceeding before me is rejected and such asserted facts and documents shall not be considered.

It is clear that this case revolves around what the Board now considers to be a clerical error. If in fact a clerical error was made by the Board May 12, 1988 when it set petitioner's salary for 1988-89 at $61,250, the error was not of petitioner's making. In fact, there is no evidence whatsoever before me to show petitioner did anything to mislead the Board in any way, shape or form. Rather, the Board is presumed to have had all relevant information before it on May 12, 1988 when it determined to establish petitioner's salary for 1988-89 at $61,250.

That petitioner requested on June 11, 1988 to receive his first pay check for 1988-89 on July 5 because he was going on vacation does not suggest any conduct

on his part to take a higher salary to which he otherwise knew he was not entitled. Rather, it is reasonable to believe an employee who is going on vacation would ask of his employer to receive a paycheck prior to the time the vacation commences. As noted by petitioner in his letter memorandum, the Commissioner and the State Board of Education have already ruled that a board which establishes a teacher's salary cannot at a later date reduce that established salary because of some clerical error. *N.J.S.A.* 18A:6-10 specifically provides in part as follows:

> No person shall be dismissed or reduced in compensation,
>
> (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state
>
> ***
>
> Except for inefficiency, incapacity, unbecoming conduct, or other just cause, and only after a hearing held pursuant to this subarticle, by the commissioner, or by a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such a person***

When the Board acted on July 14, 1988 to rescind its earlier resolution of May 12, 1988 by which it set petitioner's salary at $61,250 in favor of setting his salary at $57,500, such an action constituted a reduction in compensation to petitioner. The Board did not certify tenure charges against petitioner to the Commissioner for determination and, obviously, a tenure hearing was not conducted. The Board is without authority to reduced tenure employee's salary during the period of time for which it had already established that person's salary. In this case, that is what the Board seeks to do. The Board set petitioner's salary for 1988-89 on May 12, 1988. The employment term for which that salary was set commenced July 1, 1988. The Board sought to reduce petitioner's salary on July 14, 1988 during the term of the 1988-89 school year to a level lower than the amount it had already established on May 14, 1988.

I have reviewed the position taken by the Board regarding the application of the recent State Board of Education decision, Markot v. East Brunswick Board of Ed., supra., to this matter. In my view, the Markot case is distinguishable. The State Board seems to have relied in Markot upon the fact that the salary dispute there had already been taken through the negotiated grievance procedure which resulted in the denial of Markot's grievance. No such procedure was entered in this case according to the stipulated facts. Consequently, I **CONCLUDE** that the Markot decision is not on point here.

Accordingly, I **CONCLUDE** that the action of the East Brunswick Board of Education on July 14,1988 by which it seeks to reduce petitioner's salary to $57,500 cannot stand. Therefore, the Board is **ORDERED** to establish petitioner's salary for 1988-89 at the level of $61,250 and to tender to petitioner the difference between $61,250 he should have received for 1988-89 compared to the amount in salary he did in fact receive during that time.

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

I hereby **FILE** this initial decision with **SAUL COOPERMAN** for consideration.

October 13, 1989
Date

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

October 16, 1989
Date

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 19 1989
Date

Gladys Rogers
OFFICE OF ADMINISTRATIVE LAW

jz

ROCCO J. MAGLIOZZI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that, based upon the stipulation of facts agreed to by the parties in their joint request for Summary Decision of this matter, "the action of the East Brunswick Board of Education on July 14, 1988 by which it seeks to reduce petitioner's salary to $57,500 cannot stand." (Initial Decision, ante) Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law and directs the Board herein to establish petitioner's salary for 1988-89 at the level of $61,250 and to remit to petitioner the difference between $61,250 he should have received for 1988-89 compared to the salary he did in fact receive during that time. In so directing, the Commissioner adopts the reasoning embodied in the initial decision as his own.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

November 16, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
DECISIONS ON MOTIONS and
ORDER DENYING CONSOLIDATION/
PREDOMINANT INTEREST
OAL DKT. NO. EDU 3305-89
AGENCY DKT. NO. 58-3/89

BARBARA A. TODISH,

Petitioner,

v.

JANE NEWMAN, AMY SARNOFF,
and

THE DIVISION OF TEACHER CERTIFICATION,
N. J. STATE DEPARTMENT OF EDUCATION,

Respondents.

Barbara A. Todish, petitioner, pro se

Robin T. McMahon, Esq., for respondent Sarnoff
(Associate Counsel for Newark Board of Education)

David Earle Powers, Deputy Attorney General, for respondents Newman and N. J. State Department of Education
(Peter N. Perretti, Attorney General of New Jersey, attorney)

Record Closed: September 26, 1989 Decided: October 5, 1989

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

Barbara A. Todish, a candidate for certification through the Alternate Route Certification Program who was dismissed from her teaching position by the Newark Board of Education, filed a Petition of Appeal contesting a notice of ineligibility from Jane Newman, coordinator of the Provisional Teacher Program, Office of Teacher Preparation and Certification, N. J. State Department of Education (State), to continue participation in the alternate route instructional training program at the Newark Regional Training Center.

The State seeks dismissal of the Petition, asserting its action was required under the Provisional Teacher Program (PTP) due to the petitioner's status of unemployment.

The matter was transmitted to the Office of Administrative Law as a contested case on May 3, 1989 by the Commissioner of Education pursuant to N.J.S.A. 52:14F-1 et seq. with the expressed limitation that the hearing process be limited solely and exclusively to the issue of petitioner's eligibility to continue participation in the alternate route instructional training program. It is also noted that the transmittal indicated that the Commissioner of Education dismissed a Petition of Appeal (AGY DKT NO. 33-2/89) filed by Ms. Todish contesting her termination by the Newark Board of Education on March 27, 1989, which was affirmed by the State Board of Education on June 6, 1989.

A telephonic prehearing conference was held on July 27, 1989 at which the sole issue framed was and is as follows:

> **IS PETITIONER, SEEKING ALTERNATE ROUTE CERTIFICATION, ELIGIBLE TO CONTINUE PARTICIPATION IN THE TRAINING PROGRAM UNDER THE PROVISIONAL TEACHER PROGRAM AFTER HER DISMISSAL AS A TEACHING STAFF MEMBER BY THE NEWARK BOARD OF EDUCATION, WHICH CREATED A STATUS OF UNEMPLOYMENT?**

The Prehearing Order entered on July 27, 1989 by the undersigned incorporated the following stipulation of facts which are adopted herein as **FINDINGS OF FACT:**

1. Barbara A. Todish was dismissed as a teaching staff member by the Newark Board of Education, effective February 20, 1989.

2. Barbara A. Todish has been unemployed as a teaching staff member since February 20, 1989.

The Prehearing Order also incorporated an agreement by the parties to proceed to summary disposition, and further that the burden of proof rests with petitioner. A briefing schedule was established, and after extensions provided due to procedural difficulties, the record closed on September 26, 1989 with the filing of a reply brief by petitioner.

It is noted that neither party requested the Order to be amended to correct errors pursuant to N.J.A.C. 1:1-13.2(b).

It is also noted that petitioner Todish advised the undersigned and DAG Powers in her initial brief that she filed a complaint against the Newark Teachers Union for an unfair labor practice due to the Union's refusal to provide legal representation. Said complaint is now before the Public Employee Relations Commission (PERC) and petitioner Todish seeks a consolidation of these matters and a determination of predominant interest.

It is further noted that associate counsel Robin T. McMahon for the Newark Board of Education advised the undersigned in a letter under date of September 26, 1989 (with copies to Todish and Powers) that a motion on behalf of respondent Sarnoff "to dismiss this matter or for summary judgment in her favor" was filed with the Commissioner of Education on May 2, 1989. She seeks dismissal of Sarnoff as a co-respondent because of the failure of petitioner to oppose Sarnoff's motion as required by

N.J.A.C. 1:1-12.2(c). Alternately, Sarnoff seeks to join Newman and the State seeking dismissal of the instant petition through summary disposition.

The matters of the Todish motion for consolidation and predominant interest, Sarnoff's motion for dismissal as a co-respondent, and summary disposition of the substantive issue herein shall now be addressed separately.

CONSOLIDATION AND PREDOMINANT INTEREST

Pursuant to N.J.A.C. 1:1-17.1 and 1:1-17.3 consolidation involves common questions of fact or law between identical parties. Pursuant to N.J.A.C. 1:1-17.6(a), a predominant interest determination is made only when consolidation is to be ordered.

The instant matter involves the State, an employee of the State, and an employee of the Newark Board of Education. The issue is exclusively involved with the eligibility of petitioner Todish to continue participation in the alternate route instructional training program.

The matter pending before PERC is between Todish and the Newark Teachers Union and involves an unfair practice allegation due to the latter's failure to provide legal representation for Todish.

I FIND the absence of identical parties and no nexus of common questions of fact or law. **I CONCLUDE** that petitioner's motion shall be and is hereby **DENIED. IT IS SO ORDERED.**

Pursuant to N.J.A.C. 1:1-17.7, this Order shall be forwarded to PERC and the Commissioner of Education for review.

THE SARNOFF MOTION

Amy Sarnoff is employed by the Newark Board of Education (Board) and assigned to the Certification Unit of the Board's Division of Human Resource Services. Her duties include coordinating various aspects of the Provisional Teacher Program (PTP) on behalf of the Board.

Sarnoff informed the State that Todish was terminated by the Board, effective February 20, 1989. Jane Newman, Coordinator of the PTP for the State advised Sarnoff in a letter under date of March 6, 1989 of the ineligibility of Todish to continue participation in the alternate route instructional training program "after she completes Phase II." Sarnoff then so advised Todish in a letter under date of March 9, 1989 as requested by Newman. See, C-1 and C-2.

Notwithstanding that a review of the record fails to reveal any opposition to this motion filed by Todish pursuant to N.J.A.C. 1:1-12.2(c), I **FIND** that Sarnoff merely performed a required ministerial duty in advising the State of the unemployment status of Todish, and further **FIND** the substantive issue in the instant matter to be solely the determination by the State related to the ineligibility of Todish to further participate in the PTP.

I **CONCLUDE** therefore that the Sarnoff motion is **GRANTED. IT IS ORDERED** that Amy Sarnoff shall be and is hereby **DISMISSED** as a co-respondent.

THE SUBSTANTIVE ISSUE

The scenario of events leading to the filing of a Petition of Appeal by Barbara Todish is undisputed.

A statement of eligibility under date of January 7, 1988 was issued to Todish by the State which qualified her to seek employment in a public school as an elementary school teacher. See, C-3. Todish succeeded in securing a position to teach in the Newark

public schools effective April 25, 1988 and was issued a provisional teaching certificate on that date. See, C-4 and C-9.

Todish was noticed under date of January 20, 1989 of the termination of her employment with the Newark Board of Education effective February 20, 1989. See, C-5. Todish filed an appeal with the Commissioner of Education to contest her termination, which was dismissed under date of March 27, 1989. See, C-6. Todish filed an appeal with the State Board of Education, which affirmed the Commissioner's decision on July 6, 1989. See, C-7.

Todish was noticed under date of April 6, 1989 in a letter from the State that she is "no longer legally entitled to attend and complete instruction" in the PTP. See, C-8.

The above scenario is adopted herein as **FINDINGS OF FACT.**

The Todish arguments incorporated in her briefs incorporate her experiences as a teacher in Newark and her inability to secure legal representation. The issue of the termination of her services as a teaching staff member in the Newark public schools has been litigated before the Commissioner and State Board. The undersigned is precluded from providing a de novo hearing on that issue as a matter of law in the absence of a remand from the Appellate Division of the New Jersey Superior Court. The determination of the Newark Teachers Union to deny legal representation to Todish is before PERC and is not a matter cognizable by either the Commissioner or the undersigned under school laws pursuant to N.J.S.A. 18A:6-9. The exclusive issue to be adjudicated herein is whether Todish is eligible to continue participation in the alternate route instructional training program under the PTP. This issue is ripe for summary decision in the absence of disputed material facts as a matter of law. Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954).

A review of the provisional teaching certificate issued to Todish reveals it was issued in June 1988; expired July 1988; was renewed July 11, 1988; and expired July 1, 1989. See, C-9. Todish stipulated she became unemployed as the result of her termination by the Newark Board as of February 20, 1989 and has been unemployed since.

The provisional certificate issued to Todish incorporates the following contingency:

> This certificate is valid contingent upon the holder's participation in a State-approved provisional teacher program, including but not limited to attendance for purposes of receiving formal instruction at a training center operated by the New Jersey Department of Education or by a State-approved school district.

The regulatory scheme related to provisional certificates is codified in N.J.A.C. 6:11-4.2, which states at (b)3:

> To be eligible for the provisional certificate in instructional fields the applicant shall:
> . . .
> 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 program;
> . . .

The requirements for provisional certification for State-approved alternate training programs are codified at N.J.A.C. 6:11-5.3, and incorporates the employment requirement at (a)3.

I **FIND** that:

1. State-approved alternative training programs are designed to provide opportunities for applicants, who cannot meet requirements for a standard teacher certificate, to secure same through a process of training and supervision upon admission to the Provisional Teacher Program (PTP).

2. Admission to the PTP is contingent upon receipt of a statement of eligibility; employment in a State-approved school district approved by the Commissioner upon recommendation of the Board of Examiners to offer a certification training program; and possession of a valid provisional teaching certificate.

3. Barbara A. Todish is not employed in a State-approved school district as indicated above; and does not possess a valid provisional teaching certificate.

4. Barbara A. Todish is not eligible to continue participation in the alternate route training program.

I **CONCLUDE**, therefore, that the motion for summary decision is **GRANTED** to respondents and **DENIED** to petitioner Todish as a matter of law. The Petition of Appeal shall be and is hereby **DISMISSED. IT IS SO ORDERED.**

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

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

5 October 1989
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

October 12, 1989
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

OCT 17 1989
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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BARBARA A. TODISH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JANE NEWMAN AND THE DIVISION OF TEACHER CERTIFICATION, NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner pursuant to N.J.A.C. 1:1-18.4.

Petitioner raises the following objections to the initial decision: Judge Young failed to consider that petitioner was treated in a discriminatory fashion given that "at least one substitute not under board contract was permitted (even encouraged) to attend the formal instruction component of the 'Provisional Teachers Program.'" (Petitioner's Exception No. 1) Judge Young erred in characterizing former Respondent Sarnoff's role in the contested matter as ministerial, rather than instigating and dismissing her as a co-respondent on that basis. (Exception No. 2) The State has failed to consider the dangerous precedent it is setting in prohibiting non-employed teachers from completing the formal component of provisional training; in a situation where a state-operated school district (specifically Jersey City) is returned to local control, provisional teachers may be fired en masse as a political "statement," thus depriving them of the right to complete their training through no fault of their own and making them reluctant to re-enter the provisional program in another district. (Exception No. 3) Petitioner further asserts she began to be maligned and misevaluated, and was eventually fired, as a result of "whistleblowing" activities, which are protected under law. (Final Exception, no number) In conclusion, petitioner asks the Commissioner to consider both the mitigating circumstances surrounding her own dismissal and the needs of future provisional teachers, and to accordingly permit participants in the provisional program, who are terminated by the employing district, to complete and be credited with their formal training component notwithstanding the absence of concurrent practical experience.

Upon review, the Commissioner finds that, on the whole, petitioner's exceptions ultimately pertain either to her actual dismissal by the Newark Board of Education or to the wisdom of existing regulations. Neither matter is at issue in the present proceeding. As noted in the initial decision, ante, petitioner's dismissal has already been adjudicated and is outside the purview of further administrative consideration absent remand from the court. The second matter is precluded by the nature of petitioner's

challenge as expressed--with petitioner's agreement--in the prehearing order, where the issue is clearly the application of regulations to petitioner rather than the validity of the regulations themselves. (Id., at pp. 2-3) Even if petitioner's contention that an exception to the policy of terminating provisional teachers from classroom training participation upon the termination of their employment in a district were true, such action would have been a violation of policy and cannot serve as a justification for a further violation. Consequently, petitioner's exceptions do not dissuade the Commissioner from full concurrence with the initial decision of the ALJ for the reasons stated therein. The Commissioner further notes that his concurrence is not only based on clear regulatory language, but also on a firm commitment to the philosophy underlying that language: in the provisional teacher program practical experience and formal instruction are inextricably intertwined, and the absence of one component renders the other null and void for purposes of meaningful teacher training.

Accordingly, the initial decision of the Office of Administrative Law is adopted as the final decision in this matter, and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

November 27, 1989

Pending State Board

KENNETH TRIMMER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION AND BOARD OF EDUCATION OF CALDWELL-WEST CALDWELL, ESSEX COUNTY, ET AL.	:	DECISION
RESPONDENTS.	:	

For the Petitioner, Joseph A. Fortuanato, Esq.

For the Respondent NJSIAA, Hannoch Weisman
(Michael J. Herbert, Esq., of Counsel)

For the Respondent Board, McCarter & English
(Steven B. Hoskins, Esq., of Counsel)

This matter was opened before the Commissioner on April 9, 1989 by way of a Petition of Appeal from Kenneth Trimmer, a junior varsity basketball coach at the Caldwell-West Caldwell Public Schools, seeking a directive from the Commissioner of Education that petitioner be provided a due process hearing before the New Jersey State Interscholastic Athletic Association (NJSIAA) regarding a two game suspension imposed upon him by that organization for alleged "flagrant or violent misconduct - verbal" pursuant to Rule 2, Specific Sport Regulations, Note 4 of the Amendments to Bylaws and Rules and Regulations of the NJSIAA. Further, petitioner seeks enjoinment of the enforcement of the Rules, Regulations and Bylaws of the NJSIAA which deny hearings or appeals of decisions of game officials. Petitioner also seeks compensatory and punitive damages, as well as attorney fees and costs.

Final decision in this matter has been delayed due to an inadvertent transmittal to OAL. OAL was requested to return the papers in May 1989; however, the papers were not received from that agency until August 1989 at which time briefing schedules were established with first briefs being received on October 27, 1989.

Factual Background

The uncontroverted facts are as follows:

1. Petitioner is currently a junior varsity basketball coach at Caldwell High School in Caldwell, New Jersey.

2. During a game with Pequannock High School, petitioner was ejected from the game by an official, Patrick J. Gavin, for "flagrant or violent misconduct - verbal."

3. Respondent Gavin filed a "'Disqualification Report' pursuant to Rule 2, Specific Sport Regulations, Note 4, of the Amendments to By-laws and Rules and Regulations of the [NJSIAA], effective September 1, 1988." (Petition, at p. 2)

4. NJSIAA therefore imposed a two game suspension on petitioner pursuant to the aforementioned rules.

5. A copy of the disqualification report was sent to Respondent Frank Gambelli, Principal of Caldwell High School, with a letter from Respondent Robert Kanaby, Executive Director of the NJSIAA, requesting a reply concerning other administrative action taken by Caldwell High School against petitioner.

6. Principal Gambelli responded to Mr. Kanaby that the Caldwell-West Caldwell Board of Education "had suffered very negative consequences..." as a result of petitioner's alleged failure to exhibit "good sportsmanship." (Id., at p. 3)

7. NJSIAA Bylaws specifically exempt protests or appeals based upon an official's judgment. (Article VII, Section 1)

Petitioner's Argument

Initially, petitioner alleges a violation of his right of due process under the 14th Amendment of the United States Constitution and the New Jersey State Constitution. (Article 1, Section 1) Such deprivation, argues petitioner arises from Rule 2, Specific Sport Regulations, which permit disqualification of a coach for flagrant or violent verbal or physical misconduct," without the right of appeal of the official's judgment. (Letter Brief, at p. 4) Petitioner contends that "'***where a persons good name, reputation, honor or integrity is at stake *** notice and an opportunity to be heard are essential.' Wisconsin v. Constineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L. Ed. 2d 515." (Id., at p. 5)

Petitioner further cites Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed 548 (1972) for the proposition that he deserves an opportunity "***to refute the charge*** and clear his name." (Id.)

Respondent NJSIAA's Argument

NJSIAA argues that petitioner's two game disqualification in this matter arose as a result of his ejection from a game based upon the judgment of a game referee. Respondent NJSIAA contends as such that the Commissioner lacks jurisdiction to deal with judgment calls of a referee. In support of such position, NJSIAA cites the initial decision of the ALJ in Pagliughi v. NJSIAA, OAL DKT. NO. EDU 1028-85.

Further, NJSIAA argues that the petitioner in this matter should be dismissed because there exists no factual dispute which would warrant a hearing. Petitioner contends NJSIAA does not dispute that he entered the floor three times and, thus, received three technical fouls resulting in exclusion from the game.

Additionally, NJSIAA contends that petitioner in this matter had constructive notice of the applicable rules relating to bench conduct of coaches. In support of its position, NJSIAA cites Palmer v. Merluzzi, 689 F. Supp. 400 (D.N.J. 1988) for the proposition that no hearing is required in order to impose a disciplinary action when the question of guilt is not at issue. Under such circumstances "'any injury to his reputation is attributable to his conduct and not to a deficiency of process.' (868 F.2d at 90, footnote 5)." (Letter Brief, at p. 9)

If judgment calls of referees were to become subject to review by the Commissioner through a hearing process the NJSIAA contends that "***the havoc that such an intrusion would bring *** would be monumental." (Id.)

Under such circumstances, the NJSIAA and the Commissioner would be inundated by such appeals resulting ultimately in potential reversals of game and contest results.

The NJSIAA further argues that this matter should be dismissed even if the Commissioner enjoyed jurisdiction because the rule which is the subject of controversy in this matter was promulgated to achieve an important public purpose, namely, the assurance of good sportsmanship and the health and safety of students and the public. The NJSIAA points out that the rule at issue was promulgated because of growing examples of violence and improper conduct. The NJSIAA further points out that the Commissioner has in the past upheld the Association's unsportsmanlike conduct rule in In the Matter of the Unsportsmanlike Conduct Allegations Arising out of the Cranford-Ridge Field Hockey Game on October 9, 1987, decided by the Commissioner July 28, 1988.

In response to the claim of constitutional deprivation raised by petitioner in this matter, the NJSIAA holds that participation in interscholastic sports either as a player or coach, unlike attendance at school, is not a right of constitutional dimensions. As a privilege, denial of athletic participation raises no issue of liberty or property interest. In this case the NJSIAA points out that petitioner lost no tenure rights and suffered no monetary loss as a result of the minor discipline of disqualification for two games imposed in this matter. Citing Goss v. Lopez, 419 U.S. 565, the NJSIAA contends that if a short term suspension from the constitutionally protected right to attend school without a formal due process proceeding is permissible, then the relatively minor penalty of disqualification for two games does not rise to the level of requiring a due process hearing.

Respondent NJSIAA's position is best summarized by the following excerpt from its brief:

> The two-game disqualification rule should not be disturbed by the Commissioner because it serves a genuine public purpose. It prevents the imposition of harsher and more severe penalties for improper conduct not arising to the level of physical assault or extreme instances of unsportsmanlike conduct. It is an essential

measure which has been soundly endorsed by the overwhelming majority of member schools, so as to allow game officials to officiate at contests without enduring obstreperous and potentially volatile behavior by coaches and students alike. In a word, the rule is a "first line of defense" against unsportsmanlike and unsafe behavior. When the petitioner and all other interscholastic coaches voluntarily assumed their positions, they did so with full knowledge of the two-game disqualification rule. The petitioner had notice that he would receive a technical penalty or foul if he violated the "bench rule" and that if there were three such violations, he would be ejected and would thereafter be disqualified for two games. The notice was clear and precise and the penalty directly related to carrying out the laudable public purposes of assuring safe and properly conducted high school sports activity. As such, this very necessary measure is both fair and effective and should not be disturbed by the Commissioner of Education.

(Letter Brief, at p. 13)

Arguments of Respondent Caldwell-West Caldwell Board of Education and Frank Gambelli

The Caldwell-West Caldwell Board of Education and Frank Gambelli (Board) take no position with respect to the dispute between petitioner and the NJSIAA. Instead, it seeks dismissal of the petition on the basis of untimely filing pursuant to N.J.A.C. 6:24-1.2(b). Further, the Board contends that even if timely filed, the petition fails to state a claim against the Board in that the sole claim "***is that as a result of a letter written by principal Frank Gambelli in response to an inquiry by the NJSIAA, petitioner allegedly suffered emotional distress." (Board's Brief, at p.2)

Finally, the Board argues for dismissal on the grounds that the Commissioner is without authority to award punitive damages or attorney fees.

Commissioner's Findings

The Commissioner has carefully considered the arguments of the parties as set forth in their respective briefs. Based upon the aforesaid review, the Commissioner affirms the appropriateness of the rules which are controverted in this matter, namely, Rule 2, Specific Sport Regulations, Note 4, which calls for a two game disqualification to be imposed upon coaches or athletes guilty of unsportsmanlike and flagrant verbal or physical conduct and Article VII, Section 1 of the NJSIAA Bylaws, which bars appeals or protests based upon an official's judgment. In reading the aforesaid conclusion, the Commissioner agrees with the contention of Respondent NJSIAA that he will not substitute his judgment for that of the game referee who interpreted petitioner's conduct as constituting a violation of Rule 2, Specific Sports Regulations, Note 4, namely flagrant verbal conduct. In so doing, however, the Commissioner notes that the argument raised by Respondent NJSIAA

relative to the Commissioner's automatic lack of jurisdiction is misplaced. The Commissioner notes that the case cited by NJSIAA namely Pagliughi, supra, in support of the position limiting the Commissioner's jurisdiction relies upon the initial decision of the ALJ which was modified by the Commissioner in his decision rendered on April 15, 1985. While the Commissioner in the aforesaid decision did emphasize that he would not substitute his judgment for that of the referee, there were certain factual allegations raised in the petition of appeal which required a determination on his part. The instant case, however, raises no such factual issues.

The Commissioner further finds that the aforesaid rules by denying the right to appeal a referee's decision do not interfere with any property or liberty interest of petitioner substantially for the reasons set forth by Respondent NJSIAA. The Commissioner likewise finds, in agreement with the arguments raised by the Respondent Board and Principal Gambelli that petitioner has requested relief in the way of damages and legal fees which the Commissioner is without jurisdiction to grant. As to the untimeliness issue raised by the Board, the Commissioner finds the record sparse as to exactly when petitioner received notification of his two game disqualification. Insofar as the Commissioner has considered the merits of the matter, he therefore finds no necessity to reach a conclusion as to timeliness.

Consequently, in light of the above findings the Petition of Appeal in this matter is dismissed.

COMMISSIONER OF EDUCATION

November 27, 1989

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
185 WASHINGTON ST.
NEWARK, NEW JERSEY 07102
(201) 648-6186

INITIAL DECISION
OAL DKT. NO. EDU 6445-88
AGENCY DKT. NO. 222-7/88

EDWARD SAHAGIAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP
OF NORTH BERGEN,
HUDSON COUNTY,
Respondent.
JOSEPH ROVELLI,
Intervenor.

Richard A. Friedman, Esq., for petitioner
(Zazzali, Zazzali, Fagella & Nowak, attorneys)

Joseph J. Ryglicki, Esq., for respondent

Philip Feintuch, Esq., for intervenor
(Feintuch & Porwich, attorneys)

Record Closed: July 21, 1989 Decided: October 18, 1989

BEFORE OLIVER B. QUINN, ALJ:

STATEMENT OF CASE

Petitioner, a former districtwide supervisor of mathematics in respondent board's school district, alleges that respondent's failure to appoint him to the position of

chairperson/supervisor of the math department at the high school, while appointing a nontenured staff member to that position, violated his tenure and seniority rights and his constitutional rights. Respondent Board of Education contends that the positions of districtwide math supervisor and high school math department chairperson/supervisor are significantly different, and that petitioner's tenure does not extend to the high school position he seeks.

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) on August 31, 1988, 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.

Prehearing orders were issued on January 20, 1989 and June 1, 1989. Telephone conference were held in February and March 1989. On February 1989, an Order granting intervenor status to Joseph Rovelli was issued. On June 12, 1989, a joint stipulation of facts was filed and a briefing schedule was set. The record closed on July 21, 1989.

FACTS

I FIND the facts as stipulated by the parties. A joint stipulation of facts is annexed to this decision.

LEGAL DISCUSSION

School district employees holding appropriate certificates acquire tenure after employment in the school district for three consecutive calendar years or three consecutive academic years together with employment at the beginning of the next succeeding academic year. N.J.S.A. 18A:28-5. Tenured employees who are transferred or promoted acquire tenure in the new position after holding it for two consecutive calendar years or for two academic years together with employment in the new position at the

beginning of the next succeeding academic year. N.J.S.A. 18A:28-6. When one acquires tenure, that tenure applies to all positions for which the tenured employee's certificate qualifies him. Capodilupo vs. West Orange Township Board of Education 218 N.J. Super. 510 (App. Div. 1987).

In the instant matter, petitioner holds both an instructional certificate and an administrative and supervisory certificate. From 1964 through 1981, a period of 17 years, he was employed by respondent school district as a high school mathematics teacher. From September 1981 through August 1985, a period of 4 consecutive academic years, petitioner served as the district's supervisor of mathematics. He was riffed (reduction-in-force) from that position on August 31, 1985. Based on the time frames in which petitioner held the above-mentioned positions, I **CONCLUDE** that he was tenured both as a high school mathematics teacher and as a districtwide mathematics supervisor. N.J.S.A. 18A:28-5 and N.J.S.A. 18A:28-6.

Petitioner argues that his tenure as a districtwide math supervisor includes the position of high school math department chairperson/supervisor. To prevail, he must establish that the responsibilities of the position he seeks are "substantially identical to the position to which he earned tenure." Santarsiero v. Parsippany-Troy Hills Bd of Ed., OAL DKT. EDU 5667-83 (March 30, 1984) adopted, Comm'r of Ed. of Education, (May 14, 1984), adopted, State Bd. of Ed. (Oct. 5, 1984). The parties herein have stipulated the specific responsibilities of both positions. Based on the stipulation of facts, I **CONCLUDE** that the positions were substantially identical. In fact, the districtwide supervisor of math position had greater responsibilities than the high school math department chairperson/supervisor position which petitioner now seeks. Therefore, I **CONCLUDE** that petitioner's tenure extends to the high school math department chairperson/supervisor position.

Intervenor Rovelli, who was appointed to the high school math department chairperson/supervisor position by respondent on May 18, 1988, had previously served as an elementary school principal within respondent district from September 1979 through June

30, 1980, a period of one academic year. After being riffed from that position in June, 1980, he returned to his prior position as a 7th and 8th grade mathematics teacher. That principalship was the only administrative or supervisory position the intervenor held within the district prior to his appointment as high school math department chairperson/supervisor on July 1, 1988.[1] Thus, intervenor was not tenured in an administrative or supervisory position at the time of his appointment to the disputed position because his previous supervisory experience did not fulfill the stastutorily required time period. N.J.S.A. 18A:28-6.

In Capodilupo, the Appellate Division clearly held that ". . . a tenured teacher seeking reinstatement within the endorsements on his or her certificates is entitled to preference in a riff as against a nontenured applicant with the same certification." In the instant matter, I CONCLUDE that petitioner is entitled to a preference for appointment to the position of department chairperson/supervisor of the high school math department as against the intervenor, who was nontenured. Even if the intervenor held the required certification, which is not clear from the record, the parties stipulated that he did not serve the amount of time prescribed in N.J.S.A. 18A:28-6. He held a prior administrative position for only one academic year. Further, that administrative position was as an elementary school principal. Thus, even if the intervenor was tenured as an elementary school principal under an administrative and supervisory certification, that tenure would not extend to the position of high school mathematics department chairman because the positions are not "substantially identical." Because intervenor is not tenured, it is unnecessary to reach petitioner's seniority arguments.

---

[1] From May 1988 until his appointment on July 1, 1988, intervenor Rovelli voluntarily filled the position in an acting capacity.

ORDER

It is **ORDERED** that petitioner be appointed to the position of department chairperson/supervisor of the high school mathematics department, retroactive to July 1, 1988.

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

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

October 18, 1989
DATE

OLIVER B. QUINN, ALJ

10/24/89
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

OCT 25 1989
DATE

Mailed To Parties:

OFFICE OF ADMINISTRATIVE LAW

vcb/e

EDWARD SAHAGIAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
AND	:	
JOSEPH ROVELLI,	:	
INTERVENOR.	:	

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

Petitioner first notes what he believes is an oversight in the ALJ's decision. He observes that the initial decision fails to provide for appropriate compensation such as back pay and other emoluments denied him, including seniority and pension credit for the period during which he was improperly retained in a teaching position rather than as Department Chairperson/Supervisor of the high school mathematics department. He asks to have such emoluments included in the Commissioner's decision, retroactive to July 1, 1988.

Second, while conceding that it is probably unnecessary to reach the seniority issue in the instant matter, petitioner submits that if the Commissioner reaches such inquiry, he also has a seniority claim to the position of high school department chairperson/supervisor. In making such point, petitioner relies upon Point II of his Brief which he incorporates into his exceptions.

Petitioner urges the Commissioner to adopt the ALJ's decision with the above-stated modifications.

Upon a careful and independent review of the instant matter the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that "petitioner is entitled to a preference for appointment to the position of department chairperson/supervisor of the high school math department as against the intervenor, who was nontenured." (Initial Decision, ante) (Footnote omitted) As noted by the ALJ, because petitioner was tenured as a supervisor, having served under that endorsement with his administrator's certificate, he is entitled, by virtue of his tenured status as a supervisor, to any other supervisory position in

the district over a nontenured individual. Capodilupo v. West Orange Township Board of Education, 218 N.J. Super. 510 (App. Div. 1987) Further, because the intervenor in this matter is not tenured in a supervisory position, the Commissioner need not reach petitioner's seniority arguments.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law ordering petitioner be appointed to the position of department chairperson/supervisor of the high school mathematics department in respondent's district, retroactive to July 1, 1988, with all benefits and emoluments of employment due and owing retroactive to July 1, 1988.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

November 28, 1989

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

PARTIAL SUMMARY DECISION
OAL DKT. NO. EDU 6574-88
AGENCY DKT. NO. 254-8/88

MAURICE KAPROW,
Petitioner,
v.
BOARD OF EDUCATION
OF THE TOWNSHIP OF
BERKELEY, OCEAN COUNTY,
Respondent.

John J. Ross, Esq., for petitioner (Lomurro, Davidson, Eastman & Munoz, attorneys)
Milton H. Gelzer, Esq., for respondent (Gelzer, Kelaher, Shea, Novy & Carr, attorneys)
Thomas E. Monahan, Esq., for intervenor Robert Ciliento, Superintendent of Schools (Gilmore & Monahan, attorneys)
Gregory P. McGuckin, Esq., for intervenor Shelia C. McGuckin, District Supervisor of Elementary Education (Dasti & Murphy, attorneys)
Wayne J. Oppito, Esq., for intervenor Paul Polito, Principal
Stephen B. Hunter, Esq., for intervenors Elementary Teaching Staff Members (Klausner, Hunter & Oxfeld, attorneys)

Record Closed: August 31, 1989 Decided: October 12, 1989

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE

Petitioner seeks an order from the Commissioner of Education (Commissioner) directing the Board of Education of Berkeley Township (Board) to reinstate petitioner to an employment position or positions to which he claims tenure and/or

seniority as a consequence of a Reduction in Force (RIF), pursuant to N.J.S.A. 18A:28-9 et seq. Petitioner also alleges that the RIF affecting him was improper and not for the purposes articulated by the Board. The Board denies petitioner's claims and allegations and requests that his petition be dismissed.

PROCEDURAL ASPECTS

Petitioner filed his Petition of Appeal with the Commissioner on August 1, 1988. The Board was granted an extension until September 2, 1988 in which to file its Answer. The matter was thereafter transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. Subsequently, on February 9, 1989, the OAL was in receipt of petitioner's Amended Petition.

Due to petitioner's claims of tenure and/or seniority in positions now held by elementary teaching staff members, a principal, the District Supervisor of Elementary Education and the Superintendent of Schools, permission was granted by this tribunal for these various parties to intervene in these proceedings, pursuant to N.J.A.C. 1:1-2.1. Petitioner advanced an application for partial summary decision on the issues of his tenure and seniority status and reemployment with the Board. The Board and each of the Intervenors replied to petitioner's motion by way of briefs. The Board cross-moved for summary disposition on its behalf to which petitioner responded. The briefing record closed on August 31, 1989.

STATEMENT OF FACTS

Commencing on October 5, 1976, petitioner was employed by the Board in the position of Assistant Superintendent in Charge of Curriculum. Prior to his employment with the Board, petitioner acquired State of New Jersey Certification as School Administrator.

During the summer months of 1977 through 1980, petitioner served as principal of the Board's summer school.

On October 5, 1979, petitioner achieved tenure in the position of Assistant Superintendent in Charge of Curriculum. On or about February 10, 1980 through

September 1, 1980, petitioner served as acting Superintendent of Schools. On February 5, 1980, the Board changed petitioner's job title to Assistant Superintendent.

Effective June 30, 1981, petitioner's employment with the Board was terminated as a consequence of a RIF. The Board, by motion, second and roll call vote on May 5, 1981, abolished the position of Assistant Superintendent effective June 30, 1981 for reasons of economy and petitioner's duties and responsibilities were distributed among other Board employees.

On September 9, 1986, the Board appointed Robert Ciliento Assistance Superintendent of Administrative Services, a position he held until July 1, 1987, at which time the Board appointed him Superintendent of Schools. Petitioner was not advised by the Board or its agents prior to or immediately after the Board's action to appoint Ciliento to the Position of Assistant Superintendent.

On July 1, 1987, the Board appointed Shelia McGuckin to the position of District Supervisor of Elementary Education Services.

On or before February 23, 1988, petitioner requested information concerning administrative appointments made by the Board subsequent to petitioner's RIF and termination. The Board Secretary, by note dated February 23, 1988, advised petitioner of the Board's appointments of Ciliento and McGuckin to their respective positions and the effective dates of the appointments. On February 28, 1988, petitioner wrote to the Board Secretary advising her that he had tenure in the position as Assistant Superintendent which was reinstated by the Board. Petitioner also asserted that the duties which he performed as the Assistant Superintendent were now performed under the position of District Supervisor of Elementary Education and requested that the Board reinstate him, retroactively, to his tenured position with full back pay and benefits.

The Board did not respondent to petitioner's letter dated February 28, 1988. By way of letter dated April 25, 1988, petitioner again asserted his claim for the reestablished position of Assistant Superintendent and/or the position as District Supervisor of Elementary Education. On June 14, 1988, the Board's then legal counsel responded to petitioner's letter asserting, among other things, that

petitioner's former position was abolished for reasons of economy and that his then duties were distributed among other Board employees, which distribution of duties continued to the present time. The Board attorney continued to aver that the position of Assistant Superintendent for Administrative Services held by Ciliento beginning in September 1986, were substantially different from the duties performed by petitioner when petitioner was in the Board's employ. The Board attorney continued to advise petitioner that there was no equivalent position to petitioner's former position, hence, there was no basis for petitioner's reinstatement with the Board, especially retroactively with full back pay and benefits.

By way of his Petition of Appeal, Amended Petition of Appeal and Certification, petitioner lays claim to the positions of Superintendent of Schools, District Supervisor of Elementary Education, elementary principal, and various elementary teaching staff positions by virtue of his certifications and that all of the divers positions were filled by non-tenured employees subsequent to his RIF.

DISCUSSION OF THE LAW AND CONCLUSIONS

The herein record meets the criteria set forth by our Supreme Court in Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954) in applying the Summary Judgment rule with regard to petitioner's tenure status and seniority rights in his position as Assistant Superintendent in Charge of Curriculum and his claims of entitlement to employment with the Board as a teacher, principal and/or superintendent.

The facts in this matter clearly demonstrate that petitioner acquired a tenure status with the Board as an Assistant Superintendent in Charge of Curriculum. Tenure is a legislative status conferred by N.J.S.A. 18A:28-5, when the precise conditions of N.J.S.A. 18A:28-3 and N.J.S.A. 18A:28-4 are met. N.J.S.A. 18A:28-3 provides that tenure shall not be acquired unless the teaching staff member is a citizen of the United States. N.J.S.A. 28-4 provides that no teaching staff member may acquire tenure unless and until that person holds an appropriate certificate for the position, issued by the State Board of Examiners and which is in full force and effect. N.J.S.A. 18A:28-5 provides that all teaching staff members shall be under tenure during good behavior and efficiency if and when the person meets one of three conditions pursuant to subsections (a) and (b) of the statute. Tenure is

acquired by teaching staff members, "including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents,...", among others. Petitioner, who commenced his employment with the Board in or about October 5, 1976, in the position of Assistant Superintendent in Charge of Curriculum, acquired a tenure status in that position on or about October 5, 1979. N.J.S.A. 18A:28-5 (b). The facts further demonstrate that on or about February 5, 1980, the Board changed the title of petitioner's position to that of Assistant Superintendent and petitioner served 16 months in that capacity, until June 30, 1981 when the Board abolished the position and subjected petitioner to a RIF. N.J.S.A. 18A: 28-9.

Petitioner's employment rights, as a tenured Assistant Superintendent in Charge of Curriculum, are protected by N.J.S.A. 18A:28-12, which provides that any teaching staff member dismissed as a result of a RIF,

> ...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...

The record demonstrates that no other person had seniority over petitioner in the position of Assistant Superintendent in Charge of Curriculum. Seniority is a notion which only applies to certain rights of tenured individuals and then only has meaning when a RIF is exercised. Howley v. Ewing Bd. of Ed., 6 N.J.A.R. 509, 521 (1982).

With reference to N.J.S.A. 18A:28-12 and the reemployment rights of tenured individuals, petitioner relies, in part, on two Appellate Division of Superior Court decisions in support of his contention that nontenured personnel cannot be retained or hired over a tenured individual with respect to a position for which the tenured individual is qualified. Capodilupo v. West Orange Twp. Bd. of Ed., 218 N.J. Super. 510 (App. Div. 1987); Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987).

In Capodilupo, the Appellate Court affirmed the reinstatement of a RIFFED teaching staff member who obtained tenure as a physical education instructor who taught at the secondary level to a position occupied by a nontenured teacher of

physical education at the elementary level. The tenured secondary physical education teacher had preference to the position over the nontenured elementary physical education teacher despite the fact that the secondary teacher had no teaching experience at the elementary level. Both teaching staff members had endorsements on their teaching certificate to permit them to teach physical education in grades kindergarten through grade 12.

In Bednar, the Appellate bench reversed the decision of the State Board of Education and reinstated a tenured elementary art teacher to a full-time position at the secondary level after the elementary art teacher had been reduced to a part-time position while the board of education maintained a nontenured art teacher in its secondary school.

Petitioner contends that these two cases, and school law decision which follow, stand for the proposition that tenured individuals are entitled to positions held by nontenured individuals within the area of the tenured individual's certification. Petitioner cites Commissioner's decisions in Mirandi v. Bd. of Ed. of West Orange, 1988 SLD ___ (September 15, 1988); Schaeffer v. Bd. of Ed. of the Boro of South Orange-Maplewood, (no date); Burke v. Bd. of Ed. of Boro of Union Beach, 1988 SLD ___ (June 29, 1988). Petitioner asserts that in these decisions, the Commissioner found Capodilupo and Bednar directly on point in that nontenured individuals cannot be employed over a properly qualified, certified tenured teaching staff member. In applying the principles of law enunciated in these cases, petitioner avers that the Board had and has the obligation to reemploy petitioner to the highest position held by a nontenured individual within the area of petitioner's certification.

Petitioner asserts that while employed by the Board as its Assistant Superintendent in Charge of Curriculum, he held certificates issued by the Board of Examiners as School Administrator supervisor, principal and elementary school teacher. Consequently, he claims, that at the time of the RIF, the Board was obligated to employ him in any of the positions for which he was qualified at the time of the RIF. Such positions would include, but not be limited to the principal positions held by nontenured Paul Polito and the assistant principal held by nontenured Shelia McGuckin at the time of the RIF in 1981. In addition, petitioner asserts, the Board had an obligation to offer employment to petitioner when it

subsequently appointed nontenured Robert Ciliento to the position of Supervisor of Special Education Services in 1984 and nontenured Arlene Lippincott to the position of Supervisor of Special Education Services on August 1, 1987. Other positions to which petitioner claims title include: nontenured Shelia McGuckin to the position of District Supervisor of Elementary Education Services in August 1987; nontenured Robert Ciliento to the position of Assistant Superintendent of Administrative Services on July 16, 1986; and the appointment of nontenured individuals Robert Ciliento and Roseann Cialella as Superintendents of Schools during the years 1987 and 1984 respectively and the retention of Edward Leppert as Superintendent in 1981.

Petitioner complains that at no point did the Board notify him or offer him employment in any of the above position to which, he claims, he was entitled by virtue of his tenure rights. More particularly, petitioner asserts that the virtual identity between the duties he performed as Assistant Superintendent and the duties of the position of Assistant Superintendent for Administrative Services and District Supervisor of Elementary Education Services support his claim for either of those two positions. Petitioner contends that the Board denies any similarly or overlap and termed his tenure status as "meaningless" for the purposes of his claim to those positions.

Petitioner observes that tenure rights cannot be averted or diminished by assigning different job titles to positions subsuming duties performed by a tenured employee under a different job title. Boeshore v. Bd. of Ed. of Twp. of North Bergen, 1975 SLD 805 (1974). Petitioner asserts that while he served in the capacity as Assistant Superintendent he performed virtually all of the duties delineated in the various Board policies describing the positions of Assistant Superintendent of Administrative Services and District Supervisor of Elementary Education Services, which positions were filled by the Board with nontenured individuals and not offered to petitioner.

In any event, petitioner argues, a factual finding of similarity of duties is not necessary to arrive at the conclusion that petitioner was and is entitled to one or more of the positions to which he lays claim. Petitioner asserts that he is a tenured teaching staff member who is qualified for each of the positions discussed

hereinbefore as well as other teaching staff positions including, but not limited to, elementary school teacher.

Petitioner misconstrues the court opinions in Capodilupo and Bednar as they apply to tenure and seniority. In Capodilupo the tension was between two individuals certificated and assigned to the position of physical education teacher. The physical education teacher with a tenure status was RIFFED by the board of education in favor of retention of a nontenured physical education teacher. The Appellate Division of Superior Court held and determined that the tenured physical education teacher had priority over the nontenured physical education teacher, and, thus, reinstated the tenured individual to the position. Similarly, in Bednar, the issue in dispute involved the position of teacher of art where the board of education retained a nontenured art teacher in a full-time position over a tenured art teacher. A careful reading of both Capodilupo and Bednar demonstrates that the antecedent to tenure and, thus, seniority is "position."

Chapter 28 of Title 18A is entitled TENURE. Under N.J.S.A. 18A:28-1, "position;" is defined "As used in this chapter the word 'position' includes any office, position or employment." Pursuant to N.J.S.A. 18A:28-5, Tenure of teaching staff members, the positions to which petitioner acquired a tenure status is specifically identified; i.e., "assistant superintendents." The record shows that petitioner acquired a tenure status in the position of Assistant Superintendent in Charge of Curriculum and nothing more. He was employed the requisite period in the position, pursuant to N.J.S.A. 18A:28-5 (b). Upon the Board's abolishment of the position of Assistant Superintendent in Charge of Curriculum and petitioner's RIF, petitioner's seniority in the position was fixed. Tenure attaches to position and the position specified in N.J.S.A. 18A:28-5 is "assistant superintendents," that is the only tenure status held by petitioner herein.

During the course of petitioner's employ with the Board from October 5, 1979 to June 30, 1981, he served only in the position of assistant superintendent. Petitioner did not serve in the position as "teacher," therefore, he acquired no tenure rights to the position. Having acquired no tenure status in the position of teacher, no seniority rights attached as a consequence of petitioner's RIF.

Petitioner asserts that his service as the Board's summer school principal and its Acting Superintendent entitles him to either of those two positions over nontenured individuals so appointed prior to or subsequent to his RIF. Petitioner acquired no tenure status in either of the two positions. In order for him to have acquired such a status, petitioner must have met the precise conditions under N.J.S.A. 18A:28-6, Tenure upon transfer or promotion, which provides that:

> Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:
>
> (a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose; or
> (b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or
> (c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years;
> provided that the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion.

There is nothing in the record to demonstrate that petitioner met any of the statutory conditions above when he served as the Board's principal of its summer school or when he served as the Board's Acting Superintendent for the period February 10, 1980 through September 1, 1980. Having acquired no tenure status in either position of principal or Superintendent, no seniority rights attach to petitioner for either position.

Technically, petitioner did not acquire tenure in the general category as "assistant superintendent," pursuant to N.J.S.A. 18A:28-6, having served in that

changed titled position for only 16 months, from February 5, 1980 to June 30, 1981. The time served in that position, however, accrued to his position of Assistant Superintendent in Charge of Curriculum.

CONCLUSIONS

I **CONCLUDE**, therefore, that the herein record demonstrates that petitioner acquired a tenure status and thus seniority of four years and eight months in the position of Assistant Superintendent in Charge of Curriculum upon the Board's abolishion of the position and petitioner's reduction in employment force.

I **CONCLUDE** that petitioner acquired no tenure status in the positions of "teacher," or "principal," and/or "superintendent," pursuant to N.J.S.A. 18A:28-5 and 6 and, therefore, acquired no seniority rights to any of those specific positions.

I therefore, **CONCLUDE** that in accordance with the law, petitioner has no entitlement to any of the positions in the Board's employ categorized as "teacher," "principal," and/or "superintendent."

ORDER

Accordingly, it is hereby **ORDERED** that partial summary decision be entered against petitioner Maurice S. Kaprow and in favor of Intervenors Robert Ciliento, superintendent; Paul Polito, principal and thirty-one elementary teaching staff members.

It is further **ORDERED** that petitioner's claims of entitlement to the positions of superintendent, principal and/or elementary teacher be and are hereby **DISMISSED WITH PREJUDICE.**

REASONS FOR THE RIF

Petitioner alleges, among other things, that the Board's action to abolish the position of Assistant Superintendent and to subject petitioner to a RIF was taken for reasons other than those expressed by the Board. Petitioner has advanced no facts nor proofs that the Board's action to abolish the position of Assistant

Superintendent was taken for any reason other than for reasons of economy. The facts herein demonstrate that subsequent to the RIF, the duties of the Assistant Superintendent were assigned to the remaining five administrators in the Board's employ. Petitioner has failed to produce any facts to the contrary.

Accordingly, absent a finding that the Board acted in violation of the statutes or in an arbitrary, capricious manner, or was motivated by bad faith, I **CONCLUDE** that the Board's action is entitled to a presumption of correctness and shall stand. Quinlan v. Bd. of Ed. of North Bergen Twp., 73 N.J. Super. 40 (App. Div. 1962).

Accordingly, petitioner's allegation in the Second Count of the Amended Petition that the Board's action to abolish the position of Assistant Superintendent was taken for reasons other than for reasons of economy, are without merit and are hereby **DISMISSED.**

MATTERS NOT RIPE FOR SUMMARY DISPOSITION

Petitioner claims retroactive entitlement to the position of Assistant Superintendent Administrative Services and/or the position of Director of Elementary Education Services by virtue of identity of duties and responsibilities performed. Petitioner contends that the duties performed by these two positions are essentially identical to those duties he was responsible for when employed by the Board in the capacity of Assistant Superintendent.

The Board and Shelia McGuckin counter to assert that the duties, responsibilities and job specifications for the position of District Supervisor of Elementary Education are not co-extensive with the duties, responsibilities and job specifications for the position previously held by petitioner. The Board also asserts that those duties, responsibilities and job specifications for the position of Assistant Superintendent in Charge of Administrative Services are substantially different from and at variance with those duties, responsibilities and job specifications for the position previously held by petitioner.

Where an issue of material fact exists, summary adjudication is held to be improper. Judson. In the event there is the slightest doubt as to a material issue of fact, a motion for summary judgment must be denied. Garley v. Waddington, 177

N.J. Super. 173 (App. Div. 1981). The Board and Intervenor McGuckin raise material issues of fact which, unresolved, forecloses the granting of summary disposition and requires that the matter proceed to a hearing. Judson.

Accordingly, petitioner's motion for summary disposition together with the Board's cross-motion for same are hereby **DENIED**, except to the extent that partial summary disposition has been entered for Intervenors Ciliento, Polito and 31 teaching staff members.

Accordingly, this matter is to proceed to hearing on the issue of petitioner's claim to the positions of Assistant Superintendent in Charge of Administrative Services and/or District Supervisor of Elementary Education Services as expeditiously as possible.

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.

12 October 1989
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

OCT 17 1989
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 18 1989
DATE

Jayne LaVerdiere/KS
OFFICE OF ADMINISTRATIVE LAW

dho

MAURICE KAPROW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the partial summary decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed, as were replies by the Board and Intervenors Ciliento, Polito and Elementary Teaching Staff Members. A collective response to these replies was filed by petitioner, but as N.J.A.C. 1:1-18.4 makes no provision for such submissions, this document has not been considered by the Commissioner in rendering his decision. Also barred from consideration were untimely exceptions filed by Intervenor McGuckin and a reply thereto filed by petitioner.

In his exceptions, petitioner first contends that the ALJ erred in dismissing his claim to the position of superintendent, principal and elementary school teacher, and in not granting entitlement by summary judgment to the position(s) of Assistant Superintendent and/or Supervisor of Elementary Education Services. In essence, he repeats the arguments of his prior brief and asserts that Bednar, supra, Capodilupo, supra, and subsequent cases stand for the proposition that riffed teaching staff members are, by virtue of their tenure rights, entitled to bump nontenured staff from any position for which they hold appropriate certification, regardless of whether tenure was obtained in the position to which entitlement is claimed or whether they have actually served under the certification required for the position. Accordingly, petitioner is entitled outright to any position requiring a school administrator, principal/supervisor or elementary teacher certificate. (Exception I)

Petitioner next excepts to the ALJ's finding that petitioner attained tenure only in the position of Assistant Superintendent for Curriculum. Initially, he notes his service as Summer School Principal for four consecutive years supports his claim to a principal's position, citing case law to the effect that tenure accrues to part-time employees as well as full-time. He then argues for the proposition that "assistant superintendent" is a separately tenurable position under N.J.S.A. 18A:28-5, and that the same certificate was required for both Assistant Superintendent for Curriculum and Assistant Superintendent. Accordingly, petitioner's tenure accrued in the general position rather than only within the

subcategories established by the parameters of his specified duties during his service as Assistant Superintendent for Curriculum. (Exception II)

Petitioner then attacks the ALJ's denial of summary judgment with respect to the positions of Assistant Superintendent for Curriculum and Supervisor of Elementary Education Services on the grounds that respondent and intervenors failed to properly interpose a genuine issue of material fact such as would necessitate an evidentiary hearing. Specifically, petitioner asserts that the only acceptable basis for requiring a hearing would have been allegations of contrary fact by parties having specific personal knowledge rather than merely information and belief, which is all that the statements of respondent and intervenors evince. (Exception III)

Finally, petitioner objects to the ALJ's summary dismissal, for lack of evidences of petitioner's charges that his position was abolished for reasons other than economy. Petitioner contends that summary disposition of this matter was sought neither by petitioner nor the Board and intervenors, so that proffering of evidence was neither required nor appropriate during the stages of this case prior to the anticipated plenary hearing. Accordingly, the ALJ erred in making sua sponte summary disposition of an unripe matter. (Exception IV)

Respondent Board of Education replies by professing its agreement with the initial decision except insofar as it does not determine "with any degree of adequacy" the application of N.J.A.C. 6:24-1.2 (90-day rule) to the present proceedings. The Board notes in particular that application of this rule bars petitioner's claim to the only positions where he was found by the ALJ to have possible entitlement.

Intervenor Ciliento distinguishes the cases relied on by petitioner, noting that neither they nor any other precedent entitles a teaching staff member to lay claim to a position other than the one in which tenure was actually acquired; accordingly, petitioner is entitled to no more than an assistant superintendency falling within the scope of his certificate. Further, petitioner's claim to the superintendency is time-barred both from the broader ground of the initial cause of action (the 1981 RIF) and the narrower one of petitioner's recent awareness of Ciliento's appointment as superintendent. Finally, even if one accepted petitioner's claims arguendo, he would have no superior entitlement to the superintendency over Ciliento, who was similarly tenured as an assistant superintendent at the time of his appointment to the higher position.

Intervenor Polito likewise raises matters of general entitlement and timeliness. He, too, asserts that petitioner's own arguments would preclude a claim to Polito's position, since Polito was both tenured as a teaching staff member and certified as a principal at the time of his appointment, with many more years of service in the district than petitioner.

Intervenor Elementary School Teachers' reply to petitioner's exceptions references the arguments of previous summary judgment papers, which arguments were incorporated by the ALJ and need not be repeated here.

Upon a careful review of this matter, the Commissioner concurs with much of the ALJ's decision, but finds the need for elaboration and modification as noted below.

The Commissioner fully endorses the ALJ's view that tenure attaches to the position in which the requisite service was rendered, so that petitioner's claims to the superintendency and various elementary teaching positions can be disposed of without further elaboration. Petitioner has never served, nor does he purport to have served, as an elementary school teacher. While he did serve as Acting Superintendent for several months in 1980, service in an acting capacity does not normally establish a tenure right, N.J.S.A. 18A:16-1.1, and even in those instances where it does (e.g., Pastore v. Jersey City Bd. of Ed., Hudson County, Commissioner decision June 22, 1984), the requisite amount of time must be served to acquire tenure. The Commissioner rejects as unfounded in law and contrary to sound educational policy the notion that tenure attaches to every endorsement on every certificate held by a teaching staff member regardless of the position in which he or she acquired tenure. The cases relied upon by petitioner to make such a claim did not reach this conclusion, nor does the Commissioner see any indication that the court intended its holdings to be broader than demanded by the fact patterns at hand. Simply put, the cases relied upon by petitioner stand for no more than the proposition that, within the scope of the position in which tenure was acquired, seniority regulations cannot be invoked to retain a nontenured teacher at the expense of a tenured one. These cases did not deal with, nor did the court speak to, holders of more than one type of certificate; neither was the court concerned with claims to positions in more than one of the separate and distinct categories enumerated in N.J.S.A. 18A:28-5. Because the interpretation advanced by petitioner would wreak havoc on the stability of the school environment, absent a clear statement of legislative intent or an explicit judicial holding to the contrary, the Commissioner continues in his conviction that tenure rights are not transferable to a position in which one has not achieved tenure.

The Commissioner does differ from the ALJ, however, in several matters. First, although he fully concurs with the ALJ's summary dismissal of petitioner's allegations regarding the abolition of his original position in June 1981, the Commissioner disagrees with the ALJ's reasoning (that insufficient evidence was presented to support such allegations) and, instead, orders dismissal of this charge for clear failure to meet the timeliness provisions of N.J.A.C. 6:24-1.2.

Second, the Commissioner disagrees with the ALJ that petitioner might have an entitlement to the position of District Supervisor of Elementary Education based on a possible identity of

duties with petitioner's former position. The position of supervisor is, by virtue of a distinct certificate pursuant to N.J.A.C. 6:11-10.4, a separately tenurable one in which petitioner has never served, so that petitioner would have no more right to Intervenor McGuckin's position than to the superintendency or an elementary teaching position. This claim should have been dismissed, and the Commissioner hereby dismisses it, as a matter of summary judgment.

Third, although the Commissioner concurs with the ALJ's summary dismissal of petitioner's claim to tenure as a principal (based on serving as Summer School Principal in four consecutive years), he does so for reasons beyond those set forth by the ALJ. It is unclear from the record whether the summer school principalship was merely an extension of petitioner's duties as Assistant Superintendent, which he performed under a twelve-month contract and for which he would not have had to invoke a separate certificate due to his possession of a higher certificate which subsumes the lower one (N.J.A.C. 6:11-10.7); or constituted a distinct appointment to a position separately tenurable under N.J.S.A. 18A:28-5 or N.J.S.A. 18A:28-6. In either case, however, petitioner would not have acquired separate tenure. In the first event, his service would have attached to his tenure as Assistant Superintendent, while in the second, he would not have served sufficiently long to acquire tenure under either N.J.S.A. 18A:28-5 (the equivalent of more than three academic years) or N.J.S.A. 18A:28-6 (the equivalent of more than two academic years).

Finally, while the ALJ is correct in concluding that petitioner acquired tenure as an assistant superintendent, he errs in specifying that petitioner acquired tenure only in the position of Assistant Superintendent for Curriculum. Tenure accrues in the positions enumerated in N.J.S.A. 18A:28-5, so that petitioner's tenure is not limited to curriculum positions, but would include any assistant superintendency within the scope of his certificate as set forth in N.J.A.C. 6:11-10.4 (a limitation that would preclude him from claiming a position as Assistant Superintendent for Business Affairs). Thus, petitioner is entitled as a matter of law to the Position of Assistant Superintendent of Administrative Services if that position, vacant since mid-1987 and purported to have been a one-time temporary appointment, is filled at any point subsequent to this decision.

Because the Commissioner finds that petitioner has no entitlement to any position other than an assistant superintendency within the scope of his certificate, and that respondent Board of Education is not presently utilizing such a position, he has not found it necessary to reach to the timeliness of petitioner's tenure claims. He does note, however, that the Board erred in not notifying petitioner of the availability of the position Assistant Superintendent of Administrative Services in September 1986, and directs that the Board henceforth be more conscientious in fulfillment of its obligations pursuant to N.J.S.A. 18A:28-12.

Accordingly, the partial summary decision of the ALJ is modified as stated herein, and the instant matter dismissed with prejudice. The Berkeley Township Board of Education is directed to reemploy petitioner, if he so chooses, in the first available assistant superintendency falling within the scope of his certificate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

November 29, 1989

Pending State Board

LEE J. GRANDE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

For the Petitioner, Selikoff & Cohen (Kenneth A. Sandler, Esq., of Counsel)

For the Respondent, Bruce Gorman, Esq.

This matter was opened before the Commissioner of Education by way of the filing of a Petition of Appeal by petitioner and by a Motion for Summary Judgment by the Board and by petitioner.

Petitioner seeks an order of the Commissioner directing the Board to provide to him and/or his representative access to his personnel file at a time mutually convenient to both parties and to allow the copying of any and all materials from that file. The Board opposes the request and seeks a summary decision denying same.

The following undisputed facts are derived from the record:

1. Petitioner was employed by the Board as a nontenured custodian from February 18, 1987 until August 30, 1988 at which time he was suspended from his duties;

2. Pursuant to a motion of the Board at a special meeting on September 7, 1988, petitioner was discharged from his employment with the Board;

3. Petitioner thereafter made several requests of the Board to review his personnel file which were denied.

4. Petitioner did not file a grievance under the provisions of the collective bargaining agreement with regard to the refusal of the Board to allow access to his personnel file.

Petitioner avers that the prior decision of the Commissioner in White v. Bd of Ed. of the Township of Galloway, 1977 S.L.D. 900, aff'd State Board 903, aff'd N.J. Superior Court, Appellate Division, 1978 S.L.D. 1048 controls the legal issue in this matter; therefore, judgment should be entered in his favor. He argues that in White the Commissioner ruled that Petitioner White had a right to review her entire personnel file in the presence of a person of her choosing and that the matter was one within the Commissioner's jurisdiction because it had emerged from an action taken by the board which resulted in an alleged deleterious effect upon another. Petitioner also points out that in White the Commissioner cited to Executive Order No. 11 (November 15, 1974), concluding that Ms. White was a "person in interest" and, thus, was entitled to inspect her personnel file and to authorize another person to assist her. See 1977 S.L.D. 902-903.

Petitioner herein contends that he too is entitled to review and/or copy any and all portions of his personnel file either alone or in the presence of a representative of his choosing and that claims of confidentiality cannot be asserted as he is the subject of the records at issue.

In support of its motion for summary judgment the Board has submitted a sworn affidavit of its Board Secretary attesting to the fact that during the summer of 1988 two female employees approached

him individually and complained about what was perceived to be erratic and threatening behavior by petition which caused fear for their well-being. Upon investigation, the Board Secretary concluded that the incidents were not isolated but represented a general course of conduct which could not be tolerated. He thus recommended termination of petitioner's employment.

The Board Secretary further avers in his affidavit that:

> ***
>
> 5. At no time did the Petitioner request a written statement of reasons pursuant to NJS 18A:27-3.2. Additionally, at no time did Petitioner request appearance before the Board of Education pursuant to NJAC 6:3-1.20.
>
> 6. The Board of Education is deeply concerned with regard to Petitioner's recent request to review his file. To date the Petitioner is unaware of the identity of the female personnel in question. Given that it is now too late for him to take any action with regard to ascertaining the reasons for his termination, and given that his non-tenured status would afford him no remedy with regard to his employment in any event, I must question his motive in seeking this information.
>
> 7. I would certainly hope that the Petitioner would have no interest in taking retaliation against the female employees in question. Nevertheless, given the circumstances surrounding his termination, the Board of Education has a great reluctance to disclose to Petitioner the documents which led up to his termination as those documents contain the identities of the female employees.
>
> 8. On behalf of the Board of Education of the City of Wildwood, I respectfully ask that the Commissioner balance the equities in this case. At this late date, there is little for Petitioner to gain from reviewing the documentation which led to his termination, and the potential harm to the female employees in question if he seeks retaliation is of considerable concern.
>
> (Affidavit, at pp. 2-3)

The Board argues in its Motion for Summary Judgment that petitioner's action is barred by the terms of the collective

bargaining agreement between the Board and the Wildwood Education Association which represents all custodians in its employ. Article III, A 2 of that agreement dictates that a grievance must be initiated in writing by the employee within 30 calendar days from the time the employee knows or should know of the grievance, yet petitioner has never filed a grievance in the matter. It avers that petitioner's correspondence requesting access to his personnel file was not submitted until three months after his termination and does not constitute a grievance.

As to this, the Board maintains that:

The grievance procedure itself is structured pursuant to the Public Employment Relations Act. Specifically, NJSA 34:13A-5.3 states:

> "Public employers shall negotiate written policies setting forth grievance and disciplinary review procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decision, including disciplinary determinations, affecting them, provided that such grievance and disciplinary review procedures shall be included in any agreement entered into between the public employer and the representative organization."

The New Jersey Supreme Court determined the meaning of that Statute in the matter of Township of West Windsor v. Public Employment Relations commission, 78 NJ 98 (1978). The Court held, 106

> "In effect, under any negotiated grievance procedure, the employees must retain the right to prosecute an appeal over the 'interpretation, application, or violation of policies, agreements and administrative decision affecting them.' We construe this enumeration to be a legislative attempt to establish a grievance 'definition' which would include everything that could

> [possibly] 'affect' public employees. See Post at 110. The statutory language chosen evinces a legislative intent to ensure that all negotiated grievance procedures would provide public employees with a forum for the presentation of their complaints to their public employers on all matters 'affecting them.' In N.J.S.A. 34:13A-5.3 the Legislature has seen fit to impose a definition of the matters as to which public employees must be able to present grievances and has thus standardized the scope of all negotiated grievances procedures."

> Therefore, the Supreme Court has held that any dispute between the parties, regardless of whether the matter falls within the four corners of the contract, is subject to the grievance procedure between the parties. Petitioner has failed to file a grievance herein within the thirty day period mandated by the contract, and accordingly he cannot now come before the Commissioner seeking redress.
>
> (Board's Brief, at pp. 3-4)

The Board also avers that petitioner is not entitled to review his personnel file under the facts of the case, urging that the appropriate approach to the issue at hand is a balancing test. (Id., at p. 5) In support of this it cites two New Jersey Supreme Court decisions, McClain v. College Hospital, 99 N.J. 346 (1985) and Loigman v. Kimmelman, 102 N.J. 98 (1986). In McClain the court stated:

> As the considerations justifying confidentiality become less relevant, a party asserting a need for the materials will have a lesser burden in showing justification. If the reasons for maintaining confidentiality do not apply at all in a given situation, or apply only to an insignificant degree, the party seeking disclosure should not be required to demonstrate a compelling need.
>
> (at 362)

It further stated in Loigman that:

> ***A court should balance, in each case, the individual's right to the information against the

> public interest in the confidentiality of the file.*** (at 104)

Given the above, the Board contends that the question becomes one of whether petitioner's right to see the materials with respect to the documentation received from certain female employees outweighs the need of the females involved to maintain their confidentiality. As to this the Board avers:

> Had the Petitioner sought to enforce his rights pursuant to NJS 18A:27-3.2 by requesting a statement of reasons for his termination, and had he further sought an appearance pursuant to NJAC 6:3-1.20, his need for this information might be deemed paramount. But what possible use does he have for this information nearly one full year subsequent to his termination?
>
> The obvious inference to be drawn is that the Petitioner may seek reprisals against those female employees who spoke against him. While there is no way to know what goes on in the Petitioner's mind, the Respondent is deeply concerned with that possibility. Respondent would respectfully submit that the welfare of the female personnel involved must now control. Petitioner is far beyond the point in time where he could take any action with regard to his employment. No possible good can come out of his ascertaining the identity of these ladies.
> (Board's Brief, at p. 6)

Upon review of the parties' legal arguments in this matter, the Commissioner grants summary judgment to petitioner based upon the following reasons.

First, it is emphasized that N.J.S.A. 18A:27-3.2 and N.J.A.C. 6:3-1.20 have no relevance or applicability to this matter. The right to a statement of reasons for termination and a hearing afforded by these legal provisions apply only to teaching staff members, not custodial staff. White, supra at 902

Second, this is a matter properly before the Commissioner as was determined in White, supra at 903. The Board has provided no

grounds to conclude that any provision of the collective bargaining agreement between the Wildwood Education Association, of which custodians are a part, addresses access to personnel records. The provision with respect to the definition of a grievance provided by the Board is for administrative staff, not custodial staff. Further, the Board has not disputed petitioner's copy of the relevant Education Association's contract provision limiting the scope of a grievance to allegations of "***violation, misinterpretation or inequitable application by the Board or any of its administrators of any terms of this Agreement." (emphasis supplied) (Petitioner's Reply Brief, at p. 15)

Third, the Commissioner finds White, supra, to be controlling in this matter. The two Supreme Court decisions cited by the Board are not deemed applicable to the facts herein. In McClain, supra, the plaintiff was seeking access to investigative reports of a licensing board's inquiry into a professional's acts. In Loigman, supra, plaintiff sought access to information with respect to disbursements made under certain confidential accounts of the county prosecutor.

In the instant matter, petitioner seeks access to his own personnel record. While it is clear the Board has a genuine concern for the confidentiality of the identities of the female employees whose complaints led to petitioner's termination, such concern does not alter the determinations of the Commissioner, State Board and the Appellate Court in White that an employee has the right to access his or her personnel file.

Accordingly, summary judgment is hereby granted to petitioner. The Board is to forthwith provide petitioner access to his personnel file. The Commissioner, however, does grant the Board the right to redact the names of those female employees whose safety it seeks to ensure. Should petitioner in this matter seek to challenge such redaction, he shall not be precluded from filing a new petition demonstrating compelling need for obtaining the names so redacted.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 7, 1989

DATE OF MAILING - DECEMBER 7, 1989

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4623-89
AGENCY DKT. NO. 179-6/89

BERNARD BAILLY DE SURCY,
Petitioner,
v.
BOARD OF EDUCATION OF LONG BRANCH, MONMOUTH COUNTY,
Respondent.

Lee Emmer, Esq., for the petitioner (Chamlin, Schottland, Rosen, Cavanagh & Uliano, attorneys)
J. Peter Sokol, Esq., for the respondent (McOmber & McOmber, attorneys)

Record Closed: October 17, 1989 Decided: November 3, 1989

BEFORE **AUGUST E. THOMAS**, ALJ:

Petitioner is a non-tenured teacher who asserts that he was terminated without notice in violation of law. He filed a Petition of Appeal with the Commissioner of Education who transferred the matter to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 and N.J.S.A. 52:14F-1 et seq. A hearing was conducted on September 25, 1989, in the West Long Branch Borough Municipal Court. Briefs were filed after the hearing, the last one received on October 17, 1989.

PROCEDURAL HISTORY

Petitioner was educated primarily in Paris, France. He speaks five languages (French, German, Latin, Spanish, English), and holds the equivalent of a United

States Baccalaureate Degree in Music. He has taught courses in United States universities and colleges up to the doctoral level (Exhibit C).

In the middle of the 1987-88 school year, a combination French/Latin teacher left the employ of the Board of Education (Board). The vacant position was advertised and posted. Petitioner, the only applicant for that position, was employed by the Board commencing December 16, 1987, for the remainder of the school year. He was reemployed by the Board for the 1988-89 school year; however, he was terminated on March 10, 1989 for his failure to acquire a certificate to teach in the public schools. Petitioner states that he was fully qualified for a provisional certificate when he was terminated, and asserts that the certificate was not issued because of the Board's failure to forward to the Office of Teacher Education and Certification, the required "Statement of Assurance to Teach" and a "Training and Supervision Contract." But for the inaction of the Board, he asserts that he would have received his teaching certificate.

UNCONTESTED FACTS

1. A French (3/5ths) and Latin 2/5ths) teacher left the employ of the Board of Education of the City of Long Branch in the middle of the '87-'88 school year.

2. As a result, the position was both advertised and posted.

3. Mr. de Surcy was the only applicant for that position.

4. Mr. de Surcy provided an application, a resume, results of the National Teachers Examination for French, a New York State evaluation dated September 1987, and an indication that the New Jersey Department of Education had received the results of the National Teachers Examination for French.

5. Mr. de Surcy began working in the above described position on December 16, 1987.

6. In June of 1988, with nothing having been forwarded concerning Mr. de Surcy's education in France, the Board's administration

contacted the New York State Department of Education on or about June 21, 1988, asking about Mr. de Surcy's New York status.

7. The New York State Department of Education responded on July 11, 1988, indicating that Mr. de Surcy would become eligible for a certification in French in New York upon the completion of a course.

8. After the '88-'89 school year began, Mr. de Surcy was contacted by the Board office on October 25, 1988, insisting that he pursue the alternate route to obtain his provisional certification.

9. On November 16, 1988, Mr. de Surcy was contacted by letter from the Board office, once again, insisting that he pursue the alternate route for provisional certification.

10. Having heard nothing from Mr. de Surcy, the Board office, specifically Mr. Archie Greenwood, called Mr. de Surcy into his office to a meeting which was ultimately held on December 6, 1988.

11. On December 6th (1988), Mr. Greenwood instructed Mr. de Surcy to contact a Mr. John Phillips at Thomas Edison College for an evaluation of his course offerings to determine if Mr. de Surcy qualified for the alternate route program.

12. Mr. Haynes, the principal of the High School where Mr. de Surcy taught, wrote a letter to Mr. de Surcy on January 31, 1989, asking for a clarification of Mr. de Surcy's status.

13. Mr. de Surcy did receive a statement of eligibility on or about December 21, 1988, for French, but not for Latin.

14. The Board of Education of the City of Long Branch passed a resolution terminating Mr. de Surcy's employment for failure to obtain the requisite certifications for the teaching of French and Latin. (J-1)

Thus, from the date of his initial employment, December 16, 1987, until his termination on March 10, 1989, fifteen months later, petitioner held no New Jersey teaching certificate.

The Board asserts that petitioner simply did not follow-up on his obligation to acquire the required certificate; and, despite the many warnings and proddings by its administrators petitioner failed to provide any certificate whatsoever.

Initially, it appeared that petitioner would become certified in New York State and he believed he would also be certified in New Jersey through reciprocity between the states. However, it became apparent that this process was not working or could not be utilized; therefore, petitioner was advised by letter from the personnel director on November 16, 1988, to pursue the alternate route for provisional certification. This letter outlined the emergency which existed because of the lack of certification and warned petitioner that he "must be certified" in his areas of assignment pursuant to N.J.A.C. 6:11-3.1 et seq. A meeting with petitioner was scheduled for November 22, 1989, but he did not attend. However, he did meet with the personnel director on December 6, 1988. Petitioner testified regarding that meeting, that the "business of the alternate route was not very clear (but) it was a possibility." Another letter by the high school principal was sent to petitioner concerning his certificate on January 31, 1989, warning that his next year's contract was in jeopardy because of his lack of certification. Petitioner did not recall seeing that letter (J-6).

The record shows that petitioner was issued , a Statement of Eligibility from the State Board of Examiners with an endorsement to teach French on December 21, 1988. Petitioner testified that he submitted a letter enclosing that statement to the personnel director. (P-4, P-5) However, the personnel director never received those documents and petitioner failed to produce them for the personnel director, the Board, or anyone else, even on the eve of the Board hearing which culminated in his termination. The documents were produced after the Board's action. The personnel director testified that had the Board received the statement of eligibility to teach, it would have forwarded the two required documents to the Office of Teacher Education and Certification. The record shows that from December 21, 1988 until the beginning of March 1989, petitioner did not speak to the personnel director abut the two required documents.

CONCLUSION

Petitioner argues that he was a "Teaching staff member" as set forth in N.J.S.A. 18A:1-1. And as such a teaching staff member he is entitled to all of the statutory protections afforded non-tenure teachers.

I cannot agree. In my judgment the statute which governs in this matter is "N.J.S.A. 18A:27-2. Employment without certificate prohibited".

> Any contract or engagement of any teaching staff member, shall cease and determine whenever the employing board of education shall ascertain by written notice received from the county or city superintendent of schools, or in any other manner, that such person is not, or has ceased to be, the holder of an appropriate certificate required by this title for such employment, notwithstanding that the term of such employment shall not then have expired.

Clearly, the Board is without authority to employ a person who does not hold a certificate, and in this case, petitioner had more than fifteen months to acquire a certificate and he did not. The statement of eligibility he finally produced, after his termination, applied to French only, so even it was inadequate as to his eligibility to be certified for Latin, a subject he was required to teach. Further, "the procuring of certification is the primary responsibility of a teacher." See: Syndor v. Englewood Bd. of Ed., 1976 S.L.D. 113, 117.

N.J.A.C. 6:11-3.1 states that "No teacher shall be entitled to any salary unless such teacher shall be the holder of an appropriate teacher's certificate (N.J.S.A. 18A:26-2)."

Petitioner's argument that he received no notice prior to his termination is without merit. Although petitioner received no notice to the effect that he would be terminated unless he produced a certificate, the record shows that petitioner received continuous notice, orally and in writing that he must possess a teaching certificate. See: (J-4-6). Finally, petitioner's employment without a certificate is prohibited. N.J.A.C. 6:11-3.2 states that

> Any contract or engagement between a board of education and a teacher shall cease and be of no effect whenever said board shall ascertain by notice in writing that said teacher is not in possession of a proper teacher's certificate. This rule shall apply even though the term of the contract may not have expired. (N.J.S.A. 18A:27-2).

Based on all of the above I **FIND AND CONCLUDE** that petitioner had more than adequate time to acquire his teaching certificate. Having missed that opportunity I **FIND** further that he had adequate notice that his job was in jeopardy, even though the statutes indicate that no notice is required under these circumstances.

Accordingly, there is no relief to which petitioner is entitled.

The Petition of Appeal is **DISMISSED** with prejudice.

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

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

3 November 89
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ, t/a

Agency Receipt:

November 6, 1989
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

Nov 13, 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

tp

BERNARD BAILLY DE SURCY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY, RESPONDENT.	:	DECISION

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

Petitioner's exceptions are essentially a reiteration of the arguments raised at hearing. He repeats the contention that his responsibilities for acquiring provisional certification through the alternate route were "independent" (Exceptions, at p. 2) from those of the Board to file the assurance to teach and the supervision contract. He adds that while it is true that primary responsibility for procuring appropriate certification belongs to the teacher,

> [t]his cannot be the standard under the particular set of facts in this case. The Petitioner could not have forced the Board to do what the law requires the Board to do. Clearly, the Petitioner was within his rights in believing the Board would act pursuant to the specific guidelines. (Id.)

Petitioner is seeking reversal of the initial decision.

By way of reply exceptions, the Board suggests that petitioner ignores the factual issue which the ALJ decided in regard to petitioner's bad faith allegation. The Board suggests that the ALJ found the Board's witnesses more credible than petitioner in connection with whether Mr. DeSurcy notified Board personnel about his receipt of the statement of eligibility which would have triggered the filing of the requisite documents by the Board with the Department of Education. The Board also claims in reply exceptions that petitioner was "generally lax in pursuing his certification and in communicating with the Board's administration." (Reply Exceptions, at p. 1)

Relying on its original brief and the arguments set forth in its reply exceptions, the Board requests that the findings of the initial decision be adopted by the Commissioner.

Upon a careful and independent review of the record of this matter, including the exceptions and reply exceptions, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that

> petitioner had more than adequate time to acquire his teaching certificate. Having missed that opportunity, I find further that he had adequate notice that his job was in jeopardy, even though the statutes indicate that no notice is required under these circumstances.
>
> (Initial Decision, ante)

No argument contained in petitioner's exceptions alters the Commissioner's accord with the findings and conclusions of the ALJ which thoroughly addressed those arguments presented by petitioner first at hearing and again in exception.

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

December 11, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5220-89
AGENCY DKT. NO. 192-6/89

CONCERNED PARENTS OF WALL TOWNSHIP:
CATHY S. ABEL, THOMAS ABEL,
MARY BARNES, JANE HANSON,
ELIZABETH MASTO, FRANCES M. ROSSI,
DOROTHY THOMPSON, LYNN THORNLEY,
KAREN M. WARD, HARCOURT S. WARD, III,
SHIRLEY WITTE, CHARLES H. WITTE,
AND JOHN ZIMMER,
Petitioners,
v.
WALL TOWNSHIP BOARD OF EDUCATION
AND MARK FRANCESCHINI, SUPERINTENDENT,
Respondents.

Concerned Parents of Wall Township, petitioners, pro se

Michael T. Warshaw, Esq., for respondents (Magee & Graham, attorneys)

Record Closed: September 28, 1989 Decided: November 1, 1989

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

Petitioners are residents of Wall Township each of whom have children who are pupils in the Wall Township public elementary schools under the control of the Wall Township Board of Education (Board). Petitioners, in the name of an informal association called Concerned Parents of Wall Township, filed a Petition of Appeal before the Commissioner of Education on June 19, 1989 by which they allege the Board and its superintendent of schools, Mark Franceschini (superintendent), acted arbitrary, capricious, and unreasonably regarding the asserted involuntary intra-school transfer of 4 elementary

school principals and 16 elementary school teachers. After the Commissioner of Education transferred the matter on July 18, 1989 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., the then assigned administrative law judge Solomon A. Metzger entertained oral argument on petitioners' motion for a stay of the controverted transfers and on the Board's motion to dismiss the Petition upon petitioners' asserted lack of standing. Judge Metzger, in a written ruling August 14, 1989, concluded petitioners have standing and be denied the Board's motion to dismiss the Petition. Judge Metzger also denied petitioners' application for a stay of the controverted transfers.

Thereafter, the matter was reassigned to this administrative law judge. The Board then moved for summary decision on the merits of the case pursuant to N.J.A.C. 1:1-12.5. Petitioner Rossi filed a response thereto September 27, 1989. A telephone prehearing conference was conducted October 3, 1989 during which oral argument was heard on the motion and the issues of the case were agreed upon. The issues as stated in the prehearing order which followed the telephone conference call on October 3, 1989 are reproduced here in full:

1. Whether the controverted transfers should be set aside if petitioners establish by a preponderance of credible evidence that the transfers resulted from an asserted arbitrary, capricious, or unreasonable action taken by the Board.

2. Whether the issue states a cause of action for which relief could or should be granted by the Commissioner and, if not, should the petition of appeal be dismissed.

This initial decision concludes that the issue presented by the collectively named parents, informally identifying themselves as the Concerned Parents of Wall Township, fails to state a cause of action for which relief could or should be granted by the Commissioner and the further conclusion is reached that the Petition of Appeal should be and is dismissed. Therefore, the hearing scheduled for December 21, 1989 is cancelled.

BACKGROUND FACTS

For purposes of the motion for summary decision the background facts established by the record are these. The record, it is noted, consists of the Petition, the Answer, written arguments which resulted in Judge Metzger's earlier ruling, the Board's

motion for summary decision with supporting affidavit executed by the superintendent, and legal argument, and a response to the motion filed by the designated spokesperson for petitioner, Frances M. Rossi. Finally, it is noted that Rossi submitted a counter-statement of assorted facts unsupported by affidavit or certification in lieu of affidavit.

The Petition of Appeal filed in this case alleges that the controverted transfers of 4 elementary school principals and 16 elementary school teachers will disrupt all four elementary schools in Wall Township; that the Board accepted the recommendation of the superintendent to transfer the principals and teachers without "open discussion or explanation of this action offered or expressed by the Board or the Superintendent" (Petition of Appeal, para. B); that the superintendent publicly stated that he recommended the transfers not because the involved teachers or administrators have not done an adequate job but because of a difference in management styles in response to changes in the student population and that the transfers were necessary to avoid a path to oblivion (Id. at para. C); and, that both the Board and the superintendent refuse "to respond to the overwhelming objections and sentiments expressed by the parents and registered voters who elected them * * *" (Id. at para. F).

The Board, in denying that its transfer of personnel was arbitrary, capricious, or unreasonable, seeks summary decision on the issue that the assignment of personnel is an inherent managerial prerogative and, as such, it is not subject to challenge on the basis presented here. In support of its motion for summary decision, the Board relies not only upon the memorandum of law filed in support thereof, together with excerpts from the relevant Agreement between it and the Wall Township Education Association, but also upon the affidavit of superintendent Franceschini. Franceschini attests in part in his filed affidavit as follows:

> * * *
>
> 2. In late 1988 and early 1989, I made a determination as Chief Administrator of the Wall Township Board of Education that the best interests of the School District would be served by arranging for transfer inter-school of the Principals in each of the four (4) elementary schools as well as for transfers of various members of the teaching faculty. In fact, in October, 1988, I discussed the transfers with the Principals involves.
>
> 3. Because one-third (1/3) of the members of the Board were up for election in the April, 1989, elections, I felt it prudent to wait for the elections to occur prior to presenting this subject to the Board so that the issue would not be a political one to be utilized in the elections.

4. In point of fact the question was raised prior to the election and two of the three members who were ultimately elected in the April, 1989, elections indicated opposition to the suggestion of transfers of Principals among the four elementary school and trachers (sic) among all schools in the district.

5. Thereafter, the newly elected members of the Board of Education took their positions on the Board and the issue of transfers was presented to them by me.

6. Elections were held on the first Tuesday in April. On the following Monday the Board met and the subject of transfers was discussed in closed session. On April 18, 1989, a public session or forum was held at which the public was invited to speak on any issue, including the transfers. On April 25, 1989, the Board voted 9-0 in favor of the transfers.

7. The notification to the transferees was made pursuant to existing contractual terms between the various collective bargaining (negotiating?) units representing each of the distinct groups, i.e., the teachers and the administrators.

8. Attached hereto as Exhibit A is a copy of Article XIII of the Agreement between the Wall Township Board of Education and the Wall Towship Education Association regarding involuntary transfers and reassignments. That Article was fully complied with prior to the presentation and adoption of the Resolution by the Board of Education to transfer said teachers.

9. Attached hereto as Exhibit B is a copy of Article XI of the Agreement between the Wall Township Board of Education and the Wall Township Township Administrators Association. That Article was fully complied with prior to the presentation and adoption of Resolution by the Board of Education to transfer said teachers.

10. At no time did any Principal or teacher involved in the transfer herein request a hearing before the Board or object to said transfer. Neither did any party involved in the transfers agree to waive the confidentiality provided for in N.J.S.A. 10:4-12(b).

11. On April 25, 1989, after proper and appropriate presentation and discussion of the matter at an open public meeting, the Board of Education members voted and unanimously adopted a Resolution authorizing the transfers.

12. The actions for transfer were taken by the Board of Education at my recommendation and were taken in the best interest of the overall administration of the Board of Education of the Township of Wall and the education of the children thereof. The actions were taken pursuant to N.J.S.A. 18A:17-20 and N.J.S.A. 18A:25-1.

13. Involuntary teacher transfers are undertaken by the Board of Education each year among the four (4) elementary schools, the Intermediate School and the High School. Involuntary Principal transfers were last made seven (7) year ago. Since it is not a policy to transfer Principals and since teacher transfers occur annually, and since no one ever objected to any prior transfers, and since the transfers are an administrative prerogative, I submit that the transfers are valid and sustainable.

Petitioner Rossi, in the unsupported statement of asserted facts filed in opposition to the Board's motion, contends that contrary to paragraph 2 of the superintedent's affidavit no discussion was held with the principals involved but petitioner Rossi does not explain the basis for this assertion; she asserts in opposition to paragraphs 8 and 9 of the superintendent's affidavit that teachers and principals were not notified of the pending transfers prior to the April 25, 1989 Board meeting at which the transfer occurred but petitioner Rossi fails to submit any basis for such assertion; and, she contends that contrary to paragraph 10 of the superintendent's affidavit "The principals did in fact object * * *" which, it is noted, is based on a memorandum dated March 8, 1989 sent the Board by certain staff members seeking to retain the then assigned school principal. There is nothing in the memorandum which would tend to show that "the principals" objected as is asserted by petitioner Rossi. Petitioner Rossi in opposition to paragraph 11 of the superintedent's affidavit asserts that there was no public discussion of the matter nor was any public explanation given. Finally, petitioner Rossi asserts that paragraph 12 of the superintendent's affidavit is only his opinion which, she says, is not supported by reasons nor explanations given by the superintendent.

This concludes a recitation of all relevant background facts of the matter for purposes of the Board's motion for summary decision.

LEGAL ANALYSIS AND CONCLUSION

I

The issue of standing to bring an action against the Board has already been determined by Judge Metzger, subject to review by the Commissioner of Education at the conclusion of this case. Nevertheless, the favorable ruling petitioners received on the issue of standing to bring an action does not necessarily result in the conclusion that petitioners have stated a cause of action for which relief could or should be granted.

II

It has been consistently held by New Jersey courts as well as by the Commissioner of Education that an employing board of education has the statutory right to transfer teachers. Greenway v. Camden Bd. of Ed., 129 N.J.L. 461 (E&A 1942), aff'ing 129 N.J... 46 (Sup. Ct.); Downs v. Hoboken Bd. of Ed., 12 N.J. Misc. 345 (Sup. Ct. 1934); and Keane v. Flemington-Raritan Reg. Bd. of Ed., 1970 S.L.D. 176, 177. In point of law, N.J.S.A. 18A:16-1 provides, in part, that "Each board of education * * * shall employ * * * such principals, teachers * * * as it shall determine * * *". N.J.S.A. 18A:27-1 provides that "No teaching staff member shall be appointed, except by a recorded roll call majority vote of the full membership of the board of education appointing him". N.J.S.A. 18A:25-1 provides that "No teaching staff member shall be tranferred, except by a recorded roll call majority vote of the full membership of the board of education by which he is employed." Indeed, boards of education are vested with broad discretionary authority regarding the appointment, transfer, dismissal or non-renewal of teachers so long as such actions over such matters do not exceed Fourteenth Amendment limitations. See, Winston v. Bd. Ed. So. Plainfield, 125 N.J. Super. 131, 143 (App. Div.), aff'd 64 N.J. 582 (1974).

Subsequent to the passage of the New Jersey Employer-Employee Relations Act, L. 1968, c. 303, as amended by L. 1974, c. 123, N.J.S.A. 34:13A-1 et seq., (the Act) a dispute, which ultimately reached the issue of terms and conditions of employment subject to negotiations under the Act between boards of education and local teachers' associations, began when involuntarily reassigned and transferred teachers filed a grievance. The New Jersey Supreme Court, in Ridgefield Park Ed. Assn. v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), in holding that the authority to assign teachers is an inherent managerial prerogative of the Board not subject to negotiation, said this:

> The selection of the school in which a teacher works or the grade and subjects which he teaches undoubtedly have an appreciable effect on his welfare. However, even assuming that this effect could be considered direct and intimate, we find that this aspect of the transfer decision is insignificant in comparison to its relationship to the Board's managerial duty to deploy personnel in the manner which it considers most likely to promote the overall goal of providing all students with a thorough and efficient education. Thus, we find that the issue of teacher transfers is one on which negotiated agreement would significantly interfere with a public employer's discharge of inherent managerial responsibilities* * *
>
> (78 N.J., at p. 156)

III

Here, there is no evidence to show that the subject principals or teachers, those who now have the direct and intimate interest, filed a Petition of Appeal challenging their transfers. Rather, individually named petitioners, who have children attending the various schools under the Board's direction, claim that their interest is to insure that the Board continues to provide a thorough and efficient program of education. This argument presupposes that newly assigned teachers and principals to the Board's respective schools are somehow less capable than the teachers and principals who have been reassigned or, alternatively, it presupposes that parents of children in the school have greater statutory rights to negotiate with the Board the subject of transfers when those who are directly and intimately affected in terms of employment regarding the transfers, the principals and teachers, do not have such a right.

Judge Metzger, in his written ruling, noted that at oral argument on the motions then before him petitioners expressed a fear that the staff changes resulting from the transfers would create "* * * uncertainties and insecurities for [their] children which would be detrimental to their educational progress." An expressed fear by petitioners of vague uncertainties and insecurities is, in light of the Board's duty to operate a thorough and efficient program of education for all pupils in the district, is an insufficient basis upon which an actionable claim may be stated. Petitioners' assertion in this regard appears to be the linchpin of the filed Petition. Implicit within the assertion is the argument that no board of education could assign, reassign, or transfer teachers newly employed or teachers already in their employ if any parent would thereafter complain that his/her child would experience "uncertainties" or "insecurities" from being exposed to a professional teacher or several new teachers in the school building with whom they had had no prior contact. Such an argument cannot be a valid basis to present a claim against the board when it is common knowledge that elementary school pupils experience a "new" teacher each year in the sense of moving from one grade level to another grade level taught by a teacher different from the preceeding school year.

Petitioners' contention that the Board refuses to state reasons for the transfers is, in light of the evidence in this record, misleading. Petitioners acknowledge in their filed Petition that "* * * the superintendent publicly stated that he recommended the transfers not because the involved teachers or administrators have done an adequate job but because of a difference in management styles in response to changes in the

student population and that the transfers were necessary to avoid a path to oblivion". That is a legitimate reason for the Board to exercise its inherent management prerogative to deploy its personnel in the manner it deems best suited to the needs of pupils for whom it is obligated to provide a thorough and efficient program of education. It is acknowledged here that the reasons do not satisfy petitioners. Nevertheless, a difference of opinion between petitioners and the Board regarding how best to deploy personnel is not an issue for which relief could or should be granted by the Commissioner in light of the clear statutory authority of the Board of Education to assign personnel.

There is nothing set forth within the Petition of Appeal nor in any of petitioners' submitted writings which suggest that the Wall Township Board of Education violated some specific statute regarding the transfers nor is there any complaint before the Commissioner of Education from any of the affected transferred employees suggesting that their tenure rights have been violated or that they were transferred for retaliatory reasons or for political animus. While petitioners certainly have an interest in their children's education, the duty to provide the constitutionally-mandated thorough and efficient program of education rests with the Wall Township Board of Education. It is that body which must make professional decisions regarding its personnel. Petitioners' allegation that somehow the transfers were arbitrary, capricious, or unreasonable is based soley on their difference of opinion on how best to use personnel. A claim based on personal opinion does not present a justiciable issue.

For all the foregoing reasons, I **CONCLUDE** that summary decision must be granted the Board of Education in an acknowledgement that it alone has the authority to transfer teachers as it deems appropriate and that absent a specific allegation that the Board has violated some specific statute with respect to the transfer its actions are not subject to interference.

The Petition of Appeal is **DISMISSED.** The hearing scheduled for December 21, 1989 is hereby **CANCELLED.**

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.

November 1, 1989
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

11/2/89
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

NOV 8 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

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CONCERNED PARENTS OF WALL TOWNSHIP,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WALL AND DR. MARK FRANCESCHINI, SUPERINTENDENT, MONMOUTH COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18:4.

On the merits of their claim, petitioners' exceptions reiterate the arguments posed in their brief in opposition to summary decision, and contend that "the Board has refused to state reasons for the transfers.***" (Exceptions, at p. 1) They submit that had they been given reasons or explanations as to how such transfers would benefit the children, "***that would have been sufficient. It was the lack of explanations and reasons, as well as the adamant refusal of the Board to make any of this information available to us in any form which prompted this action." (Id.)

Petitioners also claim that their response to the Motion for Summary Decision "contained no supporting affidavits, because the persons who will, if subpoenaed for a hearing, attest to these facts have been advised by an attorney that their positions will not be protected should they sign affidavits. That they will be protected only if they testify under subpoena at a hearing." (Id.)

Petitioners seek reversal of the initial decision and a hearing on the merits of their arguments.

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that summary decision be granted the Board in this matter, in that "***it alone has the authority to transfer teachers as it deems appropriate and that absent a specific allegation that the Board has violated some specific statute with respect to the transfer its actions are not subject to interference." (Initial Decision, ante)

On the issue of the failure to produce notarized affidavits in their brief in opposition to the Motion for Summary Decision, the Commissioner is cognizant of petitioners' pro se status, which behooves both him and the Office of Administrative Law to extend particular care in explaining procedures and technical terms. Yet, notwithstanding their status as pro se applicants, in order to have

their claim survive a motion for summary decision, petitioners "must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered." (emphasis supplied) (N.J.A.C. 1:1-12.5) The Commissioner's review of the "statement of assorted facts unsupported by affidavit or certification in lieu of affidavit" (Initial Decision, ante) submitted by petitioners herein concurs as to the ALJ's that such presentation is inadequate to meet the burden upon them brought by the Board's motion. Yet, even assuming arguendo that such facts were properly notarized, such facts as alleged would not give rise to a cause of action for which relief could or should be granted for the reasons expressed in the initial decision.

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

December 14, 1989

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4739-89
AGENCY DKT. NO. 140-5/89

BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK,
Petitioner,
v.
MAYOR OF THE BOROUGH OF BOUND BROOK AND CITY COUNCIL,
Respondent.

David W. Carroll, Esq., for the petitioner (Carroll & Weiss, attorneys)

John F. Richardson, Esq., for the respondent

Record Closed: October 26, 1989 Decided: November 3, 1989

BEFORE **AUGUST E. THOMAS**, ALJ:

The Board of Education of the Borough of Bound Brook (Board) appeals from an action taken by the Mayor of the Borough of Bound Brook and City Council (Council) under N.J.S.A. 18A:22-37 by which it certified to the Somerset County Board of Taxation a lesser amount of appropriations for current expense purposes for the 1989-90 school year than the amount proposed by the Board in its budget which was rejected by the voters. The voters rejected, also, the Board's proposal to transfer monies from its current expense free appropriations balance to its Capital Outlay account. After the matter was transferred to the Office of Administrative Law as a contested case (N.J.S.A. 52:14F-1 et seq.), a hearing was conducted on September 20, 1989, in the Green Brook Township Municipal Building, Green Brook. The Board filed a posthearing brief on October 10, 1989. The record was closed on October 26, 1989, after receipt of respondent's reply brief.

PROCEDURAL HISTORY

At the annual school election held on April 4, 1989, the Board submitted to the electorate a proposal to raise $4,971,287 by local taxation for current expense costs of the school district for the 1989-90 school year. The Board also proposed to transfer $55,000 from its current expense free appropriations balance (surplus) to its capital outlay account. The voters rejected both proposals. The Board then submitted its budget to Council for its determination of the amounts necessary for the operation of a thorough and efficient school district in Bound Brook for the 1989-90 school year.

After consultation with the Board, Council made its determination and certified to the Somerset County Board of Taxation the amount of $4,721,287 for 1989-90 current expense costs, a reduction of $250,000. Council disapproved of any transfer of monies from Current Expense to Capital Outlay. The Board contends that Council's action was arbitrary, capricious and unreasonable and offered the testimony of its superintendent and business administrator in support of its need for restoration of the requested amounts. Council denies that its action was arbitrary, capricious or unreasonable and maintains that its determination to raise a lesser amount by local taxation is fully consistent with its obligation under N.J.S.A. 18A:22-37. Council offered an expert witness to show how the reductions could be effected with little or no adverse consequence to the Board's budget.

Council argues that it has a mere three weeks to review the Board's budget, after its defeat by the voters. The facts, as they existed then, are the facts which should be reviewed by the Commissioner of Education, and not the modified budget figures presented by the Board at the time of the hearing. Council relies on Bd. of Ed. of the Tp. of E. Brunswick v. Tp. Council of the Tp. of E. Brunswick, 91 N.J. Super. 20 (App. Div. 1966), which stated in part as follows:

> . . . the council's action must be sustained unless the Commissioner finds the budget it fixed was so deficient as to constitute a purely arbitrary exercise of discretion devoid of any reasonable foundation.

Council asserts that the Board is insensitive to the voters' mandate.

Bd. of Ed. of the Tp. of E. Brunswick v. Tp. Council of the Tp. of E. Brunswick, 48 N.J. 94, 105 (1966), affirmed the decision of the appellate division, supra, and set forth additional guidelines as follows:

> Though the law enables voter rejection, it does not stop there but turns the matter over to the local governing body. That body is not set adrift without guidance, for the statute specifically provides that it shall consult with the local board of education and shall thereafter fix an amount which it determines to be necessary to fulfill the standard of providing a thorough and efficient system of schools. Here, as in the original preparation of the budget, elements of discretion play a proper part. The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones property 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 . . . Emphasis supplied.

In the instant matter some of the facts at hearing, especially concerning the surplus, were different from those proposed at the time of the voter rejection of the budget. Council asserts that the Board's advertised surplus was $950,000 and that the Board claims now to have a surplus of only $281,000. Nevertheless, the important concept to bear in mind is that if the Commissioner finds the budget of the Council insufficient, he must direct appropriate corrective action.

Regarding the surplus, the business administrator testified that the Board was committed to an asbestos management program, required by law, and that roughly $300,000 has been spent or committed to this program. Other obligations, which will be detailed later, further eroded the Board's surplus.

The Council's expert testified that capital items proposed by the Board should be capitalized so as to spread the cost of these items over a period of years rather than feel the full impact in a single year.

In view of Council's arguments, and the mandate of the Court, this budget was examined from the perspective of allowing sufficient monies for the operation of a thorough and efficient system of the public schools, E. Brunswick, supra. Council's reductions are set forth below and in the order in which they were presented.

LINE ITEM REDUCTIONS

LINE ITEM	DESCRIPTION	BOARD'S PROPOSAL	COUNCIL'S PROPOSAL	COUNCIL'S REDUCTION
J822	Group Health Insurance	$541,785.00	$531,785.00	$10,000.00
J720	Building repairs	67,885.00	42,885.00	25,000.00
J530	Vehicle replacement	21,000.00	-0-	21,000.00
J870	Special education tuition	266,500.00	230,500.00	36,000.00
J240	Teaching supplies-Lafayette	22,624.00	18,624.00	4,000.00
J240	Teaching supplies-High School	14,000.00	11,000.00	3,000.00
J240	Teaching supplies-guidance	2,250.00	250.00	2,000.00
J240	Teaching supplies-A.V.	10,000.00	9,000.00	1,000.00
J240	Teaching supplies-Jr. High School	4,263.00	2,263.00	2,000.00
J420	Health Office	6,000.00	4,000.00	2,000.00
J650	Custodial Supplies	42,000.00	39,000.00	3,000.00
J650	Custodial Ground Supplies	6,500.00	4,500.00	2,000.00
J730	General Equipment	12,615.00	10,615.00	2,000.00
J250	Misc. Exp. High School	9,400.00	7,400.00	2,000.00
J920	Food Service	31,553.00	24,953.00	6,600.00
J822	Food Service Insurance			3,400.00
				Total Line Item Reductions $125,000.00

It is noted that the line item reductions total only $125,000. However, Council increased the Board's Miscellaneous Revenue from $40,000 to $60,000 and demanded that an additional $50,000 from the Board's surplus be applied to the current expense account for the 1989-90 budget.

REVENUE AND CURRENT EXPENSE

Line Item		Board Proposal	Council's Proposal	Change
Miscellaneous Revenue	Investments	$40,000	$60,000	+ $20,000
Current Expense Free Balance	Surplus	$75,000	$125,000	+ $50,000
		$115,000	$185,000	Total + $70,000

The Board asserts that these monies added to the revenue side of its budget are illusory and that it will not earn $60,000 from its investments. Thus, the addition of $20,000 in miscellaneous revenues coupled with the $50,000 in surplus added to the revenue side of its budget leaves the Board with an unbalanced budget, even if it accepted Council's proposal.

The line item reductions of $125,000 when added to the $70,000 from the revenue side of the budget total $195,000. The remaining $55,000 of Council's proposal of a $250,000.00 reduction is the Board's proposed transfer of surplus to its capital outlay account.

LINE ITEMS

1822 Group Health Insurance

The Board's actual expenditure in this account for 1987-88 was $356,333. Council factored in a 49% increase reflecting a $174,603 increase for the two year period resulting in an expenditure of $530,936 for this account. The Board asserts that it must pay the rates established by the New Jersey State Health Benefit Plan which has set rates for fiscal year (FY) 1989-90 nearly 30% over rates in 1988-89.

Simple multiplication of the number of employees, the plan* selected by each, times the rate shows an incurred expenditure of $541,785. However, the Business Administrator testified that the Board needs $560,000 in FY 1989-90 because health benefits billings are adjustable in May of each year for the final two school months at a substantially higher rate. Council's percentage calculation does not approximate the actual expenditure in this account. The business administrator's calculations are much more accurate even with a shortfall of monies. As a result, this account is underbudgeted.

Based on the evidence above, I **FIND** that the Board has proved its need for the monies it proposed; therefore the $10,000.00 reduction is restored.

J720 Building Repairs

The Board proposed to repair part of the roof at its Smalley School at a cost of $25,000. The roof has four sections and this was to be the first year of a multi-year project to replace the old roof. During the previous school year, $8,725 was expended on eight different occasions for emergency repairs to stop leaking. The Board believes that failure to take action creates the potential for structural damage, and consequently, a larger expenditure in future years.

Council does not dispute the need for the repair; however, it asserts that the roof should be replaced as a capital item; therefore, it reduced the line item by $25,000. Council asserts also that the repair should be in the capital outlay account.

A determination as to the repair or replacement of a roof rests with the Board, and according to the Chart of Accounts published by the Department of Education, contracted services for the repair of buildings is set forth in account 720b; consequently, I **FIND** that the Board has placed this repair in the proper line item.

Based on the testimony, I **CONCLUDE** that the repairs are necessary; therefore, $25,000 is restored to the budget.

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*Employees may select single, husband and wife or family coverage.

J530 Vehicle Replacement

Older vehicles with high mileage need replacement. The Board has four vehicles each with more than 100,000 miles. The van in question has 133,071 miles as of June 30, 1989. A replacement program is essential.

The testimony indicated that the state reimburses the Board for 85% of the cost of a new vehicle two years after its purchase. A new vehicle was purchased two years ago so the Board is eligible for that reimbursement this year; however, at 90% of the cost (N.J.S.A. 18A:58-7). The Board proposed $21,000 for the replacement vehicle in 1989-90. It is reasonable to conclude that new vehicle costs have risen at least 8% per year; therefore, I conclude that an identical vehicle purchased two years ago would have cost $17,640. At 90% reimbursement, the Board will receive $15,876 from the state.

I **CONCLUDE** that a reduction in this account of $15,876 is proper and that $5,124 will be restored to the budget.

J870 Tuition, Special Education

Council reduced this line item from $266,500 to $230,500 a cut of $36,000. Its reason is based on alleged overbudgeting for the past two years. The record shows that this line item was budgeted in the 1987-88 school year at $220,000, but the actual expenditure was $160,449. However, the Superintendent testified that $257,402 was budgeted for 1988-89 and the actual expenditure was $268,824, a short fall of $11,422. He testified, further, that the Board's commitments for 1989-90 are already $311,588, or $45,000 above the budget. Additional students classified during the school year will add to the cost for 1989-90.

Based on the foregoing, I **CONCLUDE** that this account is already insufficient in meeting the tuition costs. Therefore, the $36,000 reduction is restored.

J240 Teaching Supplies (five items)

Four schools and the high school guidance department are represented here. The aggregate proposal by the Board in these accounts amounts to $53,137, and Council proposed $41,137, a reduction of $12,000. According to the

Superintendent's testimony, the Board only means to "hold the line" with modest increases for inflation. However, the record shows an expenditure, last year of $37,762, less than the amount proposed by Council.

Based on the above, there is no showing that the Board will be unable to provide a thorough and efficient education if these cuts are sustained. Therefore, Council's reduction of $12,000 will stand.

J420 Health Office Miscellaneous Expense

During the 1988-89 school year, the Board added an Employee Assistance Program at a cost of $400 per month or $3,600 for nine months. It proposed to extend the program to 12 months for the 1989-90 school year and it has already been contracted for its second year at a cost of $4,800. Total expenditures for the 1988-89 school year were $5,980. Council based its reduction on the fact that the account was underbudgeted by more than $3,000 in the 1987-88 school year. Council asserts that the same underexpenditure will occur in the 1988-89 school year.

The record shows that the account had a $520 balance in the last school year and the Board reduced that account by $500 prior to its submission to the voters. Based on the testimony and the documents in evidence I **CONCLUDE** that the Board's figures are correct. Accordingly, the evidence shows that $2,000 must be restored to the budget.

J650 Custodial Supplies J650 Custodial Ground Supplies

The Board agrees that the reductions in these accounts represent modest cuts; however, it asserts that the reductions are unrealistic considering last year's expenditures. Council asserts that there was a $3,000 underexpenditure in 1987-88 and anticipated underexpenditure of $3,000 in each account for the 1988-89 school year. It reduced the accounts by $3,000 and $2,000, respectively. There was no showing by the Board that it would be unable to provide a thorough and efficient system of schools without restoration of these monies.

I **CONCLUDE** that the $5,000 in reductions will stand as set forth by Council.

J730 General Equipment

The Board accepts the $2,000 reduction in this line item.

J250 Miscellaneous Expenses High School

The Board accepts the $2,000 reduction in this line item.

J920 Food Service; and
J822 Food Service Insurance

The Board reduced its staff by one person anticipating a savings of $6,600 in the J920 account. As a result there would also be a concomitant savings in the Group Health Insurance of $3,400 in the J822 account. The Board originally had no objection to these reductions; however, it now projects that inflation and an expected decrease in the federal aid through the National School Lunch program will more than offset these savings.

I am not convinced by the evidence that a savings will not be effected or that the Board will not be able to provide a thorough and efficient educational program notwithstanding these cuts. Council's reductions of $6,600 and $3,400 will stand.

Miscellaneous Revenue-(Income Investment)

Council asserts that a sound cash management plan will generate $60,000 in investment income during the 1989-90 school year, $20,000 more than that projected by the Board, even in this period of declining interest rates. And based on the Board's interest earned in 1988-89, a 20% increase should be reflected in fiscal year 1989-90. The Board asserts that its current expense free appropriations balance for FY 1988-89 was $1,016,198 and that the bulk of its miscellaneous revenue for that year came from certificates of deposit. This year the free balance began at $525,574. The State Aid shortfall is $181,786, and with $75,000 appropriated to the 1989-90 budget there are fewer funds to invest. With interest rates declining, the Board states that it will be difficult to generate $30,000 in interest; therefore, this revenue should be decreased, not increased.

Based on the testimony and the evidence including the 1988-89 audit report (P-10), the Board's free balance on June 30, 1989 is substantially less than its free balance at the beginning of the 1988-89 school year. Consequently, it would be highly improbable that the Board could generate $60,000 in interest, $20,000 more than it proposed. Council based its proposal on a free balance that simply does not exist; therefore, the $20,000 added to the Board's revenue, which represents a $20,000 reduction in the budget, is restored.

Council proposed also a transfer of $50,000 from the free balance to the current expenses of the budget. This is in addition to the $75,000 already placed in the 1989-90 budget by the Board. This amount, which is part of the over-all $250,000 reduction must be restored for reasons explained below.

Transfer of $55,000 to Capital Outlay

After the transfer of $55,000 from current expense free appropriations balance to capital outlay was rejected by the voters, Council concluded that that amount was not necessary for the operation of a thorough and efficient school system, and the cut became a part of Council's over-all reduction of $250,000.

The record shows the current expense free appropriations balance as of June 30, 1989 to be $525,574 (P-10). The business administrator testified about the $181,786 short-fall in state aid, and the $75,000 appropriated by the Board to its 1989-90 budget from the free balance. Additionally, special education tuition and health benefits are underbudgeted by $63,215. Subtracting these required expenditures from the free balance leaves that account with $205,573. The current expense budget adopted was $9,433,367. The Board submitted to the voters an amount of $4,971,287 to be raised locally for school purposes. The current expense free appropriations balance remaining, $205,573, represents slightly more than 2% of the total current expense budget. A further reduction in free balance by transferring another $50,000 to current expenses would place the Board in an extremely vulnerable position with less than a 2% free balance. Decisions by the Commissioner and the courts have long upheld the authority of Boards to maintain a reasonable free balance to meet unforeseen contingencies. See: Board of Education of Delaware Valley Regional High School v. Township Committee of the Township of Alexandria; Mayor and Council of Borough of Frenchtown; Township Committee of the Township of Holland; Township Committee of the Township of

Kingwood; Borough Council of the Borough of Milford, decided December 7, 1988; aff'd Commissioner of Education, February 6, 1989; aff'd in relevant part, State Board, August 2, 1989; Fair Lawn Board of Education v. Fair Lawn, 143 N.J. Super. 250 (Law Div. 1976) aff'd 153 N.J. Super. 480 (App. Div. 1977).

Based on these decisions, I **CONCLUDE** that the $55,000 must be restored and that the $50,000 cannot be applied to the 1989-90 budget. In this way, the Board will have a minimal current expense free appropriations balance considering its circumstances.

A board of education may transfer current expenses to its capital outlay account if approved by the voters (Hoboken City Bd. of Ed. v. Mayor and Council, 1977 S.L.D. 493, 499). In the instant matter, the Board committed most, if not all, of its outlay account, $30,000, and sought voter approval for the $55,000 transfer so that it might utilize that $85,000 for the necessary upgrading of its high school biology laboratory, and to remodel significantly two rooms to create an adequately sized pre-kindergarten classroom with lavatory facilities. The superintendent testified that the kindergarten class size does not meet the recommended 1,020 square footage. The biology laboratory is more than 35 years old with no workable plumbing or gas fixtures for students.

I **CONCLUDE** from the testimony concerning these expenditures that the $55,000 is necessary in order to to operate a thorough and efficient system of public schools in Bound Brook. Accordingly, the Board's request for a transfer of $55,000 from current expenses to capital outlay is **GRANTED.**

A recapitulation is shown in the following chart.

LINE ITEM RESTORATION

Line Item	Description	Council's Proposal	Council's Reduction	Restored
J822	Group Health Insurance	$531,785	$10,000	$10,000
720	Building Repairs	42,885	25,000	25,000
530	Vehicle Replacement	-0-	21,000	5,124
870	Special Education tuition	230,500	36,000	36,000
240	Teaching supplies-Lafayette	18,624	4,000	-0-
240	Teaching supplies-High School	11,000	3,000	-0-
240	Teaching supplies-guidance	250	2,000	-0-
240	Teaching supplies-A.V.	9,000	1,000	-0-
240	Teaching supplies-Jr. High School	2,263	2,000	-0-
420	Health Office	4,000	2,000	2,000
650	Custodial Supplies	39,000	3,000	-0-
650	Custodial Ground Supplies	4,500	2,000	-0-
730	General Equipment	10,615	2,000	-0-
250	Misc. Exp. High School	7,400	2,000	-0-
920	Food Service	24,593	6,600	-0-
822	Food Service Insurance		3,400	-0-
				Total Line Item Restorations $78,124

Line item restorations total $78,124. Other restorations are: Miscellaneous Revenue, $20,000; Current Expense Free Appropriations Balance, $50,000; and a Current Expense Free Appropriations Balance proposed transfer, $55,000. The total restorations to the Board's budget are:

$ 78,124
50,000
55,000
$183,124

Based on the persuasive testimony and that such testimony establishes a preponderance of the credible evidence as delineated above, I **FIND** and **CONCLUDE** that the sum of $183,124 must be restored to the Board's budget so that it may provide for a thorough and efficient system of schools in Bound Brook.

Accordingly, it is **ORDERED** that $183,124 be added to the tax levy of Bound Brook by the Somerset County Board of Taxation so that the total amount certified to be raised by local taxation for current expense costs of the Bound Brook Board of Education for the 1989-90 school year shall be $4,904,411.

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

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

3 November 89
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ, t/a

Agency Receipt:

November 3, 1989
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed to Parties:

Nov. 13, 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

tp

BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND CITY COUNCIL OF THE BOROUGH OF BOUND BROOK, SOMERSET COUNTY, RESPONDENT.	:	DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner (hereinafter "the Board") pursuant to N.J.A.C. 1:1-18.4. Neither exceptions nor replies were filed by respondent (hereinafter "Council").

Although the Board fully concurs with the greater substance of the ALJ's determinations, it takes exception to two aspects of his decision. First, it points to a clerical error in tallying the total amount of restorations approved by the ALJ, observing that the columnar calculation in the initial decision, ante, inadvertently omitted the $20,000 Miscellaneous Revenue restoration discussed on pages 9-10 and included in the prose summary preceding the columnar calculation. The correct figure for the total amount restored by the ALJ, then, would be $203,124 rather than $183,124. (Exceptions, at pp. 1-2)

Second, the Board excepts to the ALJ's sustaining of $15,876 of a $21,000 cut made by the Council in the transportation account. The ALJ's action, observes the Board, was premised on two erroneous assumptions. First, there was no evidence in the record on which to base inferences about the nature and cost of the vehicle purchased two years ago, so that the dollar amount of the revised cut is automatically suspect. Second, and more fundamentally, the ALJ assumed that additional State transportation aid would be forthcoming to reimburse the district for the prior vehicle purchase, when in fact that reimbursement was included in the district's 1989-90 aid entitlement and therefore had already been incorporated into overall revenue calculations (Exhibits P-1 and P-2). Thus, in order to purchase the vehicle, an additional $15,876 must be restored to the budget. (Exceptions, at pp. 2-3)

Upon careful review, the Commissioner concurs with the great majority of the ALJ's findings and conclusions for the reasons stated by him in the initial decision. In the two areas noted by the Board in its exceptions, however, the Commissioner finds that the Board is correct in its observations. The omission of the $20,000 restoration in the columnar calculation is clearly an inadvertent clerical error, while the ALJ's discussion of Council's

cut in the vehicle replacement account (p. 7) is premised on a misunderstanding of the pertinent State aid process. Aid for approved vehicle purchases is indeed forthcoming two years subsequent to purchase, so that the district is in fact receiving aid for a prior vehicle purchase; however, this aid is disbursed as part of the district's 1989-90 general transportation aid entitlement and not, as the ALJ plainly assumes, as monies over and above the transportation aid already included in the Board's revenue calculations. Thus, whatever the amount of the reimbursement, earmarking it to offset a new bus purchase would create a corresponding deficit in revenues available to support other areas of the budget. Thus, given that the need for the new vehicle is uncontroverted, the $15,876 cut sustained by the ALJ must be restored.

Accordingly, the Commissioner determines that the local tax levy for the 1989-90 current expense budget of the Bound Brook School District shall be established as follows:

	Current Expense
Original Tax Levy	$4,971,287
Reduction	250,000
Tax Levy After Reduction	4,721,287
Restoration	219,000
Tax Levy After Restoration	4,940,287

The Somerset County Board of Taxation is hereby directed to make the necessary adjustment to reflect a total amount of $4,940,287 to be raised in the 1989-90 tax levy for current expense purposes.

IT IS SO ORDERED this _____ day of December 1989.

COMMISSIONER OF EDUCATION

December 19, 1989

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2540-89
AGENCY DKT. NO. 20-1/89

EDWARD PIGUT,
Petitioner,
v.
NEPTUNE TOWNSHIP BOARD OF EDUCATION,
Respondent.

Edward Pigut, petitioner, pro se

James T. Hundley, Esq., for respondent (Patterson & Hundley)

Record Closed: October 6, 1989 Decided: November 8, 1989

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

Edward A. Pigut (petitioner), a teacher employed by the Neptune Township Board of Education (Board), filed a Petition of Appeal before the Commissioner of Education in which he complains that the Board "* * *allows the Program for Acceleration in Careers of Engineering (PACE) and Bell Labs Project Step to use Neptune Junior High School to recruit only minority students for their programs* * *" which, he says, is a violation of N.J.A.C. 6:4-1.5(a) and (g) and N.J.A.C. 6:4-1.6(c). After the Commissioner of Education transferred the matter on April 6, 1989 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a telephone prehearing conference was conducted June 30, 1989 at which certain issues were identified including the Board's motion to dismiss the action by reason of petitioner's asserted lack of standing and that if he has standing petitioner filed the Petition of Appeal beyond the 90-day time limit set forth at N.J.A.C. 6:24-1.2 and, accordingly, the Petition should be dismissed as being time barred.

The motion was held in abeyance pending a hearing on the matter which was conducted September 13, 1989 at the Asbury Park Municipal Building. After the hearing, petitioner filed a letter in opposition to the then-pending motions.

Findings are reached in this initial decision that petitioner lacks standing, that the Petition of Appeal was filed out-of-time, and even if petitioner has standing and the Petition were not filed out-of-time, the evidence produced at hearing is insufficient to sustain a cause of action against the Board.

BACKGROUND FACTS

According to the pleadings filed in this matter, one program complained of by petitioner is operated by the Brookdale Community College, located in Monmouth County as is the Neptune Township School District. The other program is operated by Bell Communications Research (Bellcore), a research and technology company established following the 1984 breakup of the Bell system. Brookdale operates the Program for Acceleration in Careers of Engineering (PACE), which has been in operation since 1982, and sponsored by the minority professionals at Brookdale Community College and by the New Jersey Department of Education. Bellcore operates a "Summer Science Program." Both programs operate during the summer months and afford black, hispanic and asian students, grades 9 through 12, in precollege curriculum and for summer employment in engineering. Apparently, the programs are designed to emphasize minority pupil participation in the exclusion of caucasian pupils.

The Neptune Township guidance counselors are asked each year to recommend "minority students" who have aptitude for math and science to participate in the Bellcore program. (See P-2) There is some evidence that a caucasian pupil was rejected for the Bellcore program and not recommended for participation because the program is for minority youth. (See P-3)

Petitioner claims in his Petition that:

> As a member of the faculty of the Neptune Township district, in the spring of 1988 I found it necessary to file an Affirmative Action Grievance against Neptune Township for what I believe is a violation of N.J.A.C. 6:4-1.6(c)* * *
>
> Neptune Township allows the Program for Acceleration in Careers of Engineering (PACE) and Bell Labs Project Step to use

> Neptune Junior High School to recruit only minority students for their programs, I believe this is also a violation of N.J.A.C. 6:4-1.5(a)

The Board admits that Brookdale Community College and Bellcore to use the Neptune Township public school system for purposes of recruiting minority pupils for both programs.

This concludes the recitation of all relevant and material background facts of the matter for purposes of adjudication of the matter.

LEGAL ANALYSIS
STANDING

Standing to commence litigation requires that the litigant, in this case petitioner, have sufficient stake and real adverseness with respect to the subject matter of litigation, and substantial likelihood that some harm will fall upon him in the event of an unfavorable decision. In re New Jersey Bd. of Public Utilities, 200 N.J. Super. 544 (App. Div. 1985). See also, Silverman v. Bd. of Ed. Twp. of Millburn, 134 N.J. Super. 253, aff'd 136 N.J. Super. 435 (App. Div. 1975).

In this case, petitioner's position of employment with the Board as a teacher provides an insufficient stake for him to complain of the two programs he puts in issue here. There is no real adverseness as between petitioner, the Board, and the program operators. Petitioner has failed to identify any harm that would fall upon him in the event of an unfavorable decision. While it may appear at first blush some pupils, not otherwise classifiable as minority pupils, may be excluded from participation in the program solely because they are not a minority, whatever harm if any harm would flow to those pupils is not visited upon petitioner. Petitioner is not an attorney who is licensed to practice law in the state of New Jersey; consequently, he may only represent his own interest in filing a Petition of Appeal.

In this case, petitioner has failed to identify that interest and the harm which would befall him should the programs be affirmed.

Therefore, I **CONCLUDE** petitioner does not have standing to bring the matter before the Commissioner of Education. Petitioner claims in his letter filed September 25, 1989 that a recent case, Concerned Parents of Wall Township v. Wall Township Board of Education, et al., Dkt. EDU 5220-89, 192-6/89, decided by the

Commissioner on September 7, 1989, adds strength to his standing. Nevertheless, petitioner does not explain why.

In the cited case, I am aware that an administrative law judge ruled that petitioners had standing to challenge the Board's transfer of its professional staff. Nevertheless, that case has subsequently been dismissed by this judge because petitioners there failed to state a cause of action. I am not aware of the Commissioner specifically affirming the administrative law judge's ruling that petitioners had standing in the first instance to challenge such an action.

TIMELINESS

N.J.A.C. 6:24-1.2 provides, in part, as follows:

* * *

(b) 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.

Here, petitioner complains of both programs which were operated during the 1988 summer. Furthermore, petitioner filed a grievance, presumably under the then-existing Agreement between the Neptune Township Teachers Association and the Board regarding the continuation of the programs for the 1988 summer. The Board ultimately denied petitioner's grievance on or about July 27, 1988. The Board advised petitioner of its denial on or about July 28, 1988. The instant Petition of Appeal was filed March 7, 1989, more than 90 days from the date the Board denied his grievance. Petitioner's argument that the programs are likely to continue into the future and thus the complaint of programs are continuing violations is rejected. If in fact the programs are continued each year, then a new cause of action would arise each year. But, here petitioner complains of the programs operated during the 1988 summer months.

The Petition of Appeal is filed untimely if, in fact, petitioner had standing to bring the action in the first instance.

MERITS OF THE CASE

Even if petitioner had standing to bring the action and even if the Petition was filed in a timely manner, the evidence produced at hearing regarding petitioner's interest in the sense of his being a teacher in the Board's employ and therefore obligated to carry out what he contends are unlawful programs, the evidence simply does not support that allegation. Petitioner did call a parent to testify that her son was not recommended for the program because he is not a minority. However, that testimony does not support whatever interest petitioner himself may have in the program. Petitioner produced absolutely no evidence to show that in his own right the programs are unlawful. Furthermore, the cited administrative regulations petitioner contends the Board violates by allowing such programs are contained within Chapter 4 of Title 6 of the New Jersey Administrative Code. The title of Chapter 4 is Equality in Educational Programs provides at N.J.A.C. 6:4-1.3(b) that:

> Each local school district shall develop two affirmative action programs or plans, which shall include timetables for corrective action to overcome the affects of any previous patterns of discrimination which may exist and a systematic internal monitoring procedure to insure continuing compliance * * *.

Clearly, local boards of education have the authority by State Board of Education regulation to engage in an affirmative action program which tends to correct past patterns of discrimination. Petitioner has produced no evidence that the Board through its cooperation with the Brookdale Community College and Bellcore has in any way exceeded the scope of its authority.

CONCLUSION

For all the foregoing reasons, the Petition of Appeal must be dismissed because (1) petitioner lacks standing to bring the action, (2) if he has standing, the Petition of Appeal was filed in an untimely manner, and (3) if petitioner has standing and if the Petition of Appeal was filed in a timely manner the evidence produced by petitioner at hearing is insufficient to find and conclude that the Board is violating or has violated any of the cited administrative regulations.

The Petition of Appeal is **DISMISSED.**

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION ON MOTION
OAL DKT. NO. EDU 7499-88
AGENCY DKT. NO. 331-10/88

MT. PLEASANT-BLYTHEDALE UNION FREE SCHOOL DISTRICT,

Petitioner,

v.

N.J. STATE DEPARTMENT OF EDUCATION
and
MT. ARLINGTON Board of Education,
MARLBORO Board of Education,
JEFFERSON TOWNSHIP Board of Education,
FREEHOLD Board of Education,
WESTWOOD Board of Education,
RIDGEFIELD Board of Education,
TEANECK Board of Education, and
BERNARDSVILLE Board of Education,

Respondents.

Larry Blumenstyk, Esq., for petitioner
(Gilbert, Gilbert, Schlossberg & Bottitta, attorneys)

Arlene Goldfus-Lutz, Deputy Attorney General, for respondent, N.J. State Department of Education
(Peter N. Peretti, Jr., Attorney General of New Jersey, attorney)

BARBARA CARNEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the findings and the conclusions of the Office of Administrative Law that petitioner has failed to advance a cause upon which relief can be granted. The Commissioner further finds and determines that petitioner has failed to demonstrate that there are genuine material issues of fact, for the reasons expressed in the initial decision.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law granting the Board's Motion for Summary Decision and, thus, dismisses the Petition of Appeal with prejudice for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

September 18, 1989

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
MOTION FOR EMERGENCY RELIEF
OAL DKT. NO. EDU 8504-89
AGENCY DKT. NO. 339-11/89

RIDGEFIELD PARK BOARD OF EDUCATION,

Petitioner,

v.

LITTLE FERRY BOARD OF EDUCATION,

Respondent.

James L. Plosia, Esq., for petitioner
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Maria Taus, Esq., for respondent
(Gallo, Geffner, Fenster, Farrell, Turitz & Harraka, attorneys)

Record Closed: November 16, 1989 Decided: November 16, 1989

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

The Ridgefield Park Board of Education, a receiving district educating high school pupils who reside in Little Ferry, seeks both tuition payments for the 1986-87 school year approximating $96,320 and tuition payments of $186,314.50 for the 1989-90 school year (total of $372,629) which were due for September and October of the current school year. Ridgefield Park also seeks an Order to require Little Ferry to make subsequent tuition payments in a timely fashion, as well as interest for overdue payments.

The matter was transmitted to the Office of Administrative Law as a contested case on November 6, 1989. Oral argument was heard on November 16, 1989 and the record closed at the completion of same on that date.

The transmittal of this matter incorporated the direction by the Commissioner of Education that the hearing be "limited solely to tuition which may be due and owing for the 1989-90 school year." It is presumed that the recently completed audit of tuition costs for the 1986-87 school year will notice Little Ferry of any back tuition payments due for that school year, and that payment of same will be expeditiously transmitted to petitioner.

It is undisputed that the parties entered into a sending-receiving contract in 1972, and that no sucessor contract has been executed since the 1982 expiration of that agreement. Nevertheless, Ridgefield Park has continued to educate the high school pupils from Little Ferry. Notwithstanding the continuing relationship, Little Ferry appears to have challenged previous tuition costs without success, and now has refused to transmit monthly tuition payments based on its desire to determine the accuracy of Ridgefield Park's estimated costs.

I FIND the rationale of Little Ferry to lack merit.

The method of determining tuition rates is incorporated in N.J.A.C. 6:20-3.1, and was authorized by the Legislature at N.J.S.A. 18A:38-19, which states:

> Whenever the pupils of any school district are attending public school in another district, . . ., the board of education of the receiving district shall determine a tuition rate to be paid by the board of education of the sendinng district to an amount not in excess of the actual cost per pupil as determined under rules prescribed by the commissioner and approved by the state board, and such tuition shall be paid by . . . the sending district out of any moneys . . . available for current expenses. . . .

I know of no authorithy to permit a sending district to defer current tuition payments pending its determination of the accuracy of a receiving school's estimate. The regulatory scheme incorporates a process of actual cost determination by audit as well as provisions for crediting and debiting over and under estimates, and also provides a process for a sending district to seek a deferment of a debit payment. See, N.J.A.C. 6:20-3.1(d)3 and 4.

I **FIND** the sending district is required to make current tuition payments in a timely fashion as a matter of law, and **CONCLUDE** that petitioner's Motion for Emergency Relief shall be and is hereby **GRANTED.**

The Little Ferry Board of Education is **ORDERED** to authorize and transmit 1989-90 back tuition payments no later than the first public meeting following receipt of the Commissioner's decision in this matter, and is further **ORDERED** to make subsequent payments in a timely fashion.

The misperceived entitlement by Little Ferry to withhold tuition payments until it determines the accuracy of tuition estimates is determined here to be insufficient to require the payment of interest.

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

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

16 November 1989
DATE

WARD R. YOUNG, ALJ

Nov. 21, 1989
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

NOV 21 1989
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Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

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BOARD OF EDUCATION OF THE VILLAGE OF RIDGEFIELD PARK, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LITTLE FERRY, BERGEN COUNTY, RESPONDENT.	:	DECISION

The record and initial decision rendered by the Office of Administrative Law in response to a Motion for Emergent Relief brought by the Ridgefield Park Board of Education have been reviewed. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. Little Ferry's exceptions, however, were untimely as documented by return receipt card indicating receipt on November 24, 1989. Therefore Ridgefield Park's reply exceptions to Little Ferry's primary exceptions were not considered in the review of this case.

Ridgefield Park submits two exceptions. It would first correct what it perceives is an error on the part of the ALJ in assessing the total amount owed to Ridgefield Park by Little Ferry for tuition. It claims the actual amount owed is $466,249, not $372,629 as recorded in the initial decision, ante. Further, Ridgefield Park avers the ALJ erred in declining to award pre-judgment interest. It claims that "Little Ferry's refusal to pay the tuition monies owned was a bad faith denial in flagrant violation of statutory duties***." (Ridgefield Park's Exceptions, at p. 2) It argues that Little Ferry's refusal to pay the money owed cannot be attributed to a "misperception" (Id.), as the ALJ characterizes it, because Little Ferry has already been ordered by the Commissioner to pay $33,000 in owed tuition for the 1985-86 school year, but has failed to do so. Further, it claims it is impossible for Little Ferry to audit the 1989-90 costs at this time,"*** and it is ludicrous for Little Ferry to assert that it is withholding this year's tuition based upon prior year's alleged inaccurate tuition charges." (Id.)

Ridgefield Park further argues that Little Ferry is well aware of the established procedure for payment of tuition and adjustment for overcharges or undercharges. It claims that Little Ferry's refusal to pay the monthly charges of $186,014.50 was in bad faith and a deliberate disregard for the law, constituting grounds for awarding pre-judgment interest to Ridgefield Park. It also seeks post-judgment interest pursuant to N.J.A.C. 6:24-1.18(b)(2). It argues that although N.J.A.C. 6:24-1.18(c)(2) provides that such interest will accrue from 60 days of the date of the Commissioner's decision, Ridgefield Park asks that a 10-day period be established in light of Little Ferry's flagrant refusal to comply with the Commissioner's earlier decisions.

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that the Little Ferry Board's argument on the merits of this matter that it is entitled to withhold tuition payments until it is satisfied with the accuracy of tuition estimates is entirely without merit. As found by the ALJ, the method for determining tuition rates is plainly set forth at N.J.A.C. 6:20-3.1, a regulation that Little Ferry knows or should know of as a result of its long-standing sending-receiving relationship with Ridgefield Park. The Commissioner further finds that the ALJ's moving beyond the standards for reviewing a Motion for pendente lite restraints as set forth in Crowe v. De Gioia, 90 N.J. 126 (1982) to the merits of the matter was appropriate as was his conclusion that in the instant matter "***the sending district is required to make current tuition payments in a timely fashion as a matter of law***." (Initial Decision, ante)

The Commissioner disagrees with the conclusion reached by ALJ Young, however, that "[t]he misperceived entitlement by Little Ferry to withhold tuition payments until it determines the accuracy of tuition estimates is determined here to be insufficient to require the payment of interest." (Id.) The standard by which the grant of pre-judgment interest is gauged is set forth at N.J.A.C. 6:24-1.18(c)(1), which states:

> Pre-judgment interest shall be awarded by the commissioner when he or she has concluded that the denial of the monetary claim was an action taken in bad faith and/or has been determined to have been taken in deliberate violation of statute or rule.

The Commissioner in this regard agrees with the Ridgefield Park Board's assessment that Little Ferry's recalcitrance in paying the tuition for the 1989-90 school year to date is evidence of bad faith taken in contravention of its statutory duties. The Commissioner does not concur with the Ridgefield Park Board, however, that post-judgment interest is appropriate. No Commissioner's decision has issued concerning the matter at hand, which was specifically "limited solely to tuition which may be due and owing for the 1989-90 school year." (See Initial Decision, ante) Thus, the Commissioner makes no judgment on total amounts which may be due and owing from Little Ferry from the years before the 1989-90 school year, nor does he conclude on the basis of any previous holdings of the Commissioner that a shorter grace period is warranted in the matter currently before him concerning the 1989-90 tuition payments. He so finds.

Accordingly, for the reasons expressed in the initial decision, as modified herein, the Commissioner accepts the recommendation of the Office of Administrative Law granting the prayer for relief requested by Ridgefield Park. The Commissioner directs the Little Ferry Board of Education to authorize and transmit 1989-90 back tuition payments due and owing up through the current date no later than the first public meeting following receipt of the Commissioner's decision in this matter, with pre-judgment interest assessed based upon the average rate of

interest earned on investments by the party responsible for such payments during the period of time in which the monies awarded were illegally detained pursuant to N.J.A.C. 6:24-1.18(d)1. The Commissioner further directs the Little Ferry Board of Education to make subsequent payments in a timely fashion.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 20, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2055-89
AGENCY DKT. NO. 46-3/89

ROBERT HERMANN,
Petitioner,
v.
HUNTERDON CENTRAL REGIONAL HIGH SCHOOL BOARD OF EDUCATION,
Respondent.

Sanford R. Oxfeld, Esq., for petitioner (Oxfeld, Cohne, Blunda, Friedman, LeVine & Brooks, Attorneys)
James P. Granello, Esq., for respondent

Record Closed: October 1, 1989 Decided: November 13, 1989

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

INTRODUCTION

Robert Hermann, (petitioner), a teacher with a tenure status in the employ of the Hunterdon Central Regional Board of Education (Board), claims in a petition filed March 13, 1989 to the Commisssioner of Education that the Board improperly terminated his employment following a reduction-in-force because the Board failed to honor a prior agreement entered during September 19, 1979. After the Commissioner transferred the matter on March 21, 1989 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1, et seq. a telephone prehearing conference was

conducted May 31, 1989. The issues of the case were agreed upon and the parties also agreed to submit the matter for adjudication by way of cross-motions for summary decision on the record. The record consists of the pleadings and filed exhibits. Memoranda of law were filed by the parties, along with petitioner's certification in lieu of affidavit in opposition to the Board's argument regarding the timeliness of the petition.

The conclusion is reached in this initial decision that the prior agreement entered by the parties during September 1979 provides no basis upon which petitioner is entitled to greater seniority than that already credited him by the Board.

BACKGROUND FACTS

The background facts of the matter as established by the pleadings and exhibits and by petitioner's certification in opposition to the argument of timeliness are the following.

On or about April 6, 1977 petitioner, along with other Board employees was charged by the police with receiving stolen property from a minor. The Board determined on or about November 15, 1977 to certify tenure charges of unbecoming conduct against petitioner and to suspend him from his teaching duties, without pay, pending a determination on the merits of the charges.

During May 1977 petitioner was granted pretrial intervention on the criminal charges. During July 1979 the administrative tenure charges were scheduled to be heard. Prior to the commencement of the hearing, however, the parties entered a settlement agreement of those charges which agreement is the focus of the present petition. The agreement entered into during July 1979 is reproduced here in full:

> Whereas, on November 14, 1977, the Hunterdon Central High School Board of Education (hereinafter Board) resolved to issue tenure charges against Respondent Robert Hermann; and
>
> Whereas, on October 25, 1978, the Commissioner of Education ordered a stay of all proceedings pending the resolution of an appeal filed by the Respondent regarding his application to pre-trial intervention, and
>
> Whereas, on or about May, 1979, the New Jersey Supreme Court ruled that the Respondent could be permitted into pretrial intervention, and

Whereas, on June 22, 1979, a second prehearing conference was held between the parties wherein it was ordered that tenure hearings be conducted, and

Whereas the matter in difference in the above entitled action having been amicably adjusted by and between the parties it is hereby stipulated and agreed that the same be and it is hereby dismissed with prejudice subject to the following terms and conditions:

1. The Respondent accepts his suspension from the date that tenure charges were filed against him in November of 1977 to the beginning of the second semester of the 1979-80 school year, without pay.

2. That the Respondent, Robert Hermann will be placed on the sixth step of the teacher's salary guide beginning in the second semester of 1979-80 school year and will be entitled to move to the seventh step of the salary guide beginning in September of 1980 subject to the Board's right to withhold salary increments.

3. A letter of repimand will be drafted by counsel for the Board which will contain an acknowledgement that the Respondent's activities in April of 1977 were unbecoming a professional teacher, and that he should have know better than to get himself involved in this particular activity. Counsel for the Repondent will have an opportunity to review this letter of reprimand before it is placed in the Respondent's personnel file.

4. The Respondent will obtain written confirmation from a representative of the Hunterdon Central High School Education Association which will indicate that no action will be instituted as a result of any settlement arrived at concerning the Respondent regarding this matter, which will collaterally attack any part of this stipulation of settlement.

5. A copy of this settlement will be submitted to the Commissioner of Education requesting the withdrawal of these charges with prejudice.

The agreement as written was then mutually accepted by the parties. The tenure charges were withdrawn and respondent after serving a suspension without pay from November 15, 1977 to the beginning of the second semester 1979-80 academic year, a total of approximately two academic years and two months, returned to classroom teaching.

During June 1988, the Board determined to institute a reduction-in-force which itself is not challenged here by petitioner. Nevertheless, petitioner does challenge

the Board's failure to credit him for seniority for the two year two month absence between 1977 through 1980 he was on suspension without pay.

Petitioner's filed certification initially presents his version of "facts" leading to his arrest on the criminal charge and subsequent suspension without pay by the Board on the administrative tenure charges. Petitioner than relates that he was the only teacher suspended by the Board despite two other employees purchasing lumber and that another teacher who was to have been involved in the conduct which lead to his, petitioner's arrest "*** continued in the employ of the Board and never lost a day's seniority or pay ***"

The foregoing asserted facts, I **FIND**, are irrelevant to the issue of the 1979 agreement presented by the petitioner. The relevant facts are that petitioner was arrested for criminal conduct, that based on the conduct the Board certified tenure charges of unbecoming conduct against him and suspended him without pay, that prior to taking of testimony on the tenure charges petitioner entered a settlement presented above with the Board, and that the Commissioner approved the written settlement agreement as presented him.

In opposition to the argument of timeliness of the petition being filed, petitioner's certification states in relevant part as follows:

> 8. [After the settlement agreement regarding the tenure charges was reached]
>
> I then stated to the Board attorney that I was earning a living as a carpenter while I was suspended and I had two additional jobs to complete. I suggested it would be better for both me and the students if, instead of returning during the first semester, I would be reinstated in January 1980 at the beginning of the second semester. The Board attorney said that the Board could not pay me from September 1979 if I did not return to work. I told the Board attorney that the Board could keep all the money it owed me (including pay for all time after 120 days had elapsed) if I could return in January 1980 as if I had never left. The Board attorney agreed to this. All the terms of the settlement were executed, including my second repremand, my forfeiting all back pay, my returning to work in January, 1980 and, when I return to the classroom my being placed on the sixth step of the salary guide (where I would have been if I had never been suspended), my receiving all accumulated sick leave, and my hospitalization and health benefits were paid.

9. Accordingly, when I returned to work, I had assumed that the Board had complied with the settlement agreement in full, as all of the terms had been fulfilled by me and the Board. I had also assumed that as per the settlement, I had lost no seniority.

10. At the beginning of each school year, a departmental meeting is held. At each meeting, we were given a 3x5 card to complete by the department chairman. On this card, I consistently responded that my seniority was as if I had never left. This was what was agreed to in the settlement. At no time did anyone ever challenge my seniority entry.

***

12. In the middle of April 1988, I was advised by the school administration that I would be RIFFED at the end of 1987-88 school year. I then met with the new Superintendent and explained to him what had occurred in 1979-80. He said that he was not familiar with what had occurred. There is another shop teacher who has less seniority than I do - if I was treated as we had agreed - whom I contended should have been RIFFED ***

Petitioner further contends without explanation that neither N.J.A.C. 6:3-1.10(b) nor Cohen v. Emerson Bd. of Educ., 225 N.J. Super. 324, 330-331 (App. Div. 1988) apply to this case. Petitioner certifies that "I was suspended by the Board pursuant to N.J.S.A. 18A:6-10. I was not absent or on a leave of absence. There was no time that I was allowed to return to work but was absent for a period greater than 30 days. I was prevented from working due to my suspension ***."

This concudes a restoration of all relevant background facts of the matter.

LEGAL ARGUMENTS

BOARD

The Board contends petitioner's present petition is barred for failure to file in a timely manner under N.J.A.C. 6:24-1.2, the 90 day rule and upon the equitable doctrine of laches. The Board notes that petitioner received notice during June 1988 that it intended to reduce its teaching force and that, as a result, his employment would be terminated. Nevertheless, the instant petition of appeal was not filed until March 13, 1989, more than nine months far in excess of the 90 days provided by the rule within which to file a petition. Furthermore, the Board contends that the equitable principal of

laches should apply in this case because petitioner engaged in an inexcusable delay between the time the settlement agreement was entered in 1979 until the present, 1989, when he decides to challenge the terms of the agreement.

The Board contends that petitioner's claim for seniority credit during his two year suspension is prohibited as a matter of law under N.J.A.C. 6:3-10(b) and cites several cases in support of its position, primarily Cohen v. Emerson Board of Ed., 225 N.J. Super. 324 (App. Div. 1988).

The Board argues that the parol evidence rule bars asserted oral agreement to expand the understanding of parties to a written agreement when that written is fully intergrated and cites Kronisch v. Howard Savings, 154 N.J. Super. 576, 586 (Chan. Div. 1977) and Varriano v. Miller, 58 N.J. Super. 511, 519 (App. Div. 1959). Finally, the Board contends that the petition should be dismissed because of petitioner's failure to name all necessary parties to the action. It is noted that the Board iteself fails to identify the necessary and indepensible parties necessary to named in this case which it alleges petitioner failed to identify.

PETITIONER'S ARGUMENTS

Petitioner, in opposition to the Board's motion for summary decision and in opposition to Board's assertion the petition was filed untimely, cites Lavin v. Hackensack Bd. of Ed., 90 N.J. 145 (1982) for the proposition that if lachees is involved in this case, a hearing is necessary to determine the equities of the parties. In all other respect, petitioner relies upon the certification filed, parts which have been reproduced herein.

LEGAL ANALYSIS

N.J.A.C. 6:24-1.2(b) provides that a petition to the Commissioner shall be filed no later than "*** the 90th day from the receipt of the notice of the final order, ruling or other action by the District Board of Education which is the subject of the requested contested case hearing." In this case, there is no doubt that petitioner was notified at least by June 30, 1988 of his termination of employment following the Boards reduction-of-force. Moreover, his certification reveals that he himself acknowledges that "In the middles of April 1988, I was advised *** I would be in RIFFED ***." In light of the fact petitioner did not file the instant petition of appeal to the Commissioner until March 13,

1989 according to the date stamp of the Depratment of Education, the petition of appeal was clearly filed beyond the 90 days allowed under the cited administrative regulation. Petitioner presents no basis upon which the 90 day rule should be relaxed. Accordingly, I **FIND** and **CONCLUDE** that petitioner's petition to the Commissioner, having been filed March 13, 1989, was filed more than 90 days from the date of receipt of the notice from the Board that his employment would be terminated as of June 30, 1988. Consequently, the petition of appeal must be dismissed for having been filed in an untimely fashion. The 90 day rule having been applied in this case, there is no need to address the issue of the application of the equitable doctrine laches.

But even if the petition of appeal were filed to the Commissioner in a timely fashion under N.J.A.C. 6:24-1.2(b), the petition itself fails to state a cause of action. Seniority under N.J.S.A. 18A:28-11, et seq., is to be determined according to standards adopted by the Commissioner. The Commissioner's standards for determining seniority are established at N.J.A.C. 6:3-1.10 and contrary to petitioner's argument the rule does apply. It provides that seniority is to be determined according to actual service provided the Board by the affected employee. In this case, petitioner provided no service to the Board during his suspension without pay under the terms of the agreement in lieu of a plenary hearing on the tenure charges. Indeed, the agreement itself, requiring the prior approval of the Commissioner before the execution of its terms, must be a completely intergrated agreement and, as noted by Board, is not subject to alteration by oral agreements not contained within the writing. Consequently, the agreement standing on its own terms, makes no provision for seniority to accrue to petitioner during the time of his suspension without pay.

Even if the agreement provided for the accrual of seniority by petitioner during his suspension without pay, the agreement would be unenforceable because seniority accrual depends upon service rendered. If an affected employee does not render service to the Board, seniority does not attach accept as provided by law or regulation. There is no law or regulation which provides for seniority during a suspension imposed as a form of discipline.

Contrary to petitioner's certification that he was ostensibly prohibited by the Board from working due to its suspension of him, the fact is petitioner was not working due to his own prior conduct upon which the Board determined to certify tenure charges.

Accordingly, I **FIND** and **CONCLUDE** that (1) the petition was filed out of time under N.J.A.C. 6:24-1.2(b) and I conclude that the petition of appeal should be dismissed on that basis; (2) I find that the petition of appeal fails to state a cause of action for which relief could or should be granted because the seniority regulations promulgated by the Commissioner pursuant to his statutory duty provides for the accrual of seniority based only upon employment service rendered to the Board; and, (3) even if the agreement provided for the accrual of such seniority, the agreement in these circumstances would not be enforceable.

CONCLUSION

For the foregoing reasons, I **CONCLUDE** that summary decision must be entered on behalf of the Board of Education. Therefore, the petition of appeal filed by Robert Hermann against the Hunterdon Central Regional High School is hereby dismissed.

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

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

November 13, 1989
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Nov. 14, 1989
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

NOV 16 1989
DATE

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ROBERT HERMANN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions and replies thereto were filed respectively by petitioner and respondent pursuant to N.J.A.C. 1:1-18.4.

Both petitioner's exceptions and respondent's replies consist solely of references to documents presented to the Administrative Law Judge (ALJ) and discussed by him in the initial decision, so that their substance and line of argumentation need not be reiterated here.

Upon his own independent review of this matter, the Commissioner fully concurs with the findings and conclusions of the ALJ that the instant petition was filed out of time, fails to state a cause of action on which relief can be granted, and seeks an interpretation of the underlying settlement agreement that would render it unenforceable if true.

Accordingly, for the reasons expressed in the initial decision, the Commissioner adopts the ALJ's dismissal of the instant Petition of Appeal as the final decision in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 26, 1989

Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7153-88
AGENCY DKT. NO. 261-8/88

LEE AMOS,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE,
Respondent.

Robert M. Schwartz, Esq., for petitioner

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

Record Closed: September 25, 1989 Decided: November 9, 1989

BEFORE **ARNOLD SAMUELS**, ALJ:

The petitioner, Lee Amos, is a tenured teaching staff member and assistant principal employed by the respondent, Board of Education of the City of East Orange (Board). On June 7, 1988, the Board acted to withhold the petitioner's salary increments for the 1988-89 school year. This is an appeal by Mr. Amos of the Board's action.

PROCEDURAL HISTORY

The petitioner filed his verified petition of appeal with the Commissioner of Education on August 9, 1988, alleging that the Board's withholding action was arbitrary, capricious, unreasonable and in violation of *N.J.S.A.* 18A:29-14. A second count alleged violation of a contractual agreement between the Board and the East Orange Administrator's Association. A timely answer, denying the substantive allegations of the petition and asserting various affirmative defenses, was filed by the respondent. On September 29, 1988, the Commissioner of Education transmitted the matter to the Office of Administrative Law for hearing and determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

A telephone prehearing conference was held on November 29, 1988, and a prehearing order was entered, defining the issues to be decided, providing for discovery and regulating other procedural aspects of the forthcoming hearing. A two-day hearing was held on April 26 and 27, 1989, at the Office of Administrative Law in Newark, New Jersey. The petitioner, Lee Amos, testified in his own behalf, and two witnesses testified for the respondent. Twenty-one exhibits were marked in evidence, as identified on the exhibit list attached to this decision. Posthearing briefs and memoranda were filed by the parties, following a delay caused by problems in obtaining transcripts. The record closed on September 25, 1989.

ISSUES

The issues to be resolved, as set forth in the prehearing order, are as follows:

A. Was the action of the Board in withholding petitioner's increments arbitrary, unreasonable, capricious and therefore unlawful?

B. If any finding is made in favor of the petitioner, what remedy shall be granted him?

The petitioner originally included a second count in the petition of appeal, alleging a violation of the contractual agreement between the East Orange Administrators' Association and the East Orange Board of Education. In its transmittal of the contested case to the Office of Administrative Law, the

Department of Education stated that Count II of the petition involved a contractual matter not cognizable before the Commissioner of Education. It was requested that either a predominant interest determination be made, pursuant to *N.J.A.C.* 1:1-17.1 *et seq.*, or that Count II be severed from the appeal.

The foregoing direction of the Commissioner of Education was mentioned at the prehearing conference, and counsel replied that he would proceed only on Count I (the increment withholding issue stated above). The prehearing order then limited the issues to A & B, as stated above. A predominant interest determination was not applied for thereafter.

On the first hearing day, counsel for petitioner stated that he desired to proceed with Count II, as well as Count I. This request was denied because of the situation explained above, and the hearing proceeded to its conclusion limited only to Issues A and B, dealing with Count I. However, it was ruled, at the beginning of the hearing on April 26, 1989, that Count II was severed from the appeal, but not considered to be abandoned by the petitioner, whose rights to otherwise pursue it, whatever those rights were at the time, would be preserved.

DISCUSSION OF THE EVIDENCE AND TESTIMONY

The petitioner, Lee Amos, testified that he had been employed as an assistant principal at the Vernon L. Davey Jr. High School in the East Orange School District for the past 15 years, since 1973. He served under four different principals, the most recent being Laura Trimmings, whose first year at the school, and as Mr. Amos' supervisor, was 1987-88. Her evaluation of the petitioner in May 1988 recommended that Mr. Amos be terminated from his position. Instead, the Board withheld the increments that are the subject matter of this appeal.

The petitioner stated that his basic duties as assistant principal were generally the same during each of his 15 years in the position, allowing for some variations, depending on the style of each of the four principals. His duties were generally to assist the principal in all aspects of operating the school. More specifically, Mr. Amos listed four major areas of responsibility: discipline, relating to teachers, students, parents and the community in general; instructional, including administrative assistance, observation, support and evaluation of the instructional process;

community, relating to communication with outside agencies regarding their supporting roles; and evaluation of teachers, where the petitioner was responsible for approximately 50 percent of the direct teacher evaluations. During most of the years of his tenure as assistant principal, Mr. Amos was the only administrative assistant in the building.

Virtually all of the testimony at the hearing revolved around the evaluation of the petitioner by the principal, Laura Trimmings, in May 1988, near the end of the school year. This 14-page document, marked Exhibit P-1 in evidence, contains highly detailed and extensive checklists and narrative matter covering many areas of administrative skills. The evaluation is strongly worded and exceedingly negative. It was the only evaluation of the assistant principal for the year, and Mr. Amos testified that it arrived without warning because, although he conferred with the principal about building operations several times, he had no conferences with Ms. Trimmings about the evaluation until after it was presented to him in May.

In order to demonstrate the surprise he experienced upon receiving the negative evaluation, Mr. Amos introduced a series of his prior evaluations from 1981 through 1987, all of which rated his performance as satisfactory (See Exhibits P-3 through P-9). These earlier evaluations were done by Melvin Sanders, Ms. Trimmings' predecessor as principal. The prior evaluations were much shorter and less detailed than the extensive document involved in this dispute. Some shortcomings were noted in the earlier documents, along with strengths that supported the satisfactory ratings. The prior evaluations were marked into evidence, but they were only admitted to show the background that preceded the 1987-88 contested evaluation. The earlier evaluations had no relevance to the petitioner's actual job performance during the 1987-88 school year.

The petitioner's testimony largely consisted of his comments relating to the individual chapters and paragraphs in the May 1988 evaluation by Ms. Trimmings, Exhibit P-1. The principal's testimony, immediately following, essentially responded to the petitioner's testimony, paragraph by paragraph. She also related and expanded on the various conferences and memoranda between the two protagonists during the 1987-88 school year.

The subject evaluation (Exhibit P-1) is separated into seven subject areas: administrative and management skills; instructional leadership skills; school/community involvement; interpersonal skills; professional attributes; personal factors; and miscellaneous performance factors. Each of these areas, except miscellaneous performance factors, is broken down into two sections: the first section consists of preprinted evaluative items, which are checked by the evaluator according to a six-point multiple choice ranging between outstanding and failure. Secondly, extensive typewritten comments follow the checklists in each of the categories, except for miscellaneous performance factors. The document then contains a summary of performance evaluation and a professional improvement plan.

In the first category, administrative and management skills, the multiple choice section contained four performance items rated "average," three "needs improvement," five "unsatisfactory" and one "failure." The principal's written comments were markedly negative. Her opening comments state, "Based on the kind of behavior exhibited by Mr. Amos in the discharge of his administrative assignments, it is obvious that he lacks an understanding of what a building-based administrator is expected to do, particularly in the area of decision-making and the statutes by which the process is guided." She then proceeds to criticize Mr. Amos' performance relating to student discipline, stating that " . . on more than 100 occasions, has called the principal during a parent conference to ask if what he has said to a parent in an attempt to modify disruptive behavior in students is the best or most appropriate response." She then says,"Clearly, Mr. Amos should have had the insight, after 14 years of experience in this school site, to plan a course of action and a disciplinary policy suitable for Vernon L. Davey. . . ." Ms. Trimmings also indicates that on more than three separate occasions, Mr. Amos had exhibited the inability to control his behavior when dealing with other staff. Concluding her comments in this category, the principal states, "Obviously, Mr. Amos further suffers from the inability to deal with stressful situations and is incapable of taking charge in the absence of the principal. Overall, Mr. Amos' performance has been functional at a level below minimal acceptability." See P-1, page 4.

In his testimony, the petitioner stated that he objected strongly to the foregoing critique when he conferred with the principal on May 19, 1988, following his receipt of the evaluation. According to Mr. Amos, Ms. Trimmings was not able to give him

any concrete examples to support the above comments, and she gave him no satisfactory answers. Referring to those occasions when he called her during student disciplinary conferences, Mr. Amos stated that he only sought her input in cases where she had been involved in a specific disciplinary problem with a child. The petitioner said that this happened approximately six times, not more than 100.

Referring to the principal's statement about the absence of a disciplinary policy, Mr. Amos testified that he had looked to the new principal to announce an initial disciplinary policy and procedures, but she did not do so until March 1988, after he requested it. Mr. Amos also testified that he questioned Ms. Trimmings about her comment that he exhibited an inability to control his behavior when dealing with other staff, when she referred to a verbal outburst directed towards a secretary on one occasion. The petitioner explained that the outburst came from indignant and angry parents, not from him, and the principal had never discussed that situation with him.

In her testimony, Ms. Trimmings attempted to expand on the rather general narrative comments dealt with above, by citing specific examples. To some extent, she was prevented from continuing with these specifics in her testimony because petitioner correctly objected that he was being taken by surprise with such additional details, which were not provided in discovery. It was demonstrated that when specific details were requested in interrogatories, they were not provided in the answers. Instead, the answers simply referred back to the evaluation document by stating, "See evaluation dated May 18, 1988," or similar language to that effect. In other words, when specific facts and instances were not supplied in answers to interrogatories, in response to direct questions seeking those facts, respondent was precluded, to some extent, from supplying the information it was unwilling to give in his answers to interrogatories.

In the instructional and leadership skills section of the evaluation, the petitioner was given seven "average" ratings, five "needs improvement" and two "failures." The narrative comments were exceedingly negative. Some excerpts from these comments are as follows: "Mr. Amos' general performance in the area of instructional leadership is unsatisfactory. His leadership behavior is clouded by negativism. He communicates administrative joint decisions in a reversed manner to staff which breaches the confidentiality between the administrators' working

relationship. Consequently, the resultant teacher implementation of directives given by him demonstrates behavior which appears to be intended to undermine district and school goals and objectives. . . . Needless to say, Mr. Amos' incompetency in this area has resulted in a year-long series of interruptions in the schedule, inefficient utilization of staff, and some students repeating the same cycle courses for one, two, or more cycles. Mr. Amos' cooperation in these regards [sic] has been far less than acceptable." *See* P-1, page 6.

In his testimony, Mr. Amos stated that he asked the principal exactly what she meant when she said that his "behavior is clouded by negativism." Mr. Amos said that she never gave him any details to support that statement. He also asked how his behavior undermined school goals. According to his testimony, he was never told what that meant.

Ms. Trimmings' comments at the end of the narrative referred to the assistant principal's alleged incompetency in the area of scheduling. According to the petitioner, he did the scheduling and kept the principal informed of problems and changes, without criticism. He also stated that he had done similar scheduling the year before, under the previous principal, who had approved it. These procedures were essentially unchanged in 1987-88. Mr. Amos said that any disruption in the scheduling was due to the fact that the principal did not give the computer operators enough time to smooth out the details. When he told her that additional computer time was needed to enter major changes on the schedule, the time was not allotted because other duties had been assigned by the principal to the computer input people.

The evaluation section relating to school/community involvement was very brief. The multiple choice section contained two "average" ratings and one "needs improvement." However, even there, the brief narrative comments were critical. It was stated that Mr. Amos had been in attendance at nearly all school/community activities during the year, but "although he has willingly accepted the responsibility to participate in school/community programs, he makes very little, or not effort at all to prepare for such assignments." The principal then concedes in her comments that, "Mr. Amos has been instrumental in bringing noteworthy assembly programs to students on two occasions." *See* P-1, page 8.

In his brief testimony relating to this section, Mr. Amos stated that he had little responsibility for programs.

In the evaluation section pertaining to interpersonal skills, out of eight categories Mr. Amos received four "needs improvement" ratings and four "unsatisfactory" ratings. The narrative comments here were also pointedly negative. The principal stated,"The dimensions of Mr. Amos' interrelationships with staff, parents, and students for providing a purposeful and meaningful environment in which growth and development may occur may be characterized as shallow." She also wrote that he lacked the ability to follow through on decisions, directives and alternatives, a situation that caused initial problems to increase in magnitude or caused the emergence of additional problems. It was further stated that,"The manner in which he communicates suggestions and information to staff, parents and students tends to have a deleterious effect on all groups as well as on the school program potential as indicated by the lack of receptiveness and response." *See* P-1, page 9.

In his testimony, Mr. Amos said that when he asked the principal for specific details to support the above conclusions, she would not give him any concrete examples.

The next section of the evaluation deals with professional attributes. In the multiple choice portion of the document, Mr. Amos received three "average" ratings, three "needs improvement" and one "unsatisfactory." The brief narrative comments were no better than the prior sections. The principal stated that, "Since August 30, 1987, Mr. Amos has formally met with the principal on the average of twice weekly to jointly assess and evaluate those areas of his responsibilities which are functioning and those which are not or are in need of improvement. The discussions from several of these meetings have been reduced to writing to serve as tools for self-improvement. Resultantly, self growth and development for Mr. Amos has not been demonstrated." *See* P-1, page 10.

The petitioner denied that he met twice a week with Ms. Trimmings. He said that there was no established meeting schedule and he suggested more frequent meetings. According to Mr. Amos, the principal accepted this suggestion for one or two weeks, but the meeting routine lapsed in January and February. The petitioner

did not deny that the two of them met on various occasions, but he insisted that these occasions were not regular and there was no established schedule.

The next portion of the evaluation discussed personal factors. Here, in the top section of the document, Mr. Amos was rated "above average" once, "average" three times and "unsatisfactory" three times. The narrative comments were very critical once again. Some excerpts follow: "Mr. Amos lacks initiative and enthusiasm in the discharge of his responsibilities. He shows no apparent resentment to criticism, however, he does not utilize it for improvement. Such examples of the lack of improvement subsequent to criticism are apparent in continued errors and inaccuracies in reporting student attendance from September through February." Mr. Amos testified that again, the principal would give him no concrete examples to support her conclusions. Although she stated that there were many incorrect student schedules, she would not give him any specific cases.

Later in the same comments, the principal stated that, "Mr. Amos failed to develop a timely schedule for handling parent conferences, and on numerous occasions this caused the magnitude of the mobility level in his office to elevate and become chaotic." The petitioner stated that there had been a few instances where parents had to wait to speak to him in the early morning. He believes that is what she meant by the failure to develop a timely schedule for conferences, affecting the magnitude of the mobility level in his office. He thought that she was referring to the early morning delays, but she did not confirm that when he asked her about the meaning of the above quotation. *See* P-1, page 11.

The last specific category in the evaluation deals with miscellaneous performance factors. Here, the principal listed five factors, all of which were negative and critical, as follows: "1. He shys [sic] away from the responsibility of standing firmly behind a decision by simply never making a decision; 2. He is unable to provide staff with many answers and information relative to daily routines at the school; 3. He does not offer suggestions for improvement in the school program, nor does he show any concern or enthusiasm for planning and revising programs for better effecting the learning environment at Vernon L. Davey; 4. His content knowledge of the workings of a school building is minimal; 5. He finds difficulty in remembering the contents of verbal and written communications and directives." *See* P-1, page 12.

Again, the petitioner referred to his post-evaluation conference with Ms. Trimmings when he asked her for specific examples to support her negative conclusions. Addressing each of the five items related above, Mr. Amos stated that she gave him no details and did not elaborate on the statements themselves. For example, she did not tell him what decisions he failed to make.

Following the seven specific sections of the evaluation discussed above, it was stated in a summary of performance evaluation and a professional improvement plan that "overall, Mr. Amos' performance for the 1987-88 school year has been less than minimally acceptable." Eight areas for improvement were listed, many of which rephrased the criticisms discussed above. *See* P-1, page 13.

The final page of the evaluation contains the principal's conclusion and recommendation. Needless to say, nothing positive was written here. The petitioner was referred to as "incompetent" more than once and the final conclusion stated, "Supported by incompetence, uncooperativeness, the lack of initiative in the discharge of his duties, and ineffectiveness throughout this evaluative period, Mr. Amos' performance has been, without question, unsatisfactory." Ms. Trimmings recommendation followed: "I, therefore, recommend that Mr. Amos be terminated from the position of assistant principal in the East Orange School District." *See* P-1, page 14.

Continuing with his testimony, Mr. Amos indicated that he knew his performance was not acceptable to the principal, because some of their differences were discussed at a meeting with an assistant superintendent of schools, Dr. Kenneth D. King, in November 1987, where the petitioner denied some of Ms. Trimmings' accusations. Mr. Amos asked for another conference with Dr. King in January or February 1988. At that conference, he stated that he thought he was being mistreated and misevaluated by the principal, and he asked the assistant superintendent to help improve the situation.

Mr. Amos further stated that all of the dissatisfaction expressed by the principal came as a surprise to him during the 1987-88 school year, his 14th year in the position. During all of those prior years, he had never been charged with any of the shortcomings expressed by the new principal. When counsel sought to determine if some previous animus existed between Mr. Amos and Ms. Trimmings, the petitioner

stated that, although the principal had previously worked in the district in a different school, he did not know her well nor did she know him. There had been no previous contact between them that might have laid the groundwork for such antagonistic feelings. The petitioner acknowledged that he had applied for the open principal's position, but she was selected instead. He was disappointed, but he had no hard feelings and he had told her that.

In his testimony, the petitioner also referred to an exchange of critical memoranda between him and the principal. On December 21, 1987, Ms. Trimmings wrote to Mr. Amos about several issues that she felt compelled to address. The first involved a student, Ormond Simpkins, who had apparently been suspended by the petitioner. According to the principal, he had been sent home without being given a copy of the suspension letter, and neither a parent or other guardian was informed. A similar criticism was leveled in the case of another student, Monica White, who had been suspended for eight days before it was discovered that her mother was never notified of the suspension. Since the petitioner was in charge of student discipline, the principal blamed these incidents on him.

The principal's memo of December 21, 1987 also indicated that Mr. Amos' office failed to use prescribed forms for referrals when students are picked up for rule infractions.

Another item in the same memo criticized Mr. Amos for failing to personally contact the mother of a student, Johnny Lamont Taylor, before he was sent out of school on suspension. Instead, according to the principal, petitioner made the contact through a security guard.

The last item in the principal's memo criticized Mr. Amos about the number and frequency of teachers and paraprofessionals who loiter in his office during the school day.

Ms. Trimmings concluded by reminding the petitioner that she had discussed all of the above matters with him previously and she strongly suggested that he consider altering his actions to conform with her directives. A copy of the memorandum was placed in the petitioner's personnel file. *See* Exhibit P-10.

Mr. Amos wrote a detailed rebuttal to the Trimmings' memo on December 23, 1987. He sharply disagreed with each of her criticisms and addressed the items point by point. Relating to Ormond Simpkin, the petitioner stated that he did write a suspension letter, but the student failed to pick it up, as directed. Additionally, Mr. Amos stated that he placed telephone calls to the parent, but no one answered. A similar explanation was given concerning the Monica White situation. The petitioner said that he made three telephone calls to notify Ms. White's parents of her absences, but no one answered. He also stated that he notified the police. Additionally, Mr. Amos stated generally that no student had been removed from the building with his permission without the knowledge of a parent or guardian.

Answering the principal's criticism dealing with Johnny Lamont Taylor, Mr. Amos again stated that he properly prepared the suspension document and made several telephone calls to the parents, without success. He also indicated that the student left the office without permission and never returned. Later, according to the petitioner, he discovered that the security guard had been directed by someone in the main office, not him, to make the telephone call.

The petitioner, in his reply, also stated that he checked with office personnel about the alleged frequency of teachers and paraprofessionals loitering in his office during the school day. No one seemed to be aware of this situation, nor was he.

Mr. Amos further complained that his functions had been limited by staff changes, illnesses and procedural changes in the daily operation of his office that made things extremely difficult. He also referred to a lack of adequate secretarial assistance. *See* Exhibit P-11.

Two other missives were exchanged between the petitioner and Ms. Trimmings two months later. On February 9, 1988, the principal wrote to Mr. Amos informing him that he had failed to comply with administrative direction relating to the completion of grade reports for the second marking period. This complaint involved procedures evidently designed to have teachers return grade scan sheets to the guidance office promptly so that grades could be verified and entered in the computer in time to meet deadlines for report card distribution. The memo was extremely detailed, listing all of the procedures that the petitioner failed to follow.

At the end, the principal stated that his failure to comply with the directions given was "in fact, an act of insubordination." *See* Exhibit R-2.

Mr. Amos replied with a memo in rebuttal three days later. He wrote that the principal's memorandum was unnecessary and erroneous, and that it assassinated his job performance. The petitioner addressed each point in detail, indicating that he properly directed, administered and monitored the grade reporting process according to the district's schedule for generating the report cards. In conclusion, he stated that, since most of the scan sheet procedures were completed between January 25 and February 22, 1988, when the principal was absent due to illness, he effectively performed these duties. Referring to Ms. Trimmings' characterization of his behavior as irresponsible, Mr. Amos stated that he in turn submitted that she was guilty of harassment, and that he was prepared to deal with the threatening tone of her memorandum. *See* Exhibit R-3.

Several other written memoranda were marked in evidence by the respondent, consisting of directions given by the principal to the staff in general and to Mr. Amos in particular. The first was written on October 8, 1987, barely more than one month after the school year began, when the principal wrote a five-page memo to all faculty regarding routine changes in the disciplinary system. *See* Exhibit R-4. Even though the petitioner was responsible for discipline, this memo from the principal laid out the daily operation of the disciplinary system in great detail, even to the point of scheduling specific staff assignments.

Approximately a week later, the principal wrote to Mr. Amos advising him that it was imperative that she be made aware of serious discipline problems on a daily basis. Appropriate forms and reference to routines that she had established were included in this memorandum. *See* Exhibit R-6.

On February 1, 1988, the principal wrote to the guidance staff informing them of the due date for grade scan sheets to be delivered to the central office, and including other directives dealing with the collection of grades. Exhibit R-8 is a memo to Mr. Amos informing him of her direction to the guidance staff. This was another instance when Ms. Trimmings felt it necessary to become involved in an additional area of the petitioner's responsibilities.

On February 1, 1988, the principal also wrote to Mr. Amos and informed him that she found it necessary to reassign teacher duties in school corridors in order to ensure tighter security during the school day. Ms. Trimmings stated that this directive had been necessitated by the large number of disruptive incidents among students and outsiders entering the building during the past week. See Exhibit R-9.

Ms. Trimmings directed a memo to all first period and home room teachers on March 24, 1988, establishing new attendance procedures. Evidently, the existing attendance recording was unsatisfactory, because the new procedures were extremely detailed. See Exhibit R-11.

On April 18, 1988, Ms. Trimmings wrote a memo to Mr. Amos confirming the outcome of a conference between them during the previous week. The petitioner was evidently being chastised by the principal because he was told that she had assigned him the task of revising the disciplinary policy on March 23, four weeks earlier. Evidently, it had not been done. The memo, Exhibit R-14, informed Mr. Amos that she expected the new disciplinary policy to be in complete form and submitted to her for review no later than 3:00 p.m. on Wednesday, April 20, 1988.

In his testimony, the petitioner took issue, on a point by point basis, with each of the criticisms leveled against him in the documents discussed above. In connection with the February 1988 memo, Exhibit R-2, accusing him of failing to follow grade report directives, Mr. Amos stated that there was no basis in fact for the principal's allegations. He acknowledged that there had been some minor errors, which were corrected. The petitioner stated that approximately eight inaccurate items were discovered, out of a total of six or seven hundred entries. Mr. Amos also testified that he had a great deal of difficulty being efficient and effective in carrying out his responsibilities because the principal did not provide him with a secretary or other needed staff on a regular basis.

When questioned about the length of time involved in the deterioration of his relations with the principal, Mr. Amos said that he did not discern any difficulties when the school year began. However, in October, approximately a month into the school year, Ms. Trimmings' criticism and disagreement with his performance became obvious to him.

Although Mr. Amos has since been transferred to a different school in the district, Laura Trimmings is still principal of Vernon L. Davey Jr. High School. She testified in support of her negative evaluation of the petitioner and the Board's decision to withhold his increment. Ms. Trimmings stated that when she first arrived at the school she had no prior opinion or disposition about the petitioner's abilities or qualifications. Their first contact was at the end of August 1987, when they reviewed the schedule for the forthcoming year. The principal stated that she saw some potential problems in the schedule and mentioned these to Mr. Amos, who defended it because it was organized in the same manner as in prior years. Ms. Trimmings nevertheless told him that some revisions would be needed. She also informed the petitioner that she wanted him to continue with the same duties he performed in prior years, except that she wanted to do all of the regular teacher evaluations. Mr. Amos previously did about half of these. They agreed to this, except that the petitioner continued to evaluate special education and physical education staff.

Ms. Trimmings also used the basic evaluation document, Exhibit P-1, in explaining her reasons for the negative assessment of the petitioner. She essentially repeated and explained her dissatisfaction with Mr. Amos, as set forth in the evaluation. However, as in the document, her testimony was highly conclusionary in nature. Even where the principal was not precluded, by discovery limitations, from furnishing extra details, her testimony was not very specific. Referring to the summary of performance evaluation and professional improvement plan at the end of the evaluation, on page 13, Ms. Trimmings insisted that the petitioner constantly failed to provide her with information about two of his important areas of responsibility, scheduling and discipline. She was also critical of Mr. Amos' failure to meet deadlines, even when repeatedly reminded to do so. Ms. Trimmings also noted that the assistant principal's office was often unmanned by him or by a secretary, either one of whom should have been there at all times. In discussing the professional improvement plan, the principal continually preferred to speak in conclusionary language, without specific examples, even when the prohibition caused by discovery limitations was lifted.

Referring back to the various written memoranda discussed above, Ms. Trimmings noted that she delivered her October 8, 1987 memo relating to disciplinary procedures, Exhibit R-4, because the petitioner failed to provide any effective

disciplinary guidelines, even though it was his area of responsibility. Additionally, she repeated her assertion that, even in the second half of the year, Mr. Amos still did not function to her satisfaction, and she therefore was compelled to write covering memoranda to the staff in order to cure the inadequacies. As examples, she cited R-2, relating to failure to complete timely grade reports for the second marking period; R-6, dealing with disciplinary referrals to the principal; R-8, providing for grade scan sheet submissions to the central office; R-9, reassigning faculty to security duty; and R-11, establishing new attendance procedures.

Ms. Trimmings also pointed to the petitioner's lateness in establishing details for a revised disciplinary policy, as evidenced by her memo to him of April 18, 1988, Exhibit R-14, approximately two months before the end of the school year. When cross-examined about this, Ms. Trimmings stated that she told Mr. Amos that she wanted to revise the disciplinary policy as early as mid-September 1988. According to her testimony, not only did he not deliver a revised policy, but he never provided her with a copy of the pre-existing policy when she asked for it. From this, she drew the inference that there may not have been any previous disciplinary policy.

When asked why she recommended that he be terminated from his position, especially since he had held the position for the past 14 years, the principal replied that she felt he should have known, after all that time, how to better perform his job. She also referred to the fact that, beginning early in the school year, she engaged in constant conferences with the petitioner and with an assistant superintendent, in addition to the written memoranda she directed to Mr. Amos. This indicated to Ms. Trimmings that the petitioner knew early on that she was dissatisfied with his performance, and yet, in her opinion, he did little to improve.

Dorinda Smith, a security officer at Vernon L. Davey Jr. High School during the 1987-88 school year, testified that the petitioner had tried unsuccessfully to reach Johnny Lamont Taylor's mother to inform her of his suspension. He knew that Ms. Smith was familiar with the family and, according to her testimony, he asked her to contact the boy's aunt, because the student had already left the building. Ms. Smith made the requested contact and spoke to a cousin when she could not reach the aunt. There was no question in her mind that Mr. Amos had directed her to make the call.

Ms. Smith further testified that she told the principal the next day that the petitioner had asked her to make the call. Ms. Trimmings reprimanded her for having done so. Ms. Smith said that the above situation was the only time that she had been asked to call a student's home, but she did not recall having been told not to do so by anyone. The purpose of this testimony was an attempt to impeach the petitioner's credibility, because he had denied asking Ms. Smith to make the call. There was certainly nothing crucial about this situation. Aside from the credibility question, it demonstrated that Mr. Amos had made bona fide attempts to notify the student's parent of the suspension, and he evidently deemed it important to get word to the parent or other relative.

FINDINGS OF FACT

Having heard the testimony and observed the witnesses, and having reviewed the exhibits and considered the submissions of counsel, I **FIND** the following **FACTS**, by a preponderance of the credible evidence:

1. Petitioner is a tenured teaching staff member in the respondent school district.

2. Petitioner served as an assistant principal in the East Orange School District, in the Vernon L. Davey Jr. High School for 14 years, from the 1973-74 school year through the 1987-88 school year. Petitioner was reassigned to a different school, as an assistant principal, beginning in the 1988-89 school year.

3. Petitioner's evaluations in all of the years he served at the Vernon L. Davey Jr. High School were satisfactory, as rated by three different principals.

4. A new principal, Laura Trimmings, arrived at the Vernon L. Davey Jr. High School at the beginning of the 1987-88 school year. At the end of that year, Ms. Trimmings' evaluation of the petitioner's performance was markedly unsatisfactory.

5. As a result, the respondent's East Orange Board of Education voted to withhold the petitioner's 1988-89 increment. The unsatisfactory

evaluation was dated May 18, 1988, and the Board's increment withholding vote followed on June 7, 1988.

6. No prior animus existed between petitioner and the new principal, Laura Trimmings, prior to her arrival and the beginning of her tenure as the petitioner's supervisor at the end of August 1987.

7. Although the principal generally wanted the petitioner to continue in the same areas of responsibility as in previous years, she insisted on a tightening and reshaping of many policies and procedures, such as discipline, attendance, office procedures, communication with her, scheduling and grade reporting.

8. The principal asked Mr. Amos for a revised disciplinary policy in mid-September 1988. The petitioner was slow in complying with her request. Therefore, Ms. Trimmings prepared a highly detailed memorandum regarding disciplinary operation in the school on October 8, 1988. Soon thereafter, she prepared and distributed disciplinary referral forms. She also reminded the petitioner to keep her informed of serious disciplinary problems on a daily basis.

9. Having received no overall written disciplinary policy from the petitioner by spring, the principal reminded Mr. Amos to complete and submit same by April 20, 1988.

10. The principal was not satisfied with the extent to which Mr. Amos communicated with her about every day problems.

11. The principal was also not satisfied with the speed and accuracy of grade reporting, and she felt compelled to inform the petitioner of her dissatisfaction in this area.

12. The principal was also unhappy about the precision with which the petitioner handled student suspensions and notification of parents or guardians. However, the petitioner gave satisfactory explanations for difficulties experienced in several such instances.

13. Petitioner acknowledged having some difficulty keeping up with necessary routines, but some of these difficulties were caused by a lack of adequate and steady staff personnel, such as secretaries.

14. The principal felt that it was necessary for her to deal with new attendance procedures, although that was within petitioner's area of responsibility.

15. Petitioner was aware of Ms. Trimmings' unhappiness with his performance early in the school year, by way of conferences and written memoranda.

16. The petitioner did not meet several deadlines imposed by the principal, most particularly, dates for the submission of grade scan sheets to the central office and the preparation of disciplinary policies.

LEGAL DISCUSSION

A single statute controls a decision by a board of education to withhold a teacher'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 ten days, to give written notice of such action, together with the reasons therefor, to the member concerned. . . .
> *N.J.S.A.* 18A:29-14.

A leading case defining the factors to be weighed by the Commissioner of Education with respect to an increment withholding is *Kopera v. West Orange Bd. of Education*, 60 *N.J. Super.* 288 (App. Div. 1960). The court there stated:

> [T]he scope of the Commissioner's review is, as respondents say, not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions. . . [T]he burden of proving unreasonableness is upon the appellant.
> *Id.* at 296-297.

The foregoing standards have been analyzed and commented upon frequently:

> The purpose of the statute is thus to reward only those who have contributed to the educational process thereby encouraging high standards of performance. In determining whether to withhold a salary increment, a local board is therefore making a judgment concerning the quality of the educational system. It is reasonable to assume that an adversely affected teacher will strive to eliminate the causes or the bases of 'inefficiency.' The decision to withhold an increment is therefore a matter of essential managerial prerogative which has been delegated by the Legislature to the Board. *Board of Education, Bernards Township v. Bernards Township Education Ass'n.*, 79 *N.J.* 311, 321 (1979).

Based on the foregoing, the only question open for review is whether the Board had a reasonable basis for its factual conclusions. One who challenges the action of a board that has withheld a salary increment must sustain the ultimate burden of demonstrating that the complained of withholding was arbitrary, capricious or unreasonable because the board did not have a reasonable basis for its factual conclusion. The board's determination may not be otherwise reversed. In addition, it has been held by the Commissioner of Education that "justification for withholding a salary increment for unsatisfactory performance may be found in a single, serious infraction of the rules of the school, or in many incidents." *Myers v. Glassboro Board of Ed.*, 1966 *S.L.D.* 66, 68. *See also, Rosania v. Board of Ed. of the Borough of Middlesex, Middlesex County*, OAL DKT. EDU 5723-87 (December 14, 1987), OAL DKT. NO. EDU 5303-86, remanded, mod., Comm'r. of Education, January 22, 1988.

Clear and adequate notice of the reasons for an increment withholding is an additional requirement in order to justify such an action. As pointed out by counsel, the withholding must not come as a surprise to the teaching staff member. The summary presented to the board must be clear, reasonably specific about deficiencies, and not subject to interpretation, *i.e.*, it must not be left to the board, or to the teaching staff member, to read between the lines. *Carney v. Freehold Regional High School District Board of Education, Monmouth County*, 1984 *S.L.D.* (July 20, 1984), aff'd State Board of Education, February 6, 1985, aff'd App. Div., November 8, 1985.

CONCLUSIONS

The final conclusion in this matter is reached only after a strict application of the law to the facts and surrounding circumstances. The petitioner served as the assistant principal for 14 years under three principals, all of whom considered his overall performance to be satisfactory. Previous evaluations did point out shortcomings and needs for improvement, but all ended with satisfactory ratings and recommendations for increment awards. A new principal arrived on the scene, obviously a new broom, intent on sweeping the school clean with a vengeance. Mr. Amos was the only professional staff assistant she had in the building, and she promptly let him know that she wanted him to improve and/or change certain procedures in his areas of responsibility. The assistant principal had been doing things the same way for 14 years, and the new principal was unrelenting. There were some tasks and functions within the areas of the petitioner's responsibilities that the principal justifiably found to be neglected, inadequately performed and in need of improvement and change.

However, Ms. Trimmings' testimony and the 14-page evaluation she produced does not indicate that she engaged in a great deal of cooperative counseling and constructive effort to instruct Mr. Amos in the methods and procedures that she expected from him. Her attitude was that he should have known what to do because he had been there for 14 years. The principal may not have appreciated the fact that, because she wanted things done differently than in the past, constructive guidance was called for. Instead, she attacked his perceived shortcomings harshly, as seen in the memoranda she addressed to him. Certainly, such an approach only pushed the petitioner into a defensive posture.

Nevertheless, despite her caustic and unkind comments, Ms. Trimmings did reveal some substantive shortcomings on the petitioner's part during the school year, as mentioned above in the findings of fact. Unfortunately, the invective and revilement heaped on Mr. Amos, together with the use of a great deal of obfuscatory jargon, almost obscures the truth. The sheer volume of personal name calling and rhetorical conclusionary matter in the evaluation was unnecessary. Nevertheless, after considering all of the facts and circumstances, it was obvious that Ms. Trimmings did have some justification for her unhappiness with the petitioner's performance. In addition, the petitioner had notice of his shortcomings and of the

principal's disapproval during most of the school year. An unfavorable evaluation should not have surprised him. Furthermore, the principal's recommendation to the Board provided it with a firm, albeit vituperative basis for its withholding action. So long as that existed, Ms. Trimmings' harshness with the petitioner does not, by itself, make the recommendation unreasonable or arbitrary. That all important factor, the fact that there were some reasonable bases for the Board's withholding action, overcomes the principal's tactics.

It is therefore **CONCLUDED** that the petitioner has failed to prove, by a preponderance of the credible evidence, that the Board did not in fact have a reasonable basis for its withholding action or that the Board's action was arbitrary or capricious.

ORDER

It is therefore **ORDERED** that the respondent's action withholding the petitioner's 1988-89 employment increment be **AFFIRMED** and the petition **DISMISSED**.

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

I hereby **FILE** this initial decision with **SAUL COOPERMAN** for consideration.

November 9, 1989
Date

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

Nov. 14, 1989
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 15 1989
Date

OFFICE OF ADMINISTRATIVE LAW

ms/e

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

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner and replies thereto by respondent (hereinafter "the Board").

The great weight of petitioner's exceptions consists of a detailed exposition of how the Board, through Principal Laura Trimmings, failed to substantiate with underlying facts the conclusions on which its withholding action was based. Petitioner notes that he propounded detailed interrogatories asking for such documentation, and that these were answered with nothing more than references to the evaluation document (P-1) where the conclusory statements originated or to memoranda (P-10, R-2) based on second-hand information. Because the Board chose to respond in this way, petitioner then could not permit Principal Trimmings to elaborate on the facts behind her evaluation document during testimony, as doing so would have brought forward information not provided to petitioner during discovery. Thus, the record on which this matter must be judged demonstrates no factual basis for the Board's action.

Petitioner also argues that the overall purpose of the increment statute, to encourage quality in performance, was violated by the Board's action and by an initial decision sustaining that action "only after a 'strict application of the law'***." (Exceptions, at p. 6, citing Initial Decision, ante) The instant withholding, asserts petitioner, rests on statements so unsubtantiated, conclusory and contrary to the positive purpose of the evaluation process that they should not be permitted to serve as a basis for disciplinary action.

In summation, petitioner concludes:

> ***Petitioner understands that to prevail in this action he must demonstrate that the Board's action was arbitrary, capricious, and unreasonable. Put another way, for the Board to prevail, all the Commissioner must find is that the Board's action was supported by some rational reason. However, the reason must have some factual basis. The Petitioner respectfully asks the Commissioner to not only look to a strict

> application of the law, but to also require adherence to the evaluation process which minimally requires the evaluator to articulate the basis of the criticisms upon which the increment denial is based. See Carney [supra].***
> (Exceptions, at pp. 6-7)

In reply, the Board points to both controlling case law (Kopera, supra) and particular Findings of Fact (Nos. 8-11, 13, 15 and 16), which support the proposition that there was indeed some factual basis for the Board's decision and therefore its reasonable and proper withholding action cannot be upset by the Commissioner.

Upon careful review of this matter, the Commissioner determines that the Board's withholding action must be sustained for the reasons stated by the ALJ and reiterated by the Board in its reply to petitioner's exceptions. The Commissioner could have found otherwise only by being able to establish that the facts underlying Principal Trimmings' evaluation document (P-1) were not as represented therein, as the document itself is quite specific as to the reasons for its final recommendation to the Board and there is no indication of animus or improper motive on Principal Trimmings' part. To a great extent, the Commissioner was unable to consider the underlying facts in this case because the manner in which the parties chose to proceed during discovery and hearing precluded development of a complete factual record. However, even the record which was established clearly demonstrates some reasonable bases (Findings of Fact, at pp. 17-19) for the negative evaluation, so that the Board's withholding action cannot properly be said to be arbitrary or unreasonable. Petitioner did not offer, nor did the Commissioner's independent review of the record (including two volumes of hearing transcript) evince, any evidence to challenge the ALJ's Findings of Fact. Thus, even though the factual underpinnings of the entire evaluation could not be determined, because at least some of the Board's stated bases were shown to be both reasonable and true, the withholding must be sustained. Green et al. v. Lakewood Bd. of Ed., decided by the Commissioner October 3, 1980, affirmed State Board March 4, 1981

Petitioner's contention that the Board's action should be declared invalid because it thwarts the positive purpose of the evaluation process is misplaced in this context. In an increment withholding proceeding the Commissioner can neither substitute his own discretion for that of the evaluator, nor pass judgment on the professional efficacy of the evaluation document; he can only reach to the truthfulness of purported facts. (Kopera, supra) The Commissioner notes that, contrary to the contentions of petitioner (and to a lesser extent the ALJ), the evaluation document does articulate very carefully the bases for the great majority of its criticisms and, excepting a handful of extreme statements, is not unduly conclusory for a year-end assessment. The degree of factual detail sought by petitioner to establish the truth of the evaluation's contents in an appeal proceeding could not reasonably be expected to be included in a routine supervisory document, even one culminating in a negative recommendation. Nor can petitioner,

in the absence of any affirmative arguments on his own behalf, rely solely on the Board's failure to provide all such details during discovery to seek reversal of the Board's action. To so permit would effectively shift the burden of proof in this matter from petitioner to the Board, contrary to the established standard for challenges of withholding actions. (Kopera, supra)

Thus, the Commissioner concurs that petitioner has failed to prove, by a preponderance of credible evidence, that the Board's action in withholding his increment was arbitrary, unreasonable or contrary to statute. Accordingly, the initial decision of the Office of Administrative Law is affirmed, the East Orange Board of Education's withholding of petitioner's 1988-89 employment increment is sustained, and the instant Petition of Appeal is dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 29, 1989

Pending State Board

THOMAS BARAN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT,	:	
V.	:	
JAMES JACKSON,	:	
INTERVENOR-RESPONDENT.	:	

Decided by the Commissioner of Education, December 22, 1988

For the Petitioner-Appellant, Bucceri & Pincus (Gregory T. Syrek, Esq., of Counsel)

For the Respondent-Respondent, Apruzzese, McDermott, Mastro & Murphy (Robert T. Clarke, Esq., of Counsel)

For the Intervenor-Respondent, Arthur N. Martin, Jr., Esq.

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

May 3, 1989
Date of mailing _____

BOARD OF EDUCATION OF THE TOWNSHIP OF BERLIN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT, CAMDEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, December 19, 1988

For the Petitioner-Appellant, Capehart & Scatchard
(Joseph F. Betley, Esq., of Counsel)

For the Respondent-Respondent, Weinberg and McCormick
(Joseph M. Weinberg, Esq., of Counsel)

This matter arises from a petition for declaratory judgment filed by the Board of Education of the Township of Berlin (hereinafter "Board") raising the issue of whether there is statutory authority for a reduction in purpose of or partial withdrawal from a limited purpose regional school district, whether the Commissioner of Education is authorized to oversee and approve such action, and, if so, the proper procedure for implementing a reduction or withdrawal.

The Township of Berlin, a Type II K-6 school district, is one of seven constituent districts to the Lower Camden County Regional High School District (hereinafter "Regional District"). The Regional District, which originally included grades nine through twelve only, was enlarged in 1955 pursuant to N.J.S.A. 18A:13-33 (previously codified as R.S. 18:8-19) to add grades seven and eight. Since that time, the Board has sent its students from grades seven through twelve to the Regional District.

On August 11, 1988, however, the Board adopted a formal resolution in which it found that it was in the best educational interests of the students and the school district for its seventh and eighth grade students to be educated within the district and returned from the Regional District. Following correspondence from the Director of the Bureau of Controversies and Disputes that the Commissioner did not have the statutory authority to consider such a proposal, the Board filed the instant petition, seeking a declaration that there was, indeed, authority for a reduction in purpose of or partial withdrawal from a limited purpose regional school district.

The Board of Education of the Lower Camden County Regional High School District ("Regional Board") has taken no position on the petition, noting in a letter to the Commissioner that the Board was not requesting that the Commissioner rule on a request for a partial withdrawal, but only on whether he has the authority to oversee and approve such a reduction.

On December 19, 1988, the Commissioner dismissed the petition, finding that the statutes which authorize the Commissioner to permit the enlargement of the purposes of regional school districts or the total withdrawal from such districts cannot serve to authorize the reduction of such purposes or a partial withdrawal therefrom. The Commissioner noted that he had been given broad supervisory power to grant relief in instances where the constitutional mandate for the provision of a thorough and efficient education was being compromised or not being implemented, but that there was no such claim in the instant matter. In reliance upon the doctrine of expressio unius est exclusio alterius, "the expression of one thing is the exclusion of another," the Commissioner concluded that he had no authority, implied or otherwise, to entertain or approve a request for partial withdrawal from a limited purpose regional school district.

The Board has filed the instant appeal. While acknowledging that there is no express statutory authorization for a reduction in purpose of or partial withdrawal from a limited purpose regional school district, the Board maintains that the Commissioner has the implied authority to so act under his broad supervisory powers, particularly those regarding the supervision of regional school districts, and asserts that those comprehensive powers are not limited to instances in which the constitutional mandate for a thorough and efficient education is at risk.

The Board argues that:

> The common sense interpretation of N.J.S.A. 18A:13-33, 13-34 and 13-51 suggests that the Legislature, in allowing for the establishment of regional school districts, did not intend to create a procedural anomaly whereby the regional district must continue in perpetuity without any method for a local district to separate itself from the regional district in a piecemeal fashion short of specific amendatory legislation. Rather, a more logical construction would be that the Legislature wished to have the Commissioner vested with full authority to determine whether a regional school district should or should not be formed, and also whether the regional district should be enlarged or reduced to fit the specific and ever changing needs of the local district.

Board's brief, at 14.

The Board further maintains that "the clear and compelling implication to be drawn from Chapter 13 of Title 18A is that the Commissioner has the inherent authority to partially dismantle or

reduce that which he has the express power to create and totally eliminate," id. at 15, and that the doctrine of expressio unius est exclusio alterius should only be relied upon in the most compelling circumstances.

For the reasons that follow, we agree with the Board that the Commissioner has taken an unduly restrictive view of his implied powers, and we, therefore, reverse his decision.

The Commissioner, it is now well established, has been vested with broad supervisory powers over the public school system, which powers and responsibilities are not limited to remedying violations of the thorough and efficient clause. Jenkins et al. v. Tp. of Morris School Dist. and Bd. of Ed., 58 N.J. 483 (1971).

Chapter 13 of Title 18A provides a broad scheme for the Commissioner's general supervision of regional school districts, including a prominent role in the formation of regional districts, N.J.S.A. 18A:13-34; adoption of additional purposes for limited regional districts, N.J.S.A. 18A:13-33; enlargement of regional districts to include additional local districts, N.J.S.A. 18A:13-43; and the withdrawal of a constituent local district from a regional district, N.J.S.A. 18A:13-51, et seq.

We cannot agree with the Commissioner, in light of his broad supervisory powers and the statutory scheme set forth in Chapter 13, that he does not have the authority to entertain a request for a reduction in purpose of or partial withdrawal from a limited purpose regional school district. "It is a well-settled principle of administrative law that the statutory powers accorded an agency 'should be liberally construed to permit the agency to achieve the task assigned to it, and that such administrative agency has such implied incidental powers as may reasonably be adapted to that end.'" Bd. of Educ., City of Newark, Essex Cty. v. Levitt, 197 N.J. Super. 239, 245 (1984), quoting In re Suspension of Heller, 73 N.J. 292, 303 (1977).

We are mindful, too, that great caution must be exercised in applying the doctrine of expressio unius est exclusio alterius. "At best, this maxim is merely an aid in determining legislative intent, not a rule of law....[B]lind application can often lead...to an 'improper interpretation' of the statute being construed." Allstate Ins. Co. v. Malec, 104 N.J. 1, 8 (1986). The issue remains one of intention, and the answer must be found in the common sense of the situation. Reilly v. Ozzard, 33 N.J. 529, 539 (1960).

We agree with the Board that a common sense reading of the statutes governing the formation, maintenance, enlargement and reduction of regional school districts leads to the conclusion that the Legislature, while making no express provision for a reduction in purpose of or partial withdrawal from such districts, did not intend to preclude such action. The Legislature has enacted a statutory framework which gives the Commissioner supervisory authority over regional school districts and which provides specific procedures for adding to the purposes of such districts and for the

addition and withdrawal of constituent local districts. We cannot reasonably conclude, from a common sense interpretation of those statutes, that the Legislature intended to thereby preclude the Commissioner from having the corresponding authority to reduce those purposes or to allow a local district to effectuate a complete, but not a partial, withdrawal from a regional district.

Indeed, in the instant case, it is grades 7 and 8, the grades which were added to the regional district in 1955 pursuant to N.J.S.A. 18A:13-33 (previously codified as R.S. 18:8-19), that the Board seeks to withdraw. To conclude that the Commissioner has the authority to permit the addition of those grades to the regional district in the best educational interests of the local districts and students, but not to subsequently authorize their withdrawal for similar reasons, would be an overly narrow interpretation of the Commissioner's powers, which, as noted, must be liberally construed to permit him to achieve the assigned task.

We therefore conclude that there is implied statutory authority for a reduction in purpose of or partial withdrawal from a limited purpose regional school district, and that the Commissioner, in the great breadth of his powers, including his supervisory responsibilities and authority over regional districts, has implied incidential powers to oversee and authorize such a reduction or withdrawal in the proper circumstances.

In the event that the Board herein or any other individual constituent districts seek to withdraw their 7th and 8th grade students from the Regional District, while preserving the purpose of the Regional District as a 7-12 district, we find that the proper procedure would be under N.J.S.A. 18A:13-51, et seq. and N.J.A.C. 6:3-3.1 et seq., which provide for the withdrawal of constituent districts. In the event that all of the constituent local districts seek to reduce the purpose of the Regional District so as to eliminate grades 7 and 8, we find that the proper procedure would be under N.J.S.A. 18A:13-33, which provides for the modification of the purposes of a regional school district.

August 2, 1989

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

Remanded by the Appellate Division, May 13, 1988

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

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

On May 13, 1988, the Appellate Division reversed the decision of the State Board of Education herein which held that, pursuant to Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick, 48 N.J. 94 (1966), the failure of the Deptford Council to provide reasons for its line item reductions in the 1986-87 school year budget either at the time of its original tax levy certification or its amended certification invalidated the reductions. The Appellate Division held that, under the circumstances, the filing of reasons in the answer to the petition filed by Petitioner with the Commissioner of Education was adequate and timely compliance with the intent and spirit of East Brunswick, and remanded the matter to the State Board for consideration on the merits of the controversy. On September 7, 1988, the State Supreme Court granted certification.

Pending disposition of the appeal currently before the State Supreme Court, the State Board hereby remands this matter to the Commissioner of Education.

February 1, 1989

PAUL GORDON

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF PASSAIC, MORRIS COUNTY, : DECISION

RESPONDENT-RESPONDENT. :

:

Decided by the Commissioner of Education, September 7, 1988

For the Petitioner-Appellant, Greenberg & Prior
(Leslie A. Adelman, Esq., of Counsel)

For the Respondent-Respondent, Riker, Danzing, Scherer, Hyland & Perretti (Glenn D. Curving, Esq., of Counsel)

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

January 4, 1989

JOHN GERMAN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CAPE MAY COUNTY VOCATIONAL-TECHNICAL CENTER, CAPE MAY COUNTY,	:	DECISION
RESPONDENT-RESPONDENT	:	
	:	

Decided by the Commissioner of Education, May 9, 1988

For the Petitioner-Appellant, Selikoff & Cohen
(Barbara E. Riefberg, Esq., of Counsel)

For the Respondent-Respondent, Barbour & Costa
(John T. Barbour, Esq., of Counsel)

In 1982, John German (hereafter "Petitioner"), a tenured teacher, filed an appeal from the abolishment of his position as a distributive education teacher/coordinator by the Board of Education of the Cape May County Vocational-Technical Center (hereafter "Board"), claiming that the Board violated his tenure and seniority rights. On January 12, 1984, the Commissioner agreed that Petitioner's seniority rights had been violated, and directed the Board to reinstate Petitioner as a job success orientation teacher and to compensate him for all salary and benefits he would have earned during the 1982-83 school year, less mitigation.

The State Board affirmed the Commissioner's decision and, on December 6, 1985, the Appellate Division affirmed the State Board. Although Petitioner was reinstated while those appeals were pending, the Board neither paid the Petitioner as directed by the Commissioner nor requested a stay of the Commissioner's decision during the pendency of the appeals.

On December 16, 1985, after the Appellate Division's affirmance, Petitioner demanded back pay of $19,083, as well as post-judgment interest in the amount of $3,745.56. On February 14, 1986, the Petitioner reduced his demand for back pay to $16,626 and that of interest to $3,229.59, based on discrepancies in the original earnings figures and other factors agreed upon by the parties.

On or about June 30, 1986, the Board remitted and the Petitioner accepted payment in the amount of $15,877.80. Thereafter, in a letter dated August 13, 1986, Petitioner again requested post-judgment interest. That demand was made once more in

a letter dated December 24, 1986, in which Petitioner advised the Board that if he did not receive a positive response, including a repayment proposal, by January 15, 1987, an appeal would be filed. When no such response was received, Petitioner initiated this action on March 3, 1987, requesting post-judgment interest from the date of the Commissioner's decision until payment of the principal on June 30, 1986.

On December 11, 1987, an Administrative Law Judge ("ALJ"), addressing four issues argued by the parties, issued a partial summary decision in which he concluded:

1. The petition should not be dismissed as untimely under N.J.A.C. 6:24-1.2 insofar as the Board never formally indicated that it would not pay the post-judgment interest until it failed to respond to Petitioner's January 15, 1987 deadline. The ALJ emphasized that at no time did the Board decline in writing to pay such interest, and Petitioner's appeal was timely taken within 90 days of his January 15th deadline.

2. Despite the fact that his original 1982 petition requesting reinstatement and back pay did not include a specific request for interest, Petitioner was not precluded from pursuing that remedy. The ALJ concluded that "the Commissioner's authority to award post-judgment interest was unclear as a matter of law and was not definitely settled until [Bd. of Educ., City of Newark, Essex Cty. v. Levitt, 197 N.J. Super. 239 (App. Div. 1984)]. Furthermore, there was no reason to request post-judgment interest until the Board had failed to make payment in the time allowed." Partial summary decision, at 5.

3. Both Levitt, supra, decided on November 29, 1984, and N.J.A.C. 6:24-1.18, effective May 5, 1986, expressly authorizing the Commissioner to award post-judgment interest, may be applied retroactively to the instant case. The ALJ, noting that Levitt had expressly overruled the Law Division's decision in Fallon v. Scotch Plains-Fanwood Bd. of Ed., 185 N.J. Super. 142 (Law Div. 1982), stated that the general rule in New Jersey is to give retroactive effect to a judicial decision overruling a precedent. He further noted that the real thrust of Levitt was to avoid piecemeal litigation by having the Commissioner make the interest determination in the first instance and that no new right to post-judgment interest was created therein. The ALJ concluded that N.J.A.C. 6:24-1.18 should also be applied retroactively in that it did no more than codify the Levitt decision, which had merely acknowledged the Commissioner's inherent authority to award post-judgment interest.

4. The elements of N.J.A.C. 6:24-1.18 had been met and Petitioner was therefore entitled to post-judgment interest. The ALJ concluded that the precise amount due Petitioner could have been readily ascertained after the Commissioner's January 1984 decision had either party made an effort to do so, and, in the absence of a stay, the Board had an affirmative duty and obligation to pay Petitioner the awarded compensation and to take the steps necessary to discharge that duty by seeking any required additional information. The ALJ stressed:

> To disallow post-judgment interest where a board has failed to take any action to satisfy a readily ascertainable claim, would encourage boards to indefinitely avoid, through recalcitrance or negligence, payment of claims. Petitioner's failure to submit a request for a precise amount does not excuse the Board's failure to discharge its clear and affirmative legal duty to make payment in accordance with the Commissioner's decision, which did not precisely fix the sum but precisely set the formula by which the sum could have been readily ascertained.

Id. at 10-11.

The ALJ recommended that partial summary judgment be granted Petitioner on those four issues, and on March 25, 1988, pursuant to calculations submitted by the parties, he recommended that Petitioner be awarded post-judgment interest in the amount of $3,835.67 for the period from April 1, 1984 through June 30, 1986. He also recommended denial of Petitioner's claims for attorney's fees and costs in that the Commissioner did not have the authority to award such items.

On May 9, 1988, the Commissioner rejected the ALJ's recommended decision and dismissed Petitioner's appeal as untimely under N.J.A.C. 6:24-1.2. The Commissioner concluded that the Petitioner's cause of action accrued on or about June 30, 1986 when he accepted the Board's payment in the amount of $15,877.80. According to the Commissioner, notice of "other action" under N.J.A.C. 6:24-1.2(b) was provided when the Petitioner received and accepted a check which, based upon its amount, did not include post-judgment interest. At that time, concluded the Commissioner, Petitioner knew or should have known that the Board had not acceded to his demands for post-judgment interest.

The Commissioner added that even assuming arguendo that the Petitioner was waiting for a response to his August 1986 demand for interest, when a response to that request was not received within a reasonable period, Petitioner knew or should have known that a controversy existed.

Petitioner has filed the instant appeal from the Commissioner's decision, contending that the Board's "belated and grudging payment raised a reasonable expectation on the part of the [Petitioner] that the balance of interest would also be paid, in a similarly resistant manner." Appeal brief, at 7. Petitioner argues that only the Board's failure to respond to the ultimatum in his December 1986 letter "converted Respondent's silence to a statement of non-compliance." Id.

After a thorough review of the record, we reverse the Commissioner and award Petitioner the post-judgment interest recommended by the ALJ.

N.J.A.C. 6:24-1.2(b) provides:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested contested case hearing.

We find that under the facts of this case, the mere receipt of a check for payment in the amount of $15,877.80 was not sufficient notice of the Board's refusal to pay post-judgment interest. As we stressed in Parisi v. Board of Education of the City of Asbury Park, decided by the State Board, October 24, 1984, when a petitioner's knowledge is predicated on the action taken by the board, the notice provided by such action must be specific and definite.

In Parisi, the district board, determining that a reduction in force was necessary, adopted a resolution stating that music instruction could be provided by one less music teacher. The board resolved to develop a seniority list, to notify each person of his or her seniority status, and that the least senior person would be the one terminated. The resolution also stated that the Board would seek an advisory opinion from the Commissioner as to its seniority list and would place the least senior person on a preferred eligibility list. The resolution constituted the sole formal action taken by the Board in eliminating the position. It included a seniority list by date of hire and one that included certification dates and dates of assignment. The resolution and lists were sent to all music teachers, including petitioner therein, who was the last person listed on the seniority lists, along with a memo from the superintendent, which stated that he intended to recommend staff appointments in June and expressed his hope that more definite information concerning funding would be available at that time.

Although the petitioner in Parisi filed an appeal more than 90 days after receipt of the resolution and memo, the State Board reversed the Commissioner and concluded that neither the resolution nor the memo provided specific or definite notice that the position held by the petitioner was the one being eliminated.

As in Parisi, the nature of the notice herein was not precise. Petitioner's demands were always divided into separate amounts for principal and interest, rather than one combined sum. There is nothing in the record to demonstrate that the Board specifically indicated to Petitioner that it regarded the check as full payment for his claim or that it gave Petitioner any other written notice that it had denied his interest demand. Under the circumstances, we find that it would not be unreasonable for Petitioner to expect the interest to be included on a separate check, and we conclude that it would be inequitable to hold that the $15,877.80 payment constituted notice of final Board action denying his interest claim. See Stockton v. Bd. of Educ. of City of Trenton, 210 N.J. Super. 150 (App. Div. 1986) (receipt of a salary check for less of an increase than anticipated did not provide teacher with notice that a decision had been made to correct an error allegedly made three years earlier, and thus did not constitute "other action" which would start the running of the 90-day period for appeal).

Thus, we conclude that mere receipt of the check, without more, did not provide Petitioner with specific or definite notice that the Board was denying his claim for post-judgment interest, and cannot be construed as the final action under N.J.A.C. 6:24-1.2 so as to begin the running of the 90-day period for the filing of an appeal.

We further conclude that even if the Petitioner's cause of action can be found, as a result of the Board's silence and inaction, to have accrued more than 90 days before he filed this action for post-judgment interest, relaxation of the 90-day rule as provided by N.J.A.C. 6:24-1.17 is appropriate under the facts of this case to avoid injustice. The Petitioner received a judgment from the Commissioner for back pay on January 12, 1984. Despite the Board's failure to apply for a stay of that decision pending appeal to the State Board and Appellate Division, N.J.S.A. 18A:6-25 (decisions of the Commissioner are binding unless and until reversed upon appeal), it failed to make payment to Petitioner until June 30, 1986, almost two-and-a-half years after the Commissioner's decision and nearly seven months after the Appellate Division's affirmance. Petitioner was thus deprived of those awarded funds, despite the absence of a stay, for a prolonged period while the Board pursued unsuccessful appeals.

Following payment of the principal, nearly seven months after an affirmance on the final appeal, Petitioner continued his efforts to collect post-judgment interest, including two written demands therefor, neither of which was responded to or denied in writing by the Board.[1] Insofar as the Board delayed two-and-a-half years in making the payment ordered by the Commissioner, we find that it was not unreasonable for Petitioner to wait until the Board failed to act on his December 1986 letter to conclude that it was denying his interest demand. To deprive him of the right to pursue that post-judgment interest through legal channels under such circumstances as a result of his failure or inability to ascertain the point at which the Board's silence constituted a denial of that claim, would unjustly enrich the Board with the interest earned on Petitioner's money during the Board's prolonged failure to comply with the Commissioner's order.

Thus, even if the Board's silence could, at some earlier point, have been construed as a denial of Petitioner's claim, we conclude that relaxation of the 90-day rule of N.J.A.C. 6:24-1.2 is warranted under the specific facts of this case insofar as strict adherence thereto would result in injustice.

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[1] We note that Petitioner's counsel gave the Board deadlines for response in both written demands. In the August 1986 letter, the Board was given two weeks to respond positively or legal action would be recommended. In the December 1986 letter, the Board was given until January 15, 1987.

Turning, therefore, to the issues before us, we concur with the ALJ's analysis and conclusions concerning the lack of a specific request for interest in Petitioner's original pleading, and further agree that Levitt and N.J.A.C. 6:24-1.18 may be applied retroactively to the instant case. As the ALJ pointed out, the Court in Levitt held that the Commissioner's authority to award post-judgment interest was incidental to his power to fix money judgments. The Court created no new right to post-judgment interest, but, rather, concluded that an award of interest was more appropriately made by the Commissioner as part of his determination of a case than by deferring the question to a court, which would be required to undertake a complete review of the record, wasting the resources of both the court system and the litigants. N.J.A.C. 6:24-1.18 codified that holding.

We also agree with the ALJ that the precise amount due Petitioner was calculable within 60 days of the Commissioner's decision had the Board undertaken its affirmative obligation in the absence of a stay to make such payment. N.J.A.C. 6:24-1.18(c)(2) provides:

> Post-judgment interest shall be awarded when a respondent has been determined through adjudication to be responsible for such payment, the precise amount of such claim has been established and the party responsible for the payment of the judgment has neither applied for nor obtained a stay of the decision but has failed to satisfy the claim within 60 days of its award.

The Commissioner's January 1984 decision directed the Board to pay Petitioner all salary and benefits he would have earned during the 1982-83 school year, less mitigation, and adjusted for military service credit. Although there were several adjustments made to the figures once the parties began their calculations, we agree that the precise amount due was readily ascertainable within 60 days after the Commissioner's decision, and, accordingly, that the Petitioner should not be made to pay for the Board's failure to take affirmative steps towards fulfillment of its obligation.

Although the Court in Levitt concluded that under all the circumstances therein, the precise amount due under the Commissioner's October 5, 1977 decision was not established until September 8, 1978 as to one petitioner and April 30, 1979 as to the other, in that case the board did not appeal the Commissioner's decision and the board's attorney assured petitioners that "payment was in the process." In the instant matter, however, there is no evidence that the Board took any steps towards making the awarded payment or assuring Petitioner that payment was being prepared. Rather, without seeking a stay, it appealed the Commissioner's decision without success to the State Board and Appellate Division. The Board neither satisfied nor made any effort to satisfy the claim during the nearly two years its appeals were pending and for some time thereafter. Nor, as noted, did it apply for a stay of the Commissioner's and State Board's decisions.

Under all the circumstances, we conclude that the Board's extensive delay in taking steps towards calculation of the precise amount it was obligated to pay Petitioner under the Commissioner's order and towards satisfaction of that judgment cannot now be used by the Board against Petitioner in arguing that the precise amount was not established until payment was made in June 1986. Such an argument, if accepted, would, as the ALJ pointed out, encourage boards to unduly delay such calculations at the claimant's expense.

Moreover, we reject the Board's attempt to place the burden on Petitioner for failing to demand a specific sum until after the Appellate Division's affirmance. The Board was required to either comply with the Commissioner's order or to obtain a stay of that decision pending appeal, N.J.S.A. 18A:6-25, and acted at its own peril in delaying compliance. Its obligation to make the payment directed by the Commissioner was not contingent upon the Petitioner's active pursuance of that award, and the Board's failure to take any steps towards payment cannot be excused on that basis.[2]

We therefore conclude that insofar as the precise amount due could have been established within 60 days of the Commissioner's decision had the Board taken steps to discharge its affirmative duty to satisfy the judgment, the elements of Levitt and N.J.A.C. 6:24-1.18 were satisfied and Petitioner was entitled to post-judgment interest. After reviewing the figures and calculations in the record, we find that the ALJ correctly determined the amount of interest due to be $3,835.67, and we direct the Board to make such payment.

We also agree that Petitioner is not entitled to an award of attorney's fees and costs as no statutory authority empowers this agency to award such fees in this instance.

Attorney exceptions are noted.
October 4, 1989

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2 We note in response to the Board's exceptions that the Board's first request for mitigation information from Petitioner was made only after the Petitioner demanded payment of the principal and interest in December 1985. Petitioner supplied the Board with the requested documentation.

ANNE HALL,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Remanded by the Commissioner of Education, March 31, 1988

Decided by the Commissioner of Education, October 20, 1988

Decision on motion by the Commissioner of Education, January 10, 1989

Decision on motion by the State Board of Education, March 1, 1989

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

For the Respondent-Appellant, James P. Granello, Esq.

On April 16, 1984, Anne Hall (hereinafter "Petitioner"), a tenured school secretary, tendered her resignation with an effective date of June 30, 1987 to the Board of Education of the Township of Jefferson (hereinafter "Board"), and requested any and all special retirement allowances to which she was entitled. On May 14, 1984, at its regular meeting, the Board accepted her resignation by a unanimous vote. As a result, Petitioner invoked her right to contractual retirement benefits[1] and received $1,500 from the Board beginning in the 1984-85 school year as longevity payments, such disbursements to continue through the 1988-89 year. She also applied for and received accumulated unused sick leave benefits in the amount of $1,155 during the 1986-87 school year.

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[1] As stipulated by the parties, "contractual retirement benefits" were those benefits to which an employee within the Jefferson Township School District was entitled, pursuant to an agreement between the Board and the Jefferson Township Education Association, as he or she approached retirement age and notified the Board of his or her intent to retire within a certain period of time.

In a letter dated February 26, 1986 to the superintendent of schools, however, Petitioner stated that upon reviewing her financial status, she found that it would be necessary to continue working beyond June 30, 1987, and requested a two-year extension, until June 30, 1989. On March 21, 1986, the district superintendent of schools advised Petitioner that no decision had yet been made on her request and that any such extension would be based upon her performance during the 1986-87 school year. On September 22, 1986, Petitioner was once again advised, this time by the assistant superintendent in charge of business/Board secretary, that her status would be reviewed during the 1986-87 school year and a decision on whether to agree to her proposed extension would be based upon her performance.

On January 31, 1987, a written evaluation of Petitioner's performance was prepared by her immediate supervisors, the cafeteria manager and the building principal. While it was generally satisfactory, in the category of cooperation, the supervisors had checked: "Shows reluctance to cooperate." Stipulation of facts, Exhibit G, at 1. They noted, in addition, that Petitioner handled problems "with reluctance and minimal follow through" and was "not sensitive to situations in the kitchen." Id. at 2. In a written response thereto, Petitioner termed the comments "unfounded, unjust, demeaning and totally out of line" and remarked, in reference to the cafeteria manager: "I have never worked with anyone so disorganized." Stipulation of facts, Exhibit H, at 1. She concluded by stating: "I refuse to again be used as a scapegoat for the shortcomings of my supervisor." Id. at 3.

On March 17, 1987, the assistant superintendent in charge of business/Board secretary reported to the Board that despite satisfactory work, Petitioner's attitude was terrible. He called her response to the evaluation one of the most damaging documents he had ever seen from an employee when speaking of a supervisor and suggested that Petitioner did not or could not recognize that it was possible for her to have some faults. Accordingly, he informed the Board that he could not recommend that her request to extend the effective date of her retirement be honored. Stipulation of facts, Exhibit I, at 2. As a result, the Board declined to take action to alter its May 14, 1984 decision accepting her tendered resignation, and in a letter to Petitioner dated April 14, 1987, the district superintendent reaffirmed the Board's May 14, 1984 action. Petitioner filed the instant appeal, alleging that the Board improperly based its refusal to accept her proposed rescission and modification on her job performance and that termination of her employment violated her tenure rights.

On February 23, 1988, an Administrative Law Judge ("ALJ") dismissed Petitioner's appeal, stating:

> It is clear, as a general rule, that a Board of Education may refuse to honor an employee's attempt to rescind a resignation after the Board has formally acted to accept it, where the

> attempted recission [sic] comes before the effective date of resignation. Kozak v. Bd. of Ed., Twsp. of Waterford, 1976 S.L.D. 633. A resignation is properly accepted when the Board does so by resolution; it cannot thereafter be unilaterally withdrawn by the employee. Cohen v. Bd. of Ed., Town of Hackettstown, Warren County, 1979 S.L.D. 439, 441-2. Only in circumstances involving unusual equitable considerations, apparently, has the court ever allowed recission [sic] of resignation after Board acceptance; circumstances in the case, however, were described as an "extraordinary concatenation of events." Cf. Evaul v. Bd. of Ed., City of Camden, 35 N.J. 244, 249 (1961). There is none here.

Initial decision, at 9. The ALJ concluded that Petitioner's resignation of April 16, 1984, which was accepted by the Board, was legally binding and that Petitioner had failed to prove that the Board's action in declining to act to alter its previous decision, based on her performance during the 1986-87 school year, was arbitrary or capricious or otherwise an abridgement of her tenure rights.

On March 31, 1988, the Commissioner of Education, concluding that intent to retire under the Teachers' Pension and Annuity Fund and the Public Employees' Retirement System ("PERS") was evidenced by submission of retirement papers to the appropriate program, remanded to the Office of Administrative Law for a determination of when Petitioner ceased services to the district, if and when Petitioner submitted retirement papers to her retirement program, further clarification of "contractual retirement benefits," and the legal effect, if any, of those factual determinations.

On September 9, 1988, on remand, the ALJ, based upon the parties' stipulations, found that Petitioner had ceased service to the district on June 30, 1987 and had submitted her retirement papers to her retirement program, PERS, on or about June 22, 1987.[2] Noting that the newly developed factual determinations only substantiated his earlier conclusion, the ALJ once again dismissed Petitioner's appeal, adding, in addition to his previous conclusions, that the Board had acted on Petitioner's resignation to its detriment by commuting and disbursing longevity and sick leave entitlements, and that it would be inequitable for the Board to be compelled to abide Petitioner's reinstatement in face thereof.

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[2] We note that Petitioner, while continuing to assert her refusal to retire on June 30, 1987, agreed to honor her principal's directive not to report to work after that date, and submitted her retirement papers in order to protect her rights in the event she lost the instant litigation.

On October 20, 1988, the Commissioner rejected the ALJ's decision and directed that Petitioner be reinstated. While acknowledging that a district board could refuse to accept a rescission of an employee's resignation after the date it was accepted by the board, the Commissioner noted that in previous cases dealing with rescission of retirement dates, the employee had left the board's employ and thereafter sought reinstatement, whereas in the instant case, the Board refused to extend a date of retirement well in advance of the time requested. The Commissioner concluded that such action would violate Petitioner's tenure rights, absent charges brought pursuant to N.J.S.A. 18A:6-10 et seq., and that the Board's consideration of her extension request could not hinge on Petitioner's performance during the 1986-87 school year without the filing of tenure charges. The Commissioner added that the Board should expect such situations to arise when it promotes announcement of retirement as much as five years in advance.

For the reasons expressed herein, we reverse the Commissioner. While the Board was free to accept Petitioner's proposed rescission, it was not obligated to do so. It is well settled, as the ALJ pointed out, that a tendered resignation is legally binding upon proper acceptance, and cannot thereafter be unilaterally rescinded or modified, absent equitable circumstances warranting such rescission. See e.g., Evaul, supra.

This result is unaltered by the fact that Petitioner herein attempted to rescind prior to the date her tendered resignation was to become effective. The Board's acceptance on May 14, 1984 of her letter dated April 16, 1984 established a legally binding resignation with an effective date of June 30, 1987. Thereafter, it was discretionary on the part of the Board whether to agree to a requested rescission and modification thereof.

To hold otherwise would render meaningless a tendered resignation and a board's acceptance thereof, as the employee would be free to unilaterally rescind prior to the effective date. Such a result is not only contrary to established legal principles, but would also prevent district boards from taking conclusive steps to replace retiring employees and/or effectuate any changes necessitated by their departures until after the effective dates thereof. A board is entitled to rely upon the effective date of a tendered and accepted resignation.

We further reject, for purposes of our determination, the relevance of the date on which Petitioner submitted retirement papers to her retirement program. The status of Petitioner's employment was not altered by submission of papers to the Public Employees' Retirement System. As noted, when a district board properly accepts a tendered resignation, a termination date legally binding on both parties is established. It is of no moment for such purposes when or if the employee thereafter submits retirement papers to his or her retirement program. The Board and PERS are separate and independent agencies functioning within unrelated areas of responsibility. See Laing v. Board of Education of the Township

of Edison, decided by the Commissioner, April 11, 1977, aff'd by the State Board, August 3, 1977, aff'd, 1978 S.L.D. 1025 (App. Div. 1978).

Insofar as we find that Petitioner's tendered resignation with an effective date of June 30, 1987 became legally binding upon the Board's acceptance thereof, we reject Petitioner's claim that her tenure rights were violated when the Board terminated her services and when it based its decision on whether to accept her proposed rescission on her performance during the 1986-87 school year. Petitioner was not dismissed or reduced in salary while under tenure of office, position, or employment, so as to trigger the provisions of N.J.S.A. 18A:6-10 et seq., insofar as her status as a tenured employee under N.J.S.A. 18A:17-2 terminated on June 30, 1987, the binding effective date for her retirement. Petitioner does not dispute the voluntary nature of her tendered resignation and chosen effective date, and based upon the Board's acceptance thereof, she requested and accepted contractual retirement benefits.[3]

Since acceptance of Petitioner's proposed rescission was, therefore, a matter within the Board's discretion, its action in refusing to agree to an extension would not be improper unless it was arbitrary or capricious. No promises were made to Petitioner regarding acceptance of her extension request. She was simply informed that her status would be reviewed during the 1986-87 school year and a decision on whether to accept her proposed rescission would be based upon her performance. In light of Petitioner's evaluation and the report of the assistant superintendent that he could not recommend acceptance of Petitioner's proposed rescission, we find that the Petitioner has failed to demonstrate that the Board's action in declining to act to alter its previous decision accepting her tendered resignation with an effective date of June 30, 1987 was arbitrary or capricious.

Nor do the equities herein provide justification for granting Petitioner's proposed extension. In Evaul, supra, a tenured teacher with 25 years of service in the district tendered her resignation at the end of an emotional day in which she had a tumultuous confrontation with her principal, superintendent and board president. Unknown to appellant therein, the board had scheduled a special meeting for that evening, at which time her resignation was accepted. After learning of the meeting, she sent telegrams to the board, superintendent and board president attempting to rescind her resignation. The Court, in reinstating appellant on equitable principles, viewed her resignation as "an impetuous act prompted by her understandably disraught condition." Evaul, supra, at 249. The Court felt it was unduly harsh for her to

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[3] We note that Petitioner does not challenge as unreasonable the Board's retirement policy itself, either as established or as applied to her position.

lose rights acquired during her many years in the system as the result of an "extraordinary concatenation of events.... particularly so, in light of the additional fact that in the interim between the acceptance of her resignation and appellant's prompt attempt to rescind, the school board did not take any action in reliance upon the effectiveness of her release." Id. at 249-50.

While the factual situation in Evaul differs from that in the instant matter in that the employment of the appellant therein was terminated upon the board's acceptance of her tendered resignation, we find the Court's analysis useful in assessing Petitioner's situation. Unlike Evaul, the resignation tendered herein was not an impetuous act. Petitioner tendered her resignation with an effective date more than three years in the future and, in the interim, requested and accepted contractual retirement benefits. In addition, the Board did not act to accept Petitioner's resignation for nearly a month, during which time she could have unilaterally rescinded. Petitioner failed to do so, however, until nearly two years later when she advised her superintendent that a review of her financial situation indicated the necessity for remaining in the Board's employ for an additional two years. We do not find a reassessment of financial status herein the kind of circumstances which would warrant granting equitable relief to Petitioner, particularly in light of the fact that the Board acted upon Petitioner's tendered and accepted resignation by disbursing requested contractual retirement benefits to her beginning in the 1984-85 school year, which payments were accepted by the Petitioner.

We therefore conclude that Petitioner's tendered resignation, with an effective date of June 30, 1987, was legally binding on both parties upon acceptance by the Board on May 14, 1984, and could not thereafter be unilaterally rescinded or modified. While the Board had the discretion to agree to an extension on the effective date thereof, it chose not to do so. In addition, we can find no equitable circumstances which would justify allowing Petitioner's proposed rescission and modification, and we therefore reverse the Commissioner and dismiss the Petitioner's appeal.

Alice Holzapfel opposed.
May 3, 1989
Date of mailing _____

EDU #5301-85
C # 227-86
EDU #9002-86
C # 198-87
SB # 66-86 and #50-87 (consolidated)

MARY HART,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT,	:	
AND	:	
DONALD CELIDONIO, ROSLYN FERNHOFF AND LADISLAVA KRAWIEC,	:	
INTERVENORS-RESPONDENTS.	:	

Decided by the Commissioner of Education, September 9, 1986

Decided by the Commissioner of Education, August 4, 1987

For the Petitioner-Appellant, Bucceri and Pincus (Louis P. Bucceri, Esq., of Counsel)

For the Respondent-Respondent, Gallo, Geffner, Fenster, Farrell, Turitz & Harraka (Dennis G. Harraka, Esq., of Counsel)

For the Intervenors-Respondents, Alfred F. Maurice, Esq.

These consolidated cases involve a challenge by Mary T. Hart (hereinafter "Petitioner"), a tenured teaching staff member with certification in home economics (K-12), to the termination of her employment by the Board of Education of the Borough of Ridgefield (hereinafter "Board") as the result of a

reduction in force ("RIF") pursuant to N.J.S.A. 18A:28-9, which she claims was in violation of her tenure and seniority rights.

As stipulated by the parties, Petitioner had been employed by the Board as a full-time home economics teacher in grades 6, 7 and 8 from 1966-67 through 1981-82.[1] From 1982-83 through 1983-84, she taught full-time home economics in grades 6 and 7 and high school. As the result of a RIF at the end of 1983-84, petitioner was reduced to part-time status for the 1984-85 school year, and subsequently taught 2/5 part-time home economics grades 6 and 7 and family life education grade 6 from September 1, 1984 until December 31, 1984, and 3/5 part-time home economics grades 6 and 7 and family life grade 6 and high school from January 1, 1985 through June 30, 1985.

Petitioner appealed her reduction to part-time status in 1984-85, alleging that the Board assigned teachers with less seniority to teach classes in family life education. ("Hart I"). The Commissioner dismissed her appeal, finding that family life was an interdisciplinary program without a separate endorsement, and which individuals with nine different types of endorsements were authorized to teach. As such, the Commissioner noted, the Board was under no obligation to assign family life instruction to staff members with any one type of endorsement, nor was the implementation of the program required to be controlled by seniority claims. Thus, the Commissioner concluded, Petitioner had accrued no family life seniority under her home economics endorsement by merit of any

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[1] We note that grades 7 and 8 were departmentalized at all times relevant to this action.

authorization to assist in the program, and her seniority rights were not violated when the Board assigned a less senior high school physical education and health teacher to teach those classes. This decision was affirmed by the State Board and Appellate Division, and certification was denied by the Supreme Court. Hart v. Board of Education of the Borough of Ridgefield, decided by the Commissioner, June 7, 1985, aff'd by the State Board, Dec. 6, 1985, aff'd, Docket #A-2176-85T6 (App. Div. 1986), certif. denied, 107 N.J. 136 (1987).

On April 18, 1985, Petitioner was advised that her part-time employment was being terminated effective the 1985-86 school year due to declining enrollment. On July 16, 1985, Petitioner appealed the abolition of her home economics position for 1985-86, alleging that the Board improperly employed teachers with less seniority than she. ("Hart II"). Specifically, Petitioner alleged that she was entitled to teach the 5th and 6th grade home economics classes assigned to Intervenor Roslyn Fernhoff ("Fernhoff") and five periods per week of career education taught by Intervenor Donald Celidonio ("Celidonio") at the high school level. She also claimed the family life classes taught by two other teachers, including Intervenor Ladislava Krawiec.[2]

It was stipulated that Fernhoff had taught home economics solely at the secondary level through the 1984-85 school year, but was assigned seven classes per week of 5th and 6th grade home

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[2] Petitioner's challenge in Hart II was filed prior to final exhaustion of her appeals in Hart I. Petitioner conceded that insofar as the issue of the family life classes was litigated in Hart I, she would be precluded from re-litigating that particular issue unless the administrative rulings therein were reversed on appeal, which they were not.

economics in 1985-86, following Petitioner's dismissal, along with her secondary classes. It was also stipulated that Celidonio had been a Cooperative Industrial Education ("C.I.E.") coordinator and taught C.I.E. related subjects, as well as career education, at the high school level. For 1985-86, Celidonio was assigned five periods per week of career education, with the balance of his full-time schedule dedicated to C.I.E. and industrial arts.

On the matter of the elementary home economics classes, Petitioner claimed 18.52 years of both elementary and secondary seniority under her home economics endorsement, while asserting that Fernhoff's 20 years of seniority was only in secondary home economics. Thus, she claimed bumping rights, under N.J.A.C. 6:3-1.10(i), to the seven 5th and 6th grade home economics classes taught by Fernhoff in 1985-86. The ALJ concluded that Petitioner was, indeed, entitled to those classes, on the ground that she had greater seniority at the elementary level than Fernhoff. As noted by the ALJ:

> Intervenor Fernhoff argued petitioner could make no claim to the incidental hours to which Fernhoff had been assigned in the elementary school because, under the holding in Godwin-Davis v. Bd. of Ed. Ewing Twp., 1985 S.L.D. ___ (April 29, 1985), a school board is not required to adjust or modify its curriculum schedule for the sole purpose of creating a part-time position for petitioner or provide her with the maximum possible caseload. (Slip op. at 13-14). While the proposition may appear valid, it is my view the case is not apposite factually because the administrative law judge in that case found expressly that Godwin-Davis has not shown "there was a position for which she was qualified that was occupied by a less senior teacher." (Id.; slip op. at 9). Here on the contrary, the evidence showed petitioner Hart has established that while she and intervenor Fernhoff were qualified as district-wide home economics teachers, only she, Hart, had any actual service

> in elementary classes when her employment was terminated and when Fernhoff was assigned for 1985-86 to 5th and 6th grade home economics for the first time. At that moment in time, therefore, Hart's seniority out-stripped Fernhoff's. Cf. Peterson v. Bd. of Ed., Twp. of Willingboro, 1985 S.L.D. ___ (Dec. 12, 1985).

Initial Decision, at 10.

On the career education classes taught by Celidonio, Petitioner argued that insofar as the Board had not designated any particular certification for service as a teacher of career education, she was entitled to those five classes assigned to Celidonio since she had greater seniority at the secondary level under her home economics endorsement than he had under his educational services certificate. The ALJ concluded that Petitioner was at least as equally qualified as Celidonio to teach career education, stating that there was nothing in the record to show that Petitioner was not properly certified for the position, and directed the Board to redetermine Petitioner's relative seniority rights to the position.

The ALJ also dismissed Petitioner's seniority claim to the family life classes already litigated in Hart I.

On September 8, 1986, the Commissioner affirmed the ALJ's dismissal of Petitioner's claim to the family life classes, but rejected his conclusions regarding her entitlement to Celidonio's career education classes and Fernhoff's 5th and 6th grade home economics classes. The Commissioner noted that the career education classes were not a special subject field category pursuant to N.J.A.C. 6:3-1.10, and that career education was not an endorsement on any certificate. He further determined that the Board had properly assigned Celidonio to teach career education in that it was

more closely aligned to the endorsements he possessed. As to the home economics classes, the Commissioner stated that in order for Petitioner to prevail, she was required to establish that a vacant position existed at the start of the 1985-86 school year to which she was entitled by virtue of seniority under N.J.S.A. 18A:28-12, but that the evidence established that no such vacancy existed in home economics at that time. He added that the Board's assignment of those classes to Fernhoff was a proper exercise of its discretion to efficiently operate its school program by retaining one full-time teacher of home economics on a district-wide basis, and that Petitioner could not seek to create a new part-time position for herself by attempting to fragment those classes assigned to Fernhoff on a full-time basis.

In October 1986, Petitioner filed an appeal challenging the Board's failure to assign her to the controverted positions teaching home economics and career education for the 1986-87 school year. ("Hart III"). In addition to her arguments advanced in Hart II, Petitioner asserted that Fernhoff was now teaching 11 elementary home economics classes, rather than the 7 to which she had been assigned in the previous year.

The ALJ, in reliance upon the holdings in Hart II, concluded that Petitioner was not entitled to any remedy, adding that the increased number of elementary home economics classes taught by Fernhoff did not significantly distinguish the facts from Hart II. In her exceptions to the Commissioner, Petitioner, for the first time, claimed district-wide seniority over Fernhoff, citing the recent State Board decision in Cohen v. Board of Education of Emerson, decided by the State Board, June 3, 1987, aff'd with

modification, 225 N.J. Super. 324 (App. Div. 1988), certif. denied, ___ N.J. ___ (1989). The Commissioner adopted the ALJ's findings and conclusions, denying Petitioner's seniority claims for the reasons expressed in Hart II. He also rejected Petitioner's district-wide seniority assertion, noting that when the Board reduced Petitioner to a part-time position in home economics at the end of the 1983-84 year, the full-time position existed in the secondary category, in which Fernhoff had greater seniority. Thereafter, the Commissioner stressed, there was no vacant position available in home economics.

On September 29, 1987, we consolidated the Petitioner's appeals from the Commissioner's determinations in Hart II and III. Petitioner argues that Fernhoff's full-time assignment in 1985-86 and 1986-87 was district-wide, to which she, Petitioner, was entitled by virtue of seniority acquired on a district-wide basis; that the Commissioner ignored the second RIF in April 1985 when she was notified that her part-time position was being abolished, and that Fernhoff, with no district-wide experience, was given the "new" position which encompassed both the elementary and secondary levels; and that she was at least entitled to Fernhoff's elementary level classes in home economics and Celidonio's career education class by virtue of seniority. Petitioner concedes, in light of Hart I, that she has no seniority claim to the family life classes and also abandons any claim to the home economics classes assigned to Fernhoff in 1984-85, after the first RIF, acknowledging that Fernhoff, at that time, was solely in a secondary position, in which she had greater seniority than Petitioner. Moreover, Petitioner does not challenge the propriety or good faith of the RIF's.

We note initially our agreement with the Commissioner's rejection of Petitioner's claims to the career education classes taught by Celidonio. Career education, like family living, is not an assignment within a tenurable position to which a teaching staff member may claim entitlement on the basis of seniority, but, rather, represents a multi-disciplinary course that may properly be assigned to any teacher whose certification authorizes teaching the subject. Accordingly, the Board was not required to designate a separate position title or qualifying endorsement, and no seniority rights existed as among the disciplines authorized to teach that course. See Hart I, supra. Like the Commissioner, we find that Celidonio was qualified by virtue of his endorsements for the position, and was properly assigned to those classes.

We cannot, however, concur with the Commissioner's analysis of Petitioner's claims to the home economics classes assigned to Fernhoff in 1985-86 and 1986-87. As Petitioner points out, she was subject to a second RIF when she was dismissed from her part-time position at the end of the 1984-85 school year. Thus, the fact that the Commissioner found no vacancies existing to which Petitioner could exercise her seniority rights, pursuant to N.J.S.A. 18A:28-12, is not fully determinative of Petitioner's claim. Her rights at that time must also be assessed under N.J.S.A. 18A:28-10, which provides:

> Dismissals resulting from any such reduction shall not be made by reason of residence, age, sex, marriage, race, religion or political affiliation but shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board.

Petitioner asserts that under the State Board decision in Cohen, supra, she was entitled to Fernhoff's full-time assignments in 1985-86 and 1986-87 insofar as she had greater district-wide seniority.

In Cohen, the petitioner, a tenured speech correctionist, had been assigned exclusively at the elementary level prior to February 1, 1981, with additional employment by the board during 1978-79 that included providing services to parochial school students in grades K-8. On February 1, 1981, she was employed on a two-and-a-half days per week basis to provide services to students at the secondary and elementary levels, and during the next three years, was assigned exclusively at the elementary level. On May 21, 1984, the board reduced her employment to one-and-a-half days per week while retaining the intervenor, another speech correctionist, at the secondary level on a three-days-a-week basis. Petitioner therein alleged that by so doing, the board had violated her tenure and seniority rights in that she had accrued district-wide seniority since 1978-79 under N.J.A.C. 6:3-1.10(1)(16)(iii) [now N.J.A.C. 6:3-1.10(1)(20)(iii)], and therefore had greater seniority in the secondary level than the intervenor. The State Board agreed that petitioner had accrued district-wide seniority since 1978-79 in light of her work with the K-8 parochial school students, but held that she still had less seniority at the secondary level than the intervenor. In analyzing the regulations governing district-wide seniority, the State Board noted:

> Initially, we emphasize that seniority on a district-wide basis for persons serving under special subject field or educational services endorsements is limited to those persons whose actual duties were assigned on a district-wide

> basis, such as a child psychologist who as a member of the child study team provided services on K-12 basis. In the Matter of the Seniority Rights of Certain Teaching Staff Members Employed by the Old Bridge Board of Education and the Edison Township Board of Education, supra. In essence, this provision recognizes that those staff members whose assignments require them to provide services simultaneously to students at both the elementary and secondary level have by virtue of such assignment acquired experience in both the elementary and secondary categories. Consistent with the purpose of the current rules, this provision mandates that the experience of the member in both categories be recognized, and, as is the case where a member serves under different subject area endorsements during the same year, see N.J.A.C. 6:3-1.10(f), requires that simultaneous service be credited fully in each category within which the member served. Thus, a member whose assigned duties required that he provide services to students at all grade levels K-12 has earned and may assert seniority in both elementary and secondary categories. Additionally, although neither N.J.A.C. 6:3-1.10(l)(16)(iii) nor N.J.A.C. 6:3-1.10(l)(15)(iv) establish an additional seniority category, seniority acquired on a district-wide basis controls entitlement to assignments made on a district-wide basis, such as speech correctionist K-12.

State Board decision, at 15-16.

Subsequent to submission of the Petitioner's briefs herein, the Appellate Division, while affirming the State Board's decision rejecting petitioner's claim, disagreed with the State Board's conclusion on the facts granting petitioner district-wide seniority from 1978-79, stating that it was apparent that petitioner worked as an elementary school speech correctionist that year, notwithstanding the fact that she also provided services for the parochial school students. The Court, noting that, pursuant to statute and regulation, the actual therapy was conducted at the public schools in groups consisting of both public and parochial school students, concluded that the classification of the services should be based

upon the school in which the services were rendered, in this case a non-departmentalized elementary school, and not upon the parochial school from which the students were drawn.

Petitioner argues that since she taught classes at both the elementary and secondary levels, she acquired seniority on a district-wide basis, as well as in the elementary and secondary categories. She alleges that Fernhoff was assigned to a new position in 1985-86, which was district-wide pursuant to Cohen since it encompassed service in both the elementary and secondary categories, and thus entitlement was controlled by seniority acquired on a district-wide basis, of which she had over 18 years while Fernhoff had none.

N.J.A.C. 6:3-1.10(1)(15)(iv) and N.J.A.C. 6:3-1.10(1)(16)(iii),[3] governing district-wide seniority under the specific categories of elementary and secondary, provide:

> Persons employed and providing services on a district-wide basis under a special subject field endorsement[4] or an educational services certificate shall acquire seniority on a district-wide basis.

As noted in Cohen, N.J.A.C. 6:3-1.10(1)(15)(iv) and N.J.A.C. 6:3-1.10(1)(16)(iii) neither create substantive rights to a position nor establish an additional seniority category. Rather,

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[3] N.J.A.C. 6:3-1.10(1)(15)(iv) is currently codified as N.J.A.C. 6:3-1.10(1)(19)(iv), and N.J.A.C. 6:3-1.10(1)(16)(iii) is now codified as N.J.A.C. 6:3-1.10(1)(20)(iii). All references herein will be to the former citations.

[4] We note that N.J.A.C. 6:3-1.10(1)(15)(iv) and N.J.A.C. 6:3-1.10(1)(16)(iii) are identical except that while the former refers to a "special subject field endorsement," the latter refers to a "special field endorsement."

they recognize that staff members who provide services simultaneously at both the elementary and secondary levels are to be fully credited in each of those categories and that seniority acquired on a district-wide basis controls entitlement to assignments made on a district-wide basis, such as speech correctionist K-12. Cohen, supra.

After a thorough review of the record, however, we find, for the reasons that follow, that the record does not support the conclusion that the Board, in retaining Fernhoff on a full-time basis, established a new position to which entitlement would be controlled by "district-wide seniority" acquired pursuant to N.J.A.C. 6:3-1.10(1)(15)(iv) and N.J.A.C. 6:3-1.10(1)(16)(iii). We further find that in assigning home economics classes at the elementary level to Fernhoff in 1985-86 and 1986-87 in order to retain her on a full-time basis, while, at the same time, dismissing Petitioner, who had superior seniority in the elementary category, the Board violated Petitioner's seniority rights.

Again, there is no dispute that in 1984-85, Fernhoff had been employed in a full-time position teaching home economics at the 8th grade and high school levels, all secondary. Petitioner held a part-time position teaching elementary and secondary home economics. In effectuating the reduction in force at the end of that school year and establishing class assignments for teachers subject to the RIF, the Board retained Fernhoff in her secondary assignment and, incidental to that assignment, also assigned her several home economics classes at the elementary level in order to retain her on a full-time basis, despite the reduction in her

full-time secondary assignment.[5] Petitioner, who had been assigned the elementary home economics classes in the district, was dismissed. There is no evidence that the Board prepared or adopted a job description for a new position of home economics K-12 or took any other action to formally establish such a position.[6] Rather, the Board, while retaining Fernhoff in her reduced secondary assignment, merely provided her with additional classes at the elementary level, in order to retain her on a full-time basis. While the Board was not precluded from establishing a K-12 position, the factual circumstances, as established in the record, show that in assigning elementary home economics classes to Fernhoff in order to retain her on a full-time basis, the Board did not alter the basic character of her secondary assignment.

Given these circumstances, the propriety of the Board's action must be judged by an evaluation of seniority accrued by these teachers in the elementary and secondary categories. We stress that while any "district-wide seniority" acquired by Petitioner does not entitle her to the home economics assignments herein, the regulations require that simultaneous service on the elementary and

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5 As stipulated by the parties, a normal full-time teaching load in the district is 25 periods per week.

6 We note that while the absence of a district-wide job description is not conclusive evidence of the non-existence of a home economics K-12 position, the Petitioner has failed to demonstrate that the Board's action in effectuating the RIF by merely retaining Fernhoff in her reduced secondary assignment while providing her with additional classes at the elementary level in order to retain her on a full-time basis created a new home economics K-12 position in the district.

secondary levels be credited fully in each category. We turn, therefore, to a review of Petitioner's seniority rights within the elementary and secondary categories under her home economics endorsement.

It is undisputed that Fernhoff possessed greater seniority than Petitioner at the secondary level. A review of Petitioner's claim to the elementary home economics classes assigned to Fernhoff, however, requires a more detailed review of the facts. Prior to the 1985-86 year, Fernhoff had taught home economics solely at the high school and 8th grade levels, all secondary insofar as 7th and 8th grade were departmentalized. While she had accrued 20 years of seniority at the secondary level by the start of the 1985-86 school year, she had no actual experience at the elementary level, and, accordingly, no seniority in the elementary category under her certification. In 1985-86, she was retained in her secondary assignment and, in addition, assigned seven periods per week of 5th and 6th grade home economics.

Petitioner, on the other hand, had taught 6th grade home economics every year with the district since 1966-67, in addition to teaching the subject at the 7th and 8th grade and high school levels, thereby accruing seniority at both the secondary and elementary levels. However, in effectuating the reduction in force at the end of the 1984-85 school year, the Board dismissed Petitioner from her part-time position teaching at the elementary and secondary levels, and gave her elementary assignment to Fernhoff, notwithstanding her lack of seniority in the elementary category.

The Board asserts, in reliance upon Godwin Davis v. Board of Education of the Township of Ewing, decided by the Commissioner, April 29, 1985, that it was not required to work out all possible permutations of assignments in order to create a new part-time position for the Petitioner, noting that it acted properly within its discretion to efficiently operate its schools by retaining its full-time positions instead of fragmenting those courses by assigning them to part-time teachers.

However, as the ALJ pointed out, Godwin Davis is inapposite to the instant matter. In Godwin Davis, the petitioner, dismissed from her position teaching business math and business training under her general business certification, sought assignment to different classes, within her certification, being taught by other staff members. The Commissioner, in ruling against the petitioner therein, refused to direct the Board to rearrange its schedule to suit petitioner's desires and maximize its course offerings to coincide with her areas of certification, adopting the ALJ's finding that petitioner had not shown there was a position for which she was qualified that was occupied by a less senior teacher.

While we agree that a board is not required to work out all possible permutations in assignments for which available personnel have credentials or to fragment existing positions by reassigning a teacher subject to a RIF to a subject area in which he or she has no seniority entitlement, dismissals in a RIF must be made on the basis of seniority according to standards established by the Commissioner with the approval of the State Board. N.J.S.A 18A:28-10.

Petitioner herein seeks reinstatement to an assignment within the seniority category from which she was dismissed and in

which she had accrued far greater seniority than Fernhoff, who had never taught home economics at the elementary level. Fernhoff's assignment was altered to give her the elementary assignment to which Petitioner seeks reinstatement when Fernhoff's full-time secondary assignment was reduced, thereby allowing the Board to retain her on a full-time basis. The regulations, however, provide no authority for the Board to retain Fernhoff in her reduced secondary assignment and, in addition, also give her Petitioner's assignment at the elementary level, despite Petitioner's far superior seniority in that category, on the basis that the elementary classes were incidental. N.J.A.C. 6:3-1.10(l) divides "secondary" and "elementary" into distinct categories for seniority purposes. While the record does not support the establishment of a new full-time home economics K-12 position so as to require consideration of Petitioner's "district-wide seniority," the Board, in effectuating the RIF, was obligated to take into account Petitioner's seniority rights within the elementary category. And insofar as Petitioner had over 18 years seniority in the elementary category, while Fernhoff had none, Petitioner was entitled by virtue of seniority to assignment to the elementary classes in home economics following the RIF.

Thus, for the reasons stated, we conclude that the Board acted improperly in dismissing Petitioner from her part-time position at the end of the 1984-85 school year and assigning all elementary home economics classes to Fernhoff in 1985-86 and 1986-87.

We therefore affirm the Commissioner's decisions rejecting Petitioner's claims to the career education classes assigned to Intervenor Celidonio and the full-time home economics assignment of

Intervenor Fernhoff. Insofar as Petitioner has abandoned any claims to the family life classes litigated in Hart I, that matter is not before us. We, however, reverse the Commissioner's decisions rejecting Petitioner's claims to the elementary home economics classes assigned to Fernhoff, and direct Petitioner's reinstatement to an assignment teaching all scheduled elementary home economics classes, with back pay and emoluments from the commencement of the 1985-86 school year. This decision in no way precludes the Board from establishing a K-12 position in home economics, entitlement to which would be controlled by "district-wide seniority" acquired pursuant to N.J.A.C. 6:3-1.10(1)(15)(iv) and N.J.A.C. 6:3-1.10(1)(16)(iii), so as to retain one full-time teacher rather than two part-time.

Attorney exceptions are noted.

June 7, 1989

Date of mailing JUN 09 1989

BOARD OF EDUCATION OF THE CITY OF HOBOKEN,

PETITIONER-RESPONDENT,

V.

MAYOR AND COUNCIL OF THE CITY OF HOBOKEN, HUDSON COUNTY,

RESPONDENT-APPELLANT

STATE BOARD OF EDUCATION

DECISION

Decided by the Assistant Commissioner of Education, Division of Finance, November 9, 1988

For the Petitioner-Respondent, Murray & Murray (Karen A. Murray, Esq., of Counsel)

For the Respondent-Appellant, Eugene P. O'Connell, Esq.

This is an appeal from a determination made by the Assistant Commissioner, Division of Finance, see N.J.S.A. 18A:4-34, relating to the current expense budget of the Board of Education of the City of Hoboken (hereinafter "Board") for 1988-89. In his decision, the Assistant Commissioner directed restoration of $2,812,690 to the Board's budget, which had been reduced by the Council of the City of Hoboken (hereinafter "Council") pursuant to N.J.S.A. 18A:22-37 on April 26, 1988, following defeat of the budget by the voters.

The Hoboken school district is currently subject to Level III monitoring pursuant to N.J.S.A. 18A:7A-14. The reduction effectuated by virtue of the Council's action included amounts representing current expenses for continued operation of one of the district's schools, amounts relating to implementation of Level III monitoring requirements, and 10% reductions in various other accounts.

The Council acted after meeting with three members of the Board who had been designated by the Board as a "budget review committee," but did not meet with the full Board prior to acting. While identifying its reductions by line item in its resolution adopted on April 26, it did not specify therein the reasons underlying its reductions. Nor did it provide a statement of reasons when it filed its answer to the Board's pleadings on June 6, 1988. Following pre-hearing conference conducted on July 8, 1988, the Council, on July 27, 1988, did file a statement pursuant to directive for compliance with N.J.A.C. 1:6-10.1(a).

On July 26, the Board moved for summary judgment. In support of its motion, it argued that summary judgment was warranted in that the Council had failed to arrive at an independent determination when it acted to reduce the budget and had failed to provide the Board with the reasons for its reductions either when it acted or when its answer was filed. In response, the Council asserted that the Board had prior knowledge of the reasons underlying the Council's reductions.

The Assistant Commissioner deferred ruling on the motion, and determined to proceed to hearing on the merits. On August 10, the Council filed a motion seeking the recusal of the Commissioner from this matter and arguing that the matter should instead be decided by an Administrative Law Judge (ALJ). The Council contended that recusal was called for because the Commissioner had an interest in the outcome since the Board could possibly use any budget reduction as a defense in a subsequent action for State takeover of the school district. The Assistant Commissioner denied the motion.

On August 12, the Board filed a motion for dismissal of the reductions related to the continued operation of one of its schools. The Assistant Commissioner granted the motion, concluding that the magnitude of the Council's reduction of those amounts would force serious consideration of the closing of the facility and that, given the Level III status of the district, this would have a serious negative impact on the Board's ability to provide a thorough and efficient education. In so concluding, the Assistant Commissioner found that regardless of the outcome of the hearing on the merits, this would create the distinct probability that the school system would not be able to open on the scheduled date and would seriously undermine student performance and destroy the credibility of the Board.

Following argument, the Assistant Commissioner also granted the Board's motion to restore specific amounts related to implementation of the district's Level III program, although he deferred determination as to the remaining reductions for continued hearing. However, the Assistant Commissioner ultimately found it unnecessary to make further findings as to those amounts in that, based on the testimony, he found it evident that the Council's actions were contrary to the mandates of Bd. of Ed., E. Brunswick Twp. v. Twp. Council, E. Brunswick, 48 N.J. 94 (1966). The Assistant Commissioner therefore granted summary judgment to the Board, and directed inclusion of the $2,812,690 at issue in the tax levy for current expense purposes for the 1988-89 school year.

The Council appealed, renewing its arguments that the Commissioner should have recused himself from this matter and that it fully complied with N.J.S.A. 18A:22-37 when it reduced the budget proposed by the Board so as to entitle it to remand of the matter. The Council contends that the undisputed facts demonstrate that it complied with the requirements of N.J.S.A. 18A:22-37 in that the "budget review committee" appointed by the Board met with Council members prior to the Council's action to reduce the budget, the

reductions adopted by the Council were those proposed by the committee, the Council, in adopting those reductions, adopted the committee's rationale as its own, and a detailed statement of reasons was made available after appeal to the Commissioner was commenced.

In response, the Board maintains that the minutes of the Council's meeting of April 26 show that the Council did not independently consider the reductions, that the first time it provided the reasons underlying the reductions was on July 27, three months after the appeal was initiated, and that the Board therefore is entitled to summary judgment as a matter of law. As to the question of whether recusal was required, the Board argues that the fact that a decision as to a budget might be used as a defense at some future time in some possible action is not an interest such as to require the Commissioner's recusal. It further argues that, regardless, the matter was heard by an Assistant Commissioner rather than the Commissioner, and, in any event, only the Commissioner could render a final decision in the matter were it remanded to an Administrative Law Judge.

Initially, we reject the Council's arguments that recusal of either the Commissioner or the Assistant Commissioner was called for in this case. We find no indication of bias so as to warrant disqualification. See, e.g., Sheeran v. Progressive Life Ins. Co., 182 N.J. Super. 237 (App. Div. 1981). Nor has the Council pointed to the existence of any interest that might have conflicted with the ability of either the Commissioner or Assistant Commissioner to fairly hear and decide this case. In this respect, we emphasize that the wisdom of charging the Commissioner with the responsibility for evaluating the performance of school districts and for assuring correction of deficiencies pursuant to N.J.S.A. 18A:7A-14, and for adjudicating budget appeals pursuant to N.J.S.A. 18A:22-37 has been passed upon by the Legislature. c.f. In re Trenton Bd. of Ed., 176 N.J. Super. 553, 555-56 (App. Div. 1980), aff'd, 86 N.J. 327 (1981). In the absence of a showing of malice, we find it entirely proper that the Commissioner or, as in this case, the Assistant Commissioner, Division of Finance, hear appeals from determinations by municipal governing bodies reducing budgets proposed by district boards so as to assure that the governing bodies so acting have fulfilled their obligation under N.J.S.A. 18A:22-37 to appropriate a sufficient amount for each item to provide a thorough and efficient system of schools in their districts. See id.

Based on our review of the record in this matter, we further conclude that summary decision was warranted in this case as to the amounts reduced by Council by virtue of its action of April 26.

It is undisputed that while Council members met with a committee of three Board members prior to acting on April 26, the Council at no time met with the full Board. There is no dispute that the Council did not provide reasons for its reductions when it acted on that date, and that it did not do so until July 27. Nor is

it disputed that the committee was not authorized to act on behalf of the Board, that the Council's action was that of accepting cuts recommended by the committee, and that the Council's action was not accompanied by any independent consideration of those reductions or by any discussion of the effect of the reductions on the educational process in the district.

The Council's failure to consult with the Board prior to acting violated the express requirements of N.J.S.A. 18A:22-37. Regardless of the wisdom of the Board's appointment of three of its members elected on a platform of budget reduction to the "budget review committee," that committee was not authorized to act on behalf of the Board and, under the circumstances here, the Council could have no illusion that in meeting with this committee, it was fulfilling its statutory obligation to consult with the Board prior to determining the amount necessary to be appropriated to provide a thorough and efficient system of schools in the district.

However, our conclusion that summary judgment was called for in this case does not rest on this failure alone. Regardless of the sufficiency of its consultation with the district board, N.J.S.A. 18A:22-37 places the responsibility for making a determination as to an amount necessary to provide a thorough and efficient education following voter defeat of a budget squarely and unambiguously for the governing body. In fulfilling this responsibility, as articulated by the New Jersey Supreme Court,

> 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.

Bd. of Ed., E. Brunswick Twp. v. Twp. Council, E. Brunswick, supra, at 106 .

It is undisputed that the Council in this case did not make an independent determination when it acted to reduce the budget proposed by the Board. Rather, its action was to adopt reductions recommended by the "budget review committee." Consequently, the Council's action was without regard to educational considerations.

Given the district's monitoring status and the magnitude of the Council's reductions, the Council's total failure to even consider the educational impact of the reductions leaves room for no conclusion other than that its action was taken in total disregard of the impact of its reductions on the ability of the district to meet the State's educational standards and that, in so acting, it failed to fulfill its statutory obligation.

In these circumstances, the Council's failure to provide a statement of reasons is far more than procedural. Rather, it is reflective of the fact that the Council, as so clearly shown in the record, had no reasons to justify its action except voter reaction and the generalized belief that the amount of per pupil expenditure in the district was too high. Exhibit J-1.

We find that the Council's failure in this case goes to the heart of its constitutional obligation. In failing to even consider the educational impact of the reductions and to make an independent determination of the amount necessary to provide a thorough and efficient education in the district, the Council here totally disregarded that obligation. See Board of Education of the Borough of South Plainfield v. Mayor and Council of the Borough of South Plainfield, decided by the State Board, May 3, 1989, slip op. at 4-6, appeal pending, Appellate Division.

The impact of this failure is clearly demonstrated by even cursory review of the reductions. As the Assistant Commissioner found, the Council's action would have forced serious consideration of the closing of one of the district's schools. Even assuming that the closing of a school could be effectuated by action taken by a governing body under authority of N.J.S.A. 18A:22-37, a reduction of such consequence could not in any circumstance be sustained in the total absence of any consideration of the impact on the education of the district's students. Nor can we ignore that, without consideration of the educational impact, the Council's action would have reduced amounts appropriated for the district's Level III plan, the implementation of which has been required in order that the district will meet the State's educational standards. See N.J.S.A. 18A:7A-14(c). Finally, in the absence of any independent assessment or consideration by the Council as to their educational impact, the 10% reductions in various other items must be considered substantively arbitrary.

In sum, after careful review of the record, we conclude that the Council's action in this case was taken in total disregard of its statutory obligation and that its reductions in the budget proposed by the Board, therefore, must be deemed arbitrary. Accordingly, for the reasons expressed by the Assistant Commissioner in his decision, as well as those set forth herein, the State Board of Education affirms that decision.

July 6, 1989

MADONNA LEDBETTER,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, December 12, 1988

For the Petitioner-Appellant, Katzenbach, Gildea & Rudner (Arnold M. Mellk, Esq., of Counsel)

For the Respondent-Respondent, Gelzer, Kelaher, Shea, Novy & Carr (Kathleen W. Hofstetter, Esq., of Counsel)

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

May 3, 1989
Date of mailing _____

WILLIAM LOVE, ET AL.,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, October 12, 1988

For the Petitioners-Appellants, Andrew O. Kaplan, Esq.

For the Respondent-Respondent, Lemuel H. Blackburn, Jr., Esq. (Gregory G. Johnson, Esq., of Counsel)

This case involves eight top level administrative employees of the Board of Education of the City of Trenton (hereinafter "Board"), some, but not all, of whom were certificated pursuant to the education laws. All were designated as "Confidential Administrators," classified by the Board as "confidential employees," and none were included in a collective negotiations unit designated pursuant to the New Jersey Employer-Employee Relations Act, N.J.S.A. 18A:34A-1 et seq. In October 1987, these employees petitioned the Commissioner of Education, alleging that the Board had violated N.J.S.A. 18A:29-4.3 by failing to establish and place them on a salary schedule. They also asserted that in unilaterally rescinding a Memorandum of Understanding (hereinafter "Memorandum") adopted by the Board on August 31, 1976, which stated that "the fringe benefits (exclusive of salaries) accorded those top-level administrators shall not be less than those fringe benefits and any other personal benefits accorded to any other employee of the district," the Board's action of October 27, 1987, was arbitrary, capricious and unreasonable.

On August 26, 1988, an Administrative Law Judge ("ALJ") determined that the Board had violated N.J.S.A. 18A:29-4.3 by failing to adopt salary schedules for its "Confidential Administrators" prior to October 27, 1987, and had not fully implemented its schedule in that the Board had made entitlement to salary pursuant to the schedule contingent on the signing of individual employment contracts, which included a provision waiving the Memorandum, by each "Confidential Administrator". The ALJ further concluded that insofar as the Board had relied, in part, upon the Memorandum as a basis for compensation to that class of employees and the Commissioner had recognized the application of the Memorandum as the basis for determining the salaries of the Board's confidential employees, the Commissioner had subject matter jurisdiction over the Petitioners' claim that the Board improperly rescinded the Memorandum. Relying on Galloway Tp. Bd. of Ed. v.

Galloway Tp. Ed. Ass'n, 78 N.J. 1 (1978), the ALJ concluded that the Board had acted unreasonably in unilaterally rescinding the Memorandum in that rescinding it without engaging in negotiations with Petitioners did not comport with the statutory objectives of N.J.S.A. 34:13A-5.3.

On October 12, 1988, the Commissioner adopted in part and rejected in part the initial decision. The Commissioner agreed that the Board had violated N.J.S.A. 18A:29-4.3 by failing to adopt a salary schedule until April 28, 1988, when the Board acted to adopt salary schedules for 1987-88 for its "Confidential Administrators," but held that insofar as some of the Petitioners were not certificated as administrators, those particular employees were not required to be placed on a salary scale pursuant to N.J.S.A. 18A:29-4.3. For the reasons expressed by the ALJ, the Commissioner found that insofar as the Board had required the Petitioners to sign employment contracts which included a provision waiving the Memorandum, and Petitioners had refused to sign those contracts which would have made the salary schedule applicable to them, the Board had failed to fully implement its statutorily mandated schedule, and he directed the Board to fully implement the salary schedule for eligible employees.

The Commissioner, however, rejected the ALJ's determination that the Board had acted unreasonably in unilaterally rescinding the Memorandum of Understanding. In reaching that conclusion, the Commissioner found that fringe benefits were within the exclusive purview of Public Employment Relations Commission (PERC) and that he therefore needed only to consider the issues related to salary. The Commissioner noted that he did not recognize the use of the term "confidential employee" insofar as it was found under PERC law, and that his jurisdiction provided no authority for compelling the Board to bargain with Petitioners as a unit.

The Memorandum, he concluded, was a Board policy within the Board's power to make under N.J.S.A. 18A:11-1, and therefore was subject to revision or rescission by the Board at any time. Noting that there was no evidence that the Memorandum was either a formal agreement collectively made with the Petitioners or an individual contract made with the individual Petitioners, the Commissioner found that the Board had not acted improperly in rescinding the memorandum.

Petitioners have filed the instant appeal from the Commissioner's decision, contending that rescission of the Memorandum was arbitrary, unreasonable and ultra vires, and that the Memorandum is binding upon the Board with respect to salary and benefits. Petitioners further contend that the salary schedule adopted by the Board on April 28, 1988 does not comply with N.J.S.A. 12A:29-4.3 in that the Board did not negotiate with Petitioners regarding salary and that the salary schedule adopted for these administrators is inequitable in relation to that applicable to members of the Trenton Administrators and Supervisors Association.

We agree with the Commissioner's determination that the Board violated N.J.S.A. 18A:29-4.3 by failing to adopt salary schedules for those teaching staff members which it designated as "Confidential Administrators" until April 28, 1988, and would affirm his directive that the Board fully implement the salary schedule now in place. In arriving at this conclusion, we reject Petitioners' contention that the Board's schedule contravenes N.J.S.A. 18A:4.3 in that the Board did not negotiate the terms of that schedule with Petitioners.

Although a district board may have an obligation pursuant to N.J.S.A. 34:13A-5.3 to negotiate concerning terms and conditions of employment, including salary schedules, with the majority representative of an appropriate negotiating unit as determined by the Public Employment Relations Commission under authority of N.J.S.A. 34:13A-5.2, e.g., Board of Ed. of Rockaway Tp. in Morris County v. Rockaway Tp. Ed. Ass'n, 120 N.J. Super. 564 (Ch. Div., 1972), nothing in N.J.S.A. 18A:4.3 requires such negotiation, and Petitioners have not pointed any other provision of the education laws that would impose such obligation on the Board.

Nor have Petitioners shown that the substantive terms of the salary schedule adopted by the Board contravene any requirement of the education laws. In this respect, we emphasize that while the compensation statutes prescribe the minimum salary to which full-time teaching staff members are entitled, they do not in any way mandate any relationship that must exist between the salaries of various classifications of teaching staff members. N.J.S.A. 18A:29-5 et seq. Thus, nothing in the education laws precluded the Board here from adopting a salary schedule for its high-level administrators that provided salary increases of lesser amounts than those to which the those employees represented by the Trenton Administrators and Supervisors Association may be entitled pursuant to the collective negotiations agreement applicable to them.

We have carefully reviewed Petitioners' assertions that rescission of the Memorandum of Understanding contravenes the education laws. Although, as follows, we reject those assertions and agree with the Commissioner's conclusion that the Board did not act improperly in rescinding the Memorandum of Understanding, we find that the Commissioner's analysis of this claim is flawed.

While the Commissioner properly recognized that classification of an employee by a district board as a "confidential employee" under N.J.S.A. 34:13A-3(g) so as to preclude membership in a collective negotiations unit pursuant to N.J.S.A. 34:13A-5.3 has no bearing in determining entitlement to statutory benefits conferred on such employees by the education laws by virtue of their status as teaching staff members, and correctly determined that his jurisdiction under the education laws did not provide authority to compel the Board to negotiate collectively with Petitioners, we find that in arriving at his decision, the Commissioner viewed his authority too narrowly and did not properly apply the statutes relevant to resolving Petitioners' claim.

We recognize that in cases where a collective negotiations relationship exists, PERC has primary jurisdiction to determine whether a dispute such as that presented here is within the scope of collective negotiations. e.g., Board of Ed. of Bernards Tp., Somerset County v. Bernards Tp. of Ed. Ass'n., 79 N.J. 311 (1979).[1] We further recognize that PERC has exclusive jurisdiction over unfair labor practices. Galloway, Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, supra. However, the jurisdiction conferred on PERC by the Legislature does not preempt or limit this agency's jurisdiction to decide controversies and disputes arising under the education statutes. City of Hackensack v. Winner, 82 N.J. 1 (1980).

In this regard, we conclude that the Commissioner erred in finding that he was without authority to comment on "the terms of the petitioners' contract" related to "fringe benefits" on the grounds that fringe benefits "lie within the purview of PERC exclusively." Commissioner's decision, at 27. We concur with the Commissioner that, in requiring district boards to adopt salary schedules for supervisory and administrative employees, N.J.S.A. 18A:29-4.3 by its terms applies only to monetary compensation and does not apply to or confer on teaching staff members having supervisory or administrative responsibilities any entitlement to fringe benefits. c.f. Cliffside Park Borough Bd. of Ed. v. Mayor and Council, 100 N.J. Super. 490, 93 (App. Div. 1968). However, pursuant to N.J.S.A. 18A:29-4.1, district boards may adopt salary policies, including salary schedules for all teaching staff members, binding upon the board for up to three years. In contrast to a salary schedule adopted pursuant to the mandate of N.J.S.A. 18A:29-4.3, a salary policy adopted under authority of N.J.S.A. 18A:29-4.1 includes, in addition to salary schedules, "fringe benefits" of employment. Newark Teachers Assn. v. Board of Ed. of Newark, 108 N.J. Super. 34, 49 n.2 (App. Div. 1969), aff'd, 57 N.J. 100 (1970); Cliffside Park Borough Bd. of Ed. v. Mayor and Council, supra at 493. Thus, where a question arising under N.J.S.A. 18A:29-4.1 is raised, the Commissioner has not only the jurisdiction, but the responsibility to consider those issues relating to fringe benefits as necessary to resolve the controversy regardless of whether or not the salary policy involved is embodied in a collective negotiations agreement.

While both adoption and rescission of the memorandum at issue in this case may have constituted actions taken under general

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[1] We note that on July 15, 1988, the Public Employment Relations Commission ("PERC") acted on a petition to it by the Board for a scope of negotiations determination, by which the Board sought a declaration that the Memorandum of Understanding was unenforceable. City of Trenton Board of Education and William Love et al., PERC No. 89-5 (July 15, 1989). Noting that Petitioners were not in any collective negotiations unit and that their sole claim was that the education laws required the memorandum's continuation, PERC recognized that such claim was within the jurisdiction of the Commissioner of Education and held that it did not have jurisdiction to resolve the dispute.

authority of N.J.S.A. 18A:11-1(c), specific authority for its adoption is derived from N.J.S.A. 18A:29-4.1. Petitioners, however, have not pointed to any provision of the education laws that would preclude unilateral rescission of the Memorandum.[2] In this regard, we agree with the Commissioner that the ALJ's reliance on Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, supra, in finding that the Board was under a duty to negotiate with Petitioners prior to acting, was improper. In contrast to the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., the education laws do not include the authority to determine units appropriate for collective negotiations or impose upon district boards a duty to negotiate with employees before acting to adopt or rescind salary policies under authority of N.J.S.A. 18A:29-4.1. Thus, unless otherwise bound by such policy, the education laws do not prohibit a board from acting unilaterally to alter or rescind the terms of policies previously adopted so long as they do so consistently with the procedural and substantive requirements of the education laws.

In this case, there is no collective negotiations relationship between Petitioners and the Board and, consequently, no collective negotiations agreement that might have bound the Board to the terms of the Memorandum under the education laws. See, e.g., Scotch Plains-Fanwood Education Association et al. v. Board of Education of Scotch Plains-Fanwood, decided by the State Board, March 4, 1987, slip op. at 14-15. Nor, as the Commissioner found, have Petitioners demonstrated the existence of a contractual relationship not within the scope of collective negotiations through which the Board might have been bound by the terms of the Memorandum. In the absence of a contractual relationship and given that Petitioners have not shown that the Board is failing to provide them with any benefit mandated by the education statutes, we conclude there is no basis under the education laws upon which Petitioners might be entitled the relief sought in these proceedings.

For the reasons expressed by the Commissioner as modified herein, the State Board of Education affirms the decision of the Commissioner in this matter.

August 2, 1989

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[2] In that the sole question raised in the proceedings was whether rescission of the Memorandum was in contravention of the education laws, we can not in this appeal properly consider questions relating its validity. However, in that N.J.S.A. 18A:4.1 establishes the maximum number of years for which a board acting to adopt such policy may be bound, the Petitioners could not hold the Board to the terms of the Memorandum beyond the maximum period established by the statute. See N.J.S.A. 18A:29-4.1, L. 1965 c. 236, amended by L. 1987 c. 123 (effective May 20, 1987).

MICHAEL MARKOT,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, May 9, 1988

For the Petitioner-Respondent, Klausner, Hunter and Oxfeld
(Nancy Iris Oxfeld, Esq., of Counsel)

For the Respondent-Appellant, Rubin, Rubin and Malgran
David B. Rubin, Esq., of Counsel)

Petitioner in this case is a tenured mathematics teacher who, under the salary guide established by the collective negotiations agreement between the Board of Education of the Township of East Brunswick (hereinafter "Board") and the East Brunswick Education Association (hereinafter "Association"), was entitled to a total salary of $26,250 for the 1986-87 school year. However, as the result of clerical error, the Board set his salary at $27,920 for that year when it acted on January 21, 1987.[1]

In February 1987, the Board discovered its error and determined to recoup the amounts overpaid by means of deductions from Petitioner's paycheck, and, on March 9, 1987, it acted to "reduce" Petitioner's salary to the correct amount. Although Petitioner had initially agreed to repay the amounts as proposed by the Board, on March 17, the Association filed a grievance on his behalf challenging the Board's action. The grievance was processed as provided by the collective negotiations agreement, and resolved on June 11, 1987, when the Board upheld the determination that had been made pursuant to the grievance procedure by the superintendent of schools to readjust Petitioner's salary to $27,920 for 1986-87, but to freeze his salary at that amount until the overpayment was recouped.

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1 The Board action followed agreement reached with the Association in December 1986 concerning use of funds allocated under the Teacher Quality Employment Act, L. 1985, c. 321 (codified as amended at N.J.S.A. 18A:29-5 et seq.). Retroactive payment was to be made for the 1986-87 school year in February 1987.

Consistent with the Board's action resolving the grievance, the Board issued Petitioner a check for $901.50 in June so that for the last half of 1986-87 Petitioner was paid at an annual rate of $27,920. Petitioner continued to receive salary payments at that annual rate during the first half of 1987-88, although, pursuant to the salary provisions of the collective negotiations agreement then in effect he was entitled to payment at an annual rate of only $27,810.

In November 1987, the Board and the Association reached agreement as to employee salaries for 1987-88, providing for salary increases as of February 1988. Pursuant to the terms of the agreement, based upon his education, experience and tenure status, Petitioner would have received, absent the Board's action resolving the grievance, salary payments at an annual rate of $29,400 as of February 1988. The Board, however, determined to continue Petitioner's salary payments at an annual rate of $27,920 until it had recouped the amount of overpayments made during the last half of 1986-87 and the first half of 1987-88. That amount totaled $1,725.

In August 1988, Petitioner filed a petition to the Commissioner seeking a determination under the education laws that the Board could not pay him at the annual rate of $27,920, but was required to compensate him at $29,400 as of February 1988 when, pursuant to the collective agreement, the salaries of teaching staff members were increased by moving them to the next step of the negotiated guide.

Based on the stipulations of the parties, the Administrative Law Judge (ALJ) found that, absent withholding of Petitioner's increment pursuant to N.J.S.A. 18A:29-14, the Board could hold him to a salary level of $27,920 only until February 1988, when, under the negotiated salary guide, Petitioner's experience and training would entitle him to payment of a salary of $29,400.

The Commissioner adopted the ALJ's determination, concluding that a Board may hold a teacher in place on a guide until such time as the teacher's experience and training meet the level erroneously fixed by the Board, but to do so longer constitutes a reduction in salary contrary to N.J.S.A. 18A:28-5. Thus, the Commissioner found that from February 1988, Petitioner was entitled to $29,150 plus $250 in recognition of his tenure status as provided by the collective negotiations agreement. For the reasons that follow we reverse.

Initially, we note that the error from which this case arises was not a mistake in placement on a negotiated salary guide upon initial employment. Rather, the error here occurred in establishing the salary of a tenured teaching staff member under the terms of such salary guide. Consequently, had Petitioner challenged in this forum the Board's initial action to recoup the amounts overpaid, the question presented under the education laws would have involved whether the action constituted a reduction in the salary of a tenured teaching staff member in contravention of N.J.S.A.

18A:28-5 rather than one involving whether the collective agreement controlled placement made pursuant to N.J.S.A. 18A:29-9. See Conti and Cutler v. Bd. of Ed. of Montgomery, decided by the State Board, aff'd, Docket #A-77-86T1 (App. Div. October 13, 1987).

That question, however, is not before us in that, despite his initial agreement to pay back the amount through salary deduction, Petitioner chose to challenge the Board's action through the grievance procedure rather than through petition to the Commissioner of Education.[2]

Petitioner's grievance was processed pursuant to the procedures established by the collective agreement to the fourth level. See East Brunswick Board of Education and East Brunswick Education Association Agreement (1984-1987) (1987-1989), Art. III (hereinafter "Agreement"). In that the Association did not request arbitration, the grievance was resolved by the Board's determination of June 11, 1987, upholding that made by the superintendent of schools. Pursuant to that determination, Petitioner received a higher salary amount for the last half of 1986-87 and the first half of 1987-88 than that to which his education and experience entitled him under the terms of the negotiated salary guide. Thus, in resolving the grievance, the total amount of overpayment was increased. However, by the terms of the Board's determination, Petitioner was to be paid at an annual rate of $27,920 until the increased amount was repaid.

Essentially, while not excusing the Board from its obligations under the June 11 determination, Petitioner seeks through these proceedings to set aside that portion of the Board's determination resolving the grievance which would hold him to a salary of $27,920 until the total amount of the overpayment is recouped.

We recognize that Petitioner may properly have sought to challenge the Board's initial action in this forum under the education laws. e.g. Riely, supra; Winston v. Bd. of Ed. So. Plainfield, 125 N.J. Super. 131, 140-142 (App. Div. 1973), aff'd, 64 N.J. 582 (1974). See Thornton v. Potamkin Chevrolet, 94 N.J. 1 (1983). Likewise, had the Board's determination of June 11 been unrelated to the grievance procedure, it too may have provided a proper basis for seeking an adjudication in this forum.

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[2] Although Petitioner has not challenged that action in these proceedings, we note that the time limit for making such challenge has long passed, and that Petitioner's choice to pursue his complaint through the grievance procedure did not alter the time limits for challenging the Board's action in this forum. e.g. Riely v. Hunterdon Central High Bd. of Ed., 173 N.J. Super. 109 (App. Div. 1980).

However, the Board's determination of June 11 was in fact arrived at pursuant to the grievance procedure established by the collective agreement, and was made as a direct result of the Association invoking those procedures on behalf of Petitioner in order to resolve the matter. In that the Association did not request arbitration as provided by the collective agreement, See Agreement, Art. III (c) (Level 4), the Board's determination of June 11 constituted the final resolution of Petitioner's grievance under that procedure. While we recognize that such resolution might not constitute a grievance settlement entitled to judicial enforcement, see Stigliano v. St. Rose High School, 198 N.J. Super. 520 (App. Div. 1984),[3] the fact that the grievance was settled short of arbitration does not confer on us the authority to invoke our jurisdiction to resolve on appeal controversies arising under the school laws so as to review the terms of a grievance settlement arrived at under procedures established by a collective negotiations agreement.

Nor do we find that the Board's continued payment to Petitioner after February 1988, as established by its June 11 determination, provides independent grounds upon which Petitioner can assert a cause of action under the education laws. Again, it was pursuant to the terms of the negotiated salary guide included in the collective agreement that Petitioner's salary would have been increased. In continuing salary payments to Petitioner as established by the grievance settlement, the Board, while not increasing his salary in February, did not reduce the amount of his salary payments from that established by the settlement. Nor did the Board alter his salary payments by deduction from the amount established for that year by virtue of the grievance settlement. See Conti and Cutler, decided by the State Board, July 2, 1986, slip op. at 8-9, aff'd, Docket #A-77-86 T1 (App. Div. October 13, 1987). While we pass no judgment whether continued payment at the lower amount after February was in violation of the terms of the collective agreement, Petitioner had no entitlement under the education laws to the increase in compensation provided for by that agreement. In this respect, we emphasize that, as amended, the minimum salary provisions of the education laws do not entitle teaching staff members receiving more than the minimum salary required by statute to automatic salary increases. N.J.S.A. 18A:29-5 et seq. In that Petitioner had no entitlement under the education laws to the salary increase provided by the collective agreement and in that his salary payment was not reduced from the

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[3] We note that the agreement between the Board and the Association provides that both the Board and the Association will "use no other channel to resolve any question or proposal until the procedures within [the] agreement are fully exausted." Agreement, Art. XXV(c). As indicated above, the Agreement provides for arbitration and specifies the procedures for requesting arbitration where the Association is disatisfied with the Board's decision rendered pursuant to the grievance procedure. Agreement, Art. III(c)(4)(Level 4).

amount established by the grievance settlement, continuation of payment at that amount after February 1988 did not constit.te a reduction in compensation within the meaning of N.J.S.A. 18A:28-5.

Further, in that payment pursuant to the Board's determination of June 11 did not deprive Petitioner of amounts which he had in fact earned during the course of his employment by the Board, continued payment at that level until the overpayment was recouped did not constitute withholding of an increment to which N.J.S.A. 18A:29-14 would be applicable. Conti and Cutler, supra.

We therefore conclude that while the Board's failure to increase Petitioner's salary under the collective agreement might be actionable in another forum, Petitioner in this case has not presented any claim for which the school laws would provide a remedy. See Conti and Cutler, supra, State Board's decision at 8. In so concluding, we emphasize that while the State Board of Education did not pass upon the propriety of the Commissioner's decision in Trenton Education Association v. Board of Education of the City of Trenton, decided by the Commissioner, October 6, 1986, in that his decision was not appealed to us, our conclusions herein are not inconsistent with the holding in that case.

Therefore, for the reasons stated, the State Board of Education reverses the decision of the Commissioner.

Attorney exceptions are noted.
August 2, 1989

Pending N.J. Superior Court

MATAWAN REGIONAL TEACHERS ASSOCIATION, ET AL.,	:	
PETITIONERS-RESPONDENTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT, ET AL., MONMOUTH COUNTY,	:	DECISION
RESPONDENTS-APPELLANTS.	:	
	:	

Decided by the Commissioner of Education, July 28, 1988

Decision on motion by the State Board of Education, January 4, 1989

For the Petitioners-Respondents, Oxfeld, Cohen, Blunda, Friedman, Levine and Brooks (Mark J. Blunda, Esq., of Counsel)

For the Respondents-Appellants, Kenney, Kenney, Gross and McDonough (Malachi J. Kenney, Esq., of Counsel)

For the amicus curiae New Jersey School Boards Association, Russell Weiss, Jr., Esq.

On March 19, 1987, during contract negotiations between the Petitioner Matawan Regional Teachers Association (hereinafter "Association") and the Respondent Board of Education of the Matawan-Aberdeen Regional School District (hereinafter "Board"), representatives of the Association set up picket lines outside business premises occupied by the Respondents Danbe Corporation and Frame-by-Frame Video Services, Inc. in Aberdeen. The picketers held signs and shouted statements relating to contract and budget disputes within the school district.

Respondent Suzanne Scheraga, a member of the Board, was a director, secretary, employee and 50% shareholder of the Danbe Corporation and a director, secretary and 50% shareholder of Frame-by-Frame Video Services, Inc. Her husband, Respondent Jerrold Scheraga, was the registered agent, a director, president and 50% shareholder of both companies.

That same day, the Board secretary, on instructions from the Board president, polled Board members on authorizing legal proceedings on behalf of Ms. Scheraga to restrain the picketing. As a result of the poll, authorization was received from the Board members to instruct the Board's labor counsel to take appropriate steps to restrain the picketing. The polling was affirmed and memorialized on March 23, 1987 at the next Board meeting.[1]

On March 20, 1987, the Board's counsel, on behalf of Respondents Jerrold and Suzanne Scheraga, Danbe Corporation and Frame-by-Frame Video Services, Inc., filed an order to show cause with temporary restraints in New Jersey Superior Court, Chancery Division, along with a verified complaint and supporting affidavit seeking injunctive relief and monetary damages for loss of business against the Association and its members. On that date, the Superior Court, stating that it appeared that "illegal economic duress is and probably will continue causing immediate, substantial and irreparable harm," issued a temporary restraining order enjoining the Association and its members, defendants therein, from picketing at the premises, except for on a grass divider along the highway, or from interfering with access to and from the property. On March 30, 1987, the restraints were continued with the defendants' consent, pending final hearing.

On May 5, 1987, the plaintiffs therein, in response to defendants' request for a statement of damages, served a demand for damages in the amount of $50,000.[2] On May 27, 1987, the

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[1] We note that in their exceptions, Petitioners, for the first time, allege that it was inappropriate for Suzanne Scheraga "to participate in the March 23, 1987 executive session discussion and vote to use public funds for a private law suit instituted on behalf of herself, her husband and two corporations in which she had a financial interest." Although Petitioners have not previously raised this argument, we note that the record does not reflect the vote alleged by Petitioners. The minutes of the executive session indicate only that there was a general discussion about the problem and "agreement by the Board members present" to defend the rights of "individual Board members" attacked by the Association or other groups. The minutes of that session also indicate the results of the poll taken earlier in which all Board members, except one, were also in "full agreement" on such action.

[2] We note that the demand for damages filed by the plaintiffs in the underlying action was filed in the normal course of their action for injunctive relief, in response to the defendant's formal demand therefor. The record indicates that the claim for monetary damages was dismissed by stipulation of the parties sometime after the injunctive relief was dismissed as moot, and there are no bills in the record from the Board's counsel for legal services rendered in that action subsequent to dismissal of the injunctive relief.

injunctive relief was dismissed as moot, and sometime thereafter the claim for monetary damages was dismissed by stipulation of the parties. For legal services rendered in that action through May 1987, the Board's counsel billed it for the sum of $4,340.[3] Thereafter, Petitioners filed the instant appeal, challenging the Board's authority to expend public funds to underwrite the Scheragas' legal expenses.

On June 16, 1988, an Administrative Law Judge ("ALJ") concluded that under N.J.S.A. 18A:12-20, which requires a district board to indemnify its members who are defendants in actions arising out of the performance of their duties, there was neither mandatory nor discretionary authority for a district board to underwrite legal fees when a board member became a plaintiff. The ALJ further concluded that boards are without discretionary authority to underwrite legal expenses for their members who are plaintiffs in purely private actions and the subject matter of such actions is not of public concern. Accordingly, he recommended that the Board be prohibited from utilizing public funds to underwrite the underlying Superior Court action and that the Respondents Scheraga's, Danbe Corporation and Frame-by-Frame Video Services, Inc. reimburse the Board for all monies expended on their behalf in connection with that action.

On July 28, 1988, the Commissioner of Education adopted the findings and conclusions of the ALJ, citing Gibson v. Board of Education of the City of Newark, decided by the Commissioner, March 30, 1984, appeal dismissed by the State Board, June 6, 1984, rev'd and remanded, 205 N.J.Super. 48 (App. Div. 1985), aff'd with modification by the State Board, May 6, 1986, aff'd, Docket #A-5209-83T6 and #A-3111-84T5 (App. Div. 1986), in support of his determination, and concluding that there was no authority in law permitting the Board to underwrite a private civil damage action filed by private individuals or corporations.

Respondents have filed the instant appeal from the Commissioner's decision, alleging that the legislative purpose of N.J.S.A. 18A:12-20 was to insulate board members from financial loss when required to defend against attacks arising from actions as a board member; that the Commissioner relied upon irrelevant school law decisions; and that while the factual situation herein may not technically apply to those elements required under N.J.S.A. 18A:12-20, the statute does not prohibit the payment of legal fees in instances other than when the board member is a defendant, citing the Board's general powers under N.J.S.A. 18A:11-1.

[3] We note that Petitioners, in their exceptions, raise for the first time allegations regarding the propriety of an invoice dated March 18, 1987. Insofar as Petitioners have made no such previous allegations, we have no basis for assessing the validity of their argument and, based upon a review of the record, we find no merit to these claims.

On January 4, 1989, we granted the motion of the New Jersey School Boards Association to appear as amicus curiae. They argue that the ALJ and Commissioner's characterization of the underlying Superior Court action as "purely private" and "serving no public purpose" was in error in that private financial interests and public purposes are not mutually exclusive, and that application of state public policy regarding the protection of public employees in the performance of their duties compels a finding in Respondents' favor.

We turn initially to a review of N.J.S.A. 18A:12-20, which provides:

> Whenever a civil or a criminal action has been or shall be brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education, and in the case of a criminal action such action results in final disposition in favor of such person, the board of education shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such persons from any financial loss resulting therefrom.

In Houston v. Bd. of Ed of the Borough of North Haledon, decided by the Commissioner, 1959, S.L.D. 73, aff'd by the State Board, 1961 S.L.D. 232, decided prior to the enactment of N.J.S.A. 18A:12-20, the district board voted to retain counsel to represent a member of the board and the board counsel in a suit filed against them by a former member of the board for alleged interference with a contractual relationship. The State Board, in upholding the district board's action, concluded that "the most desirable means to the whole public good is to adopt a principle that, where a Board member, or other official, is sued in an action where the Board has reliable evidence that the suit is based upon acts related to his official duties, it has the implied power to retain an attorney to defend him." 1961 S.L.D. at 234. In reaching its determination, the State Board was guided by three principles of public policy:

> First, we should be alert to avoid improper use of public funds. Second, public money should not be expended for such retention of attorneys if indeed the acts upon which the suit is based were not related to official duties of the defendant. Third, the principles to be adopted should not serve to discourage interested citizens from assuming the burdens of such public service which they render in serving on or for, Boards of Education.

Id. at 233

The State Board in Houston noted that requiring a board member to bear the burden of laying out of his or her own pocket the moneys necessary to retain an attorney in such instances would have two probable effects:

> Either he will not, in the first instance, be willing to serve, or, if he does so, his judgment as a Board member will not be the objective display of conviction and competence for which his talents have been sought, but will not unnaturally be restrained and fettered by his concern for his personal security.

Id. at 234.

In enacting N.J.S.A. 18A:12-20 in 1965, the Legislature, observing that under existing law a board of education had implied power to pay for the reasonable legal expenses incurred by board members in defending suits against them arising out of the performance of their official duties, at least when the judgment in such suits was in favor of the defendant, deemed it desirable for boards to have express statutory authority to pay such expenses. The stated purpose of the bill was "to require the board in such cases to bear the reasonable cost of the defense, and thus to remove a possibly severe burden which otherwise the individual board member might unjustifiably be forced to bear." Statement, L.1965, c.157, s.142.

Thus N.J.S.A. 18A:12-20 was enacted to assure that board members who were defendants in civil or criminal actions arising from the performance of their official duties would be protected from the legal expenses and other financial losses resulting from such actions (unless the final disposition in a criminal case was not in their favor). In order to guarantee such protection, the statute makes it mandatory for boards to defray the costs of defending those actions and to otherwise protect their members from any financial losses resulting therefrom.

While the underlying action herein, in which Suzanne Scheraga was a plaintiff, does not fall within the express language of N.J.S.A. 18A:12-20 so as to require the Board to underwrite her expenses, we find that the statute does not and was not intended to preclude a board from providing such protection, at its discretion, in other situations not falling within that statute's express language. The Legislature, mindful of the severe burden faced by a school board member forced to defend against legal action arising out of the performance of his or her duties and the fact that boards were not required to protect their members from the expenses and financial losses resulting therefrom, enacted N.J.S.A. 18A:12-20 in order to convert that implied and discretionary power into an express mandate. It did not act upon or preclude any other specific powers of a board which might otherwise be properly implied.

It is well established that while there must be statutory authority for every act of a board, a board is not limited to those actions expressly stated in a statute. As noted in Fair Lawn Ed. Ass'n. v. Fair Lawn Bd. of Ed., 79 N.J. 574, 579 (1979):

> Local boards of education are creations of the State and, as such, may exercise only those powers granted to them by the Legislature -- either expressly or by necessary or fair implication.

Cases cited by the ALJ and Commissioner do not operate as a bar to the exercise of such discretion in the proper circumstances. In Famette v. Board of Education of the Borough of Wood-Ridge, decided by the Commissioner, 1964 S.L.D. 42, four board members sued a fifth member for libel. The libel case was subsequently settled, and, thereafter, the Commissioner prohibited the board from reimbursing its members involved in that suit (the four plaintiffs and the defendant) for their legal fees, concluding that there was no public purpose served by the suit, which was found to be private and personal, and that the act for which the defendant was sued was not committed in the good faith performance of the duties of his office.

In Hogan et al. v. Board of Education of the Town of Kearney, decided by the Commissioner, 1982 S.L.D. 329, aff'd by the State Board, 1982 S.L.D. 356, board members who sought to be reimbursed by the board under N.J.S.A. 18A:12-20 for legal fees incurred in an underlying suit in which they challenged a board action, were held not to be entitled to such reimbursement under N.J.S.A. 18A:12-20 in their procedural posture as plaintiffs. The State Board added that there was no authority for such reimbursement in that the underlying action did not arise out of the duties or in the course of performance of duties of members of the board.

While we agree that N.J.S.A. 18A:12-20 does not expressly or impliedly authorize the Board's action herein, that statute, as previously noted, does not preclude such voluntary action, in a board's discretion, in other situations where the authority can be found by necessary or fair implication.

In support of their position, Respondents cite N.J.S.A. 18A:11-1, which provides school boards with broad general powers, including authorization to:

> d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.

We must therefore determine whether the Board's action in underwriting Suzanne Scheraga's legal challenge to the Association's picketing at her business premises was necessary for the proper conduct of the district.

Since the Board could not so act, even if Suzanne Scheraga were a named defendant in the underlying Superior Court action, if those proceedings were not based upon acts related to her official duties as a member of the Board but, rather, were purely private and personal, any assessment of the Board's authority herein must include an analysis of the nature of the legal challenge.

As previously noted, the picketing at the Scheragas' business premises occurred during the course of a contract dispute between the Board and the teachers association. The picketing was undertaken by representatives of the Association, who were attempting, by tactics sufficiently injurious to warrant at least temporary restraints, to influence Suzanne Scheraga's position in ongoing contract negotiations. The fact that the challenge mounted thereto involved the protection of her private financial interests does not necessarily foreclose the implication of a public purpose. A school board and the residents of a district have a vested interest in ensuring that board members involved in contract negotiations with a teachers association as part of their official duties can undertake such responsibility objectively and free of undue hazard to their personal resources generated by representatives of that association.

That the means to that end may, in the proper circumstances, involve protection of a member's private financial interests at the board's expense, does not automatically label such a proceeding as purely private and personal. In situations in which board members are confronted with hazard to their personal resources generated by parties involved in contract negotiations with the board, we find that the public interest would not be served if boards were not authorized to protect those interests in the proper circumstances, so as to ensure that board members can continue to fulfill their duties and obligations to the residents and students of the district with the "objective display of conviction and competence" for which their talents have been sought, and not "restrained and fettered by...concern for...personal security." Houston, supra. We are mindful, too, of the principle espoused in Houston to avoid discouraging interested citizens from assuming and retaining the burdens and responsibilities of public service.

In the instant case, there can be no dispute that the picketing by representatives of the teachers association which led to Suzanne Scheraga's legal challenge arose out of the performance of her duties as a member of the Board, specifically with regard to her stance in the ongoing contract negotiations. Picketers were representatives of the teachers association and carried signs with slogans related to the contract dispute. Petitioners, in fact, acknowledge in response to Respondents' interrogatories that the purpose of the picketing was:

> To impress upon Mrs. Scheraga the seriousness of our concerns about the massive school budget cuts, the program cuts in the schools, the upcoming election issues, and the drastic change in her position since the date of her election.

Clearly, the location of the picketing was chosen because of Suzanne Scheraga's interest in the businesses operating on those premises.

In light of such circumstances, we find that the legal challenge mounted against the teachers association arose out of the performance of Suzanne Scheraga's official duties in ongoing contract negotiations between the Board and the Association. Furthermore, despite the fact that the challenge involved the protection of her private financial interests, we conclude that, under the circumstances, the action cannot be labeled as purely private and personal. The fact that her husband also had an interest in the businesses and was, therefore, also named as a plaintiff in the underlying action, along with the two corporations, does not alter the nature or purpose of the picketing or of Suzanne Scheraga's challenge thereto. Nor do any rights a board may have under N.J.S.A. 18A:11-2 to bring an action in its own name alter this result. The implied power implicated herein is independent of any authority expressly conferred by N.J.S.A. 18A:11-2, which does not necessarily provide board members with comparable protection in all instances.

We also find Gibson, supra, cited by the Commissioner, inapplicable to this case. In Gibson, a board member brought suit against the board, seeking an adjudication that actions taken by the board were contrary to the statutory scheme. The State Board, in holding that the board member could not collect his legal fees incurred in the suit, expressed a concern that such an award might encourage litigation between boards and their members on issues of far less merit.

The instant matter does not involve a suit by a board member against the board, but, rather, by a board member acting to restrain picketing against her family businesses arising out of the performance of her duties as a board member. Contrary to being the opposing party, the Board herein authorized its legal counsel to take such action on behalf of its member. Thus, the stated policy rationale behind Gibson -- a desire to avoid encouraging litigation between boards and their members -- is not present herein.

Nor are the Scheraga's the moving party in an attempt to force the Board to pay their legal fees. In this instance, the Board was acting voluntarily, within its discretion. There was no express requirement that it so act, and, as in Hogan, it could not be compelled to do so under N.J.S.A. 18A:12-20.

We therefore conclude that under the specific facts of this case, in which the Board authorized its legal counsel to mount a legal challenge, on behalf of Board member Suzanne Scheraga, to picketing by members of the teachers association at the premises of two businesses of which Suzanne Scheraga and her husband were the owners, officers and directors, which picketing was directed at her and arose out of the performance of her duties as a member of the Board, the Board had the implied authority to underwrite that challenge. We find that the Board's action was necessary for the

proper conduct of the district in ensuring that Respondent Suzanne Scheraga could continue to fulfill her official public duties and obligations in contract negotiations with the teachers association objectively and unrestrained by concern for the financial security of her family businesses, which concerns were generated by representatives of that Association. We further find that, under the circumstances, the Board's exercise of its discretion was not arbitrary or capricious.

Thus, while we remain alert to the improper use of public funds, under the circumstances, we find that the Board had the implied authority to pay the reasonable legal fees of that challenge. We therefore reverse the Commissioner and dismiss Petitioners' appeal. Insofar as we find that oral argument is not necessary to a fair determination of this case, Respondents' request for oral argument is denied.

Attorney exceptions are noted.
Alice Holzapfel opposed.
July 6, 1989

VINCENT MIRANDI,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, September 15, 1988

For the Petitioner-Respondent, Zazzali, Zazzali, Fagella & Nowak (Richard A. Friedman, Esq., of Counsel)

For the Respondent-Appellant, Stephen J. Christiano, Esq.

As the result of a reduction in force ("RIF"), Vincent Mirandi (hereinafter "Petitioner"), a tenured assistant principal with a principal certification, serving at the high school level, was dismissed at the end of the 1983-84 school year, assigned to a position as high school social studies teacher and placed on a preferred eligibility list for assistant high school principal pursuant to N.J.S.A. 18A:28-12. When a position as middle school assistant principal in the district became available two years later, Petitioner asserted a claim to the position, but it was given instead to an individual with eight years of experience outside the district as a middle school assistant principal, but no experience in the district.

In December 1986, Petitioner filed the instant Petition of Appeal, claiming priority to the middle school position by virtue of his tenure rights as an assistant principal and requesting assignment to the position in addition to back pay and other benefits.[1]

On August 2, 1988, an Administrative Law Judge ("ALJ") found that under Capodilupo v. West Orange Bd. of Ed., 218 N.J.

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[1] We note that subsequent to filing his petition herein, Petitioner was assigned to a position as high school dean of students. In addition, Petitioner acknowledges in his answering brief that he was eventually placed in a position as middle school assistant principal, and advises us that the non-tenured individual originally placed in the position at issue has left the district. His petition is not, however, rendered moot by his assignment to the middle school position insofar as he is also requesting back pay and other benefits denied him as a result of the position being given to the non-tenured individual.

Super. 510 (App. Div. 1987) and Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987), the Petitioner was entitled to the position of middle school assistant principal, noting that "[t]he petitioner has tenure and the necessary certification for the position and deserves protection from the non-tenured teacher." Initial Decision, at 12. The ALJ rejected the Board's argument that under the "educationally based reasons" test expressed by the State Board in Capodilupo, the non-tenured individual had preference due to his years of middle and junior high school experience outside the district as opposed to Petitioner, whose experience was only at the high school level.

On September 15, 1988, the Commissioner adopted the ALJ's findings and determinations, concluding that Petitioner's lack of experience at the middle school level did not affect his tenure rights since the specific endorsements necessary for assignment to the tenurable position of assistant principal authorized service at all grade levels, and thus, under Capodilupo and Bednar, Petitioner had entitlement over a non-tenured individual to any assistant principal position which became vacant.

The Board has filed the instant appeal, contending that the "educationally based reasons" criteria mentioned by the State Board in Capodilupo requires that the position be filled by a person with experience at the middle school level and that the Commissioner erred in focusing on tenure rights and ignoring the seniority regulations. The Board also argues in its reply brief that since the RIF occurred two years before the middle school vacancy, Capodilupo was not applicable since the RIF and vacancy were not contemporaneous.

For the reasons expressed herein, we reject the Board's arguments, and with the modifications expressed herein, affirm the decision of the Commissioner.

It is now well established that a tenured teaching staff member whose position is abolished when a district board acts pursuant to N.J.S.A. 18A:28-9 to reduce the number of teaching staff members employed in the district has, by virtue of his or her tenure status, the right to retention in another assignment within the scope of his or her tenured position over a non-tenured individual, despite the former's lack of actual experience in the seniority category applicable to the assignment. Bednar, supra.

This case does, however, differ from Capodilupo and Bednar in that the Petitioner's claim to the middle school assistant principal position occurred not at the time of the RIF, but, rather, two years later, while Petitioner was on a preferred eligibility list for the position of high school assistant principal, pursuant to N.J.S.A. 18A:28-12, which provides:

> Dismissal of persons having tenure on reduction; reemployment
>
> If any teaching staff member shall be dismissed as a result of such reduction, such person shall

> be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs....

In support of its position that Petitioner is not entitled to assignment to the middle school position at issue, the Board cites Geiling-Hurley v. Edison Twp. Bd. of Ed., decided by the State Board, November 5, 1986, aff'd Docket #A-1959-86T8 (App. Div. October 5, 1987), in which the State Board noted in a footnote:

> In her exceptions to the Legal Committee's Report in this matter, Petitioner, relying on our recent decision in Capodilupo v. Board of Education of the Town of West Orange, decided by the State Board, September 3, 1986, argues that she is entitled to reemployment in the vacancy at issue here by virtue of her tenure status. We do not agree. In Capodilupo, we emphasized that the principles enunciated in that decision are applicable only when a district board acts under the authority granted by N.J.S.A. 18A:28-9. Capodilupo, supra, at 20. N.J.S.A. 18A:28-9 is not implicated when, as here, a board fills a vacancy six months after the reduction in force that resulted in the termination of a tenured teacher's employment, and, therefore, Capodilupo is not applicable to this case.[2]

While acknowledging that his claim to the position did not arise at the time of the RIF, Petitioner asserts that the Appellate Division opinion in Bednar, decided subsequent to its unpublished decision in Geiling-Hurley, reiterates the strong preference to which tenured teachers are entitled, which preference cannot be diluted by seniority regulations, and therefore, Petitioner maintains, it is immaterial whether the preference involves a claim to a position at the precise time a RIF occurs or when a vacancy later arises.

We agree. As noted in Bednar, supra, at 241:

> Tenure is created by a statute, N.J.S.A. 18A:28-1 et seq., which should be liberally construed to further its beneficial purpose of affording security to teaching staff who meet its standard of length of service. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 74 (1982).

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[2] We note that the Appellate Division, in affirming "substantially for the reasons stated by the State Board of Education," did not address this aspect of the State Board decision.

In Bednar, a tenured elementary art teacher with no experience at the secondary level was reduced to part-time status while, at the same time, the district board retained a non-tenured secondary art teacher on a full-time basis. Mr. Bednar challenged the district board's action, alleging that the reduction in his hours violated his tenure and seniority rights. The State Board denied his petition, finding that his tenure rights were not violated by his retention, based on seniority, in a part-time assignment in the elementary category, notwithstanding the employment of a non-tenured teacher for a greater number of hours a week in an assignment in a category in which Bednar had no seniority. The State Board concluded that when the district board properly determined, pursuant to N.J.S.A. 18A:28-10, that Bednar's seniority mandated his retention in the part-time assignment and retained him in that assignment, it properly accommodated his tenure rights, and he had no claim to other assignments in categories in which he had no seniority.

The Appellate Division reversed, finding merit in Bednar's argument that his tenure as an art teacher gave him the right to avoid a RIF by claiming the secondary school job of a non-tenured art teacher with experience in the specific category of secondary art, explaining:

> The tenure statute authorizes the creation of seniority regulations to rank the job rights of tenured teaching staff in a RIF. N.J.S.A. 18A:28-13. Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362, 368 n.4 (1983); Capodilupo v. West Orange Tp. Ed. Bd., 218 N.J. Super. 510, 514 (App. Div. 1987). The statute does not create or authorize the Commissioner to create competing rights for non-tenured teachers. Under current regulations, seniority is measured by years of employment in specific job categories which are normally narrower than the subject fields which are endorsed on teachers' certificates. See N.J.S.A. 18A:28-5; N.J.S.A. 6:3-1.10(b).
>
> Seniority is a statutory concept created by Chapter 28 of Title 18A, a chapter which deals only with the various aspects of tenure. Old Bridge Tp. Bd. of Educ. v. Old Bridge Educ. Ass'n. 98 N.J. 523, 531 (1985). It does not purport to create employment rights for non-tenured employees....Chapter 28 surely does not contemplate use of the concept of seniority to justify retaining a non-tenured teacher within the certificate of a dismissed tenured teacher....
>
> The State Board of Education attempted to fairly resolve a tension it perceived between tenure and seniority. The State Board's solution was to rule that tenure does not permit a teacher to claim an assignment in a job category in which he

> has no seniority against a non-tenured teacher with experience in the category. The Board cited N.J.S.A. 18A:28-10, which invokes seniority to determine job rights in a RIF, and reasoned that since Bednar had no seniority teaching art on a secondary level, his rights were not violated by reducing his hours while retaining a full-time non-tenured secondary art teacher.
>
> The defect in the Board's approach is this. N.J.S.A. 18A:28-10 declares only the rights inter sese of tenured teachers in a RIF. Among them, seniority is determinative. But, the statute does not authorize regulatory dilution of tenure rights by affording a non-tenured teacher "seniority." The tension perceived by the State Board between tenure and seniority is one the Board created. Its only proper resolution is to rule that the rights conferred by the tenure statute may not be dissolved by implementing regulations.
>
> The State Board's approach may or may not represent sound educational policy. However, it erodes tenure rights which appear plain on the face of the statute, which we are bound to recognize and which can be removed only by the Legislature. See In re Jamesburg High School Closing, 83 N.J. 540, 547 (1980).

Bednar, supra, at 242-43.

We find that the justification for the protection accorded tenured individuals in Bednar is just as applicable to the instant situation, despite the two year lapse between the RIF and the vacancy. It is evident from the terms of the statutes that the tenure rights of a teaching staff member dismissed as the result of a reduction in force pursuant to N.J.S.A. 18A:28-9 have not been fully effectuated until such individual is reemployed pursuant to N.J.S.A. 18A:28-12. In this case, Petitioner was dismissed from his tenured position as an assistant principal and assigned to a position as a high school social studies teacher. Two years later, Petitioner asserted claim to a position which had become available as middle school assistant principal, but the position was given instead to an individual with experience as a middle school assistant principal but no experience in the district.

Although under current regulations, Petitioner's seniority rights are limited to the secondary level, at which he has actually served, his statutorily-created tenure rights are not so limited. There is no dispute that Petitioner was tenured in the position of assistant principal, a separately tenurable position under N.J.S.A. 18A:28-5, and authorized, by virtue of his certification, to serve at all grade levels. See N.J.A.C. 6:11-10.4; Capodilupo, supra; Howley v. Bd. of Ed. of the Township of Ewing, decided by the Commissioner, December 20, 1982, aff'd by the State Board, June 1,

1983. As emphasized in Bednar, the tenure statute does not authorize regulatory dilution of tenure rights by affording "seniority" to a non-tenured individual. To deny Petitioner's claim to the controverted position simply because the vacancy occurred when he was on the preferred eligibility list, rather than at the precise time of the RIF, would be to dilute the substantive tenure rights recognized in Bednar by affording a non-tenured individual "seniority."

N.J.S.A. 18A:28-12 itself furnishes further support for Petitioner's position, providing that individuals dismissed in a RIF be placed on a preferred eligibility list in order of seniority for reemployment "whenever a vacancy occurs in a position for which such person shall be qualified." (emphasis added). Here, by virtue of his principal certification, which is valid for all levels, Petitioner is "qualified" for the position of middle school assistant principal, and while, under current regulations, he does not have actual experience in the seniority category applicable to the assignment, the rights conferred by the tenure statute may not be dissolved by implementing regulations. Bednar, supra.

Thus, since Petitioner was tenured as an assistant principal and by virtue of his certification was qualified for the position of middle school assistant principal, he was entitled to that position as against a non-tenured individual when a vacancy arose. We concur with the Commissioner's rejection of the Board's "educationally based reasons" argument, and, in light of the Appellate Division decision in Bednar, supra, reject the continuing viability of such a standard in assessing the rights of tenured individuals in a RIF.

We therefore affirm the decision of the Commissioner as modified herein.

Attorney exceptions are noted.
April 5, 1989

ROBERT J. PALADINO,	:	
PETITIONER-RESPONDENT.	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LACEY, OCEAN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, July 1, 1988

For the Petitioner-Respondent, Russell J. Schumacher, Esq.

For the Respondent-Appellant, Curry & Stein, P.C.
(Arthur Stein, Esq., of Counsel)

On March 23, 1987, the Board of Education of the Township of Lacey (hereinafter "Board") appointed Robert J. Paladino (hereinafter "Petitioner"), a principal in the Lacey Township School District, as superintendent of schools, and on April 6, 1987, the Board voted to give Petitioner an employment contract which included a specific salary schedule for the period from March 24, 1987 through June 30, 1990 and a termination clause with no notice provision for termination.

On April 29, 1987, after School Board elections which resulted in several changes in the membership of the Board, the Board voted to terminate Petitioner's appointment as superintendent, stating in a letter from its attorney that he lacked the experience and background for the job. The Petitioner was thereupon returned to his tenured position as an elementary school principal.

Petitioner challenged the Board's action, alleging, in pertinent part, that:

> ....10. At no time during his service as Superintendent did petitioner receive an evaluation, reprimand, or notification that just cause existed for his termination from the position of Superintendent of Schools.
>
> ....12. The respondent has arbitrarily, capriciously, and unreasonably violated the provisions of N.J.S.A. 18A:17-19 by its actions.
>
> ....14. The respondent has arbitrarily, capriciously, and unreasonably reduced the salary of petitioner, a tenured employee, without implementing the provisions of N.J.S.A. 18A:29-14 or N.J.S.A. 18A:6-10 et seq.

15. In reliance upon N.J.S.A. 18A:17-15 and N.J.S.A. 18A:28-6, petitioner had a reasonable expectation of continued employment as the superintendent of schools and the acquisition of tenure absent behavior on his part which would constitute just cause warranting his dismissal.

16. The actions of the respondent in dismissing petitioner from the position of superintendent were arbitrary, capricious, and unreasonable, and tainted by bad faith motivations unrelated to valid educational reasons, and are void ab initio.

Petition of Appeal, at 3-4.

At the conclusion of Petitioner's case during hearings before an Administrative Law Judge ("ALJ"), the Board moved to dismiss the petition with prejudice, and in his initial decision dated May 16, 1988, the ALJ granted the Board's motion. Based only on the Petitioner's witnesses and evidence presented to that point, the ALJ concluded that Petitioner had failed to carry his burden of pursuasion and that the action of the prior Board in appointing Petitioner and awarding him a contract with no notice provision for termination was not taken in good faith but, rather, with the intent to deny successor boards any power of review by contractually granting Petitioner instant tenure.

On July 1, 1988, the Commissioner of Education set aside the findings and determinations of the ALJ. The Commissioner found no evidence of bad faith in the prior Board's action in appointing Petitioner and found no merit in the successor Board's argument that the prior Board's intent in the contract was to deny future Boards any power to review Petitioner's appointment by granting him instant tenure. Since he concluded that the contract between Petitioner and the prior Board was binding, the Commissioner found no basis for voiding or rescinding it, but also noted that the Board was within its power to terminate Petitioner's services as superintendent as long as it acted in compliance with N.J.S.A. 18A:28-6 and the terms of the contract. The Board, however, was directed to honor the payment terms of the contract and pay Petitioner all emoluments and salary due him under the contract, less that salary he received as an elementary school principal.

The Board has filed the instant appeal, alleging that the Commissioner's decision had no basis in the record and that the employment contract was void because it was made in bad faith or, if valid, should be rescinded because there was no meeting of the minds between Petitioner and the Board on the meaning of the termination provision.

After a careful review of the record, including the initial pleadings of the parties, we find that certain errors made below mandate a thorough re-examination of this matter. We note initially that Petitioner does not allege any contract violations or

acquisition of tenure as a superintendent. His claim goes only to alleged violations of the school laws in his termination and subsequent reduction in salary when returned to his tenured principal's position. The ALJ, however, acting on the Board's motion to dismiss following the testimony of Petitioner's witnesses, concluded that the prior Board had acted in bad faith in appointing Petitioner and entering into a contract intended to deny successor boards the right to review Petitioner's service by granting him instant tenure.[1] The Commissioner, in reversing the ALJ on the bad faith issue, fashioned relief for the Petitioner under the terms of the contract.

Based upon our review of the record, Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447 (App. Div. 1982), we reverse the Commissioner for the reasons expressed herein. N.J.S.A. 18A:6-9 limits the Commissioner's subject matter jurisdiction to "controversies and disputes arising under the school laws." In determining jurisdiction, we note that a contractual dispute does not arise under the school laws. Salley v. Board of Education of the City of Newark, decided by the Commissioner, November 8, 1984. Since the Petitioner does not claim tenure under the employment contract or allege school law violations related or incidental to the contract itself, our jurisdiction is limited to addressing his allegations of violations under the school laws in his termination as superintendent and consequent reduction in salary when returned to his position as a principal in the district.

As previously noted, Petitioner does not allege to have acquired tenure as a superintendent, and it is uncontested that he was tenured as a principal. Accordingly, his employment as superintendent was not subject to the protection of N.J.S.A. 18A:6-10 et seq., governing the dismissal and reduction in salary of persons under tenure. The fact that Petitioner was "a tenured employee," as he asserts in his petition, does provide him with the protection of N.J.S.A. 18A:6-10 et seq. in his tenured employment, but such protection is subject to the provisions of N.J.S.A. 18A:28-6, and, accordingly, does not provide him with protection from removal from his non-tenured superintendent's position. We note, in addition, that since Petitioner has produced no evidence of any Board action to withhold his increments, N.J.S.A. 18A:29-14 is also inapplicable.

As for Petitioner's assertion that under N.J.S.A. 18A:17-15 and 18A:28-6 he had a reasonable expectation of continued employment

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[1] We note that the Board, in its answer to the petition, does not allege that the contract granted tenure to the Petitioner. Rather, the Board refers to Petitioner as non-tenured in the superintendent's position and asserts that Petitioner's claim is barred by virtue of his non-tenured status. In addition, in a motion filed prior to the start of hearings before the ALJ, the Board requested summary judgment on the grounds that Petitioner was non-tenured in his position as superintendent and was properly returned to his former tenured position. This motion was denied.

and acquisition of tenure as superintendent of schools, these statutes provide no assurances of continued employment. Any claims of such expectations are purely contractual in nature and, therefore, not properly addressed in this forum. While the protection of N.J.S.A. 18A:28-6, which governs the rights of a tenured teaching staff member who is transferred or promoted with consent, is germane to Petitioner's situation, the Board has complied with this provision. Petitioner was, in fact, returned to his former tenured position, and there is no evidence that this action resulted in his receiving a salary less than that he would have received had the promotion to superintendent not occurred. N.J.S.A. 18A:28-6. He therefore has no entitlement to damages under this provision.

Nor is Petitioner's claim under N.J.S.A. 18A:17-19, prohibiting the reduction of a superintendent's salary during his term in office, valid. Since his employment as superintendent was terminated by the Board, his term in office ended upon his termination.

Finally, after a review of the record, we reject Petitioner's claim of bad faith in his termination, finding no evidence supporting this allegation. The Board, through its attorney, cited Petitioner's lack of experience and background for the position in support of its action, and Petitioner's witnesses, while expressing generalized opinions regarding what they considered to be the arbitrary and improper nature of his termination, were unable to provide any specific information regarding other motives for the Board's action. Thus, Petitioner has failed to refute this explanation or meet his burden of demonstrating that the Board's action in terminating him was arbitrary or capricious.[2]

Therefore, since we have found no school law violations in Petitioner's termination from his employment as superintendent and return to his former tenured position, we reverse the Commissioner and dismiss Petitioner's appeal. Any claims for relief under the employment contract itself are properly addressed in another forum.

Attorney exceptions are noted.
Alice Holzapfel opposed.
February 1, 1989

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[2] We note that absent violations of constitutional or legislatively-conferred rights, local boards of education have an almost complete right to terminate the services of a non-tenured individual, and where such person alleges that the reasons provided by the board for its decision to terminate his or her services are not supported by the facts, that individual is entitled to litigate that question only if the facts alleged, if true, would constitute such a violation. Guerriero v. Bd. of Ed. of the Borough of Glen Rock, decided by the State Board, Feb. 5, 1986, aff'd, Docket #A-3316-85T6 (App. Div. Dec. 17, 1986).

JOSEPH PEZZULLO,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT-APPELLANT	:	
	:	

Decided by the Commissioner of Education, January 23, 1987

Decided by the Commissioner of Education, November 5, 1987

Decision on motion by the Commissioner of Education, February 25, 1988

Decision on motion by the State Board of Education, May 4, 1988

For the Petitioner-Respondent, Russell J. Schumacher, Esq.

For the Respondent-Appellant, James P. Granello, Esq.

On January 9, 1986, the Petitioner sought a declaratory judgment that the duties he performed in the position of Coordinator of the Alternate School, an unrecognized title not approved pursuant to N.J.A.C. 6:11-3.6, were those of a principal and that he was tenured as such ("Pezzullo I"). On December 9, 1986, an Administrative Law Judge ("ALJ") denied the relief sought, finding the position to be that of a supervisor, but on January 23, 1987, the Commissioner of Education, while holding that Petitioner was tenured within the district, rejected the ALJ's determination that the position required a supervisor's endorsement, noting that such a determination was not within his authority insofar as N.J.A.C. 6:11-3.6 vested the authority to determine appropriate certification with the county superintendent. Accordingly, he ordered the Board to immediately develop and adopt a job description for the position to reflect the actual duties expected of Petitioner in the past, and directed the County Superintendent to review the matter.

On April 28, 1987, before the County Superintendent received a job description and made a determination, the Petitioner filed the instant Petition for Declaratory Judgment ("Pezzullo II") as a result of the abolishment of his position as Coordinator of the Alternate School on June 30, 1986. Petitioner sought a declaration that the Board wrongfully withheld his salary from June 30, 1986 until August 30, 1986, when the position was recreated, alleging

that since the Commissioner had determined in Pezzullo I that he was tenured, the Board was under a duty to assign him to another position.

On June 9, 1987, the Commissioner held the matter in abeyance until the County Superintendent determined the Petitioner's appropriate certification for the position, pursuant to his order in Pezzullo I.

On July 13, 1987, the Board adopted a job description for the position of Coordinator of the Alternate School. The County Superintendent, however, did not accept the job description as adopted, stating in a letter dated August 6, 1987 to the Board President that it was not attested to by the Superintendent, Assistant Superintendent and Director of Secondary Education.[1] Thus, in order to ascertain whether the job description did indeed reflect the duties performed by Petitioner, the County Superintendent took the following actions, as noted in his letter of August 6th:

1. Analyzed the Elementary and Secondary Principals job descriptions against the Coordinator of the Alternate School job description.

2. Listed from Mr. Pezzullo's sworn testimony which was given "without contradiction from the Board" his duties and responsibilities as Coordinator of the Alternate School.

3. Interviewed the Superintendent, Assistant Superintendent and Director of Secondary Education to determine whether the duties in the job description as submitted reflected the actual duties performed by Mr. Pezzullo.

4. Reviewed records to substantiate Mr. Pezzullo's duties.

Based upon his review and independent determination of Petitioner's duties, the County Superintendent found that 21 of 45 secondary principal's duties and 19 of 34 elementary principal's duties were included in the Coordinator of the Alternate School job description and that an additional nine duties actually performed by the Petitioner were not included in the job description. Based on his findings, he concluded that the appropriate certification for the position was that of principal.

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[1] It should be noted that the job description was, in fact, attested to by both the Willingboro School District Superintendent and Assistant Superintendent. In a memo dated July 16, 1987, the District Superintendent advised the County Superintendent that the Director of Secondary Education was not available to sign as he was vacationing in Germany until August 3rd.

On August 26, 1987, during a conference call between the Director of the Bureau of Controversies and Disputes and the parties' attorneys, it was determined that the issue of the appropriate endorsement for the position would be determined by the Commissioner by way of cross-motions for summary decision.

On November 5, 1987, following submission of motions, the Commissioner denied the Petitioner's request for declaratory judgment in Pezzullo II as time-barred under N.J.A.C. 6:24-1.2, but addressed the County Superintendent's certification determination as it would have bearing on any reduction in force ("RIF") arising after the filing of the instant petition. Concluding that "[u]nder the Pezzullo I decision and N.J.A.C. 6:56-1.3, the county superintendent had a legal obligation to take whatever steps he deemed necessary to see that compliance with that decision immediately occurred," Commissioner's decision, at 22, the Commissioner held that the County Superintendent acted appropriately and within his jurisdictional powers in looking beyond the submitted job description and making his own findings as to the Petitioner's duties. The Commissioner further held that the County Superintendent's designation of a principal certificate was reasonable and appropriate, and that insofar as the Petitioner was tenured as a principal, his appropriate seniority category was that of high school principal, his seniority to be counted from the date his certificate as a principal was issued in 1978. Accordingly, the Commissioner held that if, as a result of his decision, Petitioner had been improperly subjected to a reduction in force at any time after April 28, 1987, he was to be reinstated immediately to a position to which his seniority entitled him and receive all emoluments and benefits flowing from that entitlement.

The Board has filed the instant appeal, alleging that the County Superintendent exceeded his authority and engaged in improper fact-finding, that the Commissioner erred in upholding the County Superintendent's determination that Petitioner's position called for a principal's certificate, and that the Commissioner erred in determining that the appropriate seniority category was that of high school principal.

We turn initially to a review of the County Superintendent's actions in determining the appropriate certification. N.J.A.C. 6:11-3.6(b), which authorizes county superintendents to make such determinations, provides that:

> 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....

Thus, while a county superintendent is, in fact, given the responsibility for determining appropriate certification for service in an unrecognized position title, this provision contemplates and authorizes the performance of this function based upon a job description prior to an appointment being made, when there are no previous duties to consider.[2] Since N.J.A.C. 6:11-3.6(b) is specific in its mandate that a district board submit a written request with a detailed job description prior to making such appointment, and though it does not expressly limit the county superintendent to a review of the job description alone, this provision cannot be construed to authorize a county superintendent to make an independent determination of the actual duties performed in a position after an appointment has been made so as to be determinative of those duties in resolution of a controversy arising under the school laws. This function is not intended or authorized by the regulations, and cannot be implied.[3]

By its terms, N.J.A.C. 6:11-3.6(b) confers on a county superintendent authority to determine appropriate certification where he or she is exercising the discretion afforded by the regulations with respect to approval for use of an unrecognized title. It does not, however, authorize the Commissioner to rely upon factual determinations made by a county superintendent concerning duties actually performed by an incumbent in such position so as to resolve a controversy under the school laws over which the Commissioner has exercised his jurisdiction pursuant to N.J.S.A. 18A:6-9. We find that to permit county superintendents to make such determinations would impermissibly delegate quasi-judicial functions contrary to the terms of the statutory grant of authority conferred by N.J.S.A. 18A:6-9. By that provision, the Legislature has conferred on the Commissioner the authority and responsibility to hear and determine controversies and disputes arising under the school laws. While even prior to the enactment of the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., the courts consistently upheld the propriety of delegating responsibility to act as a gatherer of evidence to a subordinate official, e.g., In re Masiello, 25 N.J. 590 (1958), where delegation of final

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[2] We note that the Board does not contest the County Superintendent's authority to make a certification determination herein "after the fact," but only his action in looking beyond the job description. Reply brief, at 2.

[3] Nor does N.J.A.C. 6:56-1.3, also relied upon by the Commissioner, justify the County Superintendent's actions herein. That provision only empowers a county superintendent to ascertain whether orders of the Commissioner are being obeyed and to inform the Commissioner concerning the action taken by the parties with respect to the order.

decision-making authority is not proper,[4] decisional authority remains with the Commissioner, N.J.A.C. 1:1-18.6, and it is well settled that it is the Commissioner's obligation to render an independent decision on the facts. See In re Masiello, supra, at 606.

In this case, the Commissioner did not fulfill that obligation. Without addressing the merits of the County Superintendent's factual determinations or making his own findings on duties performed by the Petitioner, it is apparent that the Commissioner relied upon the County Superintendent's factual findings, including the nine duties found by the County Superintendent which were not included in the job description, in concluding that the County Superintendent's designation of a principal certification was reasonable and appropriate.[5] Commissioner's Decision, at 25. Consequently, the Commissioner did not "determine" this case as mandated by N.J.S.A. 18A:6-9.

As the ultimate fact-finder and administrative decision-maker for controversies and disputes arising under the school laws, Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447 (App. Div. 1982), we have reviewed the record, including the job description adopted by the Board. Based on our review of the record, we find that this matter can be decided based on the job description alone, and we therefore need not address the issue of additional duties Petitioner may have performed.

Neither the Board nor the Petitioner dispute that the duties listed in the job description were among the duties required of the Coordinator of the Alternate School. The Board argues, rather, that the majority of Petitioner's duties were those of a supervisor and that there was no finding that the Board authorized Petitioner to perform the nine duties found by the County Superintendent which were not listed in the job description.

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[4] The only specific delegation of the Commissioner's final decision-making authority under N.J.S.A. 18A:6-9 authorized by the Legislature is contained within N.J.S.A 18A:4-34 (delegation to an assistant commissioner to hear and determine disputes and controversies arising under the school laws).

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[5] That the Commissioner cites the Board's lowest assessment of the percentage of principal's duties performed by the Petitioner in support of his conclusion does not alter the fact that the Commissioner relied on the County Superintendent's factual findings, insofar as the Board's quoted percentage assumes the appropriateness of the County Superintendent's fact-finding. Board's Brief in Support of Motion for Summary Decision, at 18-20.

Based on our review of the job description developed and adopted by the Board and approved by the District Superintendent and Assistant Superintendent, we find that the Petitioner was responsible for the management and operation of the alternate school, its facilities, staff, curriculum and budget. While the administrative functions of a supervisor are similar in many respects, the overall design of the job description and the fact that Petitioner was apparently the sole administrator at the alternate school indicate that Petitioner had a higher level of administrative responsibility than a supervisor. As noted in the job description: "The Coordinator of the Alternate School shall organize, plan, direct and supervise the Alternate School." Responsibilities included assuring that the curriculum was well planned and executed, scheduling teachers and students, overseeing testing programs, insuring that the condition of the facilities was adequate at all times, direct involvement in hiring staff members, planning the alternate school's annual budget, supervising expenditures and preparing reports for the Board, the superintendent and other county, state and school officials.

The fact that the adopted job description includes some duties not requiring a principal's certification does not alter the fact that it includes responsibilities for which principal's certification is the appropriate certification. It is undisputed that Petitioner was required to perform a number of duties normally performed by principals. Whether these constituted a majority of his responsibilities is not determinative. Based upon the job description, which was developed and adopted by the Board and which includes duties not disputed by the Board, we find that the Petitioner was functioning as a principal. Therefore, we concur with the Commissioner's ultimate conclusion that the appropriate certification for the unrecognized title of Coordinator of Alternate School is that of principal.

Since certification as principal is the appropriate certification for the position and Petitioner holds the necessary endorsement, we find that he is tenured as a principal. In addition, since we find that the Petitioner's service was as a principal, we conclude that under N.J.A.C. 6:3-1.10, the proper seniority category for this unrecognized and unapproved title is that of high school principal and that such seniority began to accrue in 1978 when Petitioner obtained a principal's certificate.

We therefore affirm the ultimate result reached by the Commissioner for the reasons we have expressed herein.

Attorney exceptions are noted.
March 1, 1989

EDU #1726-88
C # 309-88
SB # 1-89

R.W., ON BEHALF OF A.W., :

PETITIONER-CROSS/APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE ET AL., SOMERSET COUNTY, : DECISION

RESPONDENT-APPELLANT :

Decided by the Commissioner of Education, December 2, 1988

For the Petitioner-Cross/Appellant, Taub & Wilde (Richard V. Wilde, Esq., of Counsel)

For the Respondent-Appellant, Schachter, Cohn, Tromadore & Offen (Stephen A. Offen, Esq., of Counsel)

This is an appeal on behalf of an educationally handicapped student from a decision of the Commissioner, which set aside suspensions from regular school attendance that had been imposed on her during 1987-88, and which directed that her record be purged and her educational status immediately be evaluated by the child study team. Specifically, the Commissioner, adopting with modification the Administrative Law Judge's determination, found that, in applying its disciplinary policy, the school district had disregarded the requirements of N.J.A.C. 6:28-2.8(c) and (d), which specify the procedures that must be followed whenever an educationally handicapped student is suspended. While rejecting the ALJ's determination that the district's probation system was unreasonable, the Commissioner concurred that Petitioner's due process rights had been violated in that there is no legal distinction between in-school and out-of-school suspensions so as to nullify such rights on that basis where a student is subject to proceedings which could result in the imposition of the serious sanction of suspension. Goss v. Lopez, 419 U.S. 565 (1975). The Commissioner, however, found that the record failed to support Petitioner's allegations that the district's actions were the product of ill-will or animous, and likewise found that the record did not provide a sufficient basis upon which to arrive at a conclusion that the Board's policy, which provides for disciplinary action on the basis of a point system, is inherently flawed.

On appeal, the Board renews its arguments that there is a distinction between in-school and out-of-school suspension such that different legal standards should apply, that Petitioner's classified status does not justify setting aside the suspensions since the child study team advised the vice-principal to treat her like everyone else, and that its actions were in compliance with N.J.A.C. 6:28-2.8(c) and (d). The Board further argues that the Commissioner's decision improperly considered Petitioner's classified status in that this issue was not included in the prehearing order.

Petitioner has cross-appealed, seeking a determination striking down the Board's point system and arguing that permitting suspension on the basis of the accumulation of points denies a student his right to a thorough and efficient education.

After careful review of the Board's arguments, we find them to be without merit. With respect to those arguments relating to the Commissioner's consideration of Petitioner's classified status, we find that the record clearly shows that the Board knew that Petitioner's classified status would be at issue and provides ample support for the Commissioner's determination. Further, in that the district was aware of Petitioner's status when it acted and is responsible for complying with the regulations pertaining to such students, we would not set aside the Commissioner's decision solely on the grounds that Petitioner's classified status was not included in the prehearing order. Nor has the Board demonstrated the existence of additional evidence so as to warrant the reopening of hearing in this case. e.g. In re Marvin Gastman, 147 N.J. Super. 101, 114 (App. Div. 1977).

We likewise reject Petitioner's claim that the Board's policy is facially invalid. In this respect, we emphasize that while, under the Board's policy, suspension may follow parental notification based on accumulated points, the policy does not provide for automatic suspension or mandate particular disciplinary action solely on the basis of the number of points accumulated. Nor did Petitioner present proofs demonstrating that as it has applied its policy to any student other than Petitioner, the Board has failed to provide due process as it would be required by law.

Therefore, for the reasons expressed by the Commissioner as well as those set forth herein, we affirm the decision of the Commissioner.

June 7, 1989

CHARLOTTE RUPAKUS,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CALDWELL-WEST CALDWELL SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, August 24, 1988

For the Petitioner-Appellant, Zazzali, Zazzali and Kroll
(Kenneth I. Nowak, Esq., of Counsel)

For the Respondent-Respondent, McCarter and English
(Stephen B. Hoskins, Esq., of Counsel)

Petitioner Charlotte Rupakus appeals from a decision of the Commissioner which held that she was not employed in a full-time position so as to entitle her to additional compensation since the number of hours she was required by the Board to work was less than the number of hours that constituted full-time employment in the district. The Commissioner found that, because N.J.A.C. 6:20-5.6(b) defines full-time employment for purposes of compensation under N.J.S.A. 18A:29-5 in terms of the number of hours in a day that are prescribed by the district board for such employment, Petitioner's status turned on the number of hours she was required by the Board to spend at school. Notwithstanding that Petitioner was willing to spend additional time at school preparing for her teaching duties, her required hours differed from those of a full-time teaching staff member in that her hours were 8:45-2:50, in contrast to 8:15-3:30, as required of full-time staff members.

On appeal, Petitioner renews her argument that her duties are that of a primary classroom teacher, and that she is entitled to full-time status for compensation purposes since she fulfilled such responsibilities as preparation, grading papers and meeting with parents outside of her required hours. We reject Petitioner's argument and concur with the Commissioner's decision in this matter.

Petitioner does not dispute that her required hours were less than those of a full-time staff member. Nor does she dispute that her workday consisted of five class periods totaling three hours and forty minutes teaching time. She had no other assigned periods, although she was required to be at school the remainder of

her workday, affording her the opportunity during her required hours to perform those functions, such as preparation and planning, that necessarily accompany classroom teaching.

We deny Petitioner's motion to supplement the evidentiary record in this case. Petitioner knew or should have known at the time of hearing the information that she now seeks to include as evidence and we do not find that, had it been included, it would have been likely to affect the decision in this case. In re Gastman, 147 N.J. Super. 101 (App. Div. 1977).

Therefore, for the reasons expressed by the Commissioner in his decision, we affirm that decision.

John Klagholz opposed.
January 4, 1989

Pending N.J. Superior Court

MILTON SCHAEFFER,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF SOUTH ORANGE-MAPLEWOOD, ESSEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, March 14, 1988

Decision on motion by the Commissioner of Education, May 5, 1988

Decision on motion by the State Board of Education, October 5, 1988

For the Petitioner-Respondent, Wayne J. Oppito, Esq.

For the Respondent-Appellant, Greenwood, Young, Tershis, Dimero & Sayovitz (Sidney A. Sayovitz, Esq., of Counsel)

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

March 1, 1989

RAYMOND F. SHENEKJI,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF TECHNICAL AND VOCATIONAL EDUCATION, PASSAIC COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, November 18, 1988

For the Petitioner-Respondent, Oxfeld, Cohen, Blunda, Friedman, Levine & Brooks (Arnold S. Cohen, Esq., of Counsel)

For the Respondent-Appellant, Green & Dzwilewski (Jacob Green, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. We, however, modify the Commissioner's decision so as to reflect Petitioner's service as school business administrator commencing on August 29, 1983, the retroactive date of his appointment. Petitioner was appointed as acting school business administrator pending completion of the necessary classes and receipt of his school business administrator certification, but the Board did not take formal action to appoint him as school business administrator until nearly seven months after he had acquired that certification. Under the circumstances, we find that the Board's failure to assure that all necessary approvals for the acting position were obtained or to take prompt action to formally appoint Petitioner to the school business administrator position once he had received the necessary certification in August 1983 should not be held to his detriment.

May 3, 1989
Date of mailing _____

ALAN R. SITEK,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE SOUTHERN REGIONAL HIGH SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, November 15, 1988

For the Petitioner-Respondent, New Jersey Principals & Supervisors Association (Wayne J. Oppito, Esq., of Counsel)

For the Respondent-Appellant, Berry, Kagan, Privetera & Sahradnik (Franklin H. Berry, Jr., Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. The Appellant's motion for a stay of the Commissioner's decision is rendered moot by our decision herein, and it is, accordingly, denied.

March 1, 1989

ROBERT SMILON,	:	
PETITIONER,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

Decided by the Commissioner of Education, May 13, 1988

For the Petitioner-Respondent, Aronsohn, Springstead & Weiner (Harold N. Springstead, Esq., of Counsel)

For the Respondent-Appellant, Sullivan & Sullivan (Mark G. Sullivan, Esq., of Counsel)

This case arises from the decision of the Board of Education of the Township of Mahwah (hereinafter "Board") to withhold the 1987-88 salary increments of Robert Smilon (hereinafter "Petitioner"), a tenured school psychologist. Petitioner, who holds a doctoral degree in psychology, was hired as a school psychologist by the Mahwah school system in July 1967. In 1969, he was made coordinator of the Child Study Team and Special Education Services and in 1977 was promoted to supervisor. Since 1984 he has been the psychologist on the Mahwah Child Study Team (CST), and has not served as supervisor during that time.

On June 15, 1987, the Board took action to withhold Petitioner's employment/adjustment increments for the 1987-88 school year, giving Petitioner its statement of reasons as required by N.J.S.A. 18A:29-14 in a letter from Barrent M. Henry, Superintendent of Schools, dated June 24, 1987:

> 1. You violated both state and federal guidelines governing the administration of psychological tests to a student. In this case, parent permission had not been secured, and your responsibility was to determine whether such permission was in the hands of appropriate administrative officials prior to testing such primary age child. Parental objection to this incident was further heightened by what was indicated as questions asked of the child, which had to do with personal family matters.

2. During the course of this school year, you have failed to adequately accept appropriate leadership provided you by Dr. Patricia Hanratty, the new administrator for the Child Study Team.

3. It has been concluded that you have failed to adequately practice the use of tact in your interactions with parents and colleagues. This weakness or failure on your part has been indicated to you in previous annual evaluations.

4. It is my understanding that you have not filed all reports within your responsibility area in a consistent and timely manner.

5. Because of professional weaknesses, as illustrated in #1 and #3 previously, I requested you, by a letter dated April 16, 1987, to modify your sabbatical proposal such that, rather than pursuing further investigation into the area of diagnosis, you pursue investigations which would provide you with better understandings and practices by which you could deal with and serve more effectively and appropriately the students and parents of our school district. To date, no response has been received to my communication.

P-2, in evidence.

Petitioner challenged the Board's action as arbitrary, capricious and unreasonable, and the matter was heard by an Administrative Law Judge (ALJ) on January 25, 1988. On March 25, 1988, the ALJ concluded that the Board had no reason to withhold Petitioner's increments "since the underlying facts are not as those who evaluated Smilon claim and therefore it was not reasonable for the Board to base its denial upon those facts." Initial Decision, at 24. The ALJ found that four of the five grounds set forth by the Board for withholding Petitioner's increment were not supported by the record, but concluded that Petitioner had administered a psychological test to a primary age student without parental consent in violation of state and federal guidelines. She determined that this reason alone, however, was insufficient to base an increment withholding upon and, accordingly, recommended that the Board pay Petitioner the difference between the salary received during the 1987-88 school year and the salary he would have received had his increments not been withheld.

On May 13, 1988, the Commissioner adopted the findings and conclusions of the ALJ with clarifications, and directed that the Board pay Petitioner as recommended by the ALJ.

The Board has filed the instant appeal, alleging that there was a reasonable basis for its action and that the ALJ unduly weighted the Petitioner's testimony.

Under N.J.S.A. 18A:29-14, "[a]ny board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year...." The leading case setting forth the standards to be applied and factors to be weighed in evaluating a decision by a local board to withhold a teacher's increment is Kopera v. Board of Education of the Town of West Orange, 60 N.J. Super. 288 (App. Div. 1960), in which the court noted that the only question open for review in such cases is whether the board had a reasonable basis for its factual conclusion. Id. at 295. The Commissioner and State Board may not substitute their judgment for that of those who made the evaluation, but should only determine: (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts. Id. at 296-97. The burden of proving unreasonableness is upon the party challenging the board's action. Id. at 297.

After a thorough review of the record, including the transcript from the ALJ hearing and the documents in evidence, we conclude that the Petitioner has not met his burden of proving the unreasonableness of the Board's action in withholding his increments for the 1987-88 school year.

We note initially our agreement with the Commissioner that the record does not show Petitioner's failure to file reports in a timely manner, failure to modify a sabbatical proposal or lack of tact in his interactions with parents and colleagues. As the ALJ points out, in Petitioner's annual evaluations for the 1984-85 and 1985-86 school years, he is specifically praised for his positive relationship with administration, staff, parents and students. Only in his evaluation for the 1986-87 school year does his new supervisor, Hanratty, allege a lack of tact.

Petitioner testified that Hanratty never indicated to him the specifics of this charge, despite his request. Tr. 1/25/88, at 20-22. He also introduced into evidence two instructional observation reports by Hanratty, dated November 20, 1986, P-16, in evidence, and January 30, 1987, P-17, in evidence, in which she praised his sensitive and empathetic manner with parents.

Hanratty testified that while she had never actually observed his lack of tact in his dealings with parents and colleagues, she had been told of such conduct by teachers, a school nurse, parents, Board members and a social worker. Tr. 1/25/88, at 97-98.

In light of the evidence, we agree with the Commissioner that the Board's conclusion that Petitioner failed to use tact in dealing with parents and colleagues cannot be used as a basis for withholding his increments.

Likewise, we conclude that Petitioner has sufficiently demonstrated that the Board did not have a reasonable basis for its conclusions on the untimeliness of his reports and failure to modify his sabbatical request, and therefore agree that these items cannot be used as a basis for withholding Petitioner's increments.

However, there is no dispute that Petitioner did, in fact, administer a psychological test to a primary age student without parental consent. The Petitioner admits his mistake, but explains that it was an unintentional and isolated incident (his first such error in over 20 years of testing students) caused by scheduling pressures. Tr. 1/25/88, at 7-14. It is Petitioner's position that withholding his increments for this error is unreasonable due to the extenuating circumstances.

While we find credibility in Petitioner's explanation of the incident as an honest mistake, that alone does not vitiate the Board's factual conclusion that he did, in fact, perform the test before making certain that parental authorization had been obtained. Parental consent is a crucial prerequisite to psychological testing of young students, which cannot be assumed or ignored, and such a lapse on Petitioner's part, particularly after conducting such tests for over 20 years, is inexcusable. The Board simply stated the facts of the incident as one of its bases for withholding the Petitioner's increments.

We also conclude, based upon our own review of the record, that Petitioner did, as the Board concluded, fail to adequately accept the leadership of his supervisor, Dr. Patricia Hanratty (hereinafter "Hanratty"), the Child Study Administrator. One particular incident before the Board occurred at a CST meeting held on December 22, 1986. While Hanratty and Petitioner provided differing analyses of Petitioner's conduct, Mary Murphy, supervisor of curriculum for the school district, who was in attendance at the meeting to observe Hanratty, characterized the Petitioner's behavior as more than just disagreement, adding: "It was almost harassment." Tr. 1/25/88, at 73.

According to Murphy, Hanratty's skills "were really put to great test" by "the reaction of Dr. Smilon to almost every single thing that Dr. Hanratty said." Tr. 1/25/88, at 65. She testified:

> It was a very negative and resistent type of attitude. If Dr. Hanratty would say, well, now, folks, we have to work on such and such as a team, Dr. Smilon would say, well, you are administrator. That's your job. Or if she would ask

> the team how something could be approached, he would give her pretty much the same answer. Well, you tell us. You are in charge.
>
> We had just completed the State monitoring, so it was her job really to bring to the team's attention some of the recommendations that the State monitoring team had discussed with us. So when she would bring these things up, while the rest of the team would either listen or make suggestions, Dr. Smilon became extremely defensive and resistent and would either say that he disagreed with that or that in his knowledge, such and such never occurred. It was just continuous. I don't know when I had ever been at a meeting where the person in charge had such a difficult time.

Tr. 1/25/88, at 65-66.

In her observation report of Hanratty's performance at that meeting, Murphy made further note of Petitioner's conduct:

> The psychologist has an obvious problem in accepting information which only he interpreted as, in some way, critical of the team. He defensively kept telling Pat [Hanratty] that certain action items were her job not his.

R-1, in evidence.

The ALJ, in determining that Petitioner did not fail to accept Hanratty's appropriate leadership, relied heavily upon her finding that Hanratty was not a credible observer and had demonstrated a lack of leadership. While the ALJ merely alluded to Murphy's testimony set forth above, she gave considerable weight to her belief that Murphy did not remember the subject of the dispute and that "[e]ven Murphy commented in her observation report on Hanratty that she failed to make clear to the Child Study Team what she expected of them." Initial Decision, at 18. She also relied upon the testimony of George Kreoll (hereinafter "Kreoll"), a learning disability teacher consultant who worked with Petitioner on the Child Study Team and who was also present at the meeting, who did not perceive that Petitioner refused to accept Hanratty's leadership. Id.

The Commissioner, acting without the benefit of the transcript of the ALJ hearing, adopted the ALJ's determination that Petitioner did not fail to accept Hanratty's leadership, but observed that the ALJ "may have gone beyond her responsibility" in making conclusory statements on Hanratty's behavior and leadership

abilities. Commissioner's Decision, at 34. The Commissioner, unable to make an independent review of the transcript, adopted the factual assessments and credibility determinations of the ALJ.

We have the distinct advantage of being able to review the entire record of this matter, including the transcript of the hearing before the ALJ.[1]

In assessing the Petitioner's conduct, we find several flaws in the ALJ's analysis of the facts. Initially, it should be noted that while Kreoll did attend the December 22, 1986 meeting, he gave no specific testimony about the Petitioner's behavior at that meeting. His comments were limited to acknowledging that he was present at some meetings attended by Petitioner and Hanratty, and that "[i]t's not my feeling" that Petitioner refused to accept Hanratty's leadership. Tr. 1/25/88, at 54. We note also that in reviewing Murphy's observation report on Hanratty, R-1, in evidence, we can find no reference to Hanratty's failure to make clear to the CST what she expected of them, a statement relied upon by the ALJ in finding in Petitioner's favor. In fact, Murphy comments in her report that "[u]nderstanding of future actions of the team seemed to be clear to them as a result of the meeting." Id. Her only suggestion to Hanratty -- "I think if the team realizes you are sharing information rather than outlining work for them to do, they may be more receptive and may in the end operate with a true team spirit," id., -- is hardly justification for Petitioner's behavior, particularly in light of the complete evidence now before us.

Hanratty testified that Petitioner's conduct was "antagonistic...towards whatever issue I brought up." Tr. 1/25/88, at 106. And Murphy's testimony, to which the ALJ only alluded, is extremely illuminating. As supervisor of curriculum for the school district, she attended the meeting as an impartial observer for the district. We therefore give great weight and credibility to her testimony, which supports Hanratty's assessment of the hostile and disruptive nature of Petitioner's behavior. The Petitioner, in his testimony, acknowledged that he had questioned Hanratty's request to

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[1] Petitioner, in his exceptions, argues that since the transcript was not provided to the Commissioner, it should not be considered by the State Board. Contrary to Petitioner's assertions, such a result is not mandated by N.J.A.C. 6:2-1.14, which requires the Legal Committee to make available "the entire record" to the State Board, or In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). It is well recognized that the State Board may make its own independent findings of fact as the ultimate administrative decision-maker for controversies under the school laws. Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 452 (App. Div. 1982). While the State Board is not required to always review transcripts, even when available, In re Morrison, supra at 159, there is nothing under our statutes, regulations or case law that precludes the State Board from reviewing an available transcript simply because such transcript was not supplied to the Commissioner.

the CST at that meeting to help her modify a special education booklet. He stated that he told Hanratty that he had written a booklet when he was supervisor and questioned whether he should be given the responsibility of writing it again. That interaction, he noted, lasted only ten minutes in a one-and-a-half hour meeting, and from then on, his interaction with Hanratty was very appropriate and not belligerent. Tr. 1/25/88, at 135. Although Petitioner says he only questioned Hanratty on the subject of the special education booklet, Murphy credibly testified that Petitioner's resistent and negative attitude towards Hanratty was "continuous," and while she could not remember all of the subjects covered, she did specifically recall that Petitioner's hostile conduct also extended to Hanratty's comments on the State monitoring recommendations.

Also, while Petitioner may have been reluctant to assist Hanratty, her conduct at the meeting cannot be considered as a factor contributing to Petitioner's behavior. Murphy, in her instructional observation report, praises Hanratty for handling her responses to Petitioner "very tactfully and professionally." R-1, in evidence. She further states: "Your patience in dealing with the constant roadblocks created by one of your team members will, hopefully, be rewarded by better future cooperation." Id. And at the ALJ hearing, she testified that Hanratty did a good job at the meeting and helped to reduce tensions by not getting upset and by trying to calmly answer each question. Tr. 1/25/88, at 73-74.

Although we agree with the Commissioner that "the behavior and attitude of a subordinate may indeed be influenced by the attitude, style and personal interrelations which may exist with that individual's superior," Commissioner's decision, at 36, the Petitioner's behavior in almost harassing Hanratty and in otherwise acting as an antagonistic and disruptive force at the CST meeting cannot be justified in light of the evidence. Inherent in Petitioner's responsibilities as a teaching staff member functioning as a school psychologist and member of the Child Study Team, was the obligation to accept the supervisory authority of the Child Study Administrator and to conduct himself appropriately in his relationship with her, both on an individual basis and at meetings. According due weight to the testimony of Murphy and proper consideration to the evidence before us, we find that Petitioner's conduct at the meeting shows that he failed to acknowledge the supervisory role of Hanratty and to adequately accept her supervisory authority, and supports the Board's conclusion that Petitioner failed to adequately accept Hanratty's leadership.

This conclusion is reinforced by Petitioner's action in taking a one-half day emergency leave on February 27, 1987 without advising Hanratty, which she claimed was reflective of his failure to view her as the administrator. Tr. 1/25/88, at 87-88. Petitioner introduced into evidence a memo written by Hanratty in which she criticized him for not making any effort to contact her. P-8, in evidence. Petitioner testified that he had received a call

that morning advising him that someone close to him had been admitted to a hospital on an emergency basis. Initially, he thought he could wait to visit until after school, but during lunch, he made a phone call and learned that the situation required his immediate attention. He made sure he had no meetings scheduled, and left the building. When he reached the hospital, about a one-and-a-half hour drive from the school, he called the Child Study secretary, who had been out to lunch when he left, to advise her that he was taking an emergency leave. He testified that the procedure for the last 20 years in such situations was to cancel or complete all meetings and then, as soon as possible, advise the Child Study secretary. Tr. 1/25/88, at 15-16, 48.

Hanratty stated that to the best of her knowledge, there were rules within the district that required contacting a supervisor to request an emergency leave, but admitted that she had never actually seen any such rules for CST members. Tr. 1/25/88, at 125-26.

Notwithstanding the dispute and uncertainty over proper procedure, we agree with the Commissioner's assessment of the situation:

> [T]he Commissioner cannot state strongly enough his dissatisfaction with any employee's abandoning his/her station without so much as a word to anyone in the building of intent to leave. Had petitioner been unable to find his immediate supervisor or the child study team secretary, common sense would dictate he report to the main office to apprise someone on the staff of the emergency at hand and of his intention to leave the building. The Commissioner finds it entirely irresponsible on petitioner's part to have left without so notifying in writing or in person of his need to leave. A call after the fact is certainly inadequate to relieve him of his responsibility as a teaching staff member to account for his whereabouts during working hours.

Commissioner's Decision, at 35-36.

Although the Commissioner found this incident alone sufficient to withhold Petitioner's increments, he concluded that it was not a consideration of the Board since it failed to include this incident as a basis for withholding.

We find, however, that the incident was indicative of Petitioner's failure to accept Hanratty's supervisory authority and to acknowledge her leadership. It is not necessary for a board to list in detail every specific incident underlying its stated reasons

for withholding an employee's increment. (Certainly there is no mention of the December 22, 1986 CST meeting in the June 24, 1987 letter to Petitioner.) Hanratty testified that she viewed his action in taking a leave without notifying her as reflective of his failure to accept her as the administrator. Such conduct reinforces the conclusion that Petitioner failed to accept Hanratty's leadership.

Since we have determined that the record both shows that Petitioner administered a psychological test to a primary age student without parental consent and supports the conclusion that he failed to adequately accept Hanratty's leadership, we never reach the question faced by the Commissioner as to whether the Petitioner's improper testing of the student would alone support a withholding of his increments. Together, Petitioner's failure to ensure that parental consent had been obtained and to adequately accept the leadership of his supervisor provided the Board with a reasonable basis for withholding his increments.

In arriving at our determination, we note that we have no reason to believe from the record that Petitioner is not a capable psychologist. Even Hanratty, in her 1986-87 annual evaluation of him, acknowledges Petitioner's knowledge of the field. P-14, in evidence. However, the Petitioner's negative and resistant attitude towards Hanratty seems to have impaired his ability to perform his responsibilities and obligations to the Child Study Team and the students in an appropriate and professional manner. By failing to make certain that parental authorization had been obtained before proceeding with the psychological test (a serious error, particularly for a psychologist with over 20 years of experience in performing such tests), by acting in an antagonistic manner towards Hanratty at a CST meeting and by taking an emergency leave in the middle of the day without taking reasonable steps to ensure that his supervisor had notice of his departure, the Petitioner failed to adhere to the standards of professionalism demanded of a teaching staff member functioning as a school psychologist and Child Study Team member. Such an attitude is not only counterproductive to the Petitioner, but also affects the CST in fulfilling its critical responsibilities to the students and parents of the district.

As has been frequently noted, the purpose of N.J.S.A. 18A:29-14 is "to reward only those who have contributed to the educational process thereby encouraging high standards of performance." Board of Education of Bernards Township v. Bernards Township Education Association, 79 N.J. 311, 321 (1979). We believe that Petitioner has exhibited the ability to contribute, but find that, as the Board concluded, Petitioner by his conduct during the 1986-87 school year, did not contribute so as to be entitled to a reward of increments for that year.

Mindful of the fact that we should not substitute our judgment for that of the Board, Kopera, supra, we find that the Petitioner has not shown that the factual basis for the Board's

conclusions on the testing incident and his failure to accept Hanratty's leadership were not as the Board claimed, and, based on those facts as established, we conclude that the Board did, in fact, have a reasonable basis for its decision to withhold the Petitioner's increments for the 1987-88 school year. Accordingly, we reverse the decision of the Commissioner.

Betty Dean, Alice Holzapfel and Regan Kenyon opposed.
Attorney exceptions are noted.
January 4, 1989

Pending N.J. Superior Court

IN THE MATTER OF THE TENURE :
HEARING OF RALPH M. THOMAS, : STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF LIVINGSTON, ESSEX COUNTY. :
:

Remanded by the Commissioner of Education, March 14, 1988

Decided by the Commissioner of Education, July 26, 1988

For the Petitioner-Respondent, Riker, Danzig, Scherer, Hyland & Perretti (Mark A. Baber, Esq., of Counsel)

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

The decision of the Commissioner of Education is affirmed, subject to the following modification. As we stated in In the Matter of the Tenure Hearing of Lynn Jenisch Tyler, decided by the State Board, November 1, 1988, appeal pending, Docket #A-2082-88T1 (App. Div.), since the Office of Administrative Law and Commissioner of Education are not "courts" within the meaning of N.J.S.A. 9:6-8.10(b)(6), the contents of a confidential Division of Youth and Family Services ("DYFS") report may not be released or disclosed in proceedings before such tribunals without a court order. Therefore, the remand ordered by the Commissioner herein to adduce testimony from the DYFS investigator regarding the contents of his confidential report was improper. However, we note that the Administrative Law Judge ("ALJ"), on remand, did not find anything in the additional DYFS evidence requiring any change in her previous decision, which was based upon evidence independent of the DYFS report, and, accordingly, she once again found Respondent guilty of inflicting corporal punishment upon five students and of insubordination for failure to discontinue his use of exercise and physical contact with students as part of his teaching method despite repeated warning from school administrators to cease and desist such practices. The Commissioner's decision on remand adopted those findings of the ALJ, but concluded that the cumulative effect of the charges of corporal punishment and insubordination warranted Respondent's dismissal, rather than the six-month salary forfeiture recommended by the ALJ.

Insofar as we find, after a thorough review of the record, that there was sufficient credible independent evidence to support the findings of the Commissioner, who adopted the factual findings of the ALJ which were unchanged from her findings prior to the remand, we affirm the Commissioner's decision, subject to the modification expressed herein.

Dr. Deborah Wolfe abstained.

March 1, 1989